NON-OBSERVANCE OF GENERAL PRINCIPLES IN PUBLIC PROCUREMENT IN LIGHT OF RECENT CASE LAW

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ABSTRACT
Treaty on Functioning of EU does not offer any specific provisions relating to public procurement. However, it contains general principles that need to be obeyed. In particular, the principle of transparency, non-discrimination, equal treatment and proportionality. When these general principles expressed in the Treaty on the Functioning of the EU and in public procurement directives are violated, it happens in an indirect manner, which at first glance is not a flagrant violation of any of the provisions of the Treaty. The paper analyses recent case law of the Court of Justice of the EU. It further studies the approach of the Czech administrative courts and compares it with the one of Court of Justice of the EU. Results of the analysis are synthesized and deviations found in the comparative part are exposed. The paper also summarizes the most common causes of violation of the general principles which render public contracts invalid.

Keywords: *Court of Justice of the EU, General principles, Non-discrimination, Proportionality, Public procurement, Transparency.*

1 INTRODUCTION

Public procurement is regulated by the European Union in all its Member States in order to facilitate creation of a single market and promote competition. Both general principles in the Treaty on the Functioning of the EU (TFEU) and detailed secondary legislation in the form of procurement directives, which set out award procedures for major contracts, apply to public procurement. The principles, which flow from this procurement legislation, in particular, the principle of transparency, non-discrimination, equal treatment and proportionality, are binding on the contracting authorities and their breach will result in invalidity of a contract entered into as a result of defective public procurement procedure.

Contrarily, EU measures are not intended to lay down how member States should achieve value for money or integrity in public procurement, which are matters for Member States to determine in their national legislative measures. (Arrowsmith, 2006; p. 340) As to the extent, to which they wish to adopt such rules seeking to assure wise spending of public money, Member States are left with a certain margin of discretion. However, the Court of Justice of the EU has in the past twenty five years heavily curtailed this freedom of regulation through the application of the general principles of equal treatment and transparency. (De Mars, 2013; p. 318)

The Court's approach of teleological interpretation of the TFEU, of using general principles as a regulatory means, and the case law being rather fragmented and vague leaves Member States with substantial legal uncertainty. The specific obligations that stem from the jurisprudence are not always clear. For this, but also other reasons, Member States sometimes choose to apply rules and principles of EU procurement law even to matters for which they

are not required to do so – for public contracts which fall short of the thresholds set by the public procurement directives. Those are often rather demanding on procurement authorities as they create many formal obligations. On the other hand, these developments tend to increase the degree of harmonization among Member States, which is positive.
This article seeks to demonstrate the nature of the general principles governing public procurement and common conducts that infringe these principles through analyses of relevant case law of the Court of Justice of the EU and the administrative courts of the Czech Republic. Although, the available case law deals with directives which have been made ineffective by new directives which were to be transposed by April 2016, valid conclusions may be drawn from it, because the principals stay the same as they were in the replaced directives. Most common causes of violation of the general principles are summarised as a result of the analyses. Further, Czech national case law is compared to the case law of the Court of Justice of the EU and deviations are stressed.

2 EU LEGISLATION GOVERNING PUBLIC PROCUREMENT

EU public procurement measures, since they specifically concern public service contracts, are intended to ensure the free movement of goods and services and the opening-up of undistorted and as broadly as possible competition in the Member States (see Bayerischer Rundfunk and Others, C 337/06, paragraph 39 and the case-law cited).
The TFEU does not contain any specific provisions on the award of public contracts, but it regulates the principles applicable to public procurement within the EU. Member States must ensure that the principles as stipulated by the TFEU are respected.
These are the principles of transparency, and equal treatment, which follow from the principles of the free movement of goods and services, right of establishment and mutual recognition of qualification. They may be drawn from Articles 18 TFEU, 34 TFEU, 49 TFEU and 56 TFEU. These provisions prescribe that contracting authorities may not discriminate against bids and bidders from other EU Member States (including goods that were already imported to EU). They apply to all public contracts, provided that those have a certain cross-border interest in the light if its value and the place where they are carried out, even to those that do not come within the scope of the public procurement directives, as they fall short of the relevant threshold laid down in the particular directive, as will be mentioned later.
The original EC procurement regime had very much of a framework character. It laid down a limited body of rules on key issues, and left considerable discretion to Member States to supplement these with their own national procurement laws. However, EU law has moved significantly away from its original framework character in the direction of a system of common rules. Originally, it was thought that the Treaty created only negative obligations, as to what behaviour is forbidden, which needed to be supplemented by positive obligations contained in directives covering public procurement. However, in 1993 Court of Justice of the EU changed this understanding by inferring first two general principles and used those to imply positive obligations beyond those stated in the directives on Member States. At the same time, the Court made it clear, that States do not need to implement these obligations to their national laws; however they need to assure that the principles are not breached.
Public procurement directives[1], on the other hand, abound with positive obligations laid on the states which need to be transposed. The specific rules contained in the directives deal with

[1] The three most important public procurement directives date from 2014 were to be transposed by 18 April 2016. They have replaced directives from 2004 and cover both public sector (government or public bodies whether at federal, state, regional, or local/municipal level) and the utilities sector (water suppliers, energy, transport and postal services). Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of

how the public contracts need to be advertised, types of awarding procedures and their course, on what basis a public contract may be awarded, and so on. However, these rules apply only to major contracts, as the directives set financial thresholds under which the contracts are deemed to be not capable of distorting cross-border competition.
The directives stress four essential procurement principles which are contained in Art. 18 of the Public Sector Directive, and Art. 36 of the Utilities Directive, which both stipulate that contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the procurement shall not be made with the intention of excluding it from the scope of Directives or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators. Both directives add further principles aimed at protection of environment, and compliance with EU social and labour law provisions.[2]

3 CZECH LEGISLATION GOVERNING PUBLIC PROCUREMENT

New law, Act No. 134/2016 Coll., On Public Procurement (further in the text referred to as the "Act" only), came into force on 1st October 2016. It has replaced in full Act No. 137/2006 Coll., On Public Contracts. The new law was adopted in response to three new European Union Directives, mentioned above. The act builds on some aspects of the original Act on Public Contracts, but in many respects the concept of the new law is different, introducing into the Czech legal order also some of the previously unknown and unused public procurement institutes.
The principles explicitly mentioned by the Czech public procurement law are definitely inspired by EU law. They are defined in Sec. 6 of the Act. The principle of transparency, proportionality, equal treatment, and non-discrimination are followed by contracting authority's obligation not to restrict participation in the procurement procedure to those suppliers established in (a) a Member State of the European Union, the European Economic Area or the Swiss Confederation; (b) another State which has an international treaty with the Czech Republic or with the European Union guaranteeing the access of suppliers of these States to a public contract.
The second group of not expressly mentioned principles, but still applicable ones, consists of 3E principles (economy, efficiency, and effectiveness of the money spent), and other principles resulting from the nature of public contracts and its aim to find the best value for money which comes from public budgets. These principles are contained in other laws in relation to the spending of public funds for the award of the contract. However, they are often neglected because the contracting authorities are not sure to link these principles to the Act. Other principles include, for example, ensuring the cost-effective management of public funds, promoting competitive environment, the principle of formality of the award procedure.

4 INDIVIDUAL PRINCIPLES

Analysis of individual principles appearing both in the EU directives and the Czech Act together with the comparison of the Court of Justice approach and the approach of the Czech

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the Council of 26 February 2014, on public procurement and repealing Directive 2004/18/EC; and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014, on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

[2] Art. 18 par. 2 of the Public Sector Directive reads as follows. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions (listed in Annex X of the directive).

administrative courts will be carried out in this chapter. The intention is to indicate differences in interpretation and application of the principles, if any. Further, the level of inspiration of the Czech courts by the case law of the Court of Justice is to be assessed.

4.1. Equal treatment

The principle of equal treatment can be understood as the obligation of the contracting authority to approach all tenderers, perhaps any interested parties, in the same way during the tender procedure. Equal treatment of individual tenderers means such acting of the contracting entity, whereby the same, unfavourable approach to all economic operators is ensured, i.e. equal opportunities are ensured.

In Fabricom[3] the Court of Justice defined conditions of equal treatment as: "comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified".

The contracting entity is to be neutral towards all tenderers. It is therefore totally inadmissible to provide, for example, more information on the subject of a public contract to a selected tenderer or group of tenderers.

Together with the principle of transparency the principle of equal treatment precludes, following the award of a public contract, the contracting authority and the successful tenderer from amending the provisions of that contract in such a way that those provisions differ materially in character from those of the original contract. Such is the case if the amendments either extend the scope of the contract to encompass elements not initially covered or to change the economic balance of the contract in favour of the successful tenderer, or those changes are liable to call into question the award of the contract, in the sense that, had such amendments been incorporated in the documents which had governed the original contract award procedure, either another tender would have been accepted or other tenderers might have been admitted to that procedure. (Case C-454/06 of 19 June 2008, par. 34 to 37) In principle, a substantial amendment of a contract after it has been awarded must give rise to a new award procedure for the contract so amended. It may be effected by direct agreement between the contracting authority and the successful tenderer if such amendment had been provided for by the terms of the original contract.

Recent example of the breadth of this principle is Finn Frogne.[4] "Following the award of a public contract a material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where the amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from difficulties encountered in the performance of that contract." (Case C-549/14 of 7 September 2016, par. 40)

As for the Czech case law, the importance of this principle was highlighted by the Supreme Administrative Court in its judgment of 12 May 2008, ref. No. 5 Afs 131/2007 - 132, where it judged, "... this principle contains equality of opportunities for all tenderers and the contracting authority must observe it in every stage of the awarding procedure. Its objective is to promote the development of healthy and effective competition between the entities involved in the procurement procedure and therefore requires all tenderers to have the same opportunities in formulating their tender bids. It is therefore assumed that all competitors need to be subject to the same conditions."

Equal treatment principle is manifested in many specific provisions of the Act. For example, when completing or clarifying data, documents, samples or models pursuant to Sec. 46 of the

[3] Fabricom v Etat Belge (C-21/03 and C-34/03)

[4] Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation (C-549/14) of 7 September 2016

Act, it can be inferred that the contracting authority should, if it chooses to use its right in the award procedure, to use this institute equally in relation to all contractors.
Another example of a breach of equal treatment of all tenderers was found by the Regional Court in Brno in its judgment of 16 March 2011, ref. No. Ca 29/2009, in a situation: "...when the contracting authority sets absolutely disproportionate requirements to prove the fulfilment of qualification, by which it purposefully and in contravention of the law limits the participation of a certain group of potential suppliers. The contracting authority is entitled to avail itself of the space provided by law, and thus create a disadvantage for certain potential suppliers through imposing specific level of economic and financial qualifications or technical qualification prerequisites, provided that it is justified by objective circumstances and the requirements of the contracting authority are not disproportionate."
However, it is not contrary to equal treatment principle, if the same entity processes part or the entire tendering specifications (e.g. as a designer) and later participates in the award procedure as the tenderer. The objection that the tenderer had a longer preparation period is refuted by the fact that all tenderers must have the same deadline for submitting tenders, determined at such a length as to ensure that everyone has an equal opportunity to bid.

4.2. Non-discrimination

The principle of non-discrimination is similar to the above-mentioned principle of equal treatment. The difference between the principles may not always be clearly distinguished in practice because the boundary between the two principles is relatively unclear. Even the use of the terms "equal treatment" and "non-discrimination" can be considered almost synonymous. The Act accordingly to the directives sets out both principles separately. The difference may be seen in the fact that each of the principles is relevant at a different stage of the procurement process. Also, the principle of equality can in certain circumstances require taking affirmative action in order to diminish or eliminate conditions that cause or help to perpetuate discrimination.
Discrimination generally can mean "different, other approach to one group than to another or everyone else. The concept of discrimination in the field of public procurement, means making participation in the award procedure harder or the complete exclusion of possible participation in the award procedure for one or more specifically or generally designated contractors. The Supreme Administrative Court, for example, in its judgment Ref. No. 1 Afs 20/2008, of 5 June 2008, held that: "The concept of discrimination primarily implies ... different treatment of the individual compared to the other members of the group being compared."
No tenderer may be favoured over others unless it is envisaged by the Act. A legal advantage is allowed for, where economic operators employing persons with disabilities are favoured. A typical example of a violation of this principle is the unauthorized use of a negotiated procedure without disclosure, which discriminates against all contractors who have not been invited. Another case is selection of unfair criteria of participation, e.g. requirements related to minimum capacities which are not objectively necessary to be met for the award procedure at issue.

4.3. Transparency

EU public procurement legislation stresses the principle of transparency. This principle includes the principle of accountability in the public sector, in particular requirements for the transparency of procurement by contracting authorities. The purpose of this principle is to ensure the possibility of reviewing all the acting of the contracting authority and thus for the possibility of its full control. The principle aims to motivate the contracting authority to

prevent any form of corruption, and to refrain from any activities that could be viewed as incentives to suppliers to enter into unlawful agreements.
Observance of the principle of transparency thus ensures that the tenderers, contracting authorities and the public are informed as much as possible about the progress of public procurement. First of all, the principle of transparency requires that as many suppliers as possible are able to learn about the public contract and can take part in the award procedure. Further, it should stimulate the procedure to be foreseeable and in accordance with the principle of legal certainty. Finally, all the acts that the contracting authority makes should be reasoned and the reasons made known to all whom it may concern. The same applies to the final decisions of any public authority or court that reviews acts of the contracting authority.
According to the judgment of the Supreme Administrative Court of 15 September 2010, Ref. No. 1 Afs 45/2010 - 159, the principle of transparency is violated if "there are elements found in the practice of the contracting authority that would make the award procedure unmanageable, less controllable, unreadable and unclear, or raise doubts about the true reasons of the contracting authority's actions." Thus, a procedure is transparent when it raises no doubts as to whether the acting of the contracting authority is correct. The same approach is also apparent from the Regional Court in Brno judgment dated 19 January 2012, Ref. No. 62 Af 36/2010 – 103. The court has ruled that the purpose of the transparency principle is to "ensure that public procurement is conducted in a transparent, legally correct and predictable manner, with conditions set in advance and in a clear and comprehensible manner."
A common example, when the principle of transparency is breached, is when a contracting authority provides additional information to only some tenderers. It may not be provided solely to those who have requested it, or only to some of the tenderers who have picked the tender dossier because the contracting authority simply did not register all the potential tenderers and has no list available. Such acting is unreviewable and thus non-transparent. It would also provide an advantage only to some tenderers, and therefore constitute breach of another principle of equal treatment vis-à-vis tenderers.
Furthermore, the course of the awarding procedure should be transparent, acts of the contracting authority understandable and duly reasoned, and all acts carried out in writing. This enables review of the contracting authority’s acts by public authorities (competition offices).
The principle must be observed even after the award procedure is terminated. For example, in the judgment of the Regional Court in Ústí nad Labem of 25th April 2012, ref. No. 15 Ca 89/2009, the court concluded that ... "the principle of transparency must be observed not only at all stages of procurement procedure but also after termination thereof in cases where tenderers within the limits of the Act on Free Acess to Information request the contracting authority to provide certain information on the procurement procedure carried out. The purpose of the transparency principle is undoubtedly that a particular award procedure could be regarded legible and, in a sense, predictable and subject to effective public control.”
To summarise, award procedure is transparent when following essential data are known: (i) who made the decision, (ii) what was decided, (iii) how, and (iv) why. These data should be stored in the procurement documents in order to allow subsequent control.

4.4. Proportionality

The principle of proportionality is a reaction to the fact that the law leaves the contracting authorities with a large margin of discretion as to the choice of a particular course of action during the procurement procedure. Thus, acting in accordance with the principle of proportionality, means primarily that, the contracting authority will carry out such a procurement procedure that will not unduly restrict competition beyond the scope of the

above-mentioned objective. At the same time the contracting authority is provided with sufficient assurances that the procedure will lead to the choice of supplier who will actually be able to carry out the public contract well and within the deadlines set. According to the principle of proportionality, the contracting authority must therefore set the parameters of the procurement procedure in such a way as to be proportionate to the nature and subject of the public contract.

Contracting authorities should follow the principle in all phases of the award procedure. One of the areas where this principle is applied is when contracting authority is setting up parameters of the procurement procedure. These must adequately correspond to the subject and the value of the performance, for example in the case of proving the capacities of the individual suppliers and in a reasonable setting of the number and value of the reference orders. The contracting entity may not require an excessive number of reference orders with multiple times the volume of performance than the award of the public contract. By analogy, the principle of proportionality applies when defining the time-limits in the procurement procedure. In the case of a time limit for submitting a bid, it is appropriate to consider a time limit which is sufficient from the point of view of the tenderer as a professionally qualified professional to prepare the tender, in particular the drafting of the contract, the responsible valuation of the public contract's subject-matter and the thorough preparation of other documents required by the contracting authority.

Court of Justice of the EU found in one of the latest cases, C-27/15, dated 2 June 2016, dealing with proportionality and capacities that a situation whereby national legislation may allow economic operators to rely on the capacities of one or more third-party entities for the purpose of satisfying minimum requirements for participating in a tendering procedure which are only partially satisfied by that operator.

However, it seems that proportionality is not endowed with the same importance as the other principles. In case C 171/15 of 14 December 2016 the Court of Justice of the EU held that the provisions of directives … read in the light of the principle of equal treatment and the obligation of transparency which derives from that, must be interpreted as precluding a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, even though, according to the tender conditions of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction.

The Act is the first piece of Czech legislation covering public procurement that expressly contains the principle of proportionality. The explicit enactment of this principle into law has its origins in the text of the public procurement directives, in particular Article 18 (2) of Public Sector Directive. This principle could have been inferred from the previous legislation - under both EU law and Public Procurement Act No. 137/2006 Coll., even though it was not explicitly stated. However, its explicit inclusion in the Act reinforces the legal certainty of the entities involved in the public procurement process. The principle was practically unreservedly accepted in the domestic decision-making practice and in the case-law of the administrative courts. Most often in the context of the interpretation of the concept of hidden discrimination, where the "obvious disparity" of qualification prerequisites in relation to the subject of a particular public contract was considered a key issue of hidden discrimination.

One of the first decisions, where the hidden discrimination was classified by the court as a question of proportionality, was the Supreme Administrative Court's Judgment Ref. No. 1 Afs 20/2008-152 of 5 June 2008. The Court based its decision on detailed reasoning including a comparative and euroconform interpretation, and concluded that "…a hidden form of

unacceptable discrimination in procurement procedures can be also seen in the procedure by which the contracting authority prevents certain suppliers from applying for a public contract by setting such qualification prerequisites where the required level of technical competence is clearly disproportionate in relation to size, complexity and technical demands of a particular public contract. It was evident, that in the case the Court was dealing with, only some of the economic operators who otherwise would objectively be able to fulfil the subject-matter of the public contract, were allowed to participate in the procurement procedure precisely for these disproportionate qualifying assumptions."
Further, the Regional Court in Brno, in its judgment of 10th March 2011, ref. No. 62 Ca 15/2009-71 stated that: "Conclusion on the proportionality and therefore the legality of the economic and financial qualification requirements and the technical qualification requirements may not be result of arbitrary considerations abstracted from the market in which the tender for the award of a public contract is to take place, or from the specific consequences that such qualification requirements may have on market conditions, in view of the participation of suppliers in the tender for the award of a public contract. "
Thus, as the case law is rather fragmented, the specific scope of the principle of proportionality is left to decision-making.

4.5. Other principles seeking to ensure efficient and effective spending

From the national perspective, the primary purpose of public procurement is to ensure that public funds are spent efficiently and effectively. Therefore, other principles stem from this very purpose of public procurement to award the contract to an economic operator who will provide best value for public money spent. They intend to secure the effective handling of public funds which the contracting entity is handling, either solely or partially. The awarding procedure should lead to the acceptance of the most advantageous bid which meets the specified requirements of the contract's subject-matter. The most advantageous offer is either the lowest bid or the most economically advantageous offer.
The EU law does not require national legal measures to adhere to these principles, as explained already above. Thus national legislation may differ, however it still needs to comply with the principles securing that competition is not distorted. These principles may turn out to be contradictory.
In the studied case of the Czech Republic, compliance with these principles is ensured by individual provisions of the Act. Although, the principles are not expressly covered by the already mentioned Sec. 6, they may be drawn from other acts applicable to the public sector. The Regional Court in Brno dealt with this issue in its judgment of 26th April 2012, file No. 62/2010 61/2010 - 332, where it concludes that "…the contracting authority is obliged to proceed not only in accordance with the principles enshrined in Sec. 6 of the Act (i.e. principles of transparency, equal treatment and non-discrimination), but also according to the principle of cost-effectiveness of the management of public funds and the principles of ensuring competition and the competitive environment."

5 CONSLUSION

On the EU level, the principles applicable to public procurement stem from TFEU, and they are also expressly mentioned in the public procurement directives. Their aim is to provide for the widest possible preservation of competition. They thus seek to prevent hidden discrimination, i.e. seek to ensure that opportunities are opened up to economic operators from all Member States, by requiring contracts to be advertised and awarded through a competition and, secondly to ensure a minimum level of transparency so that Member States may not easily conceal discriminatory award decisions.

Out of the four main principles - principle of equal treatment, non-discrimination, transparency and proportionality – the Court of Justice of the EU stresses in its case law the principles of equal treatment and transparency. However, they are interpreted rather broadly, which leaves states and contracting authorities with legal uncertainty. Furthermore, the case law is casuistic. Still, the analysis has proven that the Czech administrative courts are fully aware of the European case law and their interpretation of the four essential principles is euroconform. This may be demonstrated on the principle of proportionality, which has been applied by the Czech courts already before it has appeared in the Act.
Also, EU law allows for further principles to be enacted by Member States in their national public procurement measures. Most important are those, the goal of which is to ensure that public funds are spent efficiently and effectively. Even though the Act No. 134/2016 Coll., On Public Procurement, does not contain express statement of such principals (as did not the act preceding it), the Czech administrative courts derive those from other legal measures applicable to management of public funds. In practice, however, they are often neglected because the contracting authorities are not sure to link these principles to public procurement and thus they do not realize that such negligence is contradictory to obligations relating to public procurement.

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