

Landmark case law of the Court of Justice of the EU in procurement



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Introduction

- **Role of the Court of Justice of the EU in procurement**
- **Types of actions and consequences**
 - Preliminary references (Article 267 TFEU)
 - Infringement proceedings (Article 258 TFEU)

Contracting authority

- **C-470/99** - Universale-Bau and Others, 12/12/2002
- Context:
 - Entsorgungsbetriebe Simmering GesmbH ("EBS") issued a public invitation to tender for the award of a public works contract for the construction of the second biological treatment phase of the principal sewage treatment plant of Vienna.
 - The invitation specified the criteria on the basis of which the contract will be awarded to the most economically advantageous bid. EBS also said that the required references would be evaluated according to a "scoring" method, the details of which were only made known after expiry of the time-limit for applications and the award of the contract.

Q: Does a legal person constitute a "contracting authority" (...) even if it was not established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but now meets such needs?

CJEU:

„(...) a **body which was not established to satisfy specific needs** in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since actually satisfied, **fulfils the condition** required by the first indent of the second subparagraph of Article 1(b) of Directive 93/37 so as to be capable of being regarded as a body governed by public law within the meaning of that provision, on condition that the assumption of responsibility for the satisfaction of those needs can be established objectively”

Public contract

- **C-410/14** - Falk Pharma, 2/06/2016
- Context:
 - The request for a preliminary ruling has been made in proceeding between Dr. Falk Pharma GmbH and DAK-Gesundheit, a statutory health insurance fund, with Kohlpharma GmbH as a joined party, concerning a procedure carried out by DAK in order to conclude rebate contracts with undertaking marketing a medicinal product whose active ingredient is mesalazine, and which led to such agreement being reached with Kohlpharma.

Q: Does the concept of a “public contract” (...) no longer apply if a contracting authority carries out an authorisation procedure in which it awards the contract without selecting one or more economic operators?

CJEU:

„(...) **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’ (...)”

Concession

- **C-206/08** – Eurawasser, 10/09/2009
- **Context:**
 - The proceedings of this case in Germany arose in connection with a contract award procedure conducted by WAZV Gotha, an association of municipalities responsible for water distribution and sewage disposal in the Gotha region. The award procedure was for a 20-year contract for the distribution of drinking water and disposal of sewage.
 - WAZV Gotha considered that the Utilities Directive did not apply, as the arrangement was a services concession and thus outside the Utilities Directive. This view was challenged by one of the potential bidders.

CJEU:

„In relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for the contract in question to be categorised as a ‘service concession’ (...), **where the supplier assumes all, or at least a significant share, of the operating risk** faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service.”

Exemptions from the scope of the application of Directives

- **C-107/98** – Teckal, 18/11/1999
- **Context:**
 - The case concerned an agreement between the Municipality of Viano and the AGAC consortium for the provision of services for heating buildings and supplying fuel. The subject-matter of the agreement had been entrusted without the competitive procedures required by then applicable Directives 93/36/EEC and 92/50/EEC.
 - The question referred to the CJEU by the national court was whether the material scope of the directives determined, inter alia, by the definition of 'public contract', covers agreements concluded between the contracting authority and an entity which is organisationally and economically dependent on it.

CJEU:

„(...) it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned **a control** which is similar to that which it exercises over its own departments and, at the same time, that person carries out the **essential part of its activities** with the controlling local authority or authorities.”

Meaning of general principles

- **C-318/15** - Tecnoedi Costruzioni, 6/10/2016
- **Context:**
 - The case concerned the award of a works contract for the extension and upgrading the energy efficiency of the nursery school in Italy. The award criterion for this contract was the lowest price. The terms and conditions of the contract in question provided that 'the presence of an abnormally low tender will be established automatically' if the number of valid tenders was ten or more.
 - The Italian court asked the CJEU whether the provisions of EU law preclude the application of national legislation which provides for the automatic exclusion of abnormally low bids in tenders for the award of a contract of cross-border importance for works with a value below the threshold.

CJEU:

„In accordance with the Court’s settled case-law, the award of contracts which, in view of their value, do not fall within the scope of the directives on the award of public contracts is nonetheless subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts are of certain **cross-border interest** (...)”

„As regards the **objective criteria** which may indicate certain cross-border interest, (...) may be, in particular, the fact that the contract in question is for a **significant amount**, in conjunction with the **place** where the work is to be carried out or the technical **characteristics of the contract** and the specific characteristics of the products concerned. In that context, it is also possible to take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are **real** and not fictitious (...).”

Consequences of a breach

- **C-503/04** – Commission v Germany, 18/07/2007
- Context:
 - The judgment was issued upon an action brought to the CJEU by the European Commission against Germany for non-implementation of measures to comply with an earlier judgment of the Court, which held that the German Republic had failed to fulfil its obligations under EU law when awarding a public service contract.

CJEU:

„(...) although that provision [article 2(6) of Directive 89/665] permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate expectations of the parties thereto, its effect cannot be, unless the scope of the EC Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis third parties is to be regarded as in conformity with Community law following the conclusion of such contracts (...)”

„(...) even if it were to be accepted that the principles of legal certainty and of the protection of legitimate expectations, the principle pacta sunt servanda and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission, Member States cannot rely thereon to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade their own liability under Community law (...)”

Modification of the contract

- **C-454/06** – presstext Nachrichtenagentur, 19/06/2008
- Context:
 - The case concerned an amendment to an agreement between the Republic of Austria (the contracting authority) and the APA company (the contractor). In September 2000, the APA contractor set up the company APA-OTS, which was integrated organisationally, financially and economically into the founding company. Subsequently, the APA contractor informed the contracting authority that part of the services provided would be carried out by the APA-OTS company, but that the contractor would be jointly and severally liable.
 - In 2004, another contractor, Presstext Nachrichtenagentur GmbH (PN), submitted a bid to the contracting authority, but the Republic of Austria was not interested in concluding an agreement with the new contractor. The PN contractor then appealed to the Bundesvergabeamt, requesting a declaration that the division of the contract as a result of the restructuring of the APA and the subsequent changes were unlawful and in fact constituted the award of a new contract in disregard of the applicable tendering procedures.

Q: Did the parites' amendments to the contract actually constitute the award of a new contract?

CJEU: „(...) amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract (...) when they are **materially different** in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (...)”

„An amendment to a public contract during its currency may be regarded as being **material** when it introduces conditions which, had they been part of the initial award procedure, **would have allowed for the admission of tenderers** other than those initially admitted or **would have allowed for the acceptance of a tender** other than the one initially accepted.”

