RECENT CJEU CASE LAW
Core notions, principles and exemptions

Roberto Caranta
2014: A VINTAGE YEAR!

- The new Directives
- 10 Judgements on Public Contracts
- A LOT from Italy 😊
CORE NOTIONS

There are still doubts as to some fundamental notions, such as for instance:

• Public contract (objective and subjective)
• Economic operator
• Transfer of risk (concessions)

HOWEVER,

• Not much on this is the case law,
• rather in the new directives

STILL: 2 interesting cases
MORE ON IN HOUSE: Case C-15/13

Technische Universität Hamburg-Harburg

- Technische Universität Hamburg-Harburg directly awarded service contract to Hochschul-Informations-System GmbH (‘HIS’);

- HIS is limited company governed 1/3 of capital Federal Rep. Germany, 2/3 16 German Länder (City of Hamburg 4.16%).
DIRECT AWARD ILLEGAL: NOT IN HOUSE

- **Horizontal in-house possible** in theory, BUT
- University is autonomous, is not under similar control of Hamburg (HIS is) because this cannot be recognised in case of "partial control" (even if the contract fell under THAT control);
- Fact that 2 out of 10 of members of HIS supervisory board are named a proposal from the Conference of Rectors not considered;
- No ‘municipal’ co-operation (HIS not directly entrusted with SIG);
- NOW Article 11(2) Dir. 2014/24.
Case C-568/13 AOU Careggi-Firenze

- Regione Lombardia issued invitation to tender for service contract for processing data for external quality control in relation to medicinal products;
- AOU Careggi-Firenze is first, principally as a result of the price at which it offered its services, equivalent to 59% lower than that of the second placed tenderer;
- Abnormally low tender ruled out after investigation.
AOU Careggi-Firenze: questions to the CJEU (rewarded)

- May national legislation exclude entities receiving public funding on a permanent basis and is directly contracted to provide a public service?
- Does EU law preclude national legislation allowing such an entity to submit a tender which cannot be matched by any competitors as a result of the public funding which it receives, when no corrective measures has been taken to prevent distortions of competition?
First question

ECONOMIC OPERATOR means any natural or legal person, including a public body, which offers services on the market in return for remuneration on the market, even occasionally.

CoNISMa, paragraph 38; and Ordine degli Ingegneri della Provincia di Lecce and Others, paragraph 26.
Second (and trickier) question

- CS worrying of the gen. pr. freedom of competition, non-discrimination and proportionality and doubting rules on abn. low tenders adequate for preventing distortions of competition,

HOWEVER, according to CJEU

- EU legislature did not make provision for mechanisms other than that on abn. low tenders;

- tenderer cannot be excluded on the sole ground that, as a result of public subsidies, may submit significantly lower prices.
Second (and trickier) question cont.

- Existence of aid incompatible with the Treaty may be used to exclude tenderers in receipt of such aid (ARGE and CoNISMa referred again);
- Possibility to reject abn. low tender not limited solely to the case in which the low price proposed is explained by unlawful State aid;
- "That possibility is more general in character";
- CA may take into consideration for the purpose of ensuring healthy competition all the factors relevant in the light of the service at issue. ???
GENERAL PRINCIPLES

Treaty freedoms - Bundesdruckerei

Plenty of cases on exclusions

1. Case C/358/12 Cons. Stab. Libor
2. Case C-42/13 Cartiere dell’Adda
3. Case C-470/13 Generali-Providencia and also
4. Case C-440/13 Croce Amica

NB: often below the thresholds contracts
C-549/13 Bundesdruckerei
taking the benefits of the internal market

• Obligation to guarantee payment of a minimum wage to the employees of subcontractors of tenderers, provided for by legislation of the Land to which the CA belongs;

• Unlike in Rüffert, Directive 96/71/CE is not applicable (no posting of workers)
C-549/13 Bundesdruckerei: cont.

- A minimum wage on subcontractors established in an other MS constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State;
- Therefore capable of constituting a restriction under Article 56 TFEU;
- Might be justified so that employees are reasonably paid to avoid 1) ‘social dumping’ 2) penalisation of competitors granting reasonable wages; HOWEVER
• Rules apply solely to public contracts and therefore not appropriate for achieving that objective (Rüffert);
• Anyway, in so far as they cover a situation were employees carry out a public contract in a different MS in which minimum wage rates are lower they are disproportionate.
THE NEW DIRECTIVES

• Requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, *should remain* at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive (Rec. 98 of Dir. 2014/24; wait for Case C-115/14, *RegioPost*, pending);

• Services should be considered to be provided at the place where the characteristic performances are executed (Rec. 38 of Dir. 2014/24; instance of call centres)
Case C-358/12 Cons. Stab. Libor proportionality again!

- Comune di Milano issued an invitation to tender for ‘extraordinary maintenance and work to install intruder alarm systems’ (value above EUR 4 M but below THR);
- LIBOR excluded for having (yet) failed to pay EUR 278 of social security contributions;
- IT legislation setting a de minimis to 5% or less than EUR 100
- Referring court considering
  1. cross-border interest present
  2. potential breach principles of proportionality and of equal treatment
A classic fundamental freedoms analysis

• EU wants to ensure the widest possible participation by tenderers

• provisions excluding those having committed serious infringements of nat. rules on soc. security contributions may compromise the widest possible participation

• as such they amount to a restriction within the meaning of Articles 49 TFEU and 56 TFEU

HOWEVER, may be justified in so far pursue a legitimate objective in the public interest and to the extent that comply with the principle of proportionality (suitable for securing the attainment of that objective and not going beyond what is necessary in order to attain it).
Analysis

- Exclusion of those not paying soc. contr. is to ensure the reliability, diligence and responsibility of the tenderer and proper conduct in relation to employees.
- Which is a legitimate objective in the public interest;
- Suitable for securing the attainment of the objective pursued, in so far as the failure by an economic operator to pay social security contributions gives an indication of the lack of reliability etc;
- Precise threshold for the exclusion ensures equal treatment of tenderers and legal certainty, a principle which must be complied with for a restrictive measure to be proportionate.
Respecting MS discretion

- Article 45(2) Directive 2004/18/EC leaves the application of the cases of exclusion mentioned to the assessment of MS, meaning
- No uniform application at EU level of grounds of exclusion; MS may choose not to apply those grounds of excl. at all or to incorporate them into nat. law with varying degrees of rigor;
- That is all the more true with regard to contracts below threshold laid and are not subject to the strict special procedures laid down in the directive.
Professional misconduct: Case C-470/13 Generali-Providencia

- Generali-Providencia Biztosító Zrt excluded because of previously committed non-criminal infringement of the national competition rules;
- Below THR insurance contract, but same rules apply according to H law;
- CJ requires nat. court to assess whether cross-border.
Breach of competition rules as professional misconduct

- Operator guilty of grave professional misconduct proven by any means may be excluded under Article 45(2)(d) Dir. 2004/18;
- ‘Professional misconduct’ covers all wrongful conduct impacting on the professional credibility of the operator;
- Infringement of the competition rules, in particular where that infringement was penalised by a fine, constitutes a cause for exclusion.
Below & new Directive

• Exclusion possible under Dir. 2004/18 must **a fortiori** be justified for below THR contracts which are not subject to the strict special procedures laid down in directive (Libor ref. to);

• Rec. 101 to new Directive expressly refer to exclusion for serious professional misconduct, such as infringement of the competition rules, as such misconduct may render an economic operator’s integrity questionable;

• SEE also Article 57(4)(d) new Directive.
Case C-42/13 Cartiera dell’Adda equal treatment and transparency

- Contract for the supply of paper from separate municipal solid waste collections (where is the procurement?)
- Excluded because a statement relating the person designated as technical director was not submitted with the bid;
- Notice provided for exclusion in case the statement was missing;
- Procedure cancelled since the other tenderer too was excluded;
- The person concerned had no criminal record and anyway was mistakenly mentioned as tech dir
Upholding formalities

• CA must comply strictly with the criteria which it has itself established (Manova, C-336/12);
• That strict requirement has its origins in the principle of equal treatment and the obligation of transparency deriving from that principle.
The catechism of equality & transparency

- **First**, the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their bids, which therefore implies that the bids of all tenderers must be subject to the same conditions.

- **Second**, the obligation of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules must be drawn up in a clear, precise and unequivocal manner so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and, second, CA is able to ascertain whether the bids satisfy the criteria (*Succhi di frutta*, C-496/99 P).
What room left for irregularities?

- Articles 45 and 2 of Dir. 2004/18 allow exclusion of a tenderer that omitted a statement;
- In so far as CA considers (in the notice) omission is not a purely formal irregularity, it cannot allow the tenderer subsequently to remedy the omission after the expiry of the deadline;
- Article 51 cannot be interpreted as permitting CA to accept any rectification of omissions which, as expressly provided for in the notice, must result in the exclusion of the bid.
Artcle 56 (General principles)

1. Contracts shall be awarded provided CA has verified that all of the following conditions are fulfilled:

(a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents

See also Art. 57(2) on Eur. Proc. Passport
Withdrawal of invitation to tender: Case C-440/13 Croce Amica One Italia

• Transportation by road of organs, tissue, biological material, surgical equipment and patients for transplant operations;
• 3 out of 4 companies rejected by the selection committee after the technical bids had been evaluated;
• Croce Amica tender found anomalous;
• Preliminary criminal law investigations opened against the legal representative of Croce Amica for fraud and intentionally false statements;
• CA starts procedure for the cancellation of the invitation to tender in accordance with the power available to the administration to withdraw, suspend or modify its own measures.
Transparency and equal treatment

• Withdrawal of invitation to tender must comply with Articles 41(1) Dir. 2004/18;

• Article 41(1) requires CA to inform tenderers ASAP of such decisions and to state the grounds for the decision,

• However, no EU substantive or formal conditions for a decision; more specifically this need not to be limited to exceptional cases or necessarily to be based on serious grounds;

• Duty to give reasons ensures a minimum level of transparency and hence compliance with the principle of equal treatment (and JR).
EXEMPTIONS: SOCIAL SERVICES
Case C-113/13 ASL 5 Spezzino

- Regione Liguria concluded a framework agreement with bodies representing voluntary associations, on the regulation of relations between the health and hospital authorities;
- ASL No 5 implemented framework agreement concluding agreements relating to urgent and emergency ambulance services with the voluntary associations affiliated to ANPAS and the Croce Rossa Italiana;
- Unclear whether urgent & emergency prevalent (List A or B)
CONSIGLIO DI STATO HAVING COMPETITION CONCERNS AGAIN!

• If definition of economic operator does not exclude bodies which are not primarily for profit (see Careggi), CAs should not use voluntary associations for the provision of certain services, to the exclusion of for-profit undertakings;

• OTHERWISE those associations would be given the twofold right to be both exclusively demanded to provide services and take part to calls for tender;

• THIS EVEN MORE SO if voluntary associations could, in addition, obtain financial resources from the agreements reserved for them, which would enable them to submit attractive offers in public tendering procedures.
USUAL INTERNAL MARKET ANALYSIS PATTERN

• The general principles of transparency and equal treatment applicable to a framework agreement;
• Award, in the absence of any transparency, to an undertaking located in the same MS as CA amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but are situated in another MS;

HOWEVER
Recourse on a preferential basis to the voluntary organisations covered by the agreement seeking specifically to ensure that that public service is provided in an economically balanced manner for budgetary purposes MAY BE OBJECTIVELY JUSTIFIED

MS may consider that a social welfare system necessarily implies that the admission of private operators to that system as providers of social services is conditioned upon their being non-profit-making (Sodemare 1997)
CONDITIONS (AND NEW DIRECTIVE)

• They really must be not for profit and using mostly volunteers.

NEW DIR:

• Art. 10 (h) - non-profit organisations or associations
• Art. 77 reserved contracts - organisations fulfilling a number of detailed conditions
CONCLUSIONS 1

• Core notions still somewhat unclear
• General principles v. relevant: cases focusing on them more than on specific provisions
• BUT CJEU seen pouring cold water on some of nat. courts’ enthusiasm
• HOWEVER, analysis of whether limitations proportionate is central
• Exeptions the next frontier for elusion, abuses and litigation