RULE OF LAW ASSESSMENT – CASE STUDY OF PUBLIC PROCUREMENT

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Abstract

This article deals with the concept of Rule of Law in the process of public procurement. Authors analyse various aspects of the topic from the various points of view. The research is focused on finding, whether and how the rule of law is applied in the process of public procurement, and what are the consequences for its breach.

Key words: *rule of law, EU Law, public procurement, principle of sound administration*

INTRODUCTION

The Rule of law. This value is one of the fundamental principles, upon which the European Union is founded. It is present (in its full performance or at least partially) in all policies and areas of law. Referring to the checklist provided by the Venice Commission of the Council of Europe (2016), the rule of law contains various aspects, such as legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination, access to justice, the conflict of interest. The EU, closely linked to the concepts developed within the Council of Europe [Varga 2019: 166], recognises a wider concept, as it counts also on a right to good administration, proportionality, right to defend, transparency, right to be heard, effectivity and efficiency.

The Rule of law is expressed in primary law[1] as well as in all sorts of secondary law. However, as rule of law is a general principle, its applicability emanates just from its material content.

In this paper, authors verify the hypothesis that the rule of law is generally applicable and applied without the necessity of its verbalising in the form of secondary law relating to public procurement. Authors chose the area of public procurement because it is not the traditional branch of the administrative law with traditional administrative rules and principles. Therefore, it will be a good example on which they can verify or refute the above-mentioned hypothesis. During the research, authors used scientific methods such are analyses, comparison and deduction.

1. RULE OF LAW IN PUBLIC PROCUREMENT – FROM PRIMARY LAW TO SECONDARY LAW

The rule of law as a common value of the Member States and the EU [Mokrá 2013: 233], as enshrined in Article 2 of the Treaty on European Union (TEU) must be applied without any doubt, not only in all areas covered by EU law but also in areas that remain the competence of the Member States [Schroeder 2016: 59]. Nevertheless, without any enforcement mechanisms the value of the rule of law can remain an empty declaration. Indeed, the "nuclear bomb" solution under Article 7 TEU does not seem to be an appropriate and proportionate measure for day-to-day application and a system for the evaluation of the adherence to the values of the EU. Moreover, an actual application of Article 7 TEU can hardly lead to an effective remedy and, in fact, it can rather lead to anti-Brussels sentiments in the "delinquent" state than to real aligning with the values of the EU again. The only direct legal measure for enforcement of rule of law as a value of the EU is, henceforth, more a "bludgeon" than a "nuclear bomb" [Nagy 2018: 8-9]. Without an effective "direct" remedy, the values of the EU, including the rule of law, are taken into account while being applied in respective rules or dealing with possible violation of rules, duties and rights stipulated by the Treaties. The recent case Commission v Poland (2019)[2] can serve as an example of such indirect enforcement of rule of law. Moreover, rule of law and its features (e.g. procedural safeguards, legal certainty, limited powers of government) must be considered in every decision and action of EU institutions as well as Member States' authorities. In extreme cases, honouring the value of rule of law, including legal certainty, can lead to "exemptions" or extraordinary disapplication of measures aimed to protect the internal market (Cf. case CIF).[3]

In primary law, alongside other fundamental rights and freedom, the value of rule of law is particularly linked to the right to good administration under Article 41 of the Charter of Fundamental Rights of the European Union (hereinafter "Charter"). However, the scope of Article 41 of the Charter is limited: it explicitly covers merely rights of persons vis-à-vis the EU's institutions and agencies as well as duties of the EU itself as an "umbrella right" including a set of particular rights (e.g. right to be heard) (for detail see e.g. Friedery 2018). However, case law extended the right to good

[1] See for example the Article 2 of the Treaty on European Union, or the Preamble to the Charter of Fundamental Rights of the European Union.

[2] Judgment of the Court of 24 June 2019, Case C-619/18 *Commission v Republic of Poland,* ECLI:EU:C:2019:531.

[3] Judgment of the Court of 9 September 2003, Case C-198/01 *Consorzio Industrie Fiammiferi* (*CIF) v Autoritá Garante della Concorrenza e del Mercato*, ECLI:EU:C:2003:430.

administration as a duty of the Member States because it constitutes a general principle of the EU [Groussot et al. 2016].
Regarding ratione personae, the scope of Article 47 of the Charter is broader since it covers both remedies – by European as well as national judiciary. On the other hand, the scope is narrower since it covers judicial remedies, while Article 41 of the Charter takes into account the administration of public affairs as a whole. Article 41 of the Charter is an EU counterpart to the body of rules of the Council of Europe focused on good administration. Although the Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration is not a binding instrument, content of the recommendation can be linked to rights and freedoms stipulated in the European Convention on Human Rights [Stelkens and Andrijauskaitė 2017: 18-24]. The body of case law explaining the content of the right to good administration developed mainly in the area of competition, anti-dumping, state aid and customs [e.g. Lanza, 2008: 488]
The Court also stated in H.N.[4] (2014), that the right to sound administration, enshrined in Article 41 of the Charter, reflects a general principle of EU law. Its inherent part is the duty of care or diligence. Duty of diligence applies generally to the actions of the (EU) administration in its relations with the public and requires that administration act with care and caution [Masdar[5] 2018]. In its essence, it obliges the relevant institution to examine carefully and impartially all the relevant facts of the case [Randa Chart v EEAS[6] 2015: 113].
Hence, both, the EU and the Member States are bound by the principles of good administration via the Charter (the EU) and via the European Convention on Human Rights (the Member States). These requirements must be reflected in secondary legislation and secondary legislation must be seen and interpreted trough the prism of values of the EU, including rule of law, which contains the right for good administration and effective judicial remedies. Moreover, violation of rule of law as a general legal requirement is a reason for annulment of an act of an institution (Article 263 of the Treaty on the Functioning of the European Union; TFEU) and might be a solid base for a claim for damages caused by maladministration, too.
The original aim of the directives on public procurement is to remove internal barriers for free movement of goods and services via transparency and non-discrimination on a basis of nationality. The very scope of the directives is given by "universal" harmonisation provision of Article 114 TFEU. Since directives deal with the relationship between public bodies (contracting authorities) and private entities (economic operators), requirements of the right for good administration, as a specific feature of rule of law are immanent. Although public procurement represents a specific form of administrative procedures, the principle of good administration shall be obeyed. The specific character of public procurement does not limit the scope of application of these principles but requires considering other additional aspects, such as free competition and effectiveness of procurement procedures.

[4] Judgement of the Court of 8 May 2014, Case C-604/12 *H.N. v Minister for Justice, Equality and Law Reform, Ireland,* ECLI:EUC:2014:302, point 49.
[5] See to that regard for example judgement of the Court of 16 December 2008 *Masdar Ltd v Commission of the European Communities*, ECLI:EU:C:2008:726.
[6] Judgement of the General Court of 16 December 2015, T-138/14 *Randa Chart v European External Action Service*, ECLI:EU:T:2015:981, point 113.

2. PRINCIPLES OF PUBLIC PROCUREMENT AS AN IMPLEMENTATION MECHANISM OF RULE OF LAW

Public procurement is an area of law of significant importance. In so far, as it concerns, inter alia, public services, supplies contracts and works contracts, it is intended to ensure of freedoms of the Internal market and the opening-up towards competition in Member States [Cf. Petr 2016: 100-101], which shall be undistorted and as wide as possible.[7] According to the Court's settled case law, the purpose of coordinating the procedures for the award of public contracts at European Union level is to eliminate barriers to the freedom to provide services and goods and therefore protect the interests of traders established in a Member State which wishes to offer goods or services to contracting authorities established in another Member State [P.M.[8] 2019]. Public procurement is at the same time one of the key market-based instruments to be used to achieve smart, sustainable and inclusive growth whole ensuring the most efficient use of public funds. Under statistics provided by the European Commission[9], over 250 000 public authorities in the EU spend around 14% of GDP on the purchase of services, works and supplies every year. It is therefore crucial to ensure that this process would be effective.

Efficiency and Efficacy

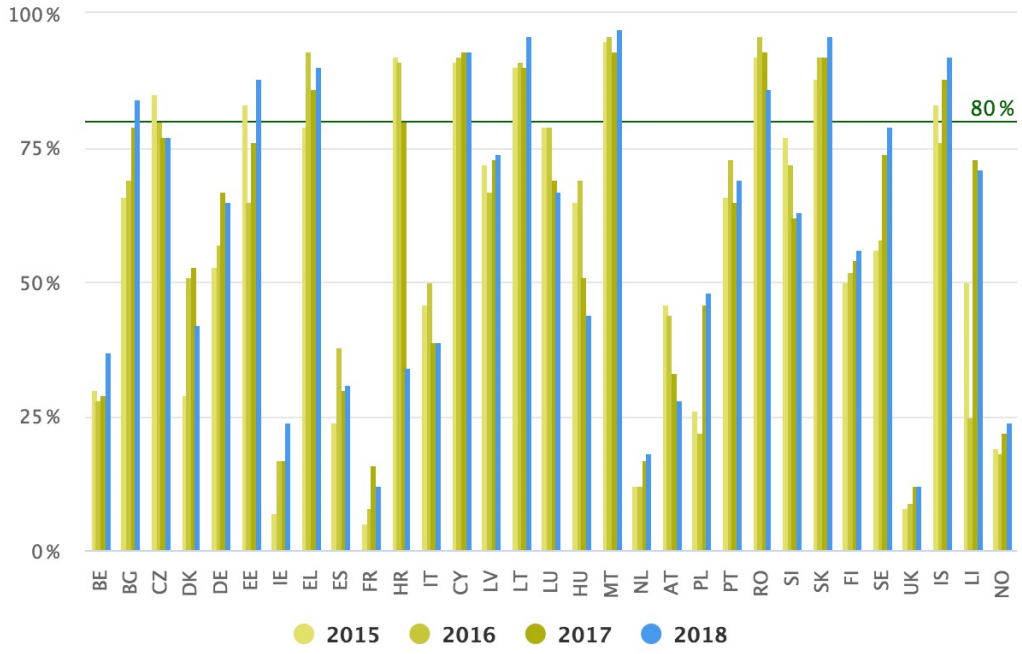
The public procurement directives enable contracting authorities to design award criteria merely on the basis of price or they can consider also other criteria. Non-inclusion of other criteria into the award process can lead to ineffectiveness because qualitative criteria can be omitted from the process. Belgium, Estonia, Greece, Cyprus, Lithuania, Malta, Romania, Slovakia and Iceland rely mainly on the lowest price, while Austria, Belgium, Ireland, Italy, Spain, France, the Netherlands, the United Kingdom and Norway almost regularly include also criteria other than the lowest price of purchase in tenders [European Commission 2019] (see Graph 1).
Such Member States´ behavioural pattern can be closely linked to good (sound) administration. Slack compliance with the duty of due diligence, when procuring public supply may lead to ineffective spending of public resources, or worse, even to maladministration.

Principles of public procurement

Public procurement procedures, by their character, belong to the area of administrative law. However, due to the particular features of public procurement, not all aspects and legal institutes of "traditional" administrative procedure are applicable to these procedures and specific procurement rules are used instead.
First of all, the award of public contracts by contracting authorities shall comply with the principles of the TFEU, as well as the principles deriving therefrom[10]. Pursuant

[7] See to this effect for example the judgement of the Court of 11 December 2014, C-113/13 Azienda sanitaria locale n. 5 'Spezzino' and Others v San Lorenzo Soc. coop. Sociale and Croce Verde Cogema cooperativa sociale Onlus, ECLI:EU:C:2014:2440.
[8] Judgement of the Court of 6 June 2019, Case C-264/18 *P.M. and Others v Ministerrad*, ECLI:EU:C:2019:472, point 24.
[9] Available at: https://ec.europa.eu/growth/single-market/public-procurement_en.
[10] Those are identified in Public Procurement Directive or in the case-law.

Graph 1: Award criteria - % of tenders in which award was based on the lowest price only (source, European Commission, 2019)



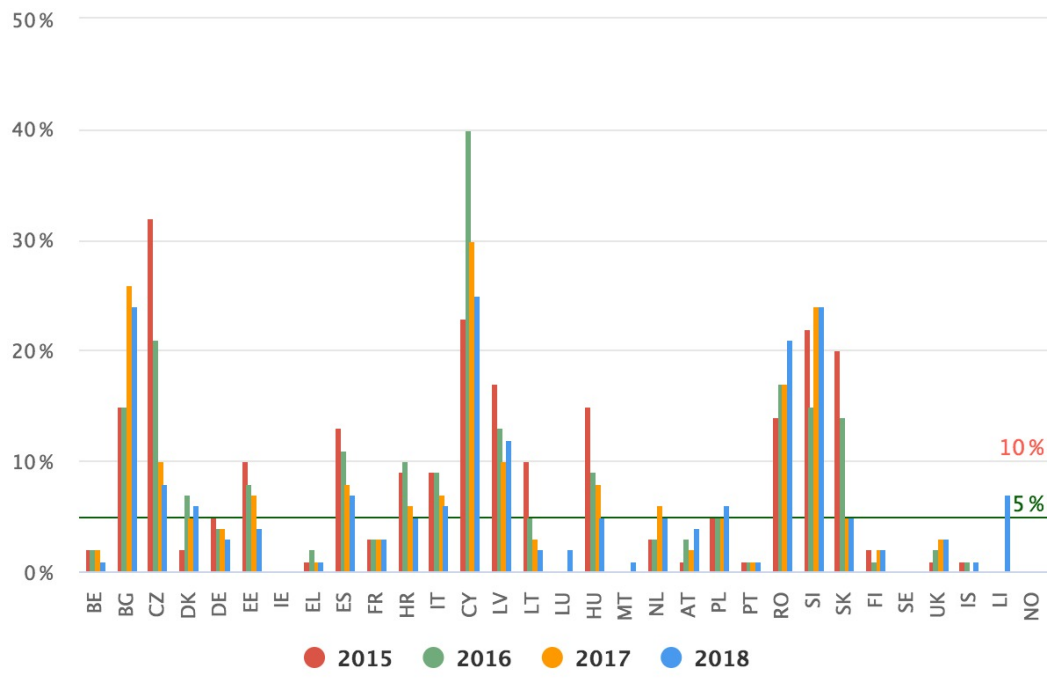
to Article 18 of the Public Procurement Directive[11], contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

According to the Court's settled case-law, the principle of equal treatment means that tenderers must be on an equal footing both when they prepare their tenders and when those tenders are evaluated by the contracting authority [Communicaid Group v Commission[12] 2014: 580]. In other words, principle of equal treatment, as a general principle of EU law, requires comparable situations not to be treated differently and different situations not to be treated in the same way, unless such treatment is objectively justified. The comparability of different situations must be assessed with regard to all the elements which characterise them. Those elements must, in particular, be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field, to which the act relates must also be taken into account [P.M. 2019: 24, 29]. The principle of equality also requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions. It is the obligation of contracting authority to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers [Evropaïki Dynamiki v Commission[13] 2007: 45]. If equality of opportunity between the various

[11] 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, p. 65-242).
[12] Judgement of the General Court of 11 June 2014, Case T-4/13 *Comminciaud Group Ltd v European Commission*, ECLI:EU:T:2014:437
[13] Judgement of the Court of First instance of 12 July 2007, Case T-250/05 Evropaiki Dynamiki – Proigmena Systimata Tilepikinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities, ECLI:EU.T:2007:225

economic operators is secured, a system of undistorted competition, as laid down in the Treaties, can be guaranteed.
The obligation of transparency requires there to be a degree of publicity (on the part of the contracting authority) sufficient to enable, on the one hand, competition to be opened up and, on the other, the impartiality of the award procedure to be reviewed [UNIS and Beaudout Père et Fils[14] 2015]. However, level of transparency varies from state to state. Graph 2 shows different situations in the EU Member States as well as non-EU state of the European Economic Area (EEA). Some Member States maintain level very low level of non-transparent tenders, while Belgium, Latvia, Cyprus, Romania and Slovenia exceed 20 % level of tenders without calls. In Czechia, Hungary, Ireland and Slovakia dramatical improvement of this category is visible. Despite several improvements and development, the divergence gap between the Member States is substantial: from 0 % to 25 %.

Graph 2: No call for bids - % of tenders without calls (source European Commission, 2019)



Therefore, obligation of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their

[14] Judgement of the Court of 17 December 2015, Joined case C-25/14 and C-24/14 Union des syndicats de l'immobilier (UNIS) v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social et Syndicat national des résidences de tourisme (SNRT) and Others and Beaudout Père et Fils SARL v Ministre du Travail, de l'Emploi et de la Formation professionnelle et du Dialogue social and Others, ECLI:EU:C:2015:821, point 39

exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question [Pizzo[15] 2016].

Prohibition of discrimination on grounds of nationality is a specific expression of the principle of equal treatment with regard to the application of Articles 49 and 56 TFEU in the field of public procurement [Anodiki Services[16] 2018].
The principle of equal treatment and the obligation of transparency must be then interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts [Lavorgna[17] 2019]. Together with the obligation of transparency they preclude also any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned [Partner Apelski Dariusz[18] 2016].

Principle of proportionality as a general principle of EU law [Mokrá 2011: 401] is presented specifically also in Public procurement law. According to this principle, legislation must not go beyond what is necessary to achieve the intended objective. In this connection, EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition. Principle of proportionality is applied mostly relating the exclusion of a tenderer from the tendering procedure. In this regard, principle of proportionality requires, for example in the case of conflict of interest, that the contracting authority is required to examine and assess whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure [Lloyd´s of London[19] 2018: 38]. Only a finding of such influence, in any form, is sufficient for those undertakings to be excluded from the procurement procedure (i.e. automatic exclusion without through assessment would mean a breach of this principle). Furthermore, legislation and contracting authorities cannot intentionally narrow competition or try to circumvent requirements stipulated by the directives. Moreover, this "intent" seems to be interpreted in an "objectified" manner, rather than under literal interpretation based on the context of authority's behaviour [Sanches-Graells 2016].

[15] Judgement of the Court of 2 June 2016, Case C-27/15 Pippo Pizzo v CRGT Srl, ECLI:EU:C:2016:404, point 36.
[16] Judgement of the Court of 25 October 2018, Case C-260/17 Anodiki Services EPE c G.N.A. O Evangelismos - Ofthalmiatreio Athinon – Polykliniki and Geniko Ogkologiko Nosokomeio Kifisias – (GONK) 'Oi Agioi Anargyroi, ECLI:EU:C:2018:864, point 36.
[17] Judgement of the Court of 2 May 2019, Case C-309/18 Lavorgna Srl v Comune di Montelanico, Comune do Supino, Comune di Sgurgola, Comune do Trivigliano, ECLI:EU:C:2019:350, point 20.
[18] Judgement of the Court of 7 April 2016, Case C-324/14 Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, ECLI:EU:C:2016:214, point 62.
[19] Judgement of the Court of 8 February 2018, Case C-144/17 Lloyd´s of London v Agenzia Regionale per la Protezione dell´Ambiente della Callabria, ECLI:EU:C:2018:78, point 38.

When mentioning the conflict of interest, the Public Procurement Directive obliges Member States to ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.
Regarding the review of the compliance with the procurement principles and right of tenderer to an effective judicial protection, we refer to Article 1(3) of the Remedy Directive[20], pursuant to which Member States shall ensure that the review procedures are available, under detailed rules which Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In the absence of detailed procedural rules laid down by EU law for giving effect to a right, in accordance with settled case-law of the Court, it is for the national legal system of each Member State to lay down procedural rules to ensure the safeguarding of rights which individuals derive from EU law. Those rules must not, however, be less favourable than those governing similar domestic remedies (principle of equivalence) and must not render the exercise of rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness) [Rudigier[21] 2018]. This rule undoubtedly covers reference to the rule of law, too.
Principles of public procurement as required by the directive as well as developed by the case law can be aligned to different partial aims of public procurement legislation, which protect or shall protect three types of interests: integration of internal market, protection of rights of an individual and effective public policies (Table1).

Table 1: Principles of public procurement and aims of public procurement legislation

Principle	Integration of internal market	Protection of rights of an individual	Effective public policies
Equal treatment	X	X	
Transparency	X	X	X
Non-discrimination	X	X	
Proportionality	X		
Conflict of interest	X	X	X
Judicial protection and effective remedies		X	
Efficiency and efficacy			X

[20] 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, p. 33.
[21] Judgement of the Court of 20 September 2018, C-518/17 *Stefan Rudigier v. Salzburger Verkersverbund GmbH*, ECLI:EU:C:2018:757, point 61.

3. RULE OF LAW AND SOUND MANAGEMENT OF PUBLIC AFFAIRS

Specific features of public procurement are caused the "two-faced" character of interference of public authority with private sector and citizens. On the one hand, the contracting authority shall obey administrative safeguards vis-à-vis economic operators when selecting bids or excluding bidders. This point of view also covers policies of internal market, i.e. non-discrimination and free movement of goods and services. In this case, the obligation of due diligence requires that the contracting authorities act with care and caution [Masdar 2008: 93] and implies the obligation to examine all the relevant elements of the individual case carefully and impartially and to give an adequate statement of the reasons for its decision [Netherlands v Commission[22] 2008: 56].

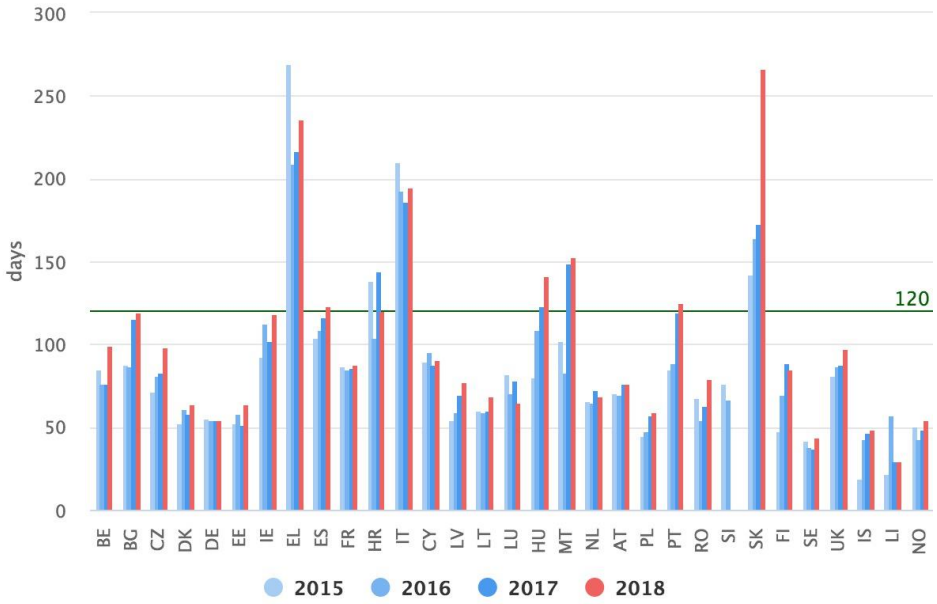
On the other hand, the contracting authorities, as a public bodies, directly or indirectly fulfil public policies by providing public goods to the general public, i.e. consumption of public bodies is linked to policy activities of central or local government itself. Principles of efficiency and effectiveness are substantial in this context.

Proper administration of public affairs inevitably includes the requirement that the public authority shall spend public funds in the most effective manner when purchasing or otherwise acquiring goods and services necessary for the performance of its duties. Indeed, more vigorous competition between bidders can generate more favourable conditions for a contracting authority. Therefore, contracting authority shall stimulate such a competition, even though the Public Procurement Directive allows contracting authorities procure without call for bids (Article 32 Directive 2014/24/EU) (see Graph 2). Efficiency of public procurement can be also undermined by inclination to the lowest price as the only criterion for award of a contract. As it was mentioned before, in such cases qualitative criteria are omitted and best value-for-money ratio can be unacquired. The pattern of behaviour of contracting authorities varies among the Member States (see Graph 1) and imbalances are significant.

The third quantitative evaluation of public procurement procedures, which is directly bound to rule of law and good administration, is the length of procurement procedures. Very lengthy procedures lead to ineffectiveness on both sides because of raising uncertainty. It cannot be excluded that such uncertainty can be included into the bid price by an economic operator as a risk margin. On the other hand, the contracting authority, as a public body, cannot perform its tasks without required goods and services and it cannot provide public goods. Thus, lengthy public procurement procedures can frustrate the performance of public services, public security etc. and thus it can undermine reliability of the functioning of public administrations. Moreover, such failure can lead to interference to the right of citizen for good administration due to delays in providing public services. In this context, right for good administration shall be seen not only as a negative commitment (i.e. non-interference into individual's rights) but also as a positive commitment (i.e. proper fulfilment of duties of public authority). In 2018, the average length of tender procedure exceeded six months in three Member States (Graph 3) which could have had serious impact on the possibility to purchase or otherwise acquire goods and services necessary for performing public duties within the fiscal year.

[22] Judgement of the Court of 6 November 2008, Case C-405/07 P *Kingdom of the Netherlands v Commission of the European Communities*, ECLI:EU:C:2008:613.

Graph 3: Decision speed (in days) (source, European Commission, 2019)



Observance of all abovementioned requirements for sound administration can be enforced by economic operators and public procurement surveillance authorities during procurement procedures. An economic operator can employ all legal tools provided by the directive and by national law. In this way administrative and private law remedies can be obtained. In this context, rule of law enforced via protection of rights of economic operators may be safeguarded effectively. Such protection of the rights of economic operators, including remedies and right to damages, is enshrined in directives and in the corresponding case law.

The finding of an irregularity, which in comparable circumstances would not have been committed by a normally prudent and diligent administration, permits the conclusion that the conduct of the institution has constituted an illegality, which leads to the non-contractual liability. For the non-contractual liability for unlawful conduct of a public body (EU institution as well as national authority), three conditions must be fulfilled cumulatively: (1) the unlawfulness of the acts alleged against the institutions, (2) the fact of damage and (3) the existence of a causal link between that conduct and the damage complained of.

With regard to the condition relating the unlawful conduct of an institution, it is required that there be established a sufficiently serious breach of a rule of law intended to confer rights on individuals. A decisive test for finding that a breach of EU law is sufficiently serious is whether there was a manifest and grave disregard by the institution of the limits on its discretion. Factors, which shall be taken into account are, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation or margin of discretion available to the author of the act in question.

As regards the requirement relating the reality of the damage, liability can incur only if the harmed person has actually suffered a real and certain loss. The burden of proof in this regard stays with the harmed person (claimant), who shall produce

conclusive evidence produce to the court in order to establish both the fact and the extent of such loss.

As regards the condition that there be a causal link, it is satisfied if there exists a direct link of cause and effect between the unlawful act committed by the institution concerned and damage invoked, a link which is for the claimant to prove. Liability exists only for damage which is sufficiently direct consequence of the wrongful conduct of the contracting authority.[23]

Consequences for the breach of duty of sound administration of a contracting authority in public procurement may be demonstrated on the case Vakakis kai Synergates (2018). The subject matter of this case was the inadequacy of the supervision of the tendering procedure by a contracting authority and the existence of a conflict of interest resulting in the breach of the principle of equality and sound administration. The court established that the contracting authority infringed a rule of law intended to confer rights on individuals emanated from the principle of protection of legitimate expectations and the principle of equal treatment as well as the principle of sound administration and Article 41 of the Charter (namely the right to have one's affairs handled impartially and fairly).

As regards the existence of sufficiently serious infringements, the court rejected the claims based on the existence of a sufficiently serious infringement of the principle of protection of legitimate expectations with the reasoning that the award of a public contract takes place following a comparative assessment of the tenders by the contracting authority and no tenderer is entitled to be awarded contracts automatically. On the other hand, when regarding the infringement of the principle of sound administration, the Court established that the contracting authority committed an irregularity (1) by accepting statements made by the winning tenderer that it was not in a situation of a conflict of interests without any ex officio investigation so as to determine whether that winning tenderer was in a situation of a conflict of interests and (2) by omitting to conduct an investigation of this matter. Such an irregularity would not have been committed, in similar circumstances, by an administrative authority, exercising ordinary care and diligence. Such an irregularity must be classified as a manifest and serious breach of the obligation of due diligence and, therefore, as a sufficiently serious infringement of that obligation, of the principle of sound administration and of Article 41 of the Charter.

The court then considered the damage and the causal link. The applicant claimed that it suffered five different heads of damage constituted, (1) by loss of profit, (2) by the cost incurred in contesting the lawfulness of the tendering procedure, (3) by the loss of an opportunity to participate and win other tenders, (4) by the loss of an opportunity to be awarded the contract and (5) by costs relating to the participation in the tendering procedure. The Court rejected claims for damages (1)-(3). On the rest, however, the Court ordered to pay compensation[24] for the damage in relation to

[23] See to this regard Judgement of the General Court of 28 February 2018, Case T-292/15 Vakakis kai Synergates — Symvouloi gia Agrotiki Anaptixi AE Meleton v European Commission, ECLI:EU:T:2018:103, points 62-67

[24] As parties did not reach settlement to the amount of compensation, the General Court in this case (T-292/15) with later judgement of 12 Feburary 2019, ECLI:EUT:2019:84 fixed he amount of compensation to be paid by the European Commission to Vakakis kai Synergates at EUR 234 353, together with default interest with effect from 28 February 2018 until full payment, at the rate set by the European Central Bank (ECB) for its principal refinancing operations, increased by 2%; and order the Commission to pay the costs incurred with respect to the proceedings giving rise to the judgment of 28 February 2018.

the loss of an opportunity to be awarded the contract (4) and for the costs and expenses incurred in participating in that call for tenders (5).
In this case, the Court considered that, during the tendering procedure, the contracting authority committed several unlawful acts in the context of the investigation relating to the existence of the conflict of interests. Such unlawful acts in the conduct of the tendering procedure fundamentally vitiated that procedure and affected the chances of the applicant, whose tender was ranked in second position, to be awarded the contract. If the contracting authority had fulfilled its obligation of due diligence and adequately investigated the extent of expert's involvement in the drafting of the Terms of Reference, it is not excluded that it might have established the existence of a conflict of interests in favour of his (winning) company justifying its exclusion from the procedure. Therefore, by deciding to award the contract to this company without having conclusively established that it was not in a situation of a conflict of interests even though significant evidence suggested the existence of an apparent conflict of interests, the contracting authority affected the chances of the applicant being awarded the contract. In those circumstances, the damage invoked with respect to the loss of an opportunity was considered as actual and certain, because there is evidence that, since an unsuccessful tenderer definitively lost an opportunity to be awarded the contract and that that opportunity was real and not hypothetical. The damage directly and immediately resulted from the unlawful acts committed by the contracting authority. The condition relating to the existence of a causal link was assessed in the light of the loss alleged. Due to the inadequacies of the investigation and the award of the contract to the winning company, the contracting authority vitiated the tendering procedure and, consequently, directly affected the tenderer's chances of being awarded the contract.
The above mentioned example proves that principle of sound administration as an integral part of the rule of law can be enforced in public procurement vis-à-vis to contracting authority through the claims for damages. Paradoxically, maladministration of public affairs, despite the possible wider negative effect on general public, cannot be remedied effectively, as consequences may have only political character .

CONCLUSION

Written or not, the applicability of the rule of law depends on the one who applies it. Even when applying the rule of law value, it is not a rare situation that human activities slide to just "value formalism". [Hodás 2015: 367].
Following the actual legislation and the case law we can conclude that public procurement rules complies with the principles of rule of law, even in situations, in which its individual aspects are not explicitly specified in the written law. Due application of the principles or rule of law verbalised in the Treaties, Public Procurement Directives and case law of the EU Courts shall result in effective purchase of services, goods and works by contracting authorities.
Paradoxically, despite the fact that actual common legislation tends to guarantee a more effective procurement, the research proved, that Member States approached harmonised procurement rules differently, which resulted in less effective procurement.
Even economic competition itself was impeded by those disparities (see Graph 2). And this is an interesting paradox. Competition, which is an exclusive competence of the EU, is regulated in primary law and directly applicable law, thus it shall be protected

and developed uniformly in the whole EU. However, disparities between Member States were obvious. The same rules work for some Member States, for others they do not. Therefore, it is not a surprise that public procurement, which is regulated only in directives and relevant case law, shows even higher disparities relating to three most important parts – transparency, award criteria and length of procedure.
Failure of proper implementation of public procurement rules, as well as principles of rule of law is not a question of good/bad design of the EU legislation, but a result of the failure of enforcement by Member States (Graph 3). The possible solution may be presented in a "procurement" version of the Directive ECN+[25], which introduces particular steps to ensure, that national competition authorities have the necessary guarantees of independence, resources and enforcement powers to be able to effectively apply competition rules. The Directive ECN+ was introduced also due to ineffectiveness of public enforcement of competition rules by national competition authorities which caused, inter alia, disparities between the Member States. The procurement enforcement directive then may set common rules for uniform and effective enforcement of procurement rules which would help to strengthen the rule of law in this area of law. However, the action form the European Commission is not likely in short time, since the European Commission did not find its reports (2017a, 2017b) failure of EU law and it attributed disparities to the Member States. Hence, quite broad wording of the Remedies Directive that contains no details of enforcement powers of review bodies (compared to the Directive ECN+) de facto relies on effective and comprehensive national legislation and enforcement rules rather that European framework of Public Procurement Directives. Another obstacle for the adoption of "Public Procurement Enforcement" Directive can be found in the different legal basis, compared to competition law. While competition rules on internal market are exclusive competence of the European Union (Article 3 TFEU) and are stipulated in Article 101 et seq TFEU explicitly, public procurement is based on a "general" harmonisation provision aimed to remove obstacles to free movement of goods and services (Article114 TFEU). In this context, facing the principle of proportionality and the principle of subsidiarity, any action of the European Union may have legal basis only if different enforcement of the Public Procurement Directives and ineffectiveness of public procurement procedures create real and potential obstacles to free circulation within the internal market.
Regarding the hypothesis that the rule of law is generally applicable and applied without the necessity of its verbalising in the form of secondary law relating public procurement, we can conclude that our research verifies this presumption. However, the fact that rule of law is generally applicable does not mean that it is generally applied in the same way.

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[25] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

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