

# **PREVENTIVE AND JUDICIAL PROTECTION IN THE AWARD PROCEDURES FOR PUBLIC CONTRACTS IN BELGIUM, THE NETHERLANDS AND FRANCE WITH THE INFLUENCE OF THE JURISPRUDENCE OF THE COURT OF JUSTICE**

## **INTRODUCTION**

The object of my research is to examine in what way individuals and companies, who participate in an award procedure for the obtaining of a public contract, are legally protected. My study is not limited to the public contracts which fall into the scope of the Public Procurement Directives. On the contrary, I deal especially with the principles derived from the European Treaties which govern the award of public contracts falling outside the scope of the Public Procurement directives and with the principles which govern the judicial protection of the individuals and in companies participating in such an award procedure.

The research contains three major parts : in the first part, I examine the concept ‘public contract’, the second part treats about the principle of equality and the obligation transparency, the third part concerns ‘the judicial protection of the individuals and companies participating in an award procedure’ (interim relief and annulment of the contract, principle of effectiveness, . . .).

The method that I am using is a comparative study of the existing systems in Belgium, the Netherlands and France. By comparing those systems, I’m not only explaining the similarities or the differences, but I also where the systems are defective and where another system can contribute to solve the problems in another system. In the most important part, I will confront these national systems with the principles which derive from the jurisprudence of the Court of Justice.

At this moment, I nearly terminated one part of my research. It is this part that will be the object of my paper. This paper will try to make clear in which way the principles of equality and transparency, applicable to award procedures of public contracts falling outside the scope of the European directives on public procurement, were and are present in Belgium, the Netherlands and France before and after the different major decisions of the Court of Justice

in that area. Furthermore, I examine to what extent the Court of Justice has elaborated those principles.

The part of my study, exposed in the present paper, is composed of two main chapters : the application of the principles of equality and transparency in the three above mentioned member states (Chapter I) and the confirmation of those same principles by the Court of Justice (Chapter II).

## Chapter I : The application of the principles of equality and transparency in Belgium, the Netherlands and France

For each examined legal system, I divided the study in two main paragraphs : in a first paragraph, I examine to which extent an authority has the freedom to choose his partner when she concludes a ‘public’ contract, and in the second paragraph, I examine in what way public principles (of good administration) restrain this freedom of choice.

### **§1 - Freedom of choice**

In the three examined legal systems, the principle is that an authority can choose freely his partner, when she wants to conclude a contract. In France, the Conseil d’Etat has confirmed this freedom as a general principle of law for public contracts (contrats administratifs). In Belgium and the Netherlands, the choice of a public authority to conclude a contract is the choice of a private manner to fulfil the public interest. By choosing a private legal concept (the contract), necessarily the principles of civil law are applicable. One of those principles is the freedom to choose his contract partner.

Notwithstanding this freedom principle, in each country the jurisprudence has confirmed that this freedom of choice can’t be exercised in an arbitrary way. Even if an authority has some discretionary powers, a court has always the possibility to do a margin control. For that purpose, the courts in the different examined legal systems have confirmed some general principles which govern the freedom of choice of the authority to look for a contract partner. An authority can’t be entirely considered as a private person, because its major aim is the preservation of the general interest.

## §2 - Principles

### 1. In general

In the three examined legal systems, the different competent courts have confirmed several principles which govern the actions of an authority. In Belgium and the Netherlands, these principles have a specific name : the principles of good administration. In France, the Conseil d'Etat and the Conseil Constitutionnel have confirmed some specific principles applicable to the award procedures of public contracts. The Conseil Constitutionnel has confirmed in a decision of 26 June 2003 that the principles of the free participation in an award procedure, of equal treatment of the candidates and of the transparency of the procedure are all principles of constitutional value.

After examining the major jurisprudence in the three studied legal systems, I have come to the conclusion that especially the principles of equality and transparency must be observed by the awarding authority, when she awards or executes a public contract:

- In France, the application of those principles on contracts was not disputed because of the difference in France between 'les contrats administratifs' and 'les contrats de l'administration'. The 'contrats administratifs' are totally determined by public law and thus, the general principles of equality and transparency are naturally applicable. As already explained, the Conseil Constitutionnel confirmed those principles a constitutional principles.

- In the Netherlands, the 'Hoge Raad', after a long period of hesitation, has confirmed the application of the principles of good administration on private contracts in a decision of 27 March 1987. This is not so obvious, because in the Netherlands, the contracts of an authority are mostly considered as private contracts. That way normally only private law is applicable. The Hoge Raad has made an exception for the principles of good administration and the principles of equality and transparency especially.

- In Belgium, the application of the principles of good administration is not discussed when it concerns the award decision, but it is still not clear if those principles are also applicable to the execution of public contracts. I defend the thesis that those principles are applicable to the execution by an authority of a public contract.

In the next part, I shall examine more in detail the principle of equality, because it is the main principle that governs the award procedure of a public contract.

## 2. The principle of equality

### (a) In general

The definition of the principle of equality is similar in the three examined legal systems. An authority must treat similar situations in a similar way and different situations in a different way.

The equal treatment of candidates to an award procedure has been recognised in the three examined legal systems, as a general principle governing all kinds of contracts. The principle of equality implicates two general obligations: the equal access to an award procedure and the equal treatment in the award procedure.

I came to the conclusion in the three examined systems, that an authority can't have the obligation to organise an award procedure in every circumstance. Such an obligation exists only for public procurement contracts, because it's imposed by a specific law. The principle of equality can't be interpreted as containing such an obligation. The most important courts of the studied legal systems never imposed an obligation to hold a tender procedure.

Main consequence of the principle of equality is the duty or the principle of transparency in the award procedure.

### (b) The duty of transparency

Only in France, the Conseil Constitutionnel and the Conseil d'Etat have already confirmed the existence of the principle of transparency. In the Netherlands, the 'Hoge Raad' has recognised the principle of transparency as a general principle of public procurement. In Belgium, the 'Raad van State' did not confirm such a principle until now, although in different decisions, the 'Raad van State' confirmed that when an authority wants to commence an award procedure, she has to make public this intention.

Since the confirmation of the duty of transparency by the Court of Justice, several laws have been adopted in France for several public contracts falling out of the scope of the Public Procurement directives which create the duty to hold a tender procedure so that a transparent procedure is guaranteed.

The principle or duty of transparency implicates two main obligations: the publication of the award procedure and conducting a transparent procedure (the objectivity in the award procedure). None of the examined legal systems mentions what concrete obligations an authority has to fulfil to make an award procedure transparent. For example, in a very important decision, the Raad van State in Belgium decides that the sale of a property by an authority has to be a public sale. That way the candidates have an equal opportunity to participate and are equally treated during the sale. I think that the degree of transparency must be guided by the principle of proportionality. The duties of publication or transparent procedure must be in proportion to the importance of the contract.

### CONCLUSION

It's important to emphasize that for example in Belgium and in France, the Conseil d'Etat had already confirmed some obligations, which implicate a transparent procedure on basis of national law and principles. The confirmation of those obligations by the national courts starts from another point of view than the Court of Justice. Main purpose of the Court of Justice to recognize such principles is the creation of a single market (economic goal). Main goal for the national authorities is the preservation of the general interest.

From the three examined legal systems, France has the most far reaching system. Public contracts are used a lot in France and thus more conflicts arise in that field. The French system could be an example for the other legal systems as to what extent the influence of the Court of Justice can lead.

## Chapter II : The influence of the European jurisprudence

In his jurisprudence, the Court of Justice has confirmed that an awarding authority must observe two main principles, when she awards a public contract : the principle of equality and the principle of transparency. In this chapter, I examine the sources of those two principles (§ 1), the recognition of those principles by the Court of Justice (§ 2), the field of application of those two principles (§ 3) and their specific application (§ 4).

### **§ 1 - The sources**

The principles of equality and transparency are a creation of the Court of Justice. The sources of these two principles can be found in his jurisprudence. I distinguish two major sources : the European Treaties (1) and the directives on Public Procurement (2).

#### 1. The European Treaty

Main goal of the European Community is the establishment of a single market. This includes the elimination of the obstacles to the free movement of goods, persons, services and capital. Those four free movements can explicitly be found in the European Community treaty. All discrimination on ground of nationality is prohibited within the field of the application of the Treaty. The competition within the single market can't be distorted.

In these general principles of free movement and non-discrimination on ground of nationality, the Court of Justice has recognised a general principle of equal treatment of individuals and companies of other member states. This principle of equality or non-discrimination implies also an obligation of transparency in order to enable the contracting authority to satisfy itself that it has been complied with.

#### 2. The directives on Public Procurement

The single market could not be obtained nearly by prohibiting trade restrictions. There is also need for positive integration. Because of their economic relevance, the European

Commission has adopted several directives applicable on Public Procurement transactions. The Procurement directives are intended to create a single market for public contracts with general free movement of goods and services and effective competition for public contracts.

In order to achieve the goal of this directive, it is also intended to ensure equal treatment of tenderers and transparent award procedures. The means to create a single market for public contracts and to ensure equal treatment and transparent award procedures is the obligation that is imposed by the Procurement Directive to use predetermined procedures for the award of public contracts.

The Court of Justice derived from these main goals in the public procurement directives the principle of equal treatment and the principle or obligation of transparency (see Walloon busses case).

## **§ 2 -The confirmation of the principles**

### 1. Principle of equality

The principle of equality can't be found as such in the European Treaties. It is a principle which has been recognised by the Court of Justice in his jurisprudence. The Court of Justice has confirmed that the principle of equality is one of the fundamental principles of the European Community law. This principle means that equal situations must be treated equally and that different situations must be treated differently.

The equal treatment of candidates during an award procedure is the specific application of the general principle of equality. The Court of Justice has recognised such principle of equal treatment concerning several public contracts in general and Public Procurement contracts especially.

### 2. Principle of transparency

In his decision Telaustria Verlag, the Court pointed out that, even though service concessions are excluded from the scope of the Procurement directives, they are nevertheless bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-



discrimination on ground of nationality, in particular. Furthermore, the principle of non-discrimination implies an obligation on transparency. That obligation of transparency consists in ensuring, for the benefit of an potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of Procurement procedures to be reviewed.

In the Coname case, the Court of Justice has clarified the transparency requirement. The transparency principle requires an awarding authority to insure that an undertaking located in the territory of a different member state can have access to appropriate information regarding that concession before it is awarded, so that, if that undertaking has swished, it would have been in a position to express its interest in obtaining that concession.

As such, I don't think that the principle of transparency can be considered as a general principle of community law. Indeed, the Court of Justice did never confirm such general principle. Most of the decisions of the Court of Justice speak about an obligation or a requirement of transparency and not of a principle.

### **§3 – The field of application**

The jurisprudence of the Court of Justice shows that the principles of equality and transparency can be applied to all kind of contracts concluded by an authority.

If an authority has the possibility to discriminate persons or companies of another member state by awarding a contract, the principles of equality and transparency are applicable.

Different decisions of the Court of Justice confirm that the principles are applicable to all Public Procurement contracts, above or below the directives thresholds, to concession contracts, . . .

## **§4 – Application**

In this paragraph, I examine which are the concrete implications of the principles of equality and transparency for the award of public contracts.

### **1. In general**

The principles of equality and transparency are used by the Court of Justice to interpret the existing rules of law (directives and treaty) and to fill up the gaps in those same rules. They enable the Court to develop a notion of the rule of law appropriate to the community polity and at the same time insure conceptual and ideologic continuity from the legal systems of the member states.

### **2. Specific obligations**

(a) The obligation for an award procedure?

In this first point, I examine if the principles of equality and transparency implicate an obligation to hold an award procedure.

In the Coname case, the Court of Justice confirmed that the principles of equality and transparency don't implicate an obligation to hold a tender procedure. I also defend the opinion in my study that that kind of obligation can't be derived from the European Treaties and the principles of equality and transparency.

Principles and obligations can be derived from the European Treaties to a certain extend. They can't impose the Member States obligations, that they never wanted. The Directives are normally the tool to impose specific obligations. If such directives don't exist, the Member States indirectly indicate that they don't want specific obligations in that specific area. The Court of Justice is not competent to create such specific rules anyway.

The principles are mere guidelines for each member state. It's clear that the regulations of the public procurement directives can't be transposed as such to other public contracts. I don't think that there exists a kind of 'leverage principle'.

## (b) Other obligations

The principle of equality implies several other obligations, but the main obligation is that of a transparent award procedure. As mentioned above, the obligation of transparency consists in two major obligations : a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of Procurement procedures.

Question is what is meant by a sufficient degree of advertising. An award without publication may be permitted in some cases. The details of the requirements for transparency depend on the circumstances of each particular case. The requirement for advertising is subject to various exceptions and grounds of justification.

In the already mentioned Coname case, the Court of Justice stated that, in so far as the concession in question may also be of interest to an undertaking located in a Member State other than the Member State, the award, in the absence of any transparency, of that concession to an undertaking located in the latter Member State amounts to a difference in treatment to the detriment of the undertaking located in the other Member State. Because of special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in another Member State would have no interest in the concession at issue and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that may have been infringed.

Another restriction can be found in the Cassis de Dijon case: “OBSTACLES TO MOVEMENT WITHIN THE COMMUNITY RESULTING FROM DISPARITIES BETWEEN THE NATIONAL LAWS RELATING TO THE MARKETING OF THE PRODUCTS IN QUESTION MUST BE ACCEPTED IN SO FAR AS THOSE PROVISIONS MAY BE RECOGNIZED AS BEING NECESSARY IN ORDER TO SATISFY MANDATORY REQUIREMENTS RELATING IN PARTICULAR TO THE EFFECTIVENESS OF FISCAL SUPERVISION , THE PROTECTION OF PUBLIC HEALTH , THE FAIRNESS OF COMMERCIAL TRANSACTIONS AND THE DEFENCE OF THE CONSUMER” .

Transmitted to the obligation of transparency, one could defend that this principle and the obligation to advertise is not necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

### CONCLUSION

The jurisprudence of the Court of Justice has a big impact on the way authorities can award a public contract, falling out of the scope of the Public Procurement directives. National authorities are not always aware of this impact. The establishment of a single market implicates the abolition of all kind of obstacles to the free movement.

Even if transparency as a principle could be found in earlier national jurisprudence, national authorities and courts must now interpret such obligations in a different way. Tenderers must be treated equally and award procedures must be transparent in order not to effect the fundamental freedoms of the European treaty.

My suggestions would be that the Court of Justice takes also into account the original goals of the principle of equality and the obligation of transparency, the preservation of the general interest. In order, to interpret the principles a balance should be made between the economic goals of the European community and the social goals of the national authorities.