The Fundamental Principles Drawn from the Court of Justice of the European Union in the Field of Public Procurement and Concessions

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Abstract: This article aims to present major guidelines in case-law of the Court of Justice of the European Union (EU) in the field of public procurement and concessions. Court, with the mission to enforce EU law in the interpretation and uniform application of the Treaties, has contributed to establishing the content of the principles which apply in the award, conclusion, amendment and termination of public procurement contracts and concessions, and in shaping the principles applicable to review against abuses carried out by the contracting entity in the award procedure. This article analyzed the principles of transparency and impartiality in the award of these contracts and described the means by which these goals are achieved in practice: non-discriminatory description of the subject-matter of the contract, equal treatment of operators involved in awarding the contract, mutual recognition of diplomas, certificates and other evidence, the principle of equal treatment of public and private operators, appropriate time-limits in which the undertakings concerned of any Member State are able to prepare their offers. Ensuring the application of EU rules in the field of public contracts can not be achieved without the existence of an effective judicial review based on the principle of effectiveness means legal action and the principle of equivalence. Knowledge the content of these principles is particularly important for a uniform application of EU law on public contracts in all Member States.

Keywords: public contracts; case-law; principles; transparency; impartiality

1. Preliminary Considerations

The law of the European Union has had, since the creation of the three Communities, an economic logic, aiming to create a single market and promote free competition between markets and services (Vlachos, 2001, p. 222) (Alexandru, 2008, pp. 865-873). Creating an internal market has involved and creating a competitive and non-discriminatory market in the field of public contracts.

Currently, the EU legislative framework in the field of public contracts has three directions (Cartou, Clergerie, Gruber, Rambaud, 2000, p. 307):

- regulation by general rules of procedures for the award of public contracts (public procurement contracts and, partly, concessions). Law draws a distinction

between public contracts for the supply of goods, the provision of services and execution of works (Mathijsen, 2002, p. 448). These contracts are currently covered by Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[1];

- regulation of a separate area with exceptional character, depart from general rules presented at the first point, that the procurement procedures of entities operating in the water, energy, transport and postal services sectors. These contracts are currently covered by Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors[2].
- regulating procedures for the review when it violated EU law on the award of public contracts. Currently this is achieved by Council Directive 89/665/EEC 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[3] and Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community (now Union) rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[4].

Court of Justice of the European Union has an important role in the interpretation and uniform application in all 27 Member States of legislation on public contracts.

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts under article 19 (1) of the Treaty on European Union (TEU) [5]. Court aims to ensure compliance with EU law in the interpretation and uniform application of Treaties which governed the creation of the European Communities and then the European Union. At the request of the Union institutions, a State or private persons directly concerned, the Court may cancel the provisions of the Commission, Council of EU or national governments which would be incompatible with the founding Treaties (now the Treaty on European Union and the Treaty on the Functioning of the European Union[6]).

[1] Published in the Official Journal of the European Union (OJEU) No. L 134/30.04.2004, as amended.
[2] Published in the OJEU No. L 134/30.04.2004, as amended.
[3] Published in the Official Journal of the European Communities (OJEC) no. L395/30.12.1989, as amended.
[4] Published in OJEC no. L 76/23.03.1992, as amended.
[5] See Art. 19 (1) of the consolidated version of the Treaty on European Union, published in the OJEU no. C 83/30.3.2010, http://europa.eu/documentation/legislation/index_en.htm.
[6] See consolidated version of the Treaty on the Functioning of the European Union, published in the OJEU no. C 83/30.3.2010, http://europa.eu/documentation/legislation/index_en.htm.

With an experience of almost 60 years, the EU Court of Justice has established by case-law, the guidelines (principles) which the Member States should take into account in the application of European Union law (Alexandru, 2008, p. 879).

In the field of public procurement contracts and concessions, the EU Court of Justice concluded a few principles which contribute to the uniform interpretation and application of the provisions of EU directives governing public contracts. These principles derive an essential role, as the sole criterion for reporting, in public contracts are not subject to rules of Directives 2004/18/EC and 2004/17/EC (with a value lower than the threshold specified in Art. 7 of Directive 2004/18/CE and art. 16 of Directive 2004/17/EC or is expressly excluded as happens, for example, if the concession of services[1]) or are only partially subject to their (the public works concession regulated by art. 56-65 in Directive 2004/18/EC). Court of Justice of the European Union stated that these contracts, which are totally or partially excluded from the scope of EU Directives in the field of public contracts, are required, however, to respect the fundamental principles of constituent Treaties relating to: the free movement of goods (Article 34 of the Treaty on the Functioning of the European Union - ex Article 28 of the Treaty establishing the European Community – TEC), the right of establishment (Article 49 of the Treaty on the Functioning of the European Union - ex Article 43 TEC), the freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union - ex Article 49 TEC), prohibition of discrimination on grounds of nationality (Article 18 of the Treaty on the Functioning of the European Union - ex Article 12 TCE), transparency, proportionality and mutual recognition (Case C-59/00, *Bent Mousten Vestergaard*, point 20; Case T-258/06, *Germany/Commission*, point 113 ff.; Brown, 2007, pp. 84-87). Court clearly stated in many decisions, willingness to appreciate all public contracts in relation to fundamental freedoms recognized and guaranteed by the EC Treaty (now the Treaty on the Functioning of the European Union), subjecting their minimum obligations prior to advertising, organizing effective competition and fairness of procedures (Grove-Valdeyron, 2008, p. 404).

In other cases-law Court has decided that the standards derived from the EC Treaty (now the Treaty on the Functioning of the European Union) apply only to contract awards having a sufficient connection with the functioning of the EU Internal Market (Case C-458/03, *Parching Brixen*, point 49; Case C-231/03, *Coname*, points 16-19; Kotschy, 2005, pp. 845-853; Idot, 2005, p.23-24; Brown, 2006, p. 40-47; Nicolella, 2006, p. 30). In this regard, the Court considered that in individual cases, "*because of special circumstances, such as a very modest economic interest at stake"*, a contract award would be of no interest to economic operators located in other Member States. In such a case, "*the effects on the*

[1] In article 17 of Directive 2004/18/EC states that "without prejudice to the application of Article 3, this Directive shall not apply to service concessions as defined in Article 1(4)".

fundamental freedoms are … to be regarded as too uncertain and indirect" to warrant the application of standards derived from primary Union law.

The Commission Interpretative Communication of 2006 indicates that it is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States. In the view of the Commission, this decision has to be based on an evaluation of the individual circumstances of the case, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices etc.) and the geographic location of the place of performance. If the contracting entity comes to the conclusion that the contract in question is relevant to the Internal Market, it has to award it in conformity with the basic standards derived from Union law.

When the Commission becomes aware of a potential violation of the basic standards for the award of public contracts not covered by the Public Procurement Directives, it will assess the Internal Market relevance of the contract in question in the light of the individual circumstances of each case. Infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union (ex Article 226 TEC) will be opened only in cases where this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market.

2. Fundamental Principles Applicable in the Award of Public Procurement Contracts and Concessions Drawn from the Court of Justice of the European Union

2.1. Transparency in the Process of Awarding Public Procurement Contracts and Concessions

The Court of Justice of the European Union stated that the obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed (Case C-324/98, *Telaustria*, point 62; Case C-458/03, *Parking Brixen*, point 49; Case T-258/06, *Germany/Commission*, point 109; Dischendorfer, 2001, pp. 57-63). A transparent and objective approach to procurement procedures requires that all participants must be able to know the applicable rules in advance (the award criteria to be satisfied by the tenders and the relative importance of those criteria) and must have the certainty that these rules apply to everybody in the same way (Case T-258/06, *Germany/Commission*, point 109; Case C-87/94, *Commission/Belgium*, points 88 and 89; Case C-470/99, *Universale-Bau and others*, point 99). The role of this principle is to afford all tenderers equality of opportunity in formulating the terms

of their applications to participate or of their tenders (Case T-258/06, *Germany/Commission*, point 124; Brown, 2007, pp. 84-87).

In the absence of publicity and openness to competition in the awarding of concession contracts and public procurement contracts, there is "a potentially discriminatory to the detriment of undertakings from other Member States that are prevented to enjoy freedom to provide services and freedom of establishment covered by the EC Treaty" - ***potential damage criterion*** (Case C-231/03, *Coname*, point 17) (Noguellou, 2005, p. 511) (Brown, 2005, pp. 153-159) (Kotschy, 2005, pp. 845-853).

The obligation of transparency requires that an undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to express its interest in obtaining that contract (Case C-231/03, *Coname*, point 21) (Grove-Valdeyron, 2008, pp. 406-408) (Brown, 2005, pp. 153-159) (Idot, 2005, pp. 23-24).

The principles which flow from the EC Treaty cannot impose a requirement of prior publicity where the directives expressly provide for derogation, or that derogation would be nugatory (Opinion of Advocate General Stix Hackl in Case C-231/03, *Coname*, point 93).

Contracting entities may take measures to limit the number of applicants to an appropriate level, provided this is done in a transparent and non-discriminatory manner. They can, for instance, apply objective factors such as the experience of the applicants in the sector concerned, the size and infrastructure of their business, their technical and professional abilities or other factors. In any event, the number of applicants shortlisted shall take account of the need to ensure adequate competition. Alternatively, contracting entities might consider qualification systems where a list of qualified operators is compiled by means of a sufficiently advertised, transparent and open procedure (section 2.2.2. the Commission Interpretative Communication of 2006; Case T-258/06, *Germany/Commission*, point 126).

Worth noting that the Court of Justice of the European Union played an important role in shaping the content of the principle of transparency in public procurement, with important consequences for the overall public economic management (Monjal, 2006, p. 6) (Brown, A., 2005, pp. 153-159) (Idot, 2005, pp. 23-24). Thus, in Case C-573/07 *Sea* relating to the award of a service of collecting, transporting and disposing of urban waste, the Court noted that it is not contrary to Articles 43 EC and 49 EC (now art. 49 and 56 of the Treaty on the Functioning of the European Union), the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting

authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it. Consequently, without prejudice to the determination by the national court of the effectiveness of the relevant provisions of the statutes, the control exercised over that company by the shareholder authorities may be regarded as similar to that which they exercise over their own departments, when, first, that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit and, second, through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions. The Court also noted that, although it is not inconceivable that shares in a company may be sold to private investors, to allow that mere possibility to keep in indefinite suspense the determination whether or not the capital of a company awarded a public procurement contract is public would not be consistent with the principle of legal certainty. Opening of the capital to private investors may not be taken into consideration unless there exists, at the time of the award of the public contract, a real prospect in the short term of such an opening.

2.2. Principle of Impartiality of Adjudication Procedures

The Court of Justice has determined that contracting authorities are obliged to respect the rules and principles enshrined in the EC Treaty (now the Treaty on the Functioning of the European Union) which guarantee the impartiality of procurement procedures and fair competition for all economic operators interested in awarding (Case C-470/99, *Universale-Bau AG*, point 93). The guarantee of a fair and impartial procedure is the necessary corollary of the obligation to ensure a transparent advertising (Case T-258/06, *Germany/Commission*; Brown, 2007, pp. 84-87). This can be best achieved in practice through:

2.2.1. Non-discriminatory Description of the Subject-Matter of the Contract

This objective follows from the principle of equal treatment, of which the fundamental freedoms embody specific instances (free movement of goods, persons, services and capital). That is why, in its case-law, the Court of Justice held that the lawfulness of a clause in the contract documents for a contract whose value was below the threshold set in Directive 93/37 concerning the coordination of procedures for the award of public works contracts (now replaced by Directive 2004/18/EC), and which therefore fell outside the scope of that directive, had to be assessed by reference to the fundamental rules of the EC Treaty, which include the

principle of the free movement of goods, provided in Article 28 EC (Case C-59/00, *Vestergaard*, point 21; Klages, R., 2002, pp. 157-159).

The Member States must describe the subject-matter of the contract in such a way that it may be understood in the same way by all potential tenderers, while guaranteeing equal access to economic operators in other Member States (Case T-258/06, *Germany/Commission;* Brown, 2007, pp. 84-87). The description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production unless such a reference is justified by the subject-matter of the contract and accompanied by the words "or equivalent" (Case C-59/00, *Vestergaard*, point 21-24; Case T-258/06, *Germany/Commission;* the Commission Interpretative Communication of 2006, p. 9; the Commission Interpretative Communication of 2003, p. 2). According to the case-law on public supply contracts, failure to add the words "or equivalent" after the designation in the contract documents of a particular product may not only deter economic operators using systems similar to that product from taking part in the tendering procedure, but may also impede the flow of imports in intra-Community trade, contrary to Article 28 EC (now art. 34 of the Treaty on the Functioning of the European Union), by reserving the contract exclusively to tenderers intending to use the product specifically indicated (Case C-45/87 *Commission/Ireland*, point 22; Case C-359/93 *Commission/Netherlands*, point 27; Case C-59/00, *Vestergaard*, point 24; Case T-258/06, *Germany/Commission*, point 114) (Fernández, José, 1995, pp. 74-79) (Terneyre, 1989, pp. 217-218). It is therefore recommended to use more general descriptions regarding contract performance or functions. Technical specifications for such contracts have to be established prior to selection of a contractor and must be made known or available to potential bidders by means that ensure transparency and place all potential bidders on equal footing (Opinion of Advocate General Jacobs in Case C-174/03, *Impresa Portuale di Cagliari*, points 76-78).

2.2.2. Equal Treatment of Operators Involved in Awarding

In the internal market conditions, this principle requires first ensuring equal access for economic operators from all Member States. The Court considered that this objective (aim), which is designed to ensure that traders, of whatever origin, have equal access to contracts put out to tender, derives from compliance with the principles of freedom of establishment, freedom to provide services and free competition (the Opinion of Advocate General Léger in Case C-44/96 *Mannesmann Anlagenbau Austria and Others*, point 47; Opinion of Advocate General Mischo in Case C-237/99 *Commission/France*, point 49) and, in particular, with the principle of equal treatment as expressed in the prohibition of

discrimination on grounds of nationality laid down in Article 12 EC (now art. 18 of the Treaty on the Functioning of the European Union).

According to the case-law of the Court of Justice, the principle of equal treatment, of which Articles 43 EC and 49 EC of the Treaty (now art. 49 and 56 of the Treaty on the Functioning of the European Union) reflect specific instances, prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, through the application of other criteria of differentiation, bring about the same outcome in practice, so that public contracts in the various Member States are open to all undertakings in the Union (Case C-22/80, *Boussac Saint-Frères*, point 7; Case C-3/88, *Commission/Italy*, point 8; Case C-243/89, *Commission/Denmark*, point 23 and 33; Case C-87/94, *Commission/Belgium*, point 51).

The case-law of the Court of Justice of the European Union stresses that to achieve equal access for economic operators from all Member States, contracting entities should not impose conditions causing direct or indirect discrimination against potential tenderers in other Member States, such as the requirement that undertakings interested in the contract must be established in the same Member State or region as the contracting entity (Case C-324/98, *Telaustria*; Case T-258/06, *Germany/Commission*, point 109; the Commission Interpretative Communication of 2006, p. 9; Dischendorfer, 2001, p. 57-63).

According to the case-law of the Court of Justice, the general conditions of the contract documents must comply with all the relevant provisions of Union law and, in particular, with the prohibitions flowing from the principles laid down in the EC Treaty (now the Treaty on the Functioning of the European Union) in relation to the right of establishment and the freedom to provide services, and to the principle of non-discrimination on grounds of nationality (Case C-27/86, *CEI/Association intercommunale pour les autoroutes des Ardennes*, point. 15; Case C-29/86, *Bellini*, paragraph 15; Case C-31/87, *Beentjes*, paragraphs 29 and 30).

The procedure for comparing tenders therefore had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders (Case C-87/94, *Commission/Kingdom of Belgium*, point 54; Charbit, 1995, pp. 22-27).

It is important that the final decision awarding the contract complies with the procedural rules laid down at the outset and that the principles of non-discrimination and equal treatment are fully respected. This is particularly relevant to procedures providing for negotiation with shortlisted tenderers. Such negotiations should be organised in a way that gives all tenderers access to the same amount of information and excludes any unjustified advantages for a specific

tenderer (section 2.2.3. the Commission Interpretative Communication of 2006; Case T-258/06, *Germany/Commission*, points 129 and 130).

The Existence of regulations in the Member State reserving the public procurement contract only to companies of which the State or the public sector, whether directly or indirectly, is a major, or the sole, shareholder, is a violation of the principle of equal treatment (Case C-3/88, *Commission/Italie*, point 30).

The Court also determined that it violated the principle of equal treatment when participants in the procedure for awarding public procurement contract no benefit from an objective analysis of the tenders and when during the course of the procedure is changing conditions and allows a participant to gain advantage over other competitors (Case C-243/89, *Storebaelt*, point 37).

2.2.3. Mutual Recognition of Diplomas, Certificates and other Evidence of Formal Qualifications

The principle of mutual recognition makes it possible for the free movement of goods and services to be ensured without there being any need to harmonise the national legislation of the Member States (Case 120/78 *Rewe-Zentral*; Mattera, 1980, pp. 505-514).

If applicants or tenderers are required to submit certificates, diplomas or other forms of written evidence, documents from other Member States offering an equivalent level of guarantee have to be accepted in accordance with the *principle of mutual recognition* of diplomas, certificates and other evidence of formal qualifications (Case C-451/08, *Helmut Müller*). In that regard, the authorities of a Member State are required to take into consideration all of the diplomas, certificates and other evidence of formal qualifications of the person concerned, as well as the relevant experience of that person, by comparing the specialised knowledge and abilities thus attested and that experience with the knowledge and qualifications required under the national legislation (Case C-340/89 *Vlassopoulou*, paragraphs 16, 19 and 20; Case C-319/92 *Haim*, paragraphs 27 and 28; Case C-238/98 *Hocsman*, paragraph 23; Case C-31/00 *Dreessen*, paragraph 24; Huglo, 1995, pp. 668-672). The Court has held that mutual recognition must enable the national authorities to assure themselves, on an objective basis, that the foreign diploma certifies that the holder has knowledge and qualifications which, if not identical, are at least equivalent to those attested by the national diploma (Case C-222/86 *Heylens and Others*, paragraph 13).

The role of European Union legislation, based on economic desideratum, is to overcome national borders, giving the freedom of movement for economic operators and secondly, to prohibit discrimination between public and private operators. ***The principle of mutual recognition*** has been laid down by the Court

and gradually defined in greater detail in a large number of judgments on the free circulation of goods, persons and services. According to this principle, a Member State must accept the products and services supplied by economic operators in other Union countries if the products and services meet in like manner the legitimate objectives of the recipient Member State (Huglo, 1995, pp. 668-672) (Niculeasa, 2007, pp. 55-80).

The application of this principle to public procurement and concessions implies, in particular, that the Member State in which the service is provided or the good is delivered must accept the technical specifications, diplomas, certificates, qualifications or other written evidence, documents from other Member States and providing an equivalent level of guarantee (Săraru, 2005, p. 136; Case T-258/06, *Germany/Commission*). For example, the Member States in which the service is provided must accept the equivalent qualifications already acquired by the service provider in another Member State which attest to his professional, technical and financial capacities.

In Romania in this field apply the Law 200/2004 on recognition of diplomas and professional qualifications for regulated professions in Romania[1].

2.2.4. Principle of Equal Treatment of Public and Private Operators

Under this principle, EU rules apply to the same conditions for public and private enterprises (Săraru, 2005, p. 137; Case T-244/94, *Wirtschaftsvereinigung Stahl and Others/ Commission;* Case T-156/04, *EDF/ Commission*). Under the influence of this principle, we are witnessing today a remarkable evolution involving the progressive abandonment of protected markets, where traditionally operated only public enterprises (mainly in air and rail transport sectors, telecommunications and energy), for a genuine competition between public and private operators (Colson, 2001, p. 333, 334). Thus found that the model public-private division of the French legal system does not fall under EU law (Alexandru, Cărăuşan, Bucur, 2005, pp. 399-401) (Alexandru, 2004, pp. 52-54). Interests and ideals which it serves Europe today seems no longer compatible with that the "royalty" of administrative law of which he spoke the French P. Legendre (Legendre, 1992).

Unlike the French model, EU law has its source in a manner opposite to share social roles, the promotion of private enterprise and market principles implies a significant reduction in administrative functions and public law behind them. In the French doctrine is assessed that no area is more difficult to reconcile with freedom of movement or the provision of services in the European Union than the administrative contracts, because these contracts are, by nature, discriminatory, one

[1] Published in Official Gazette no. 500 of June 3, 2004, as amended.

of the contractors being a public authority acting to achieve the public interest (Cartou, Clergerie, Gruber, Rambaud, 2000, p. 306). Therefore, the EU had undertaken an effort gradually to liberalize public contracts. This liberalization has been successively applied: public works contracts, public supply contracts, public service contracts, concessions, certain categories of acquisitions in particular sectors (water, energy, transport, and postal services sectors).

The case-law of the Court of Justice of the European Union showed that application of EU law on public contracts (public procurement and concessions) does not depend on public, private or mixed structure of the co-contractor (Case C-107/98, *Teckal*, point. 50). However, in Case C-480/06, *Commission/Germany*, concerning a contract relating to the disposal of waste in a new incineration facility concluded between four Landkreise (administrative districts) and the City of Hamburg Cleansing Department without a tendering procedure, the Court held that a contract which forms both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service, namely thermal incineration of waste, in so far as it has been concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility, does not fall within the scope of Directive 92/50/EEC[1]. A public authority has the possibility of performing the public interest tasks conferred on it either by using its own resources or in cooperation with other public authorities, without being obliged to call on outside entities not forming part of its own departments. In that connection, first, Union law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Under Union law, public authorities are free to pursue economic activities themselves or to assign them to third parties, such as mixed capital entities founded in the context of a Institutionalised Public-Private Partnerships – IPPP (the Commission Interpretative Communication of 18.02.2008). Secondly, such cooperation between public authorities does not undermine the principal objective of the Union rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

[1] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209/24.7.1992). The provisions of this Directive are currently found in Directive 2004/18/EC.

2.2.5. Appropriate Time-Limits in which the Undertakings Concerned of any Member State Are Able to Prepare their Offers

Time-limits for expression of interest and for submission of offers should be long enough to allow undertakings from other Member States to make a meaningful assessment and prepare their offer (Case T-258/06, Commission/Germany).

The requirement of reasonable time result from the fact that contracting authorities must comply with the principle of the freedom to provide services and the principle of non-discrimination, which seek to protect the interests of traders established in a Member State who wish to tender goods or services to contracting authorities established in another Member State (Case C-380/98, *University of Cambridge*, paragraph 16; Case C-237/99, *Commission/France*, paragraph 41; Case C-92/00, *HI*, paragraph 43; Case C-470/99, *Universale-Bau and Others*, paragraph 51). Their aim is to avoid the danger of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities (Case C-470/99, *Universale-Bau and Others*, paragraph 52).

3. Principles for the Execution of Public Procurement Contracts and Concession Contracts Drawn from the Court of Justice of the European Union

Directives 2004/18/EC and 2004/17/EC relate, mostly, the procedure for awarding public contracts (public procurement contracts and partly of concession contracts), not closing procedures, modification and termination of these contracts (Săraru, 2009, pp. 454-458). Also, as noted above, the procedure for awarding public procurement contracts and concessions that fall outside the regulatory scope of both directives, but have a sufficiently close link with the EU internal market, is subject to rules and principles of the Treaty EC (now the Treaty on the Functioning of the European Union). Question is what rules will apply on conclusion procedures, amendment and termination of public procurement contracts and concessions.

Regarding the enforcement of contract conditions, directives states that contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Union law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations (art. 26 of Directive 2004/18/EC and art. 38 of Directive 2004/17/EC).

In the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions adopted in 2004, the Commission states that the

contractual provisions governing the phase of implementation are primarily those of national law. However, contractual clauses must also comply with the relevant Union rules, and in particular the principles of equality of treatment and transparency. This implies in particular that the descriptive documents must formulate clearly the conditions and terms for performance of the contract. The case-law of the Court of Justice showed that, in addition, these terms and conditions of performance must not have any direct or indirect discriminatory impact or serve as an unjustifiable barrier to the freedom to provide services or freedom of establishment (Case C-19/00, *SIAC Constructions*, points 41-45; Case C-31/87, *Beentjes/Pays-Bas*, points 29-37).

The success of a contract depends to a large extent on the appropriate assessment and optimum distribution of the risks between the public and the private sectors, and determining mechanisms to evaluate the performance in executing the contract on a regular basis. In this context, the principle of transparency requires that the elements employed to assess and distribute the risks, and to evaluate the performance, be communicated in the descriptive documents, so that tenderers can take them into account when preparing their tenders.

The period during which the private partner will undertake the performance of a work or a service must be fixed in terms of the need to guarantee the economic and financial stability of a project. The duration of the contract must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital. An excessive duration is likely to be censured on the basis of the principles governing the internal market or the provisions of the Treaty on the Functioning of the European Union governing competition (article 101 – ex Article 81 TEC; article 102 – ex Article 82 TEC and Article 106 – ex Article 86 TEC). The principle of transparency requires that the elements employed to establish the duration be communicated in the descriptive documents so that tenderers can take them into account when preparing their tenders.

Contractual relationships must be able to evolve in line with changes in the macro-economic or technological environment, and in line with general interest requirements. The Green Paper adopted in 2004 show that, in general, Union public contract law does not reject such a possibility, as long as this is done in compliance with the principles of equality of treatment and transparency. The descriptive documents transmitted to the tenderers or candidates during the selection procedure may provide for automatic adjustment clauses, such as price-indexing clauses, or stipulate the circumstances under which the rates charged may be revised. They can also stipulate review clauses on condition that these identify precisely the circumstances and conditions under which adjustments could be made to the contractual relationship. However, such clauses must always be sufficiently

clear to allow the economic operators to interpret them in the same manner during the tenderers-selection phase.

In general, changes made in the course of the execution of a contract, if not covered in the contract documents, usually have the effect of calling into question the principle of equality of treatment of economic operators. Such unregulated modifications are therefore acceptable only if they are made necessary by an unforeseen circumstance, or if they are justified on grounds of public policy, public security or public health (art. 52 of the Treaty on the Functioning of the European Union - ex Article 46 TEC). In addition, any substantial modification relating to the actual subject-matter of the contract must be considered equivalent to the conclusion of a new contract, requiring a new competition (Case C-337/98, *Commission/France*, points 44 ff.).

4. Fundamental Principles Drawn from the Court of Justice of the European Union Applied in the Review Procedures to the Award of Public Procurement and Concession Contracts

Opening public procurement to competition in the European Union requires the existence of guarantees of transparency and nondiscrimination. For these guarantees to be effective, tenderers must have the possibility to use review procedure or repair, if a breach of EU law.

The review procedures are covered by Council Directive 89/665/EEC 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 and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Union rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. Directive 2007/66/EC amends Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts[1].

Council Directive no. 89/665/EEC (as amended by Directive 2007/66/EC) states in Art. 1(3) that "Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement". Court noted in Case C-129/04, *Espace Trianon* that the wording "any person having or having had an interest in obtaining a particular contract" is to be interpreted as not precluding

[1] Published in the OJEU No. L335/20.12.2007.

national law from providing that only the members of a consortium without legal personality which has participated, as such, in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract and not just one of its members individually.

In accordance with the case-law on judicial protection, the available remedies must not be less efficient than those applying to similar claims based on domestic law - **principle of equivalence** - and must not be such as in practice to make it impossible or excessively difficult to obtain judicial protection - **principle of effectiveness** (Case C-46/93, *Brasserie du Pêcheur*, point 83; Case C-48/93, *Factortame*, point 83; Case C-327/00, *Santex*, point 55) (Belorgey, Gervasoni, Lambert, 2003, pp. 2153-215) (Dubouis, 1996, pp. 583-595) (Trifone, 1997, pp. 63-89).

Member States should take necessary measures to ensure that decisions taken by bodies responsible for review procedures can be implemented effectively - **the principle of effectiveness of legal means of action** (Belorgey, Gervasoni, Lambert, 2003, pp. 2153-2154) (Niculeasa, 2007, p. 500) (Dubouis, 1988, pp. 691-700; Case C-50/00, *Unión de Pequeños Agricultores*, point 39; Case C-222/86, *Heylens*, point 14). To allow for an effective exercise of the right to such a review, contracting entities should state the grounds for decisions which are open to review either in the decision itself or upon request after communication of the decision - **principle reasons the decision of the contracting authority** (Case C-222/86, *Heylens*, point 15; Dubouis, 1988, pp. 691-700).

Court of Justice has decided several occasions on review procedures. Thus, in Case C-26/03, *Stadt Halle and RPL Lochau*, the Court stated that the purpose of Directive 89/665 is to enforce EU rules on public procurement by means of effective and rapid remedies, particularly at a stage when infringements can be corrected (Kotschy, 2005, pp. 845-853). In another case, C-15/04 *Koppensteiner GmbH*, the Court stated that the decision to withdraw an invitation to tender for a public procurement contract is one of those decisions in relation to which Member States are required under Directive 89/665 to establish review procedures for annulment, for the purposes of ensuring compliance with the rules of Union law on public procurement contracts and national rules implementing that law. National legislation does not meet the requirement of ensuring effective judicial protection if the national court's role is limited to mere finding of unlawful withdrawal of call for tender; national legislation should allow the introduction of an action for damages against the contracting authority. These two decisions illustrate the need to improve the effectiveness of the remedies available for undertakings when are violated EU rules on the procedure for awarding public contracts, particularly at a stage when infringements can be corrected (Grove-Valdeyron, 2008, p. 410).

Mechanisms for review the award procedure has to ensure completion of an impartial monitoring of the procedure and for the unregulated public procurement. The review procedures covered by Directive 89/665/EEC and Directive 92/13/EEC concern only public procurement contracts for which the award procedure is laid down in Directives 2004/18/EC and 2004/17/EC. For contracts whose value is below the threshold for applying Directives 2004/18/EC and 2004/17/EC will apply rules and principles of the EC Treaty (now the Treaty on the Functioning of the European Union) and the case-law of the Court of Justice of the European Union (the Commission Interpretative Communication of 2006). The case-law of the Court indicates that in these contracts, tenderers must be able to receive effective legal protection of the rights conferred by EU law (Case C-50/00, *Unión de Pequeños Agricultores*, point 39; Case C-222/86, *Heylens*, point 14; Dubouis, 1988, pp. 691-700). In the absence of relevant Union law provisions, it is up to the Member States to provide the necessary rules and procedures guaranteeing effective judicial protection. To ensure effective legal protection is necessary that the decisions detrimental to a person who has an interest in obtaining a public contract (such as the decision to eliminate a candidate) to be the subject of a review, designed to determine possible violations of fundamental rules arising from the EU primary law.

5. Conclusions

In the EU Member States, public contracts are used as an administrative action, in different ways. Overall, it is noted that, although the development of the contractual process is uneven from country to country, today we are witnessing a continuous growth of the contractual techniques, even between legal persons of public law. This, in the general context in which it talks about the transition from "*Old Public Administration*" (based on the classic Weberian model)" to "*New Public Management*" (NPM) as a factor of convergence between European administrations, based on outsourcing activities through administrative or commercial contracts (Săraru, 2009, pp. 505-506). In this context, the public procurement and concession contracts gaining more ground. The new model of public administration requires a new relationship, radically different, between governments, public service and citizens. Today many public organizations integrate their mission and the overall project in order to honor the role that it plays both at the "macro" (public policy) and at "micro" (satisfaction the needs of citizens). All these issues involve the organizational changes, requiring a new approach to the project in public sector, the overall quality and performance. Public opinion and customer perception is an important part of measuring the performance. The performance of public sector requires, on the one hand, the introduction a market-type behavior in public services and, secondly, transferring

of powers to managers and motivate them to improve performance. To achieve the EU desideratum to create an internal market where goods, services, capital and persons can move freely, was needed and creating a competitive and non-discriminatory market in the field of public contracts. The general framework for market functioning public contracts in the European Union is currently given to the principles found in primary legislation (the Treaty on European Union and the Treaty on the Functioning of the European Union), the Union's rules of secondary legislation (the main such regulations are given in the directives 2004/18/EC, 2004/17/EC, 1989/665/CEE and 1992/13/CEE and subsequent legislation relating to public procurement contracts and partly to the concession contracts) and the principles drawn from the Court of Justice of the European Union during the interpretation of laws to implement the treaties uniformly in all Member States.

Knowledge of principles drawn from the Court of Justice of the European Union is necessary by national legislators (Dubouis, 1996, pp. 583-595; Trifone, 1997, pp. 63-89) and contracting authorities for transposition into national law of EU legislation in the field of public contracts and application of these rules in letter and spirit of the EU Treaties. The role of these principles is to increase public sector performance and the degree of convergence of administrative actions at Member States of the European Union.

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