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The Duty of Diligence of a Tenderer in EU Public Procurement Law

1. Introduction

It is the obligation of each Member State and therefore each contracting authority to ensure that public procurements follow the principles behind the Treaty on the Functioning of the European Union (TFEU), particularly those of the free movement of goods, freedom of establishment, and the freedom to provide services, while also making sure that the principles derived therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality, and transparency, are followed.^{*1} In the context of the EU's public procurement law, those principles are meant to protect the interests of the tenderers from unfair discrimination by the contracting authorities. Therefore, although the EU public procurement directives^{*2} regulate many aspects of tenderers' rights, these regulations pertain primarily to the duties of said authorities.

The duty of diligence on the part of the contracting authority is for the most part not regulated in EU public procurement law. Nevertheless, the Court of Justice of the European Union ('CJEU' or 'the Court') has in several of its judgments held the contracting authority responsible for breaches of such a duty. The aim of the duty of diligence seems to be 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. In particular, 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.^{*3}

In the same way, many judgments of the CJEU indicate that a certain diligence level is expected from tenderers as well, although such a duty does not directly derive from the EU's public procurement directives. Neither are the consequences of failure to fulfil this duty regulated. Generally, the circumstances of

¹ See Recital 1 of Directive 2014/24/EU.

² 'Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts', OJ L 94, 2014; 'Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC', OJ L 94, 2014; 'Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC', OJ L 94, 2014; '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 (Text with EEA relevance)', OJ L 216, 2009.

³ K. Härginen. 'Duty of diligence of a contracting authority in the E.U. public procurement law'. *Public Procurement Law Review* 2022(2), pp. 76–88.

the cases wherein the CJEU analyses the tenderer's duty of diligence indicate that being diligent is relevant mostly for the purpose of assessing either the tenderer's right to review or the acceptance of an offer.

However, the duty of diligence of a tenderer entails more considerations than this, such as making sure that there are no mistakes in an offer or that all required fields are fulfilled in the documentation submitted to the contracting authority. Furthermore, I submit that the duty of diligence necessitates the tenderer's honesty in disclosing information such as data about exclusion criteria etc.⁴ For example, in case C-387/19, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, the CJEU stated that in the European Single Procurement Document submitted by the tenderers in public procurements to prove initial conformity with the qualification criteria and the absence of grounds for exclusion, the declarations by the tenderers are based on their honour. Therefore, I do not assume that the cases analysed in this article are the only possible circumstances wherein the tenderer has a duty of diligence.

In relation to the duty of diligence of a tenderer, the national administrative laws do not offer a reference point, as the administrative laws regulate the activities of contracting authorities, as a rule. However, Simovart has referred to the pre-contractual, contractual, and civil-law origins of the duty of diligence of tenderers.⁵ The confusion as to the essence of the tenderer's duty to be diligent in public procurement calls for research into the substance as well as the possible consequences of breaching such a duty. With this article, I address what types of obligations the duty of diligence imposes on a tenderer, which requirements a diligent tenderer cannot reasonably be subjected to, and in which cases obligations may occasionally arise under specific circumstances (such as in light of the tenderer's right to review).

The tenderer's duty of diligence under EU public procurement law has not been analysed in prior work except in passing – e.g., in a brief introduction of the topic by Simovart in 2009.⁶ For this reason, the article relies mainly on the body of CJEU case law that has directly analysed the duty of diligence on the tenderer's part.

2. The diligent tenderer in CJEU case law

The duties of diligence of tenderers and of contracting authorities are fundamentally intertwined. This is obvious, for example, from the *SIAC Construction* case, in which the CJEU explained that the equal-treatment requirement incumbent on tenderers entails the duty to formulate award criteria in the contract documents or contract notice in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.⁷ The CJEU has reiterated this notion in several cases since then.⁸

Accordingly, the duty of diligence of a tenderer does not exist outside a public procurement in which the tender participates or wishes to take part. It is established only once a contracting authority has published a contract notice and set the terms and conditions of the procurement. As can be seen from the *T-Systems Magyarország and Others* case⁹, analysed in Subsection 2.4 of this article, the question of the duty of diligence of a tenderer can arise also in circumstances wherein the contracting authority's modifications to the public procurement contract are challenged. A tenderer's duty of diligence follows from a contracting authority's actions, without which the tenderer's duty of diligence has no relevance for the purposes of EU public procurement law.

⁴ Case C-387/19, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, ECLI:EU:C:2021:13, para. 31.

⁵ M.A. Simovart. '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 at <https://www.nottingham.ac.uk/pprg/documentsarchive/phdconference2009/mari-ann-simovart.pdf> (most recently accessed on 20 April 2022).

⁶ *Ibid.*, pages 8–12.

⁷ Case C-19/00, *SIAC Construction*, ECR I-07725, 2001, ECLI:EU:C:2001:553, paragraphs 40–42.

⁸ K. Härginen (see Note 3). See, for example, case C-448/01, *EVN and Wienstrom*, ECR I-14527, 2003, paragraphs 56–58; case C-496/99 P, *Commission v. CAS Succhi di Frutta*, ECR I-03801, 2004, para. 111; case C-72/10, *Costa and Cifone*, ECLI:EU:C:2012:80, para. 73; case C-538/13, *eVigilo*, ECLI:EU:C:2015:166, paragraphs 54–57; case C-226/04, *La Cascina and Others*, ECR I-01347, 2006, para. 32; case C-27/15, *Pippo Pizzo*, ECLI:EU:C:2016:404, para. 37; case C-336/14, *Ince*, ECLI:EU:C:2016:72, para. 87; case C-298/15, *Borta* ECLI:EU:C:2017:266, paragraphs 69–77; case C-309/18, *Lavorigna*, ECLI:EU:C:2019:350, para. 18.

⁹ Case C-263/19, *T-Systems Magyarország and Others*, ECLI:EU:C:2020:373.

The CJEU has occasionally specified that a tenderer involved in public procurement needs to be informed reasonably well, normally or reasonably aware,^{*10} or experienced.^{*11} Therefore, depending on the circumstances, some characteristics are expected from an economic operator's actions each time it takes part in a tender process. However, there are only a few hints of what such characteristics mean or of what the consequences are when a tenderer is not reasonably well-informed, normally diligent, or reasonably aware. The following analysis examines the CJEU cases in groups, based on the subject matter of the cases, to inform understanding of the situations in which the duty to be diligent commences for the tenderer and what characteristics said duty then entails.

2.1. The tenderer's duty of diligence and its impact on the right to review

2.1.1. CJEU case law on the tenderer's duty of diligence and the right to review

The Remedies Directives^{*12} are designed to safeguard economic operators' right to review by establishing deadlines for disputing contracting authorities' decisions. Although EU procurement law does not harmonise specific deadlines for disputing the procurement documents, CJEU case law repeatedly emphasises that, after the date for submission of tenders, the procurement conditions are obligatory for the contracting authority, to ensure equal treatment of all tenderers and transparency of the procurement process^{*13}. Therefore, once the tenders have been submitted, the tender conditions are indisputable.

There have been several cases in CJEU case law wherein a tenderer discovered the discriminatory nature of procurement documents in the later phases of a tender procedure, once the deadline for disputing the tender documents under national law had passed. In such cases, as is discussed below, the CJEU has anchored the tenderer's right to dispute the tender conditions in later stages in the tenderer's duty of diligence linked to becoming aware of the irregularity before the time for contesting the procurement conditions had elapsed.

In the *Lämmerzahl* case, the CJEU analysed whether the tenderer had brought the correctness of the use of the procurement procedure into dispute at the right time. Only once the tenderer's offer was rejected by the contracting authority did the tenderer argue that the procurement procedure itself had been unlawful in that the contract notice should have been published EU-wide. The German national courts rejected the associated arguments for the reason of the tenderer having been in a position to identify the breach complained of in its application from the contract notice.^{*14} In this reasoning, therefore, the tenderer lost its right to challenge the choice of procedure or the estimate of the contract price and also the right to be heard.^{*15} One of the arguments behind the contracting authority's submission that the tenderer's claim did not merit being accepted was that the authority's alleged mistake should have been evident to the tenderer in light of the tenderer's experience.^{*16}

In that 2007 decision, the CJEU found that it is contrary to EU public procurement law for the tenderer to lose its right to be heard once the deadline for disputing the procurement documents has passed when the contracting authority has not provided information about the total quantity or scope of the contract.^{*17} On one hand, the conclusion that the right to review had not elapsed was based on the mistake of

¹⁰ Case C-19/00, *SIAC Construction* (see Note 7), paragraphs 40–42; case C-448/01, *EVN and Wienstrom* (see Note 8), paragraphs 56–58; case C-496/99 P, *Commission v. CAS Succhi di Frutta* (see Note 8), para. 111.

¹¹ Case C-423/07, *Commission v. Spain*, ECLI:EU:C:2010:211, para. 58.

¹² '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 (Text with EEA relevance)', OJ L 335, 2007; 'Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts', OJ L 395, 1989; 'Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors', OJ L 76, 1992.

¹³ See, for example, case C-336/12, *Manova*, EU:C:2013:647, para. 40; case C-42/13, *Cartiera dell'Adda*, EU:C:2014:2345, paragraphs 42 and 43; case C-27/15, *Pippo Pizzo* (see Note 8), para. 39.

¹⁴ Case C-241/06, *Lämmerzahl*, ECLI:EU:C:2007:597, para. 23.

¹⁵ *Ibid.*, para. 30.

¹⁶ *Ibid.*, para. 24.

¹⁷ *Ibid.*, para. 64.

the contracting authority, indicating that the tenderer's right to review was independent of the tenderer's actions. On the other hand, even without explicit reference, the same argument implies that the tenderer, in failing to learn about the irregularity, had not been sufficiently diligent.

Despite the Advocate General's suggestion, the CJEU did not analyse the tenderer's previous experience and, thereby, the fulfilment of the duty of diligence as a premise for *locus standi* to dispute the contracting authority's actions. In the opinion of the Advocate General, the evaluation of whether the tenderer still held the right to be heard should be based on the tenderer's level of diligence. The Advocate General discussed the main criterion for assessing whether the tenderer had lost its right to be heard as being the tenderer's knowledge or awareness of an irregularity. In cases wherein the tenderer is not aware of such an irregularity, the tenderer has not lost its right to review.^{*18}

The Advocate General stated that the CJEU already applies an objective standard in respect of the tenderer's ability to interpret award criteria against the yardstick of equality of treatment in public procurement – namely, the ability of a 'reasonably well-informed and normally diligent tenderer'. Therefore, the same standard can be applied in cases wherein the right to review is assessed.^{*19} However, the CJEU did not rely on such an interpretation fully, agreeing with the Advocate General that sufficient information was not published by the contracting authority but not explicitly agreeing that the assessment should be based on the level of diligence of the tenderer.

Eight years after the *Lämmerzahl* decision, in 2015, the CJEU similarly analysed the tenderer's right to review, in the *eVigilo* case. The cases are similar in the sense that the tenderer raised the question of the legality of procurement conditions in later stages of the procurement process when the deadline for disputing the procurement conditions had already passed. In a contrast against the *Lämmerzahl* decision, the CJEU in this evaluation of whether the tenderer then has lost its right to review or not, made direct mention of a tenderer's duty of diligence in becoming aware of an irregularity in the tender conditions before the submission of the tenders.

In the *eVigilo* case, the tenderer disputed the legality of the tender procedure as a whole and the evaluation criteria in particular, after the contracting authority had already evaluated the tenders and stated reasons for the exact evaluation results. Arguing that it had learnt that the evaluation criteria were unlawful only when it saw how the contracting authority had applied them, the tenderer claimed that the deadline for disputing the evaluation criteria had not passed.^{*20}

The CJEU ruled that the tenderer indeed had a right to dispute the evaluation criteria in the later stages of the procurement procedure, if the tenderer truly was unable to understand the award criteria at issue and should not have been expected to understand them by applying the standard of a reasonably informed tenderer exercising ordinary care. Factors to consider in assessing this are other tenderers' ability to submit tenders and whether the tenderer concerned, before submitting its tender, has requested clarification from the contracting authority.^{*21}

2.1.2. Characteristics of the tenderer's duty of diligence in relation to the right to review

The duty of diligence discussed in the *Lämmerzahl* and *eVigilo* cases represents what could be generally expected from a well-informed and normally diligent tenderer in the context of the tenderer's right to review. Paraphrasing the CJEU's conclusions, one can state that a diligent tenderer reviews the tender conditions before the submission of the tender so is able to contest the terms if doing so is needed. A diligent tenderer would therefore normally not need to contest the contracting authority's decisions in later stages in the procurement process. It may be assumed that, so as to do this, a diligent tenderer becomes familiar with and analyses the tender conditions within a reasonable span of time after the publication of the tender notice. Otherwise, the tenderer is unable to recognise whether the procurement documents are clear and proportional or otherwise ascertain the existence of an irregularity.

Additionally, as the Court stated in the *eVigilo* judgment, in the event of ambiguity or confusion, the duty of diligence of a tenderer may entail the obligation to seek clarifications from the contracting authority

¹⁸ See the opinion of Advocate General Sharpston in case C-241/06, *Lämmerzahl*, ECLI:EU:C:2007:329, paragraphs 55–56.

¹⁹ *Ibid.*, para. 67.

²⁰ Case C-538/13, *eVigilo* (see Note 8), para. 27.

²¹ *Ibid.*, paragraphs 55–58.

as to the tender conditions before the deadline for submission of tenders has passed. Again, should it not do so, the tenderer may lose the right to review if it relies on the discriminatory nature of the tender conditions when making claims in the later phases of the procurement process.^{*22} An exception to the tenderer's duty to request clarifications may exist in cases wherein the need to ask for clarifications was not evident during the preparation of the tender. For example, as seems to have occurred in the *eVigilo* case, the discriminatory nature of an evaluation criterion became evident only after the tenderer learned how the contracting authority had applied it.^{*23}

The level of detail that can be expected with regard to the tenderer's duty of diligence in reviewing the tender documents can be disputed. That was not analysed by the CJEU in the above-mentioned cases but is a question that naturally arises from the CJEU's conclusions. It would certainly be unfair to suggest that any tenderer would need to conduct as thorough a review as usually carried out by a court or a supervisory organ to understand whether there is an irregularity in the procurement conditions. In the *Connexion Taxi Services* case, the CJEU found that the existence of 'unambiguous terms, as is the case with regard to the contract documents at issue in the main proceedings, enables all economic operators which 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'.^{*24} This means that being aware of the procurement conditions is normally expected from a diligent tenderer.

At the same time, normal awareness would mean at least spotting obvious mistakes that hinder the tenderer's possibility to submit an offer at all or submit one that the tenderer feels could be successful (when the competition factor is taken into account, of course). Nevertheless, for example, in 2021, the CJEU found in the *Simonsen & Weel* case that 'the contracting authority's failure to comply with its obligation to indicate the extent of a framework agreement is, in such circumstances, sufficiently noticeable for it to be detected by an economic operator who intended to submit a tender and who ought, as a result, to be regarded as being duly informed'.^{*25} The contracting authority's mistake neither prevented the tenderers from taking part in the tender process nor kept them from being successful, at least in theory; rather, it involved the legality of the framework agreement and, thereby, the tenderer's right to review to dispute the validity of such a framework agreement. Therefore, it may be argued that in some cases the tenderer's duty of diligence involves also notifying of mistakes in the tender conditions that do not impair the tenderer's ability to submit a tender. Were one, then, to state conclusions as to what minimal normal awareness entails as part of the duty of diligence of a tenderer, it certainly encompasses becoming aware of any conditions in the procurement documents (an irregularity) that preclude submitting a tender or succeeding with it.

Similarly, it is questionable whether the duty of diligence would in such circumstances also entail an obligation to seek legal guidance. Given that the aim for the EU's public procurement regulation is to open the common market^{*26} to a broad range of economic operators, the general rule still is that the contracting authority has an obligation to set conditions^{*27} that are clear enough as to be understandable without recourse to legal counsel. Therefore, if the nature of the irregularity is beyond the understanding of a normally diligent tenderer, the right to review has not expired. Nevertheless, in assessment of this, as the CJEU pointed out in the *eVigilo* case, the activities of a tenderer subject to the duty of diligence are still to be evaluated. Hence, the scales in evaluating the right to review shift between the nature of the contracting authority's mistake and the tenderer's efforts to eliminate it (by seeking clarification, proposing changes to the tender conditions, or disputing the procurement documents) in due course. In any case, the CJEU has distinctly recognised the tenderer's duty of diligence in the procurement process and that it may have direct bearing on the tenderer's right to review.

However, the question of whether the tenderer requested clarifications at the right moment in the procurement process might not always become a tool whereby the contracting authorities are able to escape

²² See also S. Smith. 'C-538/13 *eVigilo*: dealing with bias and conflicts of interest, time limits for making a claim and acceptability of allegedly abstract award criteria'. *Public Procurement Law Review* 2015/4, pp. 104–108.

²³ Case C-538/13, *eVigilo* (see Note 8), para. 48.

²⁴ Case C-171/15, *Connexion Taxi Services*, ECLI:EU:C:2016:948, para. 37.

²⁵ Case C-23/20, *Simonsen & Weel*, ECLI:EU:C:2021:490, para. 89.

²⁶ See, for example, H.J. Priess & P. Friton. 'Joint liability of a tenderer and its supporting third party'. *Public Procurement Law Review* 2018/4, pp. 141–151.

²⁷ Case C-42/13, *Cartiera dell'Adda* (see Note 13), para. 44, and the case law referenced therein; case C-27/15, *Pippo Pizzo* (see Note 8), para. 36.

their responsibility for stipulating clear and proportional procurement conditions. For example, if a tender document is flawed but none of the tenderers has asked for any clarification or made the contracting authority aware of the mistakes in the documentation, the contracting authority might still be obliged to cancel the procurement on its own initiative and start again. Although the precise consequences of the tenderer's failure to be diligent still remain somewhat unclear, the consequence that must not follow is the contracting authority being able to conduct an illegal public procurement. Avoidance of such an outcome is safeguarded by the public procurement principles.

A valuable part of the Advocate General's opinion in the *Lämmerzahl* case describes the characteristics of a reasonably well-informed and normally intelligent tenderer. Although the CJEU did not echo the Advocate General's opinion with its decision, the description offered by the Advocate General nevertheless helps to put the tenderer's duty of diligence into a wider context within EU public procurement law, as is evident from the subsequent case law of the CJEU, discussed in the next subsection of the paper. Even when the CJEU did not wish to discuss the characteristics specific to a diligent tenderer in the cases involving the right to review, the subject still arises in connection with grounds for exclusion and the compliance of the tender.

The Advocate General stated that one distinguishing factor for deciding whether a tenderer is diligent is that tenderers can be deemed to be 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 Advocate General argued that in the *Lämmerzahl* case this meant that the tenderer had general knowledge of national and Community tender procedures and of relevant thresholds, including the possibilities for challenging decisions under both procedures and the time limits for raising such challenges.^{*28}

2.2. The tenderer's duty to be reasonably aware of the applicable law and national case law

2.2.1. The duty to fulfil conditions arising from the interpretation of the national case law

The *Pippo Pizzo*^{*29} and *Lavorigna*^{*30} cases addressed the tenderer's awareness of the national law in force and the national case law interpreting it. In these cases, interpretations from case law were applied to the tenderers without the contracting authority explicitly stipulating them in the procurement documents. Accordingly, the question arose of the extent of a tenderer's duty of diligence in being aware of all applicable laws and regulations and of the case law pertaining to these.

If the duty of diligence of a tenderer entails a duty to be aware of such regulations and interpretations, approaching the question from the other side of the equation brings in the issue of the contracting authority's obligation to stipulate all relevant conditions in the procurement documents, including the substance of relevant case law, if needed. On that basis, two categories of tenderer awareness that the duty of diligence on a tenderer's part could encompass are awareness of the applicable law and of the national court practice interpreting that law. This matter is analysed next.

After a little more than a year, 2016's *Pippo Pizzo* case followed the *eVigilo* judgment. Among the main matters disputed in the *Pippo Pizzo* case was whether – and, if so, to what extent – the tenderer needs to be aware of the national legal requirements and the interpretation of them by the administrative courts where these are not specified in the procurement documents but may lead to the tenderer's exclusion.

The obligation the tenderer in this case needed to fulfil was derived from the interpretation of national legal regulation and the case law of national courts pertaining to paying annual fees to the state construction-supervision board as a precondition for submitting an acceptable tender in the procurement process for construction works.^{*31} The procurement documents did not refer to such regulations being applied or state that a tenderer shall be excluded in consequence of not meeting their requirements. The Italian courts indicated that, in view of national case law, this was something that the tenderer should have known could

²⁸ Opinion of Advocate General Sharpston in the *Lämmerzahl* case (see Note 18), para. 68.

²⁹ Case C-27/15, *Pippo Pizzo* (see Note 8).

³⁰ Case C-309/18, *Lavorigna* (see Note 8).

³¹ Case C-27/15, *Pippo Pizzo* (see Note 8), paragraphs 10, 35, and 41.

lead to its exclusion even though there was no hint to that effect in the procurement documents, since the interpretation of the courts relied on the ‘mechanism by which mandatory provisions are automatically inserted into administrative measures’.^{*32} As I understand it, the case law of the national courts was taken to function as an extension to the procurement documents. Therefore, the procurement conditions, in the context of the obligation to pay the fee and of the contracting authority’s obligation to exclude such non-compliant tenderers, were interpreted as a whole, as a single piece of regulation.

The CJEU, in contrast, found that the tenderer should not have been automatically excluded from the procurement because of not having fulfilled an obligation derived from administrative law and the interpretation of the national courts where the contracting authority had not stipulated such a condition in the procurement documents. The CJEU, therefore, rejected the reasoning that a tenderer should independently analyse what the other applicable conditions are that should be fulfilled in order for its tender to be accepted for the procurement. For that reason, the general rule is that all relevant grounds for exclusion need to be outlined in the procurement documents.

Such a conclusion might not, however, be applied to all national regulations relevant for the specific procurement at issue. The CJEU stated in the same *Pippo Pizzo*’s judgment that it runs counter to the principles of equal treatment and transparency for a tenderer to be excluded on grounds not clearly stipulated in the procurement documents or expressly arising from the national law in force.^{*33} This implies that in cases wherein the obligation in question follows from the national law in force, the tenderer’s duty of diligence still entails a requirement of being aware of all such generally applicable obligations in parallel to the conditions stipulated in the procurement conditions.

The Advocate General submitted that it is illogical for the contracting authorities to be obliged to specify conditions the fulfilment of which is required under generally applicable legislative provisions and of which a reasonably informed tenderer exercising ordinary care cannot be unaware. One example is the set of basic conditions that, in the context of civil and commercial law, affect the legal capacity of individuals and companies, conditions of which no economic operator may be ignorant or require explicit, detailed inclusion in documents relating to a public procurement procedure.^{*34}

The Advocate General thus concluded that there is a minimum level of care that reasonably informed tenderers are required to be aware of and exercise: ‘The levels of care and information that may be reasonably required of a tenderer constitute the decisive criteria for the purposes of a proper understanding of the intended spirit of Article 2 of Directive 2004/18 and the way the CJEU interprets the principles of equality and transparency in that context.’^{*35} The Advocate General, therefore, found that the national court needs to establish whether undertakings bidding for public contracts have sufficient familiarity with the statement of the law and the case law of the national courts to suggest that a reasonably informed tenderer exercising normal care could not have been ignorant of it^{*36}. In cases wherein the national courts find that the majority of the tenderers were aware of such an obligation, waiving the requirement to meet that obligation in relation to a particular tenderer would constitute discrimination.^{*37} The CJEU did not explicitly employ the line of reasoning of the Advocate General in the *Pippo Pizzo* judgment, but it did rely on a similar conclusion already in the next relevant case, the *Lavorogna* case, only three years later. This is analysed below.

2.2.2. The duty to fulfil conditions arising from the national law

In a contrast against *Pippo Pizzo*, the CJEU found in the *Lavorogna* case^{*38}, from 2019, that the tenderer had breached its duty of diligence when not including information about labour costs in its financial offer. While the procurement conditions did not specifically require the tenderers to include information related

³² Ibid., para. 41.

³³ Ibid., para. 51. The same was stated in non-published decisions from nearly identical cases: C-162/16, *Spinosa Costruzioni Generali and Melfi*, ECLI:EU:C:2016:870, paragraphs 30–32; C-140/16, *Edra Costruzioni and Edilfac*, ECLI:EU:C:2016:868, paragraphs 32–35; C-697/15, *MB*, ECLI:EU:C:2016:867, paragraphs 31–34.

³⁴ See the opinion of Advocate General Campos Sánchez-Bordona in case C-27/15, *Pippo Pizzo*, ECLI:EU:C:2016:48, para. 52.

³⁵ Ibid., para. 53.

³⁶ See also M.A. Simovart’s presentation ‘The new Remedies Directive: would a diligent businessman enter into ineffective procurement contract?’ (see Note 5), pp. 8–12.

³⁷ Opinion of Advocate General Campos Sánchez-Bordona in case C-27/15 (see Note 34), para. 64.

³⁸ Case C-309/18, *Lavorogna* (see Note 8).

to the labour costs, national procurement law did stipulate said general obligation.^{*39} In the later stages of the procurement procedure, the contracting authority asked several of the tenderers, including the ultimate winner, to state the labour costs.^{*40}

The Italian courts were inclined to favour the approach represented by the *Pippo Pizzo* case, which would allow the winner and other tenderers to submit such information after the tender submission deadline since the contracting authority had not set a requirement for stating the labour costs in its procurement conditions, given that the grounds for rejecting a tender need to be outlined in the procurement conditions.^{*41}

This time, however, the CJEU found that, since the obligation to submit a statement of labour costs with the financial offer stemmed from national public procurement law, all reasonably informed tenderers exercising ordinary care were allowed to be in a position to be aware of the relevant rules, among them the obligation to list labour costs in conjunction with the financial offer.^{*42} The CJEU, referring to the findings in the *Pippo Pizzo* case, took this opportunity to offer a reminder that the tenderers are not obliged to consider such information at the time of submitting a tender where the tenderer's obligations are derived from national courts' interpretation of the national law.^{*43}

Hence, even though the obligation to submit labour costs was not repeated in the procurement conditions, it sufficed that the contracting authority had stipulated that the rules of Italy's national procurement law apply to matters not expressly provided for in the tender notice, documents, and specifications. Therefore, the tenderers were or at least should have been aware of their obligation to submit a statement of the labour costs alongside the tender. That is, if the obligation is stipulated in the law in force rather than being derived from national case law, the data at issue must be submitted by the tenderers on their own initiative.^{*44}

It should be kept in mind also that the contracting authority did allow all of the tenderers to submit such data after the tender submission date, applying the equal-treatment principle. Still, the CJEU did not allow the contracting authority to accept the data that were submitted too late. The idea here is that if the obligation to submit such data with the tender stems from the law in force, the contracting authority is not permitted to relieve the tenderers of their duties, even by applying the equal-treatment principle and enabling all the tenderers to correct their alleged mistake equally.^{*45} This would have meant that the contracting authority had in practical terms 'changed the law in force' and therefore still breached the equal-treatment principle.^{*46}

Generally, the tenderer does not need to search for or request explanations from the contracting authority with regard to any other relevant conditions that may apply if it is clear from the tender conditions what those conditions are. That is, the tenderer does not need to assume that there might be some other conditions it needs to be aware of that are not listed in the procurement conditions. The CJEU case law nevertheless assumes a tenderer to be aware at least of the laws and regulations that the contracting authority has referred to in the tender documents. This was the opinion expressed by the Advocate General in 2016, in the *Pippo Pizzo* case, and a similar position had been adopted also by the CJEU itself already in 2019.

³⁹ *Ibid.*, para. 8.

⁴⁰ *Ibid.*, para. 12.

⁴¹ *Ibid.*, paragraphs 13–16.

⁴² *Ibid.*, paragraphs 21, 25, and 27.

⁴³ *Ibid.*, para. 20.

⁴⁴ See also S. Smith. 'Supplementing, clarifying or completing tender documents after submission – permissibility of national rules limiting this opportunity (Lavorgna)'. *Public Procurement Law Review* 2019/5, pp. 195–197.

⁴⁵ For further discussion, see 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)*'. *Public Procurement Law Review* 2022/2, pp. 33–39.

⁴⁶ The same is indicated by S. Smith. 'Optional ground for exclusion for grave professional misconduct and the requirements for proportionality, equal treatment and transparency: *C-171/15 Connexion Taxi Services*'. *Public Procurement Law Review* 2017/3, pp. 86–90.

2.2.3. The tenderer's awareness of the applicable law and national case law in light of the *Pippo Pizzo* and *Lavorgna* rulings

In the context of the tenderer's duty of diligence and the tender exclusion criteria, the *Pippo Pizzo* decision states that the tenderer's duty of diligence is, at least in the context of exclusion criteria, narrow. The tenderer's duty of diligence does not extend to independent activities in searching for applicable obligations not explicitly mentioned by the contracting authority. At the same time, the tenderer's obligation to be aware of the national legal obligation that expressly arises out of the national law in force is not excluded from the duty of diligence, as was evident already in the conclusions from *Pippo Pizzo* and elaborated upon in the *Lavorgna* judgment.

The question that still has no clear answer in the CJEU case law is, whether the contracting authority should make a general reference to the national law for it to apply to the tenderers or not. The logical answer seems to be that where the national law explicitly regulates the tenderer's obligations and, in consequence, the possibility of being excluded, the contracting authority need not stipulate such conditions and it is assumed that the tenderer is aware of such regulations as part of fulfilling the duty of diligence. In cases of such conditions arising from such articulations as administrative acts/regulations, the duty of diligence of a tenderer does not oblige the tenderer to know and honour them. A distinction based on the nature of the regulation (secondary administrative regulation or act etc.) may not be a good means for ascertaining in which cases a duty of diligence obtains, however. Across the Member States, regulations are somewhat different, so discerning the duties of tenderers on the basis of the nature of the legal regulation may be problematic.

In *Pippo Pizzo*, the CJEU drew the line by means of comparison with foreign companies wanting to participate in the tender process. Where 'their level of knowledge of national law and the interpretation thereof and of the practice of the national authorities cannot be compared to that of national tenderers'⁴⁷, in such cases the tenderer does not have to be aware of said regulation. The CJEU delineated the tenderer's duty of diligence not on the basis of the nature of the legal regulation but in terms of what should normally be known to domestic and foreign companies equally.^{48, 49} It follows that the contracting authority needs to stipulate in the procurement documents the applicability of (or at least a reference to) such regulations that foreign tenderers would otherwise not be aware of. Therefore, the boundaries of the knowledge the tenderer ought to be aware of under the duty of diligence as to the applicability of national law are still ambiguous.

The CJEU did not, however, state that the tenderer must under all circumstances be familiar with the national case law. Nor did it explicitly reject that conclusion. The CJEU stated that a condition influencing the tenderer's acceptability or the acceptability of its tender may not arise from the interpretations of the national case law. Being aware of national case law and the prohibition of the contracting authority directly applying concepts from national case law without including these in the procurement documents are distinct from each other. Therefore, the answer to the question of whether the tenderer's duty of diligence entails an obligation to be aware of the national case law and, if so, the extent of that obligation remains inconclusive.

Because setting clear and proportional conditions is the obligation of the contracting authority, at this point in time and with the directions the CJEU's case law has provided, the answer is that the duty of diligence does not require a tenderer to be aware of national case law as a premise for submitting an acceptable tender. It may not, however, be ruled out that this interpretation could change in the future, as the Advocate General hinted already in 2007 by stating that a diligent tenderer would normally be expected to have 'general knowledge of national and Community tender procedures and relevant thresholds, including the possibilities for challenging decisions under both procedures and the time limits for bringing such challenges'.⁵⁰ Such general knowledge could also entail the relevant court practice. So far, the CJEU has analysed the tenderer's duty to be aware of the national law in force but has not analysed the tenderer's duty to have more extensive knowledge of EU procurement law and also, therefore, of the practice of the CJEU itself.

⁴⁷ Case C-309/18, *Lavorgna* (see Note 8), para. 46.

⁴⁸ For more on this, see T. Kotsonis. 'Case C-324/14 Partner Apelski Dariusz v Zarząd Oczyszczania Miasta: the circumstances in which it is permissible to restrict the ability of bidders to rely on third parties'. *Public Procurement Law Review* 2017/1, pp. 18–24.

⁴⁹ For further discussion, see A. Sanchez-Graells. 'The emergence of trans-EU collaborative procurement: "living lab" for European public law'. *Public Procurement Law Review* 2020/1, pp. 16–41. – DOI: <https://doi.org/10.2139/ssrn.3392228>.

⁵⁰ Case C-241/06, *Lämmerzahl* (see Note 14), para. 68.

Even though in the *Pippo Pizzo* case the CJEU was of the opinion that the contracting authority should have mentioned the conditions from the law in force and the case law of the national courts in the procurement conditions,^{*51} it is evident that some level of knowledge of the general legal regulations, EU public procurement regulations among them, may still be expected from tenderers as a part of their duty of diligence.^{*52} Whether particular obligations stemming from the law in force should have been known to the tenderer or not must be assessed case-specifically. Therefore, the CJEU's conclusions in the *Pippo Pizzo* case do not indicate that a contracting authority would be obliged to address all regulations in its procurement conditions; rather, it must cover the ones that are relevant and that may influence the tenderer's ability to take part in the tender process.

Another interesting aspect of the *Pippo Pizzo* case is that the CJEU firmly rejected the argument that the tenderer's prior experience in providing services that constitute the subject matter of the tender should be considered and that, hence, the tenderer should already be aware of such obligations. The CJEU stated that a clear breach of the equal-treatment principle and the transparency obligation exists when the tenderer is 'subject to criteria which are not established by the call for tenders and would not be applicable to new operators'^{*53} – i.e. when the procurement conditions would be somehow assumed and applied on the basis of past procurement procedures in which the economic operator participated. This emphasises again the importance of the duty of diligence of the contracting authority in establishing clear and proportional procurement conditions and affirms that the consequences of the failure on the contracting authority's part shall not result in excluding the tenderer or rejecting its tender.

2.3. The duty of providing information on the tenderer's own initiative

2.3.1. CJEU case law on the tenderer's duty of diligence and voluntary submission of information

In the *Specializuotas transportas* case, two tenderers, both having the same parent company, submitted a tender in the relevant procurement process. The main question in the dispute was whether the tenderers were obliged to inform the contracting authority of the involvement between them, to rule out possible anti-competitive collusion between affiliated tenderers.^{*54, *55} The tender of one of those subsidiary companies was rejected for unsuitability, and that action was not disputed. The other subsidiary company was declared successful, and the tenderer placing second challenged the decision. The main argument being that the two subsidiary companies, because of their alleged mutual involvement, were to be regarded as having submitted alternative tenders, not individual tenders. Since submitting alternative tenders was not allowed, the complainant argued that the contracting authority should have rejected the tenders of both of the subsidiary companies.^{*56}

The national courts in Lithuania found that the subsidiary companies should have informed the contracting authority of their involvement, so as to rule out distortion of competition, although there was no such obligation articulated in Lithuanian national procurement law or the procurement conditions.^{*57} The CJEU reiterated that it is contrary to EU law for subsidiary companies not to be allowed to submit tenders in the same procurement process. Additionally, in a case wherein no such conditions are set forth among the procurement conditions, the tenderers are not obliged to inform the contracting authority on their own initiative. Therefore, the contracting authority was to consider the tenders of both subsidiary companies compliant with the tender conditions.^{*58}

⁵¹ Case C-27/15, *Pippo Pizzo* (see Note 8), paragraphs 43, 45, 46 and 51.

⁵² The same approach is offered on pp. 8–12 of M.A. Simovart's presentation on the new Remedies Directive (see Note 5).

⁵³ Case C-27/15, *Pippo Pizzo* (see Note 8), para. 47.

⁵⁴ For further details on this, see T. Kotsonis. 'Public procurement law concerns and competition law principles: some further reflections on tender co-ordination by affiliated entities in light of *Specializuotas transportas* (C-531/16)'. *Public Procurement Law Review* 2019/4, pp. 153–160.

⁵⁵ See also case C-74/14, *Eturas and Others*, ECLI:EU:C:2016:42, para. 27.

⁵⁶ Case C-531/16, *Specializuotas transportas*, ECLI:EU:C:2018:324, paragraphs 7–14.

⁵⁷ *Ibid.*, para. 16.

⁵⁸ *Ibid.*, paragraphs 23–26.

Three years later, the issue of the tenderer's right and obligation to submit information to the contracting authority was discussed again, in the 2021 *RTS infra* case.^{*59} This time, the question stemmed from the tenderer's right to submit documentation about the self-cleaning measures taken and, thereby, prove that the contracting authority should not exclude said tenderer on the basis of previous breaches committed during the performance of a public procurement contract. Although the case pertained largely to the applicability of the EU's classical public procurement directive in the interim while the national legislator had not yet adopted the provisions necessary for enforcing the new directive, the judgment also touched on the contracting authority's and tenderer's duty of diligence. The Court reiterated similar reasoning seen already in the argumentation in the *Pippo Pizzo* and *Specializuotas transportas* cases: in the event that the obligation to submit documents about self-cleaning measures at a certain moment in a public procurement procedure is not directly derived from national law, the conditions connected with submitting such documents need to be outlined in the procurement documents. The Court even explained that, if the obligation to submit these documents so as to avoid exclusion stems from the law, the procurement documents should make reference in the procurement documents to the relevant national law.^{*60}

2.3.2. Delimitation of the tenderer's duty of diligence with regard to voluntary submission of information

The CJEU's reasoning in both *Specializuotas transportas* and *RTS infra* was similar to that discussed with regard to the *Pippo Pizzo* case above. In the absence of specific requirements in the procurement documents, a tenderer is not obliged to offer any information to the contracting authority. Therefore, performing assessments of what might possibly interest the contracting authority is not part of the tenderer's duty of diligence. Thus, the tenderer's duty of diligence is restricted in light of what information is specifically required by the contracting authority per the procurement documents.^{*61} Considering this alongside the conclusions from the *Lavorgna* judgment, one sees that the duty of diligence includes an obligation to submit information or data to the contracting authority on the tenderer's own initiative if such an obligation or opportunity is provided for by the law in force or explicitly in the procurement documents.

The *RTS infra* case is noteworthy in that the information in question was of a voluntary and not mandatory nature. The contracting authority may exclude a tenderer if a ground for exclusion exists, but that authority may neither oblige the tenderer to take self-cleaning measures nor demand submitting proof to it for ensuring that said tenderer does not get excluded from the competition. This would naturally lead to the conclusion that, in keeping with the tenderer's duty of diligence, the tenderer itself should make sure that the documents at issue are submitted, since otherwise the tenderer might be excluded. As the Advocate General stated 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.'^{*62} Accordingly, it is in the direct interest of the tenderer to safeguard remaining in consideration in the competition. 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 the tenderer, should it wish to appeal to its self-cleaning measures to avoid exclusion, has an obligation to submit proof.^{*63} Hence, the CJEU expressed the same view as in the *Specializuotas transportas* case that the tenderer's duty of diligence with regard to providing information to the contracting authority during the procurement procedure is restricted by way of the information specifically required by the contracting authority per the procurement documents.

The case is even more noteworthy for the CJEU having denied that the tenderer would need to submit information about self-cleaning measures with the tender when the breach that constituted ground for exclusion had taken place in relation to the same contracting authority. The CJEU found that, in such a case, the tenderer 'could reasonably expect, solely on the basis of Article 57(6) of Directive 2014/24, that

⁵⁹ Case C-387/19, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (see Note 4).

⁶⁰ *Ibid.*, para. 36.

⁶¹ See also S. Smith, 'Disclosure and investigation of links between tenderers: case C-531/16 *Specializuotas transportas*'. *Public Procurement Law Review* 2018/5, pp. 131–135.

⁶² Opinion of Advocate General Campos Sánchez-Bordona in *RTS infra* (see Note 4), para. 86.

⁶³ Case C-387/19, *RTS infra* (see Note 4), paragraphs 36 and 37.

they would subsequently be invited by the contracting authority to provide evidence of the corrective measures taken to remedy any optional ground for exclusion which that authority may have identified'.⁶⁴ Consequently, although the tenderer's duty of diligence assumes the tenderer submitting the information listed in the tender conditions at the right time in the procurement procedure, the breach might still not necessarily yield negative outcomes for the tenderer itself as the contracting authority's duty of diligence requires that the tenderer in some circumstances be reminded of its duty and also of the documents accepted in connection with this.

As the circumstances of the *RTS infra* case are somewhat unique, it is debatable whether all the conclusions are transferable to cases wherein the national legislation does specify the exact point at which the tenderer is to submit the self-cleaning documentation. It is rather to be presumed that in cases wherein the national legislation directly obliges the tenderer to submit self-cleaning documents such an obligation would not require repetition in the procurement documents. The *Lavorgna* judgment suggests such a conclusion although the wording of it is not clear-cut.⁶⁵ The nature of the tender conditions is not to dismiss or enforce the law in force, as a contracting authority does not have such legal capacity, but to inform of the possible obligations of the tenderer. Should the law contain provisions that directly oblige tenderers to submit information to the contracting authority, it would be hard to make the argument based on the CJEU's conclusions in *Lavorgna*⁶⁶ and *RTS infra*⁶⁷ that the general law in force is not applicable for the reason of the tender conditions not mentioning this.⁶⁸ In any case, if the tender conditions refer to the national procurement legislation as applicable, the obligation to submit information exists⁶⁹ as the tenderers are duly informed of their obligations and/or they had a possibility to ascertain them.

The *Specializuotas transportas* and *RTS infra* cases, therefore, affirm that the notion of the tenderer's duty of diligence is to be applied and interpreted narrowly since one of its purposes is to respond to the duties of the contracting authority – i.e., to those of the party that is the main subject and enforcer of EU public procurement law. As the foregoing discussion attests, the CJEU has been very conservative in any assignment of direct responsibility to the tenderer in cases of the mistake of the tenderer having followed a mistake by a contracting authority (or the national legislator). Even when the national courts had shown themselves to be more liberal in interpreting the tenderer's duty of diligence, as was evident in the *Specializuotas transportas* case⁷⁰, the CJEU has rejected such expansive interpretations that put emphasis on the tenderer's duty of diligence rather than the contracting authority's own.

This emphasises again that the core purpose of EU public procurement law is to open the common market to all economic operators and that the responsibility for that rests with the contracting authority itself. The tenderer's duty of diligence should always be looked at through this lens first. Therefore, analysis of the tenderer's duty of diligence and any breach of it should always be 'second in line', meaning that the contracting authority's duties and actions should be analysed first. In the event of a mistake being established in the latter, the duty of diligence of the tenderer should not even be considered. This approach is consistent with the methodology of the CJEU in, for example, the *Lämmerzahl*, *Pippo Pizzo*, *eVigilo*, *Specializuotas transportas*, and *RTS infra* cases.

As for the intertwined relationship between the contracting authority's and the tenderer's duty of diligence, it may be suggested that there certainly are cases wherein a heightened duty by one party implies a lower level of required care on the part of the other. For example, as the obligation to set clear tender conditions is a duty of the contracting authority, the tenderer may assume that meeting the criteria set forth in the tender documentation is sufficient. Therefore, the tenderer does not need to search for and analyse any other, related regulations to ensure that its offer will be accepted. There may nevertheless be cases in which the duty of diligence of both the contracting authority and the tenderer are heightened, at the same time. This may occur when there is suspicion of an unreasonably low tender price. In such cases, the contracting authority is obliged to analyse the data surrounding the offered price thoroughly and ask for clarification

⁶⁴ Ibid., para. 40.

⁶⁵ Case C-309/18, *Lavorgna* (see Note 8), para. 25.

⁶⁶ Ibid., paragraph 26.

⁶⁷ Case C-387/19, *RTS infra* (see Note 4), para. 36.

⁶⁸ See also S. Smith. 'Grounds for exclusion and evidence of "self-cleaning": *RTS infra* BVBA and Aannemingsbedrijf Norré-Behaegel (C-387/19)'. *Public Procurement Law Review* 2021/3, pp. 56–60.

⁶⁹ Case C-309/18, *Lavorgna* (see Note 8), paragraphs 21, 25, and 27; case C-387/19, *RTS infra* (see Note 4), para. 36.

⁷⁰ Case C-531/16, *Specializuotas transportas* (see Note 56), para. 16.

while the tenderer simultaneously has an obligation to offer such clarification if it wishes to see its offer accepted.

2.4. An economic operator's diligence connected with proposing a change to a procurement contract

A whole new layer has been added to the discussion by the most recent judgment, in the 2020 case *T-Systems Magyarország and Others*.⁷¹ From Hungary, the Budapest High Court referred a question to the CJEU regarding the possibility of holding a tenderer accountable for breaching the rules on agreeing to modifications in a public procurement contract⁷². Not only did the CJEU consider it possible to hold a tenderer accountable for the unlawful modifications, but the Court also guided the national court to weigh the proportionality of the punishment to the tenderer in consideration of the tenderer's activities at the time of agreeing with the modifications.⁷³ The Court did accept the argument that the subject of the obligation to make sure that any modifications to a public procurement contract are consistent with the applicable EU directives relies on the contracting authority, not on the tenderer.⁷⁴ Nevertheless, the CJEU saw the tenderer as possessing responsibility in agreeing to and also in suggesting such modifications.⁷⁵ The CJEU indicated that the national court is to establish whether the tenderer 'took the initiative to propose the modification of the contract or whether it suggested, or even demanded, that the contracting authority refrains from organising a public procurement procedure to meet the needs necessitating the modification of that contract'.⁷⁶

That being said, the tenderer's responsibility here does not follow EU-wide from either the public procurement or the remedies directives, though the Member States may foresee a misdemeanour in this regard in their national law. Such a responsibility of the tenderer is not harmonised in EU public procurement law.⁷⁷ Nevertheless, the CJEU's decision points to new questions as to the boundaries of the tenderer's duty of diligence. Although regulations may differ between the Member States, usually the public procurement procedure ends upon concluding the public procurement contract. The contract itself is governed by the national civil law and, for the most part, not public law. Under civil-law regulation, as is the case in Estonia, for example, making declarations of intention in a contractual relationship is normal and legal contractual behaviour. The same is true of proposing modifications to a public procurement contract.

In the CJEU framing, to avoid any undesired responsibility for unlawful modifications to a public procurement contract, a tenderer would be required not to suggest such modifications at all and maybe even not to accept such modifications. Since civil-law regulation thus far has articulated the opposite of such an understanding, this would ultimately bring a turning point in the substance of the tenderer's duty of diligence. As noted above, this would require in the first place that each Member State establish such a misdemeanour in its law in force. Secondly, in my view, more detailed regulation pertaining to proposing and agreeing to modifications in public procurement contracts would need to be adopted as well. Tenderers would also require knowledge in advance of how to behave so as to avoid a fine and possibly, in addition, exclusion from the next 3–5 years' public procurement EU-wide.

The *T-Systems Magyarország and Others* judgment thus illustrates that the tenderer's duty of diligence has an independent meaning in EU public procurement law but one with developing substance and boundaries.

⁷¹ Case C-263/19, *T-Systems Magyarország and Others* (see Note 9).

⁷² *Ibid.*, paragraphs 49, 59–61, 63–64, and 67.

⁷³ *Ibid.*, paragraphs 66 and 70.

⁷⁴ *Ibid.*, para. 74.

⁷⁵ *Ibid.*, paragraphs 72–73, 75.

⁷⁶ *Ibid.*, para. 73.

⁷⁷ See also A. Brown. '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* 2020/5, pp. 194–198.

3. Conclusions

The duty of diligence of a tenderer is independent of the duty of diligence of the contracting authority. Even if the CJEU has described the duty of diligence of a contracting authority by outlining the expected influences on tenderers, it is evident from the cases analysed above that a certain level of care is demanded also from the tenderers. The CJEU case law discussed illustrates how the duty of diligence of the tenderer has slowly (and almost in the shadows) developed from a yardstick by which the diligence level of the contracting authority has been measured into an instrument that has a meaning quite independent of the tenderer's rights.

The CJEU characterises a normally diligent tenderer as an economic operator who is well-informed and reasonably aware. The duty of diligence of a tenderer entails at least the obligation of being aware of the tender conditions and, thereby, the expectation of being aware of its possible irregularity either hindering the tenderer's efforts to submit a tender or ruling out winning. A tenderer is to be aware of the relevant national law in force, although the CJEU's conclusions on the boundaries of said obligation are not clear. A diligent tenderer is not required to be acquainted with the relevant case law *per se*. Seeking clarification may form one part of the duty of diligence of a tenderer, but such a duty heretofore has shown relevance mainly in cases pertaining to the tenderer's right to review. Although the Advocate General of the CJEU has referred to diligent tenderers being experienced, said duty has not been confirmed by the CJEU.

The CJEU has been highly conservative with regard to attributing direct responsibility to the tenderer. Among the purposes of the duty of diligence on a tenderer's part is to respond to the contracting authority's duties, the latter being the main subject and enforcer of EU public procurement law. This is why the analysis of the tenderer's duty of diligence and therefore the existence and nature of any breach by the tenderer should almost always come second. The contracting authority's duties and actions should be analysed first, and if a mistake is identified in that stage, the duty of diligence of the tenderer should not even be subject to consideration. This is one of the fundamentals most clearly established in CJEU case law.