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The Principle of Non-Discrimination in the EC Public Procurement Law

INTRODUCTION

One of the fundamental objectives of the European Community is to create a common market based on the free movement of goods and services. The foregoing freedoms have been grounded in Article 34 (ex Article 28) of the Treaty on the Functioning of the European Union (TFEU)[1] and Article 56 (ex Article 49). While solutions relating to economic activities of public undertakings have been contained in the Treaty from the very beginning (Article 106 of TFEU, ex Article 86), there were no provisions in it regulating the award of public procurement contracts. And, yet, by awarding public procurement contracts public authorities could exercise a great influence on economic life[2]. It changed in the early "70s when the first public procurement directives were adopted[3].

Subsequent directives were adopted in the early "90s. Three directives – separate for each of the services[4], supplies[5] and construction works[6]

[1] The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed on 13 December 2007 changed the title of the Treaty of Rome into the Treaty on the Functioning of the European Union and changed the numbering of the articles, OJ C306 of 17 December 2007.

[2] The Polish public procurement market is valued at approximately 8.6% of GDP according to the report on the functioning of the public procurement system in 2008, Public Procurement Office 2009. Many industries, in general, depend on public procurement, including railroad construction or medical equipment supply sectors.

[3] Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to economic operators acting through agencies or branches, OJ L 185 of 16 August 1971, p. 1 and Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, OJ L 185, of 16 August 1971, p. 5.

[4] Council Directive 92/50/EEC of 18 June 1992 coordinating procedures for the award of public *service* contracts, OJ L 209 of 24 July 1992, p. 1, Special edition in Polish: Chapter 6, Vol. 1, p. 322.

[5] Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ L 199 of 9 August 1993, p. 1 Special edition in Polish: Chapter 6, Vol. 2, p. 110.

[6] Council Directive 93/37/EEC coordinating procedures for the award of public works contracts, OJ L 199 of 9 August 1993, p. 54, Special edition in Polish: Chapter 6, Vol. 2, p. 163.

– regulated awarding public procurement contracts by public authorities as well as by public undertakings. The fourth directive covered granting of public procurement contracts by entities operating on the basis of a special right (privilege) in the public utility sectors, namely in the energy, transport, telecommunications and water sectors[7] (so-called public utility sectors).

Currently, a third generation of directives on public procurement is in place. Directive 2004/18/EC[8] regulates the award of public supply contracts, public service contracts and public works contracts in the so-called classic sector[9] and Directive 2004/17/EC[10] regulates the award of public procurement contracts in the public utility sectors. Subjecting the authorities and other public entities to the strict regime is regarded as a natural process for public spending. However, the EC legislator has subjected private entities to that regime as well, mainly the ones that make certain investments which are financed, in more than a half, out of public funds.[11] Another group obliged to apply the public procurement regime are private entities that enjoy a privilege granted by public authorities. The privilege may result from obtaining a license the exclusivity basis of exclusivity, from performed construction works.[12] Public procurement law must also be applied in selecting economic operators by the entities that operate in one of the public utility sectors. The underlying assumption is the fact that certain public utility sectors, in particular the so-called network industries and the transport sector are not subject to as free a competition as other branches of economy. The reasons for it are both economic and legal. Since the telecommunications sector in the European Union has been liberalized to a great extent, the sector-related

7 Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 74 of 23 March 1993, p. 14; Special edition in Polish, OJ, Chapter 6, Vol. 1, p. 315.

8 Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts , OJ L 134 of 30 April 2004, p. 114; Special edition in Polish, OJ, Chapter 6, Vol. 1, p. 132, which replaced Directive 92/50/EEC (services), 93/36/EEC (supplies) and 93/37/EEC (public works).

9 The so-called classic sector comprises all the sectors apart from the public utilities sector. Unlike in the public utilities sector, all public authorities are subject to the public procurement regime, whereas private entities only under certain circumstances.

10 Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors OJ L 134 of 30 April 2004, p. 1; Special edition in Polish, OJ, Chapter 6 Vol. 1, p. 19, which replaced Directive 93/38/EEC (Sector Directive).

11 Art. 8 of Directive 2004/18/EC.

12 Such a license must be distinguished from a license which constitutes a special type of permit to carry on an economic activity provided for in the Act of 2 July 2004 on the Freedom of Economic Activity Journal of Laws of 2007, No. 155, item 1095, as amended. A traditional meaning of the „license" under the Polish law has acquired a new meaning along with the harmonization of Polis law with Community law.

Directive 2004/18/EC in force – contrary to Directive 93/38/EC – does not apply to it, however certain postal undertakings have been subjected to the new sector-related directive. Since postal undertakings are privatized at least in part, classifying them as the classic sector would lead to their exemption from application of public procurement laws at all. The Community legislator decided not to do it for the lack of free competition in this sector.

However, if a sector-related activity in a member state enjoys free competition, to be ascertained by the European Commission in a decision issued under Article 30 of Directive 2008/17/EC, entities operating in such a sector may be exempted from a duty to apply public procurement laws.

There are also directives that aim at strengthening judicial protection of entities applying for contracts. They govern appellate procedures for the classic sector[13] and separate regulations in respect of public utility sectors 93/13/EEC[14]. It must be stressed that the differences between the regulations concerning appellate procedures are not as big as the differences regarding the procedures for the award of public procurement.

A significant increase in the number of judgments of the Court of Justice concerning public procurement took place in the nineties. This trend continues. One can attempt to sort out the principal topics before the Luxembourg court. In the beginning judicature was restricted to the matters expressly regulated in directives. In the last years of the previous decade the Court of Justice went for a more expansive interpretation, eliminating loopholes in the regulations of statutory law. Recent years are characterized by preventing evasion of the public procurement directives. A new trend is the coordination of the rules of awarding public procurement contracts in defense[15].

Competences of the ECJ are based on two instruments provided for in the Treaty. The first instrument is a complaint by the European Commission

[13] Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 76 of 23 March 1993, p. 14; Special edition in Polish, OJ, Chapter 6, Vol. 1, p. 315.

[14] Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L3995 of 30 December 1989, p. 33, Special edition in Polish, OJ, Chapter 6, Vol. 1, p. 246.

[15] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L216 of 20 August 2009, p. 76.

against a member state pursuant to Article 258 (ex 226). Resulting decisions concern, basically, two situations. First, the European Commission complains against any member state for adopting laws that are inconsistent with EC law. Second, complaints contain an objection that contracting authorities violated EC public procurement law. This means that violations are attributed to a member state as such. Another institution are preliminary questions.

Since many institutions under the directives are the same, decisions of the Court of Justice most often apply to any public procurement contracts. This concerns both judicial decisions made under the directives that have been replaced by new laws and the ones relating to procurement contracts of a particular kind (construction works, services, supplies, procurement in the classic sector, in the public utilities sector).

2. PROTECTED ENTITIES AND THE CONTENT OF THE PRINCIPLE OF NON-DISCRIMINATION

The principle of non-discrimination forbids to treat comparable situations differently and different situations in the same way, unless objectively justified.[16] Hence, the principle of non-discrimination is not absolute.

The TFEU in Article 25 of the TFEC (ex Art. 12 of the TEC) expressly prohibits any discrimination on the grounds of nationality. The obligation to comply with the principle of non-discrimination under the public procurement directives is not restricted to the issue of equal treatment of tenderers from different countries. It about the equal treatment of the tenderers where only national companies take part in the procedure. In the *Walloon Buses* decision[17] the Court of Justice pointed out that the absence of tenderers from other member states did not release the contracting authorities from applying the public procurement directives. Terms and conditions which favor national tenderers may discourage competitors from other Member States, if their fulfillment is easier for national parties[18]. It would contravene the

[16] Cf., e.g., C-210/03 *Swedish Match* [2004] ECR I-11893, section 47.

[17] C-87/94 *Commission v. Belgium (Walloon Buses)* [1996] I-2043, section 33.

[18] Joined cases C-27-29/86 *CEI & Bellini* [1987] ECR 3347, section 14, C-225/98 *Commission v. France (Nord-Pas-de Calais)* [2000] ECR I-7445, section 83.

objective of the directives, which is to develop effective competition on the EC public procurement market[19].

In practice, the purpose of EC public procurement law is not only to facilitate access to foreign public procurement markets, but also to protect national tenderers against unequal treatment, even if there is no discrimination on the grounds of nationality[20].

EC law prohibits also indirect discrimination[21]. In *Commission v. Italy*[22] the Commission objected to a provisions defining multi-stage procedure for selecting an entity to perform construction works for commercial purposes. Under this procedure, at the initial stage the authorities invited the so-called promoters to submit proposals for an award of a license. In the second stage further two offers were chosen in a limited procedure.

In the third the best offer was to be selected in negotiations. During the negotiations the promoter could adjust its proposal to the best offer. The Commission held that the foregoing provisions favored promoters, because they were invited to participate in negotiations without having to go through the initial stages of the procedure and because they could adjust their proposals to best offer.

In *Commission v. France* the Court held that the prohibition of discrimination covers discouragement from participating in a tendering procedure.[23]

The principle of non-discrimination also applies to contracts below the value threshold provided in directives. In *Bent Mousten*[24] the Court stressed that not being covered by directives does not leave a contract outside the Community law. With regard to such contracts, the contracting authorities are also obliged to respect the basic rules of the Treaty. In *Commission v. Italy*[25] the Court pointed out that the lack of public information on tendering procedure concerning a contract below the threshold of application of directives, where such a contract might be of interest outside the state in which the contracting entity is based, amounted to the exclusion of economic operators from other member states. Apart from

19 E.g. C-225/98 *Commission v. France* [2000] ECR I-7445, section 34; C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, section 52; joined cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, section 34; C-470/99 *Universale-Bau and others* [2002] ECR I-11617, section 89.

20 C-458/03 *Parking Brixen* [2005] ECR I-8585

21 E.g. Case 31/87 *Beentjes* [1988] ECR 4635, section 33, case 3/88 *Commission v. Italy* [1989] ECR 4035, section 8.

22 C-412/04 *Commission v. Italy* [2004] ECR [2008] ECR I-619.

23 C-16/98 *Commission v. France* [2000] ECR I-8315.

24 C-59/00, *Bent Mousten Vestergaard* [2001] ECR I-9505.

25 C-412/04 *Commission v. Italy* [2008] ECR I-619, section 66.

certain justifiable cases, such differentiation in treatment constitutes indirect discrimination on the grounds of nationality, prohibited under Articles 49 and 56 of the TFEC.

In recent years more judgments concerning contracts below the thresholds set in the directives made reference directly to the Treaty. Differently than in cases concerning directives, the Court expressly indicated that the trans-border nature of the freedoms was rooted in the Treaty. In *Serratoni*[26], the Court referred to a judgment in *SECAP and Santoroso*[27], in which it had expressly stated that a national court should examine whether a contract was of international significance.

3

THE EXTENSION OF THE PRINCIPLE OF NON--DISCRIMINATION – THE PRINCIPLE OF TRANSPARENCY

Directives contain detailed rules with regard to announcing tendering procedures and notifying economic operators of the contracting entity's actions in the course of the procedure. It *Transporoute*[28] the Court noted that the purpose of those provisions was to protect economic operators against arbitrary decisions of contracting authorities.

The Court invoked the *Walloon Buses*[29] judgment. Yet, it is the judgment issued in *Unitron Scandinavia*[30] that is most frequently cited. The Dutch laws implementing directive 92/102/EEC on the identification and registration of animals provided that identification tags would be supplied by Dansker Slagterier (DS). The principal focus of the judgment was to determine whether such private entity had to apply the provisions of directive 93/36/EEC. DS addressed the invitation to submit offers for supply to the entitled selected by it. The Unitron and 3-S companies complained that DS acted for the ministry of agriculture and should have applied the procedure envisaged in the directive. The Court ruled that a private entity such as DS was not required to apply the directives. However, the contracting authority

26 C-376/08 *Serratoni*, the judgment of 23 December 2009, available at: www. curia.europa.eu, section 35.

27 Joined cases C-147/06 C-148/06 *SECAP & Santorso* [2008] ECR I-3565, section 34.

28 Case 76/81 *Transporoute v. Minister of Public Works* [1982] ECR 417.

29 C-87/94 *Commission v. Belgium (Walloon Buses)* [1996] I-2043, section 33.

30 C-275/98 *Unitron Scandinavia & 3-S* [1999] ECR I-8291.

while granting a special or exclusive right to it should, pursuant to Directive 93/36/EC, obligate it to observe the principle of non-discrimination on the grounds of nationality in awarding contracts to third parties for the purpose of exercising such a special right. The Court added that the principle of non-discrimination should not be interpreted restrictively[31]. This is because the principle implies the duty to maintain transparency of the procedure o verify whether the principle of non-discrimination has been respected.

*Telaustri*a[32] was of particular importance. In 1997 an agreement of an Austrian telecommunications operator with a private partner to publish telephone directories had expired. Telekom Austria published an invitation to submit offers regarding a license agreement for an indefinite period of time. Telastria and Telefonadress initiated proceedings before a chamber of public procurement audit, asserting that EC directives should be applied. In the meantime Telekom Austria continued to negotiate with the Herald company. As a result a number of agreements were concluded which, together, formed a license to publish telephone directories (also in an electronic form). The Court reiterate of Justice pointed out that although Directive 93/38/EC did not regulate a license to provide services, the contracting authority was bound by the fundamental principles of the Treaty, in particular the principle of non-discrimination on the grounds of nationality. Like in *Unitron Scandinavia*[33], the Court reiterated that the principle of transparency of the tendering procedure stemmed from the principle of non-discrimination. Without transparency it is not possible to ensure equal competition and the free movement of services. Therefore the contracting authorities have an obligation to make a public announcement. The *Telaustria* judgment was critical, because it concerned a license to provide services that had not been regulated in the directive.

Directives expressly regulate the terms and conditions for admitting economic operators to the tendering procedure and the assessment of offers. Although in *Beentjes*[34] the Court decided those were two separate procedures, the directives do not exclude the possibility of carrying them out jointly. Even if the contracting entity verifies the economic operators'' capability and assesses the offers at the same time, these actions are

[31] C-275/98 *Unitron Scandinavia & 3-S* [1999] ECR I-8291, section 31.

[32] C-324/98 *Telastria & Telefonadress v. Telekom Austria* [2000] ECR I-10745.

[33] C-275/98 *Unitron Scandinavia & 3-S* [1999] ECR I-8291.

[34] 31/87 *Gebroeders Beentjes BV* [1988] ECR 4635, section 19.

governed by different principles and rules. And while the admissible criteria of evaluation of economic operators" capabilities are restricted in the directives themselves, the contracting entity is free, as a rule, to determine the criteria of assessment. Yet, the criteria should help select the most beneficial offer[35]. The criterion of greatest economic benefit does not exclude social policy[36] or environmental protection[37].

4. CONDITIONS FOR PARTICIPATION IN THE TENDER PROCEDURE

The easiest way to restrict access to public contracts is to impose requirements that directly limit the need for procurement procedure. Since presenting evidence plays a key role in the procedure, the determination by contracting authorities of the documents confirming the fulfillment of prescribed requirements may discriminate against certain economic operators.

Requirements can be classified into two groups. First are the requirements relating to the ability to perform a contract. Second, the requirements concerning the fulfillment of public law obligations, lack of criminal record and observance of good practices.

As regards technical capability, skills, experience and credibility, the Court held in *Transporoute*[38] that a contracting authority may demand only the documents defined in the provision of Directive 71/305/EEC. However, admissible evidence of the financial and economic situation of an operator was regulated differently. Pursuant to Article 47 of directive 2007/17/EC, the contracting authority must, on the one hand, recognize other documents than the ones specified by it in the documentation of the procedure, but it may, on the other hand, demand other documents from economic operators than the ones mentioned in the foregoing provision.

If an economic operator cannot prove the fulfillment of the public law obligations it is excluded from the procedure. First directives of the 70s

35 Cf, e.g. the *Beentjes* case, section 19, C-19/00 *SIAC Construction* [2001] ECR I-7725, sections 35 and 35, C-513/99 *Concordia Bus Finland* [2002] ECR I-7313 or C-315/01 *GAT* [2003] ECR I-6351, sections 63 and 64.

36 31/87 *Gebroeders Beentjes BV* [1988] ECR 4635, C-225/98 *Commission v. France* („*Nord-Pas-de Calais"*) [2000] ECR I-7445.

37 C-448/01 *EVN & Wienstrom* [2003] ECR I-14527.

38 C-76/81 *Transporoute* [1982] ECR 417, section 9.

contained the list of reasons for excluding economic operators from the procedure. Harmonization is intended to maintain equal conditions in applying for a contract. In evaluating national laws relating the participation in tendering procedures the Court adopted a very pragmatic position.

In *ARGE*[39] the Court revealed the importance of the purpose of the directives. An Austrian association of civil engineering companies and civil engineers made a complaint against the Ministry of Agriculture and Forestry for admitting two public research institutes to a tendering procedure. The Federal Office for Public Procurement, which examined the complaint brought by ARGE, asked the Court of Justice whether admission of public entities to the procedure for the award of a public procurement contract, which, due to financing from public funds, may offer prices considerably lower than market prices, was tantamount to indirect discrimination or constituted a barrier to free provision of services. The Court held that admission to the procedure of entities which get support from public authorities did not amount to an unequal treatment, even if such admission allowed offering lower prices. On the contrary, the provision of Art. 1(c) of Directive 92/50/EEC expressly admits the participation of "public entities". The Court also pointed out that the directive allowed the contracting authority to exclude an economic operator if it obtained public aid inconsistent with the Treaty. However, the mere fact of obtaining public aid did not breach the principle of equal treatment under Directive 92/50/EEC. The Court also addressed the question of whether in light of Article 59 of the Treaty (now Article 56) a circumstance that subsidies were obtained only by the Austrian economic operators connected to the Austrian authorities constituted indirect discrimination. The Court agreed with the European Commission that since public aid was usually granted to domestic undertakings, then unequal treatment of foreign undertakings was inherent to the public aid structure. That does not mean, however, that, there is an indirect discrimination or any restriction on freedom to provide services.

Sometimes a judgment of the Court of Justice results from interpretation of national law inconsistent with the EC law. Italian provisions implementing Directive 2004/18/EC restricted the concept of an economic operator to the entities which operate on the market for commercial purposes. In considering the justifiability of exclusion of the consortium of Italian public

[39] C-94/99 *ARGE Gewässerschutz* [2000] ECR I-11037.

research institutes and universities, CoNISMa, the Court decided[40] that obtaining by an economic operator of public funds or aid should not be a reason for excluding it *a priori* from a tender procedure. It also stressed that the purpose of Community public procurement law was to allow as broad participation of various entities as possible in the procedure for the award of public procurement contracts. For this reason even agreements between contracting authorities were subjected to it[41].

In *La Cascina*[42] a judgment concerned the exclusion of the La Cascina consortium from the procedure for the award of a contract for catering services. At issue was Article 29 of Directive 92/50/EC providing for the exclusion from a tendering procedure of a service provider who "has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which it is established or with those of the country of the contracting authority". The Court shared the position of the European Commission that such a provision puts a restraint on a member state only to the extent that it could not stipulate for broader grounds for exclusion than in respective directives. An acceptable deadline could be the time of submitting requests for admission to the tendering procedure, the time of submitting offers or even immediately before evaluation of offers. National law could also take into account payment by installments, appellate procedure and other institutions allowing a deferment of public law liabilities. The Court stressed that each solution had to be consistent with the principles of non-discrimination and transparency. Service providers must know the deadline in advance to determine, with absolute certainty, the time in which they must fulfill their obligations knowing that the same requirements must be fulfilled by all service providers.

In evaluating the legality of exclusion from participation in a tendering procedure the Court was usually pragmatic thereby supplementing the provisions of the directives. A general path found expression in *Fabricom*[43]. Belgian laws provided that economic operators who assisted the contracting authorities in preparing a tendering procedure had to be excluded from

40 C-305/08 *CoNISMa*, available at: www.curia.europa.eu.

41 C-305/08 *CoNISMa,* section 39, C-26/06 *Stadt Halle* [2005] ECR I-1, section 47.

42 Joined cases C-226/04 and C-228/04 *La Cascina and others* [2006] ECR I-1347.

43 Joined cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, sections 33 and 35. Cf. also the judgment of the National Chamber of Appeals (KIO/UZP 1303/08).

it. The Court admitted that assisting the authorities might result in a conflict of interests. At the same time it said that an absolute ban was disproportionate, and, that economic operators should have a chance to prove that their assistance would not impede competition.

In *Assitur* the Court admitted the exclusion on the grounds other than based in Art. 29 of Directive 92/50/EEC, provided that it was proportionate and necessary.

Undoubtedly, prevention of a collusion fostered the implementation of those principles. The Court found the Italian law banning participation in the same proceeding of entities in a relationship of dominance and dependency to be disproportionate and inconsistent with the Community law. So connected economic operators should be allowed to demonstrate that their relationship did hand no bearing on their conduct.

The overall Courts position has been summarized in the *Mechaniki*[44] judgment. Greek law precluded the award of procurement contracts to media undertakings. The prohibition also applied to entities and persons connected with such undertakings (shareholders, members of their bodies, relatives, etc.) unless such entities and persons proved independence from the owner, members of corporate bodies and shareholders. A certificate of exemption from the prohibition was issued by the Greek National Radio and Television Board. The Michaniki company applied to the Council of the State for annulment of the certificate issued to the winner, because the principal shareholder and a member of the management board was the father of a member of the management boards of two media companies. The Council of the State asked in a preliminary question whether the grounds for exclusion were exhaustively listed in Directive 93/37/EC. The Court noted that the grounds for exclusion under its Art. 24 concerned professional honesty, solvency and technical and economic capabilities of economic operators. Since the purpose of that provision is to indicate objective circumstances for the exclusion, the list set out in Art. 24 is closed. However, such nature of the list does not rule out the possibility for a member state to adopt other solutions aimed at the realization of the principle of non-discrimination and the principle of transparency of the procedure. The Court pointed out that economic operators must be given equal guarantees[45]. The

[44] C-213/07 *Michaniki*, available at: www.curia.europa.eu.

[45] *Michaniki*, sections 46–49.

Court upheld the view expressed in *La Cascina and others* that, taking into consideration their respective historical, economic and legal conditions, the member states had the right to adopt provision aimed at enhancing the principle of non-discrimination and transparency. While admitting that Community law recognized the protection of media plurality[46] and prevention of corruption[47] as important causes to be pursued, the Court found the measures disproportionate. Although their purposes were consistent with the Community law, the assumption that the status of an owner or shareholder in a media company is in conflict with the status of an economic operator performing a public contract, was inconsistent with the principle of proportionality.

In a recent judgment of 12 November 2009 the Court evaluated the invitation by ERGA OSE, a public railway company, to tender for a contract for a study of the construction of a railway station[48]. The Commission complained against the requirement to demonstrate experience and the criterion of offer evaluation. According to the invitation Greek economic operators had to be registered in the national register of consulting firms. Firms from the European Economic Area had to demonstrate that they had formal qualifications and personnel corresponding to those required of Greek firms. The Commission objected on the grounds of the breach of the principle of non-discrimination. The Greek authorities argued that any doubts of the foreign economic operators regarding the invitation to tender could be explained by the contracting authority. The Court decided that prospective economic operators must apply for public procurement on equal terms contained in the invitation itself, without asking for clarification. Since ERGA OSE's invitation put forward different requirements to national and foreign firms, foreign consulting firms could be discouraged from participating in the tendering proceeding. However, the Court did not share the view that the invitation had breached the Community principle of recognizing qualification and diplomas, as foreign economic operators could participate in the procedure.

The foregoing line of reasoning was reiterated in *Serrantoni*: the EC law prohibited national laws providing for an automatic exclusion of members

46 C-368/95 *Familiapress* [1997] ECR I-3689, section 18, C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, sections 41 and 42.

47 C-275/92 *Schindler* [1994] ECR I-1039, sections 57–60, joined cases C-338/04, C-359/04 and C-360/04 *Placanica and others* [2007] ECR I-1891, section 46.

48 C-199/07 *Commission v. Greece*, available at: curia.europa.europa.eu.

of consortia if they apply for the same public procurement contract. In that context, the court repeated that the member states were entitled to a degree of discretion, taking into account the economic, legal and even historical conditions. However, their solutions could not violate the principle of proportionality, the fundamental principle of the Community law.[49] Also, an automatic exclusion does not allow to take into account a situation where economic operators and a consortium prepared their offers independently, in other words, where there was no collusion. Therefore, the automatic exclusion conflicted with the objective of providing the broadest possible access to the public procurement market, and was disproportionate with and contrary to the principle of non-discrimination. The Court pointed out that the provisions of the Treaty relating to the freedom of enterprise and the freedom to provide services prohibited national measures that could prevent or limit the attractiveness of those freedoms. The prohibition was not dependent on the actual acts of national discrimination[50].

Community law defines the documents that a contracting entity may request from economic operators. The breach may be effected by requesting documents easier to obtain for domestic entities. In *Transporoute*[51] the Court found Luxembourg law to be in breach of the EC law for demanding that foreign economic operators be registered in Luxembourg. The Court decided that such national rules render the free movement of services ineffective.

Spanish law of the early nineties provided for confirming legal personality of foreign entities. Such additional confirmation was not required from entities registered in Spain. In *Commission v. Spain*[52] the Court stated that for the purpose of confirmation only documents expressly listed in a directive can be requested. Additional obligation was inconsistent with the principle of equality and also not justified by the overriding public interest under Article 59 of the Treaty (now Article 56). In the same judgment the Court held that favoring locally available resources, in evaluation of technical, material and financial resources of the tenderers by the contracting entity or national laws or practices was in breach of the procurement law. Such preferences were contrary both to Directive 71/305/EWG and to Article 59 of the Treaty on the freedom of movement of services (currently Article 56).

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49 C-376/08 *Serratoni*, section 33.

50 C-376 *Serratori*, section 41.

51 C-76/81 *Transporoute* [1982] ECR 417.

52 C-71/92 *Commission v. Spain* [1993] ECR I-5923.

5

DESCRIPTION OF THE SUBJECT OF PROCUREMENT AND THE EVALUATION OF OFFERS

The first step of a contracting authority should be to publish an invitation to tender. A full description of the subject of procurement is set out in the tendering procedure documentation, which in Poland known as "specification" of the relevant terms of procurement (the terms of reference). Description of the subject of procurement is of crucial importance. Directives define the method of describing the subject of procurement. The relatively strict former directives have been replaced with more flexible solutions.

Directives require that the subject-matter of a procurement contract be described with the European technical specifications first, and international specifications next and, if there is no other choice, with national specifications (norms, technical approvals and other documents)[53]. Technical specifications used by a contracting authority should afford equal access to procurement for tenderers and must not have the effect of creating unjustifiable obstacles to the opening up of public procurement to competition[54]. The contracting authority may also describe the subject-matter by pointing to functional features. Pursuant to Article 23, section 8 of the directive, the description of the subject-matter of a procurement contract may not refer to a specific brand or a process, trade mark, patents, type, or origin. The directive permits the use of such references in a way of exception if justified by the context of a contract and if description of the subject-matter is sufficiently precise. The contracting authority must also allow for an equivalent solutions as demonstrated in *UNIX*[55]. The Court found that indication of a specific operating system both breached Directive 77/62/EEC and constituted a barrier to trade, prohibited under the former Article 30 of the Treaty (now Article 34 of the TFEU). Therefore, ensuring conformity with a national norm is not permissible. In *Dundalk*[56] the Court of Justice clearly stated that specification without examining the equivalence of offers was inconsistent with Article 30 of the Treaty.

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53 Art. 23 section 3 of Directive 2004/18/EC.

54 Art. 23 section 2 of Directive 2004/18/EC.

55 Case C-359/93 *Commission v. Kingdom of the Netherlands* [1995] ECR I-157.

56 Case 45/87 *Commision v. Ireland* [1988] ECR 4929.

Situation is different where the object of a procurement contract is described by functional features instead of technical specifications. Here, the directives do not impose on the economic operator the burden of proof that the offer is equivalent. An obligation to demonstrate functional equivalency warrants no reservations. However, making reference to specific brands, patents, etc. poses a much greater challenge. Where a contracting authority described a contract with functional features, the proof of equivalence consists in comparing with the parameters of its own making. Where a brand, patent, etc. has been indicated, the economic operator most often has to carry out a full analysis of the object of the procurement. For this reason, the provisions of the Directive restrict using brands, patents etc. to exceptional situations.

Non-discriminatory description of the subject-matter of a procurement contract and non-discriminatory terms of participation in the tendering procedure do not guarantee that the principle of equality will be respected in the course of the entire procedure for the award of a procurement contract. The criteria of evaluation of the offers are of great importance. In the late nineties, in Finland, there was only one gas station for buses. The authorities of Helsinki issued an invitation to tender for the provision of municipal transport services stipulating that buses be powered by gas. Since only the municipal undertaking HKL had access to the gas station, the Concordia Bus company objected on the grounds that the criterion based on nitrogen oxides emission breached the principle of equality. However, the Court of Justice found that the criteria were non-discriminatory. A circumstance that only few tenderers were in a position to meet the criteria did not mean that the principle of equality had been breached. It was more important, whether the evaluating criteria were aligned with the subject-matter of the contract, and whether the contracting authorities did not have too much discretion in choosing a supplier. If the principles of transparency and equality are to be respected, the criteria of evaluation of offers must be set out in the invitation to tender or in the tendering procedure documentation. However, caution must be exercised in commenting that judgment. Firstly, the *Concordia Bus* decision[57] was passed when ecological technologies only started. The environment-related criteria were not generally admitted at that time. Priority was given to economic criteria, perceived

[57] C-513/99 *Concordia Bus Finland* [2002] ECR I-7123, section 38.

as more objective. Although the contracting authority has some leeway in specifying the offer evaluation criteria, yet, as a rule, the criteria should facilitate selection of the economically most advantageous offer[58]. By today standards *Concordia Bus* criteria might pass for economic ones for ecological solutions are expected to bring a long-term economic profit. If applied today, those criteria, favoring an economic operator owned by the contracting authority[59], most likely would be challenged by the Court.

To determine whether the principle of non-discrimination has been breached, the manner of operation of the contracting authority should also be taken into account. Incorrect use of neutral criteria may result in discrimination. In the *Walloon Buses*[60] case a Belgian transport company took into account a suggestion given by an economic operator after the opening of tenders. As a result EMI changed its initial offer[61]. Moreover, in assessing the offer SRWT did not apply all the criteria announced at the outset. The Court held that the principle of equality guaranteed the same conditions of preparing offers to all economic operators. An open-ended procedure (unlimited tender) should guarantee the same time to prepare offers. Taking into account information submitted after the deadline favors some operators. The contracting authority should interpret the initial criteria of offer assessment during the entire proceeding.

In the *SIAC Construction*[62] case the Board of the Irish Mayo county invited economic operators to participate in a tender for hydrological works. The contracting authority expected to award the contract to a tenderer who presented most advantageous offer with regard to technical value and cost. A provisional cost estimates was presented in pertinent documentation complete with the prices and quantities of materials as proposed by tenderers. Tender evaluation was to be made by a consultant engineer. As SIAC Construction offered free delivery of 27.5% of items, the consultant engineer found the offer not feasible. The tenderer appealed on the grounds that the contracting authority deviated from the original criteria in breach of the principle of transparency and equality. In reply to a preliminary question of the Irish Supreme Court ECJ noted that economic operators had to be

58 *Beentjes*, section 19; *SIAC Construction*, section 36; *Concordia Bus*, section 59; *GAT*, section 64.

59 At present the City of Helsinki would not have to make a call for tenders at all. According to the *Stadt Halle* case, contracts may be awarded under certain conditions to entities dependent on the contracting authority (so-called *in-house* contract).

60 C-87/94 *Commission v. Belgium (Walloon Buses)* [1996] I-2043.

61 C-87/94 *Commission v. Belgium* [1996] I-2043, item 37.

62 C-19/00 *SIAC Construction* [2001] ECR I-7725.

treated equally both at the stage of preparing offers and in the course of assessment of tenders. Describing the criteria was a condition for their lawful application. Transparency allows tenderers to verify the lawfulness of the conduct of the contracting authorities. The wording of the criteria should be clear to all reasonable and prudent tenderers. Also the assessment of offers should be objective and carried out in the same way with respect to all tenderers.

The way criteria are applied is equally important as demonstrated in *ATI EAC*[63] and *Lianakis*[64]. The authorities of the Venice province published an invitation to tender for a transport services contract. One part of the procurement concerned services in the city of Mestre. It appeared from the documentation delivered to the tenderers that 75 points would be awarded to tenders according to the strictly defined criteria and the remaining 25 points for organization of services would be awarded on a discretionary basis. Then, after the expiry of the time limit for the submission of tender offers but before the opening of tenders, the contracting authority sent information on a manner of distribution of 25 points among five sub-criteria. The contract was awarded to ATI La Linea, which was appealed. The Court of Justice, drawing on its previous decisions (*Walloon Buses*, *SIAC Construction*, *Concordia Bus*) left the assessment of conformity with the Community law to an Italian court. The ECJ pronounced the following guidelines: Community law is breached if later sub-criteria effectively modified the original criteria or, if amending the initial terms is of such a nature that if tenderers knew them earlier, they would have modified their mode of operation.

In *Lianakis* the authorities of Alexandroupolis, Greece undertook a town planning project. The applied criteria were as follows: experience, manpower and the ability to complete the project within a set time limit. The weightings of 60%, 20% and 20%, respectively, were set for three criteria of evaluation. A more detailed scoring was defined later by a project commission in the course of the procedure. The Greek Council of the State asked the ECJ whether Directive 92/50/EEC permitted to allot weightings at a later date, and if so, on what terms and conditions. First, the Court referred to its previous decisions concerning discrepancies between the conditions relating to tenderer's capability and the evaluation criteria. Replying to the

63 C-331/04 *ATI EAC and others* [2005] ECR I-10109.

64 C-532/06 *Lianakis and others* [2008] ECR I-251.

preliminary question the Court addressed the principle of transparency. It presupposes that the parties must be aware of all circumstances which the contracting authority intends take into account as well as their weight. Therefore, the contracting authorities may not attach weight to any particular criteria or introduce sub-criteria of which tenderers were not *ex ante* informed. The Court pointed out that such arrangement would conflict with the ruling in *ATI EAC*. In the latter decision the Court defined strict principles for presenting a more detailed scoring system at a later stage. By ignoring it, the Alexandroupolis project commission revised the scoring system and introduced sub-criteria of evaluation.

Also, a contracting authority may demand an explanation of a price manifestly too low. In *Transporoute* the Court ruled that the authority should have asked tenderers to explain the calculation of prices[65]. Excluding them without explanation amounted to arbitrary decision making.

In some states there were other pricing mechanisms. Until late in the "90's, the Italian law provided for an automatic elimination of tenders with prices set at less than 10 points below the average price of submitted tenders. Also, it was mandatory to present calculation for 75% of the value of a tender. A contracting authority was entitled to eliminate tenders of excessively low value without asking tenderers for additional explanations. In *Impresa Lombardi*[66] the Court noted that automatic elimination of a tender deprives the tenderers, contrary to the directive, of a chance to explain the calculation although mathematical formulas as such are not *per se* inconsistent with the principle of non-discrimination. Tenderers objected also because the contracting authority had opened envelopes with price calculation, leaving unopened the envelope containing full documentation of the tender and without opening other tenders. They raised that it facilitated manipulation and was liable to force the contracting authority into awarding the contract to a tenderer whose price was acceptable, even if he failed to prepare calculation. Unfortunately, the Court did not address this objection.

65 Case 76/81 *Transporoute* [1982] ECR 417, section 17.

66 Joined cases C-285/99 and C-286/99 *Impresa Lombardini and others* [2001] ECR I-9233, section 33.

6

INSTRUMENTS OF PUBLIC PROCUREMENT LAW NOT HARMONIZED WITH THE COMMUNITY LAW

The public procurement directives do not fully harmonize national laws. A number of public procurement concepts remain naturally domestic, examples being: bid security (Art. 45), joint and several liability of participants in a consortium (Art. 141), performance security (Art. 141) or joint and several liability of members of a consortium (Art. 147). The above mentioned *Telaustria* case concerned a license to provide services – the institution not regulated in detail by the directives. In this case the Court referred to the provisions of the Treaty.

One of the most important judgments of the Court of Justice was in the *Alcatel*[67] case. An Austrian highway operator concluded an agreement with Alcatel for the supply of equipment for electronic data processing. Kapsch, its competitor, learned about the agreement from the press and complained against its enforcement. The Austrian government argued that in a referral proceeding, the Court could only examine the terms of seeking damages. According to Directive 89/665/EEC, following the conclusion of an agreement, national law may restrict the rights of the unsatisfied economic operator only to claiming damages. The Court decided, however, to address the issue because the interpretation suggested by the Austrian government would exclude "the most important decision of the contracting authority", that is if to conclude the agreement. If Austria's standpoint were upheld, the Court argued, it would challenge the principal objective of Directive 89/665/EEC to secure effective procedures facilitating conformity of the contracting authorities" conduct with the directives as quickly as possible. The Austrian government also argued that Directive 89/665/EEC expressly differentiated the situations before and after the conclusion of a contract and did not provide for the period of time which must elapse between the selection of a tender and the conclusion of a contract. Rejecting the argument the Court pointed out that the lack of such a provision in Directive 89/665/EWG could not exclude the execution of a contract from the scope of duties of the appellate authority, referred to in Article 2 section 1 of that

[67] C-81/98 *Alcatel Austria and others* [1999] ECR I-7671.

directive. In addition to a duty to provide a way to seek damages, the member states must ensure that the right to appeal and to annul the transaction where necessary.

Although the *Alcatel* judgment does not refer directly to the principle of non-discrimination, it cannot be disregarded. There is no doubt that the effective appellate procedure, is a *sine qua non* condition of the rule of law. Without appropriate procedural guarantees, even the most comprehensive rights and principles would be void of meaning[68].

Directives do not cover the conclusion of a tendering procedure in which no offer is selected. Nevertheless in *Fracasso*[69] the Court evaluated Austrian laws allowing to annul the procedure in the event there is only one offer. A contracting authority is not obligated, then, to award a contract because where there is no competition between offers the purpose of the directives cannot not be achieved. Interesting, the Court resorted to the interpretation Art. 18 of Directive 93/37/EC which stipulates that contracts are awarded on the basis of evaluation criteria. The Court made no reference to the Treaty, but instead it creatively interpreted a provision confined *prima facie* to the admissible evaluation criteria.

Under the Austrian law, it is possible to withdraw the invitation to tender. Directive 92/50/EC only stipulated that tenderers must be notified of such a decision. In the *Hospital Ingenieure* (HI)[70] case the authorities withdrew the invitation, because an expertise revealed it would be more advantageous to award a contract for food management in hospitals to the Humanomed company. In its complaint Hospital Ingenieure Krankenhaustechnik Planungs – GmbH (HI) submitted that the authorities acted in the interest of Humanomed to which they were allegedly connected.

The Public Procurement Audit Chamber in Vienna rejected the complaint because complaints were admitted only in respect of certain decisions. The Austrian Constitutional Court repealed the rejection and decided that the appellate body should ask the Court of Justice whether the

[68] The *Alcatel* judgment paved the way for the European Commission to complain the Court of Justice about failure to implement the Court's recommendations into national law, C-212/02 *Commission v. Austria* – not published in ECR, or, recently, two judgments on the complaint of the European Commission against Ireland: C-455/08 of 23 December 2009 and C-456/08 of 28 January 2009, and in 2007 it was a cause for enacting amendments to the appellate Directives, Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC in the scope of enhancing the effectiveness of appellate procedures in the field of awarding public procurement contracts, OJ L 335 of 20 December 2007, p. 31. Unfortunately, the amendments contained provisions allowing to conclude a contract without observing a standstill period (where agreement is stayed) if in view of a contracting authority certain rather general conditions have been met, cf. the provisions of Art. 2b in connection with 2d, section 3 of Directive 89/665/EEC, added by the amendment.

[69] C-27/98 *Fracasso and Leitschutz v. Saltzburger Landesregierung* [1999] ECR I-5697.

[70] C-92/00 *HI Hospital Ingenieure Krankenhaustechnik PlanungsgesmbH* [2002] ECR I-5553.

withdrawal was subject to appeal under Directive 89/665/EEC. The ECJ, drawing on the *Alcatel* judgment, decided that the directive did not define the contracting authority's decision, therefore decisions that might infringe the EC law were appealable. Then, even if Directive 92/50/WE was rather laconic, in making a withdrawal decision the contracting the authority must respect the basic principles of the Community law, in particular the principle of non-discrimination.

Contracts on big infrastructural projects are mostly applied for by consortia. Yet, Directive 93/37/EC only briefly admitted their participation in tendering proceedings[71]. I did not apply, however, to construction contracts. In *Makedoniko Metro*[72] the Greek minister of regional development terminated negotiations with Makedoniko consortium, because a change in its composition breached tendering rules. While recognizing that Directive 93/37/EC allowed national authorities to prohibit membership changes. The Court considered whether the consortium could appeal against the ministerial decision under Directive 89/665/EEC (the appeal directive) in the absence of a provision directly covering the issue. Referring to the *Telaustria* judgment it pointed out that the principle of equal treatment is binding also where the public procurement directives do not apply as the case was generally governed by the Community law. Therefore, the minister's decision was subject to the "appeal directive".

The principle of non-discrimination was also invoked by the Court of Justice in evaluating whether contracting authorities must apply the public procurement directives and the principles arising directly out of the Treaty. The *Stadt Halle*[73] ruling concerned an important issue of awarding a contract to the entity connected with the contracting authority, i.e. an in-house contract. Like in other cases this judgment was passed in the context of an appeal against the decision of a contracting authority. The German city of Halle concluded a contract without following the public procurement procedure, for the provision of waste management services with RPL Lochau in which most shares were held by the city, while a minority was in private hands. The Court qualified the contract as a public procurement contract and decided that the exemption from the scope of

71 Art. 21 of Directive 93/37/EC, Art. 4 section 2 of Directive 2008/18/EC.

72 C-57/01 *Makedoniko Metro* [2003] ECR I-1091.

73 C-26/03 *Stadt Halle* [2005] ECR I-1.

directives did not apply following the *Teckal*[74] judgment. The presence of private capital ruled out that the company acted solely in the public interest. The freedom of making contracts with companies with mixed capital would negatively affect competition and the principle of equal treatment. For this reason a decision on non-application of the directives must be subjected to review. This judgment found its way to Directive 2007/66/EC[75].

Outside of the above case[76] one must note that the Court applies an expansive interpretation of the procurement directives often deviating from their wording, but that it has always done so with a view of implementing the general principles of the EC law.

[74] C-107/98 *Teckal* [1999] ECR I-8121, items 50 to 51.

[75] Directive 2007/66/EC amending directives of the Council 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335 of 20 December 2007, p.31).

[76] Cf. also C-231/03 *Coname* [2005] ECR I-7287, C-458/03 *Parking Brixen* [2005] ECR I-8585, C-29/04 *Commission v. Austria* (*Stadt Mödling*) [2005] ECR I-9705, C-410/04 *ANAV* [2006] ECR I-3303, C-340/04 *Carbotermo* [2006] ECR I-4137,C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo)* [2007] ECR I-2999, C-324/07 *Coditel Brabant* or recent judgments C-486 *European Commission v. Germany of* 9 June 2009 and C-573/07 *Sea Srl* of 10 September 2009 – www.curia.europa.europa.eu.