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School of Law, University of Tartu, Estonia

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# ABBREVIATIONS

- CFREU: Charter of the Fundamental Rights of the European Union
- CJEU: Court of Justice of the European Union
- EC: European Community
- EU: European Union
- Public Procurement Directives or Directives: Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU together
- Public Sector Directive: Directive 2014/24/EU
- Remedies Directives: Directives 89/665/EEC, 92/13/EEC, and 2007/66/EC together
- TFEU: Treaty on the Functioning of the European Union

# ANALYTICAL COMPENDIUM TO A CUMULATIVE DISSERTATION

## 1. Introduction

### 1.1. Public procurement's role in a democratic state

To truly understand public procurement, one must understand its role in redistributing public money to the private sector. In a democratic state, public procurement's position and power justifies the existence of legal scholarship regarding something as mundane as paying money to entrepreneurs from the public purse. It could be claimed that a just and efficient public procurement system plays as important a role in the existence of a democratic country as, for example, its defence forces. Of course, the public sector units (contracting authorities) who conduct the procurements have a critical role to fulfil.

Put simply, the core importance of public procurement as one of the defenders of democracy lies in the extensive fiscal impact on the functioning of the state and, more broadly, of the region or association. The misuse of money and its power distorts the conditions of competition, affects the functioning of the economy, and thus tilts the functioning of democracy in an unfavourable direction. To avoid this, among other things, public procurement rules have been established.

The power of public procurement is extensive when viewed financially. According to the European Commission, the annual volume of money released from public funds to the so-called private market through public procurement across the EU is about 2 trillion euros or 14% of GDP.[1] The volume of the Estonian state budget in 2022 was 12 billion euros[2], of which the volume of public procurement is usually up to 4 billion euros annually. However, in 2022, it was a record 5.6 billion euros (ca 38% of the volume of the state budget in 2022).[3]

On a national and EU-wide level, one of the goals of public procurement rules is to combat corruption, i.e., to ensure that public money is distributed among the economic operators who have applied for public procurement through fair and transparent public procurement. In countries where public procurement rules and systems are weak or contracting authorities are inappropriately influenced, contracts are often awarded to economic operators with influential owners. Corruption, in turn, increases the cost of procurement contracts and lowers the quality

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1 European Commission's data about the volume of the EU 2020. public procurements. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

2 2022. aasta riigieelarve seadus, RT I, 16.12.2021, 24.

3 Statistics published by the Estonian Ministry of Finance. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

of the service or work received.[4] After all, the interest of corruptors is mainly in stripping resources, not in the quality execution of the mandate they receive. In addition to the negative fiscal impact, the situation adversely affects the health of democracy through the low level of taxpayers' trust in the state, which in turn is a source of other anti-system consequences.

Unfortunately, it is possible to give many examples of countries where public procurement rules are in place but work according to the wishes of, for example, the organiser or third parties, which differs from how we are used to understanding them at the level of EU law.

Fair, transparent, and verifiable public procurement rules and systems play a vast and essential role in a democratic society. It can also be said that functioning public procurement rules are an unseen but strategically important tool for maintaining the population's trust in its rulers. This is especially the case in a country such as Estonia, where, most likely, in connection with the war in Ukraine, the volume of public procurement has increased to almost 40% of the total state budget.

## 1.2. Establishing the problem

### 1.2.1. Contracting authority's due diligence obligations within the current legal framework

Contracting authorities are the primary implementers of the EU public procurement rules. The concept of a contracting authority is functional in EU law[5]. Therefore, all public entities are the addressees of the EU public procurement rules in case they meet the material criteria for being a contracting authority. Thus, the status of the contracting authority may not depend on a formalistic approach. This means that state and local authorities, as well as their derivatives, such as foundations and non-profit associations, set up by the abovementioned entities, the companies they own are contracting authorities if certain material conditions are met. Therefore, the effectiveness of public procurement as a legal system and achieving its goals depend on contracting authorities being compliant and diligent.

To begin with a simplified generalisation, it can be argued that the contracting authority is diligent when it fulfils all the direct obligations arising from the legislation. In this way, however, we would quickly arrive at a result where, outside of what is expressly stipulated in the legislation, there are no other requirements

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[4] To such an outcome has been referred to regarding the Sochi 2014 Olympic Games. The Russian Federation is a member of the WTO Government Procurement Agreement but in observer status. This means that the procurement rules agreed on in the international treaty have yet to be adopted into state law. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.
Transparency International confirms the existence of such an effect. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

[5] See, for example, in the CJEU earlier case law, case C-31/87 *Beentjes v State of the Netherlands* [1988] ECLI:EU:C:1988:422, p 12; case C-360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding* [1998] ECLI:EU:C:1998:525, p 62.

for the contracting authority's conduct. In such a case, all rules the contracting authority must follow would be directly visible in the legislation. However, this is clearly not the case. Both EU and national legislation are imperfect, which is why in order to achieve the goals set out in the legislation it operates not only based on the EU general principles and the EU public procurement principles but also on guidance arising from court decisions.

Legal scholars have also pointed out that, despite the extensive rules on public procurement procedures laid down in the directives, there are still areas where there is a lack of adequate guidance.[6] It has also been stated that the public procurement directives are merely setting a framework to safeguard public procurement principles.[7] It is evident then that the scope of the contracting authority's obligations goes beyond compliance with the rules deriving from the EU public procurement directives[8] and national laws on public procurement.

Until the adoption of the 2014 public procurement directives, the EU legislator had never expressly regulated the due diligence obligation of the contracting authority. To understand the depth of what has been said, I point out that the first public procurement directive[9] in the European Community was adopted in 1971. Since 2014, the Directives mention the contracting authority's diligence, but only in one provision and a recital explaining this.[10]

The Public Procurement Directives require an assessment of the diligence of the contracting authority's past conduct when the contracting authority wishes to amend a valid public procurement contract in a situation that a diligent contracting authority could not have foreseen. The Directives' recitals regard a contracting authority as being diligent when it has, in the public procurement prior to the award of the contract, carried out thorough preparatory work, taking into account the means available, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure a reasonable balance between the resources required to prepare for the award of the contract and the estimated value of the contract. However, if such diligence results in an external

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6 Steinicke, M., Vesterdorf, P. (editors). *EU Public Procurement Law. Brussels Commentary* (Beck, Hart, Nomos, 2018), p 295.

7 Hamer, C. R. and Andhov, M. in Caranta, R., Sanches-Graells, A. (editors). *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar Publishing, 2021), p 188.

8 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] O.J. L94; 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 [2014] O.J. L94; 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 [2014] O.J. L94.

9 Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts [1971] OJ L 185, 16.8.1971, p. 5–14. English special edition: Series I Volume 1971(II), p. 682 – 692.

10 Article 72(1)(c) and 109th Recital in the Public Sector Directive; Article 43(1)(c) and 76th Recital in the Concessions Directive; Article 89(1)(c) and 115th Recital in the Utilities Sector Directive.

circumstance for the performance of the contract that the contracting authority could not have foreseen, a modification of the contract is permitted.

The guidelines in the Public Sector Directive recital are very general, leaving the contracting authorities uncertain how to conclude that sufficient diligence has been exercised. For instance, measuring the thoroughness of the preparatory work: does due diligence always require the contracting authority to involve technical experts or legal advisers in the preparation of the procurement, or can the contracting authority be regarded as diligent if it has assembled the procurement by itself? Similarly, the guidelines in the recital require that the contracting authority considers the nature and characteristics of a particular project. However, there is no understanding of what a project is since the Public Procurement Directives regulate the obligations of contracting authorities in the context of specific public procurements and not projects. Not to mention what it means to consider good practice in this area in the context of a particular procurement.

It could be inferred from the preceding that the contracting authority's due diligence as such exists in EU public procurement law but is limited to a very narrow situation relating to the modification of the contract discussed above. That would mean that the contracting authority's due diligence is based on compliance with the rules laid down, whereby, in one particular case, due diligence must be understood and fleshed out a little more broadly, although it is not clear how and what the yardstick is. Even in the assumption that the contracting authority's due diligence manifests in implementing only one specific provision in EU public procurement law, the specific content of the contracting authority's due diligence is still insufficiently specified for practical application.

If a conclusion that the due diligence of a contracting authority manifests only in one specific clause could be considered true, this dissertation would have no wider value. However, in consideration of the CJEU's case law, it can be stated that the due diligence obligations of a contracting authority have a wider manifestation in the EU public procurement law.

### 1.2.2. Expansion of the contracting authority's due diligence by the CJEU case law

There are indications in the case law of the CJEU that the contracting authority's diligence entails requirements for the performance of contracting authorities to a significantly greater extent than is directly apparent from the aforementioned provision in the Directives. Such signs can be regarded as conditionally direct and implicit.

A contracting authority's duty of diligence has been mentioned only a few times. However, this is the case in contexts which are not relevant to the first provision dealing with due diligence inserted in the Directives since 2014. For example, as early as 2013, the CJEU carried out an extensive analysis of the contracting authority's due diligence in two decisions concerning the construction of a railway in Spain. The Court found that the contracting authority had inadequately prepared the entire railway construction project, failed to consider the

possible coordination and comments of the local authorities when drawing up the technical requirements and timetable of the project. Additionally, it failed to carry out sufficiently thorough technical tests. For this reason, several additional contracts were awarded through new so-called direct awards[11] without opening up the procurements to a broader market.[12]

It follows from that that the contracting authority's due diligence is indeed broader from the outset than the literal interpretation of the provisions of the Public Procurement Directives would be able to conclude. Moreover, no new directives had even been adopted at the time of those judgments.

The so-called implicit indications of the contracting authority's duty of diligence in the CJEU case law stem from judgments concerning the contracting authority's obligations at specific stages of the public procurement procedure. For example, the CJEU has pointed out that where the conditions for exclusion from a procurement procedure do not expressly follow from the documents relating to that procedure or from the national law in force but from interpretations of national law and documents or the filling in of gaps in those documents by the authorities or the administrative court, the contracting authority is not entitled to exclude a tenderer from the award procedure automatically.[13] In the context of the contracting authority's duty of diligence, this means that without an obligation from the Directives, the contracting authority is required to include such conditions arising from other legislation, interpretations of documents, or instructions given in case of law in the procurement documentation. However, the CJEU's position in the referred judgment applies in a situation where the contracting authority has already breached such a duty, and the consequences of the contracting authority's infringement must be considered in light of remedying the rights of the tenderers.

In a recent case law, the CJEU explained how contracting authorities were to deal with and assess business secrets contained in tenders. The CJEU took the view that the contracting authority could not be bound by the tenderer's mere assertion that the information communicated was confidential. The contracting authority must ask the tenderer to prove that the information which it objects to the disclosure of was, in fact, confidential.[14] However, such an obligation does not expressly arise for contracting authorities under the Public Procurement Directives.[15]

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[11] The direct awards mentioned are to be understood as public procurement contracts signed as a result of the negotiated procedure without prior notice. The direct awards thus do not mark illegal direct awards without any public procurement procedure.

[12] Cases T-540/10 *Spain v Commission* [2013] ECLI:EU:T:2013:47, and T-235/11 *Spain v Commission* [2013] ECLI:EU:T:2013:49. The cases were later dismissed due to the non-compliance of the time limits. Still, the Court's argumentation remains of interest. Cases C-192/13P *Spain v Commission* [2014] ECLI:EU:C:2014:2156, and C-197/13 P *Spain v Commission* [2014] ECLI:EU:C:2014:2157.

[13] Case C-27/15 *Pizzo* [2016] ECLI:EU:C:2016:404, p 35–51.

[14] Case C-54/21 *ANTEA POLSKA and Others* [2022] ECLI:EU:C:2022:888, p 65–67.

[15] Article 21 of the Public Sector Directive.

A third example, also arising from recent times, concerns the diligence of the contracting authority in anticipating and preparing for the different waves of the COVID-19 pandemic. The public procurement directives allow for the so-called direct award of contracts only in the event of an unforeseeable event beyond the control of the contracting authority.[16] Thus, the criterion distinguishing the legality of the contracting authority's conduct is whether and how diligent the contracting authority has been in the past. In similar previous cases, the CJEU found that contracting authorities who, for example, were waiting for the approval of the budget or other approvals were responsible for the development of a rapid need.[17] This means that the contracting authorities had not been diligent as they could and should have initiated the procurement process in parallel when it was already sufficiently clear that there is a need for a purchase. In Estonia, the question of the (political) responsibility of the Minister of Education and Research arose on this topic, based on whether and for how long the Ministry should have foreseen the emergence of new so-called COVID-19 waves.[18] However, this is a question of the diligence of the contracting authority in collecting preliminary information and making timely forecasts based on it.

Consequently, those so-called implicit CJEU decisions are addressed in detail with the additional obligations of the contracting authority, supplementing the requirements arising from the directives, without referring to the due diligence obligation of the contracting authority under the common name. Given that, in those decisions, the CJEU lists the activities which the contracting authorities should have conducted or, on the contrary, should not have implemented, there is a specification of the contracting authority's obligations. Thus, in so-called implicit cases, I consider that the notional point of distinction between the interpretation of the provision and the additional (due diligence) obligation is whether, in interpreting the provision, the court has listed additional obligations on the contracting authority or merely extended the content of the obligations arising from the specific provision. In the first case, the creation of additional obligations, which can be defined by the common name of the contracting authority's due diligence, can be affirmed.

Thus, the starting point for the dissertation is based on the knowledge that (1) the contracting authority's due diligence as such exists in EU public procurement law and (2) it is broader than that directly regulated by the current Public Procurement Directives. At the same time, its exact source, nature, limits, and influence are unclear in legal scholarship and, unfortunately, also in practice. However, it is precisely this uncertainty and lack of legal clarity that make this dissertation necessary and its outputs valuable.

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[16] Article 32(2)(c) of the Public Sector Directive.

[17] See, for example, Case C-107/92 *Commission v Italy* [1993] ECLI:EU:C:1993:344, case C-324/91 *Commission v Spain* [1992] ECLI:EU:C:1992:134, and case C-394/02 *Commission v Greece* [2005] ECLI:EU:C:2005:336.

[18] Kersna kiirtestide hanke väärteomenetluses leiti rikkumisi. Äripäev, 18.11.2022. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

### 1.2.3. Other aspects as found in the legal literature

A comprehensive review of legal literature on EU public procurement law indicates a clear gap regarding any overarching theory about the contracting authority's due diligence in the EU public procurement law. It is not entirely illogical, as before the 2014 Public Procurement Directives contracting authority's due diligence was entirely unregulated in the EU public procurement law. Except for only a very few sources, there was no explicit mention of a contracting authority needing to be diligent in EU law regulated procurements.[19]

A. Brown suggested in 2004 that a reasonableness standard might be applied to an authority's inability to define technical or legal matters in advance and that a court might therefore consider it appropriate to assess whether a reasonably diligent authority ought to have been capable of pre-defining those matters. Brown also submitted that a court should consider the actual level of experience and expertise of the particular authority in relation to the type of contract being awarded.[20] The same was suggested a few years later in 2006 by S. Treumer.[21]

After the 2014 Directives introduced the regulation on contract modifications that included the notion of a diligent contracting authority the subject of changes in a public procurement contract have been and still are widely discussed in the legal literature[22]. Inter alia, the contracting authority's

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[19] Burnett, M. 'Developing a Complexity Test for the Use of Competitive Dialogue for PPP Contracts' (2010) 4 European Public Private Partnership Law Review, p 215–223. Sanchez-Graells, A. 'What Need and Logic for a New Directive on Concessions, Particularly regarding the Issue of Their Economic Balance' (2012) 7 European Procurement & Public Private Partnership Law Review, p 94–104. Due diligence was only mentioned in introducing the CJEU case law by Caranta, R. and Dragos, C. D. in Bovis, C. (editor) *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing, 2016), respectively Caranta on p 162 and 166 and Dragos on p 190.

[20] Brown, A. 'The impact of the new Procurement Directive on large public infrastructure projects: competitive dialogue of better the devil you know?' (2004) 4 Public Procurement Law Review, p 170–171.

[21] Treumer, S. 'The field of application of competitive dialogue' (2006) 6 Public Procurement Law Review., p 313.

[22] For example, Tartai, T. 'The possibility of imposing fine on both parties due to unlawful contract amendment (case C-263/19 T-Systems Magyarorszag)' (2022) 3 European Procurement & Public Private Partnership Law Review, p 202–205. Bogdanowicz, P. *Contract Modifications in EU Procurement Law* (Edward Elgar Publishing, 2021). Plas, E. 'Amendments to public contracts: in search of a sufficient degree of transparency' (2021) 1 Public Procurement Law Review, p 1–28. Jaramillo Villacis, A. L., Peiro Baquedano, A. I. P., 'Contract Modifications and the CJEU: The Evolution of Public Procurement Case Law' (2021) 1 European Procurement & Public Private Partnership Law Review, p 78–88. Wangelow, V. P. 'EU Public Procurement Law: Amendments of Public Works Contracts After the Award due to Additional Works and Unforeseeable Circumstances' (2020) 2 European Procurement & Public Private Partnership Law Review, p 108–214. Smith, K. 'A risk worth taking? Practical application of the law on contract modifications in the context of PPP accommodation projects' (2019) 1 Public Procurement Law Review, p 16–25. Brodec, J., Janeček, V. 'How does the substantial modification of a public contract affect its legal regime?' (2015) 3 Public

due diligence obligations are mentioned, but mostly not further elaborated upon.[23]

However, 2023 book *Contract Changes. The Dark Side of EU Procurement Law*[24] covers some additional aspects of the contracting authority's due diligence. For example, it is suggested that Public Sector Directive's Article 72(1)(c), that covers the conditions for modifying a public procurement contract, entails a 'diligent contracting authority test'. Such a test as a concept of a hypothetical diligent contracting authority sets certain limits to what was unforeseeable at the time when the public contract award process was initiated. It is then further analysed what could be the circumstances that a hypothetical diligent contracting authority could and should foresee. For example, a diligent contracting authority should pay attention to the situation in the market while drafting public procurement conditions such as considering future changes in the law, learning technical parameters, price, and delivery times.[25]

Outside of the topic of contract modifications, references to a contracting authority's due diligence are scattered and incidental, covering various and unrelated aspects of the contracting authority's activities. In the context of applying the proportionality principle in public procurement, the academics suggest that the use of words 'appropriate' and 'reasonably necessary' in Article 18(2) of the Public Sector Directive seems to limit the extent of the expected due diligence required from a contracting authority.[26] This suggests that the general principles of public procurement law delimit the conditions of the due diligence of a contracting authority. On a more general level, it has also been stated that there is little guidance on how an entity can show good faith and due diligence.[27]

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Procurement Law Review, p 90–105. Treumer, S. 'Contract changes and the duty to retender under the new EU public procurement Directive' (2014) 3 Public Procurement Law Review, p 148–155.

[23] For example, the following distinguished public procurement law book, *EU Public Procurement Law. Brussels Commentary.* by Steinicke, M., and Vesterdorf, P. L. (editors) (Beck, Hart, Nomos, 2018) only refers to such a notion in the commentary to Article 72, p 768. Similar way, it is mentioned but not elaborated on in Arrowsmith, S. *The Law of Public and Utilities Procurement. Regulation in the EU and UK* (3rd ed., Sweet&Maxwell, 2014), Vol.1, p 590, 600; Stalzer, J. in Caranta, R., Sanches-Graells, A. (editors). *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar Publishing, 2021), p 787, and Bogdanowicz, P. *Contract Modifications in EU Procurement Law* (Edward Elgar Publishing, 2021), p 97–99.

[24] Dragos, D. A., Halonen, K.-M., Neamtu, B., Treumer, S. (editors). *Contract Changes. The Dark Side of EU Procurement Law*. Edward Elgar Publishing, 2023 (European Procurement Law series).

[25] Simovart, M. A. in *op. cit.* 24, p 85, and 87–89.

[26] Andhov, M. in *op. cit.* 7, p 201.

[27] Butler, L. R. A. in Arrowsmith, A. Butler, L. R. A., La Chimia, A., Yukins, C. (editors) *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic.* (Hart Publishing, 2021), p 130.

As to the other incidental references to the due diligence of a contracting authority, some common threads can be observed. Legal scholars bring up the contracting authority's due diligence in situations where the threat to the breach of the tenderers' rights is the highest. Both in terms of (1) a wider approach where the market as a whole is left without information that a public procurement contract is awarded and in (2) a narrow approach where the question concerns the right to continue participating in a tender procedure for a single bidder.

Beginning with the wider approach, academics call out the contracting authorities to act with extensive due diligence when determining which part of a mixed objects' contract is its main object.[28] This is to avoid a 'capital' breach of the EU public procurement regulation where a public contract is awarded without any procurement procedure. The Directive enables a contracting authority to choose a suitable procedural regulation based on the main object of the public contract.[29] In case the contracting authority makes a mistake in determining that, it may dismiss the application of a proper public procurement regulation when it is actually demanded. In such a case, the public contract is not opened up to all possible tenderers. The same rationale has been referred to in borderline public procurement awards using the negotiated procedure without prior notice.[30] The severity of the breach is the same – a contracting authority signs a public contract with a tenderer without opening the competition up for the market at all. Therefore, legal literature encourages contracting authorities to take great care in reaching and documenting their decision that a direct award without prior publication is permissible.[31] Diligence while executing a public contract is also mentioned.[32]

The references to due diligence in the narrow sense touch upon various decisions that a contracting authority needs to make in different stages of a public procurement procedure. Depending on the contracting authority's decision, a tenderer can still be in consideration for the contract award or fall out of the procedure completely. Academics note that those decisions need to be deliberated with particular diligence. For example, heightened due diligence applies when considering the admission or rejection of participants to e-auctions,[33] verifying and assessing potentially anticompetitive stances during an award procedure,[34]

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[28] Nowicki, P. 'Article 3. Mixed procurement' in Caranta, R., Sanches-Graells, A. (editors). *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar Publishing, 2021), p 34.

[29] Article 3, Public Sector Directive.

[30] Hamer, C. R. 'The Principle of Proportionality: A Balance of Aims in Public Contracts' (2022) 3 European Procurement & Public Private Partnership Law Review, p 194.

[31] Ginter, C., Simovart, M. A. in *op. cit.* 6, p 1427–1482.

[32] Ginter, C., Parrest, N., Simovart, M. A. 'Access to the content of public procurement contracts: the case for general EU-law duty of disclosure'. (2013) 4, Public Procurement Law Review, p 164.

[33] Simovart, M. A. in *o.p cit.* 6, p 1427–1482.

[34] Dragos, D. C. in *op. cit.* 6, p 453.

considering tenderers' requests of rectification related to the merits of the tender,[35] verifying the possible presence of discretionary exclusion grounds,[36] or while assessing the economic operator's ability to undertake the contract being tendered.[37]

In Estonian legal literature, a diligent contracting authority has been referred to in the context of calculating the estimated value of a tender and deciding upon the appropriate procedure[38], and stating reasons for using the voluntary *ex ante* transparency notice[39]. The term 'good public procurement practice' has also been offered out. It stands for how a contracting authority ought to be following the public procurement principles, recommendations, guidelines, and other similar soft-law documents.[40]

There is also no overarching legal theory about tenderer's due diligence obligations while participating a public procurement. Simovart has referred to the pre-contractual, contractual, and civil-law origins of the duty of diligence of tenderers.[41] Some academics are of the opinion that a level of due diligence is also expected from tenderers[42] at least in the context of carrying out checks when it includes in its tender a subcontractor that has breached the obligations in Article 18(2) of the Public Sector Directive.[43] It has additionally been noted that tenderers are expected to pay attention to the currently known risks prior to the submission of tenders and avoid making tenders based on the presumptions of hitherto circumstances returning or continuing.[44]

### 1.2.4. Due diligence under the public procurement process of different nature

A separate difficulty of the subject under analysis lies in the different legislative powers of the EU and national legislators and the resulting implications for the sources and content of the contracting authority's due diligence. EU public

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35 Friton, P., Zöll, J. in *op. cit.* 6, p 583.

36 Friton, P., Zöll, J. in *op. cit.* 6, p 609. Telles, P. Friton, P., Zöll, J. in *op. cit.* 6, p 658.

37 Telles, P. in *op. cit.* 7, p 660.

38 Raude, M. Comment to the § 23 in Simovart, M. A., Parind, M. (editors), *Riigihangete seadus. Kommenteeritud väljaanne* (Juura, Tallinn, 2019), p 209.

39 Fels, E. Comment to the § 121 in *op. cit.* 38, p 805.

40 Antonov, M. Comment to the § 210 in *op. cit.* 38, p 1187.

41 Simovart, M. A. 'The new Remedies Directive: Would a diligent businessman enter into ineffective procurement contract?', a presentation at the 4th Public Procurement PhD conference, 7–8 September 2009 at the University of Nottingham, pp. 8–12. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

42 To an existence of a general due diligence obligation of tenderer has been referred to by Stalzer, J. in *op. cit.* 7, p 769. And also, in Estonian academic writings by Simovart, M. A., Pilving, I., Ginter, C. in Comment to the § 185 in *op. cit.* 38, p 1049.

43 Andhov, M. in *op. cit.* 7, p 201.

44 Simovart, M. A. in *op. cit.* 24, p 84

procurement law can be considered to be those rules that derive directly from EU primary law and the Public Procurement Directives or, in a small number of cases, from other EU legislation[45]. Member States have an obligation to harmonise directives into national law, which is why directives achieve their effects in national law after transposition into national law by means of the relevant legislation. However, based on how a Member State decides to harmonise EU public procurement law to solve domestic problems and promote practices, this choice may, in turn, have different effects on the contracting authority's due diligence.

Based on the practical implementation of EU public procurement law, Member States can be divided into two main categories: (1) those who transpose the Directives into their national law but do not introduce any significant additions to it; and (2) those who transpose the Directives but who also lay down additional conditions, both above and below the financial threshold or scope of the Public Procurement Directives. Most Member States fall predominantly into the second category, including Estonia. For example, the countries described in the first category are Denmark and Sweden, which over the years have been implementing the Directives from the financial thresholds provided for in the Directives without substantially improving the rules laid down in the Directives.[46] In the practice of the countries in the second category, EU public procurement law and national public procurement law are often mixed. Such an imposition of regulations similarly affects the contracting authority's due diligence and its obligations.

The contracting authority's due diligence obligations may, depending on the legal traditions of the Member States, be governed by several different principles simultaneously. However, not all of them may derive from national public procurement law. Given the differences between the laws of the Member States, in addition to the general principles of public procurement in the EU, the sources of

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[45] One recent example of such legislation is the EU's sanctions packages relating to the Russian military actions in Ukraine. Amongst other measures, the regulation (Article 5k) foresees additional measures for public procurements to ensure the effectiveness of the adopted sanctions. The Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. OJ L 111, 8.4.2022, p. 1–66.

Another example is the Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market. OJ L 330, 23.12.2022, p. 1–45. Contracting authorities shall be obliged to notify the European Commission when a tenderer submits a declaration of foreign financial contributions as part of the tender (Article 29). The said regulation comes into effect on July 12, 2023.

A traditional example is Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70. OJ L 315, 3.12.2007, p. 1–13. The said regulation foresees rules for public service contracts in addition to the rules in the public procurement directives (Article 5).

[46] Neergaard, U., Jacqueson, C., Ølykke, G. S. (editors). Public Procurement Law: Limitations, Opportunities and Pradoxes. The XXVI FIDE Congress in Copenhagen, 2014. Congress Publications Vol. 3. DJØF Publishing, Copenhagen 2014, p 86, 307 and 729. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

due diligence obligations of the contracting authority can, for example, be considered to be the principle of good administration or the principle of good faith. The relevance of the principle of good faith to the award of public contracts in some Member States stems from the fact that the awarding of a public contract is regarded as a private law procedure.[47] However, public law is observed in most Member States, as in the case of the EU's own procurement.[48]

Depending on the legal traditions of the Member States, the question also arises, whether the public procurement procedure is a subordination or a co-operation relationship between the contracting authority and the tenderers. This too influences the substance of the contracting authority's due diligence obligations. In this way, the obligations of the contracting authority can be inferred not only from EU public procurement law but also from other relevant national principles.

A suitable example is the general principle of public procurement laid down in Article 3 Subsection 5 of the Estonian Public Procurement Act,[49] which obliges contracting authorities to use funds economically and expediently, concluding a public contract based on the best possible price-quality ratio and conducting a public procurement within a reasonable time. There is no such principle in the EU public procurement directives.[50] The main objective of EU public procurement rules is to ensure the functioning of the EU internal market and to create equal, transparent, and proportionate conditions for businesses to operate there.[51] The prudent use of national budgets is in the Member States' interest, not the EU's.[52] However, Estonian contracting authorities must keep this in mind when conducting public procurements in addition to applying EU public procurement principles. Furthermore, the principle of good administration may set the tone for

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[47] In Germany, the public procurement procedure is regarded as a pre-contractual obligation. Volens, U. *Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid*. Doctoral thesis. Tartu University Press, 2011, p 275.

[48] *Ibid.*, p 85.

[49] Riigihangete seadus. RT I, 23.02.2023, 7.

[50] The same has been denoted by the Estonian authors of the Commented edition of the PPA. Kuusmann, T. Comment to the § 3 in *op. cit.* 38, p 47.

[51] See, for example, case C-54/21 *ANTEA POLSKA and Others* [2022] ECLI:EU:C:2022:888, 49, and case C-699/17 *Allianz Vorsorgekasse* [2019] ECLI:EU:C:2019:290, p 61–62.

[52] Professor Arrowsmith and P. Kunzlik argue that value for money could be the result of the public procurement rules, but the public procurement rules, as such, were never designed to seek value for money. The free movement provisions in the Treaty are only concerned with hindrances to the trade, and even the positive rules on EU-wide advertising of the tenders is a tool to ensure monitoring of the obligation not to discriminate. See, for example, Arrowsmith, S. and Kunzlik, P. (editors). *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions.* (Cambridge University Press, 2009), p 31–33. A similar view is shared by Professor Hamer. Hamer, C. R. 'The Principle of Proportionality: A Balance of Aims in Public Contracts' (2022) 3 European Procurement & Public Private Partnership Law Review, p 194–195.

the activities of the contracting authority in matters not regulated in the Estonian public procurement law.

Thus, the delimitation of the contracting authority's due diligence and its obligations across the EU is very complex, depending significantly on the legal order of a particular Member State. The issue is also problematic as it clearly affects the uniform implementation of EU public procurement law. Although different due diligence sources may not always lead to a result in which the requirements for the performance of the contracting authority are contradictory, such situations are not excluded. For example, in addition to ensuring the functioning of the EU internal market (i.e. equal treatment of cross-border bidders), the Estonian contracting authority is obliged to monitor what is happening in its wallet. However, if the Estonian contracting authority prefers financially influenced decisions to EU public procurement principles, the latter will lose their effectiveness. Thus, national sources regulating a contracting authority's due diligence that are in competition with EU public procurement law may not only be unacceptable but may also hinder the attainment of the objectives pursued by EU public procurement law. This, in turn, raises the issue of the coherent application of EU public procurement law since it has been given priority over national law.

### 1.2.5. Consequences of a breach of due diligence obligations

Regardless of whether the contracting authority's due diligence is visible and acknowledged to those implementing EU public procurement law, the contracting authority's failure to comply with due diligence also entails liability. Such consequences are mainly inconveniences in organising or continuing the procurement (for example, the impossibility of continuing with the procurement).[53] It is also customary to have an employment contract or disciplinary liability of an employee of the contracting authority, but it is not legally impossible (at least in Estonia) to be held criminally liable for, among other things, a breach of the due diligence obligations.[54] A notorious decision stemming from Hungarian public procurement law provides an example of a misdemeanour punishment of both a contracting authority and tenderer due to the illegal modification to a public procurement contract.[55]

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[53] In case of mistakes in the procurement, the contracting authority is allowed not to sign a contract and cancel the whole procurement procedure. See, for example, cases C-27/98 *Fracasso and Leitschutz* [1999] ECLI:EU:C:1999:420, p 23 and 25; C-92/00 *HI* [2002] ECLI:EU:C:2002:379, p 41; C-440/13 *Croce Amica One Italia* [2014] ECLI:EU:C:2014:2435, p 31–32; C-769/21 *BTA Baltic Insurance Company* [2022] ECLI:EU:C:2022:973, p 23.

[54] An employee working for an Estonian utilities sector entity provided information on the procurements still in the planning and already being executed in exchange for a tenderer building an automatic fence system at the employee's home. The employee pleaded guilty and was punished with a fine equal to the employee's 36 days' pay. Case no 1-16-84, Viru County Court's 12.02.2016 decision.

[55] Case C-263/19, *T-Systems Magyarország and Others* [2020] ECLI:EU:C:2020:373.

The more striking cases from the CJEU's practice imply that contracting authorities may be subjected to extensive recoveries of structural funds because of a breach of due diligence,[56] and such cases continue to be discovered today. In Estonia, it has been found as a result of the verification of the legality of the procurement that the contracting authority has not been diligent enough in determining the breach of contract by the tenderer, interpreting it as an illegal amendment to the contract. However, no provision in EU public procurement law or in the PPA regulates such activities of the contracting authority.[57]

## 1.3. Research problems, objectives, and questions

The dissertation examines the requirements arising from EU public procurement law for the diligence of the contracting authority. To this end, four research questions are posed:

1) what is the source of such due diligence in EU public procurement law?
2) what is the objective of such due diligence in EU public procurement law?
3) what are the contracting authority's specific due diligence obligations in EU public procurement law?
4) what is the relationship between the contracting authority's and the tenderer's due diligence obligations in EU public procurement law?

In a situation where, on the one hand, the contracting authority's due diligence as a doctrine is not discussed in the EU legislative procedure and not generally provided for in Directives, it is obvious that the practical output of the contracting authority's due diligence varies from one Member State to another. On the other hand, as pointed out above, the contracting authority's due diligence is also affected by whether the awarding of the contract is regarded as a private or public process. One of the main aims of the dissertation is the actual awareness of the contracting authorities of the requirements arising from the due diligence obligation of the contracting authority and that they cannot just be assumed, from both the practical point of view of the individual contracting authority and from the point of view of the uniform implementation of EU public procurement law.

However, creating a new concept of a diligent contracting authority in EU law is not a goal of this dissertation. Rather, the intention is to bring forward and connect the hitherto disparate analysis and viewpoints as demonstrated in the overview of the academic literature as well as in the CJEU's case law, which already entail either the notion of a due diligence concept or certain due diligence

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[56] Cases T-540/10 *Spain v Commission* [2013] ECLI:EU:T:2013:47, and T-235/11 *Spain v Commission* [2013] ECLI:EU:T:2013:49. The cases were later dismissed due to the non-compliance of the time limits. Still the Court's argumentation remains of interest.

[57] For example, case 3-23-702 pending in Tallinn Administrative Court.

obligations. By connecting the current knowledge about the contracting authority's due diligence into one comprehensive discussion and building upon of the existing body of knowledge, the contribution to the subject matter is a deep, well-defined, and comprehensive understanding of the due diligence of a contracting authority in EU public procurement law.

The existence, content and scope of the contracting authority's due diligence are recognisable to contracting authorities, both at the level of legislation and in practice, though only to a limited extent. This entails the risk that contracting authorities fail to comply with their obligations out of ignorance. At the same time, the supervisory organs see the contracting authorities' actions as non-compliant with requirements that they regard as part of the contracting authority's due diligence. Thus, one of the objectives of the doctoral thesis is to make the contracting authority's due diligence more legally clear, transparent, and predictable as a whole, but also in relation to its more specific elements.

For that, the sources of the contracting authority's due diligence need to be ascertained. Based on that, conclusions can be made on the objective of the contracting authority's due diligence obligations. This, in turn, helps with understanding and describing the individual elements of due diligence obligations, addressing the content of the due diligence requirements and the extent to which they apply.

Although the directives in force since 2014 deal to a small extent with the due diligence obligations of the contracting authority, the EU law does not mention the tenderer's due diligence obligation in public procurement. There is legal logic behind this since the directives are addressed to the Member States and, through the States, to their public entities that are the contracting authorities. Thus, the public procurement directives are not intended to regulate the conduct of tenderers participating in public contracts.[58] However, it is apparent that the public procurement procedure is not an end in itself in the EU public procurement law but achieves its objective when the tenderers participate in it. Thus, tenderers form an essential part of the public procurement procedure, without whom it would not be possible to conduct public procurements successfully.

Consequently, as in the case of the contracting authority's duty of diligence, the CJEU case law concerns requirements describing whether and how diligent the tenderer must be at certain stages of public procurement. Thus, the tenderer's due diligence is observed as an inverse facsimile of the contracting authority's due diligence, so to speak. That, in the hopes of drawing conclusions from it, in turn, as to the nature of the contracting authority's due diligence, including its

[58] Although there are cases where the Member States have regulated the obligations of the tenderers as well. CJEU analysed a case where the Hungarian law allowed for a punishment of a tenderer who contributed to the illegal change of a public procurement contract. Case C-263/19 *T-Systems Magyarország and Others* [2020] ECLI:EU:C:2020:373. See also Brown, A. 'Further insights into the lawfulness of ex officio reviews by national supervisory authorities concerning modifications to a public contract during its term: T-Systems (C-263/19)'. Public Procurement Law Review (2022) 5, 194–198.

elements and the scope of its application. The original hypothesis was that in situations where the contracting authority's due diligence is high, the tenderer's due diligence is low, and vice versa. This turned out not be the case, but the initial hope that the tenderer's due diligence would provide valuable information on the purpose, content, and scope of the contracting authority's due diligence was confirmed.

This doctoral thesis focuses on studying the contracting authority's due diligence purely from the EU public procurement law perspective. In this way, anything concerning other requirements or principles of national law relating to the conduct of the contracting authority is excluded from the scope of research of this dissertation. The above is addressed to the minimal extent necessary to answer the research questions and to open up context. The research question itself dictates such a choice. Since the research problem arose precisely based on EU public procurement law and CJEU case law, such a restriction is justified. The dissertation aims to open up the meaning of the contracting authority's due diligence in EU public procurement law, as directed by the CJEU with its judgments, and as it serves the achievement of the goals of EU public procurement law. The effects of national law on the substance of the contracting authority's due diligence are undoubtedly of significant importance in practice and in the light of the coherent application of EU public procurement law, but this remains outside the scope of the research of this thesis and the domain of future research.

## 1.4. The structure of this thesis

The structure of the dissertation reflects the research questions.

Chapter 2 of this overview article and Publication addresses the first research question regarding the source of the contracting authority's due diligence obligations in the EU public procurement law. For that, the development of the EU public procurement law and principles are covered, as well as the relationship between EU public procurement law and TFEU, CHREU, and EU general principles. An overview of the results of the research on the origin of the due diligence obligations of a contracting authority is covered in Publication I. Chapters 2.2.1. (sources deriving from the Member States' law) and 2.2.2. (possible spill-over effect of the CJEU case law on EU administration procurements) are partly based on Chapters 2.2 and 2.3. of Publication I. Chapter 2.2.3 again offers a new argumentation regarding the good administration principle as a general principle of EU as a source of the due diligence obligations of a contracting authority to address the recent CJEU case law and its possible effect on the due diligence obligations of a contracting authority.

The second and third research problems are covered in Chapter 3 of the dissertation. Firstly, the definitions of due diligence, in general, are explained. Thereafter, relying on the analysis and conclusions of Chapter 2 and partly Publication I, the aim of the due diligence obligation of a contracting authority in the EU public procurement law answering the second research question is explored.

To answer the third research question about the different due diligence obligations, there is a partial reliance on the analysis and conclusions of Publication III.

Chapter 4 and Publication II explain the relationship between a contracting authority's obligations and tenderer's (due diligence) obligations, thereby answering the fourth and final research question. Chapter 4 mostly relies on the research, analysis, and conclusions of Publication II that observed the situations in the CJEU case law where the question of the diligence of a tender was discussed. Nevertheless, specific categorisation of the possible due diligence obligations of a tenderer is additionally listed and discussed.

This dissertation is a progression from my previously published works in peer-reviewed legal journals with international editorial boards and a blind peer-review process. Those publications focused on specific aspects of the dissertation's research problems, which have been supplemented by an in-depth examination of the broader subject field. By connecting individual research problems covered in my publications, this dissertation offers a more comprehensive and nuanced understanding of the issues at hand. As such, this dissertation goes beyond a mere reiteration of my earlier work, offering an expanded analysis of the research problems, their interconnections, and the conclusions drawn from them.

## 1.5. Methods and sources

This dissertation is legal dogmatic research that is best described as research that aims to provide a systematic exposition of the principles, rules, and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules, and concepts with a view to solving ambiguities and gaps in the existing law. The system is not only the subject of the inquiry, but it also provides the normative framework for analysis.[59]

The methods used in the doctoral thesis are analysis, interpretation, synthesis, deduction, induction, and empirical data collection for the analysis of the CJEU's judgments.

The main research question of the doctoral thesis concerns the contracting authority's due diligence in EU public procurement law, which is why the dissertation (Chapter 2) identifies the relevant rules of EU primary law (Treaty on the Functioning of the European Union) as well as general principles of the EU law, and secondary law (public procurement directives) concerning the diligence of the contracting authority.

As said, in EU public procurement law, there are only a few norms relating directly to the due diligence of the contracting authority, which do not provide an adequate answer to the research questions through interpretation. Therefore, the

[59] Smits, J. 'What is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research' in van Gestel, R., Micklitz, H.-W., Rubin, E. L. (editors), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, Cambridge University Press, 2017, p 207–228. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

nature, sources, essence of due diligence, scope of application as well as the degree of diligence of the contracting authority are analysed based on the relevant CJEU decisions that were collected by using an empirical data collection method (Publications I–III).

The judgments date from 1981 to early 2023. These are CJEU judgments found based on keyword searches, but also by general search, that concern the general due diligence of a contracting authority or the due diligence of a contracting authority in specific circumstances (as is covered in Publication III, for example). The start time of the period marks the time when ECJ started making public procurement decisions. The end time of the period understandably corresponds to the last period of doctoral studies, when it was still possible to consider CJEU's practice when drafting this dissertation. This choice of the period was dictated by two reasons:

1) The answer to the first research question required an identification of the situations in which and based on which sources the Court had mentioned the contracting authority's due diligence (obligations) in the first place. Since the CJEU thoroughly addressed the due diligence of the contracting authority already in 2013 in two decisions, without being based on any of the rules laid down in the EU public procurement directives, it had to be assumed that the Court may have taken such decisions in the past as well. Judgments of a more general nature are discussed in Publication I as well as II.

2) To examine the more precise expression of the contracting authority's due diligence (essence, scope of application and degree of diligence) in the practical situation of public procurement, I narrowed the third research question in Publication III down to two illustrative types of public procurement situations. Therefore, all the CJEU's rulings came under scrutiny that concerned provisions on the same subject in different generations of EU public procurement directives.

Through the analysis, interpretation, and induction of the relevant EU public procurement law rules and CJEU's rulings, the dissertation leads to ascertaining some precise contracting authority's due diligence obligations (Chapter 3 and Publication III).

In Publication III, to identify more specific elements of the due diligence, the scope of application, and the degree of diligence, I narrowed the research focus down to two specific public procurement situations – the choice of a negotiated procedure without prior publication of a contract notice in the event of an unforeseen event and the modification of the contract in the event of an unforeseen circumstance. The latter is the only situation where the contracting authority's duty of diligence is expressly regulated today by the EU public procurement directives. The negotiated procedure without prior notice has been regarded as an exceptional procedure, the implementation of which must be justified only by very narrow situations. However, the existence of an unforeseeable event justifying the application of such a type of procedure is intricately linked to the

diligence expected of the contracting authority. Consequently, those two public procurement situations constituted an appropriate reference base for concluding the more specific elements of the contracting authority's due diligence, the scope of application, and the degree of diligence.

It is possible to criticise reliance on CJEU's decisions to such a large extent as sources of the doctoral thesis on the grounds that the obligations of the contracting authorities can still arise only from the law in force. Thus, it could be argued that the CJEU's decisions cannot be regarded as a source of law. Such an argument can be balanced with a statement that CJEU's case law forms part of the EU *aqui* and therefore is considered a legal source of EU law.

Additionally, although the official role of the CJEU in EU law is also not related to legislation but to judicial supervision[60], the effects of the guidelines given in the CJEU's rulings could, in practice, be observed as essentially having legislative significance or effect. It is nevertheless correct to address the CJEU's role as an interpreter of the Treaties and the preserver of the rule of law in the EU. As the role of the CJEU has been and is unique in the context of a supranational organisation and its complex multi-layered legislation, the activities of the CJEU have been somewhat different than they are ordinarily seen in national courts.[61]

In EU public procurement law, as well as in other areas of law, the CJEU has often, years prior to the inclusion of certain legal approaches in directives, practically 'established' legally (re)transformative conclusions for the whole subject field. The most well-known example of such is the *Costa v E.N.E.L* case, in which the Court established the principle of the supremacy of EU law over national law.[62]

If to limit the so-called legislative impact of the CJEU decisions to the context of EU public procurement law, there are already cited such examples in Publication I[63] being in-house transactions[64] and the principles of the cooperation between contracting authorities[65] (the so-called Hamburg doctrine)[66], which had

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[60] Articles 258, 260, and foremost, 263 and 267 of the TFEU.

[61] The controversial aspects of the CJEU's role have been discussed, and an overview of opposing aspects is given in Craig, P., De Búrca, G. *EU Law. Text, Cases, and Materials* (7th ed., Oxford University Press, 2020), p 92–96.

[62] Case C-6/64 *Costa vs. E.N.E.L* [1964] ECLI:EU:C:1964:66.

[63] Härginen, K. 'Duty of diligence of a contracting authority in the E.U. public procurement law' (2022) 2 Public Procurement Law Review, p 81.

[64] Case C-107/98 *Teckal* [1999] ECLI:EU:C:1999:562, and case C-458/03 *Parking Brixen* [2005] ECLI:EU:C:2005:605. See also Ginter, C., Härginen, K., Sõrm, M. "In-house transactions: lost in translation?" (2020) 3 Public Procurement Law Review, p 117–130.

[65] Case C-480/06 *Commission v Germany* [2009] ECLI:EU:C:2009:357, and Steinicke, M. 'The Court of Justice of the European Union, public procurement and in-house contracts – a critique of Case C-480/06, Commission v Germany' in Koch, H., Hagel-Sørensen, K., Haltern, U. and Weiler, J. (editors), *Europe The New Legal Realism* (Djøf Forlag, Copenhagen, 2010), p 729–745.

[66] Arrowsmith, S. *The Law of Public and Utilities Procurement. Regulation in the EU and UK* (3rd ed., Sweet&Maxwell, 2014), Vol.1, p 521.

been addressed in CJEU practice since 1999, although the way into the directives only began in 2014. Similarly, born out of the practice of the CJEU, the contracting authorities' right to amend public contracts under the presence of certain conditions,[67] which were also only included in the directives in 2014. The CJEU also recognised the principle of proportionality as a stand-alone EU public procurement general principle[68] before it was incorporated into the Directives in 2014. The principle that it is not contrary to public procurement rules for a tenderer to receive state aid can also be highlighted from the earlier practice of the CJEU.[69] This rule, too, was later introduced into the directives. While examining tenders on the suspicion of abnormally low tenders, lawfully obtained state aid is still one of the reasons whereby it is considered that the tender price is not abnormally low.

The most important sign of the impact of CJEU's decisions must be considered to be that the CJEU itself is complying with its previous decisions, as is followed in everyday practice by the courts of the Member States. However, the EU legislator also follows the CJEU's rulings. The recitals in the preamble to Directives 2004/17 and 2004/18 state that those directives are based on the case law of the CJEU.[70] It is clear from the recitals in the preamble to Public Sector Directive that to a large extent, the new regulations represent a codification of CJEU case law without any intention of amending the practice of the CJEU when the directives were adopted.[71] Such a role of the CJEU has been highlighted by all weighty EU public procurement law scholars, including Professor Arrowsmith [72],

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[67] Cases C-496/99 *Succhi di Frutta SpA* [2004] ECLI:EU:C:2004:236; C-454/06 *pressetext Nachrichtenagentur* [2008] ECLI:EU:C:2008:351, and case C-503/04 *Commission v Germany* [2007] ECLI:EU:C:2007:432.

[68] Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici* [2014] ECLI:EU:C:2014:2063, case T-195/08, *Antwerpse Bouwwerken v Commission* [2009] ECLI:EU:T:2009:491, case C-171/15 *Connexxion Taxi Services* [2016] ECLI:EU:C:2016:948. See also Article 18(1), for example, in the Public Sector Directive.

[69] Case C-94/99 *ARGE* [2000] ECLI:EU:C:2000:677, p 29–30.

[70] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts [2004] OJ L 134, 30.4.2004, p 114–240, 1st Recital.

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors [2004] OJ L 134, 30.4.2004, p. 1–113, 1st Recital.

[71] Directive 2024/14/EU, Recitals 2, 10, 11, 31, 89, 97, and 107.

[72] Sue Arrowsmith KC (hon) is Professor Emerita of Public Procurement Law and Policy at the University of Nottingham. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

Although Professor Arrowsmith denotes that there is no system of precedent, it is clear that individual decisions of the CJEU have a highly persuasive value and that it is, in fact, extremely rare for the CJEU to fail to follow previous decisions on the law. Arrowsmith, S. EU Public Procurement Law: An Introduction, p 41. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

Professor Steinicke[73], and Professor Hamer[74].

Thus, regardless of whether secondary EU legislation is immediately amended based on the CJEU rulings, the Member States have put into practice what has been set out in the CJEU judgments without waiting for the changes introduced by the EU legislator. Estonian public procurement law alone provides examples where, because of CJEU rulings, national law has been changed before the same issue was introduced years later through 2014 EU public procurement directives. For example, since 2007, Estonian public procurement law regulated the amending of public procurement contracts and, since 2010, the admissibility of in-house transactions.[75]

Thus, also from a legal-dogmatic point of view, it would be incorrect to disregard CJEU's judgments as sources of law. Even more so since the legal dogmatic method presupposes the observation and analysis of law from the position of the practitioner as it is.[76] This, in turn, means accepting legal realities that deviate from the normative approach but have been confirmed in practice and linking it to legal concepts. Such an approach also helps to overcome the criticism of legal dogmatic research, as if legal dogmatics limits itself only to the artificial world, in which (sometimes artificial) problems are worded and solved without any necessary connection to some societal reality.[77] In a situation where the EU legislator narrowly regulates the contracting authority's duty of diligence in one case only, but the practice of the CJEU indicates that it has a much broader

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Professor Steinicke still regards the CJEU case law as an authoritative interpretation of the rules. *Op. cit.* 6, p 26.

[74] Carina Risvig Hamer is a professor of administrative law and public procurement in the Faculty of Law in the University of Copenhagen. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

Professor Hamer states that some of the case law has been inserted directly into the 2014 directive. Hamer, C. R. and Andhov, M. in *op. cit.* 7, p 188.

[75] Estonia enacted the conditions for modifying procurement contract's terms already from 2007, PPA § 96(3). Riigihangete seadus RT I 2007, 15, 76. Until the adoption of the 2014 public procurement directives, the EU public procurement law did not regulate the conditions for modifying a public procurement contract.

Estonia also adopted the in-house transaction rules based on the CJEU's practice already in 2010, PPA § $14^1$. Riigihangete seadus RT I, 31.12.2010, 2. In the same way, the EU legislator introduced such rules to the EU public procurement directives only in 2014. See also the Explanatory Note to the Draft Act 860SE, p 5. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

[76] Taekema, S. 'Relative Autonomy, A Characterisation of the Discipline of Law' in van Klink, B., Taekema, S. (editors) *Law and Method Interdisciplinary research into law* (Mohr Siebeck, Tübingen, 2011), p 41.

[77] Hoecke, M. V. (editor). *Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011), p vii.

application, the analysis emerging from the CJEU's judgments constitutes the so-called legal reality.

To the maximum extent possible, legal literature and the relevant CJEU's case law is used to interpret the rules governing the contracting authority's due diligence and its obligations thereunder. However, it must be held that there are scarce legal theoretic sources expressly relating to the contracting authority's due diligence obligations. There are enough of them to recognise that the contracting authority's due diligence exists in EU public procurement law, but to such an extent that it does not provide a sufficient legal theoretic basis as to the nature of the due diligence obligations, the specific elements, the scope of application and the expected degree of diligence. The doctoral thesis also relies on the published works of renowned leading legal scholars in EU public procurement law, such as Professor Arrowsmith[78], Professor Caranta and Professor Sanchez-Graells[79], Professor Steinicke, and P.L. Vesterdorf[80]. Peer-reviewed articles published in the *Public Procurement Law Review,* one of the most recognised journals in the field of public procurement law in the EU, are also used.

As regards the tenderer's (due diligence) obligations, it is possible to mainly rely only on CJEU's decisions and the opinions of the Advocates General expressly relating to it. There is no normative source in EU public procurement law that would directly address tenderers' (due diligence) obligations in public procurement. While the Remedies Directives govern the protection of tenderers' rights in public procurement[81], Directives does not regulate the rights and obligations of tenderers during a procurement procedure.

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[78] Arrowsmith, S. *The Law of Public and Utilities Procurement. Regulation in the EU and UK* (3rd ed., Sweet&Maxwell, 2014), Vol.1, and Vol.2 (2018).

[79] Roberto Caranta is a full professor of Administrative Law, Law Department, University of Turin, Italy. Albert Sanchez-Graells is a professor of Economic Law and Co-Director of the Centre for Global Law and Innovation at the University of Bristol Law School. He specialises in EU economic law and, in particular, in competition and public procurement law and policy. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

Caranta, R., Sanches-Graells, A. (editors). *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar Publishing, 2021).

[80] Peter Leif Vesterdorf holds a master's degree in law and a PhD in EC law from the University of Copenhagen. His major employments have included posts in the European Parliament, the Danish Parliament, the Danish Ministry of Foreign Affairs and the European Court of Justice. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

Steinicke, M., Vesterdorf, P. (editors). *EU Public Procurement Law. Brussels Commentary* (Beck, Hart, Nomos, 2018).

[81] 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 [1989] OJ L 395, 30.12.1989, p. 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

The rights and obligations of a tenderer in a particular procurement procedure are mainly governed by the procurement documents established by the contracting authority in that public procurement. Thus, EU public procurement rules only achieve their effect vis-à-vis a tenderer once the contracting authority has established them and the tenderers decide to participate in the relevant public procurement. To a certain extent, the national public procurement law may also regulate the rights and obligations of a tenderer, but such norms go beyond the research problem of this dissertation as the focus is on the due diligence based on EU public procurement law.

procedures of entities operating in the water, energy, transport, and telecommunications sectors [1992] OJ L 76, 23.3.1992, p. 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 [2007] OJ L 335, 20.12.2007, p. 31–46.

# 2. Sources of the contracting authority's due diligence obligations in EU public procurement law

## 2.1. Development of due diligence of a contracting authority

### 2.1.1. Historic creation and purpose of the EU public procurement law

The development of EU public procurement law in the European Community and later in the European Union has not been linear. The creation of public procurement rules has not started with the introduction of new rules for Member States or the implementation of a single set of rules. On the contrary, EU public procurement law has, for the first time since the early 1970s, evolved alongside the public procurement rules applied in parallel in the Member States' own legal orders, starting with the harmonisation of a small number of Community-wide rules.

Before the first public procurement directive was introduced, public procurement rules in the Member States were subject to the EC Treaty.[82] This was done based on the assumption that the prohibition of discrimination on the grounds of nationality alone is also sufficient in the field of public procurement. Firstly, because public procurement was not regarded as a regulated activity, which is why the rules on public procurement were regarded as a matter falling within the competence of the Member States. Secondly, it was widely accepted at the time that public sector entities could, without any restrictions but with a consideration for the prohibition of discrimination on the grounds of nationality, select the co-operation partner or tenderer they wished, regardless of the reason for that choice.[83]

The first public procurement directive 71/305/EEC thus laid down rules of only 34 articles and, in order to promote transparency, provided that the directive would aim, as a first priority, to abolish restrictions on access to, participation in, and execution of public works contracts and, as a second priority, to harmonise Member States' national procedures.[84] Article 2 of that directive provided that, in the award of public contracts, contracting authorities were to apply national procedures adapted to comply with the provisions of that directive. A similar rule was provided for (in Article 2) by directive 77/62/EEC, which coordinated the rules on public service procurement, adopted a few years later.[85]

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[82] Treaty Establishing the European Community, Rome Treaty, 25 March 1957.

[83] Steinicke, M. in *op. cit.* 6, p 1.

[84] Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts [1971] OJ L 185, 16.8.1971, Recitals. See also, case C-76/81 *Transporoute v Ministère des travaux publics* [1982] ECLI:EU:C:1982:49, p 7.

[85] Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts. OJ L 13, 15.1.1977.

Thus, initially, in the first phase[86] of the coordination of public procurement rules, the Member States' own public procurement rules remained in force, which only had to be supplemented at the rate referred to by the EC legislator. From the outset, the EU (then the EC) did not modify or create a requirement for the implementation of a procedure of specific content and nature (public or private). Member States were able to continue with their legal traditions and procedures as they had before coordinating public procurement rules across the EC.

It was not until the mid-80s that public procurement rules became a focus area for the European Commission[87], in connection with the completion of the single market, due to the economic incentive effect the public procurement had to the single market.[88] However, the subsequent directives, adopted only in the late 1980s[89], the consolidated directives in the mid-1990s[90] and the new public procurement directives adopted in 2004,[91] did not regulate the public or private nature of public procurement as a procedure, laying down only the material rules to be transposed by each Member State.

On the eve of the creation of the internal market, in 1988 and 1989, a second generation of EC public procurement directives was adopted, the recitals of which explain the adoption of directives, mainly through the need to ensure the functioning of the internal market that will soon be established. The amendments to be implemented were clarified by the need to improve and extend the scope of

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[86] See about the development and phases of the public procurement directives in Arrowsmith, S. *EU Public Procurement Law: An Introduction*, chapter 2.3, p 55. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

[87] Steinicke, M. in *op. cit.* 6, p 2.

[88] Arrowsmith, S. *EU Public Procurement Law: An Introduction*, Chapter 2.3, p 55. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

[89] Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC [1988] OJ L 127, 20.5.1988, p. 1–14.

Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts. OJ L 210, 21.7.1989, p 1–21

[90] Previous directives, 88/295/EEC, and 89/440/EEC, together with directives 71/305/EEC and 77/62/EEC, saw a consolidation in 1993 into two directives. Accordingly, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L 199, 9.8.1993, p 1–53, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1993] OJ L 199, 9.8.1993, p 54–83.

[91] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport, and postal services sectors operating in the water, energy, transport, and postal services sectors [2004] OJ L 134, 30.4.2004, p. 1–113.

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts [2004] OJ L 134, 30.4.2004, p. 114–240.

the directives by increasing the transparency of procurement procedures and practices and enabling stricter restrictions on the free movement of goods, which constitutes the basis of the directives.[92] Also that, in order to ensure real freedom of establishment and freedom to provide services in the market of public works, it is necessary to improve and extend the safeguards contained in the directives, which aim to make the procedures and practices for the award of such contracts more transparent so that compliance with the prohibition of restrictions can be monitored more closely and, at the same time, the differences in the competitive conditions faced by nationals of different Member States.[93]

The 1992 directives also mention the guarantee of fundamental freedoms as the objective of harmonising the rules on public procurement, clarifying that achieving the free movement of goods in the Member States in the case of public contracts awarded by contracting authorities requires not only the abolition of restrictions but also the coordination of national procedures for the award of public contracts. At the same time, in addition to harmonising Community-wide rules, emphasis continued to be placed on the need to take into account, as far as possible, the procedures and administrative practices of the Member States.[94] The ECJ also considered that the purpose of the directive was to avoid the risk of giving preference to national tenderers in the award of public contracts.[95]

The 2004 and 2014 directives no longer expressly refer to the safeguarding of the internal market. They nevertheless emphasise that it is for the Member States, when awarding public contracts by contracting authorities, to apply the principles of the Treaty. In particular, the principle of free movement of goods, the principles of freedom of establishment and the freedom to provide services and the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. It is, therefore, evident that the main objective of the EU public procurement directives has not changed.

The 2004 directives further stressed that the provisions to be coordinated should, as far as possible, correspond to the procedures and practices in force in each Member State at that time.[96] However, a similar provision is no longer included in the 2014 directives. On the contrary, it follows from the recitals in the preamble to the Public Sector Directive that, since the coordination of the laws, regulations, and administrative provisions of the Member States applicable to certain procurement procedures, as an objective of the 2014 Directive, cannot be

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92 Council Directive 88/295/EEC, Recitals.

93 Council Directive 89/440/EEC, Recitals.

94 Council Directive 93/36/EEC and 93/37/EEC, Recitals.

95 Case C-44/96 *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck* [1998] ECLI:EU:C:1998:4, p 33, and C-360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding* [1998] CLI:EU:C:1998:525, p 42.

96 Directive 2004/18/EC, 2nd and 3rd Recitals. Directive 2004/17/EC, 9th Recital. Directive 2024/14/EU, 1st Recital.

sufficiently achieved by the Member States, the scope and effects of the directive can therefore be better achieved at Union level, with the result that the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TFEU.[97]

From this, it can be concluded that the starting point no longer seems to be the earlier paradigm of introducing EU rules into the Member States' own law to a harmonised extent, but, on the contrary, the full implementation of EU law. Thus, from 2016, Member States will retain legislative freedom only in so far as they are not governed by EU public procurement law. The latest directives seem to mark a starting point for the coordination of the procedural rules as well, although, from the text of the directives, this is not explicit. The recent cases[98] discussed in Chapter 2.2.3 of this thesis may be regarded as one sign of such a development as the CJEU pinpoints the good administration principle as an EU general principle as the basis of the activities of contracting authorities.

Today, the public procurement rules in the Member States consist mainly and to a very large extent of rules laid down by the EU legislator. The Public Sector Directive[99] alone establishes a section of rules in 94 articles, supplemented by rules on remedies[100], the Defence and Security Sector Directive[101], the Utilities Sector Directive[102] and the Concession Contracts Directive.[103] The volume of

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97 Directive 2014/24/EU, 136th Recital.

98 Cases C-927/19 *Klaipėdos regiono atliekų tvarkymo centras* [2021] ECLI:EU:C:2021:700, p 120 and 122; and C-54/21 *ANTEA POLSKA and Others* [2022] ECLI:EU:C:2022:888, p 50, 64, 66, and 76.

99 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 [2014] O.J. L94.

100 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 [1989] OJ L 395, 30.12.1989, p. 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 [1992] OJ L 76, 23.3.1992, p. 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 [2007] OJ L 335, 20.12.2007, p. 31–46.

101 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.

102 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 [2014] O.J. L94.

103 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] O.J. L94.

rules to be transposed has increased not only in the number of articles but also in the volume of regulation. Professor Arrowsmith criticised such a reform even before the 2014 directives were adopted, calling the multiplicity of directives and regulations 'Frankenstein's monster' and proposing one directive for the public sector, utility sector, concession contracts, defence and security, and another directive for remedies.[104] History shows that legal scholars were not listened to. Fortunately, this is not always the case as the Estonian legislator recently thoroughly 'repaired' the Estonian Public Procurement Act after the publishing of the commented edition to the law marking many shortcomings and controversies in the law so far.[105]

In this way, the harmonisation and coordination of public procurement rules in EU law-making have moved from one extreme to the other. The EU public procurement rules are now so extensive that they cover almost the entire scope of the contracting authority's activities. In essence, the development of EU public procurement law has reached a stage where the Member States' own public procurement law concerns only the organisational elements of public procurement procedures or public contracts falling below the scope of the directives. According to CJEU case law, Member States are not entitled to modify the provisions of the EU public procurement directives even when these are applied below the EU thresholds[106] which is why the rules of the EU legislature must be transposed into national law and complied with in the manner laid down.[107] However, the public or private nature of the procedure has remained at the discretion of the Member States to this day. This must be taken into consideration when formulating the sources and purpose of the contracting authority's due diligence

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[104] Arrowsmith, S. 'Modernising the European Union's public procurement regime: a blueprint for real simplicity and flexibility' (2012) 3 Public Procurement Law Review, p 71–82.

[105] Riigihangete seadus. RT I, 05.05.2022, 2.
The explanatory note (page 3) to the Draft Act 491SE specifically mentions one of the reasons for the modifications to the existing law to derive from the works of the academics in the Simovart, M. A., Parind, M. (editors), *Riigihangete seadus. Kommenteeritud väljaanne* (Juura, Tallinn, 2019).

[106] See, for example, case C-226/04 and C-228/04, *La Cascina vs Ministero della Difesa* ECLI:EU:C:2006:94 [2006], p 22; in earlier practice, see case C-71/92 – *Commission v Spain* [1993] ECLI:EU:C:1993:890, p 44–45, and case 76/81 *Transporoute vs. Ministère des travaux publics* [1982] ECLI:EU:C:1982:49, p 6–15.

[107] The CJEU has long held that in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt, directly and unconditionally, the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that provisions taken from that measure should be interpreted uniformly. That makes it possible to forestall future differences of interpretation and to ensure that those situations and situations falling within the scope of those provisions are treated in the same way. See, for example, cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] ECLI:EU:C:1990:360, p 36 and 37; C-298/15 *Borta* [2017] ECLI:EU:C:2017:266, p 33 and 34; C-367/19 *Tax-Fin-Lex* [2020] ECLI:EU:C:2020:685, p 21; and C-195/21 *Smetna palata na Republika Bulgaria* [2022] ECLI:EU:C:2022:239, p 43.

since both the purpose and the sources may depend on the nature of the procedure at the national level.

Although EU public procurement rules have a number of important strategic sub-objectives (e.g. horizontal objectives [108]), in a nutshell, the most important objective of the EU public procurement directives is to ensure the functioning of the internal market and opening up the market for public contracts. The tenderers' access to public contracts and ensuring free movement of undertakings are, therefore, generally seen as the overall aim of the rules.[109] The rules on public procurement as the guarantor of the EU's fundamental freedoms and, thus, of the internal market have also been mentioned on several occasions by the CJEU[110] while it has been clarified in later practice that the second objective is to ensure open and fair competition in all Member States.[111] By allowing a remark more frivolous and popularising legal scholarship, Professor Weatherill has simplistically noted regarding the relationship between EU public procurement rules and the internal market that EU public procurement law simply makes the internal market better.[112]

### 2.1.2. General principles of EU public procurement law as sources of the due diligence obligations of a contracting authority

EU public procurement principles are the principles of equal treatment of tenderers, non-discrimination, proportionality, and transparency.[113] The Public Sector Directive also mentions mutual recognition as an additional principle.[114] These principles derive from the fundamental freedoms enshrined in the TFEU: the free movement of goods, the freedom of establishment, and the free movement of

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[108] Horizontal policies (also sometimes named secondary procurement policies) are a phenomenon whereby public procurement is used to promote social, environmental, and other societal objectives that are not inherently necessary to achieve the functional objective of a specific procurement but which the procuring body chooses, or is required, to advance in the context of its procurement contracts. Arrowsmith, S., Kunzlik, P. (editors). *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions.* (Cambridge University Press, 2009), p 12.

[109] Hamer, C. R. 'The Principle of Proportionality: A Balance of Aims in Public Contracts' (2022) 3 European Procurement & Public Private Partnership Law Review, p 194–195.

[110] See, for example, cases C-360/96 *Gemeente Arnhem, Gemeente Rheden v BFI Holding* [1998] ECLI:EU:C:1998:525, p 41; C-380/98 *University of Cambridge* [2000] ECLI:EU:C:2000:529, p 16; C-91/08 *Wall* [2010] ECLI:EU:C:2010:182, p 48; C-336/12 *Manova* [2013] ECLI:EU:C:2013:647, p 28; and C-19/13 *Fastweb* [2014] ECLI:EU:C:2014:2194, p 65.

[111] Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECLI:EU:C:2012:191, p 25.

[112] Weatherill, S. in Bogojevic, S., Groussot, X., Hettne, J. (editors). *Discretion in EU Public Procurement Law.* (Bloomsbury Publishing, 2019), p 21–50.

[113] Academics disagree about whether the EU public procurement law also entails a principle of competition. The most recent comprehensive critique is offered by Losnedahl, T. G. H. 'The general principle of competition is dead' (2023) 2 Public Procurement Law Review, p 85–98.

[114] Directive 2024/14/EU, 1st Recital.

services.[115] Therefore, both the CJEU[116] and the legal scholars consider the TFEU to be the primary basis for EU public procurement rules.[117] Within the TFEU, those fundamental freedoms are governed, respectively, by Articles 34 (free movement of goods), 49 (freedom of establishment), and 56 (freedom to provide services). From the point of view of public procurement rules, Articles 45 (free movement of workers), 63 (free movement of capital), and 18 (prohibition of discrimination on the grounds of nationality) are also considered important.

In addition to the EU public procurement principles directly inferring from those articles of the TFEU, the legal literature considers the role of those provisions in public procurement to be twofold. First, the provisions of the TFEU apply to situations where the directives do not apply. In such a situation, the provisions of the TFEU, together with the general principles of the EU, constitute the basic regulation (e.g., the implementation of exceptions or the conclusion of mixed objects' agreements). Secondly, the provisions of the TFEU also apply to situations in which the directives also apply. In this case, attention must be given to the effects of their simultaneous application. In addition, there is no financial (*de minimis*) threshold for the application of the TFEU provisions and the general principles of the EU, as defined as a prerequisite for the application of the rules on public procurement and also on the competition.[118]

The general principles of the EU impose two types of obligations on the contracting authority: (1) a negative obligation to refrain from implementing measures that impede free movement or have discriminatory effects[119] and (2) a positive obligation to actively pursue the objective of the general principles, such as the publication of a contract notice enabling economic operators to express their interest and to participate in public procurement.[120]

As regards the function of the general principles laid down in the Public Procurement Directives, academics consider that they have three distinct effects. (1) On the one hand, the general principles of public procurement (in particular, the principles of equal treatment and transparency) form the basis of the existing provisions of the Directives. They, therefore, also form the basis for interpreting

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[115] Directive 2014/23/EU Article 3; Directive 2024/14/EU, 1st Recital and Article 18; and Directive 2014/25 2nd Recital and Article 36.

[116] The CJEU has noted that the award of public contracts is to remain subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services. See, for example, cases C-92/00 *HI* [2002] ECLI:EU:C:2002:379, p 42; C-507/03 *Commission v Ireland* [2007] ECLI:EU:C:2007:676, p 26; C-454/06 *pressetext Nachrichtenagentur* [2008] ECLI:EU:C:2008:351, p 33; C-226/09 *Commission v Ireland* [2010] ECLI:EU:C:2010:697, p 29;

[117] Steinicke, M. in *op. cit.* 6, p 4.

[118] Steinicke, M. in *op. cit.* 6, p 5.

[119] Brown, A. 'Seeing through transparency: the requirement to advertise public contracts and concessions under the EC treaty' (2007) 1 Public Procurement Law Review, p 1–21.

[120] Kuusmann, T. Comment to the § 3 in *op. cit.* 38, p 51. See also Arrowsmith, S. in *op. cit.* 66, p 252.

the provisions of the Directives. (2) On the other hand, the more practical task of the principles is to supplement the more detailed rules of the Directives. This mainly concerns areas where the Directives have not regulated the specific situation in detail but have left it to the contracting authority to lay down certain elements of procurement procedures[121] or where there is no regulation at all, such as rules on the modification of the contract before the entry into force of the Directives adopted in 2014.[122] Put simply, it is to help bridge legal loopholes. (3) The third role of the general principles of public procurement has also been considered to be guiding the contracting authority in making discretionary decisions, [123] i.e., decisions in different public procurement situations on a daily basis.

Although the Directives distinguish between the prohibition of non-discrimination and the principle of equal treatment, in practice, they are regarded as essentially the same principle and are used synonymously.[124] The principle of equal treatment has also been referred to in the case law of the CJEU as the very heart of the directive[125] and the basis of the directives.[126] The principle of equal treatment is expressed in public procurements in that the contracting authority is required to treat both economic operators participating in a public contract and potential tenderers equally.[127] The CJEU considers that the objective of equal treatment is to promote the development of healthy and effective competition between the economic operators participating in the procurement procedure.[128] The principle of equal treatment applies to all phases of the procurement procedure.[129]

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[121] Hamer, C. R. and Andhov, M. in *op. cit.* 7, p 188. See also, Steinicke, M. in *op. cit.* 6, p 292.

[122] See further about the modifications to the public procurement contract based on the CJEU practice before the entry into force of the 2014 public procurement directives that first regulated the issue in Simovart, M. A. *Lepinguvabaduse piirid riigihankes: Euroopa Liidu hankeõiguse mõju Eesti eraõigusele.* Doctoral thesis. Tartu University Press, 2010.

[123] Kuusmann, T. Comment to the § 3 in *op. cit.* 38, p 48. Such conclusion is based on cases C-131/16 *Archus and Gama* [2017] ECLI:EU:C:2017:358, p 32 and C-14/17 *VAR and ATM* [2018] ECLI:EU:C:2018:568, p 34.

[124] Hamer, C. R. and Andhov, M. in *op. cit.* 7, p 188. Steinicke, M. in *op. cit.* 6, p 294.

[125] Cases C-243/89 *Commission v Denmark* [1993] ECLI:EU:C:1993:257, p 33, C-513/99 *Concordia Bus Finland* [2002] ECLI:EU:C:2002:495, p 81, and Case C-21/03 *Fabricom* [2005] ECLI:EU:C:2005:127, p 26.

[126] Cases C-470/99 *Universale-Bau and Others* [2002] ECLI:EU:C:2002:746, p 91, C-92/00 *HI* [2002] ECLI:EU:C:2002:379, p 45; C-315/01 *GAT* [2003] ECLI:EU:C:2003:360, p 73; and C-213/07 *Michaniki* [2008] ECLI:EU:C:2008:731, p 45.

[127] Cases C-87/94 *Commission v Belgium* [1996] ECLI:EU:C:1996:161, p 54 and 70; C-19/00 *SIAC Construction* [2001] ECLI:EU:C:2001:553, p 34; C-448/01 *VN and Wienstrom* [2003] ECLI:EU:C:2003:651, p 47; C-331/04 *ATI EAC and Others* [2005] ECLI:EU:C:2005:718, p 22; and C-396/14 *MT Højgaard and Züblin* [2016] ECLI:EU:C:2016:347, p 37.

[128] Cases C-19/00 *SIAC Construction* [2001] ECLI:EU:C:2001:553, p 34, and *MT Højgaard and Züblin* [2026] ECLI:EU:C:2016:347, p 38.

[129] Case C-16/98 *Commission v France* [2000] ECLI:EU:C:2000:541, p 107.

However, this principle may have various specific expressions in different public procurement situations (for example, when conducting negotiations or asking for additional information about tenders). Infringements of the principle of equal treatment are most often found in non-qualification, negotiation, acceptance of non-compliant tenders, selection of discriminatory tenders, and the establishment of award criteria.[130]

There is no fundamental framework within which to assess whether tenderers have been discriminated against, so it can be presumed that any discrimination between tenderers during the public procurement process will result in a potential conflict with the principle of equal treatment. As a basis for such a framework, it has been proposed to determine whether undertakings are in a comparably competitive position since the principle of equal treatment generally prohibits the difference in treatment of precisely such undertakings.[131] In so far as the finding of a comparable competitive position depends, in turn, on a number of different factors (e.g. the precise need of the contracting authority, the proportionality of the conditions, the ability of tenderers to meet the required conditions, the existence of the necessary competence, etc.), which do not always appear in the same way in all situations, it cannot be concluded on the basis of such a method whether discrimination exists.[132]

The role of the principle of transparency is, quite simply, to be the guarantor of the principle of equal treatment. That principle makes it possible to ensure and verify compliance with the principles of equal treatment and non-discrimination,[133] including self-assessment by the contracting authority of following the principles.[134] The CJEU has called the principle of transparency a principle that stems from the principle of equal treatment[135] but also as a corollary of the principle of equal treatment, the purpose of which is to ensure that there is no risk of favouritism on the part of a contracting authority nor that it acts arbitrarily.[136] However, legal scholars also regard the principle of transparency in public procurement law as an independent principle that applies in certain public procurement situations

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[130] Professor Steinicke mentions for example, specific expressions of the principle of equal treatment in negotiations, reservations, correction of and correcting the price, and cancellation of the tender procedure. *Op. cit.* 6, p 292–319, 294, and 295.

[131] Arrowsmith, S. in *op. cit.* 66, p 615.

[132] *Ibid*., p 617.

[133] Steinicke, M. in *op. cit.* 6, p 319. See also cases C-421/01, *Traunfellner* [2003] ECLI:EU:C:2003:549, p 29, and case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECLI:EU:C:2004:236, p 109.

[134] Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECLI:EU:C:1999:567, p 31, and C-324/98 *Telaustria and Telefonadress* [2000] ECLI:EU:C:2000:669, p 61.

[135] Cases C-213/07 *Michaniki* [2008] ECLI:EU:C:2008:731, p 44, and C-599/10 *SAG ELV Slovensko and Others* [2012] ECLI:EU:C:2012:191, p 25.

[136] Cases C-496/99 P *Succhi di Frutta SpA* [2004] ECLI:EU:C:2004:236, 109–111; C-92/00 *HI* [2002] ECLI:EU:C:2002:379, p 45; and C-72/10 *Costa and Cifone* [2012] ECLI:EU:C:2012:80, p 73.

without the principles of equal treatment or non-discrimination having first been applied.[137]

Based on the principle of transparency, Professor Steinicke distinguishes between the obligations of the contracting authority in two general situations: (1) ensuring transparency regarding the procurement (existence and conditions) and (2) ensuring transparency in the public procurement process.[138] The contracting authority must, therefore, clearly inform the economic operators operating on the market on the basis of the principle of transparency of the conduct of the procurement and of its terms and conditions[139] (publication of the terms and conditions of the procurement, as well as notice of modification of the contract in certain cases), publication of the terms and conditions of the procurement, as well as notice of modification of the contract in certain cases[140] (clarity and comprehensibility of the terms and conditions of the procurement).

Lawyers usually understand the principle of proportionality without further explanation. In the context of EU public procurement law, that principle, which differs from the other principles discussed above, is not expressly attributed a separate objective of ensuring the internal market. At the same time, it is clear that the principle of proportionality ensures the implementation of both equal treatment and the principles of transparency. In the words of Professor Hamer, the principle of proportionality plays a balancing role with other principles deriving from the EU Public Procurement Directives to ensure that the general objectives of public procurement are achieved.[141]

The most obvious practical expression of the principle of proportionality in a public procurement procedure can be considered to be the stage of selection of the tenderer, which determines whether, in terms of its financial situation and technical experience, the tenderer will be able to perform the future contract.[142] However, the aim of this stage is not to find the best tenderer since the successful tender is determined on the basis of other criteria during the evaluation phase. Therefore, it is precisely at this stage of the procedure that there must be a very good balance between access to procurement and the elimination of unsuitable and not sufficiently capable tenderers.[143]

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[137] Halonen, K.-M. in Halonen, K.-M., Caranta, R., Sanches-Graells, A. (editors). *Transparency in EU Procurements. Disclosure Within Public Procurement and During Contract Execution* (Edward Elgar Publishing, 2019), p 17–18.

[138] Steinicke, M. in *op. cit.* 6, p 319–320.

[139] Case C-31/87 *Beentjes v State of the Netherlands* [1988] ECLI:EU:C:1988:422, p 21.

[140] Cases C-42/13 *Cartiera dell'Adda* [2014] ECLI:EU:C:2014:2345, p 44, and C-27/15 *Pizzo* [2016] ECLI:EU:C:2016:404, p 36.

[141] Hamer, C. R. and Andhov, M. in *op. cit.* 7, p 196.

[142] See, for example, case C-21/03 *Fabricom* [2005] ECLI:EU:C:2005:127, p 34.

[143] Steinicke, M. in *op. cit.* 6, p 327.

As a concrete expression of the principle of proportionality, the Public Sector Directive sees the regulation of self-cleaning[144] created by the 2014 Directives as a counterbalance to strict rules on exclusion from public procurement. The purpose of the regulation is to allow such undertakings to continue to participate in public procurement despite having met certain grounds for exclusion. In such a case, it is for the tenderer to prove that it has taken (several different) measures, with the result that the contracting authority can conclude that the ground for exclusion has been remedied in substance.[145]

Although the CJEU has, in its case law, extensively explained the expression of the principles of equal treatment, transparency, and proportionality in public procurement, legal scholars consider that a number of public procurement issues, such as the scope of the principles of equal treatment and transparency, are not sufficiently defined.[146] It must be accepted that regulatory gaps reduce legal certainty, as it can often be difficult to determine the legal situation solely on the basis of principles.[147]

As will be seen from the following chapters of the doctoral thesis, it is precisely the transmission of general principles to the procurement situation that is one of the most important functions of the contracting authority's duty of diligence today, but also one of the greatest difficulties. The precise content of the contracting authority's obligations, which do not arise expressly from the Directives, is difficult to define, even if such efforts are guided by the general principles of EU law, the provisions of the TFEU, and the general EU principles of public procurement. Due diligence as an instrument helps to carry out this task.

In its judgments referred to in Publications I to III, the CJEU did not state the source of the contracting authority's duty of diligence while analysing the contracting authority's due diligence obligations. Nor did the CJEU state that it would draw relevant conclusions based on specific principles. However, in my opinion, it is clear from the foregoing and the analysis of the CJEU's decisions

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[144] Article 57(6) stipulates the self-cleaning mechanism in the Public Sector Directive. Steinicke, M. in *op. cit.* 6, p 326.

[145] The self-cleaning theory emerged based on the German, Austrian, and Italian public procurement law. See Schramm, J., Aicher, J., Fruhmann, M., Thienel, R. *Bundesvergabegesetz 2002. Kommentar* (Springer, Wien, 2005), p 739 and 742. On the early idea, see also Prieß, H.-J., Stein, M. R. 'Nicht nur sauber, sondern rein: Die Wiederherstellung der Zuverlässigkeit durch Selbstreinigung' (2008) 4 Neue Zeitschrift für Baurecht und Vergaberecht; and Arrowsmith, S., Prieß, H.-J., Friton, P. 'Self-cleaning as a Defence to Exclusion for Misconduct: An emerging Concept in EC Public Procurement Law' (2009) 6 Public Procurement Law Review. About the recent case law on self-cleaning, see cases C-178/16 *Impresa di Costruzioni Ing. E. Mantovani and RTI Mantovani e Guerrato* [2017] ECLI:EU:C:2017:1000; and C-387/19 *RTS infra and Aannemingsbedrijf Norré-Behaegel* [2021] ECLI:EU:C:2021:13. See also a case note concerning the same case by McGowan, D. 'Post-tender submission obligations relating to exclusion criteria: Case C-178/16 Impresa di Costruzioni Ing. E. Mantovani SpA, Guerrato SpA v Provinzia autonoma di Bolzano' (2018) 3 Public Procurement Law Review, p 81–84.

[146] Steinicke, M. in *op. cit.* 6, p 293–319. See also Arrowsmith, S. in *op. cit.* 66, p 620.

[147] Hamer, C. R. and Andhov, M. in *op. cit.* 7, p 188.

that the source of the contracting authority's due diligence is, above all, the general principles of public procurement in the EU. In the event of their ambiguity or insufficiency, as well as the general principles of EU law and the relevant rules of the TFEU.

The strongest point of support for this conclusion is the fact that the CJEU, in its judgments in Publications I–III, has looked at the contracting authority's due diligence obligations only in public procurement situations that have emerged from the applicability of the Public Procurement Directives and has not gone beyond the framework for the application of the Directives in its analysis of the contracting authority's due diligence. The CJEU's conclusions have been in line with EU public procurement principles and have been driven by the objectives of ensuring the functioning of the internal market and promoting competition. Thus, there is little possibility of concluding that the main source of the contracting authority's duty of diligence in EU public procurement law can be a source other than the sources mentioned above.

## 2.2. Other sources of the due diligence obligations of a contracting authority

Besides the obvious aforementioned sources of the due diligence of a contracting authority under the EU public procurement law, three other sources can be regarded as the basis or origin. Firstly, the Member States' national budgeting laws and administrative law principle on good governance. Secondly, the EU law principle on sound administration and diligence as applied to the EU institution's own public procurements. Thirdly, the EU law's general principle of good administration. These sources are discussed hereafter.

### 2.2.1. Sources deriving from the Member States' laws

It is customary in the public procurement law of the Member States that, in addition to EU public procurement principles, public procurement is also aimed at the economical and rational use of financial resources.[148] Consequently, national

[148] Latvian Public Procurement Law (Section 2) stipulates the effective use of the funds of the contracting authority as one purpose of the Law. Public Procurement Law, Latvijas Vēstnesis, 254, 29.12.2016. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

The same aim can be found in the Lithuanian Public Procurement Law, Article 17(2)(1) of The Republic of Lithuania Law on Public Procurement. 13 August 1996 No I-1491 (As last amended on 28 June 2018 – No XIII-1330). Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

Finnish Public Procurement Law, Section 2(1) foresees as one of the aims of the Act to enhance efficiency in the use of public funds. 1397/2016, Act on Public Procurement and Concession Contracts. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

budgetary law and the principle of good administration cannot be denied as sources of due diligence on the part of the contracting authority. That is, even despite the fact that their relationship to the due diligence obligations of the contracting authority arising on the basis of EU public procurement principles is unclear and differs by countries.

Before the founding of the European Community and its public procurement regulation, the roots of the public procurement law derived from the budgetary laws of the Member States.[149] Although the EU procurement law coordinates the regulations on conducting the public procurement procedures, the Member States still possess the authority over the national budgetary law and its application. For example, in the UK (when still part of the EU and today), all public bodies must pursue value for money, a requirement embedded within the fiduciary duty imposed by case law under general principles of administrative law. The basic concept of such a fiduciary duty is that the money that government holds and spends is public money, which effectively belongs to citizens, and is held for them in trust by the government to be spent in a proper manner for the purposes agreed via a democratic process.[150]

Such a conclusion can be attributed to the Member States, as in all democratic countries, the public sector is entrusted with the public money and held responsible for its effective use of it. As part of national administrative laws, national budgetary laws thus oblige public authorities to use public funds effectively and to follow economic principles. Hence it can be argued that exercising due care and diligence is an inherent obligation of any contracting authority under its national law as it is not otherwise possible to guarantee honest and effective use of public funds (or value for money as a more specific goal).

As budgetary and administrative laws expect the public sector to use the public funds responsibly for the general good of the public (directly or indirectly), the principle of sound administration entails the obligation to act with due care. In some Member States, such obligations might be more specified within the public administration regulations[151] and in others, this can be left to the discretion of each public sector authority or a certain mid-level of government body, or this may derive from the application of the sound administration principle.

Member States are obliged to implement the Public Procurement Directives above a certain threshold, which is why Member States are free to create national regulations below the monetary thresholds defined by the Directives. The same applies to the regulations introduced by Member States to complement the

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The German public procurement law calls for the observance of economic efficiency. Gesetz gegen Wettbewerbsbeschränkungen. Teil 4. § 97(1). Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

149 Schwarze, J. and Müller, P.-Ch. *Das öffentliche Auftragswesen in der EG: Vorträge der Fachgruppe für Europarecht auf der 25. Tagung der Gesellschaft für Rechtsvergleichung vom 20.–22. Märtz 1996 in Jena* (Nomos, Baden-Baden, 1996), p 8.

150 Arrowsmith, S. in *op. cit.* 66, p 21.

151 *Ibid.*, p 31. See also p 17–32.

regulations of the Public Procurement Directives.[152] In this way, however, in addition to EU public procurement rules, national rules and principles achieve effects in public procurement in at least two different, previously mentioned situations.

Nevertheless, as is evident from the cases analysed in Publications I–III, the CJEU has 'measured' the diligence level of national contracting authorities without determining or assessing the national due diligence obligations. This leads to two conclusions. First, the duty of diligence has an independent meaning under the EU public procurement law as the CJEU has not based its decisions regarding the contracting authority's due diligence obligations on the principles deriving from the national law. Second, the national principles cannot be regarded as a primary source of the due diligence of a contracting authority under EU public procurement law. National principles, however, do additionally apply to the duty of diligence of a contracting authority in the Member States' law. They address contracting authorities' obligations in situations that are not covered by EU public procurement law.

### 2.2.2. Spill-over effect of the principle of good administration in the EU administration procurements

The EU's own institutions are contracting authorities that apply rules stipulated in the Financial Regulation like those imposed on Member States by the Public Procurement Directives.[153] Due to the similarity of the rules,[154] Publication I looked at the rulings of the General Court concerning the EU administration's due diligence in public procurement. In those decisions observed in Publication I,

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[152] The CJEU has also stated that the directives do not preclude the option for Member States to maintain or adopt substantive rules designed, in particular, to ensure, in the field of public procurement, observance of the principle of equal treatment and of the principle of transparency entailed by the latter, principles which are binding on contracting authorities in any procedure for the award of a public contract. Case C-213/07 *Michaniki* [2008] ECLI:EU:C:2008:731, p 44.

For example, the Latvian Public Procurement Law (Section 24) stipulates detailed rules on the establishment of the Procurement Commission, which is responsible for the performance of the procurement procedure. Public Procurement Law, Latvijas Vēstnesis, 254, 29.12.2016. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

[153] See 96th Recital and rules stipulated in Title VII. Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012. OJ L 193, 30.7.2018, p. 1–222.

[154] *Ibid*., the 96th Recital states that the procurement rules and principles applicable to public contracts awarded by Union institutions on their own account should be based on the rules set out in Directive 2014/23/EU of the European Parliament and of the Council and Directive 2014/24/EU.

the General Court considers the general principles of good administration and diligence to be the source of the contracting authority's duty of diligence.[155] The General Court has defined the contracting authority's duties of diligence very precisely. Therefore, the case law of the General Court can be analysed by analogy when assessing the activities of the contracting authorities in the Member States. Even if the case law on the activities of the EU's own institutions is not a direct source of the contracting authority's due diligence under EU public procurement law, it carries valuable information on how the CJEU sees the substance of the contracting authority's due diligence and its obligations under rules analogous to EU public procurement rules.

The principle of good administration governing the EU institutions' activities is stipulated by the Article 41 of the CFREU[156]. The referred provision requires that everyone's questions be dealt with impartially, fairly, and within a reasonable time.[157] Therefore, in addition to the EU public procurement principles, the procurement activities of the EU administration are governed by the principle of sound administration and diligence.

Before the entry into force of the CFREU in 2009, which stipulated the right to good administration, the name of the principle has varied in the case law and has also been labelled as due diligence, the principle of care, and the principle of good, proper, or sound administration.[158] The objectives of the principle are to promote transparency, legal certainty, and predictability within administrative procedures.[159]

Until the entry into force of the CFREU, the principle of good administration governing the actions of the EU institutions derived from the practice of the European Community Courts and, later on, the General Court.[160] The case law

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[155] Cases T-292/15 *Vakakis kai Synergates v Commission* [2018] ECLI:EU:T:2018:103, p 81 and the case law cited in it; T-7/20 *Global Translation Solutions v Parliament* [2021] ECLI:EU:T:2021:649, p 54, 60, and 61. See also further on the case T-7/20 Simovart, M. A. 'A contracting authority's powers to reject a con-compliant tender, or to opt for correction of mistakes therein: Global Translation Solutions Ltd v European Parliament (T-7/20)' (2022) 2 Public Procurement Law Review, p 33–39.

[156] Article 41 requires that everyone's questions be dealt with impartially, fairly, and within a reasonable time. In addition to the EU public procurement principles, the procurement activities of the EU administration are governed by the general principle of sound administration and diligence. Charter of Fundamental Rights of The European Union. OJ C 202, 7.6.2016, p 389–405.

[157] Charter of Fundamental Rights of The European Union. OJ C 202, 7.6.2016, p 389–405.

[158] Reichel, J. 'Between Supremacy and Autonomy – Applying the Principle of Good Administration in the Member States', in Berniz, U. et al. (editors)*, General Principles of EC Law in a Process of Development* (Kluwer, 2008), p 247.

[159] *Ibid.*, p 247.

[160] In 2003, even before Estonia accessed the EU, Estonian Supreme Court acknowledged the principle of good administration, relying, amongst other sources, on the Charter of Fundamental Rights of the European Union. The Court explained that the Charter has legal authority because '/.../ it is based, inter alia, on the constitutional tradition and the principles of

regarding the principle of sound administration and diligence dates back to the mid-1950s when the ECJ found that procedural requirements may be regarded as essential when they are intended to ensure that the measures concerned are formulated with all due care and prudence.[161] The principle of sound administration may therefore constitute a rule of law whose purpose is to confer rights on individuals where it constitutes the expression of specific rights.[162] The CJEU has explained that the general principle of sound administration also encompasses the duty of diligence, and the European Commission is to behave diligently in its relations with the public[163] as well as examine carefully and impartially all the relevant facts of the case.[164] The courts have further explained that the duty of diligence entails that the EU administration must act with care and caution but is not required to remove from economic operators all harm following from normal commercial risks.[165]

A failure to comply with the principle of good administration, in case of a sufficient seriousness of the breach, results in a manifest error of assessment and thus leads to an annulment of a decision due to its illegality.[166] Moreover, the EU administration can be non-contractually liable for wrongful conduct where it fails to act with all necessary care and, as a result, caused harm.[167]

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democracy and the rule of law, common to the Member States of the European Union'. 17.02.2003 decision in case 3-4-1-1-03, p 14–16. On this subject, see further the doctoral thesis of Ginter, C. *The application of the principles of European Law in the Supreme Court of Estonia*. Tartu University Press, 2008, p 12.

[161] Case C-6/54 *Netherlands v High Authority* [1955] ECLI:EU:C:1955:5, p 112.

[162] Case T-461/08 *Evropaïki Dynamiki v EIB* [2011] ECLI:EU:T:2011:494, p 128 and case T-128/05 *SPM v Council and Commission* [2008] ECLI:EU:T:2008:494, p 127.

[163] Case C-47/07 *P Masdar (UK) v Commission* [2008] ECLI:EU:C:2008:726, p 92. This has been later repeated by the General Court in case T-50/05 *Evropaïki Dynamiki v Commission* [2010] ECLI:EU:T:2010:101, p 119.

[164] Case T-292/15 *Vakakis kai Synergates v Commission* [2018] ECLI:EU:T:2018:103, p 81 and the case law cited in it.

[165] Case C-47/07 *P Masdar (UK) v Commission* [2008] ECLI:EU:C:2008:726, p 93 and case T-292/15 *Vakakis kai Synergates v Commission* [2018] ECLI:EU:T:2018:103, p 82.

[166] Hofmann, H. C. H. 'General Principles of EU law and EU administrative law' in Barnard, C., Peers, S. (editors). *European Union Law*. Oxford University Press, 2017, p 215.

[167] The non-contractual liability of the EU is subject to the fulfilment of a number of conditions, namely the unlawfulness of the conduct alleged against the institutions, the existence of actual and certain damage and the existence of a direct causal link between the conduct of the institution concerned and the damage alleged. Where one of those conditions is not satisfied, the action must be dismissed in its entirety, without there being any need to examine the other conditions for the non-contractual liability of the EU. See, for example, cases C-26/81 *Oleifici Mediterranei v EEC* [1982] ECLI:EU:C:1982:318, p 16; T-231/97 *New Europe Consulting and Brown v Commission* [1999] ECLI:EU:T:1999:146, p 29; T-195/08 *Antwerpse Bouwwerken v Commission* [2009] ECLI:EU:T:2009:491, p 91; C-146/91 *KYDEP v Council and Commission* [1994] ECLI:EU:C:1994:329, p 81, and recently in T-74/22 *Siemens v Parliament* [2023] ECLI:EU:T:2023:202, p 53–54. On damages in EU public procurement law, see further Schebesta, H. *Damages in EU Public Procurement Law* (Springer, 2016).

In its March 17, 2005 decision[168], the court ordered damages from the European Commission to one of the participants in a tendering procedure conducted in 1999–2000, where the European Commission breached the duty of diligence. The Commission failed to investigate conflict of interests whereby one of the evaluation committee members was employed by the winner of the procurement. The court explained that 'after the discovery of a conflict of interests, the Commission must act with due diligence and on the basis of all relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue'. The court added that 'that obligation derives in particular from the principles of sound administration and equal treatment',[169] 'which requires the Commission to examine each tender impartially and objectively in the light of the requirements and general principles governing the tendering procedure, to ensure that all the tenderers are afforded the same opportunities'.[170] As the Commission failed to diligently investigate the conflict of interests, such breach of the duty of diligence resulted in the breach of the equal treatment principle.[171]

Later, the court considered that a breach of the due diligence obligation could also derive from not responding to the applicant's requests quickly[172] or sufficiently,[173] not acting within a reasonable time in conducting administrative proceedings,[174] leaving the possibility of abnormally low tender unexamined,[175] or failing to require additional information from the tenderer before adopting a decision.[176]

The General Court has, therefore, consistently evaluated the procurement activities of the EU administration based on the application of the principle of good administration. The court considers due diligence and its specific obligations to

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[168] Case T-160/03 *AFCon Management Consultants and Others v Commission* [2005] ECLI:EU:T:2005:107, p 75.

[169] *Ibid.*, p 75.

[170] *Ibid.*, p 90. See additionally, case T-292/15 *Vakakis kai Synergates v Commission* [2018] ECLI:EU:T:2018:103, pp 106 and 149–151.

[171] Cases T-160/03 *AFCon Management Consultants and Others v Commission* [2005] ECLI:EU:T:2005:107, p 91, and T-556/11 *European Dynamics Luxembourg and Others v EUIPO* [2016] ECLI:EU:T:2016:248, p 77.

[172] Case T-59/05 *Evropaïki Dynamiki v Commission* [2008] ECLI:EU:T:2008:326, p 150 and case T-50/05 *Evropaïki Dynamiki v Commission* [2010] ECLI:EU:T:2010:101, p 119.

[173] Case T-589/08 *Evropaïki Dynamiki v Commission* [2011] ECLI:EU:T:2011:73, p 80.

[174] Case T-59/05 *Evropaïki Dynamiki v Commission* [2008] ECLI:EU:T:2008:326, p 152 and case T-50/05 *Evropaïki Dynamiki v Commission* [2010] ECLI:EU:T:2010:101, p 119.

[175] Case T-407/07 *CMB and Christof v Commission* [2011] ECLI:EU:T:2011:477, p 179–183.

[176] Case T-211/02 *Tideland Signal v Commission* [2002] ECLI:EU:T:2002:232, p 37.
Cases T-340/09 *Evropaïki Dynamiki v Commission* [2014] ECLI:EU:T:2014:208, p 170–172 and T-292/15 *Vakakis kai Synergates v Commission* [2018] ECLI:EU:T:2018:103, p 107, 148–150.

stem from both the principle of sound administration and the principle of equal treatment.

It has been suggested by Professor Reichel[177] that the field of application of the due diligence obligation can be divided into two types of situations under the good administration principle. (1) From the demand to *examine carefully and impartially all the relevant aspects* follows a duty for the institutions to handle matters diligently and to carefully follow any procedures laid down in secondary legislation or as general principles. (2) The demand to *give special attention to aspects that speak for private parties* includes a duty to use the principle of due diligence as a counterweight to the discretionary powers of the institutions in the decision-making process itself. [178]

Professor Reichel argues that when applied in the first manner, the principle of due diligence functions as a standard for the good behaviour of institutions. When applied in the second manner, the principle gives the private party a tool to influence the substantive outcome of the decision-making procedure by enabling the party to give input based on the decision and how it should be assessed. In this form, the principle of due diligence is a procedural rule with a close connection to the substantive evaluation of the case, as the duty to investigate carefully requires a close connection to the interpretation of the legal question at stake.[179]

In Publication I, the so-called spill-over effect of the General Court's case law on the EU administration's procurement law as one of the sources of the contracting authority's due diligence obligations in EU public procurement law was covered. The idea was that the contracting authority's duty of diligence, as applied by the General Court in the EU administration procurement cases, had been transferred or 'loaned' to the case law of the CJEU on EU public procurement law and the contracting authority's obligation based on that. I concluded in Publication I that such an effect was not recognisable for two reasons.

Firstly, although the CJEU did not mention any EU public procurement principles as grounds for due diligence in the CJEU case law on EU public procurement law in the Member States, the CJEU did not refer to the principle of sound administration either. The Court also did not mention the same due diligence obligations developed in the General Court's practice, such as responding to the applicant's requests quickly and sufficiently and acting within a reasonable time. Such due diligence obligations are not stipulated in the Public Procurement Directives regulating the Member State's contracting authorities' activities. They are also not listed as distinct obligations of the contracting authorities in

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[177] Jane Elisabeth Reichel is a professor in administrative law in the University of Stockholm. Before that, she was a professor of administrative law at the Faculty of Law, Uppsala University. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

[178] Reichel, J. in *op. cit.* 157, p 247.

[179] *Ibid.*, p 247 and 249.

the case law of the CJEU concerning the Member States' contracting authority's obligations.

Secondly, the General Court expressly relied on the principle of sound administration, which underpinned the EU administration's conduct in disputes concerning procurements organised by the EU institutions.

Thus, the case law of the General Court and that of the CJEU marked a clear distinction between the due diligence obligations of a contracting authority and the application of the Financial Rules and CFREU underlying procurement activities by the EU administration and in the EU public procurement law, which is mandatory for Member States.

### 2.2.3. Principle of good administration as an EU general principle

At present, however, the question of the principle of good administration as a source of due diligence of a contracting authority must be raised again. This is not in the context of the principle of good administration, which underpins the activities of the EU administration, but in the context of the same principle as the general principle of EU law.

As indicated earlier, Article 41 of the CFREU stipulates that the principle of good administration governs the EU administration.[180] The CJEU has repeatedly explained that the expression of the good administration principle as an EU general principle encompasses the obligation of the administration to provide reasons for its decisions. Such reasons need to be sufficiently specific and concrete to allow the person concerned to understand the grounds of the individual measure adversely affecting them. The duty to state reasons is thus a corollary of the principle of respect for the rights of the defence, which is a general principle of EU law.[181]

Earlier, the principle of good administration was not regarded as a source of EU public procurement law by directives, CJEU case law or academics.[182] Nevertheless, in 2021–2022, the CJEU issued two decisions concerning the EU public

[180] See about the different scopes of application of the principle of good administration both in EU administrative and in the EU law in general, for example, in Hofmann, H. C. H. 'General Principles of EU law and EU administrative law' in Barnard, C., Peers, S. (editors). *European Union Law*. Oxford University Press, 2017, p 214–218.

[181] See, for example, cases C-349/07 *Sopropé* [2008] ECLI:EU:C:2008:746, p 50; C-141/12 and C-372/12 *YS and Others* [2014] ECLI:EU:C:2014:2081, p 68; C-277/11 *M.* [2012] ECLI:EU:C:2012:744, p 88; C-249/13 *Boudjlida* [2014] ECLI:EU:C:2014:2431, p 38; and C-230/18 *PI* [2019] ECLI:EU:C:2019:383, p 56–57.

[182] See about the sources listed by the academics in Section 2.1.2. The academics regard as EU public procurement principles the principles of equal treatment, non-discrimination, transparency, and proportionality.

procurement law analysing the activities of a contracting authority in the light of the principle of good administration as an EU general principle.[183]

In both cases concerned, inter alia, confidential information in tenders and the possibility of disclosing such information to other tenderers participating in the tender. While the Directives prohibit a contracting authority from disclosing to other tenderers any information that distorts competition between tenderers,[184] the Directives do not regulate how a contracting authority should deal with a request for the release of confidential information. Nor do the Directives impose any obligation on the contracting authority to justify its refusal to supply such information.

The CJEU found that the contracting authority was obliged to verify whether the concerned information was, in fact, confidential[185] and, if so, provide the tenderer requesting the information with reasons why the contracting authority considers that information to be confidential.[186]

The CJEU founded that obligation on the requirements of effective judicial protection.[187] Therefore, the prohibition in the Public Sector Directive to publish confidential information must be weighed against the general principle of good administration, which obliges the contracting authority to state reasons.[188] This is because, in the absence of sufficient information an unsuccessful tenderer will not be able to rely on its right to an effective review.[189] Thus, the decision is linked

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[183] Cases C-927/19 *Klaipėdos regiono atliekų tvarkymo centras* [2021] ECLI:EU:C:2021:700, p 120 and 122; and C-54/21 *ANTEA POLSKA and Others* [2022] ECLI:EU:C:2022:888, p 50, 64, 66, and 76.

[184] Public Sector Directive 2014/24 Article 21(1) stipulates a prohibition to the contracting authorities from disclosing information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders, unless otherwise provided in this Directive or in the national law to which the contracting authority is subject.

See also Ginter, C., Parrest, N., Simovart, M. A. 'Access to the content of public procurement contracts: the case for general EU-law duty of disclosure'. (2013) 4, Public Procurement Law Review, p 156–164. The authors suggested already in 2013, during the legislative process of the 2014 directives, to regulate the general disclosure of public procurement contracts.

[185] Case C-927/19 *Klaipėdos regiono atliekų tvarkymo centras* [2021] ECLI:EU:C:2021:700, p 117–118.

[186] *Ibid.*, p 122–123.

[187] *Ibid.*, p 121.

[188] Case C-54/21 *ANTEA POLSKA and Others* [2022] ECLI:EU:C:2022:888, p 50.

[189] Taylor, J. 'An illustration of confidentiality rules, contract-specific turnover requirements and proportionality in applying exclusions: Klaipedos Regiono Atlieku Tvarkymo Centras UAB (C-927/19)'. (2022) 1, Public Procurement Law Review, p 4–12. See also Denfield, H. 'Disclosure of confidential information: experience examples, subcontractors and tender submissions with commercial value: Antea Polska S.A., Pectore-Eco sp. z o.o., Instytut Ochrony Srodowiska – Panstwowy Instytut Badawczy v Panstwowe Gospodarstwo Wodne Wody Polskie (C-54/21)'. (2023) 3, Public Procurement Law Review, p 119–124.

with the remedies available for the tenderers in disputing the retention of confidential information that could, in turn, influence who is awarded the contract.

In the beforementioned cases,[190] the CJEU refers to the case *LS Customs Services*[191], as a basis for implementing the principle of good administration in the context of the EU public procurement law. In *LS Customs Services* case, the court applies the principle of good administration by analogy, relying on a previous case *N.*[192] In *N.*, the principle of good administration, stemming from Article 41 of the CFREU, was discussed due to the peculiarities of the Member State's procedural law on granting refugee status. The CJEU found there that where a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have their affairs handled impartially and within a reasonable period, are applicable in a procedure conducted by the competent national authorities.[193]

In turn, the two abovementioned public procurement cases did not stem from circumstances where the Member State's public procurement procedural law would have negatively affected the tenderer's rights seeking the information about the winner's tender. The court did not even analyse the Member State's procedures regarding publishing confidential information. At the same time, it could also be argued that the Member State's procedural law did not have a positive effect on the tenderer's rights either, as the contracting authority did not enable the tenderer to be informed of the competitor's offer nor were reasons offered why the information was considered confidential.

However, as the principle of good administration establishes the right to be heard, the aforementioned cases on confidential information may be observed not primarily from the EU public procurement material law's perspective but from the standpoint of ensuring legal protection and recourse to judicial review of the tenderers. In such a case, applying the good administration principle to EU public procurement law cases remains a novelty but of a different variety. The cases can be seen as securing the remedies available to the tenderers. So far, the decision to decline from the publication of confidential information has not been seen as a decision that could separately be tried in a court of law. At the same time, stating reasons in public procurement decisions has long been recognised in the EU public procurement law.[194] Therefore, the CJEU could be seen as enforcing the rule to state reasons for decisions negatively impacting tenderers to secure the

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[190] Case C-927/19 *Klaipėdos regiono atliekų tvarkymo centras* [2021] ECLI:EU:C:2021:700, p 121.

[191] Case C-46/16 *LS Customs Services* [2017] ECLI:EU:C:2017:839, p 39.

[192] Case C-604/12 *N.* [2014] ECLI:EU:C:2014:302, p 50–57.

[193] *Ibid.*, p 50.

[194] For example, in case the contracting authority does not hold the measures sufficient to decide not to exclude the tenderer, Article 57(6) in the Public Sector Directive obliges the contracting authority to state reasons. The same stems from the Article 2c of the remedies directive, 2007/66/EC.

right for review, as is the case with all the other contracting authority's decisions made during a public procurement procedure.

At the same time, the CJEU has established that there is a process in determining the nature of the business secret that a contracting authority needs to follow while applying EU public procurement law. As such, the CJEU is expanding the scope of application of the EU public procurement law to a procedure currently unregulated in the Directives. Therefore, it is not only a question about securing the tenderers' rights for judicial review but also foreseeing requirements for the contracting authority's activities in applying EU public procurement law.

Academics have previously doubted whether the principle of good administration is an EU general principle as the CJEU has, in its judgments, stated that the good administration principle in Article 41 in the Charter of Fundamental Rights only 'reflects' the EU general principles. Additionally, the CJEU's position on the direct applicability of Article 41 to the Member States has been conflicting in different judgments.[195] However, the said critique pre-dates the two EU public procurement law cases where the CJEU directly states that good administration is a general principle of EU law, applying to the Member State's contracting authority's activities. The CJEU has since named the good administration principle as an EU general principle in at least one other case outside the field of EU public procurement law.[196] Today, academics also recognise the good administration principle as a principle of EU general law that is applicable to Member States' actions in the scope of the EU law.[197]

On this basis, the question of what the future role of the principle of good administration will be in EU public procurement law can be posed – whether the CJEU has 'discovered' a new principle of EU public procurement law or whether the CJEU will indeed in the future extend the principle of good administration as a general principle of the EU law to any public procurement procedure. Until now, there were no such indications in the CJEU case law. At the same time, as indicated in Chapter 2.1.1, the 2014 Public Procurement Directives no longer refer to preserving Member States' own practices but are based on the coordination of EU law. Thus, implying that the CJEU could be seen as starting to unify the Member State's procedural laws in relation to the EU public procurement law.

Today, legal scholars can only speculate on the role of good administration as a general principle of EU public procurement law. As the public procurement procedure obliges the contracting authority to adopt a variety of decisions, the scope of application of the good administration principle may be wider than currently indicated in the two analysed CJEU judgments. As the Remedies

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[195] Groussot, X., Hettne, J., Petursson, G. T. 'General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union' in Vogenauer, S., Weatherill, S. (editors). *General Principles of Law. European and Comparative Perspectives*, Hart Publishing, Oxford and Portland, Oregon, 2017, p 88–90.

[196] Case C-230/18 *PI* [2019] ECLI:EU:C:2019:383, p 56–57.

[197] Hofmann, H. C. H. 'General Principles of EU law and EU administrative law' in Barnard, C., Peers, S. (editors). *European Union Law*. Oxford University Press, 2017, p 214–218.

Directives also oblige the contracting authority to state reasons for its decisions, it can additionally be argued that the good administration principle as an EU law general principle is already present in the EU public procurement law. The good administration principle, however, goes further than the contracting authority's duty to state reasons for its decisions deriving from the application of the Public Procurement or Remedies Directives. The good administration principle also demands that the person's affairs are handled within a reasonable time and a right to a hearing before a negative decision is adopted.

Supposing the CJEU continues to apply the same principle in EU public procurement matters, the question arises as to whether the due diligence obligations of contracting authorities under EU public procurement law will be the same or similar as in the previous practice and the practice of the EU's own institutions as discussed in Publication I and previously in Chapter 2.2.2. Today, there is not a sufficient basis for drawing such conclusions. Nevertheless, based on the CJEU's most recent case law the principle of good administration as a general principle of the EU, it must be affirmed as a source of due diligence of the contracting authority.

# 3. Essence of the contracting authority's due diligence and its obligations

## 3.1. Definitions of due diligence

Due diligence is a universal legal phenomenon found in any legal tradition. Due diligence comes from the Latin word *diligentia,* which can be translated as care or circumspection. The opposite of (due) diligence is negligence. The Encyclopædia Britannica defines due diligence as a 'standard of vigilance, attentiveness, and care often exercised in various professional and societal settings. The effort is measured by the circumstances under which it is applied, with the expectation that it will be conducted with a level of reasonableness and prudence appropriate for the particular circumstances'.[198]

Diligence is a qualifier of behaviour, as shown in its adverbial use: an actor can behave diligently – or negligently. Due diligence is no free-standing obligation, but a *modality* attached to a duty of care for someone or something else (including the duty to prevent and mitigate harm). One might call it an ancillary obligation if one wants to use the language of obligation at all. Due diligence is needed when a risk has to be controlled or contained in order to prevent harm and damage to another actor or to public interest. The rise of the concept is therefore tied to the rise of the 'risk society' and the idea of risk management.[199]

The idea of due diligence has an inbuilt normative (evaluative) component because the assessment of what is 'due' requires a value judgment. This value judgment, the appraisal of what is appropriate or owed (and concomitantly whether due diligence has been observed or not), depends on the (legitimate) expectations directed at the relevant actor's behaviour. These expectations, in turn, depend on factors attached to the actor itself (notably its capacities) and can arise from the social, political, and legal context. Another question is whose expectations count.[200] I submit that in the context of EU public procurement law, these are the expectations of the EU legislator, and perhaps it is even more precise to say that the expectations arise from the purpose of the functioning of the internal market.

The expression 'due diligence' is generally used in two senses, both of which involve taking prudent, well-informed steps to avoid a bad outcome. The first sense of the term 'acting with due diligence' means to take the appropriate amount of care and may amount to a legal standard, i.e., the negative outcome to be avoided through the action taken is legal liability. The second sense, sometimes referred to as 'doing due diligence', denotes a broader exercise in risk mitigation,

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[198] Valentine, S., Sprague, R. *Encyclopædia Britannica*. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation. Referred to by Peters, A., Krieger, H., Kreuzer, L. *Due Diligence in the International Legal Order*. Oxford University Press UK, 2020, p 2.

[199] Peters, A., Krieger, H., Kreuzer, L. *Due Diligence in the International Legal Order*. Oxford University Press UK, 2020, p 2.

[200] *Ibid*.

i.e., there may be many bad outcomes to be avoided through the action taken, including acting lawfully. Due diligence is a term used in a variety of circumstances in domestic law, in corporate transactions, as well as in general usage outside these situations.[201]

In a business law environment, legal due diligence mostly concerns transactional situations whereby buyers and sellers analyse and disclose transaction-related information. Therefore, in legal theory, such due diligence has been defined as a broad concept covering a range of checks that are performed to ascertain and confirm important facts and assess risk, generally relating to a proposed contract or course of action.[202] International organisations such as OECD publish their own due diligence guides for different fields of supply chains,[203] therefore, giving the term due diligence its own meaning.

There is no definition in EU public procurement law of what exactly can be considered due diligence. Although EU law regulates the content of due diligence in a number of areas,[204] there is no single legal definition in EU law as a whole, as a result of which it can be concluded that a person or organisation has been diligent in their specific actions. Thus, due diligence does not have the meaning of an autonomous concept in EU law. In the vacuum of legal regulation, the ECJ has, in its early practice, inferred the principles of EU law from the usual method of 'discovering' the general principles of the Union from, inter alia, the Member States' own legislation, legal literature and case law,[205] with the result that it can be argued that national law can also be relied on to define general presumptions of due diligence.

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[201] McDonald, N. 'The role of due diligence in international law' (2016) 68(4) International & Comparative Law Quarterly, p 1041.

[202] De Koker, L., Harwood, K. 'Supplier Integrity Due Diligence in Public Procurement: Limiting the Criminal Risk to Australia' (2015) 37(2) Sydney Law Review, p 218 and Spedding, L. S. cited in that article. *Due Diligence and Corporate Governance.* Croydon: LexisNexis UK, 2004.

[203] See, for example, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*. OECD, 2018, and *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, OECD 2017.

[204] See, for example, Chapter III of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act). OJ L 277, 27.10.2022, p. 1–102. Another example is Article 406 of the Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012. OJ L 176, 27.6.2013, p. 1–337.

[205] CJEU stated in this early case that 'unless the Court is to deny justice, it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing, and the case law of the member countries. Case C-7/56 *Algera jt vs. Assemblée commune* [1957] ECLI:EU:C:1957:7, p 55.

The notion has been later referred to as the 'traditional method of 'discovery' of the general principles of EU law'. See, for example, case T-207/10 *Deutsche Telekom v Commission* [2018] ECLI:EU:T:2018:786, p 92.

In the context of criminal law, Estonian jurisprudence and legal literature have found that due diligence is a mandatory requirement for everyone to behave responsibly and follow elementary safety requirements. Due diligence means displaying the diligence required of everyone to communicate in society, i.e., the kind of attentiveness and conscientiousness that is expected in general communication or in a particular field of activity.[206] In the case law of the Supreme Court of Estonia, due diligence is divided into two subcategories in criminal law: (1) general human due diligence and (2) special due diligence required of a person operating in a particular field. [207] In the latter category, a model of diligent behaviour can be derived from the norms governing the field. A breach of the duty of diligence does not always constitute a breach of a requirement arising from a rule of law since there is no general rule in the legal order requiring diligent conduct. Due diligence may therefore be inferred from good practice in a particular area and, in turn, from standards of a recommendatory nature. When constructing a model of diligent behaviour, the court may proceed, in addition to the standard, from, for example, the views expressed in the scientific literature, the rules of professional organisations, as well as the general laws of nature. A violation of diligent behaviour is established by comparing the behaviour of the person under consideration in a particular situation with diligent or required behaviour. In this way, the question must be raised as to how a person who is, on average conscientious and far-sighted, acting in the same sphere of life, would have acted instead of a particular person.[208]

Due diligence in Estonian private law is a part of the good faith principle and the loyalty obligation,[209] having different expressions in particular fields of law. For example, the Estonian Supreme Court has extensively analysed the due diligence obligations of a member of the board of a private company.[210]

Since due diligence as a concept can be regarded as an obligation inherent in the exercise of any activity, regardless of whether the activity in question arises from the implementation of EU law or from private or public relationships raised under national law, it is also possible to transpose the previously discussed legal theoretic definition of due diligence into the context of EU public procurement law. This is for several reasons.

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[206] Estonian Supreme Court in cases 3-2-1-127-04, p 8; 3-1-1-45-14, p 8, and 3-1-1-52-16, p 11.2.

[207] Estonian Supreme Court in cases: 3-1-1-136-05, 3-1-1-90-06, and 1-17-7111/81, p 11.

[208] Summary of the interpretation of the Estonian Supreme Court practice by Pikamäe, P. in Sootak, J., Pikamäe, P. *Karistusseadustik. Kommenteeritud väljaanne.* (5th edition. Kirjastus Juura 2021), p 98–100.

Estonian Supreme Court in case 3-1-1-7-10, p 7–10.

[209] Kull, I. in Varul, P., Kull, I., Kõve, V., Käerdi, M., Sein, K. (editors) *Võlaõigusseadus I. Üldosa (§§ 1–207). Kommenteeritud väljaanne* (Kirjastus Juura, 2016), p 39.

[210] Estonian Supreme Court in cases 3-2-1-33-10, p 11; 3-2-1-197-13, p 19; 3-2-1-169-14, p 20; 3-2-1-113-16, p 15; 3-2-1-54-17, p 13.1–13.3; 3-17-2235, p 13, and 2-17-10474, p 20–21.

Firstly, as aforementioned, there is no general definition of due diligence in EU law.

Secondly, analogously with the theoretical sources and case law discussed above, the CJEU has established a breach of the contracting authority's due diligence obligations by way of comparison, thus treating the contracting authority's duty of diligence as a specific field of due diligence.

Although the CJEU has not expressly compared the so-called hypothetical reasonable and lawfully acting contracting authority with the contracting authority specifically at issue in the case law, it can nonetheless be argued that CJEU has compared the performance of the specific contracting authority at issue in the judgment with the activities of the contracting authority performing its due diligence obligations, which the CJEU considered that the contracting authority should have complied with in the circumstances.[211] Thus, in light of the circumstances of the specific situation, the CJEU has in essence created a set of activities expected of the contracting authority. On that basis, the Court has then concluded whether a particular contracting authority has infringed EU public procurement law. Although the CJEU has not used the term 'reasonable contracting authority', in a situation where the CJEU has identified the activities of a particular contracting authority and stated whether and what the obligations of that contracting authority were, in fact, under EU public procurement law, it is, in essence, a question of creating, as a benchmark, a reasonable contracting authority standard.

In this way, the CJEU has essentially relied on a similar approach as described earlier in Estonian legal literature and case law as a general theoretic basis for due diligence. In other words, the CJEU has proceeded based on sectoral due diligence of a particular field, considering the activities presumed to have been lawfully engaged in by a contracting authority operating in the relevant field, applying not only the specific rules of EU public procurement law on which the obligations are based but also the obligations arising from the of EU public procurement principles. To a certain extent, it can even be argued that the CJEU has relied on natural laws in defining the contracting authority's duty of care. This is the case concerning public procurements in connection with natural disasters.[212]

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[211] Case C-24/91 *Commission v Spain* [1992] ECLI:EU:C:1992:134, p 15, where CJEU denotes that after the budgetary appropriations had been granted, the contracting authority had sufficient time to use the accelerated procedure. Thus, a diligent authority should have behaved differently. Other examples are the cases Case T-540/10 *Spain v Commission* [2013] ECLI:EU:T:2013:47 and T-235/11 *Spain v Commission* [2013] ECLI:EU:T:2013:49. In both of these cases, CJEU established many breaches of the due diligence obligations referring to actions that the contracting authority ought to have opted for. The same can be said about the case C-394/02 *Commission v Greece* [2005] ECLI:EU:C:2005:336.

[212] Case C-107/92 *Commission v Italy* [1993] ECLI:EU:C:1993:344, where the CJEU analysed the contracting authority's actions in procurement related to avalanche risk in the Alps. Case C-525/03 *Commission v Italy* [2005] ECLI:EU:C:2005:648, concerned the purchase of helicopters due to forest fires. Case C-318/94 *Commission v Germany* [1996] ECLI:EU:C:1996:149, concerned the tide in a river in Germany, and dealing with floodwaters was discussed in case C-385/02 *Commission v Italy* [2004] ECLI:EU:C:2004:522.

Against this background, the legal theoretic basis for the due diligence is not only hypothetically transmissible to EU public procurement law but has already been implemented by the CJEU in case law.

Thirdly, the activities of a public authority in democratic states governed by the rule of law in public relations are subject to the rules (legal norms) specified by the legislator in legislation, but in their absence, to general principles of law (such as the principle of good administration and the principle of equal treatment). At the same time, such rules and principles are also intended to direct the conduct of persons and organisations operating in the respective legal area to law-abiding behaviour, regardless of whether this is provided for by specific legal provisions or obligations arising from legal principles.

## 3.2. Purpose of the contracting authority's due diligence in EU public procurement law

To define the aim and function of the due diligence obligations of a contracting authority in EU public procurement law, I will first look at what constitutes such due diligence and, thereafter, the obligations it involves.

As mentioned in the previous Chapter, due diligence is not a free-standing obligation, but a modality attached to a duty of care for someone or something else. Thus, it is seen as an ancillary duty to the fulfilment of pre-existing obligations arising from the law in force or other relevant sources (as, for example, internal guidelines). Following the regulation in the directives harmonised to the Member State's law is the primary obligation of a contracting authority. In the context of this dissertation, I do not consider that following such direct obligations would be something that the due diligence obligation covers.

Based on the case law reviewed in Publication I and III, due diligence obligations can be seen as deriving from EU public procurement principles. They expand the contracting authority's field of action in support of fulfilling the primary obligations from the directives. Therefore, the obligations arising directly from the law in force are to be regarded as direct obligations that are not part of the contracting authority's due diligence obligations *per se*.

Otherwise it should be concluded that all the contracting authority's activities under the Public Procurement Directives, that is, those that are directly regulated and those that are guided by the EU public procurement principles, are part of the due diligence of a contracting authority. In very broad terms, such a conclusion is not incorrect,[213] as contracting authorities need to diligently follow the law. At the same time, in the dissertation's context, such a conclusion is imprecise because the due diligence obligations in the narrower sense would not have an independent

[213] See previously in Chapter 2.2.2. the function of the good administration principle applicable to the EU administration. Professor Reichel suggested that observing the direct regulation does fall under the due diligence of an EU administration authority. Reichel, J. in *op. cit.* 157, p 247.

meaning and would not be distinguishable from the diligence following the direct obligations.

Therefore, there would not be any newfound clarity on the aim or substance of the contracting authority's due diligence. As previously mentioned, the CJEU case law, where the due diligence obligations are discussed, differentiates due diligence obligations from the fulfilment of direct obligations. Thus, until the EU legislator entails a new provision specifically on the contracting authority's due diligence, the contracting authority's due diligence is more visible and distinguishable when it is separated from the following of the direct regulations.

For this reason, I submit that the due diligence obligations of a contracting authority under the EU public procurement law consist of such duties that supplement the fulfilment of the duties directly stipulated in the Public Procurement Directives and in the national law harmonising it. Such an approach allows for more precise conclusions on the contracting authority's additional obligations that are otherwise not evident from the Directives or the Member State's law.

The same conclusion can be drawn from the CJEU's case law observed in Publications I and III. As indicated in the introduction of this dissertation, there are so-called direct and implicit judgments in the CJEU's practice concerning the contracting authority's due diligence and its obligations. The direct judgments analyse the contracting authority's obligations in the planning phase of the procurement: the way the contracting authority should have run the project as a whole, the communication with the affected parties, collecting information, planning the timeline, and other preparatory activities as measurements or tests needed for setting the exact scope of the future procurement contract. Such preparatory activities are not regulated by the Public Procurement Directives. However, as is evident from the CJEU case law, breaches of due diligence obligations in the preparatory phase of the procurement lead to breaches of the direct obligations set in the Directives. Based on that, it can be concluded that such due diligence obligations are needed to be fulfilled to secure the direct obligations and, thus, the EU public procurement principles. As such, the contracting authority's due diligence obligations may be ancillary duties for fulfilling the direct obligations and applying the EU public procurement principles.

The same conclusion can be made regarding the so-called implicit CJEU judgments, mostly observed in Publication III. The breaches the CJEU identified in those cases in the activities of the contracting authorities were of the same nature as in the so-called implicit judgments. The contracting authorities had not undertaken the correct preparatory activities at the right time or made a correct decision based on the information available to the contracting authority. Those breaches resulted in contracting authorities conducting unlawful public procurement procedures that, in turn, breached the direct obligations in the directives as well as the equal treatment and transparency principles.

The contracting authority's due diligence should be observed as institutional or organisational due diligence, as it is the contracting authority as an institution, organisation, or entity that is responsible for fulfilling the obligations set in the Public Procurement Directives. Organisational due diligence influences the per-

sonal due diligence of employees and officials in their professional relationship, but while analysing the contracting authority's due diligence obligations, the personal obligation of single physical actors is not regarded. In the same way, the CJEU has considered the due diligence obligations of entities and organisations in the case law reviewed in Publication I and IIII and not of the physical persons.[214]

Still, the contracting authority's due diligence is also connected to the due diligence obligations arising from private contractual relationships. This is particularly the case concerning employment relationships. Although a part of the employees of the contracting authorities are officials in Estonia, the employees of several contracting authorities and entities are employees with employment contracts.[215] Thus, the due diligence inherent in the performance of private employment agreements is, in turn, linked to the performance of the contracting authority's due diligence obligations under EU public procurement law. In occupational and employment relations, both the official and the employee with an employment contract are expected to comply with the (administrative) instructions established in the respective organisation (as is the case with the internal procurement rules in Estonia[216]) in addition to complying with the obligations arising from the law, which in turn may deal to a significant extent with the obligations arising from EU public procurement law. For example, guidelines in the planning phase of public procurement that require a timely and accurate mapping of the needs of the following financial year, based on which the costs of the relevant procurements are summarised, which in turn serves as the basis for the selection of the appropriate type of procurement procedure.

The duties of a contracting authority arise from the EU public procurement regulations. The contracting authority is thus bound with sectoral due diligence, that is, the due diligence of an actor in a particular field. In the context of the EU public procurement law and the obligations of a contracting authority, sectoral due diligence is to be understood as care to be exercised by a contracting authority while acting in the sphere of EU public procurement law considering also the field of action dictated by the object of the procurement (such as construction, catering, tourism, etc.).

The question about the aim of the due diligence of a contracting authority is the question of what the contracting authority is to take additional care of in addition to following the direct regulations. It derives from the CJEU case law

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[214] See, for example, the two cases on the building of the railway in Spain, case C-24/91 *Commission v Spain* [1992] ECLI:EU:C:1992:134, and case C-71/92 *Commission v Spain* [1993] ECLI:EU:C:1993:890. Additionally, the cases covered in Publication III Chapters 2.1. and 2.2.

[215] In the EU public procurement law, certain non-profit organisations, foundations, and business enterprises are also considered contracting authorities or entities, see Public Sector Directive, Article 2(1)(1)–(4).

[216] Estonian Public Procurement Act § 9 foresees the obligation to enforce an internal procurement regulation that entails, for example, how procurements below the thresholds set by law are conducted and who is the responsible person for a public procurement procedure). RT I, 23.02.2023, 7.

that that while interpreting different provisions it is necessary to take into account not only the wording of the provision concerned, but also its context and the general scheme of the rules of which it forms part and the objectives pursued thereby.[217] As explained earlier, the EU public procurement principles aim to safeguard the internal market's functioning and opening up the market for public procurement contracts. The ultimate purpose of the due diligence obligations of a contracting authority can only be the same.

The aim of the duty of diligence can also be defined as the creation of a universal set of obligations or a behavioural minimum that each procurement authority is expected to follow in specific cases, where the risk of the breach of equal treatment and transparency principles is the highest. Either in the high-risk situations where the question of the applicability of the Directives is at issue (like the application of exemptions or use of mixed objects' contracts), or in cases where the question concerns the right to continue participating in a tender procedure for a single bidder. As such, the duty of diligence addresses certain behavioural demands that contracting authorities must meet to ensure that procurements are opened up to competition as widely as possible.

As indicated previously, one function of the principle of transparency is to offer a possibility for self-assessment by the contracting authority in following the principles.[218] Offering a framework for self-assessment could therefore be seen as a separate purpose of the due diligence obligations of the contracting authority.

## 3.3. Scope of application of the due diligence

The scope of application of due diligence of a contracting authority concerns two aspects: (1) which situations does the duty extend to, and (2) are all contracting authorities subject to the same or differentiated due diligence obligations.

Regarding the scope of application of the due diligence of a contracting authority, a definitive list of such situations cannot be provided, though most of the situations where due diligence obligations are apparent can be named. The next Chapter of this dissertation covers the typical due diligence obligations.

In general, it can be stated that the contracting authority's obligation to be diligent follows the scope of application of the EU public procurement principles. As indicated earlier in Chapter 2.1.2, the academics submit that, to this day, the scope of application of the EU public procurement principles is not sufficiently defined.[219]

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[217] Cases C-213/17 *X* [2018] ECLI:EU:C:2018:538, p 26, and C-395/18 *Tim* [2020] ECLI:EU:C:2020:58, p 36. Hamer, C. R. 'The Principle of Proportionality: A Balance of Aims in Public Contracts' (2022) 3 European Procurement & Public Private Partnership Law Review, p 196.

[218] Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECLI:EU:C:1999:567, p 31, and C-324/98 *Telaustria and Telefonadress* [2000] ECLI:EU:C:2000:669, p 61.

[219] Steinicke, M. in *op. cit.* 6, p 293–319. See also Arrowsmith, S. in *op. cit.* 66, p 620. Hamer, C. R. and Andhov, M. in *op. cit.* 7, p 188.

I established in the previous chapter that the due diligence of a contracting authority covers those situations that are not directly regulated by the directives. This leaves us with situations guided by the EU public procurement principles only. These are the cases in the CJEU case law where additional obligations, besides the ones deriving from the directives, have been referred to or discussed.

Such a conclusion about the material scope of application of the due diligence of a contracting authority is in harmony with one of the functions of the EU public procurement principles mentioned in Chapter 2.1.2. Namely, academics have concluded that the more practical task of the public procurement principles is to supplement the more detailed rules of the directives. This mainly concerns areas where the directives have not regulated the specific situation in detail but have left it to the contracting authority to lay down certain elements of procurement procedures.[220] Therefore, it is also apparent that where the EU public procurement general principles are the basis of the contracting authority's actions, specific obligations arise corresponding to the nature of the situation and the exact way the principles thus apply.

Moving on to the issue of whether the contracting authority's due diligence affects all contracting authorities the same, it needs to be addressed first and foremost by reflecting on the earlier occasional viewpoints of the academics to highlight the line of thought and legal discussion. Therewith, it needs to be kept in mind that the academic discussion took place before the CJEU directly discussed the due diligence obligations of a contracting authority and before the 2014 Directives first regulated the issue directly.

At that time, the academics proposed that the due diligence required should depend on the specific contracting authority's experiences, thus indicating that the application of the due diligence to each specific contracting authority could vary. A. Brown suggested that some reasonableness standard may be applied to the authority's inability to define technical or legal matters in advance. He continued that a court may therefore consider it appropriate to assess whether a reasonably diligent authority ought to have been capable of pre-defining those matters. He also submitted that a court should consider the actual level of experience and expertise held by the particular authority in relation to the type of contract being awarded. For example, a court should allow greater flexibility where the authority is awarding a large PFI contract[221] for the first time. By contrast, a stricter approach may be justified where the contract is a virtual re-run of a very similar contract that the same authority awarded within the previous few years.[222] The

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[220] Hamer, C. R. and Andhov, M. in *op. cit.* 7, p 188. See also, *op. cit.* 6, p 292.

[221] In essence, a large concession agreement is indicated. The term PFI indicates private finance initiative, which is a concept whereby large public projects are first financed by a private party.

[222] Brown, A. 'The impact of the new Procurement Directive on large public infrastructure projects: competitive dialogue of better the devil you know?' (2004) 4 Public Procurement Law Review, p 170–171.

same was suggested a few years later by S. Treumer.[223] Later, A. Brown added that a diligent contracting authority might also be expected to take external legal advice to corroborate its view that a direct award is permitted.[224] Therefore adding a more conservative approach to the assessment.

Today, there are no signs in the CJEU case law and neither the current nor the earlier Directives that such a conclusion could be defended. Each contracting authority has the same legal duties in applying the regulation from the Directives and the same obligation to safeguard the observance of the EU public procurement principles and their purpose in the functioning of the internal market. In none of the cases observed in Publications I–III did the CJEU consider the specific characteristics of a contracting authority while assessing its activities in light of the EU public procurement rules. As has been explained, the current Public Procurement Directives directly and specifically regulate the duty of diligence of a contracting authority concerning modifications to a public procurement contract. Yet, even in that specific provision and in the recitals of the directive, does the EU legislator indicate that the duty of diligence of a contracting authority could rely on its previous experiences or other, so to say, individual characteristics. Keeping in mind that the consequences of the breach of due diligence obligations may be that a direct award is made, and the market is left unnotified of the tender, the previous experience of a contracting authority or any other 'subjective' reason arising from the contracting authority itself cannot be the reason why the EU public procurement rules and principles are left unfollowed. Thus, the due diligence expected from each contracting authority is the same.

### 3.4. Due diligence obligations of a contracting authority

In a situation where the principles of public procurement guide the activities of the contracting authority, the contracting authority has extensive discretion on how to act in the respective public procurement situation. The contracting authority's discretion is nevertheless limited by the EU public procurement principles. The contracting authority has to first recognise that it is in a situation whereby the EU public procurement principles govern its actions, and the due diligence obligations may arise from these principles. Thereafter, the contracting authority needs to decide based on discretion whether and how to react or not, when to do it and by applying which tools to solve the issue at hand.

What makes following due diligence obligations difficult is that there can be many different ways to achieve a specific goal and to be diligent. In doing so, the

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[223] Treumer, S. 'The field of application of competitive dialogue' (2006) 6 Public Procurement Law Review., p 313.

[224] Brown, A. 'When will publication of a voluntary ex ante transparency notice provide protection against remedy of contract ineffectiveness? Case C-19/13 Ministero dell'Interno v Fastweb Spa.' (2015) 1 Public Procurement Law Review, p 15.

contracting authority must familiarise itself with the legal framework and factual circumstances surrounding the situation. Thereby, the contracting authority needs to exercise a reasonable degree of foresight and choose a course of action that is consistent with the EU public procurement principles and, more broadly, with their main objective of ensuring the functioning of the internal market.

There are several possibilities for putting the due diligence obligations of a contracting authority in a legal context. One of them is, for example, the public procurement principles. Another is the specific procurement procedures. I prefer to observe the due diligence obligations by the general phases of the procurement procedure as this enables a clearer overview of the specific procurement situations where such obligations may arise and puts their substance and requirements into actionable perspective.

The due diligence obligations can thus be seen as arising from the three main phases of the procurement procedure: (1) preparatory, (2) conduction, and (3) execution phases. Relying on the case law reviewed in the Publications I–III, the most due diligence obligations arise in the preparatory phase. This reflects, in my opinion, the fact that the result of the preparations of a public procurement procedure is clearly stipulated in the Directives. That is, each specific procurement must have a defined scope, clear conditions, and expected results. Relevant preparations thus need to be made, but the way to achieve that is left for the contracting authorities to ascertain.

The least amount of due diligence obligations can be identified in the conduction phase of a procurement procedure. This is because the Directives regulate that phase of procurement in more detail. Therefore, there is less need to define other obligations beyond those that are already stipulated. The CJEU has expanded upon many of the conduction phase obligations, such as the duty to clarify tenders or to give an equal right to supplement them. As these obligations can be seen directly deriving from the existent regulations, I do not regard them as due diligence obligations for the reasons stated in Chapter 3.2.

The most unclear still are the due diligence obligations in the execution phase of the procurement process. There has been much debate on the modifications to a public procurement contract, but as the Public Procurement Directives do not regulate the said phase other than the clauses for modification of the procurement contract, there is little clarity. The phase where a public procurement contract is being fulfilled is the area of the application of the EU public procurement principles, where new case law and expansion are most probable.

For these reasons, I define these contracting authority's due diligence obligations that are evident from the specific provision in the Public Procurement Directives and from the case law of the CJEU. I do submit that other due diligence obligations possibly exist, but only these are presented that became evident from the research underlying this thesis.

## 3.5. Due diligence obligations in the preparatory phase of a public procurement procedure

The Recitals of the Directives list[225] general due diligence obligations that a diligent contracting authority is to follow to conclude that it may modify the contract in case of an unforeseeable circumstance. Such activities are a thorough preparation of the *initial award* by the contracting authority, including considering the following:

1) the nature and characteristics of the specific project;
2) good practice in the field in question; and
3) considering the need to ensure an appropriate relationship between the resources spent preparing the award and its foreseeable value.

According to the CJEU, the operative part of an act (that is, the explanations to the directive) is indissociably linked to the statement of reasons for it, with the result that, when it has to be interpreted, an account must be taken of the reasons which led to its adoption.[226] Therefore, these obligations listed in the explanations of the directives act as a framework for assessing the due diligence of a contracting authority's activities while preparing the initial public procurement. However, the list is not exhaustive. Due to the vast nature of the EU public procurement principles and the fact that the due diligence obligation is derived from the EU public procurement principles, there might be other specific diligent preparatory steps for individual procurements that the contracting authority needs to take to ensure that it has been reasonably diligent.

The beforementioned due diligence obligations framework may also be regarded as a roadmap for the diligent preparation of any public procurement, as the Directives do not discern the due diligence of a contracting authority in cases where the contracting authority wishes to later amend the contract and in cases where amendments are not needed. Therefore, it may be assumed that the EU legislator presumes the same kind of diligence from all contracting authorities in preparing any public procurement.

### 3.5.1. Duty to consider the nature and characteristics of the specific project

Public procurement is a tool for achieving the goals entrusted to the contracting authority by the public. It involves coordination and communication with other stakeholders in a project's planning and execution phases. The key here is that as part of the contracting authority's due diligence, the Directive's recital does not

[225] Accordingly, 109th Recital in the Public Sector Directive; 76th Recital in the Concessions Directive, and 115th Recital of the Utilities Directive.

[226] Case C-496/18 *HUNGEOD and Others* [2020] ECLI:EU:C:2020:240, p 69.

oblige the contracting authority to consider the nature and characteristics of a 'specific procurement' but a 'specific project'. This indicates that the due diligence obligation while preparing the initial award is broader, including the whole reason for the award and not narrowly the need for a specific award itself.

This corresponds with the directive's more specific regulation about calculating the estimated value of the public procurement[227] and the subdivision of public procurement into lots.[228] The contracting authority is to consider all future purchases while calculating the value and is banned from technically subdividing procurements into lots to avoid a proper procedure. Thus, the Directives' regulation also assumes that the contracting authority makes decisions based on the main reason for public procurement (the whole project) and not only on individual purchases.

The notion that the contracting authority's due diligence depends on the nature of the project means that the more detailed the project is, involving a high amount of information and interested parties, the higher the contracting authority's due diligence of being aware of all project-related information, including all necessary administrative procedures needed to be completed before deciding on the scope of the procurement and initiating a tender. In practical terms, the strength of the project management must match that of the project.

In the beforementioned Spanish railway case, the CJEU stated that a normally diligent contracting authority must achieve a prior consensus of the local governments affected by the construction.[229]. Additionally, during the initial tendering phase of the contract, the contracting authority is to take due account of the possible harmful effects and environmental impact of such contract[230], and, at least during the construction of such infrastructure, take reasonable account of possible changes in the socio-economic and demographic conditions of the areas concerned.[231] The nature of the railway construction project was complicated, detailed, and extensive, which the contracting authority failed to consider before initiating the tenders leading to numerous additional negotiated procedures without prior notice due to changes in the initial project.

At the same time, the contracting authority's due diligence also depends on the length of the project. As indicated by the CJEU, the contracting authority needs to consider the information that could change during the execution of the project. The longer the project, the more foresight in planning the contracting authority is to have. Nevertheless, the contracting authority's obligation to consider the relevant information is not lower by shorter projects; it is generally just more easily achievable. The contracting authority still needs to define the scope of the procurement and research the necessary information for that.

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227 Article 5, Public Sector Directive.

228 Article 46, Public Sector Directive.

229 Case T-540/10 *Spain v Commission* [2013] ECLI:EU:T:2013:47, p. 90.

230 *Ibid.*, p. 80.

231 *Ibid.*, p. 83.

Considering the nature and scope of the project would also mean considering the overall economic changes and adding relevant clauses to the contract, whereby it is already apparent in the initiation phase of the procurement that such clauses are most probably needed in the execution phase of the project, like indexation of the contract price or alternatives for changing the contract (reducing or expanding the scope and/or conditions for prolonging the execution deadline when specific circumstances arise, etc.).[232] Thus, adding flexibility to the future execution phase by regulating all reasonable contract conditions in advance that any reasonably diligent tenderer would do in preparing and executing such a project. Generally, such clauses are absent from the contracts because the contracting authorities have not diligently researched the nature and specifics of the project. Thus, the need for changes surprises them later on but is not unexpected in terms of due diligence.

### 3.5.2. Duty to consider involving outside counsel

The nature and characteristics of a project can reveal instances where the contracting authority lacks the necessary skills and expertise to prepare or conduct the procurement process by itself. An example of this could be when the technical description of a project requires specialised knowledge of natural equipment or processes for building a CNG and LNG fuelling station, but the contracting authority has no expertise in this field.

In such a case, the contracting authority is required to involve a gas specialist advising on the preparation of the technical description and even the execution of the contract, ensuring that the project is carried out effectively and by relevant regulations and standards. Along with this, the contracting authority may need support from a range of specialists, including lawyers, economists, other analysts, or a project manager. It is thus part of the due diligence of the contracting authority to identify the lacking expertise and involve the necessary specialists or procure the advisory services.

### 3.5.3. Duty to consider the good practice in the field in question

In terms of due diligence, this concerns the contracting authority's active pursuits to become aware of such good practices as guidelines or any other soft-law regulations that are relevant in the field of the project – for example, model contract conditions. If the contracting authority is unaware of such good practices in the field in question, the contracting authority would be required to initiate preliminary market consultations.

[232] See also Simovart, M. A. in *op. cit.* 24, p. 93–94.

### 3.5.4. Duty to consider the balance between the preparatory investments and their foreseeable value

Public resources are always limited, and it should be weighed which preparatory investments to make, considering both time and money. How to determine the point where additional investments in preparatory activities beyond a certain level do not add much value and cannot be expected from the contracting authority?

The balancing point should be the possible threat of unequal treatment of the tenderers or breaching the transparency principle. That is, the contracting authority has gathered essential knowledge to conduct the procurement, whereby all EU public procurement principles and the fundamental rights of the tenderers are safeguarded. In practical terms, it would mean that the contracting authority is sufficiently informed of all relevant aspects of the project for drafting the procurement conditions: technical description, qualification, and evaluation criteria.

Therefore, the duty of diligence requires that the contracting authority actively identify and acknowledge such parts of the project requiring additional information, for proper legal decision-making. With these project parts, the contracting authority's expected degree of diligence is heightened. In case the information (or the lack thereof) later on shows that a decision to change the contract would depend on the missing or under-researched information, then the foreseeable value of such preparatory investment is very high as this would constitute the future need to restrict the competition by ordering the required goods or services through a contract modification. The investments are thus relevant when it helps to secure that the EU public procurement principles are followed in the initial procurement and to avoid the need for later contract changes that could and should have been part of the initial public procurement scope.

In case the contracting authority failed to properly acquire some information because it chose not to investigate, and despite that, continued to conduct the public procurement, which later on led to the need for modifications, the contracting authority has not been diligent. In other words, if there is new relevant information to be obtained from additional analyses or expert opinions that could change the scope or relevant terms of the procurement documents and, thus, the contract conditions, the duty of diligence obliges the contracting authority to make such investments.

## 3.6. Due diligence obligations in the conduction phase of a public procurement procedure

### 3.6.1. Duty to sufficiently answer the tenderer's questions

After the publication of the tender notice but before the tender submission date, it is customary that the tenderers have the right to ask additional questions about the procurement conditions. The Directives do not regulate such right, but in practice, such tenderer's right is observed as today, the electronic platforms

where the procurement is conducted already foresee such an opportunity. The Directives also do not stipulate how thoroughly the contracting is expected to answer such questions.[233] Therefore, such duty falls under the discretion of the contracting authority and is governed by the EU public procurement principles.

The purpose of allowing the tenderers to ask questions is to help them understand the tender conditions (better) or even to become aware of possible mistakes in the conditions. Based on the answers, the tenderers can better prepare for the tender submission so that the tenderer could potentially be successful or even dispute the procurement conditions.

The contracting authorities are obliged to provide an answer based on the Estonian PPA[234], but in (Estonian) practice, the level of thoroughness while answering the questions varies. While most contracting authorities provide substantial answers, some simply reply that the contracting authority remains by the set conditions offering no further explanations. Pro forma, the contracting authority has fulfilled its obligation to answer. Still, while viewing the same from the due diligence perspective, it can be argued that the contracting authority has not fulfilled its duty of diligence.

As the aim of the EU public procurement rules is to safeguard the internal market and to open up the market, the EU public procurement principles entail a premise that a diligent contracting authority answers the tenderers' questions in a useful and substantial manner. Offering answers that do not provide assistance or actual clarifications can thus be seen as breaching the due diligence obligation on the part of a contracting authority. Although the good administration principle as a general principle of EU law has not been extended to EU public procurement (yet), a similar duty is, to a certain extent, recognised by the General Court in the EU's procurements.[235]

### 3.6.2. Duty to act within a reasonable time

The Directives do not foresee that a procurement procedure needs to be conducted during a specific (fixed) period. At the same time, as indicated in Chapter 2.2.2. the good administration principle, as applied in the EU's own procurements, entails a duty for the contracting authority to act within a reasonable time.[236] As the duty to review the matter within a reasonable time is also part of the good

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[233] Article 53(2) of the Public Sector Directive foresees the final time by which the additional clarifications need to be submitted by the contracting authority.

[234] Article 46(1) of the Estonian PPA obliges the contracting authority to answer all questions within 3 working days.

[235] Case T-589/08 *Evropaïki Dynamiki v Commission* [2011] ECLI:EU:T:2011:73, p 80.

[236] Case T-59/05 *Evropaïki Dynamiki v Commission* [2008] ECLI:EU:T:2008:326, p 152 and case T-50/05 *Evropaïki Dynamiki v Commission* [2010] ECLI:EU:T:2010:101, p 119.

administration principle as an EU general principle, [237] it remains to be seen if and to what extent a Member States' contracting authorities would need to comply with such a requirement.

Even when no such duty of diligence is directly evident today under the Directives, it needs to be highlighted that acting within a reasonable time frame may still affect the contracting authority's liability under the Member State's national law. Estonian Supreme Court has considered a case[238] concerning a damage claim initiated by the contracting authority against the tenderer who withdrew its tender. Therefore, the contracting authority signed a contract with the next tenderer, who was second in the said procurement with a higher contract price. The contracting authority asked the court to grant the price difference as damages The courts reduced the damages awarded to the contracting authority because the contracting authority had not informed the tenderer for 1,5 months if and when the signing of the procurement contract would take place. In the meantime, the market conditions had changed to an extent where the tenderer could no longer fulfil its duties at the offered price. Therefore, acting within a reasonable time might have specific expressions related to conducting a public procurement process.

## 3.7. Other due diligence obligations

### 3.7.1. Duty to create a self-assessment framework

As said, offering a framework for self-assessment could be seen as a separate purpose of the due diligence obligations of the contracting authority. A contracting authority may exercise self-assessment in each specific public procurement procedure, where it stipulates the relevant conditions and evaluates them before the initiation of the public procurement procedure. Such self-assessment could be regarded as a narrow view. A broader view of such self-assessment activities could also entail stipulating and periodically renewing internal guidelines that govern the internal decision-making process. Additionally, training its officials or employees on the EU public procurement law application in general as well as on the internal guidelines. The CJEU case law has not directly expanded the application of the EU public procurement principles to cover the internal regulations of the contracting authority' but such measures clearly support the fulfilment of both EU public procurement principles and direct obligations stipulated in the law of public procurement.

[237] Article 41 of CFREU requires that everyone's questions be dealt with impartially, fairly, and within a reasonable time.

[238] Estonian Supreme Court in case 3-2-1-194-13, p 12 and a later decision in the same case 3-2-1-144-14.

### 3.7.2. Due diligence during the contract performance phase

Another possible set of due diligence obligations may arise from the execution phase of a public procurement contract, as indicated earlier: (1) the diligence of a contracting authority while deciding on modifying a public procurement contract and (2) the contracting authority's diligence during the execution of the contract, in general.

When the tenderer makes a proposition for raising the contract price due to an unforeseeable price increase relying on the price increase as an unforeseeable circumstance, the contracting authority is to evaluate the circumstances. In such a case, in addition to evaluating the due diligence of the initial public procurement, the contracting authority would need to thoroughly investigate whether the prices have increased, by how much, when, and whether the tenderer should have considered this while submitting the tender. Therefore the contracting authority should make by itself all reasonable efforts to verify that the alleged unforeseeable circumstances exist. Such a verification process could be similar as is the process for verifying the tender price in case of a suspicion of an abnormally low price.

Regarding the contracting authority's due diligence during the execution of a public procurement contract, for example, in the Estonian administrative practice it has been found that a contracting authority is obliged to put in writing all the tenderer's breaches during the execution phase of the contract. Thereafter, it is demanded that the contracting authority claims all possible contractual penalties.[239] Leaving such penalties unclaimed is implied as a breach of the EU public procurement principles.

A similar view has emerged regarding the change of a public procurement contract. It is considered that if the tenderer fulfils the contract differently from what was agreed on, this constitutes a contract modification, even when there are no active agreements on such modification between the parties.[240] Essentially, the change of the contract is derived from the fact that the tenderer has done something differently than agreed on and the contracting authority has not reacted to it (in time or at all). To highlight that this is not an Estonian national procurement law specific question, an application for a preliminary ruling has been submitted to the CJEU in case *Obshtina Balchik*.[241] One of the questions referred to the CJEU concerns the same situation where the parties have fulfilled the public pro-

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[239] The Guideline on the Modifications to Public Procurement Contracts in Time of Crises, published on 22.03.2022 by the Estonian Ministry of Finance, p 9. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

[240] Such an argument has been raised in the Estonian financial correction case 3-23-702 in the Tallinna Administrative Court. Currently pending. A similar view has been expressed in the Estonian public procurement literature. See Simovart, M. A. in *op. cit.* 38, p 820–821.

[241] Case C-443/22 *Obshtina Balchik.* Bulgarian court's request for a preliminary ruling. July 5, 2022. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

curement contract differently from what was published in the tender and agreed on in the initial public procurement contract.

Therefore, the CJEU position still remains to be seen, but this is a potential public procurement situation where the scope of application of the EU public procurement principles may be expanded.[242] As concluded earlier, in a situation where the scope of application of the EU public procurement principles is established, but there are no direct provisions governing the matter in the directives, due diligence obligations arise.

[242] In the Estonian public procurement literature, such an opinion has been already shared by Kuusman, T in *op. cit.* 38, p 53.

# 4. Influences of the tenderer's obligations on the contracting authority's duties

## 4.1. Tenderer's role in a procurement procedure

In public procurement procedures, any person can be a tenderer, regardless of whether they are natural or legal.[243] It is also permissible for the state's own units to be tenderers and to provide services to the state itself.[244] It is permitted to offer to sell goods or carry out construction work, but in practice, it is common for the state's own entities (e.g. universities) to compete with private companies in public procurement in the market for services (e.g. training services).[245] Several examples exist in Member States where public entities provide waste transport and disposal services to local authorities.[246]

The Public Procurement Directives provide guidelines for Member States and public sector entities on conducting public procurement. However, these directives do not explicitly regulate the actions of tenderers. Although the Remedies Directives outline the requirements for protecting the rights of tenderers and their right to challenge the actions of the contracting authority, they do not impose any obligations on tenderers during the public procurement process. The Public Procurement Directives outline how contracting authorities must regulate and safeguard the rights of tenderers throughout the public procurement process. Therefore, the mandatory requirements for tenderers to comply with come from the procurement documents created by the contracting authority for each public procurement or from other sources referred to in those documents. It is also possible that EU or national law may impose additional requirements on tenderers beyond those in the Public Procurement Directives.

In practical terms, there is uncertainty surrounding due diligence that a tenderer must exercise while participating in a public procurement. The case law of CJEU provides several examples where contracting authorities, national courts, and advocates-general have sought to assign contractors a more active and independent role in the public procurement process. This usually refers to the level of independence a tenderer must demonstrate in participating a public procurement procedure and, also, directing the activities of the contracting authority during

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[243] See further, for example, *op. cit.* 6, p 177.

[244] This directly derives from the definition of the economic operator in the Public Sector Directive 2014/24/EU, Article 2(1)(10). Nevertheless, the participation of the public sector entity as a tenderer should not distort competition in public procurement. See also cases C-574/12 *Centro Hospitalar de Setúbal and SUCH* [2014] ECLI:EU:C:2014:2004, p 33; C-568/13 *Data Medical Service* [2014] ECLI:EU:C:2014:2466, p 35–36; and C-203/14 *Consorci Sanitari del Maresme* [2015] ECLI:EU:C:2015:664, p 34–35.

[245] Cases C-305/08 *CoNISMa* [2009] ECLI:EU:C:2009:807, p 45 and C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECLI:EU:C:2012:817, p 27.

[246] See, for example, cases C-480/06 *Commission v Germany* [2009] ECLI:EU:C:2009:357, C-573/07 *Sea* [2009] ECLI:EU:C:2009:532, and C-429/19 *Remondis* [2020] ECLI:EU:C:2020:436.

public procurement to ensure that the procurement conditions adhere to the requirements outlined by law and whether any supplementary provisions should be included in the procurement document. By suggesting this, the relationship between contracting authorities and tenderers is likely viewed as one of cooperation rather than subordination. This has led to a desire to place a greater emphasis on the requirements for tenderers' activities, implying that participating in public procurement always involves a greater degree of requirements or obligations for tenderers.

In essence, the question at hand concerns the role of the tenderer in the tendering procedure. Therefore, the obligations of the tenderer can and must be analysed in response to those of the contracting authority. The answer to this question once again depends on the law of the Member States, as EU public procurement law does not harmonise the national law requirements for what the public procurement procedure must be, whether it is public or private law process. Legal literature has found that EU public procurement law tends towards a public procedure, and public procurement by the EU's own institutions has been organised as a public procedure.[247] The legal nature of the proceedings understandably determines the rights, obligations, and responsibilities of the parties to the proceedings.

In some Member States, the award procedure for public procurement is viewed as a private process. However, according to case law cited in Publication II, the CJEU considers it a public process. The distinction is important because when the procedure is conducted as a public process, the responsibility for ensuring its legality lies with the contracting authority. This reduces the role of the tenderer to that of a party to the proceedings.

As a result, the contracting authority is responsible for managing the entire procedural process, which limits the requirements for the performance and diligence of the tenderer. The tenderer is only required to comply with the conditions set by the contracting authority if it wishes to submit a tender. If the contracting authority requests clarification on the tender and the tenderer wishes that its tender is still considered, the tenderer should respond specifically to the questions posed by the contracting authority.

The tenderer is not responsible for instructing or directing the contracting authority towards establishing other solutions or conditions, as such a requirement falls under cooperation rather than a subordination relationship. If public procurement is considered a private process, the question of equality of parties should be considered, and the position of the tenderer may be seen as more active one. Simovart has referred to the duty of diligence of tenderers originating from pre-contractual, contractual, and civil law. Still, the CJEU's practice does not indicate such a nature of the public procurement procedure or the tenderer's role.

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[247] Neergaard, U., Jacqueson, C., Ølykke, G. S. (editors). Public Procurement Law: Limitations, Opportunities and Pradoxes. The XXVI FIDE Congress in Copenhagen, 2014. Congress Publications Vol. 3. DJØF Publishing, Copenhagen 2014, p 85. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

## 4.2. Tenderer's due diligence obligations as defined by CJEU case law

Publication II observed the CJEU case law, where the duties of a tenderer were discussed. The CJEU has occasionally referred that a tenderer needs to be reasonably well informed, normally, or reasonably aware,[248] or experienced[249] in public procurement.

As it appears from the CJEU case law, the duty of diligence of a tenderer can actually be regarded as part of the duty of diligence of a contracting authority, or to be more exact, by creating or reminding of the diligence of the tenderer, the CJEU has actually described the level of care expected from the contracting authority. For example, in the *SIAC Construction* case, the Court explained that the requirement that tenderers be treated equally means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.[250] The CJEU has repeated such a notion in later cases.[251]

As such, the CJEU has not set a direct minimum of the tenderer's duties but reviewed the procurement procedures' lawfulness. Nevertheless, even when the characteristics of a tenderer have been used as a yardstick for measuring the diligence of the contracting authority, depending on the circumstances, some characteristics are expected from an economic operator each time they take part in a tender. The question of how diligent a tender should be has risen several times in the case law.

Advocate General Sharpston proposed in the *Lämmerzahl* case[252] that one distinguishing factor for deciding whether a tenderer is diligent is that such tenderers can be deemed experienced in submitting tenders in their particular field. A well-informed and normally diligent tenderer is to have general knowledge and understanding of key legal considerations affecting the markets in which it operates. The tenderer should also have a general knowledge of national and EU tender procedures and relevant thresholds, including the possibilities for

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[248] Cases C-19/00 *SIAC Construction* [2001] ECLI:EU:C:2001:553, p 40-42; C-448/01 *EVN and Wienstrom* [2003] ECLI:EU:C:2003:651, p 56–58 and C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECLI:EU:C:2004:236, p 111.

[249] Case C-423/07 *Commission v Spain* [2010] ECLI:EU:C:2010:211, p 58.

[250] Case C-19/00 *SIAC Construction* [2001] ECLI:EU:C:2001:553, p 40–42.

[251] See for example cases C-448/01 *EVN and Wienstrom* [2003] ECLI:EU:C:2003:651, pp 56–58; C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECLI:EU:C:2004:236, p 111; C-72/10 *Costa and Cifone* [2012] ECLI:EU:C:2012:80, p 73; C-538/13 *eVigilo* [2015] ECLI:EU:C:2015:166, p 54–57; C-226/04 *La Cascina and Others* [2006] ECLI:EU:C:2006:94, p 32; C-27/15 *Pizzo* [2016] ECLI:EU:C:2016:404, p 37; C-336/14 *Ince* [2016] ECLI:EU:C:2016:72, p 87; C-298/15 *Borta* [2017] ECLI:EU:C:2017:266, p 69–77, and C-309/18 *Lavorgna* [2019] ECLI:EU:C:2019:350, p 18.

[252] Case C-241/06 *Lämmerzahl* [2007] ECLI:EU:C:2007:597.

challenging decisions under both procedures and the time limits for bringing such challenges.[253]

Although the CJEU did not reiterate Advocate General Sharpston's opinion in the *Lämmerzahl* judgment, the description offered by the Advocate General nevertheless helps to put the tenderer's duty of diligence into a wider context in the EU public procurement law. As the CJEU's case law has shown, the yardstick for the diligence of a tenderer proposed by the Advocate General was too high and broad. The CJEU has been modest in pinpointing tenderer's legal obligations. Nevertheless, it can be concluded that the tenderer has the following duties while participating in the EU public procurement procedures.

### 4.2.1. Duty to familiarise with the tender conditions

As it is impossible to submit a tender without acquainting the terms of it, such duty seems self-explanatory and obvious without further legal explanation.[254] However, what constitutes procurement documents that the tenderer needs to be aware of may differ. As Professor Arrowsmith has put it, it may be difficult to draw a line between legislative measures that economic operators are expected to know without being pointed to them and those on which the contracting authority must provide information to comply with its transparency obligations in laying down the specification or other requirements for the specific award procedure.[255]

Three types of situations have been discussed in the CJEU's case law: (1) the terms of the participation stem from the court of law or the interpretations of documents of administrative organs; (2) the terms stem from another legal act that has been referred to in the procurement documents; and, (3) terms that stem from another legal act that has not been referred to in the procurement documents.

In the first situation, the CJEU has denied the possibility that the tenderer ought to be aware of any conditions for participation in the tender that derive from the case law of the national courts or interpretations of administrative documents.[256] The CJEU was of such an opinion despite the fact that the national courts indicated that such national case law could lead to the tenderer's exclusion from the procedure was something the tenderer should have known.[257] The CJEU drew the line by using the comparison of foreign companies wanting to participate in the tender. If 'their level of knowledge of national law and the inter-

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[253] Opinion of the Advocate General Sharpston, Case C-241/06 *Lämmerzahl* [2007] ECLI:EU:C:2007:329, p 68.

[254] The Estonian Supreme Court has already in 2013 noted, without referring to any legal source, that in public procurement procedures, it is appropriate to expect heightened due diligence from the tenderers. The Court specifically stated that the tenderer has the duty to assure that it would not forget to submit any documents, leave no field unfilled, and see that the data submitted is not contradictory. Estonian Supreme Court in case 3-3-1-24-13, p 17.

[255] Arrowsmith, S. in *op. cit.* 66, p 624.

[256] Case C-27/15 *Pizzo* [2016] ECLI:EU:C:2016:404.

[257] *Ibid*., p 41.

pretation thereof and of the practice of the national authorities cannot be compared to that of national tenderers'[258], then in such a case, the tenderer need not be aware of the said regulation. The CJEU did not differentiate the tenderer's duty of diligence based on the nature of the legal regulation either but based the conclusion on what should normally be equally known to home and foreign companies.[259] The CJEU remained in the same position in a dispute concerning the award of a concession agreement, adding that in case national circumstances related to the procurement object influence the tender's substance, the contracting authority is to describe those in the procurement documents as well.[260]

In the second situation, the tenderer's duty to be informed of the terms outside the procurement document is different when the contracting authority has referred that terms from another legal act apply. As the reference to such a legal act is part of the procurement documents, the tenderer is assumed to be aware of and follow them. Although the ECJ's early case law suggests that a general reference to a provision of national legislation cannot satisfy the publicity requirement and that the tenderer is not obliged to be aware of such regulations, the more recent case law suggests otherwise. In a case where the requirement to submit labour costs was not repeated in the procurement conditions, the contracting authority stipulated that the rules of the national procurement law apply to matters not expressly provided for in the contract notice, documents, and specifications. The Court held that the tenderers should have been aware of their obligation to submit the labour costs with the financial offer[261] and thus submitted such information on their own initiative.[262] This affirms that the current understanding is that if the procurement documents reference other legal acts, the tenderer is to be aware of their content and the tenderer's obligations in a public procurement procedure stemming from such legal act directly.

A question still arises regarding the nature of the reference made by the contracting authority. In the previous example, the contracting authority stated that the national procurement law applies. If the procurement documents ambiguously

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[258] Case C-309/18 *Lavorgna* [2019] ECLI:EU:C:2019:350, p 46.

[259] See more on that Kotsonis, T. 'Case C-324/14 Partner Apelski Dariusz v Zarzad Oczyszczania Miasta: the circumstances in which it is permissible to restrict the ability of bidders to rely on third parties' (2017) 1 Public Procurement Law Review, p 18–24. Sanchez-Graells, A. 'The emergence of trans-EU collaborative procurement: a 'living lab' for European public law' (2020) 1 Public Procurement Law Review, p 16–41.

[260] Case C-423/07 *Commission v Spain* [2010] ECLI:EU:C:2010:211, p 55, 64–70.

[261] The contracting authority was also not allowed to relieve the tenderers from their duties by applying the equal treatment principle and enabling all the tenderers to correct their alleged mistake equally. See further on that M. A. Simovart. 'A contracting authority's powers to reject a con-compliant tender, or to opt for correction of mistakes therein: Global Translation Solutions Ltd v European Parliament (T-7/20)' (2022) 2 Public Procurement Law Review, p 33–39. See also S. Smith 'Supplementing, clarifying or completing tender documents after submission – permissibility of national rules limiting this opportunity (Lavorgna)' (2019) 5 Public Procurement Law Review, p 195–197.

[262] Case C-309/18 *Lavorgna* [2019] ECLI:EU:C:2019:350, p 8.

state that all relevant legal acts apply without specifying which ones, then it should be concluded that the tenderer is not responsible for knowing every legal regulation. The tenderer's duty to be aware of the referred regulations only arises when the contracting authority names them in a way that clearly specifies the exact regulations. Furthermore, suppose the referred legal acts contain detailed regulations that are not directly understandable, and there are alternative possibilities for understanding these requirements, more than a general reference to the legal act is required in that case.[263] It can be expected that tenderers follow the references in the procurement documents, but it is not their responsibility to delineate exact terms from such legal acts if there are several possibilities for their application.

In the third situation, there may be requirements that are mandatory to fulfil while completing a contract, even if they are not explicitly listed in the procurement documents. These requirements may apply to the activities of the tenderer based on how they choose to fulfil the contract. In such cases, the public procurement procedure is not considered unlawful if it does not list all these requirements. It is the tenderer's responsibility to be aware of such legal requirements and act accordingly.[264] While the contracting authority can predict qualification criteria based on the object of the procurement contract, they cannot anticipate every possible way a tenderer might choose to fulfil the contract, such as forming a consortium and dividing responsibilities within the cooperation model. Therefore, the boundary between the contracting authority's responsibility to set clear and proportionate criteria in the procurement documents and the tenderer's duty to be aware of all relevant legal acts and requirements lies in these specific conditions that arise from the tenderer's chosen approach to fulfilling the contract. If particular conditions for the tenderer's activity arise from their choice of how to fulfil the contract, it is their responsibility to comply with those requirements.

Returning to Advocate General Sharpston's opinion, the tenderer's obligation to be aware of the national and EU rules governing the tenderer's business is undoubtedly part of the tenderer's daily activities. However, such an obligation cannot be entirely imposed on tenderers in public procurement procedures. In the context of the award of a public contract, the contracting authority must define all the tender specifications in respect of which it wishes to receive competing tenders. Whether tenderers are aware of the legislation and case law in that regard does not play a role since it is the responsibility of the contracting authority and not of the tenderer to define the tender conditions.

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[263] A similar issue was analysed by the CJEU when the tender documents referred to an Ecolabel where the scope of application of the tender criteria thus remained unclear. Case C-368/10 *Commission v Netherlands* [2012] ECLI:EU:C:2012:284.

[264] Case C-295/20 *Sanresa* [2021] ECLI:EU:C:2021:556, p 60. See also Smith, S. 'The distinction between performance conditions and participation conditions (selection criteria): the ECJ decision in Sanresa (C-295/20)' (2021) 6 Public Procurement Law Review, p 169–172.

Therefore, whatever other knowledge a normal business entity might have from its day-to-day activities or previous experiences does not become part of the procurement documents. As such, the contracting authority may also not rely on such tenderer's knowledge or previous experience, as is also reflected in the CJEU case law. This is also how the public law nature of the public procurement process comes to light in the EU public procurement law. However, to a limited extent, as discussed above, the tenderer may be obliged to be aware of the obligations arising from other legal acts, the fulfilment of which is a prerequisite for submitting a valid tender.

### 4.2.2. Duty to seek clarifications about unclear tender conditions

Seeking clarifications about unclear procurement conditions can be a part of the duty of diligence of a tenderer. Still, such duty has mainly had relevance in cases concerning the tenderer's right to review. So, the main rule still is that, given the object of the procurement, the contracting authority needs to set such clear conditions that all economic operators who have the recourses to take part in that tender and that the contracting authority itself can ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure.[265]

This would ideally mean that the procurement conditions are clear enough so that no additional clarifications are needed. As has been mentioned before, in practice, the procurement documents are (unintentionally) imperfect, and the contracting authority is unable to foresee all possible details of the procurement. Thus, the question about the tenderer's obligation to seek clarification is actually about who should bear the risk of uncertainty in the procurement documents.

Tenderer's requests for clarifications would help to mitigate the unclarity of the conditions, which is why it would make sense to attribute responsibility to the tenderer as a party to the procedure to help establish better procurement conditions. Although such a conclusion is practically logical, it does not align with the contracting authority's obligations set under the Directives. The duty to seek clarification may, therefore, only arise when the tenderer wishes to enforce its right to equal opportunity after the deadline for contesting the procurement documents has passed. Therefore, as a legally allowed excuse as to why it had not disputed the tender conditions during the allowed time.

There are several cases[266] in the CJEU case law where a tenderer has learned about the discriminatory nature of procurement documents in later phases of a tender procedure when the deadline for disputing the procurement documents under national law has passed. The CJEU ruled that the tenderer had the right to

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[265] Case C-72/10 *Costa and Cifone* [2012] ECLI:EU:C:2012:80, p 73. See also, case C-42/13, *Cartiera dell'Adda* [2014] EU:C:2014:234, p 44 and the case law referred therein; cases C-513/99 *Concordia Bus Finland* [2002] ECLI:EU:C:2002:495, p 62, and C-27/15 *Pizzo* [2016] ECLI:EU:C:2016:404, p 36.

[266] For example, cases C-241/06 *Lämmerzahl* [2007] ECLI:EU:C:2007:597, and C-538/13 *eVigilo* [2015] ECLI:EU:C:2015:166.

dispute the evaluation criteria in the later stages of the procurement procedure if the tenderer was, in fact, unable to understand the award criteria at issue and it should neither have understood them by applying the standard of a reasonably informed tenderer exercising ordinary care. While assessing that, factors to consider are the capability of other tenderers to submit tenders and that the tenderer concerned, before submitting its tender, did not request clarification from the contracting authority.[267]

As previously discussed, the tenderer's duty of becoming aware of the tender conditions is part of the tenderer's due diligence obligations. A diligent tenderer would, therefore, usually not need to contest the procurement conditions in later phases of the procurement. Thus, in case the tenderer wishes to dispute the conditions to secure its participation and the possible win in the procedure, it bears the risk of acquainting the procurement conditions with enough diligence at the right time that it is able to ascertain whether its tender would be acceptable.

The level of detail expected from the tenderer under the duty of diligence in reviewing the procurement documents can be disputed. It would certainly be unfair to suggest that any tenderer would need to conduct as thorough of a review procedure as usually exercised by a court or a supervisory organ to understand whether there is an irregularity in the procurement conditions. In the *Connexxion Taxi Services* judgment, the CJEU found that 'unambiguous terms enable all economic operators who are reasonably well-informed exercising ordinary care to be apprised of the requirements of the contracting authority and the conditions of the contract so they may act accordingly'.[268]

This means that being aware of the procurement conditions is normally expected from a diligent tenderer. In my opinion, normal awareness would mean at least noticing obvious mistakes that hinder the tenderer's possibility of submitting an acceptable offer or an offer that the tenderer feels could also be successful (considering the competitive factor, of course). In practical terms, that would mean that the tenderer would consider or decide in advance which product it would like to offer or what the setup for providing the service would look like. So, at least some degree of analysing the possible bid structure would be required. If the qualification criteria are disproportionate, then it can be assumed that the tenderer considers what possible references it could use and assess them against the tender conditions. The same goes for the evaluation criteria.

If the ambiguity in the procurement documents does not prevent the tenderer from submitting an acceptable and possibly successful tender, then there is also no duty for the tenderer to ask any clarifying questions. That is, even if there are irregularities in the procurement documents. As said, the EU public procurement address the contracting authorities, and it is the duty of a contracting authority to

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[267] Case C-538/13 *eVigilo* [2015] ECLI:EU:C:2015:166, p 55–58.

[268] Case C-171/15 *Connexxion Taxi Services* [2016] ECLI:EU:C:2016:948, p 37. About the same case, see further Smith, S. 'Optional ground for exclusion for grave professional misconduct and the requirements for proportionality, equal treatment, and transparency: C-171/15 Connexxion Taxi Services' (2017) 3, Public Procurement Law Review, p 86–90.

stipulate clear and proportional conditions. It is not forbidden for the tenderer to point out irregularities in the procurement documents, but it cannot be used against the tenderer in case it does not do so.

In any case, whether the tenderer has requested clarifications at the right time in the procurement procedure may not become a tool whereby the contracting authorities can escape their responsibility in stipulating clear and proportional procurement conditions. For example, if a procurement document is flawed but none of the tenderers has asked for any clarifications nor made the contracting authority aware of the mistakes in the documentation, the contracting authority might be obliged to cancel the procurement at its own discretion and start again.[269] Although the exact consequences of the tenderer's failure to be diligent are still somewhat unclear, the result that cannot follow is that the contracting authority is able to conduct an illegal public procurement. The public procurement principles safeguard avoidance of such an outcome.

### 4.2.3. Duty to prepare the tender diligently

A duty of a tenderer that has specifically been mentioned by the CJEU is preparing an application or a tender diligently.[270] Although the CJEU has not further elaborated on what such duty involves exactly, it is manifest that submitting all necessary information stipulated in the procurement documents is required. In case the application or the tender itself is incompliant due to missing or incoherent information, the responsibility for the mistakes relies solely on the tenderer itself. Correcting mistakes might be possible in some cases,[271] but it is not the responsibility nor the right of a contracting authority to assure that the tender is compliant.[272]

CJEU has even considered a case where the Member State's law foresaw that a precondition for allowing a tenderer to eliminate mistakes in the tender is reliant on the tenderer paying a penalty first. The CJEU accepted that a Member State may establish such a regulation, but the penalty may not be unproportionally high, nor the amount of it automatic. The aim of such regulation was to palace responsibility on the tenderers in submitting their tenders and offsetting the financial burden that occurred to the contracting authority in eliminating whatever mistakes in the tender.[273]

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[269] CJEU has recognised the contracting authority's wide discretion regarding cancelling the tender. For example, in case C-440/13 *Croce Amica One Italia* [2014] ECLI:EU:C:2014:2435, p 34.

[270] Case C-599/10 *SAG ELV Slovensko and Others* [2012] ECLI:EU:C:2012:191, p 38.

[271] Also, C-131/16 *Archus and Gama* [2017] ECLI:EU:C:2017:358, p 29, and C-336/12 *Manova* [2013] ECLI:EU:C:2013:647, p 30–39.

[272] Cases C-336/12 *Manova* [2013] ECLI:EU:C:2013:647, p 40; C-131/16 *Archus and Gama* [2017] ECLI:EU:C:2017:358, p 33, and C-927/19 *Klaipėdos regiono atliekų tvarkymo centras* [2021] ECLI:EU:C:2021:700, p 93.

[273] Case C-523/16 *MA.T.I. SUD* [2018] ECLI:EU:C:2018:122, p 63.

CJEU has stated that the declarations given by the tenderers in the ESPD[274] to prove initial conformity of the qualification criteria and absence of exclusion grounds are based on their honour.[275] Therefore, it is to be assumed that the information provided by the tenderer is correct. Such a conclusion also follows from the Court's previous case law, where it has been found that the contracting authority must treat the concerned tenderer's offer, throughout the procedure, as an offer that complies with public procurement directive when there is no evidence that states otherwise.[276]

Therefore, the correctness of the submitted data is assumed, but that does not constitute an obligation for the tenderer to submit only truthful information. The procurement procedure is built on the contracting authority's obligation to stipulate clear and proportional tender conditions and verify whether the submitted tender meets the established criteria within the procedure. As stated before, this implies again the public law nature of the procurement procedure, which relies on checks and controls of the contracting authority. In case the tenderer submits untruthful information, it bears the risk of its tender being excluded from the procedure or that its tender will be rejected. Thus, losing the desired business opportunity.

### 4.2.4. Duty to submit information on tenderer's initiative

Similarly to the duty to seek clarifications, the contracting authorities have wished to extend the tenderer's obligations in a public procurement procedure to a duty of offering additional information to the contracting authority that the contracting authority has not asked for in the procurement documents. This corresponds to the contracting authority's obligation to review the tenders and ascertain their conformity to the tender conditions. In cases where the contracting authorities have had doubts, or a part of the information in the tender is missing, a wish to rely on the obligation of the tenderer to submit such information on their own initiative has developed.

The CJEU has strongly negated the tenderer's duty to submit any information to the contracting authority on its own initiative.[277] The CJEU's reasoning is again based on the notion that 'substantive and procedural conditions concerning participation in a contract need to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply

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[274] The European single procurement document (ESPD) is a self-declaration form used in public procurement procedures.

[275] Case C-387/19 *RTS infra and Aannemingsbedrijf Norré-Behaegel* [2021] ECLI:EU:C:2021:13, p 31.

[276] Case C-531/16 *Specializuotas transportas* [2018] ECLI:EU:C:2018:324, p 23.

[277] *Ibid.*, p 23–26; Additionally, C-387/19 *RTS infra and Aannemingsbedrijf Norré-Behaegel* [2021] ECLI:EU:C:2021:13.

to all candidates'.[278] This, however, falls under the obligations of the contracting authority. Therefore, the CJEU's conclusion links back to the tenderer's duty to be aware of the procurement documents and not of conditions from other possible sources. An obligation that has not been stipulated in the procurement documents does not constitute a clearly defined condition, and it would be difficult for tenderers to determine the exact scope of that obligation.[279]

The CJEU has remained by the same conclusion even when the information in question is of a voluntary and non-mandatory nature. The contracting authority may exclude a tenderer if an exclusion ground is present, but the contracting authority may not oblige the tenderer to use self-cleaning measures nor demand submitting proof thereto. That is, secure that the tenderer would not be excluded from the competition. This would thus naturally lead to the conclusion that based on the tenderer's due diligence, the tenderer itself should ensure that the documents are submitted as the tenderer may otherwise be excluded. As put by the Advocate General in the *RTS infra* case, 'there is nothing to compel an economic operator to participate in a public procurement procedure. If it does, however, it must comply with the rules of that procedure'.[280] So, it is in the direct interest of the tenderer to safeguard that it could remain competing.

Even then, the CJEU confirmed that while the submission of information or documentation is voluntary for the tenderer, the contracting authority is still obliged to outline in the tender conditions that in case the tenderer wishes to rely on self-cleaning measures to avoid exclusion, it has an obligation to submit proof.[281] Hence, the CJEU held the same view as in the *Specializuotas transportas* case[282] that the tenderer's obligation with regard to providing information to the contracting authority during the procurement procedure is restricted by the information required explicitly by the contracting authority in the procurement documents.

## 4.3. Contracting authority's role in light of the tenderer's duties

As indicated in the introduction of this dissertation, the initial hypothesis regarding the relationship between the duty of diligence contracting authority and the duty of diligence of a tenderer was that in case the contracting authority's duty to act or remain from acting was high, then at the same time the tenderer's obligation to do so was low and vice versa. In some cases, such a hypothesis holds true.

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[278] Case C-531/16 *Specializuotas transportas* [2018] ECLI:EU:C:2018:324, p 23.

[279] *Ibid.*, p 24.

[280] Opinion of the Advocate General Campos Sánchez-Bordona, Case C-387/19 *RTS infra* [2020] ECLI:EU:C:2020:728, p 86.

[281] Case C-387/19 *RTS infra and Aannemingsbedrijf Norré-Behaegel* [2021] ECLI:EU:C:2021:13, p 36 and 37.

[282] Case C-531/16 *Specializuotas transportas* [2018] ECLI:EU:C:2018:324.

For example, as the obligation to set clear tender conditions is the duty of the contracting authority, the tenderer may assume that following the criteria established in the procurement documentation is sufficient. Therefore, the tenderer does not need to search and analyse any related regulations to ensure that its offer will be accepted.

There may nevertheless be cases whereby the duty of diligence of both the contracting authority and the tenderer are heightened at the same time. This may be the case when there is a suspicion of an unreasonably low tender price. In such cases, the contracting authority is obliged to thoroughly analyse the data concerning the offered price and ask for clarifications. The tenderer is at the same time obliged to provide such clarifications if it wishes that its offer will be accepted.

Keeping this in mind, the main conclusion about the said hypothesis is that it is incorrect to assume that the relationship between the contacting authorities' duties and the due diligence obligations of tenderers has such an interconnected nature that the due diligence obligations of one party depend on the other party's obligations.

The case law on the tenderer's due diligence obligations strongly points out that the contracting authority cannot reduce the amount of its obligations by relying on the tenderer's duty of diligence. As previously stated, the contracting authority is responsible for leading the procurement procedure and assuring its lawfulness.[283] The tenderer's duty to seek clarifications may negatively impact the tenderer's rights within the procedure when it fails to appeal the procurement conditions on time. Conversely, this does not diminish the contracting authority's duties while carrying out the procedure.

In cases where the omissions of the tenderers are viewed, the contracting authority's duty in assuring the legality of the procurement procedure stays the same. Thus, analysing the tenderer's due diligence obligations and establishing the occurrence and nature of a tenderer's possible breach should almost always be 'second in line'. The contracting authority's duties and actions are to be analysed first. In case a mistake is first established there, the tenderer's omissions should not even be examined, as is also established in the CJEU case law discussed in Chapters 4.2.1.–4.2.4. above.

[283] For example, as was seen in case C-72/10 *Costa and Cifone* [2012] ECLI:EU:C:2012:80, p 73.

## 5. Conclusions

In response to the research questions, I found that the source of the contracting authority's due diligence in EU law is mainly the general principles of EU public procurement. The EU's general principles in public procurement are the principles of equal treatment, non-discrimination, transparency, and proportionality. Insofar as it is not covered by the general principles of EU public procurement law, the contracting authority's duty of care may also arise from the application of the provisions of the TFEU guaranteeing the internal market, as well as by the general principles of EU law.

To date, it is unclear what effect the principle of good administration as a general principle of EU law has as a source of due diligence for the contracting authority. That principle has recently been applied twice by the Court of Justice in cases concerning the public procurement law of the Member States, which may indicate that that general EU principle may also give rise to more precise duties of care on the part of the contracting authority. To date, the Court has dealt with that principle in cases concerning the disclosure of business secrets in the context of stating reasons for the decisions of the contracting authority and in the context of allowing the tenderer to raise counterarguments.

By its very nature, the contracting authority's due diligence is institutional, sectoral due diligence. By that complex definition, I mean that it is clear from the case law of the Court that the contracting authority's due diligence obligations are addressed in the context of the activities and responsibilities of the contracting authority as an organisation. Thus, the contracting authority's due diligence, as it is to be understood in the context of EU public procurement law, does not directly concern the due diligence of natural persons. The contracting authority's due diligence concerns the requirements for the functioning of the contracting authority to ensure compliance with the EU public procurement principles and, as a key objective, the functioning of the internal market. The contracting authority's due diligence must be regarded as sector-specific due diligence because it is limited only to the specific professional activity of the contracting authority as the addressee of the directives. The contracting authority's due diligence is an ancillary obligation with regard to the performance of direct obligations under the Public Procurement Directives.

The goal of the contracting authority's due diligence is to ensure the application of the EU public procurement principles and the internal market's functioning. Since this is the main goal of EU public procurement law, the contracting authority's due diligence objective cannot be different from that objective. Another objective of the contracting authority's due diligence is establishing a framework for self-assessment. One of the functions of the principle of transparency as an EU public procurement principle is precisely to create an opportunity for the contracting authority to exercise self-assessment, through which the contracting authority can satisfy itself that it complies with other EU public procurement principles.

The scope of the contracting authority's due diligence must be regarded as covering public procurement situations that the Directives do directly regulate. In other words, these are situations in which the activity of the contracting authority is based solely on the EU public procurement principles. Legal scholars have found that the exact scope of applying EU public procurement principles remains undefined. However, since the due diligence obligations of the contracting authority can arise precisely in those situations which, alongside the Directives, are governed solely by the general principles of EU public procurement, the scope of the contracting authority's due diligence is also not fully defined. It is, nevertheless, possible to draw conclusions on the scope of application of the due diligence obligations from the existing case law of CJEU.

The contracting authority's due diligence concerns all contracting authorities in the same manner and at the same rate in terms of the extent of the obligations. Legal scholars have pointed out in an earlier discussion that the courts, when assessing a contracting authority's diligence, may also consider the previous experience of that particular contracting authority in conducting similar public contracts. The CJEU's case law, like the existing Public Procurement Directives, do not support such a conclusion. The fact that the consequences of a breach of the contracting authority's due diligence obligations may have an equally negative impact on EU public procurement principles and the functioning of the internal market speaks in favour of a uniform application of due diligence. Regardless of whether experienced or non-experienced contracting authorities have made the mistakes, the infringement's seriousness does not change.

The contracting authority's specific due diligence obligations are recognisable from the CJEU's existing case law in the planning phase of the public procurement. Such specific due diligence obligations can be considered to be taking into account the specific circumstances on which the public procurement is based, the legal regulations and the purpose of the procurement. In addition, an assessment of whether the contracting authority has sufficient competence and knowledge to carry out the procurement or whether it is necessary to involve external specialists (such as a professional project manager, a sectoral technical specialist, a legal service provider, etc.). A separate due diligence obligation is to take account of good practice in the field, which includes, firstly, actively determining whether there is good practice in the relevant field and, if so, what it is and how it can and should be taken into account when conducting a public procurement. Similarly, the contracting authority must assess the required preparatory actions and financial resources. It should be stressed that if the contracting authority's decision to open a public procurement more widely across the EU depends on ordering specific tests or the performance of a study, the contracting authority is obliged to do so. However, this is given the size of such an investment and the importance of the information foreseeable from the conduct of the study.

Another due diligence obligation, which is not expressly apparent from the case law of CJEU or the Directives, can be defined as the obligation of the contracting authority to establish an internal organisation. In other words, to establish the necessary internal guidance materials so that the contracting authority, as an

organisation, can fulfil both its direct legal obligations and those due diligence obligations that stem from the EU public procurement principles.

It is also possible to predict that the EU public procurement principles will be expanded into the contract execution phase. Just as the question has arisen in Estonian administrative practice regarding whether and to what extent the contracting authority must comply with the general principles of EU public procurement law in performing a public contract, a similar question has been referred to CJEU in the preliminary ruling proceedings currently underway. If, in the future, the CJEU finds that the EU public procurement principles cover the contract performance phase to a larger extent than is presently understood, this will form the basis for defining the new contracting authority's due diligence obligations.

Keeping in mind the existing CJEU practice, it is possible, to a minimal extent, to mention the due diligence obligations of the contracting authority in the phase of conduction of the public procurement. This phase is most regulated by the Public Procurement Directives. Thus, in disputes concerning the public procurement phase, the Court has often interpreted the various provisions of the directives and clarified the obligations arising therefrom. I did not consider such obligations to be covered by the contracting authority's due diligence. This is because, in a situation where provisions in the directive govern the activities of the contracting authority, it is the fulfilment of a direct and fundamental obligation of the contracting authority, that is to say, the implementation of a rule. However, it is precisely situations which go beyond the application of specific rules in the directives and are thus governed by the EU public procurement principles that can be regarded as due diligence on the part of the contracting authority.

The Public Procurement Directives do not regulate the obligations of tenderers. However, the Remedies Directives govern the tenderer's procedural rights. Therefore, the obligations of tenderers in public procurement derive mainly from the procurement document established by the contracting authority. Since tenderers' participation in public contracts forms an essential part of conducting public procurements, CJEU has begun to 'measure' the legality of the activities of contracting authorities using a standard of the reasonably aware and diligent tenderer. The case law also reveals several discussions about whether and what tenderers' due diligence obligations are when participating in public procurement.

The Court has thus addressed the diligence of tenderers, particularly in its judgments on the performance of those obligations by the contracting authorities. Separately, also in cases where the focus is on the right of the tenderer to request judicial review of the activities of the contracting authority. It is clear from the case law studied that an attempt has been made to attribute the following due diligence obligations to tenderers: (1) the obligation to learn the conditions of the procurement documents, (2) the obligation to ask the contracting authority for clarifications regarding unclear procurement conditions, and (3) the obligation to provide information to the contracting authority on its own initiative. The existence of the tenderer's due diligence obligations can be affirmed only to a very limited extent.

As one of the few, it can be accepted that the tenderer is obliged to examine the procurement documents, provided that it wishes to submit a potentially successful tender. However, if the tenderer so wishes, it may also assume the risk of submitting a non-compliant tender. In practice, such abuses are not too frequent. Still, such tenders are deliberately submitted, for example, when tenderers are interested in the pricing of competitors' tenders or in other conditions communicated only to tenderers who have submitted a tender. However, assuming that the tenderer also wishes to be successful in the awarding of a public contract, it is apparent from the case law of the Court that the tenderer's diligence includes learning the terms of the procurement documents and complying with the applicable other legislation expressly referred to therein. The Court has considered whether a tenderer must be aware of other administrative and/or case law when submitting its tender. In those judgments, the Court has maintained conservatively that it is the responsibility of the contracting authority to lay down clear tender conditions. Therefore, the contracting authority must include all such requirements in the procurement documents. Once included, the contracting authority is also entitled to implement them. Otherwise, the tenderer is not obliged to comply with them.

The tenderer is not obliged to ask for clarifications on unclear procurement conditions. However, suppose the tenderer wishes to challenge the tender conditions at a later stage. In that case, asking questions and clarifications may impact whether the tenderer's right to challenge the tender conditions has been preserved. In other cases, the tenderer itself bears the risk of whether its tender meets the requirements of the tender conditions.

Another duty of diligence of a tenderer is demonstrating a heightened level of care while preparing the tender. That is, ensuring that the tender complies with the requirements set in the procurement documents. CJEU has specifically stated that this forms a part of the tenderer's responsibility. Tenderers may be presumed to provide correct information, but the existence of such an obligation has not (yet) been confirmed in the CJEU case law. The consequence of submitting untruthful information is the loss of a possible business opportunity but is not otherwise sanctioned. Submitting a possibly successful tender is the tenderer's right, not an obligation.

This also reflects the public nature of public procurement procedures, which is based on the premise that the role of leading the procurement procedure lies with the contracting authority, which must also ascertain the correctness of the information provided by the tenderers. However, it was apparent from the decisions relating to the tenderer's rights that the Court regards the relationship between the contracting authority and the tenderer as a relationship of subordination and not cooperation. Therefore, under EU public procurement law, the contracting authority has an obligation to ensure the legality of a public procurement procedure in respect of which the tenderer is not directly obliged to contribute.

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# SUMMARY IN ESTONIAN

## Hankija hoolsuskohustus Euroopa Liidu riigihankeõiguses

Doktoritöö peamine uurimisprobleem puudutab EL riigihankeõigusest tulenevaid nõudeid hankija hoolsusele. Doktoritöö keskendub EL riigihankeõiguses hankija hoolsuskohustuse allikate ja olemuse tuvastamisele, üksikute hoolsuskohustuste piiritlemisele ning seostele pakkuja võimalike hoolsuskohustustega. Doktoritöö eesmärk on muuta hankija hoolsuskohustus EL riigihankeõiguses hankijate jaoks nähtavaks ja seeläbi ka prognoositavaks.

Uurimisprobleem tõusetub olukorrast, kus EL riigihankedirektiivid reguleerivad hankija hoolsuskohustust üksnes ühe hankelepingu muudatust puudutava sätte juures. Samas on Euroopa Kohus käsitlenud hoolsa hankija küsimust ka lahendites, millel pole hankelepingu muutmise olukorraga seost. Sellest nähtub, et hankija hoolsuskohustus EL riigihankeõiguses on laiem kui üksnes direktiivides sätestatud üks klausel. Euroopa Kohus on riigihangete valdkonnas ka varasemalt laiendanud riigihangete üldpõhimõtete kohaldumist olukordadele, mis pole direktiivi normidest täpsemalt äratuntav. Nii on Euroopa Kohus loonud sisetehingu sõlmimise ning hankijate vahelise koostöö lubatavuse kriteeriumid ning sedastanud, et proportsionaalsuse põhimõte on eraldiseisev EL riigihankeõiguse põhimõte. Samuti on Euroopa Kohus pidanud hankelepingute muutmist ja raamlepingute sõlmimist lubatavaks enne, kui kõik eelnevalt nimetatud kohtupraktikas arenenud kontseptsioonid on hilisemalt EL riigihankedirektiividesse sisse viidud.

Käesoleval ajal ei ole hankija hoolsuskohustus aga praktikutele arusaadav. Hankijatele ei ole äratuntav, milliseid kohustusi selline hoolsuse nõue võib sisaldada. Samuti on oma arvamus asjast ka järelevalveorganitel. Kohaldamise erinevused tekitavad olukordi, milles hankijalt eeldatakse selliste hoolsuskohustuste täitmist, mida direktiivis ega ka kohtupraktikas selgelt defineeritud pole. Seetõttu on põhjendatud EL riigihankeõiguses hankija hoolsuskohustuse õigusteaduslik uurimine.

Hankija hoolsuskohustuse allikad EL riigihankeõiguses ei ole samuti täpsemalt äratuntavad. Seetõttu analüüsib doktoritöö erinevaid allikaid, millest hankija hoolsuskohustused võivad tuleneda. Doktoritöö vaatleb hankija hoolsuskohustust üksnes EL riigihankeõiguses. Uurimistöö fookusest jäävad seega välja riigisisesed regulatsioonid, millest samuti võivad EL hankeõiguse kõrval hoolsuskohustused tuleneda. Liikmesriikide õigused võivad omada hankija hoolsuskohustuse täpsemal ja edasisel sisustamisel siiski olulist rolli. Riigisisesel tasemel võivad mõju omada nii hea halduse kui ka hea usu põhimõtted. EL seadusandja ei ole harmoneerinud EL riigihankedirektiivides seda, kas riigihangete menetlused peavad olema avalik-õigusliku või eraõigusliku iseloomuga. EL enda institutsioonide riigihankeid vaadeldakse avalik-õigusliku protsessina, nagu see on ka suuremas osas liikmesriikides. Siiski leidub liikmesriike, mille õiguses reguleeritakse riigihankeid kui eraõiguslikku protsessi. Seeläbi mõjutavad hankijate kohustuste täitmist ka erinevad riigisisesest õigusest tulenevad põhimõtted.

Doktoritöö eesmärgi saavutamiseks seadsin neli alamuurimisküsimust:

1) Mis on EL riigihankeõiguses hankija hoolsuskohustuse allikas?
2) Mis on EL riigihankeõiguses hankija hoolsuskohustuse eesmärk?
3) Millised on hankija täpsemad hoolsuskohustused?
4) Milline on EL riigihankeõiguses pakkuja hoolsuskohustuse mõju hankija kohustustele?

Doktoritöö näol on tegemist õigusdogmaatilise uurimusega. Õigusdogmaatiliste uurimustööde eesmärgiks on anda süstemaatiline ülevaade konkreetset õigusvaldkonda või institutsiooni reguleerivatest põhimõtetest, reeglitest ja mõistetest ning analüüsida nende põhimõtete, reeglite ja mõistete vahelisi seoseid, et lahendada ebaselgused ja lüngad kehtivas õiguses. Sealjuures ei käsitleta sellist õigussüsteemi mitte ainult uurimise objektina, vaid see pakub ka normatiivset raamistikku läbiviidavaks analüüsiks.[284] Peamised doktoritöös kasutatud meetodid on analüüs, tõlgendamine, süntees, deduktsioon, induktsioon ning empiiriline andmete kogumine Euroopa Kohtu lahendite edasiseks analüüsimiseks.

Kuivõrd doktoritöö käsitleb hankija hoolsuskohustust kitsalt EL õiguse raamides, siis on doktoritöö normatiivseteks allikateks EL primaarõigusest (ELTL) tulenevad normid, EL õiguse üldpõhimõtted ning EL riigihankedirektiivid. Täiendavaks õiguse allikaks on Euroopa Kohtu praktika. Mõningate näidete ilmestamiseks on tuginetud ka liikmesriikide riigihankeõiguse sätetele ja kohtupraktikale. Õigusteoreetilised allikad on EL riigihankeõiguses juhtivate õigusteadlaste raamatud ning eelretsenseeritud teadusajakirjades avaldatud artiklid.

Doktoritöö on koostatud teaduspublikatsioonide kogumina, põhinedes kolmel anonüümse eelretsenseerimise läbinud teaduspublikatsioonil:

**Publikatsioon I** Härginen, Kadri (2022). Duty of diligence of a contracting authority in the E.U. public procurement law. [*Hankija hoolsuskohustus EL riigihankeõiguses*] Public Procurement Law Review, 2, 76–88.

**Publikatsioon II** Härginen, Kadri (2022). The Duty of Diligence of a Tenderer in EU Public Procurement Law. [*Pakkuja hoolsuskohustus EL riigihankeõiguses*] Juridica International, 31, 111–124. DOI: 10.12697/JI.2022.31.08.

[284] Smits, J. 'What is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research' in van Gestel, R., Micklitz, H.-W., Rubin, E. L. (editors), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, Cambridge University Press, 2017, p 207–228. Available on the Internet, the link to the webpage is provided in the References Chapter of this Dissertation.

**Publikatsioon III** Härginen, Kadri (2023). Unforeseeable Events and Circumstances: Balancing the Contracting Authority's Duty of Diligence in EU Public Procurement Law. [*Ettenägematud sündmused ja asjaolud: hankija hoolsuskohustuse tasakaalustamine EL riigihankeõiguses*] Avaldamisel teadusajakirjas Public Procurement Law Review.

Olen Publikatsioonide I–III ainuautor.

Publikatsioon I uurib hankija hoolsuskohustuse allikaid ning võimalikku EL institutsioonide riigihangete korraldamist puudutava Euroopa Kohtu kohtupraktika ülekannet liikmesriikide riigihankeõigust puudutavasse kohtupraktikasse. Seega seondub publikatsioon I esimese ja teise uurimisküsimuse analüüsimisega. Publikatsioon II käsitleb neljandat alamuurimisküsimust, käsitledes Euroopa Kohtu praktikale tuginedes pakkuja hoolsuskohustuse olemust, mille pinnalt on võimalik omakorda teha järeldusi hankija kohustuste täitmise kohta. Publikatsioon III tegeleb kolmanda alamuurimisküsimusega ehk hankija täpsemate hoolsuskohustuste defineerimisega. Artikli fookuses on konkreetsete hankija hoolsuskohustuste väljaselgitamine spetsiifilistes riigihankeolukordades. Publikatsioonis III vaatlen selliseid spetsiifilisi hoolsuskohustusi väljakuulutamiseta läbirääkimistega hankemenetluse ja ühe hankelepingu muudatuse aluse kontekstis. Mõlemad valitud situatsioonidest lähtuvad ettenägematu asjaolu või sündmuse esinemisest ning sellega kaasnevalt hankijalt oodatavatest tegevustest.

Doktoritöö ülevaateartikkel ehk käesolev doktoritöö terviktekst seob eelnevalt nimetatud publikatsioonid tervikuks. Lisaks publikatsioonide spetsiifilisematele uurimisfookustele panustab doktoritöö ülevaateartikkel EL riigihankeõiguse kujunemisest, ELTL asjakohaste sätete ja EL riigihankepõhimõtete omavahelistest seostest ning hankija hoolsuskohustuse allikatest ülevaate andmisesse. Ülevaateartikkel käsitleb täiendavalt publikatsioonidele uuemast Euroopa Kohtupraktikast tulenevaid võimalikke mõjusid hankija hoolsuskohustuse allikatele hea halduse põhimõtte kui EL üldpõhimõtte kontekstis. Samuti täiendab ülevaateartikkel publikatsioonides käsitletut hankija hoolsuskohustuse eesmärgi ja kohaldumisala puudutavas osas. Seega tugineb ülevaateartikkel publikatsioonides esitatud analüüsile vaid osaliselt ning seda oluliselt täiendades. Töö teemade selline käsitlus lähtub soovist seostada publikatsioonides uuritud kitsamaid küsimusi EL riigihankeõiguse laiema kontekstiga, luues seoseid nii normatiivsete allikate, kohtupraktika ning õigusteoreetiliste seisukohtade vahel.

Vastuseks seatud uurimisküsimustele leidsin, et hankija hoolsuskohustuse allikaks EL õiguses on peamiselt EL riigihangete üldpõhimõtted. EL riigihangete üldpõhimõteteks on võrdse kohtlemise, mitte-diskrimineerimise, läbipaistvuse ja proportsionaalsuse põhimõtted. Osas, mida EL riigihankeõiguse üldpõhimõtted ei kata, võib hankija hoolsuskohustuse allikaks olla ka ELTL siseturgu tagavad

sätted[285] ning ka EL õiguse üldpõhimõtted. Tänaseks ei ole täielikult selge, millist mõju omab hankija hoolsuskohustuse allikana hea halduse põhimõte EL õiguse üldpõhimõttena. Seda põhimõtet on Euroopa Kohus hiljuti kahel korral kohaldanud liikmesriikide riigihankeõigust puudutanud asjades, mis võib viidata, et ka sellest EL üldpõhimõttest võivad tuleneda hankija täpsemad hoolsuskohustused. Seni on Euroopa Kohus seda põhimõtet käsitlenud ärisaladuse avalikustamist puudutanud kaasustes, hankija otsuste täpsema põhjendamise ning pakkujale vastuargumentideks võimaluse andmise kontekstis.

Hankija hoolsuskohustus on oma olemuselt institutsionaalne valdkonnapõhine hoolsuskohustus. Selle keeruka määratlusega pean silmas seda, et Euroopa Kohtu praktikast nähtub, et hankija hoolsuskohustust käsitletakse hankija kui organisatsiooni tegevuse ja vastutuse kontekstis. Seega ei puuduta hankija hoolsuskohustus, nii nagu seda tuleb mõista EL riigihankeõiguse kontekstis, otseselt füüsiliste isikute hoolsuskohustust. Hankija hoolsuskohustus käsitleb nõudeid hankija toimimisele, et tagada EL riigihankepõhimõtte järgimine ning peamise eesmärgina, siseturu toimimine. Valdkonnapõhiseks hoolsuskohustuseks tuleb hankija hoolsuskohustust pidada seetõttu, et see on piiritletud vaid hankija kui direktiivide adressaadi professionaalse spetsiifilise valdkondliku tegevusega. Hankija hoolsuskohustus on EL riigihankedirektiividest tulenevate ja liikmesriikide õigusesse harmoneeritud otseste kohustuste täitmise suhtes kõrvalkohustus.

Hankija hoolsuskohustuse eesmärgiks tuleb pidada EL riigihangete põhimõtete järgimist ning siseturu toimimise tagamist. Kuna selline on EL riigihankeõiguse peamine eesmärk, ei saa hankija hoolsuskohustuse eesmärk olla sellest erinev. Hankija hoolsuskohustuse teiseks eesmärgiks saab pidada enesekontrolli raamistiku loomist. Läbipaistvuspõhimõtte kui EL riigihanke aluspõhimõtte üheks funktsiooniks on just nimelt hankijale enesekontrolli võimaluse loomine, mille kaudu saab hankija veenduda, et ta täidab teisi EL riigihangete põhimõtteid.

Hankija hoolsuskohustuse kohaldumisalaks tuleb pidada neid riigihankesituatsioone, mille osas direktiivid otsest regulatsiooni ei kehtesta. Teisisõnu on tegemist olukordadega, milles on hankija tegevuse aluseks üksnes EL riigihangete üldpõhimõtted. Õigusteadlased on leidnud, et EL riigihangete põhimõtete täpne kohaldumisala on jätkuvalt lõpuni defineerimata. Kuna hankija hoolsuskohustused saavad tõusetuda aga just neis olukordades, mida reguleerivad direktiivide kõrval üksnes EL riigihangete üldpõhimõtted, on ka hankija hoolsuskohustuse täpsem kohaldumisala lõpuni defineerimata. Siiski on võimalik teha selle kohaldumisala kohta järeldusi olemasoleva Euroopa Kohtu praktika pinnalt ning tõlgendades EL riigihangete põhimõtete kontekstis direktiivides sätestatud üksikut normi, mis näeb ette hankija hoolsuskohustuse hankelepingu muutmise ühes spetsiifilises olukorras.

Hankija hoolsuskohustus puudutab kohustuste mahult kõiki hankijaid samal viisil ja määras. Õigusteadlased on varasemas diskussioonis viidanud sellele,

[285] Artiklid 34 (kaupade vaba liikumine), 49 (asutamisvabadus), 56 (teenuste osutamise vabadus). EL riigihangete kontekstis peetakse oluliseks ka artikleid 18 (rahvuse alusel mitte-diskrimineerimine), 45 (töötajate vaba liikumine) ning 63 (kapitali vaba liikumine).

nagu võiks kohtud hankija hoolsuse hindamisel võtta arvesse ka seda, milline on selle konkreetse hankija varasem kogemus sarnaste riigihangete korraldamisel. Doktoritöö koostamisel uuritud Euroopa Kohtu praktika, nagu ka kehtivad riigihankedirektiivid sellist järeldust ei toeta. Hoolsuskohustuse ühtlase kohaldamise kasuks räägib asjaolu, et hankija hoolsuskohustuse rikkumise tagajärjed võivad omada EL riigihangete põhimõtetele, kuid tegelikult siseturu toimimisele samaväärselt negatiivselt mõju. Seda sõltumata sellest, kas eksinud on kogenud või mittekogenud hankija: rikkumise raskus sellest ei muutu.

Hankija täpsemad hoolsuskohustused on olemasoleva Euroopa Kohtu praktika pinnalt äratuntavad riigihanke planeerimise faasis. Sellisteks täpsemateks hoolsuskohustusteks saab pidada riigihanke aluseks olevate täpsemate asjaolude, õiguslike regulatsioonide ja hanke eesmärgi arvestamist. Lisaks selle hindamist, kas hankijal on piisav pädevus ja oskusteave hanke läbiviimiseks või on vajalik kaasata väliseid spetsialiste (nagu nt professionaalne projektijuhtija, valdkondlik tehniline spetsialist, õigusteenuse osutaja jms). Eraldiseisvaks hoolsuskohustuseks on valdkondliku hea tavaga arvestamine, mis hõlmab endas esmalt selle aktiivselt välja selgitamist, kas vastavas valdkonnas on hea tava ning kui, siis milles see seisneb ning kuidas saab ja tuleb riigihanke läbiviimisel sellega arvestada. Samamoodi tuleb hankijal anda hinnang ettevalmistavate tegevuste ja selleks vajalike rahaliste vahendite kohta. Rõhutada tuleb, et juhul, kui hankija otsus riigihanke laiemalt EL üleselt avamiseks sõltub konkreetse proovi võtmisest või uuringu tegemisest, siis on hankijal kohustus seda teha. Seda siiski arvestades sellise investeeringu mahtu ning uuringu tegemisest ettenähtava informatsiooni olulisust.

Täiendavaks hoolsuskohustuseks, mille olemasolu Euroopa Kohtu praktikast ega direktiividest täna otseselt ei tulene, kuid mille olemasolu saab jaatada läbipaistvuspõhimõtte alusel, on hankija kohustus luua sisemine korraldus. Teisisõnu, kehtestada vajalikud sisemised juhendmaterjalid selleks, et hankija saaks organisatsioonina täita nii oma otseseid õigusaktidest tulenevaid kohustusi kui ka neid hoolsuskohustusi, mis võrsuvad EL riigihangete üldpõhimõtetest.

Ka on võimalik prognoosida EL riigihangete üldpõhimõtete laienemist hankelepingu täitmise faasi. Nagu on Eestiski halduspraktikas tõusetunud küsimus sellest, kas ja millisel määral tuleb hankijal hankelepingu täitmisel lähtuda EL riigihangete üldpõhimõtetest, on samasisuline küsimus esitatud Euroopa Kohtule hetkel käimasolevas eelotsuse menetluses. Kui Euroopa Kohtu seisukoht on tulevikus, et EL riigihangete üldpõhimõtted laienevad täna mõistetut oluliselt suuremal määral ka hankelepingu täitmise faasi, on see aluseks uute hankija hoolsuskohustuste defineerimisele.

Riigihanke läbiviimise faasis saab täna Euroopa Kohtu praktika valguses nimetada vähesel määral hankija hoolsuskohustusi. Seda põhjusel, et riigihangete läbiviimise faas on EL riigihangete direktiividega ja riigisisese õiguse alusel kõige suuremal määral reguleeritud. Nii on Euroopa Kohus riigihangete läbiviimise faasi käsitlevates vaidlustes tihti tõlgendanud erinevaid direktiivide sätteid ning nendest tulenevaid hankija kohustusi täpsustanud. Selliseid kohustusi ma ei pidanud hankija hoolsuskohustusega hõlmatuks. Seda seetõttu, et olukorras, kus

hankija tegevust reguleerib direktiivis ja riigisiseses õiguses direktiivi aluseks võttev norm, on tegemist hankija otsese ja peamise kohustuse täitmisega ehk normi rakendamisega. Hankija hoolsuskohustuseks saab aga pidada just neid olukordi, mis sellisest konkreetse normiga kaetud olukordadest väljuvad EL riigihangete üldpõhimõtete üldisesse kohaldumisalasse.

EL riigihankedirektiivid ei reguleeri pakkujate kohustusi. Pakkuja menetluslikke õigusi reguleerivad siiski õiguskaitsemeetmete direktiivid. Pakkujate kohustused tulenevad riigihangetes seetõttu peamiselt hankija kehtestatud riigihangete alusdokumendist. Kuivõrd pakkujate osalemine riigihangete läbiviimisel moodustab riigihangete korraldamise olemusliku osa, on Euroopa Kohus asunud hankijate tegevuste õiguspära „mõõtma" läbi mõistlikult tähelepaneliku ja hoolsa pakkuja standardi. Kohtupraktikast ilmneb mitmel puhul ka diskussioon selle üle, kas ja millised on pakkujate hoolsuskohustused riigihangetel osalemisel.

Euroopa Kohus on seega pakkujate hoolsust käsitlenud eelkõige just eelnimetatud hankijate kohustuste täitmist puudutavates lahendites. Eraldiseisvalt ka kaasustes, mille fookuses on pakkuja õigus nõuda hankija tegevuse kohtulikku kontrollimist. Doktoritöö koostamise käigus uuritud kohtupraktikast nähtub, et pakkujatele on püütud omistada järgnevaid hoolsuskohustusi: (1) kohustus tutvuda riigihanke tingimustega, (2) kohustus küsida hankijalt ebaselgete hanketingimuste kohta selgitusi, ning (3) kohustus omal initsiatiivil esitada hankijale informatsiooni. Pakkuja viidatud hoolsuskohustuste olemasolu saab jaatada vaid väga piiratud ulatuses.

Ühena vähestest saab nõustuda sellega, et pakkujal on kohustus tutvuda riigihanke tingimustega, kuid seda loomulikult eeldusel, kui ta soovib esitada pakkumuse. Siiski võib pakkuja soovi korral võtta ka selle riski, et esitab mittevastava pakkumuse. Praktikas ei ole sellised kuritarvitused liiga sagedased, kuid teadlikult selliste pakkumuste esitamist esineb näiteks olukordades, kus pakkujad tunnevad huvi konkurentide pakkumuste maksumuste või muude tingimuste kohta, millest teavitatakse üksnes neid pakkujaid, kes on pakkumuse esitanud. Võttes siiski eelduseks, et pakkuja soovib olla riigihankel ka edukas, siis nähtub Euroopa Kohtu praktikast, et pakkuja hoolsuse hulka kuulub riigihanke alusdokumendi tingimustega tutvumine ning selles otseselt viidatud kohalduvate muude õigusaktide järgimine. Euroopa Kohus on kaalunud seda, kas pakkujalt saab eeldada ka kohustust olla pakkumuse esitamisel teadlik muust haldus- ja/või kohtupraktikast. Kohus on neis lahendites jäänud konservatiivselt seisukohale, et selgete hanketingimuste seadmine on hankija kohustus, mistõttu tuleb hankijal kõik sellised nõuded riigihanke alusdokumenti sisse viia. Muul juhul puudub pakkujal kohustus neid järgida ning hankijal ka õigus neid rakendada.

Pakkujal pole kohustust küsida ebaselgete hanketingimuste kohta selgitusi. Samas, kui pakkuja soovib hanketingimusi hilisemas etapis vaidlustada, siis võib küsimuste küsimine ja selgituste palumine mõjutada seda, kas pakkuja õigus hanketingimusi vaidlustada on säilinud või mitte. Muudel juhtudel kannab pakkuja ise riisikot selle eest, kas tema pakkumus on vastav hanketingimustele või mitte.

Ühena vähestest jaatab Euroopa Kohtu praktika ka pakkuja vastutust hoolsalt pakkumuse koostamise eest. Riigihangetes võib eeldada, et pakkujad esitavad tõest informatsiooni, kuid sellise kohustuse olemasolu pole Euroopa Kohtu praktikas (veel) jaatatud. Pakkumusega ebatõese informatsiooni esitamise tagajärjeks on potentsiaalse ärivõimaluse kaotus, kuid sellele ei järgne mistahes muud sanktsiooni või karistust. Pakkujal on õigus, mitte kohustus esitada hankija seatud nõuetele vastav pakkumus.

See peegeldab riigihangete menetluste avalik-õiguslikku iseloomu, mis tuginеb eeldusele, et hankemenetluse juhtimise roll on hankijal, kellel tuleb ka talle esitatud andmete õiguses veenduda. Pakkuja antud kinnituste puhul on küll hankijal õigus teatud riigihangete etappides kontrolliprotseduuride lihtsustamiseks nende õigsust eeldada, kuid lõplik pakkuja andmete kontroll peab olema sisuline. Pakkuja õigusi puudutavatest lahenditest ilmnes aga see, et Euroopa Kohus näeb hankija ja pakkuja suhet kui alluvus- ning mitte koostöösuhet. Seetõttu on hankijal EL riigihankeõiguses kohustus tagada riigihanke menetluse õiguspärasus, mille osas pakkujal kaasaaitamiskohustus otseselt puudub.

# PUBLICATIONS

# CURRICULUM VITAE


**Name** Kadri Härginen
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**Education**

| | |
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| 2012 to date | Doctoral studies, University of Tartu, Faculty of Law |
| 2009–2012 | M.A., University of Tartu, Faculty of Law |
| 2005–2009 | B.A., University of Tartu, Faculty of Law |
| 2001–2005 | Professional higher education, Administrative Law and Arrangement, Estonian Academy of Security Sciences |

**Professional Experience**

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| 2023 to date | Head of Law Firm Sorainen regional Public Procurement & Public Projects practice |
| 2022 to date | Counsel, Law Firm Sorainen, Dispute Resolution & Risk Management practice |
| 2019 to date | Head of Sorainen Estonian Public Procurement & Public Projects practice |
| 2016–2022 | Senior Associate, Law Firm Sorainen, Dispute Resolution & Risk Management practice |
| 2015–2017 | Public Procurement Law Lecturer, University of Tartu, Faculty of Law |
| 2013–2016 | Associate, Law Firm Sorainen, Dispute Resolution & Risk Management practice |
| 2009–2012 | Procurement Policy Specialist, Estonian Ministry of Finance |
| 2009 | Public Procurement Law Lecturer, Estonian Academy of Security Sciences |
| 2007–2009 | Procurement Advisor, Estonian Ministry of the Interior |
| 2007 | Procurement Specialist, Estonian Rescue Board |
| 2005–2007 | Lawyer, Rapla County Government |

**Main Areas of Research**

Public Procurement Law, EU Public Procurement Law, Administrative Law

**Publications**


Härginen, Kadri (2023). Unforeseeable Events and Circumstances: Balancing the Contracting Authority's Duty of Diligence. Accepted for publication in Public Procurement Law Review.

Härginen, Kadri (2022). The Duty of Diligence of a Tenderer in EU Public Procurement Law. Juridica International, 31, 111–124. DOI: 10.12697/JI.2022.31.08.

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Ginter, C., Härginen, K., Sõrm, M. (2020). In-house transactions: lost in translation? Public Procurement Law Review, 3, 117–130.

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Härginen, K. (2019). Comments to articles 9, 10, 95–97, 127–130, 135–138, and 142–144. Public Procurement Act. Commented edition. Juura. 2019. ISBN978-9985-75-542-6

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**Participation in Academic Conferences and Presentations**

26.01.2023, Legal research conference ‘Public procurement in times of crisis: national experiences’ (Tartu). Presentation: ‘Unforeseeable circumstance, the negotiated procedure without prior notice, and the contracting authority’s duty of diligence’.

10.–14.05.2022, 10th Konstanz-Tartu joint seminar ‘The Public-Private Law Divide’ (Konstanz). Presentation: ‘Tenderer’s duty of diligence in the E.U. public procurement law’.

17.–18.2019, ‘Public Procurement: Global Revolution IX’ (Nottingham). Presentation: ‘The standard of diligent contracting authority – a new standard in EU procurement law’.

**Participation in Drafting Legislation**

Drafting the amendments to the Public Procurement Act (2010)

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**Hariduskäik**

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| 2012–praegu | doktorantuur, Tartu Ülikool, õigusteaduskond |
| 2009–2012 | magistriõpe, Tartu Ülikool, õigusteaduskond |
| 2005–2009 | bakalaureuseõpe, Tartu Ülikool, õigusteaduskond |
| 2001–2005 | rakenduskõrgharidus, halduskorraldus, Sisekaitseakadeemia |

**Teenistuskäik**

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| 2023–praegu | Advokaadibüroo Sorainen AS regionaalse riigihangete ja avalike projektide valdkonna juht |
| 2022–praegu | Nõunik, vandeadvokaat, Advokaadibüroo Sorainen AS, vaidluste lahendamise ja ennetamise töörühm |
| 2022–2023 | vandeadvokaat, Advokaadibüroo Sorainen AS, vaidluste lahendamise ja ennetamise töörühm |
| 2019–praegu | Advokaadibüroo Sorainen AS Eesti riigihangete ja avalike projektide valdkonna juht |
| 2015–2017 | Riigihankeõiguse õppejõud, Tartu Ülikool, õigusteaduskond |
| 2013–2022 | advokaat, Advokaadibüroo Sorainen AS, Vaidluste lahendamise ja ennetamise töörühm |
| 2009–2012 | juhtivspetsialist, Rahandusministeerium |
| 2009 | Riigihankeõiguse õppejõud, Sisekaitseakadeemia |
| 2007–2009 | Riigihanke nõunik, Siseministeerium |
| 2007 | Riigihanke spetsialist, Päästeamet |
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**Peamised uurimisvaldkonnad**

Riigihankeõigus, Euroopa Liidu riigihankeõigus, haldusõigus

**Publikatsioonid**

Härginen, Kadri (2023). Unforeseeable Events and Circumstances: Balancing the Contracting Authority's Duty of Diligence in EU Public Procurement Law. [*Ettenägematud sündmused ja asjaolud: hankija hoolsuskohustuse tasakaalustamine EL riigihankeõiguses*] Võetud vastu avaldamiseks ajakirjas Public Procurement Law Review.

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Simovart, M. A., Härginen, K. (2019). Implementation of EU Public Procurement Law in Estonia – history revisited. [*EL riigihankeõiguse rakendamine Eestis – ajalugu kordub*] Public Procurement Law Review, 5, 229–241.

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**Osalemine teaduskonverentsidel ja tehtud ettekanded**

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**Õigusloomealane tegevus**

Riigihangete seaduse muutmise seaduste eelnõud ja seletuskirjad (2010)

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