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## **APPLICATION OF THE PRINCIPLE OF TRANSPARENCY IN PUBLIC PROCUREMENT LAW BY THE COURT OF JUSTICE OF THE EUROPEAN UNION**

### **Abstract**

The aim of this article is to investigate how the principle of transparency, deriving from the Treaties and the secondary law, is implemented in the course of conditions and rules imposed during the public procurement procedure. Firstly, the principle of transparency in the EU legal system is discussed and explained are its sources, types and aspects, as well as the necessity to adapt it with time. Secondly, the principle of transparency in the EU public procurement law is outlined, with particular emphasis on its sector specific sources and aims it serves. Furthermore, the question is analysed whether the notion of “transparency” is a principle or a legal obligation, used to implement other principles. Thirdly and lastly, the principle of transparency is discussed, as reflected at different stages of public procurement procedure.

### **KEYWORDS**

transparency principle, public procurement law, EU law

### **SŁOWA KLUCZOWE**

zasada przejrzystości, prawo zamówień publicznych, prawo UE

## 1. INTRODUCTION

The public procurement sector was identified by the European Commission as “one of the most evident barriers to the achievement of a real internal market”, which is a result of the favouritism of local economic operators<sup>1</sup>. Even the implementation of the initial public procurement directives, adopted in the 1970s, faced far reaching difficulties<sup>2</sup>. Therefore, harmonisation of public procurement law at the EU level is supposed to “give effect to the free movement rules” in this sector<sup>3</sup>. Indeed, the purpose of the EU directives was to achieve the Single Market in the field of public procurement<sup>4</sup>, and the pillars for the harmonisation were to implement the Treaty provisions, in particular the prohibition of discrimination based on nationality, in order to combat the observed wide protectionist tendencies<sup>5</sup>. This means that without proper public procurement policy and measures of efficient control in place, public authorities tend to favour local economic operators and render the competition for a contract a mere illusion.

In this context the principle of transparency became one of the most important principles of public procurement law, as it plays a vital role in ensuring that the Treaty freedoms are respected, so that the proper functioning of the Single Market can truly be achieved. Most importantly, this principle provides for the traceability of the decision-making process, allowing the stakeholders to stay informed and equally treated as well as enabling the accountability of the procurement authorities, so that the discriminatory behaviour can be identified and fought against.

Therefore, the aim of this article is to analyse the principle of transparency deriving from the Treaties and the secondary law, and to investigate how it is implemented in the course of conditions and rules imposed during the public procurement procedure. This article firstly discusses the principle of transparency in the EU legal system, and explains its sources in the Treaties, as well as its types and aspects. Secondly, it analyses the principle of transparency in the EU public procurement law, with particular emphasis on its sector specific sources and aims it serves. Moreover, the analysis is conducted regarding whether the notion

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<sup>1</sup> European Commission, Completing the internal market. White Paper from the Commission to the European Council, Vol. 1985/0130, COM (85) 310 final, Brussels, 14 June 1985, para 81, p. 23.

<sup>2</sup> European Commission, Public procurement: Commission Communication outlines policy priorities, Brussels, 11 March 1998, p. 2.

<sup>3</sup> A. Buijze, *The principle of transparency in EU Law*, 2013, <https://dspace.library.uu.nl/bitstream/handle/1874/269787/buijze%2Bapp.pdf?sequence=4> (accessed 20.10.2021), p. 151.

<sup>4</sup> S. Arrowsmith, *The EC procurement directives, national procurement policies and better governance: The case for a new approach*, “European Law Review” 2002, Vol. 27, p. 5.

<sup>5</sup> European Commission, Green Paper – Public procurement in the European Union: Exploring the way forward, COM(96)583 final, p. 3.

of “transparency” is a principle or a legal obligation, used to implement other principles. Thirdly, the stages of public procurement procedure are presented in which the principle of transparency is reflected.

## 2. PRINCIPLE OF TRANSPARENCY IN THE EU LAW

In order to comprehend the application and functioning of the principle of transparency in EU public procurement law, it is crucial to begin by outlining its sources in the EU legal system.

Firstly, the principle of transparency has been recognized as one of the fundamental principles of EU Law<sup>6</sup>. It is noted that its origins derive from the principle of democracy<sup>7</sup>, which showcases its overall importance in the legal system<sup>8</sup>. The close link between the two principles is clear in Art. 1 of the TEU, which underlines that the decision-making process in the EU is to be conducted as openly and as closely to citizens as possible<sup>9</sup>.

Secondly, it is also emphasized that transparency plays a role in the functioning of the principle of rule of law, as it requires the adoption of clear, understandable, and predictable laws<sup>10</sup>. In practice, it means that the adopted rules and regulations should be clear enough so that the intentions of the authorities are understandable to the public<sup>11</sup>. That being said, the clarity requirement is especially important on the national level rather than on the EU one, since it connects to the proper implementation of EU legislation<sup>12</sup>.

Moreover, this article finds that two types of transparency can be distinguished: passive transparency, meaning the right to access information exercised upon a request, and active transparency, which is described as the obligation

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<sup>6</sup> C. Bovis, *The effects of the principles of transparency and accountability on public procurement and public-private partnerships regulation*, “European Public Private Partnerships Law Review” 2009, Vol. 4, issue 1, p. 7.

<sup>7</sup> V. Karageorgou, *Transparency principle as an evolving principle of EU law: Regulative contours and implications*, 2013, <https://www.right2info.org/resources/publications/eu-karageorgou-vasiliki-transparency-principle-as-an-evolving-principle-of-eu-law> (accessed 20.10.2021), p. 2.

<sup>8</sup> For more on principles of EU law, see T. Tridimas, *The General Principles of EU Law*, Oxford 2007.

<sup>9</sup> Treaty on European Union, consolidated version (OJ EU C 326, 26.10.2012), “TEU”.

<sup>10</sup> V. Karageorgou, *op. cit.*, p. 4.

<sup>11</sup> G. Klich, *Zasada przejrzystości postępowania o udzielenie zamówienia publicznego*, “Research Papers of the Wrocław University of Economics” 2017, No. 497, p. 76.

<sup>12</sup> V. Karageorgou, *op. cit.*, p. 11.

for the institutions to conduct transparent proceedings and make their decisions public<sup>13</sup>.

The passive transparency depends, on the one hand, on the initiative of the person with the right to access information to exercise it, and on the other hand, on the fulfilment of the request by the obligated public authority<sup>14</sup>. In this case, the public authority is a receiver of a potential request to fulfil its duties connected to transparency.

This aspect of the principle of transparency is included in Art. 15 (3) TFEU providing for the right of access to the documents of the EU's institutions, bodies, offices, and agencies<sup>15</sup>, whereas its specific rules are laid down in Regulation 1049/2001<sup>16</sup>. Additionally, the right to access documents evolved into a fundamental right – freedom of information, covered by Art. 42 of the Charter of Fundamental Rights of the European Union<sup>17</sup>.

Moreover, the provisions connected to passive transparency also cover the legal measures needed to challenge and overrule the public authorities' unlawful decisions to refuse access to public information. Such measures should include the right to appeal to a higher authority as well as the possibility to challenge the decision in a court of law.

On the other hand, the active transparency relies on the public authorities and the way in which they are obligated to conduct their proceedings, so that they are documented, law-based, and justified, as well as their outcome made public by default. Thus, transparency in the active context is an umbrella term covering many different actions as well as the manner in which they are undertaken.

Furthermore, these two aspects of principle of transparency are closely interconnected as one cannot access information, e.g. a copy of documents, if they were not formulated to document a given decision or action in the first place. Similarly, lack of transparency regarding a given decision substantially hinders the possibility to exercise the right to access full information, since the public simply could not know of them to begin with.

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<sup>13</sup> A. Alemanno, *Unpacking the principle of openness in EU law. Transparency, participation, and democracy*, "European Law Review" 2014, Vol. 39, issue 1, p. 8.

<sup>14</sup> For more on the right to access information see D. Adamski, *Prawo do informacji o działaniach władz publicznych Unii Europejskiej*, Warszawa 2011; M. Szwarc, *Ograniczenia prawa dostępu do dokumentów instytucji Unii Europejskiej na podstawie rozporządzenia 1049/2001 w sprawie publicznego dostępu do dokumentów*, "Studia Prawnicze" 2013, No. 2, pp. 163–195; D.M. Curtin, *Citizens' fundamental right of access to EU information: An evolving digital passport*, "Common Market Law Review" 2000, Vol. 37, issue 1, pp. 7–41.

<sup>15</sup> Treaty on the Functioning of the European Union, consolidated version (OJ EU C 326, 26.10.2012), "TFEU".

<sup>16</sup> Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, pp. 43–48).

<sup>17</sup> Charter of Fundamental Rights of the European Union, original version (OJ EU C 191, 29.07.1992).

It also should be underlined that the catalogue of the obligations arising from the transparency principle is not only open, but also evolves alongside technological progress. With the growing availability of technologically-driven solutions, the manner in which transparency obligations are carried out as well as their form and scale might change. This means that with time and technological development, transparency provisions at the state level will be subject to change in order to cover the new technological solutions and best practices. Conversely, many of the transparency provisions included in the directives, might remain unchanged. This evolution may concern issues such as the means through which the public authorities communicate with the private entities, create the reports or share the documents while providing the enhanced accessibility to information for people with disabilities.

### **3. THE PRINCIPLE OF TRANSPARENCY IN THE EU PUBLIC PROCUREMENT LAW**

#### **3.1. LEGAL BASIS FOR TRANSPARENCY MEASURES IN THE EU PUBLIC PROCUREMENT LAW**

Public procurement market is harmonised through the implementation of several directives, most importantly:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement<sup>18</sup>,
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport, and postal services sectors<sup>19</sup>,
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts<sup>20</sup>,
- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts, and service contracts by contracting authorities or

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<sup>18</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, pp. 65–242), “Directive 2014/24”.

<sup>19</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, pp. 243–374), “Directive 2014/25”.

<sup>20</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, pp. 1–64), “Directive 2014/23”.

entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC<sup>21</sup>.

What is particular about the transparency measures is that they are scattered throughout the procurement directives, as general rules and as concrete obligations. Given that the core of European public procurement law remains, however, in the Directive 2014/24, the analysis will focus primarily on that directive.

Most importantly, transparency is listed among procurement principles in the Art. 18 (1) of the Directive 2014/24<sup>22</sup>. Another crucial aspect of the transparency measures includes the provisions related to the publication of procurement notices. Thanks to the standardised advertisements as well as the rules on their content and deadlines for publications, the directives ensure that all economic operators from different Member States have equal opportunity and access to information crucial for their decision on whether to take part in the procurement procedure or to challenge its outcome. It is the most vivid example of how abiding by the principle of transparency ensures the respect of the equal treatment principle.

Indeed, Art. 48–55 of the Directive 2014/24 deal with the matters related to the publication and transparency, and cover such issues as contract and contract award notices as well as the form and manner of publication of notices<sup>23</sup>. Moreover, this matter is further covered by the Commission Implementing Regulation 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement<sup>24</sup>.

Furthermore, it should be noted that the description of the subject-matter of a procurement is another key element of the implementation of the principle of transparency. Thus, Art. 42–44 of the Directive 2014/24 describe the content of the technical specifications, characteristics of the procured goods, services or works, and means to prove their fulfilment, such as the appropriate use of labels, test reports, and certifications<sup>25</sup>.

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<sup>21</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, pp. 76–136), “Directive 2009/81”.

<sup>22</sup> This is not a singular case, since transparency is described as a procurement principle also in the other directives, namely: Art. 36 (1) of the Directive 2014/25, Art. 3 (1) in connection with the Art. 30 (2) of the Directive 2014/23 as well as Art. 4 of the Directive 2009/81.

<sup>23</sup> Similarly, rules on the publication and transparency are included in the Art. 67–75 of the Directive 2014/25, Art. 31–34 of the Directive 2014/23. Even Directive 2009/81 contains rules on advertising and transparency in its Art. 30–37.

<sup>24</sup> Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No. 842/2011 (OJ L 296, 12.11.2015, pp. 1–146).

<sup>25</sup> A. Sołtysińska, H. Talago-Sławoj, *Charakter specyfikacji jako instrumentu gwarantującego przestrzeganie zasady przejrzystości*, “Zamówienia Publiczne Doradca” 2018, Vol. 4. Analogical regulation is included in the Art. 60–62 of the Directive 2014/25. On the other hand, Art. 36 of the Directive 2014/23 sets out rules for the technical and functional requirements with regards

Lastly, obligations arising from the transparency principle are applicable at every stage of the procedure, from evaluating the offers to rejecting them, and the actions of the contracting authority must at all times comply with them. The rule of thumb can be described as providing the same information to all economic operators at the same time, and not using any information in a way that the lack of transparency leads to direct or indirect unequal treatment. The Court of Justice of European Union's (CJEU) case law has developed and nuanced those premises, and is a subject of analysis in the latter part of the article.

### 3.2. OBJECTIVES OF THE PRINCIPLE OF TRANSPARENCY IN THE PUBLIC PROCUREMENT SYSTEM

Due to its multifaceted nature, the principle of transparency serves various different objectives in the public procurement system.

Most importantly, it should be noted that observance of the principle of transparency ensures the proper functioning of the four freedoms in this field, as it is necessary to allow for the development of efficient competition. In doing so, this principle facilitates market access for economic operators from other countries, and the creation of an efficient competition in place. Thanks to that, transparency is considered a key measure to promote the Single Market<sup>26</sup>. Its role in enabling efficient competition for the awarding of public contracts can be overall described as preventing information asymmetries, especially due to the differences in nationalities. Economic operators coming from different Member States have a natural disadvantage compared to their local competitors, as they do not possess comparable knowledge of the local market or know-how on the procedures and laws in place. Thus, it has been argued that a lack of transparency results in higher transaction costs<sup>27</sup> and indirect discrimination<sup>28</sup>.

Indeed, it should be emphasised that transparency is closely linked to the respect and application of the non-discrimination principle at the international level<sup>29</sup>. To counteract that, active transparency obligations especially aim at diminishing that information gap by providing all economic operators with the same information on the requirements, procedure, and qualification criteria. Thus, the

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to concessions, whereas Art. 18 of the Directive 2009/81 regulates it in the field of defense procurement.

<sup>26</sup> S. Arrowsmith, *The EC procurement directives...*, p. 5.

<sup>27</sup> A. Buijze, *op. cit.*, p. 147.

<sup>28</sup> *Ibidem*, p. 155.

<sup>29</sup> S. Arrowsmith, *Transparency in government procurement: The objectives of regulation and the boundaries of the World Trade Organization*, "Journal of World Trade" 2003, Vol. 37, issue 2, p. 288.



principle of transparency acts to ensure that the attempts of the Member States' discriminatory behaviour are visible and can be fought against<sup>30</sup>.

Moreover, as noted before, there is a close link between the principle of transparency and equal treatment. Observance of one is required to safeguard the respect of the other<sup>31</sup>. The equal treatment principle is considered to imply the obligation of transparency because there must be ensured equality of opportunity for economic operators, regardless of their nationality, as well as the possibility to review the lawfulness of the decisions of the contracting authority<sup>32</sup>. The reason being is that transparency serves to provide all economic operators with the same information, which is compiled in a way for anyone to make an informed decision. Also, the required documentation of the process enables the efficient verification of its lawfulness, and if needed, a proper judicial review to prevent discriminatory behaviour. When direct and indirect discrimination are difficult to apply, due to the possibility for a legal challenge and their consequences, effective equal treatment is provided<sup>33</sup>.

Furthermore, the principle of transparency is considered an important anti-corruption and accountability tool. It also serves as a tool to verify the proper delivery of public services<sup>34</sup>. According to recital 126 of the Directive 2014/24 "The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud". In this recital, both the active aspect of transparency, meaning accessing information upon request, and its passive aspect, such as documenting the procurement process, were mentioned as providing necessary traceability for the decision-making process. The connection between relative levels of transparency and corruption was empirically proven, and this principle was consequently emphasised as a way to not only allow for the discovery of corruption, but also correct inefficiencies, which otherwise may not have been identified<sup>35</sup>. In effect, corruption and opaqueness facilitate the distortion of competition and particularly favouritism for local economic operators<sup>36</sup>.

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<sup>30</sup> S. Arrowsmith, *EC regime on public procurement*, (in:) Khi V. Thai (ed.), *International handbook of public procurement*, 2009, p. 257.

<sup>31</sup> A. Buijze, *op. cit.*, p. 155.

<sup>32</sup> S. Prechal, M. De Leeuw, *Dimensions of transparency: The building blocks of a new legal principle?*, "Review of European Administrative Law" 2007, Vol. 0, No. 1, p. 59.

<sup>33</sup> A. Buijze, *op. cit.*, p. 155.

<sup>34</sup> C. Bovis, *op. cit.*, p. 8.

<sup>35</sup> K. Osei-Afoakwa, *How relevant is the principle of transparency in public procurement?*, "Developing Country Studies" 2014, Vol. 4, issue 6, p. 143.

<sup>36</sup> For more on the relationship between transparency and accountability see A. Alemanno, *op. cit.*



### 3.3. TRANSPARENCY IN EU PUBLIC PROCUREMENT LAW: A STANDALONE PRINCIPLE?

The status of transparency as a principle or an obligation is important from a perspective of its interpretation in a situation of conflicting obligations or principles. Thus, if transparency is a principle, it carries more importance when put against another principle in a given evaluated case, than when it is a mere obligation.

For the purpose of this article, transparency within the public procurement system is referred to as a principle. However, despite the fact that transparency is argued to be one of the key principles of the public procurement system<sup>37</sup>, the literature considers it a “means used to achieve one or more objectives of public procurement”<sup>38</sup>, rather than a goal in itself<sup>39</sup>.

The above-mentioned may be caused by the fact that it is not clear whether the EU legislator considers it as a standalone principle or as an obligation deriving from a principle of equal treatment. Indeed, the Directive 2014/24 refers to transparency in both of these manners.

On the one hand, transparency is emphasised as a principle in numerous recitals of Directive 2014/24. In effect, further to recital 1, the award of public contracts has to comply with the principles of the Treaties, especially the four freedoms, and “the principles deriving therefrom, such as equal treatment, non-discrimination and (...) transparency”. What is important to note is that in this recital, transparency is referred to as a principle, deriving directly from the principles which are fundamental to the European integration process and is presented at the same level as the equal treatment principle<sup>40</sup>.

Not only the recitals of Directive 2014/24, but also some of its provisions, refer to transparency as a principle. Most notably, Art. 18 (1) should be underlined as it

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<sup>37</sup> See K. Osei-Afoakwa, *op. cit.*; A. Sołtysińska, *Komentarz do Art. 18 Dyrektywy 2014/24/UE w sprawie zamówień publicznych, uchylającej Dyrektywę 2004/18/WE*, (in:) A. Sołtysińska, H. Talago-Sławoj, *Europejskie prawo zamówień publicznych. Komentarz*, Warszawa 2016.

<sup>38</sup> S. Arrowsmith, *The objectives of public procurement system and regulatory provisions*, (in:) S. Arrowsmith (ed.), *Public procurement regulation: An introduction*, 2010, p. 20, <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulation-introduction.pdf> (accessed 20.10.2021).

<sup>39</sup> G. Klich, *op. cit.*, p. 82.

<sup>40</sup> Transparency is also treated as a principle, in recital 68 of the Directive 2014/24 dealing with electronic purchasing techniques, in recital 110 concerning the issue of a replacement of an economic operator by another without a new competition in case of a contract termination, as well as in recital 90 of the Directive 2014/24 describing that the award criteria should be objective. Similarly, recital 114 of the Directive 2014/24, dealing with the limited cross border aspects of certain services, emphasizes that the “rules of this Directive take account of that imperative, imposing only the observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers”.

is entitled “Principles of procurement”. That being said, this provision precisely showcases the source of confusion related to the status of transparency in the EU public procurement law, since in Art. 18 (1) it states that “Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner”. Indeed, the wording of this article from one point emphasises that it concerns the principles of procurement, from another it refers to transparency as an obligation, when in several provisions of the Directive 2014/24 it is described as a principle<sup>41</sup>.

The aforementioned confusion is not present, however, in the Art. 56 (3) which lays down the “general principles” for the selection of participants and the award of public contracts and refers to transparency as a principle, on an equal footing with the principle of equal treatment. An analogous solution is included in the Art. 76 (1), concerning “principles of awarding contracts”.

On the other hand, there are also examples of the EU legislator referring to transparency as a tool to implement other principles, as a manner in which actions should be undertaken or simply describes given transparency obligations, such as the traceability.

In effect, the treatment of transparency as a means for the implementation of the equal treatment principle can be found in such provisions as recital 58 of the Directive 2014/24, which states that documentation and keeping of written records provide for an adequate transparency level, which enables the verification of compliance with the equal treatment principle, implying that transparency is a mere tool to help achieve it<sup>42</sup>.

Moreover, there are many examples of the referral to transparency as a manner in which the contracting authorities should carry out their actions, one example of which is the Art. 56 (2) of the Directive 2014/24, which relates to the verification of the grounds for exclusion<sup>43</sup>.

From the analysis of the above-mentioned provisions a conclusion can be drawn that there is a duality in how the transparency principle is invoked. The first

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<sup>41</sup> Namely, Art. 40 of the Directive 2014/24 requires that any preliminary market consultations do “not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency”.

<sup>42</sup> Similarly, the previously mentioned recital 90 of the Directive 2014/24 in its second part states that “To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision”.

<sup>43</sup> Additionally, further to recital 73 of the Directive 2014/24, which deals with joint cross-border procurement, underlines that Member States should not use this solution in an attempt to circumvent the “provisions on transparency and access to documents or specific requirements for the traceability of sensitive supplies”. Whereas, recital 80 of the Directive 2014/24 concerning the electronic means of communication, emphasizes that they may lead “to increased transparency and time savings”.

perspective is when it is invoked as a standalone principle, and the other – as an obligation to act in a particular way during the decision-making process in order to ensure fulfilment of other principles of the public procurement system. This conclusion remains in line with the view that regulation of the public procurement sector derives from two main sources: the overarching Treaties, and specific rules laid out in the procurement directives<sup>44</sup>. Therefore it would mean that “a degree of transparency that ensures equal treatment of tenderers is different from a degree of transparency that ensures the proper functioning of the common market”<sup>45</sup>.

Firstly, transparency is referred to as a principle when its source can be linked directly to ensuring the fulfilment of the obligations imposed in the Treaties. In such cases, the best example being recital 1 of Directive 2014/24, it is one of the fundamental principles of EU law, and is called upon to ensure compliance of the award of the contract with the four freedoms. In fact, it has been argued that lack of the minimal transparency compliance can lead to the breach of all four freedoms<sup>46</sup>. Moreover, in this context, transparency is understood as an umbrella term for its many different aspects arising from passive and active transparency compliance. Furthermore, when the transparency derives from the Treaties, meaning that it serves to ensure the functioning of the Single Market, its minimal level of compliance must be respected, even when procurement directives themselves are not applicable to the given award procedure. Such instances might happen for example when the value of the procurement contract falls below the threshold set in the Directive<sup>47</sup>.

Secondly, the above-described application of the principle of transparency stemming from the Treaties can be distinguished from instances when certain aspects of this principle are referred to in the Directive 2014/24. Rather than being considered specifically as a standalone principle, it is a tool to achieve the observance of other principles as well as a measure imposed for the efficacy of the functioning of harmonization of the public procurement market.

In effect, one of the most often called upon aspects of the principle of transparency in Directive 2014/24 is the traceability of the decision-making process and the right to access documents. In recital 52, the EU legislator underlined that the electronic means of information and communication increase of transparency of procurement proceedings, which suggests that they facilitate the exercise of the right to access information, indicating the passive transparency. On the other hand, recital 82 should be mentioned as it touches upon active transparency by

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<sup>44</sup> C. Arrowsmith S., *EC regime...*, p. 254.

<sup>45</sup> A. Buijze, *op. cit.*, p. 154.

<sup>46</sup> *Ibidem*, p. 146.

<sup>47</sup> For the applicability of the transparency to the procurement falling outside of the scope of Directive 2014/24 see M. Szydło, *Zasada przejrzystości w zamówieniach publicznych, do których nie stosuje się lub stosuje jedynie częściowo przepisy wspólnotowych dyrektyw o zamówieniach publicznych*, “Samorząd Terytorialny” 2008, No. 7–8.

emphasising that the contracting authorities should, without a relevant request, provide tenderers with information on its key undertaken decisions.

Furthermore, an example of combining the two aspects of transparency described above is recital 45, which on the one hand refers to transparency as a principle and places it on an seemingly equal footing with principle of equal treatment. It can also be argued that the source of transparency in this provision is drawn from the Treaties, as it is meant to safeguard against procurement procedures which are less open by default, from possible discriminatory actions, so that effective competition and market access for foreign economic operators is equally ensured. On the other hand, the second part of this recital underlines that “in order to ensure transparency and traceability of the process, all stages should be duly documented”. Thus, in this case, the EU legislator emphasises the importance of concrete, passive aspects of transparency of the public procurement procedure, in the form of an obligation to ensure proper traceability and documentation of the public procurement procedure.

In addition, the CJEU shares the EU legislator’s double referral with regards to transparency – as a principle<sup>48</sup> and as an obligation<sup>49</sup> serving to fulfil other principles, which sustains the lack of clarity with regards to its status<sup>50</sup>. Thus, it remains unclear whether the Court regards it as a principle or merely a tool for the observance of other principles<sup>51</sup>.

#### 4. REFLECTION OF THE PRINCIPLE OF TRANSPARENCY IN THE PUBLIC PROCUREMENT PROCEEDINGS

The principle of transparency under EU law is not clearly reflected in the particular provisions<sup>52</sup>. As seen in the previous section, they rather tend to be formed as general guidelines. In fact, the transparency rules come from two different sources: the public procurement directives and Treaty provisions. When

<sup>48</sup> Judgement of the Court of Justice of the European Union of 29 April 2004, C-496/99 *Succhi di Frutta*, 2004 I-03801, para 32; Judgement of the Court of Justice of the European Union of 8 February 2018, C-144/17 *Lloyd’s of London*, ECLI:EU:C:2018:78, para 30.

<sup>49</sup> Judgement of the Court of Justice of the European Union of 18 October 2001, C-19/00 *SIAC*, ECLI:EU:C:2001:553, para 41; Judgement of the Court of Justice of the European Union of 4 May 2017, C-387/14 *Esaprojekt*, ECLI:EU:C:2017:338, para 36; Judgement of the Court of Justice of the European Union of 2 June 2016, C-27/15 *Pippo Pizzo*, ECLI:EU:C:2016:404, para 35.

<sup>50</sup> G. Klich, *op. cit.*, p. 79.

<sup>51</sup> O. Heitling, *The principle of transparency in public procurement*, State Aid and Public Procurement in the European Union, University of Maastricht, <https://www.maastrichtuniversity.nl/sites/default/files/2012/heitling.pdf> (accessed 20.05.2021), p. 14.

<sup>52</sup> K. M. Halonen, *Disclosure rules in eu public procurement: Balancing between competition and transparency*, “Journal of Public Procurement” 2016, Vol. 16, issue 4, p. 537.

the given procurement falls under the scope of the directives' applicability<sup>53</sup>, the transparency rules stemming from the public procurement directives are applicable. On the other hand, when it does not fall under the scope of the directives, for example due to its low value, then the transparency rules stem from the Treaty provisions on the internal market freedoms, as interpreted by the CJEU. In fact, the Court used the principles, including transparency, to build on top of what is expressively foreseen in them<sup>54</sup>. In effect, many of the transparency rules were developed throughout the process of the judicial review and the scope of applicability of transparency measures was extended further than that of the procurement directives.

From the substantial point of view, transparency rules can be divided according to the four major groups of aspects they concern: contract opportunity advertisement, publicity of the rules of the procedure, rule-based decisions throughout the procedure, and verifiable and justifiable contract award decisions with the availability of legal remedies<sup>55</sup>.

To facilitate the analysis, the specific rules and requirements arising from the directives or from the case law will be divided according to which stage of the procurement process they concern: initial stage of the procedure, decisions taken in the course of the contract award procedure, final stage and legal remedies.

#### 4.1. INITIAL STAGE OF THE PROCEDURE

The initial stage of the procedure plays a crucial role in ensuring that the contract opportunity attracts all the potential economic operators possible. It sets out the premise of the procurement, its subject and objectives as well as its rules and procedures. Therefore, the form and manner in which the documents are

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<sup>53</sup> The threshold for applicability of the directives is prescribed in: the Art. 4 of the Directive 2014/24 and the Commission Delegated Regulation (EU) 2019/1829 of 30 October 2019 amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts, and design contests (OJ L 279, 31.10.2019, pp. 27–28); Art. 9(4) of the Directive 2014/23 and the Commission Delegated Regulation (EU) 2019/1827 of 30 October 2019 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the threshold for concessions (OJ L 279, 31.10.2019, pp. 23–24); Art. 17(4) of the Directive 2014/25 and the Commission Delegated Regulation (EU) 2019/1829 of 30 October 2019 amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts, and design contests (OJ L 279, 31.10.2019, pp. 27–28); 68(1) of the Directive 2009/81 and the Commission Delegated Regulation (EU) 2019/1830 of 30 October 2019 amending Directive 2009/81/EC of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts (OJ L 279, 31.10.2019, pp. 29–30).

<sup>54</sup> S. Arrowsmith, *EC regime...*, p. 267.

<sup>55</sup> S. Arrowsmith, *The EC procurement directives...*, pp. 5–6.

formulated throughout the procurement procedure should respect the principle of transparency<sup>56</sup>.

It is also worth noting, however, that the obligation to respect this principle may start even before the procurement procedure is launched, at the stage of eventual preliminary market consultations, as Art. 40 of the Directive 2014/24 requires that they do not lead to a breach of principles of transparency, equal treatment or to distortion of the competition.

Moreover, the clear link between advertisement of the contract opportunity and respect of the principle of transparency is underlined by the fact that the whole Section 2 of the Chapter 3 is called “Publication and transparency” and it covers such matters as information on planned procurements (Art. 48), contract notices (Art. 49), and contract award notices (Art. 50). Additionally, Annex V to the Directive 2014/24 describes what information should specifically be included in the notices.

The above-described provisions serve as means to embody the principle of transparency in several ways. Most importantly, they require that the information on contract opportunity be made public in an adequate manner, so the potential tenderers<sup>57</sup> would be properly informed about it, and consequently be able to make a decision regarding whether to submit an offer or not – which concerns in particular the criteria for participation and the contract award criteria as well as their weight<sup>58</sup>. Thanks to the prescribed deadlines, economic operators are provided with an effective opportunity to acquire the advertised information and have time to take steps accordingly.

As the CJEU underlined, compliance with the principle of transparency requires that the contract award procedure is governed by the rules and conditions, which are clear, precise, unambiguous, and described in the notice in advance, to allow all the potential tenderers to be reasonably informed about the procurement opportunity and its criteria<sup>59</sup>. This is particularly crucial as without transparency, economic operators, especially foreign ones, are not enabled to take part in the procedure to win the public contract<sup>60</sup>.

Furthermore, the principle of transparency was found to prohibit the change of the conditions set out in the invitation to tender during the contract performance, as it would result in applying different conditions compared to those applicable during the invitation stage to the economic operator, at the expense of those who

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<sup>56</sup> A. Sołtyńska, H. Talago-Sławoj, *op. cit.*, p. 44.

<sup>57</sup> Further to Art. 2, para 1, point 11 of the Directive 2014/24 it means economic operator who submitted an offer.

<sup>58</sup> G. Klich, *op. cit.*, p. 83.

<sup>59</sup> Judgement of the Court of Justice of the European Union of 29 April 2004, C-496/99 *Succhi di Frutta*, 2004 I-03801, para 111.

<sup>60</sup> Opinion of Advocate General Bot of 17 December 2009, C-203/08, *The sporting exchange*, ECLI:EU:C:2009:791, para 133.

participated in the procedure or considered doing so at the publication of the invitation stage<sup>61</sup>.

Additionally, while reviewing the case concerning unforeseen requirements in the contract notice to disclose links between economic operators, the CJEU held that contracting authorities are required to define and make public all the participation conditions in advance under pain of invalidity<sup>62</sup>. The analysis of this case showcases that even though this requirement had its source in state law, applying it without any information about it in the notice, especially as it relates to the elements of the documents to submit, would have had an indirect discriminatory effect on foreign economic operators who do not possess knowledge and know-how about the local laws and procedures in contrast with their local counterparts.

These views of CJEU showcase the extraordinary importance of the notices – not only do they serve as an information about certain events, such as contract opportunities, but they also set out the whole premise for the procurement procedure, including the information on requirements arising from the state law, which could lead to indirect discrimination, if it is not known by the foreign economic operators.

The requirement of transparency at the initial stage of the public procurement procedure has also been underlined by the CJEU in the context of such procurement to which the EU directives do not apply, due to the fact that its value falls below the threshold of the directives' applicability. Indeed, the CJEU developed the concept of required degree of advertising, which extends the applicability of the publication requirements to procurements falling outside of the scope of public procurement directives. At the heart of this view lies the opinion that if the subject matter of the contract is of certain cross-border interest, then transparency is needed to allow economic operators from different Member States to learn about the procurement opportunity<sup>63</sup>. Similarly, CJEU held that when a given procurement has a certain cross-border interest, it must then respect principles arising from the Treaties and the subsequent obligation of transparency, which entails the requirement of adequate publicity, so that the potential economic operators are able to gain necessary information on the rules of procedure, in particular concerning the qualitative selection<sup>64</sup>.

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<sup>61</sup> Judgement of the Court of Justice of the European Union of 29 April 2004, C-496/99 *Succhi di Frutta*, 2004 I-03801, paras 120–121.

<sup>62</sup> Judgement of the Court of Justice of the European Union of 17 May 2018, C-531/16 *Specialus autotransportas*, ECLI:EU:C:2018:324, para 23.

<sup>63</sup> Judgment of the Court of Justice of the European Union of 3 June 2010, C-203/08, *The Sporting Exchange*, ECLI:EU:C:2010:307, para 40.

<sup>64</sup> Judgement of the Court of Justice of the European Union of 2 June 2016, C-410/14, *Falk Pharma*, ECLI:EU:C:2016:399, paras 44–45.



Moreover, in the *Telaustria* case, it was underlined that the public service concessions falling outside of the directive's scope, still need to abide by the fundamental Treaty principles, including prohibition of discrimination and, arising from it, the transparency obligation, which requires a certain degree of advertising to potential tenderers to ensure opening the procedure up to competition and the possibility of review<sup>65</sup>.

This concept ensures that the Treaty based principle of transparency is respected so that economic operators from other Member States could rely on the four freedoms of the internal Market to compete for the award of the procurement, even though it falls below the procurement directives' applicability.

The exception to the above-described concept would be the lack of cross-border interest for the given subject matter, and so-called in-house procurement, where the contracting authority has control over the economic operator with whom the contract is concluded<sup>66</sup>. In fact, the CJEU held that the clearest indicator for the lack of cross-border interest is the small value of the planned procurement<sup>67</sup>.

#### **4.2. DECISIONS TAKEN IN THE COURSE OF THE CONTRACT AWARD PROCEDURE**

According to Art. 56 (1) of the Directive 2014/24 contract is awarded on the basis of criteria provided for in Art. 67–69 to a tenderer who passes the selection criteria while not being the subject to exclusion from the procedure and who's tender satisfies requirements, conditions, and criteria, foreseen in the notice and other procurement documents. Consequently, this stage of the procedure can be divided into two main substages: the qualitative selection and selection of the winning tender.

Firstly, the qualitative selection consists, most importantly, of obligatory and non-obligatory grounds of exclusion. As specified in Art. 56 (1) (b) of the Directive 2014/24, the procurement contract can not be awarded to a tenderer who falls under obligatory or facultative exclusion criteria and who does not meet the selection criteria specified in the tender notice and procurement documents. The obligatory criteria for exclusion, as specified in Art. 57 (1) and (2) of the Directive 2014/24, are applicable when there was a conviction of a given tenderer by final judgement as well as a final and binding judicial or administrative decision. Whereas, the facultative exclusion criteria, meaning the ones that a Member State may foresee in its law, are listed in the Art. 59 (4) of the Directive 2014/24.

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<sup>65</sup> Judgement of the Court of Justice of the European Union of 7 December 2000, C-324/98 *Telaustria*, ECLI:EU:C:2000:669, paras 60–62.

<sup>66</sup> Opinion of Advocate General Bot of 17 December 2009, C-203/08, *The sporting exchange*, ECLI:EU:C:2009:791, paras 144–145.

<sup>67</sup> *Ibidem*, para 165.

The respect of the principle of transparency requires, above all, that all the decisions taken throughout the procurement procedure are documented, justified, and rule-based, so that it would prevent corruption and favouritism, to guarantee efficient competition for the public contract<sup>68</sup>. Moreover, the set criteria must be applied to every tenderer in the same manner throughout the whole procedure<sup>69</sup>. In practice it means that all exclusion criteria must be specified and made public in advance, applied identically to all tenderers by the contracting authority, who becomes bound by them.

Therefore, the CJEU held that if a contracting authority foresees, in a given procedure or as a result of national law, a deadline for submission of the evidence of corrective measures, which could exempt a tenderer from an exclusion, the transparency principle requires that this fact is communicated precisely in advance in tender specifications<sup>70</sup>.

Moreover, the principle of transparency prohibits imposing grounds for exclusion, which arise solely from the case law and are not laid down in the given contract procedure<sup>71</sup>. It is then admissible to prescribe a deadline for the supplementation of documents to satisfy the condition arising from the case law<sup>72</sup>.

Additionally, the verification regarding whether an economic operator falls under grounds for exclusion should not be determined automatically<sup>73</sup>. In fact, in the CJEU's opinion, the mere fact that two offers were signed by the same representative, without requesting proof that they were drawn up independently, did not allow for the automatic exclusion, but needed to be based on evidence<sup>74</sup>.

Secondly, when tenders are subject to verification and evaluation, it is of outmost importance that their comparison is conducted in compliance with the transparency principle as well as the equal treatment principle at every step<sup>75</sup>. The reason being is that further to Art. 76 (1) of the Directive 2014/24, award of the contract must abide by the principle of transparency.

Specifically, the CJEU held that upon deciding which offer is the best in a given procedure, the contracting authority may not rely on any other criteria than those expressly prescribed in the tender documents<sup>76</sup>. Additionally, the con-

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<sup>68</sup> S. Arrowsmith, *The objectives...*, p. 21.

<sup>69</sup> Judgement of the Court of Justice of the European Union of 18 October 2001, C-19/00 SIAC, ECLI:EU:C:2001:553, para 44.

<sup>70</sup> Judgement of the Court of Justice of the European Union of 14 January 2021, C-387/19, RTS *infra* BVBA, ECLI:EU:C:2021:13, para 36.

<sup>71</sup> Judgement of the Court of Justice of the European Union of 2 June 2016, C-27/15 Pippo Pizzo, ECLI:EU:C:2016:404, para 50.

<sup>72</sup> *Ibidem*.

<sup>73</sup> Judgement of the Court of Justice of the European Union of 8 February 2018, C-144/17 Lloyd's of London, ECLI:EU:C:2018:78, para 35.

<sup>74</sup> *Ibidem*, para 46.

<sup>75</sup> S. Prechal, M. De Leeuw, *op. cit.*, p. 57.

<sup>76</sup> G. Klich, *op. cit.*, p. 83.

tracting authority takes the responsibility for any unclarities, uncertainties or shortcomings of the procurement documentation<sup>77</sup>. This ensures that criteria and conditions are known and all the tenderers have the same opportunity to take part in the procedure and their tenders will be evaluated in the same manner.

It should also be noted that Art. 56 (3) of the Directive 2014/24 enables the contracting authority at this stage to request the tenderer to submit, supplement, clarify or complete the otherwise incomplete, unclear or erroneous tender. This provision stresses that any such request must be conducted in full respect of the transparency and equal treatment principles. Consequently, the CJEU underlined that it is prohibited to negotiate with tenderers and the tender may not be changed after the deadline for submission had passed<sup>78</sup>. This results in the general prohibition to amend a submitted tender after it has been submitted, regardless of whether it is at the request of the contracting authority or at the request of the tenderer<sup>79</sup>.

However, the CJEU clarified that there are limited exceptions to the above-mentioned prohibition, such as the possibility to request clarifications of the imprecise offer or the offer which does not meet the technical specifications<sup>80</sup>. Thus, a violation of the principle of transparency was found in the supplementation of the documents included in the tender, which consisted, among others, of third party experience and the resources necessary to perform the contract<sup>81</sup>. The reason being that allowing for the change of an entity, whose capacities are relied upon in the submitted tender, would constitute a material change, resulting in practice in submission of a new tender<sup>82</sup>. Therefore, the Court specified that an exception applies when the scope of the clarification is not substantial or when there are obvious material errors<sup>83</sup>. Moreover, as the additional documents and resources were submitted after the deadline for tender submission, it would provide different rules to the tenderer in question, than were foreseen in the notice.

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<sup>77</sup> A. Sołtysińska, H. Talago-Sławoj, *op. cit.*

<sup>78</sup> Judgement of the Court of Justice of the European Union of 4 May 2017, C-387/14 Esaprojekt, ECLI:EU:C:2017:338, para 37.

<sup>79</sup> Judgement of the Court of Justice of the European Union of 3 June 2021, C-210/20, Rad Service Srl Unipersonale [*et al.*], ECLI:EU:C:2021:445, para 43.

<sup>80</sup> Judgment of the Court of Justice of the European Union of 7 April 2016, C-324/14, Partner Apelski Dariusz, ECLI:EU:C:2016:214, para 63.

<sup>81</sup> Judgement of the Court of Justice of the European Union of 4 May 2017, C-387/14, Esaprojekt, ECLI:EU:C:2017:338, paras 41 and 44.

<sup>82</sup> Judgement of the Court of Justice of the European Union of 3 June 2021, C-210/20, Rad Service Srl Unipersonale [*et al.*], ECLI:EU:C:2021:445, para 44.

<sup>83</sup> Judgment of the Court of Justice of the European Union of 7 April 2016, C-324/14, Partner Apelski Dariusz, *op. cit.*, para 32.

### 4.3. FINAL STAGE AND LEGAL REMEDIES

Firstly, it should be underlined that the issue of legal remedies is covered by the Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts<sup>84</sup>. As the name suggests, this directive amended the provisions of the Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>85</sup> as well as the Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts<sup>86</sup>.

Secondly, in this context it is important to note that transparency rules allow for the securing of access to remedies for economic operators<sup>87</sup>. The reason being that the transparency principle imposes the obligation to formulate clear, precise, and understandable conditions<sup>88</sup>, which enables economic operators to exercise their right to an appeal and judicial verification of the lawfulness of the contracting authority's decision<sup>89</sup>.

Indeed, in the recital 3 of the Directive 2007/66/EC the EU legislator highlighted that the adoption of this directive was a result of identified shortcomings in the measures established by the two preceding directives, hence “the guarantees of transparency and non-discrimination” should be reinforced so that the EU could take advantage of new directives, which harmonise the public procurement law.

Thus, one of the crucial adopted changes concerns Art. 3a of the Directive 2007/66/EC dealing with the “Content of a notice for voluntary ex ante transparency”, which includes a justification for the decision to withhold from publica-

<sup>84</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, pp. 31–46).

<sup>85</sup> Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, pp. 14–20).

<sup>86</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, pp. 33–35).

<sup>87</sup> K.-M. Halonen, *Disclosure rules...*, p. 528.

<sup>88</sup> G. Klich, *op. cit.*, p. 84

<sup>89</sup> Judgement of the Court of Justice of the European Union of 14 November 2013, C-388/12, *Comune di Ancona*, ECLI:EU:C:2013:734, para 46.

tion of a prior contract notice. Thanks to such a notice, economic operators are provided with an opportunity to verify and challenge the contracting authority's decision.

Moreover, when discussing legal remedies, it should be stressed that exclusion of economic operators from the proceeding might have an effect of narrowing competition for the given public contract. To prevent that, the contracting authority is obliged to abide by the conditions it set up in the procurement documents. Consequently, the CJEU held that an economic operator may be excluded from the proceeding when it does not submit a required document, such as a statement of not being subject to criminal proceedings or a conviction before the deadline to submit the offers<sup>90</sup>. Otherwise, it might successfully seek legal remedies for unlawful exclusion.

Subsequently, the CJEU underlined that the implementation and application of exclusion grounds besides compliance with the principle of transparency, must also be conducted in accordance with “the principle of respect for the rights of the defence which, as a fundamental principle of EU law”<sup>91</sup>. Thus, the Court held that this meant respecting the right to be heard before the contracting authority undertakes a decision, which will adversely affect a given tenderer, such as exclusion from the procedure<sup>92</sup>.

Furthermore, another significant premise for potential challenges worth noting is the amendment of the public contract and the contract award conditions after the best offer was chosen. The basis for contract modification is laid down in the Art. 72 of the Directive 2014/24.

In effect, the CJEU emphasised that a material amendment to the public procurement contract in course of its performance was considered to form a new contract, without a contract award procedure, and as such an infringement of the principle of transparency<sup>93</sup>.

Thus, as a rule, amendments to the procurement contract in the absence of such a possibility foreseen in the contract notice constitute a breach of transparency principle. This rule is, however, subject to exceptions. For instance, the Court allowed for a change of the currency of the contract as its value was raised, and thus effectively when such an adjustment was minimal<sup>94</sup>.

Finally, the obligation to respect the principle of transparency applies as well when the contracting authority decides to not award the contract after conducting

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<sup>90</sup> Judgement of the Court of Justice of the European Union of 6 November 2014, C-42/13, *Cartiera dell'Adda SpA*, ECLI:EU:C:2014:2345, para 50.

<sup>91</sup> Judgement of the Court of Justice of the European Union of 14 January 2021, C-387/19, *RTS infra BVBA*, ECLI:EU:C:2021:13, para 34.

<sup>92</sup> *Ibidem*.

<sup>93</sup> Judgement of the Court of Justice of the European Union of 19 June 2008, C-454/06 *Presse-text*, 2008 I-04401, para 34.

<sup>94</sup> *Ibidem*, paras 60–61.

the public procurement procedure. Further to the judgment of the CJEU, in order to ensure the necessary transparency, the contracting authority should communicate grounds for its decision to withdraw an invitation to tender<sup>95</sup>. Moreover, it was emphasised that a decision to withdraw can be reviewed and overthrown<sup>96</sup>, thus thanks to the transparency and knowing its grounds, the legal review process is provided with all the necessary information to be done efficiently.

Additionally, the Court specified that such grounds may include the assessment of expediency in awarding the contract taking into account identified changes in factual or economic circumstances, contracting authority's needs or insufficient competition for the contract, including a situation when only one tenderer qualified to perform it<sup>97</sup>.

## 5. CONCLUSION

The principle of transparency is an umbrella term for its many different aspects and the obligations it carries. What is important to note is that transparency arises from two sources – the Treaties and the Directives. The origin of transparency requirement in a given case influences whether it could be applicable – as a fundamental principle of the Treaties – even to contracts falling outside of Directive 2014/24. Indeed, the principle of transparency, stemming from the Treaties, serves CJEU to verify the actions of contracting authorities, even when taken in course of proceedings, which are outside of the scope of directives. In fact, the Court has used this principle to develop and concretise the obligations arising from the principle of transparency.

However, despite the wide scope of application of transparency in the EU public procurement law, its status remains unclear. That being said, from the analysis conducted in this article it may be concluded that the determination of whether it is a principle or an obligation requires an analysis of its origin in a given case, to determine whether it is invoked as a Treaty principle or as an obligation arising from the directives.

Moreover, this principle serves numerous objectives in the public procurement system, such as ensuring the proper functioning of the Single Market in the field, supporting the compliance with equal treatment and non-discrimination principles, providing for traceability of the public procurement process and accountability of the contracting authorities. Consequently, it helps to lower transaction

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<sup>95</sup> Judgement of the Court of Justice of the European Union of 11 December 2014, C-440/13 *Croce Amica One Italia srl*, ECLI:EU:C:2014:2435, para 33.

<sup>96</sup> *Ibidem*, para 34.

<sup>97</sup> *Ibidem*, para 35.

costs and facilitate market access for foreign entities<sup>98</sup>. It also forces the Member States to take positive steps towards further improving market access to public contracts for foreign economic operators<sup>99</sup>.

Most importantly, compliance with transparency requires the decisions to be rule-based, well-documented and publicized<sup>100</sup>. It also requires the information on procurement procedures to be accessible in advance, clear, comprehensive, and understandable<sup>101</sup>. Moreover, in order to fully implement transparency obligations, there needs to be an access to judicial review to verify the lawfulness of the decisions and actions undertaken by the contracting authority.

Furthermore, it should be underlined that one of the unique characteristics of this principle is that provisions implementing it are subject to changes with technological development and the introduction of novel best practices, with the understanding that such changes are likely to happen at a higher frequency than in other fields of law.

Subsequently, the obligation to respect the principle of transparency is present at all stages of the procurement procedure – from the notice to legal remedies. Indeed, by setting out the elements of notices the EU legislator ensured that all necessary information on procurement procedure is shared with potentially interested economic operators. It is also at this initial stage that the duality of legal basis for the transparency in public procurement is most vivid as the CJEU extended the application of transparency principle even beyond the scope of the directive's applicability. This resulted in the doctrine of requiring a sufficient degree of advertising when a procurement is of a certain cross-border interest, but falls outside of the scope of the directive. Finally, thanks to the obligation to justify decisions, including that of withdrawal an invitation to tender as well as imposing limits on supplementation of documents and contract amendments, the respect of transparency principle is also ensured at the final stage of the procurement procedure and provides the grounds for an efficient judicial review.

Overall, it should be expected that the understanding of the principle of transparency will get more and more concrete with the CJEU rulings on specific cases, and transparency regulations at the state level will evolve to allow for more accessibility and traceability of the procurement processes.

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<sup>98</sup> S. Arrowsmith, *Transparency...*, p. 290.

<sup>99</sup> S. Arrowsmith, *EC regime...*, p. 257.

<sup>100</sup> K. Osei-Afoakwa, *op. cit.*, p. 141.

<sup>101</sup> *Ibidem*.



## REFERENCES

### Literature

- Adamski D., *Prawo do informacji o działaniach władz publicznych Unii Europejskiej*, Warszawa 2011
- Alemanno A., *Unpacking the principle of openness in EU law: Transparency, participation, and democracy*, "European Law Review" 2014, Vol. 39, issue 1
- Arrowsmith S., *EC regime on public procurement*, (in:) Khi V. Thai (ed.), *International handbook of public procurement*, 2009
- Arrowsmith S., *The EC procurement directives, national procurement policies and better governance: The case for a new approach*, "European Law Review" 2002, Vol. 27
- Arrowsmith S., *The objectives of public procurement system and regulatory provisions*, (in:) S. Arrowsmith (ed.), *Public procurement regulation: An introduction*, 2010, <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf> (accessed 20.05.2021)
- Arrowsmith S., *Transparency in government procurement: The objectives of regulation and the boundaries of the World Trade Organization*, "Journal of World Trade" 2003, Vol. 37, issue 2
- Bovis C., *The effects of the principles of transparency and accountability on public procurement and public-private partnerships regulation*, "European Public Private Partnerships Law Review" 2009, Vol. 4, issue 1
- Buijze A., *The principle of transparency in EU law*, 2013, <https://dspace.library.uu.nl/bitstream/handle/1874/269787/buijze%2Bapp.pdf?sequence=4> (accessed 20.05.2021)
- Curtin D.M., *Citizens' fundamental right of access to EU information: An evolving digital passepartout*, "Common Market Law Review" 2000, Vol. 37, issue 1
- European Commission, *Completing the internal market. White Paper from the Commission to the European Council*, Vol. 1985/0130, COM (85) 310 final, Brussels, 14 June 1985
- European Commission, *Green Paper – Public procurement in the European Union: Exploring the way forward*, COM(96)583 final
- European Commission, *Public procurement: Commission Communication outlines policy priorities*, Brussels, 11 March 1998
- Halonen K.-M., *Disclosure rules in EU public procurement: Balancing between competition and transparency*, "Journal of Public Procurement" 2016, Vol. 16, issue 4
- Heitling O., *The principle of transparency in public procurement. State Aid and Public Procurement in the European Union*, University of Maastricht, <https://www.maastrichtuniversity.nl/sites/default/files/2012/heitling.pdf> (accessed 20.05.2021)
- Karageorgou V., *Transparency principle as an evolving principle of EU law: Regulatory contours and implications*, 2013, <https://www.right2info.org/resources/publications/eu-karageorgou-vasiliki-transparency-principle-as-an-evolving-principle-of-eu-law> (accessed 21.05.2021)
- Klich G., *Zasada przejrzystości postępowania o udzielenie zamówienia publicznego*, "Research Papers of the Wrocław University of Economics" 2017, No. 497
- Osei-Afoakwa K., *How relevant is the principle of transparency in public procurement?*, "Developing Country Studies" 2014, Vol. 4, issue 6

- Prechal S., De Leeuw M., *Dimensions of transparency: The building blocks of a new legal principle?*, "Review of European Administrative Law" 2007, Vol. 0, No. 1
- Sołtysińska A., *Komentarz do Art. 18 Dyrektywy 2014/24/UE w sprawie zamówień publicznych, uchylającej Dyrektywę 2004/18/WE*, (in:) A. Sołtysińska, H. Talago-Sławoj, *Europejskie prawo zamówień publicznych. Komentarz*, Warszawa 2016
- Sołtysińska A., Talago-Sławoj H., *Charakter specyfikacji jako instrumentu gwarantującego przestrzeganie zasady przejrzystości*, "Zamówienia Publiczne Doradca" 2018, Vol. 4
- Szwarc M., *Ograniczenia prawa dostępu do dokumentów instytucji Unii Europejskiej na podstawie rozporządzenia 1049/2001 w sprawie publicznego dostępu do dokumentów*, "Studia Prawnicze" 2013, No. 2
- Szydło M., *Zasada przejrzystości w zamówieniach publicznych, do których nie stosuje się lub stosuje jedynie częściowo przepisy wspólnotowych dyrektyw o zamówieniach publicznych*, "Samorząd Terytorialny" 2008, No. 7–8
- Tridimas T., *The general principles of EU Law*, Oxford 2007

### Legal acts

- Charter of Fundamental Rights of the European Union, original version (OJ EU C 191, 29.07.1992)
- Commission Delegated Regulation (EU) 2019/1827 of 30 October 2019 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the threshold for concessions (OJ L 279, 31.10.2019, pp. 23–24)
- Commission Delegated Regulation (EU) 2019/1828 of 30 October 2019 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests (OJ L 279, 31.10.2019, pp. 25–26)
- Commission Delegated Regulation (EU) 2019/1829 of 30 October 2019 amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts, and design contests (OJ L 279, 31.10.2019, pp. 27–28)
- Commission Delegated Regulation (EU) 2019/1830 of 30 October 2019 amending Directive 2009/81/EC of the European Parliament and of the Council in respect of the thresholds for supply, service and works contracts (OJ L 279, 31.10.2019, pp. 29–30)
- Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011 (OJ L 296, 12.11.2015, pp. 1–146)
- Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, pp. 33–35)
- Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, pp. 14–20)

- Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, pp. 31–46)
- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, pp. 76–136)
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, pp. 1–64)
- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, pp. 65–242)
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, pp. 243–374)
- Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, (OJ L 145, 31.5.2001, pp. 43–48)
- Treaty on European Union, consolidated version (OJ EU C 326, 26.10.2012)
- Treaty on the Functioning of the European Union, consolidated version (OJ EU C 326, 26.10.2012)

### **Case law**

- Judgement of the Court of Justice of the European Union of 7 December 2000, C-324/98, *Telaustria*, ECLI:EU:C:2000:669
- Judgement of the Court of Justice of the European Union of 18 October 2001, C-19/00, *SIAC*, ECLI:EU:C:2001:553
- Judgement of the Court of Justice of the European Union of 29 April 2004, C-496/99, *Succhi di Frutta*, 2004 I-03801
- Judgement of the Court of Justice of the European Union of 19 June 2008, C-454/06, *Pressetext*, 2008 I-04401
- Judgment of the Court of Justice of the European Union of 3 June 2010, C-203/08, *The Sporting Exchange*, ECLI:EU:C:2010:307
- Opinion of Advocate General Bot of 17 December 2009, C-203/08, *The sporting exchange*, ECLI:EU:C:2009:791
- Judgement of the Court of Justice of the European Union of 10 October 2013, C-336/12, *Manova*, ECLI:EU:C:2013:647
- Judgement of the Court of Justice of the European Union of 14 November 2013, C-388/12, *Comune di Ancona*, ECLI:EU:C:2013:734
- Judgement of the Court of Justice of the European Union of 6 November 2014, C-42/13, *Cartiera dell'Adda SpA*, ECLI:EU:C:2014:2345
- Judgement of the Court of Justice of the European Union of 11 December 2014, C-440/13, *Croce Amica One Italia sarl*, ECLI:EU:C:2014:2435

- 
- Judgement of the Court of Justice of the European Union of 2 June 2016, C-410/14, Falk Pharma, ECLI:EU:C:2016:399
- Judgment of the Court of Justice of the European Union of 7 April 2016, C-324/14, Partner Apelski Dariusz, ECLI:EU:C:2016:214
- Judgement of the Court of Justice of the European Union of 2 June 2016, C-27/15, Pippo Pizzo, ECLI:EU:C:2016:404
- Judgement of the Court of Justice of the European Union of 4 may 2017, C-387/14, Esaprojekt, ECLI:EU:C:2017:338
- Judgement of the Court of Justice of the European Union of 8 February 2018, C-144/17, Lloyd's of London, ECLI:EU:C:2018:78
- Judgement of the Court of Justice of the European Union of 17 may 2018, C-531/16, Specialus autotransportas, ECLI:EU:C:2018:324
- Judgement of the Court of Justice of the European Union of 14 January 2021, C-387/19, RTS infra BVBA, ECLI:EU:C:2021:13
- Judgement of the Court of Justice of the European Union of 3 June 2021, C-210/20, Rad Service Srl Unipersonale et al, ECLI:EU:C:2021:445