

PUBLIC PROCUREMENT IN THE VIEW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION DECISIONS

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The article is part of the grant project of Slovak Research and Development Agency No. APVV-17-0641 „Making the public procurement legislation more effective and its application in the context of European Union law “

Abstract: The article focuses on the role of the Court of the European Union in the public procurement. The article will deal with the contract's cases, recent case law in public procurement and cases in preliminary ruling procedures issued by Slovakian courts. The article focuses on cases in the preliminary ruling procedure.

Keywords: Court of Justice, Public Procurement, Preliminary rulings, Case Law.

1 Introduction

The role of the Court of Justice of the European Union is crucial in public procurement area. The Court of Justice has clearly jurisdiction to deal the cases of public procurement. This article will focus on the cases dealt in the preliminary rulings based on article 267 TFEU. The Court in the preliminary ruling creates the law and goes beyond the legal framework. The reference for a preliminary ruling is an important procedure in the European Union law, the aim of which is to achieve an uniform interpretation of European law. The only competent body to initiate this procedure is the national judge, respectively the court. However, the concept of “a court” is not so clear and its interpretation is carried out by the Court of Justice on the basis of its case-law.

The regulation of public procurement in the European Union has multiple dimensions, as a discipline of European law and policy, directly relevant to fundamental principles of the common market and as policy instrument in the hands of Member States. Its purpose is to insert a regime of competitiveness in the relevant markets and eliminate all non-tariff barriers to intracommunity trade that emanate from preferential purchasing practices which favour national undertakings¹.

2 Public Contracts in Case Law

In the context of definition of the public contract the case *Auroux and Others*² shall be reminded. The Court held that an agreement by means of which a contracting authority entrusted another body with the execution of works constituted a public works contract, regardless of whether the contracting authority was or would become the owner of all or part of those works. It made no difference that the authority would not acquire ownership of the work, or that the successful tenderer would not execute the works itself but would have them carried out by subcontractors. It was also no defence that the successful tenderer itself would apply the directive's competitive procedures when awarding the sub-contracts for work.

In case *Helmut Müller*³ the Court held that only a contract concluded for pecuniary interest constituted a public contract within the scope of the Directive. The “pecuniary nature of the contract” means that the contracting authority that has concluded a public works contract receives a service pursuant to that contract in return for remuneration. That service consists in the realization of works from which the contracting authority intends to benefit. Economic benefit is clearly established where it is shown that the public authority is to become the owner of the works that are the subject of the contract. Economic benefit may also be considered to exist where the contracting authority is to

hold a legal right over the use of the works so that they can be made available to the public. Economic benefit may also exist through the economic advantages that the contracting authority may derive from the future use or transfer of the works, the financial contribution of the authority to the realization of the works or its assumption of the risk that the works may turn out to be an economic failure.⁴ The *Helmut Müller* makes clear that not all land development agreements with public authorities will fall within the EU procurement rules. It should therefore quell some of the more expansive interpretations that were being given to the earlier *Auroux* judgment. The Court has made clear that a public works contract will arise from a development-type agreement only when the resulting works will be of direct economic benefit to the authority, such as where the authority will acquire ownership or use of the works or contributes at least some of the cost. The Court also gave a useful steer on the circumstances when the works will be regarded as corresponding to requirements specified by the authority. What is made clear is that the mere exercise of planning powers by a local authority is not sufficient to trigger the procurement rules.

In the recent case *Tirkkonen*⁵ the Court of Justice specified the concept of a procurement contract in the way, that not every contract is a public contract. Farm advisory scheme, through which a public entity admits all the economic operators who meet the suitability requirements set out in the invitation to tender and who pass the examination referred to in that invitation to tender, even if no new operator can be admitted during the limited validity period of that scheme, does not constitute a public contract. The case *Tirkkonen* clarifies the concept of a public procurement contract. In case the contracting authority does not make a comparison between the bids, the question is not of a public procurement procedure.

The Directive 2014/24/EU in recital 4 says that that situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorization schemes. The Court of Justice also considered the doctrine of *Falk Pharma*⁶ pointed out by the referring court. In the *Falk Pharma* case the Court has already pointed out that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of ‘public contract’ within the meaning of Article 1(2) of that directive. The contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in favor of national operators.

In the *Tirkkonen* case⁷ Finland launched a tender procedure in order to conclude contracts for advisory services. The advisory services referred to in that contract notice were offered to farmers who were part of the agreement. Farmers who fulfil condition and who wish to request advice are free to contact an advisor of their choice, who is a member of the Farm Advisory Scheme. That advisor is then paid according to the work carried out, by way of an hourly rate excluding value added tax (VAT) paid by the Agency, the farmer only bearing the amount of VAT. It can be stated that what distinguishes a procurement contract from other purchases is the use of award criteria.

The difference between *Falk Pharma* and *Tirkkonen* was that the latter system was not open for new operators during the contract term.

¹ Bovis, Ch.: EU Public Procurement Law. Second edition. Cheltenham: Elgar European Law. 2012. p. 1. ISBN: :978085793841

² Judgment of 18 January 2007, Auroux and Others, C-220/05, EU:C:2007:31

³ Judgment of 25 March 2010, Helmut Müller, C-451/08, EU:C:2010:168

⁴ <http://www.sigmaweb.org/publications/Judgements-CourJustice-31July2014-Eng.pdf> (27.12.2019)

⁵ Judgment of 1 March 2018, Tirkkonen, C-9/17, EU:C:2018:142, paragraph 42.

⁶ Judgment of 2 June 2016, Falk Pharma, C-410/14, EU:C:2016:399, paragraph 37, 38

⁷ Judgment of 1 March 2018, Tirkkonen, C-9/17, EU:C:2018:142, paragraph 15

3 Recent Case Law in Public Procurement

3.1 General Principles

In *Telaustria* case⁸ the Court made clear that the contracting authorities are bound by the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, that principle implying, in particular, an obligation of transparency.⁹ The obligation of transparency flows from the economic freedoms and is implied by the application of principle of non-discrimination, as is stated very explicitly in the *Union des Syndicats Immobilier (UNIS)*¹⁰ case. In UNIS case the Court made clear that a public authority creating an exclusive right is under a duty to comply with the obligation of transparency. The public authority must have given potentially interested operators other than the one appointed an opportunity to express their interest in providing such management, any must have acted with full impartiality when appointing the operator entrusted with management of that supplementary scheme.¹¹

In recent *Rudigier* case¹² the obligation to provide prior information laid down in that provision applies to contracts for public transport services by bus which are in principle awarded in accordance with the procedures provided for by Directive 2014/24/EU or by Directive 2014/25/EU and an infringement of that obligation to provide prior information does not entail the annulment of the call for tenders concerned, provided that the principles of equivalence, effectiveness and equal treatment are complied with, which is for the referring court to ascertain.

3.2 Green Public Procurement¹³

In the *Concordia Bus*¹⁴ case the Court considered award criteria relating to ecology (emissions and noise). The main issue was to consider to what extent can environmental requirements be taken into consideration at the point of earning extra points under the award criteria. The Court stated that it is acceptable to take into consideration environmental award criteria when assessing the most economically advantageous tender. But the Court put these conditions for such consideration: (i) award criteria must have a link to the subject matter of the contract; (ii) award criteria must be specific and objectively quantifiable; (iii) award criteria must have been expressly mentioned in the contract documents or in the tender notice; (iv) award criteria shall comply with general principles of EU law (namely the non-discrimination); (v) the criteria chosen must be capable of identifying the most economically advantageous tender. Once the criteria have been chosen, by reference to the requirements that they must fulfill as mentioned above, the contracting authority will proceed to weigh such criteria. Lastly, the evaluation to be carried out by the contracting authority will be determined which tender best meets the needs of the entity.¹⁵ The *Concordia Bus* opened the possibilities for contracting authorities to include environmental award criteria in their tenders, provided the above conditions are met. The case concerned the possibility of imposing environmental requirements in public procurement, which the relevant directive at that time did not expressly permit. The court thus paved the way for a formal amendment of EU law concerning public procurement. This enabled Member States to include environmental protection requirements in the list of criteria for assessing the most economically advantageous tender. The integration principle thereby has the effect that legal rules outside the area of environmental policy can be interpreted

in the light of Treaties' environmental protection requirements.¹⁶ The ruling has been considered as significant for environmental protection because it diminishes, for example, the Commission's demand that environmental aspects should be economical by nature.¹⁷

The *Wienstrom* case¹⁸ is another "environmental" award criteria case deal by the Court. The criterion was to supply of energy producing from as much energy possible using renewable sources. In order to identify the best tender from that perspective, the contracting authority included an award criterion whereby tenders had to state how much electricity they could supply from renewable energy sources to a non-defined group of consumers.¹⁹ A weighting of 45% was provided to the award criterion of supplying the electricity from renewable sources.

The Court held that it is acceptable to make use of ecological award criteria, even if the criterion in question doesn't provide an immediate economic benefit for the contracting authority and it is furthermore possible to give an important weighting to such criteria (in this case 45%). On the other hand, the court ruled that it is not acceptable when this criterion is not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified; when it requires tenderers to state how much electricity they can supply from renewable energy sources to a non-defined group of consumers, and allocates the maximum number of points to whichever tenderer states the highest amount, where the supply volume is taken into account only to the extent that it exceeds the volume of consumption expected in the context of the procurement. The court reasoned the decision by findings that an award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract. Moreover, the fact that, in accordance with the award criterion applied, it is the amount of electricity in excess of the expected annual consumption as laid down in the invitation to tender which is decisive is liable to confer an advantage on tenderers who, owing to their larger production or supply capacities, are able to supply greater volumes of electricity than other tenderers. That criterion is thus liable to result in unjustified discrimination against tenderers whose tender is fully able to meet the requirements linked to the subject-matter of the contract. Such a limitation on the circle of economic operators in a position to submit a tender would have the effect of thwarting the objective of opening the market to competition pursued by the directives coordinating procedures for the award of public supply contracts. The court considered as unobjective criterion using only the numbers stated by the application in their proposals without being able to verify that information by the contracting authority. The case specified more the previous case *Concordia Bus* requirements by setting two additional. First, the criteria must be accompanied by requirements which enable the contracting authority to verify the information submitted regarding compliance with the environmental criteria. Second, award criteria must be related specifically to the subject-matter of the contract, and not to the general capacity of the economic operator.

*Dutch coffee*²⁰ was another case in the raw of environmental cases at the Court. Although it was a case in the infringement procedure not in preliminary ruling, the mentioning is important due to the relevance with the above-mentioned cases. In this case the contracting authority sought to acquire fair trade and organic supplies for its vending machines. In this case the Court found the contracting authority at fault due to the prescription of the

⁸ Judgment of 7 December 2000, *Telaustria*, C-324/98, EU:C:2000:669, paragraph 67.
⁹ See also Caranta, R.: Public Procurement and Award Criteria, p. 149, In: Research Handbook on EU Public Procurement Law, Northampton, Cheltenham :Edward Elgar Publishing, 2016. ISBN: 9781781953259

¹⁰ Judgment of 17. December 2015, *Union des Syndicats Immobilier (UNIS)*, C-25/14 and C-26/14, EU:C:2015:821, paragraph 46

¹¹ Ericsson, A., Groussot, X.: The Obligation of Transparency, In: Discretion in EU public procurement law. Chicago : Hart publishing. 2019. p. 111. ISBN: 9781509919499.

¹² Judgment of 20 September 2018, *Rudigier*, C-518/17, EU:C:2018:757, paragraph 73
¹³ https://ec.europa.eu/environment/gpp/index_en.htm (27.12.2019)

¹⁴ Judgment of 17 September 2002, *Concordia Bus*, C-513/99, EU:C:2002:495

¹⁵ Franch, M., Grau, M.: Contract Award Criteria, In.: EU Public Contract Law: Public Procurement and Beyond, Bruxelles : Bruylant, 2014, p. 35

¹⁶ Langlet, D., Mahmoudi, S.: EU Environmental Law and Policy, New York : Oxford University Press, ISBN: 9780198753933, p. 61

¹⁷ Palmujoki, A., Parikka, Alhola, K., Ekroos, A.: Green Public Procurement: Analysis on the Use of Environmental Criteria in Contracts, In: Reciel 19 (2) 2010, p. 252

¹⁸ Judgment of 4 December 2003, *Wienstrom*, C-448/01, EU:C:2003:651, paragraph 68,69

¹⁹ Sanchez-Graells, A.: Some Reflection on the "Artificial Narrowing of Competition" as a Check on Executive Discretion in Public Procurement, In: Discretion in EU public procurement law. Chicago : Hart publishing. 2019. ISBN: 9781509919499.

²⁰ Judgment of 10 May 2012, *Dutch Coffee*, C-368/10, EU:C:2012:284, paragraph 91

specific labels that the supplies had to bear in order to obtain points linked to fair trade and organic production requirements.²¹ The ruling confirmed that it was not possible to set a requirement that the supplied goods need to bear a specific label. According to the Court, organic production could be a required as a technical specification, but it found that social criteria under the 'Max Havelaar' label could not, as they relate to the 'conditions under which the supplier acquired them from the manufacturer'.²² There is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof. The Court held thus, in paragraph 34 of EVN and Wienstrom, that European Union legislation on public procurement does not preclude, in the context of a contract for the supply of electricity, a contracting authority from applying an award criterion requiring that the electricity supplied be produced from renewable energy sources. There is therefore nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin.

4 Slovakia and Case Law in Public Procurement

In this part of the article some of the preliminary cases issued by Slovakian court will be mentioned and analysed. The first case in preliminary ruling was a case *SAG ELV Slovensko and others*²³. The case was about the public procurement of Slovak company controlled by State: Národná diaľničná spoločnosť, to the supply of services relating to toll collection on motorways. In this case, the Court considered whether, in certain circumstances, a contracting authority could or would have to seek clarification from an economic operator that had submitted a tender in a restricted procedure. The relevant circumstances occur when a contracting authority takes the view that a tender submitted is abnormally low or imprecise or does not meet the technical requirements of the tender specifications. Abnormally low tenders: The Court decided that a contracting authority was obliged to ask an economic operator to clarify an abnormally low tender. This decision was based on the provisions of article 55 of the directive 2004/18/EC, which relates to abnormally low tenders. Imprecise tenders or tenders that do not meet specification requirements: The Court concluded that a contracting authority was not obliged to seek clarification of a tender that it considered to be imprecise or incapable of meeting the technical requirements of the specifications. Furthermore, it could reject a tender on that basis. Permitted clarification: The Court was of the view that the Directive did permit "the correction or amplification of details of a tender, where appropriate, on an exceptional basis". However, such changes were to be permitted only when a number of additional conditions were satisfied.²⁴ The case is an important case in the view of contract award in public procurement. The Court provided guidance on the issue of permitted clarification in award criteria. The Court stated a general rule that the tender should not be amended after the submission, however some corrections to a tender are possible. The important ruling of the Court in this case was: "Article 55 of Directive 2004/18 precludes a contracting authority from taking the view that it is not required to ask a tenderer to clarify an abnormally low price. Article 2 of Directive 2004/18 does not preclude a provision of national law, such as Article 42(2) of the abovementioned Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or

disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome."

*Metrostav*²⁵ is another case in the area of public procurement started by Slovakian Supreme Court. The issue was that one of the tenderers did not satisfy the economical requirement and did not provide the statement from a Slovak bank or a Slovak branch office of a foreign bank confirming that it would grant them credit in the amount of at least EUR 3 000 000 but instead of such a bank statement provided statement, given by a bank, which contained information on the opening of a current-account credit facility for an amount exceeding EUR 5 000 000, and a sworn statement from the tenderer certifying that, if its bid was successful, it would have available in its current account, at the time of conclusion of the contract for works and throughout the period of performance of the contract, a minimum amount of EUR 3 000 000. It was considered that he did not meet the tender economic and financial standing. The Court answered that on one hand the contracting authority can exclude the tenderer from tendering on the ground of not complying with the economic and financial standing. On the other hand the Court stated that in case the bank of tenderer considers themselves unable to provide the tenderer with a statement in the terms specified by the contract notice may constitute a 'valid reason', within the meaning of that article, allowing the tenderer, where appropriate, to prove its economic and financial standing by any other document considered appropriate by the contracting authority, provided that it was objectively impossible for the tenderer to provide the references required by the contracting authority.

5 Conclusion

The Court of Justice has definitely an important role also in the area of public procurement. In the article several important decisions of the Court were mentioned such as *Telaustria*, *Helmut Müller and Auroux*. Then the analysis continues with the recent case law in decisions such as *Tirkkonen*, *UNIS* and *Rudigier*.

Next the green public procurement is analysed with significant recent decisions such as *Concordia Bus*, *Wienstrom* and *Dutch Coffee*. Green public procurement is about setting environmental criteria while complying with the legal principles of the free movement of goods, transparency and equal treatment of bidders. Important in legal matters is the objectivity of the award criteria, so that they are linked to the subject matter of the public contract in question. In some cases, this linking need, however, at least some kind of justification related to requirements and their importance from an environmental point of view. Generally, if a purchaser wishes to address detailed environmental issues in contract award criteria, these requirements may also need more precise justification.²⁶

The article proves that the Court of Justices provides new standards and not only interprets the law but also provides new rules for the public procurement area in EU law such as allowing adding the environmental award criteria in tenders.

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²² Commission: https://ec.europa.eu/environment/gpp/caseLaw_en.htm (28.12.2019)

²³ Judgment of 29 March 2012, *SAG ELV Slovensko and others*, C-599/10, EU:C:2012:191, paragraph 32-34, 38-39.

²⁴ SIGMA: Selected Judgments of the Court of Justice of the European Union on Public Procurement (2006-2014) available on <http://www.sigmaxweb.org/publications/Judgements-CourtJustice-31July2014-Eng.pdf> (29.12.2019)

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Primary Paper Section: A

Secondary Paper Section: AG