THE TRANSPARENCY REQUIREMENT BASED ON LEGAL PRINCIPLES - THE POSSIBILITIES OF EXCEPTIONS FROM THE REQUIREMENTS OF TRANSPARENCY WHEN AWARDING PUBLIC CONTRACTS COVERED ONLY BY EU PRIMARY LAW

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ABSTRACT. The EU Public Procurement Directives (Directive 2004/17 and Directive 2004/18, here after the Directives) regulates only the award of contracts with a value over certain thresholds, and the award of contracts that have not been expressly excluded. The regulation of contracts falling outside the scope of the Directives falls under the Member States' competence. However, where these contracts have a certain cross-border interest, the award is subject to EU primary law. The primary law on public procurement consists of the provisions on freedom of movement of goods, services and the right of freedom of establishment in the Treaty on the Functioning of the European Union (TFEU), and the legal principles derived from these provisions. The legal principles of most importance to the award of public contracts are the principles of equality, non discrimination, proportionality, mutual recognition and transparency.

This article discusses to what extent the provisions in the TFEU on the possibility to make exceptions from the Treaty obligations, are applicable for the award of contracts covered only by EU primary law. It also deals with the interesting aspect, if the provisions in the Directives could apply, when contracting authorities and entities award contracts only covered by EU primary law. It especially examines weather the provisions on exceptions in the Directives could apply to the award of public contracts falling outside the scope of the Directives.

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INTRODUCTION

The legal base for the award of all public contracts in the EU, are the provisions on freedom of movement in the TFEU and the general principles, i.e. the EU primary law. The Directives do not, or only partly, regulate the award of contracts for B-services, low-value contracts or the award of contracts for service concessions. The award of these contracts is however still subject to the provisions and the general principles of EU primary law, if they have a certain cross-border interest.

The Court of Justice of the European Union (CJEU) has in a number of cases ruled on different aspects of the procurement process for the award of contracts covered only by EU primary law. There has also been a discussion among scholars, if these provisions and general principles impose a duty for public authorities and entities to publish some form of notice when they award these contracts. It could be argued that the case law of the CJEU indicate that there is indeed an implied obligation to make the award of these public contracts official in some way. Whether it is necessary to publish a formal notice, or enough just to make the award public in a simpler manner, the fact remains that the principle of transparency requires some form of publication.

In December 2011, the EU Commission (the Commission) presented proposals for changes to the present Directives (COM/2011/0896 final and COM(2011) 895 final). It also presented a proposal for a new directive on concessions (COM(2011) 897 final). These proposals are at present subject to negotiations among the Member States of the EU. Until those discussions are over, it is very difficult to guess what the outcome will be. Until then, and until we may have new provisions and directives regulating public procurement, we still need to interpret and put to good use the provisions and general principles that at present regulate the award of public contracts covered only by EU primary law.

On important issue worth looking at, is the question when it is possible for procuring authorities and entities to make restrictions to the freedom of movement, i.e. from the *aquis communitaire* all together. Such restrictions from the principle of transparency

would in practice mean a direct award, without the specific public contract being put out to competition. There are some possibilities to make restrictions found in the Treaty provisions. There is also case-law from the CJEU to consider, especially the *Cassis de Dijon* case and the doctrine of mutual recognition. A third possibility is the provisions of the Directives. Could they be made applicable, including the provisions on exceptions, at the award for public contracts regulated only by EU primary law?

The following paragraphs of this article will examine when, and under what circumstances, these three types of permissible restrictions to the freedom of movement in the EU are available for procuring authorities and entities, when they award public contracts covered only by the provisions and general principles of EU primary law.

EU PRIMARY LAW AND PUBLIC PROCUREMENT

In a series of judgments, the CJEU has stated that the award of public contracts not subject to the Directives may still be subject to the provisions on freedom of movement in the TFEU and the general principles derived there from, se e.g. the cases *Vestergaard*, *Telaustria and Telefonadress* and *An Post*. The assumption is that the award of contracts for B-services, low-value contracts or contracts for service concessions can be covered by EU primary law, if they have a certain cross border-interest. A certain cross-border interest exists, if suppliers from another Member States would have an interest in competing for, and winning, a specific contract, which was first stated in the *An Post* case.

Article 18 TFEU provides that any discrimination on grounds of nationality is prohibited within the scope of the Treaties, without prejudice to any particular provision. The article thus contains the basic EU law prohibition against discrimination and applies in all areas of EU law. According to Bernitz & Kjellgren, the prohibition of discrimination can be seen as a pillar of the internal market and is based on a social market economy, highly competitive. They also consider the provision to be necessary for a "Europe of citizens" and for an ever closer unity between fellow-citizens.

The CJEU has several times stated that the obligation to respect the principle of equal treatment of tenderers is central to the Directives, as in the *Commission v. Italy* case. The purpose of the provisions of the Directives is to remove obstacles to the freedom of movement of goods and services and thus to protect the interests of economic operators which are established in one Member State, who wish to offer goods or services to contracting authorities and entities in another Member State. The legal base for the EU provisions on public procurement is therefore the prohibition on discrimination in Article 18 TFEU and the principle of equal treatment. Treumer considers the prohibition on discrimination in Article 18 TFEU to be a key provision for public contracts.

Article 18 TFEU is however only applicable on its own in situations covered by EU law, but for which there are no special provisions regarding non-discrimination in the TFEU. Since the non-discrimination principle has been implemented in all areas of freedom of movement, Article 18 TFEU is not directly applicable in the situations covered by Article 34 TFEU, Article 49 TFEU or Article 56 TFEU, as explained in the *Josman* case. A contracting authority or contracting entity acting in violation of the prohibition in Article 18 TFEU, thereby also violates the other provisions of the TFEU on the freedom of movement and, in addition, the general principles based on those provisions. It could thus be expressed as Article 18 TFEU is complementary with respect to the other provisions relating to the freedom of movement.

In the procurement field, the principle of equality, the principle of non-discrimination on the basis of nationality, the principle of proportionality, the principle of transparency and the principle of mutual recognition are the most important general principles. These general principles are since 2004 to be found in the preambles to the Directives. The principles of equality, non-discrimination and transparency are also entered into the text, which states that contracting authorities and entities shall treat economic operators equally and non-discriminatorily and act in a transparent manner.

With the provisions in the TFEU on the freedom of movement and the principles of equal treatment and non-discrimination on the basis of nationality, follows the obligation of transparency. A

contracting authority or contracting entity is required, for the benefit of any potential tenderer in the country or in an other Member State, to ensure a degree of publicity sufficient to enable a contract to be opened up to competition, and the impartiality of the award procedures to be reviewed.

According to the CJEU, the principle of equal treatment requires that all potential tenderers be afforded equality of opportunity and implies that all tenderers must be subject to the same conditions, see the *Telaustria and Telefonadress* case. The award of the contract must therefore be based on objective, non-discriminatory criteria which are known to interested suppliers in advance, in such a way as to circumscribe the exercise of the national authorities' discretion.

EU PRIMARY LAW AND THE PROVISIONS ON EXCEPTIONS

In order to enable Member States to derogate from the provisions on the freedom of movement, there must be an explicit exception in the TFEU. To begin, exceptions from EU law is possible in light of a Member State's essential security interests, which are found in Article 346 TFEU. For the exception to apply there must be some sort of security aspect to the contract to be awarded, so that the measures taken do not adversely affect competition in the internal market for goods not intended for specifically military purposes. The award of the contract can not be covered by Directive 2009/81 on defence and security procurements.

Article 34 TFEU provides that quantitative restrictions on imports and measures having equivalent effect shall be prohibited between Member States. However, it is possible for Member States in certain cases to make exceptions to the prohibition of import restrictions. Article 36 TFEU provides that Member States may impose prohibitions or restrictions on imports, exports or transit of certain goods, if such prohibitions or restrictions are justified on grounds of public morality, public order or public safety or the protection of human and animal health and life to preserve the plants, the protection of national treasures possessing artistic, historic or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions are permissible as long as they are not

means of arbitrary discrimination or disguised restrictions on trade between Member States.

Article 49 TFEU provides for the principle of freedom of establishment and Article 56 TFEU provides for the freedom to provide services. For both of these provisions there are exceptions set out in the Treaty. Article 51 TFEU exempt activities with the exercise of public power. The exception is limited to "activities which in themselves are directly and specifically connected with the exercise of official authority." In Article 52 TFEU is also indicated some other reasons that can justify discriminatory barriers to entry and impediments to the freedom of movement of services. The article measures provisions of national laws justified on grounds of public policy or public security, and providing for special treatment for foreign nationals. Thus it is possible for Member States to impose discriminatory barriers, if they are justified on grounds of public policy or public security.

In all situations where there are exceptions to the provisions on freedom of movement in the TFEU, national measures liable to hinder or make less attractive the exercise of these freedoms must meet the requirements of proportionality. A national measure must therefore guarantee the achievement of the aim pursued, that it is a coherent and systematic approach to meet the needs of achieving the objective, and can not go beyond what is necessary to achieve the desired objective.

The CJEU has in several cases tried if various exceptions taken by contracting authorities or entities in the award of contracts in EU primary law, were compatible with the exceptions in the TFEU, e.g. in the *Contse* case. In many of these cases the issue looked at has been the possibility to derogate from the freedom of movement, the general principle of transparency and the obligation to guarantee a sufficient degree of publicity resulting from these provisions. It is worth noting that the CJEU in several judgments has expressed that the provisions of Article 36 TFEU, 51 TFEU and 52 TFEU, as derogations from the freedom of movement, must be interpreted in a way that limits their scope to include only the minimum restrictions necessary, to safeguard the interests which they allow Member States to protect.

It is finally worth noting that there is in principle no de minimis rule applicable to the provisions concerning the freedom of movement in the TFEU. A national measure does not fall outside the scope of the prohibition in Articles 34–35 TFEU merely because the hindrance which it creates is slight and because it is possible for products to be marketed in other ways. Arrowsmith also notes that there is no necessity for a measure to constitute a general practice, to be covered by the provisions of the TFEU.

However, certain state measures only impose a restrictive effect on trade between Member States. If these effects are too uncertain and indirect, the measures would probably fall outside the *aquis communitaire*. They would then be subject to the Member States discretion.

OVERRIDING REASONS IN THE PUBLIC INTEREST

According to the CJEU's statement in the *Hartlauer* case, in determining whether the principle of proportionality has been infringed, a "structural balance" between conflicting interests must be made. The structured balance consists of three steps. In the first step, an assessment is made whether the measure is appropriate and effective to achieve the desired objective. In the second step, an assessment is made whether the measure is necessary to achieve its aim or if there is one for the individual less restrictive way to achieve the purpose. In the third step, an assessment is made whether the negative effect that the measure has on an individual is disproportionate to the aim pursued.

An example of criteria that were not considered to be proportionate in an award of a public contract was mentioned in the *Contse* case. The contracting authority had indicated that additional points were to be awarded to tenderers, who are already at the time of tender had facilities open to the public in some cities in the province where the services would be provided. The CJEU held that the requirement went beyond what was necessary to ensure the objectives of the contract, namely to protect human life and health, and was therefore contrary to the principle of proportionality.

In the *EVN and Wienstrom* case, the CJEU held that if a contracting authority or contracting entity gives extra points for production in excess of that needed for a given contract, the procedure is not proportionate. Such requirements were considered to go beyond what was needed to meet the purpose of the contract. In Sweden, we begin to get a more comprehensive case law on the principle of proportionality. As an example, there was a case where the contracting authority in a public procurement for waste management, had made demands that the garbage trucks would be painted in a specific colour. In another case, in a public procurement for cleaning services in a museum, the contracting authority requiring that the suppliers would previously have cleaned in a museum. In both decisions, the Administrative Courts held the provisions contrary to the principle of proportionality.

a) Exceptions from the freedom of movement

Besides the possibility to derogate from the freedom of movement by reference to an express provision in the TFEU, it is also possible for contracting authorities and entities to make exceptions if an action can be justified by an *overriding reason in the public interest*. The possibility of referring to overriding reasons in the public interest for certain exceptions were set out in the *Cassis de Dijon* case. The CJEU commented that the restrictive measures that were necessary to satisfy mandatory requirements were not prohibited. Under the ruling, obstacles to trade within the EU, which occurred because of differences between the Member States national legislation (regulation of technical standards, etc.), are accepted, provided that the provisions are necessary to satisfy mandatory requirements, particularly in terms of effective fiscal, health protection, fair trading and consumer protection.

In Directive 2006/123 one can find the following examples of overriding reasons in the public interest:

Consideration by the CJEU, that in its rulings deemed to constitute overriding reason in the public interest: public policy, public security, protection of human life and health, public health,

preserving the financial equilibrium of social security, consumer protection and recipients of services and workers, fairness of trade transactions, combating fraud, protection of environment and urban environment, animal health, intellectual rights, the preservation of national historic and artistic heritage, social and cultural policy objectives.

After the *Cassis de Dijon* case, the concept of overriding reason in the public interest has been further developed by the CJEU. The case only concerned the freedom of movement of goods, but the CJEU stated that its findings included a general prohibition on restrictions of freedom of movement. As for other examples of what the CJEU has considered as overriding reasons in the public interest, the following can be mentioned: environmental concerns, maintenance of press diversity, medical devices to hospitals and protection for gambling and betting. Since overriding reasons in the public interest constitutes restrictions to the freedom of movement, the notion however is that the exceptions are to be interpreted strictly.

It is however not possible to derogate from EU law, primary or secondary, only with reference to an overriding reason in the public interest. In the *Gebhar*d case, the CJEU gave the criteria for the justification of non-discriminatory restrictions by reference to an overriding reason in the public interest, the so-called *Gebhard*-test or the proportionality-test. The test contains of four prerequisites to test if national measures that are liable to hinder or make it less attractive to exercise the freedom of movement guaranteed by the TFEU, could still be allowed. They must:

- apply in a non-discriminatory manner,
- be justified by an overriding reason of public interest,
- be suitable to ensure that the objective they pursue and
- not go beyond what is necessary to achieve the desired objective.

The latter two elements constitute the principle of proportionality.

In all situations where there are exceptions, national measures liable to hinder or make less attractive the exercise the freedom of movement, must meet the requirements of proportionality. A restriction is only considered appropriate for securing the

attainment of the goal if it in a coherent and systematic approach meets the need to achieve the goal. In cases where less restrictive measures could have been used to achieve the same goal, the restriction is not considered to be consistent with the principle of proportionality.

In summary, it is possible for Member States to restrict the freedom of movement, either if there is an explicit exemption in the TFEU, or whether the restriction is based on a reference to an overriding reason in the public interest. A restriction is furthermore possible only if it is appropriate to ensure achievement of the aim pursued and not go beyond what is necessary to achieve the goal. It would thus appear to be the same proportionality test, both in the application of an explicit exemption in the TFEU, or where an exemption is based on a reference to an overriding reason in the public interest.

b) Requirements and criteria of EU primary law

What is interesting from a procurement aspect is the CJEU in the *Contse* case. In the case three cooperating companies had lodged an appeal against an award of a contract for the supply of home and other assisted breathing techniques. The procurement was conducted by the Spanish administrative body for health care, and the services would be provided in two different Spanish provinces. The complainants felt that both the conditions of participation (selection criteria) and assessment criteria (award criteria) was contrary to treaty provisions on non-discrimination, freedom of establishment and the freedom of movement of services, and the provisions of the then Directive on Services.

As a condition of participation, the contracting authority stated that the tenderers already at the time of tender submission should have offices that were open to the public in the provincial capital, where the service would be provided. The evaluation criteria included additional points, which were given to tenderers that, at the tender submission, had its own facilities for manufacturing, processing and filling of the necessary oxygen located within 1 000 kilometres from each province or premises open to the public at other designated locations in the provinces. In addition, preference was given to bidders that previously had

provided the service, if more than one bid achieved the same score.

The CJEU began its analysis by stating:

It should also be recalled that the evaluation criteria, like any national measure, must comply with the principle of non-discrimination as derived from the provisions of the Treaty relating to the freedom to provide services, and that restrictions on that freedom must themselves fulfil four conditions which are set out in the case-law cited in paragraph 25 of this judgment.

Paragraph 25 showed that national measures liable to hinder or make less attractive the exercise of the freedom of movement guaranteed by the TFEU, would meet four conditions to be consistent with the TFEU; they must apply in a non-discriminatory way, be justified by reference to overriding reasons in the public interest, they must be appropriate so to ensure that the objective they pursue are fulfilled and they must not go beyond what was necessary to achieve this goal. The CJEU therefore applied *the same proportionality test* to the selection criteria and the award criteria as it had previously stated as applicable to the exceptions of the freedom of movement of the TFEU.

The CJEU conducted the trial in two stages, first if the selection criteria involved any breach of the principles of non-discrimination and proportionality. It then performed the same procedures for setting the award criteria. The Court found that the contracting authority's requirements were contrary to the provision on the freedom of movement of services, because the requirements in the two cases made it difficult for foreign suppliers to participate in the tender proceedings. The CJEU however left it to the national court to determine whether the requirements actually met or conflicted with the principle of proportionality.

The conclusion of the case is that Article 56 FEUF precludes a contracting authority or contracting entity from providing, in the tendering specifications for a public contract, selection criteria or award criteria that is applied in a discriminatory manner, is not justified by an overriding reason in the public interest, is not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain its purpose.

What is interesting is that the CJEU noted that it had played no role in the event, if the contract in question was a service concession or if it was a contract for B-services, which are partly covered by the Directives. The requirements and criteria were considered to be contrary to the principles of non-discrimination and proportionality, which are applicable both at the procurement of B-service and at the granting of a service concession. The conclusion is therefore, that the evaluation criteria should be designed in accordance with the principle of non-discrimination and should comply with the principle of proportionality, also for the award of contracts in EU primary law.

Also in subsequent case law, e.g. in the *Commission v. Ireland* case and in the *Commission v. Italy (II)* case, the CJEU has stated that the requirements and criteria established in public procurement and the award of contracts in EU primary law, in both circumstances constitute restrictions on the freedom of movement. The requirements and criteria that contracting authorities and contracting entities state, are subject to EU primary law and must in all be cases be applied in a non-discriminatory manner, based on an explicit exemption in the TFEU or an overriding reason in the public interest, be suitable for ensuring attainment of the objectives they pursue and not go beyond what is necessary to achieve that goal.

THE PROVISIONS ON EXCEPTIONS IN THE DIRECTIVES

The award of contracts covered by the Directives, are submitted to a stricter and more detailed regulation of procedures than is the case for the award of contracts in EU primary law. It implies that the possibility of exceptions to the procurement legal framework is also more regulated in the Directives, in that a number of exceptions are expressly stated. In order to establish what provisions contracting authorities and entities must apply when awarding public contracts covered only by EU primary law, it is of interest to examine to what extent the possibilities of exceptions in the Directives could also apply to the award of contracts in EU primary law.

Under the provisions of the Directives, contracting authorities and entities are as a rule required choosing a procedure with prior publication, in order to ensure freedom of movement in the TFEU. The Directives contain a number of exceptions that make it possible, under certain circumstances, the use a negotiated procedure without prior publication, which may involve a direct award of contract to a particular supplier. It may be that a supplier has an exclusive right, or that services or goods for artistic or technical reasons only can be obtained from by a particular supplier. For the purposes of these exceptions, the procedure for awarding the contract is still regulated by the Directives. It is hence also subject to the provisions of the Remedies Directives, unlike the award of contracts that fall entirely outside the Directives, such as the lease of an existing building or "the award" of an employment contract.

It is also possible for Member States to reserve the participation in a specific public procurement procedure to sheltered workshops or provide for contracts to be performed within the framework of sheltered employment programs. The requirement is that the majority of the employees concerned are persons with a handicap who, because of the disability or difficulty, can not carry on occupation under normal conditions.

Furthermore, the Directives also contain provisions that may involve other restrictions of the freedoms of movement, so that providers from other Member States may find it harder to tender. For example there might be an urgent situation, which does not relate to any errors or omissions on the part of the contracting authority. In such cases it is possible to apply an accelerated procedure with shortened tender times, which in itself makes it difficult for foreign bidders to place a bid, but which is considered to be justified by the circumstances in the particular procurement.

The interesting question is whether the exceptions in the Directives also could apply to the award of public contracts in EU primary law. On what legal basis would an exception apply to the award of public contracts outside the scope of the Directives?

The Commission's interpretative communication on awards not or not fully subject to the Directives, refer to the articles of the Directives which contain provisions on the negotiated procedure

without advertising. The Commission argues that the exceptions may also apply for the award of contracts not covered by the Directives. The Commission believes that the premise is to meet the conditions for any of the exceptions laid down by the Directives, and then refers to the Advocate General Jacobs' Opinion in the *Commission v Italy* case.

The Advocate General Jacob said in his proposal for a ruling that the exceptions in the Directives could not be subject to disclosure requirements in EU primary law, because these exceptions would then be meaningless. He also indicated that the same ratio applied by analogy in the award of contracts in EU primary law, as it would be absurd if the possibility of waiving the requirement of transparency would end, when the contract amount was below the threshold laid down in the Directives. His conclusion was thus that the exceptions to the requirement of transparency in the Directives, also applied for the award of contracts in EU primary law.

Even before the Advocate General Jacobs' Opinion in the *Commission v Italy* case, however, the Advocate General Stix-Hackl delivered her opinion in the *Coname* case. According to her opinion, what it is permitted in the Directives, even more must be allowed within the EU primary law. She also mentioned that it would be too strict to require that a contract had to be implemented without publication of a notice only under the conditions specified in the Directives, not to obliterate the distinction between Directives and EU primary law.

Also in her recent opinion in the *Commission v Ireland* case, the Advocate General Stix-Hackl said that such exceptions equivalent to those prescribed by the Directives will be accepted in the primary legislation. She was discussing whether the exception relating to the award of contracts to a body with statutory exclusivity would apply also to contracts below the thresholds. Her proposal did not contain an explicit assumption that this was the case, merely a statement that if a contract were not covered by the Directives, the contracting authority had put forward an objective justification that would make the exception applicable.

It is worth noticing that none of the above mentioned opinions, that the exceptions stated in the Directives also should be

applicable in EU primary law, are based on any legal argument. Instead, the General Advocates out some kinds of fairness and moral aspects that these exceptions should be applicable also in the primary legislation. I think the starting point instead should be, if the rules of the Directives at all can apply to the award of contracts in EU primary legislation. The CJEU has several times stated that that could be so, if the provisions in the Directives are intended to prevent restrictions on the freedom of movement. As an example can be mentioned the *SECAP and Santorso* case, where the CJEU stated that the provisions in the Directives on abnormally low offers also were applicable to low value contracts. These provisions states that a contracting authority or entity can not exclude a contract that is considered to be abnormally low, without first asking in writing the bidder in question the reason for the low bid. The CJEU considered the Italian legislation, where the contracting authority could exclude such offers without prior communication, in breach of the provisions of the TFEU. This was also the case for contracts that fell outside the scope of the Directives, but where they had a certain cross-border interest. The reason was that the contracting authorities, due to the obligatory provisions of the Italian law, lacked any power to make an individual assessment of the soundness and viability of abnormally low tenders. However, the legal base for the provision on abnormally low tenders in the EU primary law, was not the provision in the Directives, but the provisions on freedom of movement in the TFEU and the general principles.

If the same reasoning also would apply to the provisions on exceptions in the Directives, it would mean that those provisions may be applicable at the award of public contracts in EU primary law, but not with the Directives as the legal basis. Instead, here too, the legal basis would be the provisions on freedom of movement in the TFEU and the general principles. General Advocate Stix-Hackl pointed out in her draft opinion in the *Commission v Ireland* case, that the contracting authority had put forward no justification or an objective justification that would make the exception applicable. Thus, it would mean that the contracting authority or contracting entity not only has the burden of proving that a particular exception is applicable, but also the burden of invoking a specific exception. Unlike the provisions for *an award procedure*, which may be applicable to the awards of contracts in the EU primary legislation due to their aim of

hindering restrictions to the freedom of movement, contracting authorities and contracting entities, when using a specific exception, probably need to both *explicitly invoke the exception*, and in case of doubt, *prove* that the exception is applicable and proportional.
As noted earlier, the possibility to make a restriction to the freedom of movement, must either be explicitly mentioned as an exception in the TFEU, or be covered by the case law of the CJEU on overriding reasons in the public interest. On what provision or principle a contracting authority or contracting entity would rely, when using an exceptions in the Directives at the award of a contract covered by EU primary law, has still to be clarified by the CJEU. In my opinion, the possibility itself already exists.

THE BURDEN OF PROOF

The provisions of the Directives states, as a general rule, that an award procedure with a prior publication of a notice shall apply. The purpose of the publication of a notice is to guarantee freedom of movement in the field of public procurement. Not to invite tenders for the award of a public contract is therefore not consistent with either the requirements of Article 49 TFEU or Article 56 TFEU, or the general principles of equality, non discrimination and transparency.

Member States and its authorities, entities and agencies may however under certain conditions restrict the freedom of movement. Such measures of restrictions shall be construed strictly. In order to be justified under the TFEU or by the CJEU case law, the measure has to comply with the principle of proportionality. The measure in question has to be necessary in order to achieve the declared objective, the objective could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-EU trade. The contracting authority or contracting entity has the burden of proving the existence of such a circumstance, which would fulfil the principle of proportionality, which was explained in the *Commission v. Germany* case.

According to the case *Commission v. Italy III*, there is a corresponding obligation for contracting authorities and contracting entities to prove the existence of such circumstances, which would justify an exception, where a restricted procedures in EU primary law means that a contract is awarded without a prior call for competition. The restriction on the freedom of movement is the same as when contracting authorities and entities use exceptions in the Directives. Therefore, the same burden of proof is found in EU primary law, when an award of a public contract is not made official.

The legal basis of the requirement for public access and availability of the exceptions for contracts that fall outside the Directives, are however not the provisions of the Directives. Instead, the legal base is the provisions on freedom of movement in the TFEU and the general principles arising from these provisions.

CONCLUSIONS

The purpose of this paper has been to examine if, and under what circumstances, the possibilities to restrict freedom of movement within the EU, are available for contracting authorities and entities when they award contracts covered only by EU primary law. The provisions of the Directives apply only to certain contracts, while contracts for B-services, service concessions and low value contracts fall outside their scope. If these contracts have a certain cross-border interest, they are however covered by the provisions in TFEU on the freedom of movement in Article 18 TFEU, Article 34 TFEU, Article 49 TFEU and Article 56 TFEU. These contracts are also subject to the general principles derived from the provisions of the TFEU, especially the principle of equality and the principle of non-discrimination, from where the principle of transparency and the requirement to make the award of a contract public are derived.

The provisions in the TFEU on freedom of movement can however be restricted. Such restrictions are applicable both to the award of contracts covered by the Directives, and to the award of contracts only covered by the EU primary law. Restrictions to the freedom of movement can be made in two separate situations. Firstly, the

TFEU holds provisions with exemptions that are applicable under certain circumstances. A Member States may for example impose prohibitions or restrictions on imports of goods justified on grounds of public safety. Secondly, a Member State may refer to an overriding interest in the public interest. In those situations, the Member State can make restrictions to the freedom of movement, based on certain public interests defined by the CJEU.

In both these two situations, the restrictions must however fulfil the criteria of the principle of proportionality. The restrictions must thus be necessary in order to achieve the declared objective, which could not be achieved by less extensive prohibitions or restrictions, or by prohibitions or restrictions having less effect on intra-EU trade. The contracting authority or contracting entity has the burden of proving that the stated criteria are fulfilled.

The provisions of the Directives set out rather detailed procedures for the award of public contracts. However, they also contain a number of exceptions from to requirement of transparency, i.e. from making the award of a public contract official. These exceptions can also apply to the award of contracts covered only by EU primary law, if their aim is to hinder restrictions to the freedom of movement within the EU. However, in these cases, the legal base for the exceptions is not the provisions in the Directives, but the provisions and general principles in EU primary law.

A contracting authority or contracting entity have not only the burden of proving that a particular exception is applicable, but also the burden of invoking a specific exception, since these are not readily codified in EU primary law.

The conclusion in this article is therefore that, the possibilities to restrict the freedom of movement within the EU stated in the TFEU, *are applicable* when contracting authorities and entities award contracts covered only by EU primary law. The provisions on exclusions in the Directives *can be applicable* also at the award of contracts falling outside the scope of the Directives, even though the legal justification in these cases is somewhat unclear. In these provisions, the EU legislator obviously found that there was a justifiable ground for an exception to the freedom of movement. Those grounds for exceptions must reasonably be justified, also

when there is a restriction to the freedom of movement in an award of a public contract in EU primary law. However, to be able to use these exceptions in the EU primary law, the contracting authority or contracting entity has both the burden of invoking the exception, and the burden of proving that the exception is in fact applicable in the specific proceeding.

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