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Right for Equal Opportunity for Fair Public Contract? Human Rights in Public Procurement[1]

Abstract: According to the new European Union' Public procurement legislation (hereinafter 2014 PP Directives), the award of public contracts by or on behalf public authority has to comply with the principles of the Functioning of the European Union, and in particular the free movement of goods, freedom of establishment and freedom to provide services, as well as the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency and sound procedural management. We understand that the main goal of public procurement is not to protect human or fundamental rights, but to put public funds to effective use. However, by adopting the new concept of procurement, there exists space for the penetration of such rights in the public procurement arena. Human and fundamental rights protection shall be applied continuously during the process of procurement, and in both the contracting and implementation phases. The authors will focus their research especially on the competitor´s right to good administration which shall guarantee the competitor´s right for equal opportunity for fair contract. Nowadays, it is not rare a situation, when the contracting authority due to breach of the principle of sound administration prioritizes another competitor rather than one, who was supposed to win. Therefore, a competitor´s right to adequate compensation under such circumstances will also be examined.
Keywords: public procurement, fundamental rights, fair public contract, equality, discrimination, principle of sound administration, conflict of interests, principle of legal certainty, the principle of legitimate expectations

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1. Introduction

The general legal framework of the human rights (hereinafter HR) protection concept in business is introduced in the UN Guiding Principles on Business and Human Rights (2011).[2] The EU recognises these Guiding Principles as a framework conducive to responsible business, as forming part of its Strategy on Corporate Social Responsibility[3] (hereinafter CSR). According to this strategy, one of the tools for implementing the HR protection concept into the business environment, is to apply it in public procurement. This approach is confirmed also in the United Nation's 2030 Agenda for Sustainable Development,[4] which includes targets on public procurement as a means for sustainable consumption, production patterns, decent work and more inclusive economies, and calls upon all countries to implement sustainable procurement policies and action plans in their respective strategies.

The European Union (hereinafter EU) has reacted to this call by transferring some HR policies into public procurement – especially in relation to environmental requirements, social considerations (non-discrimination, equality and integration of marginalised or disadvantaged groups) and the right to good administration.

The 2014 PP Directives impose on Member States an obligation to 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.[5]

Despite the fact, that the right to good administration under Article 41 of the Charter of Fundamental Rights of the European Union[6] (hereinafter Charter) is directed only to the bodies, offices or agencies of the EU when they are applying EU law (for example when they procure goods, services and construction works), we can find references to this principle, its requirements and method of application in national public procurement case law.

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2 Available at: https://www.ohchr.org/Documnents/Publications/GuidingprinciplesBusinesshr_en.pdf (accessed 16.10.2018).

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility /* COM/2011/0681 final */.

4 Resolution of the General Assembly from 25 September 2015 No. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (A/RES/70/1). Available at: https://sustainabledevelopment.un.org/post2015/transformingourworld (accessed 31.12.2018).

5 2014 PP Directives were transposed to Slovak legal order by the Act No. 343/2015 Coll. on Public Procurement and on change and amendment of certain legislation. The Public Procurement Office then introduced guidelines on responsible procurement: Green Public Procurement (2017), Social Aspects in Public Procurement (2017).

6 Charter of Fundamental rights of the European Union (OJ 2012/C 326/02).

In relation thereto, we can point to the Slovak act, Act No. 343/2015 Coll. on Public Procurement (hereinafter PPA) and on the change and amendment of certain legislation,[7] which excludes the application of the Administrative Procedure Act[8] and its general requirement on application of the principles of sound administration in administrative procedures. The reason is that the PPA is *lex specialis* toward the Administrative Procedure Act and introduces simpler procedure of the Public Procurement Office (hereinafter PPO) with the aim to enforce the most effective revision and to exclude possible procedural obstacles prolonging the decision-making process of the PPO in procedures under the PPA. However, application bodies have been seeing it differently. The Supreme Court of the Slovak Republic in its decision *Železnice Slovenskej republiky*,[9] confirmed the legal opinion of the Regional Court of Bratislava, that the "*procedure and decision-making process of the Public Procurement Office must respect, inter alia, Article 41 of the Charter of Fundamental Rights of the European Union, which establishes the right to good administration, as well as Recommendation CM/REC(2007)/7 of the Committee of Ministers to Member States on good administration, based on respect for the principles of legality, equality, impartiality, proportionality, legal certainty, timeliness, participation, respect for privacy and transparency*" and in judgement *Allen & Overy Bratislava*[10] held, that legal norms cannot be analysed and interpreted in isolation and independently from the very essence of the law, which is represented mainly by its principles. The importance of principles is *a priori* interpretative for a whole range of reasons, especially in a situation of absence of the necessary explicit legislation, when it could replace that missing legislation.

We consider this legal opinion in compliance with the settled case law of the CJEU[11] according to which even if the procured contract does not fall within the scope of application of EU public procurement directives (for example due to a lower contract value), contracting authorities awarding contracts are nevertheless bound to abide by the general principles of Union law. That covers also the principle of good administration.

7 Online available at: www.slov-lex.sk.

8 Act No.71/1967 Coll. on Administrative Procedure (Administrative Order) (online www.slov-lex.sk).

9 Decision of the Supreme Court of the Slovak republic of 24 May 2017 No. 3Sžf/38/2015 (available at: https://www.nsud.sk/rozhodnutia/).

10 Judgement of the Supreme Court of the Slovak republic of 18 June 2015 No. 8Sžf/39/2014. (online available at: https://www.nsud.sk/rozhodnutia/).

11 See for example Judgements of the CJEU in Case C-324/98 Telaustria and Telefonadress (EU:C:2000:669), para. 60 and 61; Case C-231/03 *Coname* (EU:C:2005:487), paras. 16 and 17; C-6/05 *Medipac-Kazantzidis AE v Venizeleio-Pananeio* (2007) EU:C:2007:337, para. 33; C-318/15 *Tecnoedi Costruzioni Srl proti Comune di Fossano* (2016) EU:C:2016:747, para 19, 20 and 22.

Therefore, the principle of good administration as a fundamental right shall be respected in public procurement procedure even in the legal regime, where national law does not explicitly acknowledge this principle in public procurement law.

Later, the authors will thoroughly examine the application of principles of sound administration and equal treatment. During the research, the authors used scientific methods such as analysis, deduction, comparison and synthesis.

2. Right to good administration as a mean to achieve equal treatment

The EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition.[12] Therefore, one of the goals of public procurement is to open competition in the market of public contracts as wide as possible to EU competitors when procuring goods, services and construction works at best value for money. In this context, fair competition embraces not only fair behaviour on the part of competing tenderers but also the practice of fair and diligent behaviour by contracting authorities and the Public Procurement Office.

As the CJEU held in case *European Ombudsman v Claire Staelen,*[13] the duty of the (EU) administration to act diligently is inherent in the principle of sound administration and applies generally to the actions of the administration in its relations with the public and requires that the administration act with care and caution. Therefore, sound public procurement must be realized strictly with respect to named basic principles of EU (and Slovak) procurement: equity, non-discrimination, transparency, proportionality, effectivity and efficiency[14] as well as with respect to the principle of sound administration which is an inherent (fundamental) part of the right to good administration according to Article 41 of the Charter.

Earlier the CJEU held in the *Evropaïki* case[15] that Article 47 of the Charter, constitutes the expression of such legitimate expectations[16] and the finding of an irregularity, which in comparable circumstances would not have been committed by a normally prudent and diligent administration, permits the conclusion that the conduct of the institution constituted an illegality of such a kind as to give rise to

12 Judgement of CJEU of 8 February 2018 in Case *Lloyd´s of London* C-144/17, ECLI:EU:C:2018:78, para. 33.

13 Judgement of CJEU of 4 April 2017 in case *European Ombudsman v Claire Staelen*, C-337/15 P, ECLI: EU:C:2017:256, para. 34.

14 See the Article 18 of Directive 2014/24/EU and Article 10 of Slovak PP Act.

15 See judgement of the General Court of 20 September 2011 in case *Evropaïki Dynamiki v European Investment Bank (EIB),* T-461/08, ECLI:EU:T:2011:494, para. 46

16 See judgement of the General Court of 28 February 2018 in Case *Vakakis kai Synergates - Symvouloi gia Agrotiki Anaptixi AE Meleton, formerly Vakakis International — Symvouloi gia Agrotiki Anaptixi AE v European Commission*, T-292/15, ECLI:EU:T:2018:103, para. 79, 85.

non-contractual liability for having failed to act with due diligence and caused injury as a result[17] which infringes the principle of sound administration.[18]

It needs to be reminded that under the principle of treating tenderers equally, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded the opportunity to prepare their tenders on an equal footing, which therefore implies that the tenders of all competitors must be subject to the same conditions.[19] The contracting authority must treat all tenderers the same and must not directly, indirectly, consciously or unconsciously prioritize or disadvantage any tenderer against other tenderers in the same position. Therefore, the principle of equal treatment presupposes an objective assessment and any different form of approach on the part of the contracting authority when assessing individual tenders may result in an advantage or disadvantage to the tenderer. Therefore, the obligation of due diligence requires that the institutions act with care and caution by carefully and impartially evaluating all relevant aspects of each tender submitted.

Typical examples of the breach of the tenderer´s right to good administration leading also to breach of the principle of equal treatment and transparency, can be found in both EU and Slovak case law. These include *inter alia*: awarding a contract to a tenderer where a conflict of interest exists; accepting a tender proposal which does not meet with the criteria of the tender;[20] withdrawing from the procurement without relevant justification.[21]

However, at the level of the Slovak Supreme Court, in the last 5 years, from all 39 decisions of this court only one explicitly referred to the principle of sound administration (the above mentioned *Železnice* case).

3. Competitor´s right to adequate compensation

Claiming damages is the logical consequence of the breach of the competitor´s right to good administration. As the Supreme Court held in the *SKANSKA* case,[22]

17 Ibid, para. 82.

18 Judgement of the General Court of 20 September 2011 in Case *Evropaïki Dynamiki v European Investment Bank (EIB)* T-461/08, ECLI:EU:T:2011:494, para. 128.

19 See the judgement of CJEU of 12 March 2015 in Case *eVigilo Ltd v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos*, C-538-13, ECLI:EU:C:2015:166, para. 33

20 See for example the judgement of the Supreme Court of the Slovak Republic of 15 April 2015 in case *BUSE* No. 2Sžf/98/2018. (Online available at: https://www.nsud.sk/rozhodnutia).

21 Charter of Fundamental rights of the European Union (OJ 2012/C 326/02).the judgement of the Supreme Court of the Slovak republic of 1 July in case *Národná diaľničná spoločnosť* No. 8Sžf/15/2014 (Online available at: https://www.nsud.sk/rozhodnutia).

22 Judgement of the Supreme Court of the Slovak republic of 17 December 2013 in case *SKANSKA* No. 2Sžf/96/2013. (Online available at: https://www.nsud.sk/rozhodnutia).

damage will occur to a competitor, if the tenderer will be favoured by not rigorously assessing his bid, which is contrary to the principles of public procurement, in particular to the principle of equity and fair competition. In other words, the competitor could have suffered harm by the procedure of the contracting authority as the successful tenderer´s bid had not been thoroughly assessed and evaluated to the same extent and in the same detail as the competitor´s bid was assessed.

Analogically the General Court in the *Vakakis* case (para. 82) pointed out that "the EU administration may incur non-contractual liability where it failed to act with due diligence and caused injury as a result. In particular, the finding of an irregularity which in comparable circumstances would not have been committed by a normally prudent and diligent administration permits the conclusion that the conduct of the institution constituted an illegality of such a kind as to give rise to the liability of the EU under Article 340 TFEU."

Reparation is then afforded where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation on the author of the act and the damage sustained by the injured party. As to the second condition, the Court has, in the same context, also noted that the decisive test for finding that a breach of EU law is sufficiently serious is whether the EU institution or body concerned manifestly and gravely disregarded the limits of its discretion.

In relation to public procurement, the authors would like to analyse two decisions of the General Court on compensation in public procurement cases - *Evropaïki Dynamiki* (2010) and *Vakakis* (2018). In both cases, the applicant was an unsuccessful tenderer who suffered damage due to maladministration of the contracting authority (which was an EU institution), who did not provide diligent care when assessing the bids of tenderers and therefore favoured a tenderer other than the applicant to win the contract. In both cases, the principle of sound administration was breached, the contracts fully implemented and the tenders not-reopenable.

In *Evropaïki Dynamiki* the applicant, Evropaïki Dynamiki, claimed that the court should annul the contested decision of the European Investment Bank (hereinafter EIB) as the contracting authority and order the EIB to pay compensation for the damage suffered in the tendering procedure as a result of the unlawful nature of the contested decision.

In the first instance the Court stated that (paras. 65-67), the fact that the agreement for the execution of a public contract has been signed and indeed implemented before a decision is delivered concluding the main proceedings brought by an unsuccessful tenderer against the decision awarding that contract and that there is a contractual relationship between the contracting authority and the successful tenderer does not remove the requirement for the contracting authority, if the main action is successful, to take the measures necessary to ensure appropriate protection of the unsuccessful

tenderer's interests. Where the decision awarding the contract is annulled, but the contracting authority is no longer able to reopen the tendering procedure for the public contract in question, the interests of the unsuccessful tenderer may be protected, for example, by pecuniary compensation corresponding to the loss of the chance of securing the contract or, if it can be definitively established that the tenderer should have been awarded the contract, the loss of profit. An economic value can then be attributed to the loss of chance of securing a contract suffered by an unsuccessful tenderer for the contract as a result of an unlawful decision.

The Court then decided, that the EIB has infringed the principles of equal treatment and transparency and acted in breach of the principle of sound administration and therefore annulled the decision of the EIB not to accept the tender submitted by Evropaïki Dynamiki and to award the contract to Sybase BVBA.

Despite the fact, that the court annulled the contested decision as unlawful, it dismissed the claim for compensation of loss of profit, reasoning that the applicant did not prove the causal link between the unlawful conduct of EIB and the damage, as at that time, there did not exist any principle or rule applicable to the EIB´s tendering procedure which requires it to sign the relevant contract with the tenderer designated as the winning contractor at the conclusion of the tendering procedure. The EIB by not concluding the contract with the assumed winning tenderer cannot breach any duty and therefore its conduct cannot be in this relation considered as unlawful.

However, in para. 214 of the judgement the court also stated, that dismissal of the claim for compensation of loss of profit is without prejudice to the compensation to which the applicant may be entitled to, by being restored sufficiently to its original position, following the annulment of the contested decision. Such restoration can have, where appropriate, a form of pecuniary compensation corresponding to the loss of chance of securing the contract.

Such a claim was brought to the General Court by Vakakis kai Synergates – Symvouloi gia Agrotiki Anaptixi AE Meleton in case T-292/15 against the European Commission as the contracting authority. In this case, Vakakis claimed compensation for the damage suffered in relation to the loss of an opportunity to be awarded the contract. Since Vakakis did not bring an action for annulment of the Commission´s decision rejecting its tender and awarding the public contract to another consortium, that act had become final. Therefore, the court firstly had to consider the admissibility of the claim. The key factor in this regard, was whether the action for damages seeks the same result as the action for annulment. The Court noted (para. 35-36), that in view of the special nature of disputes relating to EU public contracts, the present action for damages has neither the same object nor the same legal and economic implications as an action for annulment of the Commission´s decision and it cannot consequently nullify the effects of that decision. Whereas actions for annulment seek a declaration that a legally binding measure is unlawful, actions for damages,

on the other hand, seek compensation for damage resulting from a measure or from unlawful conduct, attributable to an (EU) institution or body.

In the *Vakakis* case, the applicant did not seek to have the Commission´s decision set aside, rather to obtain compensation for damage allegedly resulting from its adoption. The applicant therefore did not seek to obtain by its action the same or similar result as an action for annulment. Therefore, the Court found the action admissible. The Court then concluded that the inadequacy of the supervision of the tendering procedure was unlawful (see the argumentation in paras. 87-156) and realized the assessment, whether the damage invoked by the applicant is real and certain and whether there is a direct cause and effect between it and the unlawfulness found by the Court. Despite the facts, that Vakakis claimed five various types of damages (loss on profit, cost incurred in contesting the lawfulness of the tendering procedure, loss of an opportunity to participate and win other tenders, loss of an opportunity to be awarded the contract and costs relating to the participation in the tendering procedure), the Court ordered the EU to pay compensation only for the damage suffered by the applicant in relation to the loss of an opportunity to be awarded the contract and for the costs and expenses incurred in participating in that call for tenders.

Here we can point to the argumentation of the Court (paras. 188-189), where it explained the differences between loss of profit and loss of opportunity (the loss of profit concerns compensation for the loss of the contract itself, whereas the loss of opportunity concerns compensation for the loss of the opportunity to conclude that contract) and stressed that the fact that the contracting authority is never obliged to award a public contract does not preclude the finding of a loss of opportunity in this case. Although that fact affects the tenderer's certainty of winning the contract, and, therefore, a corresponding loss, it cannot preclude all likelihood of winning that contract and therefore the loss of opportunity. In any event, although it is true that the contracting authority may always, until the signature of the contract, either abandon the procurement, or cancel the procedure for the award of a public contract, without the candidates or tenderers being entitled to claim compensation, the fact remains that those situations of abandonment of the procurement or cancellation of the procedure did not actually materialize and that, as a result of the unlawful acts committed during the procedure for the award of the contract, the applicant lost an opportunity of winning that contract.

The Vakakis case confirms the continuity of legal approach of the General Court and brings the question of compensation for damages in public procurement into closer view.

4. Conclusions

In summarising the aforementioned facts, we can conclude that extending the concept of human rights and fundamental rights into European public procurement is not only the wish of the UN and its initiatives, but (at least at EU level) also a working reality. The parallel application of written law and general principles, in particular the principles of equality and sound administration, does not create greater problems for the courts of the CJEU.

However, under recent EU public procurement case law, it will be interesting to follow relevant case law in the Slovak Republic, especially in relation to the award of damages. From recent cases brought before the Supreme Court of the Republic, it is clear that Slovak judicial bodies apply the principle of sound administration in public procurement very carefully and mostly implicitly. As of the last 5 years, the Supreme Court has not been called upon to rule on awarding damages suffered by a tenderer due to the unlawful procedure of a contracting authority. Consequently, we have to wait for assessment as to whether or not forthcoming Slovak case law in this regard will be in conformity with EU case law.

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