SIGMA
Creating Change Together

A joint initiative of the OECD and the EU, principally financed by the EU

SIGMA Training resources

Casebook: Public Procurement Law in Practice

A collection of cases on public procurement from the Court of Justice of the European Union.

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This material is designed for public procurement practitioners in SIGMA partners. Its purpose is to aid in translating the EU public procurement legal framework into practical case studies using real-life judgments from the Court of Justice of the European Union. It presents crucial procurement topics including the concept of contracting authorities, definitions of public contracts, in-house contracts, framework agreements, technical specifications, and reliance on third-party capacities in procurement. It also explores the selection and exclusion of economic operators, contract award criteria, and remedies available in procurement disputes. This resource serves as practical training material for workshops and seminars, helping practitioners understand and implement public procurement processes according to EU standards, in this way enhancing transparency, efficiency, and compliance in public procurement.

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Introduction to the casebook

This training material is for public procurement practitioners in SIGMA partner administrations, mainly in the Western Balkans. Although it primarily addresses the public procurement community in the Western Balkans and Türkiye, it may also be useful for other countries harmonising their public procurement systems with the principles and standards of EU law and practice. The case studies are based on real-life procurement cases from the Court of Justice of the European Union (CJEU) to illustrate common problems public institutions face when preparing and conducting public procurement procedures.

In addition to contributing to discussions on law provisions, these cases can be used in interactive classroom training to solve practical problems. In fact, this collection can serve as training material for workshops organised for procurement officers, members and experts of procurement review bodies, auditors and judges – as well as procurement experts in business (e.g. economic operators participating in public tenders). By providing practical illustrations, this publication aims to address the foremost challenge facing procurement practitioners: how to translate abstract legal provisions into practical solutions.

In the past 15 years, SIGMA has published a wealth of training materials on public procurement: its 2010 Public Procurement Training Manual (designed as the basis for a comprehensive “training of trainers” course, updated in 2015); a set of 40 Public Procurement Briefs (2011-2016); and a collection of procurement cases from the CJEU (2014).

SIGMA has also organised several workshops and seminars for procurement decision makers, practitioners and experts (including members of procurement review bodies) in several countries in the Western Balkans and the European Neighbourhood region. Many of the seminars have been based on practical cases (often CJEU procurement cases) to actively involve participants in case-solving. All SIGMA beneficiaries in the Instrument for Pre-accession Assistance (IPA) region have already harmonised their procurement legislation with EU principles and legislation to a large extent, and EU public procurement law has been promoted and popularised by many EU-supported projects (SIGMA included).

In SIGMA’s experience, the greatest challenge for procurement practitioners in contracting entities and review bodies is often to translate the high-level principles and abstract provisions of the law into concrete solutions to the complex problems they face in daily procurement activities. This publication therefore aims to provide several practical illustrations and discussions of the most common and challenging procurement problems (and solutions) in a real-life context.

Chapter 1 introduces the concept of contracting authorities as bodies governed by public law. The Public Sector Directive defines a "body governed by public law" as meeting three criteria: it was established for non-industrial or commercial general-interest needs; it has legal personality; and it is financed or managed primarily by public authorities or bodies governed by public law. The CJEU requires satisfaction of all conditions, emphasising that general-interest activities should not compete in the market for profit. Examples include education, waste disposal and social housing. Financing from public sources “for the most part” implies over 50%, with a functional interpretation allowing for indirect funding models. Supervision by public authorities includes financial oversight and operational scrutiny.

The notion of "public contracts", defined as written agreements for monetary interest between economic operators and contracting authorities for works, supplies or services, is the subject of Chapter 2. The cases

presented explore the necessity of a contract having a "pecuniary interest" and whether a selection decision is vital for a contract to be considered a public contract. The case studies examine scenarios such as tenders offered at no cost, multi-stage co-operations between public bodies, and specific-purpose funding agreements, questioning their qualification as public contracts under the directive, or whether publicly advertised arrangements to create supplier or advisor lists require a selection decision for inclusion.

In-house contracts are defined by three criteria: the contracting authority must have similar control over the entity to what it exercises over its internal departments; over 80% of the entity's activities must be conducted for the controlling authority; and there must be no direct private capital influence. The EU directives and CJEU case law emphasise that such contracts are seen as the authority using its "own resources", thus not constituting public contracts in the traditional sense. The directives also outline methods for calculating the 80% activity threshold to ensure economic dependence and prevent market distortion. Public-public co-operation agreements are outlined as arrangements between contracting authorities to carry out public service tasks co-operatively, without creating a joint entity. Such agreements must aim to fulfil public service obligations for a common goal, be driven by public interest, and involve less than 20% of activities on the open market. Our case studies explore the nuances of control and economic dependence for in-house contracts, and the nature of co-operation and common objectives in public-public agreements, offering insight into the CJEU's interpretations and the flexibility Member States have in implementing these provisions.

Chapter 4 examines the role of framework agreements in EU public procurement, emphasising their efficiency for recurring needs. These agreements save time and resources by allowing contracts to be awarded without a new procurement process for each requirement. Initially recognised and refined in the Public Sector Directive in 2004 and 2014, these agreements are designed for clear operation, including setting terms, identifying users and managing contract awards. The chapter discusses two main issues clarified by the CJEU: the necessity for a precise potential agreement scope and the consequences of exceeding maximum values or quantities under an agreement. These considerations are vital for the legality and effectiveness of framework agreements, impacting both authorities and economic operators. Through several case studies, this chapter highlights the importance of clarity and compliance in establishing and executing framework agreements.

The next chapter delves into the role and regulation of technical specifications within EU public procurement, focusing on their importance in defining the required characteristics of works, services or supplies. This chapter underscores EU efforts to ensure these specifications do not restrict competition or favour specific operators. With the 2014 update to the Public Sector Directive, emphasis on sustainable procurement has led to new provisions on technical specifications, highlighting their strategic role in procurement processes. Technical specifications must provide equal access and not create unjustified barriers to competition, as outlined in Article 42 of the Public Sector Directive. This article defines the acceptable formulation of specifications, including references to performance or functional requirements and standards, while generally prohibiting references to specific brands or processes unless the words "or equivalent" are appended. Case studies from the CJEU illustrate practical challenges and interpretations related to technical specifications, such as how to classify technical requirements, the timing for submitting proofs of equivalency, and flexibility in formulating specifications. These examples demonstrate the directive's intent to offer flexibility in procurement while ensuring fairness, competition and adherence to the principles of non-discrimination.

Chapter 6 addresses reliance on third-party capacities in procurement processes. Subject to certain conditions, the EU Public Sector Directive permits economic operators to utilise the capabilities of other entities to meet a contracting authority's criteria for economic and financial standing. Tenderers must prove that the third parties they rely on possess the technical skills or professional qualifications necessary for contract fulfilment and are actively involved in its performance. As contracting authorities are not permitted to unreasonably restrict tenderers' rights in this regard, limitations must be justified and relate to essential

contract elements. Tenderers must disclose their reliance on third parties in their submissions, typically through the European Single Procurement Document (ESPD). Failure to do so may invalidate the tender. However, tenderers have autonomy in determining their legal ties with third parties and demonstrating access to their resources.

The next chapter outlines grounds for excluding economic operators from procurement processes. Mandatory grounds include convictions for criminal activities, while optional grounds relate to tax and social security payment obligations. Discretionary grounds encompass violations of laws; bankruptcy; professional misconduct; and conflicts of interest. Exclusion periods vary, with self-cleaning provisions allowing operators to demonstrate rehabilitation. The EU Public Sector Directive emphasises non-discriminatory evaluation procedures, with economic operators submitting self-declarations; the European Commission's eCertis service aids in identifying required evidence. Our case studies illustrate the CJEU's interpretation of exclusion provisions, emphasising fairness, transparency and the balance between exclusion and rehabilitation.

Chapter 8 addresses the process of selecting economic operators, explaining that the EU Public Sector Directive emphasises transparency, objectivity and non-discrimination in assessing operators' suitability, financial standing and technical/professional ability. Selection criteria must be proportionate and related to the contract's subject matter. The directive permits contracting authorities to request additional evidence to supplement submissions, ensuring fairness. Preliminary selection stages may be used to limit the number of candidates before tender invitations. Furthermore, the directive distinguishes between selection and award criteria, with conditions for contract performance also considered, and legal provisions are detailed in Articles 56, 58-60 and 63. Our case studies illustrate the application of selection criteria, focusing on economic, technical and professional capacities while upholding the principles of fairness and proportionality.

Regarding contract award criteria and tender evaluation, the EU Public Sector Directive mandates that contracts be awarded based on the most economically advantageous tender, ensuring fairness and transparency. This concept recognises factors beyond mere price, however, such as quality, environmental impact and social considerations. Award criteria must be objective, quantifiable and linked to the contract's subject matter. They must be disclosed in advance and not altered during the evaluation process. Criteria can include quality, accessibility, environmental considerations, staff qualifications and delivery conditions. Methods for applying criteria include weighting and classification by descending order of importance. Contract specifications must align with award criteria, with tenders evaluated based on their compliance with specified requirements. The directive also addresses the clarification of tenders, handling of abnormally low bids, and the confidentiality of tender information. Legal provisions are detailed in Articles 67, 68, 69, 21(1) and 55. The case studies explore issues related to award criteria preparation, non-economic criteria, abnormally low bids, changes in contractor identity, and balancing corporate confidentiality with transparency.

The last chapter of this collection discusses remedies available to economic operators when contracting authorities fail to comply with procurement regulations. Remedies are designed to enforce procurement regulations and protect the rights of economic operators. The Remedies Directive outlines review procedures, time limits and standing requirements, emphasising an economic operator’s right to an effective remedy and access to a court. Member States must ensure that effective review procedures are in place for contracts covered by the Public Sector Directive. Remedies are available to any person harmed by an alleged infringement, provided they have or had an interest in obtaining the contract. The Remedies Directive defines four types of remedies: interim actions; set-aside measures; damages; and contract ineffectiveness. Interim measures aim to prevent irreversible consequences and may include suspending decisions or procedures, while set-aside remedies cancel or correct unlawful decisions or situations. Damages can be awarded to those harmed by breaches of procurement law, although Member States determine their own specific conditions and liability regimes. Ineffectiveness of a contract can be declared retrospectively or prospectively, with additional penalties available. Our case studies explore determination

of a contractor's standing; loss of interest in obtaining a contract; the calculation of appeal time limits; and prerequisites for compensation.

The Court of Justice of the European Union

The European Union is a unique economic and political partnership involving 27 European countries, referred to as EU Member States. The European Union is based on two treaties of equal value: the Treaty on the European Union (TEU)[1] and the Treaty on the Functioning of the European Union (TFEU)[2].

The European Union is served by a number of institutions, one of which is the Court of Justice of the European Union (CJEU) in Luxembourg. Since its establishment in 1952, the CJEU's mission has been to ensure that the law is observed in the interpretation and application of the treaties. As part of this mission, the CJEU:

- Reviews the legality of the acts of EU institutions.
- Ensures that Member States comply with obligations under the treaties.
- Interprets EU law at the request of national courts and tribunals.

Since the CJEU is a multilingual institution, any of the official languages of the European Union can be the language of the case[3].

The CJEU consists of two courts: the General Court (GC) and the Court of Justice.

General Court

The General Court (GC) is made up of two judges from each Member State. GC judges are appointed for a six-year term by a joint agreement among Member States, and their term of office may be renewed. Unlike the Court of Justice, the GC does not have permanent Advocates General, but in exceptional circumstances that task may be carried out by a judge.

The GC has its own rules of procedure and has jurisdiction to review a range of actions: direct actions against acts, or failures to act, by institutions, bodies, offices or agencies of the EU; actions brought by Member States against the European Commission; and actions seeking compensation for damages caused by EU institutions or their staff. Judgments of the GC in the first instance can be appealed to the Court of Justice.

Court of Justice

The Court of Justice is composed of 27 judges, one from each Member State, and 11 Advocates General. Court of Justice judges are appointed for a six-year term, and their term of office may be renewed. They elect one of their number as President of the Court of Justice, for a renewable term of three years. The Court of Justice may sit as a full court (as a Grand Chamber composed of 15 judges) in complex or important cases, or in chambers composed of either three or five judges.

The Advocates General, who have equal standing with Court of Justice judges, assist the Court of Justice. With complete impartiality and independence, they are responsible for presenting an "opinion" in cases assigned to them, when the court considers it necessary to have an opinion. While the opinions of the

[1] Treaty on the European Union OJ C 326, 26.10.2012, pp. 13-390/ OJ C 326, 26.10.2012, p. 13-390 (GA).

[2] Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, pp. 47-390/ OJ C 326, 26.10.2012, pp. 47-390 (GA).

[3] http://curia.europa.eu.

Advocates General are advisory and do not bind the Court of Justice, they are nonetheless highly influential and can also be very useful to help practitioners understand Court of Justice judgments.

The structure, organisation and detailed rules of procedure of the Court of Justice are set out in the amended consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012[4].

Several types of proceedings may be brought before the Court of Justice:

- actions for failure to fulfil obligations
- referrals for a preliminary ruling
- actions for annulment of a secondary EU measure
- actions related to failure to act by an EU institution
- appeals against judgments and orders of the General Court.

The following sections provide details on the conduct of the two most commonly used proceedings before the Court of Justice related to public procurement: (i) actions for failure to fulfil obligations, and (ii) referrals for preliminary rulings.

Actions for failure to fulfil obligations (infringement procedures)

The European Commission (the Commission) may take action for failure to fulfil obligations under Article 258 of the TFEU (infringement procedures). These actions may concern infringement of the TEU and the TFEU, secondary EU legislation or general law principles; lack of action/failure to adopt required provisions; or courses of action that do not comply with the treaties, secondary EU legislation or general law principles.

Infringement procedures are brought forth by the Commission against an EU Member State and not against an individual authority within the Member State. An infringement procedure is usually prompted by an individual complaint to the Commission. The Commission may also commence an action on its own initiative, after having discovered facts or provisions allegedly inconsistent with EU law. A breach of EU law concerning public procurement may occur when, for example, the directives on public procurement have not been implemented on time or have been implemented incorrectly. A breach may also occur when a contracting authority fails to comply with the directives on public procurement. In that event, the Member State is responsible for the actions of that authority.

Prior to launching a formal infringement procedure before the Court of Justice, the Commission is required to conduct an administrative phase referred to as the “preliminary procedure”, in which the Member State concerned is give the opportunity to reply to complaints addressed to it. If this procedure does not result in the Member State rectifying the failure, an action for infringement of EU law may be brought before the Court of Justice.

A Member State may also bring forth a Court of Justice case against another Member State under Article 259 of the TFEU. Article 259 proceedings have occurred only a few times in the history of the Court of Justice and have not concerned public procurement[5]. Before a Member State commences such an action, it must present the matter before the Commission. A specific process must be followed.

References for a preliminary ruling

The CJEU is the supreme guardian of EU law, but it is not the only judicial body entitled or required to apply EU law. This task is also vested in the national courts of Member States. Article 267 of the TFEU

[4] Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013)

[5] The most recent proceeding under article 259 was Case C-364/10 *Hungary v Slovakia.*

provides the procedure that enables co-operation between the Court of Justice and national courts. It is often referred to as the “preliminary ruling” procedure.

National courts may – and sometimes must – refer to the Court of Justice to ask for clarification and interpretation of EU law. This measure aims to ensure the effective and uniform application of EU law and prevent divergent interpretations. If the issue of interpretation of EU law arises in a case before a national court, the court suspends the procedure, formulates its question(s), refers it/them to the Court of Justice and waits for an answer.

Under Article 267 of the TFEU, the Court of Justice has jurisdiction to give preliminary rulings on interpretation of the TEU and the TFEU and the validity and interpretation of acts of EU institutions, bodies, offices and agencies. Under the preliminary ruling procedure, it is not the parties in the national case that refer the question(s) to the Court of Justice, but the national court. The parties may nevertheless appear before the Court of Justice.

In light of the special features of each case, the national court determines the need for a preliminary ruling and the relevance of the question(s) it submits to the Court of Justice. Questions asked by the national court must concern the interpretation of EU law. If EU law is not at issue, the question is inadmissible. Furthermore, questions about the conformity of national law with EU law may not be asked, but when this type of question arises, the Court of Justice may be willing to reformulate the question so that it is admissible and can be considered. This happens quite often in references for preliminary rulings relating to public procurement.

In principle, the Court of Justice is obliged to give a ruling on any question raised by a national court. It may, however, refuse to rule on a question if it is obvious that the request for interpretation of EU law bears no relation to the actual facts of the main action or its purpose; if the problem is hypothetical; or if the Court of Justice does not have the factual or legal material necessary to give an appropriate answer to the question.

Only a court or tribunal of a Member State may refer questions to the Court of Justice. The term “court or tribunal” is an EU law concept; determining whether a body is a court/tribunal depends on the nature of the particular body. To make this decision, the Court of Justice takes into account a number of factors, all of which must be satisfied. It considers whether the body is established by law; is permanent; its jurisdiction is compulsory; its procedure is *inter partes*[6]; it applies the rule of law; and it is independent. The EU law concept of a court or tribunal may cover bodies that are not considered as courts according to the law of a Member State.

The Court of Justice’s ruling takes the form of a judgment or reasoned order. Its ruling is not merely an opinion, and the national court that made the referral is bound by the Court of Justice’s interpretation when deciding the case. Other courts may treat the ruling as authoritative. Rulings by the Court of Justice in response to questions asked by national courts have a retrospective effect (*ex tunc*), which means that a Court of Justice interpretation is considered to have always been the correct interpretation. Member States that have provisions affected by a Court of Justice ruling are obliged to change any provisions that are not in line with the Court of Justice’s interpretation.

Court of Justice proceedings: Commencement of proceedings to judgment

All cases, no matter the type, generally have a written stage as well as an oral stage, which is public. There are some differences, however, in the conduct of infringement actions and references for preliminary rulings.

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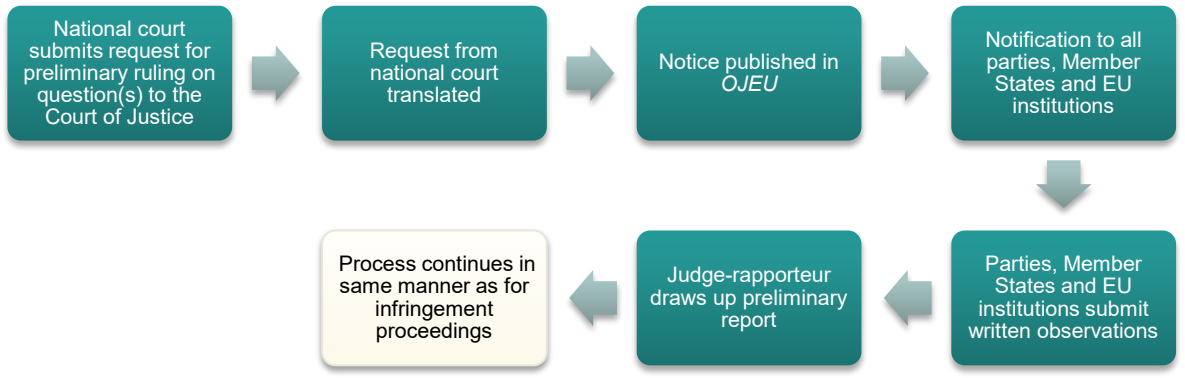
[6] *Inter partes* refers to the situation in which all interested parties have been served with adequate notice of a hearing and are given a reasonable opportunity to express their opinions and views.

Infringement actions

In infringement actions, the judicial phase is preceded by a preliminary procedure. The judicial phase starts with a written procedure before progressing to a public hearing in the Court of Justice. The key stages in an infringement action are illustrated below. Not all cases will involve an oral hearing or require an Advocate General opinion.

Reference for a preliminary ruling

In a reference for a preliminary ruling, a national court submits a question(s) to the Court of Justice. This question generally takes the form of a judicial decision, in accordance with national procedural rules. The key stages in a request for preliminary ruling are illustrated below.



Case references, content and publication of CJEU judgments (reports of cases)

Case references:

Cases submitted to the CJEU before 1989 were designated by a case number and year of registration (e.g. 101/81 or 232/87). Following establishment of the Court of First Instance (now the GC), a new way of designating cases was introduced, which differentiates between cases heard by the Court of Justice and those heard by the GC. Court of Justice cases are designated by: the letter "C" for "Court"; a sequential number; and the year in which the case was registered (e.g. C-322/20). GC cases are designated by: the letter "T" for "Tribunal"; a sequential number; and the year in which the case was registered (e.g. T-21/2011).

Presentation and content of judgments:

Judgments use a standard format and numbered paragraphs. Article 87 of the Rules of Procedure imposes the obligatory content of a judgment.

Publication:

Since 1 September 2016, Court of Justice and GC case law has been published in the general Court Reports, in digital format on the EUR-Lex site (official publications are accessible free of charge)[7]. In addition to reference numbers, cases are allocated unique ECLI identifiers. For example, the ECLI identifier for C-322/20 is ECLI:EU:C:2022:610. Reports published on EUR-Lex are also available on the CJEU website, Curia[8].

Consequences of non-compliance with Court of Justice judgments

EU Member States are bound by the judgments of the Court of Justice, which they must implement. If a Member State does not comply with a Court of Justice judgment, Article 260 of the TFEU permits the Commission to bring forth a case against that Member State, to obtain a lump sum or penalty payment calculated as a combination of a uniform flat daily rate multiplied by designated coefficients reflecting the seriousness of the contravention.

[7] https://eur-lex.europa.eu/homepage.html.

[8] https://curia.europa.eu/jcms/jcms/j_6/en/.

1 Contracting authorities "bodies governed by public law"

Introduction

The Public Sector Directive[9] applies only if a contracting authority awards a public contract, and the definition of a contracting authority is set out in Article 2(1). The two main categories of contracting authority are: (1) public authorities, such as state, regional or local authorities; and (2) bodies governed by public law.

The term "body governed by public law" refers to any body that cumulatively meets three criteria defined in Article 2(1) of the directive, relating to the purpose and nature of its functions, its legal status, and the way it is financed, managed or supervised by public authorities or by other bodies governed by public law.

The main question centres around the three cumulative conditions required by the directive to establish whether an organisation can be considered as a body governed by public law. The Court of Justice of the European Union (CJEU) has consistently held that a body must satisfy all three conditions to fall within the definition.

According to Article 2(1) of the directive, "bodies governed by public bodies" are bodies that meet all three conditions:

1. are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character
2. have legal personality
3. are financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law; or are subject to management supervision by those bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law.

Condition 1 (meeting needs in the general interest, not having an industrial or commercial character) is not defined in the directive, but the CJEU has examined this condition in particular and has addressed two separate but linked issues: 1) whether the organisation has been established to meet needs in the general interest; and 2) whether these general interest needs have an industrial or commercial character (to satisfy the definition, the general interest needs must not have an industrial or commercial character).

"Needs in the general interest" are generally needs that are satisfied other than by the availability of goods and services in the marketplace and that, for reasons associated with the general interest, the state chooses to provide itself or wishes to exercise a decisive influence over. The CJEU has tended to regard state requirements in terms of:

[9] 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 [2014] OJ L94/65.

- Specific tasks to be achieved.
- The explicit reservation of certain activities to public authorities.
- The obligation of the state to cover the costs associated with the activities in question.
- Control over the prices to be charged for the services.
- The degree of monitoring or security required.
- The "public interest".

The CJEU has recognised the following types of activities as meeting needs in the general interest:

- running a university (C-380/98 University of Cambridge, ECLI:EU:C:2000:229)
- organising exhibitions and fairs (joint cases C-223/99 and C-260/99 Agorà and Excelsior, ECLI:EU:C:2001:259)
- carrying out the activities of funeral undertakers (C-373/00 Adolf Truly, ECLI:EU:C:2002:110)
- building and acquiring property to be made available to commercial firms for the purpose of stimulating economic growth in the municipality (C-18/01 Korhonen and Others, ECLI:EU:C:2003:300)
- printing official documents (C-44/96 Mannesmann, ECLI:EU:C:1998:4)
- collecting and disposing of waste (C-360/96 Gemeente Arnhem and Gemeente Rheden v BFI Holding, ECLI:EU:C:1998:525)
- managing national forests and woodland industries (C-353/96 Commission v Ireland and C-306/97 Connemara Machine Turf, ECLI:EU:C:1998:623)
- providing low-rent housing (C-237/99 Commission v France, ECLI:EU:C:1999:69)
- establishing and repaying the costs of prisons (C-283/00 Commission v Spain, ECLI:EU:C:2003:544)
- carrying out radio and television broadcasting activities (C-337/06 Bayerischer Rundfunk and Others, ECLI:EU:C:2007:786)
- supplying heating for an urban area through an environmentally friendly process (C-393/06 Ing. Aigner, ECLI:EU:C:2008:213).

The additional criterion for the purposes of this definition is that general interest needs must not have an industrial or commercial character. These needs are generally activities carried out for profit in competitive markets. The directive explains that a body that operates in normal market conditions, aims to make a profit and bears the losses resulting from the exercise of its activity, should not be considered as a "body governed by public law".

Condition 2 (having legal personality) is self-explanatory and does not raise any doubts in practice.

To meet **condition 3** (financing, management or supervision by other contracting authorities [public authorities or other bodies governed by public law]), only one of the following conditions must be satisfied:

- The body is financed for the most part by public authorities or other bodies governed by public law.
- The body is subject to management supervision by those authorities or bodies.
- More than half the members of its administrative, managerial or supervisory board are appointed by those authorities or bodies.

The CJEU has analysed these conditions on a number of occasions.

Regarding **financing**, the term "for the most part" in the directive is quantitative and refers to more than half (more than 50%) of funding (total income, including income from commercial activity in the entity's budgetary year) (C-380/98 *University of Cambridge, ECLI:EU:C:2000:529*).

In C-337/06 *Bayerischer Rundfunk and Others* (*ECLI:EU:C:2007:786)* concerning German public broadcasting bodies, the CJEU held that the concept of financing by a public authority must be interpreted in functional terms. The CJEU considered that direct financing by the state was not required to classify an entity as a body governed by public law. For Case C-300/07 *Hans and Christophorus Oymanns* (*ECLI:EU:C:2009:358)* concerning German statutory health insurance funds, the CJEU confirmed that the financing referred to in the directive might still occur when a body has itself fixed the contribution level of its members. This is the case when a number of circumstances apply, including when membership in the body and payment of contributions are required by law; contributions are made without specific consideration; levels of contribution are fixed by law; and the body is prohibited from operating on a profit-making basis.

In contrast, in C-526/11 *IVD* (*ECLI:EU:C:2013:543)* the CJEU held that a professional association governed by public law did not satisfy the financing criterion. The professional body concerned was financed for the most part by the contributions of its members. However, the law requiring contributions to be paid and fixing the level of contribution did not determine the scope of, and procedures for, actions undertaken by that body in the performance of its statutory tasks.

Regarding **supervision by a public authority**, the CJEU held in C-373/00 *Adolf Truley* (*ECLI:EU:C:2003:110)* that the criterion of supervision was met when another contracting authority supervised the annual accounts of the body and its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency. In addition, the authority is allowed to inspect the body's business facilities and/or premises and report the results to the owner.

Case study 1

Facts of the case

The Italian Football Federation (FIGC), founded in 1898, is the association of sporting organisations that promotes football in Italy. As a national sports federation, the FIGC is a non-profit private-law association, with legal personality not established by a formal act of a public authority but which the state acknowledges under the procedural rules for recognising legal persons governed by private law.

As the FIGC is self-financed, it does not rely on public financing. It is an independent organisation, with its governing bodies (President, Vice-Presidents, Presidential Committee and Board of Auditors) elected by the Assembly representing all members.

In accordance with Italian legislation, as a national sports federation, the FIGC performs several functions of a public nature, including:

- Admission and revocation of memberships to sporting societies and associations.
- Scrutiny of the proper running of professional sporting competitions and championships.
- Management of public subsidy use.
- Doping prevention and punishment.
- Coach training.
- Oversight of public sports facility use and management.

Italian legislation explicitly recognises the public nature of these activities. In pursuing activities of a public nature, national sports federations (including the FIGC) must comply with the guidelines and controls applied by the Italian National Olympic Committee (CONI). There is no doubt that CONI itself is a public authority.

The powers that CONI exercises over the national sports federations include:

- Approving budgets, related activity programmes and the annual balance sheets of national sports federations.
- Overseeing national sports federations in matters of a public nature.
- Approving, “for sporting purposes”, statutes, regulations to implement statutes, and sports regulations governing sports disciplinary matters and anti-doping rules of national sports federations, and, when appropriate, proposing necessary amendments to these texts.
- Appointing auditors to represent it within national sports federations.
- Placing national sports federations under supervision in the event of serious mismanagement or serious violations of sports law by the governing bodies.
- Establishing the criteria and procedures governing CONI’s checks of national sports federations.
- Ensuring that sports competitions are properly organised by laying out the criteria and procedures governing national sports federations’ checks on member sports corporations and CONI’s substitute oversight function in the event of failure.
- Laying out the fundamental principles that must govern the statutes of national sports federations to obtain recognition for sporting purposes, and adopting a code of sporting discipline to be observed by all national sporting federations.
- In relation to national sports federations, adopting guidelines concerning the pursuit of the sporting activities for which they are responsible.

De Vellis Servizi Globali was invited to participate in a negotiated procedure organised by the FIGC for the award of a contract for transport services for a period of three years.

Legal dispute (the appeal)

The contract for transport services was awarded to the *Consorzio* company. *De Vellis* challenged the rules of the procedure and the way the tendering procedure had been conducted before the regional administrative court. The appellant argued that the FIGC should have been regarded as a body governed by public law within the meaning of public procurement law, and therefore the contract should have been awarded in accordance with public procurement regulations.

The regional administrative court granted the application of *De Vellis* and annulled the award of the contract to *Consorzio*. Both *Consorzio* and the FIGC challenged the decision of the court before the second-instance court, claiming that the FIGC should not be classified as a "body governed by public law" and therefore the public procurement law should not apply to the awarding of its contracts.

To determine whether the FIGC may be classified as a "body governed by public law" within the meaning of the Italian Public Procurement Code, the court has to establish whether the FIGC:

- Was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.
- Has legal personality.
- Fulfils at least one of the following criteria:
    - is financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law
    - is subject to management supervision by those bodies
    - has an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

Since the Italian Public Procurement Code precisely transposes the relevant provisions of EU Public Procurement Directives in defining a "body governed by public law", the Italian court made a request to the CJEU for a preliminary ruling on a number of questions regarding interpretation of the concept of "body governed by public law".

Questions

One of the three conditions of the definition of a "body governed by public law" is obviously met here: the FIGC has legal personality. To decide on the existence of the two other conditions in this case, the Italian court sought clarification and interpretation from the CJEU on provisions of the EU directives.

Question 1

Concerning condition 1, the national court had doubts whether the FIGC should be classified as a body "established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character", since (1) it was established as a private-law entity (association), but not by a formal act instituting a public administration; and (2) some of its activities, for which it enjoys a self-financing capacity, are not public in nature.

The Italian court therefore submitted the following question to the CJEU:

Can the FIGC be classified as a body governed by public law in so far as it was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character? In

particular, is the requirement relating to the purpose of the body satisfied in respect of the FIGC, even in the absence of the formal act establishing a public authority and despite its membership base, on account of its incorporation into a sector of sports federations, organised in accordance with models of public law and the fact that it is required to comply with the principles and rules drawn by CONI and international sporting bodies?

Question 2

Regarding condition 3 (influence of public authorities or other bodies governed by public law over the body in question), it is indisputable that two (out of three) sub-conditions are not met. The FIGC is not covered by the first and third parts of the alternative criteria: it does not rely for the most part on public financing, and public authorities do not participate in electing its managing bodies. However, the court had doubts about the second part of the alternative criteria: whether the legislation defining the relationship between CONI and national sports federations (including FIGC) gives CONI enough power to establish its managerial supervision over the FIGC.

The following question was therefore submitted:

Does CONI have a dominant influence over the FIGC in light of the legal powers relating to recognition of its undertakings for sporting purposes, approval of annual budgets, supervision of the management and proper functioning of the bodies and placing the entity itself under administrative supervision?

Instructions for resolving the case

Based on the CJEU case

Judgment of the CJEU of 3 February 2021 (*Federazione Italiana Giuoco Calcio [FIGC] and Consorzio Ge.Se.Av. S. c. arl v De Vellis Servizi Globali Srl*) (ECLI:EU:C:2021:88)

References for a preliminary ruling from the Consiglio di Stato

Joined cases C-155/19 and C-156/19

Opinion of Advocate General Campos Sánchez-Bordona delivered on 1 October 2020 (ECLI:EU:C:2020:775)

Legal resources

Article 2(1)(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement

Judgement paragraphs

Question 1

The national court questioned whether the FIGC met the criteria of being a body governed by public law. These doubts arose because the FIGC was formed as a private-law entity (association) without a formal act creating a public administration, and some of its activities, which are financially self-sufficient, are not public.

In its judgement, the CJEU provided extensive interpretation of provisions defining “body governed by public law” in the meaning of the directive.

Under Article 2(1)(4)(a) to (c) of Directive 2014/24, an entity is to be classified as a “body governed by public law” when, first, it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character. Second, it must have legal personality and, third, it is

financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law, or is subject to management supervision by those authorities or bodies, or has an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law. The three conditions in Article 2(1)(4)(a) to (c) are cumulative, it being understood that the three criteria mentioned in the third condition are alternatives.

As regards the first of these three conditions referred to in Article 2(1)(4)(a), it is apparent that the EU legislature intended to make only entities established specifically to meet needs in the general interest, not having an industrial or commercial character, and whose activities meet such needs, subject to the binding rules on public contracts. In this respect, whether since its establishment or afterwards, the entity concerned must actually meet needs in the general interest.

In the present case, activities of general interest comprised within sport are pursued by each of the national sports federations within the framework of tasks of a public nature expressly assigned to those federations by national legislation. Several of the tasks listed in the CONI Statute, such as supervision of the proper running of competitions and championships, doping prevention and punishment, and Olympic and high-level preparation, are not of an industrial or commercial nature.

In these circumstances, a national sports federation should be classified as a body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (it fulfils the condition laid down in Article 2(1)(4)(a) of Directive 2014/24).

The fact that the FIGC was created as an association governed by private law and that it was not, therefore, established by a formal act instituting a public administration is irrelevant for classification as a “body governed by public law”. First, the wording of Article 2(1)(4) of Directive 2014/24 contains neither reference to the rules for establishing the entity, nor to its legal form. Second, the concept of a “body governed by public law” must be interpreted in functional terms, and no distinction should be drawn by reference to the legal form and rules that govern the entity concerned under national law.

It is also irrelevant that, along with its activities of general interest, the FIGC pursues other activities that constitute a large part of its overall activities and are self-financed. The Court has held that it is immaterial whether, in addition to its duty to meet needs in the general interest, an entity carries out other activities. The fact that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by that entity is also irrelevant, provided that it continues to attend to the needs it is specifically required to meet.

Conclusion: The CJEU, interpreting the Public Sector Directive, clarified that a body governed by public law must be established for general interest, lack industrial or commercial character, have legal personality, and be financed primarily by the state or other public bodies. In this case, the CJEU determined that the FIGC, despite being initially formed as a private-law association, qualifies as a public-law entity because it meets the criteria and performs tasks of public interest in sport, as assigned by national legislation. The CJEU emphasised that legal form and rules under national law are irrelevant for classification, and an entity's pursuit of self-financed activities alongside public-interest tasks does not affect its classification as long as it continues to meet its required public-interest obligations.

Question 2

With its second question, the national court sought to ascertain whether the second part of the alternative criteria referred to in Article 2(1)(4)(c) of Directive 2014/24 must be interpreted as meaning that a national sports federation must be regarded as being subject to management supervision.

According to Article 2(1)(4)(c), a body governed by public law has to fulfil at least one of the following criteria:

- It is financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law.
- It is subject to management supervision by those bodies.
- It has an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

Each of the alternative criteria in Article 2(1)(4)(c) reflects the high dependency of a body on the state, regional or local authorities or other bodies governed by public law.

For the criterion of management supervision, such supervision is based on the finding that there is active control over management of the body concerned, such as to give rise to the dependency of that body on the public authorities equivalent to that which exists when one of the two other alternative criteria is fulfilled, which is likely to enable those authorities to influence that body's decisions with regard to public contracts.

Consequently, in principle, a review *ex post facto* does not satisfy this criterion, as it does not enable the public authorities to influence the body's decisions on public contracts.

In the present case, it is apparent from the national rules that, as the authority responsible for the discipline, regulation and management of sports activities, CONI's primary tasks, within the framework of the autonomy of sports law and in compliance with the principles of international sports law, are the organisation and enhancement of national sport, particularly the preparation of athletes and the provision of adequate resources for preparing for the Olympic Games; the adoption of anti-doping measures; and promotion of the practice of sport on the broadest possible scale. To these ends, the CONI National Council, as the supreme representative body of Italian sport, disseminates the Olympic ideal, ensures that actions necessary to prepare for the Olympic Games are taken, regulates and co-ordinates national sports activities, and harmonises (among other things) the actions of national sports federations.

It is therefore apparent that, by carrying out essentially a regulatory and co-ordination function, CONI is an umbrella organisation that aims above all to issue common sporting, ethical and structural rules to national sports federations to regulate the practice of sport in a harmonised manner in accordance with international rules, particularly in the context of competitions and preparation for the Olympic Games. In this regard, it should moreover be noted that CONI's power of control over these federations appears essentially limited to the proper organisation of competitions, Olympic preparations, high-level sporting activity and the use of financial aid, which is for the referring court to verify.

By contrast, it is not apparent from the documents that CONI is responsible for regulating the details of day-to-day sporting practices or interfering in the actual management of national sports federations. These federations enjoy broad autonomy in their own management and in managing the different aspects of the sporting discipline for which they are responsible, their relationship with CONI being limited, *prima facie*, to complying with its guidelines and general rules.

The management autonomy conferred on national sports federations in Italy thus seems, *a priori*, to militate against active control on the part of CONI to influence the management of a national sports federation such as the FIGC, particularly in relation to the awarding of public contracts.

Such a presumption may be rebutted if it is established that, in practice, the various powers conferred on CONI in relation to the FIGC have the effect of making the FIGC dependent on CONI to such an extent that CONI may influence its decisions on public contracts.

It is for the national court to examine whether the various powers vested in CONI in relation to the FIGC reveal, on the whole, the existence of dependency coupled with such a possibility of influence.

While this verification is solely a matter for the national court, the CJEU decided to offer clarifications to guide the national court in its decision:

> *Regarding CONI's power to recognise national sports federations for sporting purposes, CONI applies general rules common to any sports association. In addition, the criteria on which recognition is granted do not in any way concern aspects of management of the federation concerned, but relate to general conditions that must be met by any national sports federation in respect of sport and organisation, and compliance with basic rules and principles, such as the principles of internal democracy and of gender equality and equal opportunities. Since CONI's intervention is limited to establishing fundamental principles to harmonise the general rules all national sports federations are subject to, it does not appear, prima facie, that prior recognition of the FIGC for sporting purposes of itself enables CONI to exercise active control over management of this federation to such an extent as to influence its decisions on public contracts.*
>
> *With regard to Italian sports federations and CONI's power to adopt the guidelines, decisions, directives and instructions relating to the exercise of sporting activities, these norms all seek to impose on national sports federations the overarching, broad and abstract rules or general guidelines relating to the organisation of sport in its public dimension, with the result that, accordingly, CONI does not actively intervene in the management of these federations to the extent of influencing their decisions on public contracts.*
>
> *On CONI's power to approve national sports federation statutes for sporting purposes, it should be noted that it may only assess whether these federations' statutes comply with the law, its own statute and the fundamental principles established by CONI. In these circumstances, it is for the national court to ascertain whether CONI, when approving the statutes, could have imposed on the FIGC amendments that would have restricted its management autonomy.*
>
> *Concerning CONI's power to approve the national sports federations' annual balance sheets and budgets, it is for the national court to ascertain whether, in this regard, CONI confines itself purely to accounting checks of the balance sheets and of balancing of the budget (which would not indicate that there is active control over the management of these federations), or whether these checks also concern the conduct of the federations, particularly regarding proper accounting, regularity, economy, efficiency and expediency (which would tend to indicate active control over management). As regards approval of the budget, it will be for the national court to ascertain whether the national sports federations ultimately decide on their budgets, without CONI being able to oppose their adoption and therefore control the management of these federations on this point, which would again indicate that CONI has no power of coercion.*
>
> *On CONI's power to appoint auditors representing it in national sports federations, it will be for the referring court to ascertain whether the auditors are in a position to influence the federation's management policy, particularly in the area of public contracts.*
>
> *Regarding CONI's power to oversee the exercise of activities of a public nature entrusted to national sports federations and, more generally, the proper functioning of these federations, it will be for the national court to ascertain the scope of oversight of the management autonomy of these federations and of their decision-making capacity concerning public contracts. In particular, the referring court will have to determine whether oversight of the proper functioning of national sports federations is limited essentially to the proper organisation of competitions, Olympic preparations, high-level sporting activity and the use of financial aid, or whether CONI carries out more active oversight of the management of these federations.*

In light of all these considerations, the answer to the second question is that the second part of the alternative criteria referred to in Article 2(1)(4)(c) of Directive 2014/24 must be interpreted as meaning that when a national sports federation has management autonomy under national law, that federation may be regarded as being subject to management supervision by a public authority only if it emerges from an overall analysis of the powers the authority has in relation to that federation, that there is active management control that, in practice, calls into question that autonomy to such an extent as to allow the authority to influence the federation's decisions on public contracts.

Conclusion: The CJEU provided insightful clarification on the concept of management supervision, asserting that it entails active control over a body's management, allowing public authorities to exert influence over decisions related to public contracts. Importantly, the CJEU underscored that such supervision should not unduly impinge upon the day-to-day management autonomy of national sports federations.

In the context of CONI and its regulatory role in sports activities, the CJEU emphasised that CONI oversight should be assessed by national courts. Guidance offered to the national court entailed comprehensive analysis of CONI's powers concerning the FIGC. Factors such as recognition, adoption of guidelines, approval of statutes and budgets, appointment of auditors, and oversight of public activities were outlined as crucial considerations. A national sports federation may be deemed subject to management supervision only if thorough analysis reveals active management control by CONI to such an extent that it influences the federation's decisions on public contracts.

Similar cases

C-353/96 ***Coillte Teoranta*** (EU:C:1998:611): The CJEU indicated the necessity for functional interpretation of the concept of "contracting authority". The Irish company Coillte Teoranta was established by the State and entrusted with tasks related to managing national forests and woodland industries. The State's power to appoint key officers and the ministry's authority to give instructions, especially on financial matters, indicate a level of control over Coillte Teoranta's economic activities. Although there are no specific provisions on the State's control over the awarding of public contracts, the CJEU concluded that Coillte Teoranta should be considered as a body subject to managerial supervision by the state in the context of the Public Sector Directive.

C-237/99 ***OPACs*** (EU:C:2001:70): Social housing entities in France (SA HLMs) are subject to supervision by public authorities. The Minister for Construction and Housing has the authority to close or suspend SA HLM activities in cases of serious irregularities or gross mismanagement. Even if the exercise of these powers is considered an exception, it implies a form of permanent supervision. This supervision allows public authorities to influence decisions of SA HLMs concerning public contracts.

C-373/00 ***Adolf Truley*** (EU:C:2003:110): In a case involving the City of Vienna and its companies, the CJEU stated that the criterion of managerial supervision cannot be satisfied in cases of mere review of activities. This criterion can, however, be considered satisfied when public authorities actively supervise various aspects of the body's operations for proper accounting, regularity, economy and efficiency, and report their findings to the relevant authorities.

C-526/11 ***IVD*** (EU:C:2013:543): In Germany, the law determines professional medical associations' tasks and financing (contributions by members), but the associations themselves decide on their nature, procedures and scope of action. The decision to fix contribution amounts does not indicate sufficient managerial supervision. A body's autonomy in organisational and budgetary matters is crucial in determining its dependence on public authorities.

Further reading

SIGMA Public Procurement Brief No. 3, Contracting Authorities
OECD (2016), "Contracting Authorities", *SIGMA Public Procurement Briefs,* No. 3, OECD, Paris.

Case study 2

Background: Legal and financial situation of Germany's health insurance fund

Germany's public health system and the organisation and financing of statutory health insurance funds are governed by the Social Code (*Sozialgesetzbuch*) (SGB). The legislature asserts that, "As a community founded on the basis of the principle of solidarity, the purpose of the health insurance scheme is to maintain, restore or improve the state of health of the insured."

Statutory health insurance fund groups are corporations governed by public law and have legal personality as well as the right of self-management. The vast majority of Germany's population (around 90%) is compulsorily insured by law with a statutory health insurance fund. While persons insured under a compulsory scheme may select their own particular statutory health insurance fund, they may not choose between a public and private health insurance fund.

The SGB defines the rules for financing statutory health insurance funds. Financing is provided by compulsory contributions from insured persons, direct payments from the Federal State and compensatory payments based on the risk-structure compensation mechanism. Contributions paid by those compulsorily insured and by their employers constitute most of the financing of statutory insurance funds. Contribution amounts depend solely on the income of the insured, i.e. their capacity to contribute. Other factors such as age, previous illness and the number of co-insured persons are irrelevant. In practice, the insured's part of the contribution is withheld from their salary by their employer and paid to the statutory health insurance fund along with the employer's part. These are public law obligations, and contributions are compulsorily recovered based on public law provisions.

The contribution rate is not set by the State, but by the statutory health insurance fund organisations. According to the relevant rules, these companies have to calculate the contributions such that, when combined with other resources, they cover the expenses stipulated by law and guarantee that operating means and statutory reserves are available. Setting contribution rates requires the approval of each fund's supervisory authority. Contribution amounts are laid out by the law to some extent, as they must be set in such a way that revenues accrued are neither lower nor higher than expenditures. Since the vast majority of benefits to be provided under the German health insurance scheme are laid down by law, expenditure amounts generally cannot be directly influenced by the statutory health insurance fund in question.

To maintain insured persons' contribution rates at the same level, the SGB provides for annual compensatory payments between all the statutory health insurance funds, based on the risk structure compensation mechanism.

Germany's statutory health insurance fund organisations have self-management powers but are subject to State supervision, which is not limited to mere after-the-event reviews of legality. Certain activities of statutory health insurance fund companies, such as amending company statutes, setting contribution rates, conducting building and property transactions and acquiring software, require the authorisation of supervisory authorities.

At least every five years, these supervisory authorities must carry out commercial, accounting and operational management reviews of the statutory health insurance fund organisations under their control. Among other things, their supervision covers the economic efficiency of the activities of the fund in question, which may require more frequent checks. In the framework of this supervision, fund companies are required to transmit all necessary documents and information to the supervisory authorities. In addition, if the funds' self-management organs refuse to perform their required tasks, these tasks will be taken over by the supervisory authority itself.

Finally, the provisional budget of each statutory health insurance fund must be submitted to the competent supervisory authority in a timely manner, and the supervisory authority may merge unviable fund companies with other organisations or close them.

Facts and legal dispute

AOK Rheinland/Hamburg (AOK) is a German statutory insurance fund. In a specialist professional periodical, AOK posted a notice inviting tenders for the manufacture and supply of orthopaedic footwear.

Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik, an orthopaedic footwear company, submitted a tender, and two days later it lodged complaints about infringements of community and national German procurement law. The statutory health insurance fund rejected these complaints on the grounds that the rules of procurement law were not applicable in the present case. Since the footwear company's action against this decision was dismissed at first instance, the company appealed to the Procurement Division of the court (*Oberlandesgericht Düsseldorf*).

To establish whether contracts awarded by statutory health insurance funds in Germany are subject to public procurement legislation, the court had to decide if a statutory health insurance fund company is a "body governed by public law" in the meaning of German public procurement legislation transposing the EU Public Procurement Directives. The national court submitted to the CJEU a request for a preliminary ruling, seeking interpretation of Article 2(1)(4) of Directive 2014/24/EU to clarify the meaning of the concept of "body governed by public law".

Questions

Considering whether German health insurance fund companies can be classified as "bodies governed by public law" in the meaning of the Public Procurement Directives, the national court had no doubts regarding establishment of the first two conditions of Article 2(1)(4) of Directive 2014/24/EU:

- They are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.
- They have legal personality.

However, the court sought clarification on whether the third element of the alternative criteria, defining the close dependence (financial or managerial) on public authorities (the state), was fulfilled in this case.

Therefore, the court submitted the following questions to the CJEU. Please consider these questions and provide your views in response:

a) Is the requirement of "financing by the State" as referred to in the first alternative of letter (c) of Article 2(1)(4) of Directive 2014/24/EU to be interpreted as including a situation in which the state prescribes membership of a health insurance fund and the duty to pay contributions – whose amount is dependent on income – to the relevant health insurance fund, which sets the contribution rate, but the health insurance funds are linked to one another by a system of solidarity-based financing?

b) Is the requirement referred to in the second alternative of letter (c) of Article 2(1)(4) of Directive 2014/24/EU that the body be "subject to management supervision by those bodies" to be interpreted to the effect that state legal supervision which concerns current or future transactions – with other possible means of state intervention – is sufficient to satisfy that requirement?

Instructions for resolving the case

Based on the CJEU case

Judgment of the CJEU (Fourth Chamber) of 11 June 2009 in Case C-300/07, Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik, v AOK Rheinland/Hamburg

(reference for a preliminary ruling from the Oberlandesgericht Düsseldorf [Germany]) ECLI:EU:C:2009:358

Opinion of Advocate General Mazák delivered on 16 December 2008 ECLI:EU:C:2008:732

Legal resources

Article 2(1)(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement

[Judgement paragraphs 49-59]

Question 1

This question seeks clarification on whether the term “financing by the state” includes a scenario wherein the state mandates membership in a health insurance fund and imposes income-dependent contributions, and the interconnected health insurance funds operate under a system of solidarity-based financing.

Under Article 2(1)(4)(a) to (c) of Directive 2014/24, an entity is to be classified as a “body governed by public law” when, first, it is established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; second, it has legal personality; and third, it is financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law, or is subject to management supervision by those authorities or bodies, or has an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law. The three conditions in Article 2(1)(4)(a) to (c) are cumulative, it being understood that the three criteria mentioned in the third condition are alternatives.

It is clear that the conditions laid down in letters (a) and (b) of Article 2(1)(4) are fulfilled in the present case. The statutory health insurance funds are legal persons governed by public law, they were established for the specific purpose of meeting needs relating to public health, which are needs in the general interest, and those needs do not have an industrial or commercial character.

It remains to be considered, therefore, whether at least one of the alternative conditions set out in the three alternatives of letter (c) of Article 2(1)(4) has been fulfilled in the present case.

The first alternative in letter (c) of Article 2(1)(4) (“financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law”) contains no details as to the procedures for delivering the financing to which that provision relates. Thus, there is no specific requirement that the activity of the bodies in question should be directly financed by the state or by another public body. A method of indirect financing is therefore sufficient.

The CJEU in its judgement stated that:

> *In accordance with the relevant national rules, statutory health insurance funds are financed by contributions from members, including contributions paid on their behalf by their employers, by direct payments from federal authorities and by compensatory payments between the funds, based on the risk structure compensation mechanism. The health funds in question are financed, for the most part, by compulsory contributions from members.*
>
> *Member contributions are paid without any specific consideration for returns. No contractual consideration is linked to these payments, since neither the liability to pay contributions nor their amount is the result of any*

> *agreement between the statutory health insurance fund companies and their members, since membership in the funds and the payment of contributions are both required by law. In addition, contribution amounts are based solely on each member's capacity to contribute, and other factors such as the age and state of health of the insured person and the number of co-insured persons are irrelevant.*
>
> *Contribution rates are not fixed by public authorities but by the statutory health insurance funds themselves. However, the fund companies have very limited discretion because their mission is to provide the benefits laid out in social security legislation. Since the benefits (and the expenditures connected with them) are imposed by law and the organisations perform their functions on a non-profit-making basis, contribution rates must be set in such a way that revenues accrued are neither lower nor higher than expenditures.*
>
> *In any event, statutory health insurance fund companies require approval of the supervising public body to set contribution rates. Thus, contribution amounts are, to some extent, defined by law.*
>
> *Last, regarding arrangements for the collection of contributions, in practice insured persons' contribution portions are withheld from their salary and paid by their employers to the relevant statutory health insurance fund, along with the employer's part of the contribution. Contributions are therefore collected without any possibility of intervention by the insured person. The contributions are compulsorily recovered based on the provisions of public law.*

Thus, according to the CJEU, financing of statutory health insurance initiated by a measure of the state and guaranteed, in practice, by public authorities and secured by collection methods under the provisions of public law, satisfies the condition of being financed, for the most part, by the state for the purposes of applying community rules on the awarding of public contracts.

Since it had determined the existence of at least one of the conditions defined in letter (c) of Article 2(1)(4), the CJEU decided there was no need to consider whether public authority supervision of management of the statutory health insurance funds was fulfilled in this case.

Conclusion: The CJEU's answer to the main question is therefore that the first alternative of letter (c) of Article 2(1)(4) of Directive 2014/24 must be interpreted as meaning that there is financing, for the most part, by the state when the activities of statutory health insurance funds are financed chiefly by member contributions that are imposed, calculated and collected according to rules of public law. Such health insurance funds are to be regarded as bodies governed by public law and therefore as contracting authorities for the purposes of applying the rules of that directive.

Question 2

This question seeks clarification on interpretation of the requirement in the second alternative of Article 2(1)(4)(c) of the Public Sector Directive. Specifically, it asks whether the condition that the body be "subject to management supervision by those bodies" is fulfilled if there is state legal supervision related to current or future transactions, along with other potential forms of state intervention.

After deciding that statutory health insurance funds are financed, for the most part, by the state and therefore are "bodies governed by public law" in the meaning of public procurement legislation, there was no need to analyse fulfilment of the second of the three alternative conditions defined in letter (c) of Article 2(1)(4) of Directive 2014/24, related to "managerial supervision". Therefore, the CJEU remained silent on this issue.

However, the Advocate General opinion provided instructions for how this provision should be interpreted in the context of the present case.

The Advocate General referred to the CJEU judgement in Case C-373/00 *Adolf Truley*, according to which,

> *the criterion of managerial supervision cannot be regarded as being satisfied in the case of mere review since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts. The criterion of management supervision is, however, satisfied where*

> *the public authorities supervise not only the annual accounts of the body concerned but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency,*

which appears to be the case in the main proceedings.

In the present case, the supervisory activities go far beyond mere review. The legislation regulates the legal relations between the funds and the various service providers (doctors, dentists, pharmacists, etc.). The law lays down the tasks the health insurance companies must undertake, the way they are required to do so and how they have to finance themselves. Finally, the supervisory authorities have the power to intervene directly in how the funds are organised. In the opinion of the Advocate General, what is relevant here is a general dependency on a contracting authority, rather than whether there is influence over specific contracts. Therefore, it should not be necessary to prove that existing management supervision is concerned with the contract award process.

The Advocate General's opinion suggested that the health insurance funds also fulfil the second alternative of the third condition of letter (c) of Article 2(1)(4) of Directive 2014/24, since they are subject to management supervision by the State.

Conclusion

The question revolves around interpretation of the second alternative of Article 2(1)(4)(c) of the Public Sector Directive in relation to managerial supervision for bodies under public law, specifically statutory health insurance funds. While the CJEU did not directly address the issue, the Advocate General's opinion suggests that the supervisory activities of the funds extend far beyond mere review, and the supervisory authorities have the power to intervene directly in the funds' organisation. He argues for a broad interpretation, emphasising a general dependency on a contracting authority. The Advocate General proposes that the health insurance funds meet the second alternative of the third condition of Article 2(1)(4)(c) by being subject to management supervision by the State.

Similar cases

C-353/96 *Coillte Teoranta* (EU:C:1998:611): The CJEU indicated the necessity for functional interpretation of the concept of "contracting authority". The Irish company Coillte Teoranta was established by the State and entrusted with tasks related to managing national forests and woodland industries. The State's power to appoint key officers and the ministry's authority to give instructions, especially on financial matters, indicate a level of control over Coillte Teoranta's economic activities. Although there are no specific provisions on the State's control over the awarding of public contracts, the CJEU concluded that Coillte Teoranta should be considered as a body subject to managerial supervision by the State in the context of the Public Sector Directive.

C-237/99 *OPACs* (EU:C:2001:70): Social housing entities in France (SA HLMs) are subject to supervision by public authorities. The Minister for Construction and Housing has the authority to close or suspend SA HLM activities in cases of serious irregularities or gross mismanagement. Even if the exercise of these powers is considered an exception, it implies a form of permanent supervision. Supervision by public authorities allows them to influence SA HLM decisions concerning public contracts.

C-373/00 *Adolf Truley* (EU:C:2003:110): In a case involving the City of Vienna and its companies, the CJEU stated that the criterion of managerial supervision cannot be satisfied in cases of mere activity reviews. This criterion can, however, be considered satisfied when public authorities actively supervise various aspects of the body's operations for proper accounting, regularity, economy and efficiency, and report their findings to the relevant authorities.

C-526/11 IVD (EU:C:2013:543): In Germany, the law determines the tasks and financing (contributions by members) of professional medical associations, but the associations determine their nature, procedures and scope of action. The decision to fix contribution amounts does not indicate sufficient managerial supervision. A body's autonomy in organisational and budgetary matters is crucial in determining its dependence on public authorities.

C-155/19 and C-156/19 FIGC (EU:C:2021:88): The CJEU provided clarification on the concept of management supervision, asserting that it entails active control over a body's management, allowing public authorities to exert influence over decisions related to public contracts. In the context of CONI and its regulatory role in sports activities, the CJEU emphasised that CONI oversight should be assessed by national courts. Guidance offered to the national court entailed a comprehensive analysis of CONI's powers concerning the FIGC. Factors such as recognition, adoption of guidelines, approval of statutes and budgets, appointment of auditors, and oversight of public activities were outlined as crucial considerations. A national sports federation may be deemed subject to management supervision only if thorough analysis reveals active management control by CONI to such an extent that it influences the federation's decisions on public contracts.

Further reading

SIGMA Public Procurement Brief No. 3, Contracting Authorities
OECD (2016), "Contracting Authorities", *SIGMA Public Procurement Briefs,* No. 3, OECD, Paris.

Case study 3

Background: Financing of public broadcasters in Germany

In Germany, freedom of the press and freedom of broadcast and film reporting are guaranteed and protected directly by the Constitution. It guarantees the right to freedom of expression and the right to receive information from a plurality of sources, as well as the existence of public broadcasting bodies and their financing and development. Constitutional guarantees have been consistently interpreted by the highest German courts, particularly by the Federal Constitutional Court and the Federal Administrative Court, as imposing an absolute prohibition on any public authority interference or intervention in the management and operation of public broadcasting bodies, and an obligation of strict neutrality in relation to their programme material.

Public broadcasters in Germany are institutions governed by public law, endowed with legal personality and invested with a remit to serve the public interest. They are independent of State authorities, self-managed and organised in such a way as to exclude any influence by public authorities. These bodies are not part of the structure of the State.

Financing of these bodies is governed by State treaties (treaties between the Bund [the federal authority] and the Länder [regions]). Article 11(1) of the State Treaty on Broadcasting provides that "funds made available for operating costs must enable the public broadcasting bodies to fulfil their constitutional and statutory purposes; and must in particular guarantee the existence of public-law broadcasting and its development". In accordance with Article 12, more than half the needs of public broadcasting bodies are financed primarily through fees paid by citizens and, for the balance, by advertising and other revenues. The detailed procedures for fee collection are governed by the State Treaty on Regulation of the Broadcasting Fee. Under this State treaty, possession of a broadcasting receiver entails the obligation to pay the fee. The receiver's lack of actual use has no bearing on the obligation to pay. Entitlement to the fee lies formally with the regional broadcasting bodies established in the territories of each Länder. Regulations on fee amounts, calculated according to the established financial needs of the public broadcasting bodies, are contained in the State Treaty on the Financing of Broadcasting. Fee amounts are formally approved by the parliaments and governments of each Länder.

By means of an administrative agreement, public broadcasting bodies have established a central agency for fee collection, the *Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten* (GEZ). GEZ is an association governed by public law, with the particular task of invoicing and collecting the fee. It has no legal personality and lacks the capacity to initiate legal proceedings, but it acts for and on behalf of the various regional public broadcasting bodies. However, for recovery of the fee from citizens, GEZ issues a notice of liability for the charge, which is to say it acts as an official authority. Similarly, if the fee is not paid, the State Treaty on the Broadcasting Fee provides that "notices of arrears of the broadcasting fee are subject to enforcement by administrative proceedings. The regional broadcasting organisation entitled to the funds may send the request for assistance in enforcement directly to the authority having jurisdiction over the place of domicile or habitual residence of the persons liable to pay the fee …".

Monitoring and verification of the financial requirements declared by the public broadcasting bodies are entrusted to an independent commission, the *Kommission zur Überprüfung und Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for the Study and Assessment of the Financial Needs of Public Broadcasting Bodies, the KEF). This commission, consisting of 16 independent experts, receives and examines estimated requirements as submitted by the public broadcasting bodies and discusses them with their representatives. The KEF issues a report at least once every two years, and the Länder parliaments and governments base their formal fee decisions on them.

Facts of the case

In 2002 the association of German regional public broadcasters (public radio and public television) established GEZ as an administrative body governed by public law, responsible for collecting and settling the fees. Since it lacks legal personality, GEZ acts in the name of and on behalf of the respective broadcasting institutions.

In August 2005, following market research, GEZ sent a written invitation to 11 businesses to submit binding tenders to provide cleaning services in its buildings as well as in the canteen of *Westdeutscher Rundfunk* (one of the broadcasters) in Cologne, from 1 March 2006 to 31 December 2008. The value of the contract was estimated at more than EUR 400 000. Public procurement rules were not applied.

The company *Gesellschaft für Gebäudereinigung und Wartung mbH* (GEWA) and Mr Warnecke responded to GEZ's invitation to tender with separate offers. The former's offer had the lowest price. By a decision of 9 November 2005, GEZ's board of directors decided to enter into negotiations with four of the tenderers, including GEWA. The decision was also made that the economic feasibility of each of the offers would be analysed using the Kepner-Tregoe method, which allocates specific values in an assessment featuring technical, commercial and risk criteria. From that assessment, GEWA's offer was ranked in third place, and the offer of Mr Warnecke came first.

Legal dispute (the appeal)

GEZ informed GEWA by telephone that it had not been awarded the contract. In a written complaint of 14 November 2005, GEWA accused GEZ, as the contracting authority, of failure to comply with the rules relating to public contracts, since it had not invited tenders at the European level for the cleaning contract. GEZ rejected the complaint.

GEWA then brought an action against GEZ before the *Vergabekammer* (the court with jurisdiction over the awarding of public contracts) in Cologne. GEWA requested that GEZ be ordered to award the cleaning contracts by means of the formal procedure as regulated by public procurement legislation or, as an alternative, that there be a new evaluation, subject to the *Vergabekammer*'s ruling on the law.

The *Vergabekammer* held that GEZ, as a broadcaster, was a contracting authority within the meaning of German procurement legislation, given that such organisations are financed predominantly by means of fees paid by citizens and given that the basic provision of radio and television services, which is patently a public service, is a need in the general interest, not having an industrial or commercial character.

By a decision of 13 February 2006, the *Vergabekammer* upheld GEWA's action and ordered GEZ and the broadcasters, if they intended to maintain their invitation to tender, to respect the rules relating to awarding of public contracts and the principles of equal treatment and transparency, and to accordingly issue a public invitation to tender at the European level.

The regional broadcasters appealed this decision before the administrative court and sought its annulment on the grounds that the applicant's claim against GEZ was inadmissible and, in any event, unfounded. In their opinion, since they are public broadcasters, they cannot be regarded as contracting authorities because financing for public broadcasting comes principally from the fees paid by customers. In their opinion, the directive refers only to payments borne directly by the State budget and not to indirect transfers of financial resources from any public institution or another contracting authority. In the present case, fee payments circulate solely between the consumers and the broadcasters, and there is no intervention by the State, which is not a party to this flow of money. Consequently, these broadcasting bodies should not be regarded as "contracting authorities" within the meaning of the EU directives on public procurement and should be exempt from the procedures for public tendering for contracts.

Since the outcome of the proceedings depends on interpretation of the EU Public Procurement Directive's concept of a body governed by public law, the court has decided to refer a request for preliminary ruling to the CJEU.

Questions

According to Article 2(1) of the directive, "bodies governed by public bodies" are bodies that meet all three conditions:

1) are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character
2) have legal personality
3) meet at least one of the following sub-conditions:

    (1) are financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law

    (2) are subject to management supervision by those bodies

    (3) have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law.

There is no doubt that the first and second conditions are satisfied in this case, as the public broadcasting bodies were established specifically to satisfy needs in the general interest, not having an industrial or commercial character, and are endowed with legal personality.

Regarding the three sub-conditions defined in the third condition, the last two are not satisfied in this case, as public authorities do not exercise any supervision over the management of those bodies and have no influence on appointments to their governing bodies.

The issue still to be determined therefore is whether the activity of the bodies in question is financed for the most part by the State or by other contracting authorities, so that they may be regarded as "bodies governed by public law" and, consequently, as "contracting authorities".

The following questions need to be answered:

(1) Is the term "financed … by the State" to be interpreted as including indirect financing of certain bodies through the payment of fees by persons who possess broadcasting receivers, considering the overriding obligation imposed on the State by constitutional law to ensure the independent financing and existence of those bodies?

(2) If the first question is answered in the affirmative, is that condition to be interpreted as requiring that "financing by the State" involve direct public influence on the awarding of contracts?

Instructions for resolving the case

Based on the CJEU case

Judgment of the CJEU 13 December 2007 in Case C-337/06 (reference for a preliminary ruling by the Oberlandesgericht Düsseldorf [Germany]) ECLI:EU:C:2007:786

Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 6 September 2007, ECLI:EU:C:2007:487

Legal resources

Article 2(1)(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement

[judgement paragraphs 41-60]

Question 1

This question seeks clarification on interpretation of the term "financed ... by the State". Specifically, it inquires whether this includes indirect financing of certain bodies through fees paid by individuals with broadcasting receivers, considering the State's constitutional obligation to ensure the independent financing and existence of these bodies.

In the opinion of the CJEU, the concept of "financed … by the State" must receive a functional interpretation.

The fee, which provides the majority of funding for the activities of the bodies in question, has its origin in the State Treaty on Broadcasting, in other words in a measure of the State. The fee is provided for and imposed by statute and is not the result of any contractual arrangement entered into by those bodies and the customers. Liability to pay the fee arises from the mere fact of possessing a receiver and is not conditional on actual use of the services provided by the bodies in question. Also, the amount of the fee is not the product of any contractual relationship between the public broadcasting bodies and the customers. Under the State Treaty on the Financing of Broadcasting, the amount is determined by formal decisions of the Länder parliaments and governments.

The resources thus allocated to these bodies are paid without any specific consideration for returns. No contractual consideration is linked to the payments, since neither the liability to pay the fee nor its amount is the result of any agreement between the public broadcasting bodies and the customers, the latter being obliged to pay the fee provided only that they possess a receiver, irrespective of whether they use the services offered by those bodies. Accordingly, customers must pay the fee even if they have never made use of the services of those bodies.

In light of this functional approach, the assessment cannot vary according to whether the financial resources pass through the State budget, the State first collecting the fee and then making the fee income available to the public broadcasting bodies, or whether the State grants those bodies the right to collect the fee themselves.

Conclusion: The CJEU declared that financing such as in the case of German public broadcasters, which is brought into being by a measure of the State, is guaranteed by the State and is secured by methods of charging and collection that fall within public authority powers, satisfying the condition of "financing … by the State" for the purposes of applying EU rules on the awarding of public contracts. This method of indirect financing is sufficient for the condition of "financing … by the State" to be satisfied, and it is not necessary that the State itself establish or appoint a public or private body to collect the fee.

Question 2

The second question is whether the condition of "financing … by the State" requires direct interference of the State or other public authorities when a contract is awarded by such a body.

The CJEU first observed that there is no requirement in the wording of the provision under consideration that, when a particular public contract is being awarded, there be direct intervention by the State or by another public body before the condition of "financing … by the State" can be satisfied This literal interpretation would probably suffice, but the CJEU continued its discussion on rationale to regulate the public procurement procedures of bodies that are dependent on the State in broader sense.

The Constitutional guarantees of independence of public broadcasters refer only to the creation and production of programme material. Their independence in performing other activities of public broadcasters is not guaranteed by legislation, which does not require those bodies to be neutral in relation to awarding contracts. As the public broadcasting bodies depend on the State for their very existence, the criterion of dependence of these bodies on the State is satisfied, and it is not necessary for public authorities to have any real influence on the various decisions of the bodies in question in the awarding of contracts. This dependence in a broad sense does not exclude the risk, if EU rules on the awarding of public contracts are not observed, that public broadcasting bodies may allow themselves to be guided by considerations other than economic by, among other things, giving preference to national tenderers or candidates. Therefore, the obligation for public broadcasters to follow EU public procurement rules is fully justified.

The answer to the second question is thus that the first sub-condition of the third condition of Article 2(1) of the Public Procurement Directive must be interpreted as meaning that, if the activities of public broadcasting bodies are financed according to the procedures set out when examining the first question, the condition of "financing … by the State" does not require that there be direct intervention by the State or by other public authorities in the awarding of contracts by such bodies.

Conclusion: The CJEU clarified that indirect financing of certain bodies through fees, as in the case of German public broadcasters, satisfies the condition of "financing ... by the State" for EU public contract rules. The method of fee collection, whether through the State or delegated to the bodies, is immaterial. Additionally, the CJEU asserted that the condition does not necessitate direct intervention by the State or public authorities in the awarding of contracts by such bodies, provided their activities are financed according to the outlined procedures. The obligation for public broadcasters to adhere to EU public procurement rules is justified based on their broad dependence on the State.

Similar cases

C-380/98 *University of Cambridge* (EU:C:2000:529): The CJEU considered the financing system of British universities. UK universities receive funds from various sources, with some funds based on assessments of research quality and number of students, awards, grants and payments for commissioned services. Public financing includes awards or grants supporting research work and student grants, while payments for contractual services do not constitute public financing. To determine the percentage of public financing, all sources of income, including from commercial activities, must be considered. "For the most part" means more than half. The decision on whether a body is a contracting authority must be made annually, and the budgetary year during which the procurement procedure commenced is considered the most appropriate period.

C-526/11 *IVD* (EU:C:2013:543): In Germany, the law determines the tasks and financing (contributions by members) of professional medical associations, but the associations enjoy freedom in defining their nature, procedures and scope of action. The concept of financing refers to a transfer of funds made without specific consideration, with the aim of supporting the activities of the body concerned. The concept must be interpreted in functional terms, and it includes a method of indirect financing.

Further reading

SIGMA Public Procurement Brief No. 3, Contracting Authorities
OECD (2016), "Contracting Authorities", *SIGMA Public Procurement Briefs,* No. 3, OECD, Paris.

Case study 4

Facts and legal dispute

According to German law, the tasks of the doctors' professional association are to, among other things, support the public health service and public veterinary service, to adopt an opinion at the request of the supervisory authority, to guarantee an emergency medical and dental service outside of consultation hours, to publicise it and to issue emergency service regulations, to promote and carry out the professional training of members and to promote and enact measures concerning the quality of health and veterinary services. For the doctors' association to fulfil the tasks conferred upon it, legislation grants it the right to raise contributions from its members. The contribution amount must be fixed by regulations adopted by the assembly of that association, and those regulations are subject to the approval of a supervisory authority, with approval being intended only to ensure that the association has a balanced budget.

The *Ärztekammer Westfalen-Lippe* (a regional medical professional association) launched an invitation to tender for the printing and distribution of its newsletter, a contract notice having been published in the *Official Journal of the European Union*. After two other tenderers had been rejected, the choice was made between IVD and WWF Druck + Meien GmbH, and in the end the latter's tender was accepted.

IVD challenged this award first by way of a complaint, then by an action before the *Vergabekammer*, the competent administrative body for hearing and determining disputes concerning public contracts. IVD claimed that the successful tenderer had not submitted certain references required by the *Ärztekammer*. Its action was dismissed by that body, its claims declared to be unfounded.

Hearing an action against the decision of the *Vergabekammer*, the *Oberlandesgericht Düsseldorf* (Higher Regional Court, Düsseldorf) decided of its own motion to consider whether the *Ärztekammer* had the status of a contracting authority, on which the admissibility of the action brought by IVD depended.

The court considered that the tasks entrusted to that association by German legislation are in the general interest, not of an industrial or commercial character. Furthermore, that association has legal personality. Therefore, it satisfies the criteria laid down in Article 2(1)(4) points (a) and (b) of the Public Sector Directive.

On the other hand, the court wondered whether the *Ärztekammer's* right to raise contributions from its members constitutes indirect State financing satisfying the first condition in Article 2(1)(4) point (c) of the directive. According to the referring court, it follows from the jurisdiction of the CJEU (Case C337/06 *Bayerischer Rundfunk and Others* and Case C300/07 *Hans & Christophorus Oymanns*) that such indirect State financing exists when the State either itself fixes the base and amount of contributions, or exercises influence (by way of provisions setting out the precise services the legal person concerned must supply) and controls the determination of contribution amounts.

The court noted that the applicable German law does not set out the contribution amounts collected by the *Ärztekammer* and does not determine the tasks assigned to that body. On the contrary, enjoying broad discretion regarding the performance of its tasks, the association has similar latitude in determining its financing needs and, therefore, in setting contribution amounts due from its members. Although there is a system for approval by the supervisory authority of the regulation fixing that amount, that approval is intended only to ensure that the association's budget is balanced.

Questions

The *Oberlandesgericht Düsseldorf* decided to refer the following questions to the CJEU for a preliminary ruling:

> Is a body … (here, a professional association) … "financed, for the most part, by the State" or "subject to management supervision" by the State, within the meaning of point (c) of Article 2(1)(4) of Directive 2014/24/EU:
>
> > – if that body is entitled by law to raise contributions from its members but the law does not fix the amount of those contributions or the scope of the services to be financed by them;
> >
> > – but the fee regulation requires approval by the State?

Instructions for resolving the case

Based on the CJEU case

Judgement of the CJEU (Fifth Chamber) of 12 September 2013 in Case 526-11, *IVD GmbH & Co. KG v Ärztekammer Westfalen-Lippe* (request for a preliminary ruling from the Oberlandesgericht Düsseldorf) ECLI:EU:C:2013:543

Opinion of Advocate General Mengozzi delivered 30 January 2013 ECLI:EU:C:2013:40

Legal resources

Article 2(1)(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement

[judgement paragraphs 16-31]

The referring court essentially questioned whether Article 2(1)(4)(c) of the Public Sector Directive should be interpreted to mean that a body such as a public-law-governed professional association meets the criterion of financing by public authorities if it is primarily funded by contributions from its members. This is applicable if the law allows the association to determine and collect these contributions without specifying the scope or detailed rules of the actions financed by them. Additionally, the question pertains to whether the criterion of management supervision by public authorities is satisfied if the decision determining the contribution amount requires approval from a supervisory authority.

In accordance with Article 2(1)(4) of Directive 2014/24/EU, a body is a "body governed by public law" when three cumulative conditions are satisfied: that body was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character (point a); it has legal personality (point b); and is financed, for the most part, by public authorities, or is subject to management supervision by the latter, or has an administrative, managerial or supervisory board, more than half of whose members are appointed by public authorities (point c).

The three alternative criteria laid down in point (c) of Article 2(1)(4) of the directive all reflect close dependence on public authorities. That dependence is likely to enable the latter to influence the body's decisions on public contracts. Each of these criteria must be interpreted in functional terms, and each criterion must be understood to create close dependence on public authorities.

For the first criterion laid down in point (c) of Article 2(1)(4) relating to financing for the most part by public authorities, the concept of financing refers to a transfer of funds with the aim of supporting the activities of the body concerned. Since that concept must be interpreted in functional terms, the criterion relating to majority financing by public authorities includes a method of indirect financing.

The fact that, formally, a body itself fixes the contribution amount (which provides the greater part of its financing) does not make it impossible that indirect financing could satisfy that criterion. This is the case when bodies such as statutory health insurance funds are 1) financed by contributions by or for their members without specific consideration, when membership in such a fund and the payment of contributions are required by law, and when the amount of those contributions, although formally fixed by the funds themselves, is laid down by statute (with the law determining the services provided by those funds and associated expenses, prohibiting them from operating on a profit-making basis) and must still be authorised by a supervisory authority, and 2) when contributions are compulsorily recovered on the basis of the provisions of public law.

In the opinion of the CJEU, however, the situation of a body such as the Ärztekammer cannot be treated as such. Although the tasks of this body are set out in German law, it is nevertheless notable that a considerable degree of autonomy is left to it by law to determine the nature and scope of (and procedures for) the actions it undertakes to perform its tasks and to set the necessary budget and, consequently, the contributions it will claim from its members. The fact that the regulation fixing that amount must be approved by a supervisory public authority is not decisive when that authority merely ascertains that the budget of the body concerned is balanced.

Next, for the second criterion set out in point (c) of Article 2(1)(4) relating to management supervision by public authorities, well-established CJEU jurisdiction dictates that after-the-fact reviews do not satisfy this criterion, for they do not enable public authorities to influence the body's decisions on public contracts. This is the case for a general review of legality conducted *ex post facto* by a supervisory authority.

It therefore appears that, although the law determines its tasks and the manner in which the greater part of its financing must be organised, and provides that a supervisory authority must approve the decision by which it fixes the amount of contributions payable by its members, a body such as the Ärztekammer has organisational and budgetary independence, which precludes its being considered to be in a state closely dependent on public authorities. Therefore, the means of financing of such a body does not constitute financing for the most part by public authorities and does not allow management supervision of that body by public authorities.

Considering all the factors discussed, the response to the question is that, according to the correct interpretation of Article 2(1)(4)(c) of the Public Sector Directive, a body such as a public-law-governed professional association does not fulfil either the criterion of being primarily financed by public authorities when its main funding comes from member contributions (and the law does not specify the scope and procedures for the actions financed) nor the criterion of management supervision by public authorities based solely on the requirement for supervisory authority approval in determining contribution amounts.

Conclusion: In brief, the CJEU concluded that a professional association operating under public law, funded by member contributions and requiring supervisory approval, does not meet the criteria of being financed primarily by public authorities or subject to substantial management supervision. The court emphasised the autonomy of these bodies in shaping their actions and budgets, stressing their independence from significant reliance on public authorities.

Similar cases

C-353/96 *Coillte Teoranta* (EU:C:1998:611): The CJEU indicated the necessity for functional interpretation of the concept of "contracting authority". The Irish company Coillte Teoranta was established by the State and entrusted with tasks related to managing national forests and woodland industries. The State's power to appoint key officers and the ministry's authority to give instructions, especially on financial matters, indicate a level of control over Coillte Teoranta's economic activities. Although there are no specific provisions on the State's control over the awarding of public contracts, the CJEU concluded that

Coillte Teoranta should be considered as a body subject to managerial supervision by the state in the context of the Public Sector Directive.

C-237/99 *OPACs* (EU:C:2001:70): Social housing entities in France (SA HLMs) are subject to supervision by public authorities. The Minister for Construction and Housing has the authority to close or suspend SA HLM activities in cases of serious irregularities or gross mismanagement. Even if the exercise of these powers is considered an exception, it implies a form of permanent supervision. This supervision allows public authorities to influence decisions of SA HLMs concerning public contracts.

C-373/00 *Adolf Truley* (EU:C:2003:110): In a case involving the City of Vienna and its companies, the CJEU stated that the criterion of managerial supervision cannot be satisfied in cases of mere review of activities. This criterion can, however, be considered satisfied when public authorities actively supervise various aspects of the body's operations for proper accounting, regularity, economy and efficiency, and report their findings to the relevant authorities.

C-155/19 and C-156/19 *FIGC* (EU:C:2021:88): The CJEU provided clarification on the concept of management supervision, asserting that it entails active control over a body's management, allowing public authorities to exert influence over decisions related to public contracts. In the context of CONI and its regulatory role in sports activities, the CJEU emphasised that CONI oversight should be assessed by national courts. Guidance offered to the national court entailed comprehensive analysis of CONI's powers concerning the FIGC. Factors such as recognition, adoption of guidelines, approval of statutes and budgets, appointment of auditors, and oversight of public activities were outlined as crucial considerations. A national sports federation may be deemed subject to management supervision only if thorough analysis reveals active management control by CONI to such an extent that it influences the federation's decisions on public contracts.

Further reading

SIGMA Public Procurement Brief No. 3, Contracting Authorities
OECD (2016), "Contracting Authorities", *SIGMA Public Procurement Briefs,* No. 3, OECD, Paris.

2 Contracts covered

Introduction

The Public Sector Directive[10] applies to procurement by contracting authorities, by means of public contracts, for works, supplies or services above specified financial thresholds and when exceptions or exemptions do not apply.

Article 2(1)(5) of the Public Sector Directive defines "public contracts" as "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services".

Questions on the definition of public contracts and related provisions in the Public Sector Directive have given rise to a large body of case law on a range of issues including: what legal framework applies when the contract is not in writing; the correct classification of contracts involving a mixture of works, supplies and services; whether some forms of co-operation between public bodies are classified as public contracts; and the proper application of exclusions, such as for land acquisition.

The case studies in this chapter look at how the Court of Justice of the European Union (CJEU) has interpreted the definition of a public contract to decide whether a contract falls within the coverage of the Public Sector Directive. Reference is to two issues in particular: (1) the concept of and requirements for "pecuniary interest", which is not defined in the Public Sector Directive, and (2) whether a selection decision is essential for a contract to be classified as a public contract.

Case studies on pecuniary interest in the context of a public contract

The three main questions considered in the case studies on pecuniary interest in the context of contracts covered by the Public Sector Directive are:

(1) When an offer is made in a tender to perform a service free of charge and the tendered price is thus EUR 0.00, does this satisfy the requirement for pecuniary interest for the purposes of the definition of a public contract?

(2) Does multi-stage co-operation set out in a series of agreements between two public bodies amount to a reciprocal arrangement with economic benefit sufficient to satisfy the definition of a public contract?

(3) When there is a specific-purpose funding agreement for the manufacture and supply of products by an economic operator for the benefit of public hospitals, and production and distribution costs are not fully covered by the grant, does this constitute a contract for pecuniary interest?

[10] 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 [2014] OJ L94/65.

Case studies on requirements for selection decisions

The question of whether a selection decision is required for a contract to be classified as a public contract arose in the context of publicly advertised arrangements to establish lists of pharmaceutical suppliers and advisory service providers. In both cases, all economic operators meeting the specified criteria were admitted to the supplier/advisor list. The pharmaceutical supplier list was open for suppliers to apply to join at any time. For the list of advisors, providers could apply to join at the beginning, and then the list was closed.

Case study 1

Contract for IT-based legal information services: Facts and dispute

On 7 June 2018, the Ministry of the Interior of Slovenia (the Ministry) launched a procurement procedure for IT-based legal information services. Procurement was divided into two lots with a total estimated value of approximately EUR 40 000[11]. Two economic operators submitted bids for Lot 1 within the specified time frame: Tax-Fin-Lex d.o.o. (Tax-Fin-Lex) and LEXPERA d.o.o. The price proposed by Tax-Fin-Lex for service provision was EUR 0.00.

On 11 January 2019, the Ministry awarded the contract to LEXPERA and rejected Tax-Fin-Lex's offer on the grounds that the tendered price was EUR 0.00. The underlying reason for the decision to reject was that, in the opinion of the Ministry, a tendered price of EUR 0.00 could not lead to the award of a public contract because it would not constitute a "contract for pecuniary interest", as required by the definition of a "public contract" in Article 2(1)(5) of the Public Sector Directive[12]. Under Slovenian law, the definition of a "public contract" in Article 2(1)(5) of the Public Sector Directive applies to all contracts, irrespective of their value. The definition therefore applied to the procurement in question.

On 17 January 2019, Tax-Fin-Lex lodged a request with the Ministry to review the decision to reject the tender. On 5 February 2019, the Ministry rejected the request from Tax-Fin-Lex for review of the decision and on 11 February 2019 it referred the matter to the State Commission for the Supervision of Public Procurement Procedures (the State Commission).

Tax-Fin-Lex argued that its offer was acceptable and should not have been rejected. In its view, the economic operator submitting the offer has the right to freely determine the price it proposes and, consequently, to offer a service free of charge. It does not matter that the bidder is not compensated for delivery of the contract in question. Tax-Fin-Lex explained that the award of the contract would confer on it an economic advantage by giving it access to a new market, new users and references providing access to future public procurement contracts. This can be regarded as a "pecuniary interest" for the purposes of the concept of a "public contract" according to Article 2(1)(5) of the Public Sector Directive.

The Ministry argued that, on the contrary, the concept of a "public contract" according to Article 2(1)(5) of the Public Sector Directive does not apply to a contract in which the economic operator proposes to provide the service free of charge to the contracting authority. The Ministry considered that the new market advantages conferred on the economic operator do not constitute compensation for the purposes of a public contract. It argued that such an advantage is of value to all economic operators, and it cannot be expressed in monetary terms and billed to the contracting authority, so there is no pecuniary interest. The Ministry was of the view that the offer of a service performed free of charge could not, therefore, lead to the conclusion of a public contract.

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[11] The value of this contract falls below the relevant EU financial thresholds for application of the Public Sector Directive, but national law applied the provisions of the Public Sector Directive to below-threshold contracts. The CJEU therefore considered this case on the basis that provisions of the Public Sector Directive applied.

[12] 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 [2014] OJ L94/65.

Question

Consider the arguments of Tax-Fin-Lex and the Ministry and the provisions of Article 2(1)(5) of the Public Sector Directive on what constitutes a public contract. In your opinion, is Tax-Fin-Lex correct or is the Ministry correct? Give reasons for your opinion.

Instructions for resolving the case

Based on CJEU Case C-367/19 – Tax-Fin-Lex

Tax-Fin-Lex d.o.o. v Ministrstvo za notranje zadeve (C-367/19, ECLI:EU:C:2020:685)

Advocate General Opinion (C-367/19, ECLI:EU:C:2020:685)

Request for a preliminary ruling from Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (the State Commission for the Supervision of Public Procurement Procedures, Slovenia)

Legal resources

Provisions of the Public Sector Directive considered:

Article 2(1)(5)

Question

Consider the arguments of Tax-Fin-Lex and the Ministry and the provisions of Article 2(1)(5) of the Public Sector Directive. In your opinion, is Tax-Fin-Lex correct or is the Ministry correct? Give reasons for your opinion.

The CJEU first noted the definition of “public contracts” in Article 2(1)(5) of the Public Sector Directive as being “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.”

The CJEU confirmed that according to its case law, it is clear from the usual legal meaning of the phrase “for pecuniary interest” that the term designates a contract under which each of the parties undertakes to provide one form of consideration in exchange for another. The CJEU also confirmed that “consideration” need not necessarily consist of payment of a sum of money. The supply of a service could be compensated by other forms of consideration, such as reimbursement of expenditures incurred in providing the agreed service.

The CJEU went on to state that the fact remains that the reciprocal nature of a public contract necessarily results in the creation of legally binding obligations for both parties to the contract, the performance of which must be legally enforceable. It follows that a contract under which a contracting authority is not legally obliged to provide any consideration in return for that which the other party to the contract has undertaken to provide does not fall within the concept of a “contract for pecuniary interest” in the meaning of Article 2(1)(5) of the Public Sector Directive.

The CJEU was also of the view that the fact that the award of the contract could be of economic value to the tenderer in that it would open access to a new market or enable the tenderer to receive references, is too uncertain and is therefore insufficient to characterise the contract as a “contract for pecuniary interest”.

Conclusion: The concept of **“**pecuniary interest” requires “consideration”, which need not necessarily consist of payment of a sum of money. When the consideration (economic value) for the economic operators is not financial, the economic value needs a sufficient level of certainty to be classified as such.

In this case, the economic value of access to a new market or enabling the tenderer to receive references was too uncertain to characterise the contract as a "contract for pecuniary interest".

Additional remarks

Automatic rejection on the grounds that the price proposed was EUR 0.00: The case study does not go on to examine the question of whether, in this case, the Ministry was correct to have rejected the tender solely on the grounds that the price proposed was EUR 0.00. The CJEU was of the view that Article 2(1)(5) of the Public Sector Directive does not permit the automatic rejection of a tender with a tender price of EUR 0.00. The CJEU advised that a tender price of EUR 0.0 could be classified as an abnormally low tender within the meaning of Article 69 of the Public Sector Directive. It was therefore necessary to follow the procedure prescribed in Article 69 of the Public Sector Directive to establish whether the tender could be rejected on the grounds that it was abnormally low. The procedure under Article 69 of the Public Sector Directive requires the tenderer to provide an explanation for the price or costs proposed and thus can be used to assess "whether the tender is reliable and enables the contracting authority to establish that, although the tenderer proposed a price of EUR 0.00, the tender at issue will not impair the proper performance of the contract". The contracting authority may only reject the tender when the evidence supplied does not satisfactorily account for the low price or costs proposed.

Similar cases

C-386/11 ***Piepenbrock*** (EU:C:2013:385): Assignment of the task of cleaning by one public entity to another (which could subcontract to third parties), while reserving the power to supervise proper execution of that task in return for financial compensation intended to cover costs incurred, constituted a public contract.

C-51/15 ***Remondis*** (EU:C:2016:986): An agreement concluded by two regional authorities establishing a special-purpose association to which competences were transferred did not constitute a public contract, provided the responsibilities and powers related to those competences were also transferred so that the new association had decision-making and financial autonomy.

Case study 2

Fire service management IT Software transfer and co-operation agreements: Facts and dispute

The Region of Berlin, which has the largest professional fire brigade in Germany, purchased software for fire service management operations (FSM software) from SSC Consulting. The contract between the Region of Berlin and SSC Consulting permitted the Region of Berlin to transfer the FSM software to other fire brigades in Germany, free of charge.

German legal rules on fire protection, functioning of emergency services and disaster management require the local German authorities responsible for these tasks to use their operations management systems as optimally as possible and to adapt them to requirements on an ongoing basis.

On 10 September 2017, the Region of Berlin and the City of Cologne entered into a software transfer contract (the Software Transfer Contract). This contract provided for the permanent transfer of the FSM software to the City of Cologne, for use by the City of Cologne Fire Service in the management of its operations.

The Software Transfer Contract included the following provisions:

> Section 1: Subject matter of the contract
>
> 1.1 The following provisions apply to the permanent transfer and use of the customised software “FSM software”. The software provider holds the rights over the software.
>
> 1.2 The customised software “FSM software” is the software provider’s operation management software for emergency calls, scheduling and operational tracking for activities of the fire service in firefighting, technical assistance, emergency rescue and disaster control….
>
> Section 2: Nature and scope of performance
>
> 2.1 The software provider shall provide the software recipient with the customised software “FSM software” for the purposes of the agreements in the co-operation agreement.
>
> Section 3: Renumeration for transfer
>
> 3.1 The customised software “FSM software” is to be provided for use as operations management software free of charge ….

On the same day, the Region of Berlin and the City of Cologne also entered into a co-operation agreement including the following provisions:

> Article 1 – Purpose of the willingness to co-operate
>
> … The partners have decided to put in place an equal partnership entailing, if necessary, a readiness to compromise in order to adapt the software to each other’s needs and to make it available to each other on a co-operative basis …. All adaptations made by one partner shall be made available to the other partner.
>
> Article 2 – Definition of the objective of the co-operation
>
> The objective pursued by the co-operation partners is to implement the “FSM software” operations management software as a computer-aided despatch system in the control

> centres of the fire service. The software system can be extended by further specialised functionalities in the form of modules and transferred to the other co-operation partner for them to use on a cost-neutral basis ….
>
> Article 5 – Structure of the co-operation
>
> … The base software shall be transferred on a cost-neutral basis. Supplementary add-on technical modules shall be provided to the co-operation partners on a cost-neutral basis.
>
> All software adaptations shall be made available to the co-operation partners. If a partner fails to make a software adaptation available to the other co-operation partner this shall constitute grounds for optional termination of this co-operation agreement.
>
> The adaptation of the base software and the modules to individual processes must be independently commissioned and independently financed.
>
> … This co-operation agreement is binding only together with the Software Transfer Contract as a joint document.

ISE, a company that develops and sells operation management software for safety authorities, submitted an application for review to the Public Procurement Review Board. ISE argued that the Software Transfer Contract and co-operation agreement should be declared ineffective on the grounds of failure to comply with the public procurement rules. According to ISE, participation of the City of Cologne in further development of the FSM software free of charge constituted a sufficient economic advantage for the Region of Berlin, such that the Software Transfer Contract and co-operation agreement were public contracts for pecuniary interest.

The Public Procurement Review Board dismissed the application for review on the grounds that the Software Transfer Contract and co-operation agreement were not public contracts because they were not for pecuniary interest. In particular, the arrangements had insufficient connection between performance and consideration.

ISE then appealed to the Higher Regional Court in Düsseldorf. It maintained that the co-operation agreement is a contract for pecuniary interest since the Region of Berlin sought to acquire an economic advantage by providing the FSM software and obliging the City of Cologne to make supplementary add-on software modules developed by it available to the Region of Berlin.

Question

Does the co-operation arrangement between the Region of Berlin and the City of Cologne, set out in the Software Transfer Contract and software co-operation agreement, satisfy the requirement of “pecuniary interest” under the definition of a public contract in Article 2(1)(5) of the Public Sector Directive?

Note: For the purposes of this case study, you do not need to consider whether the co-operation arrangement between the Region of Berlin and the City of Cologne is an excluded contract falling within the provisions of Article 12 of the Public Sector Directive.

Instructions for resolving the case

Based on CJEU Case C-796/18 – Informatikgesellschaft für Software-Entwicklung
Informatikgesellschaft für Software-Entwicklung (ISE) mbH v Stadt Köln (C-796/18, ECLI:EU:C:2020:395)

Advocate General Opinion (C-796/18, ECLI:EU:C:2020:47)

Request for a preliminary ruling from the Higher Regional Court, Düsseldorf, Germany

Legal resources

Provisions of the Public Sector Directive considered:

Article 2(1)(5)

Question

Does the co-operation arrangement between the Region of Berlin and the City of Cologne, set out in the Software Transfer Contract and software co-operation agreement, satisfy the requirement of "pecuniary interest" under the definition of a public contract in Article 2(1)(5) of the Public Sector Directive?

Judgement paragraphs 38 to 53 (Advocate General Opinion paragraphs 52 to 64)

The CJEU first confirmed that when a "multi-stage operation" is being considered, for the purposes of deciding whether it should be categorised as a public contract, the operation must be examined as a whole, taking account of its purpose. This means that the Software Transfer Contract and the co-operation agreement need to be considered together and in light of their overall purpose.

The CJEU then turned to look in more detail at the concept of a public contract. It referred to previous case law (C-51/15 *Remondis*), in which it had confirmed the approach set out in the Advocate General Opinion that

> *an essential element of the concept of a public contract is the creation of legally binding reciprocal obligations. A public contract is characterised by an exchange of services between the contracting authority, which pays a price, and the contractor who in exchange for that price, undertakes to … provide services. The concept of public contract therefore presupposes and applies to operations involving the acquisition by the contracting authority of works, supplies or services for consideration.*

The CJEU confirmed that the service acquired must be of direct economic benefit to the contracting authority. In its judgement in C-796/18 *ISE*, the reciprocal or mutual arrangement between the parties is referred to as the "synallagmatic nature" of the contract.

Article 5 of the co-operation agreement provides that the co-operation agreement is binding "only together with the Software Transfer Contract as a single document". In assessing the nature of the contractual framework formed by the co-operation agreement and the Software Transfer Contract, account should therefore be taken not only of their terms but also of the regulatory environment in which they were concluded. The CJEU referred to the German rules on fire protection, functioning of emergency services and disaster management, which require local authorities responsible for these tasks to use their operations management systems as optimally as possible and to adapt them to requirements on an ongoing basis. The CJEU examined the contractual framework on this basis.

The CJEU was of the view that both the terms of the Software Transfer Contract and the co-operation agreement make the existence of consideration likely. Although Section 4 of the Software Transfer Contract states that the provision of software is "free of charge" it is nevertheless clear that, according to Article 1 of the Software Transfer Contract, the transfer arrangement is permanent. The CJEU acknowledged that a long-term arrangement relating to software will inevitably be subject to changes, to take account of adaptations required by new rules, organisational developments and technological progress. The CJEU noted in this context that according to the City of Cologne, significant modifications are made to the software and to supplementary modules three or four times each year. The inevitability of required software adaptations was an important factor in the judgment, prompting the CJEU to conclude that the arrangements between co-operation partners were genuinely reciprocal and of financial value.

In addition, the CJEU highlighted Section 2.1 of the Software Transfer Contract, which states that the FSM software is provided "for the purposes of the agreements in the co-operation agreement", suggesting that the Region of Berlin introduced a form of conditionality. Consequently, although the software is provided free of charge, provision of the software "does not appear to be disinterested". The CJEU commented on

the wording of Article 1 of the co-operation agreement setting out the purpose of the co-operation agreement. The CJEU's view was that this wording also suggests that the parties undertake to develop the initial version of the FSM software to ensure optimal use. The CJEU also referred to Article 5 of the co-operation agreement concerning funding of adaptations to individual processes and saw this as reflecting the Region of Berlin's financial interest in providing the software free of charge, particularly as this should allow financial savings for each partner.

Furthermore, the CJEU noted that if the Region of Berlin or the City of Cologne made an adaptation and did not pass it on to the other party, this would constitute grounds for termination of the co-operation agreement and could potentially lead to a legal claim in respect of the benefit of the adaptation. In the CJEU's view, it thus appears that the obligations are legally binding and enforceable, providing further evidence of the reciprocal nature of the arrangement, financial interest of the partners and the pecuniary nature of the contractual arrangements.

Conclusion: The co-operation arrangement between the Region of Berlin and the City of Cologne, set out in the linked Software Transfer Contract and software co-operation agreement, satisfied the requirement of "pecuniary interest" under the definition of a public contract in Article 2(1)(5) of the Public Sector Directive.

Similar cases

C-386/11 *Piepenbrock* (EU:C:2013:385): Assignment of the task of cleaning by one public entity to another (which could subcontract to third parties), while reserving the power to supervise proper execution of that task in return for financial compensation intended to cover costs incurred, constituted a public contract.

C-51/15 *Remondis* (EU:C:2016:986): An agreement concluded by two regional authorities establishing a special-purpose association to which competences were transferred did not constitute a public contract, provided the responsibilities and powers related to those competences were also transferred so that the new association had decision-making and financial autonomy.

Case study 3

Manufacture and supply of medical products with a grant-funding arrangement: Facts and dispute

On 5 April 2018, the Veneto Regional Health Authority concluded an agreement with a local medical institution, *Sacro Cuore*, to manufacture and supply to public hospitals in the Veneto region a radiopharmaceutical product called 18-FDG (the Manufacture and Supply Agreement). Under the terms of the Manufacture and Supply Agreement, *Sacro Cuore* was to manufacture and supply 18-FDG free of charge to public hospitals in the region for a period of three years. The Veneto Regional Health Authority awarded the Manufacture and Supply Agreement directly to *Sacro Cuore* without a public tender.

Public hospitals obtaining 18-FDG from *Sacro Cuore* were required to sign a supply and delivery agreement directly with *Sacro Cuore*, under which they paid a fixed-rate delivery charge of EUR 180 per delivery to cover transport costs (the Delivery Agreement). The fixed-rate delivery charge was the only payment the public hospital was required to make, as the product 18-FDG was provided to it free of charge. The Veneto Regional Health Authority drew up a model Delivery Agreement for use by public hospitals to cover the supply and delivery arrangements between the public hospital and *Sacro Cuore*. On 10 April 2018, the Mestre Public Hospital concluded a Delivery Agreement with *Sacro Cuore*.

The Veneto Regional Health Authority provided a specific-purpose grant of EUR 700 000 to *Sacro Cuore* to cover the cost of manufacturing 18-FDG.

IBA is an undertaking specialising in the production of radiopharmaceutical products and is a distributor of 18-FDG in Italy. On 29 April 2015, IBA challenged the measures and contractual arrangements under which *Sacro Cuore* was awarded the Manufacture and Supply Agreement for 18-FDG. IBA sought annulment of the direct award of the Manufacture and Supply Agreement to *Sacro Cuore* and requested that a tender procedure be organised for the supply of 18-FDG. In support of its claim, IBA challenged a number of actions, including (1) the grant of EUR 700 000 by the Veneto Region to *Sacro Cuore*; and (2) the model Delivery Agreement drawn up by the Veneto Regional Health Authority governing the supply and delivery relationship between *Sacro Cuore* and the regional hospitals.

IBA's challenge was dismissed by the Regional Administrative Court, Lazio. One of the grounds for dismissal of IBA's challenge was that the arrangements were not concluded for pecuniary interest, so did not fall within the definition of a public contract as set out in Article 2(1)(5) of the Public Sector Directive. This was because, according to the Regional Administrative Court, the supply of FDG-18 was free of charge, since neither the regional funding of EUR 700 000 granted to *Sacro Cuore* nor payment of the transport costs for the product constituted direct consideration. Apart from the reimbursement of transport costs, *Sacro Cuore* did not formally receive payment in consideration for the supply of FDG-18.

Question

Do you agree with the decision and reasoning of the Regional Administrative Court? Give reasons for your views.

Instructions for resolving the case

Based on CJEU Case C-606/17 – IBA Molecular Italy

IBA Molecular Italy Srl v Azienda ULSS n. 3 and Others (C-606/17, ECLI:EU:C:2018:843)

No Advocate General Opinion

Request for a preliminary ruling from Consiglio di Stato (Council of State, Italy)

Legal resources

Provisions of the Public Sector Directive considered:

Article 2(1)(5)

Question

Do you agree with the decision and reasoning of the Regional Administrative Court? Give reasons for your views.

Judgement paragraphs 24 to 32

The CJEU adopted a holistic approach and looked at the entirety of the arrangements – the Manufacture and Supply Agreement, the Delivery Agreement and the specific-purpose grant funding.

The CJEU was clear that, in determining whether the contract for producing and supplying 18-FDG was for pecuniary interest, the consideration paid to *Sacro Cuore* by means of the EUR-700 000 grant from the Veneto Regional Health Authority had to be taken into account.

The CJEU was in "no doubt as to the pecuniary nature of such a contract". It confirmed that "it is clear from the usual legal meaning of 'for pecuniary interest' that those terms designate a contract by which each of the parties undertakes to provide a service in exchange for another". The CJEU also confirmed that a contract providing for the exchange of services is covered by the concept of public contract, even if the remuneration provided for is limited to partial reimbursement of costs incurred to supply the services agreed.

Conclusion: The CJEU concluded that a contract by which an economic operator undertakes to manufacture and supply a product to various authorities (public hospitals), in exchange for specific-purpose funding granted to achieve that objective, falls within the definition of a contract for pecuniary interest in the Public Sector Directive. This is the case even though the product's production and distribution costs were not fully covered by the grant or by the transport costs that may be charged to the authorities (the public hospitals).

Similar cases

C-386/11 *Piepenbrock* (EU:C:2013:385): Assignment of the task of cleaning by one public entity to another (which could subcontract to third parties), while reserving the power to supervise proper execution of that task in return for financial compensation intended to cover costs incurred, constituted a public contract.

C-51/15 Remondis (EU:C:2016:986): An agreement concluded by two regional authorities establishing a special-purpose association to which competences were transferred did not constitute a public contract, provided the responsibilities and powers related to those competences were also transferred so that the new association had decision-making and financial autonomy.

Case study 4

The concept of "public works contracts"

Facts and dispute

Germany's Institute for Federal Real Estate was owner of a property known as the *Wittekind* barracks, occupying an area of just under 24 hectares in Wildeshausen, Germany. In October 2020, Wildeshausen town council decided, with a view to returning the land to civilian use, to undertake feasibility studies for an urban planning project. In October 2021, the Institute for Federal Real Estate indicated in statements made on the internet and in the press that it intended to sell Wittekind barracks.

In January 2022 the Institute for Federal Real Estate launched a call for tenders with a view to selling the property. On 15 January 2022, Helmut Müller submitted a tender offer of EUR 1 million. Another property development company, GSSI GmbH, submitted a tender offer of EUR 2.5 million**.** Helmut Müller and GSSI GmbH submitted tenders together with proposals relating to the wider urban development plan for the area. The tenderers' plans were submitted to and discussed with the Wildeshausen municipal authorities, in the presence of the Institute for Federal Real Estate.

In the meantime, the Institute for Federal Real Estate had assessed the plans submitted by Helmut Müller and GSSI GmbH and expressed a preference for GSSI's project on urban-development grounds, taking the view that it would make Wildeshausen more attractive as a town. It informed the municipal authorities accordingly. It was then agreed that the property should not be sold until after Wildeshausen town council had approved the project.

Wildeshausen town council decided in favour of GSSI's project and, on 24 May 2022, issued a preliminary decision with conditions and warnings, as follows:

> Wildeshausen town council is prepared to examine the project submitted by GSSI GmbH and to embark on the procedure of drawing up a corresponding building plan for the area …, subject to the following:
>
> - There is no statutory right to obtain a (possibly project-related) building plan.
> - It is unlawful to give binding undertakings on building use or to restrict its discretion before appropriate urban planning procedures have been concluded.
> - The abovementioned decisions are therefore in no way binding with respect to any land-use plan of the municipality of Wildeshausen.
> - The contractor and the other persons involved in the project are liable in respect of the risks associated with planning and other costs.

Immediately after the decision of 24 May 2022, Wildeshausen town council revoked its decision of October 2020 to undertake preliminary urban planning studies.

By notarial deed of 6 June 2022, the Institute for Federal Real Estate, with the concurrence of the municipality of Wildeshausen, sold Wittekind barracks to GSSI GmbH. It informed Helmut Müller of the sale on 7 June 2022. In January 2023, GSSI GmbH was entered into the land register as owner of the property. By notarial deed of 15 May 2023, the Institute for Federal Real Estate and GSSI GmbH confirmed the sales contract of 6 June 2022.

Helmut Müller brought an action before the procurement review body, arguing that public procurement rules had not been followed even though the sale of the barracks was subject to public procurement law. Helmut Müller claimed that the sales contract was void because Helmut Müller had not been kept properly informed as potential purchaser of the land.

The procurement review body dismissed the action as inadmissible on the grounds that, essentially, GSSI GmbH had not been awarded a works contract.

Helmut Müller appealed this decision to the Higher Regional Court, Düsseldorf.

Questions

1. Does the concept of "public works contracts", within the meaning of Article 2 (1) (6) of the Public Sector Directive, require that works that are the subject of a contract be physically carried out for the contracting authority in its immediate economic interest, or is it sufficient if the works fulfil a public purpose, such as development of part of a town?
2. Does the concept of "public works contracts" require that the contractor be under a direct or indirect obligation to carry out the works that are the subject of the contract and that this obligation be legally enforceable?
3. Does the Wildeshausen town council's exercising of its urban planning powers constitute the setting of "requirements specified by the public contracting authority" within the meaning of Article 2 (1) (6) of the Public Sector Directive?

Instructions for resolving the case

Based on CJEU Case C-451/08 – Helmut Müller

Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben (ECLI:EU:C:2010:168)

Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany)

Legal resources

Provisions of the Public Sector Directive considered:

Article 2(1)(6)

Article 2(1)(5)

Article 2(1)(7)

Questions

Notes for trainers: This case study is based on judgment C-451/08 *Helmut Müller* but the dates in the case study have been changed so that it is possible to refer to the currently applicable Public Sector Directive.

1. Does the concept of "public works contracts", within the meaning of Article 2(1)(6) of the Public Sector Directive, require that works that are the subject of a contract be physically carried out for the contracting authority in its immediate economic interest, or is it sufficient if the works fulfil a public purpose, such as development of part of a town?

Notes for trainers concerning question 1: It is clear that a sale, such as that of the Wittekind barracks by the Institute for Federal Real Estate to GSSI GmbH, cannot of itself constitute a public works contract within the meaning of Article 2(1)(6) of the Public Sector Directive. This question concerns the relationship

between the municipality of Wildeshausen and GSSI GmbH, i.e. the relationship between the public authority with town-planning powers and the purchaser of Wittekind barracks.

Judgement paragraphs 40 to 58

Under Article 2(1)(5) of the Public Sector Directive, “public contracts” are contracts for pecuniary interest concluded in writing. The pecuniary nature of the contract means that a contracting authority that has concluded a public works contract receives a service pursuant to that contract in return for consideration. That service consists of the realisation of works from which the contracting authority intends to benefit.

Such a service, by its nature and in view of the scheme and objectives of the Public Sector Directive, must be of direct economic benefit to the contracting authority. The CJEU explained that economic benefit is clearly established when it is provided that the public authority is to become owner of the work or works that are the subject of the contract. Such an economic benefit may also be held to exist when it is provided that the contracting authority is to hold a legal right over the use of the works that are the subject of the contract, to make them available to the public.

The CJEU noted that the economic benefit may also lie in the economic advantages the contracting authority may derive from the future use or transfer of the work, from the fact that it contributed financially to realisation of the work, or would assume the risks were the work to be an economic failure.

It follows from the foregoing that the concept of “public works contracts” within the meaning of Article 2(1)(6) of the Public Sector Directive requires that the works that are the subject of the contract be carried out for the contracting authority’s immediate economic benefit. It is not necessary, however, that the service take the form of acquisition of a material or physical object.

The question arises as to whether these conditions are satisfied when the purpose of the intended works is to fulfil an objective in the public interest, the achievement of which is incumbent on the contracting authority, such as the development or coherent planning of part of an urban district.

In EU Member States, the execution of building projects, at least those of a certain size, is normally subject to prior authorisation by the public authority having urban-planning powers. That authority must assess, in the exercise of its regulatory powers, whether execution of the works is in the public interest. However, it is not the purpose of the sole exercise of urban-planning powers, intended to give effect to the public interest, to obtain a contractual service or immediate economic benefit for the contracting authority, as is required under the Public Sector Directive.

Conclusion: The concept of “public works contracts”, within the meaning of Article 2(1)(6) of the Public Sector Directive, does not require that works that are the subject of a contract be materially or physically carried out for the contracting authority, provided they are carried out for that authority’s immediate economic benefit. The latter condition is not satisfied through the exercise of regulatory urban-planning powers by that contracting authority.

2. Does the concept of “public works contracts” require that the contractor be under a direct or indirect obligation to carry out the works that are the subject of the contract, and that this obligation be legally enforceable?

Judgement paragraphs 59 to 63

Article 2(1)(6) of the Public Sector Directive defines a “public works contract” as a contract for pecuniary interest. This concept is based on the premise that a contractor undertakes to carry out the service that is the subject of a contract in return for consideration. By concluding a public works contract, a contractor therefore undertakes to carry out, or to have carried out, the works that form the subject of that contract. Since obligations under a contract are legally binding, their execution must be legally enforceable.

Conclusion: The concept of "public works contracts" requires that a contractor assume a direct or indirect obligation to carry out the works that are the subject of the contract, and that this obligation be legally enforceable in accordance with the procedural rules laid down by national law.

3. Does the Wildeshausen town council's exercising of its urban planning powers constitute the setting of "requirements specified by the public contracting authority" within the meaning of Article 2(1)(6) of the Public Sector Directive?

Judgement paragraphs 64 to 69

In this case study, the contracting authority (the municipality of Wildeshausen) did not draw up a list of requirements relating to work to be carried out on the land occupied by Wittekind barracks. The municipality merely decided that it intended to examine the project presented by GSSI GmbH and to embark on the procedure of drawing up a corresponding building plan.

However, the third variant set out in Article 2(1)(6) of the Directive provides that the objective of public works contracts is the realisation of a "work corresponding to the requirements specified by the contracting authority".

The CJEU clarified that, for it to be possible to establish that a contracting authority has specified its requirements within the meaning of that provision, the authority must have taken measures to define the type of work or, at the very least, have had a decisive influence on its design.

The CJEU presented its opinion that the mere fact that a public authority, in the exercise of its urban-planning powers, examines certain building plans presented to it, or takes a decision applying its powers in that sphere, does not satisfy the obligation that there be "requirements specified by the contracting authority", within the meaning of that provision.

Conclusion: The "requirements specified by the contracting authority", within the meaning of the third variant set out in Article 2(1)(6) of the Public Sector Directive, cannot consist of the mere fact that a public authority has examined certain building plans submitted to it or taken a decision in the exercise of its regulatory urban-planning powers.

Similar cases

C-399/98 *Ordine degli Architetti and Others* (EU:C:2001:401)

C-220/05 *Auroux and Others* (EU:C:2007:31)

Further reading

OECD (2016), "2014 EU Directives: Public Sector and Utilities Procurement", *SIGMA Public Procurement Briefs,* No. 30, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-30-200117.pdf.

OECD (2016), "Contracts Covered by the Public Procurement Directives", *SIGMA Public Procurement Briefs,* No. 4, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-4-200117.pdf.

Case study 5

Contract for the supply of medicines: Facts and dispute

DAK is a German statutory health insurance fund, which is a contracting authority. On 28 August 2019, DAK published a notice in the *Official Journal of the European Union* (OJEU) to conduct an authorisation procedure to lead to the conclusion of "rebate contracts" for the supply of medicinal products (referred to hereafter as the "rebate scheme"). The active ingredient in the required medicinal products is mesalazine, used to treat inflammatory bowel disease. The notice in the OJEU indicated that the procedure was not subject to public procurement law.

A rebate contract is a contract with an agreed fixed rebate rate on the "ex-factory" price, applied for a specified period. According to the German Social Security Code, pharmacists must replace the prescribed product with an equivalent "substitute" product covered by a rebate contract, if the prescribed product can be replaced by an equivalent one with the same active ingredient as indicated by the prescribing doctor.

In the case of the rebate scheme, the fixed rebate rate was 15% of the "ex-factory" price. The specified contract period was two years, from 1 November 2019 to 31 October 2021.

The terms of the rebate scheme provided for the rebate contracts to be concluded with all interested undertakings meeting specified authorisation criteria ("authorised suppliers"). All authorised suppliers were required to conclude identical rebate contracts whose terms were fixed and non-negotiable. The terms of the rebate scheme also provided that any undertaking meeting the authorisation criteria had the opportunity to accede to the scheme during the two-year contract period and become an authorised supplier until expiry of the contract period.

Kohlpharma was the only undertaking to express interest in response to the OJEU notice. It satisfied the specified authorisation criteria, and on 20 October 2019, DAK concluded a rebate contract with Kohlpharma. The computer system used by pharmacists was updated, listing the product supplied by Kohlpharma as the substitute medicinal product when products with the active ingredient mesalazine were prescribed. DAK published a notice in the OJEU announcing the award of the rebate contract with Kohlpharma.

Falk Pharma brought proceedings before the Federal Public Procurement Board, Germany, seeking a declaration that the authorisation procedure initiated by DAK, and the resultant contract award, were incompatible with public procurement law.

Falk Pharma argued that public procurement law applies when a body classified as a contracting authority procures goods on the market, and that this law requires a call for tenders, which implies the conclusion of exclusive contracts.

DAK argued that to acquire the goods and services it requires, a contracting authority can have recourse not only to public procurement but to other models. A contracting authority is therefore free to award contracts on an exclusive basis following a selection decision and also to conclude contracts with all interested undertakings satisfying the authorisation criteria, without a selection process. In the latter case, there is no award of an economic advantage to an economic operator and no risk of discrimination, particularly as the rebate scheme remains open throughout its duration. DAK argued that the existence of a selection decision is a constituent element of the concept of a "public contract". In the absence of selection, a contract such as the rebate contract with Kohlpharma is not a public contract.

Question

Consider the elements of the arguments submitted by DAK. In your opinion, is the contract concluded with Kohlpharma a “public contract” falling within the definition in the Public Sector Directive? Give reasons for your opinion.

Instructions for resolving the case

Based on CJEU Case C-410/14 – Falk Pharma
Dr. Falk Pharma GmbH v DAK-Gesundheit (C-410/14, ECLI:EU:C:2016:399)

No Advocate General Opinion

Reference for a preliminary ruling from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany)

Legal resources

Provisions of the Public Sector Directive considered:

Article 1(2)(a) of the 2004 Public Sector Directive

Article 2(1)(5) of the 2014 Public Sector Directive

Question

Consider the elements of the arguments submitted by DAK. In your opinion, is the contract concluded with Kohlpharma a “public contract” within the definition in the Public Sector Directive? Give reasons for your opinion.

Note for trainers: This case considered the concept and meaning of a “public contract” in Article 1(2)(a) of the 2004 Public Sector Directive as being “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services …”. This is the same wording contained in the definition of “public” contracts in Article 2(1)(5) of the 2014 Public Sector Directive.

The 2014 Public Sector Directive also includes, in Article 1(2), a description of “procurement” within the meaning of that directive as “the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose”. The words “chosen by those contracting authorities” may be argued to further support the reasoning in this case and was referred to in the judgement discussed below.

Judgement paragraphs 32 to 42

The CJEU started by confirming that rebate schemes lead to the conclusion of contracts for pecuniary interest between a public entity, which could be contracting authority, and economic operators whose objective is to supply goods, and this corresponds to the definition of “public contracts”.

The CJEU then emphasised the importance of interpreting the 2004 Public Sector Directive in accordance with the principles of the Treaty on the Functioning of the European Union (TFEU), particularly the free movement of goods, freedom of establishment and freedom to provision of services and the resultant principles, including equality of treatment and transparency. The CJEU also noted the role and purpose of the 2004 Public Sector Directive in preserving cross-border trade by avoiding the risk of giving preference to national tenderers.

Having set the context, the CJEU moved on to explain that the risk of favouring national economic operators is closely connected to: (1) the selection the contracting authority intends to make from admissible tenders; and (2) "the exclusivity which will result from the award of the contract" to an economic operator or operators (in the case of a framework agreement) whose tenders have been accepted. This reasoning led the CJEU to the view that, when a public entity seeks to conclude supply contracts with all economic operators meeting specified conditions (the authorisation criteria in this case), "the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is awarded means that there is no need to control – through detailed provisions of the [Directive] – the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators".

The CJEU concluded that the choice of a tender, and thus of a successful tenderer, is "intrinsically linked" to the regulation of public contracts by the 2004 Public Sector Directive and consequently to the concept of a "public contract".

In support of its conclusion, the CJEU referred to three factors:

(1) requirements in the 2004 Public Sector Directive for a written report to be drawn up by the contracting authority, to include the name of the successful tenderer and the reasons why that tenderer was selected

(2) the principle expressly set out in the 2014 Public Sector Directive in the definition of the concept of procurement (referred to in the note above), which mentions the choice of economic operator

(3) the fact that the rebate scheme was not closed to participants after the initial period, but remained open for its duration, allowing economic operators to accede to the scheme at any time. The CJEU noted that this distinguishes the rebate scheme from a framework agreement, which is a closed arrangement under which contracts can be awarded only to economic operators who are originally party to the framework agreement. The CJEU did not consider whether the scheme fell within the definition of a dynamic purchasing system, with which the scheme does appear to share some common factors.

Conclusion: A contract scheme such as the rebate scheme in this case does not constitute a "public contract". The CJEU was particularly swayed by the fact that in establishing the arrangement there was no final choice of a successful tenderer. This is because the contracting authority intends to acquire goods on the market during the validity period of the scheme, to which an economic operator may accede at any time by contracting with *any* economic operator meeting the prescribed conditions, without choosing between those economic operators.

Additional remarks

This decision, together with the decision in C-9/17 *Tirkkonen* (see Contracts Covered, Case Study 6), has raised some concerns and academic debate about whether the CJEU has adopted an overly strict approach to the constituent elements required for an arrangement to be classified as a public contract for the purposes of the EU procurement rules. For example, interpreting this decision as meaning that no public contract exists when there is an element of choice for the final user could possibly cast doubts on the classification of certain types of framework agreements, dynamic purchasing systems and purchases through contracts established by a central purchasing body, as public contracts.

Case study 6

Contract for farm advisory services: Facts and dispute

On 16 September 2018, the Finnish Agency for Rural Affairs (the Agency) issued an invitation to tender, using the open procedure, to establish a framework agreement for farm advisory services for 2019-2024 (the Nuevo 2019 Farm Advisory Scheme). The contract notice stated that the procedure was open to public and private advisors. To be appointed to the framework agreement for the Nuevo 2019 Farm Advisory Scheme, advisors were required to:

(1) Meet the conditions as to capability and the minimum requirements laid down in the annexes to the framework agreement.

(2) Pass an examination.

The invitation to tender did not set out award criteria for comparing tender submissions with each other. The Agency did not award points to the bids or make a comparison of them. The framework agreement set out the principal conditions for service provision, including requirements from legislative provisions relating to the expenditure of rural development funds. It provided that subsequent contracts were to be awarded without an award procedure, in such a way as to permit farmers/land users entitled to the advisory services to obtain them from whomever they considered would best fulfil their needs. The advisors were to be paid an hourly rate by the Agency, not including VAT (which was paid by the farmers/landowners receiving the services).

Ms Tirkkonen applied to be appointed to the Nuevo 2019 Farm Advisory Scheme. The Agency excluded Ms Tirkkonen's application on the grounds that she had not filled in Point 7 of the Tender Form entitled "Observance of the formal requirements of the bid and compliance with tender conditions". In that paragraph, she should have indicated, by marking "yes" or "no", whether she accepted the tender conditions of the draft framework agreement appended to the tender.

Ms Tirkkonen challenged the Agency's decision to exclude her application. She argued that the procedure did not concern the award of a public contract, and public procurement law was therefore not applicable. In Ms Tirkkonen's view, administrative law was applicable, which would have required the Agency to ask her to complete the documentation.

In support of her view that the procedure did not concern the award of a public contract, Ms Tirkkonen argued that there are three stages in any tendering procedure: verification of the capability of tenderers; evaluation of compliance of the tenders with the tender notice; and selection of a tender based on the stated award criteria. In this case, the third stage was not carried out since the tenders were not compared with each other and it was the farmers/landowners who selected the service provider. In addition, 138 out of 140 advisors initially chosen took and passed the exam, without the examination making it possible to classify them in order of merit. The lack of selection from among the tenders precludes the existence of a public contract. In Ms Tirkkonen's opinion, the Nuevo 2019 Farm Advisory Scheme was a licensing scheme, not a public contract.

The Agency argued that, relying on the decision in C-410/14 *Falk Pharma* (Case Study 2), (1) the Nuevo 2019 Farm Advisory Scheme was not permanently open to new tenderers and so should be distinguished from a licensing scheme, and (2) the authority imposed on service providers numerous specific requirements based on legislation, bringing the Nuevo 2019 Farm Advisory Scheme close to the concept of a public contract. The Agency was of the view that applying public procurement legislation would be justified by the need to ensure that the selection criteria were not fixed in a discriminatory manner. The Agency also argued that there was an element of selection and intention to award the best tenders because

163 tenders were received but only 140 were conditionally admitted to the examination stage, with 138 finally accepted.

Following dismissal of her challenge in the first instance, Ms Tirkkonen appealed to the Supreme Administrative Court, Finland, which submitted a reference for a preliminary ruling to the CJEU.

Question

The Nuevo 2019 Farm Advisory Scheme is a closed scheme. It does not permit any new operators to accede to the scheme after the initial appointment process, which admits all economic operators that meet the suitability requirements set out in the invitation to tender and pass an examination. Is this a public contract?

Instructions for resolving the case

Based on CJEU Case C-9/17 – Tirkkonen
Proceedings brought by Maria Tirkkonen, intervener: Maaseutuvirasto (Agency for Rural Affairs, Finland) **(**C-9/17, ECLI:EU:C:2018:142)

Advocate General Opinion (C-9/17, ECLI:EU:C:2017:962)

Reference for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland)

Legal resources

Provisions of the Public Sector Directive considered:

Article 1(2)(a) of the 2004 Public Sector Directive

Article 2(1)(5) of the 2014 Public Sector Directive

Question

The Nuevo 2019 Farm Advisory Scheme is a closed scheme. It does not permit any new operators to accede to the scheme after the initial appointment process, which admits all economic operators that meet the suitability requirements set out in the invitation to tender and pass an examination. Is this a public contract?

Note for trainers: This case considered the concept and meaning of a “public contract” in Article 1(2)(a) of the 2004 Public Sector Directive as being “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services …”. This is the same wording contained in the definition of “public contracts” in Article 2(1)(5) of the 2014 Public Sector Directive.

Judgement paragraphs 26 to 41

The CJEU closely followed the reasoning of its previous decision in C-410/14 *Falk Pharma,* noting that the Farm Advisory Scheme led to the conclusion of contracts for pecuniary interest between a public entity, which could be a contracting authority, and economic operators whose objective was to supply services, and this corresponds to the definition of “public contracts”. The CJEU also noted the objective of the 2004 Public Sector Directive – to avoid the risk of giving preference to national tenderers – and the close connection between this risk and the exclusivity that would result from the award of the contract concerned to the operator or operators (in the case of framework agreements) whose tender has been accepted.

The CJEU repeated its analysis and conclusions of C-410/14 *Falk Pharma*, that the choice of a tender and thus of a successful tenderer is intrinsically linked to the regulation of public contracts by the 2004 Public

Sector Directive and, consequently, to the concept of a "public contract" under Article 1(2)(a) of the 2004 Public Sector Directive. The CJEU concluded, using the same wording as in its judgement for C-410/14 *Falk Pharma*, that "the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is awarded means that there is no need to control – through detailed provisions of the [Directive] – the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators".

Turning to the particular circumstances of the Farm Advisory Scheme, the CJEU stated, "it is necessary to determine whether the Agency has chosen a tender from among all those which satisfied the conditions it had laid down in its invitation to tender". The CJEU went on to note the following points, in support of its conclusion that the Farm Advisory Scheme did not constitute a "public contract" within the meaning of Article 1(2)(a) of the 2004 Public Sector Directive:

- The Agency intended to set up a large pool of advisors who must fulfil a number of conditions, but it made no selection among admissible tenders, confining itself to ensuring that qualitative criteria were respected.
- The opportunity for advisors to join the Farm Advisory Scheme was limited to a preliminary period, which ended when the examination was organised or, at the latest, when the final award decision was published. In the CJEU's opinion, the fact that the Farm Advisory Scheme was not permanently open to interested economic operators was "irrelevant". In the case of the Farm Advisory Scheme, the decisive factor was that the Agency did not refer to any award criteria for the purpose of comparing and classifying admissible tenders.

By way of further explanation, the CJEU made it clear that even if the verification of tenderer suitability and contract awards are carried out simultaneously, they must be regarded as two different operations governed by different rules. This means that criteria not aimed at identifying the most economically advantageous tender, but instead linked to evaluating the suitability of tenderers to perform a contract, cannot be regarded as "award criteria".

This was confirmed in Case C-532/06 *Lianakis and Others,* wherein the CJEU held that criteria relating mainly to experience, qualifications and means to ensure the proper performance of the contract concerned, were considered to relate to the suitability of tenderers to perform the contract and not as "award criteria", even though the contracting authority had classified them as such. In the CJEU's opinion, this conclusion was not affected by the CJEU's decision in C-61/13 *Ambisig*, in which it pointed out that the skills and experience of the members of a team assigned to a public contract may be included as award criteria. In that case, the CJEU regarded the experience of the proposed technical team as "an intrinsic feature of the tender" and "not merely a criterion for assessing the tenderers' suitability".

Conclusion: The CJEU concluded that the Farm Advisory Scheme was not a public contract because the requirements set out in the invitation to tender published by the Agency cannot constitute award criteria within the meaning of the 2004 Public Sector Directive. The fact that the Farm Advisory Scheme was not permanently open to interested economic operators was "irrelevant".

Additional remarks

This decision, together with the C-410/14 *Falk Pharma* decision (see Contracts Covered, Case Study 5), has raised some concerns and academic debate about whether the CJEU has adopted an overly strict approach to the constituent elements required for an arrangement to be classified as a public contract for the purposes of EU procurement rules. In this case, the Agency predefined the service provision parameters and set conditions to be fulfilled for providers to be admitted to the pool, with users calling off their requirements under the scheme. This arrangement has various factors in common with framework agreements, and it can be argued that, if narrowly interpreted, this decision is difficult to reconcile with methods for the establishment and operation of framework agreements.

3 In-house contracts and public-public co-operation agreements

Introduction

Application of the Public Sector Directive does not affect the freedom of contracting authorities to perform the public service tasks conferred on them by using their own resources. We can distinguish two basic situations in which contracting authorities use their own resources: in-house contracts and public-public co-operation agreements.

The concept of in-house award originally appeared in Court of Justice of the European Union (CJEU) case law and was triggered by the judgment in Case C-107/98 *Teckal Srl* (EU:C:1999:562). The CJEU pointed to EU Member State discretion in how public tasks are carried out and stated that the elimination of barriers to access national procurement markets applies only to contracts concluded with economic operators in a competitive market, as only this form of purchasing can violate the freedoms laid down in the Treaty on the Functioning of the European Union (TFEU). The CJEU confirmed that the performance of public tasks by entities over which the contracting authority exercises control analogous to that of its own subsidiaries, and which provide services predominantly to the contracting authority, goes beyond the scope of EU regulations on procurement procedures.

With the adoption of new directives in 2014, the EU legislator clarified the conditions under which a contracting authority can award in-house contracts or constitute public-public co-operation agreements without being obligated to apply public procurement law.

In-house contracts

An in-house contract is defined in Article 12(1) of the Public Sector Directive by reference to three conditions, all of which must be satisfied:

The control the contracting authority exercises over the legal person concerned is similar to that which it exercises over its own departments (the “organisational dependence” condition).

More than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority (the “economic dependence” condition).

There is no direct private capital participation in the controlled legal person, with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the treaties, which do not exert a decisive influence on the controlled legal person.

Concept of a controlled legal person

A controlled legal person constitutes a contracting authority's "own resources". This was made quite clear in the judgment for Case C-719/20 *Comune di Lerici* (EU:2022:372, paragraphs 33, 34 and 38) when the CJEU stated that "in the case of an in-house contract award, it is presumed that the contracting authority uses its own resources, because even if the entity to which the contract is awarded is legally separate it can, in practice, be identified with an internal organisational unit".

CJEU case law describing the conditions for awarding in-house contracts also uses the phrase "own resources of an administrative, technical or other nature", and this wording relates to the interpretation of elements of the organisational dependence condition. Already in the judgment for Case C-26/03 *Stadt Halle* (EU:C:2005:5, paragraph 48), the CJEU stated that the contracting authority may fulfil tasks "with its own resources of an administrative, technical or other nature", without recourse to external entities that do not belong to its departments. In this case, therefore, we are not dealing with a contract of a pecuniary nature entered into with an entity that is separate from the contracting authority.

Similarly, in its judgment for Case C-574/12 *Centro Hospitalar de Setúbal* EPE (EU:2014:2004, paragraph 35), the CJEU clarified that "the exception for the award of in-house contracts is based on an approach whereby the contracting authority uses its own resources to fulfil the tasks incumbent upon it". Maintaining a functional approach, the CJEU stated that "own resources" can include own departments, but also legally separate entities, as long as the control exercised over them is analogous to that over the contracting entity's own departments. In the aforementioned judgments, the CJEU focused on the legal assessment of the bond between the contracting authority and its departments or the contracting authority and the controlled legal person, which has the character of an "internal transaction", and as such is excluded from the scope of the Public Sector Directive.

Calculation of average total turnover: Adopting Article 12(5) of the Public Sector Directive, the EU legislator clarified that average total turnover – or an appropriate alternative measure based on activity such as the costs incurred by the legal person concerned or the contracting authority – for services, supplies and works for the three years preceding award of the contract would be taken into account for the purpose of determining the threshold of 80% of the controlled legal person's activities. The quantitative method was considered the most measurable and reliable, and the EU legislator rejected other methods of assessing the condition of economic dependence.

In the process of implementation, national legislators are required to adapt the economic concepts of Article 12(5) of the Public Sector Directive to national regulations in the field of accounting and finance. Individual Member States may also develop their own methods for calculating the required 80% economic activity threshold or even change its amount.

The CJEU did not exclude the possibility that the controlled legal person may carry out some activity in the competitive market, and particularly undertake activities accessory to its core business in the tasks entrusted to it by the contracting authority (C-573/07 Sea, EU:C:2009:532, paragraphs 78-80).

The condition of linking the threshold of 80% of the controlled legal person's activity to the performance of tasks entrusted to it by the contracting authority should be interpreted in light of two main objectives. One is related to strengthening control through economic dependence. The other objective seeks to ensure that in-house procurement does not distort competition "with respect to private contractors, to the extent that such co-operation places the private service provider in a position of advantage over its competitors" (recital 31 of the Public Sector Directive).

The purpose of entrusting public tasks is to use the resources of the controlled legal person to carry out the public duties of the contracting authority. The controlled legal person may earn revenues from performing the tasks entrusted to it, regardless of the form and legal basis for obtaining them. A controlled legal person may be established by the contracting authority to carry out various tasks, each of which requires a different legal basis (i.e. a contract, decision or legal act).

It is important to note that there is no single model for “in-house” contracts. Article 12 of the Public Sector Directive acknowledges this to a certain extent with provisions applying to transactions between in-house entities controlled by the same contracting authority (horizontal in-house contracts); and transactions between a group of contracting authorities and their jointly controlled entity (joint in-house contracts).

Public-public co-operation agreements

Article 12(4) of the Public Sector Directive regulates cases that are usually referred to as public-public co-operation agreements. In these cases, two or more contracting authorities may establish horizontal co-operation, without creating a jointly controlled in-house entity. EU law does not require contracting authorities to use any particular legal form to jointly carry out their public service tasks.

Conditions of public-public co-operation agreements are codified in Article 12(4) of the Public Sector Directive as follows:

- The agreement establishes or implements co-operation among the participating contracting authorities with the aim of ensuring the public services they have to perform are provided with a view to achieving common objectives.
- Implementation of this co-operation is governed solely by considerations relating to the public interest.
- The participating contracting authorities perform on the open market less than 20% of the activities covered under the co-operation.

Case studies

The case studies on award criteria and tender evaluation deal with five issues considered by the CJEU:

1. How should the condition of organisational dependence be interpreted for in-house contracts and, in particular, what should be the “similar control” exercised by the contracting authority over the dependent entity?
2. What is the condition of economic dependence?
3. How should "co-operation" between contracting authorities be defined for agreements between equal entities aimed at achieving a common objective?
4. In what cases is the "goal" of a given agreement common, and in what cases do some partners only contribute to its achievement?
5. What is the scope of competence of Member States in implementing Article 12 of the Public Sector Directive?

Case study 1

Conditions of “similar control” and horizontal in-house transactions: facts and dispute

The Hamburg University of Technology, as a public institution of higher education of the City of Hamburg, is a public-law entity and therefore a contracting authority. It has a certain amount of autonomy in organising its educational programmes and conducting research. To purchase an IT system for higher-education management, the University conducted an evaluation in which it compared IT systems developed by DI GmbH and HIS. After completing this evaluation, the University decided to purchase a system from HIS and to conclude a supply contract with this company on a negotiated basis, without using the tendering procedures set forth in the Public Sector Directive. Given the estimated value of the contract (EUR 840 000), the University was obliged to comply with the rules of the directive.

HIS is a limited company governed by private law, one-third of its capital being owned by the Federal Republic of Germany and two-thirds by the 16 German federal states, with the City of Hamburg’s share corresponding to 4.16% of that capital. The Federal Republic of Germany is divided into 16 federal states, three of which are cities (Hamburg, Bremen and Berlin). The object of HIS’s business is to support higher education, and its systems are used in more than 220 public and religious higher-education establishments in Germany.

HIS’s supervisory board is made up of ten members. Seven of the members are appointed on proposals of the Conference of Ministers of the Länder. Two are appointed on proposals of the Conference of Rectors of the higher-education establishments, an association that unites German universities and higher-education establishments that are public or recognised by the State. One member is appointed by proposal of the Federal authorities.

HIS has a board of trustees, and 19 of its 37 members come from the Conference of Ministers of the Länder. Regarding the volume of its activities, 5.14% of HIS’s turnover relates to activities on behalf of entities other than public higher-education authorities.

The direct award of the contract by the University to HIS was, according to the contracting parties, justified on the grounds that, although there is no relationship of control between the two entities, the condition of “similar control” is satisfied because both parties are under the control of the City of Hamburg.

DI GmbH filed a complaint against the decision to directly award this contract with the Procurement Review Body, which upheld the complaint. The Procurement Review Body found that the "analogous control" condition was not met because the University, as a contracting authority, could not exercise control over HIS analogous to that which it exercises over its own services. Although the University is a legal entity under public law of the City of Hamburg, whose share in the capital of HIS was 4.16%, the University and the City of Hamburg are separate legal entities. Similarly, the argument that the City of Hamburg controls both the University and HIS is insufficient to satisfy the condition in question. The Public Review Body also found that the University is autonomous and that its control of legality and substantive control exercised by the City of Hamburg as to the management of funds are not equivalent to the managerial powers a contracting authority should have.

HIS and the University have challenged the Public Review Body's decision in court.

Questions

1. Can the contract between the University of Hamburg and HIS be considered an in-house contract within the meaning of Article 12(1-3) of the Public Sector Directive?
2. Does the University exercise “similar” control over HIS – alone or jointly with other contracting authorities – within the meaning of Article 12(1)(a) of the Public Sector Directive?

Instructions for resolving the case

Based on CJEU Case C-15/13 – Technische Universität Hamburg-Harburg

Technische Universität Hamburg-Harburg, Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH (ECLI:EU:C:2014:303)

Advocate General Opinion (ECLI:EU:C:2014:23)

Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg, Germany

Legal resources

Provisions of the Public Sector Directive considered:

Article 12

Notes for trainers:

This case study is based on judgment C-15/13 Technische Universität Hamburg, but the dates of the various events were not included so that it is possible to refer to the currently applicable Public Sector Directive. The concept of in-house procurement originally appeared in CJEU case law, which points to Member States' discretion in carrying out public tasks and states that the elimination of barriers to access national procurement markets applies only to contracts concluded with economic operators in a competitive market, as only this form of purchasing can violate the freedoms laid out in the TFEU. With the adoption of new directives in 2014, the EU legislator clarified the conditions under which a contracting authority could award in-house contracts without the obligation to apply public procurement law. Article 12 of the Public Sector Directive is a codification of the CJEU's in-house jurisprudence, so earlier rulings remain valid. More on this topic appears in the introduction to this chapter.

Questions

1. Can the contract between the University of Hamburg and HIS be considered an in-house contract within the meaning of Article 12(1-3) of the Public Sector Directive?

2. Does the University exercise “similar” control over HIS – alone or jointly with other contracting authorities – within the meaning of Article 12(1)(a) of the Public Sector Directive?

Judgement paragraphs 21 to 36 (Advocate General Opinion paragraphs 25-48, 71-72 and 75)

The CJEU first confirmed that,

> *a contracting authority has the possibility of performing its public-interest tasks by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments, and that that exception may be extended to situations in which the other contracting party is an entity legally distinct from the contracting authority, where the latter exercises control over the contractor similar to that which it exercises over its own departments and that contractor carries out the essential part of its activities with the contracting authority or authorities which own it.*

The CJEU clarified the meaning of the term “similar control”, stating that the contracting authority must have power to exercise “decisive influence over both the strategic objectives and the significant decisions of the contractor, and that the control exercised by the contracting authority must be genuine, structural and functional”. Under certain conditions, “similar control” may be exercised jointly by several public authorities that are joint owners of the contractor.

The Advocate General underlined that,

> *the basis for the exemption for in-house transactions resides specifically in the fact that, since the contractor does not enjoy a degree of independence such as to preclude the contracting authority from exercising over it control similar to that which it exercises over its own departments, there can be no contractual relationship in the strict sense, as there is no concordance of two autonomous wills representing separate legal interests.*

The concept of in-house contracts proposed by the CJEU was adopted by the EU legislator in Article 12 of the Public Sector Directive, and the definition of similar control remains current.

The CJEU noted that there is no relationship of control between the University, as the contracting authority, and HIS, the contractor. The University holds no share in the capital of that entity and has no legal representative in its management bodies. Furthermore, the City of Hamburg is not in a position to exercise “similar control” over the University. The control exercised by the City of Hamburg over the University extends to only part of its activity, solely in matters of procurement – not to education and research, in which the University has a large degree of autonomy. In these circumstances, there are no grounds to assume the existence of “horizontal in-house transactions”, i.e. a situation in which the same contracting authority (the City of Hamburg) exercise “similar control” over two distinct economic operators (the University and HIS), one of which awards a contract to the other.

The Advocate General explained that the in-house contract exemption also applies to circumstances in which the authority’s own resources consist of two entities over which it exercises control, and that to perform the public-interest tasks, it is necessary to conclude a contract between those entities. The justification for applying the in-house exemption lies in the fact that conclusion of the contract at issue is not an expression of the autonomous will of the parties to the contract, but the expression of a single will.

Analysing the concept of “similar control”, the Advocate General stated that, in principle, such control should extend to all aspects of the contractor’s activities and not be confined to the procurement sector alone: “The control exercised over a contractor by a contracting authority must be similar to that which the authority exercises over its own departments, it need not be identical in every respect”. In view of the university's special legal situation, the Advocate General suggested that the “similar control” exercised must extend to all the contractor’s activities, except for the special rights and powers universities enjoy in the areas of teaching and research.

To assess whether the control condition is satisfied, it is necessary to consider all the legislative provisions in the documents governing the relationship between the parties. The control condition is not automatically met if the contracting authority sets up a company that is fully owned by that authority. Full ownership indicates a certain amount of control, but it is not sufficient to assert that the control condition has been met. The fact that a contracting authority has 100% public ownership of a company is not a decisive argument (C-340/04 *Carbotermo SpA*, paragraph 37).

Of particular importance are the circumstances indicating whether a company is subject to effective control, enabling the contracting authority to have a decisive influence over both the strategic objectives and the significant decisions of that entity. The control condition is likely to be fulfilled when the board of the company has very limited autonomy and when the decisions that can be adopted without prior approval of the contracting authority are strictly related to matters of daily work. The in-house exemption applies when, for example, a separate legal entity has no say when it receives an order from the contracting authority

owner, and it does not have the possibility of refusing a task or fixing the tariffs for its activities (C-295/05 *Asemfo*, paragraphs 60-61).

Conclusion: The contract for the supply of IT products concluded between the Hamburg University of Technology, which is a contracting authority and whose purchases of products and services are controlled by the City of Hamburg, and HIS – an undertaking under private law, owned by the Federation and by Federal States, including the City of Hamburg – does not constitute an in-house contract in the meaning of Article 12 of the Public Sector Directive, but rather a public contract, which must therefore be subject to the public procurement rules laid down in that directive.

Similar cases

C-107/98 *Teckal* (EU:C:1999:562, paragraph 50)

C-26/03 *Stadt Halle and RPL Lochau* (EU:C:2005:5, paragraphs 48 and 49)

C-182/11 and C-183/11 *Econord* (EU:C:2012:758, paragraphs 27-31)

Further reading

OECD (2016), "In-house Procurement and Public/Public Co-operation", *SIGMA Public Procurement Briefs,* No. 39, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-39-200117.pdf.

Case study 2

Conditions of "similar control" and economic dependence: facts and dispute

AGESP-Holding is a joint-stock company, and its 99.98% share capital is currently held by the *Comune di Busto Arsizio*. The other shareholders are other municipalities.

According to its statutes, AGESP-Holding's mission includes the management of public utility services in the gas, water, electricity and heating sectors. The share majority is reserved for the *Comune di Busto Arsizio*, and no private shareholder may hold more than 10% of the company's total share capital. AGESP-Holding is managed by a Board of Directors.

According to Article 26 of the statutes:

> *The Board of Directors shall be vested with the broadest possible scope of powers for the ordinary and extraordinary management of the company and shall have the power to take any action it deems necessary to implement and achieve the mission of the company, with the sole exception being acts which are formally reserved to the Assembly by law or by these statutes ….*

AGESP is a joint-stock company established by AGESP-Holding, which currently holds 100% of the share capital. AGESP's mission covers public utility services in the gas, water, electricity and heating sectors, and also the provision of various services for related companies. AGESP is managed by a board. According to Article 19 of its statutes, "the Board shall be vested with the broadest possible scope of powers, without limitation, for the ordinary and extraordinary management of the company".

By a decision of 18 December 2021, the *Comune di Busto Arsizio* awarded the contract in question directly to AGESP. The *Comune di Busto Arsizio* argued that it exercises over AGESP a control similar to that which it exercises over its own departments, and that this entity carries out the essential part of its activities with the controlling authority. A relationship of dependency between AGESP and the *Comune di Busto Arsizio* results from the latter holding 99.98% of the share capital of AGESP-Holding, which holds 100% of the share capital of AGESP. The *Comune di Busto Arsizio* stated that most of AGESP's turnover is derived from activities entrusted to it pursuant to contracts obtained directly from the *Comune di Busto Arsizio*.

On 28 April 2022, AGESP awarded contracts to subcontractors following a tendering process.

Carbotermo and *Consorzio Alisei* – companies interested in carrying out the subject of the contract – challenged the decision to award the contract to AGESP in court.

The complainants argued that the conditions for declaring the Public Sector Directive inapplicable were not met. First, the *Comune di Busto Arsizio* did not exercise any control over AGESP, since the *Comune di Busto Arsizio* only holds shares in AGESP through a holding company in which it owns shares covering 99.98% of the share capital. Second, AGESP has the full autonomy inherent in a private joint-stock company. Third, AGESP did not carry out its activities for the *Comune di Busto Arsizio* to a predominant extent.

In response, the *Comune di Busto Arsizio* and AGESP stated that in this case, the direct award of the contract was permitted, since the *Comune di Busto Arsizio* controlled AGESP by virtue of its ownership of the company's shares, and AGESP was performing its activities for the municipality to a predominant extent. In this regard, AGESP explained that more than 28% of its revenue generated in the area of the *Comune di Busto Arsizio* relates to services provided directly to the municipality, and that revenue generated in the area of this municipality represents 65.59% of its total revenue.

Questions

1. Does the *Comune di Busto Arsizio* exercise “similar” control over AGESP within the meaning of Article 12(1)(a) of the Public Sector Directive?

2. How do you estimate AGESP's economic dependence under Article 12(1)(b) and (5) of the Public Sector Directive?

3. Can AGESP award contracts to subcontractors?

4. Should the turnover obtained by AGESP when performing entrusted tasks with the co-operation of subcontractors be taken into account when estimating economic dependence?

5. Can the contract between the *Comune di Busto Arsizio* and AGESP be considered an in-house contract within the meaning of Article 12(1) of the Public Sector Directive?

Instructions for resolving the case

Based on CJEU Case C-340/04 – Carbotermo SpA

Carbotermo SpA, *Consorzio Alisei* v *Comune di Busto Arsizio*, AGESP SpA (ECLI:EU:C:2006:308)

Advocate General Opinion (ECLI:EU:C:2006:24)

Request for a preliminary ruling from the Tribunale amministrativo regionale della Lombardia, Italy

Legal resources

Provisions of the Public Sector Directive considered:

Article 12

Notes for trainers:

This case study is based on judgment C-340/04 *Carbotermo* SpA, but the dates of the various events have been changed so that it is possible to refer to the currently applicable Public Sector Directive. The concept of in-house procurement originally appeared in CJEU case law, which points to Member States' discretion in carrying out public tasks and states that the elimination of barriers to access national procurement markets applies only to contracts concluded with economic operators in a competitive market, as only this form of purchasing can violate the freedoms laid out in the TFEU. With the adoption of new directives in 2014, the EU legislator clarified the conditions under which a contracting authority could award in-house contracts without the obligation to apply public procurement law. Article 12 of the Public Sector Directive is a codification of the CJEU's in-house jurisprudence, so earlier rulings remain valid. More on this topic appears in the introduction to this chapter.

Questions

1. Does the *Comune di Busto Arsizio* exercise “similar” control over AGESP within the meaning of Article 12(1)(a) of the Public Sector Directive?

Judgement paragraphs 36 to 40 (Advocate General Opinion paragraphs 20-72)

The CJEU first recalled that,

> *in order to determine whether the contracting authority exercises a control “similar” to that which it exercises over its own departments, it is necessary to take account of all the legislative provisions and relevant circumstances. It must follow from that examination that the successful tenderer is subject to a control enabling*

> *the contracting authority to influence that company's decisions. It must be a case of a power of decisive influence over both strategic objectives and significant decisions of that company.*

The fact that the contracting authority holds, alone or together with other public authorities, all the share capital in a successful tenderer tends to indicate, without being decisive, that the contracting authority exercises over that company a control "similar" to that which it exercises over its own departments. However, the CJEU noted that the *Comune di Busto Arsizio* does not exercise over AGESP for the public contract at issue here a control "similar" to that which it exercises over its own departments.

The CJEU examined the statutes of AGESP-Holding and AGESP conferring on the Board of Directors of each of those companies the broadest possible powers for the ordinary and extraordinary management of the company:

> *Those statutes do not reserve for the Comune di Busto Arsizio any control or specific voting powers for restricting the freedom of action conferred on those Boards of Directors. The control exercised by the Comune di Busto Arsizio over those two companies can be described as consisting essentially of the latitude conferred by company law on the majority of the shareholders, which places considerable limits on its power to influence the decisions of those companies.*

Moreover, any influence the *Comune di Busto Arsizio* might have on AGESP's decisions is through AGESP-Holding. The intervention of such an intermediary may, depending on the circumstances of the case, weaken any control possibly exercised by the contracting authority over a joint-stock company merely because it holds shares in that company.

In summary, compliance with the condition of "similar" control within the meaning of Article 12(1)(a) of the Public Sector Directive requires demonstration of ownership and factual influence over decisions made by the controlled legal person. To examine the condition of "similar" control, it is necessary to investigate not only the ownership structure but also the statute of the controlled legal person or other act of incorporation.

2. How do you estimate AGESP's economic dependence under Article 12(1)(b) and (5) of the Public Sector Directive?

Judgement paragraphs 63 to 72 (Advocate General Opinion paragraphs 76-79)

The CJEU emphasised that the requirement to perform a predominant portion of economic activities for the controlling contracting authority is designed to, among other things, avoid distortion of competition. The rationale of economic dependence is an important complement to the requirement that the contracting authority exercises control analogous to that exercised over its own units – a controlled legal person would not be deprived of operational freedom if it could perform a significant part of its activities for other entities. The CJEU expressed the opinion that if the controlled legal person provides services primarily to the controlling contracting authority, it seems reasonable to disregard the restrictions under public procurement law "which are dictated by the concern to protect competition, which is not the case here". The condition of economic dependence is met if the activities of the controlled legal person are devoted primarily to the contracting authority, and any other activities are marginal.

When discussing whether only turnover obtained from the controlling contracting authority or turnover generated from activities performed within its territory should be considered in the context of economic dependence, the CJEU stressed that decisive is the turnover obtained by the controlled legal person through the controlling contracting authority's procurement decisions, which includes revenue obtained from the beneficiaries of the services in the execution of those decisions. The CJEU also clarified that any contract-related activity of the controlled legal person to which the contracting authority has awarded the contract must be taken into account, regardless of whether it is for the benefit of the contracting authority itself or for the beneficiaries of the services. In this regard, it is irrelevant who pays the remuneration to the controlled legal person – the controlling contracting authority, or third parties who are beneficiaries of the

services provided under the concession or other legal relationships established by the contracting authority. Also irrelevant is the area in which the services are provided.

In conclusion, in the opinion of the CJEU, the concept of turnover achieved by performing the delegated tasks should be understood in the context of economic dependence, when compliance with the requirement for a certain volume of activity carried out for the controlling contracting authority causes no distortion of competition, regardless of the legal form of the assignment of public tasks and the structure of financing.

Note: The combination of quantitative and qualitative methods was initially put forward in CJEU case law and the opinions of the advocates general. For example, in her opinion in Case C-340/04 *Carbotermo SpA*, the Advocate General suggested that the "core business" of a controlled legal person should be determined not only based on quantitative criteria, but also on qualitative elements. This view was shared by the CJEU but rejected by the EU legislature on the grounds that a qualitative approach would create significant difficulties and lead to a state of uncertainty.

3. Can AGESP award contracts to subcontractors?

In none of its verdicts to date on in-house contracts has the CJEU expressed an opinion on how the controlled legal person should perform the entrusted tasks; it especially has not indicated a need for "personal" performance or proposed restrictions regarding subcontracting.

Reflecting on the permissible ways of performing the entrusted tasks, attention should be paid to the meaning of “own resources”, a term that appears in case law and could potentially imply an obligation to perform the contract personally. It seems that the notion of "own resources" as it relates to in-house contracts refers exclusively to the relationship between the contracting authority and the controlled legal person, when the latter entity constitutes the contracting authority's "own resources" – this was made quite clear in the judgment for Case C-719/20 *Comune di Lerici* when the CJEU stated that "in the case of an in-house contract award, it is presumed that the contracting authority uses its own resources, because even if the entity to which the contract is awarded is legally separate it can, in practice, be identified with an internal organisational unit".

It seems indisputable that since the contracting authority's own units can carry out public tasks using third-party resources through the award of public contracts, the controlled legal person can also be obliged to carry out the tasks entrusted to it in this procedure.

There are two reasons to link the 80% activity threshold of the controlled legal person to the performance of tasks entrusted by the contracting authority. One objective is to strengthen control through economic dependence. The performance of entrusted tasks with the assistance of subcontractors does not weaken the economic dependence of the controlled legal person, especially if this way of carrying out a public task has been specified or agreed to by the contracting authority. The other objective is to ensure that in-house contracts do not distort competition. A controlled legal person is obliged to award a public contract when subcontractor resources are required to perform the entrusted task. The use of subcontracting in the "performance of entrusted tasks" does not violate Directive 2014/24/EU when the public contract appears in the market. From the perspective of contractors and the need to maintain fair competition, it is irrelevant who organised the tender, the controlled legal person or the controlling contracting authority itself.

The requirement of personal performance of entrusted tasks by the controlled legal person can therefore be considered relevant by the national legislator and introduced as an additional condition when implementing Article 12 of the Public Sector Directive. Given the variety of legal solutions for "in-house transactions" that meet the conditions of Article 12 of the Public Sector Directive, the national legislator may prohibit or restrict subcontracting in the performance of entrusted tasks in the future as a condition for the award of an in-house contract.

4. Should the turnover obtained by AGESP when performing entrusted tasks with the co-operation of subcontractors be taken into account when estimating economic dependence?

Article 12(5) of the Public Sector Directive does not require that costs related to the use of subcontractor resources be deducted from the average total turnover. It seems that remuneration from all entrusted tasks, regardless of whether they were performed using the controlled legal person's own resources or with the support of subcontractors, can be counted in the threshold of 80% of the average total turnover obtained by the controlled legal person in the performance of tasks entrusted by the contracting authority, provided that contracts with subcontractors are concluded in accordance with the Public Sector Directive.

The introduction of restrictions on subcontracting in the performance of tasks entrusted through an in-house contract raises the question of how such a particular restriction affects calculation of the required 80% threshold for demonstrating compliance with the condition of economic dependence. It seems that in calculating the 80% threshold of the controlled legal person's activities, it is necessary to include turnover received in the past for performing outsourced tasks in co-operation with subcontractors. The inclusion of such turnover must be based on the assumption that the controlled legal person was authorised to co-operate with subcontractors, e.g. by performing non-essential parts of the in-house contract or by performing tasks entrusted through a "normal" public contract, if the contract or national regulations did not impose restrictions on subcontracting.

The national legislator may, however, adopt a specific calculation for the required percentage of the controlled legal person's activities by implementing Article 12(5) of the Public Sector Directive, demanding personal performance of the entrusted tasks and prohibiting the inclusion of turnover generated by the contracting authority from services performed jointly with subcontractors.

5. Can the contract between the *Comune di Busto Arsizio* and AGESP be considered an in-house contract within the meaning of Article 12(1) of the Public Sector Directive?

Conclusion: The contract concluded between the *Comune di Busto Arsizio*, which is a contracting authority, and AGESP (an undertaking under private law, owned by AGESP-Holding) does not constitute an in-house contract in the meaning of Article 12 of the Public Sector Directive.

Additional remarks

Note that the condition in Article 12(1)(c) of the Public Sector Directive prohibiting the participation of private capital has not been satisfied. According to AGESP-Holding's statutes, private shareholders may acquire holdings in that company on two conditions: first, the majority of the shares are reserved for the *Comune di Busto Arsizio*; second, no private shareholder may hold more than one-tenth of the share capital of that company. AGESP-Holding holds 100% of AGESP's share capital. According to the latter's statutes, private shareholders may acquire holdings in it subject to only one condition, that no shareholder (with the exception of AGESP-Holding) may hold more than one-tenth of the share capital of that company.

Similar cases

C-458/03 *Parking Brixen* (EU:C:2005:605, paragraph 65)

C-26/03 *Stadt Halle and RPL Lochau* (EU:C:2005:5, paragraphs 48 and 49)

C-719/20 *Comune di Lerici* (EU:C:2022:372, paragraphs 33, 34 and 38)

Further reading

OECD (2016), "In-house Procurement and Public/Public Co-operation", *SIGMA Public Procurement Briefs,* No. 39, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-39-200117.pdf.

Case study 3

The concept of "co-operation" between contracting authorities: facts and dispute

The districts of *Mayen-Coblenz* and *Cochem-Zell* (Germany) entrusted the task of disposing of waste produced in their respective territories to the *Abfallzweckverband Rhein-Mosel-Eifel* Association, which they control together.

However, solely the Association, which is itself a contracting authority, can place residual waste (i.e. waste that comes mainly from households and contains no recyclable material, or almost no such material) in landfills. Mixed municipal household waste must undergo complex pre-treatment in a mechanical biological treatment (MBT) plant to obtain residual waste.

Since it does not have a treatment plant of this type, the Association entrusts 80% of its municipal waste disposal operations to private enterprises. Treatment of the remaining 20% is undertaken by the District of Neuwied under an agreement concluded between the Association and the District of Neuwied on 27 September 2018. That agreement was approved by the competent authority on 18 October 2018 and published in local and regional official journals.

The agreement provides as follows:

> Article 1, Initial position.
>
> 1. Paragraph 3(2) of the Law on the circular economy of the Land of Rhineland-Palatinate requires public waste management bodies to co-operate with each other to fulfil their tasks. The District of Neuwied and the Association agree to co-operate in relation to the treatment of residual waste and the disposal of mixed municipal waste on the basis of this agreement.
>
> 2. The District of Neuwied shall operate the Linkenbach waste treatment plant in the territory of the municipality of Linkenbach, which includes an MBT plant.
>
> 3. The District of Neuwied and the Association agree that the Association can use the Linkenbach MBT plant for part of the waste supplied to it.
>
> Article 2, Subject matter.
>
> 1. The Association undertakes to treat part of the waste from households and other sources which has been supplied to it … at the Linkenbach MBT plant.
>
> 2. The District of Neuwied undertakes to accept that waste in accordance with delivery conditions of this agreement and to treat it in accordance with the requirements of regulations on landfill sites. The Association shall remain responsible for the disposal of residual waste.
>
> […]
>
> Article 5, Fee.
>
> 1. In respect of the treatment of residual waste, the Association shall pay the District of Neuwied a fee, which shall vary according to the quantity of waste treated, by way of

reimbursement of costs, not taking into account a profit margin in relation to operating costs. The details are set out in a separate fee scale.

2. If the minimum waste quantity of 8 500 megagrams (Mg)/year agreed in this agreement is not reached, the Association shall be obliged to pay compensation based on tonnage in respect of the difference between the actual quantity delivered and 8 500 Mg/year. The amount of such compensation shall then be determined by mutual agreement between the parties, having particular regard to the sincere co-operation clause set out in Article 10 of this agreement. In determining that compensation, account shall be taken in particular of the costs which the District of Neuwied did not have to incur and the quantities treated on behalf of third parties. The District of Neuwied shall in no way be obliged to seek waste to be treated in order to compensate for the shortfall in the quantity of waste. If it is impossible for the District of Neuwied to use the available capacity and if it cannot reduce the costs incurred by the plant, the fee agreed in Article 5(1) shall be due as compensation for the shortfall in the quantity of waste. If the maximum quantity of waste (11 500 Mg/year) is exceeded, the parties shall, in accordance with the general principle described above, agree to adjust the fee in respect of the amount exceeding 11 500 Mg.

Article 10, Duty of sincere co-operation.

The Parties undertake to co-operate in complete confidence and in good faith for the purpose of achieving the objectives pursued by this agreement and to keep each other informed at all times of any developments or changes which may affect the implementation of this agreement.

Remondis, a private company active in the waste treatment sector, brought an action before the Procurement Review Body against this agreement on 3 December 2018. By a decision of 6 March 2019, the Procurement Review Body declared the action inadmissible on the grounds that the agreement at issue constituted a form of co-operation between two contracting authorities, falling within the scope of Article 12(4) of the Public Sector Directive.

The Procurement Review Body pointed out in particular that the Association had undertaken to annually deliver the fixed quantity of 10 000 Mg of residual waste to the district, so that the district could process the waste at the Linkenbach MBT plant. Through this mechanical and biological treatment, the district manages to have part of the waste recovered and its volume considerably reduced. The Association, for its part, undertook through the agreement at issue in the main proceedings to take back the remaining material to be placed into landfill, which represents around 46% of inputs, and to take responsibility for its disposal. The reasoning of the Procurement Review Body was that the two parties therefore entered into reciprocal obligations, establishing that there was a form of co-operation as provided for in Article 12(4) of the Public Sector Directive.

Remondis brought an action against the decision of the Procurement Review Body before the court. In support of this action, it submitted that there was no co-operation based on a co-operative concept and that the situation at issue entailed a public contract, which must be put out to tender.

Questions

1. How should the concept of “co-operation” between contracting authorities be interpreted within the meaning of Article 12(4) of the Public Sector Directive?

2. Can the contract between the Association and the District of Neuwied constitute “co-operation” and be considered an in-house contract within the meaning of Article 12(4) of the Public Sector Directive?

Instructions for resolving the case

Based on CJEU Case C-429/19 – Remondis GmbH

Remondis GmbH v Abfallzweckverband Rhein-Mosel-Eifel (ECLI:EU:C:2020:436)

Request for a preliminary ruling from the Oberlandesgericht Koblenz, Germany

Legal resources

Provisions of the Public Sector Directive considered:

Article 12

Questions

1. How should the concept of “co-operation” between contracting authorities be interpreted within the meaning of Article 12(4) of the Public Sector Directive?

Judgement paragraphs 23 to 34

The CJEU first noted that the concept of “co-operation” in Article 12(4) of the Public Sector Directive is not defined by that directive and must be interpreted independently. It is apparent from Article 12(4)(a) of the Public Sector Directive that a contract concluded exclusively between two or more contracting authorities falls outside the scope of that directive when it establishes or implements co-operation between the participating contracting authorities with the aim of ensuring that the public services they have to perform are provided with a view to achieving objectives they have in common. According to the third paragraph of recital 33 of the Public Sector Directive, that co-operation must be “based on a co-operative concept”. The CJEU explained that “such wording, which is ostensibly a tautology, must be interpreted as referring to the requirement that the co-operation thus established or implemented be effective”.

The CJEU stressed that “the joint participation of all the parties to the co-operation agreement is essential to ensure that the public services they have to perform are provided and that that condition cannot be deemed to be satisfied where the sole contribution of certain contracting parties goes no further than a simple reimbursement of costs”. If such reimbursement of costs were in itself sufficient to constitute “co-operation” within the meaning of Article 12(4) of the Public Sector Directive, no distinction could be drawn between such a form of “co-operation” and a “public contract”.

The conclusion of a co-operation agreement between parties in the public sector must be discernible as the culmination of a process of co-operation between the parties to the agreement. Accordingly, drawing up a co-operation agreement presupposes that the contracting authorities that intend to conclude such an agreement jointly establish their needs and the solutions to be adopted. By contrast, this stage of assessing and establishing needs is generally unilateral in the case of awarding a normal public contract.

The CJEU underlined that the existence of co-operation between contracting authorities is based on a strategy common to the partners to the co-operation and requires that the contracting authorities combine their efforts to provide public services.

The Advocate General provided some interesting remarks on the concept of “co-operation” in the joint cases C-383/21 and C-384/21 Sambre&Biesme (EU:C:2022:456, paragraphs 59-64). The Advocate General summarised the features of co-operation within the meaning of the Article 12(4) of the Public Sector Directive:

> There is no requirement for the co-operation to support the joint performance of a public-service task common to all the participating contracting authorities.

> Co-operation may relate to activities to support public services, provided that they contribute to the actual delivery of those services.
>
> The services provided by the contracting authorities do not necessarily have to be identical; subject to compliance with the condition that they are driven by objectives pursued in common, which must also be in the public interest, such services may be complementary.
>
> So long as there are commitments to contribute to the co-operative performance of the public service, it is not necessary for each of the parties to participate equally in the co-operation, which may be based on a division of tasks or on a particular specialisation.

The Advocate General emphasised that it is essential, however, that collaboration among the parties be intended to achieve objectives common to all of them. This is a key element of "co-operation" that differentiates it from the direct award of contracts to persons controlled by a contracting authority. Furthermore, "co-operation" is based on a co-operative concept, meaning that it requires reciprocal commitments by all participants. These commitments go beyond the performance of a particular service on the one hand, and remuneration for that service on the other.

Conclusion: The concept of "co-operation" is the most essential element defining in-house contracts within the meaning of Article 12(4) of the Public Sector Directive and distinguishing such arrangements from other in-house transactions and normal public contracts.

2. Can the contract between the Association and the District of Neuwied constitute "co-operation" and be considered an in-house contract within the meaning of Article 12(4) of the Public Sector Directive?

Judgement paragraphs 35 to 39

The CJEU judged that the agreement concluded between the Association and the District of Neuwied does not disclose any form of "co-operation" between the contracting parties. The agreement at issue is not the culmination of a process of co-operation between the Association and the District of Neuwied.

In the CJEU's view, under Article 5(1) of the agreement, the District of Neuwied's form of remuneration (reimbursement of its costs only, without any provision for a profit margin for operating costs) was insufficient to establish that a genuine form of co-operation existed between the Association and the District of Neuwied. Therefore, the sole purpose of the agreement at issue appears to be to acquire a service in return for payment of a fee.

The agreement between the parties appears to have been formed on the initiative of the Association, which was unable to carry out the tasks entrusted to it in the area of waste management on its own. On the grounds of the present case, it is not possible to identify a common objective. The District of Neuwied's situation is comparable to that of the private economic operators to whom the Association entrusts 80% of municipal waste recovery and disposal activities. The reference in Article 1 of the agreement to a law obliging public entities to co-operate with each other is not sufficient, as such co-operation can also take the form of a public contract. Similarly, Article 5 of the agreement on how the District of Neuwied is to be paid does not indicate "co-operation": after all, in the case of a public contract, remuneration may be limited to cost recovery and dependent on the size of the service. The District of Neuwied remains ready to provide the service, and therefore the obligation to pay compensation is a common contractual arrangement.

Conclusion: The contract concluded between the Association and the District of Neuwied does not constitute an in-house contract in the meaning of Article 12(4) of the Public Sector Directive.

Similar cases

C-480/06 *Commission v Germany* (EU:C:2009:357, paragraph 38)

Advocate General Opinion C-383/21 and C-384/21 *Sambre & Biesme* (EU:C:2022:456, paragraphs 59-64)

Further reading

OECD (2016), "In-house Procurement and Public/Public Co-operation", *SIGMA Public Procurement Briefs,* No. 39, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-39-200117.pdf.

Case study 4

In-house contracts awarded by a contracting authority to which other contracting authorities have delegated authority to perform public tasks: facts and dispute

By a public transport co-operation agreement that entered into force on 1 July 2020, the City of Pori, the towns of Harjavalta, Kokemäki and Ulvila, and the Municipality of Nakkila (Finland) decided to entrust certain transport-related tasks to the City of Pori, as the competent local authority. These tasks are managed by the municipalities, which are parties to the public transport co-operation agreement (the PTCA) in accordance with the Law on Municipalities, and the City of Pori has set up a joint institution for this purpose.

The public transport committee for the Pori Region, made up of five members appointed by the City of Pori and a member appointed by each of the other municipalities that are parties to the public transport co-operation agreement, acts as the competent authority for local transport in the City of Pori and exclusively for transport operated in the area of the parties to the PTCA. Operation of the public transport committee is governed by regulations approved by the City of Pori's municipal assembly and management rules approved by that committee.

Transport-related costs are divided among the municipalities that are parties to the public transport co-operation agreement, in accordance with specific arrangements determined by the public transport committee. When the budget and the financial plan are drawn up, the municipalities that are parties to the PTCA must be given the opportunity to submit proposals for the co-operation's objectives and financing.

The regulations of the public transport committee provide that, as a joint competent regional authority for transport for the area consisting of the territories of the parties to the agreement, it acts under the authority of the municipal assembly and municipal executive council of the City of Pori. The committee is responsible for the tasks the Law on Public Transport confers on the competent public transport authority, in the entire area covered by the PTCA.

At the same time, the City of Pori, the Town of Ulvila and the Municipality of Merikarvia (Finland) agreed, by a healthcare services co-operation agreement concluded 18 December 2020, pursuant to the Law on the Restructuring of Municipalities and Services, to transfer responsibility for organising social and healthcare services for their entire territory to the City of Pori.

This agreement is based on the "responsible municipality" model provided for under the Law on Municipalities. In this model, a task entrusted to various municipalities is performed by one among them (the responsible municipality) on their behalf, under an agreement those municipalities have entered into.

The healthcare services co-operation agreement designates the City of Pori as the responsible municipality, while the Town of Ulvila and the Municipality of Merikarvia are the "contracting municipalities".

Under this agreement, the system of social and healthcare services is to form a coherent whole, developed jointly by the responsible municipality and the contracting authorities. The responsible municipality is to assess and determine the needs of residents for healthcare and social services, decide on the scope and level of quality of the services offered to residents, ensure that residents have access to the necessary services and also decide how these services are to be delivered.

In practice, responsibility for organising social and healthcare services in the area covered by the co-operation agreement lies with the Committee for the Guarantee of Fundamental Social Rights of the City of Pori, which is a joint committee consisting of 18 members – 3 appointed by the Town of Ulvila, 2 by the Municipality of Merikarvia and 13 by the City of Pori. In addition, the healthcare services co-operation agreement provides that the municipal assembly of the City of Pori is to approve the Committee's

regulations and determine its field of activity and tasks. The Committee is fully responsible for social and healthcare services, the system of services and the necessary budget. It approves contracts to be concluded within its field of activity and sets charges for the services and other benefits concerned, in line with general criteria specified by the municipal assembly of the City of Pori. Finally, the agreement provides that the financial management of healthcare and social services is to be based on a jointly established budget, financial plan and plan for those services, and also on the monitoring of expenditures and use of those services. Costs are allocated according to the use of social and healthcare services, so that each municipality pays for the actual cost of the services used by its own population and the residents for whom it is responsible.

By a decision of 4 May 2022, the Committee for the Guarantee of Fundamental Social Rights of the City of Pori decided that, in the entire area covered by the healthcare services co-operation agreement, persons with disabilities would be transported to their work and day-activity facilities by low-floor buses operated by the City of Pori as its own service through Porin Linjat, a limited company owned entirely by the city. Consequently, the City of Pori did not organise a call for competitive tenders for the contract to transport persons with disabilities but awarded it directly to Porin Linjat under the rules governing in-house contracts.

The Lyttylän Liikenne Oy company challenged the decision of the Committee for the Guarantee of Fundamental Social Rights of the City of Pori of 4 May 2022 before the Market Court, which annulled it on the grounds that, first, Porin Linjat could not be classified as an “internal operator” of the City of Pori and, second, there were no other reasons to exclude the contract from the obligation to call for tenders. The court considered that, unlike the City of Pori, which had five representatives on the public transport committee, the other municipalities that were parties to the healthcare services co-operation agreement had only one representative on that committee and so were not able to exercise control over Porin Linjat. As a result, the company’s profits from operating public transport in those municipalities could not be taken into account when assessing whether the company performed the essential part of its activities for the benefit of the contracting authority that controlled it, in this case the City of Pori. Although the transport company was partly operated pursuant to instruments adopted by the City of Pori, Porin Linjat’s turnover from operating that city’s transport was not enough to establish a relationship between the City of Pori and a linked entity, since Porin Linjat did not perform the essential part of its activities for the benefit of its sole shareholder.

The City of Pori, supported by Porin Linjat, appealed to the Supreme Administrative Court, claiming that Porin Linjat was an entity linked to it. Porin Linjat, as a company owned and controlled by the City of Pori, has not taken part, as a tenderer, in calls for tenders for transport services since 2019. In addition, it does not compete on the market. Under the public transport co-operation agreement, the towns of Harjavalta, Kokemäki and Ulvila and the Municipality of Nakkila entrusted the City of Pori with responsibility for managing, as the responsible municipality, operation of the public transport services of the co-operating municipalities. Consequently, the turnover generated by Porin Linjat’s transport operations in the territory of those municipalities must be attributed to the City of Pori. More than 90% of Porin Linjat’s turnover is thus generated by transport operations in the City of Pori.

Questions

1. Does the "responsible municipality" model under these intermunicipal co-operation agreements fall within the scope of the Public Sector Directive and constitute a public contract, or is it solely a matter of internal organisation of a Member State involving a transfer of powers or competencies, which according to Article 4(2) of the TEU falls outside coverage of the Public Sector Directive? Article 4(2) of the TEU states that the European Union shall “respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”.

2. Can the “responsible municipality” be considered a contracting authority and authorised to entrust an in-house entity with services meeting not only its own needs, but also the needs of other municipalities party to the agreement, whereas without this delegation of authority the municipalities would have to meet their own needs?

Instructions for resolving the case

Based on CJEU Case C-328/19 – Porin kaupunki

Porin kaupunki (ECLI:EU:C:2020:483)

Request for a preliminary ruling from the Supreme Administrative Court, Finland

Legal resources

Article 4(2) of the TFEU

Provisions of the Public Sector Directive considered:

Article 12

Notes for trainers:

This case study is based on judgment C-328/19 Porin kaupunki, which concerned co-operation agreements entered into when the 2004 Public Sector Directive applied. The dates of the various events have been changed so that it is possible to refer to the currently applicable Public Sector Directive. The concept of in-house procurement originally appeared in CJEU case law, which points to Member States' discretion in carrying out public tasks and states that the elimination of barriers to access national procurement markets applies only to contracts concluded with economic operators in a competitive market, as only this form of purchasing can violate the freedoms laid out in the TFEU. With the adoption of new directives in 2014, the EU legislator clarified the conditions under which a contracting authority could award in-house contracts without the obligation to apply public procurement law. Article 12 of the Public Sector Directive is a codification of the CJEU's in-house jurisprudence, so earlier rulings remain valid. More on this topic appears in the introduction to this chapter.

Questions

1. Does the "responsible municipality" model under these intermunicipal co-operation agreements fall within the scope of the Public Sector Directive and constitute a public contract, or is it solely a matter of internal organisation of a Member State involving a transfer of powers or competencies, which according to Article 4(2) of the TFEU falls outside coverage of the Public Sector Directive? Article 4(2) of the TFEU states that the European Union shall “respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”.

Judgement paragraphs 46 to 58

The CJEU noted that the division of competences within a Member State benefits from the protection conferred by Article 4(2) of the TFEU, according to which the European Union must respect national identities inherent in their fundamental structures, political and constitutional, including local and regional self-government:

> *Moreover, as that division of competences is not fixed, the protection conferred by that provision also concerns internal reorganisations of powers within a Member State. Such reorganisations, which, in particular, may take the form of voluntary transfers of competences between public authorities, have the consequence that a*

> *previously competent authority relinquishes the obligation or power to perform a given public task, whereas another authority is henceforth entrusted with that obligation or power.*

Such a transfer of powers does not constitute a public contract in the meaning of Article 2(1)(5) of the Public Sector Directive. The very fact that a public authority is released from a competence with which it was previously entrusted eliminates any economic interest in the performance of tasks related to that competency.

The CJEU stated that,

> *the transfer of powers between public authorities requires that the public authority on which competence has been conferred has the power to organise the performance of the tasks coming within that competence and to draw up the regulatory framework relating to those tasks and, lastly, that it has the financial autonomy allowing it to ensure the financing of those tasks. The authority initially competent cannot, therefore, retain primary responsibility over those tasks nor retain financial control over them or give prior approval for decisions envisaged by the entity on which it has conferred powers.*

However, the autonomy of action of the public authority to which a competence is conferred does not mean that the newly competent entity must be shielded from any influence whatsoever by another public entity. An entity that transfers competences may retain a certain degree of influence over the tasks associated with the public service thus transferred, but that influence precludes any involvement in the actual performance of tasks falling within the transferred competence.

In the CJEU's view, the conditions for a transfer of powers, for the purposes of Article 4(2) of the TFEU, appeared to be met in this case, with the result that the healthcare services/public transport co-operation agreements do not appear to constitute a "public contract" within the meaning of Article 2(1)(5) of the Public Sector Directive.

Conclusion: An agreement under which the municipalities party to that agreement entrust to one among them responsibility for organising services for the benefit of those municipalities, is excluded from the scope of the Public Sector Directive on the grounds that it constitutes a transfer of powers, for the purposes of Article 4(2) of the TFEU.

2. Can the "responsible municipality" be considered a contracting authority and authorised to entrust an in-house entity with services meeting not only its own needs, but also the needs of other municipalities party to the agreement, whereas without this delegation of authority the municipalities would have to meet their own needs?

Judgement paragraphs 61 to 76

The CJEU emphasised that as a result of the transfer, the responsible municipality was, as it were, assigned the rights and duties of its contractual partners to deliver the services named in the co-operation agreements, based on the "responsible municipality" model. Thus, "if a transfer of powers, for the purposes of Article 4(2) [of the] TFEU, is not to be deprived of its practical effect, the authority to which the task has been transferred must necessarily be regarded, as regards the award of a service, as the contracting authority for that task, in respect of all the territory of the municipalities which are parties to the agreement that transfers powers".

Assuming that the responsible municipality is the contracting authority, it should be examined whether it can also award in-house contracts within the scope of its delegated competences. The first prerequisite of Article 12(1)(a) of the Public Sector Directive is that a contracting authority exercise control over the in-house entity similar to that exercised over its own services. This condition, relating to control by a public authority, is deemed to be satisfied when the contracting authority holds, alone or together with other public authorities, all the share capital in a controlled legal person.

The CJEU underlined that although use of an in-house award has so far been accepted only when a contracting authority held all or part of the shares in a controlled legal person,

> *it cannot be inferred from this that, in an arrangement such as the "responsible municipality" model, it is impossible for a contracting authority, in this case the responsible municipality, to opt for an in-house award in order to meet the needs of the contracting authorities with which it has entered into an agreement based on that model for the sole reason that the other municipalities which are parties to that agreement do not hold any shares in the in-house entity. The criterion of holding part of the shares cannot constitute the only means of achieving that objective, since control similar to that exercised by a contracting authority over its own departments may take a form other than a shareholding.*

The contractor Porin Linjat is an entity linked to the City of Pori, which controls it. Assuming that, following a transfer of powers for the purposes of Article 4(2) of the TFEU, the requirement of control over the in-house entity exercised jointly by the contracting authority benefiting from the transfer of powers and the other contracting authorities that relinquished the power concerned, it suffices that contracting municipalities that are parties to an agreement under the responsible municipality model – even though they do not hold shares in the in-house entity – are enabled to exercise, like the responsible municipality, decisive influence on both the contractor's strategic objectives and important decisions and, therefore, effective, structural and functional control over that entity.

The second prerequisite of Article 12(1)(b) of the Public Sector Directive is that "more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority".

The CJEU observed that it is therefore necessary to consider whether services awarded to an in-house entity pursuant to two co-operation agreements that each, first, transfer powers to the same responsible municipality, second, relate to different services, third, do not involve the same parties and, fourth, are intended to cover both the needs of the contracting authority itself and those of the other contracting authorities party to those agreements, may be treated as activities carried out for the benefit of the contracting authority.

The information available in this case indicates that implementation of each of the two co-operation agreements at issue appears to entail a number of safeguards, such as to prevent the in-house entity from becoming market-oriented and gaining a degree of independence that would render tenuous the control exercised by the City of Porin and its contractual partners. Since the co-operation agreements contain sufficient safeguards to protect against any harm to competition, it is immaterial that the personal and material scope of the agreements does not coincide.

The CJEU explained that,

> *in order to determine whether the in-house entity carries out the essential part of its activities for the benefit of the contracting authority or authorities controlling it, account must be taken of all the activities which it carries out under the two co-operation agreements at issue. In calculating the share of Porin Linjat's turnover derived from operating the services at issue, the turnover realised by that company at that city's behest under the healthcare services co-operation agreement and the public transport co-operation agreement with a view to meeting that city's own needs, must be added to the turnover realised by that company at the behest of the municipalities that are parties to those agreements.*

Conclusion: A co-operation agreement under which the municipalities that are parties to it transfer to one among them the responsibility for organising services for the benefit of all these municipalities, allows that designated municipality, in awards after that transfer, to be regarded as a contracting authority. This agreement thus authorises the "responsible municipality" to entrust an in-house entity with services that meet not only its own needs, but also those of the other municipalities that are party to the agreement. Without this transfer of powers, these municipalities would have to fulfil their own needs themselves.

Similar cases

C-386/11 *Piepenbrock* (EU:C:2013:385)

C-51/15 *Remondis* (EU:C:2016:985)

C-295/05 *Asemfo* (EU:C:2007:227, paragraph 57)

C-324/07 *Coditel Brabant* (EU:C:2008:621, paragraph 30)

Further reading

OECD (2016), "In-house Procurement and Public/Public Co-operation", *SIGMA Public Procurement Briefs,* No. 39, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-39-200117.pdf.

Case study 5

In-house contracts and other principles of law: facts and dispute

The Administration of the Municipality of the City of Kaunas (the contracting authority) awarded a public contract for the supply of services relating to the maintenance and management of parks in the City of Kaunas to Irgita, a private company, and on 18 March 2020 signed a contract to supply mowing and cutting services for a period of three years.

This contract made provision for the maximum quantity of services that could be sought from Irgita. However, the contracting authority gave no commitment to order all the services, nor the entire quantity of services provided for in that contract. Furthermore, the contracting authority was required to pay Irgita for only those services that were actually performed according to the tariffs laid down in the contract.

On 1 April 2020 the contracting authority requested Public Procurement Authority (Lithuania) consent to conclude an in-house transaction with Kauno švara for services that were essentially the same as those Irgita had been made responsible for by the contract of 18 March 2020.

Kauno švara, which has legal personality, is controlled by the contracting authority, which own 100% of its shares. Further, in 2019 Kauno švara achieved 90.07% of its turnover from activities performed solely for the benefit of the contracting authority.

On 20 April 2020 the Public Procurement Authority consented to the conclusion of a contract between Kauno švara and the contracting authority for the supply of the services concerned, while imposing on the contracting authority the obligation to assess, before concluding that contract, the possibility of obtaining the services by organising a public procurement procedure. The Public Procurement Authority reminded the contracting authority that, according to Lithuanian case law, the lawfulness of in-house transactions was subject not only to satisfying the criteria laid down in Article 12 of the Public Sector Directive but also to other assessment criteria deriving from, among other things, the Law on Competition. Those criteria include the continuity, good quality and availability of the service, and the effect of the envisaged in-house transaction on, first, equal treatment of all economic operators and, second, whether those operators have an opportunity to compete to supply the services concerned.

In any event, the contracting authority was bound to comply with the Law on Competition, which introduces prohibitions on undermining competition between economic operators, and on granting privileges to one economic operator and discriminating against others.

On 3 May 2020 the City of Kaunas decided to conclude a contract for the supply of mowing and cutting services with Kauno švara and set the tariffs for the services to be performed.

On 19 May 2020 the contracting authority and Kauno švara concluded the contract, with its duration fixed at five years. It provided that, among other things, orders for services would depend on the needs of the contracting authority; services would be paid for according to the tariffs set out in the contract; and the term of the contract may be extended.

On 20 May 2020 Irgita brought an action before the Lithuanian court of first instance with jurisdiction, challenging the contested decision and the contested contract. In that action, Irgita claimed that for the contract of 18 March 2020 concluded between itself and the contracting authority, the latter was not in a position to conclude the contested contract. According to Irgita, the contested contract was unlawful particularly because (1) it entailed a reduction in the quantity of services ordered from Irgita, and (2) by concluding an in-house transaction with no objective need, the contracting authority had granted to the undertaking that it controlled privileges liable to distort the conditions of competition among economic operators in the market for the maintenance of parks in the City of Kaunas.

Questions

1. Does Article 12(1) of the Public Sector Directive allow a Member State to impose a requirement that concluding an in-house transaction be conditional on, among other things, the failure of public procurement to ensure the quality of the services performed, their availability or their continuity?

2. Is the conclusion of an in-house transaction meeting the conditions set forth in Article 12(1)(a-c) of the Public Sector Directive, as such, compatible with EU law?

Instructions for resolving the case

Based on CJEU Case C-285/18 – Irgita

Kauno miesto savivaldybė, Kauno miesto savivaldybės administracija, interveners v UAB Irgita, UAB Kauno švara (ECLI:EU:C:2019:829)

Request for a preliminary ruling from the Supreme Court of Lithuania

Legal resources

Provisions of the Public Sector Directive considered:

Article 12

Notes for trainers:

This case study is based on judgment C-285/18 Irgita, which concerned co-operation contracts entered into when the 2004 Public Sector Directive applied. The dates of the various events have been changed so that it is possible to refer to the currently applicable Public Sector Directive. The concept of in-house procurement originally appeared in CJEU case law, which points to Member States' discretion in carrying out public tasks and states that the elimination of barriers to access national procurement markets applies only to contracts concluded with economic operators in a competitive market, as only this form of purchasing can violate the freedoms laid out in the TFEU. With the adoption of new directives in 2014, the EU legislator clarified the conditions under which a contracting authority could award in-house contracts without the obligation to apply public procurement law. Article 12 of the Public Sector Directive is a codification of the CJEU's in-house jurisprudence, so earlier rulings remain valid. More on this topic appears in the introduction to this chapter.

Questions

1. Does Article 12(1) of the Public Sector Directive allow a Member State to impose a requirement that concluding an in-house transaction be conditional on, among other things, the failure of public procurement to ensure the quality of the services performed, their availability or their continuity?

Judgement paragraphs 43 to 49 and 53 to 57

Article 12(1) of the Public Sector Directive enumerates only the conditions a contracting authority must comply with when it wants to enter into an in-house transaction, and thus authorises Member States to exclude such transactions from the scope of the directive.

The CJEU stated that Article 12(1) of the Public Sector Directive cannot deprive Member States of the freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others. As this freedom implies a choice at a stage prior to procurement, it cannot fall within the scope of the Public Sector Directive.

The CJEU considered that the freedom of Member States to choose a means of providing services, whereby the contracting authorities meet their own needs, follows moreover from recital 5 of the Public Sector Directive, which states that "nothing in this directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this directive".

The CJEU emphasised that "just as the Public Sector Directive does not require the Member States to have recourse to a public procurement procedure, it cannot compel them to have recourse to an in-house transaction where the conditions laid down in Article 12(1) are satisfied".

Additionally, the CJEU explained that the freedom of Member States to choose the management method they judge most appropriate for the performance of works or the provision of services cannot, however, be unlimited: "That freedom must, on the contrary, be exercised with due regard to the fundamental rules of the TFEU, in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency".

Within these limits, a Member State is free to impose on a contracting authority conditions not laid down in Article 12(1) of the Public Sector Directive if it is to conclude an in-house transaction, including conditions to guarantee the continuity, good quality and availability of the service.

When a Member State introduces rules under which one means of providing services, performing work or obtaining supplies is given preference over others, the introduction of these rules cannot be covered by transposition of the Public Sector Directive.

In such a case, however, the principle of transparency applies and the conditions to which Member States subject the conclusion of in-house transactions must be made known by means of precise and clear provisions of substantive law governing public procurement, which must be sufficiently accessible, precise and predictable in their application to avoid the risk of arbitrariness.

Conclusion: Implementing Article 12(1) of the Public Sector Directive, a Member State may impose the requirement that conclusion of an in-house transaction be subject to, among other things, the condition that public procurement does not necessarily guarantee the quality of the services performed, their availability or their continuity. If the means of service provision is chosen prior to the public procurement stage, it is necessary that the selection process pay due attention to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

Additional remarks

Note that the conditions set forth in Article 12(1) of the Public Sector Directive do not explicitly refer to the principle of fair competition and treaty freedoms, as the EU legislator considers that, as a rule, in-house transactions in compliance with this provision do not affect functioning of the internal market. If a Member State introduces additional conditions for the award of in-house contracts, it is only these supplementary regulations or the way they are applied that can be evaluated from the perspective of the general principles the CJEU refers to in Case C-285/18 *Irgita*.

2. Is the conclusion of an in-house transaction meeting the conditions set forth in Article 12(1)(a-c) of the Public Sector Directive, as such, compatible with EU law?

Judgement paragraphs 58 to 64

It follows from Article 12(1)(a-c) of the Public Sector Directive that a public contract awarded by a contracting authority to a legal person governed by private or public law does not fall within the scope of that directive when some conditions are satisfied. However, that provision concerns solely the scope of

the Public Sector Directive and cannot be construed as establishing the conditions governing whether a public contract is to be awarded in the form of an in-house transaction.

The CJEU noted that "the fact that an in-house transaction, within the meaning of Article 12(1) of the Public Sector Directive, does not fall within the scope of that directive cannot relieve the Member States or the contracting authorities of the obligation to have due regard to, inter alia, the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency".

Additionally, the CJEU observed that recital 31 of the Public Sector Directive states, in relation to co-operation between entities belonging to the public sector, that it should be ensured that any co-operation of that kind, which is excluded from the scope of that directive, does not result in a distortion of competition in relation to private economic operators.

In this case, the CJEU clarified that it is the particular task of the court to assess

> *whether, by concluding the in-house transaction at issue, the subject matter of which overlaps with that of a public contract still in force and performed by Irgita, as the party to whom that contract was awarded, the contracting authority has not acted in breach of its contractual obligations, arising from that public contract, and of the principle of transparency; whether it had to be established that the contracting authority failed to define its requirements sufficiently clearly, in particular by not guaranteeing the provision of a minimum volume of services to the party to whom that contract was awarded, or, further, whether that transaction constitutes a substantial amendment of the general structure of the contract concluded with Irgita.*

Conclusion: The award of an in-house contract satisfying the conditions of Article 12(1)(a-c) of the Public Sector Directive is not as such compatible with EU law.

Additional remarks

As mentioned earlier, the conditions for in-house transactions provided for in Article 12(1) of the Public Sector Directive were devised by the EU legislator to account for the prohibition on distorting competition in the internal market. For the most part, in-house entities operate outside the competitive internal market. However, it is possible to imagine a situation in which an in-house transaction meets the prerequisites of Article 12(1) of the Public Sector Directive but at the same time violates other rules in the area of public or private law.

The CJEU mentioned the obligation to respect, among other things, the principles of equal treatment, non-discrimination and proportionality. However, it should be added that applying these principles to internal transactions must take the specifics of such in-house contracts and their operation outside the internal market into account. For example, the principle of equal treatment of economic operators will be significantly reduced because the contracting authority is not obligated to organise a tender in which entities other than the controlled legal person would participate. Similarly, Member States are free to choose how to carry out public tasks, and the EU legislator does not obligate them to make this choice in accordance with the principle of proportionality.

Further reading

OECD (2016), "In-house Procurement and Public/Public Co-operation", *SIGMA Public Procurement Briefs,* No. 39, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-39-200117.pdf.

4 Framework agreements

Introduction

Framework agreements are widely used in EU Member States and are considered an efficient procurement technique. They are particularly useful when contracting authority purchasers have recurring requirements but cannot be precise about when and to what extent they will arise. Contracts can be awarded under an established framework agreement when the need arises, without initiating an entirely new procurement procedure. This can save considerable time and effort for both purchasers and suppliers.

Framework agreements are often set up by central purchasing bodies or contracting authorities acting on their own behalf and/or on behalf of other contracting authorities, with a view to obtaining economies of scale, including by lowering prices and transaction costs, and improving and professionalising procurement management. The inherent uncertainty as to the extent of requirements to be delivered using a framework agreement at the time it is established is acknowledged, and the resulting risks should be managed by applying the legal rules.

Provisions on framework agreements in the Public Sector Directive

Prior to 2004, a number of EU Member States used framework agreements to award public procurement contracts, but there were no specific provisions on framework agreements in the public procurement directives. Legal provisions on the establishment and functioning of framework agreements were set out in Article 32 of the 2004 Public Sector Directive[13], and these provisions were updated in 2014, in Article 33 of the Public Sector Directive[14].

Recitals 60 to 62 of the Public Sector Directive confirm that the instrument of framework agreements has been widely used and is considered an efficient procurement technique throughout Europe and should be maintained. The recitals identified several areas in which clarification was required, particularly to clearly identify users of framework agreements and to ensure that, once established, a framework agreement is not open to entry of new economic operators. The recitals also clarified that, while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement, the duration of an individual contract may be shorter or longer than the term of the framework agreement.

Article 33 of the Public Sector Directive comprises five clauses:

- Article 33(1) defines a framework agreement as “an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and,

[13] Directive 2004/18 on the Co-ordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts [2004] OJ L134/114.

[14] 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 [2014] OJ L94/65.

where appropriate, the quantity envisaged". It also provides that, as a general rule, a framework agreement shall not exceed four years.

- Article 33(2) confirms that contracting authorities using a framework agreement must be clearly identified at the outset, and procedures for awarding contracts under a framework agreement may be applied only between those users and the economic operators party to the framework agreement.
- Article 33(3) concerns awarding contracts under a framework agreement concluded with a single economic operator.
- Article 33(4) concerns awarding contracts under a framework agreement concluded with more than one economic operator and describes two methods to award contracts: (1) without reopening competition; and (2) by reopening competition (mini-competition) among the economic operators party to the framework agreement. It also covers requirements for choosing between these two procedures to award contracts when the framework agreement provides for both routes.
- Article 34(5) provides further details on conducting the process for reopening competition (mini-competitions).

Case studies on framework agreements

Case law from the Court of Justice of the European Union (CJEU) on the use and functioning of framework agreements is limited. However, two particularly interesting questions of significant practical impact have emerged and been considered by the CJEU. Both questions broadly concern the degree of precision and certainty required in describing the potential coverage of a framework agreement when it is set up, bearing in mind that framework agreements are intended to address situations in which uncertainty is acknowledged at the outset. They are important questions with practical consequences for contracting authorities, including central purchasing bodies, when they set up and/or use framework agreements. They are also of interest to economic operators party to framework agreements because all participants require certainty as to the legality of the establishment and functioning of a framework agreement, and the award of contracts under that agreement.

The two main questions considered in the framework agreement case studies are:

1. What information is required in the contract notice or procurement documents establishing a framework agreement, regarding both the estimated and maximum value and/or quantity of services, supplies or works that may be awarded under that framework agreement?

A linked question is: What are the consequences if the stated maximum value/quantity under a framework agreement is exceeded?

2. Framework agreements, particularly those set up by central purchasing bodies, are often set for the benefit of several contracting authorities. Is it necessary to determine the quantities to be procured, in advance, in the contract notice or procurement documents for all actual and potential users of the framework agreement?

Case study 1

Framework agreement to supply probe kits (probes, syringes and nutritional pumps): Facts

The Region of North Jutland (NJ) is one of five administrative regions in Denmark whose main responsibility is healthcare. NJ is a contracting authority and procures works, services and supplies necessary for the provision of healthcare facilities and delivery of health services in northern Denmark.

On 30 April 2019, NJ despatched a contract notice to the *Official Journal of the European Union* (OJEU) with a view to concluding a framework agreement between NJ and a single supplier (economic operator), for medical probe kits for patients receiving home-based care and for healthcare institutions. The procurement procedure used was the open procedure, and the proposed term of the framework agreement was four years. The contract notice also named the Region of Southern Denmark (SD) as a second contracting authority. The contract notice stated that SD would participate merely "by option". The contract notice required bidders to tender for all items in the contract and present their tender in electronic catalogue format.

The contract notice did not contain information about the estimated value or quantity of the contracts to be awarded under the framework agreement by NJ or by SD, in the event that SD exercised its option to participate. The contract notice also did not provide information about the maximum value or quantity of products to be purchased under the framework agreement.

The procurement documents were available for unrestricted and full, direct access, free of charge, by following a link in the contract notice. Additional information in the procurement documents (Annex 3) confirmed that "indicated estimates and expected quantities to be consumed [shown in the procurement documents] merely reflect the contracting authority's expectations regarding consumption … covered by the contract". Annex 3 went on to note that the contracting authority did not undertake to buy a specific quantity or to make purchases of a particular amount under the framework agreement, and that "the actual consumption may prove to be higher or lower than estimates indicate". Annex 3 confirmed that the framework agreement was not an exclusive arrangement, meaning that the contracting authority could acquire similar products from other suppliers during the validity of the framework agreement, subject to compliance with relevant procurement rules.

NJ received three tenders. On 9 August 2019, NJ and SD decided that the tender submitted by Nutricia A/S was the most advantageous and declared that Nutricia A/S had been awarded the contract. SD did not exercise its option to participate.

On 19 August 2019, an unsuccessful bidder, Simonsen & Weel (S&W) lodged a complaint with the Public Procurement Complaints Board, Denmark (Complaints Board), seeking annulment of the award decision. The Complaints Board did not grant the complaint suspensive effect, so NJ went ahead and concluded the framework agreement with Nutricia Limited on 10 October 2019. A contract award notice was published in the OJEU on 11 November 2019.

Legal dispute (the appeal)

In support of its complaint to the Complaints Board, S&W argued that:

(1) By failing to indicate in the contract notice the estimated quantity or estimated value of supplies under the framework agreement, NJ and SD infringed upon: (i) Article 49 of the Public Sector Directive[15]; (ii) the principles of equal treatment and transparency enshrined in Article 18(1) of the Public Sector Directive; and (iii) point 7 of Part C of Annex V of the Public Sector Directive. Annex V, Part C of the Public Sector Directive lists the information to be included in contract notices. Point 7 of Part C refers to the "Description of the procurement".

(2) Previous CJEU case law specifies that NJ and SD were obliged to indicate in the contract notice the maximum quantity of products that could be acquired under the framework agreement or the total maximum value of the framework agreement, to prevent NJ and SD from dividing up the framework agreement artificially throughout its duration.

In response to the complaint, NJ and SD argued that:

(1) The obligation to indicate in the contract notice the estimated quantity or value of supplies does not apply to framework agreements. In their view, the use of the words "where appropriate" in Article 33(1) of the Public Sector Directive means that such an indication remains optional for the contracting authority. It is not a mandatory requirement for framework agreements in all cases.

(2) The obligation, established by previous CJEU case law, to indicate in the contract notice the maximum quantity of products that can be acquired under the framework agreement or the total maximum value of the framework agreement does not apply in these circumstances. NJ and SD argued that the earlier decision of the CJEU, which S&W relied upon, applied to very different circumstances that were not comparable. NJ and SD explained that they were unaware at the time of the call for tenders of the specific purchasing requirements or the price level for individual contracts to be awarded under the framework agreement. Accordingly, they were unable to provide a reliable estimate of the value of the framework agreement.

The Complaints Board was uncertain on a number of points of interpretation of provisions of the Public Sector Directive and the applicability of previous CJEU case law, by analogy, to this case. The Complaints Board submitted a request for a preliminary ruling to the CJEU, raising several questions. Four of the questions considered by the CJEU are summarised below.

Questions

Question 1

Do the provisions of the Public Sector Directive listed below mean that the contract notice must state the estimated quantity and/or estimated value, as well as a maximum quantity and/or maximum value of the supplies under a framework agreement?

Question 2

Do the provisions of the Public Sector Directive listed below mean that a framework agreement will no longer have any effect once that limit is reached?

[15] 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 [2014] OJ L94/65.

Question 3

Do the provisions of the Public Sector Directive listed below mean that the estimated quantity or value of supplies under a framework agreement as well as their maximum quantity or value must be indicated in the contract notice as a whole?

Provisions of the Public Sector Directive:

- Article 49, Contract Notice
- Part C of Annex V, Contents of a Contract Notice, points 7, 8 and 10(a) in particular
- Article 33, Framework Agreements
- Article 18(1), Principles of Procurement

Question 4

Does Article 2(d)(1)(a) of the Remedies Directive[16] apply?

If yes, is the remedy of ineffectiveness available when a contract notice for a framework agreement has been published in the OJEU, but

(1) The estimated quantity and/or value of supplies under the framework agreement is stated, not in the contract notice but in the tender specifications?

(2) Neither the contract notice nor the tender specifications mention a maximum quantity and/or value of supplies under that framework agreement?

Note: The Complaints Board did not grant the complaint by S&W suspensive effect. NJ therefore went ahead and concluded the framework agreement with Nutricia Limited. This meant that the question arose as to whether the remedy of ineffectiveness of a concluded contract was available in the particular circumstances of this case.

Article 2(d)(1)(a) of the Remedies Directive provides, in summary, that if a contract notice is not published beforehand in the OJEU, without this being permissible in accordance with Public Sector Directive, the contract or framework agreement concerned is ineffective. See the Remedies Directive for precise wording.

Instructions for resolving the case

Based on CJEU Case C-23/20 – Simonsen & Weel

Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark (C-23/20, ECLI:EU:C:2021:490)

No Advocate General Opinion

Request for a preliminary ruling from the Klagenævnet for Udbud (Public Procurement Complaints Board, Denmark)

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[16] Directive 89/665/EEC on the Co-ordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts [1989] OJ L395/33, as amended.

Legal resources for Questions 1, 2 and 3

Provisions of Public Sector Directive considered:

- Article 49, Contract Notice
- Points 7, 8 and 10(a) of Part C of Annex V, Contents of a Contract Notice
- Article 33, Framework Agreements
- Article 18(1), Principles of Procurement
- Annex II, Implementing Regulation 2015/1986 Establishing Standard Forms for the Publication of Notices in the Field of Public Procurement.

Question 1: Do the provisions of the Public Sector Directive listed below mean that the contract notice must state the estimated quantity and/or value as well as a maximum quantity and/or value of supplies under a framework agreement?

Provisions of the Public Sector Directive:

- Article 49, Contract Notice
- Part C of Annex V, Contents of a Contract Notice, points 7, 8 and 10(a) in particular
- Article 33, Framework Agreements
- Article 18(1), Principles of Procurement

Judgment paragraphs 45 to 74

The CJEU first confirmed that Article 49 of the Public Sector Directive, Contract Notice, and Part C of Annex V, Contents of a Contract Notice, apply to framework agreements.

The CJEU noted that "certain provisions of [the Public Sector Directive], taken in isolation, may suggest that the contracting authority has some discretion as to the expediency of indicating, in the contract notice, a maximum value of supplies under a framework agreement". The CJEU drew attention, in this context, to the following provisions:

(1) Part C of Annex V, Contents of a Contract Notice, point 8, which refers to the estimated total "order of magnitude" of the contract rather than to a specifically defined value. This suggests that the valuation required of the contracting authority may be approximate.

(2) Part C of Annex V, Contents of a Contract Notice, point 10, "Time frame for delivery of provision of supplies, works or services and, as far as possible, duration of the contract". Point 10(a) is specifically devoted to framework agreements, and the CJEU commented that, "in accordance with that provision, the contracting authority is not required in all circumstances to indicate the value or the order of magnitude and the frequency of the contracts to be awarded".

(3) Article 33(1) of the Public Sector Directive, second subparagraph, which provides that the purpose of a framework agreement is to establish, "where appropriate", the quantity envisaged. The CJEU interpreted the words "where appropriate" as follows: "By using the words 'where appropriate', that provision makes clear, specifically in relation to the quantity of supplies, that that quantity must, in so far as possible, be established in a framework agreement".

In this context, the CJEU also referenced the standard-form OJEU contract notices published in Annex II of Implementing Regulation 2015/1986[17], which refers to "estimated total value" if applicable.

[17] Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 Establishing Standard Forms for the Publication of Notices in the Field of Public Procurement and Repealing Implementing Regulation (EU) No 842/2011.

The CJEU confirmed that "a literal interpretation alone" of the above provisions "is not conclusive for the purposes of determining whether a contract notice must indicate the estimated quantity and/or estimated value as well as a maximum quantity and/or maximum value of the supplies under a framework agreement".

The CJEU proceeded to consider the issue, applying general principles and intentions of the Public Sector Directive. It was of the view that, "in the light of principles of equal treatment and transparency laid down in Article 18(1) of the Public Sector Directive and of the general scheme of that Directive, a failure by the contracting authority to indicate, in the contract notice, a maximum value of the supplies under a framework agreement cannot be accepted".

In support of the view that the contracting authority must determine the content of the framework agreement that it intends to conclude, the CJEU referred to other provisions of the Public Sector Directive: (1) Article 5, Methods for Calculating the Estimated Value of Procurement, which refers at paragraph 5 to the "maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement …"; (2) Part C of Annex V, Contents of a Contract Notice, point 7, description of the procurement, including requiring a statement of the quantity or value of supplies. In the view of the CJEU, the contracting authority "cannot comply with that requirement without indicating, at the very least, a maximum quantity and/or a maximum value of such supplies". The CJEU also referenced the standard-form OJEU contract notice published in Annex II, Implementing Regulation 2015/1986, in which estimated value includes "the total maximum value for the entire duration of each of the lots".

In support of the view that the contracting authority must determine the content of the framework agreement that it intends to conclude, the CJEU then moved on to consider the application and impact of general principles. The CJEU confirmed that Article 33(1) of the Public Sector Directive, first subparagraph, means that the principles of equal treatment, non-discrimination and transparency apply to the conclusion of framework agreements. The CJEU confirmed that the principle of transparency implies that all conditions and detailed rules of the award procedure for framework agreements must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specification, so that (1) "all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way", and (2) "the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question".

The CJEU also noted that the principles of transparency and equal treatment of economic operators with an interest in concluding a framework agreement would be affected if the maximum quantity that the framework agreement covers is not set out. In this connection, the CJEU commented that information on estimated and maximum quantities and/or values is of considerable importance for a tenderer, "since it is on the basis of that estimate that he or she will be able to assess his or her ability to perform the obligations arising from that framework agreement".

On a more general level, the CJEU also concluded that a broad interpretation of the obligation to define the maximum estimated value or quantity covered under a framework agreement could (1) render redundant the rules in Article 33(2) of the Public Sector Directive, third subparagraph, under which contracts based on a framework agreement may under no circumstances entail substantial modification to the terms laid down in the framework agreement; and (2) constitute improper use or use intended to prevent, restrict or distort competition (recital 61).

Conclusion: The CJEU concluded that the provisions of the Public Sector Directive are to be interpreted as meaning that the contract notice must indicate the estimated quantity and/or the estimated value as well as a maximum quantity and/or maximum value of supplies under a framework agreement.

Note: Paragraph 71 of the judgment indicates that the position is more nuanced in relation to the requirement to state the maximum quantity and/or maximum value. The CJEU confirmed in a clarification that transparency requirements will be satisfied when information on the maximum quantity or the

maximum value of supplies to be awarded under a framework agreement appears in either the contract notice or tender specifications. This is the case provided that the contracting authority complies with publication obligations in Article 53(1) of the Public Sector Directive. Article 53(1) of the Public Sector Directive requires contracting authorities to "offer … by electronic means unrestricted and full direct access free of charge to the procurement documents from the date of publication of the notice".

Question 2: Do the provisions of the Public Sector Directive listed below mean that a framework agreement will no longer have any effect once that limit is reached?

Provisions of the Public Sector Directive:

- Article 49, Contract Notice
- Part C of Annex V, Contents of a Contract Notice, points 7, 8 and 10(a) in particular
- Article 33, Framework Agreements
- Article 18(1), Principles of Procurement

Judgment paragraphs 45 to 74

The CJEU commented specifically on the dangers of a lack of transparency regarding total estimated and maximum quantities and/or values, and the award of contracts when the maximum has been exceeded. The CJEU noted that "if the maximum estimated value or quantity is not indicated or if that indication were not legally binding, the contracting authority could flout that maximum quantity". On the legally binding nature of the stated maximum, the CJEU was concerned that suppliers may "be held contractually liable for non-performance of the framework agreement" if they "fail to supply the quantities requested by the contracting authority, even though those quantities exceed the maximum specified in the contract notice". The CJEU was of the view that this would be contrary to the principle of transparency. The transparency principle could also be infringed upon over the long term due to the permitted duration of framework agreements of four years, or longer in duly justified exceptional cases (Article 33[1] of the Public Sector Directive), and the awarding, under a framework agreement, of contracts that can remain valid after the framework agreement itself has expired (recital 62 of the Public Sector Directive).

The CJEU confirmed that once the maximum quantity and/or maximum value limit has been reached, the framework agreement will no longer have any effect.

Conclusion: The CJEU concluded that the provisions of the Public Sector Directive are to be interpreted as meaning that a framework agreement will no longer have any effect once the limit is reached.

Question 3: Do the provisions of the Public Sector Directive listed below mean that the estimated quantity or value of supplies under a framework agreement, as well as their maximum quantity or value, must be indicated in the contract notice as a whole?

Provisions of the Public Sector Directive:

- Article 49, Contract Notice
- Part C of Annex V, Contents of a Contract Notice, points 7, 8 and 10(a) in particular
- Article 33, Framework Agreements
- Article 18(1), Principles of Procurement

Judgment paragraphs 75 to 80

The CJEU expanded on its ruling in the previous questions. It stated that the requirements to indicate the estimated quantity and/or estimated value as well as maximum quantity and/or maximum value of supplies under a framework agreement "preclude a contracting authority from communicating only partial information about the subject and extent, in quantitative and/or financial terms, of a framework agreement".

The CJEU confirmed that indications of estimated quantity and/or value as well as maximum quantity and/or value of supplies under a framework agreement could appear as a whole in the contract notice. The CJEU noted that this would be sufficient to ensure compliance with the principles of transparency and equal treatment in Article 18(1) of the Public Sector Directive.

The CJEU went on to confirm that contracting authorities could refine the information provided to tenderers to enable those tenderers to best assess the expediency of submitting a tender. In this context, the CJEU commented that:

> *The contract notice in this case listed NJ and SD as contracting authorities for the purpose of the procurement. The contract notice stated that SD had the option to participate in the framework agreement. The CJEU confirmed that a contracting authority may lay down additional requirements and also divide the total estimated quantity or value of the supplies under the framework agreement. This may include information to separately define/identify the requirements of the contracting authority that is an original party to the framework agreement and those of a contracting authority or authorities that is/are an original party but which has/have expressed the desire to participate in the framework on an optional basis.*

Similarly, the contract notice may present the estimated quantity and/or estimated value as well as a maximum quantity and/or maximum value of the supplies under a framework agreement for each of the contracting authorities, whether they intend to conclude the framework agreement or have an option to do so. In this context, the CJEU noted that it "could be the case in particular where, in the light of the terms governing the performance of subsequent public contracts, the economic operators are invited to tender for all the lots or for all the items referred to in the contract notice, or even where the subsequent contracts are to be performed in remote locations".

Conclusion: The CJEU concluded that the provisions of the Public Sector Directive are to be interpreted as meaning that the estimated quantity or estimated value of supplies under a framework agreement, as well as the maximum quantity or maximum value of those supplies, must be indicated in the contract notice as a whole. The CJEU added that the contract notice may lay down additional requirements of the contracting authority.

Legal resources for Question 4

Article 2 of the Remedies Directive

Question 4: Does Article 2(d)(1)(a) of the Remedies Directive apply, and is the remedy of ineffectiveness thus available when a contract notice for a framework agreement has been published in the OJEU, but (1) the estimated quantity and/or estimated value of the supplies under the framework agreement is stated in the tender specifications but not in the contract notice; and (2) neither the contract notice nor the tender specifications mention a maximum quantity and/or maximum value of the supplies under that framework agreement?

Judgment paragraphs 81 to 90

The CJEU used a purposive approach to interpret Article 2(d)(1)(a) of the Remedies Directive and applied the principle of proportionality.

The CJEU first set out the context for the introduction of Article 2(d) of the Remedies Directive. It noted that Article 2(d) was inserted into the Remedies Directive by Directive 2007/66[18], and the EU legislator's underlying intention with the amendment was to combat the illegal direct awarding of contracts. The CJEU has called the illegal direct awarding of contracts "the most serious breach of EU law in the field of public procurement". The purpose of the amendments was to ensure that "there should be provision for effective,

[18] Directive 2007/66 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.

proportional and dissuasive sanctions and, on that basis, a contract resulting from an illegal direct award should in principle be considered ineffective". The CJEU confirmed that the intention of the EU legislator was to "introduce … a serious penalty, the application of which should however be confined to the most serious cases of infringements of EU law on public procurement, namely those in which a contract is awarded directly without having been subject to any prior publication of a contract notice …".

The CJEU went on to conclude that it would be disproportionate to extend the application of Article 2(d)(1)(a) of the Remedies Directive to a situation such as that at issue in these proceedings, i.e. wherein the contracting authorities published a contract notice and made tender specifications available but failed to mention in the notice or the tender specifications the estimated quantity and/or value and the maximum quantity and/or value of supplies under the framework agreement. In such a situation, the infringement of requirements for content of the contract notice is not serious enough to entail application of the penalty of ineffectiveness. The CJEU was of the opinion that failure to indicate the extent of a framework agreement was sufficiently noticeable for it to be detected by an economic operator intending to submit a tender and that ought to, as a result, be regarded as duly informed.

Conclusion: The CJEU concluded that the penalty of ineffectiveness was not applicable in this case, in which (1) a contract notice was published wherein the estimated quantity and/or value of the supplies under the framework agreement were not stated, with this information being included in the tender specifications; and (2) the maximum quantity and/or maximum value of the supplies under the framework agreement were not mentioned in either the public contract notice or the tender specifications.

Additional remarks

The CJEU applied a holistic and purposive approach when considering the requirements for publishing information on the estimated total value and/or quantities to be awarded under a framework agreement in the contract notice. It stressed the importance of not considering specific provisions of the directive in isolation and placed particular emphasis on the context and purpose of the provisions being considered. This case is a good example of how the principle of transparency is applied to interpreting provisions in the directive (questions 1, 2 and 3) and how the context and purpose of provisions influence the availability of the remedy of ineffectiveness.

On the specific points raised in this case study, the CJEU concluded that:

(1) The contract notice must indicate the estimated quantity and/or estimated value as well as maximum quantity and/or maximum value of the supplies under a framework agreement.

- **Note:** Paragraph 71 of the judgment indicates that the position is more nuanced in relation to the requirement to state the maximum quantity and/or maximum value. The CJEU confirmed in a clarification at paragraph 71 that transparency requirements will be satisfied when information on the maximum quantity or maximum value of the supplies to be awarded under a framework agreement appears in either the contract notice or tender specifications. This is the case as long as the contracting authority complies with publication obligations in Article 53(1) of the Public Sector Directive. Article 53(1) requires contracting authorities "to offer … by electronic means unrestricted and full direct access free of charge to the procurement documents from the date of publication of the notice".

(2) The framework agreement will no longer have any effect once the stated limit is reached.

(3) The estimated quantity or estimated value of the supplies under a framework agreement, as well as their maximum quantity or maximum value, must be indicated in the contract notice as a whole.

(4) The contract notice may lay down additional requirements of the contracting authority.

Similar cases

C-216/17 *Autorità Garante dela Concorrenza e del Mercato – Antititrust and Coopservice* (ECLI:EU:C:2018:1034) (Note: Framework Agreements, case study 2, is based on this case)

C-274/21 & C-275/21 *EPIC Financial Consulting* (ECLI:EU:C:2022:565): It is not possible to award a new public contract when the quantity and/or maximum value of the concerned works, supplies or services laid down in the framework agreement have already been reached.

Further reading

SIGMA Public Procurement Brief No. 17, Framework Agreements
OECD (2016), "Framework Agreements", *SIGMA Public Procurement Briefs,* No. 19, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-19-200117.pdf.

Note: This Public Procurement Brief was published before the CJEU cases included in this casebook were decided.

Manual for Framework Agreements
OECD (2014), *Manual for Framework Agreements*, OECD Publishing, Paris, https://www.oecd.org/gov/ethics/manual-framework-agreements.pdf.

Case study 2

Framework agreement for waste disposal and collection services: Facts

The Central Healthcare Authority (CHA) is a contracting authority responsible for operating a healthcare system in the central region of an EU Member State. It procures works, services and supplies necessary for the provisionment of healthcare facilities and the delivery of health services in this central region, and it is a centre of procurement expertise. In addition to conducting procurement activities to meet its own needs, the CHA acts as a lead authority, undertaking central purchasing and setting up framework agreements on its own behalf and on behalf of other healthcare authorities. National legislation obliges healthcare authorities to procure collectively for specified goods and services. There is some flexibility as to how collective procurement is achieved, including through the CHA, which acts as a central purchasing body.

Framework agreement for waste collection and disposal services: Healthcare authorities are obliged by national legislation to collectively procure waste collection and disposal services, including by using framework agreements established by the CHA. In May 2016, the CHA advertised a framework agreement for the provision of environmental sanitation, waste collection and disposal services (Waste Services Framework Agreement).

The published tender specifications for the Waste Services Framework Agreement included a clause entitled “Extension of the Contract” (Extension Clause). The Extension Clause provided for the possibility of “subsequent accession” to the Waste Services Framework Agreement and contract award under that agreement by 18 healthcare authorities listed in Annex A of the tender specifications. The healthcare authorities listed in Annex A (“secondary authorities”) had previously jointly concluded an agreement for group purchasing of goods and services.

The Extension Clause set out the process for subsequent accession to the Waste Services Framework Agreement by a secondary authority. In short, it involved the secondary authority submitting a request for accession to the supplier, specifying the waste services to be provided by the supplier for a period equal to the remaining duration of the framework agreement and on the same conditions as the original award. The supplier was not obliged to accept the secondary contracting authority’s request for accession, but if it did, this acceptance was followed by the award of a contract by the secondary authority to the supplier for provision of the services specified.

The contract notice for the Waste Services Framework Agreement indicated the estimated value of the contracts the CHA intended to award under that framework agreement to cover its own requirements. The contract notice did not indicate the value of possible accessions and subsequent contract awards by secondary contracting authorities. However, the tender specifications did refer to possible accessions and subsequent contract awards by secondary contracting authorities, in line with their “usual requirements”.

The framework agreement was awarded to an ad-hoc tendering consortium, M&H, for a term of four years from 1 January 2017 to 31 December 2020.

East Islands Healthcare Authority (EIHA) was one of the healthcare authorities listed by name in Annex A, Secondary Authorities. At the time of the award of the Waste Services Framework Agreement, EIHA had an existing contract with the East Islands Cleaning company for the provision of environmental sanitation, waste collection and disposal services. That contract was due to expire at the end of December 2017. On 1 December 2017, EIHA exercised its option to accede to the Waste Services Framework Agreement and awarded a contract under the terms of that agreement to the supplier, M&H, without a further tendering procedure. The proposed contract between M&H and EIHA covered 1 January 2018 to 31 December 2020.

Legal dispute (the appeal)

On 10 December 2017, East Islands Cleaning lodged a complaint with the Public Procurement Complaints Board (Complaints Board) seeking annulment of the EIHA decision to award a contract to M&H under the terms of the Waste Services Framework Agreement without a competitive procedure. One of the grounds for complaint was that the CHA and EIHA had failed to identify the estimated quantities to be awarded under the framework agreement with sufficient precision at the outset.

The CHA and EIHA argued that it is not obligatory to determine quantities to be procured in advance in the contract notice or procurement documents for all actual and potential users of the framework agreement. The CHA and EIHA were of the view that information on the CHA's requirements in the contract notice under the framework agreement is sufficient. This argument rests particularly on the definition of a "framework agreement" in Article 33(1) of the Public Sector Directive[19], wherein the words "where appropriate" are used with reference to the quantity envisaged to be awarded under a framework agreement. The CHA and EIHA also argued that reference in the procurement documents to the "usual requirements" of the secondary authorities was sufficient to satisfy transparency principles.

In February 2018, the Complaints Board submitted a request for a preliminary ruling to the CJEU. The Complaints Board sought clarification on whether, and to what degree of precision, it is necessary to specify in the contract notice and/or procurement documents the quantity of services that may be procured by all actual and potential users of a framework agreement.

Question

Is it necessary to determine quantities to be procured in advance in the contract notice or procurement documents for all actual and potential users of the framework agreement? Do you agree or disagree with the arguments made by the CHA and EIHA? Give reasons for your answer(s).

Instructions for resolving the case

Based on CJEU Case C-216/17 – Autorità Garante della Concorrenza e del Mercato - Antitrust, Coopservice
Autorità Garante della Concorrenza e del Mercato – Antitrust, Coopservice Soc. coop. Arl v Azienda Socio-Sanitaria Territoriale dela Vallecamonica – Sebino (ASST) and others (C-216/17, ECLI:EU:C:2018:1034)

Advocate General Opinion (C-216/17, ECLI:EU:C:2018:797)

Request for preliminary ruling from Consiglio di Stato (Council of State, Italy)

Legal resources

Provisions of the Public Sector Directive considered:

Article 33, Framework Agreements

Note for trainers: Case C-216/17 was decided on the provisions of the 2004 Public Sector Directive and the facts have been substantially adapted for the purposes of this case study to better align with the current Public Sector Directive. The CJEU judgement presentation below includes additional cross-references to corresponding provisions in the 2014 Public Sector Directive when relevant.

[19] 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 [2014] OJ L94/65.

Judgement paragraphs 57-63

Question: Is it necessary to determine quantities to be procured in advance in the contract notice or procurement documents for all actual and potential users of the framework agreement? Do you agree or disagree with the arguments made by the CHA and EIHA? Give reasons for your answer(s).

The CJEU noted that it is apparent from the definition of a framework agreement in Article 1(5) of the 2004 Public Sector Directive that the purpose of a framework agreement is to establish the terms governing contracts to be awarded during a given period, particularly with regard to price and, when appropriate, the quantities envisaged. The CJEU went on to comment that, "indeed, it could be inferred from the adverbial phrase 'where appropriate' that an indication of the quantity of the services which the framework agreement covers is merely optional". Note: The definition of a framework agreement is the same in Article 33(1) of the 2014 Public Sector Directive.

The CJEU did not, however, accept this interpretation for the following reasons:

1) The CJEU was of the view that other provisions of the 2004 Public Sector Directive mean that a framework agreement must, at the outset, determine the maximum volume of supplies or services that may form the subject matter of subsequent contracts. Provisions of particular relevance include:

- Article 9(9) of the 2004 Public Sector Directive, the method for calculating the estimated value of framework arrangements, which refers to the value of "all the contracts envisaged for the total term of the framework agreement". Note: The same wording is used in Article 5(5) of the 2014 Public Sector Directive.
- Annex VII A, Information Which Must be Included in Contract Notices, with 6(c) referring to "the estimated total value of the services for the entire duration of the framework and, as far as possible, the value and the frequency of the contracts to be awarded". Note: Annex V, Part C of the 2004 Public Sector Directive says, "as far as possible, indication of value or order of magnitude and frequency of contracts to be awarded …".

The CJEU concluded that "although the contracting authority that is the original party to the framework agreement is subject only to a requirement to use its best endeavours with regard to value and frequency of each of the subsequent contracts to be awarded, *it is nevertheless imperative that the authority state the total quantity which the subsequent contracts may comprise*" (emphasis added).

2) Article 32(3) of the 2004 Public Sector Directive provides that when a framework agreement is concluded with a single economic operator, contracts based on that agreement must be awarded within the limits of the terms laid down in the agreement. Note: The wording in Article 33(3) of the 2014 Public Sector Directive is the same. According to the CJEU, "it follows that the contracting authority that is the original party to the framework agreement can make commitments on its own behalf or on behalf of the potential contracting authorities that are specifically indicated in that agreement only up to a certain quantity and once that limit has been reached the agreement will no longer have any effect".

3) The above interpretation ensures that the fundamental principle governing the award of public contracts and that applies to the conclusion of framework agreements is observed. The principles of equal treatment and non-discrimination, and the principle of transparency that stems from them, imply that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications. This is so that (i) "all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way"; and (ii) the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question. In the context of framework agreements, the CJEU commented that the principles of transparency and equal treatment of economic operators with an interest in concluding a framework agreement would be affected if the contracting authority that is an original party to the framework agreement did not set out the total quantity covered by such an agreement.

In addition:

- The obligation of transparency is particularly important because contracting authorities are not obliged to publish a contract award notice for each contract awarded under a framework agreement.
- If the original party to the framework agreement is not obliged to indicate at the outset the quantity and maximum amount of services to be covered by the framework agreement, this raises the risk that the framework agreement could be used to divide a contract up artificially so that it remains below the thresholds for applying Directive 2004/18, which is prohibited by Article 9(3). Note: The same provision appears in Article 5 of the 2014 Public Sector Directive.
- Requiring the contracting authority that is an original party to the framework agreement to indicate the quantity and amount of services the framework agreement will cover "is a manifestation of the prohibition on using framework agreements improperly or in such a way as to prevent, restrict or distort competition …", as set out in the fifth subparagraph of Article 32(2) of the 2004 Public Sector Directive. Note: recital 61 of the 2014 Public Sector Directive refers to this requirement.

On the question of whether a reference in the procurement documents to the "usual requirements" of the contracting authorities that may opt to use the framework agreement (secondary authorities) is sufficiently clear, the CJEU noted that even if the reference to "usual requirements" could be assumed to be sufficiently explicit for national economic operators, this is not the case for an economic operator established in another Member State. The CJEU went on to note that if the total quantity of those "usual requirements" is common knowledge, then "it should not be difficult to refer to it in the framework agreement itself or in another published document, such as the tender specifications, and, by doing so, ensure full observance of the principles of transparency and equal treatment".

Conclusion: The CJEU confirmed that contracting authorities that are not signatories to the framework agreement ("secondary authorities" in this case) (1) must determine in advance the total quantity/maximum volume of services that may be required when they conclude contracts under the framework agreement; and (2) cannot determine the quantity of services required by reference to the "usual requirements" of the contracting authority.

The CJEU also confirmed that the principles of transparency and equal treatment will be infringed upon if the maximum quantity of services that may be required is not determined in advance, or the description of quantities refers to "usual requirements".

Additional remarks

To comply with Article 32 of the 2014 Public Sector Directive and satisfy the principles of equal treatment and transparency:

1) The total quantity/maximum volume of services that may be required by all potential users under a framework agreement must be determined and published at the outset, when the framework agreement is set up.

2) Describing the quantity/volume of services required by reference to a contracting authority's "usual requirements" is not permitted.

The judgement did not confirm whether the total quantity/maximum volume of services should be published in the contract notice or in the procurement documents (see Framework Agreements, case study 1).

Note on additional question considered by the CJEU on identification of potential users of the framework agreement: The CJEU considered an additional question that was not included in this case study because the redrafted 2014 Public Sector Directive now provides clarity on issues related to wording

of the 2004 Public Sector Directive. The question was: When a contracting authority uses a framework agreement, must it be a signatory of the original framework agreement? A summary of the CJEU's judgement on this point is set out below, together with notes on changes made by the 2014 Public Sector Directive, to provide context if the question arises.

Overview: The issue considered by the CJEU concerned the situation of a framework agreement being set up by one contracting authority for the benefit of other contracting authorities (secondary authorities), with the secondary authorities not being signatories to the original framework agreement. In this situation the practical question arises of whether a secondary contracting authority that is not a signatory to the original framework agreement can legitimately award a contract under that framework agreement. (The precise wording of the question considered by the CJEU was "whether a contracting authority has the power to act on its own behalf and on behalf of other contracting authorities specifically indicated, which are not, however, direct parties to the framework agreement").

In this context, the CJEU addressed the uncertainty arising from the wording of the second subparagraph of Article 32(2) of the 2004 Public Sector Directive: "Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators *originally party* to the framework agreement" (italics added).

In the 2014 Public Sector Directive, this provision was amended to provide greater clarity. Article 33(2) reads as follows: "Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and in paragraphs 3 and 4. Those procedures may be applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest and *those economic operators party to the framework agreement as concluded"* (italics added).

CJEU judgement: The specific question the CJEU considered was whether the words "originally party" in the second subparagraph of Article 32(2) of the 2004 Public Sector Directive relate to economic operators only or to both contracting authorities and economic operators.

The CJEU acknowledged that the provision is unclear, as "the wording of that provision in isolation does not allow it to be determined whether the requirement to be an original party to the framework agreement applies to both contracting authorities and economic operators or solely the latter …". The CJEU explained that to decide what the provision means it is necessary to consider "its context and the objectives pursued by the legislation of which it is part".

The CJEU confirmed that the requirement to be an "original party" to a framework agreement applies *only to economic operators*. In support of this conclusion, the CJEU referred to:

1. Recital 11 of the 2004 Public Sector Directive referring to the reopening of competition "between parties to the framework agreement", which in this context must be understood as meaning reopening competition between economic operators.
2. Annex VII A of the 2004 Public Sector Directive listing the content of contract notices, which requires a contracting authority to list "the number and, where appropriate, proposed maximum number of economic operators who will be members [of the framework agreement]".
3. The revised wording in Article 33(2) of the 2014 Public Sector Directive, which provides for the award procedures under a framework agreement to be "applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest and those economic operators party to the framework agreement as concluded".

The CJEU went on to conclude that the purpose of the second subparagraph of Article 32(2) of the 2004 Public Sector Directive was "to allow a contracting authority to give other authorities access to a framework agreement that it is proposing to conclude with economic operators who will be original parties thereto".

The CJEU confirmed that it was not a requirement for a secondary contracting authority, such as EIHA in this case, to be a signatory to the framework agreement for it to be able to award a subsequent contract at a later date. The CJEU did, however, list safeguards to ensure transparency:

1. A secondary contracting authority must appear as a potential beneficiary of the framework agreement from the date on which the framework agreement is concluded.
2. A secondary contracting authority must be clearly identified in the tender documents with an explicit reference that makes both the secondary contracting authority itself and any interested economic operator aware of the possibility that the secondary contracting authority may be a potential beneficiary of the framework agreement.
3. The reference to the secondary contracting authority can appear either in the framework agreement itself or in another document such as an extension clause/relevant clause in the tender specifications, "as long as the requirements as to advertising and legal certainty and, consequently, those relating to transparency are complied with".

Similar cases

C-274/21 & C-275/21 *EPIC Financial Consulting* (ECLI:EU:C:2022:565): It is not possible to award a new public contract when the quantity and/or maximum value of the concerned works, supplies or services laid down in the framework agreement have already been reached.

Further reading

SIGMA Public Procurement Brief No. 17, Framework Agreements
OECD (2016), "Framework Agreements", *SIGMA Public Procurement Briefs,* No. 19, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-19-200117.pdf.

Note: This Public Procurement Brief was published before the CJEU cases included in this casebook had been decided.

Manual for Framework Agreements

OECD (2014), *Manual for Framework Agreements*, OECD Publishing, Paris.

5 Technical specifications

Introduction

Technical specifications lay out the required characteristics of a work, service or supply that is the subject matter of a procurement procedure. They are part of the collection of procurement documents prepared by a contracting authority and provided to economic operators interested in bidding for an opportunity. EU public procurement rules do not, in general, restrict the purchaser's decision on what to buy. They do, however, seek to prevent public procurement from being conducted in a way that distorts the market and reduces competition. Provisions in the Public Sector Directive[20] on technical specifications allow for different ways of formulating technical specifications but also aim to ensure that technical specifications do not directly or indirectly discriminate against or favour a particular economic operator.

For many years, the public procurement directives have included provisions on technical specifications, and there is a significant body of related case law from the Court of Justice of the European Union (CJEU). New provisions on technical specifications and closely related issues introduced in the 2014 Public Sector Directive reflect the increased importance of sustainable public procurement.

Provisions on technical specifications in the Public Sector Directive

The main provisions on technical specifications are set out in Article 42 and Annex VII of the Public Sector Directive.

Article 42 comprises six clauses:

- Article 42(1) requires that technical specifications, as defined in Point 1 of Annex VII, be set out in the procurement documents. It confirms that the characteristics required of a work, service or supply may refer to the specific process or method of production or other stage of the lifecycle, provided it is proportionate and linked to the subject matter of the contract. Article 42(1) also addresses issues of transfer of intellectual property rights and accessibility requirements.
- Article 42(2) confirms the basic underlying principles that technical specifications shall afford economic operators equal access to the procurement procedure and shall not have the effect of creating unjustified obstacles in opening public procurement to competition.
- Article 42(3) sets out different ways in which technical specifications shall be formulated, including by reference to performance or functional requirements, or to specified types of standards such as national standards transposing EU standards.
- Article 42(4) confirms the general rule that technical specifications shall not refer to a specific make, source, process or trademark, etc. It delineates the exceptional circumstances when this may be permitted and requires use of the words "or equivalent".

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20 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 [2014] OJ L94/65.

- Article 42(5) addresses equivalence and proof of equivalency when a technical specification is formulated by reference to specified types of standards.
- Article 42(6) addresses equivalence and proof of equivalency when a technical specification is formulated in terms of performance or functional requirements.

Closely related issues, also addressed in the Public Sector Directive, are (1) the use of labels to prove compliance with specific environmental, social or other characteristics (Article 43); and (2) requirements for test reports, certification and other means of proving conformity with the technical specifications (Article 44).

Case studies on technical specifications

The case studies on technical specifications examine three issues considered by the CJEU between 2018 and 2021:

(1) What is the correct classification of “technical requirements” specified by a contracting authority procuring municipal waste collection services? The technical requirements at issue related to vehicle emission standards and a global positioning system for waste collection vehicles. Are these requirements selection criteria, technical specifications or conditions for performance of a contract?

(2) When must an economic operator submit proof (certification or certificates) that the products it proposes to supply are equivalent to those defined in the technical specifications? Must the economic operator submit proof as part of its tender, or can submission of proof be left to the time of first delivery of the product concerned?

(3) Does the Public Sector Directive set out a hierarchy of methods for formulating technical specifications? Can requirements be described by reference to outputs? How much discretion does a contracting authority have in formulating technical specifications? What limits to discretion apply?

Case study 1

Technical requirements for contracts to collect and transport municipal waste: Facts

On 27 September 2018, the Regional Waste Management Centre for Lithuania's Klaipéda region (the contracting authority) published a contract notice in the *Official Journal of the European Union*, using the open procedure. The contract notice invited tenders for a contract to collect municipal waste from the municipality of Neringa and transport it to the regional waste management facility (the waste contract).

The contracting authority listed several requirements in the contract notice, referred to as "technical requirements". These included requirements that the service provider use municipal waste collection vehicles that (1) comply with, at minimum, the Euro 5 vehicle emission standard; and (2) are equipped with a continuously operating global positioning system (GPS) transmitter to allow the contracting authority to determine the vehicle's exact position and its specific itinerary.

The contracting authority received three tenders, including from Ecoservice and a group of economic operators (the Consortium).

On 29 November 2018, the contracting authority notified tenderers of the evaluation of tenders and their final ranking. The contract was awarded to the Consortium, which submitted the lowest-price tender. Ecoservice was ranked second.

On 10 December 2018, Ecoservice lodged a complaint with the contracting authority, challenging the outcome of the procurement procedure. One of Ecoservice's grounds for complaint was that the Consortium did not have the required technical ability. The contracting authority dismissed the complaint.

On 27 December 2018, Ecoservice brought an action against that decision before the Regional Court, Klaipéda, Lithuania. The Regional Court dismissed the action brought forth by Ecoservice on the grounds that the Consortium satisfied the qualification requirements. Ecoservice then appealed to the Court of Appeal, Lithuania. The Court of Appeal set aside both the judgement of the Regional Court and the decision of the contracting authority establishing the ranking of the tenderers. The contracting authority then made an appeal, on a point of law, to the Supreme Court of Lithuania (Supreme Court).

The Supreme Court submitted a reference for a preliminary ruling to the CJEU on a number of issues. One of the issues concerned the correct classification of technical requirements. The Supreme Court noted that the technical requirements could be conditions relating to a tenderer's technical and professional ability, but they could also be classified as technical specifications or conditions relating to performance of the contract.

Correct classification of the technical requirements was important because of provisions in the national Public Procurement Law (PPL) relating to the obligation or possibility to correct, supplement or clarify documents submitted by a tenderer. For documents or data relating to a tenderer's capability, the PPL requires the contracting authority to request tenderers to correct, supplement or clarify documents or data. The PPL lists the types of documents and data the contracting authority must request the tenderer to correct, supplement or clarify. It excludes from this obligation documents relating to "the subject matter of the contract, technical characteristics, conditions of performance of the contract or the price of the tender". For documents or data relating to evaluation of tenders, the PPL permits, but does not require, a contracting authority to request tenderers to correct, supplement or clarify information in their tenders.

Question

The "technical requirements" specified by the contracting authority require the service provider to use municipal waste collection vehicles that (1) comply with, at minimum, the Euro 5 vehicle emission standard;

and (2) are equipped with a continuously operating global positioning system (GPS) transmitter to allow the contracting authority to determine the vehicle's exact position and its specific itinerary

What is the correct classification of these "technical requirements"? Are they:

- Selection criteria, within the scope of Article 58(4) and Annex XII, Part II of the Public Sector Directive?
- Technical specifications, within the scope of Article 42 and Annex VII of the Public Sector Directive?
- Conditions for performance of a contract, with the scope of Article 70 of the Public Sector Directive?

Instructions for resolving the case

Based on CJEU Case C-927/19 – Klaipėdos regiono atliekų tvarkymo centras
Klaipėdos regiono atliekų tvarkymo centras v UAB (C-927/17, ECLI:EU:C:2021:700)

Advocate General Opinion (ECLI:EU:C:2021:295)

Request for a preliminary ruling from Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania)

Legal resources

Articles in the Public Sector Directive:

Article 42 and Annex VII, Technical Specifications

Article 58(4), Annex XII, Part II, Selection Criteria and Means of Proof

Article 70, Conditions for Performance of a Contract

Question

What is the correct classification of these "technical requirements"? Are they:

- Selection criteria, within the scope of Article 58(4) and Annex XII, Part II of the Public Sector Directive?
- Technical specifications, within the scope of Article 42 and Annex VII of the Public Sector Directive?
- Conditions for performance of a contract, with the scope of Article 70 of the Public Sector Directive?

The CJEU considered these issues in paragraphs 83 to 90 of the judgement.

Are the technical requirements "selection criteria", within the scope of Article 58(4) of the Public Sector Directive? The CJEU noted that the means of proving technical and professional ability listed in Part II of Annex XII includes at (g) "an indication of the environmental management measures the economic operator will be able to apply when performing the contract", and at (i) "a statement of the tools, plants or technical equipment available to the service provider or contractor for carrying out the contract". The CJEU concluded that, as such means of proof can demonstrate the "technical and professional ability" of economic operators, the technical requirements for emission standards and GPS appear apt to relate to the "technical resources" of economic operators and, therefore, to be classified as selection criteria relating to their technical and professional abilities within the meaning of Article 58(4) of the Public Sector Directive.

Are the technical requirements "technical specifications" within the scope of Article 42 and Annex VII of the Public Sector Directive? The CJEU first drew attention to Article 42(3), noting that technical specifications define the characteristics required of the services covered by the contract and are formulated in terms of performance or functional requirements, including environmental characteristics, or by reference to technical standards. The CJEU went on to note that Article 41(1) refers to Annex VII, point 1(b), which states that for public supply or service contracts, a technical specification is contained "in a

document defining the required characteristics of a product or a service, such as … environmental and climate performance levels ...". The CJEU concluded that the technical requirements at issue, which are formulated in terms of performance or functional requirements and refer particularly to the Euro 5 standard on vehicle emissions, may also fall within the concept of "technical specifications".

Are the technical requirements "conditions for performance of a contract" within the scope of Article 70 of the Public Sector Directive? The CJEU confirmed that the technical requirements may also fall within the scope of conditions for performance of a contract within the meaning of Article 70 of the Public Sector Directive. In reaching this conclusion, the CJEU noted that the technical requirements satisfy the requirements of Article 70 because they (1) lay down special conditions relating to performance of the contract; (2) appear to be linked to the subject matter of the contract; and (3) are indicated in the call for competition or procurement documents. Thus, those requirements that include innovation-related and environmental considerations may also fall within the scope of conditions for performance of a contract. The CJEU went on to point out that compliance with conditions for performance of a contract is not to be assessed when a contract is awarded.

Conclusion: The CJEU confirmed that the Public Sector Directive does not preclude technical requirements, such as the technical requirements in this case, being simultaneously (1) selection criteria relating to technical and professional ability; and/or (2) technical specifications; and/or (3) conditions of performance of the contract.

Additional remarks

The CJEU decision offers the possibility that technical requirements of the type specified by the contracting authority in this case may be applied at different points of assessment in the procurement process. If, for example, the requirement to meet the Euro 5 vehicle emission standard is applied as a selection criterion, then non-compliance with the vehicle emission standard could be grounds for non-selection.

Regarding the Lithuanian legal provisions as reported in this case, there may be a mandatory requirement for the contracting authority to request the tenderer to correct, supplement or clarify documents or data relating to the Euro 5 vehicle emission standard. If, however, it is used as a technical specification, the contracting authority can decide whether to seek clarification of compliance.

This case highlights the importance of clarity in the procurement documents. To avoid uncertainty, the contracting authority needs to clearly explain in the procurement documents how and in what context the specified technical requirement is to be applied (i.e. as a selection, tender evaluation or contract condition) so that tenderers understand the consequences of non-compliance.

Further reading

Selected Judgements of the CJEU (2006-2014), Chapter 8
OECD (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD, Paris, https://www.sigmaweb.org/publications/judgements-courtjustice-31july2014-eng.pdf.

Case study 2

Proof of equivalency in tenders to supply spare parts for buses and trolleybuses: Facts

On 25 February 2015, the municipal public transport company of Milan (ATM) published a contract notice in the *Official Journal of the European Union* launching an open public procurement procedure to award a contract for the "supply of original spare parts and/or original equipment and/or equivalent for buses and trolleybuses manufactured by Iveco". The value of the contract was estimated at EUR 3.35 million plus VAT. The award criterion was lowest price.

ATM drew up a list of spare parts to be supplied, referring expressly to parts of FIAT/IVECO make. Approximately 2 200 distinct spare parts were to be offered in the tender.

According to the procurement documents' technical specifications:

- "Original spare parts" meant (1) parts made by the vehicle manufacturer itself, but also (2) spare parts made by the vehicle manufacturer's suppliers in a position to certify that the parts had been made in compliance with the specifications and manufacturing standards defined by the vehicle manufacturer.
- "Equivalent spare parts" meant spare parts made by any undertaking that certifies the quality of those spare parts matches that of components used for assembly of the vehicle and of spare parts supplied by the vehicle manufacturer.

The procurement documents specified that in the tender to be submitted, each product tendered as an "equivalent" to IVECO's spare parts had to be designated by the abbreviation EQ. The procurement documents also specified that, in the event of the contract being awarded, the supply of equivalent parts would be accepted only if those parts were certified or had certificates of equivalence. The technical specification in the procurement documents provided that, in the case of equivalent products, equivalency must be attested by submission of an appropriate certificate, to be provided to ATM at "the time of the first delivery of the spare part". The approach of requiring submission of a certificate at the time of first delivery, rather than in the original tender, was a pragmatic solution in light of the very high number of spare parts specified.

Two economic operators submitted tenders: *Iveco Orecchia* (IO) and VAR. IO was the exclusive supplier of original IVECO spare parts for northwest Italy. Following evaluation of the tenders, VAR was placed first in the ranking and awarded the contract. IO thus brought an action for annulment of the contract award decision before the Regional Administrative Court, Lombardy, which annulled the award decision on the grounds that VAR had not, either when it submitted its tender or during the procurement procedure, provided proof that the products it offered were equivalent to the original spare parts. VAR and ATM both appealed to the Council of State, which submitted a request for a preliminary ruling to the CJEU.

Question

Does Article 42(4) of the Public Sector Directive mean that the tenderer must submit, as part of its tender, proof (certification or certificates) that the products it proposes are equivalent to those defined in the technical specifications? Is it permissible to leave the submission of proof (certification or certificates) to the time of first delivery of the spare part?

Instructions for resolving the case

Based on CJEU Case C-14/17 – VAR and ATM
VAR Srl and Azienda Trasporti Milanesi SpA (ATM) v Iveco Orecchia SpA (C-14/17, ECLI:EU:C:2018:568)

Advocate General Opinion (ECLI:EU:C:2018:135)

Request for a preliminary ruling from Consiglio di Stato (Council of State, Italy)

Legal resources

Article 42 of the Public Sector Directive

Note for trainers: The CJEU judgement in this case was based on provisions on technical specifications in Article 34 of the 2004 Public Sector Directive[21], particularly Article 34(8) referring to the use of specific makes or sources of products to be supplied under the contract, and proofs of equivalency. The wording of updated provisions in Article 42 of the 2014 Public Sector Directive of direct relevance to this case study are substantially the same as the provisions of Article 34 of the 2004 Public Sector Directive. For simplicity, analysis of the CJEU judgement below discusses the provisions by reference to the 2014 Public Sector Directive, noting equivalent provisions of the 2004 Public Sector Directive when that information may be helpful.

Question

Does Article 42(4) of the Public Sector Directive mean that the tenderer must submit, as part of its tender, proof (certification or certificates) that the products it proposes are equivalent to those defined in the technical specifications? Is it permissible to leave the submission of proof (certification or certificates) to the time of first delivery of the spare part?

Judgement paragraphs 19 to 35

Article 42(4) of the Public Sector Directive concerns technical specifications that refer to specific makes or sources of products to be supplied under the contract, and proofs of equivalency. Article 42(4) of the Public Sector Directive permits reference in technical specifications to a specific make or source, on an exceptional basis, when other methods of describing requirements are not possible and subject to a requirement that such reference(s) "shall be accompanied by the words 'or equivalent'".

In answering the question raised in this case, the CJEU did not focus solely on Article 42(4) of the Public Sector Directive. It took a wider view, discussing Article 42 of the Public Sector Directive more generally. The CJEU acknowledged that Article 42(4) of the Public Sector Directive does not state at what point in time the equivalency of a product offered by a tenderer must be proved.

Under Article 42(6) of the Public Sector Directive, the situation is different, for example, for formulating technical specifications in terms of performance requirements. Article 42(6) of the Public Sector Directive expressly requires that the tenderer provide proof of equivalency "in its tender".

The CJEU was of the view that Articles 42(2), 42(5) and 42(6) of the Public Sector Directive (Articles 34[3], 34[4] and 34[5] of the 2004 Public Sector Directive) define general rules concerning (1) the formulation of technical specifications; (2) the means by which the tenderer can prove that its tender satisfies the requirements in those specifications; and (3) the stage at which that proof must be provided. In relation to these general rules, Article 42(4) of the Public Sector Directive lays down specific rules governing the conditions under which a particular way of defining the content of a technical specification is permitted, including by referring to a specific make or source.

The CJEU confirmed that Article 42(4) of the Public Sector Directive is an "exception" that must be interpreted narrowly. It noted that this exception does not state at what point in time the equivalency of a

[21] Directive 2004/18 on the Co-ordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts [2004] OJ L134/114.

product offered by a tenderer must be proven. The CJEU confirmed that Article 42(4) of the Public Sector Directive remains subject to the general rules set out in Articles 42(2), 42(5) and 42(6) of the Public Sector Directive. It therefore follows that when a contracting authority makes use of this exception, it must require tenderers wishing to offer equivalent products to provide proof of equivalency at the time the tender is submitted.

The CJEU supported this conclusion by referring to:

(1) The principle of equal treatment and the duty of transparency, which require in particular that tenderers be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority. The CJEU noted in this context that tenderers would not be subject to the same conditions at the time their tenders are assessed if tenderers offering equivalent products were permitted to prove equivalency after submission of the tender.

(2) The requirement for contracting authorities to verify that tenders comply with the requirements, conditions and criteria set out in the procurement documents (see Article 56[1][a] of the Public Sector Directive).

(3) The requirement for contracting authorities to inform unsuccessful tenderers of the reasons for rejection of their tender, including "the reasons for its decision of non-equivalence" (see Article 55[2][b] of the Public Sector Directive).

The CJEU noted that the requirements for verification and decisions on non-equivalency cannot be met at the opening of tenderers if a tenderer has not submitted proof of equivalency at that stage. This runs the risk of infringing upon the principle of equal treatment and vitiation of a tendering procedure by an irregularity.

The CJEU concluded with a practical comment. It noted that although Public Sector Directive provisions do not allow a contracting authority to permit tenderers to prove equivalency after the submission of tenders, it does have the discretion to determine how tenderers prove equivalency. The CJEU confirmed that the means of proof required must enable the contracting authority to carry out "meaningful assessment" of the tenders submitted but not exceed what is necessary by creating unjustified obstacles to the opening of competition.

Conclusion: The Public Sector Directive requires a tenderer to submit, as part of its tender, proof that the products it proposes are equivalent to those defined in the technical specifications by reference to a specific make or source. Submission of proof of equivalency cannot be left to the time of first delivery of the spare part. The CJEU made it clear, however, that a contracting authority has discretion as to the means of proof it requires. It may therefore be possible to require proof of equivalency by means other than submission of certification or certificates, as required in this case.

Additional remarks

This case may prompt discussion or comment, particularly from procurement officials, about how requiring a tenderer to provide all certificates of equivalency when submitting the tender affects the practical conduct of the tender process.

In his interesting Opinion in this case, Advocate General Campos Sánchez-Bordona discussed the need for balanced requirements to guarantee equal treatment and selection of the right contractor by ensuring that tenderers are not faced with unjustified obstacles in opening public procurement to competition. The Advocate General did not believe that equal treatment of tenderers is jeopardised because proof of equivalency may be submitted during the stage of performance of the contract. On the contrary, he was of the view that requiring proof at an earlier stage could discriminate against tenderers by giving an advantage to a manufacturer of original spare parts. He applied an analysis "from the perspective of the widest

possible opening-up of procurement to competition" and concluded that the requirement to submit certificates of equivalency before the contract is awarded may become a disproportionate obstacle, impeding participation in the competition.

The Advocate General went on to discuss other means for assessing technical ability without submitting certificates of equivalency, before concluding that Article 42(4) (Article 38[4] of the 2004 Public Sector Directive) does not necessarily require that proof of equivalency be presented at the tender submission stage. He noted that the provision "does not lay down such an obligation because it leaves the Member State … free to stipulate when certificates of equivalence must be presented. It does not predetermine a single solution because the legislature decided, wisely, that it should be the Member States and their contracting authorities which weigh up the advantages and disadvantages of choosing one or other solution".

The CJEU and the Advocate General confirmed that proof of equivalency does not have to take the form of certificates of equivalency, so another area of useful discussion may be what other forms of proof of equivalency are appropriate to ensure meaningful assessment but not create unjustified obstacles to opening up competition.

Further reading

Selected Judgements of the CJEU (2006-2014), Chapter 8
OECD (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD, Paris, https://www.sigmaweb.org/publications/judgements-courtjustice-31july2014-eng.pdf.

Case study 3

Detailed formulation of technical specifications for medical diagnostic equipment and materials: Facts and dispute

On 26 June 2016, the Polyclinic for the Dainava District of Kaunas, Lithuania (the contracting authority) published an open-procedure contract notice in the *Official Journal of the European Union* to procure healthcare-related services. The subject matter was the rental of laboratory diagnostic equipment for human healthcare and the procurement of materials and services to ensure the operation of this equipment. The procurement was divided into 13 lots. One of the lots was for the supply of reagents and test packs for use in automatic and semiautomatic blood parameter analysers, with an estimated value of EUR 250 000.

On 4 July 2016, Roche Lietuva (RL), a supplier of reagents, test packs and other consumables, submitted an initial complaint to the contracting authority. RL argued that the technical specifications set out in the procurement documents unreasonably restricted competition among suppliers due to their high specificity. The technical specifications for the reagents and test packs listed minimum performance requirements in terms of output, rather than listing the individual characteristics and functions of the reagents and test packs themselves. The performance requirements specified minimum thresholds for (1) the speed of test results and (2) levels of accuracy of the test results, when used in automatic and semiautomatic blood parameter analysers. RL was of the view that the minimum performance requirements in the technical specifications corresponded to products of specific manufacturers of blood parameter analysers. The contracting authority subsequently amended certain provisions of the technical specifications and issued the amended technical specifications to all tenderers.

RL was not satisfied with the amended technical specifications, so it brought an application before the national courts. The first-instance court and the appellate court dismissed RL's application. Both courts found that (1) the contracting authority had correctly exercised its discretion in laying out the detailed technical specifications, in light of its requirements based on the speed and accuracy of test results; and (2) RL had failed to prove that the technical specifications corresponded to specific products, devices or manufacturers.

RL then filed an appeal before the Supreme Court, Lithuania (Supreme Court). The Supreme Court decided to submit a request for a preliminary ruling to the CJEU. In its request, the Supreme Court raised the question of limits to the margin of discretion available to a contracting authority in laying down technical specifications in the procurement of reagents and test packs, for the purpose of carrying out specific medical tests. In this regard, the Supreme Court asked whether the contracting authority would comply with legal requirements of the Public Sector Directive[22] if the required functions of the reagents and test packs were defined not by reference to their isolated functioning or individual characteristics, but rather by the result (output) of that functioning, namely the speed and/or accuracy of the tests.

Questions

Question 1

Do the provisions of Article 42(3)(a) to (d) of the Public Sector Directive set out a hierarchy of methods for formulating technical specifications?

[22] 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 [2014] OJ L94/65.

Question 2

For the reagents and test packs used to carry out medical tests, do the provisions of Article 42 of the Public Sector Directive prohibit technical specifications from describing requirements by referring to outputs such as result speed and accuracy?

Question 3

Consider Article 42 in combination with Article 18(1) of the Public Sector Directive. How much discretion does a contracting authority have in formulating technical specifications? What limits to discretion apply?

Instructions for resolving the case

Based on CJEU Case C-413/17 – Roche Lietuva
C-413/17 Roche Lietuva UAB (ECLI:EU:C:2018:865)

No Advocate General Opinion

Request for a preliminary ruling from Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania)

Legal resources

Article 18(1) of the Public Sector Directive

Article 42 of the Public Sector Directive

Recital 74 of the Public Sector Directive

Questions 1, 2 and 3

Paragraphs 25 to 45 of the judgement

The CJEU noted that, according to Article 42(3) of the Public Sector Directive, technical specifications can be formulated in several ways: either in terms of performance or functional requirements, or by reference to technical specifications and also to standards (which are listed in order of preference in Article 42[3][b]). The CJEU confirmed that these provisions do not establish a hierarchy among the methods for formulating technical specifications and do not prioritise performance or functional methods (this is different from its position on standards, for which the Public Sector Directive lists a hierarchy). It also confirmed that for consumables to be used to carry out medical tests, Article 42(3) does not prevent technical specifications from articulating operational and use-related characteristics.

The CJEU was of the view that Article 42 allows the contracting authority broad discretion in formulating technical specifications. It confirmed that a margin of appreciation is justified because contracting authorities are better placed to know which supplies they need and to determine the requirements necessary to achieve the desired results.

The CJEU noted, however, that the Public Sector Directive sets certain limits that the contracting authority must comply with, and it highlighted the requirements of equal treatment and non-discrimination, the obligation not to artificially narrow competition, and application of the principle of proportionality.

Article 42(2) of the Public Sector Directive requires that technical specifications afford economic operators equal access to the procurement procedure and do not create unjustified obstacles to competition. The principle of equality of treatment is set out in Article 18(1) of the Public Sector Directive. According to this provision, contracting authorities are required to treat economic operators equally and without discrimination, and are to act in a transparent and proportionate manner. According to CJEU case law, these principles are of crucial importance for technical specifications, in light of the risk of discrimination in either the choice or formulation of specifications.

In addition, according to Article 18(1) of the Public Sector Directive, procurement procedures must not be designed to artificially narrow competition. Competition is to be considered artificially narrowed when the procurement procedure is designed to unduly favour or disadvantage certain economic operators. Recital 74 of the Public Sector Directive offers further support, specifying that technical specifications be "drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator". Also, according to that recital, "it should be possible to submit tenders that reflect the diversity of technical solutions, standards and technical specifications in the marketplace".

The CJEU emphasises that complying with these requirements is all the more important when, as in the present case, the technical specifications are formulated in a particularly detailed manner. Indeed, the more detailed the technical specifications, the higher the risk of favouring products of a given manufacturer. The CJEU confirmed that it was for the Supreme Court to determine, considering the contracting authority's margin of discretion, whether the technical specifications in question indirectly favoured a particular tenderer.

The CJEU stated that it is also necessary that the level of detail of the technical specifications comply with the principle of proportionality. This particularly implies an examination of whether the level of detail is necessary to achieve the desired objectives. In this context, the CJEU highlighted that the principle of proportionality is applied in a particular manner in the sensitive area of public health. It noted that it has consistently held that, in order to assess whether a Member State has observed the principle of proportionality in the area of public health, account must be taken of the fact that human health and life rank foremost among the assets and interests protected by the Treaty on the Functioning of the European Union, and that it is for Member States to determine the degree of protection they afford public health and how that degree of protection is to be achieved. Since this level may vary from one Member State to another, Member States should be allowed a measure of discretion.

The CJEU confirmed that it was for the Supreme Court to concretely assess the conformity of the technical specifications at issue in the main proceedings with the principles of equality of treatment and proportionality.

Conclusion: The provisions of Article 42 of the Public Sector Directive do not set out a hierarchy of methods for formulating technical specifications, nor for consumables used to carry out medical tests do they prohibit technical specifications from describing requirements by reference to outputs such as result speed and accuracy. A contracting authority has considerable discretion in formulating technical specifications, but there are limits to that discretion. A contracting authority must adhere to the principles of equal treatment and proportionality and ensure that competition is not artificially narrowed.

Applying these conclusions to the case in question, it is clear that the RL appeal should be dismissed.

Further reading

Selected Judgements of the CJEU (2006-2014), Chapter 8
OECD (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD, Paris, https://www.sigmaweb.org/publications/judgements-courtjustice-31july2014-eng.pdf.

6 Reliance on third-party capacities

Introduction

Article 63 of the Public Sector Directive provides that an economic operator may, when appropriate and with regard to a specific contract, rely on the capacity of other entities to satisfy the criteria set by the contracting authority in relation to economic and financial standing. This reliance on other entities is subject to the fulfilment of specified conditions.

Tenderers must demonstrate that the resources required for contract performance are accessible to them through the third parties they intend to rely on. This entails proving that the third parties possess the technical skills or professional qualifications essential to fulfil the contract obligations. The third party must be involved in performance of the contract in some capacity. Mere formal reliance on a third party is not sufficient.

Contracting authorities cannot unreasonably restrict tenderers' rights to rely on third parties. Any limitations imposed must be justified and should only relate to essential elements of the contract. The contracting authority must also have the opportunity to assess the suitability of the third party/parties during the tender evaluation process.

Tenderers must declare their reliance on third parties in their tender submissions, typically through documents such as the European Single Procurement Document (ESPD). Failure to disclose such reliance may render the tender invalid if it later becomes apparent that the tenderer cannot independently meet the requirements.

Tenderers have the freedom to determine the legal ties they wish to establish with third parties and how they demonstrate access to the resources of these third parties. Contracting authorities cannot impose specific collaboration agreements or partnerships before the contract award.

Overall, while reliance on the capacities of third parties is explicitly allowed by the Public Sector Directive, tenderers must ensure that their reliance on third parties is substantive and not merely formal. The involvement of third parties in performance of a contract must be genuine, and tenderers bear the responsibility of demonstrating the availability of third-party resources.

Case study 1

Facts and legal dispute

On 3 January 2018 the Local Health Authority of Central Tuscany (Italy) initiated a tendering procedure for works involving demolition of the buildings of the former Misericordia e Dolce Hospital in Prato for a basic amount of EUR 5 673 030.73.

Two tenderers ranked as first and second, the DAF ad-hoc consortium and the Del Debbio ad-hoc consortium, but the contracting authority excluded them from the procedure. As a result, the Rad Service ad-hoc consortium, which was initially ranked third, rose to first place.

In submitting its tender, the Del Debbio ad-hoc consortium relied on the technical and professional capacities of an ancillary undertaking. The reason for its exclusion was that the ancillary undertaking had submitted a declaration that did not mention a negotiated penalty that had been imposed on the undertaking's owner and legal representative on 14 June 2013. Under Italian law, such a negotiated penalty is expressly placed on the same footing as a conviction for the tortious offence of causing injury through negligence, committed in contravention of the rules on health and safety in the workplace.

The contracting authority took the view that the ancillary undertaking had made a false and untruthful declaration in response to the ESPD question asking whether it had been found guilty of grave professional misconduct. Accordingly, the contracting authority maintained that the Del Debbio ad-hoc consortium had to be automatically excluded from the procedure, in accordance with Article 80(5)(f-a) and Article 89(1) of that code.

Article 89 of the Italian Public Procurement Code provides that:

> *1. … An economic operator intending to rely on the capacities of other entities shall attach … a signed declaration by [the ancillary undertaking] attesting that it meets both the general criteria laid down in Article 80 and the technical criteria and that it has the resources for which the economic operator intends to rely on it. An economic operator shall demonstrate to the contracting authority that it will have the necessary resources by submitting a declaration signed by the ancillary undertaking in which the latter makes a commitment to the tenderer and the contracting authority that, throughout the term of the contract, it shall make available the necessary resources which the tenderer is lacking. In the case of untruthful declarations, the contracting authority shall exclude the tenderer from the tendering procedure and shall enforce the guarantee, without prejudice to the application of Article 80(12), in respect of the parties which have signed those declarations.*
>
> *[…]*
>
> *3. In accordance with Articles 85, 86 and 88, the contracting authority shall verify whether the entities on whose capacity the economic operator intends to rely meet the relevant selection criteria and whether there are grounds for exclusion under Article 80. The contracting authority shall require that the economic operator replace those entities that fail to meet one of the relevant selection criteria or that are subject to mandatory grounds for exclusion. The notice of invitation to tender may also indicate the cases in which the economic operator is required to replace an entity in respect of which there are non-compulsory grounds for exclusion, provided that these relate to technical criteria.*

The Regional Administrative Court for Tuscany had, by two judgments, overturned the exclusions of the Del Debbio ad-hoc consortium and the DAF ad-hoc consortium. The Rad Service ad-hoc consortium appealed against those judgments to the highest administrative court, the Council of State.

This latter court took the view that, under the fourth subparagraph of Article 89(1) of the Public Procurement Code, the false declaration submitted by the ancillary undertaking's legal representative in the tendering procedure automatically triggered the contracting authority's obligation to exclude the tenderer that intended to rely on that undertaking's capacities without it being able to replace it. Consequently, the

correction procedure laid down by Article 89(3) of the code does not apply, and the economic operator is therefore unable to replace the ancillary undertaking.

The court was, however, unsure whether that provision is compatible with European public procurement law, especially with the principles and rules referred to in Article 63 of Directive 2014/24 as well as with Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU).

The second subparagraph of Article 63(1) of Directive 2014/24 seeks, in particular, to ensure that the services are carried out by sufficiently skilled and ethical operators; it therefore requires that the contracting authority agree to replace an ancillary undertaking that does not meet the criteria, or for which grounds for exclusion exist. By requiring that a tenderer be automatically excluded because of untruthful declarations submitted by the undertaking on whose capacities it intends to rely, the fourth subparagraph of Article 89(1) of the Public Procurement Code prohibits replacement of the ancillary undertaking and, consequently, prohibits the remedy nonetheless provided for by Article 89(3) for all the other mandatory grounds for exclusion.

The Italian court, however, found that Article 63 of Directive 2014/24 does not set out any difference in rules and requires that the ancillary undertaking be replaced whenever it is the subject of mandatory grounds for exclusion, whatever they may be. Moreover, a tenderer is unable to monitor the authenticity and honesty of declarations made by the undertakings on whose capacities it intends to rely. It must therefore trust the declarations or documentation provided by those undertakings. The Del Debbio ad-hoc consortium also contended that it could not possibly have been aware of the criminal conviction of the owner of the ancillary undertaking, as it did not appear in the extract from the judicial record available for inspection by a private entity other than the person concerned.

Questions

The Council of State decided to refer the question to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The Italian court inquired whether Article 63 of the Public Sector Directive, along with the TFEU principles, prohibit the use of Italian law provisions regarding reliance on other entities' capacities and exclusion from award procedures outlined in the fourth subparagraph of Article 89(1) of the Public Procurement Code. According to this provision, if an ancillary undertaking makes false declarations about convictions in criminal proceedings, indicating serious professional misconduct, the contracting authority must automatically exclude the economic operator from the tendering procedure without permitting them to propose an alternative ancillary undertaking. This contrasts with situations in which relying entities fail to satisfy a selection criterion or face mandatory exclusion, allowing for the possibility of suggesting a replacement entity.

Instructions for resolving the case

Based on CJEU Case C-210/20 – Rad Service and others

Judgment of the Court (Ninth Chamber) of 3 June 2021

Rad Service Srl Unipersonale and Others v Del Debbio SpA and Others

Request for a preliminary ruling from the Consiglio di Stato

ECLI:EU:C:2021:445

Legal resources

Article 57(4)(6) and (7) and Article 63 of Directive 2014/24/EU

Judgement paragraphs 30-45

The CJEU first noted that the referred question suggests that national legislation, which prescribes that a tenderer must be automatically excluded when an entity on whose capacities it intends to rely has submitted false information, may run counter to the principle of non-discrimination, since the replacement of such an entity is permitted when the latter does not satisfy a relevant selection criterion or when it is subject to mandatory grounds for exclusion.

Member States enjoy some discretion in determining the conditions for applying facultative grounds for exclusion. In accordance with Article 57(4) and (7) of Directive 2014/24, Member States are free not to apply the facultative grounds for exclusion set out in that directive or to incorporate them into national law with varying degrees of rigour.

In these circumstances, the referred question must be rephrased such that the referring court is deemed to be asking, in essence, whether Article 63 of Directive 2014/24, read in conjunction with Article 57(4)(h) and (6) of that directive and in light of the principle of proportionality, must be interpreted as precluding national legislation under which the contracting authority must automatically exclude a tenderer from a public procurement procedure when an ancillary undertaking, on whose capacities that tenderer intends to rely, made an untruthful declaration about convictions in criminal proceedings that have become final, without being able to require or, at the very least, permit the tenderer to replace that entity, unlike in other cases when the entities on whose capacities the tenderer intends to rely fail to meet a relevant selection criterion or are subject to mandatory grounds for exclusion.

Article 63(1) of the Public Sector Directive provides the right for economic operators to utilise the capacities of other entities, regardless of their legal connections. To exercise this right, operators must submit an ESPD to the contracting authority, confirming compliance with the exclusion criteria outlined in Article 57. Subsequently, the contracting authority assesses whether the entities meet the selection criteria and examines potential grounds for exclusion, as stipulated in Article 57.

According to Article 63(1) of the Directive, the contracting authority has the option or may be obligated by its Member State to request that the economic operator replace the entity it intends to rely on. This applies when there are non-compulsory grounds for exclusion. The wording makes it clear that Member States can make it obligatory for the contracting authority to request the replacement, but they cannot take away the authority's option to request the replacement on its own initiative. The only replacement allowed by Member States is an obligation for the contracting authority to make the replacement.

This interpretation ensures that contracting authorities adhere to the overarching principle of proportionality. It emphasises that the rules implemented by Member States or contracting authorities must not exceed what is necessary to achieve the objectives outlined in the directive. Furthermore, Article 63 presupposes that before requiring the replacement of an entity, the contracting authority affords the tenderer and/or the entity an opportunity to submit corrective measures, demonstrating an effort to rectify any irregularities.

The CJEU emphasised the gravity of exclusion as the most severe measure that can be taken against an economic operator in a procurement procedure. The application of exclusion must be approached with the utmost care, particularly when the exclusion is imposed on the tenderer due to a failure by an entity on whose capacities the tenderer intends to rely, and over which it has no power of review.

In the present case, while the referring court corroborated the Del Debbio ad-hoc consortium’s claim that the criminal conviction of the owner of the ancillary undertaking on whose capacities it intended to rely did not appear in the extract from the judicial record available for inspection by private entities, with the result that, since Italian legislation did not allow the Del Debbio ad-hoc consortium to become aware of that conviction, the consortium cannot be accused of having failed to exercise due care and attention. Accordingly, in such circumstances, it would be contrary to the principle of proportionality to prevent replacement of the entity affected by grounds for exclusion.

The contracting authority's obligation to comply with the principles of equal treatment of tenderers and of transparency forms the cornerstone of EU rules on public procurement procedures. This obligation seeks to foster healthy and effective competition among participating undertakings. Consequently, it implies that tenderers should be on an equal footing both when formulating and assessing tenders. As a rule, negotiations or amendments after tender submission are prohibited, and this extends to requests to replace an entity on whose capacities a tenderer intends to rely.

In essence, a request for replacement must not lead to the submission of what basically appears to be a new tender, as this would materially amend the initial submission and violate the principles of equal treatment and transparency.

In its conclusions, the CJEU's answer to the referred question was that Article 63 of the Public Sector Directive, read in conjunction with Article 57(4)(h) of that directive and in light of the principle of proportionality, must be interpreted as overriding national legislation under which the contracting authority must automatically exclude a tenderer from a public procurement procedure when an ancillary undertaking on whose capacities that tenderer intends to rely made an untruthful declaration about criminal convictions that have become final, without being able to require or, at the very least, permit the tenderer to replace that entity.

Conclusion: Italian law stipulated that if an ancillary undertaking associated with a tenderer provided false information regarding criminal convictions, the contracting authority must automatically exclude the economic operator from the tendering procedure. The CJEU examined the question and observed the potential for discrimination and a lack of flexibility in Italian legislation. In its conclusions, the CJEU determined that Article 63 of the Public Sector Directive, in light of the principle of proportionality, prohibits national legislation from mandating automatic exclusion without providing the opportunity for the tenderer to replace the entity.

Similar cases

C-324/14 *Dariusz Apelski* (EU:C :2016 :214): The CJEU confirmed the right of economic operators to rely on capacities of other entities for a particular contract, subject to proving the availability of necessary resources. The CJEU allows for flexibility in establishing links with other entities, but emphasises the need for tangible evidence of availability of resources to execute the terms of the contract.

C-387/14 *Esaprojekt* (EU:C:2017:338): In this case, a tenderer wanted to supplement its bid after the contracting authority found its initial bid did not meet the criteria. According to the CJEU, an economic operator can rely on the experience of the group of undertakings if it can prove it will have the necessary resources for contract execution. However, the economic operator's experience within the group must be assessed in relation to its actual contribution to execution of the contract. Economic operators cannot combine the knowledge and experience of two entities if they individually lack the capacities required for a specific contract, when the contract cannot be divided and must be performed by a single operator.

Further reading

SIGMA Public Procurement Brief No. 7, Selecting Economic Operators
OECD (2016), "Selecting Economic Operators", *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris.

Case study 2

Facts and legal dispute

On 18 May 20xx, the competent department of the City of Wrocław (Poland) initiated a restricted procedure to award a public contract relating to the partial construction of a bypass. That project, the cost of which was approximately EUR 65 million, benefited from EU financial support, co-financed by the Cohesion Fund.

Of the seven operators that applied to participate in the procedure, five were invited to submit a tender. The tender specifications sent to those five operators contained a stipulation worded as, “The economic operator is obliged to perform at least 25% of the works covered by the contract using its own resources”. On 1 August 20xx, the City of Wrocław concluded a public contract with the operator it had selected.

Following an administrative procedure subsequent to performance of the contract, brought forth by the national authority responsible for monitoring the use of EU financial assistance (the Centre for EU Transport Projects, CUPT), the City of Wrocław was subject to a claim for financial correction of EUR 1 960 000, corresponding to 5% of the amount of costs borne by public funds, as a result of the alleged irregularity. CUPT took the view that the City of Wrocław had infringed upon the principle of fair competition by imposing the 25% requirement. According to CUPT, neither EU law nor national law authorised such a limitation on subcontracting. The Minister for Regional Development rejected the City of Wrocław’s appeal of the financial correction.

The City of Wrocław then appealed this decision to the Regional Administrative Court in Warsaw. The City of Wrocław stated that it had a legitimate interest in ensuring that the successful tenderer itself had the technical capacities and human resources necessary to implement at least part of the public works contract because of the difficulties in verifying subcontractors’ technical capacities and financial situations when comparing tenders.

Questions

The Polish administrative court decided to refer the case to the CJEU, requesting a preliminary ruling on the question, “In light of Article 71 paragraph 2 of Directive 2014/24, is the contracting authority allowed to stipulate in the tender specifications that the economic operator is required to perform at least 25% of the works covered by the contract using its own resources?”.

Instructions for resolving the case

Based on CJEU case

Judgment of the Court (Third Chamber) of 14 July 2016

Wrocław - Miasto na prawach powiatu v Minister Infrastruktury i Rozwoju

Request for a preliminary ruling from the Wojewódzki Sąd Administracyjny w Warszawie

ECLI:EU:C:2016:562

Opinion of Advocate General Sharpston delivered on 17 November 2015

ECLI:EU:C:2015:761

Legal resources

Article 63 and Articles 70-71 of Directive 2014/24

Judgement paragraphs 30-37

The referring court asked, in essence, whether the Public Sector Directive must be interpreted as meaning that a contracting authority is authorised to require, by means of a stipulation in the contract documents for a public works contract, that the future successful tenderer for that contract perform a certain percentage of the works under that contract using its own resources.

According to Article 71 paragraph 1 of Directive 2014/24, the contracting authority may ask or may be required by a Member State to ask tenderers to indicate in their tenders any share of the contract they may intend to subcontract to third parties and any proposed subcontractors. As the Court stated in paragraph 31 of its judgment of 10 October 2013 in *Swm Costruzioni 2 and Mannocchi Luigino* (C-94/12), that article provides for the use of subcontractors without imposing any limit in that regard.

In contrast, Article 63(1) of the directive provides the possibility for tenderers to prove that they meet the minimum levels of technical and professional capacities required by the contracting authority by relying on the capacities of third-party entities, in so far as they establish that they have at their disposal the means necessary to execute the contract if it is awarded to them. Article 63(1) of the directive explicitly confirms that an economic operator may, when appropriate and for a particular contract, rely on the economic, financial, technical and/or professional capacities of other entities, regardless of the legal nature of the links it has with them. Consequently, a party may not be eliminated from a procedure to award a public service contract solely because it proposes to use resources not its own but belonging to one or more other entities to carry out the contract. This means that the possibility to use subcontractors for the performance of a contract is, in principle, unlimited (see also the Opinion of Advocate General Sharpston, paragraph 31).

Nevertheless, when the procurement documents require tenderers to indicate in their tenders the share of the contract they intend to subcontract and the proposed subcontractors, if the contracting authority cannot verify during the tender examination and contractor selection stage the subcontractors' capacities to perform essential parts of the contract, the contracting authority is entitled to prohibit the use of those subcontractors (see the 18 March 2004 judgment in *Siemens and ARGE Telekom*, C-314/01, paragraph 45).

The Advocate General Opinion explicitly refers to Article 63(2) of the 2014 Directive, which did not have an equivalent in the previous Public Procurement Directive 2004/18. According to this provision, contracting authorities may require certain critical tasks to be performed directly by the tenderer itself or, when the tender is submitted by a group of economic operators, by a participant in that group. While this provision now expressly allows restrictions on subcontracting during the examination and selection phase, such restrictions are acceptable only in so far as they concern well-defined tasks regarded as "critical" for implementing the contract, and not just unspecified parts of the contract defined only as a percentage of the overall contract value (Opinion of Advocate General Sharpston, paragraph 38-39).

The 25% requirement as defined by the City of Wroclaw in the current case, which imposes limitations on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, is not related to the possibility of verifying the capacities of potential subcontractors and neglects any mention of the essential character of the tasks concerned. In all these respects, such a stipulation is incompatible with the Public Sector Directive.

Conclusion: Therefore, according to the CJEU, the answer to the question is that Directive 2014/24 must be interpreted as meaning that a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract.

Similar cases

C-324/14 *Dariusz Apelski* (EU:C:2016:214): The CJEU confirmed the right of economic operators to rely on capacities of other entities for a particular contract, subject to proving the availability of necessary resources. The CJEU allowed for flexibility in establishing links with other entities, but emphasised the need for tangible evidence of availability of resources to execute the terms of the contract.

C-387/14 *Esaprojekt* (EU:C:2017:338): In this case, a tenderer wanted to supplement its bid after the contracting authority found its initial bid did not meet the criteria. According to the CJEU, an economic operator can rely on the experience of a group of undertakings if it can prove it will have the resources necessary to execute the contract. However, the economic operator's experience within the group must be assessed in relation to its actual contribution to execution of the contract. Economic operators cannot combine the knowledge and experience of two entities if they individually lack the capacities required for a specific contract, when the contract cannot be divided and must be performed by a single operator.

Further reading

SIGMA Public Procurement Brief No. 37, Subcontracting
OECD (2016), "Subcontracting", *SIGMA Public Procurement Briefs,* No. 37, OECD, Paris.

7 Exclusion of economic operators

Introduction

It is important for a contracting authority to ensure that it will enter into a contract with a suitable economic operator that has the ability to perform and complete the contract.

The selection of suitable economic operators generally involves two distinct phases. First, the contracting authority will establish whether there are grounds for excluding economic operators from participating. The contracting authority then considers whether the economic operators that have not been excluded meet the relevant requirements to be selected as tenderers. The economic operators that have been selected will then be invited to submit tenders, negotiate, or participate in dialogue. In the case of the open procedure, the tenders they have already submitted will be evaluated. There are separate chapters in this casebook covering the two phases of exclusion and selection.

The Public Sector Directive[23] permits the exclusion of economic operators from participation in a procurement process when specified grounds for exclusion apply. The impact of exclusion on an economic operator is potentially very significant, possibly affecting both the current and future prospects of the operator. The inappropriate exclusion of an economic operator can also adversely affect competition and have an impact on value-for-money outcomes for the purchaser. The Public Sector Directive thus seeks to balance the interests of both the contracting authority purchaser and the economic operator to whom grounds for exclusion apply.

The grounds for exclusion are listed in the Public Sector Directive. The two types of grounds for exclusion, mandatory and discretionary (or optional), are described below. Member States must include the listed mandatory grounds for exclusion in their implementing legislation and they may choose to include some or all the discretionary grounds. Member States have the option to convert some or all the discretionary grounds for exclusion into mandatory grounds. The Public Sector Directive also provides some derogations from application of grounds for exclusion, which Member States may choose to adopt.

Member States have some discretion in determining the requirements governing application of the discretionary grounds for exclusion. They must, however, ensure that national implementing rules comply with relevant Treaty on the Functioning of the European Union (TFEU) and general law principles, as well as with the Public Sector Directive. When the Public Sector Directive does not cover an issue, or does not cover an issue in detail, Member States must ensure that the rules and procedures they implement are non-discriminatory, support the freedom of establishment and the freedom to provide services, ensure equal treatment and mutual recognition, and are transparent and proportionate.

National implementing rules must, in particular, determine the period of exclusion. For mandatory grounds, the period of exclusion must not exceed five years from the date of conviction by final judgement (when

[23] 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 [2014] OJ L94/65.

the period of exclusion has not been set by the final judgement itself). For discretionary grounds, the period of exclusion must not exceed three years from the date of the relevant event.

The Public Sector Directive includes important provisions on "self-cleaning", which give an economic operator the right to provide evidence of measures it has taken to demonstrate its reliability, despite the existence of relevant grounds for exclusion. The contracting authority is obliged to consider the evidence of measures taken by the economic operator, taking into account the gravity and particular circumstances of the criminal offence or misconduct. If such evidence is considered as sufficient by the contracting authority, the economic operator is not excluded from the procurement procedure. The right to "self-cleaning" applies to all grounds for exclusion, apart from when an economic operator has been excluded from participating in procurement or concession award procedures by way of a final judgment, wherein the judgment designates a period of exclusion.

The Public Sector Directive provides that economic operators may submit, and contracting authorities must accept, a standard form of self-declaration confirming that no grounds for exclusion apply. The contracting authority verifies evidence in support of the self-declaration for the successful tenderer only, prior to final awarding of the contract. The standard EU self-declaration form, the European Single Procurement Document (ESPD), should be integrated with national eProcurement services where these exist.

e-Certis

The European Commission's eCertis service is a useful resource to help businesses and contracting authorities identify certificates and other types of evidence requested in public procurement procedures across EU Member States and European Economic Area (EEA) countries. It includes country-by-country listings of selection criteria (including exclusion grounds) and supporting certificates/evidence required, and it can be searched using various search criteria (https://ec.europa.eu/tools/ecertis/#/homePage).

The Court of Justice of the European Union and grounds for exclusion

Grounds for exclusion and related provisions have been included in the procurement directives for many years and have become more detailed with development of the directives. For instance, the 2014 Public Sector Directive expanded the list of grounds for exclusion. It also introduced the principle of self-declarations and "self-cleaning" provisions, which were not included in previous procurement directives.

The Court of Justice of the European Union (CJEU) has frequently considered the issue of exclusion of economic operators. It has consistently emphasised the importance of considering exclusion on a case-by-case basis and has often held that national legislation or practices are not permitted when they require or have the effect of creating circumstances in which exclusion is automatic.

Provisions on exclusion in the Public Sector Directive

Mandatory grounds for exclusion listed in Article 57(1) of the Public Sector Directive

Under Article 57(1) of the Public Sector Directive, contracting authorities are obliged to exclude from participation in a public contract those economic operators known to have been convicted by final judgement for one or more of the following criminal activities[24]:

- participation in a criminal organisation
- corruption
- fraud relating to the protection of EU financial interests
- terrorist offences or offences likened to terrorist activities
- money laundering or terrorist financing

[24] Article 57(1) of the Public Sector Directive defines the offences in more detail.

- child labour and other forms of human trafficking.

The mandatory grounds for exclusion support EU policies linked to the fight against fraud, corruption, terrorism and organised crime.

Exclusion on grounds of failure to fulfil obligations to pay taxes and social security contributions listed in Article 57(2) the Public Sector Directive

Article 57(2) of the Public Sector Directive distinguishes between mandatory and optional grounds relating to obligations to pay taxes and social security contributions:

- **Mandatory grounds:** An administrative or judicial decision with final and binding effect has established a breach of obligations relating to the payment of taxes or social security contributions. In this case, a contracting authority is obliged to exclude the economic operator from participation in a procurement procedure.
- **Optional grounds:** No final and binding decision exists establishing that a breach of obligations relating to the payment of taxes or social security contributions has occurred.

These grounds for exclusion will no longer apply once the economic operator has paid its obligations or entered into a binding arrangement with a view to paying the obligations due.

Discretionary grounds for exclusion listed in Article 57(4) of the Public Sector Directive

Under Article 57(4) of the Public Sector Directive, contracting authorities are permitted, but not obliged, to exclude economic operators that, in summary:

- Have violated applicable obligations in the fields of environmental, social and labour law, proven by any appropriate means the contracting authority can demonstrate.
- Are bankrupt or the subject of insolvency or are under any analogous situation, in accordance with national laws or regulations.
- Have been guilty of grave professional misconduct that renders their integrity questionable, proven by any means the contracting authority can demonstrate.
- Have entered into agreements with other economic operators aimed at distorting competition, when the contracting authority has sufficiently plausible indications to so conclude.
- Are in a situation of conflict of interest[25] that cannot be effectively remedied by other, less intrusive measures.
- Have prior involvement in preparing the procurement procedure, which has led to a distortion of competition that cannot be remedied by other, less intrusive measures.
- Have shown significant or persistent deficiencies in performing a substantive requirement of a prior public contract, a prior utility contract or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions.
- Have been guilty of serious misrepresentation in supplying information required to verify the absence of grounds for exclusion or the fulfilment of the selection criteria, have withheld such information, or are not able to submit the supporting documents.
- Have undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that could give it an advantage in the procurement procedure, or to negligently provide misleading information that may have a material influence on the decision.

Period of exclusion in Article 57(7) of the Public Sector Directive

National implementing rules must determine the period of exclusion. Article 57(7) of the Public Sector Directive requires that the period of exclusion not exceed five years from the date of conviction by final

[25] Article 24.

judgement (when the period of exclusion has not been set by the final judgement itself) in the case of mandatory grounds for exclusion; and three years from the date of the relevant event in the case of discretionary grounds for exclusion.

Self-cleaning measures in Article 57(6) of the Public Sector Directive

Under Article 57(6) of the Public Sector Directive, any economic operator in one of the situations that constitute mandatory or discretionary grounds for exclusion may provide evidence to the effect that the measures it has taken are sufficient to demonstrate its reliability, despite the existence of relevant grounds for exclusion.

Self-cleaning measures listed in Article 57(6) of the Public Sector Directive refer to economic operators paying or undertaking to pay compensation for any damages caused by the criminal offence; clarifying facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and/or taking concrete and appropriate technical, organisational and personnel measures to prevent further criminal offences. Measures taken by economic operators must be evaluated, taking the gravity and particular circumstances of the criminal offence or misconduct into account. If the measures taken by the economic operator are considered sufficient by the contracting authority, the economic operator is not to be excluded from the procurement procedure. If the measures taken are considered insufficient, the contracting authority must provide the economic operator with a statement of reasons for that decision.

Self-cleaning is not available to economic operators that have been excluded from participating in procurement or concession award procedures by way of a final judgement, for the period of exclusion resulting from that judgement.

Case studies on exclusion

These case studies on exclusion are based on CJEU judgments on issues arising from the interpretation and application of provisions of the Public Sector Directive concerning exclusion on grounds of subcontractor failure to comply with environmental or social obligations under Article 18 of the Public Sector Directive, anti-competitive behaviour and poor performance in a prior public contract. One of the case studies looks specifically at the self-cleaning provisions in the Public Sector Directive.

Case study 1

Contract for school meals: Facts

Contract for 2016/2017: In March 2016, the Municipality of Naples advertised a contract for the provision of school catering services for the school year 2016-2017, from 1 September 2016 to 30 June 2017. The contract was divided into 10 lots, with each corresponding to one of the districts of the Municipality of Naples.

On 1 May 2016, the Municipality of Naples awarded Sirio a contract for two of the lots, for District A and District B (the 2016-17 A&B contract). The total value of the 2016-17 A&B contract was approximately EUR 1.1 million.

On 9 May 2017, the Municipality of Naples terminated the 2016-17 A&B contract with Sirio early. The reason for early termination of the contract was an incident of food poisoning in a school canteen in District B, affecting both children and members of staff. The Regional Environment Agency confirmed that the food poisoning had been caused by coliform bacteria in food served in the school canteen. A short-term contract for school catering services for District A and District B was awarded to another school catering service provider, Meca, to cover the period to the end of the school year. Meca had been ranked second in the procurement process for the 2016-17 A&B contract.

Legal action contesting the decision to terminate the contract: Sirio immediately lodged an action in the local district court contesting the decision by the Municipality of Naples to terminate the 2016-17 A&B contract early.

Contract for 2017-2018: On 2 May 2017, the Municipality of Naples advertised a contract for the provision of school catering services for the 2017-2018 school year, from 1 September 2017 to 30 June 2018 (the 2017-18 contract). The 2017-18 contract was divided into 10 lots, each corresponding to one of the districts of the Municipality of Naples. Both Meca and Sirio submitted tender documents for the 2017-18 contract. In its tender documents, submitted on 25 May 2017, Sirio confirmed that the Municipality of Naples had terminated the 2016-2017 A&B contract early and stated that an action contesting the early termination of that contract had been lodged with the District Court, Naples, on 31 May 2017. The contracting authority authorised Sirio to proceed with its participation in the procurement procedure for the 2017-18 contract, without making any assessment of the seriousness of the breach of the 2016-17 A&B contract.

Legal dispute (the appeal)

Meca issued legal proceedings in the Regional Administrative Court, Campania, challenging the contracting authority's decision to permit Sirio to participate in the procurement procedure for the 2017-18 contract.

Meca argued that Sirio should not have been authorised to participate in the tender procedure because of early termination of the 2016-17 A&B contract due to food poisoning. Meca complained that the Municipality of Naples did not assess the gravity of Sirio's breach of obligations under the 2016-17 A&B contract.

The Municipality of Naples considered that, according to Article 80(5)(c) of the Italian Public Procurement Code (see below), the action brought by Sirio before the District Court, Naples, challenging the early termination of the 2016-17 A&B contract, prevented the Municipality of Naples from conducting an assessment of Sirio's reliability.

Meca argued, in response, that the action brought by Sirio before the District Court, Naples, could not divest the contracting authority of the power to conduct an assessment of Sirio's reliability. Thus, in view

of the food poisoning that occurred in May 2017 and led to early termination of the 2016-17 A&B contract, the Municipality of Naples should not have automatically allowed Siro to participate in the procurement procedure for the 2017-18 contract.

Italian Public Procurement Code

The Italian Public Procurement Code transposed and expanded upon the provisions of Article 57(4) of the Public Sector Directive and made some of the discretionary grounds for exclusion mandatory, including exclusion on the grounds of grave professional misconduct. Article 80(5)(c) of the Italian Public Procurement Code reads as:

> A.80(5) The contracting authorities shall exclude an economic operator from participation in the tendering procedure in any of the following situations:
> […]
> (c) the contracting authorities demonstrate, by appropriate means, that the economic operator has committed grave professional misconduct such as to render its integrity or reliability questionable. Grave professional misconduct shall include: major deficiencies in the performance of a prior public contract where those deficiencies have led to early termination of those contracts that has not been challenged in the court or upheld following legal proceedings, to damages or to another comparable sanction.

Questions

Question 1

Look carefully at recital 101 and Article 57 of the Public Sector Directive. Answer the following quick questions, giving reasons and citing relevant provisions of the Public Sector Directive to support your answers.

1.1 Are Member States permitted to specify implementing provisions for Article 57(4) of the Public Sector Directive in their national law?

1.2 If yes, does the level of discretion available to Member States to specify implementing provisions vary for different grounds for exclusion? Is there more discretion available for some grounds for exclusion than for others?

1.3 Who determines whether an economic operator must be excluded from a particular procurement procedure on the grounds of prior poor performance under Article 57(4)(g) of the Public Sector Directive?

Question 2

Consider the wording of Article 80(5)(c) of the Italian Public Procurement Code and the arguments made by Meca and by the Municipality of Naples in the appeal to the Regional Administrative Court, Campania.

Is Article 80(5)(c) of the Italian Public Procurement Code compatible with Article 57(4)(c) and (g) and Article 57(6) of the Public Sector Directive? Please provide reasons for your opinion.

Instructions for resolving the case

Based on CJEU Case C-41/18 – Meca
Meca Srl v Comune di Napoli (C-41/18, ECLI:EU:C:2019:507)

Advocate General Opinion (C-41/18, ECLI:EU:C:2019:183)

Request for preliminary ruling from Tribunale Amministrativo Regionale della Campania (Regional Administrative Court, Campania)

Legal resources

Provisions of the Public Sector Directive considered:

Recital 101

Article 57

Question 1
Look carefully at recital 101 and Article 57 of the Public Sector Directive. Answer the following quick questions, giving reasons and citing relevant provisions of the Public Sector Directive to support your answers.

1.1 Are Member States permitted to specify implementing provisions for Article 57(4) of the Public Sector Directive in their national law?

Yes, Article 57(7) of the Public Sector Directive provides that, "By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article". Member States are thus required to specify implementing conditions.

1.2 If yes, does the level of discretion available to Member States to specify implementing provisions vary for different grounds for exclusion? Is more discretion available for some grounds for exclusion than for others?

Judgement paragraphs 24 to 34 and Advocate General Opinion paragraphs 31 to 36

Yes, the level of discretion available to Member States to specify implementing provisions varies. In the judgement on which this case study is based, the CJEU confirmed that, as regards the optional grounds for exclusion, the legislator differentiates between grounds for exclusion. The CJEU referred to an earlier decision based on provisions of the 2004 Public Sector Directive[26] (C-465/11 *Forposta and ABC Direct*) (*Forposta*) which confirmed that Member States have more discretion when the optional grounds for exclusion refer to Member States specifying implementing conditions in national law and regulations.

In *Forposta,* the CJEU concluded that when optional grounds for exclusion do not refer specifically to implementing conditions, it is "in order to circumscribe more strictly the discretion of the Member States", with the wording of the optional grounds for exclusion determining the scope of that exclusion.

According to the CJEU, the 2004 Public Sector Directive referred to implementing conditions in national law and regulations in five out of seven optional grounds for exclusion, but the 2014 Public Sector Directive refers to implementing conditions in only one optional ground for exclusion in Article 57(4)(b) of the Public Sector Directive. Thus, the discretion available to Member States to

[26] Directive 2004/18 on the Co-ordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts [2004] OJ L134/114.

specify implementing provisions for Article 57(4)(c) of the Public Sector Directive is circumscribed more strictly.

Member States must also ensure that, when specifying implementing provisions for optional grounds for exclusion, they do not distort the grounds or ignore the objectives and guiding principles that underpin each of those grounds within the framework provided by the Public Sector Directive.

1.3 Who determines whether an economic operator must be excluded from a particular procurement procedure on the grounds of prior poor performance under Article 57(4)(g) of the Public Sector Directive?

It is the contracting authority that determines whether an economic operator must be excluded from a particular procurement procedure on the grounds of prior poor performance under Article 57(4)(c) of the Public Sector Directive. Recital 101 states that contracting authorities have the option to exclude economic operators that have proven unreliable. Article 57 also refers to exclusion by contracting authorities. Paragraph 33 of the judgement confirms that "the EU legislature intended to confer on the contracting authority, and on it alone, the task of assessing whether a candidate or tenderer must be excluded from a procurement procedure during the stage of selecting tenderers".

Question 2

Consider the wording of Article 80(5)(c) of the Italian Public Procurement Code and the arguments made by Meca and the Municipality of Naples in the appeal to the Regional Administrative Court, Campania.

Is Article 80(5)(c) of the Italian Public Procurement Code compatible with Article 57(4)(c) and (g) and Article 57(6) of the Public Sector Directive? Please provide reasons for your opinion.

Judgement paragraphs 24 to 42

The CJEU started by outlining the underlying considerations upon which its judgement was based: the discretion available to Member States when specifying implementing provisions for optional grounds for exclusion, confirming that the contracting authority makes decisions on exclusions; the intention underpinning grounds for exclusion, i.e. integrity and reliability assessments; the timing of exclusion decisions; and the importance of the principle of proportionality in this context.

The CJEU confirmed that the Public Sector Directive restricts the discretion of Member States when specifying implementing provisions in national law or regulations for the optional grounds for exclusion listed in Article 57(4) of the 2014 Directive (see Question 1.2 above). The CJEU also confirmed that it is contracting authorities that are entrusted with determining whether an economic operator must be excluded (see Question 1.3 above).

The CJEU went on to note that the option to exclude a tender from a procurement procedure is particularly intended to enable it to assess the integrity and reliability of each of the tenderers, as is apparent from Article 57(4)(c) and (g) of the Public Sector Directive. These two grounds for exclusion are based on an essential element of the relationship between the successful tenderer and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority's trust is founded.

The CJEU also commented that Article 57(5) of the Public Sector Directive stipulates that contracting authorities must be able to exclude an economic operator "at any time during the procedure", not only after a court has delivered its judgment. The CJEU adduced this as additional evidence of the EU legislature's intention to enable the contracting authority to conduct its own assessment of the acts the economic operator has committed or omitted either before or during the procurement procedure, in any of the cases referred to in Article 57(4) of the Public Sector Directive.

The CJEU noted that if a contracting authority were to be automatically bound by an assessment conducted by a third party, "it would probably be difficult for it to pay particular attention to the principle of proportionality when applying the optional grounds for exclusion". Recital 101 of the Public Sector Directive provides that the principle of proportionality implies, particularly, that before deciding to exclude an economic operator, the contracting authority should consider the minor nature of irregularities committed or the repetition of minor irregularities.

The CJEU analysed the practical impact of Article 80(5)(c) of the Italian Public Procurement Code. It concluded that the discretion conferred on the contracting authority by Article 57(4) of the Public Sector Directive – to decide whether or not to exclude an economic operator from participation in a procurement procedure – "can be hamstrung merely because a tenderer brings and action challenging the early termination of a prior public contract awarded to it, even though its conduct appeared sufficiently deficient as to warrant that early termination".

This is because in Article 80(5)(c) of the Italian Public Procurement Code, the definition of "grave professional misconduct" justifying exclusion refers to "major deficiencies in the performance of a prior public contract where those deficiencies have led to early termination of those contracts" but continues with the proviso that the early termination "has not been challenged in the court …". This proviso is an elaboration in the national law and is not included in Article 57 of Directive 2014/14. Thus, under the Italian Public Procurement Code, when early termination of a contract has been challenged in court, the definition of grave professional misconduct justifying exclusion does not apply. This was the situation in this case because Sirio had issued a challenge before the District Court, Naples, on the decision to terminate the 2016-17 A&B contract early.

In the opinion of the CJEU, Article 80(5)(c) of the Italian Public Procurement Code is also likely to conflict with the self-cleaning provisions in Article 57(6) of the Public Sector Directive. According to the CJEU, "such a rule … clearly does not encourage a successful tenderer to whom a decision to terminate a prior public contract early is addressed to take corrective measures". The corrective measures emphasise the importance attached to the reliability of the economic operator, "as that factor profoundly influences the grounds for exclusion that relate to a tenderer's subjective characteristics".

Conclusion: Article 80(5)(c) of the Italian Public Procurement Code is not compatible with the Public Sector Directive because, according to the CJEU, lodging a legal challenge to a contracting authority's decision to terminate a public contract early on account of major deficiencies in performance cannot prevent the contracting authority from assessing the terminated operator's reliability in another tendering procedure.

Similar Cases

C-465/11 *Forposta and ABC Direct Contact* (EU:C:2012:801): This case confirmed that a judgment having the force of *res judicata* is not required to prove professional misconduct within the meaning of grounds for exclusion.

C-171/15 *Connexxion Taxi Services* (EU:C:2016:948): Regarding the level of discretion of Member States when implementing optional grounds for exclusion, the directive does not provide for uniform application. Member States may choose not to apply optional grounds for exclusion or incorporate them all into national law at varying degrees of rigour.

Further reading

SIGMA Public Procurement Brief No. 7, Selecting Economic Operators
OECD (2016), "Selecting Economic Operators", *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

SIGMA Public Procurement Brief No. 24, Use of Official Automatic Exclusion Lists in Public Procurement
OECD (2016), "Use of Official Automatic Exclusion Lists in Public Procurement", *SIGMA Public Procurement Briefs,* No. 24, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-24-200117.pdf.

SIGMA Paper No. 56, Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures
Lemke, M. et al. (2018), "Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures", *SIGMA Papers*, No. 56, OECD, Paris, https://doi.org/10.1787/20786581.

Selected Judgements of the CJEU (2006-2014), Chapter 5
OECD (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD, Paris, https://www.sigmaweb.org/publications/judgements-courtjustice-31july2014-eng.pdf.

Case study 2

Contract for road construction works: Facts

On 3 October 2014, Romania's Municipality of *Râmincu Vâlcea* (the Municipality) awarded a works contract for the restoration and modernisation of a leisure facility (leisure facility contract) to a consortium of which Delta was lead contractor (Consortium No. 1). On 17 June 2017, the Municipality terminated the contract early on the grounds that Consortium No. 1 had used a subcontractor without the Municipality's prior authorisation.

On 25 July 2017, the Municipality lodged a non-compliance report on the national Electronic Public Procurement System (EPPS) platform. The non-compliance report stated that the leisure facility contract had been terminated early on account of Consortium No. 1's misconduct and that the early termination of the leisure facility contract caused the Municipality losses of approximately EUR 521 000. Delta subsequently brought two actions before the Romanian courts against the early termination decision and the non-compliance report.

On 27 July 2017, the Romanian National Roads Authority (CNAIR) published a notice in the *Official Journal of the European Union* for a construction project to widen a national road, with an estimated value of approximately EUR 47 million. An open procedure was used and CNAIR proposed to award a framework agreement for a period of 84 months. A consortium formed by Delta, Aleandri spA and Luca Way Srl (Consortium No. 2) submitted a tender for the road construction project. Tenderers were required to submit an ESPD self-declaration with their tender. Delta's ESPD declared that it was not affected by any of the grounds for exclusion listed in the Public Sector Directive.

CNAIR searched the EPPS platform for non-compliance reports on all tenderers seeking to participate in the procurement process for the road construction project. It obtained and considered the non-compliance report filed by the Municipality on the early termination of the leisure facility contract with Consortium No.1. CNAIR then sought clarifications from both the Municipality and Delta concerning the non-compliance report on the early termination of the leisure facility contract.

In reply to the request for clarification from CNAIR, the Municipality stated that early termination of the leisure facility contract was justified because, during the contract's execution, significant portions of the work had been subcontracted without the Municipality's prior authorisation.

In Delta's reply to CNAIR's request for clarification, it made two points: (1) even if the non-compliance report reflects reality, it does not prove that Delta committed serious breaches of its contractual obligations on several occasions; and (2) it had brought two actions before Romanian courts against the non-compliance report and the decision to terminate the leisure facility contract early. Delta confirmed that the two court actions were still pending.

In light of the replies obtained, the CNAIR evaluation committee concluded that Delta had failed to show that the non-compliance report had been suspended or annulled. In addition, CNAIR noted Delta's declaration in the ESPD that no grounds for exclusion applied to Delta. The evaluation committee concluded that the grounds for exclusion in Article 57(4)(g) (transposed into national legislation) applied to Delta. On 18 December 2017, CNAIR made the decision to exclude Consortium No. 2 from the procurement process for the road construction project.

Delta then submitted a request to CNAIR, asking it to reconsider its decision to exclude Consortium No. 2 and to conduct a fresh assessment of the tender documents submitted by Consortium No. 2. CNAIR did not respond to this request.

Legal dispute (the complaint and appeal)

Complaint: On 8 January 2018, Delta lodged a complaint with the National Council for the Resolution of Complaints (CNSC) objecting to CNAIR's decision to exclude Consortium No. 2. On 2 February 2018, the CNSC rejected Delta's complaint on the basis that it did not have the power to analyse the lawfulness of the non-compliance report filed by the Municipality, nor to ascertain any misconduct in the performance of the leisure facility contract. CNAIR stated, however, that since the report had not been annulled by final judgment, it benefited from a presumption of lawfulness and was thus proof of serious breach of contractual obligations under the leisure facility contract.

The CNSC noted that CNAIR had not relied solely on the non-compliance report to exclude Consortium No. 1. CNAIR had taken steps to assess the information in the non-compliance report and relied on observations from both Delta and the Municipality. The CNSC also noted that Consortium No. 2 relied solely on its claim alleging that the non-compliance report was unlawful, without furnishing evidence of its own reliability to disprove grounds for exclusion in accordance with the self-cleaning provisions in Article 57(6) of the Public Sector Directive (transposed into national legislation).

Delta sought to annul the CNSC decision by initiating proceedings in the Court of Appeal, Bucharest (the Court of Appeal).

Appeal: Delta disputed CNAIR's right to exclude Consortium No. 2 from the procurement process for the road construction project based on early termination of the leisure facility contract by the Municipality. Delta argued in its appeal that early termination on the grounds that part of the work was subcontracted without the Municipality's prior authorisation was a minor irregularity and not a breach of a principal obligation of the contract. Consequently, such an irregularity should lead to an economic operator's exclusion only in exceptional circumstances.

Delta supported this argument by referring to recital 101 of the Public Sector Directive and a previous judgment of the CJEU on grounds for exclusion for "grave misconduct" in Article 57(4)(h). It argued that conduct by an economic operator justifying exclusion must denote wrongful intent or negligence of a certain gravity. Delta argued that this requirement for "a certain gravity" also applies to the exclusion grounds in Article 57(4)(g) of the Public Sector Directive, and that the grounds for early termination of the leisure facility contract were not of sufficient gravity.

The Court of Appeal submitted a request for a preliminary ruling to the CJEU.

Questions

Question 1: Is CNAIR obliged to exclude Consortium No. 2 on the grounds of prior poor performance under Article 57(4)(g) of the Public Sector Directive, based on evidence provided in the non-compliance report on the leisure facility contract and clarifications received from Delta and CNAIR on the non-compliance report?

Question 2: In your opinion, does subcontracting without the contracting authority's prior authorisation, and consequent early termination of that contract, constitute a significant or persistent deficiency in the performance of a substantive requirement of that public contract, justifying exclusion from participation in subsequent procurement procedures?

Question 3: Does Delta's failure to declare early termination of the leisure facility contract in its ESPD constitute conduct covered by Article 57(4)(j) of the Public Sector Directive?

Instructions for resolving the case

Based on CJEU Case C-267/18 – Delta
Delta Antrepriză de Construcţii şi Montaj 93 SA v Compania Naţională de Administrare a Infrastructurii

Rutiere SA (C-267/18, ECLI:EU:C:2019:826)

Advocate General Opinion (C-267/18, ECLI:EU:C:2019:393)

Request for preliminary ruling from Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania)

Legal resources

Provisions of Public Sector Directive considered:

Recital 101

Article 57

Question 1: Is CNAIR obliged to exclude Consortium No. 2 on the grounds of prior poor performance under Article 57(4)(g) of the Public Sector Directive, based on evidence provided in the non-compliance report on the leisure facility contract and clarifications received from Delta and CNAIR on the non-compliance report?

Judgement paragraphs 25 to 30

The CJEU first confirmed that the EU legislature intended to confer on the contracting authority the task of assessing whether a candidate or tenderer must be excluded from a public procurement procedure during the stage of selecting tenderers. This is clear from the wording of Article 57(4) of the Public Sector Directive and had previously been confirmed in Case C-41/18 *Meca* (ECLI:EU:C:2019:507 [Case Study 1]).

The CJEU made it clear that CNAIR was not automatically bound by the Municipality's assessment on the delivery of a prior public contract, and that CNAIR was required to make its own assessment, paying particular attention to the principle of proportionality and examining the facts in detail to come to its own conclusion.

The option available to any contracting authority to exclude a tenderer from a procurement procedure is mainly intended to enable it to assess the integrity and reliability of each of the tenderers. Article 57(4)(g) of the Public Sector Directive, read in conjunction with recital 101 of the Public Sector Directive, is based on an essential element in the relationship between the successful tenderer and the contracting authority, namely the successful tenderer's reliability, upon which the contracting authority's trust is founded.

The establishment of a relationship of trust between a contracting authority and successful tenderer assumes that the contracting authority is not automatically bound by an assessment conducted by another contracting authority in the context of delivery of an earlier public contract. The contracting authority must pay particular attention to the principle of proportionality when applying optional grounds for exclusion. This principle requires the contracting authority to examine and assess the facts for itself. In this regard, it is clear from the wording of Article 57(4)(g) of the Public Sector Directive that the irregularity must have been serious enough to justify early termination. It follows that the contracting authority cannot automatically infer, from another contracting authority's decision to terminate a prior public contract early on grounds of failure to obtain prior authorisation for subcontracting, that there have been "significant or persistent deficiencies" in the performance of a "substantive requirement" of the contract such as to break the relationship of trust.

Question 2: In your opinion, does subcontracting without the contracting authority's prior authorisation, and consequent early termination of that contract, constitute a significant or persistent deficiency in the performance of a substantive requirement of that public contract, justifying exclusion from participation in subsequent procurement procedures?

Judgement paragraphs 31 to 33

The CJEU held that CNAIR must determine whether, in its view, the circumstances leading to termination of the leisure facility contract constituted a significant deficiency and, if so, whether that deficiency would

affect performance of a substantive requirement of Consortium No. 1. This requires evaluation of the significance of the part of the contract that was subcontracted, and determination of whether the subcontractor's involvement had an adverse impact on performance of the leisure facility contract or amounted to a substantial amendment of the tender.

CNAIR must also examine whether the leisure facility contract included an obligation that had to be performed by the successful tenderer or could make use of a subcontractor conditional on obtaining prior authorisation from the Municipality.

Question 3: Does Delta's failure to declare early termination of the leisure facility contract in its ESPD constitute conduct covered by Article 57(4)(j) of the Public Sector Directive?

Judgement paragraphs 34 to 36

The CJEU held that CNAIR must also assess whether, in failing to declare early termination of the leisure facility contract in its ESPD, Consortium No. 2 adopted conduct covered by Article 57(4)(h) of the Public Sector Directive, having omitted to provide pertinent information. In this context, the CJEU noted that since termination of the leisure facility contract had been formally determined, Delta should have, in accordance with the requirements of transparency and good faith, declared this information in the ESPD together with evidence of "self-cleaning".

Conclusions:

Question 1: CNAIR is not obliged to – and should not – exclude Consortium No. 2 on the grounds of prior poor performance under Article 57(4)(g) of the Public Sector Directive, based on evidence provided in the non-compliance report on the leisure facility contract and clarifications received from Delta and CNAIR on the non-compliance report.

Question 2: Subcontracting without the contracting authority's prior authorisation, and consequent early termination of that contract, may constitute a significant or persistent deficiency in the performance of a substantive requirement of that public contract, justifying exclusion from participation in subsequent procurement procedures. It depends on the particular circumstances of the case.

Question 3: Failure by CNAIR to declare early termination of the prior contract in the ESPD, when the early termination had been formally determined, is conduct covered by Article 57(4)(h) of the Public Sector Directive and thus constitutes grounds for exclusion under that provision.

Additional remarks

Contracting authorities must come to their own decisions on whether to exclude on the grounds of poor performance of a prior public contract. It is not sufficient to rely solely on third-party reports to make exclusion decisions on the grounds of poor performance of a prior public contract. Exclusion must be addressed on a case-by-case basis by the contracting authority concerned. The contracting authority must conduct an appropriate investigation into the circumstances of the prior exclusion decision by a third party and apply the principle of proportionality to its own decision.

Similar Cases

C-171/15 *Connexxion Taxi Services* (EU:C:2016:948): This case confirmed the importance of a contracting authority's compliance with set criteria when considering applying grounds for exclusion.

C-91/08 *Wall* (EU:C:2010:182): Use of a subcontractor is likely to constitute a substantial amendment of the tender if it introduces conditions that, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for acceptance of an offer other than that originally accepted.

C-387/14 *Esaprojekt* (EU:C:2017:338): This case involves exclusion of an economic operator on the grounds of false declarations in the tender documents. There was no need to prove intentional misleading behaviour. It was sufficient for there to be "some degree of negligence which may have a decisive effect on the decisions to exclude candidates …".

C-178/16 *Impresa di Costruzioni Ing. E. Mantovani and Guerrato* (EU:C:2017.1000): Exclusion of a tenderer was justified when the economic operator chose not to disclose information relating to the criminal record of a director of the company in its tender.

Further reading

SIGMA Public Procurement Brief No. 7, Selecting Economic Operators
OECD (2016), "Selecting Economic Operators", *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

SIGMA Public Procurement Brief No. 24, Use of Official Automatic Exclusion Lists in Public Procurement
OECD (2016), "Use of Official Automatic Exclusion Lists in Public Procurement", *SIGMA Public Procurement Briefs,* No. 24, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-24-200117.pdf.

SIGMA Paper No. 56, Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures
Lemke, M. et al. (2018), "Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures", *SIGMA Papers*, No. 56, OECD, Paris, https://doi.org/10.1787/20786581.

Selected Judgements of the CJEU (2006-2014), Chapter 5
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Case study 3

Contract for design and construction of a motorway junction: Facts

On 13 May 2017, the Department of Roads and Traffic of East Flanders, Belgium (the Department of Roads) published a contract notice in the *Official Journal of the European Union* launching a public call for tenders for a works contract to design and construct a motorway junction (motorway junction contract). The open procedure was used. The estimated value of the contract exceeded the EU financial threshold for works, and the Public Sector Directive[27] applied to the procurement.

The contract notice and tender documents referred to the grounds for exclusion listed in Belgian national legislation, which transposed Article 57(1) to (4) of the Public Sector Directive and included committing an act of "grave professional misconduct". The contract notice and tender documents did not refer specifically to the right of self-cleaning and related processes afforded to tenderers under Article 57(6) of the Public Sector Directive.

Six tenders were submitted. On 13 October 2017, the Department of Roads decided to exclude one of the tenderers, RTS-Norré, a joint venture made up of *Norré Behagael* and RTS infra BVBA. The Department of Roads informed RTS-Norré that it was excluded from participation because its members had previously committed acts of grave professional misconduct. The Department of Roads confirmed that the acts of grave professional misconduct arose in the performance of earlier contracts awarded by the Department of Roads to members of RTS-Norré and had, for the most part, been the subject of penalties and concerned aspects that were important for performance of the motorway junction contract. RTS-Norré had included a declaration in its tender noting these performance issues in respect of earlier contracts with the Department of Roads.

RTS-Norré brought an action before the Council of State, Belgium, seeking annulment of the 13 October 2017 decision by the Department of Roads to exclude RTS-Norré.

Legal dispute (the appeal)

RTS-Norré argued that, before being excluded on the grounds of alleged grave professional misconduct, the Department of Roads should have given it the right to defend itself by providing an opportunity to demonstrate that it had remedied the consequences of that misconduct by taking appropriate corrective measures, as provided for in Article 57(6) of the Public Sector Directive. RTS-Norré argued that the Department of Roads should have formally invited RTS-Norré to submit evidence of the corrective measures taken, and made a decision on exclusion only after receipt and consideration of the evidence submitted.

The Department of Roads argued that it was incumbent on RTS-Norré to act on its own initiative and voluntarily submit evidence of corrective measures relating to the grounds for its alleged grave professional misconduct when it submitted its tender. The Department of Roads noted that neither recital 102 nor Article 57(6) of the Public Sector Directive specifies how, or at what stage of the procurement procedure, evidence of corrective measures can be provided. The Department of Roads argued that it was not unreasonable to expect tenderers to take a proactive approach and submit evidence of self-cleaning measures relating to grounds of alleged grave professional misconduct with their tenders. They also explained that provision of

[27] 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 [2014] OJ L94/65.

such evidence at the time of submission of tenders had become standard practice in the Belgian market, and RTS-Norré should have been aware of this.

Questions

Look carefully at recital 102 and Article 57 of the Public Sector Directive.

Question 1: Whose argument do you agree with, RTS-Norré or the Department of Roads? Why?

Question 2: Is it possible for a Member State to require that, when optional grounds for exclusion apply, tenderers must submit evidence of corrective measures (evidence of self-cleaning) when they submit their tender? Give reasons for your answer.

Instructions for resolving the case

Based on CJEU Case C-387/19 – RTS infra
RTS infra BVBA and Aannemingsbedrijf Norré-Behaegel v Vlaams Gewest (C-387/19 ECLI:EU:C:2021:13)

Advocate General Opinion (C-387/19, ECLI:EU:C:2020:728)

Request for preliminary ruling from Raad van State (Council of State, Belgium)

Legal resources

Provisions of Public Sector Directive considered:

Recital 102

Article 57

Article 18

Question 1: Whose argument do you agree with, RTS-Norré or the Department of Roads? Why?

Judgement paragraphs 25 to 35

The CJEU started by noting that the Public Sector Directive had introduced the self-cleaning mechanism by conferring on tenderers a right that Member States must guarantee when transposing that directive, in compliance with conditions laid down in the directive. It highlighted that neither recital 102 nor Article 57(6) of the Public Sector Directive specifies how, or at what stage of the procurement procedure, evidence of corrective measures can be provided.

The CJEU referred to Article 57(7) of the Public Sector Directive, which provides that Member States shall specify implementing conditions for Article 57 of the Public Sector Directive, having regard to EU law. The CJEU noted in this context that national implementing conditions must observe the principles of contract awards set out in Article 18 of the Public Sector Directive, which includes equal treatment, transparency and proportionality.

The CJEU highlighted that Member States must also observe the principle of respect for the right of defence when implementing conditions for Article 57. The principle of respect for the right of defence (see Articles 47 and 48 of the Charter of Fundamental Rights of the European Union), of which the right to be heard is an integral part, is a fundamental principle of EU law and is applicable when authorities are minded to adopt a measure that will adversely affect an individual, such as an exclusion decision in the context of a public procurement procedure.

The CJEU confirmed that, in accordance with the principle of transparency, all conditions and detailed rules of award procedures must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications. This is so that all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way.

The CJEU confirmed that the principle of equal treatment requires that tenderers be afforded equal opportunity when formulating their tenders, to be made aware of the exact constraints of the procedure and be assured that all tenderers are subject to the same conditions.

The CJEU further confirmed that the right to be heard means that economic operators must be in a position to effectively make their views known in the tender.

Conclusion: In the present case, although the procurement documents referred to grounds for exclusion laid down in national legislation, they did not expressly state that such evidence had to be provided voluntarily by the economic operator concerned. The CJEU therefore favoured the arguments submitted by RTS-Norré.

Question 2: Is it permissible for a Member State to require that, when optional grounds for exclusion apply, tenderers must submit evidence of corrective measures (evidence of self-cleaning) when they submit their tender? Give reasons for your answer.

Judgement paragraphs 33 to 38

The CJEU confirmed that "it is apparent from a textual, teleological and contextual interpretation of Article 57(6) of the Public Sector Directive, that that provision does not preclude the economic operator concerned from providing evidence on its own initiative or at the express request of the contracting authority or from that evidence being provided at the time of submission of requests to participate in tenders, or at a later stage of the procurement procedure".

The CJEU confirmed that a Member State may require evidence of corrective measures to be provided voluntarily by the economic operator at the time of submission of requests to participate in tenders, and limit submission of information to that stage in the process. This requirement must, however, be specified in advance in a clear, precise and unequivocal manner in the tender specifications – which must explain the obligations or make reference to relevant legal provisions. This is to ensure compliance with the principles of transparency and equal treatment.

Conclusion: A Member State may require that evidence of corrective measures be provided voluntarily by the economic operator at the time of submission of requests to participate in tenders, and limit submission of information to that stage in the process, provided that this requirement is specified in advance in a clear, precise and unequivocal manner.

Additional remarks

There are no fixed rules on when evidence of corrective measures may or must be submitted, but all requirements must be specified, in advance, in a clear, precise and unequivocal manner, particularly to ensure compliance with the principles of transparency and equal treatment.

Similar cases

C-171/15 *Connexxion Taxi Services* (EU:C:2016:948): The principles of transparency and equal treatment require all conditions and detailed rules of award procedures to be drawn up in a clear, precise and unequivocal manner, and tenderers must be made aware of the procedure's exact constraints.

Further reading

SIGMA Public Procurement Brief No. 7, Selecting Economic Operators
OECD (2016), "Selecting Economic Operators", *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

SIGMA Public Procurement Brief No. 24, Use of Official Automatic Exclusion Lists in Public Procurement
OECD (2016), "Use of Official Automatic Exclusion Lists in Public Procurement", *SIGMA Public Procurement Briefs,* No. 24, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-24-200117.pdf.

SIGMA Paper No. 56, Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures
Lemke, M. et al. (2018), "Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures", *SIGMA Papers*, No. 56, OECD Publishing, Paris, https://doi.org/10.1787/20786581.

Selected Judgements of the CJEU (2006-2014), Chapter 5
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Case study 4

Contract for optical communication system: Facts

Consip is the Italian central purchasing body. On 3 August 2016, Consip published a call for tenders in the *Official Journal of the European Union* to award a contract, using an open procedure, for the supply of an optical communication system, known as the Wavelength Division Multiplexing (WDM) system. The WDM system was intended to interconnect the data processing centres of several departments of the Ministry of Economy and Finance.

Tim Spa ("Tim") submitted a tender and listed three designated subcontractors whom it intended to use if it were awarded the contract to supply the WDM system. Tim included with its tender ESPDs for all its designated subcontractors. (An ESPD is a standard self-declaration form bidders can use to declare that grounds for exclusion do not apply. Only the winner of the tender then has to provide documentary proof that grounds for exclusion do not apply.)

During the procedure, Consip found that one of the designated subcontractors listed by Tim in its tender did not comply with the standards required for people with disabilities' right to work. Failure to comply with these standards constituted grounds for exclusion under Article 57(4)(a) of the Public Sector Directive.

Italian procurement legislation required that when grounds for exclusion under Article 57(4)(a) of the Public Sector Directive are established, the economic operator concerned must be excluded. The statutory obligation to exclude an economic operator also applied if grounds for exclusion under Article 57(4)(a) of the Public Sector Directive were established for a subcontractor designated by an economic operator in its tender.

Consip therefore excluded Tim from the procurement procedure on the basis that grounds for exclusion under Article 57(4)(a) of the Public Sector Directive were established for one of Tim's designated subcontractors.

The procurement documents issued by Consip included a section on designated subcontractors. According to the procurement documents, tenderers wishing to reserve the option of subcontracting if awarded the contract were obliged to identify up to three subcontractors in their tenders. Tenderers who identified subcontractors in their tenders were not obliged to use all or even any of those subcontractors if the bid was successful. Under Italian law, there was no requirement for the tenderer submitting the tender to verify that the designated subcontractors were not affected by grounds for exclusion referred to in Article 57(4)(a) of the Public Sector Directive.

Tim brought an action before the Regional Administrative Court, Lazio, Italy (Regional Administrative Court), challenging the unfair and disproportionate nature of its exclusion.

Legal dispute (the appeal)

Tim argued in its action before the Regional Administrative Court that it is apparent from the Public Sector Directive that finding grounds to exclude a subcontractor cannot result in the imposition of a penalty more severe than replacement of that subcontractor.

Tim added that it could, in any event, either (i) perform the contract using the two other subcontractors for whom no grounds for exclusion were found, or (ii) deliver the contract on its own because it fulfilled all the conditions necessary to deliver the contract, so recourse to subcontracting was not indispensable to performance of the contract.

The Regional Administrative Court submitted a request for a preliminary ruling from the CJEU, seeking clarification on the issue of automatic exclusion of a tenderer in the circumstances of this case.

Question

Can a contracting authority be required to automatically exclude a bidder from a contract award procedure if that bidder's subcontractor does not meet the requirements set out in Article 57(4)(a) of the Public Sector Directive?

Instructions for resolving the case

Based on CJEU Case C-395/18 – TIM SpA
Tim SpA – Direzione e coordinamento Vivendi SA v Consip SpA, Ministero dell'Economia e delle Finanze (C-395/18, ECLI:EU:C:2020:58)

Advocate General Opinion (C-395/18, ECLI:EU:C:2019:595)

Request for preliminary ruling from Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy)

Legal resources

Provisions of Public Sector Directive considered:

Article 18

Article 57

Article 76(a)(b)

Question:

Can a contracting authority be required to automatically exclude a bidder from a contract award procedure if that bidder's subcontractor does not meet the requirements set out in Article 57(4)(a) of the Public Sector Directive?

Judgment paragraphs 30 to 55

The CJEU started by noting the broad definition of "economic operator" in Article 2(1)(10) and went on to make some general points concerning the implementation of optional grounds for exclusion. The CJEU confirmed, in accordance with Article 57(7) of the Public Sector Directive, that it is for Member States, in compliance with EU law, to lay down the implementing conditions for optional grounds for exclusion. This includes the grounds for exclusion in Article 57(4)(a) of the Public Sector Directive concerning violation of applicable obligations specified in Article 18(2) of the Public Sector Directive in the fields of environmental, social and labour law. It is clear from CJEU case law that the Public Sector Directive does not provide for uniform application of optional exclusion grounds, since Member States may choose not to apply those grounds and may incorporate them into national law with varying degrees or rigour according to national legal, economic and social considerations. Member States therefore enjoy some discretion in determining the conditions for implementing optional grounds for exclusion.

Turning to the optional grounds for exclusion in Article 57(4)(a) of the Public Sector Directive, relating to failure to fulfil the obligations in Article 18(2) of the Public Sector Directive, the CJEU emphasised that the provision is drafted impersonally, without specifying who is responsible for a failure to fulfil the environmental, social and labour law obligations referred to in Article 18(2) of the Public Sector Directive. The CJEU held that Member States are not prevented from considering that a subcontractor may be the party responsible for the identified failure to fulfil obligations. As a result, the contracting authority has the

option, or even the obligation, to exclude the economic operator that submitted the tender when the failure is attributable to a subcontractor proposed by that economic operator.

The CJEU went on to present an additional argument in support of its finding that failure attributable to a proposed subcontractor may constitute grounds for exclusion. It noted that Article 18 of the Public Sector Directive (Principles of Procurement) falls within Chapter II of the Public Sector Directive, which is devoted to "general rules" on public procurement procedures. Article 18(1) requires compliance with the principles of equal treatment, non-discrimination, transparency and proportionality, and a prohibition on exclusion of a contract from the scope of the Public Sector Directive or artificially narrowing competition.

The CJEU confirmed that the requirement in Article 18(2) to fulfil obligations relating to environmental, social and labour law is established as a principle, on par with the principles referred to in Article 18(1). It noted that "... such a requirement constitutes, in the general scheme [of the Public Sector Directive], a cardinal value with which the Member States must ensure compliance pursuant to the wording of Article 18(2)" of the Public Sector Directive. Therefore, when Member States are determining implementing conditions for Article 57(4)(a) of the Public Sector Directive, they must be able to provide that the parties responsible for failure to fulfil obligations may include the subcontractors an economic operator intends to use.

The CJEU provided further support for this interpretation, referring to the objective underlying Article 57(4) of the Public Sector Directive, to enable the contracting authority to assess the integrity and reliability of economic operators. The objective of assessing the reliability of an economic operator, combined with the principle of ensuring compliance with environmental, social and labour law obligations, must enable Member States to grant the contracting authority the option or obligation to take into account subcontractors' compliance with those obligations when assessing the reliability of an economic operator intending to rely on those subcontractors for performance of the contract.

The CJEU concluded that the Public Sector Directive does not countermand national legislation, under which the contracting authority has the option, or even the obligation, to exclude economic operators for whose tenders grounds for exclusion named in Article 57(4)(a) of the Public Sector Directive are found for one of the subcontractors mentioned.

This conclusion was, however, subject to the observance of two principles of procurement highlighted by the CJEU in its judgment, the principles of equal treatment and proportionality.

Equal treatment: The CJEU applied the principle of equal treatment to a situation in which the contracting authority undertakes to verify, during the contract award procedure, whether there are exclusion grounds within the meaning of Article 57(4)(a) of the Public Sector Directive, with the potential to exclude on the grounds of failure by a subcontractor. The CJEU confirmed that the contracting authority is obliged to verify any failure to comply for all economic operators that submitted a tender, and for all subcontractors indicated by those economic operators in their respective tenders.

The CJEU briefly turned its attention to the situation in which a finding of failure by a subcontractor to fulfil environmental, social or labour law obligations is made after award of a contract. The CJEU referred to the provisions of Article 71(6)(b) of the Public Sector Directive concerning subcontracting. Article 71(6)(b) of the Public Sector Directive refers specifically to measures that may be taken with the aim of avoiding breaches of obligations under Article 18(2) of the Public Sector Directive. It provides that contracting authorities may verify, or be required by Member States to verify, whether there are grounds for exclusion of a subcontractor pursuant to Article 57 of the Public Sector Directive. When it is established that optional grounds for exclusion apply to a subcontractor, the contracting authority may require, or be obliged to require, that the economic operator replace the subcontractor concerned.

The CJEU confirmed that in this case, the principle of equal treatment does not preclude national legislation from providing for replacement of the subcontractor rather than exclusion of the successful tenderer after contract award, provided that all economic operators and their subcontractors were treated equally during

the earlier verification process. The CJEU confirmed that applying different rules before and after contract award is permitted.

Although not referred to in this judgment, it is worth noting that a similar provision to that of Article 71(6)(b) of the Public Sector Directive, permitting substitution of a subcontractor when optional grounds for exclusion apply, appears in Article 63 of the Public Sector Directive, Reliance on the Capacities of Other Entities.

Proportionality: The CJEU highlighted the need to pay particular attention to the principle of proportionality when applying optional grounds for exclusion, and the need to consider "in particular the minor nature of the irregularities committed or the repetition of minor irregularities". The CJEU went on to emphasise that "attention must be even greater where the exclusion … is imposed on the economic operator who submitted tenders for a failure to fulfil obligations committed not directly by that operator but by a person outside his undertaking", over whom the economic operator may not have control.

The CJEU confirmed that the need to comply with the principle of proportionality is also reflected by the self-cleaning provisions in Article 57(6) of the Public Sector Directive, which introduce a mechanism for corrective measures, underlining the importance attached to the economic operator's reliability. Under the self-cleaning provisions, economic operators that risk exclusion because of a designated subcontractor's failure to fulfil environmental, social or labour law obligations are entitled to seek to demonstrate to the contracting authority that they remain reliable despite such grounds for exclusion. In these circumstances, the contracting authority is required to assess the evidence provided by the economic operator in light of the seriousness of the situation and the circumstances of the case.

The CJEU concluded that the national legislation at issue in the main proceedings establishes an irrebuttable presumption that the economic operator must be excluded for any failure attributable to one of its subcontractors. This automatic exclusion infringes upon the principle of proportionality and exceeds the discretion enjoyed by Member States in specifying implementing conditions for the exclusionary grounds set out in Article 57(4)(a) of the Public Sector Directive.

: The Public Sector Directive does not countermand national legislation under which the contracting authority has the option, or even the obligation, to exclude an economic operator in whose tender grounds for exclusion in Article 57(4)(a) of the Public Sector Directive are found for one of the subcontractors.

The principle of equal treatment:

- Requires a contracting authority to verify any failure to comply on the part of all economic operators that submitted a tender, and all subcontractors indicated in those economic operators' tenders.
- Does not preclude national legislation from providing for replacement of the subcontractor rather than exclusion of the successful tenderer after contract award, provided that all economic operators and their subcontractors were treated equally during the earlier verification process. The CJEU confirmed that applying different rules before and after contract award is permitted.

The principle of proportionality:

- Requires the contracting authority to pay close attention to the nature of the irregularities committed, particularly to determine whether they are minor.
- Prohibits national legislation provisions requiring automatic exclusion of an economic operator for a subcontractor's failure to fulfil social, environmental or labour obligations.

Self-cleaning provisions in Article 57(6) of the Public Sector Directive apply in these circumstances.

Additional remarks

Procurement principles are key considerations for determining the intention and application of optional grounds for exclusion in Article 57(4)(a) of the Public Sector Directive.

Similar cases

C-178/16 *Impresa di Costruzioni Ing. E. Mantovani and Guerrato* (EU:C:2017.1000): This case addresses the level of discretion Member States have when choosing to apply optional grounds for exclusion or incorporating them into national law.

C-144/17 *Lloyd's of London* (EU:C:2018:78): Implementing rules must not exceed what is necessary to achieve the objectives of the directive and apply the principle of proportionality.

Further reading

SIGMA Public Procurement Brief No. 7, Selecting Economic Operators
OECD (2016), "Selecting Economic Operators", *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

SIGMA Public Procurement Brief No. 24, Use of Official Automatic Exclusion Lists in Public Procurement
OECD (2016), "Use of Official Automatic Exclusion Lists in Public Procurement", *SIGMA Public Procurement Briefs,* No. 24, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-24-200117.pdf.

SIGMA Paper No. 56, Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures
Lemke, M. et al. (2018), "Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures", *SIGMA Papers*, No. 56, OECD Publishing, Paris, https://doi.org/10.1787/20786581.

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Case study 5

Contract for home to school transport and taxi services: Facts

On 19 December 2019, the District of Aichach-Friedberg, Germany (the contracting authority) published a contract notice to award, by open procedure, a public contract for home to school transport and taxi services. The estimated value of the contract exceeded the financial threshold for services, and the Public Sector Directive applied to the procurement process.

The contracting authority received three tenders for the contract, from: (1) E.GmbH, (2) J.Sch.Omnibus, and (3) K.Reisen. Mr J is a trader operating under his company name, J.Sch.Omnibus. Mr J is also managing director and sole shareholder in K.Reisen. Thus, the tenders in the names of J.Sch.Omnibus and K.Reisen were both submitted by Mr J.

On 2 April 2020, Mr. J (trading as J.Sch.Omnibus) and K. Reisen were both informed that:

- Their tenders had been excluded for breach of competition rules because they had been prepared by the same person.
- The contract would be awarded to E.GmbH.

Mr J (trading as J.Sch.Omnibus) and K. Reisen both lodged complaints with the contracting authority, but these were unsuccessful. Mr J (trading as J.Sch.Omnibus) and K. Reisen then brought actions before the specialist procurement review body, the Public Procurement Board (PPB), Southern Bavaria, Germany.

The PPB upheld the actions and ordered the contracting authority to reinstate the tenders submitted by Mr J. (trading as J.Sch.Omnibus) and K. Reisen. The contracting authority appealed the PPB's decision to the Bavarian Highest Regional Court, Germany (the Regional Court).

Legal dispute (the appeal)

The contracting authority excluded Mr J (trading as J.Sch.Omnibus) and K. Reisen on the basis of Article 57(4)(d) of the Public Sector Directive, which permits exclusion "where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition".

The contracting authority argued in its appeal to the Regional Court that allowing two tenderers that constitute an economic unit to participate in the procurement procedure is not compatible with the interests of other tenderers and infringes upon the principle of equal treatment referred to in Article 18 of the Public Sector Directive, as well as competition rules, particularly because those tenderers are in a position to concert their respective tenders.

Mr J (trading as J.Sch.Omnibus) and K. Reisen argued that:

(1) The exclusion of a tenderer on grounds of infringement of competition rules under Article 57(4)(d) of the Public Sector Directive is limited to situations in which there is an agreement, decision or concerted practice prohibited by Article 101 of the TFEU.

Mr J (trading as J.Sch.Omnibus) and K. Reisen claimed that they constituted an "economic unit" for the purposes of Article 101 of the TFEU, so Article 101 of the TFEU did not apply to the situation in question. They could not, therefore, be excluded on grounds of infringement of competition rules pursuant to Article 57(4)(d) of the Public Sector Directive.

Note: Article 101 of the TFEU prohibits

> *all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, as well as decisions made by associations of undertakings, or concerted practices affecting trade between EU countries which could prevent, restrict or distort competition.*

Agreements, decisions and concerted practices with this effect are automatically void. The CJEU has, however, confirmed in previous case law that Article 101 of the TFEU does not apply when the agreements, decisions or practices prohibited by Article 101 of the TFEU are carried out by undertakings that together constitute an "economic unit".

(2) The exhaustive nature of the list of grounds for discretionary/optional exclusion provided for in Article 57 of the Public Sector Directive, as established by previous CJEU case law, precludes recourse to the principle of equal treatment.

Note: In considering earlier procurement directives, the CJEU has previously held that optional grounds for exclusion must be read as an exhaustive list of the grounds capable of justifying the exclusion of an economic operator for reasons based on objective factors relating to its professional qualities. Member States and contracting authorities may not add other grounds for exclusion based on criteria relating to professional qualities. The CJEU confirmed that the list of optional grounds for exclusion set out in Article 57(4) of the Public Sector Directive must also read as an exhaustive list.

Question 1

Must Article 57(4)(d) of the Public Sector Directive be interpreted as meaning that it (1) covers only cases for which there are sufficiently plausible indications to conclude that economic operators have infringed upon Article 101 of the TFEU, or (2) more widely covers other agreements aimed at distorting competition?

Question 2

Does the exhaustive nature of the list of optional grounds for exclusion prevent application of the general principle of equal treatment, precluding the award of a contract to economic operators whose tenders are neither autonomous nor independent?

Instructions for resolving the case

Based on CJEU Case C-416/21 – J. Sch. Omnibusunternehmen and K.Reisen
J. Sch. Omnibusunternehmen and K.Reisen (C-416/21, ECLI:EU:C:2022:689)

No Advocate General Opinion

Request for preliminary ruling from *Bayerisches Oberstes Landesgericht* (Bavarian Highest Regional Court, Germany)

Legal resources

Provisions of the Public Sector Directive considered:

Article 18

Article 57

Also relevant: Article 101 of the TFEU

TFEU Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between Member States and that have as their object or effect the prevention, restriction or distortion of competition within the internal market, particularly those that:

(a) Directly or indirectly fix purchase or selling prices or any other trading conditions.

(b) Limit or control production, markets, technical development, or investment.

(c) Share markets or sources of supply.

(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

(e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable for

- any agreement or category of agreements between undertakings

- any decision or category of decisions by associations of undertakings

- any concerted practice or category of concerted practices

that helps improve the production or distribution of goods or promotes technical or economic progress while allowing consumers a fair share of the resulting benefit, without:

(a) Imposing on the concerned undertakings restrictions that are not indispensable to the attainment of these objectives.

(b) Affording the undertakings the possibility of eliminating competition for a substantial portion of the products in question.

Notes for trainers

The reference in the case study to previous CJEU case law on Article 101 of the TFEU involves Case C-531/16 *Specializuotas transportas* EU:C:2018:324.

Question 1

Must Article 57(4)(d) of the Public Sector Directive be interpreted as meaning that it (1) covers only cases for which there are sufficiently plausible indications to conclude that economic operators have infringed upon Article 101 of the TFEU, or (2) more widely covers other agreements aimed at distorting competition?

Judgement, paragraphs 35 to 51

The CJEU was clear that the provision in Article 57(4)(d) of the Public Sector Directive covers agreements entered into with other economic operators "aimed at distorting competition" in general terms and is not limited to agreements prohibited by Article 101 of the TFEU ("Article 101").

The CJEU noted in this context that (i) that there is no mention of Article 101 in Article 57(4)(d) of the Public Sector Directive; and (ii) unlike Article 101, Article 57(4)(d) of the Public Sector Directive does not refer to a requirement that agreements are concluded "between undertakings" and that they "may affect trade between Member States". The CJEU confirmed that it follows that Article 57(4)(d) of the Public Sector Directive "covers cases in which economic operators enter into any anticompetitive agreement and cannot be limited solely to the agreements between undertakings referred to in Article 101 [of the] TFEU".

In support of this interpretation, the CJEU went on to comment on the difference in the objectives underlying Article 57(4)(d) of the Public Sector Directive and Article 101 of the TFEU. Referring to its own case law, the CJEU noted that the contracting authority's option, or obligation, to exclude an economic operator from participating in a procurement procedure is intended to enable contracting authorities to assess the integrity and reliability of each of the economic operators so that they may exclude unreliable tenderers with whom they cannot maintain a relationship of trust to ensure contract performance. According to the CJEU, this objective is different from that of Article 101, which is intended to punish anticompetitive behaviour on the part of undertakings and deter them from engaging in such conduct. The objective of Article 57(4)(d) of the Public Sector Directive leads to a broad interpretation of that provision, meaning that agreements between economic operators that do not affect trade between Member States are to be considered in connection with this optional ground for exclusion.

In further support of this broad interpretation, the CJEU also noted that the optional ground for exclusion in Article 57(4)(c) of the Public Sector Directive concerning professional misconduct covers all wrongful conduct affecting the credibility, integrity or professional reliability of the economic operator in question and must also be interpreted broadly. According to the CJEU, breach of competition rules may be regarded as a type of grave professional misconduct, and it would be inconsistent to apply a narrow interpretation to the concept of "agreements" under Article 57(4)(d) of the Public Sector Directive.

Conclusion: The CJEU applied a broad interpretation to the concept of agreements under Article 57(4)(d) of the Public Sector Directive. It concluded that "the mere fact that [such] an agreement between two economic operators does not fall within [Article 101] does not prevent it being covered by" the optional grounds for exclusion in Article 57(4)(d) of the Public Sector Directive. These grounds for exclusion are thus not limited to anti-competitive agreements falling within Article 101.

Having reached this conclusion, the CJEU then moved on to highlight an important factor the Regional Court should take into account in considering the case in question, in light of the CJEU judgment. This consideration relates to the capacity of Mr J (trading as J.Sch.Omnibus) and K. Reisen to enter into agreements aimed at distorting competition.

The CJEU emphasised that Article 57(4)(d) of the Public Sector Directive "covers the case where there is sufficient evidence to enable the contracting authority to consider that two or more economic operators

have entered into an agreement aimed at distorting competition, which necessarily presupposes that there is a common intention on the part of at least two different economic operators".

The CJEU seemed doubtful whether, in this case, there was, or could be, an "agreement" aimed at distorting competition. While it was for the Regional Court to decide on this question, the CJEU provided some additional guidance. It flagged that the Regional Court would need to determine whether, regarding the link between Mr J (trading as J.Sch. Omnibus) and K. Reisen, it is *possible* for them to enter into agreements aimed at distorting competition. In this context, the CJEU referred to the European Commission's position, which appeared to favour the idea that "two economic operators who, in substance, pass through the same natural person to take their decisions" may not enter into "agreements" between them, "as there do not appear to be two separate intentions that are capable of converging".

The CJEU confirmed that if they are not capable of entering into such agreements, the grounds for exclusion in Article 57(4)(d) of the Public Sector Directive cannot apply.

Question 2

When considering earlier procurement directives, the CJEU has previously held that the optional grounds for exclusion must be read as an exhaustive list of grounds capable of justifying the exclusion of an economic operator for reasons based on objective factors relating to its professional qualities. Member States and contracting authorities may not add other grounds for exclusion based on criteria relating to professional qualities. The CJEU confirmed that the list of optional grounds for exclusion set out in Article 57(4) of Directive 2014/24 must also read as an exhaustive list.

Does the exhaustive nature of the list of optional grounds for exclusion prevent application of the general principle of equal treatment, precluding the award of a contract to economic operators whose tenders are neither autonomous nor independent?

Judgement paragraphs 52 to 64

The CJEU first confirmed that Article 57(4) of the Public Sector Directive is an exhaustive list of the optional grounds for exclusion. It held that the EU legislature had adopted the same approach with regard to various grounds for exclusion set out in successive EU directives on the award of public contracts, which is to adopt grounds for exclusion based on only objective findings of facts or conduct specific to the contractor concerned.

However, the fact that the list is exhaustive does not prevent application of the principle of equal treatment from precluding the award of a contract to economic operators that constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

The CJEU went on to confirm that such an exhaustive list does not prevent Member States from maintaining or adopting substantive rules designed to ensure observance of the principles of equal treatment and transparency. The CJEU confirmed that these principles, which constitute the basis of the EU procurement directives, are binding on contracting authorities in any procedure for the award of a public contract, provided that the principle of proportionality is observed.

Turning to the specifics of this case, the CJEU referred to the principle of equal treatment and then offered guidance on applying the principle of proportionality. It noted that the principle of equal treatment would be infringed upon if, in the case of related tenderers, those tenderers were allowed to submit co-ordinated or concerted tenders that are neither autonomous nor independent, and which would be likely to give them unjustified advantages in relation to other tenderers. The CJEU confirmed that observance of the principle of proportionality requires a contracting authority to "examine and assess the facts, in order to determine whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure". The CJEU stated that "a finding of such influence, in any form, [is] sufficient for those undertakings to be excluded from the procedure".

In addition, the CJEU confirmed that the finding that links between tenderers had a bearing on the content of the tenders they submitted during the same procedure "suffices for those tenders not to be taken into consideration by the contracting authority, as tenders by related undertakings must be submitted completely autonomously and independently". These considerations apply even more strongly when tenderers are not merely related but constitute an economic unit.

Conclusion: The exhaustive nature of the list of optional grounds for exclusion in Article 57(4) of the Public Sector Directive does not prevent application of the general principle of equal treatment, precluding the award of the contract to economic operators that constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

Additional remarks

Article 57(4)(d) of the Public Sector Directive covers agreements entered into with other economic operators "aimed at distorting competition" in general terms and is not limited to agreements prohibited by Article 101 of the TFEU.

The exhaustive nature of the list of optional grounds for exclusion in Article 57(4) of the Public Sector Directive does not prevent application of the general principle of equal treatment, provided that the principle of proportionality is observed.

Similar cases

C-425/18 *Consorzio Nazionale Servizi* (EU:C:2019:476): The concept of "professional misconduct" must be interpreted broadly.

C-213/07 *Michaniki* (EU:C:2008:73): Member States are precluded from adding to the list of grounds for exclusion based on criteria related to professional qualities.

C-144/17 *Lloyd's of London* (EU:C:2018:78): Implementing rules must not exceed what is necessary to achieve the objectives of the directive and apply the principle of proportionality.

Further reading

SIGMA Public Procurement Brief No. 7, Selecting Economic Operators
OECD (2016), "Selecting Economic Operators", *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

SIGMA Public Procurement Brief No. 24, Use of Official Automatic Exclusion Lists in Public Procurement
OECD (2016), "Use of Official Automatic Exclusion Lists in Public Procurement", *SIGMA Public Procurement Briefs,* No. 24, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-24-200117.pdf.

SIGMA Paper No. 56, Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures
Lemke, M. et al. (2018), "Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures", *SIGMA Papers*, No. 56, OECD Publishing, Paris, https://doi.org/10.1787/20786581.

Selected Judgements of the CJEU (2006-2014), Chapter 5
OECD (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD, Paris, https://www.sigmaweb.org/publications/judgements-courtjustice-31july2014-eng.pdf.

8 Selecting economic operators

Introduction

It is important for a contracting authority to ensure that it will enter into a contract with an economic operator that has the ability to perform and complete the contract. Thus, a contracting authority may want to check, for example, the suitability of economic operators in terms of compliance with basic legal requirements as well as their financial resources, experience, skills and technical resources. The contracting authority will then exclude from the procurement process those economic operators that do not satisfy such checks. This process is referred to as the selection or qualification process.

The selection of economic operators means the process of assessing and deciding which ones are qualified to perform the contract. This process must be carried out by applying objective, non-discriminatory and transparent selection criteria, which the contracting authority sets in advance and discloses to economic operators.

The Public Sector Directive significantly limits the contracting authority's discretion in this area, as it (1) lists the selection criteria that a contracting authority may choose to use; (2) lays down the evidence or references that a contracting authority may require from economic operators to verify that the set selection criteria are satisfied; and (3) also lays down general rules concerning the selection process.

The contracting authority may use only the following selection criteria to establish whether an economic operator is qualified to perform a specific contract:

- suitability to pursue the professional activity
- economic and financial standing
- technical and/or professional ability.

Rules for creating selection criteria

In compliance with the principle of transparency, in its contract notice a contracting authority must indicate the selection-stage criteria to be applied and the relevant information to be provided. A contracting authority is permitted, but is not obliged, to consider the suitability, economic and financial standing, and technical/professional ability of economic operators. A contracting authority can therefore decide what it does and does not ask, within the limits of the permitted selection criteria.

Criteria must be related and proportionate to the subject matter of the contract. Setting criteria that are not necessary or are inappropriate may attract economic operators that are not qualified or deter efficient economic operators from participation.

It is left to the discretion of the contracting authority to fix the minimum capacity levels that economic operators must meet. However, if a contracting authority decides to fix minimum capacity levels, these levels must also be related and proportionate to the subject matter of the contract and set out in the contract notice.

Under no circumstances may the set selection criteria be changed or waived during the process of selecting economic operators. At this stage, the set selection criteria are to be applied as they stand.

Suitability to pursue the professional activity

A contracting authority may verify whether economic operators are generally suitable and fit to carry out the professional activity by asking them to prove that they are listed in trade or professional registers in their Member State of establishment. When no relevant register exists in these states, economic operators may produce a declaration on oath or a certificate, in accordance with the provisions of their national laws. The registers and corresponding declarations or certificates for each Member State are listed in the relevant annexes of the Public Sector Directive.

Economic and financial standing

A contracting authority may consider economic operators' economic and financial standing. Specific economic and financial standing criteria must be aimed at assessing whether economic operators have adequate financial resources (throughout the contract period), such as cash, a credit line or another source, to handle and complete the contract to be awarded. Contracting authorities may, for example, require that economic operators have a certain minimum yearly turnover, including in the area covered by the contract.

To facilitate the participation of small and medium-sized enterprises, as a rule the Public Sector Directive prohibits contracting authorities from demanding a minimum yearly turnover higher than twice the estimated contract value. The contracting authority may demand a larger turnover, but only in justified cases, such as circumstances related to special risks attached to the nature of the works, services or supplies. The main reasons for such a requirement should be indicated.

Technical and/or professional ability

A contracting authority may also consider economic operators' technical and/or professional abilities. Specific technical and/or professional ability requirements aim to ensure that economic operators possess the human and technical resources and experience necessary to perform the contract to an appropriate standard.

Reliance on the resources of other entities to prove economic and financial standing, or technical and/or professional ability

When appropriate and with regard to a specific contract, an economic operator may rely on the capacities of other entities, regardless of the legal nature of the links it has with them. It must in this case prove that it will have at its disposal the resources necessary, for example by producing an undertaking by those entities to that effect. This possibility allows an economic operator to rely on the economic and financial resources not only of affiliated entities but also of sub-contractors or of any other entity that has made its resources available to the economic operator.

A group of economic operators may also, under the same conditions, rely on the capacities of participants in the group or of other entities. In the case of criteria related to educational and professional qualifications or to professional experience, economic operators may rely on the capacities of other entities only if those entities will perform works or services for which these capacities are required. The contracting authority may not insist on a specific form of document confirming that those resources are available to the economic operator. For example, the contracting authority is not allowed to require the economic operator to establish a co-operation agreement or partnership with those entities.

Means of proof; missing or incomplete evidence

According to Article 18(1) of the Public Sector Directive, contracting authorities shall treat economic operators equally and without discrimination. Contracting authorities should interpret the regulations on the organisation of the tender, including the selection stage, in compliance with the principle of equal treatment of contractors.

When drafting the stage for contractor selection, contracting authorities should describe the selection criteria in accordance with Article 58 of the Public Sector Directive and indicate the means of proof established by Article 60 of the Public Sector Directive. As a rule, contractors first submit the European Single Procurement Document (ESPD) (or national equivalent), consisting of an updated self-declaration as preliminary evidence. The contracting authority requests the submission of up-to-date documents confirming compliance with the selection criteria from the successful contractor alone.

Economic operators shall not be required to submit supporting documents or other documentary evidence when and if the contracting authority has the possibility of obtaining the relevant information directly by accessing free of charge a Member State's national database, such as a national procurement register, a virtual company dossier or an electronic document storage system. As stated in Article 59(1) of the Public Sector Directive, when a contracting authority can obtain supporting documents directly by accessing the abovementioned databases, the ESPD shall also contain the information required for this purpose, such as the internet address of the database.

However, according to the wording of Article 59(4) of the Public Sector Directive, a contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents when necessary to ensure the proper conduct of the procedure.

The rules for supplementing the documents submitted by economic operators are set out in Article 56(3) of the Public Sector Directive. When information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or when specific documents are missing, contracting authorities may – unless otherwise stipulated by the national law implementing the Public Sector Directive – request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency. The contracting authority must set out in advance in the contract documents the rules for supplementing and clarifying documents submitted by contractors. The Public Sector Directive does not indicate what is meant by "supplementary" evidence or "clarification".

Rejecting an advantageous application because an economic operator fails to submit a specific piece of evidence requested by the contracting authority may go against the principle of effective procurement. On the other hand, the search for missing evidence may be very time-consuming and prolong the time allotted to the assessment of expressions of interest/applications or to the evaluation of tenders by making it necessary to wait until all the requested evidence has been submitted.

A sensible approach is to permit contracting authorities to request additional evidence, provided that it relates to the evidence already submitted and to the corresponding pre-set selection criteria. It is also advisable to allow contracting authorities to clarify evidence already provided when the evidence submitted contains inconsistent or contradictory information, is unclear, or contains omissions.

The process of supplementing and clarifying submitted documents must not lead to a violation of the principle of equal treatment of contractors or the principle of fair competition. The aforementioned process may only concern doubts about the required or already-submitted documents and evidence but may not lead to the supplementation of insufficient resources, which the contractor had at the time of submitting the bid.

Preliminary selection stage

In some procedures such as competitive procedures with negotiation, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender, provided the minimum number of qualified candidates is available. This preliminary selection stage is regulated in Article 65 of the Public Sector Directive. According to that provision, the contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, when appropriate, the maximum number.

Relationship between selection criteria and award criteria or conditions for performance of contracts

There is a clear distinction between the stage of evaluating contractors' capabilities and that of deciding upon the most economically advantageous tender, with different criteria applied to each stage. As a general rule, a contracting authority may not use the same conditions for selection criteria and award criteria in the same tender procedure. However, the contracting authority may refer to a certain capacity of contractors, e.g. to their experience, by setting the required minimum level as a selection criterion and then referring to experience in one of the award criteria by making the number of points awarded dependent on the level of experience.

The stage of evaluating contractors' capabilities usually precedes the stage of deciding on a tender award. However, in open procedures, contracting authorities may decide to examine tenders before verifying fulfilment of the selection criteria. Choosing this route ensures that verification of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no public contract is awarded to a tenderer that does not meet the contracting authority's selection criteria.

In addition to using selection and award criteria, contracting authorities can satisfy public interest needs by adopting appropriate conditions for performance of the contract's subject matter. According to Article 70 of the Public Sector Directive, contracting authorities may enumerate special conditions relating to the performance of a public contract, provided that they are linked to the subject matter of the public contract and are indicated in the call for competition or in the procurement documents. These conditions may include economic, innovation-related, environmental, social or employment-related considerations.

When preparing a tender procedure, the contracting authority should carefully consider which of the available legal tools (selection criteria, award criteria or contractual conditions) to apply to meet the selected needs in accordance with the principle of proportionality.

The provisions of the Public Sector Directive also reflect the principle of free movement of services derived from Article 56 of the Treaty on the Functioning of the European Union (TFEU), and their application must not lead to its restriction.

Legal provisions

Selection criteria are regulated mostly by Articles 56, 58 to 60 and Article 63 of the Public Sector Directive.

Case studies

The following selection criteria case studies are intended to clarify how the requirements for contractors' ability to perform the contract should be formulated so that they comply with the principles of proportionality and fair competition. In doing so, economic operators may use the resources of other entities. An important element of the case studies is the presentation of issues relating to means of proof and the rules for supplementing them in light of the principles mentioned earlier. Individual case studies will address selection criteria in the areas of economic capacity, technical capacity and professional experience.

Case study 1

Relationship between selection criteria and award criteria or conditions for performance of contracts. The principles of proportionality and non-discrimination: facts and dispute

By two decisions of 24 May 2020, Insalud (the National Health institute), as the contracting authority, issued calls for tenders for the supply of home respiratory treatments and other assisted breathing techniques in the provinces of Cáceres and Badajoz in Spain.

The tendering specifications and other documents of those two calls for tenders establish the selection criteria and the evaluation criteria. The contracting authority has defined selection criteria as admission conditions.

The admission conditions must be fulfilled at the time the tender is submitted: the tenderer must have at least one office open to the public for a minimum of eight hours a day, morning and afternoon, five days a week, in the provincial capital concerned.

The evaluation criteria concern a number of economic and technical characteristics for which points are awarded.

The contractual conditions require establishment of a technical support service, open 24 hours per day, 7 days a week.

The previous contractor is obliged to continue providing health services until the new contractor takes over to ensure that patient treatment is not interrupted. The new contractor is obligated to pay the company that continues to provide the services. If the new contractor still fails to take over responsibility for all required services, the contract may be terminated.

The contract is awarded to the undertaking submitting the tender that gains the highest number of points. In the case of a tie, the tender with the best technical evaluation will be successful. If the position is still tied, the undertaking that previously provided the service will be successful.

Contse SA and Vivisol Srl lodged complaints against these calls for tenders.

The appellants submit that a number of elements in the contested calls for tender infringe upon Article 58 of the Public Sector Directive and Article 56 of the TFEU. The following case study questions concern two of the alleged infringements, relating to an admission condition and a tie-break provision.

Insalud argues that the disputed elements of the contested calls for tenders are lawful because the service in question is a health service, and the category of patients relying on the service is particularly sensitive. The competent authorities are thus compelled to not only ensure at all times the provision of services, but to consider and evaluate the circumstances that may reduce the risks inherent in all human activity by favouring a tender that minimises those risks.

Questions

1. In the tendering documents relating to home respiratory treatments and other assisted breathing techniques, is it contrary to Article 58 of the Public Sector Directive and Article 56 of the TFEU to include an admission condition requiring contractors submitting tenders to already have offices open to the public in the province or capital of the province in which the services are to be provided?

2. In the tendering documents relating to home respiratory treatments and other assisted breathing techniques, is it contrary to Article 58 of the Public Sector Directive and Article 56 of the TFEU to stipulate that in the event of a tie, the contractor that previously provided that service will be successful?

Instructions for resolving the case

Based on CJEU Case C-234/03 – Contse SA

Contse SA, Vivisol Srl, Oxigen Salud SA v Instituto Nacional de Gestión Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud), (ECLI:EU:C:2005:644)

Request for a preliminary ruling from the Audiencia Nacional (Spain)

Legal resources

Article 56 of the TFEU

Provisions of the Public Sector Directive considered:

Article 58

Article 70

Article 18

Questions

Notes for trainers: This case study is based on judgement C-234/03 *Contse SA*, but the facts have been reduced to issues concerning selection criteria. The dates in the case study have been changed so that it is possible to refer to the currently applicable Public Sector Directive. The comments in the response have been expanded to note the possibility of using other legal solutions such as contractual terms in accordance with the principle of proportionality.

1. In the tendering documents relating to home respiratory treatments and other assisted breathing techniques, is it contrary to Article 58 of the Public Sector Directive and Article 56 of the TFEU to include an admission condition requiring contractors submitting tenders to already have offices open to the public in the province or capital of the province in which the services are to be provided?

Judgement paragraphs 35 to 46

The CJEU stressed that, first, the selection criteria must be applied in a non-discriminatory manner and shall be related and proportionate to the subject matter of the contract.

The CJEU reminded, that the principle of equality, of which Article 56 of the TFEU is a specific expression, prohibits not only covert discrimination based on nationality but also all covert forms of discrimination that, by applying other distinguishing elements, lead in fact to the same result. Although the admission condition is applicable without distinction to any contractor intending to respond to the call for tenders in question, it is necessary to determine whether that condition may in practice be met more easily by Spanish economic operators than by those established in another Member State.

In this case, it is considered common ground that the admission conditions and other elements in the contested calls for tender are intended to ensure better protection of the life and health of patients.

In the CJEU's view, the condition of having an office open to the public at the time the tender is submitted in the capital of the province concerned is irrelevant to the aim of better ensuring protection of the life and health of patients.

The CJEU admitted that, even assuming such an office may be regarded as suitable for ensuring patient health, it is evident that the requirement to have an office at the time the tender is submitted is clearly disproportionate.

The CJEU considered that such an office is not essential to supply the service in question. The contractual conditions already require establishment of a technical support service open 24 hours a day, 7 days a week, which will immediately lead to attainment of the objective of avoiding the endangerment of patient life or health when there is a problem with equipment functioning or handling. The CJEU also noted the previous contractor's obligation to provide medical services until the new contractor takes over.

The admission condition was deemed by the CJEU to be contrary to Article 58 of the Public Sector Directive due to its disproportionality. The indicated condition requires that at the time of bidding, each contractor already have an office established in the provincial capital where the services will be provided. Each contractor is obliged to bear the cost of renting and equipping such an office when it is not certain that it will be awarded the contract. The admission condition also contradicts Article 56 of the TFEU because it favours Spanish contractors that, because they provide services in Spanish territory, may already have open offices.

The proportionate and non-discriminatory solution would be to adopt a contractual condition – in the meaning of Article 70 of the Public Sector Directive – that would oblige the successful contractor to open such an office by a certain date. The contractor would be able to include the cost of operating such an office in its tender and incur the cost only after it has been awarded the contract.

Conclusion: The admission condition requiring contractors wishing to submit a tender for the services concerned to already have offices open to the public in the province or capital of the province in which the services are to be provided is contrary to Article 58 of the Public Sector Directive and Article 56 of the TFEU. This is because the requirement is both disproportionate and potentially discriminatory.

2. In the tendering documents relating to home respiratory treatments and other assisted breathing techniques, is it contrary to Article 58 of the Public Sector Directive and Article 56 of the TFEU to stipulate that in the event of a tie, the contractor that previously provided that service will be successful?

Judgement paragraph 78

The CJEU noted that deciding automatically and definitively in favour of the economic operator already present in the market concerned is discriminatory.

Experience constitutes a technical potential that may be subject to a selection criterion within the meaning of Article 58 of the Public Sector Directive. In the present case study, experience was adopted as an award criterion, from which it follows that the contracting authority considered this potential as relevant to the selection of the most economically advantageous tender. Regardless of the type of criterion, the evaluation of experience cannot depend on the territory of the country in which it was obtained. Linking experience to the territory of a particular Member State is contrary to the principle of equal treatment of contractors. Only in exceptional cases can experience be linked to a specific territory if its characteristics and peculiarities (e.g. weather conditions, type of substrate) affect the extent of experience obtained.

Conclusion: Stipulating in the tendering documents for the services concerned that in the event of a tie the contractor that previously provided that service will be successful, is contrary to Article 58 of the Public Sector Directive and Article 56 of the TFEU. This is because the provision is discriminatory.

Further reading

OECD (2016), “Selecting Economic Operators”, *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

Case study 2

Means of proof: the possibility of supplementing evidence and other documents. Preliminary selection stage: facts and dispute

By a notice published on 12 September 2018, the Ministry of Science, Innovation and Higher Education in Denmark launched a call for tenders in respect of services required for the operation of two occupational guidance and advice centres ("guidance centres") starting 1 August 2019. The value of the contract to be awarded was above the EU threshold.

The public contract was divided into two lots due to the need to operate two guidance centres.

Since the Ministry took the view that the public contract at issue related to complex services requiring negotiations, the procedure included a preliminary selection stage. The contracting authority described the selection criteria and the documents to prove that the criteria are met. The contracting authority did not stipulate in the tender documents that candidates should be allowed to supplement missing documentation.

The section of the public contract notice entitled Qualitative Selection Criteria laid down the following provision:

> Tenderers wishing to be considered must, as a basis for the assessment of their economic and technical qualifications, provide the following information and satisfy the minimum requirements set out:
>
> […]
>
> (2) submit a copy of the most recent balance sheet in so far as the tenderer is obliged to draw up such a document.
>
> (3) reference list …
>
> (4) information on the tenderer's educational and technical qualifications … .
>
> If the Ministry receives more than three applications for each of the two lots, all of which fulfil the above requirements, the candidates who will be invited to submit tenders and take part in the subsequent negotiation procedure shall be selected from among those who have demonstrated the best and most suitable experience in relation to the services put out for tender. References shall accordingly be accorded more weight than professional and technical qualifications.

By the 14 October 2018 deadline for applications, 10 undertakings/institutions had lodged applications for preliminary selection, including the University of Southern Denmark (the USD), the University of Copenhagen (the UC), and Manova.

The USD and UC applications did not include copies of their balance sheets; in this connection, the UC referred to its website.

On 29 October 2018, the Ministry sent an email to each university asking it to forward a copy of its balance sheet, a request which the UC met that same day and the USD on the following day.

On 4 November 2018, a number of candidates – including Manova, the USD and the UC – were judged successful at the preliminary selection stage and invited to submit tenders. The three candidates were

invited to tender for each guidance centre. For one of those centres, Manova found itself competing with the USD, and for another with the UC.

On 1 May 2019, following final assessment of the tenders for the two guidance centres, the Ministry found that the USD and UC tenders were economically more advantageous than the tenders submitted by Manova. Manova was the only other candidate to have submitted a competing tender for the two centres. The Ministry concluded the contracts relating to each of those centres with the USD and UC.

Manova filed a complaint before the Complaints Board against the decision to award those lots to the universities.

The Complaints Board observed that, as a general rule, Danish law allows a contracting authority to accept applications or tenders that do not meet the formal requirements set out in the public contract documents because, for example, information or documents are missing. This is provided that the awarding authority acts in accordance with the principle of equal treatment.

Question

Does the principle of equal treatment in EU law mean that, after the deadline for applications to take part in a tendering procedure has passed, a contracting authority may not ask a candidate to forward a copy of its most recent balance sheet if it did not provide the document with its application, provision of which was required under the notice announcing the preliminary selection stage?

Instructions for resolving the case

Based on CJEU Case C-336/12 – Manova

Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S, (ECLI:EU:C:2013:647)

Request for a preliminary ruling from the Østre Landsret (Denmark)

Legal resources

Provisions of the Public Sector Directive considered:

Article 58

Article 65

Article 59-60

Article 56(3)

Article 18

Question

Notes for trainers: The case study is based on a judgement C-336/12 *Manova* but the dates in the case study have been changed so that it is possible to refer to the currently applicable Public Sector Directive.

Does the principle of equal treatment in EU law mean that, after the deadline for applications to take part in a tendering procedure has passed, a contracting authority may not ask a candidate to forward a copy of its most recent balance sheet if it did not provide the document with its application, provision of which was required under the notice announcing the preliminary selection stage?

Judgement paragraphs 32 to 42

Bearing in mind the content of Article 56(3) of the Public Sector Directive, it should be stated that the contracting authority may require the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation. The Danish legislator has not introduced different regulations in this regard, as it is clear from the content of this case study that the contracting authority may demand the completion of missing documents, and such a request is at its discretion.

The process of supplementing and clarifying incomplete documents must be carried out in accordance with the principle of equal treatment and transparency. In this case study, the contracting authority did not stipulate in the tender documents that candidates should be allowed to supplement missing documentation, but it allowed the two universities that failed to do so to submit their balance sheets. Article 59(5) of the Public Sector Directive may still come into play in the case of the UC if the university's website is considered a national database in the meaning of the mentioned provision.

Judgement paragraphs 32 to 42

In considering the question referred to it, the CJEU recalled its ruling in Case C599/10 *SAG ELV Slovensko and Others* (EU:C:2012:191), which concerned the possibility of supplementing a tender. Indeed, the aforementioned Article 56 (3) of the Public Sector Directive concerns the supplementation and clarification of any documents submitted by contractors, including tenders.

The CJEU started by explaining the general principle that applies and then went on to refer to exceptions to the general principle.

The CJEU first stressed that the principle of equal treatment and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned. It follows that, when the contracting authority regards a tender as imprecise or as failing to meet the technical requirements of the tender specifications, it cannot require the tenderer to provide clarification.

However, the CJEU noted that the principle of equal treatment does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that mere clarification is required, or the correction of obvious material errors. In Case C599/10 *SAG ELV Slovensko and Others*, the CJEU laid down certain requirements to mark the bounds of the contracting authority’s right to make written requests to the concerned tenderer(s) for bid clarification:

- The request for clarification of a tender, which may not be made until after the contracting authority has looked at all the tenders, must, as a general rule, be sent in an equivalent manner to all tenderers in the same situation.
- The request must relate to all sections of the tender that require clarification.
- The request may not lead to a tenderer’s submission of what would appear to be a new tender.
- When exercising its right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear to have unduly favoured or disadvantaged the tenderer(s) to which the request was addressed, once the procedure for selection of tenders has been completed and in light of its outcome.

The CJEU explained that the above guidance for tenders can also be applied to applications filed at the preliminary selection stage for candidates in a restricted procedure. The Ministry in Denmark may request the correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to predate the deadline for applying to take part in the tendering procedure concerned.

According to the principle of equal treatment, all contractors must meet the selection criteria set for them on the date of application. In this case study, there is no doubt that the universities (the USD and the UC) met the selection criteria regarding economic standing but did not submit balance sheets as proof. By submitting balance sheets at the request of the contracting authority, the universities did not supplement and change their resources in the context of economic situation.

However, it should be explained that this would not be the case if the contract documents required provision of the missing particulars or information on pain of exclusion. The CJEU referred to the ruling in Case C496/99 P *Commission v CAS Succhi di Frutta* (EU:C:2004:236) and stated that it falls to the contracting authority to comply strictly with the criteria it has itself laid down.

Conclusion: The principle of equal treatment does not preclude a contracting authority from asking a candidate to provide documents describing that candidate's situation, such as a copy of its published balance sheet, after the deadline for applying to take part in a tendering procedure. This is permitted provided that: (1) the document in question can be objectively shown to predate that deadline; (2) it was not expressly laid down in the procurement documents that the application would be rejected if all requested documents were not submitted; and (3) the request to provide the document(s) must not unduly favour or disadvantage the candidate(s) to which it is addressed.

Further reading

OECD (2016), "Selecting Economic Operators", *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

Case study 3

Economic standing: facts and dispute

Édukövízig is an Environmental Protection and Water Management Authority in Hungary. By notice published in the *Official Journal of the European Union* of 25 July 2018, *Édukövízig* launched a restricted procedure to award a public contract for transport infrastructure works with an estimated contract value of approximately EUR 24 million.

Regarding the candidates' economic standing, the contracting authority established a minimum selection criterion that the profit/loss item in their balance sheets should not have been negative for more than one of the last three completed financial years ("the economic requirement"). Proof of the candidate's economic situation was provided by financial documents produced in accordance with accounting regulations.

Hochtief AG is the parent company of the group to which Hochtief Solutions AG, a wholly owned subsidiary, belongs. They are companies incorporated under German law. Hochtief Hungary is the Hungarian subsidiary of Hochtief Solutions AG. Hochtief Hungary has, at the very least, the option of relying on the position of Hochtief Solutions AG to meet the economic requirement.

Under a profit transfer agreement, Hochtief Solutions AG must transfer any profit it makes to its parent company every year, so that the profit recorded in the balance sheet of Hochtief Solutions AG is systematically zero or negative.

Hochtief Hungary questioned the lawfulness of the economic requirement related to annual profit, on the grounds that it was discriminatory and breached certain provisions of the Public Sector Directive.

Under German rules on annual accounts applicable to companies incorporated under German law, or at least to groups of companies incorporated under German law, it is possible for a company to show a positive profit/loss after tax but a negative profit/loss in its balance sheet because the distribution of dividends or transfer of profits exceeds the profit after tax. In contrast, Hungarian legislation prohibits any distribution of dividends that would result in a negative profit/loss in the balance sheet.

Hochtief Hungary challenged the lawfulness of the economic requirement before the court.

Hochtief Hungary argued that the economic requirement does not allow a non-discriminatory and objective comparison of the candidates, since the rules on annual accounts of companies for the payment of dividends within groups of undertakings may vary from one Member State to another. In any event, this was the case with regards to Hungary and Germany. The economic requirement was indirectly discriminatory because it disadvantaged candidates who were unable to fulfil it or could do so only with difficulty because they are subject, in the Member State where they are established, to different legislation from that applicable in the Member State of the awarding authority.

Questions

Is Article 58(3) of the Public Sector Directive to be interpreted as meaning that the contracting authority may set a minimum level of economic standing in relation to a particular balance sheet item, even though the laws of different Member States may vary in relation to that item, and consequently in the balance sheets of companies depending on the rules they are subject to in preparing their annual accounts?

In your opinion, is the requirement that "the profit/loss item in the balance sheet should not have been negative for more than one of the last three completed financial years" reasonable and proportionate?

Instructions for resolving the case

Based on CJEU Case C-218/11 – Éduköviz ig

Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Éduköviz ig), Hochtief Construction AG Magyarországi Fióktelepe v Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság (ECLI:EU:C:2012:643)

Request for a preliminary ruling from the Fővárosi Ítélőtábla (Hungary)

Legal resources

Provisions of the Public Sector Directive considered:

Article 58(3)

Article 63

Article 60(3)

Questions

Notes for trainers: This case study is based on judgement C-218/11 *Éduköviz ig*, but the dates in the case study have been changed so that it is possible to refer to the currently applicable Public Sector Directive.

Is Article 58(3) of the Public Sector Directive to be interpreted as meaning that the contracting authority may set a minimum level of economic standing in relation to a particular balance sheet item, even though the laws of different Member States may vary in relation to that item, and consequently in the balance sheets of companies depending on the rules they are subject to in preparing their annual accounts?

In your opinion, is the requirement that “the profit/loss item in the balance sheet should not have been negative for more than one of the last three completed financial years” reasonable and proportionate?

Judgement paragraphs 29 to 31 and 37 to 39

According to Article 58(3) of the Public Sector Directive regarding economic standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic capacity to perform the contract. For this purpose, contracting authorities may require that economic operators provide information on their annual accounts showing, for instance, the ratio of assets to liabilities. This ratio may be taken into consideration when the contracting authority specifies the methods and criteria for such consideration in the procurement documents. Such methods and criteria shall be transparent, objective and non-discriminatory.

Article 60(3) of the Public Sector Directive stipulates that proof of the economic operator’s economic standing may, as a general rule, be provided by one or more of the references listed in Annex XII Part I. This annex states that proof of the economic operator’s economic standing may generally be furnished by financial statements or extracts from financial statements, when publication of financial statements is required under the law of the country in which the economic operator is established. When for any valid reason the economic operator is unable to provide the references requested by the contracting authority, it may prove its economic and financial standing by any other document the contracting authority considers appropriate.

A minimum capacity level must be related and proportionate to the subject matter of the public contract. It follows that the item or items of the balance sheet chosen by a contracting authority to establish a minimum level of economic standing must objectively provide information on the economic operator’s standing, and the threshold thus fixed must be adapted to the size of the public contract concerned. In other words, it

should objectively constitute a positive indication of a sufficient economic basis for performance of the contract without, however, demanding more than is reasonably necessary for that purpose.

In the case study, the contracting authority prepared a selection criterion relating to candidates' economic standing and required that the balance sheet result not be negative for more than one of the last three financial years. This selection criterion can be assessed as objective and proportional, since the contracting authority did not indicate a specific balance sheet result but required only that it not be negative. The contracting authority required the candidates to provide proof in the form of financial documents that could confirm a positive balance sheet result.

As Member States have not fully harmonised their legislation pertaining to the annual accounts of companies, legislative differences may arise concerning particular balance sheet items that contracting authorities refer to for establishing minimum capacity levels. However, it is clear from the wording of Article 58(3) of the Public Sector Directive that, regarding proof of a tenderer's economic and financial standing, a reference may legitimately be required by a contracting authority even if, objectively, not every tenderer is able to produce it, if only, in the case of Article 58(3), because of a difference in legislation. Therefore, such a requirement cannot, in itself, be considered to constitute discrimination.

It appears that if a subsidiary in such a situation is unable to meet the minimum economic standing as defined by reference to a particular balance sheet item, it is not the fault of a difference in legislation but of the parent company obliging that subsidiary to systematically transfer it all its profits.

In this situation, the subsidiary has the option provided for by Article 63(1) of the Public Sector Directive, which allows it to rely on the economic standing of another entity by obliging the undertaking of that entity to make the necessary resources available to it. Clearly, this option is particularly suited to such a situation, since the parent company may thus itself remedy the fact that it has placed its subsidiary in a position in which it cannot meet the minimum capacity requirement.

It is worth remembering that when an economic operator relies on the capacities of other entities to meet criteria relating to economic standing, the contracting authority may require that the economic operator and those entities be jointly liable for execution of the contract.

Hochtief Hungary can easily meet the selection criterion by relying on the resources of the parent company to which it had previously transferred its business profits, ultimately resulting in a negative balance sheet.

Hochtief Hungary, by transferring profits to its parent company, actually made its economic situation less favourable, so the selection criterion chosen by the contracting authority was adequate to assess the economic situation of the candidates.

Conclusion: Article 58(3) of the Public Sector Directive must be interpreted as meaning that a contracting authority may require a minimum level of economic standing by reference to one or more particular aspects of a company's balance sheet. The selection criterion must provide information on the economic situation of the tenderer, which should be adapted to the size of the public contract in question, since it is an objectively positive indication of the economic potential necessary for execution of the contract. The contracting authority's requirement must not exceed what is reasonably necessary for that purpose. The requirement of a minimum level of economic standing cannot, in principle, be disregarded solely because that level relates to an aspect of the balance sheet, for which there may be legislative variations among the different Member States.

Additional remarks

The CJEU decided that Hochtief Hungary could easily meet the selection criterion by relying on the resources of a parent company to which it had previously transferred business profits, ultimately resulting in a negative balance sheet. One might ask whether the CJEU's ruling would have been different if a tenderer had not been able to rely on the resources of another entity. It seems that the comment about the

possibility of relying on the resources of other entities was additional and does not affect the assessment of the legality of the selection criterion. Even if a tenderer cannot rely on the resources of a parent company, such a selection criterion is permissible. In this case study, it is clearly written that the tenderer's situation is a result of the parent company's decision.

Further reading

OECD (2016), "Selecting Economic Operators", *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

Case study 4

Technical abilities and professional experience. Reliance on the resources of other entities: facts and dispute

In December 2020, the Warsaw municipal cleansing authority initiated a procedure to award a public contract for the comprehensive mechanical cleansing of roadways in Warsaw in the winter and summer seasons of 2021 to 2024. Winter cleansing consists essentially of preventing and removing ice by salting and using snow ploughs on certain categories of municipal roadways. Summer cleansing involves sweeping and wet-cleaning of roadways.

The subject matter of the public contract was divided into eight lots corresponding to different districts of Warsaw, thereby allowing each tenderer to either submit a tender for the whole of that contract or a partial tender.

As provided for in the tender specifications, to demonstrate its technical abilities, each tenderer was required to submit a list of winter maintenance services for roadways with pre-wetting technology provided in the three years prior to expiry of the deadline for submitting the tender. The total value of those services had to be at least PLN 1 000 000 for each of the eight lots of the public contract at issue. Therefore, to submit a tender for the whole contract, a tenderer had to prove that it had provided services with a value of at least PLN 8 000 000.

The list of services performed was designed to confirm that tenderers had the experience necessary to execute this public contract. The selection criterion referred to experience, while the list of completed services would provide proof of criterion fulfilment.

Following publication of the tender notice in the *Official Journal of the European Union*, the Partner company put itself forward as a candidate for the whole contract, stating that in the previous 3 years it had supplied 14 services, 12 on its own and 2 supplied by PUM, a company established in the town of Grudziądz (Poland), approximately 230 km from Warsaw.

In addition, it attached to its tender an undertaking by PUM making its capacities available to Partner, particularly its consulting services, including training for Partner's employees and help to resolve any problems that might arise at the performance stage of the public contract. Partner also stated that, for the purposes of performance of the public contract, co-operation was to be governed by a contract between the two undertakings.

The Warsaw municipal cleansing authority had concerns about PUM being based in Grudziądz, when the services were to be provided in Warsaw. The driving distance between Warsaw and Grudziądz is 310 km. On 26 February 2021, the Warsaw municipal cleansing authority asked Partner to provide further details about PUM's activities and the effect that those activities might have on the quality and efficiency of the services provided in Warsaw, particularly considering the distance between Grudziądz and Warsaw.

The Warsaw municipal cleansing authority was not satisfied with Partner's answer, and it took the view that PUM's knowledge and experience could not be made available without that company's actual direct participation in performance of the contract at issue. The Warsaw municipal cleansing authority then wrote to Partner on 11 March 2021 asking it to supplement the documents in this respect.

In its answer of 18 March 2021, Partner challenged the approach adopted by the Warsaw municipal cleansing authority. It asked the Warsaw municipal cleansing authority, if it considered the documented experience insufficient, to allocate the resources Partner relied on to each of the eight lots of the contract in order of priority. This was so that a possible rejection would not concern the whole contract, but only the lots for which it did not meet the conditions required.

The Warsaw municipal cleansing authority nonetheless rejected Partner's tender in its entirety and closed the procurement procedure.

Therefore, Partner brought an action before the National Appeal Chamber to obtain annulment of the decision by which it had been excluded from the procurement procedure and that adopted the most advantageous offers for the various lots of the contract.

Questions

1. What conditions must be met for a contractor to rely on the capabilities of other entities within the meaning of Article 63(1) of the Public Sector Directive?

2. Does Article 63(1) of the Public Sector Directive allow a contracting authority to stipulate in the tender notice or tender specifications the precise rules under which the contractor may rely on the capabilities of other entities?

3. Does the principle of equal treatment, as set out in Article 18 of the Public Sector Directive, preclude a contracting authority, after opening the tenders submitted in a public procurement procedure, from accepting the request of an economic operator who has submitted a tender for the entirety of a given contract to consider its tender only for the purpose of awarding certain lots of that contract?

Instructions for resolving the case

Based on CJEU Case C-324/14 – Partner Apelski Dariusz

Partner Apelski Dariusz v Zarząd Oczyszczania Miasta (ECLI:EU:C:2016:214)

Request for a preliminary ruling from the Krajowa Izba Odwoławcza (Poland)

Legal resources

Provisions of the Public Sector Directive considered:

Article 18

Article 63(1)

Questions

Notes for trainers: This case study is based on judgement C-324/14 *Partner Apelski Dariusz*, but the dates in the case study have been changed so that it is possible to refer to the currently applicable Public Sector Directive. The case study also omits issues related to the electronic auction, which are discussed in the judgement but are not relevant from the perspective of selection criteria.

1. What conditions must be met for a contractor to rely on the capabilities of other entities within the meaning of Article 63(1) of the Public Sector Directive?

Judgement paragraphs 30 to 49

Under Article 58 of the Public Sector Directive, a contracting authority may require tenderers to meet minimum levels of economic and financial standing and technical and professional ability.

According to CJEU settled case law, Article 63 of the Public Sector Directive recognises the right of every economic operator to rely, for a particular contract, upon the capacities of other entities, regardless of the nature of the links it has with them, provided that it proves to the contracting authority that it will have at its disposal the resources necessary for performance of the contract (Case C-94/12 *Swm Costruzioni*, EU:C:2013:646, paragraphs 29 and 33).

The CJEU stated that such an interpretation is consistent with the aim of the widest possible opening-up of public contracts to competition pursued by the relevant directives, to the benefit not only of economic operators but also of contracting authorities. In addition, this interpretation also facilitates the involvement of small and medium-sized undertakings in the contract procurement market, an aim also pursued by the Public Sector Directive (Case C-94/12 *Swm Costruzioni*, EU:C:2013:646, paragraph 34 and the case law cited).

It follows that the right established in Article 63(1) of the Public Sector Directive constitutes a general rule that contracting authorities must consider when they verify the suitability of a tenderer to perform a specific contract. In these circumstances, the statement under Article 63(1) of the Public Sector Directive that an economic operator may rely on the resources of other entities "where appropriate" cannot be interpreted as meaning that it is only exceptionally that such an operator may rely on the resources of third-party entities.

The CJEU underlined that, although it is free to establish links with the entities on whose resources the tenderer relies, and to choose the legal nature of those links, the tenderer is nonetheless required to produce evidence that it actually has access to the resources of those entities, which it does not itself own, and which are necessary for performance of the contract (Case C-176/98 *Holst Italia*, EU:C:1999:593, paragraph 29 and the case law cited).

Thus, in accordance with Article 63(1) of the Public Sector Directive, a tenderer may not rely on the resources of other entities to satisfy in a purely formal manner the conditions of the contracting authority.

It is conceivable that there may be works with special requirements necessitating a certain capacity that cannot be obtained by combining the capacities of more than one operator that, individually, would be inadequate. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level be achieved by a single economic operator or, when appropriate, by relying on a limited number of economic operators, as long as the requirement is related and proportionate to the subject matter of the public contract at issue (Case C-94/12 *Swm Costruzioni*, EU:C:2013:646, paragraph 35).

Likewise, it is conceivable that, in specific circumstances related to the nature and objectives of a particular contract, the capacities of a third-party entity, which are necessary for the performance of that particular contract, cannot be transferred to the tenderer. Accordingly, in such circumstances, the tenderer may rely on those capacities only if the third-party entity directly and personally participates in performance of the contract concerned. However, under Article 63(1) of the Public Sector Directive regarding criteria related to educational and professional qualifications or to relevant professional experience, economic operators may rely on the capacities of other entities only when the latter will perform the work or services requiring those capacities.

In the present case study, it is necessary to consider whether PUM's capacities may genuinely be transferred to Partner so that the resources necessary for performance of the contract may be placed at Partner's disposal in accordance with the terms of Article 63(1) of the Public Sector Directive – i.e. given that the resources are made available simply by providing consultation and training services, without any direct participation by PUM in performance of that contract.

In this connection, for winter cleansing, it is apparent that the service requires specific skills and detailed knowledge of the topography of the City of Warsaw and, above all, the ability to react immediately to uphold specific roadway maintenance standards within a precise period. Furthermore, this service is based on the use of specific technologies, requiring experience and a high degree of skill, which alone enables the contract at issue to be performed properly while avoiding road traffic hazards.

In these circumstances, the actual performance of such a contract requires the involvement of experienced staff who, by directly observing the state of the roadway surface and carrying out on-the-spot tests (among other things), are able to anticipate, or at least respond appropriately to, the specific needs of that contract.

It is conceivable that PUM's proposed involvement, consisting simply of the provision of consultation and training services, cannot be regarded as sufficient to guarantee that Partner would have at its disposal the resources necessary for performance of that contract.

Conclusion: The general rule is that each tenderer has the right to rely on the capacities of other entities, whatever the nature of the links existing between it and those entities. This general rule is subject to the requirement that it is proved to the contracting authority that the tenderer will actually have at its disposal the resources of those entities necessary for performance of that contract. When a tenderer wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example by producing a commitment by those entities to that effect.

Any commitment to provide resources or capabilities is proof of compliance with the selection criteria. It should be clear from the content of the commitment what resources or abilities will be transferred, in what manner and at what stage of contract execution.

The exercise of that right may be limited in specific circumstances, depending on the subject matter of the contract and its objectives. Such is the case particularly when a third-party entity's capacities, which are necessary for performance of the contract, cannot be transferred to the tenderer, so that the latter may rely on those capacities only if that third-party entity directly and personally participates in performance of the contract. Under Article 63(1) of the Public Sector Directive, restrictions may relate to education, professional qualifications, work experience or economic situation.

Regarding criteria relating to educational and professional qualifications or to relevant professional experience, economic operators may, however, rely only on the capacities of other entities when the latter will perform the work or services for which these capacities are required.

When an economic operator relies on the capacities of other entities to meet criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for execution of the contract.

Additional conditions for personal performance of part of a contract or joint and several liability should be included in the commitment to provide resources or capabilities.

Additional remarks: Under the same conditions, a group of economic operators as referred to in Article 19(2) of the Public Sector Directive may rely on the capacities of participants in the group or of other entities.

2. Does Article 63(1) of the Public Sector Directive allow a contracting authority to stipulate in the tender notice or tender specifications the precise rules under which the contractor may rely on the capabilities of other entities?

Judgement paragraphs 50 to 58

The CJEU noted that the tenderer must prove that it will actually have at its disposal the resources of the other entity, which it does not itself own and which are necessary for performance of the contract. It is nonetheless free to choose the legal nature of the links it intends to establish with the other entities on whose capacities it relies to perform a particular contract, and the type of proof it furnishes for the existence of those links.

The CJEU recalled its ruling in Case C234/14 *Ostas celtnieks* (EU:C:2016:6, paragraphs 28 and 34), in which it explained that in the tender specifications a contracting authority is not entitled before the public contract is awarded to obligate a tenderer that relies on the capacities of other entities, to conclude a co-operation agreement with those entities or to form a partnership with them.

Therefore, the contracting authority cannot, in principle, impose express conditions that may impede exercising of the right of all economic operators to rely on the capacities of other entities, particularly by

indicating in advance the detailed rules according to which the capacities of those other entities may be relied upon.

However, the CJEU issued a reminder that the exercise of such a right may be limited in specific circumstances such as those set out in Article 63(1) of the Public Sector Directive, referring to education, professional experience or economic standing. In such circumstances, the contracting authority may, to ensure proper performance of the contract, expressly set out in the tender notice or tender specifications, specific rules authorising an economic operator's reliance on the capacities of other entities.

However, if the contracting authority decides to make use of such a possibility, it must ensure that the rules it adopts are related and proportionate to the subject matter and objectives of that contract.

Furthermore, such a requirement also helps ensure compliance with the principle of transparency regarding the rules adopted by the contracting authority and allows economic operators to propose to the contracting authority alternative ways of relying on the capacities of other entities to ensure that those capacities are in fact made available.

Conclusion: Regarding the subject matter of a particular contract and its objectives, the contracting authority may, in specific circumstances to ensure proper performance of that contract, expressly set out in the tender notice or tender specifications the specific rules under which an economic operator may rely on the capacities of other entities, provided that those rules are related and proportionate to the subject matter and objectives of the contract.

3. Does the principle of equal treatment, as set out in Article 18 of the Public Sector Directive, preclude a contracting authority, after opening the tenders submitted in a public procurement procedure, from accepting the request of an economic operator who has submitted a tender for the entirety of a given contract to consider its tender only for the purpose of awarding certain lots of that contract?

The principles of equal treatment and non-discrimination require that tenderers be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions. All the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or tender documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract (Case C42/13 *Cartiera dell'Adda*, EU:C:2014:2345, paragraph 44 and the case law cited).

The principles of equal treatment and non-discrimination preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned.

However, the principles of equal treatment and non-discrimination do not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that mere clarification is required, or the correction of obvious material errors. The contracting authority must take care to ensure that the request for clarification does not lead to a tenderer's submission of what would appear to be a new tender. When exercising its right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly (Case C336/12 *Manova*, EU:C:2013:647, paragraphs 32, 36-37 and the case law cited).

In the present case study, the Warsaw municipal cleansing authority, having doubts as to whether Partner had the resources necessary to execute the contract at issue, requested the company, after it had submitted its tender, to specify the nature of PUM's participation in performance of the contract.

In answer to that request for clarification, Partner asked the Warsaw municipal cleansing authority, in the event that it considered the submitted experience to be insufficient, to allocate the resources Partner relied

upon to each of the eight lots of the contract in order of priority, so that a possible rejection would not concern the whole contract, but only the lots for which it did not meet the requisite conditions.

It is considered common ground that communication by which an economic operator indicates to the contracting authority – after the tenders have been opened – the order of priority of the lots of the contract (according to which its tender should be assessed) is far from being merely a clarification made on a limited or specific basis, or a correction of obvious material errors. It constitutes, in reality, a substantive amendment akin to the submission of a new tender.

The CJEU decided that the contracting authority cannot allow an economic operator to clarify its initial offer in such a way without infringing upon the principles of equal treatment and non-discrimination of economic operators, and the resultant obligation of transparency to which the contracting authority is subject under Article 18 of the Public Sector Directive (Case C42/13 *Cartiera dell'Adda*, EU:C:2014:2345, paragraph 43).

Conclusion: The principle of equal treatment, as set out in Article 18 of the Public Sector Directive, must be interpreted as meaning that, in circumstances such as those at issue, after the tenders submitted in a public procurement procedure have been opened, a contracting authority is precluded from acceding to the request of an economic operator that has submitted a tender for the whole of the contract concerned, to take its offer into consideration for the purpose of awarding only certain lots of that contract.

Similar cases

Case C-94/12 *Swm Costruzioni* (EU:C:2013:646, paragraphs 29 and 35)

Case C-176/98 *Holst Italia* (EU:C:1999:593, paragraph 29)

Case C234/14 *Ostas celtnieks* (EU:C:2016:6, paragraphs 28 and 34)

Case C42/13 *Cartiera dell'Adda* (EU:C:2014:2345, paragraphs 43 and 44)

Case C336/12 *Manova* (EU:C:2013:647, paragraphs 32, 36-37)

Further reading

OECD (2016), "Selecting Economic Operators", *SIGMA Public Procurement Briefs,* No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

Case study 5

Technical abilities and professional experience: facts and dispute

The contracting authority in Poland opened an award procedure for a public contract concerning the "modernisation of the existing IT systems and the installation of new systems in hospitals". The call for tenders was published in the *Official Journal of the European Union* of 29 November 2020.

The contracting authority divided the subject matter of the contract into several lots covering different establishments. Thus, it enabled interested economic operators to submit tenders for not only the whole contract, but parts of it.

The dispute in this case study concerns the award of lot No. 3, relating to the purchase and supply of an integrated hospital system (IHS) to serve the (grey) administrative sector and the (white) medical sector at the Nicolaus Copernicus Independent Provincial Hospital in *Piotrków Trybunalski* (Poland). The sectors mentioned – grey and white – are standard designations of functional areas in hospitals. The contract was for standard software that the economic operator was to deliver, install and configure to execute the contract.

As provided in the tender specifications, to prove its experience, each tenderer submitting a tender for lot No. 3 had to prove that it had performed at least two contracts, both consisting of the supply, installation, configuration and implementation of an IHS in the white and grey departments of a hospital with a minimum of 200 beds and having a value of not less than PLN 450 000.

For this purpose, each economic operator had to provide a list of the main supplies made in the three years preceding expiry of the time limit for submitting tenders or, if appropriate, a shorter period of activity, indicating the subject matter, value, date of performance and the entities for which those supplies were made and attaching proof that they were, or are being, duly provided.

The economic operator Konsultant Komputer submitted in its tender a list of supplies, including two headings concerning the delivery, installation, configuration and implementation of two IHSs for the hospitals in Słupsk (Poland) and Nowy Sącz (Poland), by the consortium composed of Konsultant IT sp. z o.o. and Konsultant Komputer.

The contracting authority selected Konsultant Komputer's tender, considering it to be the most economically advantageous for lot No. 3.

As a tenderer excluded from that procedure, Esaprojekt brought an action before the National Appeal Chamber against the contracting authority's selection of Konsultant Komputer's tender. In essence, Esaprojekt criticised the contracting authority for failing to establish that the tender in question was based on incorrect information and failed to meet the conditions laid down in the tender specifications. Consequently, Konsultant Komputer's tender should have been rejected.

By a decision of 7 April 2021, the National Appeal Chamber ordered the contracting authority to (1) annul its acceptance of the most advantageous bid for lot No. 3, and (2) request Konsultant Komputer to provide further information about the scope of the contracts it mentioned in its tender, pursuant to Poland's Law on Public Procurement transposing the Public Sector Directive. The contracting authority therefore annulled its decision and asked Konsultant Komputer to supplement the documents to prove that it met the condition relating to knowledge and experience.

In response to that request, by a letter of 29 April 2021, Konsultant Komputer indicated first that the contract it had relied on concerned services the contracting authority had defined as the grey sector and, second, that the list of supplies annexed to its tender concerned the execution of two contracts, Contract No. 51/2/2010 of 5 October 2017 and Contract No. 62/2010 of 6 December 2017.

However, it was clear from the information provided by Konsultant Komputer that, in reality, the supply of services for the hospital in Słupsk had been within the framework of two separate contracts, one of which did not include the white sector, while the other did not include the grey sector.

In light of these clarifications, the contracting authority took the view that the services supplied to the hospital in Słupsk did not fulfil the conditions laid down in the tender specifications, according to which each contract had to contain all the elements listed therein, specifically supply, installation, configuration and implementation of an IHS in the white and grey sectors. Therefore, the contracting authority requested that Konsultant Komputer supplement its documents in that regard.

For this purpose, Konsultant Komputer provided a new list of supplies in which it relied on the experience of another entity, MSI, concerning two supply contracts for hospitals in Janów Lubelski and Lublin (Poland). It also sent an undertaking from MSI to provide, as an advisor and consultant, the resources necessary for performance of the contract and again listed the supply contract for the hospital in Nowy Sącz.

Satisfied with that response, the contracting authority again selected Konsultant Komputer's tender, since it was the most economically advantageous for lot No. 3.

Esaprojekt brought an action before the National Appeal Chamber seeking annulment of the contracting authority's decision, a fresh evaluation of the tenders, and the exclusion of Konsultant Komputer on the grounds that it had submitted false information and had failed to prove that it had fulfilled the conditions for participation in the procedure.

Questions

1. How should Article 56(3) in conjunction with Article 18(1) of the Public Sector Directive be understood?, To demonstrate that it meets the selection criteria, can a tenderer submit to the contracting authority documents that were not included in its original bid, after the deadline for submitting tenders? This question relates to documents such as another entity's undertaking to place at the tenderer's disposal the capacity and resources necessary for performance of the contract in question.

2. Considering Article 58(4) in conjunction with Article 63(1) and Article 18(1) of the Public Procurement Directive, is it permissible to combine resources to demonstrate that a selection criterion is met? Can the selection criterion regarding knowledge and experience be met by combining the resources of two entities that separately do not have the capabilities required for the performance of a given contract, which cannot be split and must therefore be performed by a single contractor?

3. Is Article 58(4) of the Public Sector Directive to be interpreted as meaning that an economic operator participating individually in an award procedure for a public contract can rely on the experience of a group of undertakings, of which it was part in connection with another public contract, irrespective of the nature of its participation in performance of the latter?

4. Is Article 58(4) of the Public Sector Directive to be interpreted as meaning that an economic operator may establish its experience by relying simultaneously on two or more contracts as a single contract, although the contracting authority has not expressly provided for such a possibility either in the contract notice or the tender specifications?

Instructions for resolving the case

Based on CJEU Case C-387/14 – Esaprojekt

Esaprojekt sp. z o.o. v Województwu łódzkiemu (ECLI:EU:C:2017:338)

Request for a preliminary ruling from the National Chamber of Appeal (Poland)

Legal resources

Provisions of the Public Sector Directive considered:

Article 18(1)

Article 56(3)

Article 58(4)

Questions

Notes for trainers: This case study is based on judgement C-387/14 Esaprojekt, but the dates in the case study have been changed so that it is possible to refer to the currently applicable Public Sector Directive. The case study also omits issues related to grounds for exclusion, which are discussed in the judgement but are not relevant from the perspective of selection criteria.

1. How should Article 56(3) in conjunction with Article 18(1) of the Public Sector Directive be understood?, To demonstrate that it meets the selection criteria, can a tenderer submit to the contracting authority documents that were not included in its original bid, after the deadline for submitting tenders? This question relates to documents such as another entity's undertaking to place at the tenderer's disposal the capacity and resources necessary for performance of the contract in question.

Judgement paragraphs 34 to 45

The CJEU stated that contracting authorities are required to afford economic operators equal, non-discriminatory and transparent treatment.

Thus, first, the principles of equal treatment and non-discrimination require that tenderers be accorded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions. Second, the principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications.

The CJEU held that the principles of equal treatment and non-discrimination and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted.

However, the CJEU explained that Article 18(1) of the Public Sector Directive does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that mere clarification is required, or the correction of obvious material errors (Case C-324/14 Partner Apelski Dariusz EU:C:2016:214, paragraph 63 and the case law cited).

The contracting authority must ensure that the request for clarification does not lead to a tenderer's submission of what would appear to be a new tender (Case C-324/14 Partner Apelski Dariusz EU:C:2016:214, paragraph 64 and the case law cited).

In the present case study, Konsultant Komputer submitted to the contracting authority documents that were not included in its initial tender, after the deadline for submitting tenders. Specifically, it relied on a contract performed by another entity, and the undertaking by the latter to place at the disposal of that operator the resources necessary for performance of the contract at issue.

Such further information, far from being merely a clarification made on a limited or specific basis, is in reality a substantive and significant amendment of the initial tender, which is more akin to the submission of a new tender.

Such a communication directly affects the essential elements of the award procedure, namely the verification of that operator's capacities and, therefore, its ability to perform the contract concerned.

In those circumstances, by allowing the economic operator to present the documents in question to supplement its original tender, the contracting authority unduly favours that operator over other tenderers, breaching the principles of equal treatment and non-discrimination of economic operators and the obligation of transparency.

Conclusion: Article 56(3) of the Public Sector Directive, read in conjunction with Article 18(1) of the Public Sector Directive, must be interpreted as precluding an economic operator from submitting to the contracting authority, after the tender submission deadline for a public contract, documents not included in its initial tender to prove it satisfies the selection criteria, such as a contract performed by another entity and the undertaking of the latter to place at the disposal of that operator the capacities and resources necessary for performance of the contract concerned.

Additional remarks

To better understand the issue analysed by the CJEU, it should be recalled that according to Article 56(3) of the Public Sector Directive,

> *where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law … , request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.*

In accordance with Poland's Law on Public Procurement, if the contractor has not submitted a statement (an ESPD), means of evidence or other documents or statements, or they are incomplete or contain errors, the contracting authority shall request the contractor to submit, correct or supplement its documentation within the prescribed period. The contracting authority is not obliged to make such a request if:

- - The contractor's application to participate in the procedure or tender is subject to rejection regardless of further document submission, supplementation or correction.
- - Prerequisites to cancel the procedure exist.

In the case study, the Polish contracting authority was required to request Konsultant Komputer to submit documents proving that it met the selection criterion for experience. According to the principle of equal treatment and non-discrimination, means of proof may be submitted after the deadline for tender submission, and may even be issued after that date,but it must confirm the contractor's experience as of the date of submission of tenders. In the case study, Konsultant Komputer pointed to new experience it did not have at its disposal as of the tender submission date.

2. Considering Article 58(4) in conjunction with Article 63(1) and Article 18(1) of the Public Procurement Directive, is it permissible to combine resources to demonstrate that a selection criterion is met? Can the selection criterion regarding knowledge and experience be met by combining the resources of two entities that separately do not have the capabilities required for the performance of a given contract, which cannot be split and must therefore be performed by a single contractor?

Judgement paragraphs 46 to 54

According to the CJEU's settled case law, Article 63(1) of the Public Sector Directive recognises the right of every economic operator to rely, for a particular contract, upon the capacities of other entities, regardless of the nature of the links it has with them, provided it proves to the contracting authority that it will have at its disposal the resources necessary for performance of the contract. However, Public Sector Directive provisions do not preclude exercise of the right established in Article 63(1) thereof from being limited in

exceptional circumstances (Case C-324/14 *Partner Apelski Dariusz*, EU:C:2016:214, paragraphs 33 and 39, and the case law cited).

It is conceivable that there may be works with special requirements necessitating a certain capacity that cannot be obtained by combining the capacities of more than one operator that would be inadequate on its own. In such circumstances, the contracting authority would be justified in requiring that the applicable minimum capacity level be achieved by a single economic operator or, when appropriate, by relying on a limited number of economic operators.

In the present case study, the specifications of the public contract at issue required tenderers to present at least two contracts performed in a specific sector.

Following the request of the contracting authority, to prove that it had the skills necessary to perform the public contract at issue, Konsultant Komputer relied on the experience of another entity, citing two supply contracts performed by MSI.

The public contract at issue could not be divided, so the minimum level of capacity had to be attained by a single economic operator and not by relying on the capacities of several economic operators. In these circumstances the economic operator concerned could not rely on the capacities of another entity to prove it had the capacities necessary for performance of the public contract at issue.

Conclusion: Article 58(4) of the Public Sector Directive, in conjunction with Article 63(1) and Article 18(1) of the Public Sector Directive, must be interpreted as meaning that it does not allow an economic operator to rely on the capacities of another entity by combining the knowledge and experience of two entities that, individually, do not have the capacities required for performance of a particular contract. This applies when the contracting authority considers that the contract concerned cannot be divided, in that it must be performed by a single operator, and that exclusion of the possibility to rely on the experience of several economic operators is related and proportionate to the subject matter of the contract, which must therefore be performed by a single operator.

Additional remarks

The issue under study concerns the possibility of aggregating and sharing resources. The principle is that contractors can use the resources of other entities and can form groups to jointly demonstrate to the contracting authority that they meet the selection criteria. It is worth remembering, however, that the issue of combining resources or making them available is a factual issue, not a legal one, and arises from the nature of resources and capabilities. Cash and technical resources (equipment) can easily be shared or combined to meet the selection criteria.

The situation is different for such capabilities as experience, knowledge or economic situation. Most often, transferring these capabilities requires the participation of their owner in performance of the contract, as they cannot by their nature be detached from the owner. Combining such resources usually does not increase their value but only the number of entities that have capabilities at the same level. For example, if 10 people learn a foreign language for one year, their combined level of knowledge remains the same and does not increase just because that knowledge has been multiplied by ten.

3. Is Article 58(4) of the Public Sector Directive to be interpreted as meaning that an economic operator participating individually in an award procedure for a public contract can rely on the experience of a group of undertakings, of which it was part in connection with another public contract, irrespective of the nature of its participation in performance of the latter?

Judgement paragraphs 55 to 65

This question relates to the fact that the supply of IHSs for the hospitals concerned was carried out by a group composed of two undertakings, Konsultant Komputer and Konsultant IT. The economic operator Konsultant Komputer submitted in its tender a list of supplies, including two headings concerning the

delivery, installation, configuration and implementation of two IHSs and performed for the hospitals in Słupsk (Poland) and Nowy Sącz (Poland), by the consortium composed of Konsultant IT sp. z o.o. and Konsultant Komputer.

According to Article 58 of the Public Sector Directive, it is up to the contracting authority to check the suitability of the tenderers, and it may require tenderers to meet minimum levels of economic and financial standing and technical and professional ability.

Evidence of economic operators' technical and/or professional abilities may be furnished, taking account in particular of the nature and importance of the supplies of services they have provided, by presenting a list of works carried out during the last five years and a list of the principle deliveries effected or main services supplied in the last three years.

The experience acquired by an economic operator is a particularly important criterion for the qualitative selection of that operator, as it enables the contracting authority to check the ability of the tenderer to execute a specific public contract.

Therefore, when an economic operator relies on the experience of a group of undertakings in which it has participated, that experience must be assessed in relation to the effective participation of that operator and, therefore, to its actual contribution to the performance of an activity required of that group in the context of a specific public contract.

In practice, an economic operator acquires experience not by the mere fact of being a member of a group of undertakings without any regard for its contribution to that group, but only by directly participating in the performance of at least part of the contract, the whole of which is to be performed by that group.

It follows that an economic operator cannot rely on the supply of services by other members of a group of undertakings in which it has not actually and directly participated as proof of experience required by the contracting authority.

Conclusion: Article 58(4) of the Public Sector Directive must be interpreted as meaning that it does not allow an economic operator that has individually participated in an award procedure for a public contract to rely on the experience of a group of undertakings of which it was a member, in connection with another public contract, if it has not actually and directly participated in performance of that contract.

4. Is Article 58(4) of the Public Sector Directive to be interpreted as meaning that an economic operator may establish its experience by relying simultaneously on two or more contracts as a single contract, although the contracting authority has not expressly provided for such a possibility either in the contract notice or the tender specifications?

Judgement paragraphs 79 to 88

The CJEU issued a reminder that the contracting authority is required to check the suitability of tenderers to perform the contract concerned. The tenderers themselves must prove to the contracting authority that they have or will have the capacities necessary to ensure proper performance of the public contract.

In this connection, the contracting authority is justified in expressly setting out, in principle in the tender notice or the tender specifications, the requirement to provide evidence of specific capacities and practical arrangements by which the tenderer must demonstrate its suitability to be awarded and perform the contract concerned. Likewise, it is conceivable that, in specific circumstances depending on the nature of the works concerned and the subject matter and purpose of the contract, the contracting authority may lay down limits, in particular regarding the use of a restricted number of economic operators (Case C-324/14 *Partner Apelski Dariusz*, C324/14, EU:C:2016:214, paragraphs 39 to 41, Case C-298/15 *Borta*, EU:C:2017:266, paragraph 90 and the case law cited).

However, if the contracting authority decides to make use of such a possibility, it must ensure that the rules it adopts are related and proportionate to the subject matter and objectives of that contract (Case C-324/14 *Partner Apelski Dariusz*, EU:C:2016:214, paragraphs 40 and 56).

In the present case study, although it is true that in the contract documents the contracting authority has not expressly provided for the possibility for the tenderer to rely on two or more contracts as a single contract, the fact remains that such a possibility was not expressly excluded, either in the contract notice or the tender specifications.

In these circumstances, it is conceivable prima facie that the experience necessary for performance of the contract concerned, acquired by the economic operator in the performance of not one, but two or more different contracts, may be regarded as sufficient by the contracting authority and thereby enable that operator to win the public contract concerned.

The CJEU noted that if the requirements of a specific contract can be fulfilled by bringing together capacities or experience split between different operators, then it would simply be illogical to exclude, as a matter of principle, the possibility of bringing together capacities or experience gained by the same operator in different contracts.

Therefore, as in the case in the main proceedings, as the possibility of relying on experience acquired in several contracts has not been excluded in either the contract notice or the tender specifications, it is for the contracting authority, subject to review by the competent national courts, to determine whether the experience gained from two or more previous contracts would ensure proper performance of the present contract, considering the nature of its works and its subject matter and purpose.

Conclusion: Article 58(4) of the Public Sector Directive must be interpreted as meaning that it allows an economic operator to rely on experience derived from two or more contracts treated as a single one, unless the contracting authority has excluded such a possibility pursuant to requirements that are related and proportionate to the subject matter and purpose of the public contract concerned.

Additional remarks

To better understand the issue analysed by the CJEU, it is necessary to distinguish between the contract and its object: works or services of a certain value, and characteristics. Professional experience is gained by the contractor by performing certain works or services regardless of the legal basis for their provision. If, for example, the contracting authority wants to check the professional experience of a hospital cleaning service, the most relevant details are: the area of the hospital/number of facilities; duration of the service/speed of delivery; and the standards of the service or its value. Less important is whether the experience results from service provision for the contracting authority, for a private entity or as part of the contractor's own business (i.e. the contractor itself runs the hospital and provides cleaning). It is also of lesser importance whether the annual cleaning service was performed based on a single contract or two contracts, each covering six months. In some situations, the number of contracts or the specific buyer of the contracts may be relevant to the scope of work experience if it involves special work organisation or more resources.

Similar cases

Case C-324/14 *Partner Apelski Dariusz* (EU:C:2016:214, paragraphs 33, 63 to 64, 39 to 41 and 56)

Case C-298/15 *Borta* (EU:C:2017:266, paragraph 90)

Further reading

OECD (2016), “Selecting Economic Operators”, SIGMA Public Procurement Briefs, No. 7, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.

9 Contract award criteria and tender evaluation

Introduction

The concept of most economically advantageous tender

Award criteria constitute the basis on which a contracting authority chooses the best tender and awards a contract. These criteria must be established in advance by the contracting authority and must not be prejudicial to fair competition. The Public Sector Directive requires contracting authorities to base the award of a contract on the most economically advantageous tender. Regardless of the factors taken into account, a contract should be awarded to the tenderer offering the most economically advantageous tender.

The concept of most economically advantageous tender is explained as a tender that is the most economically advantageous from the point of view of the contracting authority. It is identified based on price or cost (using a cost-effectiveness approach such as lifecycle costing) or the best price-quality ratio. In the latter case, the ratio is assessed on criteria linked to the subject of the public procurement, including qualitative, environmental and/or social aspects. The concept of most economically advantageous tender means that it is still possible to award based on lowest price.

For procurement procedures requiring a contract notice, the contracting authority must announce in the contract notice whether it is going to apply a price-only, cost-only or best-price-quality approach. In the case of a best-price-quality approach, the criteria to be used should be disclosed in either the contract notice or the procurement documents.

Contracting authorities should observe the principle of equal treatment and non-discrimination and the principle of transparency. The award criteria must be non-discriminatory and must not be prejudicial to fair competition. The award criteria must be set in advance and duly disclosed to tenderers.

Criteria to determine the best price/quality ratio

A contracting authority may take various criteria into account to determine the best price-quality ratio. The Public Sector Directive contains an illustrative list of these criteria:

- quality, including technical merit
- aesthetic and functional characteristics
- accessibility
- design for all users
- social, environmental and innovative characteristics
- trading and its conditions

- organisation, qualification and experience of staff assigned to perform the contract, when the quality of the staff assigned can have a significant impact on the level of performance of the contract
- after-sales service and technical assistance
- delivery conditions, such as delivery date, delivery process and delivery period or date of completion.

As this list is only illustrative, it is left to the contracting authority to establish the exact criteria to be applied to determine the most economically advantageous tender from its point of view, considering the specific circumstances of each case and within certain specified limitations.

Rules for creating award criteria

The Public Sector Directive refers to the tender that is the most economically advantageous "from the point of view of the contracting authority", thus putting emphasis on the contracting authority's discretion in choosing the criteria to be applied. However, this discretion is not unrestricted and has some limitations:

- The chosen criteria must be linked to the subject matter of the public contract in question.
- The chosen criteria must be designed to identify the most economically advantageous tender and cannot be aimed at other purposes.
- The chosen criteria must be objective and objectively quantifiable.

To guarantee the objectivity of the criteria to be applied and prevent the contracting authority from having unrestricted freedom of choice, these criteria must be formulated in a manner that is precise and, as far as possible, measurable. Tenderers should be able to prepare their tenders to accommodate the way in which the tenders will be assessed/evaluated.

Additionally, under no circumstances may the announced award criteria (including their relative weighting, any sub-criteria applied and their relative weighting, and any more detailed evaluation methodology that has been announced) be changed or waived during the process of tender evaluation. At this stage, they must be applied as they stand. Otherwise, any changes to the award criteria should result in an amendment to the contract notice and the setting of a new tender submission deadline.

The relationship between contract specifications and contract award criteria

In practice, the criteria a contracting authority may apply to determine the best price-quality ratio must be chosen to match the contract specifications. All specifications subject to evaluation should have criteria associated with them.

Preparation of the specifications and determination of the criteria to be applied to establish the best price-quality ratio go hand in hand. The contract specifications cannot be prepared without consideration for the criteria to be applied, and vice versa.

When the criterion of best price-quality ratio is used, contracting authorities generally operate in one of the following manners:

- They may decide to fix the minimum mandatory specifications that all tenders must meet; tenders are evaluated based on a pass or fail system; and then scores are awarded to those tenders that achieved a pass. The scores reflect the degree to which a tender exceeds the minimum specifications.
- They may decide to fix, in addition or as an alternative to mandatory specifications, specifications that do not entail the application of a minimum threshold, and tenders are then scored based on their level of compliance with the contracting authority's requirements. In this case, some variability in level of compliance is acceptable.

Methods for applying the chosen criteria

The methods or methodologies for applying the chosen criteria are the "systems" a contracting authority may use to identify the most economically advantageous tender:

- Weighting: The Public Sector Directive requires a contracting authority to specify the relative weight it gives to each criterion to determine the most economically advantageous tender.
- Descending order of importance: When weighting is not possible for demonstrable reasons, a contracting authority must indicate the criteria applied in descending order of importance. One of the reasons that weighting may not be possible is the complexity of a contract.

Supplementation or clarification of tenders

The contracting authority must ensure that the tenders received are complete and that they comply with all the requirements set in the tender documents. A contracting authority may ask a tenderer for clarification of its tender. Clarification may be needed when, for example, a tender contains inconsistent or contradictory information about the specific aspect of the tender; is not clear in describing what it is offering; contains minor mistakes or omissions; or is non-compliant with the non-fundamental formal and/or substantive requirements set out in the tender documents.

According to Article 56(3) of the Public Sector Directive, when information or documentation to be submitted by economic operators is incomplete or erroneous, or when specific documents are missing, contracting authorities may, unless otherwise stipulated by national law, request that those economic operators submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

In accordance with the principle of equal treatment, no substantial alterations to a tender are to be sought or accepted through a request for clarification. Therefore, a request for clarification cannot, for example, allow a non-compliant tender to be brought into compliance with the fundamental, mandatory specifications that have been set, or allow a change in the tendered price (except to correct arithmetical errors).

Abnormally low tenders

In many cases, procurement decisions are made based on lowest price, which is a permitted award criterion falling within the concept of "most economically advantageous tender". The lowest price, however, is not always the offer that is the best value for money in the long term.

The Public Sector Directive contains provisions for dealing with tenders that are suspected of being abnormally low. These rules enable contracting authorities to avoid the negative consequences of accepting a tender that appears extremely advantageous but is not viable in practice. In addition to protecting the public interest against the risk of non-performance or poor performance of a contract, these provisions are also aimed at supporting genuine competition among economic operators and reducing unfair advantages. For example, the provisions permit a contracting authority to reject a low-priced tender when the low price is a consequence of illegal support from public funds or from breaches of specific labour, social or environmental laws.

The Public Sector Directive does not define what constitutes an "abnormally low tender". This concept is nevertheless generally recognised as referring to a situation in which the price offered by an economic operator raises doubts as to whether the offer is economically sustainable and can be performed properly.

There are various reasons for the appearance of abnormally low tenders in public procurement procedures: a misunderstanding or misinterpretation; underestimation of risks; non-compliance with social, labour and environmental laws; subsidies; and deliberate strategising on the part of an economic operator.

Under Article 69(1) of the Public Sector Directive, contracting authorities are obliged to require economic operators to explain the price or costs proposed in their tenders when those tenders appear to be abnormally low in relation to the works, supplies or services concerned.

This means that the contracting authority is not allowed to:

- • Accept a tender that appears to be abnormally low without having first conducted this investigation.
- • Reject a tender that appears to be abnormally low without having allowed the bidder to explain its low price or costs.

Confidentiality

Article 21(1) of the Public Sector Directive introduces the general principle that a contracting authority shall not disclose information forwarded to it by economic operators – material they have designated as confidential, including (but not limited to) technical or trade secrets and the confidential aspects of tenders.

Legal provisions

Contract award criteria are regulated by Articles 67 and 68 of the Public Sector Directive.

The admissibility of tender clarification is regulated by Article 56(3) of the Public Sector Directive.

The treatment of abnormally low bids is regulated in Article 69 of the Public Sector Directive.

The rules of confidentiality and disclosure of information contained in tenders are regulated by Articles 21(1) and 55 of the Public Sector Directive.

Case studies

The case studies on award criteria and tender evaluation deal with five issues considered by the Court of Justice of the European Union (CJEU):

1. How should the award criteria be prepared in view of the need for evaluation? What means of proof are used to examine whether a tender meets the requirements set by the contracting authority and offered by the contractor?

2. Can the concept of most economically advantageous tender take into account criteria that are not economically measurable? How can a contracting authority design criteria that are related to the contract's subject matter and at the same time implement certain policies, i.e. environmental protection?

3 How should a contracting authority deal with an abnormally low bid? What obligations are incumbent on the contracting authority?

4 What effect do changes in identity on the contractor's side have on the validity of the submitted bid? Is the admissibility of changes related to the ability to implement the subject of the contract?

5. How can a contracting authority balance the right to corporate confidentiality with the principle of transparency in public procurement law?

6. Is it permissible to change the identity of the tenderers?

Case study 1

The concept of most economically advantageous tender: facts and dispute

The Austrian contracting authority invited tenders by way of an open procedure to award a public contract for the supply of electricity. The contract to be awarded consisted of a framework contract followed by individual contracts for the supply of electricity to all the Federal Republic's administrative offices in the Land of Carinthia. The contract term ran from 1 January 2022 to 31 December 2023. The invitation to tender included the following provision under the heading Award Criteria: “The economically most advantageous tender according to the following criteria: impact of the services on the environment in accordance with the contract documents”.

The tender had to state the price in euros per kilowatt hour (kWh), and the electricity supplier had to undertake to supply the federal offices with electricity produced from renewable energy sources. The supplier was not, however, required to submit proof of the electricity sources.

It was stated in the contract documents that the contracting authority was aware that for technical reasons no supplier could guarantee that the electricity supplied to a particular consumer was actually produced from renewable energy sources, but that the authority had nevertheless decided to contract with tenderers who could supply at least 22.5 gigawatt hours (GWh) of electricity produced from renewable energy sources per annum, since the annual consumption of the federal offices was estimated to be around 22.5 GWh.

In addition, it was specified that tenders would be eliminated if they did not contain any proof that “in the past two years and/or in the next two years the tenderer has produced or purchased, and/or will produce or purchase, and has supplied and/or will supply to final consumers, at least 22.5 GWh electricity per annum from renewable energy sources”.

The award criteria laid down were net price per kWh, with a weighting of 55%, and “energy produced from renewable energy sources”, with a weighting of 45%. It was stated in relation to the latter award criterion that “only the amount of energy that can be supplied from renewable energy sources in excess of 22.5 GWh per annum will be taken into account”.

Four tenders were submitted:

- The KELAG consortium stated a price of EUR 0.44/kWh and, under reference to a table showing the amounts and origin of electricity produced or supplied by those companies, affirmed that they were able to supply a total of 3 406.2 GWh of renewable electricity.
- Energie Oberösterreich AG proposed a price of EUR 0.4191/kWh for annual consumption in excess of 1 million GWh and, in a table relating to 2019-2022, showed the various amounts of electricity from renewable energy sources that it was able to supply for each of the years in that period. The highest amount stated was 5 280 GWh per annum.
- BEWAG submitted a price of EUR 0.465/kWh. The table included with its offer showed the proportion of electricity produced or supplied by BEWAG that came from renewable energy sources, on the basis of which the contracting authority deduced that the amount stated in that connection was 449.2 GWh.
- Wienstrom GmbH and EVN AG stated a price of EUR 0.52/kWh. These applicants did not provide any concrete figures for the amount of electricity they could supply from renewable sources, but instead merely stated that they had their own electricity generating plants in which they produced electricity from such sources. In addition, they had purchase options on electricity produced by hydroelectric power stations belonging to Österreichische EA and other Austrian hydroelectric

power stations, and other electricity purchased by them derived predominantly from long-term co-ordination contracts with the largest supplier of electricity certified as coming from renewable energy sources. In 2019 and 2020, they had purchased exclusively hydroelectric power from Switzerland, and this would continue to be the case. The total amount of electricity from renewable energy sources was several times the amount of electricity referred to in the invitation to tender.

The contracting authority considered that the best tender was KELAG's, and that group received the most points for each of the two award criteria. The applicants Wienstrom GmbH and EVN AG received the fewest points in respect of both criteria.

Wienstrom GmbH and EVN AG initiated review proceedings before Austria's Public Procurement Review Body, seeking to annul the invitation to tender in its entirety and the following decisions of the contracting authority:

- the decision to make the absence of proof of production and purchase of electricity from renewable energy sources during a certain period or the absence of proof of future purchase of such electricity as grounds for exclusion
- the decision to make proof of production or purchase of a certain amount of electricity from such sources over a specified period as a selection criterion
- the decision to make the availability of electricity from renewable energy sources in excess of 22.5 GWh per year as an award criterion.

In addition, the applicants applied for an interim order prohibiting the contracting authority from awarding the contract.

By a decision of 16 July 2021, Austria's Procurement Review Body granted the applicants' application and prohibited the contract from being awarded.

Questions

1. Does the Public Sector Directive, particularly Article 67, preclude a contracting authority from applying, in its assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources?

2. If the first question is answered in the affirmative, the second question is about clarification of the Public Sector Directive requirements regarding the concrete application of such a criterion. Does the specific award criterion comply with Article 67 of the Public Sector Directive, given that the criterion:

a) Has a weighting of 45%?
b) Is not accompanied by requirements that permit the accuracy of the information contained in the tenders to be effectively verified?
c) Does not impose a defined supply period?
d) Requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers?
e) Allocates the maximum number of points to the tenderer that provides the highest amount of electricity from renewable energy sources?
f) Awards points only for the amount of supply in excess of the consumption that can be expected in the context of the public contract?

Instructions for resolving the case

Based on CJEU Case C-448/01 – Wienstrom

EVN AG, Wienstrom GmbH and Republik Österreich (ECLI:EU:C:2003:651)

Request for a preliminary ruling from the Bundesvergabeamt (Austria)

Legal resources

Provisions of the Public Sector Directive considered:

Article 67

Questions

Notes for trainers: This case study is based on judgment C-448/01 *Wienstrom*, but the dates and currency in the case study have been changed so that it is possible to refer to the currently applicable Public Sector Directive. Case C-448/01 *Wienstrom* involved the interpretation of Article 26 of Council Directive 93/36/EEC of 14 June 1993 co-ordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1). According to Article 26 of Directive 93/36/EEC, when award is made to the most economically advantageous tender, the contracting authority may establish various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance. The cited provision did not explicitly refer to environmental criteria as the current Article 67 of the Public Sector Directive does.

1. Does the Public Sector Directive, particularly Article 67, preclude a contracting authority from applying, in its assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources?

2. If the first question is answered in the affirmative, the second question is about clarification of the Public Sector Directive requirements regarding the concrete application of such a criterion. Does the specific award criterion comply with Article 67 of the Public Sector Directive, given that the criterion:

a) Has a weighting of 45%?
b) Is not accompanied by requirements that permit the accuracy of the information contained in the tenders to be effectively verified?
c) Does not impose a defined supply period?
d) Requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers?
e) Allocates the maximum number of points to the tenderer that provides the highest amount of electricity from renewable energy sources?
f) Awards points only for the amount of supply in excess of consumption that can be expected in the context of the public contract?

Judgement paragraphs 33 to 72

The CJEU explained that when a contracting authority decides to award a contract to the tenderer with the most economically advantageous tender, it may take ecological criteria into consideration, provided that they are linked to the subject matter of the contract, do not confer unrestricted freedom of choice upon the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of EU law, particularly the principle of non-discrimination. Article 67 of the current Public Sector Directive takes CJEU case law into account and explicitly states that such criteria can be used by the contracting authority.

It follows that the Public Sector Directive does not preclude a contracting authority from applying, in the context of assessing the most economically advantageous tender for a contract to supply electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources. This is acceptable provided that the criterion is linked to the subject matter of the contract, does not confer

unrestricted freedom of choice upon the authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of EU law, particularly the principle of non-discrimination.

Provided that they comply with the requirements of EU law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.

The CJEU held that the use of renewable energy sources for producing electricity is useful for protecting the environment, as it contributes to a reduction in greenhouse gas emissions, which are among the main causes of the climate change that the European Union and its Member States have pledged to combat. The CJEU decided that applying a weighting of 45% to the award criterion at issue is not incompatible with EU legislation on public procurement.

Additionally, the CJEU underlined that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority – meaning that when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers.

The CJEU issued a reminder that the principle of equal treatment implies an obligation of transparency to enable verification that it has been complied with, which consists of ensuring, among other things, a review of the impartiality of procurement procedures. Objective and transparent evaluation of the various tenders depends on the contracting authority being able to verify effectively – based on information and proof provided by the tenderers – whether the tenders submitted meet the award criteria. According to the CJEU, it is apparent that when a contracting authority defines an award criterion indicating that it neither intends nor is able to verify the accuracy of the information supplied by tenderers, it infringes upon the principle of equal treatment because such a criterion does not ensure the transparency and objectivity of the tender procedure. Therefore, an award criterion that is not accompanied by requirements permitting the tenderers' information to be effectively verified is contrary to the principles of EU law in the field of public procurement.

Additionally, the contracting authority's failure to determine in the invitation to tender the period for which tenderers had to state the amount of renewable electricity they could supply, could be an infringement of the principles of equal treatment and transparency, were it to transpire that the omission made it difficult or even impossible for tenderers to know the exact scope of the criterion in question and thus to be able to interpret it in the same way.

The CJEU stated that ecological criteria used by a contracting authority as award criteria for determining the most economically advantageous tender must be, among other things, linked to the contract's subject matter. In the case study at issue, the award criterion applied does not relate to the service that is the subject matter of the contract, namely the supply of an amount of electricity to the contracting authority corresponding to its expected annual consumption as laid down in the invitation to tender, but rather to the amount of electricity the tenderers have supplied, or will supply, to other customers. The CJEU explained that an award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of expected annual consumption, as set forth in the invitation to tender, cannot be regarded as linked to the subject matter of the contract.

Moreover, in accordance with the award criterion applied, it is the amount of electricity in excess of expected annual consumption (as defined in the invitation to tender) that is decisive. This is liable to confer an advantage on tenderers that, owing to their larger production or supply capacities, are able to supply greater volumes of electricity than other tenderers. The CJEU clarified that this criterion is thus liable to result in unjustified discrimination against tenderers whose tenders are fully able to meet the requirements linked to the subject matter of the contract. Such a limitation on the circle of economic operators in a position to submit a tender would have the effect of thwarting the objective of opening up the market to competition.

As a result, tenderers must state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and the contracting authority allocates the maximum number of points to whichever tenderer reports the highest amount. The supply volume is taken into account only to the extent that it exceeds expected consumption in the context of the procurement. Thus, the award criterion applied in this case study is not compatible with EU legislation on public procurement.

Conclusion: In assessing the most economically advantageous tender for a contract to supply electricity, the Public Sector Directive does not preclude a contracting authority from applying a 45%-weighted award criterion requiring that the electricity be produced from renewable energy sources.

Conclusion: The Public Sector Directive precludes such a criterion when:

- It is not accompanied by requirements that permit the accuracy of the information contained in the tenders to be effectively verified.

- It requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers and allocates the maximum number of points to whichever tenderer states the highest amount, with the supply volume taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement.

Additional remarks

EU regulations on public procurement were initially viewed as solutions to foster economic integration, opening up national markets to economic operators from other Member States and facilitating the free movement of goods and services. In practice, however, questions have begun to arise about the permissible scope of instrumentalising public procurement to implement non-economic policies, such as promoting compliance with labour and social laws and protecting the environment. When public authorities began to consider environmental issues in their purchasing, the idea of Green Public Procurement (GPP) was born. According to the European Commission's opinion, the basic concept of GPP relies on having clear, verifiable, justifiable and ambitious environmental criteria for products and services, based on a lifecycle approach and a scientific evidence base (https://ec.europa.eu/environment/gpp/gpp_criteria_en.htm). In the communication "Public Procurement for a Better Environment" (COM [2008] 400 final), the European Commission recommended the creation of a process for setting common GPP criteria. Since 2008, the European Commission has developed more than 20 common GPP criteria, available on its website (https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm).

The use of public procurement to promote industrial, social and environmental policies is now commonly defined as Sustainable Public Procurement (SPP) and understood as a process by which public authorities seek to achieve an appropriate balance among the three pillars of sustainable development – economic, social and environmental – when procuring goods, services or works at all stages of a project (https://ec.europa.eu/environment/gpp/versus_en.htm).

Current public procurement regulations emphasise the importance of environmentally responsible public procurement. Recital 91 of the preamble to the Public Sector Directive states that "this directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts". The EU legislator encouraged Member States to procure responsibly and consider sustainability issues. The Public Sector Directive takes environmental aspects into account and allows contracting authorities to implement GPP by providing a number of solutions that are beneficial from an environmental and climate change perspective.

The EU legislature has introduced the obligation to observe environmental law as a principle into public procurement law. According to Article 18(2) of the Public Sector Directive, Member States shall take appropriate measures to ensure that in the performance of public contracts, economic operators comply

with applicable environmental law obligations established by EU law, national law or the international environmental law provisions listed in Annex X, which refers to a number of international conventions, including several environmental agreements.

Similar cases

C-513/99 *Concordia Bus Finland* (EU:C:2002:495): The CJEU explained that not each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature.

C-19/00 *SIAC Construction* (EU:C:2001:553): The CJEU stated that to decide on the most economically advantageous tender, the contracting authority is free to choose the criteria on which it proposes to base the award of the contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority unrestricted freedom of choice regarding the award of the contract to a tenderer.

Tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority. The award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way.

C-470/99 *Universale-Bau* (EU:C:2002:746): The CJEU explained that the procedure for awarding a public contract must comply, at every stage, with both the principle of equal treatment of potential tenderers and the principle of transparency to afford all parties equality of opportunity in formulating the terms of their tenders.

Further reading

OECD (2016), "Tender Evaluation and Contract Award", *SIGMA Public Procurement Briefs,* No. 9, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-9-200117.pdf.

OECD (2016), "Setting the Award Criteria", *SIGMA Public Procurement Briefs,* No. 8, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-8-200117.pdf.

OECD (2016), "Incorporating Environmental Considerations into Public Procurement", *SIGMA Public Procurement Briefs,* No. 13, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-13-200117.pdf.

Case study 2

The concept of most economically advantageous tender: facts and dispute

A contracting authority in the Netherlands published a contract notice in the *Official Journal of the European Union* for the supply and management of automatic coffee machines. The notice described the contract as follows:

> *The contracting authority has a contract for the management of automatic coffee machines. The contracting authority intends to enter into a new contract after the expiry of the old contract and an important aspect is the desire to increase the use of organic and fair-trade products in automatic coffee machines.*
>
> *The contracting authority places an order for the supply, installation and maintenance of semi-automatic (full-operational) machines for the dispensing of hot and cold drinks, on a hire basis. The contracting authority also places an order for the supply of ingredients for the dispensing machines. Sustainability and functionality constitute important aspects.*

The contract notice dealt with the conditions relating to the contract and stated that the contract would be awarded to the most economically advantageous tender: "The tenders shall be evaluated both on the basis of qualitative and environmental criteria and on the basis of price".

The contracting authority established an award criterion stating that the ingredients to be supplied (coffee, tea and sugar) are to bear the EKO and/or Max Havelaar labels. Tenderers offering to supply ingredients bearing these ecolabels would receive a certain number of additional points in their bid evaluations.

The EKO and Max Havelaar labels have the following characteristics:

1. The private Netherlands EKO label is granted to products made up of at least 95% ingredients from organic agricultural production. It is administered by a foundation established under Netherlands private law, which has the objective of promoting organic agriculture and combatting fraud.

2. The Max Havelaar label is also a private label administered by a foundation established under Netherlands private law, in conformity with the rules laid down by an international umbrella organisation, the Fairtrade Labelling Organisation (FLO). It is used in a number of countries, including the Netherlands. The label is intended to promote the marketing of fair-trade products and certifies that the products for which it is granted are purchased at a fair price and under fair conditions from organisations made up of small-scale producers in developing countries.

This case was not a reference for a preliminary ruling by a national court to the CJEU. In this case, the European Commission commenced infringement proceedings against the Kingdom of the Netherlands on the grounds that the Kingdom of the Netherlands failed to fulfil its obligations under Articles 43, 44 and 67 of the Public Sector Directive. The European Commission claimed that the Kingdom of the Netherlands had failed to fulfil its obligations because in a tendering procedure for a public contract for the supply and management of automatic coffee machines, the contracting authority included in its award criteria a reference to the Max Havelaar and/or EKO labels, or in any event labels based on the same criteria.

Question

Is it in accordance with Article 67 of the Public Sector Directive to have an award criterion that demands a certain ecolabel?

Instructions for resolving the case

Based on CJEU Case C-368/10 – EC v Netherlands

European Commission v the Kingdom of Netherlands (ECLI:EU:C:2012:284)

Claim made by the EC according to Article 258 of the Treaty on the Functioning of the European Union (TFEU)

Legal resources

Provisions of the Public Sector Directive considered:

Article 67

Article 43

Article 44

Question

Is it in accordance with Article 67 of the Public Sector Directive to have an award criterion that demands a certain ecolabel?

Judgement paragraphs 73 to 97

The CJEU pointed out that under Article 67 of the Public Sector Directive, when a contracting authority decides to award a contract to the tenderer that submits the most economically advantageous tender from the point of view of the contracting authority, that authority must base its decision on various criteria it has determined in compliance with the requirements of the Public Sector Directive. In principle, the award criteria may be not only economic but also qualitative. Thus, among the examples referred to in Article 67(2) of the Public Sector Directive are environmental characteristics.

Article 67(3) of the Public Sector Directive requires that the award criteria be linked to the subject matter of the contract. Additionally, compliance with the principles of equality, non-discrimination and transparency requires that the award criteria be objective, ensuring that tenders are compared and assessed objectively and thus in conditions of effective competition. This would not be the case for criteria that effectively confer unrestricted freedom of choice upon the contracting authority.

The first issue to verify is whether the award criterion set by the contracting authority in this case study relates to the subject matter of the contract. It is necessary to first consider the criteria underlying the EKO and Max Havelaar labels, which characterise the designated products as being derived from, respectively, organic agriculture and fair trade. The criteria laid down by the foundation that grants the Max Havelaar label seek to promote the interests of small-scale producers in developing countries while maintaining trade relations with them, taking the actual needs of the producers into account, not only the dictates of the market. The CJEU explained that the award criterion at issue concerned environmental and social characteristics falling within the scope of Article 67 of the Public Sector Directive.

Second, it also follows from the drafting of the award criterion at issue that it covered only the ingredients to be supplied in the framework of the contract, without having any bearing on the general purchasing policy of the tenderers. Therefore, the products to be supplied under this award criterion constituted part of the subject matter of the contract.

Finally, there is no requirement for an award criterion to relate to an intrinsic characteristic of a product, i.e. something that forms part of its material substance. There is nothing, in principle, to preclude such a criterion from referring to a product as being of fair-trade origin.

The CJEU held that the award criterion at issue is linked – as required by Article 67(3) of the Public Sector Directive – to the subject matter of the contract.

With regard to the contracting authority's requirement of specific labels in its award criterion, it must be noted that if the supplied ingredients bore the EKO and/or Max Havelaar labels, the contracting authority

would award a certain number of points when classifying the competing tenders, for the purpose of awarding the contract. This condition must be examined in light of the requirements for precision and objectivity that apply to contracting authorities.

Regarding the specific issue of label use, the Public Sector Directive offers certain precise indications under Article 43(1): “Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics”.

It is clear that this provision authorises contracting authorities to have recourse to the criteria underlying an ecolabel to establish certain characteristics of a product, but not to make an ecolabel a technical specification. The use of such labels should be allowed only to create a presumption that the products bearing that label comply with the characteristics thus defined, expressly subject to any other appropriate means of proof being allowed.

When awarding public contracts, it is important to distinguish between the facts the contracting authority is supposed to establish (e.g. the characteristics of the product to be procured) and the evidence supporting the facts (e.g. labels). As labels are therefore the only evidence that the goods have certain characteristics, contractors may also use other evidence to demonstrate to the contracting authority that the coffee and tea it can offer meet the characteristics indicated by the required ecolabels. The introduction of an award criterion relating directly to the obligation to provide a specific ecolabel discriminates against economic operators that can offer coffee and tea with equivalent characteristics confirmed by other evidence.

Conclusion: The contracting authority established an award criterion that was incompatible with Article 67 of the Public Sector Directive. This is because, although the award criterion at issue is linked to the subject matter of the contract, the strict requirement for a specific label as an evaluation criterion is discriminatory.

Further reading

OECD (2016), “Tender Evaluation and Contract Award”, *SIGMA Public Procurement Briefs,* No. 9, OECD Publishing, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-9-200117.pdf.

OECD (2016), “Setting the Award Criteria”, *SIGMA Public Procurement Briefs,* No. 8, OECD Publishing, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-8-200117.pdf.

OECD (2016), “Incorporating Environmental Considerations into Public Procurement”, *SIGMA Public Procurement Briefs,* No. 13, OECD Publishing, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-13-200117.pdf.

Case study 3

The concept of abnormally low tenders. Contractors receiving subsidies: facts and dispute

By a notice published on 5 October 2020, the Region of Lombardy in Italy issued an invitation to tender to award a three-year service contract for processing data for external quality control in relation to medicinal products, based on a best-value-for-money tender. The public entity Azienda, which is established in the Region of Tuscany and carries out its activities there, participated in the procedure and placed first, principally because of the price it offered for its services, equivalent to 59% lower than that of the second-place tenderer, Data Medical Service. Following an investigation into the potentially abnormal character of that tender, the contracting authority awarded the contract to the public entity Azienda on 26 May 2021.

Data Medical Service contested the award decision before the Regional Administrative Court of Lombardy, claiming that the successful tenderer should have been excluded on the grounds that, in accordance with the applicable Italian legislation, a public entity could not participate in an invitation to tender and that, in any event, its tender was abnormally low in view of the amount of the discount offered.

The Regional Administrative Court of Lombardy noted that existing Italian legislation that excludes public entities such as Azienda from participating in tenders is inconsistent with Articles 2(1) and (10) of the Public Sector Directive. According to the Public Sector Directive provision mentioned, the notion of “economic operator” means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, offering the execution of work(s), the supply of products or the provision of services on the market. As a rule, Italian courts therefore accept that public entities can bid in tenders.

However, the Regional Administrative Court of Lombardy considered that the right of an entity in receipt of public funds to participate freely in an invitation to tender raises the issue of equal treatment among disparate competitors – on the one hand those that must be active on the market and, on the other, those that can also rely on public funding and are thereby able to submit tenders that no persons governed by private law would ever be in a position to submit.

Question

Do the Public Sector Directive and the general principles of freedom of competition, non-discrimination and proportionality that underly that directive preclude national legislation from allowing a public entity such as Azienda to participate in a tendering procedure, and to submit a tender that cannot be matched by any competitors as a result of the public funding it receives?

Instructions for resolving the case

Based on CJEU Case C-568/13 – Data Medical Service

Azienda Ospedaliero-Universitaria di Careggi-Firenze v Data Medical Service Srl (ECLI:EU:C:2014:2466)

Request for a preliminary ruling from the Consilio di Stato (Italy)

Legal resources

Provisions of the Public Sector Directive considered:

Article 69

Question

Notes for trainers: This case study is based on judgment C-568/13 *Data Medical Service*, but the dates in the case study have been changed so that it is possible to refer to the currently applicable Public Sector Directive. The previous provisions of Directive 2004/18 applied accordingly under the new regime.

Do the Public Sector Directive, and especially the general principles of freedom of competition, non-discrimination and proportionality that underlie that directive, preclude national legislation from allowing a public entity such as Azienda to participate in a tendering procedure, and to submit a tender that cannot be matched by any competitors as a result of the public funding it receives?

Judgement paragraphs 39 to 51

First, the CJEU noted that the EU legislature, while being aware of the differences between competitors participating in a public tender, did not make provision for mechanisms other than those designed to check and possibly reject abnormally low tenders from Article 69 of the Public Sector Directive. It must also be borne in mind that contracting authorities must treat economic operators equally and in a non-discriminatory manner and must act in a transparent fashion. However, the provisions of the Public Sector Directive do not allow, a priori and without further consideration, a tenderer to be excluded from participation in a procedure for the award of a public contract solely because, as a result of the public subsidies it receives, it is able to submit tenders at prices that are significantly lower than those of unsubsidised tenderers.

The CJEU explained that in certain specific circumstances, however, contracting authorities are required, or at the very least permitted, to take into account the existence of subsidies, particularly aid incompatible with the TFEU to exclude tenderers in receipt of such aid when appropriate. According to Article 69(1) and (2) of the Public Sector Directive, contracting authorities shall require economic operators to explain the price or costs proposed in the tender when tenders appear to be abnormally low in relation to the works, supplies or services. The explanations may particularly relate to the possibility of the tenderer obtaining state aid. Additionally, under Article 69(4) of the Public Sector Directive, when a contracting authority establishes that a tender is abnormally low because the tenderer has obtained state aid, the tender may be rejected on those grounds alone only after consultation with the tenderer, if the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market under the meaning of Article 107 of the TFEU.

Having in mind the practical aspects of the procedure laid down by Article 69 of the Public Sector Directive, the CJEU observed that, because such a public entity has separate accounts for its activities on the market and for its other activities, it may be possible to establish whether a tender is abnormally low as a result of state aid. However, a contracting authority may not conclude from the absence of separate accounts that the tender was made possible by the grant of a subsidy or state aid that is incompatible with the TFEU.

The possibility of rejecting an abnormally low tender is not limited solely to cases in which the low price can be explained by a grant of state aid that is unlawful or incompatible with the internal market. In the opinion of the CJEU, this possibility is more general in character.

First, it follows from the wording of Article 69 of the Public Sector Directive that when contracting authorities are examining abnormally low tenders, they are obliged to ask tenderers to furnish explanations proving those tenders are genuine. Accordingly, a proper exchange of views between the contracting authority and the tenderer at an appropriate time during tender examination, to allow the tenderer to demonstrate its tender is genuine, is a fundamental requirement of the Public Sector Directive. This stipulation is designed to prevent contracting authorities from acting in an arbitrary manner, and to ensure healthy competition among undertakings.

Second, the CJEU issued a reminder that Article 69 of the Public Sector Directive does not define what constitutes an "abnormally low tender". It is thus up to Member States, and particularly contracting authorities, to determine a method for calculating the anomaly threshold for "abnormally low" tenders within the meaning of that article.

The EU legislature therefore made it clear in that provision that the abnormally low character of a tender must be assessed "in relation to the service to be provided". Thus, during its examination of the abnormally low character of a tender, a contracting authority may take into consideration all factors that are relevant in light of the service at issue to ensure healthy competition.

Conclusion: The Public Sector Directive, and especially the general principles of freedom of competition, non-discrimination and proportionality that underlie that directive, must be interpreted as not precluding national legislation from allowing a public entity in a tendering procedure (e.g. Azienda) to submit a tender that cannot be matched by any competitors as a result of public funding it receives. However, in examining the abnormally low character of a tender based on Article 69 of that directive, the contracting authority may take into consideration public funding such an entity receives in light of the option to reject that tender. Thus, obtaining a subsidy does not deprive a contractor of the right to participate in a tender procedure in principle, but in cases of doubt, the contracting authority should verify whether the subsidy is in compliance with EU law.

Additional remark

The issue of foreign subsidies is regulated by Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies Distorting the Internal Market.

Similar cases

C-94/91 *ARGE* (EU :C :2000 :677)

C-305/08 *CoNISMa* (EU :C :2009 :807)

C-599/10 *SAG ELV Slovensko and Others* (EU :C :2012 :191)

Further reading

OECD (2016), "Abnormally Low Tenders", *SIGMA Public Procurement Briefs,* No. 35, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-35-200117.pdf.

Case study 4

Means of proof: facts and dispute

By notice of an invitation to tender published on 21 August 2018, the contracting authority in Italy launched a procedure to conclude a framework agreement for the supply of "original Iveco spare parts, or equivalent, for buses", with a value estimated at EUR 710 000.

Article 5.1 of the tender specifications, "Typology of the spare parts", distinguished between three types of spare parts: "spare parts intended for vehicle safety and environmental protection"; "original spare parts"; and "equivalent spare parts", the latter being defined as "spare parts of a quality equivalent to that of the original, or parts of a quality at least equal to that of the components used for vehicle assembly, produced according to the technical specifications and production standards of the manufacturer of the original spare part".

The tender specifications stated that "the equivalent spare parts may be manufactured by any undertaking able to certify at any time, in accordance with the rules in force, that the quality of the spare parts is consistent with that of the original components used in the assembly of the motor vehicles in question".

Article 5.2 of the tender specifications, "Certifications and declarations", stated that with the supply of an equivalent spare part, a tenderer "shall submit a certificate of conformity or a specific type-approval for the replacement component, provided by the manufacturer, the type-approval body or the laboratory for tests certified according to ISO 45000 standards".

The tender specifications declared that the "administrative documents" to be submitted with the offer should include

> *the appropriate technical documentation for each equivalent spare part proposed, accompanied by: … a product type-approval certificate, where mandatory, issued by the manufacturer of the equivalent spare part proposed; a certificate as to the equivalence of the product proposed in relation to the relevant original product, in that it is a perfect substitute requiring no adaptation of the spare part, the unit or the system into which it is to be fitted, and performance characteristics ensuring the product's regular functionality and safety in the system, as well as an identical lifetime, issued by the producer of the equivalent spare part proposed.*

The three economic operators participating in the tendering procedure included VSI Srl and Iveco Orecchia, two tenderers established in Italy. By a decision of 29 January 2019, the contracting authority made a final award of the contract to VSI Srl.

By an action brought before the Regional Administrative Court, Lombardy, Iveco Orecchia, which was ranked second, challenged the award of the contract to VSI Srl. In support of this action, Iveco Orecchia claimed that, among other things, VSI Srl should have been excluded from the call for tenders because the tender it submitted was incomplete. Iveco Orecchia argued that VSI Srl had not provided certificates of approval or conformity and technical documents to prove that the spare parts it allegedly manufactured complied with the technical specifications, the submission of which was required under the tender specifications, on pain of exclusion. According to Iveco Orecchia, VSI Srl merely submitted a general self-certification of equivalency of those spare parts, claiming that it was a manufacturer of those spare parts even though it was merely a dealer.

By a judgment of 25 June 2019, the Regional Administrative Court, Lombardy, dismissed Iveco Orecchia's action as unfounded. That court held that, among other things, the rules attached to the call for tenders relating to documentation to be submitted by tenderers required the production of a certificate of conformity or a specific type-approval, which means that it was sufficient to submit such a certificate. Moreover, for

the individual spare parts covered by the relevant market, Iveco Orecchia did not establish on what legal basis it was also necessary to provide proof confirming approval of those parts.

In this case study, a distinction must be drawn between two aspects: first, the equivalency of spare parts proposed by tenderers with original spare parts, which presupposes an assessment of the quality of the spare parts at issue and a comparison of the goods concerned; and second, the type-approval of such spare parts, which implies that they correspond to European or national technical specifications.

The rules set out in the call for tenders relating to documentation required that tenderers provide a type-approval certificate, if such approval were compulsory.

If a spare part is covered by one of the regulatory acts listed in Annex IV to Directive 2007/46 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (OJ L 263, 9.10.2007, p. 1), it may be marketed only if it has been subject to prior approval, in accordance with the relevant provisions of that directive and with the principles of equal treatment, reasonableness, proper functioning and impartiality.

In this case study, however, as alternative proof of the equivalency of the spare parts to the original parts, the successful tenderer submitted (and the contracting authorities accepted) a declaration by the tenderer, unaccompanied by the required type-approval certificate or other equivalent technical documents, for example conformity verification tests.

Questions

1. If a tenderer offers equivalent spare parts subject to approval in accordance with Directive 2007/46, must it provide, on pain of rejection of its tender, a type-approval certificate as evidence that the parts are indeed equivalent to original parts, or at least provide concrete proof that the spare part has been approved? Or is it sufficient, as an alternative to these documents, for the tenderer to provide a self-declaration that the spare parts proposed in its tender are equivalent to original parts?

2. Which entity is responsible for issuing declarations of equivalency and, more importantly, must they be drawn up by the manufacturer of the spare part or may they also be drawn up by a dealer?

Instructions for resolving the case

Based on CJEU Case C-68/21 and 84/21 – Iveco Orecchia SpA

Iveco Orecchia SpA (ECLI:EU:C:2022:835)

Request for a preliminary ruling from the Council of State (Italy)

Legal resources

Provisions of the Public Sector Directive considered:

Article 42

Article 44

Provisions of Directive 2007/46 considered:

Article 1

Article 3

Article 10

Article 19

Article 28

Questions

Notes for trainers: This case study is originally based on judgments C-68/21 and C-84/21 *Iveco Orecchia SpA*, for which the Utilities Directive is applicable. Given the similarity of provisions of Articles 42 and 44 of the Public Sector Directive and Articles 60 and 62 of the Utilities Directive, this judgment also applies to procurement under the Public Sector Directive.

1. If a tenderer offers equivalent spare parts subject to approval in accordance with Directive 2007/46, must it provide, on pain of rejection of its tender, a type-approval certificate as evidence that the parts are indeed equivalent to original parts, or at least provide concrete proof that the spare part has been approved? Or is it sufficient, as an alternative to these documents, for the tenderer to provide a self-declaration that the spare parts proposed in its tender are equivalent to original parts?

Judgement paragraphs 63 to 94

It should be noted, as a preliminary point, that Directive 2007/46 aims to "replace the Member States' approval systems with an EU approval procedure based on the principle of total harmonisation". Article 1 of Directive 2007/46 defines the subject matter of that directive as establishing "a harmonised framework containing the administrative provisions and general technical requirements for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the EU".

Directive 2007/46 also establishes provisions for the sale and entry into service of parts and equipment intended for vehicles approved in accordance with this directive.

Next, Article 19(1) of Directive 2007/46 provides that the manufacturer of a component is to affix to each component manufactured in conformity with the approved type, the EC type-approval mark, required by the relevant separate directive or regulation. Last, under Article 28(1) of Directive 2007/46, Member States are to permit the sale or entry into service of components only if those components satisfy the requirements of the relevant regulatory acts and are properly marked in accordance with Article 19 of that directive.

It is apparent, first, from a combined reading of Articles 10(2), 19(1) and 28(1), and Annex IV of that directive that the components covered by the regulatory acts, within the meaning of Article 3(1) of that directive, listed in the annex, are subject to compulsory type-approval, provided that those regulatory acts provide for such approval.

Type-approval is the instrument selected by the EU legislature in the context of Directive 2007/46 to establish that vehicle components comply with the requirements laid down in the regulatory acts listed in Annex IV.

The CJEU explained that the concepts of "type-approval" and "equivalence" have different contents. As is apparent from Article 3(5) of Directive 2007/46, type-approval certifies that, following appropriate checks by competent authorities, a type of component satisfies the requirements of Directive 2007/46, including the technical requirements set out in the regulatory acts listed in Annex IV to that directive.

The concept of "equivalence" is not defined in Directive 2007/46 and designates, according to its ordinary meaning, the status of having the same value or function. Therefore, the equivalency of a component depends upon whether that component has the same qualities as another component, regardless of whether the latter has been approved. The proof of type-approval is therefore not interchangeable with proof of equivalency, since a type-approved component can be non-equivalent to an original component referred to in a call for tenders.

Admittedly, it cannot be ruled out that non-type-approved components may in fact be equivalent to the original components referred to in the call for tenders at issue. However, if that type of component has been subject to such approval, it must be found that, for those types of components, proof of approval cannot be replaced by a declaration of equivalency issued by the tenderer.

The CJEU stated that the presented finding is not called into question by the provisions of Articles 42 and 44 of the Public Sector Directive, which refer to the technical specifications that may be included in a call for tenders and the proof by which tenderers may demonstrate that their tenders meet those technical specifications.

The CJEU underlined that the Public Sector Directive cannot disregard mandatory requirements imposed by other rules of EU law concerning, among other things, safety and environmental protection, such as the approval requirement set out for the same reasons by Directive 2007/46.

Therefore, the Public Sector Directive must not prevent the application of Directive 2007/46, as that directive seeks to ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use. To the extent that Directive 2007/46 requires that certain vehicle spare parts be type-approved, with a view to attaining its objectives, this requirement becomes mandatory and cannot be circumvented by recourse to the Public Sector Directive.

Consequently, to satisfy the mandatory requirements laid down by Directive 2007/46, since the components are subject to compulsory type-approval, only components that have received such approval – and may therefore be marketed – can be regarded as equivalent within the meaning of the terms of those calls for tenders.

The contracting authority cannot accept, in the context of a call for tenders for the supply of spare parts for buses, a tender proposing components belonging to a type of component covered by the regulatory acts listed in Annex IV to Directive 2007/46, without being accompanied by a certificate confirming the type-approval of such a component and without submitting any proof of the actual existence of such approval, provided that those regulatory acts provide for such approval.

Conclusion: If a tenderer offers equivalent spare parts subject to approval in accordance with Directive 2007/46 it must provide, on pain of rejection of its tender, a type-approval certificate as evidence that the parts are indeed equivalent to original parts, or at least provide concrete proof that the spare part has been approved. It is not sufficient, as an alternative to these documents, to provide a declaration from the tenderer that the spare parts proposed in its tender are equivalent to original parts.

Additional remarks

The contracting authority shall decide on the proof of compliance of the offered products. One may wonder to what extent the choice of a particular proof – such as the certificates in question – can be considered disproportionate and unreasonable in a given tender. Particularly for cases in which the quality and safety of the procured products are regulated by EU law, verification of compliance can be made at the contract delivery stage. Such an approach may be unreasonable for some contracts, particularly for spare parts, as there can be thousands of items listed and provision of certificates for every spare part and verification is potentially a huge administrative task.

2. Which entity is responsible for issuing declarations of equivalency and, more importantly, must they be drawn up by the manufacturer of the spare part or may they also be drawn up by a dealer?

Judgement paragraphs 95 to 111

Articles 42 and 44 of the Public Sector Directive require that a tenderer wishing to rely on the option to propose products equivalent to those defined by reference to a specific mark, origin or production already provide, in its tender, by any appropriate means, proof of the equivalency of the products concerned.

Notwithstanding the contracting authority's discretion in this regard, the means of proof accepted by it must enable it to carry out an effective assessment of the tender to determine whether it complies with the technical specifications referred to in the call for tenders.

To be considered an "appropriate means" within the meaning of Articles 42(6) and 44(2) of the Public Sector Directive, a declaration of equivalency must be issued by a body able to guarantee such equivalency, meaning that body assumes technical responsibility for the components in question and possesses the means necessary to ensure their quality. These conditions can be satisfied only by the producer or manufacturer of the components.

Such an interpretation is confirmed by Article 44(2) of the Public Sector Directive, which provides that an appropriate means of proof may be a "technical dossier of the manufacturer", meaning that the proof is issued by the manufacturer of the spare part in question.

Furthermore, under Article 3(27) of Directive 2007/46, the term "manufacturer" is defined as "the person or body who is responsible to the approval authority for all aspects of the type-approval or authorisation process and for ensuring conformity of production".

With these considerations in mind and in light of definition of the term "manufacturer" in Article 3(27) of Directive 2007/46, the CJEU noted that the wording of Articles 42 and 44 of the Public Sector Directive indicates that the contracting authority cannot accept as proof of the equivalency of components proposed by a tenderer, in the context of a call for tenders for the supply of spare parts for buses, a declaration of equivalency issued by that tenderer when that tenderer cannot be regarded as being the manufacturer of those components.

Conclusion: Declarations of equivalency shall be drawn up by the manufacturer of the spare part proposed in a tender. A self-declaration of equivalency prepared by a tenderer that is not the manufacturer is not an appropriate means of proof.

Further reading

OECD (2016), "2014 EU Directives: Public Sector and Utilities Procurement", *SIGMA Public Procurement Briefs,* No. 30, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-30-200117.pdf.

OECD (2016), "Tender Evaluation and Contract Award", *SIGMA Public Procurement Briefs,* No. 9, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-9-200117.pdf.

Case study 5

The concept of abnormally low tenders: facts and dispute

By a decision of 15 August 2018, Bulgaria's Deputy Minister of the Interior launched a "restricted" procurement procedure concerning the planning, establishment and management of a Generation 2019 system for issuing Bulgarian identity documents.

Only two economic operators – Veridos GmbH and the consortium Services GmbH – satisfied all selection criteria and were invited to submit tenders. By a decision of the contracting authority of 29 April 2020, the contract was awarded to the consortium Services GmbH.

The contracting authority did not examine the tenders to determine whether any of them were abnormally low. Article 72(1) of the Bulgarian Law on Public Procurement (Art. 72(1) BLPP) governed the criterion for verifying whether a tender is abnormally low by requiring that the tender concerned be "more than 20% lower than the mean value of the tenders submitted by the other tenderers in respect of the same criterion for assessment". The national law implicitly required that there be at least three tenders, since one of them must be assessed against the mean value of the other two. In this regard, the contracting authority found that Art.72(1) BLPP did not apply, since only two tenders had been submitted and consequently the mean value could not be calculated.

Veridos GmbH brought a complaint against that decision before the procurement review body, which rejected the complaint by a decision of 25 June 2020. On 13 July 2020, Veridos lodged an appeal against that decision before the Supreme Administrative Court.

Veridos GmbH argued that the contracting authority was under an obligation to verify whether an abnormally low tender existed, in accordance with the principles of transparency, non-discrimination and equal treatment enshrined in EU law, in order to ensure an objective comparison of tenders and to determine, under conditions of effective competition, which tender was the most economically advantageous – without that tender being abnormally low such as to distort competition.

Questions

1. Does Article 69 of the Public Sector Directive impose on a contracting authority the obligation to verify whether an abnormally low tender exists, even in the absence of any suspicion regarding a tender?

2. Does Article 69 of the Public Sector Directive require the contracting authority to verify whether an abnormally low tender exists when the criterion laid down for that purpose by national legislation, which implicitly requires that there be at least three tenders, does not apply on account of the insufficient number of tenders submitted?

Instructions for resolving the case

Based on CJEU Case C-669/20 – Veridos GmbH

Veridos GmbH v Ministar na vatreshnite raboti na Republika Bulgaria (ECLI:EU:C:2022:684)

Request for a preliminary ruling from the Varhoven administrativen sad (Bulgaria)

Legal resources

Provisions of the Public Sector Directive considered:

Article 69

Questions

Notes for trainers: This case study is based on Case C-669/20 *Veridos GmbH*, which concerned a contract award under the Defence and Security Directive. For the purposes of this case study, references are made to the Public Sector Directive, rather than to equivalent provisions in the Defence and Security Directive.

1. Does Article 69 of the Public Sector Directive impose on a contracting authority the obligation to verify whether an abnormally low tender exists, even in the absence of any suspicion regarding a tender?

2. Does Article 69 of the Public Sector Directive require the contracting authority to verify whether an abnormally low tender exists when the criterion laid down for that purpose by national legislation, which implicitly requires that there be at least three tenders, does not apply on account of the insufficient number of tenders submitted?

Judgement paragraphs 32 to 40

EU law does not define the concept of an "abnormally low tender". Article 69 of the Public Sector Directive imposes on contracting authorities an obligation to require economic operators to explain the price or costs proposed in the tender when tenders appear to be abnormally low in relation to the works, supplies or services. Contracting authorities may reject the tender only when the evidence supplied does not satisfactorily account for the low price or costs proposed.

However, the outlines of this concept have already been defined by the CJEU, which has held that it is for Member States – and particularly contracting authorities – to determine the method for calculating an anomaly threshold constituting an abnormally low tender or to set its value, provided that an objective and non-discriminatory method is used. In principle, the Bulgarian legislator could therefore introduce national regulations on how to determine whether there is an abnormally low tender that involves the obligation to request explanations.

The CJEU also explained that the contracting authority is under an obligation to "identify suspect tenders". Such an obligation therefore derives from EU law and not just national law.

Furthermore, the CJEU stated that the abnormally low nature of a tender must be assessed in relation to the service concerned. Thus, in the course of examining the abnormally low nature of a tender, the contracting authority may, for the purpose of ensuring healthy competition, take into consideration all the factors that are relevant in light of that service.

In this regard, Article 69 of the Public Sector Directive means that the contracting authority is under an obligation to first identify suspect tenders; second, to allow the tenderers concerned to demonstrate their genuineness by asking them to provide the details it considers appropriate; third, to assess the merits of the information provided by the tenderers concerned; and fourth, to make a decision on whether to admit or reject those tenders. It is only on the condition that the reliability of a tender is doubtful *a priori* that the obligations arising from this article are imposed on the contracting authority.

The contracting authority must identify tenders that appear suspect and are therefore subject to the examination procedure provided for in Article 69 of the Public Sector Directive, considering all the features of the subject matter of the invitation to tender concerned. Comparison with other (competing) tenders, however useful it may be in certain cases for the purpose of identifying any anomalies, cannot be the sole criterion used by the contracting authority in this regard. According to the CJEU, the "abnormally low tender" concept adopted by the Bulgarian legislature is not the only one possible when examining suspect tenders.

The examination of all components relating to the invitation to tender and the contract documents concerned must enable the contracting authority to determine whether, despite the gap between the

suspect tender and those submitted by other tenderers, that tender is sufficiently genuine. For this purpose, the contracting authority may rely on national rules that define a particular method for identifying abnormally low tenders.

The CJEU stated that the Public Sector Directive does not preclude the abnormally low nature of a tender from being assessed when only two tenders have been submitted. On the contrary, the inapplicability of the criterion laid down by national law for the purpose of assessing the abnormally low nature of a tender is not such as to exempt the contracting authority from its obligation to identify suspect tenders and to carry out an examination when there are such tenders.

Conclusion: Article 69 of the Public Sector Directive must be interpreted as meaning that, when it is suspected that a tender is of an abnormally low nature, a contracting authority is required to verify whether this is actually the case by considering all the relevant components of the invitation to tender and the contract documents. If the tender is not in doubt, the contracting authority is not required to initiate the procedure laid down in Article 69 of the Public Sector Directive.

"Suspicion" that the contracting authority may be dealing with an abnormally low bid may arise if the conditions for identifying potentially abnormally low bids (e.g. 20% below the mean value of all bids) specified in national law are met. However, the conditions stipulated by the national legislator are not sufficient. The contracting authority must also take other factors into account, for example:

- Whether the quoted price guarantees compliance with labour and environmental law obligations.
- Whether the contractor has a subsidy that allows it to offer a lower price.
- Whether the subject of the contract can be performed outside the Member State in which the contracting authority is located, and the contractor can employ workers under the rules applicable in the country of its registered office.

Conclusion: Article 69 of the Public Sector Directive requires the contracting authority to verify whether an abnormally low tender exists without the impossibility of applying the criteria laid down for that purpose by national legislation or the number of tenders submitted being relevant in that regard. The wording of Bulgarian law therefore does not provide justification for not examining a tender if the contracting authority has doubts about whether it could be an abnormally low tender.

Similar cases

C-285/99 and C-286/99 *Lombardini and Mantovani* (EU:C:2001:640)

C-599/10 *SAG ELV Slovensko and Others* (EU:C:2012:191)

C-198/16 P *Agriconsulting Europe v Commission* (EU :C :2017 :784)

Further reading

OECD (2016), “Abnormally Low Tenders”, *SIGMA Public Procurement Briefs,* No. 35, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-35-200117.pdf.

Case study 6

Contract for an ultra-broadband network: Facts

In May 2016, Infratel (a company owned by the Italian state) launched a procurement procedure using the restricted procedure to award public contracts for the construction, maintenance and management of a public ultra-broadband network in several regions in Italy. The award related to five lots and comprised the following stages:

Submission of requests to participate	Deadline: 18 July 2016
Issue of invitations to preselected operators	on 9 August 2016
Submission of tenders	Deadline: 17 October 2016

Telecom Italia, Metroweb Sviluppo, Enel OpEnFiber, WEbW and TOPTelF all submitted requests to participate in respect of each of the five lots, and all five candidates were preselected and invited to submit tenders. Telecom Italia, Enel OpEnFiber, WEbW and TOPTelF submitted tenders for all five lots on 16 October 2016. Metroweb Sviluppo did not submit any tenders.

On 24 January 2017, Infratel published the list of successful tenderers and their provisional ranking:

Lot	**Ranking**			
	1	**2**	**3**	**4**
Lot 1	Enel OpEnFiber	Telecom Italia	WEbW	TOPTelF
Lot 2	Enel OpEnFiber	Telecom Italia	TOPTelF	WEbW
Lot 3	Enel OpEnFiber	Telecom Italia	TOPTelF	WEbW
Lot 4	Enel OpEnFiber	TOPTelF	Telecom Italia	TOPTelF
Lot 5	Enel OpEnFiber	Telecom Italia	TOPTelF	WEbW

As Telecom Italia was not satisfied with the outcome of the award procedure, it made an application for access to the documents in Infratel's procurement file relating to the procedure.

Information in the procurement file revealed that on 10 October 2016 Enel SpA (the holding company of Enel OpEnFiber) and Metroweb (the holding company of the Metroweb Group) entered into an agreement for Enel OpEnFiber's acquisition of a 100% shareholding of Metroweb Sviluppo (the "proposed merger"). The agreement provided for the absorption of Metroweb Sviluppo into Enel OpEnFiber for the proposed merger.

The European Commission was notified of the proposed merger on 10 November 2016 under competition provisions concerning the concentration of undertakings. On 10 December 2016, the European Commission issued a decision confirming that it did not oppose the proposed merger, so the merger by absorption proceeded.

Legal dispute (the appeal)

In five actions brought before the Regional Administrative Court, Telecom Italia contested Infratel's decisions to award the five contracts (one for each lot) to Enel OpEnFiber.

Telecom Italia argued that Infratel's decisions were in breach of Article 28(2) of the Public Sector Directive[28]. It further argued that the merger agreement meant the identity of the Enel OpEnFiber preselected company and the identity of the Enel OpEnFiber company, which submitted the tender, were not substantively the same. Enel OpEnFiber should therefore have been excluded from participation. All five cases were dismissed by the Regional Administrative Court. Telecom Italia then appealed to the Council of State, Italy.

Question

Article 28(2) of the Public Sector Directive, which concerns conduct of a restricted procedure, provides that "Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender".

The preselected economic operator Enel OpEnFiber agreed to acquire another preselected economic operator, Metroweb Sviluppo. Although the merger agreement was entered into between the preselection stage and the tender stage, it was completed after the tender stage.

Does Article 28(2) of the Public Sector Directive mean that Enel OpEnFiber should have been excluded from participation and not permitted to submit a tender?

Instructions for resolving the case

Based on CJEU Case C-697/17 – Telecom Italia
Telecom Italia SpA v Ministero dello Sviluppo Economico and Infrastrutture e telecomunicazioni per l'Italia SpA (Infratel Italia SpA) (C-697/17, Telecom ECLI:EU:C:2019:599)

Advocate General Opinion (C-697/17, ECLI:EU:C:2019:54)

Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy)

Legal resources

Provisions of Public Sector Directive considered:

Article 28

Question

Article 28(2) of the Public Sector Directive, which concerns conduct of a restricted procedure, provides that "Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender".

The preselected economic operator Enel OpEnFiber agreed to acquire another preselected economic operator, Metroweb Sviluppo. Although the merger agreement was entered into between the preselection stage and the tender stage, it was completed after the tender stage.

[28] 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 [2014] OJ L94/65.

Does Article 28(2) of the Public Sector Directive mean that Enel OpEnFiber should have been excluded from participation and not permitted to submit a tender?

Judgment paragraphs 27 to 50

The CJEU started by confirming that it is clear from the wording of Article 28(2) of the Public Sector Directive that an economic operator that submits a tender must, in principle, be the one that was preselected. That provision does not, however, lay down any rules concerning changes that may have occurred in the structure or economic and technical capacity of the preselected candidate.

The CJEU noted its earlier judgment in C-396/14 *MT Højgaard and Züblin*, when it considered tenderer changes occurring during the conduct of the procurement procedure, in the analogous context of the 2004 Utilities Directive[29] and having regard to the general principles of equal treatment and transparency, and objectives of the EU procurement directives. The CJEU confirmed in C-396/14 *MT Højgaard and Züblin* that these general principles mean, in particular, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority. The CJEU stated that the aim of the principle of equal treatment of tenderers is to "promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure … [and] implies that the tenders of all competitors must be subject to the same conditions".

Although strict application of the requirement in Article 28(2) would lead to the conclusion that only those economic operators that were preselected can, in that capacity, submit tenders and be awarded contracts, in C-396/14 *MT Højgaard and Züblin* the CJEU focused on the objective of promoting competition. It specified two requirements that must be considered (in the context of this case): (1) the "new" replacement economic operator (replacing the economic operator that had been preselected) by itself meets the selection requirements of the contracting entity; and (2) continued participation of the new replacement economic operator does not place other tenderers at a competitive disadvantage.

The circumstances in C-396/14 *MT Højgaard and Züblin* were, however, rather different to those encountered in this case. In C-396/14 *MT Højgaard and Züblin,* a preselected joint venture (JVC) incorporating two economic operators (A.Co and B.Co) had been dissolved due to A.Co's insolvency, and B.Co was permitted to continue to participate in the procurement process in its own name. The economic and technical capacity of the original candidate, JVC, had been reduced through the loss of A.Co's capacity. Both the legal and substantive identity of the tendering economic operator and the preselected operator had changed. C-396/14 *MT Højgaard and Züblin* also concerned use of the negotiated procedure for a complex, high-value contract with limited competitors in the market.

By contrast, in this case, Enel OpEnFiber had increased its capacity by acquiring one of the other preselected tenderers, and the legal identity of Enel OpEnFiber had not changed. The CJEU was of the view that even though the concrete and definitive effects of the merger did not materialise until after the submission of tenders, the substantive identity of Enel OpEnFiber was not the same on the deadline for submission of tenders as it had been on the date of preselection.

The CJEU applied the two conditions established in C-396/14 *MT Højgaard and Züblin.* In considering the first condition, the CJEU commented that it was not contrary to the interests of the contracting authority for a candidate to increase its economic and technical capacity after preselection, and such an increase may include absorption of another economic operator, including one participating in the same procedure for the award of public contract. It found that, hypothetically, Enel OpEnFiber would still meet the requirements originally laid down by the contracting authority when its substantive capacity had increased.

[29] Directive 2004/17 Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors [2004] OJ L134/1.

In considering the second condition, the CJEU noted that there are provisions of EU law, distinct from the procurement directives, that are specifically intended to ensure that mergers do not pose a threat to free and undistorted competition within the internal market. Thus, as Enel OpEnFiber's conduct complied with those rules, its participation in such a merger could not be regarded as being liable to place other tenderers at a competitive disadvantage, simply on the basis that the merged entity would benefit from greater economic and technical capacity.

Judgment paragraphs 51 to 53

The CJEU included an additional discussion on a separate point. It noted that although the principle of equal treatment was not undermined by the mere fact of a merger between two preselected tenderers, the possibility could not be ruled out that sensitive information relating to the procurement procedure may have been exchanged by the parties to the merger, prior to its completion. This could have given the acquiring economic operator unjustified advantages that may have placed other tenderers at a competitive disadvantage. The CJEU noted that this may provide sufficient grounds for exclusion of the acquiring economic operator's tender, but it was not to be presumed that such exchanges of information had in fact taken place. The CJEU commented that in the present case, it was apparent that no collusive conduct had been established.

Conclusion: Article 28(2) of the Public Sector Directive does not require Enel OpEnFiber to be excluded from participation or to be prohibited from submitting a tender.

Enel OpEnFiber can continue to participate in the procurement procedure when two conditions are satisfied:

(1) The "new" post-merger Enel OpEnFiber by itself meets the selection requirements of the contracting entity.

(2) The continued participation of Enel OpEnFiber does not place other tenderers at a competitive disadvantage.

Further reading

SIGMA Public Procurement Brief No. 9, Tender Evaluation and Contract Award
OECD (2016), "Tender Evaluation and Contract Award", *SIGMA Public Procurement Briefs,* No. 9, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-9-200117.pdf.

SIGMA Public Procurement Brief No. 13, Incorporating Environmental Considerations into Public Procurement
OECD (2016), "Incorporating Environmental Considerations into Public Procurement", *SIGMA Public Procurement Briefs,* No. 13, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-13-200117.pdf.

SIGMA Public Procurement Brief No. 14, Incorporating Social Considerations into Public Procurement
OECD (2016), "Incorporating Social Considerations into Public Procurement", *SIGMA Public Procurement Briefs,* No. 14, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-14-200117.pdf.

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Similar cases

C-531/16 *Specializuotas transportas* (EU:C:2018:32): This case involves the possibility of exchange of information by parties to a merger, which may place other tenderers at a competitive disadvantage.

Case study 7

Contract for a major road infrastructure project: Facts

In March 2018, Denmark's State Highway Authority launched a procurement procedure for a major road infrastructure project for the phased construction of a new outer ring road for a major town. The contract notice published in the *Official Journal of the European Union* described a complex long-term project with an estimated value of EUR 125 million (Ring Road Project). The procurement procedure was a competitive procedure with negotiation, and the procurement documents provided for a multi-stage procurement process:

March to May 2018

Stage 0 — Invitation to Participate issued to candidates expressing an interest.

Submission and assessment of qualification and selection information in response to Invitation to Participate.

Note: No qualitative minimum requirements were set for qualification/selection. It was confirmed in the procurement documents that in the event there were more than six candidates, the State Highways Authority would conduct a preliminary selection on the basis of references for similar work.

Selection of four to six candidates to be invited to submit Stage 1 tenders.

June to September 2018

Stage 1 — Invitation to submit Stage 1 tenders issued to four to six selected candidates.

Submission and evaluation of Stage 1 tenders, with option to reduce number of tenderers.

October to December 2018

Stage 2 — Invitation to submit Stage 2 tenders issued to tenderers.

Submission and initial evaluation of Stage 2 tenders.

Negotiation of Stage 2 tenders, opportunity to submit revised Stage 2 tenders.

Evaluation and shortlist of the three most economically advantageous Stage 2 tenders.

January 2019

Stage 3 — Invitation to submit Stage 3 final tenders issued to three shortlisted tenderers.

Submission and evaluation of Stage 3 final tenders.

Selection of successful Stage 3 final tender.

Five economic operators submitted qualification and selection information in response to the Invitation to Participate. Due to the complexity and value of the project, all submissions were from economic operators consisting of consortia or groups of companies. All five economic operators were selected.

On 20 June 2018, the State Highway Authority sent invitations to submit Stage 1 tenders to all five selected economic operators. On 30 June 2018, one of the five economic operators withdrew from the procurement process.

One of the four remaining selected economic operators was a group of two companies, A.Co and P.Co, which were among the largest construction companies in Denmark. A.Co and P.Co confirmed in the qualification and selection information submitted in response to the Invitation to Participate at Stage 0, that they proposed to establish an "I/S". An I/S is a form of partnership provided for under national law, in which all participants are personally liable, jointly and severally and without limit, for the obligations of the partnership. An I/S is an independent legal entity with legal capacity.

On 26 August 2018, the contract constituting the I/S was concluded between A.Co and P.Co. On the same day, the insolvency court delivered a judgment declaring P.Co insolvent ("insolvency order"). The State Highway Authority learned of the insolvency order on the afternoon of 26 August 2018 and immediately asked A.Co about the significance of its insolvency for the ongoing procurement procedure.

Despite the insolvency order, on 27 August 2018, I/S submitted its Stage 1 tender, signed by A.Co and P.Co, but not signed by the liquidator for P.Co. Lengthy correspondence then ensued between the State Highway Authority and A.Co about how to manage the consequences of P.Co's insolvency.

On 15 October 2018, the State Highway Authority informed all tenderers of its decision to allow A.Co to continue to participate in the procurement procedure on its own, despite P.Co's insolvency. In its notification to all tenderers, the State Highway Authority gave the following explanation for its decision:

- A.Co was the leading contracting company in Denmark in terms of turnover, and it satisfied the conditions for participation in the process without needing to rely on the economic and technical capacity of P.Co.
- Participation of P.Co had not been a significant factor in the State Highway Authority's decision to invite the group comprising A.Co and P.Co to participate.
- P.Co would not be replaced by a new tenderer, and the four selected tenderers would thus remain the same, as no new operator was permitted to participate in the tendering.
- A.Co had taken over the contracts of 50 salaried employees from P.Co after the insolvency proceedings began, including key persons for completion of the Ring Road Project.

Four tenderers submitted Stage 2 tenders by the deadline of 1 December 2018. A.Co submitted a Stage 2 tender in its own name and (i) gave notice that it was submitting the tender as the continuing contractor from the consortium and I/S constituted with P.Co; and (ii) confirmed that the insolvency estate of P.Co had not given notice that it wished to continue the I/S contract, and that A.Co had therefore terminated that I/S contract.

Following the assessment of revised Stage 2 tenders, the State Highway Authority selected the three most economically advantageous ones and asked the three tenderers to submit Stage 3 final tenders. Stage 3 final tenders were submitted on 12 January 2019. On 20 January 2019, the State Highway Authority notified the three selected tenderers of its decision to award the contract to A.Co, whose Stage 3 final tender was, as a whole, the most economically advantageous in terms of quality and price.

Legal dispute (the appeal)

One of the other Stage 3 final tenderers, MTH Group, filed a complaint with the Procurement Complaints Board, arguing that the State Highway Authority had acted in breach of the principles of equal treatment and transparency by allowing A.Co, which had not been selected to participate, to continue to take part in the tendering process in place of the consortium it had constituted with P.Co.

MTH Group requested that the decision to award the contract be annulled.

Question

Consider the provisions of Articles 29(2), 65(2) and 66 of the Public Sector Directive[30] and the principles of equal treatment of economic operators and transparency.

Is it permissible for the State Highway Authority to allow A.Co, which was one of two economic operators in a group that was selected and invited to submit a tender, to take part in the procurement procedure in its own name following dissolution of that group?

Instructions for resolving the case

Based on CJEU Case C-396/14 – MT Højgaard and Züblin
MT Højgaard A/S and Züblin A/S v Banedanmark (C-396/14, ECLI:EU:C:2016:347)

Advocate General Opinion (C-396/14, ECLI:EU:C:2015:774)

Request for a preliminary ruling from the Klagenævnet for Udbud (Public Procurement Complaints Board, Denmark)

Legal resources

Provisions of the Public Sector Directive considered:

Article 29(2)

Article 65(2)

Article 66

Question

Consider the provisions of Articles 29(2), 65(2) and 66 of the Public Sector Directive and the principles of equal treatment of economic operators and transparency.

Is it permissible for the State Highway Authority to allow A.Co, which was one of two economic operators in a group that was selected and invited to submit a tender, to take part in the procurement procedure in its own name following dissolution of that group?

Note for trainers: This case study is based on the CJEU decision in C-396/14 MT *Højgaard and Züblin*, which concerned the award of a contract for rail infrastructure under the 2004 Utilities Directive[31], using a negotiated procedure with prior notification.

The facts in this case study have been adapted to apply to a public sector contract for road construction works. The 2004 Utilities Directive did not contain precisely the same provisions as those in Articles 29(2), 65(2) and 66 of the Public Sector Directive, as referred to in the case study question. However, in C-396/14 MT *Højgaard and Züblin*, at paragraph 38 of the judgment, the CJEU referred to strict application of the principle of equal treatment as expressed in Article 10 of the 2004 Utilities Directive, read together with Article 51 of that directive, leading to “the conclusion that only those economic operators who have been preselected, can in that capacity submit tenders and be awarded contracts”. This is why the case study refers to the equivalent provisions at Article 29(2) of the Public Sector Directive. The CJEU also focused

[30] 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 [2014] OJ L94/65.

[31] Directive 2004/17 Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors [2004] OJ L134/1.

on the necessity of ensuring adequate competition in a negotiated procedure, and this has been flagged in the case study by reference to Articles 65(2) and 66 of the Public Sector Directive, which include provisions concerning the requirement to ensure "genuine competition".

Judgment paragraphs 34 to 48

The CJEU started by noting that the 2004 Utilities Directive does not lay down any rules specifically for alterations made to the composition of a group of economic operators that has been preselected as a tenderer. Consequently, rules about such a situation are a matter for the Member State. Neither Danish legislation nor the contract notice in this case contained any specific rules, so the principles of equal treatment and the duty of transparency are particularly important, as are the objectives of the law in relation to public procurement.

The CJEU commented that the aim of the principle of equal treatment of tenderers is to promote the development of healthy and effective competition. It requires that all tenderers be afforded equality of opportunity when formulating their tenders and implies that all competitors' tenders are subject to the same conditions. The CJEU concluded these introductory remarks by stating that strict application of the principle of equal treatment as expressed in Article 10 of the 2004 Utilities Directive, read together with Article 51 of that directive, leads to the conclusion that "only those economic operators who have been preselected, can in that capacity submit tenders and be awarded contracts". *[Note: This approach can now be seen in Article 29(2) of the Public Sector Directive.]*

The CJEU then went on to qualify that this strict application should "ensure, in a negotiated procedure, adequate competition, as required by Article 54(3) of the 2004 Utilities Directive, which provides that in the case of a negotiated procedure the number of candidates selected shall … take account of the need to ensure adequate competition".

The CJEU noted that in this case (as in the case study), the contracting authority decided there should be at least four candidates to ensure fair competition. It went on to provide that "[i]f, however, an economic operator is to continue to participate in the negotiated procedure in its own name, following the dissolution of the group of which it formed part and which had been pre-selected … that continued participation must take place in conditions which do not infringe the principle of equal treatment of the tenderers as a whole".

The CJEU went on to set out two conditions that, if satisfied, would allow A.Co to continue to participate without infringing upon the principle of equal treatment: (1) the remaining economic operator that replaces the group economic operator that had been preselected should, by itself, meet the selection requirements of the contracting authority; and (2) continued participation of the "new" replacement economic operator should not place other tenderers at a competitive disadvantage.

Turning to the facts of C-396/14 MT *Højgaard and Züblin*, the CJEU noted that it was apparent from the P.Co order for reference that, had P.Co made the application to participate on its own, it would have been selected. The CJEU stated that it is for the Procurement Complaints Board to determine whether submission of the Stage 1 tender was vitiated by an irregularity resulting from the events of 26 and 27 August 2018, namely conclusion of the I/S contract, the insolvency order and submission of the Stage 1 tender in the name of I/S, so as to preclude A.Co from further participation.

The CJEU also noted that it was for the Procurement Complaints Board to determine whether A.Co acquired a competitive advantage at the expense of other tenderers as a result of its employment of staff formerly employed by P.Co, including staff who were key to implementation of the Ring Road Project.

Conclusion: A contracting authority is not in breach of the principle of equal treatment of economic operators when it permits one of two economic operators – who together formed a selected group of economic operators invited to submit a tender – from taking part in its own name following dissolution of that group, provided that:

(1) The economic operator by itself meets the requirements laid down by the contracting entity.

(2) Its continued participation in the procedure does not place other tenderers at a competitive disadvantage.

Further reading

SIGMA Public Procurement Brief No. 9, Tender Evaluation and Contract Award
OECD (2016), "Tender Evaluation and Contract Award", *SIGMA Public Procurement Briefs,* No. 9, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-9-200117.pdf.

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Case study 8

Contract for school musical equipment: Facts

In July 2016, Musikene, a public-sector music school in the Basque Country (Spain), launched a tender to award a public contract for the supply of musical, electro-acoustic, recording and audio-visual equipment. The equipment would be for use in the main school buildings, performance spaces and auditorium, and was required as part of a major refurbishment programme. The contract notice published in the *Official Journal of the European Union* confirmed that the open procedure applied. The estimated value of the contract was approximately EUR 1.2 million.

The procurement documents set out the contract award criteria and provided information on the evaluation process to be used:

Extract from procurement documents

Section B.

B.1 Stages of tender evaluation

A maximum of 100 points is available for technical and economic evaluation of tenders. The evaluation of tenders will be conducted in two stages:

B.1.1. Stage 1: Technical evaluation stage

A maximum score of 50 points is available for Stage 1: Technical Evaluation Stage. Technical aspects of the tender will be evaluated applying the criteria, scoring, weighting and methodology set out in section B.2.

Tenderers must achieve a minimum number of points at the technical evaluation stage in order to participate in Stage 2: Economic Evaluation Stage.

Minimum points requirement: The minimum number of points required in Stage 1: Technical Evaluation Stage is 35.

Tenderers which do not achieve 35 points in Stage 1: Technical Evaluation Stage, will not progress to Stage 2: Economic Evaluation Stage and will be informed accordingly.

Tenderers which achieve 35 points or more in Stage 1: Technical Evaluation Stage, will progress to Stage 2: Economic Evaluation Stage.

B.1.2. Stage 2: Economic evaluation stage

A maximum score of 50 points is available for Stage 2: Economic Evaluation Stage. A tender of an amount equal to the tender budget specified at Article 1.2 will be awarded 0 (zero) points. The reduction offered in relation to the tender budget will be allocated points according to the following scale:

5 points will be applied for each 1% reduction in relation to the tender budget up to a maximum of 50 points, as illustrated below:

% reduction in relation to tender budget	Points
1%	5
5%	25
10%	50

National legislation permitted the use of a two-stage approach to evaluate tenders, as set out in Musikene's procurement documents.

Legal dispute (the appeal)

On 11 August 2016, Montte, a supplier of musical, electro-acoustic, recording and audio-visual equipment, submitted an appeal concerning the procurement documents to the Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain (the Procurement Review Body).

Montte requested the annulment of condition B.1.1 requiring a minimum score threshold of 35 at the end of Stage 1: Technical Evaluation Stage to participate in Stage 2: Economic Evaluation Stage.

Montte argued that this condition restricted tenderers' access to the economic stage of the procurement procedure and rendered the joint weighting of the technical and economic criteria laid out in the procurement documents entirely meaningless in practice. Montte submitted that, unlike a price criterion applied automatically with a formula, technical criteria assessed by means of a less objective qualitative evaluation are, in practice, assigned a weighting of 100% of the total points. Therefore, according to Montte, by applying such criteria, tenders may not be judged equally depending on the price of their tender, and Musikene may accordingly be unaware of the most advantageous tender after weighing all the criteria.

Montte argued that the Public Sector Directive[32] does not permit use of a two-stage tender evaluation process in an open procedure, which may result in elimination of a tenderer after technical evaluation only.

According to Montte, the use of contract award criteria applied during successive eliminatory stages is only permitted in competitive procedures for negotiation, competitive dialogue procedures and innovation partnerships, when the possibility of successive eliminatory stages is expressly provided for in the Public Sector Directive.

In addition, Montte argued that the use of successive eliminatory stages in an open procedure restricts tenderers' access to the economic stage of the procurement procedure and may hinder genuine competition when the application of thresholds considerably reduces the number of tenderers in the final stage. This may be contrary to Article 66 of the Public Sector Directive.

Montte also claimed that the eliminatory threshold of 35 points out of 50 could prevent the most competitive tenders in terms of price from being analysed and evaluated. Tenders may not be judged equally depending on the price of their tender, and Musikene may accordingly be unaware of the most advantageous tender after weighing all the criteria.

Musikene's view was that condition at B.1.1 was justified.

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[32] 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 [2014] OJ L94/65.

Musikene argued that, because the public contract at issue concerned the provision of equipment that would be installed as part of a building, it was acceptable to require tenderers to submit tenders that met certain minimum requirements regarding compliance with time limits and the technical quality of services provided.

Musikene was of the view that the use of this two-stage evaluation did not hinder genuine competition and was not contrary to Article 66 of the Public Sector Directive. It argued that it is not a process intended to limit the number of tenders subjected to price-based evaluation, given that all tenders submitted may, in principle, meet the minimum threshold requirements.

Musikene also argued that it should not be obliged to consider the price of tenders that have been rejected based on failure to meet the minimum technical points score because, in any event, those rejected tenders would not meet Musikene's specified requirements.

Questions

Question 1

Consider the following provisions of the Public Sector Directive: Recital 90, Article 18, Article 27, Article 29, Article 30 Article 31 and Article 67.

Do these provisions permit the use of a predetermined minimum scoring threshold for technical evaluation in an open procurement procedure, meaning that tenders not reaching that threshold are excluded from subsequent evaluation based on both technical criteria and price?

Question 2

Does Article 66 of the Public Sector Directive apply to this situation and prohibit the use of a predetermined minimum scoring threshold for technical evaluation in an open procurement procedure, meaning that tenders not reaching that threshold are excluded from subsequent evaluation based on both technical criteria and price?

Instructions for resolving the case

Based on CJEU Case C-546/16 – Montte
Montte SL v Musikene (C-546/16, ECLI:EU:C:2018:752)

Advocate General Opinion (C-546/16, ECLI:EU:C:2018:493)

Request for a preliminary ruling from the Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi (Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain)

Legal resources

Provisions of Public Sector Directive considered:

Recital 90, Article 18, Article 27, Article 29, Article 30 Article 31, Article 66 and Article 67

Question 1

Consider the following provisions of the Public Sector Directive: Recital 90, Recital 92, Article 18, Article 27, Article 29, Article 30 Article 31 and Article 67.

Do these provisions permit the use of a predetermined minimum scoring threshold for technical evaluation in an open procurement procedure, meaning that tenders not reaching that threshold are excluded from subsequent evaluation based on both technical criteria and price?

Judgment paragraphs 26 to 39

According to the CJEU, Article 27(1) of the Public Sector Directive provides that in open procedures any interested economic operator may submit a tender in response to a call for competition. Article 27 of the Public Sector Directive does not contain any rule as to how the tendering is to be conducted, with the exception of rules relating to the minimum time limit for the receipt of tenders. The Public Sector Directive allows contracting authorities to lay down minimum requirements in relation to technical evaluation in an open procedure. This is supported by the provisions of Recitals 90 and 92, which recall that contracting authorities are free to set adequate standards by using technical specifications or contract performance conditions and specify that the purpose of the Public Sector Directive is to encourage contracting authorities to choose award criteria that allow them to obtain high-quality work, supplies and services that are optimally suited to their needs.

Articles 67(1) and 67(2) of the Public Sector Directive state that contracting authorities are to base the award of public contracts on the most economically advantageous tender, from the point of view of the contracting authority. The most economically advantageous tender may be identified by price or cost, and possibly by best price-quality ratio, assessed through criteria that may address quality and technical merit.

With reference to Recital 90 and Article 67(4), the CJEU emphasised that evaluation criteria must comply with the principles of transparency, non-discrimination and equal treatment to guarantee an objective comparison of the relative merits of the tenders and effective competition. By the same reasoning, evaluation criteria should not have the effect of conferring on the contracting authority unrestricted freedom of choice. The CJEU also flagged the importance of observing principles of procurement set out in Article 18 of the Public Sector Directive.

The CJEU concluded that, provided they comply with the requirements outlined in the previous paragraph, contracting authorities are free to:

1) Determine the level of technical merit the submitted tenders must provide, depending on the characteristics and subject matter of the contract.

2) Establish a predetermined minimum threshold tenders must comply with from a technical point of view. The CJEU noted that it appears that tenders that do not reach such a threshold do not correspond, in principle, to the needs of the contracting authority and must not be taken into account for determination of the most economically advantageous tender. The contracting authority is not required to determine whether the price of a tender that has been eliminated, because it does not meet the minimum threshold, is lower than the prices of tenders that have not been eliminated.

The CJEU confirmed that these conclusions are not undermined by provisions of the Public Sector Directive, which expressly allows the use of successive stages in competitive procedures for negotiation, competitive dialogue procedures and innovation partnerships. The CJEU stated that the possibility of certain procedures being conducted in successive stages “does not permit the conclusion that a two-step evaluation of tenders during the contract award stage would be inadmissible in the case of an open procedure such as that at issue in the main proceedings”.

The CJEU further confirmed that the approach used by Musikene does not hinder genuine competition. It is not a process intended to limit the number of tenders subjected to price-based evaluation, given that all tenders submitted may, in principle, meet the minimum threshold requirements.

Conclusion: When conducting an open procedure, contracting authorities are free to:

1) Determine the level of technical merit the submitted tenders must provide, depending on the characteristics and subject matter of the contract.
2) Establish a predetermined minimum threshold tenders must comply with from a technical point of view.

This is provided that the contracting authorities observe principles of transparency, non-discrimination and equal treatment, so as to guarantee an objective comparison of the relative merits of the tenders and effective competition.

Question 2

Does Article 66 of the Public Sector Directive apply to this situation and prohibit the use of a predetermined minimum scoring threshold for technical evaluation in an open procurement procedure, meaning that tenders not reaching that threshold are excluded from subsequent evaluation based on both technical criteria and price?

Judgment paragraphs 40 to 44

The CJEU held that if the conditions laid down in the Public Sector Directive are applied correctly, particularly Articles 18 and 67 (as discussed above), "it must be held that the contracting authority has ensured effective competition". The CJEU also confirmed that even when there is only one tender left following technical evaluation, the contracting authority is not required to accept that tender and may even decide to terminate that procedure and, if necessary, launch a new procedure with different award criteria.

The CJEU then turned to the specific question of the whether Article 66 of the Public Sector Directive applied to the case in question. Article 66 of the Public Sector Directive concerns reduction of the number of tenders and solutions, which is a process permitted in the Public Sector Directive's Article 29(6) for competitive procedures with negotiation and Article 30(4) for competitive dialogue. The CJEU found that the case in question concerned a different situation from those referred to in Article 66 of the Public Sector Directive. The need to ensure genuine competition until the final stage of the procedure referred to in Article 66 of the Public Sector Directive does not concern open procedures such as that at issue in this case.

Conclusion: Article 66 of the Public Sector Directive does not apply to the conduct of an open procedure.

Additional remarks

Regarding the conduct of open procedures, Article 27 of the Public Sector Directive does not contain any rules on how open tendering procedures are to be conducted, with the exception of those rules relating to the minimum time limit for the receipt of tenders.

The Public Sector Directive allows contracting authorities to establish minimum requirements for technical evaluation, to apply in an open procedure. An open procedure may include a published two-stage evaluation process, which could result in a tenderer being excluded based on failure to meet a minimum threshold score on the technical evaluation. In this case there is no obligation to proceed to evaluate the financial aspects of an excluded tender.

Contracting authorities must observe principles of transparency, non-discrimination and equal treatment when using this two-stage evaluation process to guarantee an objective comparison of the relative merits of the tenders and effective competition.

National provisions may include provisions for the use of two-stage evaluation in open procedures that must observe principles of transparency, non-discrimination and equal treatment.

Similar cases

C-27/98 *Fracasso and Leitschutz* (EU:C:1999:420): This case concerned a tender process to award a contract for road construction works, which the contracting authority cancelled after receiving only one acceptable tender. The CJEU confirmed that when only one tender is left for a contracting authority to consider, the contracting authority is in no way required to accept that tender.

Further reading

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Case study 9

Contract for environmental consultancy services: Facts and legal dispute

In 2019, Poland's State Water Company (the contracting authority) published a public contract notice for consultancy services for the development of environmental projects in certain river basin districts. The procurement documents included reference to the conditions, criteria for awarding the contract and documents to be submitted by tenderers.

According to the procurement documents, evaluation of the tenders was based on three criteria: price (40% weighting) and two qualitative criteria, project development design (32% weighting) and the description of how the contract would be performed (18% weighting). The qualitative criteria were broken down into sub-criteria.

Four tenders were submitted. The contract was awarded to CDM Smith, with Antea ranked second. Antea submitted a lower-priced tender, but CDM Smith obtained the highest overall score when the qualitative criteria were taken into account.

Antea brought forth a legal action seeking annulment of the contract award decision and fresh examination of the tenders. As part of its legal action, Antea requested access to information contained in the tenders submitted by the other three tenderers, but not previously disclosed by the contracting authority when requested by Antea. Antea argued that the very limited nature of the information about other tenders that had been made available by the contracting authority to Antea was problematic, since it had the effect of impeding or even preventing the effective use of remedies.

Antea requested the following information about the tenders submitted by the other three tenderers:

> Category 1: List of relevant experience – contracts obtained or projects carried out and references.
>
> Category 2: Information on the natural and legal persons, including subcontractors, which the tenderer indicates in its tender that it may rely on to perform the contract, being:
>
> - names of experts and/or subcontractors
> - qualifications or professional capacities of the experts and/or subcontractors
> - size and form of the workforce which will deliver the services
> - share of the contract that the tenderer intends to assign to sub-contractors.
>
> Category 3: Project development design proposals and Description of how the contract would be performed.

The contracting authority refused to disclose this information on the grounds that it had all been identified in advance by the other tenderers as confidential "trade secrets". Nevertheless, Poland's Public Procurement Law (PPL) contained a general presumption in favour of publication of information related to public procurement procedures, including information submitted by tenderers. However, this general presumption was subject to provisions aimed at balancing two potentially conflicting positions: the need to ensure disclosure of information to meet transparency requirements on the one hand and, on the other, the requirement to acknowledge tenderers' commercial interests and respect confidentiality of information, particularly trade secrets. According to Article 8 of the PPL, information constituting trade secrets was not to be disclosed:

8.1 The procurement procedure shall be public.

8.2 The contracting authority may restrict access to information related to a procurement procedure only in the cases determined by law.

8.2a The contracting authority may set out in the tender specifications requirements that must be met in order to maintain the confidentiality of information provided to the economic operator in the course of the procedure.

8.3. Information constituting trade secrets shall not be disclosed if the economic operator, not later than the deadline for submission of tenders or requests to participate, has stated that the information concerned may not be disclosed and has demonstrated that the reserved information constitutes a trade secret.

8.4 A “trade secret” shall be construed as technical, technological, scientific and organisational information of an undertaking or other information of economic value that is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons normally dealing with that type of information, provided that the entity authorised to use such information or to which such information is available has taken reasonable measures to keep it confidential.

Antea pointed out that it was standard practice of the contracting authority, and other contracting authorities, to accept the designation of information by tenderers as “trade secrets” as a matter of course. Antea’s view was that economic operators participating in a public procurement procedure should expect certain information about their activities to be disclosed, in accordance with the principles of equal treatment and transparency.

The contracting authority and the other tenderers disputed Antea's arguments. They maintained that a duty of confidentiality extended to the lists of personnel assigned to the contract, as their identification could result in the loss of staff to competitors. In their view, information about the organisation’s human resources held high commercial value and qualified as trade secrets. They also argued that information about subcontractors or third parties involved in the project contained valuable expertise and constituted trade secrets. The contracting authority and other tenderers asserted that the project development design proposals and the description of how the contract would be performed contained valuable intellectual property developed through years of experience. They claimed that disclosing this information could harm the legitimate interests of the tenderer submitting that information, as competitors could exploit their know-how and technical solutions. The contracting authority also argued that each tenderer provided credible explanations justifying the classification of the information as trade secrets, and therefore the principle of transparency should not override the protection of trade secrets.

The National Appeal Chamber, Poland (the referring court), submitted a request for a preliminary ruling to the CJEU on questions relating to disclosure of information provided by tenderers, and remedies.

Questions

Question 1

Read through Articles 18(1) and 21(1) of the Public Sector Directive, in conjunction with Articles 50 and 55 of that directive. In your opinion, do these provisions together with the general principles of procurement and good administration preclude:

(1) National legislation, which requires that, with the sole exception of trade secrets, information sent by tenderers to contracting authorities be published in its entirety or communicated to the other tenderers?

(2) A practice on the part of contracting authorities whereby requests for confidential treatment in respect of trade secrets are accepted as a matter of course?

Give reasons for your answers.

Question 2

In your opinion, do Articles 18(1), 21(1) and 55 of the Public Sector Directive, together with general procurement principles, permit, require or prohibit disclosure of the information requested by Antea?

Consider separately each of the three categories of information requested by Antea and give reasons for your answers.

Instructions for resolving the case

Based on CJEU Case C-54/21 – ANTEA POLSKA

Antea Polska S.A.,Pectore-Eco sp. z o.o., Instytut Ochrony Środowiska – Państwowy Instytut Badawczy v Państwowe Gospodarstwo Wodne Wody Polskie (C-54/21, ECLI:EU:C:2022:888)

Advocate General Opinion (C-54/21, ECLI:EU:C:2022:385)

Request for a preliminary ruling from the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland)

Legal resources

Provisions of the Public Sector Directive considered:

Article 18(1)

Article 21(1)

Article 50

Article 55

Notes for trainers:

This case study focuses on the issues raised in Case C-54/21 *Antea Polska* concerning disclosure of information contained in tenders.

Question 1

Read through Articles 18(1) and 21(1) of the Public Sector Directive, in conjunction with Articles 50 and 55 of that directive. In your opinion, do these provisions together with the general principles of procurement and good administration preclude:

(1) National legislation, which requires that, with the sole exception of trade secrets, information sent by tenderers to contracting authorities must be published in its entirety or communicated to the other tenderers?

(2) A practice on the part of contracting authorities whereby requests for confidential treatment in respect of trade secrets are accepted as a matter of course?

Give reasons for your answers.

Judgment paragraphs 46 to 68

The CJEU started by flagging the need for contracting authorities to balance two obligations: (1) to act in a transparent manner, as established in Article 18(1) of the Public Sector Directive; and (2) the prohibition

on disclosure by the contracting authority of "information forwarded to it by economic operators which they have designated as confidential" in accordance with Article 21(1) of the Public Sector Directive. The CJEU commented that it has repeatedly held that the principal objective of the EU rules on public procurement is to ensure undistorted competition. To achieve this objective, it is important that contracting authorities do not release information that could be used to distort competition. The principle of protection of confidential information must, however, be balanced with other requirements, including effective judicial protection and the right to an effective remedy, as raised by Antea in its claim.

The CJEU went on to note that Article 21(1) of the Public Sector Directive gives each Member State discretion to strike a balance between the requirement for confidentiality and the rules of national law pursuing other legitimate interests. Other legitimate interests may include ensuring the greatest possible transparency in procurement processes. Any regime introduced by a Member State in exercising this discretion must, however, respect the objective of undistorted competition; not undermine the balancing exercise required to protect confidential information and other rights, including the right to an effective remedy; and not alter requirements relating to the publicising of awarded contracts and rules relating to information on candidates and tenderers, set out in Articles 50 and 55 of the Public Sector Directive.

The CJEU was of the view that Article 21(1) of the Public Sector Directive precludes national legislation from requiring the publicising of any information that has been communicated to the contracting authority by all tenderers, with the sole exception of information covered by the concept of trade secrets. In the opinion of the CJEU, contracting authorities must also be able to decide not to disclose, on an exceptional basis, information that is not covered by the concept of trade secrets but that "must remain inaccessible pursuant to an interest or objective referred to in Articles 50 and 55" of the Public Sector Directive.

The CJEU was clear that contracting authorities cannot merely accept an economic operator's claim that information submitted is confidential. The contracting authority must require that the economic operator demonstrate the genuinely confidential nature of the information it claims should not be disclosed.

The CJEU confirmed that to comply with the general principle of good administration and reconcile the protection of confidentiality with effective judicial protection, a contracting authority must take additional steps in disclosing information to an unsuccessful tenderer. According to the CJEU, the contracting authority must also (1) state the reasons for its decision to treat certain data as confidential, and (2) "communicate in a neutral form – to the extent possible and in so far as such disclosure is capable of preserving the confidentiality of the specific elements of that data which merit protection on that basis – the essential content of that data to an unsuccessful tenderer which requests it".

In this context, the CJEU envisaged the contracting authority providing a summary of "certain aspects of an application or tender and their technical characteristics, in such a way that confidential information cannot be identified". The CJEU also referred to the possibility of the contracting authority asking the successful tenderer to provide it with a "non-confidential version of the documents containing the confidential information".

Conclusion: The Public Sector Directive invalidates national legislation that requires publicising of any information that has been communicated to the contracting authority by all tenderers, with the sole exception of information covered by the concept of trade secrets. It also prohibits contracting authorities from accepting as a matter of course requests by economic operators for confidential treatment in respect of trade secrets.

Question 2

In your opinion, do Articles 18(1), 21(1) and 55 of the Public Sector Directive, together with general procurement and administrative principles, permit, require or prohibit disclosure of the information requested by Antea?

Consider separately each of the three categories of information requested by Antea and give reasons for your answers.

Judgment paragraphs 69 to 85

Category 1: List of relevant experience – contracts obtained or projects carried out and references

The CJEU's starting point was that tenderers' relevant experience and the reference material they attach to their tenders to demonstrate their capacities "cannot be classified as confidential in its entirety".

The CJEU was clear that when an economic operator participates in a procurement procedure, the list of contracts or projects it provides to demonstrate relevant experience and supporting references cannot be treated as confidential, in whole or in part. The CJEU's supporting explanation was that the experience of a tenderer is not, as a rule, secret. Competitors cannot therefore be deprived of information relating to that experience on the basis that it is a "trade secret" according to the law of a Member State. The law of the Member State is intended to define the scope of confidentiality, protect legitimate commercial interests and preserve fair competition within the meaning of the Public Sector Directive.

The CJEU further refined this conclusion by explaining that, in any event, tenderers must, in the interests of transparency, good administration and effective judicial protection, enjoy access "at the very least, to the essential content of the information provided by each of them to the contracting authority concerning their relevant experience for the public contract in question and the references used to demonstrate that experience". The CJEU did, however, acknowledge that some information may be withheld in exceptional cases on the grounds mentioned in Article 55(3) of the Public Sector Directive. Article 55(3a) relates to compliance with a prohibition or requirement laid down by law or the protection of public interest.

Conclusion: As a rule, disclosure of a list of relevant experience – contracts obtained or projects carried out and references – is both permitted and required.

Category 2: Information on the natural and legal persons, including subcontractors, which the tenderer indicates in its tender that it may rely on to perform the contract, being:

- names of experts and/or subcontractors
- qualifications or professional capacities of the experts and/or subcontractors
- size and form of the workforce which will deliver the services
- share of the contract that the tenderer intends to assign to sub-contractors.

For this second category of information, the CJEU distinguished between (1) information that enables persons to be identified and (2) information that relates qualifications and professional capacities "without the possibility of making … an identification" of the persons concerned.

The CJEU seems to have two issues in mind here: one concerning the protection of personal data pursuant to requirements laid down by law, such as data protection legislation, and the other regarding whether the data requested to be disclosed is of wider commercial value to the economic operator concerned.

For non-name-specific data presented in a way that does not raise the possibility of personal identification, the CJEU concluded that the principle of transparency and the right to an effective remedy require this information, or at least its essential content, to be disclosed. In this context, the CJEU referred specifically to Category 2 information: qualifications or professional capacities of the natural or legal persons engaged to perform the contract; size and form of the workforce formed to deliver the contract; and share of the contract the tenderer intends to assign to subcontractors.

Conclusion: As a rule, disclosing information on the natural and legal persons the tenderer indicates it may rely on to perform the contract, including subcontractors, is both permitted and required, provided it is presented in a non-name-specific format.

Category 3: Project development design proposals and description of how the contract would be performed

The CJEU referred to two issues that, after consideration by the contracting authority, may result in a decision to limit the disclosure of information concerning project development design proposals and descriptions of how the contract would be performed. These two issues are the protection of intellectual property rights and the protection of elements having commercial value, disclosure of which may distort competition.

The CJEU directed that it is for the contracting authority to examine whether the proposals and descriptions constitute or contain elements that can be protected by intellectual property rights and thus qualify as grounds for refusal of disclosure under Article 55(3) of the Public Sector Directive. In the context of discussion on protection from disclosure derived from copyright, the CJEU included a cautionary paragraph noting the limited extent of that protection. The CJEU explained that when whole or part of a design or description are regarded as "original works", copyright protection "does not extend to ideas, procedures, operating methods or mathematical concepts as such". This led the CJEU to conclude that intellectual property rights protection does not relate to "technical or methodological solutions" in the proposals, designs or descriptions submitted by a tenderer.

The CJEU went on to comment that project development design proposals and descriptions of how a contract would be performed may have a commercial value that would be unduly undermined if they were disclosed as they stand. This is the case irrespective of whether they constitute or contain elements protected by intellectual property rights. The CJEU explained that the publication of project development design proposals or descriptions of how a contract would be performed may, when they have commercial value, be liable to distort competition. This is because such publication may reduce the ability of the economic operator concerned to distinguish itself using the same design and description in future public procurement procedures.

The CJEU concluded that it is therefore possible that full access to project development design proposals and descriptions of how a contract would be performed should be refused based on provisions in Articles 21(1) and 55(3) of the Public Sector Directive. However, the CJEU qualified this finding, noting that it is "excessively difficult, if not impossible" for a tenderer to exercise its right to an effective remedy if there is no information available on the design or manner of performance. The CJEU thus requires that the "essential content of that part of the tender" be made available.

Conclusion: Full access to project development design proposals and descriptions of how a contract will be performed may, in certain cases, be refused based on provisions in Articles 21(1) and 55(3) of the Public Sector Directive. In such cases, the "essential content of that part of the tender" must still be made available, so limited disclosure is required.

Similar cases

C-927/19 *Klaipėdos regiono atliekų tvarkymo centras v UAB* (C-927/17, ECLI:EU:C:2021:700)

Further reading

SIGMA Public Procurement Brief No. 9, Tender Evaluation and Contract Award
OECD (2016), "Tender Evaluation and Contract Award", *SIGMA Public Procurement Briefs,* No. 9, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-9-200117.pdf.

SIGMA Public Procurement Brief No. 13, Incorporating Environmental Considerations into Public Procurement
OECD (2016), "Incorporating Environmental Considerations into Public Procurement", *SIGMA Public Procurement Briefs,* No. 13, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-13-200117.pdf.

SIGMA Public Procurement Brief No. 14, Incorporating Social Considerations into Public Procurement

OECD (2016), “Incorporating Social Considerations into Public Procurement”, *SIGMA Public Procurement Briefs,* No. 14, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-14-200117.pdf.

SIGMA Public Procurement Brief No. 29, Detecting and Correcting Common Errors in Public Procurement
OECD (2016), “Detecting and Correcting Common Errors in Public Procurement”, *SIGMA Public Procurement Briefs,* No. 29, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-29-200117.pdf.

SIGMA Public Procurement Brief No. 34, Lifecycle Costing
OECD (2016), “Lifecycle Costing”, *SIGMA Public Procurement Briefs,* No. 34, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-34-200117.pdf.

Selected Judgements of the CJEU (2006-2014), Chapter 5
OECD (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD, Paris, https://www.sigmaweb.org/publications/judgements-courtjustice-31july2014-eng.pdf.

10 Remedies

Introduction

Remedies are legal actions that allow economic operators to request the enforcement of public procurement regulations and their rights under those regulations when contracting authorities fail to comply with the legal framework for public procurement. The EU legal framework on remedies relating to award procedures covered by the Public Sector Directive is found in the 1989 Remedies Directive. The Remedies Directive was substantially amended by Directive 2007/66/EC and the Concessions Directive. Certain procedural rules are set out in the Remedies Directive, but most of the details and specific procedural rules are implemented in national law.

The aim of the Remedies Directive is to ensure that irregularities occurring in contract award procedures are challenged and corrected as soon as they occur. The Remedies Directive reflects the right to an effective remedy and the right to a court hearing, guaranteed by the EU Charter of Fundamental Rights. The Remedies Directive regulates review procedures only in outline, granting Member States freedom when integrating their objectives into national law. However, national regulations must not contradict the principle of effectiveness and restrict contractor access to remedies.

Article 1(1) of the Remedies Directive requires that “Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of the Public Sector Directive, decisions taken by the contracting authorities may be reviewed effectively on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law”. The Remedies Directive does not define the concept of "decisions" taken by contracting authorities, and it can only be deduced from Article 2(1)(b) that these may include “technical, economic or financial specifications in the invitation to tender, the contract documents or any other document relating to the contract award procedure”. In addition, bearing in mind the tendering procedures shaped by the Public Sector Directive, the EU legislator mentions decisions regarding the exclusion of contractors, rejection of tenders and selection of the most advantageous tender.

Regarding time limits, the Remedies Directive sets out minimum rules for reviewing a contracting authority's decisions. Article 2c of the Remedies Directive normally allows a minimum of 10 days, effective from the day following the date on which written notification of a decision is sent by the contracting authority to a tenderer or candidate.

The following elements are relevant for the calculation and effectiveness of time limits:

- the amount of time needed for a contractor to prepare an appeal (the Remedies Directive introduced some minimum rules)
- the prohibition on concluding a contract before the appeal time limit expires (the Remedies Directive decided to apply a standstill period, as explained below)
- the obligation to justify the appealed decision (the Remedies Directive states that “the communication of the contracting authority's decision to each tenderer shall be accompanied by a summary of the relevant reasons”)

- the moment from which the time limit begins to run (the day following the date of delivery/notification/publication of the decision or the day following the date when the contractor became aware of the breach of law).

The Remedies Directive does not settle rules on evidence for proceedings or the burden of proof, but national regulations in this regard must not contradict the principle of access to effective remedies and must not hinder contractors from pursuing their claims.

Standing

Under Article 1(3) of the Remedies Directive, Member States must ensure that review procedures are available, in accordance with detailed rules they themselves may establish, at least to any person having or having had an interest in obtaining a particular contract, who has been (or risks being) harmed by an alleged infringement. The condition that entitles an economic operator to use remedies is the threat to their possibility of obtaining a particular contract, and not any harm to the legal interests of a given entity. An economic operator should prove that its interest was harmed, or exposed to harm, in the course of a specific tender procedure in which it participated or was prevented from participating in due to an infringement of the law, and the harm is related to the loss of an opportunity to obtain a contract.

Interest in obtaining a particular contract should be understood more broadly and should relate to the contract in the sense of the subject matter of the economic transaction, and not to the given tender procedure. An entity that uses legal remedies intends to obtain benefits from a contract for specific goods, services or work. Thus, an interest in obtaining a contract may be realised in a subsequent tender procedure. In fact, the Court of Justice of the European Union (CJEU) explained that even if all tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly (C-100/12 *Fastweb*, EU:C:2013:448; C-689/13 *PFE*, ECLI:EU:C:2016:199). A public contract may be the subject of one or more tendering procedures if the contracting authority divides the public contract into sections.

The Remedies Directives do not introduce specific regulations on the standing of groups of economic operators or their members, which means that Member States can regulate this issue on their own, observing the principles of equivalence and effectiveness.

Remedies available

The Remedies Directive requires that Member States ensure four types of remedies are available: interim and set-aside measures (as precontractual remedies), and damages and contract ineffectiveness (as post-contractual remedies).

Interim measures

Interim measures are provisional measures taken in relation to the contract notice and any contracting decision, including the contract award decision. The aim of interim measures is to prevent the creation of unalterable situations and to avoid continuation of the contract award procedure without an economic operator that would otherwise have been able to participate and possibly be awarded the contract.

The following interim measures can typically be ordered:

- suspension of implementation of any decision taken by a contracting authority
- suspension of an entire contract award procedure
- provisional correction of a breach (this interim measure depends on local law and is rather unusual).

Set-aside

Application of the set-aside remedy cancels or renders ineffective a contracting decision taken unlawfully, or otherwise corrects an unlawful situation. The aim of set-aside measures is to correct proven irregularities. Precontractual measures are supported by the standstill-period rule. Contracting authorities are required to wait a certain number of days between the contract award decision and conclusion of the contract with the successful tenderer. This standstill period allows rejected tenderers to challenge the contracting authority's decision not to award them the contract, if they believe the decision was unlawful, and therefore to prevent the contract from being concluded based on an improper award decision.

The following set-aside measures can typically be ordered:

- removal of discriminatory technical, economic or financial specifications in the contract notice, tender documents or any other document relating to the contract award procedure
- annulment of an unlawful contracting decision
- positive correction of any unlawful document or contracting decision, for example an order of the contracting authority to amend or delete an unlawful clause in the tender documents or to reinstate an economic operator that had been unlawfully excluded.

Damages

The Remedies Directive obliges EU Member States to implement the right to award damages to those harmed by breaches of EU procurement law. In view of the wording of Article 1(1) of the Remedies Directive, it should be assumed that these are violations committed by contracting authorities and not by other entities or administrative bodies.

The Remedies Directive does not specify the conditions for awarding compensation or how it should be estimated. In the absence of specific regulations at the EU level, it is up to Member States to determine the criteria on which damages resulting from violations of EU public procurement law should be ascertained and estimated, subject to compliance with the principles of equivalence and effectiveness. The effectiveness of damages should be viewed in consideration of the objectives of the Remedies Directive.

The Remedies Directive also does not specify a liability regime for damages for violations of the law in the area of EU public procurement. Among national legal solutions, there are regimes of liability in contract and tort law, or for damages caused in the performance of public functions. A Member State compares the contracting authority's liability to its liability for damages for violation of EU law, or, on the contrary, considers such a reference insufficient for correct implementation of the Remedies Directive.

Difficulties concerning interpretation of the provisions of these directives regarding claims for damages arise because the first directive was adopted before judgment was passed in the joined cases C-6/90 and C-9/90 *Francovich* (EU:C:1991:428), in which the CJEU derived from primary EU law the principle of Member States' liability for damages from violations of EU law.

This raises concerns about the relationship between liability for damages under the Remedies Directives and Member State liability for damages for violations of EU law. This is important because, regarding the principle of Member State liability for violations of EU law, the CJEU has defined the conditions for claiming damages and the rules for estimating them. The CJEU said that an individual is entitled to full compensation if a Member State has violated EU law in a sufficiently serious manner. The individual does not have to prove that the Member State has committed the violation culpably.

Ineffectiveness of a public contract

The other post-contractual remedy is a declaration of a contract's ineffectiveness. The ineffectiveness sanction was adopted to prevent contracting authorities from hastening to conclude contracts, even in violation of the standstill or suspension periods or of basic procurement rules, assuming that they would be immune to any sanctions following the conclusion of these contracts.

Procurement review bodies set aside or otherwise render ineffective a concluded contract when specific conditions are met, such as failure to publish a contract notice and carry out an award procedure; non-compliance with the rules applying to the award of contracts under a framework agreement; or a breach of standstill requirements that harm the tenderer and deprive it of the opportunity to claim interim measures or set-aside measures.

Member States have the option of allowing contracts to be declared ineffective either:

- Retrospectively: all contractual obligations, including those already performed, are to be cancelled, and the tenderer and contracting authority must establish their relationship under local rules.
- Prospectively: only future and unperformed contractual obligations may be annulled.

When a Member State opts for prospective cancellation, the Remedies Directives require that other penalties must also be available. These additional penalties are (1) fines imposed on the contracting authority, which must be adequately high to punish the unlawfulness; and (2) contract shortening.

Case studies

The following case studies on remedies focus on:

1. How should a contractor's standing be determined, especially if it is submitting a tender in a group?

2. In what cases can a contractor lose its interest in obtaining a contract and thus its legal standing?

3. How should the time limits for filing an appeal be calculated, especially when the contractor could not gain access to justification for the contracting authority's decision or all documents of the tender procedure?

4. How should the prerequisites for compensation be determined, since the Remedies Directives do not specify them?

Case study 1

Standing: facts and dispute

By a contract notice published on 24 January 2018, Attico Metro, a contracting authority in Greece, launched an open procurement procedure for technical consultancy services to extend the Athens Metro, valued at approximately EUR 21.5 million. The award criterion of most financially advantageous tender was used, based on an optimum quality/price ratio. According to the contract notice, the first stage of the procedure was to consist of reviewing supporting documents and candidates' technical tenders, while the second was to involve the opening of tenders and general assessment.

Four contractors submitted tenders. In the first stage of the proceedings, the contracting authority's evaluation committee proposed to reject one contractor's tender during the review of supporting documents, and when reviewing the technical tenders, to reject the tenders of two other candidates, including NAMA's. It also proposed admitting the SALFO consortium to the second stage of the procedure. Before issuing a final decision in this regard, the contracting authority requested detailed information on the experience of the team proposed by NAMA.

The proposals of the committee were approved by a decision of the contracting authority on 6 March 2019. NAMA's tender was rejected on the grounds that the construction work experience of certain members of its team did not meet the requirements of the contract notice. In the contracting authority's opinion, NAMA was excluded because it was not suitable for performance of the contract. Its tender thus did not proceed to the second (evaluation) stage.

On 26 March 2019, NAMA brought an application for review before the Procurement Review Body against that decision, by which it contested both the rejection of its technical tender and the acceptance of SALFO's tender.

By a decision of 21 May 2019, the Procurement Review Body upheld NAMA's application only in so far as it contested the grounds of the contracting authority's decision concerning proof of experience of one of the members of its proposed team. It dismissed the remainder of the application.

Following the partial dismissal of its application for review, NAMA brought an action before the Court, Suspension Chamber, by which it requested:

1) Suspension of the Procurement Review Body's decision of 21 May 2019.
2) Suspension of the contracting authority's decision of 6 March 2019.
3) Application of every relevant measure designed to ensure the interim protection of its interests in the context of pursuing the procurement procedure at issue.

In its pleas, NAMA alleged that its exclusion from the procedure was unlawful on the grounds that the contracting authority had wrongly evaluated the experience of some of its experts, and that the principle of equality in the review of contractors' technical tenders had been infringed upon because the contracting authority had assessed them differently. The Court, Suspension Chamber, held these pleas to be inadmissible and unfounded.

In the initial opinion presented, the Court, Suspension Chamber, referred only to the allegations concerning the exclusion of NAMA and rejection of its tender. The Court, Suspension Chamber, has yet to rule on NAMA's objections to the acceptance of SALFO's tender in the second stage.

Questions

1. Can the legality of a decision admitting the tender of SALFO be contested during the procurement procedure, prior to the final contract award stage, by an excluded tenderer (NAMA) whose tender has been rejected? Is national law allowed to require that a tenderer wait for a public contract to be awarded before applying for review of a decision allowing another tenderer to participate in the procurement procedure that led to that award decision?

2. Does NAMA still have an interest in obtaining this particular contract? As NAMA was excluded by the contracting authority at the first stage of the process, is it still a “concerned” candidate for the purposes of Article 2a(2) of the Remedies Directive?

3. Can NAMA raise objections only with respect to SALFO's tender? What restrictions are there on NAMA in relation to pleas it can submit for consideration by the court? In particular, can it make a plea against the decision allowing SALFO to participate even though this has nothing to do with the shortcomings of NAMA’s tender?

4. Is it relevant to the assessment of NAMA's standing that it was required to first submit an appeal to the Procurement Review Body (administrative body)?

5. Is it relevant to adjudication of the case that NAMA applied for a suspension?

Instructions for resolving the case

Based on CJEU Case C-771/19 – NAMA

NAMA Symvouloi Michanikoi kai Meletites AE – LDK Symvouloi Michanikoi AE and Others v Archi Exetasis Prodikastikon Prosfigon (ECLI:EU:C:2021:232)

Request for a preliminary ruling from the Council of State (Suspension Chamber), Greece

Legal resources

Provisions of the Remedies Directive considered:

Article 1(3)

Article 2(1)(a-b)

Article 2a(2)

Questions

1. Can the legality of a decision admitting the tender of SALFO be contested during the procurement procedure, prior to the final contract award stage, by an excluded tenderer (NAMA) whose tender has been rejected? Is national law allowed to require that a tenderer wait for a public contract to be awarded before applying for review of a decision allowing another tenderer to participate in the procurement procedure that led to that award decision?

Judgement paragraphs 28, 34 to 37

The Remedies Directive does not specify the stage at which an action against such a decision of a contracting authority may be brought forth by a tenderer.

Decisions taken by contracting authorities shall be reviewed effectively and, especially, as rapidly as possible. The Remedies Directive’s objective of effective and rapid judicial protection, particularly by

interim measures, does not authorise Member States to make the right to apply for review conditional on a public procurement procedure having formally reached a particular stage.

A national law requiring that a tenderer wait for a decision awarding the public contract in question before it may apply for review of a decision allowing another tenderer to participate in that procurement procedure/another stage of the tender procedure would infringe upon the provisions of the Remedies Directive.

Conclusion: NAMA may bring forth an action against the decision of the contracting body that admits SALFO's tender, regardless of the stage of the procurement procedure for the award of a public contract for which that decision was taken.

2. Does NAMA still have an interest in obtaining this particular contract? As NAMA was excluded by the contracting authority at the first stage of the process, is it still a "concerned" candidate for the purposes of Article 2a(2) of the Remedies Directive?

Judgement paragraphs 30 to 31, and 38

Article 2a(2) of the Remedies Directive provides that, following the decision to award a public contract, that public contract may not be concluded before the expiry of a period calculated on the basis of the means by which the decision to award the public contract was communicated to the tenderers and to the candidates concerned. Further, among other things, it specifies the conditions under which a tenderer or candidate is considered to be concerned. Tenderers are deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been communicated to the tenderers concerned and has either been deemed lawful by an independent review body or can no longer be subject to a review procedure.

Tasked with interpreting the provisions of Article 1(3) of the Remedies Directive, the CJEU ruled that, in the context of a procurement procedure for the award of a public contract:

1) Tenderers whose exclusion is requested have an equivalent legitimate interest in the exclusion of bids submitted by the other tenderers, with a view to obtaining the contract.
2) The exclusion of one tenderer may lead to another tenderer being directly awarded the contract in the same procedure.
3) If both tenderers are excluded and a new public procurement procedure is launched, each of those tenderers may participate in the new procedure and thus obtain the contract indirectly.
4) The number of participants in the public procurement procedure concerned, as well as the number of participants that instigated review procedures and the differing legal grounds they relied upon, are irrelevant.

Conclusion: NAMA still has an interest in obtaining this particular contract and may bring forth an action against the contracting body's decision to admit the tender of SALFO, since it has not yet been definitively excluded from the tendering procedure.

3. Can NAMA raise objections only with respect to SALFO's tender? What restrictions are there on NAMA in relation to pleas it can submit for consideration by the court? In particular, can it make a plea against the decision allowing SALFO to participate even though this has nothing to do with the shortcomings of NAMA's tender?

Judgement paragraphs 41 to 42

The Remedies Directive does not set out any particular requirements, so according to Article 1(1), the tenderer may rely on pleas based on infringements of EU law concerning public procurement or of national laws transposing directives.

Conclusion: NAMA is entitled to advance any plea against the decision allowing SALFO to participate, including those that do not have any connection with the shortcomings for which its own tender was excluded.

4. Is it relevant to the assessment of NAMA's standing that it was required to first submit an appeal to the Procurement Review Body (administrative body)?

Judgement paragraphs 44 to 45

The fact that the national law requires an unsuccessful tenderer to apply for administrative review before being able to bring forth an action before the court is immaterial to the interpretation concerning standing.

The Remedies Directive expressly authorises Member States to confer on non-judicial authorities the power to rule, at first instance, on actions provided for by that directive, in so far as any allegedly illegal measure taken by that authority or any alleged defect in the exercise of the powers conferred on it can be the subject of a judicial action or of an action before another body that is a court or tribunal within the meaning of Article 267 of the Treaty on the Functioning of the European Union (TFEU), which is independent of the contracting body and of the non-judicial authority that ruled at first instance.

5. Is it relevant to adjudication of the case that NAMA applied for a suspension?

Article 2(1)(a) and (b) of the Remedies Directive sets out the requirements that must be met by any national measures taken to ensure review procedures. Review procedures must allow Member States to take interim measures to correct the alleged infringement or prevent further injury to the interests concerned, while also allowing them to set aside or ensure the setting-aside of decisions taken unlawfully.

The fact that NAMA requested the suspension is irrelevant to the interpretation concerning standing. The contractor may use any available legal remedy. NAMA may apply to suspend the contracting authority's decision to accept a competitor's tender or to cancel it. However, the type of remedy chosen is relevant to the further course of the appeal proceedings.

In this case study, we have information that the Court, Suspension Chamber, held to be inadmissible and unfounded the pleas put forward by NAMA and concerning its exclusion. Such a decision does not necessarily prejudge that NAMA's exclusion is final. However, it is worth noting the deadlines the national legislator introduced for appealing the review body’s decision. Interim measures are intended to secure claims until they are adjudicated. If NAMA does not file a timely appeal against the decision of the Public Review Body, it will be considered finally excluded.

Similar cases

C-100/12 *Fastweb* (EU:C:2013:448): The CJEU explained that neither the order of the actions filed nor their nature (counterclaim) affects the standing of the tenderers if they are adjudicated in the course of the same judicial proceeding, especially if the validity of the tender submitted by each of the economic operators is challenged on identical grounds. In such a situation, each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful tender.

C-391/15 *Marina de Mediterráneo and Others* (EU:C:2017:268): The CJEU decided that the Remedies Directive has not formally laid down the time from which the possibility of review must be open. The objective of the Remedies Directive does not authorise Member States to make the right to apply for review conditional on the public procurement procedure having formally reached a particular stage.

C-355/15 *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich* (EU:C:2016:988): The CJEU stated that Article 1(3) of the Remedies Directive must be interpreted as not precluding a tenderer that has been excluded from a public procurement procedure by a finalised decision of the contracting authority from being refused access to a review of the decision to award the public

contract, when only that unsuccessful tenderer and the successful one submitted bids, and the unsuccessful tenderer maintains that the successful one's bid should also have been rejected.

Additional remarks

1. The CJEU explained that an economic operator has the right to appeal a contracting authority's decision even if it results in cancellation of the tender because of rejection of all the bids. The contractor has an interest in claiming cancellation of the tender, but only if there is a likelihood that the contracting authority will organise a new tender for which the applicant will be able to submit a bid.

2. The CJEU clarified that an economic operator loses its standing to sue because of final rejection of its tender or exclusion. The question of when such legitimacy is assessed (at the time the appeal is filed or again at the time the appeal is adjudicated) remains open.

Further reading

OECD (2016), "Remedies", *SIGMA Public Procurement Briefs,* No. 12, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-12-200117.pdf.

Case study 2

The concept of a "decision" of the contracting authority: facts and dispute

The City of Halle, by a city council decision of 12 December 2021, awarded a contract to RPL Lochau to draw up a plan for the pretreatment, recovery and disposal of its waste, without having formally initiated a public procurement procedure. At the same time, the City of Halle decided, again without calling for tenders, to enter into negotiations with RPL Lochau with a view to concluding a contract with that company for residual urban waste management from 1 June 2025. RPL Lochau would be the investor for construction of a thermal waste disposal and recovery plant.

RPL Lochau is a limited liability company set up in 2010. Of its capital, 75.1% is held by Stadt Halle mbH (wholly owned by the City of Halle) and 24.9% by a private limited liability company. RPL Lochau's objects are the operation of recycling and waste treatment plants. Resolutions of the general meeting of shareholders are adopted either by a simple majority or by a majority of 75% of the votes. The commercial and technical management of the company is currently contracted out to another undertaking, and the City of Halle is entitled to audit the accounts, among other things.

On learning of the award of the contract without a call for tenders, TREA Leuna, which was also interested in providing the services, opposed the City of Halle decision and made an application to the Procurement Board for the City of Halle to be ordered to issue a public call for tenders.

The City of Halle argued in its defence that in accordance with national legislation, the application was inadmissible since it, as a contracting authority, had not formally initiated an award procedure. According to national law, an economic operator has a subjective right to compliance with the "provisions governing the award procedure", which enables it to enforce against the contracting authority any rights relating to "the performance or omission of an act in an award procedure". A review is available in the field of procurement only if the applicant is seeking to have the contracting authority ordered to act in a particular way in a current formal award procedure, which means that it is not possible to seek a review if the contracting authority has decided not to issue a public call for tenders and not to formally initiate an award procedure.

Questions

I.

1. Is Article 1(1) of the Remedies Directive to be interpreted as meaning that the obligation of Member States to provide effective and rapid remedies against decisions taken by contracting authorities also extends to decisions taken outside of formal award procedures, particularly decisions on whether the contract in question falls within the scope of the Public Sector Directive?

2. From what point during a procurement procedure are Member States obliged to make a remedy available to an affected economic operator?

II.

3. How should a national court proceed in a situation in which national law does not provide for the possibility to challenge decisions made by contracting authorities outside of formal procurement procedures?

Instructions for resolving the case

Notes for trainers:

The solution to this case study is based on two CJEU decisions. Cases C-26/03 and C-15/04 were decided on the original provisions of the Remedies Directive (before the adoption of Directive 2007/66/EC amending the Remedies Directive), but the content of Articles 1(1) and 2(1)(a)-(b) of the Remedies Directive has not been changed. The dates of the various steps in the tendering procedure have been adapted for the purposes of this case study, to better align with current EU rules in the public procurement area.

I.

Based on CJEU Case C-26/03 – Stadt Halle

Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (ECLI:EU:C:2005:5)

Advocate General Opinion (ECLI:EU:C:2004:553)

Request for a preliminary ruling from the Higher Regional Court, Naumburg, Germany

Legal resources

Provisions of the Remedies Directive considered:

Article 1(1)

Article 2(1)(a)

Article 2(1)(b)

Questions

1. Is Article 1(1) of the Remedies Directive to be interpreted as meaning that the obligation of Member States to provide effective and rapid remedies against decisions taken by contracting authorities also extends to decisions taken outside of formal award procedures, particularly decisions on whether the contract in question falls within the scope of the Public Sector Directive?

Judgement paragraphs 25, 27 to 35, and Opinion paragraph 23

The CJEU explained at the beginning that when an operation falls within the personal and material scope of the Public Sector Directive, the public contracts in question must be awarded in accordance with the directive and must be made the subject of a call for tenders and be adequately advertised.

The CJEU noted that the concept of “decisions taken by contracting authorities” is not expressly defined in the Remedies Directive, so its scope must be determined based on the wording of relevant provisions of the directive and the objective of effective and rapid judicial protection pursued by it. The CJEU also recalled previous case law on the issue under consideration – C92/00 *HI* (EU:C:2002:379, paragraph 37) and C57/01 *Makedoniko Metro and Mikhaniki* (EU:C:2003:47, paragraph 68) – pointing out that “every decision of a contracting authority falling under the EU rules in the field of public procurement and liable to infringe them is subject to the judicial review”. It thus refers generally to the decisions of a contracting authority without distinguishing among those decisions according to their content or time of adoption.

Article 2(1)(b) of the Remedies Directive provides, moreover, for the possibility of annulling unlawful decisions of contracting authorities in relation to technical and other specifications not only in the invitation to tender but also in any other document relating to the award procedure in question. In the CJEU’s opinion,

this provision can therefore include documents containing decisions taken at a stage prior to the call for tenders.

This broad meaning of the concept of a decision taken by a contracting authority is confirmed by CJEU case law: C81/98 *Alcatel Austria and Others* (EU:C:1999:534, paragraphs 35 and 43) and the previously cited C92/00 *HI* (paragraphs 49 and 55). The Remedies Directive does not lay down any restrictions on the nature and content of the decisions it refers to. Moreover, a restrictive interpretation of the concept of a decision subject to review would be incompatible with Article 2(1)(a) of that directive, which requires that Member States make provisions for interim relief procedures for any decisions taken by contracting authorities.

In line with this broad interpretation of the concept of a decision subject to review, the CJEU held that a contracting authority's decision on which tenderer to award the contract to, prior to conclusion of the contract, must in all cases be open to review, regardless of the possibility of obtaining an award of damages once the contract has been concluded.

The CJEU also held that a contracting authority's decision to withdraw an invitation to tender for a public service contract must be open to a review procedure. The CJEU shared the Advocate General's concept that a contracting authority's decision not to initiate an award procedure may be regarded as the counterpart of its decision to terminate such a procedure. When a contracting authority decides not to initiate an award procedure on the grounds that the contract in question does not, in its opinion, fall within the scope of relevant EU rules, such a decision constitutes the very first decision subject to judicial review.

Conclusion: Any act of a contracting authority adopted in relation to a public contract within the material scope of the Public Sector Directive and capable of producing legal effects constitutes a decision subject to review within the meaning of Article 1(1) of the Remedies Directive, regardless of whether that act is adopted outside a formal award procedure or as part of such a procedure, in particular the decision on whether a particular contract falls within the personal and material scope of the Public Sector Directive.

Additional remarks: The CJEU stated that acts that constitute a mere preliminary study of the market or are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure are generally not subject to review.

2. From what point during a procurement procedure are Member States obliged to make a remedy available to an affected economic operator?

Judgement paragraphs 38 to 41

The CJEU explained that,

> *as to the time from which a possibility of review is open, it must be noted that no such time is formally laid down in the Remedies Directive. However, having regard to that directive's objective of effective and rapid judicial protection, in particular by interim measures, it must be concluded that Article 1(1) of the directive does not authorise Member States to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.*

Generally, compliance with EU rules must be ensured, particularly at the stage when infringements can still be corrected. One of the motives behind adoption of the Remedies Directive was the need to provide pre-contractual remedies enabling the review of decisions taken by contracting authorities before the contract-conclusion stage. The CJEU stated that an expression of the will of the contracting authority in connection with a contract, which comes in any way to the knowledge of the persons interested, is subject to review when that expression has passed the stage of a mere preliminary study of the market and can produce legal effects. Entering into specific contractual negotiations with an interested party constitutes such an expression of will.

Conclusion: The possibility of review is available to any person having or having had an interest in obtaining the contract in question, who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects. Member States are not therefore authorised to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage.

II.

Based on CJEU Case C-15/04 – Koppensteiner GmbH

Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH (ECLI:EU:C:2005:345)

Request for a preliminary ruling from the Bundesvergabeamt, Austria

3. How should a national court proceed in a situation in which national law does not provide for the possibility to challenge decisions made by contracting authorities outside of formal procurement procedures?

Judgement paragraphs 31 to 35

When national law, even when it is interpreted in accordance with the requirements of EU law, does not make it possible for an economic operator to challenge a decision adopted by a contracting authority outside a formal award procedure (as that decision infringes upon EU law, and on these grounds application could be made for it to be set aside), that national law does not fulfil the requirements of Articles 1(1) and 2(1)(b) of the Remedies Directive.

A national court before which an economic operator applies for a decision adopted outside a formal award procedure to be set aside (inasmuch as that decision infringes upon EU law), and which cannot rule on the application under national law, is therefore faced with deciding whether, and if so under what circumstances, it is required under EU law to declare that such an application for annulment is admissible.

The CJEU stated that the Member States' obligation under a directive to achieve the result prescribed by the directive and their duty to take all appropriate measures, general or particular, to ensure fulfilment of that obligation, is binding on all the authorities of Member States including the courts, for matters within their jurisdiction. In this case, it is not disputed that under the applicable national law the Procurement Board has jurisdiction to hear applications for review relating to "decisions" taken by contracting authorities, within the meaning of Article 1(1) of the Remedies Directive, in procedures for the award of public contracts. In these circumstances, the court or tribunal having jurisdiction is required to disapply national rules that prevent compliance with the obligation arising from Articles 1(1) and 2(1)(b) of the Remedies Directive.

Conclusion: The national court should directly apply Article 1(1) of the Remedies Directive and decide the case on its merits.

Similar cases

C-81/98 *Alcatel Austria and Others* (EU:C:1999:534, paragraphs 35 and 43)

C-92/00 *HI* (EU:C:2002:379, paragraphs 37, 49 and 55)

C-57/01 *Makedoniko Metro and Mikhaniki* (EU:C:2003:47, paragraph 68)

C-314/01 *Siemens and ARGE Telekom* (EU:C:2004:159)

C-260/17 *Anodiki Services EPE* (EU:C:2018:864)

C-440/13 *Croce Amica One Italia* (EU:C:2014:2435)

Further reading

OECD (2016), “Remedies”, *SIGMA Public Procurement Briefs,* No. 12, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-12-200117.pdf.

Case study 3

Time limits for applying for review and burden of proof: facts and dispute

On 22 January 2020, a contracting authority published an open invitation to tender to purchase a system for warning and informing the public, using the network infrastructure of public mobile telephone connection providers. eVigilo and another economic operator, HNIT-Baltic UAB, submitted tenders.

The call for tenders in question concerned a purchase covered by the Public Sector Directive and the Remedies Directive.

The contracting authority adopted as evaluation criteria:

- The overall price of the warning system.
- The number of operators taking part in the project with the tenderer.
- General and functional requirements.

The assessment of general and functional requirements included the consideration of justifications for the technical and architectural solutions; particulars of the functional elements and their conformity with the technical specifications and requirements of the contracting authority; and the integrity and compatibility of proposed systems with the technical and information-technology infrastructure used by the contracting authority.

The contracting authority's Public Procurement Commission, having examined the evaluation of the technical tenders carried out by six experts, upheld the results of that evaluation. On 4 November 2020, the contracting authority informed the tenderers of the evaluation results. The successful contractor was HNIT-Baltic UAB.

On 2 November 2020, eVigilo brought forth an action relating to the lawfulness of the procurement procedure, arguing particularly that the conditions of the call for tenders lacked clarity.

Further details were added to the application on 20 December 2020, alleging failings in the experts' evaluation and that the results of that evaluation were groundless.

On 8 March 2021, the contracting authority and HNIT-Baltic UAB concluded the public contract, even though the proceedings between eVigilo and the contracting authority were still pending.

On 19 March 2022, eVigilo added to its application relating to the lawfulness of the evaluation of tenders, explaining its arguments concerning the erroneous definition of the criteria in the invitation to tender for evaluating an economic advantage.

On 10 April 2022, eVigilo again added to its application and invoked new facts connected with the bias of the experts who evaluated the tenders, to show the existence of professional relations between the experts and the specialists referred to in the HNIT-Baltic UAB's tender.

It claimed that the specialists referred to in the tender submitted by the successful tenderer were, at the Technical University of Kaunas, colleagues of three of the six experts of the contracting authority who drew up the tender documents and evaluated the tenders.

eVigilo's application was rejected by the courts of first instance and of appeal.

By its appeal on a point of law before the Supreme Court of Lithuania, eVigilo stated that those courts incorrectly assessed the connections between the specialists referred to by the successful tenderer and the experts appointed by the contracting authority. It claimed also that those courts thereby failed to take account of the experts' bias.

Furthermore, eVigilo claimed that the contracting authority provided very abstract criteria for evaluation of the most economically advantageous tender, particularly the criterion of “compatibility with the needs of the contracting authority”, which affected how the tenderers formulated their tenders and how the contracting authority evaluated those tenders. eVigilo claims that it was able to understand the award criteria for most economically advantageous tender only after the contracting authority sent it exhaustive reasons for refusing to award it the contract. It was therefore only after that communication that the period for bringing forth an action ought to have begun.

According to the contracting authority and the successful tenderer, the courts of first instance and of appeal were correct in holding that eVigilo was required not only to show objective connections between the successful tenderer’s specialists and the experts who evaluated the tenders, but also to prove the subjective fact that the experts were biased. They also maintained that eVigilo was too late in challenging the lawfulness of the criteria for evaluating the most economically advantageous tender.

In addition, the contracting authority and HNIT-Baltic UAB contested the claim that the criteria for awarding the public contract were inappropriately defined, given that, until the closing date for the submission of tenders, eVigilo had not contested them and had not requested that they be explained.

Questions

1. To establish that the evaluation of tenders was unlawful, is it sufficient for eViglio Ltd to prove that its competitor HNIT-Baltic UAB had significant ties with the experts appointed by the contracting authority who evaluated the tenders? Is eViglio Ltd required to prove that the bias of these experts influenced the decision to award the contract to HNIT-Baltic UAB, and should it provide concrete proof of this bias?

2. Can a tenderer file an appeal after the deadline provided for challenging the legality of the award criteria has passed? Can a tenderer use the defence that it understood the content of the award criteria only when the contracting authority, after evaluating the tenders, provided comprehensive information on the reasons for its decision to apply the said award criteria?

Instructions for resolving the case

Based on CJEU Case C-538/13 – eViglio Ltd

eVigilo Ltd v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos, supported by: ‘NT Service’ UAB, ‘HNIT-Baltic’ UAB (ECLI:EU:C:2015:166)

Request for a preliminary ruling from the Supreme Court of Lithuania

Legal resources

Provisions of the Remedies Directive considered:

Article 1(1) and (3)

Provisions of the Public Sector Directive considered:

Article 24

Notes for trainers: Case C-538/13 was decided before adoption of the Public Sector Directive. The dates of the various steps in the tendering procedure have been adapted for the purposes of this case study, to better align with current EU rules in the public procurement area.

Questions

1. To establish that the evaluation of tenders was unlawful, is it sufficient for eViglio Ltd to prove that its competitor HNIT-Baltic UAB had significant ties with the experts appointed by the contracting authority who evaluated the tenders? Is eViglio Ltd required to prove that the bias of these experts influenced the decision to award the contract to HNIT-Baltic UAB, and should it provide concrete proof of this bias?

Judgement paragraphs 36 to 47

The CJEU began by explaining that the contracting authority's appointment of experts acting on its mandate to evaluate the tenders submitted does not relieve that authority of its responsibility to comply with the requirements of EU law and, among other standards, with the principles of transparency and equal treatment of economic operators.

The finding of bias on the part of an expert requires, in particular, the assessment of facts and evidence that fall within the competence of contracting authorities and administrative or judicial control authorities. The CJEU noted that the Remedies Directive does not contain specific provisions in this regard.

Article 24 of the Public Sector Directive provides some general regulations:

> *Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures …. The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority … who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.*

The CJEU reminded that, in the absence of EU rules governing the matter, every Member State must establish detailed rules of administrative and judicial procedures for safeguarding individuals' rights deriving from EU law. The CJEU underlined that the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of the Remedies Directive.

In accordance with Article 24 of the Public Sector Directive, the contracting authority is, at all events, required to determine whether any conflicts of interests exist and to take appropriate measures to prevent and detect conflicts of interests and remedy them. The CJEU stated that it would be incompatible with this active role for the applicant to bear the burden of proving that experts appointed by the contracting authority were in fact biased. Such an outcome would also be contrary to the principle of effectiveness and the requirement of an effective remedy set out in the third subparagraph of Article 1(1) of the Remedies Directive, particularly since tenderers do not generally have access to information and evidence allowing them to prove such bias.

Thus, it is enough for eViglio Ltd to prove the existence of connections between the experts appointed by the contracting authority and the specialists of HNIT-Baltic UAB – the fact that they work together in the same university, belong to the same research group or have employer-employee relationships within that university. If proved to be true, these allegations must lead to a thorough examination by the contracting authority or by the administrative or judicial control authorities.

The CJEU stated that "the concept of 'bias' and the criteria for it are to be defined by national law. The same applies to the rules relating to the legal effects of possible bias. Thus, it is for national law to determine whether, and if so to what extent, the competent administrative and judicial authorities must take into account the fact that possible bias on the part of the experts had no effect on the decision to award the contract".

In the context of examining an action for annulment of an award decision on the grounds that the experts were biased, the unsuccessful tenderer may not be required to provide tangible proof of the experts' bias. In principle, it is a matter of national law to determine whether, and if so to what extent, the competent

administrative and judicial control authorities must consider that possible bias on the part of experts affected the contract award decision.

Conclusion: To establish that the evaluation of tenders is unlawful, it is sufficient for eViglio Ltd to prove that its competitor HNIT-Baltic UAB had significant ties with the experts appointed by the contracting authority to evaluate the tenders. eViglio Ltd cannot be required to prove that the bias of these experts influenced the decision to award the contract to HNIT-Baltic UAB. The national legislator should determine whether it is sufficient to prove a connection between the experts and the successful tenderer for annulment of the award decision, or whether the court should examine the impact of such a connection on the award decision.

2. Is the third subparagraph of Article 1(1) of the Remedies Directive to be interpreted as meaning that the right to initiate an action on the lawfulness of award criteria is available, after expiration of the time limit prescribed by national law, to a tenderer that was able to understand those criteria only when the contracting authority – after evaluating the tenders – provided comprehensive information on the reasons for its decision after application of the award criteria?

Judgement paragraphs 49 to 58

This question refers to the period prescribed for initiating an action relating to the lawfulness of a call for tenders provided for by national law. The award criteria are prepared by the contracting authority at the beginning of the tender procedure and disclosed in the contract notice. Under national law, a legal remedy is available to tenderers at the stage of the call for tenders, allowing its lawfulness to be contested. The national legislator may stipulate that the content of the contract notice containing the selection and award criteria may be contested by contractors only up to a certain deadline. After expiration of the time limit for appeal, a contractor may not raise objections to the legality of such criteria. When complaining about the decision to exclude or reject a tender, it may only challenge the legality of the way in which these criteria were applied by the contracting authority.

The CJEU recalled that Article 1(1) and (3) of the Remedies Directive requires effective remedies to be available “under detailed rules which the Member States may establish”, and especially as rapidly as possible, in accordance with the conditions set out in Articles 2 to 2f of that directive.

In accordance with CJEU case law – C470/99 *Universale-Bau and Others* (EU:C:2002:746, paragraphs 75 and 76), C241/06 *Lämmerzahl* (EU:C:2007:597, paragraphs 50 and 51) and C456/08 *Commission v Ireland* (EU:C:2010:46, paragraphs 51 and 52) –

> *the setting of reasonable limitation periods for bringing proceedings must be regarded as satisfying, in principle, the requirement of effectiveness under the Remedies Directive, since it is an application of the fundamental principle of legal certainty. The full implementation of the objective sought by the Remedies Directive would be undermined if contractors were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements.*

However, the CJEU noted the moment from which the running of such a time limit should be counted. The objective laid down in Article 1(1) of the Remedies Directive can be realised only if the periods for initiating proceedings start from the date on which the claimant knew, or ought to have known, of the alleged infringement of those provisions (C161/13 *Idrodinamica Spurgo Velox and Others*, EU:C:2014:307, paragraph 37).

In paragraph 42 of its judgment in C19/00 *SIAC Construction* (EU:C:2001:553), the CJEU held that the award criteria must be formulated in the contract documents or the contract notice in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

In this case scenario, the Supreme Court of Lithuania was to assess whether eViglio Ltd was in fact unable to understand the award criteria at issue or whether it should have understood them by applying the

standard of a reasonably informed tenderer exercising ordinary care. The CJEU explain that in the context of this assessment it was necessary to consider that eViglio Ltd and the other tenderer were able to submit tenders, and that eViglio Ltd did not request clarification from the contracting authority before submitting its tender.

If it follows from the assessment that the award criteria were in fact incomprehensible to eViglio Ltd and that it was prevented from introducing an application within the period provided for by national law, it is entitled to initiate an action until the period prescribed for bringing proceedings against the decision to award the contract has expired.

Conclusion: The third subparagraph of Article 1(1) of the Remedies Directive must be interpreted as requiring that the right to initiate an action relating to the lawfulness of the award criteria be open, after expiry of the period prescribed by national law, to reasonably well-informed and normally diligent tenderers that could understand the award criteria only when the contracting authority, after evaluating the tenders, provided exhaustive information relating to the reasons for its decision. Such a right to initiate an action may be exercised until the period prescribed for bringing proceedings against the decision to award the contract has expired.

Additional remarks: The contractor in this case could invoke before the court the obligation to apply an interpretation of national law in compliance with the purpose of the directive. Time limits for challenging individual decisions of the contracting authority are in line with the principle of speed but must not restrict contractors' access to effective review procedures.

Further reading

OECD (2016), “Remedies”, *SIGMA Public Procurement Briefs,* No. 12, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-12-200117.pdf.

Case study 4

Standing: The group of economic operators. Interest in obtaining a particular contract: facts and dispute

On 30 September 2017, FOREM, as contracting authority in Belgium, published a contract notice concerning “the design, construction and financing of a building of approximately 6 500 m²” for its Liège district headquarters. Because of the value of the public contract, it was covered by the Public Sector Directive.

Tenders opened on 20 February 2018. Five tenders were submitted, one of which came from the consortium Espace Trianon-Sofibail.

On 22 December 2018, FOREM awarded the public contract to another consortium, CIDP-BPC. On 25 January 2019, Espace Trianon and Sofibail were notified of the award decision.

On 19 February and 8 March 2019 respectively, Espace Trianon and Sofibail – members of one consortium without legal personality – lodged applications seeking the annulment of FOREM’s decision of 22 December 2018.

According to Article 19 of the Belgian Civil Code, members of a consortium without legal personality, having participated in a procedure for the award of a public contract and having not been awarded that contract, are required to act together, in their capacity as associates or in their own names, to bring forth an action against the decision awarding the contract.

The Belgium Court observed that Espace Trianon’s decision to initiate legal proceedings was taken by two of its administrative officers and not by its Board of Directors in accordance with its articles of association. Therefore, this decision was irregular. The Belgium Court also observed that, by contrast, Sofibail’s decision to initiate legal proceedings was legal and valid.

Question

Are the provisions of the Belgian Civil Code requiring members of a consortium without legal personality to jointly bring forth actions against contracting authorities' decisions compatible with Article 1(3) of the Remedies Directive?

Instructions for resolving the case

Based on CJEU Case C-129/04 – Espace Trianon SA

Espace Trianon SA and Société wallonne de location-financement SA (Sofibail) v FOREM (ECLI:EU:C:2005:521)

Request for a preliminary ruling from the Conseil d’État (Belgium)

Legal resources

Provisions of the Remedies Directive considered:

Article 1(3)

Provisions of the Public Sector Directive considered:

Article 19(2)

Question

Are the provisions of the Belgian Civil Code requiring members of a consortium without legal personality to jointly bring forth actions against contracting authorities' decisions compatible with Article 1(3) of the Remedies Directive?

Notes for trainers: Case C-129/04 was decided on the original provisions of the Remedies Directive (before the adoption of Directive 2007/66/EC amending the Remedies Directive), but the content of Article 1(3) of the Remedies Directive has not been changed. The dates of the various steps in the tendering procedure have been adapted for the purposes of this case study, to better align with current EU rules in the public procurement area.

Judgement paragraphs 19 to 27

The CJEU began by explaining that Article 1(3) of the Remedies Directive, in referring to any person having an interest in obtaining a public contract, alludes to persons who, in tendering for the public contract at issue, have demonstrated their interest in obtaining it. In this situation, it is the consortium that submitted the tender and not its individual members. In the same way, all the members of the consortium – had the public contract at issue been awarded to them – would have been obliged to sign the contract and carry out the work. Nothing in the case study prevented the members of the consortium from together bringing forth, in their capacity as associates or in their own names, an action for annulment of the decision of 22 December 2018.

The CJEU decided that Belgian implementation of the Remedies Directive is in line with the principle of efficiency and equivalence: “A national procedural rule which requires an action for annulment of a contracting authority’s decision awarding a public contract to be brought by all the members of a tendering consortium does not limit the availability of such an action in a way contrary to Article 1(3) of the Remedies Directive”. The procedural rule referred to in this case study applies in the same way to all actions brought forth by members of consortia in relation to the operations they carry out in the course of their activities, there being no need to know whether the claims are founded on a breach of EU law or of national law, or whether they relate to public contracts or to other operations.

The procedural rule in question could not undermine the requirement for effective review laid down in Article 1(1) of the Remedies Directive. The CJEU clarified that this principle does not require that an action be held admissible when the provisions relating to representation in legal proceedings, which stem from the legal form assumed, have not been adhered to as far as concerns the person who initiates the proceedings.

Finally, it is worth mentioning a practical aspect of the requirement that consortium members act together. A group of economic operators submits a single tender and is treated as "one" contractor in the tendering process. If only one of the consortium members disputes the contracting authority's decision, their possible victory in a lawsuit will not allow them to obtain the contract anyway, since the tender was submitted by a group of economic operators.

Conclusion: The provisions of the Belgian Civil Code requiring members of a consortium without legal personality to jointly bring forth actions against contracting authorities' decisions are compatible with Article 1(3) of the Remedies Directive.

Additional remarks

The question in this case study concerned compliance with the Remedies Directive’s requirement for joint action by consortium members. It is worth remembering, however, that the Remedies Directives define only the minimum circle of entities entitled to bring forth appeals, and Member States may expand this circle by granting individual consortium members the right to challenge a contracting authority's decisions.

To sum up, the CJEU has regarded as compatible with EU law both a national rule under which actions were admissible only if brought forth by all the members of a temporary association acting together (C-129/04 *Espace Trianon SA*) and a national rule under which, by contrast, actions were also admissible if initiated by an individual member of a consortium (C-492/06 *Consorzio Elisoccorso San Raffaele* EU:C:2007:583). The reason for this is that the Remedies Directive simply lays down the minimum conditions to be satisfied by the review procedures established in national legal systems, to ensure compliance with the requirements of EU law concerning public contracts.

However, since the CJEU found that the requirement for joint action is in compliance with the Remedies Directive, it seems that a single consortium member cannot derive from the mentioned EU regulations the right to file an individual action when an entire consortium has an interest in obtaining the contract.

Another important issue is the right of each member of a consortium to seek damages. If in the given Member State the condition for awarding damages is the prior annulment of a contracting authority's decision, in accordance with Article 2(6) of the Remedies Directive, then national regulations on the legal standing of the consortium and its members must not impede the pursuit of claims for damages.

In the area of damages, EU law is regarded as conferring an individual right of action on every member of a temporary association (joined cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others*, EU:C:2010:247).

Further reading

OECD (2016), "Remedies", *SIGMA Public Procurement Briefs,* No. 12, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-12-200117.pdf.

Case study 5

Damages: facts and dispute

In 2008, Graz City Council in Austria announced an EU-wide invitation to tender by open procedure for the manufacture and supply of bituminous hot-mix asphalt. Under the heading “period for performance”, the notice of invitation to tender specified “start: 1 March 2009; end: 20 December 2009”.

Fourteen tenders were submitted. The highest-ranked bidder was HFB, a construction undertaking. If that undertaking had been excluded, the tender submitted by Strabag, which was ranked second, would have been successful.

HFB had enclosed with its tender a letter in which it stated, “by way of supplement”, that its new asphalt mixing plant, which was to be constructed in the coming weeks in Austria, would be operational from 17 May 2009. Strabag was unaware of that letter.

On 5 May 2009, Strabag brought review proceedings before the Austrian procurement review body, in which it stated that HFB did not possess a hot-mix asphalt plant in Austria, which made it technically impossible for it to perform the contract at issue. Strabag claimed that HFB’s tender should therefore be excluded.

At the same time, Strabag submitted an application for interim measures, which was granted by the Austrian procurement review body by an order of 10 May 2009 prohibiting Graz City Council from awarding the contract pending a decision on the substance of the contract.

By a decision of 10 June 2009, the Austrian procurement review body dismissed the action brought forth by Strabag in its entirety, including its applications for the exclusion of HFB from the tender. It stated that HFB was authorised to manufacture asphalt and that requiring the hot-mix plant to be operational at the time of the opening of tenders would have been disproportionate to the subject matter of the contract and contrary to commercial practice.

On 14 June 2009, Graz City Council awarded the contract to HFB.

By a decision of 9 October 2012, following an action brought forth by Strabag, the Austrian administrative court annulled the decision of the Austrian procurement review body on the grounds that HFB’s tender did not conform with the invitation to tender because, although the performance period ran from 1 March to 20 December 2009, HFB was unable to make use of its new asphalt mixing plant until 17 May 2009.

The Austrian procurement review body, by a decision of 23 April 2013, held that because of an infringement of the public procurement law, the award of the contract by Graz City Council had not been lawful.

Strabag brought an action against Graz City Council before the civil courts for damages. In support of its action, it claimed that HFB’s tender should have been excluded on the grounds of an irreparable defect and that its own tender should consequently have been accepted. Graz City Council erred by failing to hold that HFB’s tender was incompatible with the terms of the invitation to tender. According to Strabag, the decision of the Austrian procurement review body could not release from liability Graz City Council, which acted at its own risk.

For its part, Graz City Council claimed that it was bound by the Austrian procurement review body’s decision of 10 June 2009 and that, if that decision were unlawful, such unlawfulness was attributable to this body. Its own organs, by contrast, were not at fault.

By an interlocutory decision, the civil court of first instance held that the action for damages brought forth by Strabag was well founded, concluding that Graz City Council had erred by not carrying out a review of

the tenders and by awarding the contract to HFB, despite the clear defect in its tender, during the period allowed for appealing the decision of the Austrian procurement review body.

That decision was upheld on appeal. The civil court of appeal stated, however, that its decision was amenable to an ordinary appeal on a point of law, given the lack of case law concerning the contracting authority's liability for fault when, as in the present case study, at the date of award of the contract to the highest-ranked bidder, the contracting authority's position was upheld by a decision of the Austrian procurement review body.

The appeal court held that the ordinary courts were bound by the Austrian procurement review body's decision of 23 April 2013. The appeal court found the award to be unlawful and that a causal link had been established between Graz City Council's unlawful decision and damages suffered by Strabag. In the opinion of the appeal court, it was still necessary to examine whether Graz City Council was at fault concerning its decision of 14 June 2009 to award the contract to HFB. This was without taking into consideration the fact – which was not referred to in the Austrian procurement review body's decision of 10 June 2009 – that the letter accompanying HFB's tender indicated it was unable to comply with the performance periods of the contract at issue.

Graz City Council lodged before the Supreme Court a review on a point of law against the judgment given on appeal.

The Supreme Court had doubts as to the conformity of Austrian law with the Remedies Directive. It was uncertain whether any national legislation that makes a tenderer's right to damages conditional in any way on a finding that the contracting authority is at fault must be held to be incompatible with that directive, or only national legislation that imposes on a tenderer the burden of proving that fault.

The Supreme Court pointed out in this regard that Austrian law reverses the burden of proof, with the effect that the contracting authority as a body is presumed to be at fault. Furthermore, the contracting authority is not entitled to rely on a lack of individual abilities, since its liability is equated with that of an expert. Nevertheless, if Graz City Council was indeed bound, actually and extensively, by the procedurally final decision of the Austrian procurement review body, it would be able to discharge the burden of proof to the required legal standard.

Question

Is a national provision making the contracting authority's liability for damages subject to a presumption of fault consistent with Articles 1(1) and 2(1)(c) of the Remedies Directive? Does the means of proving fault matter in this case? Can a national provision that introduces a presumption of fault on the part of the contracting authority – and that the contracting authority's reliance on a lack of individual capacity, and thus a lack of personal fault, is excluded – be compatible with Articles 1(1) and 2(1)(c) of the Remedies Directive?

Instructions for resolving the case

Based on CJEU Case C-314/09 – Stadt Graz

Stadt Graz v Strabag AG (ECLI:EU:C:2010:567)

Request for a preliminary ruling from the Supreme Court in Austria

Legal resources

Provisions of the Remedies Directive considered:

Article 1(1)

Article 2(1)(c)

Question

Does a national rule under which claims for damages for a contracting authority's infringement of EU procurement law are subject to the condition of fault – including when that rule is applied in accordance with a presumption that fault lies with the contracting authority and its reliance on a lack of individual abilities, hence on a lack of personal fault, is excluded – align with Articles 1(1) and 2(1)(c) of the Remedies Directive?

Notes for trainers: The dates of the various steps in the tendering procedure and forum names have been adapted for the purposes of this case study, to clarify the course of events.

Judgement paragraphs 30 to 45

Under Article 2(1)(c) of the Remedies Directive, Member States are to ensure that measures taken for review procedures include provisions for the power to award damages to persons harmed by an infringement.

The CJEU issued a reminder that the Remedies Directive lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law. If there is no specific provision governing the matter, it is for the domestic law of each Member State to determine the measures necessary to ensure that the review procedures effectively award damages to persons harmed by an infringement of the law on public contracts. However, the procedural autonomy of Member States is limited by the principles of equivalence and effectiveness.

The CJEU noted that the wording of Article 1(1), Article 2(1), (5) and (6), and the sixth recital in the preamble to the Remedies Directive in no way indicates that a breach of 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 – proven or presumed – on the part of the contracting authority. This assessment is supported by the general context and aim of damages, as provided for in the Remedies Directive.

The damages provided for in Article 2(1)(c) of the Remedies Directive can be an effective alternative to other remedies only if the possibility of awarding damages is not made more dependent than other remedies in public procurement, provided for in Article 2(1) of the Remedies Directive, on a finding of fault on the part of the contracting authority.

It is correct that the Remedies Directives do not differentiate between the degree and manner of violation of the law depending on the remedy chosen. According to the wording of Article 2(1)(c) of the Remedies Directive, there is reference to the award of damages to those having suffered as a result of a violation (of any kind).

It is irrelevant that Austrian legislation in this case did not impose on Strabag the burden of proving that the contracting authority was at fault but required Graz City Council to rebut the presumption that it was at fault, while limiting the grounds on which it could rely for that purpose. The way in which the premise of guilt is shaped and the way in which it is proven, even in favour of the contractor, are irrelevant. In any case, the requirement to meet the premise of guilt is incompatible with the Remedies Directive.

The reason for this is that the legislation created the risk that Strabag, which had been harmed by an unlawful decision of a contracting authority, was nevertheless deprived of the right to reparation for damages resulting from that decision, whereas Graz City Council was able to rebut the presumption that it was at fault. Such a possibility is not excluded in this case study, given that Graz City Council was able to rely on the fact that the legal error it was alleged to have made is excusable, on account of intervention

of the Austrian procurement review body's decision of 10 June 1999, which dismissed the action brought forth by Strabag.

At the very least, Strabag ran the risk under that legislation of only belatedly being able to obtain damages, in view of the possible duration of civil proceedings seeking a finding that the alleged infringement was culpable.

The CJEU underlined that, in both cases, the situation would be contrary to the aim of the Remedies Directive, which according to Article 1(1) and the third recital in the preamble is to guarantee judicial remedies that are effective and implemented as rapidly as possible against contracting authority decisions that infringe upon the law on public contracts.

Graz City Council might have taken the view in June 2009 that it was required, because of the objective of efficiency in procedures to award public contracts, to take immediate steps to comply with the Austrian procurement review body's decision of 10 June 2009 without awaiting expiry of the period for bringing forth an appeal against that decision. According to the wording of Article 2(3) of the Remedies Directive, a contracting authority may not conclude a contract before the review body has made a decision on an application for interim measures or an appeal.

In this case study, Stadt Graz was entitled to award the contract because the case in the first instance, decided by the Austrian procurement review body, had been concluded. In this case study, there is no indication that Austrian law extends the standstill period prohibiting the conclusion of a public contract until the second-instance ruling. Strabag correctly asserted that Graz City Council awarded the public contract at its own risk without waiting for a decision in the second instance.

There was therefore some likelihood that Graz City Council could rebut the presumption of fault.

Damages cannot – contrary to the wording, context and objective of the provisions of the Remedies Directive – depend on a finding that the contracting authority involved is at fault.

Conclusion: A national rule under which claims for damages for a contracting authority's infringement of EU procurement law are subject to a condition of fault – including when that rule is applied in accordance with a presumption that fault lies with the contracting authority and its reliance on a lack of individual abilities, hence on a lack of personal fault, is excluded – is contrary to Articles 1(1) and 2(1)(c) of the Remedies Directive.

Additional remarks: If national rules conflict with the Remedies Directive, a national court should disregard them in accordance with the principles of pro-EU interpretation. In this case study, the national court should have decided on damages by disregarding provisions relating to fault of the contracting authority.

Similar cases

C-70/06 *Commission v Portugal* (EU:C:2008:3): The CJEU expressed the opinion that national law that makes the award of damages conditional on proving fault or intentional misconduct on the part of the infringing contracting authority is a barrier to the use of this remedy.

C-568/08 *Combinatie Spijkier* (EU:C:2010:751): The CJEU stated that Directive 89/665/EEC does not introduce any criteria for awarding damages, and therefore there are no more specific conditions for liability than those arising from the general principle of Member States' liability for damages for violations of EU law. Referring to the judgment in joined cases C-6/90 and C-9/90 *Frankovich* (EU:C:1991:428) and C-46/93 and C-48/93 *Brasserie du Pecheur S.A.* (EU:C:1996:79), the CJEU stated that Article 2(1)(c) of the Remedies Directive embodies the principle of state liability for damages caused to individuals by violations of EU law attributable to it.

Further reading

OECD (2016), “Remedies”, *SIGMA Public Procurement Briefs,* No. 12, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-12-200117.pdf.

Case study 6

The right to an effective remedy: facts and dispute

In 2019, a contracting authority published a public contract notice to develop projects relating to the environmental management of certain river basin districts in Poland. The tender specifications set out the conditions for participating in the procedure, the documents required and the criteria for awarding the contract.

For the latter, the tender specifications stated that tenders would be evaluated on three criteria: price (40% weighting); project development design (42%); and description of the manner of contract performance (18%).

Following evaluation of the four tenders submitted, the contract was awarded to CDM Smith. Although the price of Antea's tender was lower than that of CDM Smith, Antea obtained a lower overall score because more points were awarded to CDM Smith for the quality-related criteria.

Antea brought an action before the court, seeking (among other things) annulment of the decision awarding the contract to CDM Smith, fresh examination of the tenders, and the disclosure of certain information.

In support of this action, Antea especially complained that the contracting authority failed to disclose the information communicated to it by CDM Smith and other tenderers concerning their tenders. This includes lists of services previously provided; lists of persons who would be assigned to perform the contract if it were awarded; information relating to subcontractors or other third parties providing resources; and, more generally, project development designs and descriptions of manner of contract performance.

Antea submitted that it was deprived of its right to an effective remedy on account of, first, the excessively confidential nature accorded to the information contained in its competitors' tenders and, second, the lack of an adequate statement of reasons for the scores awarded.

Questions

If the contracting authority is found to have unlawfully classified information provided to it by tenderers as confidential, should the court reviewing the complaint against the award decision annul it to allow the complainant to file a new complaint in which it can include information previously unlawfully classified as confidential?

Instructions for resolving the case

Based on CJEU Case C-54/21 – Antea Polska SA

Antea Polska SA v Państwowe Gospodarstwo Wodne Wody Polskie (ECLI:EU:C:2022:888)

Request for a preliminary ruling from the National Chamber of Appeal, Poland

Legal resources

Provisions of the Remedies Directive considered:

Article 1(1)

Questions

If the contracting authority is found to have unlawfully classified information provided to it by tenderers as confidential, should the court reviewing the complaint against the award decision annul it to allow the complainant to file a new complaint in which it can include information previously unlawfully classified as confidential?

Judgement paragraphs 97 to 108

First, it should be noted that in this case study we are dealing with two decisions of the contracting authority, which are subject to review. The first decision concerns the classification of information as confidential, and the second concerns the award of the contract. The problem is that a possibly incorrect decision on confidential information may affect the right to an effective remedy for the second decision. A tenderer that did not have access to information classified as confidential could not assess whether the decision to award the contract was correct.

It follows from Article 1(1) of the Remedies Directive that decisions taken by a contracting authority in a procurement procedure that falls under EU law must be capable of being reviewed effectively, and as rapidly as possible. The purpose of the Remedies Directive is therefore to ensure full respect for the right to an effective remedy and to a fair trial, as enshrined in the first and second paragraphs of Article 47 of the Charter of Fundamental Rights of the European Union.

The CJEU explained that to observe the right to an effective remedy, the national court must ascertain that the contracting authority rightly considered that the information it refused to disclose to the applicant was confidential, taking into account the contracting authority's obligation to provide the unsuccessful tenderer with sufficient information to safeguard the right to an effective remedy and the right of other economic operators to protection of confidentiality.

If the national court finds that certain information was wrongly classified as confidential at the end of this verification, the court must be able to annul the contracting authority's decision refusing to disclose that information. Furthermore, if it is permitted to do so under national law, the court must itself be able to take a new decision in this regard.

The CJEU stated that, regarding how failure to disclose information affects the legality of the procurement procedure, and thus the contract award decision, the provisions of the Remedies Directive do not make it possible to determine the detailed procedural rules under which the national court must examine these effects.

Therefore, in a case study such as this one in which the applicant seeks annulment of the contract award decision on the grounds that, among other things, certain information was wrongly classified as confidential, it is for the court hearing the case to examine whether that information should have been disclosed and, if so, to assess whether the failure to disclose that information deprived the applicant of the possibility of initiating an effective action against that award decision.

The CJEU issued a reminder that effective review can be realised only if the periods laid down for bringing forth review proceedings start from the date on which the applicant knew, or ought to have known, of the alleged infringement of those provisions. In the case of information wrongly classified as confidential, the applicant will only become aware of its contents after the contracting authority's decision is annulled by the court.

Consequently, when it transpires that the right to an effective remedy has been infringed upon as a result of a failure to disclose information, the court must either annul that award decision or find that the applicant may bring forth a fresh action against the award decision, only once the applicant has access to all information that was wrongly classified as confidential.

Conclusion: If the contracting authority is found to have unlawfully classified information provided to it by tenderers as confidential, the court reviewing the complaint against the award decision should annul the

award decision to allow the complainant to file a new complaint in which it can include information previously unlawfully classified as confidential.

Similar cases

C-927/19 *Klaipėdos regiono atliekų tvarkymo centras* (EU:C:2021:700)

C-406/08 *Uniplex* (UK) (EU:C:2010:45)

Further reading

OECD (2016), "Remedies", *SIGMA Public Procurement Briefs,* No. 12, OECD, Paris, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-12-200117.pdf.

SIGMA Training resources

Casebook: Public Procurement Law in Practice

This material is designed for public procurement practitioners in SIGMA partners. Its purpose is to aid in translating the EU public procurement legal framework into practical case-studies using real-life judgments from the Court of Justice of the European Union. It presents crucial procurement topics including the concept of contracting authorities, definitions of public contracts, in-house contracts, framework agreements, technical specifications, and reliance on third-party capacities in procurement. It also explores the selection and exclusion of economic operators, contract award criteria, and remedies available in procurement disputes.

This resource serves as practical training material for workshops and seminars, helping practitioners understand and implement public procurement processes according to EU standards, in this way enhancing transparency, efficiency, and compliance in public procurement.

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