

PUBLIC CONTRACTS PERFORMANCE AND COMPETITION RULES. A EUROPEAN AND NATIONAL PERSPECTIVE

Brief summary

As the title shows, this study focuses on two different branches of EU law: public procurement directives, *i.e.* provisions of EU secondary legislation and EU competition rules which are part of the EU primary law (the Treaty).

These subjects are not traditionally compared, even though a recent doctrine has tried, in different ways, to evidence their link by adopting a so called “integrative approach” or “common approach”. The study moves on from these theories, in order to develop them in a certain direction, by considering that they share the same concept of *market*.

In particular, the scope of the analysis concerns the peculiar phase of contract performance, which is generally not taken into due account. For the first time, public procurement directives discipline this phase in only a few norms.

In order to analyse this phase, firstly the study seeks out for principles which inspired these norms and which can guide their interpretation and application.

Part one of the study focuses on the principles governing public contracts. Article 18 of directive 2014/24/UE, for instance, by setting “*principles of procurement*” is given an extensive interpretation. The idea is that these principles cover not only the procurement phase, but also the performance phase, insomuch as they cannot be violated *ex post*, once the contract has been signed.

From this viewpoint, principles of transparency, competition, proportionality and fairness are analysed.

In particular, the principle of transparency is studied in its two dimensions. On the one hand, it is seen in terms of equal treatment and competition, as it is traditionally viewed. Transparency can indeed increase competition, for the reason that it allows participation in the race on the same basis (transparency-competition). On the other hand, it is seen in combination

with accountability, giving that the former permits the latter (transparency-accountability).

Competition, here mentioned in an innovative manner in the directive's provision on principles, plays a fundamental role in this analysis.

The principle allows referring to EU competition rules, enacted in order to protect competition.

At the same time, it is felt that there is a need for *consistency* in the interpretation and application of norms which are inspired by the same principle.

Therefore, the interpretation of the provision on competition in the context of public procurement here proposed is more in line with that set out in the Treaty. Competition should not be merely interpreted as parity of treatment. It is in fact a concept inherent to the market and linked to market-efficiency and consumer welfare. It requires objective assessments and it recognises, as an important element, analysis of the market.

Given these premises on principles, part two examines the discipline of subcontracting, modification of contracts during their term, duration and termination. Here, are analysed firstly EU norms, secondly their transposition in the national ones (French and Italian). These norms are presented in an interactive dialogue.

Principle of competition seems in general to inspire the discipline of contract performance. In particular, on subcontracting and duration, access of other operators to the market needs to be actively encouraged. This happens both by adding another party (subcontractor) and by limiting the duration of the contract, in order also to let new operators to enter into the market.

The principle of competition has a wider scope and during the contract performance other rules can also applied.

Part three, by analysing case law, shows how competition rules *i.e.* prohibition of cartels, abuse of dominant positions or state aid, can overlap pending the contract performance phase.

As examples, it can happen that so-called bid-rigging is discovered during the performance phase when an illicit subcontracting is concluded.

The excessive duration of the contract, which for instance has been extended, can lead the contractor to abuse its dominant position in the market, where the latter exists. At the same time, the contractor who is dominant in the market, may impose predatory prices on other operators or adopt anti-competitive or non-collaborative behaviour towards the public authority.

State aids may be involuntary recognised through excessive works payment, or through a grant given pending the performance which covers a risk assumed by the concessionaire.

Antitrust rules are indeed rules of prohibition. Their violation can be realised through different acts, contracts, behaviour, and only when linked together in a specific context do they reveal their anti-competitive nature.

Antitrust rules protect the market through competition. Public procurement rules also protect the market through competition, in a proactive way. There is therefore a need to guarantee consistency in the system in the application of the various norms protecting competition. This aim has been developed in the thesis.