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Mapping due diligence in EU
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What is due diligence?

Legal Concept:

1. defined both in legal norms and through interpretation
2. In abstract definition of legal concepts
3. once defined the content of a legal concept remains unchanged cross-sectorally (i.e. the concept of contracting authority, the concept of goods)

Legal Standard:

1. undefined in legal norms
2. Flexible concepts based on intentionally indeterminate criteria
3. their content is defined on a case-by-case basis, providing an opportunity to adapt the rule to the diversity of situations.

General Principle:

1. undefined in legal norms
2. permanent, stable dimension
3. benefit from explicit and solemn - usually constitutional - recognition
4. tied to legal standards from a teleological standpoint -> gap-filling mechanisms

Dual plasticity of due diligence

Definition of due diligence:

Positive 'definition': a series of actions/reactions that the average reasonable legal actor is customarily expected to demonstrate in the scenario at stake

Negative definition: the counterpart of negligent behaviour establishing tort liability

Status of due diligence:

Differentiated legal status, depending on the sector

1. International investment law -> unwritten obligation of investors
2. Civil law -> explicit references to almost all European civil codes -> from *pater familias diligens* to *bon père de famille/buen padre de familia/die im Verkehr Ergordeliche Sorgfalt*
3. **International public law -> status of general principle, that also has a precautionary approach** recognised (Corfu Channel, United Kingdom v Albania)

What's the role of due diligence in national public law?

Challenging transfusion into administrative law

Common law jurisdictions:

Diceyan dialectic: lacking distinction between public and private entities

UK: system of nominate torts – negligence applies to public entities

UK: claim of damages in negligence requires a duty of care -> breach of this duty a recoverable damage (+ causal link)

Civil law jurisdictions:

Principle of legality: Administration is explicitly bound by law and Statute

Reverse principle of legality: administrative liability isn't but the breach of a statutory obligation, illegality connotes fault and hence liability.

Objective liability

What's the role of due diligence in EU public law?

Article 41 Charter – right to good administration

Direct administration

A number of positive obligations have been attached to the concept of due diligence:

Case T-24/90 Automec Srl v Commission [1992] ECR II-2223;

Case T-432/05 EMC Development AB v European Commission

Case T-7/92 Asia Motor France SA v Commission

Commission's Regulation no 1164/94 – cohesion fund

Commission v Spain, T-540/10, Spain v Commission, T-235/11

Indirect administration

Nuanced references – obstructed by the principle of subsidiarity, the concept of sufficiently serious breach (Brasserie du Pêcheur)

Not sufficient to qualify as an obstacle to the fundamental freedoms

Private due diligence in EU public procurement law - Impact of private due diligence to the legality of an authority's actions

Establishment and drafting of award criteria

SIAC, C-19/00, para 42.

“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”

EVN Wienstrom, Succhi di Frutta, La Cascina, Costa and Cifone, eVigilo, Lavorgna

(use of the same formula, deferential judgments)

Standard of the average reasonable economic operator in order to determine whether the contracting authority has breached the principle of equal treatment by drafting the award criteria in a way that may create confusion among the economic operators.

General principle -> economic operator's diligence -> clarification of an existing obligation

Private due diligence in EU public procurement law - Impact of private due diligence to the legality of an authority's actions

Post-submission modification of tenders

Premise: the average economic operator shows an advanced level of diligence upon drafting and submitting a tender.

A contracting authority is not obliged to remedy the mistakes made by economic operators, because the latter should have been more careful and diligent.

Impact of the concept of diligent economic operator:

Clarifications discretionary: **Archus and Gama C-131/16**

Clarifications should never result in a new tender: **SEGRO, C-52/16 and C-113/16**

complete an incomplete offer: **Cartiera dell'Adda, C-42/13, Ciclat, C-199/15**

Clarifications should be exceptional, **Lavorgna**

Principle of equal treatment → partially-defined step in the procedure → diligent economic operator → addition/clarification of a discretionary step in the procedure

Purely public diligence in EU public procurement law as an effectiveness levier

Concept of diligent contracting authority:

Modifications due to unforeseeable circumstances

(First explicit reference: Directive 2014/24 Article 72c 1)

Use of negotiated procedure without prior publication

(Article 32 par. 2b of the 2014/24 D)

Common elements of the two:

Diligence associated with the umbrella term of 'unforeseeable circumstances'

Both instances: Instances of exceptional discretion -> the contracting authority can only recourse to them once the conditions laid down by the law are satisfied.

Judicial control of this margin of appreciation coincides with the effectiveness of the directive

Court's competence: usually infringement procedures

Concept of a diligent contracting authority

Direct awards:

Usage of diligence: diligent contracting authorities could foresee the circumstances at a point where accelerated procedures could still be respected, but due to administrative inertia they ended up becoming urgent

No case of direct award has ever been validated by the Court

- *Commission v Italy*, Case 194/88 R
- *Commission v Spain*, C-24/91 – growing number of students
- *Commission v Italy*, C-107/92 – new geological findings
- *Commission v Germany*, C-318/94 – delay in the approval of the works

Modifications:

Usage of diligence: a diligent contracting authority could have foreseen the circumstances without the need of modifying the contract

Obshtina Razgrad, C-441/22 and C-443/22 usual weather conditions are excluded from the concept of unforeseen circumstance -> transposition of the case-law on direct awards

Linkage between CSDDD and PP directives

Article 24 – legislative obligation, administrative discretion between CSDDD and PPD

Member States ***shall ensure*** that compliance with the obligations resulting from the national measures transposing this Directive, or their voluntary implementation, ***qualifies as an environmental or social aspect that contracting authorities may***, in accordance with Directive 2014/24/EU of the European Parliament and of the Council, Directive 2014/25/EU of the European Parliament and of the Council and Directive 2014/23/EU of the European Parliament and of the Council, ***take into account as part of the award criteria*** for public and concession contracts, and as an ***environmental or social condition*** that contracting authorities may, in accordance with those Directives, lay down in relation to the performance of public and concession contracts.

Potential ground for exploration

Private due diligence as it has been interpreted up until now:

A. Common elements:

1. Existence of a general principle : Principle of sustainability : Article 18(2)
– Principle of equal treatment

2. Lack of explicit obligation : Article 24 (discretionary power of the contracting authority)

B. Differentiation with previous case-law : discretion as policy has not yet been interpreted through the lens of due diligence (obligation, discretion as an exception).

Thank you !

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