ERA Forum (2018) 19:257–266
https://doi.org/10.1007/s12027-018-0511-x

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# Latest jurisprudence of the Court of Justice of the EU in the field of Public Procurement Law

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Published online: 14 May 2018


**Abstract** The article examines the notable judgments of the Court of Justice of the European Union in the field of public procurement law delivered in 2016 and 2017. The judgments discussed address issues such as the concept of 'public contract', the scope of application of the Public Procurement Directives, exclusion, economic and financial standing, review procedures and non-contractual liability of the European Union.

**Keywords** Public procurement · Jurisprudence · Court of Justice of the European Union

## 1 Introduction

This article provides information coming from judgments of the Court of Justice of the European Union (CJEU) but also expresses some views on them. Such views are personal and not those of the Court.

The period covered refers to decisions of the Court pronounced in 2016 and 2017. Perhaps, 2016 might not be considered to be the latest, but examining the year 2017 alone would risk not being representative enough. In fact, 2016 was a particularly rich year since 31 judgments or orders were pronounced in this field while this number was only 15 in 2017. 15 was not an unusually low number. There were 12 in 2012 and also in 2013, 13 in 2014 and 14 in 2015. Therefore, there is really no need to

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investigate the cause of the decrease. But, if we are tempted to do so, the following points could be mentioned. First, it may be suggested that the Court is coming closer to a situation in which it could be considered that it has exhausted its room for interpretation. In other words, we have already said what we had to say and the national courts have already been well advised so there is no need to ask further questions. This as such is probably not true but we hope it has a grain of reality. More important is the factor that there is new Union legislation in this field, new directives, namely Directive 2014/23/EU on the award of concession contracts,[1] Directive 2014/24/EU on public procurement,[2] and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors,[3] were published in February 2014 and their deadline for transposition was set for 18 April 2016. One can presume that the national courts were less interested in the interpretation of the provisions of the old directives that would soon cease to apply. But the new directives or more precisely the national implementing legislation would have to be in force for some time before questions could be triggered.

The cases discussed in this article have been selected on the basis of whether they are considered to represent additional value in the existing case law. Preference was given to cases in which the author was reporting judge and he had this function in 11 cases in 2016 and in 7 cases in 2017.

The cases have been divided in categories according to the subject matter. These categories do not cover all the stages of a procurement procedure, someone might find that important categories are missing. The reason for this is simple—there were no appropriate available cases to present.

## 2 Concept of public contract

It follows from the judgment in Case **C-410/14** ***Falk Pharma***,[4] that competition among the tenderers and selection by the contracting authorities among them is a necessary element of the concept of public procurement. In this case, the contracting authority established a scheme under which any economic operator that undertakes to provide the goods demanded in accordance with predetermined conditions was authorised to participate and to supply the products without choosing between them by the contracting authority. The Court decided that this does not constitute a public contract within the meaning of Directive 2004/18.[5]

[1] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1.

[2] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

[3] 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 [2014] OJ L 94/243.

[4] Case C-410/14 *Falk Pharma*, EU:C:2016:399.

[5] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (JO L 134, p. 114).

In Case **C-51/15 *Remondis***,[6] the Court decided that an agreement concluded by two regional authorities by which they form a special purpose association with legal personality (*Zweckverband*) on the basis of which they transfer to that new public entity certain competences, does not constitute a public contract. This association was set up for waste management.

In Case **C-701/15 *Malpensa Logistica Europa***,[7] the Court was asked to reply to the question whether the allocation of areas in an airport to be used for groundhandling services for which no remuneration is paid by the management of the airport requires a public selection procedure according to Directive 2004/17.[8] The Court considered that this operation does not fall within the scope of the Directive. Remuneration by a contracting authority constitutes a necessary element of a public service contract. On the other hand, the Court emphasised that another directive, namely Directive 96/67/EC[9] on access to the groundhandling market at Community airports, was applicable.

In Case **C-567/15 *LitSpecMet***,[10] the concept of 'body governed by public law' defined in Article 1, paragraph 9 of Directive 2004/18 was at issue. It concerned a subsidiary of a public state railway company. The subsidiary carried out both transactions for the parent company and transactions on the competitive market. The Court decided that such a subsidiary company may in certain conditions be regarded as a body governed by public law, namely, when its activities are necessary for the parent company to be able to meet needs in the general interest and it is able to be guided by non-economic considerations.

## 3 Scope of application of the Directives

It is important to note that beside Directives 2004/17 and 2004/18, in 2007, a new regulation was adopted, namely Regulation EC 1370/2007 on public passenger transport services by rail and by road.[11] This Regulation also establishes a sort of public procurement procedure. The 2007 Regulation raises difficult delimitation problems with respect to the already existing directives. The first of these problems was dealt with in Case **C-292/15 *Hörmann Reisen***.[12] According to Article 5, paragraph 1 of the 2007 Regulation, public service contracts in the area of passenger transport by rail and road as a general rule are awarded according to this Regulation. But the same

[6] Case C-51/15 *Remondis*, EU:C:2016:985.

[7] Case C-701/15 *Malpensa Logistica Europa*, EU:C:2017:545.

[8] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L 134/1.

[9] Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (JO L 272, p. 36).

[10] Case C-567/15 *LitSpecMet*, EU:C:2017:736.

[11] Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 [2007] OJ L 315/1.

[12] Case C-292/15 *Hörmann Reisen*, EU:C:2016:817.

paragraph provides for a derogation for public passenger transport services by bus, which shall be awarded in accordance with the requirements of Directive 2004/17 or 2004/18. The Court clarified the scope of this derogation saying that it applies only to paragraphs 2 to 6 of Article 5 and does not extend to other parts of the provisions of this Regulation. If a matter outside Article 5 is regulated by both the Regulation and the Directives, priority should be given to the Regulation as lex specialis. The case in question concerned the rules on subcontracting.

Several cases indicate that the Court takes a stricter line as regards public contracts in which the amounts do not reach the threshold fixed in the directives. These contracts are not governed by the directives, but may nevertheless under certain conditions remain subject to the basic provisions of the Treaty and the principles of equality and non-discrimination as well as the obligation of transparency. In earlier case law, the Court acted in a more cooperative spirit with regard to the referring courts and was willing to find grounds to respond to a question relating to a procurement procedure even if the amounts of the contracts were under the threshold. The criteria for the application of EU law was, and still is, whether a procedure presents 'certain cross-border interests', but now the Court seems to require evidence of a more concrete cross-border interest. In Case **C-318/15 *Tecnoedi Costruzioni***,[13] the Court stated that a certain cross-border interest cannot be inferred hypothetically from certain factors which, considered in abstract, could constitute evidence to that effect, but must be the positive outcome of a specific assessment of the circumstances of the contract at issue. Consequently, in order for a procedure to be subject to EU law, it is not sufficient to maintain that a certain cross-border interest cannot be ruled out. Rather, there must be evidence capable of proving that such a cross-border interest exists. In this specific case, the national Court relied mainly on the fact that companies within the same country as the contracting authority expressed interest despite the fact that they were located at a considerable distance from the site of the works to be executed. The Court emphasised that a tenderer from another Member States faces additional constraints and burdens relating to the obligation to adapt to the legal and administrative circumstances of the Members States where the work is to be carried out. In the period covered, four additional preliminary requests were declared inadmissible based on the absence of proof of a certain cross-border interest (**C-110/16 *Lg Costruzioni***;[14] **C-129/15 *M.***;[15] **C-214/15 Sá *Machado & Filhos***;[16] **C-486/17 *Olympus Italia***[17]).

Internal or 'in house' contracts, awarded directly between public law bodies, do not fall within the scope of application of the Procurement Directives. The Court in several rulings has developed detailed case law starting from the judgment of 18 November 1999, **C-107/98 *Teckal***.[18] This case law is losing partly its relevance because it has been codified by Directives 2014/24 (Article 12) and 2014/25 (Arti-

[13]Case C-318/15 *Tecnoedi Costruzioni*, EU:C:2016:747.

[14]Case C-110/16 *Lg Costruzioni*, EU:C:2017:446.

[15]Case C-129/15 *M.*, EU:C:2016:540.

[16]Case C-214/15 *Sá Machado & Filhos*, EU:C:2016:548.

[17]Case C-486/17 *Olympus Italia*, EU:C:2017:899.

[18]Case C-107/98 *Teckal*, EU:C:1999:562.

cle 28). In addition, it should be noted that Regulation (EC) 1370/2007 on public passenger services by rail and by road by its Article 5 also introduced a concept of direct contracts the requirements of which are different from those defined by the case law. In the period covered, two judgments are worth mentioning which may preserve their relevance.

In Case **C-50/14** ***CASTA e.a.***,[19] the Court decided that national legislation can allow local authorities to entrust the provision of medical transport services by direct award to voluntary associations provided that the activity of those associations contributes to the social purpose and the pursuit of the objectives of the good of the community as well as budgetary efficiency. In Case **C-553/15** ***Undis Servizi***,[20] the question arose how to calculate the essential part of the activity for the contracting authority (which is now according to the Directives 80%) in order to fulfil the criteria of 'in house' contracts. The Court decided that only the activity which is carried out for the controlling shareholders could be taken into account and no other activity, even if it is imposed on the company by a public authority for the benefit of local authorities that are not shareholders and do not exercise any control over the company.

## 4 Personal situation of tenderers (exclusion)

Case **C-178/16** ***Impresa di Costruzioni Ing. E. Mantovani and Guerrato***[21] concerned the circumstances under which a company could be rehabilitated, in other words, could avoid exclusion in case its director has committed a criminal offense. The Court decided that national legislation could provide for conditions requiring an effective dissociation from the activities of the person having committed a criminal offense. The Court held that the fact that the concerned director ceased to perform his duties in the year preceding the tender notice was insufficient and the fact that his conviction, even if it had not become final, was not declared by the company was a factor to show the absence of a full and effective dissociation. The Court in particular examined the question of proportionality since, if the period between the wrongful conduct and the exclusion is too long, the exclusion could unnecessarily reduce the scope of the Directive. But in this Case, the wrongful conduct took place in the year preceding the publication of the tender notice and therefore the exclusion measure did not appear to be disproportionate. It should be noted that the issue of rehabilitation was regulated in Directive 2014/24, Article 27, paragraphs 6 and 7 but the effective entry into force of that Directive was later than the date of the tendering notice in this Case.

In Case **C-171/15** ***Connexxion Taxi Services***,[22] the referring court asked the question whether EU law, in particular Article 45, paragraph 2 of Directive 2004/18 precluded national law from obliging the contracting authorities to assess by application of the principle of proportionality whether a tenderer which has been guilty of grave

[19] Case C-50/14 *CASTA e.a.*, EU:C:2016:56.

[20] Case C-553/15 *Undis Servizi*, EU:C:2016:935.

[21] Case C-178/16 *Impresa di Costruzioni Ing. E. Mantovani and Guerrato*, EU:C:2017:1000.

[22] Case C-171/15 *Connexxion Taxi Services*, EU:C:2016:948.

professional misconduct must indeed be excluded. While the Directive does not require such verification, the Court ruled that the national legislation can do so. On the other hand, such verification cannot lead to a situation in which the tenderer that has been guilty of grave professional misconduct is not excluded and receives the award of the public contract where the tender specifications without the consideration of the proportionality of this sanction specifically provide for such exclusion.

In Case **C-396/14** ***MT Højgaard et Züblin*** (Grand Chamber),[23] two economic operators formed a group of undertakings that as such was invited to submit a tender by a contracting authority. The group was dissolved and one of the participants continued to participate in the procedure. The Court decided to permit such a change on the condition that the economic operator by itself meets the requirement laid down by the contracting authority and the continuation of its participation in the procedure does not mean that other tenderers are placed at a competitive disadvantage.

## 5 Economic and financial standing

The Court has dealt in many cases with the conditions of using subcontractors and has produced a nuanced case law. On the one hand, in some cases it stood firmly for an unlimited right of the economic operator to use subcontractors but on the other hand, in specific circumstances cases it recognised some limits.

In Case **C-234/14** ***Ostas celtnieks***,[24] it considered that Directive 2004/18 precludes a contracting authority from imposing in the tender specification on a tenderer, who relies on the capacities of other entities, the obligation, before the contract is awarded, to conclude a cooperation agreement with other entities to form a partnership.

In Case **C-406/14** ***Wrocław—Miasto na prawach powiatu***,[25] the Court decided that in the application of Directive 2004/18, a contracting authority is not authorised to require, by a stipulation in the tender specifications of a public works contract, that the future contractor of that contract perform with its own resources a certain percentage of the works covered by that contract. In fact, in this case, the percentage at issue was 25%.

In Case **C-324/14** ***Partner Apelski Dariusz***,[26] the Court held that the right of using subcontractors may be limited in specific circumstances having regard to the subject matter of the contract concerned and its objectives. This could be the case when the capacities of a third party entity cannot be transferred to the candidate or the tenderer.

In Case **C-387/14** ***Esaprojekt***,[27] the Court ruled that Directive 2004/18 does not allow an economic operator to rely on the capacities of another entity by combining the knowledge and experience of two entities which individually do not have the capacities required for the performance of a particular contract where the contracting

[23] Case C-396/14 *MT Højgaard et Züblin*, EU:C:2016:347.

[24] Case C-234/14 *Ostas celtnieks*, EU:C:2016:6.

[25] Case C-406/14 *Wrocław—Miasto na prawach powiatu*, EU:C:2016:562.

[26] C-324/14 *Partner Apelski Dariusz*, EU:C:2016:214.

[27] Case C-387/14 *Esaprojekt*, EU:C:2017:338.

authority considers that the contract concerned cannot be divided, in that it must be performed by a single operator and that such exclusion of the possibility to rely on the experience of several economic operators is related and proportionate to the subject matter of the contract.

## 6 Obligation of transparency

Under this heading, only one judgment is worth mentioning, namely **C-6/15 *TNS Dimarso***.[28] In this judgment, the Court clarified that while the award criteria and their relative weighting must be communicated to the tenderers in the contract notice or the tender specification, there is no obligation of the contracting authority to do so regarding the method of evaluation to be used by the contracting authority in order to evaluate and rank the tenders.

## 7 Application of the national preference

Although the regulation of the procurement procedures in general aims at eliminating national preferences in the period covered, there is only one judgment where this was specifically at issue. This is Case **C-296/15 *Medisanus***,[29] in which the Court decided that Directive 2004/18 in conjunction with Article 36 of the Treaty on the Functioning of the European Union, must be interpreted as precluding a clause in the tender specifications which, in accordance with the law of the Member State, requires medicinal products derived from plasma to be obtained from the plasma collected in that Member State.

## 8 Review procedures

In Case **C-689/13 *PFE***,[30] the Court (Grand Chamber) was faced once again with the question of how to handle a situation in which a claim is brought against a tenderer aiming at its exclusion but a counterclaim is submitted with the same purpose, namely the exclusion of the author of the first claim. The national legislation had given preferential treatment to this counterclaim in the sense that it had to be examined first and if it was successful, the first claim would become inadmissible. The Court ruled already in Case **C-100/12 *Fastweb***,[31] that such national legislation is incompatible with the requirement of effective review procedures in the sense of Article 1, paragraphs 1 and 3 of Directive 89/665 on the review procedures.[32] According to the Directive,

[28] Case C-6/15 *TNS Dimarso*, EU:C:2016:555.

[29] Case C-296/15 *Medisanus*, EU:C:2017:431.

[30] Case C-689/13 *PFE*, EU:C:2016:199.

[31] Case C-100/12 *Fastweb*, EU:C:2013:448.

[32] 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 [1989] OJ L 395/33.

the review procedures must be available to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement. In Case **C-689/13 *PFE***,[33] this case law was confirmed but also enlarged. While in the Fastweb case there were only two opposing tenderers, in this new case they were several. The Court stated that the number of participants in the public procurement procedure and the participants in the review procedure—as well as the legal grounds on which they relied—were irrelevant for granting a possibility for judicial review. The Court explained that all those tenderers have an interest in obtaining a particular contract because the exclusion of a tenderer may lead to the other being awarded a contract directly in the same procedure or if all the tenderers are excluded, a new public procedure may be launched in which each of the tenderers may participate and thus obtain the contract indirectly.

The principle laid down by the Grand Chamber in the PFE ruling was applied in Case **C-131/16 *Archus et Gama***.[34]

While in the PFE case, the Court favoured the right to a review procedure, in Case **C-355/15 *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich***,[35] it decided that a tenderer who has been excluded from a public procurement procedure by a decision which has become final can be refused access to a review of the decision awarding the final contract and of the conclusion of the contract.

The effectiveness of the review procedures provided by Directive 89/665 was also examined in Case **C-391/15 *Marina del Mediterráneo e.a.***[36] A decision, based on a national law, restricted the right of independent judicial review of certain preparatory decisions. In particular, the right of review was limited to those acts which decided on the award of a contract, or made it impossible for tenderers to continue the procurement procedure or caused irreparable harm to its legitimate rights or interests. The Court decided that such a limitation was not compatible with the requirement of effectiveness provided for by Directive 89/665. For a decision allowing a new tenderer to participate in a procurement procedure, which allegedly was adopted in breach of EU public procurement law or the national transposing legislation, the possibility of an independent judicial review had to be provided.

In the Joined Cases **C-439/14 and C-488/14 *Star Storage***,[37] the Court decided that Directive 89/665 does not preclude national legislation which makes the admissibility of an action against an act of the contracting authority subject to the obligation of the applicant to provide a good conduct guarantee to the contracting authority. However, this guarantee must be refunded to the applicant whatever the outcome of the action is.

In Case **C-495/14 *Tita e.a.***,[38] the Court once again took a position on the question whether the Court fees (frais de justice) limit the right of the undertakings to bring

[33] Case C-689/13 *PFE*, EU:C:2016:199.

[34] Case C-131/16 *Archus et Gama*, EU:C:2017:358.

[35] Case C-355/15 *Bietergemeinschaft Technische Gebäudebetreuung und Caverion Österreich*, EU:C:2016:988.

[36] Case C-391/15 *Marina del Mediterráneo e.a.*, EU:C:2017:268.

[37] Joined Cases C-439/14 and C-488/14 *Star Storage*, EU:C:2016:688.

[38] Case C-495/14 *Tita e.a.*, EU:C:2016:230.

legal proceedings and restrict the effectiveness of the judicial review in the area of public procurement. This question was examined in detail in Case **C-61/14 *Orizzonte Salute***,[39] according to which, in the absence of EU rules governing the matter, it is up to each Member State in accordance with the principle of procedural autonomy to lay down the detailed rules regarding this subject. However, these rules cannot be less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of the rights conferred by EU law (principle of effectiveness). The Court found that the Court fees at issue in the national proceedings did not adversely affect the effectiveness of Directive 89/665 nor the principle of equivalence and effectiveness. The Court confirmed this case law.

## 9 Non-contractual liability of the European Union, claim for damages

The institutions, bodies, offices or agencies of the European Union are also contracting authorities. Fortunately, it is rare that the tenderers based on an alleged violation of the public procurement rules raise claims for damages under Article 340 of the Treaty on the Functioning of the European Union. This happened in Case **C-677/15 P *EUIPO/European Dynamics Luxembourg e.a.***[40] in which the Court acted on appeal of a judgment of the General Court. In this judgment, the Court confirmed its existing case law according to which three conditions must be met for such a claim to be successful: the conduct of the contracting authority must be unlawful, the claimant must suffer an actual damage and there must be a causal link between the conduct and the damage. In this case, the Court set aside the judgment of the General Court which ordered the European Union to pay compensation for the harm suffered by the tenderer as a result of the loss of an opportunity to be awarded a framework contract as the contractor ranked first in a cascade. The Court found that the General Court had not established the necessary causal link. Then, examining the damage claim, without referring the case back to the General Court, the Court decided that the tenderer had failed to establish that it suffered actual harm or to demonstrate the causal link between the unlawful conduct and the damage. It is difficult to reach any conclusions from this sole judgment, nevertheless it seems the Court is requiring convincing proof, in any case, stronger than what the General Court has required, in order to recognise the right for compensation in cases where it is based only on the loss of opportunity.

## 10 Closing remarks

At the end, the question arises whether some new general lessons can be drawn from the cases put forward. In my opinion this is not the case—one can say that the activity of the Court was 'business as usual'. To add one personal observation: National courts

[39] Case C-61/14 *Orizzonte Salute*, EU:C:2015:655.

[40] Case C-677/15 P *EUIPO/European Dynamics Luxembourg e.a.*, EU:C:2017:998.

do not always understand the function of the Court of Justice of the European Union. We are not here to resolve individual cases but to lay down abstract criteria or rules on the basis of which individual cases are decided by national courts. We experience situations in which a national court describes in great detail what has happened and then asks the Court to say whether this constitutes a violation of the principle of equality or non-discrimination or the obligation of transparency. Although we are trying to assist, it seems to us that it is up to the national court to appreciate the facts and to decide on the case, so frankly there is not much room for interpretation. By the way, there are terms or words that call for application and not for interpretation. There is no sense to attach an abstract term to an existing elementary term which in itself is already understandable and applicable. This leads only to the need for the interpretation of the new term.

Personally, I think that the number of requests for preliminary ruling will increase. There are now three new directives and a relatively new regulation which provide for even more detailed regulation. New concepts, new terms, new rules, have appeared that unavoidably are subject to interpretation.