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The Court of Justice's case law on public procurement

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I/ Introduction

In the outstanding contributions during this seminar, several participants already presented the European directives on public procurement and the numerous audit avenues opened up by such directives.

In this contribution, I intend to stand back a bit from the technical aspects of the directives and move, say, more « philosophically » to the general issue of public procurement in relation to European treaties[1] and certain basic principles behind these treaties. I shall also focus more specifically on the principle of non-discrimination which lies at the core of all European law on public procurement, whether in the directives themselves or in the treaties.

II/ European law on public procurement

Before delving into the content of the Court's case law, we are thus going to review the set-up provided by the European treaties.

In this respect, I would like to mention an excerpt from the Opinion of an advocate general that will steer us in our analysis of this system's philosophy. The advocates general's duty is to assist the Court of Justice and their role is to deliver legal advice, called "Opinions", in all impartiality and all independence for matters they have been referred to.

Here is then what an advocate general was stating regarding the directives: « Community public procurement law pursues an immediate, limited aim: coordination of the procedures for the award of public contracts. However (…) that (aim) is nothing more than an instrument for the achievement of a more important objective, namely, the development of effective competition in the sector, in the interests of establishing the fundamental freedoms in European integration»[2].

Let us now analyse this assertion. What are the basic legal issues underlying this small quote?

[1] Official Journal of the European Union C 83 of 30 March 2010: Treaty on European Union (TEU) on the one hand and Treaty on the functioning of the European Union (TFEU) on the other.

[2] Paragraph 31 of the conclusions of advocate general D. Ruiz-Jarabo Colomer in the case *Ing. Aigner*, judgment of 10 April 2008, Case C-393/06, ECR I-2339.

A/ The directive as an instrument: the primacy of the treaty

First, behind this quote lies the idea of end and means, as, according to the advocate general, directives pursue « a limited aim » and are « nothing more than an instrument for the achievement of a more important objective».

When the advocate general refers to the directives as an « instrument », he reminds the fundamental principle of the hierarchy of norms. In fact, within the European Union, things are like in any state: administrative acts must be in compliance with laws, and laws voted by Parliament must be in compliance with the Constitution. Likewise, by virtue of the treaties, an act, such as a directive for instance, shall only be voted by the European legislator if it is intended to « attain the objectives set out in the treaties »[3], and « the Court of Justice of the European Union shall review the legality of legislative acts »[4].

The advocate general's statement is also that it is « an instrument for the achievement of a more important objective». This clarification is essential. If a directive must comply with the principles and the aims set out in the treaties, it does not imply that when a directive is not applicable the principles and aims of the treaty are not applicable. When the scope of the directives was explained earlier, it was already shown that certain contracts were not subject to the requirements of the directive : this is among others the case for contracts below the threshold amounts and for service concessions.

What does the Court of Justice say in this instance? « In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of (the) Directive (…), the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality in particular »[5], « in the event that such contracts nevertheless are of certain cross-border interest »[6].

It can be now understood why my concern focuses more on the treaties than on the directives.

[3] Article 5, § 2, TEU.
[4] Article 263, al. 1, TFEU.
[5] Judgment of 7 December 2000, Case C-324/98, *Telaustria and Telefonadress*, ECR I-10745, paragraph 60.
[6] Judgment of 13 November 2007, Case C-507/03, *Commission/Ireland* (postal service), ECR I-9777, paragraphs 25-30.

B/ The directive implementing a more important aim: the aims of the treaty

What is this « more important aim » set out in the treaties?

They refer mainly to « establishing the fundamental freedoms in European integration ».

The advocate general hints at the main objective set out by the Treaty of Rome in 1957 in the early stages of the European construction, namely the establishment of a common market. At the present stage, under the treaty of Lisbon, it refers to the internal market defined in the treaties as «comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the treaties »[7] : these are thus the « fundamental freedoms » which are at the core of the European law on public procurement.

But before delving with « the establishment of the fundamental freedoms in European integration », it is necessary to present in a few words the issue of « the development of effective competition » in the sector of public procurement, which is also broached by the advocate general.

1/ The development of effective competition

In fact, I have few comments to make on this subject. This objective has always prevailed in many countries, even way ahead of the European construction: this is a self-evident measure to protect the financial interests of public authorities. And so, in Belgium for instance, as early as 1846, a law provided that « all contracts concluded on behalf of the State are subject to competition (and) advertising (…) »[8]. As things stand now, within the frame of the European Union, this budgetary objective beneficial to the Member States is still relevant, but also and most of all, this objective of effective competition has to be placed against the background of the establishment of an internal market within the European Union. It is bearing this in mind that the Court of Justice also refers to the purpose of the Directive which is to open up the contracts to which it applies to « Community competition »[9], to « competition in the Member States which is undistorted and as wide as possible »[10], while emphasizing that « exposure to Community competition (…) ensures that the public authorities cannot indulge

[7] Article 26, § 2, TFEU. See also among the multiple competences of the European Union mentioned in article 3, paragraph 3, first sentence, TEU: « The Union establishes an internal market ».
[8] Article 21 of the state accounting law of 15 May 1846.
[9] Judgment of 5 October 2000, Case C-16/98, *Commission/France* (Electrification works in the Vendée region), ECR I-8315, paragraph 108.
[10] Judgment of 13 December 2007, Case C-337/06, *Bayerischer Rundfunk*, ECR I-11173, paragraph 39.

in favouritism »[11]. The Court of Justice is thus anxious to avoid trigging certain nationalist reactions of the kind « Buy national! », so that Community competition has to abide by the freedoms of an internal market.

This is a first specific example of application of the principle of non-discrimination and also of the frame of a « more important aim » - and in my view the most important one – of « establishing the fundamental freedoms in European integration », as meant by the treaties.

2/ European integration

First, as far as « European integration » is concerned, the treaties clearly set out an aim of economic integration to be attained, as the advocate general states, through the « establishment of fundamental freedoms ». And as far as we are concerned, the issue of public procurement is obviously part of this same concept of internal market and European integration, irrespective of the directives on public procurement, as any contract presupposes the possibility of a free movement of goods, persons and/or services as set out in the European treaties.

Nevertheless, I also find it necessary to specify what an internal integration is not. Many capitals in the Member States are reluctant to broach this issue or are even rather distrustful. Everybody has heard these rather derogatory terms: « Brussels has decided this or Brussels has decided that ».

I would like to briefly remind certain principles of a constitutional nature contained in the Treaty of the European Union. *First*, « The Union shall respect the national identities (of its Member States), inherent in their fundamental structures, political and constitutional »[12]. *Second*, there are the multiple limits imposed on the action of the European Union : without delving into details, I would like to mention the principle of conferral of competences, the principle of subsidiarity and the principle of proportionality[13], to name a few.

Integration is not an all-encompassing concept.

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[11] Judgment of 12 July 2001, Case C-399/98, *Ordine degli Architetti (Teatro alla Scala)*, ECR I-5409, paragraph 75.

[12] Article 4 TEU.

[13] Article 5 TEU: « 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level (…).

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties ».

3/ Establishment of fundamental freedoms

What is meant by « establishing the fundamental freedoms »?

a) The principle of non-discrimination

In the context of the fundamental freedoms of the internal market, it is necessary to first explain the principle of non-discrimination.

The principle of non-discrimination, or principle of equal treatment, is a fundamental principle that governs the freedoms of the internal market. More precisely, it refers to the principle of non-discrimination on grounds of nationality, which is the first kind of discrimination prohibited within the scope of application of the treaties[14], and thus not only in the instance of the internal market[15].

This is one of the most important principles of the treaties. Therefore, when the Community directive 2004/18 states that « Contracting authorities shall treat economic operators equally and non-discriminatorily (…) »[16], this statement is not a new rule as such, but rather a confirmation of the general principle on which the internal market is founded. This confirmation is reminded constantly since the terms « (non-)discrimination » and « (non)-discriminatory » appear 18 times in the text of this directive.

As an « illustrative » example of the principle of non-discrimination, fundamental freedoms are part of any public procurement, irrespective of directives, and this explains why the Court of Justice's vast case law on the internal market could also be applied to public procurement where the principle of non-discrimination is central in its analysis.

The Court of Justice defines this principle in a fairly logical but also summary way: « the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified »[17].

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[14] Article 18 TFEU: « Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited (…) ».

[15] It should be paragraphed out that this principle can also be applied to face other kinds of discrimination (article 19 TFEU. See also title III of the Charter of fundamental rights), such as discriminations based on sex (see also article 157 TFEU), on age or race, for instance.

[16] Article 2 of the 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, *OJEU* L 134 of 30 April 2004, p. 114.

[17] Judgment of 3 March 2005, Joined Cases C-21/03 and C-34/03, *Fabricom*, ECR I-1559, paragraph 27.

What is more interesting is the very wide extent given by the Court to this principle: it « prohibits not only *overt* discrimination by reason of nationality but also all *covert* forms of discrimination which, by the application of other criteria of differentiation, lead *in fact* to the same result »[18].

The few examples cited hereafter show how central the principle of non-discrimination is. In the instance of the free movement of goods, any trade regulation of a Member State « capable of hindering, *directly or indirectly, actually or potentially,* intra-Community trade »[19] is prohibited. Likewise, when it goes to the free provision of services, the treaty « requires the elimination of any restriction, even if it applies *indistinctly* to national providers of services and to those of other Member States alike, when it is liable to prohibit or impede the activities of a provider of services established in another Member State, where he lawfully provides similar services »[20] . And thus, a potential hinder, or a mere « annoyance » in a public contract[21], shall constitute an infringement to the rules of the Treaty, even, as I have already mentioned, in the event of contracts having certain cross-border interest and not being subject to the directives.

There is no need to add that the principle of non-discrimination is also at the core of its analysis of the European directives.

And thus in a general way, the Court holds that « the principle of non-discrimination (…) applies to all the stages of the tendering procedure »[22]. But the Court also has the opportunity to confirm this applicability in relation to several specific issues. I'll give a few examples among others:

- the comparison between tenders (article 28 of the directive)[23];
- the personal situation of the candidate or tenderer (article 45)[24];
- the contract award criteria (article 53)[25];
- the abnormally low tenders (article 55)[26];
- the decision to withdraw an invitation to tender[27].

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[18] Judgment of 5 December 1989, Case 3/88, *Commission/Italy* (computer systems), ECR 4035, paragraph 8 ; Judgment of 3June 1992, Case C-360/89, *Commission/Italy* (preference to regional undertakings), ECR I-3401, paragraph 11. We have underlined these passages.

[19] Judgment of 20 March 1990, Case C-21/88, *Du Pont de Nemours*, ECR I-889, paragraph 8. We have underlined these passages.

[20] Judgment of 20 October 2005, Case C-264/03, *Commission/France* (delegated management contracts), ECR I-8831, paragraph 66. We have underlined these passages.

[21] See for instance the judgment of 22 September 1988, Case 45/87, *Commission/Ireland* (Dundalk water supply augmentation scheme), ECR 4929, judgment of 24 January 1995, Case C-359/93, *Commission/Netherlands* (UNIX), ECR 157, et the order of 3 December 2001, Case C-59/00, *Bent Mousten Vestergaard*, ECR I-9505.

[22] Judgment of 5 October 2000, Case C-16/98, *Commission/France* (electrification works in the Vendée region), ECR I-8315, paragraph 107.

[23] Judgment of 25 April 1996, Case C-87/94, *Commission/Belgique* (walloon buses), ECR I-2043, paragraph 54 ; judgment of 18 October 2001, Case C-19/00, *SIAC Construction*, ECR I-7725, paragraph 34.

[24] Judgment of 9 February 2006, Joint cases C-226/04 and C-228/04, *La Cascina and Zilch*, ECR I-1347, paragraphs 29-33 ; judgment of 16 December 2008, Case C-213/07, *Michaniki*, ECR I-9999.

[25] Judgment of 18 October 2001, Case C-19/00, *SIAC Construction*, ECR I-7725, paragraphs 35-40 and 44-45 ; jusgment of 17 September 2002, Case C-513/99, *Concordia Bus Finland*, ECR I-7213, paragraphs 81-86.

[26] Judgment of 10 February 1982, Case 76/81, *Transporoute*, ECR 417, paragraphs 16-18.

b) The fundamental freedoms

The « fundamental freedoms » of the internal market are defined in the treaty and I would like to draw your attention on the terminology used[28] : « restrictions are prohibited between Member States», « prohibition of any discrimination on grounds of nationality », etc.

This is, on the one hand, a long list of prohibitions, which presupposes the abolition of all national regulations in contradiction with these fundamental freedoms, that are hindering, *directly or indirectly*, *actually or potentially*, as clarified by the Court of Justice.

But, on the other hand, Member States cannot be prevented from using regulations governing the administrative action of public authorities, and the issue of public procurement is a case in point because public procurement must meet certain rules.

c) The establishment of the internal market

Therefore, I now come to the last term of our range of issues: « establishment ». Remember the advocate general's opinion: the directive is an instrument in the interests of establishing the fundamental freedoms.

The treaty does not only provide prohibitions of a negative nature, it also provides the European legislator with the opportunity to take certain measures, of a positive nature, designed to allow the real and material establishment of fundamental freedoms and allow Member States to have a legislation that meets a need of general interest, as such is the case with public procurement. The terms « negative integration» and « positive integration » are used in reference to these two types of provisions of the treaty.

Bearing this in mind, the legislator adopts « the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market »[29]. Similarly, concerning the right of establishment, the treaty provides that « in order to *facilitate the right to take up and pursue activities as self-employed persons*, the European Parliament and the Council (…) issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons »[30].

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[27] Judgment of 18 June 2002, Case C-92/00, *Hospital Ingenieure* (HI), ECR I-5553, paragraphs 42-47.
[28] Articles 28, 34, 35, 45, paragraph 2, 49, paragraph 1, 56, paragraph 1, and 63, paragraphs 1 and 2, TFEU.
[29] Article 114, § 1, TFEU.
[30] Article 53, § 1, TFEU. We have underlined the passages.

In this context, the Court of Justice often reminds that the aim of the directives « lies in the *effective realisation* of freedom of establishment and freedom to provide services in the field of public works contracts » within the European Union[31].

C/ The establishment of the fundamental freedoms through the principle of non-discrimination

After giving an overview of the concepts contained in the advocate general's opinion, I would like to delve further into the principle of non-discrimination.

The case law I have already referred to concerning this principle was about prohibitions of a negative nature.

Besides, the principle of non-discrimination also acts positively by imposing several constraints on the contracting authorities, more particularly in the instance of public contracts that are not subject to the Community directive. So, in some way, a situation is created where the principle of non-discrimination replaces, though in a limited way, the duties set out in the directive, as is the case for contracts with an estimated value lower than the threshold amounts provided in the directive[32], for service concessions[33] and for service contracts listed in annex II B of the directive, which are only partly subject to this regulation[34].

The Court of Justice is always driven by the same concern: « the principle of equal treatment of tenderers is intended to afford equality of opportunity to *all tenderers* when formulating their tenders, regardless of their nationality »[35]. As a result, the Court is of the opinion that « notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of the directive, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular. It is true (…) that this principle implies, among others, an obligation of transparency in order to allow a contracting authority to *satisfy itself* that it has complied with the principle of non-discrimination. That obligation of transparency which is imposed on the contracting authority *consists in ensuring, for the benefit of any potential tenderer,* a degree of advertising sufficient to enable the services

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[31] Judgment of 15 January 1998, Case C-44/96, *Mannesmann,* ECR I-73, paragraph 43 ; judgment of 10 November 1998, Case C-360/96, *BFI Holding,* ECR I-6821, paragraph 41 ; judgment of 3 October 2000, Case C-380/98, *University of Cambridge,* ECR I-8035, paragraph 16. We have underlined the passages.

[32] Article 7 of the directive 2004/18/EC.

[33] Article 17 of the directive 2004/18/EC.

[34] Article 21 of the directive 2004/18/EC.

[35] Judgment of 13 October 2005, Case C-458/03, *Parking Brixen*, ECR I-8612, paragraph 48. We have underlined the passages.

market to be opened up to competition, and the impartiality of procurement procedures to be reviewed »[36].

Two types of positive obligations are thus to be borne by the Member States: a degree of advertising in the award procedures of public procurement should be *ensured* and a review of the impartiality of procedures have also to be *ensured*.

For the first obligation which the Court of Justice has already repeatedly ruled on, Member States have a certain degree of leeway: the required publicity should not necessarily be equated with publication[37] or necessarily imply an obligation to hold an invitation to tender[38], but, the Court states, « in the absence of advertising and the opening to competition (…), there is discrimination, *at least potentially*, against undertakings of the other Member States »[39]. It is true that an undertaking from another Member State is unable to express its interest in a contract if it did not have access to adequate information before the contract was awarded[40]. Finally, the Court of Justice states that « the Member States must not maintain in force national legislation which permits the award of (those specific contracts) without their being put out to competition (…) »[41]. A certain degree of advertising has thus to be provided.

As to the second obligation, which is to ensure « a review of the impartiality of procedures », the Court of Justice ruled on two aspects of the award procedure of those specific contracts.

A first case related to a national regulation that imposed an absolute duty on the contracting authorities to automatically exclude tenders considered to be abnormally low according to a mere mathematical criterion.

According to the Court of Justice, this regulation «deprives tenderers who have submitted abnormally low bids of the opportunity to demonstrate that those bids are viable and genuine (…). The application of the rule requiring the automatic exclusion of tenders considered to be abnormally low to contracts of certain cross-border interest may constitute an indirect discrimination since, in practice, it places at a disadvantage operators from other Member States which as they have different cost structures, may benefit from significant economies of scale or, intending to cut their profit margins in order to enter the market in question more effectively would be in a position to make a bid that was competitive and

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[36] Judgment of 7 December 2000, case C-324/98, *Telaustria et Telefonadress*, ECR I-10745, paragraphs 60-62. We have underlined the passages. See also the conclusions of the advocate general : « Substantive compliance with the Treaty-based principle of non-discrimination on grounds of nationality requires that the award of 'public service concessions' respect a minimum degree of publicity and transparency » (paragraph 42).

[37] Opinion of the advocate general in the case *Telaustria et Telefonadress*, already mentioned, paragraph 43.

[38] Judgment of 21 July 2005, Case C-231/03, *Coname*, ECR I-7287, paragraph 21.

[39] Judgment of 13 October 2005, Case C-458/03, *Parking Brixen*, ECR I-8612, paragraph 55. We have underlined the passages.

[40] Judgment of 13 November 2007, Case C-507/03, *Commission/Irlande* (postal service), ECR I-9777, paragraph 32 ; judgment of 21 July 2005, Case C-231/03, *Coname*, ECR I-7287, paragraphs 17-18.

[41] Judgment of 13 October 2005, case C-458/03, *Parking Brixen*, ECR I-08612, paragraph 52.

at the same time genuine and viable »[42]. The regulation has thus to be modified so as «to allow those contracting authorities the possibility of verifying the constituent elements of those tenders *by requesting the tenderers* concerned to provide details of those elements »[43]. So there are obviously concrete constraints for the contracting authorities.

The second case involved the issue of a grouping of undertakings allowed to bid.

The national regulation made a distinction between two categories of groupings of undertakings and provided for different conditions of access. According to the Court of Justice, this regulation, « which provides that (one of those two categories of groupings of undertakings) may be automatically excluded, is likely to have a dissuasive effect on economic operators established in other Member States (…) in order to be able to participate more easily in public tendering procedures launched by the contracting authorities of that Member State and thereby be able to offer their services more easily »[44]. Here again, the national regulation has thus to be modified. And what does in fact the Court's decision amount to? It creates for these specific contracts a rule similar to that set out in the directive on public procurement for contracts within its scope. Article 4 of the directive 2004/18 provides that « in order to submit a tender or a request to participate, these groups may not be required by the contracting authorities to assume a specific legal form ».

It appears thus clearly that when the positive measures set out in the directive do not apply, they are so to say relayed by the principle of non-discrimination. The fact that these specific contracts have been excluded from the scope of the directives is in some sort « made up for » by the principle of non-discrimination and by the meaning given by the Court of Justice, with its implication of an obligation of transparency from the contracting authorities.

Particularly these last five years, the Court of Justice has developed a case law of this nature, which is bound to be expanded further. As I mentioned in relation to public contracts subject to the directive, if the Court is of the opinion that « the principle of non-discrimination (…) applies to all stages of the tendering procedure », nothing precludes the application of this principle in a general way to the specific contracts that are not subject to the scope of this directive, and, more particularly, to the many contracts the estimated value of which is lower than the threshold amounts set out in the directive.

[42] Judgment of 15 May 2008, joint cases C-147 et 148/06, *SECAP et Santorso*, ECR I-3565, paragraphs 23-24 and 26.
[43] Paragraph 35 of the same judgment. We have underlined the passages.
[44] Judgment of 23 December 2009, Case C-376/08, *Serrantoni*, to be published, paragraphs 15 and 42.

III/ Conclusions

And now, in a nutshell, my conclusion about the Court of Justice.

Firstly, the Court of Justice's competence is mandatory and exclusive for all matters in relation with the European Union law, for the citizens and economic operators as well as for the Member States.

Besides, the various remedies at law set out in the treaty allow to ensure the « effectiveness » of its case law, whether it concerns a preliminary ruling procedure or an action for failure to fulfil obligations by Member States.

Finally, its general jurisdiction, which is to « ensure that in the interpretation and application of the treaties the law is observed »[45], allows the Court to have this creative role, not only towards the Member States, as noted, but also towards the European Institutions. In this context, the directive « remedies » 89/665 had to be modified by the European legislator following a judgment of the Court of Justice in the case *Alcatel*[46].

Starting from a small quote by an advocate general, we have explored extensively several major legal issues in relation to public procurement and I find that these paragraphs have to be kept in mind when, as auditors, we carry out an audit in this field.

[45] Article 19, paragraph 1, TEU.
[46] Judgment of 28 October 1999, Case C-81/98, *Alcatel Austria*, ECR I-7671.