

POSITIVE OBLIGATIONS DERIVED FROM THE EU TREATIES

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ABSTRACT. This paper examines some specific issues relevant to awarding a contract that falls within the Public Sector Directive and analyses whether similar obligations as under the Public Sector Directive can be said to derive from the principles of the Treaties; therefore, making them applicable when awarding certain types of contracts not covered, or not fully covered, by the Public Sector Directive.

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1. INTRODUCTION

The EU Treaties as well as the EU Procurement Directives apply to certain public contracts when a contracting authority wishes to entrust a public task to a third party.

According to the Court of Justice such contracts are regulated by secondary EU legislation to: *'...ensure the free movement of services and the opening-up to undistorted competition in all the Member States'*.¹

Therefore, adopting common procedures applicable for contracting authorities when awarding certain public contracts was found appropriate. However, for various reasons, not all types of public contracts fall within the Public Sector Directive. Three types of contracts that are either not covered, or not fully covered, by the Public Sector Directive are service concession contracts, contracts with a value falling below the thresholds in the EU Procurement Directives (henceforth, 'contracts below the thresholds'), and contracts regarding services listed in Annex II B to the Public Sector Directive (henceforth 'B-service contracts').

The above-mentioned contract types are referred to as 'the three types of contracts'.

The Public Sector Directive does not cover these types of contracts because the EU legislator did not intend for it to be necessary to follow the detailed procedural rules in the Directive when awarding one of these types of contracts. Nevertheless, not covering these contracts fully by the Public Sector Directive does not mean that these types of contracts are entered into less frequently or are not of interest to economic operators. Indeed, service concession contracts are essential, particularly when contracting authorities need to mobilise private capital and know-how in order to supplement scarce public resources. In this context these contracts are an attractive means executing projects of public interest.² Furthermore, the value of contracts below the threshold amounts to 12 percent of the total government and utility expenditure on works, goods and services.³ Finally, as concerns B-service contracts regarding sectors such as

education, health and social services these amount to 36 percent of the total government and utility expenditure on works, goods and services.⁴

Consequently, the three types of contracts are frequently of interest to economic operators (domestic as well as non-domestic, depending on the contract in question). The Commission even calls the lack of secondary law for service concession contracts a loophole, that gives rise to: '*serious distortion of the internal market, in particular limiting access by European business (...) to the economic opportunities offered by concession contracts.*'⁵

Contracting authorities are obliged to follow the EU Treaties and the principles derived there-in when awarding one of the three types of contracts. The case law from the Court of Justice has shown that the principles of the EU Treaties imply certain positive obligations for contracting authorities that must be observed before a contract can be awarded and signed.⁶ However, the precise content of these obligations is unclear. Overall, the principles of the EU Treaties create a separate regime for the three types of contracts, which aim to ensure that contracting authorities protect the interest of economic operators by creating competition for the contract and guaranteeing that economic operators are treated equally in tandem with the overall aim of the EU procurement rules.

The application of the principles of the Treaties might lead to obligations similar to those required under the Public Sector Directive because many of the provisions in the Procurement Directives are merely expressions of the principles. Thus, some of the requirements in the Public Sector Directive may be 'transferred' to apply when entering into one of the three types of contracts, or the Court of Justice may find inspiration in the Procurement Directives as to which requirements apply when interpreting the principles of the Treaties. However, even though a few cases have appeared before the Court of Justice on specific matters,⁷ whether obligations similar to those in the Public Sector Directive will apply when awarding one of the three types of contracts remains to be seen.

This paper examines some specific issues relevant to awarding a contract that falls within the Public Sector Directive and analyses

whether similar obligations as under the Public Sector Directive can be said to derive from the principles of the Treaties; therefore, making them applicable when awarding one of the three types of contracts. The paper will not discuss whether the principles of the Treaties contain an obligation for contracting authorities to advertise the contract beforehand.

2. ARE THE RULES OF THE PUBLIC SECTOR DIRECTIVE TRANSFERRABLE?

For various reasons the Public Sector Directive does not cover the three types of contracts. Therefore, the most logical conclusion is that the rules of the Public Sector Directive do not apply for such types of contracts. On the other hand, arguably many of the provisions in the Directive are merely expressions of the principles of the Treaties; therefore, they apply for such contracts.

Advocate General *Fennelly* argued in her opinion to *Telaustria* that the transparency obligation does not ‘... require the awarding entity to apply by analogy the provisions of the most relevant of the Community procurement directives.’⁸ Others have suggested that some requirements could ‘...be imported into the Treaty, also, through the Treaty’s transparency obligation.’⁹ Thus, the court may find inspiration in secondary law (here, the Public Procurement Directives) to apply similar obligations under primary law (here, the principles of the Treaties). *Treumer* and *Werlauf* call this use of secondary law the leverage principle.¹⁰

The question of whether some rules in the Public Sector Directive apply has been the subject of a few cases on specific matters before the Court of Justice. In *Commission v. Ireland*, the question of weighting award criteria for a B-service contract was being disputed, and the Court of Justice stated in that regard that

‘...it would be necessary for the specific rule governing the prior weighting of the award criteria for a contract falling within the ambit of Annex II A to the Directive to be regarded as constituting a **direct consequence of the fact that the**

contracting authorities are required to comply with the principle of equal treatment and the consequent obligation of transparency [emphasis added].¹¹

Thus, emphasising that the rules could not apply as a consequence of the Directive, but must be found within the Treaties (which the Court found that it did not).

Another recent case *Strong Segurança SA*, addressed whether Article 47(2) of the Public Sector Directive applied when entering into a B-service contract. In the case, the undertaking Strong Segurança SA had submitted a tender and based its financial standings on a third undertaking. According to Article 47(2) of the Public Sector Directive, this action is permissible for contracts falling within the Directive as long as the economic operator can prove *'that it will have at its disposal the resources necessary, (...).'* Portugal had not provided for the use of Article 47(2) in its national legislation for B-services (which was not required).

Regarding whether the provision was applicable for B-services as a consequence of the Directive, the Court stated that *'... there is no indication from the wording of the provisions of Directive 2004/18, or from its spirit and general scheme, that the subdivision of the services into two categories is based on a distinction between the "substantive" and "procedural" provisions of that directive'* [emphasis added].¹² Thus, according to the Court, neither the wording nor the spirit of the Directive required that Article 47(2) apply to B-services.

Therefore, the relevance of the debate on the applicability of other provisions in the Public Sector Directive could be questioned because the Court clearly stated that the provisions of the Public Sector Directive do not apply to B-services.

However, even though the Court found that the Directive did not apply, it went on to examine whether the principles of transparency and equal treatment could consequently result in the application of Article 47(2) to the case (if the contract was of 'certain cross-border interest'). Thus, the Court acknowledges the possibility that

requirements similar to the rules in the Directive apply as a consequence of the principles of the Treaties.

Regarding the principle of transparency, the Court found that ‘... *the fact that an economic operator cannot rely on the economic and financial capacities of other entities **has no connection with the transparency of the contract award procedure***’ [emphasis added].¹³ Thus, relying on another undertaking for financial capacity could not be derived from the principle of transparency and ‘...*application of Articles 23 and 35(4) of Directive 2004/18 during the contract award procedures relating to such “non-priority” services is **also intended to ensure the degree of transparency that corresponds to the specific nature of those contracts***’ [emphasis added].¹⁴ By stating that the Directive already decided the amount of transparency for B-services, it is doubtful that the Court will interpret other provisions in the Procurement Directives to apply as a consequence of the principle of transparency. However, at the same time, the Court did not make any reference to the transparency obligation (as this was already complied with). Therefore, it can be argued that the Court might not have ruled out exhaustively that some rules in the Directive could apply as a consequence of the principle of transparency.

Regarding the principle of equal treatment, the Court found that not applying Article 47(2) could not give rise ‘...*to any discrimination, direct or indirect, on the basis of nationality or place of establishment*’ and that if Article 47(2) could be interpreted to derive from the principle of equal treatment, such interpretation could result in other obligations in the Public Sector Directive applying, such as ‘...*the qualitative criteria for the selection of candidates (Articles 45 to 52) as well as the contract award criteria (Articles 53 to 55)*.’¹⁵ Moreover, the Court found that such obligations would risk making ineffective the distinction between A-services and B-services laid down in the Directive.¹⁶ Thus, the Court found that Article 47(2) was not a consequence of the principle of equal treatment.

The Court of Justice seems to conclude that since services are divided into two categories, the rules in the Public Sector Directive are not applicable to B-services. Nevertheless, the Court still indicates that the principles of transparency and equal treatment could lead to some obligations. However, for the rules of the Directive to apply, they

must be a concrete consequence of the principles of equal treatment and transparency; furthermore, the Court doubted that selection and award criteria could be such a consequence.

With respect to the result, I find the Court's approach in the case to be correct. Article 47(2) is a precise provision that does not leave much discretion in its interpretation; therefore, such a provision cannot be derived from the principles of the Treaties. However, had the Court come to the opposite conclusion; this would perhaps not have been surprising, as the Court was already willing to impose a transparency obligation when awarding such contracts (The *Telaustria* requirement to ensure a "degree of advertising"). Therefore, the Court might have concluded differently regarding other requirements of the Directive. Even though the question is highly relevant, the Court ruled without an opinion from an Advocate General.

The Court of Justice's ruling could be interpreted as its way to stop the development of a secondary regime for contracts outside the Directive. After *Telaustria*, many had criticised the Court for creating obligations that were not found within secondary legislation. Thus, *Strong Segurança SA* can be said to show that the Court has sought to stop the development of placing obligations on contracting authorities when awarding a contract that does not fall within the Directive.

Nevertheless, despite the above cases, the question remains as to whether some of the elements contained in the Directive are already a consequence of the principles of the Treaties. For example, in *SECAP*,¹⁷ the Court of Justice could be said to have found inspiration in its case law and the rules of the Public Sector Directive. In the case, an Italian court asked the Court of Justice whether the principles of the Directive's provision on abnormally low tenderers also applied to a contract that fell below the thresholds. According to Article 55 of the Public Sector Directive, a contracting authority can reject a tender that appears abnormally low, but not until the tender has been verified to be abnormally low. Thus, before rejecting the tender, the contracting authority is required to request explanations from the tenderers as to why the tender appears low. National Italian legislation stated that a contracting authority was obliged to reject

tenderers identified as abnormally low on the basis of a certain mathematical threshold. Despite the fact that there can be many reasons why a contracting authority wishes not to award a contract to a tenderer, with a tender, which is abnormally low (for example the risk of non-performance if the tenderer is bankrupt or similar), the contracting authority had in the case not rejected such a tenderer. The Court of Justice found that even though the contract fell below the thresholds, if a contract is of certain cross-border interest, the contracting authority was not permitted to exclude the apparently abnormally low tender based on a '*...mathematical criterion laid down by the national legislation without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those.*'¹⁸

The Court based its ruling on the fundamental rules of the Treaty on freedom of establishment and freedom to provide services and the general principle of non-discrimination and, thus, not on the rules of the Public Sector Directive. Even though the ruling was based on the Treaty's principles, that the Court found inspiration in the case law applicable to contracts falling within Directive 2004/18/EC could be argued. The Directive does not allow the rejection of a tender that appears abnormally low before verifying the reason for the tender being low. Thus, the Court 'transferred' this situation to outside the Directive, meaning that the Court does not rule out that Member States are not allowed to have national rules regarding the exclusion of abnormally low tenders in their national system, but only that the contracting authority must conduct a verification process before a tender can be rejected. Thus, the Court also found that similar requirements under the Public Sector Directive apply outside the Directive.

However, that the detailed rules in the Directive can be considered expressions of the Treaties' principles is doubtful.¹⁹ The Directives are built on the principles of the Treaties; therefore, many Court of Justice cases are ruled upon using these principles. Thus, that some of the case law can be applicable to the three types of contracts is possible. Sections 3-5 discuss and examine some of the case law for

which the Court of Justice ruled on the grounds of the provisions in the Treaties.

3. SPECIFICATIONS AND DESCRIPTION OF THE CONTRACT

The principles of transparency and equal treatment imply that tenderers must know what they are competing for and how the procedure will be conducted. Thus, information on the subject matter of and the conditions related to the contract must be clear from the outset. The amount of details depends on the type of contract; hence making general statements on the minimum amount of information that must be provided to potential tenderers is difficult. Contracting authorities have wide discretion in describing the subject matter of a contract, regardless of whether described in functional or technical terms.

To ensure equal treatment of tenderers and to create transparency, the information provided must be sufficient to convey the intent of the contract and how it will be awarded. In other words, what the contracting authority seeks to buy and how an undertaking will be awarded the contract must be clear. Thus, tenderers must be given sufficient knowledge of the contract to allow them to submit a competitive tender.

A contracting authority is obliged to follow its own requirements, as stipulated at the outset of the competition, throughout the procedure to ensure transparency and equal treatment of tenderers.²⁰ Furthermore, as the General Court has found the invitation to tender must specify clearly *'the subject-matter and the conditions of the tendering procedure, and to comply strictly with the conditions laid down, so as to afford equality of opportunity to all tenderers when formulating their tenders.'*²¹ Thus, the manner in which the tender procedure will be conducted must be clear from the outset.

The contract must be described in an objective manner to ensure equal treatment of tenderers and to avoid potential discrimination and preferences for a domestic undertaking. Furthermore, the contracting authority may not include requirements contrary to the TFEU's provisions on free movement, such as a requirement that the

tenderers should have an office at a specific location before submitting tenders,²² or referring to a specific type of make.²³ Furthermore, the contracting authority must accept certain types of documentation otherwise it would make participation more difficult for non-domestic tenderers. Thus, naturally, the principle of mutual recognition also applies when awarding one of the three types of contracts because it is found within the Treaty.

4. PROCEDURES

Changing the procedure along the way is not allowed for contracts falling within the Public Sector Directive. This was seen in the *Wallonian Bus* case. In that case, Belgium claimed that since it was not obliged to award the contract through an open procedure, it could have chosen a negotiated procedure and thereby no breach would have taken place.²⁴ However, the Court rejected such an argument and found that even though the negotiated procedure could have been used, '*...once they have issued an invitation to tender under one particular procedure, they are required to observe the rules applicable to it, until the contract has been finally awarded.*'²⁵ Thus, once a contracting authority has stated that a certain procedure will be followed, the contracting authority must ensure that the procedure is in fact applied. To ensure transparency and equal treatment, this also applies when awarding one of the three types of contracts. Thus, in the absence of a specific required procedure, stipulating from the outset how a procedure will be conducted is necessary. In that regard, the contracting authorities can choose to follow one of the procedures in the Public Sector Directive, combine the procedures or create their own procedure that fits the needs of the specific contract.²⁶

4.1. Negotiation

Whether the contracting authority is allowed to negotiate with tenderers during a competition is a topic for discussion. Negotiating can be particularly relevant in complex contracts that require a certain dialogue and flexibility to ensure that the contracting authority

gets the best value for its money. However, negotiating can have a negative impact on the competition because it creates the risk that the principle of equal treatment will be breached. Thus, guaranteeing effective competition is one reason to conclude that negotiating should not always be allowed²⁷ when entering into one of the three types of contracts.

Under the first Works Directive, the Council and the Commission issued a common statement regarding negotiations in connection with the open and restricted procedure.²⁸ According to the Council and the Commission, negotiations with candidates and tenderers in the restricted and open procedure:

'... on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out. However, discussions with candidates or tenderers may be held, but only for the purpose of clarifying or supplementing the content of their tenders of the requirements of the contracting authorities and provided this does not involve discrimination.'

The statement is linked to the Procurement Directives, but as these Directives do not explicitly ban negotiation, the statement has greatly influenced the content of the ban on negotiation.²⁹ The extent to which this statement is a direct consequence of the principle of equal treatment determines whether the content of the statement also applies to the three types of contracts. In my view, the principles of the Treaties do not permit negotiation *per se*. Negotiation can create the *risk* of breaching the principle of equal treatment, but this possibility is not sufficient to rule out permitting negotiation. This view is also in line with contracts falling under the Utilities Directive, which always allows the use of a negotiated procedure when a contracting authority has published a call for competition in the OJ.³⁰ Thus, it can be argued that at least if one of the three types of contracts has been put out for open competition, negotiating with the tenderers afterwards would also be permitted. Negotiation is also permitted under

the Defence Directive because, as stated in Recital 47 '*the contracts covered by this Directive are characterised by specific requirements in terms of complexity, security of information or security of supply. Extensive negotiation is often required to satisfy these requirements when awarding contracts.*' Thus, the principle of equal treatment does not lead to a ban on negotiation in these sectors, neither should negotiation be ruled out regarding the three types of contracts.³¹ This has also been the conclusion before the Danish Complaints Board for Public Procurement.³²

Nevertheless, if negotiation takes place, the contracting authority must provide the tenderers with the same information (principle of equal treatment). Furthermore, that contracting authorities are allowed to negotiate does not mean that substantial parts of the contract are always up for negotiating. Such a situation could result in a change in the contract, which would require a new 'competition' because other potential tenderers may have been interested in the contract if these conditions had been known beforehand.

A review of the above-mentioned statement from the Commission and the Council shows that the subject can concentrate on two aspects: negotiations on fundamental aspects and clarifying or supplementing the content of a tender. The latter will always be permitted as long as the contracting authority allows for all tenderers to correct the same types of mistakes.

The statement indicates that price and other fundamental aspects of the contract that are likely to distort the competition may not be negotiated, indicating that once a tender has been submitted, negotiation could lead to the tenderer changing parts of its tender, which may restrict the competition. The case law from the Court of Justice provided little guidance on what may be considered fundamental aspects of a contract. In *Adia*, a tenderer made a calculation error in price in its tender and was of the opinion that the Commission had breached the principle of equal treatment by refraining from contacting it to ensure that it could correct the mistake. The General Court found that the Commission had acted correctly by not asking the tenderer to correct the error. The Commission's approach was in accordance with the principle of equal treatment, since contacting the tenderer allowed it to correct

elements other than price in the tender.³³ In that regard, the Court emphasised that the calculation error was not particularly obvious, and stated that, '*Any contact made by the Commission with the applicant in order to seek out jointly with it the exact nature and cause of the systematic calculation error would have involved a risk that other factors taken into account in order to establish its tender price.*'³⁴

Possibly, the more complex a contract, the easier it is to justify that negotiation take place.

4.2. Time limits

The Public Sector Directive contains different time limits depending on the type of procedure and the amount of transparency provided for by the contracting authority. These time limits have been set to ensure equal treatment of tenderers and to give them sufficient time to prepare and submit a tender. In my view, that a particular time limit will apply cannot be derived from the principle of equal treatment. Giving tenderers the same information regarding the procedure and equally applying the time limit to all tenderers concerned is sufficient for fulfilling the principle of equal treatment.

According to the Commission's 2006 Communication, contracting authorities awarding a contract regarding a B-service or a contract below the thresholds must apply '*appropriate time-limits*', and such time limits should '*be long enough to allow undertakings from other Member States to make a meaningful assessment and prepare their offer.*' Thus, the communication does not state that a particular time limit applies.

Some Member States have stated different time limits in their national legislation, whereas other let the contracting authorities impose appropriate time limits.³⁵ Often, time limits in the national legislation are shorter than the time limits in the Public Sector Directive, and they tend to range from 10 to 15 days for applications and from 10 to 25 days for the submission of tenders. They may often be shortened in the case of electronic submission.³⁶

The principle of equal treatment requires the contracting authority not to change substantially the time limits once the procedure begins.

Changing a time limit for submission of tenders could have the effect of discriminating against potential tenderers that refrained from bidding on a contract because of a short time limit – at least in situations in which the prolongation is substantial. In a recent case before the General Court, *Evropaïki Dynamiki v. Commission*, the question of time limits for prolongation arose. The Commission prolonged a time limit by 35 days because it wanted to change the financial requirement of tenderers' turnover to make the contract available to additional tenderers. The Financial Regulation did not contain requirements related to a precise time limit for such a prolongation. The General Court found that the time limit must be extended '*long enough to allow interested parties a reasonable and appropriate period to prepare and submit their tenders (...) A time-limit which is reasonable and appropriate is a matter to be determined in the light of the circumstances of the individual case.*'³⁷ The Court found that a 35-day extension was sufficient and that the tenderers would have time to submit a bid.

The length of the time limit depends on the type of contract. A complex contract may require a longer time limit compared with a contract concerning simple delivery of goods. The Commission's new proposal for a Directive on Concession suggests setting a time limit of 52 days (see Articles 37 and 38 of the Proposal) which is the same as the current Public Sector Directive). At the same time, the proposal for a new Procurement Directive suggests reducing the time limits in the public sector to 40 days.³⁸ According to the proposal on Concessions, '*It has been decided to provide for concessions a longer deadline than in case of public contracts, given that concession contracts are usually more complex.*'³⁹ In my view, it should be for the authorities should decide on whether a longer time limit is necessary for concession contracts because such contracts may not always be complicated and may not require a longer time limit. In this regard, the contracting authority and tenderers may possibly agree on a given time limit, which is permitted under the Utilities Directive.⁴⁰

5. AWARD AND SELECTION CRITERIA

The award and selection criteria to be used and how these must be weighted and disclosed is a subject of utmost importance and relevance for contracts covered by the Public Sector Directive, as well as for contracts outside the Directive. Selection and award criteria are essential to procurement matters and are often the subject of complaints by economic operators that believe that procedures were not conducted properly. Selection and award criteria must be in line with the principles of the Treaties to ensure equal treatment and transparency, and, according to the Commission's 2006-Communication 'to afford fair conditions of competition to all economic operators interested in the contract.'

Thus, it is submitted that when awarding one of the three types of contracts, the contracting authority must use selection and award criteria, but whether the authority needs to follow the same rules as in the Public Sector Directive is questionable. To recall, the Court found in *Strong Segurança* that if Article 47(2) of the Public Sector Directive could be interpreted to constitute a consequence of the principle of equal treatment, this interpretation could cause other obligations in the Public Sector Directive to apply, such as '... *the qualitative criteria for the selection of candidates (Articles 45 to 52) as well as the contract award criteria (Articles 53 to 55).*'⁴¹ Additionally, according to the Court, such obligations would risk making ineffective the distinction between A-services and B-services as noted in the Directive.⁴² Thus, whether other provisions apply outside the Directive must be determined solely based on the principles of the Treaties. Section 5.1 discusses selection criteria and section 5.2 discusses award criteria.

5.1. Selection criteria

Selection criteria relates to requirements for the undertaking whom the contracting authority wishes to engage in a contract with. In that regard contracting authorities may establish conditions for participation relating to an undertaking's suitability to perform the task, the economic and financial standing of the undertaking or other conditions such as the technical and professional ability. Selection

criteria are a measure to ensure that the economic operator being awarded the contract is actually qualified to perform the task.

Selection criteria is not a requirement for the contracting authority to use when awarding one of the three types of contracts, but when doing so these criteria must be objective and must apply equally to all undertakings. For example, setting selection criteria is not relevant when inviting only certain economic operators to tender for a contract. In such a situation, the contracting authority is assumed to invite only economic operators that it considers qualified.

A contracting authority cannot state requirements that restrict the free movement provisions, such as the requirement to have an office at a specific location before the submission of tenders,⁴³ or imposing other requirements that non-domestic undertakings will have more difficulty fulfilling.

The principles of transparency and equal treatment call for candidates to be selected on the basis of known objective criteria. Thus, if the contracting authority wishes to use selection criteria, it must state the criteria in the tender documents. Otherwise it will make it impossible for undertakings to know whether they should bid for a given contract.

The Public Sector Directive contains provisions on exclusion of tenders and selection criteria. Some of these requirements are mandatory for the contracting authority whereas others are voluntary. Other provisions contain general requirements on the economic operators' ability to perform the contract in question.

Mandatory grounds to exclude tenderers are found in Article 45(1) of the Public Sector Directive. According to the provision, a contracting authority must exclude an economic operator under certain conditions, such as if the economic operator participated in criminal activities including corruption, fraud and money laundering. Even though the provision is relevant for obvious reasons, in my opinion the requirement cannot be found to be a consequence of the principles of the Treaties. Thus, for the contracting authority to apply requirements similar to those in Article 45(1) when awarding one of the three types of contracts will not be mandatory.

Article 45(2) of the Public Sector Directive addresses voluntary grounds for exclusion. According to this provision, the contracting authority can exclude an economic operator for several reasons, such as if the operator is bankrupt, is being wound up or has been found guilty of grave professional misconduct. The Court of Justice has stated that the previous Article 29 in the Service Directive, which is equivalent to Article 45(2), addresses the only limits to the power of the Member States in the sense that they cannot provide for grounds for exclusion other than those mentioned therein, and that power of the Member States is also limited by the '*...general principles of transparency and equal treatment.*'⁴⁴ Thus, because the Court refers to the principles of the Treaties, it is arguably only permitted to apply the grounds for exclusion stated in Article 45(2). Thus, in relation to the three types of contracts, the only grounds for exclusion based on the economic operator must be those set in Articles 45(1) and 45(2),⁴⁵ and it is submitted that contracting authorities are free to apply these grounds for exclusion because they do not go beyond the principles of the Treaties.⁴⁶

5.1.1. Allowable selection criteria

Articles 46–48 of the Public Sector Directive contain voluntary selection criteria that are linked to the technical or economic capacity of an economic operator. The contracting authority is free to apply these criteria, but other criteria may also apply. When setting criteria, the principle of proportionality, which requires that criteria are disproportionate to the subject of the contract, must be observed.

In *Serrantoni*, the Court of Justice found that the national Italian legislation that automatically excluded members of a permanent consortium from participating in a tender procedure was not valid since it constituted '*... discrimination against that form of consortium, and does not therefore comply with the principle of equal treatment.*'⁴⁷ Thus, when a contracting authority sets selection criteria, these cannot discriminate against undertakings that have organised themselves in a certain way.

When selecting candidates, the contracting authority can require that the economic operator has a certain authorisation or similar qualification. Nevertheless, when setting such a requirement, the free

movement rules must be ensured. For example, requiring that a non-domestic operator must be a member of a domestic association is not permitted.⁴⁸

Excluding a tenderer on the grounds that it did not submit the required documents and information to the contracting authority is possible. According to the Court of Justice, in *Storebælt*, '*the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.*'⁴⁹ Thus, if a tender has not complied with the stated conditions, for example, lack of submitting certain documents, it is possible to exclude such an undertaking.

Excluding tenderers has been the subject of quite a few cases in Denmark – also in relation to B-services and contracts below the thresholds. For example, in *Keto Vikar ApS v. Københavns Kommune*⁵⁰ (regarding a B-service contract), the Board found that the contracting authority had a duty to reject an application from an economic operator that did not submit a certain declaration, which was required in the tender material. If the contracting authority had accepted such a tender, the authority would, according to the Complaints Board, have acted contrary to the principle of equal treatment.

5.2. Award Criteria

5.2.1. Allowable award criteria

According to the Public Sector Directive, when awarding a contract the criterion '*lowest price*' or '*most economical advantageous tender*' must be used.⁵¹

However, that only these two award criteria were found appropriate for contracts under the Public Sector Directive (as well as the Utilities Directive) does not mean that other award criteria could not satisfy the principles of the Treaties when awarding one of the three types of contracts. However, the award criterion must be objective. Therefore, it is possible for the contracting authority to use award criterion such as '*most environmentally best tender*' or only use quality as an award

criterion. Thus, in my view the overall award criterion does not need to be 'lowest price' or 'most economical advantageous tender'.

Once a contracting authority has stated the overall award criteria, using several sub-criteria is possible. Article 53 of the Public Sector Directive lists a set of criteria to be used when awarding a contract falling within the Directive. The list is not exhaustive.⁵² When setting award criteria under the Public Sector Directive, the criteria must aim to identify the economically most advantageous tender.⁵³ However, this will not inevitably be the case for the three types of contracts because price is not required to be a criterion.

The Court of Justice held in *Concordia* that environmental criteria were permitted if they fulfilled four conditions. Firstly, they must be linked to the subject matter of the contract (section 5.2.2). Secondly, they do not confer an unrestricted freedom of choice on the authority (section 5.2.4). Thirdly, they must be expressly mentioned in the contract documents or the tender notice (section 5.2.3). Fourthly, they must comply with all of the fundamental principles of EU law, in particular the principle of non-discrimination.⁵⁴

The final criterion, which requires that the principles must comply with the fundamental principles of the Treaty, will naturally apply for the three types of contracts.⁵⁵ It is submitted that these four principles will apply when awarding one of the three types of contracts, which will be discussed below.

5.2.2. *Linked to the subject matter of the contract*

According to case law from the Court of Justice for contracts falling within the Directive, award criteria must '*be linked to the subject-matter of the contract.*'⁵⁶

Even though the Court bases this requirement on the fact that this is due to the criteria 'most economically advantageous tender',⁵⁷ it is my opinion that also when awarding one of the three types of contracts it is necessary that an award criterion must be linked to the subject matter. The Court stated in *Concordia* that '*...Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that*

provision must themselves also be linked to the subject-matter of the contract.'⁵⁸ This will also apply to the three types of contracts, because a contract must be awarded on the basis of the subject of the contract and not on the basis of who will perform the contract. For tenderers to compete on something other than the contract makes little sense. Thus, I submit that award criteria for the three types of contract must be 'linked to the subject matter of the contract.'

However, certain criteria, such as environmental and social criteria, can possibly be used to a further extent than under the Directive,⁵⁹ primarily because elements such as price do not need to be a part of the assessment, making room for other criteria such as experience, environmental and social consideration to be used instead. However, according to the *EVN* case, the principle of equal treatment requires that contracting authorities effectively verify whether tenders meet the award criteria.⁶⁰ Thus, setting some requirements on the criteria to be used as verification becomes important to guarantee the award is transparent and non-discriminatory.

Under the Public Sector Directive, in all cases the contracting authority must ensure that a selection phase and an award phase take place. An evaluation of the two phases can take place simultaneously, but '*...the two procedures are nevertheless distinct and are governed by different rules.*'⁶¹ The selection phase concerns the tenderers' suitability to perform a given task, whereas the award phase is an evaluation of the tender submitted for the specific contract in question. A highly relevant (and debated) question is whether elements linked to the suitability of a tenderer, such as tenderers' previous experience with the type of contract in question, are permitted to use during the award phase.⁶²

This question arose in *Lianakis* in which the Court found that a contracting authority could not use as an award criterion the tenderers' previous experience and manpower. Such elements could only be used during the selection phase. The Court based its ruling in *Lianakis* on the fact that an award criterion should be '*linked to the subject matter,*' which in my opinion also applies outside the Directive. Thus, arguably the Court would come to the conclusion that evaluating experience should not be permitted when awarding one of the three types of contracts. Contrary, having only one phase is

permitted when awarding one of the three types of contracts. Therefore, experience could arguably be used as a criterion since no distinct selection and award phases exist. Thus, experience could be more frequently used outside the Directive.

If a contracting authority wishes to use previous experience as an award criterion, it must be linked to the contract. Therefore, for a simple contract concerning goods, tenderers' experience is not linked to the contract; thus, such criterion cannot be used. For certain service and works contracts, taking 'experience' into consideration is often relevant. In that regard it can be relevant that the contract are performed by persons that has previous experience and not just that the undertaking has experience. Thus, it can be relevant to make an evaluation of which persons the tenderer suggest should perform the actual contract. Thus, whether drawing a strict distinction between selection and award criteria can apply under the Treaties is doubtful.⁶³ In its new proposal for a Directive, the Commission has suggested (in Article 66(2)) that contracting authorities be able to use experience in certain situations.

5.2.3. *Whether award criteria must be mentioned beforehand*

In theory, a lack of knowledge of the award criteria beforehand is equally true for all tenderers. However, not knowing the criteria beforehand also gives the contracting authority wide discretion that can lead to a more random choice and an unsuitable, non-transparent situation. Thus, it is submitted that award criteria must be present before the submission of tenders. The award criteria need not be stated in the contract notice and can be disclosed at a later stage, provided that all tenderers receive the same information beforehand. In *SIAC*, the Court found that '*... the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.*'⁶⁴

In *Universal Bau*, the Court explicitly found that tenderers must have knowledge of the award criteria, and that this requirement follows from the principles of transparency and equal treatment. Thus, it is

submitted that the principle of equal treatment and transparency provides legal basis for the requirement to disclose the award criteria.

Whether a contracting authority is required to publish its sub-criteria is a subject for discussion.⁶⁵ On the one hand, the principle of transparency requires that the sub-criteria describing the grounds on which a contract is to be awarded be stated. Setting a sole criterion such as 'the economically most advantageous tender' will not make tenderers aware of what the contracting authority are emphasising. Thus, sub-criteria must be stated.⁶⁶

Brown states that since full disclosure of elements is build on the principle of equal treatment and transparency, the Court of Justice '*...can be expected to find that the same duty of full disclosure applies equally to procurement procedures conducted under the Treaty.*'⁶⁷ I agree with this statement. The principles of transparency and equal treatment require the contracting authority to state the grounds for the award of the contract, which will allow the undertakings to be aware of what they are competing for.

5.2.4. Weighting of award criteria

Under the Public Sector Directive, a main rule is that the contracting authority weights the award criteria it intends to use, unless weighting the criteria can be justified as not possible. In the latter situation, listing the criteria in descending order is, according to Article 53(2) necessary.

A requirement that calls for stating the weighting of the criteria cannot be found to be a consequence of the principles of the Treaties. Neither the principle of equal treatment nor the principle of transparency requires such a concrete assessment, which is also in line with the prior Procurement Directives that considered a list of the criteria in priority order as sufficient.⁶⁸

In *Commission v. Ireland*, the question of weighting award criteria for a contract regarding a B-service was disputed. In the case, the contracting authority set up seven sub-criteria for awarding the contract without stating the weighting of those criteria. However, the contract notice stated that, '*the award criteria should not be*

*construed as being listed in descending order of importance.*⁶⁹ On the day of the submission of tenders, the members of the evaluation committee received an evaluation matrix suggesting specific relative weightings. The Court found that ‘... *the reference to the weighting of the award criteria in the case of a contract that is not subject to a provision such as Article 53(2) of the Directive does not constitute an obligation for the contracting authority.*’⁷⁰

The Court found that the contracting authority’s failure to give tenderers access to the weighting of the award criteria before the date of submission of the tenders was not a breach of the principle of transparency. However, the principles of equal treatment and transparency imply an obligation for the contracting authorities to interpret the award criteria in the same way throughout the procedure. Thus, the contracting authority was not permitted to change the weighting *after* the opening of the tenders.

In *Intramed A/S v. Region Nordjylland*,⁷¹ a Danish case before the Complaints Board of Public Procurement, the Board came to the opposite conclusion. Even though the decision came after the decision in *Commission v. Ireland*, the latter is not mentioned in the Complaints Board’s decision. *Intramed A/S v. Region Nordjylland* concerned a contract below the thresholds for an IT quality assurance system for registration of diabetes treatment. Regarding the award criteria, the contract notice stated that the contract would be awarded based on price, quality and the technical solution. Even though the criterion price was listed first, this criterion had the lowest weight. However, the contract notice did not state that it would be listed first. By having listed the criteria, the Complaints Board found that the contracting authority gave the tenderers the assumption that the criteria were listed in order of importance, which the Board found to be contrary to the principle of equal treatment and transparency. In *Commission v. Ireland*, the contract notice stated that the award criteria should not be construed as being listed in descending order of importance, but the various criteria were numbered 1 through 7. Thus, a small difference existed in the two cases.

In my view, whether the result in the Danish case would have turned out differently had the contract notice stated that the criteria were not listed in prioritised order is not entirely clear. *Mengozi* also argues in

his Opinion to *Commission v. Ireland* that the only reason for changing the criteria was because it was stipulated from the outset that the criteria were not listed in descending order.⁷²

I do not find the Court's approach correct. A closer look at the principle of transparency shows that tenderers must be made aware of the criteria used when awarding a contract to ensure competition and compliance with the principle of equal treatment. This is especially the case when a certain criterion has more weight than other criteria. Otherwise, competition would be irrelevant, as tenderers would not know on which grounds they are competing. Nevertheless, as it stands, the Court of Justice case law seems to allow for the weighting of the criteria not to be stated and for the criteria not to be stated by priority as long as the contract notice states that the criteria are not listed.

6. CONCLUSION

First of all, that the provisions in the Public Sector Directive do not apply to the three types of contracts unless so stated (Article 21 for B-services) must be pointed out. *Strong Segurança* and *the Commission v. Ireland* made this point clear. Thus, for obligations similar to those under the Public Sector Directive to apply to the three types of contracts, the obligations must be direct consequences of the principles of the Treaties.

The Directive's detailed requirements will not apply in the form in which they appear in the Directive, but when the contracting authority holds a competition regarding a contract outside the Directive, time limits must be long enough to allow undertakings to prepare their offers and the selection of tenderers. Moreover, the award of the contract must be based on objective criteria to create transparency and ensure equal treatment of undertakings.

Thus, it is submitted that many obligations similar to those for contracts falling under Directive 2004/18/EC apply for the three types of contracts as a consequence of the principles of the Treaties.

REFERENCES

Arrowsmith, S. (2005). S, "The Law of Public and Utilities Procurement", 2nd edn. London, UK: Sweet & Maxwell, p. 194.

Brown, A. (2007) "Seeing through transparency: the requirement to advertise public contracts and concessions under the EC treaty" *Public Procurement Law Review*, 1, 1-21.

Brown, A. (2010) "EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives" *Public Procurement Law Review* 5, 169-181

Sánchez Graells, A. *Public Procurement and the EU Competition Rules*. Oxford-Portland, OR: Hart Publishing,

Krugner, M. (2003) "The principles of equal treatment and transparency and the Commissions Interpretative Communication on Concessions" *Public Procurement Law Review*, 5, 181-207

Treumer, S. (2000) "Ligebehandlingsprincippet", DJØF,

Treumer, S. (2006) "The discretionary powers of contracting entities - towards a flexible approach in the recent case law of the European Court of Justice?" *Public Procurement Law Review*, 3, 71-85,

Treumer, S. & Werlauff, E. (2003) "The Leverage Principle: Secondary Law as a Lever for the Development of Primary Community Law" *European Law Review*, 1, 28(1) 124-133.

Ølykke, G. (2010) "Abnormally low Tenders – with an emphasis on public tenderers" DJØF

NOTES

¹ Case C-454/06, Priesetext Nachrichtenagentur GmbH v. Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung, [2008] ECR I-4401, paragraph 31.

² See the Commission's Impact Assessment on an Initiative on Concessions, SEC(2011) 1588 final, p. 4.

³ See the Commission's Evaluation Report '*Impact and Effectiveness of EU Public Procurement Legislation*', part 1 SEC(2011) 853 final, p. 35.

⁴ Commission's Evaluation Report '*Impact and Effectiveness of EU Public Procurement Legislation*', part 1 SEC(2011) 853 final, p. 35, bearing in mind that also goods and works in these sectors are covered by the estimate.

⁵ Explanatory Memorandum to the Commission's Proposal for a Directive of the European Parliament and the Council on the award of concession contracts COM(2011) 897 final, p. 2.

⁶ Starting mainly with Case C-324/98, Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG, [2000] ECR I-10745.

⁷ Joined Cases, C-147 and C-148/06, SECAP Spa and Santorso Soc. coop. arl v. Comune di Torino, [2008] ECR I-3565, Case C-226/09, Commission v. Ireland, [2009] November 18, 2011, (not yet reported), Case C-95/10, Strong Segurança SA v. Município de Sintra, Securitas-Serviços e Tecnologia de Segurança, [2011] March 17, 2011, (not yet reported).

⁸ Opinion of Advocate General Fennelly delivered on May 18, 2000 in Case C-324/98, Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG, [2000] ECR I-10745, paragraph 43.

⁹ Arrowsmith, S. (2005). S, *The Law of Public and Utilities Procurement*, 2nd edn. London, UK: Sweet & Maxwell, p. 194. Also Brown argues that some requirements from the Directives might apply outside the Directives, see Brown, A. (2007) "Seeing through transparency: the requirement to advertise public contracts and concessions under the EC treaty" *Public*

Procurement Law Review, 1, 1-21. See Treumer, S. (2006) "The discretionary powers of contracting entities - towards a flexible approach in the recent case law of the European Court of Justice?" *Public Procurement Law Review*, 3, 71-85, who states: 'In the concrete case [Telaustria ed], the transparency obligation, based on the Treaty principle of non-discrimination on the ground of nationality, is likely to be developed on the basis of the Public Procurement Directives.'

¹⁰ Treumer, S. & Werlauff, E. (2003) "The Leverage Principle: Secondary Law as a Lever for the Development of Primary Community Law" *European Law Review*, 1, 28(1) 124-133.

¹¹ Case C-226/09, Commission v. Ireland, [2009] November 18, 2010 (not yet reported), paragraph 41.

¹² Case C-95/10, Strong Segurança SA v. Município de Sintra, Securitas-Serviços e Tecnologia de Segurança, [2011] March 17, 2011, (not yet reported), paragraph 31.

¹³ Case C-95/10, Strong Segurança SA v. Município de Sintra, Securitas-Serviços e Tecnologia de Segurança, [2011] March 17, 2011, (not yet reported), paragraph 39.

¹⁴ Ibid.

¹⁵ Case C-95/10, Strong Segurança SA v. Município de Sintra, Securitas-Serviços e Tecnologia de Segurança, [2011] March 17, 2011, (not yet reported), paragraph 42.

¹⁶ Case C-95/10, Strong Segurança SA v. Município de Sintra, Securitas-Serviços e Tecnologia de Segurança, [2011] March 17, 2011, (not yet reported), paragraph 42.

¹⁷ Joined Cases C-147 and C-148/06, SECAP SpA and Santorso Soc. coop. arl v. Comune di Torino, [2008] ECR I-3565. The case is commented by Ølykke, G. (2010) "Abnormally low Tenders – with an emphasis on public tenderers" DJØF.p. 201. See also Sánchez Graells, A. "Public Procurement and the EU Competition Rules." Oxford-Portland, OR: Hart Publishing, p. 323.

¹⁸ Joined Cases C-147 and C-148/06, SECAP SpA and Santorso Soc. coop. arl v. Comune di Torino, [2008] ECR I-3565, paragraph 35.

¹⁹ In line with Arrowsmith, S. (2005). S, "The Law of Public and Utilities Procurement", 2nd edn. London, UK: Sweet & Maxwell, p.194, footnote 65, who argues: 'Obviously some of the more detailed rules regulating discretion would not be imported in the same form – for example, the rules limiting selection criteria in the public sector directives.'

²⁰ In line with the opinion of Advocate General Stix-Hackl delivered on April 12, 2005, in Case C-231/03, Consorzio Aziende Metano v. Comune di Cingia de' Botti, [2005] ECR I-7287, paragraph 86, who states '...the requirements

stipulated at the outset of the award procedure must be met and must be applied in the same manner to all candidates.'

²¹ Joined Cases T-191/96 and T-106/97, *CAS Succhi di Frutta v. Commission*, [1999] ECR II-3181, paragraph 73. See also Case T-203/96, *Embassy Limousines & Services v. European Parliament*, [1998] ECR II-4239, paragraph 85, and Case T-125/06, *Centro Studi Antonio Manieri Srl v. the Council*, [2009] ECR II-69, paragraph 87, where it was stated that the principle of transparency: *'...implies an obligation upon the contracting authority to publish all precise information concerning the conduct of the entire procedure.'*

²² Case C-234/03, *Contse and Others*, [2005] ECR I-9315, paragraph 43.

²³ Unless the subject matter of the contract justifies such a reference and is accompanied by the words 'or equivalent. This has been stated in *Vestergaard* for contracts below the threshold, Case C-59/00, *Bent Moustén Vestergaard v. Spøttrup Boligselskab*, [2001] ECR I-9505.

²⁴ Case C-87/94, *Commission v. Belgium*, [1996] I-2043, paragraph 34.

²⁵ Case C-87/94, *Commission v. Belgium*, [1996] I-2043, paragraph 35.

²⁶ Krugner, M. (2003) "The principles of equal treatment and transparency and the Commissions Interpretative Communication on Concessions" *Public Procurement Law Review*, 5, 181-207, states: *'The only requirement contracting authorities have to meet is that the procedure chosen does not constitute a restraint on the market access opportunities.'*

²⁷ Sánchez Graells, A. *Public Procurement and the EU Competition Rules*. Oxford-Portland, OR: Hart Publishing, p. 340.

²⁸ Statement concerning Article 7 (4) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, [1994] OJ L111/114. A similar statement exists in relation to Article 20 of the Utilities Directive (Statement regarding Article 20 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, [1994] OJ L111/114).

²⁹ Treumer, S. (2000) "Ligebehandlingsprincippet", DJØF, p. 146 for criticism of the statement as a legal source.

³⁰ Article 40 (2) and Article 1(9) litra c of the Utilities Directive.

³¹ This also seems to be the General Court's view, where in Case T-258/06, *Germany v. Commission*, [2010] ECR II-2027, paragraph 129, it is stated that *'This is particularly relevant to procedures providing for negotiation with shortlisted tenderers. Such negotiations should be organised in a way that gives all tenderers access to the same amount of information and excludes any unjustified advantages for a specific tenderer.'* Thus, indicating that it is permissible to conduct a procedure with negotiation.

³² See decision of July 29, 2011, *Social-Medicinsk Tolkeservice v. Region Hovedstaden* where the Board found that it is allowed to negotiate when entering into a contract regarding a B-service.

³³ Case T-19/95, *Adia Interim SA v. Commission*, [1996] ECR II-321, paragraph 51.

³⁴ Case T-19/95, *Adia Interim SA v. Commission*, [1996] ECR II-321, paragraph 46-47.

³⁵ OECD (2010), *Support of Improvement of Governance and Management (SIGMA) Paper n° 45 'Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives (2010)'*, section 1.4, p. 16.

³⁶ *Ibid.* p. 16. Reduction of time limits can also be reduced under the current Public Sector Directive when using electronic means. See Article 38 of Directive 2004/18/EC.

³⁷ Case T-232/06, *Evropaïki Dynamiki – Proigmaena Systemata Tilepikoinonion Pliroforikis kai Tilematikis AE v. Commission*, [2011] September 9, 2011, (not yet reported), paragraph 41.

³⁸ See Article 45 of the Proposal for a Directive of the European Parliament and the Council on public procurement, COM (2011) 896 final.

³⁹ See the Explanatory memorandum, to the proposal for a Directive of the European Parliament and the Council on the award of concession contracts COM(2011) 897 final, p. 7.

⁴⁰ See Article 45(3), *litra b* of the Utilities Directive. The option has also been suggested as possibility for sub central authorities in the Proposal for a Directive of the European Parliament and the Council on public procurement, COM(2011) 896 final, see Article 26(4) of the proposal.

⁴¹ Case C-95/10, *Strong Segurança SA v. Município de Sintra, Securitas-Serviços e Tecnologia de Segurança*, [2011] March 17, 2011, (not yet reported), paragraph 42.

⁴² Case C-95/10, *Strong Segurança SA v. Município de Sintra, Securitas-Serviços e Tecnologia de Segurança*, [2011] March 17, 2011, (not yet reported), paragraph 42.

⁴³ Case C-234/03, *Contse and Others*, [2005] ECR I-9315, paragraph 43.

⁴⁴ *Joined cases C-226/04 and C-228/04, La Cascina Soc. coop. arl and Zilch Srl v. Ministero della Difesa and Others (C-226/04) and Consorzio G. f. M. v. Ministero della Difesa and La Cascina Soc. coop. arl (C-228/04)*, [2006], ECR I-1347, paragraph 22.

⁴⁵ However, a few exceptions can be found. See, for example, *Joined cases C-21/03 and C-34/03, Fabricom SA v. Belgian State*, [2005] ECR 2005 I-1559, where it according to the principle of equal treatment was possible to exclude an undertaking for reasons of conflict of interest. See also Case C-

213/07, *Michaniki AE v. Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, [2008] ECR I-9999, paragraph 24 where it was stated that Member States are not precluded from ‘...providing for further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective.’

⁴⁶ See also Case C-95/10, *Strong Segurança SA v. Município de Sintra, Securitas-Serviços e Tecnologia de Segurança*, [2011] March 17, 2011, (not yet reported), paragraph 46, which stated that, the Directive does not preclude Member States: ‘and, possibly, contracting authorities from providing for such application in, respectively, their legislation and the documents relating to the contract.’

⁴⁷ Case C-376/08, *Serrantoni Srl and Consorzio stabile edili Scrl v. Comune di Milano*, [2009] ECR I-12169, paragraph 37.

⁴⁸ See Case C-76/81, *SA Transporoute et travaux v. Minister of Public Works*, [1982] ECR 417, paragraphs 14-15.

⁴⁹ Case C-243/89, *Commission v. Denmark*, [1993] ECR I-3353, paragraph 37. Paragraph 40 furthermore states: ‘That requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them to do so.’

⁵⁰ Decision of April 22, 2010, *Keto Vikar ApS v. Københavns Kommune*. See also decision of March 10, 2010, *Manova A/S v. Undervisningsministeriet*, where the Board found that since the contracting authority had asked certain tenderers to submit missing documents regarding their turnover, after the deadline for submission of applications, the contracting authority had in fact acted in breach of the principle of equal treatment.

⁵¹ Article 53 of Directive 2004/18/EC. The Proposal for a Directive of the European Parliament and the Council on public procurement, COM(2011) 896 final, suggest changing the criteria lowest price to lowest costs. See Article 66 of the proposal.

⁵² See, for example, Case C-19/00, *SIAC Construction Ltd v. County Council of the County of Mayo*, [2001] ECR I-7725, paragraph 35.

⁵³ Case C-31/87, *Gebroeders Beentjes BV v. the Netherlands*, [1988] ECR 04635, paragraph 19. See also Case C-513/99, *Concordia Bus Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, [2002] ECR I-7213, paragraph 59, Case C-532/06, *Emm. G. Lianakis AE, Sima Anonymi Techniki Etairaia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v. Dimos Alexandroupolis and Others*, [2008] ECR I-251, paragraph 29.

⁵⁴ Case C-513/99, *Concordia Bus Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, [2002] ECR I-7213, paragraph 64.

⁵⁵ See also Case C-234/03, *Contse and Others*, [2005] ECR I-9315, paragraph 49, where the Court found that evaluation criteria: ‘... like any national measures, must comply with the principle of non-discrimination as derived from the provisions of the Treaty relating to the freedom to provide services.’

⁵⁶ Case C-513/99, *Concordia Bus Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, [2002] ECR I-7213, paragraph 59.

⁵⁷ See also Article 53 (1) (a) which is a codification of the case law and which states: ‘...when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question,’

⁵⁸ Case C-513/99, *Concordia Bus Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, [2002] ECR I-7213, paragraph 59.

⁵⁹ In line with Krugner, M. (2003) “The principles of equal treatment and transparency and the Commissions Interpretative Communication on Concessions” *Public Procurement Law Review*, 5, 181-207.

⁶⁰ Case C-448/01, *EVN AG and Wienstrom GmbH v. Republik Österreich*, [2003] ECR I-14527, paragraph 45 ff.

⁶¹ See in relation to works contracts, Case C-31/87, *Gebroeders Beentjes BV v. the Netherlands*, [1988] ECR 4635, paragraphs 15 and 16. Case C-532/06, *Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v. Dimos Alexandroupolis and Others*, [2008] ECR I-251, paragraph 26 regarding services.

⁶² See, for example, the special issue of *Public Procurement Law Review* [2009] n° 3, pp. 103-164. In this issue case law from Germany, Italy, Belgium, Norway and Denmark are analysed in the context of before and after Lianakis.

⁶³ In line with Brown, A. (2010) “EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives” *Public Procurement Law Review* 5, 169-181.

⁶⁴ Case C-19/00, *SIAC Construction Ltd v. County Council of the County of Mayo* [2001] ECR I-7725, paragraph 45.

⁶⁵ See decision of July 20, 2011, *Kijana v. Jysk Fællesindkøb*, where the Board found that the contracting authority did not have a duty to publish sub criteria beforehand regarding a B-service contract. However, it was necessary that the contracting authority state sub-criteria, if he wishes to use such.

⁶⁶ In decision of April 8, 2010, *KPI Communications A/S v. IT- & Telestyrelsen* (regarding a B-service), the contracting authority had not stated any sub criterion to ‘most economical advantageous tender,’ which

the Board found was a breach. Thus, the contracting authority had to state sub-criteria as well.

⁶⁷ Brown, A. (2010) "EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives" *Public Procurement Law Review* 5, 169-181.

⁶⁸ Case C-234/03, *Contse and Others*, [2005] ECR I-9315, paragraph 68.

⁶⁹ Case C-226/09, *Commission v. Ireland*, [2009] November, 18 2010 (not yet reported), paragraph

⁷⁰ Case C-226/09, *Commission v. Ireland*, [2009] November, 18 2010 (not yet reported), paragraph 43.

⁷¹ Decision of February 4, 2011, *Intramed A/S v. Region Nordjylland*.

⁷² Opinion of Advocate General Mengozzi delivered on June 29, 2010, in Case C-226/09, *Commission v. Ireland*, [2010] November 18, 2010 (not yet reported), paragraph 49.