

COMMISSION INTERPRETATIVE COMMUNICATION

on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives

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INTRODUCTION

The European Community has recently adopted new directives for the award of public works, supplies and services contracts (1). They set up detailed rules on EU-wide competitive tendering procedures.

However, the Public Procurement Directives do not apply to all public contracts. There remains a wide range of contracts that are not or only partially covered by them, such as

- Contracts below the thresholds for application of the Public Procurement Directives (2);
- Contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC that exceed the thresholds for application of these Directives.

These contracts present significant opportunities for businesses in the Internal Market, particularly for SMEs and start-up companies. At the same time, open and competitive award methods help the public administrations to attract a broader range of potential bidders for such contracts and to gain from better-value offers. Ensuring the most efficient use of public money is of particular importance in view of the budgetary problems encountered in many Member States. One should also not forget that transparent contract awarding practices are a proved safeguard against corruption and favouritism.

Yet, such contracts are still in many instances directly awarded to local providers without any competition. The European Court of Justice (ECJ) has confirmed in its case-law that the Internal Market rules of the EC Treaty apply also to contracts outside the scope of the Public Procurement Directives. On various occasions, Member States and stakeholders have asked the Commission for guidance on how they should apply the basic principles deriving from this case-law.

This interpretative communication addresses the two above mentioned groups of contracts not or only partially covered by the Public Procurement Directives (3). The Commission sheds light on its understanding of the ECJ case-law and suggests best practices in order to help the Member States to reap the full benefit of the Internal Market. This communication does not create any new legislative rules. It should be noted that, in any event, interpretation of Community law is ultimately the role of the ECJ.

1 Directive 2004/18/EC, OJ L 134, 30.4.2004, p. 114 and Directive 2004/17/EC, OJ L 134, 30.4.2004, p. 1 ("the Public Procurement Directives").

2 Threshold values are set in Article 7 of Directive 2004/18/EC and Article 16 of Directive 2004/17/EC.

3 A third group of contracts not or only partially covered by the Directives are concessions. See Article 17 of Directive 2004/18/EC and Article 18 of Directive 2004/17/EC for service concessions and Articles 56 to 65 of Directive 2004/18/EC and Article 18 of Directive 2004/17/EC for works concessions. However, these are not discussed in this communication since they will be included in the follow-up to the Green Paper on Public Private Partnerships.

1. LEGAL BACKGROUND

1.1. Rules and principles of the EC Treaty

Contracting entities (4) from Member States have to comply with the **rules and principles of the EC Treaty** whenever they conclude public contracts falling into the scope of that Treaty. These principles include the **free movement of goods** (Article 28 of the EC Treaty), the **right of establishment** (Article 43), the **freedom to provide services** (Article 49), **non-discrimination and equal treatment, transparency, proportionality and mutual recognition**.

1.2. Basic standards for the award of contracts

The ECJ has developed a set of **basic standards for the award of public contracts** which are **derived directly from the rules and principles of the EC Treaty**. The principles of equal treatment and non-discrimination on grounds of nationality imply an **obligation of transparency** which, according to the ECJ case-law (5), *“consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed”* (6).

These standards apply to the award of services concessions, to contracts below the thresholds (7) and to contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC in respect of issues not dealt with by these Directives (8). The ECJ stated explicitly that *“although certain contracts are excluded from the scope of the Community directives in the field of public procurement, the contracting authorities which conclude them are nevertheless bound to comply with the fundamental rules of the Treaty”* (9).

1.3. Relevance to the Internal Market

The standards derived from the EC Treaty apply only to contract awards having a sufficient connection with the functioning of the Internal Market. In this regard, the ECJ considered that in individual cases, *“because of special circumstances, such as a very modest economic interest at stake”*, a contract award would be of **no interest to economic operators located in other Member States**. In such a case, *“the effects on the fundamental freedoms are ... to be regarded as too uncertain and indirect”* to warrant the application of standards derived from primary Community law (10).

4 In this Communication the term “contracting entity” covers both contracting authorities within the meaning of Article 1(9) of Directive 2004/18/EC and contracting entities within the meaning of Article 2 of Directive 2004/17/EC.

5 Cases C-324/98 *Telaustria* [2000] ECR I-10745, paragraph 62, C-231/03 *Coname*, judgment of 21.7.2005, paragraphs 16 to 19 and C-458/03 *Parking Brixen*, judgment of 13.10.2005, paragraph 49.

6 *Telaustria* case, paragraph 62 and *Parking Brixen* case, paragraph 49 (emphasis added).

7 See Cases C-59/00 *Bent Moustén Vestergaard* [2001] ECR I-9505, paragraph 20 and C-264/03 *Commission v France*, judgment of 20.10.2005, paragraphs 32 and 33.

8 Case C-234/03 *Contse*, judgment of 27.10.2005, paragraphs 47 to 49. The Public Procurement Directives provide only a limited set of rules for these contracts, see Article 21 of Directive 2004/18/EC and Article 32 of Directive 2004/17/EC.

9 *Bent Moustén Vestergaard* case, paragraph 20 (emphasis added).

10 *Coname* case, paragraph 20 (emphasis added).

It is the responsibility of the individual contracting entities to decide whether an intended contract award **might potentially be of interest to economic operators located in other Member States**. In the view of the Commission, this decision has to be based on an **evaluation of the individual circumstances of the case**, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices, etc.) and the geographic location of the place of performance. If the contracting entity comes to the conclusion that the contract in question is relevant to the Internal Market, it has to award it in conformity with the basic standards derived from Community law.

When the Commission becomes aware of a potential violation of the basic standards for the award of public contracts not covered by the Public Procurement Directives, it will **assess the Internal Market relevance of the contract in question in the light of the individual circumstances of each case**. Infringement proceedings under Article 226 EC Treaty will be opened only in cases where **this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market**.

2. BASIC STANDARDS FOR THE AWARD OF CONTRACTS RELEVANT TO THE INTERNAL MARKET

2.1. Advertising

2.1.1. *Obligation to ensure adequate advertising*

According to the ECJ (11), the principles of equal treatment and of non-discrimination imply an **obligation of transparency** which consists in ensuring, for the benefit of any potential tenderer, **a degree of advertising sufficient to enable the market to be opened up to competition.**

The obligation of transparency requires that an **undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded**, so that, if it so wishes, it would be **in a position to express its interest** in obtaining that contract (12).

The Commission is of the view that the practice of contacting a number of potential tenderers would not be sufficient in this respect, even if the contracting entity includes undertakings from other Member States or attempts to reach all potential suppliers. Such a selective approach cannot exclude discrimination against potential tenderers from other Member States, in particular new entrants to the market. The same applies to all forms of "passive" publicity where a contracting entity abstains from active advertising but replies to requests for information from applicants who found out by their own means about the intended contract award. A simple reference to media reports, parliamentary or political debates or events such as congresses for information would likewise not constitute adequate advertising.

Therefore, the only way that the requirements laid down by the ECJ can be met is by **publication of a sufficiently accessible advertisement prior to the award of the contract.** This advertisement should be **published by the contracting entity in order to open the contract award to competition.**

2.1.2. *Means of advertising*

The contracting entities are responsible for deciding the most appropriate medium for advertising their contracts. Their choice should be guided by an assessment of the **relevance of the contract to the Internal Market**, in particular in view of its subject-matter and value and of the customary practices in the relevant sector. **The greater the interest of the contract to potential bidders from other Member States, the wider the coverage should be.** In particular, adequate transparency for contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC that exceed the thresholds for application of these Directives will typically require publication in a medium with wide coverage. Adequate and commonly used means of publication include: 11 *Telaustria* case, paragraph 62 and *Parking Brixen* case, paragraph 49. 12 *Coname* case, paragraph 21.

- Internet

The wide availability and ease of use of the World Wide Web makes contract advertisements on websites far more accessible, especially for undertakings from other Member States and for SMEs looking for smaller contracts. The Internet offers a large choice of possibilities for advertising of public contracts:

Advertisements on **the contracting entity's own website** are flexible and cost-effective. They should be presented in a way that potential bidders can easily become aware of the information. Contracting entities might also consider publishing information on forthcoming contract awards not covered by the Public Procurement Directives as part of their **buyer profile** on the Internet (13). **Portal websites** specifically created for contract advertisements have a higher visibility and can offer increased search options. In this respect, the setting-up of a specific platform for low value contracts with a directory for contract notices with subscription for e-mail constitutes a best practice, making full use of the Internet's possibilities in order to increase transparency and efficiency (14).

- National Official Journals

National journals specialising in public procurement announcements, newspapers with national or regional coverage or specialist publications

- Local means of publication

Contracting entities may still use local means of publication such as local newspapers, municipal announcement journals or even notice boards. However, such means ensure only strictly local publication, which might be adequate in special cases, such as very small contracts for which there is only a local market.

- Official Journal of the European Union/TED (Tenders Electronic Daily)

Publication in the Official Journal is not mandatory but could be an interesting option, particularly for larger contracts.

2.1.3. Content of advertising

The ECJ has explicitly stated that the requirement of transparency does not necessarily imply an obligation to hold a formal invitation to tender (15). The advertisement may therefore be limited to a short description of the **essential details of the contract to be awarded and of the award method** together with an invitation to contact the contracting entity. If necessary, it might be completed by additional information available on the Internet or to be obtained upon request from the contracting authority.

The advertisement and any additional documentation should provide as much information as an undertaking from another Member State will **reasonably need to make a decision** on whether to express its interest in obtaining the contract.

13 See Annex VIII to Directive 2004/18/EC and Annex XX to Directive 2004/17/EC.

14 See for instance the newly created opportunities portal for lower value contracts in the United Kingdom.

15 Coname case, paragraph 21.

As mentioned in point 2.2.2 below, the contracting entity may take measures to limit the number of applicants invited to submit an offer. In this case, the contracting entity should provide adequate information on the mechanisms applied to select the applicants shortlisted.

2.1.4. Procedures without prior publication of an advertisement

The Public Procurement Directives contain specific derogations allowing, under certain conditions, procedures without prior publication of an advertisement (16). The most important cases concern situations of **extreme urgency** due to unforeseeable events and contracts which may, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, be **executed only by one particular economic operator**.

In the view of the Commission, the relevant derogations may be applied to the award of contracts not covered by the Directives. Therefore, contracting entities may award such contracts without publishing a prior advertising, provided they meet the conditions laid down in the Directives for one of the derogations (17).

2.2. Contract award

2.2.1. Principles

The ECJ stated in the *Telaustria* judgment that the obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition and the **impartiality of the procedures** to be reviewed. The guarantee of a fair and impartial procedure is the necessary corollary of the obligation to ensure a transparent advertising.

It follows that the award has to be in line with the **rules and principles of the EC Treaty** so as to afford fair conditions of competition to all economic operators interested in the contract (18). This can be best achieved in practice through:

- Non-discriminatory description of the subject-matter of the contract

The description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production unless such a reference is justified by the subjectmatter of the contract and accompanied by the words "or equivalent" (19). In any case, it would be preferable to use more general descriptions of performance or functions.

16 Article 31 of Directive 2004/18/EC and Article 40(3) of Directive 2004/17/EC.

17 See Opinion of Advocate General Jacobs in Case C-525/03 *Commission v Italy*, paragraphs 46 to 48.

18 See Case C-470/99 *Universale-Bau AG* [2002] ECR I-11617, paragraph 93.

19 See *Bent Moustén Vestergaard* case, paragraphs 21 to 24 and Commission interpretative communication on facilitating the access of products to the markets of other Member States, OJ C 265, 4.11.2003, p. 2. Contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC have to comply with the rules on technical specifications in Article 23 of Directive 2004/18/EC and in Article 34 of Directive 2004/17/EC if they exceed the threshold for application of these Directives. Technical specifications for such contracts have to be established prior to selection of a contractor and must be made known or available to potential bidders by means that ensure transparency and place all potential bidders on equal footing, see Opinion of Advocate General Jacobs in Case C-174/03 *Impresa Portuale di Cagliari*, paragraphs 76 to 78.

- Equal access for economic operators from all Member States

Contracting entities should not impose **conditions causing direct or indirect discrimination** against potential tenderers in other Member States, such as the requirement that undertakings interested in the contract must be established in the same Member State or region as the contracting entity (20).

- Mutual recognition of diplomas, certificates and other evidence of formal qualifications

If applicants or tenderers are required to submit certificates, diplomas or other forms of written evidence, documents from other Member States offering an equivalent level of guarantee have to be accepted in accordance with the principle of mutual recognition of diplomas, certificates and other evidence of formal qualifications.

- Appropriate time-limits

Time-limits for expression of interest and for submission of offers should be long enough to allow undertakings from other Member States to make a meaningful assessment and prepare their offer.

- Transparent and objective approach

All participants must be able to know the applicable rules in advance and must have the certainty that these rules apply to everybody in the same way.

2.2.2. *Limit on the number of applicants invited to submit an offer*

Contracting entities may take measures to limit the number of applicants to an appropriate level, provided this is done in a **transparent and non-discriminatory manner**. They can, for instance, apply **objective factors** such as the experience of the applicants in the sector concerned, the size and infrastructure of their business, their technical and professional abilities or other factors. They may even opt for **drawing lots**, either exclusively or in combination with other selection criteria. In any event, the **number of applicants shortlisted** shall take account of the need to ensure adequate competition.

Alternatively, contracting entities might consider **qualification systems** where a **list of qualified operators** is compiled by means of a sufficiently advertised, transparent and open procedure. Later, for the award of individual contracts falling within the scope of the system, the contracting entity may select the operators to be invited to submit an offer from the list of qualified operators on a non-discriminatory basis (e.g. by drawing in rotation from the list).

2.2.3. *Contract award decision*

It is important that the final decision awarding the contract complies with the procedural rules laid down at the outset and that **the principles of non-discrimination and equal treatment are fully respected**. This is particularly relevant to procedures providing for negotiation with shortlisted tenderers. Such negotiations should be organised in a way that gives all tenderers

20 However, the successful tenderer may be required to establish certain business infrastructure at the place of performance if this is justified by the specific circumstances of the contract.

access to the same amount of information and excludes any unjustified advantages for a specific tenderer.

2.3. Judicial protection

2.3.1. *Principles*

In the *Telaustria* judgment the ECJ stressed the importance of the possibility to **review the impartiality of the procedure**. Without an adequate review mechanism, compliance with the basic standards of fairness and transparency cannot be effectively guaranteed.

2.3.2. *Directives on review procedures*

The Directives on review procedures (21) cover only contracts falling within the scope of the Public Procurement Directives (22). This means that in the present context they apply only to contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC which exceed the thresholds for application of these Directives. Review procedures for such contracts have to comply with the Directives on review procedures and the relevant case-law. These principles remain unchanged in the recently adopted proposal for a new Directive on review procedures (23).

2.3.3. Basic standards derived from primary Community law

With regard to contracts below the thresholds for application of the Public Procurement Directives it has to be taken into account that under ECJ case-law (24) individuals are entitled to **effective judicial protection of the rights they derive from the Community legal order**.

The right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. In the absence of relevant Community law provisions, it is up to the Member States to provide the necessary rules and procedures guaranteeing effective judicial protection.

In order to comply with this requirement of effective judicial protection, at least **decisions adversely affecting a person having or having had an interest in obtaining the contract**, such as any decision to eliminate an applicant or tenderer, should be subject to review for possible violations of the basic standards derived from primary Community law. To allow for an effective exercise of the right to such a review, contracting entities should state the grounds for decisions which are open to review either in the decision itself or upon request after communication of the decision (25).

In accordance with the case-law on judicial protection, the available **remedies** must not be less efficient than those applying to similar claims based on domestic law (principle of

21 Directive 89/665/EEC, OJ L 395, 30.12.1989, p. 33 and Directive 92/13/EEC, OJ L 76, 23.3.1992, p. 14.

22 See Article 72 of Directive 2004/17 and Article 81 of Directive 2004/18.

23 Commission Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, COM(2006) 195 final.

24 See Case C-50/00 *Unión de Pequeños Agricultores* [2002] ECR I-6677, paragraph 39 and Case 222/86 *Heylens* [1987] ECR 4097, paragraph 14.

25 See *Heylens* case, paragraph 15. (equivalence) and must not be such as in practice to make it impossible or excessively difficult to obtain judicial protection (principle of effectiveness) (26).

26 See for this principle Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, paragraph 83 and Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 55.