

SOME ISSUES ON PUBLIC PROCUREMENT PRINCIPLES

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Abstract: *Public Procurement regulation is mainly justified by economic considerations. The reasons for this are based on the assumption that through the introduction of competitiveness in the respective markets of the Member States, their liberalization as well as integration will follow. As an essential part of the Internal Market, one of the main goals of Public Procurement is to guarantee the free movement of persons, goods, services and capital, which is accomplished specifically through transparent procedures in which participants are placed on equal and non-discriminatory terms. The purpose of this article is to show how the case-law of the Court of Justice of the European Union fills in a gap in the EU law regarding Public Procurement due to a lack of explicit regulations on some issues.*

Keywords: Public Procurement, principles, competition, Court of Justice of the EU.

1. Introduction

There are substantial legal reasons for the regulation of Public Procurement since they are a need full element of the Internal Market. As the integration processes progress, the development of this market is governed by the fundamental principles of the Treaties, for instance the free movement of goods and services, the right of establishment and the prohibition of discrimination on the grounds of nationality. This leads to the need for Public Procurement markets, which are the place where countries engage in commercial activities for the sake of public benefit or in the public interest [1] they apply the same principles. The political rationale for Public Procurement regulation reveals that, despite the inability of competition law to govern the *sui generis* market, the enormous need for transparency and accountability refers to the Public

Procurement regime as a guarantee of compliance with the above principles [2]. The usage of it as a policy tool is a long-standing phenomenon, the subject of a number of legal analyses, covering many policy areas. Accountability refers to the procurement regime as a guarantee of compliance with the above principles [3]. One of the major goals of Public Procurement is to guarantee the free movement of persons, goods, services as well as capital, which is accomplished precisely via transparent procedures in which participants are equal and non-discriminatory. The provision of Art. 18, par. 1 of Directive 2014/24 /EU [4] sets out the basic principles of public policy as follows “Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.” Paragraph 2 of the above-mentioned provision introduces a

requirement that “The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition.”

In fact, the EU Treaties do not deal with Public Procurement issues and they are subject to the provisions of the Internal Market, including the principles on which they are built upon and operate. The relevant Public Procurement provisions are Articles 34 to 36 Treaty on functioning of EU (TFEU) on the free movement of goods, Articles 49 to 55 TFEU on the freedom of establishment, Articles 55 to 62 TFEU for services and Article 106 TFEU on special or exclusive rights of public undertakings and entities. In this context, the case-law of the Court of Justice on these matters in relation to the conduct of Public Procurement procedures is particularly significant, since it fills in the absence of explicit regulation [5]. However, it should be pointed out that the Court of Justice exercises control over Public Procurement, which in turn can be seen as a process, stages at which they are interconnected and logically conditioned [6].

The realization of Public Procurement in the Internal Market means, on the one hand, the elimination of all obstacles to their implementation, just as barriers to trade in goods as well as services among EU Member States are removed. On the other hand, it is necessary to prevent the construction of new ones. It should be borne in mind that the abuse of a monopoly position is the most typical manifestation of the doctrine per se, according to which there are commercial and economic practices which in any case restrict competition or eliminate it and thus lead to market monopolization. As a rule, these practices have a negative effect on competition on the market and, on the other, on the relations between the dominant undertakings themselves and the consumers of their products, which justifies their prohibition in all cases [7].

Trade barriers can be raised through the national law of the Member States in the area of Public Procurement, by giving priority to national products or by discriminatory decisions that may be issued by contracting authorities. Barriers can also be created by economic operators through a coherent policy, for example to set lower prices. All this leads to distortions of competition in the internal market for public procurement. The case law of the Court develops the basic principles in the scope of Public Procurement, the application of which achieves the removal of existing obstacles and the creation of new ones in this field [8]. They are closely interconnected because, in order to have fair competition, the participants must be equal (hence the principle of transparency), non-discriminatory and have equal opportunities to protect against unlawful acts or decisions by contracting authorities. There are three basic principles in Public Procurement that are largely derived from the practice of the CJEU. These are competition, the principle of equal treatment, which is firmly linked to the principle of non-discrimination as well as transparency [9].

2. Competition

The first basic principle is fair competition. The aim of market definition, including in the Internal Market, is to identify the competitors of the participating undertakings and to evaluate which of them can actually restrict the behaviour of other entities in that market, as well as lay effective competitive pressure upon them. Accordingly, the market in competition law is defined according to its product, geographical and time dimension [10]. It is competition that, through changes in the prices of goods and services, determines their availability on the market, as well as the place of suppliers on the market. Fair competition, which is essentially achieved by ensuring a level playing field for all

participants, is also at the heart of the public procurement market. The aim is to stop restricting it within the EU. Public procurement law sets the task for Member States to prevent any attempt to stop economic operators from participating. The importance of respecting the principle of competition for the normal development of Public Procurement has been repeatedly emphasized in the practice of the Court of EU. In p. 2 of Judgment of 21.02.2008. in *Case C-412/04 - Commission v. Italy*, the Court points out that the procurement directives "...were adopted in pursuance of the establishment of the internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. The directives sought to eliminate practices that restrict competition in general and participation in public contracts by other Member States' nationals, in order to implement inter alia the freedom of establishment and freedom to provide services enshrined in Articles 43 EC and 49 EC respectively". And not just competition, but providing the broadest one since "In this context of a single internal market and effective competition it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders" [11]. The principles of Public Procurement are interrelated and respect for all - Protection of competition, equality, avoidance of discrimination are a guarantee that all exceptions are proportionate. It should be emphasized once again that freedoms of movement, as the main building blocks of the Internal market, are linked to a common institutional framework established by common sources, enshrined in the Treaties, and are derived as established principles of CJEU practice.

3. Discrimination (Non-discrimination)

Article 18 TFEU and the special provisions governing the various freedoms of movement have been in accordance with

the case-law of the Luxembourg Court, the prohibition of discrimination being a part of the relevant article. This is directly linked to the equal treatment of the persons concerned. The prohibition of discrimination is linked to the right to equal treatment of every individual, in the case of Public Procurement, and of any private entity. The right to equality of all before the law and the protection of all persons against discrimination are two sides of the same principle. The one side is - equality of opportunity, which positively expresses the idea of equal opportunity for people (entities) to acquire and enjoy rights. The other is related to the elimination of discrimination, which is a denial of equal opportunities [12]. Non-discrimination and equal treatment are not the same thing. In the scope of Public Procurement, the aim is to maintain equality between economic operators and case law determines what equal treatment in this area is. The Court has held that this principle demands identical situations to be treated in the same manner and diverse situations not to be treated correspondingly, [13] unless treatment is not objectively justified [14] and it requires equal treatment of identical people. The contracting authorities will evaluate the economic operators on the basis of their tenders and not on the basis of the different characteristics or difficulties they face. The principle of equality provides for an objective assessment of the prices and qualities of the bidder. Non-discrimination and the requirement of equal treatment is a manifestation of the general principle of equality before the law, are basic principles that the CJEU applies to EU law, as the CJEU has applied in its practice [15].

4. Transparency

The principle of transparency is most often seen as an opportunity to ensure openness and publicity at various stages of the procurement process, to allow participants

and control authorities to monitor their development from start to finish and to determine that the procedure is conducted in compliance with all legal requirements [16]. The doctrine uses different methods to define this principle in public procurement. Some authors accurately describe its main objectives of ensuring non-discriminatory and open treatment in procedures, [17] while others describe the responsibilities that should be assigned to participants in order to ensure a high degree of transparency. Its main purpose is to ensure that the contracting authority's behavior is as visible as possible throughout the procedure. One of the main instruments guaranteeing this principle is the obligation of contracting authorities to publish contracts in the Official Journal of the European Union. The publication and accessibility of the legislation provide clarity and security for all stakeholders and enables cooperation between them. It should be noted that the quality of "interested" parties is determined by the legal interest in participating in the relevant procedure, and at a later stage, it is a necessary prerequisite for the right to challenge the public procurement procedure and the condition for its proper exercise [18]. The concept of transparency is set out in the *Telaustria* case. The Court stated in its judgment that the principle of non-discrimination presupposes, in particular, an obligation of transparency, which is to ensure each potential trader a degree of advertising sufficient to be open to competition and to the impartiality of the procedures which must be reviewed. Ensuring a fair and impartial procedure is a necessary consequence of the obligation to ensure transparent advertising [19]. Fair conditions of competition for all economic operators presuppose transparency of their insurance in order to conduct the Public Procurement procedure in accordance with the rules and principles of the EU Treaties. This requires non-description, which does

not discriminate against the subject of the contract, does not exclude it from participation, e.g. the characteristics of a product or service must not relate to a certain brand or source or a separate process or trademark, if such reference is not justified by the subject matter of the contract and followed by the words "or equivalent". According to Public Procurement case law, the omission of the words "or equivalent" after the designation of a specific product may impede the flow of traffic in Community trade, as well as stop economic operators using systems similar to that of the tendering product [20]. The use of more general descriptions of implementation or functions is a necessary condition for compliance with the principle of transparency, as well as to ensure equal access to Public Procurement for economic operators from all Member States. Conditions which directly or indirectly discriminate against tenderers in other Member States by contracting authorities are inadmissible. The Court's repeated definitions and clarification of the importance of the principles of non-discrimination and equal treatment have contributed to the development of Public Procurement law. In its subsequent judgments, the Court not only strengthened its case-law but also described the characteristics of the principles in Public Procurement. It is stated that it has been established that the principle of transparency is observed where all the conditions and requirements of the award procedure are set out clearly, precisely and unambiguously in a notice or in the procurement documents [21]. The Court's case-law in the direction outlined above is also confirmed in its subsequent rulings. The clarity and reliability of procurement information are important for the transparency of procurement criteria and procedures and should not be misleading in their description. Requirements are linked to the increasingly current problem of fake

news, using methods that employ different techniques that result in demand in both political campaigns and business models for profit [22]. The easy access to the relevant instruments underlines the almost complete absence of obstacles, which in the scope of Public Procurement, through the creation of misleading criteria, leads to a violation of the rights of the participants, respectively, to the appeal of the procedure.

Conclusion

As far as the principles are interrelated, in

the cases, although it accentuates one or the other of them, depending on the particular case, the Court of EU always emphasizes that they must be respected and defines their specialities. Derived from its practice, their application contributes to the development of a specific market, such as that of Public Procurement. One of the main objectives for effective access of operators to economic opportunities related to Public Procurement is the choice of fair selection criteria related to compliance with the principles of Public Procurement.

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