

**DISCLOSURE RULES IN EU PUBLIC PROCUREMENT: BALANCING BETWEEN
COMPETITION AND TRANSPARENCY**

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ABSTRACT. The paper examines the disclosure of information within public contract awards under EU law. EU Public Procurement rules have several objectives that may at some times be conflicting with each other. A certain level of transparency of public procurement procedure is necessary in order to fight corruption, enhance trade opportunities and ensure effective legal remedies. On the other hand, too much transparency may have certain anti-competitive effects. The national laws regarding disclosure of information vary in different EU member states. In Finland the EU law principle of effective remedies has been interpreted as requiring full transparency among the bidders. The transparency rules under EU law and certain Member States' national laws are analysed. As a conclusion, it is suggested that the rules on disclosure should not be left solely to the discretion of member states as the over-transparent approach taken by certain member states may negatively affect the markets both on a national and EU level.

INTRODUCTION

The principle of transparency is one of the fundamental and underlying principles of EU public procurement rules. The transparency of public procurement is an important element of anti-corruption measures, in establishing trust towards public authorities as well as in securing access to remedies in public procurement. Adequate and transparent justifications of contract award decisions are necessary in order for the economic operators that have taken part in a competitive procedure to evaluate their own legal standing —

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and equal treatment in comparison to other bidders in the contract award.

The Finnish Act on the Openness of Government Activities (*laki viranomaisten toiminnan julkisuudesta 621/1999*), later referred as Openness Act, grants the parties of a contract award procedure access to all procurement documents including offers of other tenderers. A party's, i.e. a fellow tenderer in the procurement process, right to information is not limited to non-confidential information but includes also confidential and trade secret information if such information is assessed in tender evaluation and thus may have affected such party's legal position. It is not clear to what extent the disclosure rules are a matter of national rules and whether some obligations can be derived from EU rules. Nevertheless, some obligations and guidelines are included both in the current 2014/24 Procurement Directive and the case law of Court of Justice of European Union (CJEU).

The purpose of this paper is to identify the rules of disclosure under EU law and to clarify the disclosure requirements – if any – concerning the tender documentation of other tenderers and contracts in public procurement with an emphasis on the protection of confidential information. In addition, the paper analyses national law on transparency requirements in public procurement within an EU Member State, Finland, where the rules seem to go far beyond what is required or even accepted under EU law. In Nordic Countries, the tradition of full transparency of public administration has created concerns for the protection of confidential information. Although a certain level of transparency in public procurement is necessary for anti-corruption purposes, this paper concentrates on the conflict between effective remedies and disclosure obligations in a legal regime where full transparency is considered as a starting point.

This paper proceeds in three parts. First, this paper looks into the tension pertaining to transparency by elaborating the potential anti-competitive effects of extensive transparency and in comparison, transparency as an anti-corruption measure or a necessity for effective remedies in public procurement under EU law. Secondly, the paper analyses the rules concerning the disclosure of information under EU law. Finally, before conclusions, the paper addresses the serious concerns relating to current Finnish disclosure rules that ensure competitors' access also to trade secrets of fellow tenderers.

BACKGROUND

The rules on disclosure of information under the EU Public Procurement Directives after a contract has been awarded principally concern documentation drafted by the contracting authority, e.g. the obligation to state reasons tender exclusion and of tender evaluation. The contracting authorities have a duty of equal treatment towards tenderers and authorities are to provide sufficient justification for an award decision. This is necessary in order to allow the non-successful tenderers to consider the need for judicial review and to secure effective remedies in public procurement.

Requirement of transparency, open electronic access to contract notices and invitations to tender are promoted and required under the new 2014 EU Public Procurement Directives. On the other hand the Directives still remain silent on issues of transparency relating to the actual tenders submitted. This falls under the discretion of national law of the EU member states. Lately, also the question of third party access to concluded contracts has become more current as the adoption of the 2014/24 Procurement Directive includes first codified EU rules on limiting the material modifications of procurement contracts.¹

Public administration in Northern European countries such as Finland and Sweden has been founded on the principle of openness and full transparency. This implies in practice that any citizen or entity can access any document in the possession of a public authority without the need to identify themselves or to state reasons for the need to access information. Thus, also the offers of other tenderers as well as public contracts concluded between an authority and a supplier are considered public documents.

The importance of the openness principle was underlined by the Finnish Government in the proposal for Finnish fundamental rights' reform. According to the Government proposal, openness and transparency are conditions of participation and influence of citizens in social activities. Furthermore, openness of Government activities is also a prerequisite for control and criticism towards public authorities, as well as a mean to exercise power (Finnish Government Proposal HE 309/1993 vp.). In Northern European countries the integrity and the control over public administration are partly in the hands of citizens. Nevertheless, the principle of transparency is not absolute

and certain exemptions exist, e.g. the need to protect trade secrets and confidential information of both public and private entities (Finnish Openness Act s.24 sub-paragraphs 17 and 20). The over-interpretation of EU public procurement rules has during the past few years led to new concerns nationally. In general, confidential information is protected under Finnish law. However, it is considered that the right for effective remedies in public procurement overcomes the private interests relating to the protection of confidentiality and requires that a competitor has an access to any information related to tender evaluation (Finnish Parliamentary Commerce Committee, 2010).

DISTORTION OF COMPETITION

The principle of competition has received more and more attention lately in the context of EU public procurement law. This is partly a result of the CJEU's extensive case law on the matter which has repeatedly emphasized that one of the fundamental purposes of EU public procurement rules is to ensure open and undistorted competition in the member states as well as to develop effective competition in the field of public contracts (Sánchez Graells, 2015a). According to the CJEU the purpose of EU law is to open up undistorted competition in all the Member States (C-213/13 Impresa Pizzarotti; C-70/06 Commission v Portugal; C-213/07 Michaniki; C-251/09 Commission v Cyprus; C-336/12 Manova; C-450/06 Varec and C-26/03 Stadt Halle. In addition, the CJEU has concluded that the purpose of the EU Procurement Directives is to develop effective competition in the field of public works contracts (C-138/08 Hochtief and Linde-Kca-Dresden).

In the previous 2004/18 Procurement Directive, the principle of competition was not mentioned along with the other key principles of transparency and equal treatment. This changed in 2014 and the principle of competition is often cited in the recitals of the current 2014/24 Procurement Directive. In addition, the principle of competition is mentioned in Art. 18 (1) of the 2014/24 Directive.

The risk of competition distortions increases if too much information or if confidential information is disclosed. In C-450/06 Varec, the CJEU considered maintaining fair competition in the context of public contract award procedures an important public

interest and concluded that “[i]n order to attain that objective it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an on-going procurement procedure or in subsequent procedures” (para 35). Thus, according to CJEU the disclosure of trade secrets for example during or after a contract award may affect the competition conditions in current or subsequent procedures.

In addition, the CJEU stated that “[f]urthermore, both by their nature and according to the scheme of Community legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them” (C-450/06 Varec, para 36). Therefore, the protection of confidential information should not only be seen as a subjective right to property but as a matter of public interest: a necessity to secure undistorted competition.

The question relating to preservation of fair competition in the public contract markets and disclosure rules is two-fold. Primarily there is a need to protect confidential information due to the private interests of the owner of such information. Disclosure of a trade secret could damage the business activities of an undertaking but moreover it would cast a shadow on the public procurement regime. Perhaps it could even remove suppliers’ motivation to take part in further public contract awards. As a judge concluded in a UK Appeal Court case *Veolia v Nottinghamshire CC* “...it is plain that there is a strong public interest in the maintenance of valuable commercial confidential information... If the penalty for contracting with public authorities were to be the potential loss of such confidential information, then public authorities and the public interest would be the losers, and the result would be potentially anti-competitive.”

On the other hand, even the disclosure of non-confidential information is likely to increase the risks of distortions of competition. Also the OECD has expressed its concerns regarding excessive transparency in public procurement as an increasing risk for antitrust violations (OECD, 2011). Through award decisions, evaluation reports

and in some countries even through the offers of competitors, economic actors gain knowledge on each other's prices, identities of other bidders, business practices and contractors.

The disclosure of "too-much" information may change the market behaviour of undertakings (OECD, 2011). Whereas the objectives of the EU Public Procurement rules are mainly related to transparency of the contract award procedure but also protecting the confidential information, the competition law aspects are pulling towards an interpretation that only necessary information should be disclosed i.e. information which is necessary for tenderers to evaluate their need to start judicial proceedings (Sánchez Graells, 2013). This tension between different goals attached with transparency in public procurement is well reflected in a report of the OECD concluding that "[s]trategies to address collusion and corruption in public procurement must address a fundamental tension: while transparency of the process is considered to be indispensable to corruption prevention, excessive and unnecessary transparency in fact facilitates the formation and successful implementation of bid rigging cartels" (OECD, 2011).

If the disclosure of excessive information might have anti-competitive results and even reduce the motivation of certain suppliers to attend public contract awards, disclosure of confidential information will likely set unnecessary boundaries for cross-border trade and joint public procurement, objectives clearly set out by the European Commission and enshrined in the 2014/24 Directive. Similarly, in the Finnish legislative proposal for transparency rules, the need to protect confidential information was considered important in the preservation of fundamental values and principles of international trade and economic system (Government Proposal HE 30/1998). The need to secure fair competition should not be undermined taken into consideration that the ultimate purpose of the EU Procurement Directives is to enhance undistorted competition within the public contract market in the member states (C-213/13 *Impresa Pizzarotti*).

The tradition of openness and full transparency in central and local government level in the Nordic countries appear problematic in comparison to the views presented the OECD on the excessive transparency. One could suggest that due to full transparency in the public sector, there should be more antitrust violations in Finland

than in countries where excessive information on offers and contracts is not available.

Economic and competitive aspects advocate a stricter approach to transparency (McDonagh, 2002). However, the pressure towards more extensive transparency in public procurement is increasing in the EU due to the need to fight corruption (European Commission, 2014) as well to enhance business opportunities and cross-border procurements (Ginter, Parrest, & Simovart, 2013). Open access public contract register exists already in many EU member states (European Commission, 2014).² Through open public contract registers the economic operators would have a possibility to retrieve information on certain contracts or fields of business online. There is also a risk, as Sánchez Graells has suggested, that this kind easily accessible data increase risks for collusive behaviour (Sánchez Graells, 2015b).

It seems that from an economic perspective, the current requirements for open, unrestricted electronic communication under the Procurement Directive 2014/24 and the development of eProcurement tools are likely to create more competition concerns than the openness principle in the Nordic countries as Nordic public authorities rarely publish documents or concluded contracts online. Perhaps from a competitive perspective the relevant question is not only if certain data is accessible or not, but moreover of how easily the data can be retrieved and how much data one source of information provides. The risk of collusive behaviour increases significantly if data on all actual procurement contracts falling under the scope of the EU Procurement Directives would be collected and stored in one location, in an open access contract register (Sánchez Graells, 2015b). Although the data included in the potential register would exclude any trade secrets, the transparency of large amount of detailed data stored in one location would be risky as often the opportunity makes a thief.

NEED FOR TRANSPARENCY

The rules on disclosure of information differ under EU law and under Finnish national law. EU Directives and especially the CJEU case law address the questions relating to disclosure of information in public procurement along with effective remedies or principle of

competition. Moreover, transparency and other public procurement rules are important anti-corruption tools at EU level. The more transparent the procurement procedures become, the harder it is to hide corruptive practices. The pressure towards more extensive transparency in public procurement is growing (European Commission, 2011 and European Commission, 2014). These anti-corruption strategies have in part contributed to the establishment of the above mentioned online contract registers or recommendations and/or obligations under which contracting authorities are required in certain EU member states to publish all procurement contracts online (European Commission, 2014). In UK, a new transparency plan for contracting authorities and especially for the national central purchasing unit (Crown Commercial Services) was very recently introduced to cover the whole procedure and contract period. According to the new guidance all procurement documentation and information should be transparent and electronically and without any restrictions available from the beginning of the procedure to the end of the contract term (UK Open Government National Action Plan, 2016). Such developments may create new challenges. As suggested in the earlier chapter, extreme transparency is considered to increase risk for collusion or other anti-competitive behaviour of economic operators,

The need to fight corruption and to enhance accountability of public sector officials are not the only reasons for the demand of wider transparency. The principle of effectiveness, often referred to in the CJEU's case law, requires that EU law is actually enforced in the Member States. Therefore, national rules of EU Member States cannot prevent the full application of EU law. The principle of effectiveness is also enshrined in the EU Public Procurement Directives. According to Art. 1 of the Public Procurement Remedies Directive 2007/66 the Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible. As concluded by the CJEU in C-81/98 Alcatel, the principle of effectiveness requires, *inter alia*, that a party has a real possibility to apply for review of the award decision prior to the conclusion of the contract.

In order for an economic operator to have a possibility to evaluate the need for judicial review and effectively apply for remedies, it must

be aware of the grounds and justifications of the contract award. In C-406/08 Uniplex and C-161/13 Idrodinamica), the CJEU concluded that a time limit to start proceedings cannot start to run before the party concerned has been informed of the reasons for the result of the contract award or on the possible modifications adopted after the award decision.

During the past few years, new issues relating to transparency requirements and effective remedies have emerged. Even though procurement procedures have become more transparent within the past 10 years in the EU, the importance of contract execution phase has been recognized both from a perspective of corruption prevention and effective legal protection in public procurement (Ferraris, Mazza & Scomparin, 2016).

Current EU Public Procurement rules set out limits on contracting authorities' and their contractors' rights to agree on amendments of the contract under the rules of general contract law (Simovart, 2015). Based on case law developed by the CJEU and since codified in the Art. 72 of the 2014/24 Procurement Directive, the contracting parties have limited possibilities to modify the procurement or procurement contracts after the contract award. In C-454/06 Pessetext, the CJEU considered that a material amendment to a procurement contract constitutes a new contract award (likewise in C-337/98 Commission v France). In addition, also changes prior to the conclusion of a contract may be regarded as material (C-161/13 Idrodinamica and C-496/99 Succhi di Frutta). In practice, the remedies are not effective, if information on contract amendments or other material changes after the contract award are not available (C-161/13 Idrodinamica). As Treumer puts it, "the competitors will typically not know of a breach of the duty to retender as it is difficult or perhaps impossible to obtain exact insight into the details of the original contract and the subsequent changes which will discourage most competitors from complaining" (Treumer, 2012, p. 153).

Ginter, Parrest and Simovart have suggested that access to public procurement contracts is vital for the remedies' system of EU procurement law to actually function. This requires that interested parties must be able to challenge infringements of EU procurement rules that may occur after the conclusion of the contract. For this purpose, the contract information must be public or accessible - otherwise, according to the authors, the remedies' system lacks the

required effectiveness. The authors suggest publication of all contracts on contracting authorities' websites or in a general procurement environment which additionally would also enhance the cross-border participation (Ginter, Parrest, & Simovart, 2013). Such measures seem to be acceptable also under the current Public Procurement Directive 2014/24, according to which "...the provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes" (recital (51)). This would undoubtedly enhance the use and effectiveness of the remedies regime, but such means of publication also create competition concerns as discussed earlier.

It is clear that certain level of transparency is required in order to secure effective remedies for serious breaches conducted within the contract term, but the measures aiming to reach the goal of informing the market on contract modifications should be carefully considered.

DISCLOSURE RULES

The exact rules on transparency under EU law are not that clear as there are no general, explicit EU-level rules on transparency in public sector unlike in many member states. The transparency and rules of disclosure regarding award decision, reasons of evaluation and contracts under EU law are mainly based on the CJEU's case law on the principle of effective legal protection.

The contracting authorities are required to accompany their award decision to tenderers with a summary of the relevant reasons under Art. 2c of the Remedies Directive 2007/66 and give more detailed reasoning on request under Art. 55 of the 2014/24 Procurement Directive. To answer the question of what is considered as sufficient reasoning, the CJEU stated in C-629/11 P *Evropaïki Dynamiki* that the statement of reasons required must be assessed in the light of the circumstances of each case, in particular the content of the measure in question and the nature of the reasons given.

However, in order to effectively contest reasons and interpretations adopted in the contracting authority's decision, the bidders would benefit from access to the offer of the winning bidder or of other participants of the contract award. Regardless of the importance of access to tender documentation as means to verify

equal treatment and adequate tender evaluation, the EU Procurement Directives do not set out an obligation for their disclosure. All in all, the disclosure requirements under the EU Procurement Directives are fairly limited (Arrowsmith, 2005).

In comparison, in Finland the access to full evaluation report and to all submitted tenders is considered necessary in order to verify whether the principle of equal treatment has been adhered to (Finnish Parliamentary Commerce Committee, 2010).

For the first time, the 2014/24 Procurement Directive enforces certain disclosure obligations to contracting authorities on concluded contracts and contract amendments. Under Art. 83(6) of the 2014/24 Procurement Directive, the contracting authorities are required to, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than 1 000 000 EUR in the case of public supply contracts or public service contracts and 10 000 000 EUR in the case of public works contracts. In addition, contracting authorities are to grant access to those contracts – at least to procurement monitoring authorities – unless otherwise required in the applicable EU or national rules on access to documents and data protection. Moreover, contracting authorities are required to publish a contract amendment notice during the contract term on certain material amendments under Art. 72 of the 2014/24 Procurement Directive. Nevertheless, it has been suggested in legal literature that even more extensive general duty to publish or allow access to concluded procurement contracts may be derived from the principles of transparency, equal treatment and the right to effective remedies enacted in the existing EU directives (Ginter, Parrest, & Simovart, 2013; Arrowsmith, 2014).

Although EU Procurement Directives do not require disclosure of submitted tenders, rules and obligations concerning the disclosure of concluded contracts or submitted tenders exist in many countries under national law, including Finnish Openness Act and UK's Freedom of Information Act 2000. The offers as well as the concluded contracts are public in principle although there are exemptions from the openness e.g. due to the need of protection of trade secrets. The purpose of these national rules is to guarantee a free, unlimited access to all public sector documents not only to bidders and contractors of public authorities but also to citizens, media or different interest groups in order to enhance the trust towards public

sector activities or to establish whether there has been any corruption, whether the contracting authority has achieved their objectives of value for money or non-discrimination (Arrowsmith, 2005).

DISCLOSURE RULES OF CONFIDENTIAL INFORMATION

According to the Finnish Parliamentary Commerce Committee, a party shall always have an access to all information used in tender evaluation regardless of whether such information is considered confidential or not. In the opinion of the Committee, this is necessary in order to comply with EU law and for the parties to ensure that their bids have been duly reviewed (Finnish Parliamentary Commerce Committee, 2010). However, the Committee fails to refer to actual EU law requiring such interpretation. Is it truly so, that EU law is requiring contracting authorities to disclose trade secrets and other confidential information to fellow tenderers as implied under Finnish law?

The CJEU case law does not seem to support the approach adopted in Finnish national law. During the past years, the protection of business secrets has been elevated by the CJEU to a status of a general principle and fundamental right under EU law (Oliver, 2015; C-450/06 Varec; C-1/11 Interseroh Scrap). The need to protect confidential information of a tenderer may conflict with the rights of others. The question of fair trial and disclosure rules in public procurement should be regarded as a struggle of fundamental freedoms (Brown, 2008). According to the CJEU, the principle of the protection of confidential information and of trade secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights to defence of the parties to the dispute (C-450/06 Varec). On the other hand, the transparency requirements are safeguarding the right to good and transparent administration as referred by the General Court of European Union in T-183/10 Sviluppo Globale GEIE v Commission (para 40). If the protection of trade secrets is considered as a fundamental freedom under the European Convention of Human Rights and the EU Charter of Fundamental Rights, this will affect the interpretation of the disclosure rules also under national law.

The current 2014/24 Procurement Directive promotes transparency, but also emphasizes the importance of the protection of confidential data of tenderers. According to Art. 21 (1) the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders unless otherwise provided in the 2014/24 Procurement Directive or under national law. Thus, despite of the objective to protect confidential data, the provision seems to leave a lot of discretion Member States on the disclosure rules.³

When the award decision is notified to a participant of a procurement procedure, the tenderers concerned should be given the relevant information which is essential for them to seek effective review (Recital (6) of the 2007/66 Remedies Directive). However, under EU law the tenderers are to assess their need for legal protection and the legality of a contracting authority's actions solely based on the award decision and the reasoning thereof. Even in the event where a procurement litigation would be based on details considered as confidential information, an undertaking seeking judicial review does not usually have access to a competitor's confidential information as in C-450/06 Varec, the CJEU considered that the requirement of effective remedies and fair trial are met if at least the court deciding on the matter has access to all relevant information.

The exact wording of the Art. 21 (1) of the Public Procurement Directive 2014/24 implies that confidential information shall be not disclosed provided that such disclosure is also prohibited under national law. Therefore, the wording of the Directive leaves the exact rules on protection of trade secrets and other confidential information to the member states however suggesting that the confidentiality of such information should be protected unless otherwise explicitly required under national rules. Regardless of the explicit formulation of the provision, Arrowsmith considers it likely that EU Procurement law and the Procurement Directive 2014/24 gives economic operators an independent "EU-level" right to protection of confidential information (Arrowsmith, 2014, p. 1340; UK Court of Appeal, *Veolia v Nottinghamshire CC*). Arrowsmith's interpretation appears reasonable, as otherwise EU rules would not guarantee any protection if the disclosure of confidential information was acceptable

under national law. Taking into consideration the fact that the ultimate purpose of EU procurement rules is to create open and undistorted competition within EU, it can be argued that the protection of trade secrets is not, or at least it should not be, a question belonging solely to the discretion of an individual Member State as such rules may affect economic operators' interests to participate in public contract awards.

SERIOUS CONCERNS REGARDING FINNISH RULES ON DISCLOSURE OF CONFIDENTIAL INFORMATION

In Finland the rules on transparency in public procurement and in other public authorities' activities are governed under the Finnish Openness Act. The rules apply both to central and local government activities though excluding, unlike in UK, the state or municipality-owned companies and other contracting authorities without an authority status. The transparency obligations of these contracting authorities falling out of the scope of the Openness Act are set out instead in the Finnish Act on Public Contracts (*laki julkisista hankinnoista 348/2007*). Similar legislation based on the principle of openness exist also in Sweden and UK, for example. In Sweden the Public Access to Information and Secrecy Act (*Offentlighets-och sekretesslagen, 2009, p. 400*) is applied to all information in the possession of a public authority. Regardless of the transparency rules, the trade secrets and other confidential information are safe in UK under the Freedom of Information Act and in Sweden under the Public Access to Information and Secrecy Act (McDonagh, 2002). This unfortunately is currently not the case in Finland. Thus, it is likely that the rules will be amended in near future.

In Finland the rules of disclosure of public procurement documents can be divided in three categories: documents in the public domain, non-public documents accessible by parties and confidential or secret documents. As a starting point, all documentation relating to a procurement procedure of a public authority are in public domain. The offers and contracts become public and accessible by anyone after the procurement contract has been concluded. Any information on a trade or professional secret is not in the public domain. Also documents containing other similar confidential business information shall not be public, if the disclosure would cause economic loss to an undertaking. This is the starting

point for the general publicity of documents in Finland. However, a tenderer in a procurement procedure has been granted special and more extensive rights to access information due to its party status.

According to the legislative proposal of Finnish Government the trade and professional secrets would fall under rules of absolute secrecy (HE 30/1998 vp). Notwithstanding, the same Act diminishes the protection of business secrets by considering a fellow tenderer's access to information and the right for effective remedies more valuable than the protection of business secrets and the trust towards public contract markets and contracting authorities.

A party of a contract award procedure has according to s.11 of the Finnish Openness Act access also to all confidential procurement documents, if they have had relevance in tender evaluation and therefore affected the said party's rights.⁴ Even though these rights usually exclude secret information, a party in public procurement in Finland has an explicitly granted right to access all tender evaluation related documents including all the offers of other tenderers right after the contract award decision by the awarding authority. In the opinion of the Committee, this is necessary in order to comply with EU law – an interpretation that was discussed and questioned above.

Taking into consideration the CJEU's conclusions in C-450/06 Varec, it is rather hard to support Commerce Committee's interpretation that the all information regarding tender evaluation and submitted tenders should be disclosed under EU law including the confidential information of tenderers. On the contrary, the CJEU held that the national courts should strive to find alternative ways to secure effective remedies in public procurement without disclosing confidential information. This, according to the CJEU and the 2014/24 Procurement Directive may be achieved by adequate reasoning of award decisions and by ensuring that a court handling a procurement case has a full access to the confidential information even though same information would not be accessible by other tenderers.

One could assume that these extensive rights set out under Finnish law would have created a lot of discussion and criticism among the Finnish legal practitioners and academics. Surprisingly, it seems that many have accepted the approach of effective remedies precluding the protection of trade secrets under Finnish law

(Mäenpää, 2006; Dimoulis, 2012) even though the CJEU's case law and EU Procurement Directives seem to rather encourage member states to enhance the protection of confidential information. As discussed above, Arrowsmith has suggested that EU law grants a certain, independent EU-level protection towards confidential information. Such approach can be supported by CJEU's case law if truly the protection of trade secrets is a EU-level fundamental freedom. In that case, Finnish national law would be infringing EU law and such national rules should be disregarded.

The Finnish Openness Act grants participants of a contract award extensive access to confidential information, if such information has been used in tender evaluation. Interestingly the national courts in Finland have until recently been the guardians of trade secrets and adopted a stricter approach towards the right to information. The Finnish Market Court, handling procurement cases in first instance, has consequently concluded that legal proceedings in a court should not be used as a fishing expedition i.e. as a mean to gain access to competitor's trade secrets (MaO 40/16; MaO 488/15; Finnish legislative proposal HE 12/2006 vp).⁵ Consequently, in MaO 239/15 the Market Court denied the access to service process documents which were considered confidential, as this, according to the Finnish Market Court, did not compromise fair trial.

The Finnish Supreme Administrative Court has addressed the question on the protection of confidential information in public procurement twice since the legislative amendment of the Finnish Openness Act on party's access to confidential information entered into force in 2011. In December 2015 the Supreme Administrative Court decided that a contracting authority shall not disclose information on winning bidder's exact laboratory performance results. According to this Supreme Administrative Court's decision KHO 11.12.2015 case 3660, the disclosure was not required or authorised as the information requested was not directly used in tender evaluation i.e. as the final evaluation points on quality were based on overall scoring of several performance results. The approach of the court is open for criticism due to its contradiction with the explicit wording of the Openness Act requiring contracting authorities to grant access to evaluation related information to parties. One can criticize the Finnish disclosure rules due to their

potential anti-competitive effects and suggest amendments, but until new rules are adopted, the current rules are requiring disclosure.

A new era concerning protection, or more precisely the lack of protection of trade secrets began in Finland in March 2016. For the first time the 2011 amended provision of the Finnish Openness of Government Activities Act was enforced by the Finnish Supreme Administrative Court. In KHO 15.3.2016 case 908 the Supreme Administrative Court concluded that a party to a contract award has a right to access trade secrets of its competitor as these were used in tender evaluation. Thus, the contracting authorities are obliged to give such information to parties having a legal interest to the contract award. Although the ruling followed the wording of the Finnish Openness Act, it is still a shock for those who consider the protection of trade secrets a fundamental freedom. On the other hand, perhaps others would praise the Supreme Administrative Court's decision of transparency as an improvement of the remedies regime as well as a measure of ensuring the accountability of public administration.

Nevertheless, the strong message given by the Finnish Supreme Administrative Court's latest decision is likely to affect the quality, substance and pricing of tenders that are submitted to public contract awards at least temporarily. The interest of national and especially foreign companies to attend competitive procedures in Finland is surely reduced. If such are the consequences, the main objective of EU public procurement law, enhancing open and undistorted competition across EU member states, is severely compromised in Finland. Due to the negative effect of current Finnish national provisions on fair competition and the lack of protection of economic operators' interests, the Finnish Government just recently submitted, on June 22, 2016, a draft for new legislation regarding trade secrets in public contract awards. According to the suggested amendment a party in a contract award would not have an access to others' trade secrets in any situation (HE 108/2016). Thus, it seems that the worried remarks made by academics and procurement specialists since Supreme Administrative Court's latest decision will lead to a fast correction in national law as the new rules are likely to be enforced in the beginning of 2017.

CONCLUSIONS

The current EU Public Procurement Directives aim to enhance the protection of confidential and secret information in public contract awards. Same approach was adopted by the CJEU in *Varec*, which considered the protection of trade secrets as a matter of fundamental freedom. Also many EU member states, UK and Sweden for example, are offering protection to confidential information in public procurement. This is important for the public interest, but also in terms of the protection of private interests. Due to the need to preserve fair competition in public contract markets, it is necessary to protect the private interests of tenderers. There are significant differences in disclosure rules across the EU member states which may affect economic operators' motivation to participate to cross-border procurement.

The level of transparency of non-confidential information is increasing in the EU. It is likely that within the next few years more and more public contract information will be available online. Such practices are likely to be praised for enhancing corruption prevention, production of market information and effective remedies. However, a certain level of protection towards private interests and especially towards confidential information is also required in order to maintain undistorted competition and economic operators' interests to participate public contract awards.

Although EU law is principally aiming to protect the commercial interests of private undertakings by protecting their confidential information and trade secrets in public contract awards, it leaves a lot of discretion to the member states regarding the exact rules on disclosure. As a result, in some member states, in Finland for example, the rules on disclosure of information whether non-confidential or confidential differ from the level required under EU law (Table 1).

The purpose of the EU Procurement Directives is to enhance undistorted competition within the public contract market. Hence any national interpretation or domestic laws on transparency which potentially compromise the ultimate objectives of EU law should be viewed critically. Finland's over-transparent approach in public

TABLE 1
Differences of Disclosure Rules under EU law and Finnish Law

	EU law	Finnish law
Transparency of tender evaluation	Adequate reasoning required	Full transparency
Transparency of submitted bids	Prohibition to disclose before award decision. No post-award disclosure rules in the Procurement Directives.	No disclosure before award decision. Full transparency to fellow tenderers after award decision. Public to everyone else after the procurement contract has been signed.
Transparency of public contracts	No disclosure rules in the Procurement Directives to fellow bidders or to public. Disclosure obligations on certain contracts for monitoring purposes. Some transparency required in practice in order to secure effective remedies in the event of material contract modification.	Full transparency
Transparency of trade secrets or other confidential information	Rules are two-fold. Protection of trade secrets a starting point under the Procurement Directives but subject to national law. Under CJEU case law, the protection of trade secrets is considered a fundamental right.	To be disclosed to fellow bidders with no exemptions if assessed in tender evaluation phase in order to secure effective remedies (rules likely amended in 2017).

procurement is open for criticism. Even though the provision in the Finnish Openness Act requiring contracting authorities to disclose confidential information to fellow tenderers has been in force for the past five years, it was not until March 2016 that the Finnish Supreme Administrative Court obliged a contracting authority for the first time to disclose winning bidder's trade secrets to its competitor. This recent judgment has created a lot of uncertainty and discussion about the rights of private undertakings in Finland. There is a risk that

the current national regulation now that it has been enforced also by Supreme Administrative Court case law will affect companies' motivation to participate in public contract awards or leads to procurement procedures based solely on pricing and not on quality. Taking into consideration the potential anti-competitive effects of the current national rules, the political pressure towards the need to amend the national rules increased in Finland. Results were seen faster than anticipated as already in late June 2016 Finnish Government suggested a new legal provision, which would secure the protection of trade secrets in public contract awards. The new rules are likely to enter into force in 2017.

Although it seems that the wording of the Art 21 of the Procurement Directive 2014/24 leaves discretion to member states on matters concerning disclosure of information, it may be argued that EU law grants a certain, independent right for the protection of trade secrets. The disclosure of confidential information of tenderers should be viewed as a struggle between fundamental freedoms. As the CJEU concluded in *Varec*, the protection of trade secrets is a fundamental right which should not be interfered with if the effectiveness of remedies can be guaranteed by less harmful measures such as providing the secret information only to the court deciding the case. If certain member states, such as Finland, do not protect the ultimate interests of private undertakings, this may have anti-competitive effects in the EU's internal market and affect national or foreign companies' interests to participate in public contract awards. Without undermining the requirement of effective remedies, the interpretation of the principle of effectiveness should not go as far as demolishing the foundations of business activities of economic operators.

NOTES

1. Material contract modifications are considered as direct awards under EU law. The rules on material modifications have been codified for the first time in Art. 72 of the Procurement Directive 2014/24, but the doctrine is not a novelty as it was originally developed by the Court of Justice of the European Union (CJEU), first in C-496/99 *Succhi di Frutta* and then in several other cases including the famous C-454/06 *Pressetext* ruling.

2. The problems relating to public contract registers are discussed more detail by Sánchez Graells (2015b). Such registers exist at least in Italy, Portugal, Slovakia. The potential establishment of a public contract register was discussed by the European Commission Shareholder Expert Group meeting in 2015. See the Agenda for the Stakeholder Expert Group on Public Procurement of 14 September 2015.
3. In the event where EU Directives contain no provisions on subject matter, it is for the internal legal order of each Member State to establish such rules. The national rules however shall not compromise the effectiveness of EU law. On the division between EU and domestic law, see for example C-470/99 *Universale-Bau* para 71–73 and C-406/08 *Uniplex* para 26–28.
4. A party i.e. an undertaking having an interest in a procurement case refers to entities that have participated in the tender procedure and who consequently may have a legal interest in obtaining a change to the procurement procedure. According to settled national Finnish case-law, a party having an interest to a direct award procurement case i.e. where a contracting authority has neglected to publish a contract notice and awarded a contract directly to a certain supplier, is an entity which would have had an opportunity to get its bids accepted had the procurement procedure been carried out in harmony with EU public procurement law. In practice business activities in a field equivalent to the subject matter of the direct award contract would be considered as a justification for a party status.
5. It is however important to point out that in Finland the rules on transparency and openness applied to contracting authorities are to some extent more extensive than the rules concerning transparency during judicial proceedings applied by the courts. Nevertheless, the Finnish Market Court has consistently held that a competitor's right to information has been met by providing him the total prices of the winning tenderer. The principle of fair trial does not, according to Market Court, require an access to all winning tender's unit prices or pricing methods (MaO 488/15, MaO 250/15, MaO 165/14 and MaO 153/14).

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