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Is the regulation of Abnormally Low Tenders a viable tool to detect cross-subsidisation of public providers?

Analysis of the effectiveness of Article 69 of Directive 2014/24/EU and its application at national level: Italy as a case study

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1 Introduction

The present contribution is meant to analyse whether the European public procurement legal framework provides efficient mechanisms to detect and, ultimately, to prevent the violation of State aid rules, when public law entities take part in procurement procedures as competitive operators.

It must be acknowledged that the cross-subsidisation of activities, which arguably represents the main risk when public law entities bid in a tendering procedure, should be prevented by rules set outside the public procurement framework, above all the Transparency Directive.

However, it is considered that public procurement procedures could play a substantial role in detecting whether these State aid rules have been respected or not. Therefore, the coordinated application of the two sets of rules is necessary to achieve a competitive level playing field.

Accordingly, this article will first analyse the measures provided under State aid law to prevent cross-subsidisation of activities. Then, it will concentrate on Article 69(4) of Directive 2014/24/EU, regulating the exclusion of abnormally low tenders tainted by State aid, which represents, at the current stage, the only tool to tackle State aid issues within public procurement procedures. Specific attention will be given to the ratio of the norm and to the limits of incompatible aids covered by the provision. The (ineffective) relationship between the duties and powers of the contracting authorities and the controlling role of the European Commission will also be discussed.

It will be argued that Article 69(4) of the Directive, as currently formulated and applied, is not useful to detect the cross-subsidisation between competitive and reserved activities. Consequently, some proposals will be made to improve the overall efficiency of the system and to guarantee competition on a fair ground between public and private operators.

The article will then conclude with a specific focus on the application of the mechanism at national level showing how, although the European obligations have been ‘precisely’ transposed, State aid issues are not tackled in case of abnormally low offers of public tenderers.

2 Public undertakings as economic operators in procurement markets

Following the recent trend of liberalisation and externalisation, public law entities have increasingly entered the market as providers of services. At the same time, the European Union has fostered a broad and functional notion of ‘economic operator’ with the clear purpose of opening up procurement markets to public providers, in order to ensure the widest competition possible[1].

Accordingly, the new public procurement Directive[2] has clarified in its Preamble that: “the notion of ‘economic operators’ should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are ‘legal persons’ in all circumstances”[3].

It is clear from the above that the legal status of the entity is irrelevant[4] and the distinguishing element is the offer of products, works or services on the market[5]. In other words, the focus is on the activity exerted rather than on the legal status of the entity carrying it out. Consequently, a public entity can certainly qualify as a valid economic operator as far as it carries out an economic activity and, in relation to that activity, the entity is subject to all relevant competition and State aid rules.

The Court clarified early on that it is irrelevant whether the offering entity provides its services on a regular basis or occasionally, as well as whether the entity has an organisational structure or not[6]. Indeed, the Court held that *“the concept of ‘economic operator’, must be interpreted as per-*

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[1] According to a well-established case law, the widest possible participation by tenderers is meant to guarantee “*the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts and the development, at the Community level, of effective competition in that field*” Case C-213/07 *Michaniki* [2008] ECR I-9999, para 39; Case C-412/04 *Commission v Italy* [2008] ECR I-619, para 2; Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, para 52.

[2] Directive 2014/24/EU of the European Parliament of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65–242).

[3] Recital 14 of the Preamble of Directive 2014/24/EU.

[4] The Commission Notice on the notion of State aid clarifies that “*the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 107(1) of the Treaty. The same applies to an entity that is formally part of the public administration. The only relevant criterion is whether it carries out an economic activity*” (OJ C 262, 19.7.2016, p. 1–50, para 8).

[5] This approach is entirely consistent with the European notion of ‘undertaking’, which encompasses every entity engaged in an economic activity, regardless of whether the body is established under public or private law, or the way in which it is financed (Case 118/85 *Commission v Italy* [1987] ECR 2599, para 11; Case C-41/90 *Hofner and Elser* [1991] ECR I-1979, para 21; Cases C-180-184/98 *Pavlov* [2000], ECR I-6451, para 74; Case C-138/11 *Compass-Datenbank v Republik Osterreich* [2012], ECLI:EU:C:2012:449). For that purpose, any activity consisting of offering goods or services on a given market is considered an economic activity (Case C-41/90 *Hofner and Elser* [1991] ECR I-1979, para 21; Case C-222/04 *Ministero dell’Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, para 107).

[6] Case C-305/08 *Conisma*, [2009] ECR I-12129, para 30; see also, in identical terms, the Opinion of the Advocate General Mazàk in Case C-305/08 *Conisma*, para 21.

mitting entities which are primarily non-profit-making and do not have the organisational structure of an undertaking or a regular presence on the market – such as Universities and research institutes and consortia made up of Universities and public authorities – to take part in a public tendering procedure for the award of a service contract"[7]. In these cases, the Court only requires the service provided be compatible with the institutional and statutory objectives and purposes of the entity involved[8].

Secondly, it is not necessary that the entity has a distinct legal personality. Therefore, also public law bodies and State units, fully integrated in the public administration, can be regarded as economic operators in regard to some of their activities[9].

Following the same extensive approach, also undertakings (public or not)[10] carrying out a SGEI for which they receive compensation and entities entrusted with exclusive or special rights under Article 106(2) TFEU are entitled, in principle, to submit an offer in a public tender procedure.

The same applies for in-house providers[11], as far as the services offered in the tendering procedure do not excxeed the 20% limit set by Article 12 of the new procurement Directive[12].

In conclusion, the European *favor partecipationis* has meant to include within the notion of economic operator a wide spectrum of public law entities, which are engaged in 'mixed activities', provided that such participation does not interfere with their public mission and obligations. In particular, the Court did not consider the fact that these entities benefit from public funds as a valid reason to *a priori* exclude them from competitive procedures[13].

3 The issue at stake: cross-subsidisation of reserved activities

In order to ensure competition on a level playing field between public and private bidders, the favor partecipationis toward public undertakings shall be balanced with adequate competitive neutrality measures[14]. Otherwise said, public undertakings, which are involved in commercial activities, shall not benefit from any unfair competitive advantage over their privately-owned competitors, due to government ownership or involvement.

On this point, two remarks are to be made. On the one hand, as mentioned, public entities entering competitive markets are subject to all relevant competition and State aid rules just as their

[7] Case C-305/08 *Conisma*, para 52.

[8] Case C-305/08 *Conisma*, paras 48-49.

[9] Case 41/83 Italy v Commission [1985], ECR 873, paras 16-20; Case C-138/11 *Compass Datenbank*, para 37.

[10] SGEIs can be provided both by private and public undertakings and the possible violation of State aid rules are potentially the same; however, the present analysis will focus on the case of public entities.

[11] The Court has confirmed this approach even when the in-house provider is directly connected to the contracting authority launching the tender (see Case C-94/99 *ARGE*, [2000] ECR I-11037, para 41).

[12] Article 12 of the new procurement Directive codifies the conditions under which the 'in-house exception' applies; in particular, letter b) of the Article requires that *"more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority"*. Therefore, the in-house entity is entitled to provide to other public contracting authorities up to 20% of its service, in competition with other operators.

[13] Case C-305/08 *Conisma*, para 34; Case C-94/99 *ARGE*, para 25-26.

[14] The identification and enforcement of competitive neutrality policies have been the subject of several reports of the OECD. See in particular: 'Competitive neutrality: Maintaining a level playing field between public and private business' (2012), <www.oecd.org/corporate/50302961.pdf> last accessed 18 March 2018; 'Competitive neutrality, a Compendium of OECD Recommendations, Guidelines and Best Practices' (2012) <www.oecd.org/daf/ca/50250955.pdf> last accessed 18 March 2018; 'Competitive neutrality and State- Owned Enterprises: Challenges and policy options', OECD Corporate Governance Working Papers, No.1 (2011), <www.oecd.org/daf/corporateaffairs/wp> last accessed 18 march 2018.

private competitors. On the other hand, it must be acknowledged that when a public body carries out at the same time both reserved activities and competitive ones, it experiences a 'special link' to the State and its public resources, which needs to be specifically targeted and regulated in order to prevent the violation of State aid rules.

In a public procurement context, it is perceived that one of the main risks is the cross-subsidisation from reserved activities, i.e. the use of resources devoted to performing public interest tasks to boost activities provided on market terms or, from a different perspective, the allocation of costs of the competitive activity to the reserved area. In other words, the competitive activity is performed without covering its real costs with the price charged and the State is (indirectly) paying the difference.

It is worth noting that, when mixed activities are carried out within the same entity, it is often not possible to entirely separate the 'reserved area' from the 'competitive area', since the entity might be using the same infrastructure, personnel etc. etc. Thus, it becomes crucial to identify a method that properly allocates common costs and, consequently, ensures that the public undertaking pays the 'right price' for the services or facilities, which latu sensu receives from the reserved sphere[15].

4 How to prevent cross-subsidisation: separation of accounts, cost allocation and benchmarking

The previous paragraph shows the importance of achieving adequate transparency and accountability of the resources used by the public provider in order to prevent cross-subsidisation of the competitive service. Indeed, the European Union is well aware that "identifying the costs of any given function of commercial government activity is essential if competitive neutrality is to be credibly enforced"[16].

On this regard, two aspects are considered essential: the separation of accounts between the reserved and competitive activities and the identification of a proper allocation method for the common costs. If those conditions are respected, it will be possible for the public operator to demonstrate that it had not received an unfair advantage due to its link with the State and, conversely, for the Commission to verify such circumstance. In particular, it would be able to benchmark the inter-

[15] On this regard, the Court has set, as a general rule, that the provision of logistical and commercial assistance by a public enterprise to its subsidiaries carrying out commercial activities amounts to State aid "*if the remuneration received in return is less than that which would have been demanded under normal market conditions*" (Case C-39/94, *SFEI* [1996], ECR I-3547, para 62). In exceptional circumstances, where normal market conditions are merely hypothetical, i.e. there is no equivalent private operator on the market, the presence of aid is excluded if "*the price charged properly covers all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it is used for* [the competitive] *activity and if, second, there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion.*" (Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others v Ufex and others* [2003], ECR I-06993, para 40). As it has been brilliantly summarized: "*the economic activity (the public undertaking) must not acquire services or products from the non-economic sphere without paying full market price for the said products or services as if the said products or services had been acquired from a third party* [SFEI formula]. *It is only when the market price cannot be established that it will be permissible for the economic sphere to pay a full cost price following the* Chronopost *formula"* (Honoré M., 'Public Activities on Commercial Markets: The Issue of Cross-subsidisation' in EStAL 2|2017, 181-191 at p.187).

[16] OECD report 'Competitive neutrality: Maintaining a level playing field between public and private business', op. cit., p. 35.

actions between the reserved and competitive area and, consequently, to check whether the market economy investor principle has been respected.

To that purpose, the Commission issued the Transparency Directive[17], which specifically imposes a separation of accounts to "any undertakings that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) [now Article 106(1)] of the Treaty or is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) [now Article 106(2)] of the Treaty, that receives public service compensation in any form whatsoever in relation to such service and that carries on other activities"[18]. The Directive clarifies that, from such separation of accounts, "(a) the costs and revenues associated with different activities; (b) full details of the methods by which costs and revenues are assigned or allocated to different activities"[19] must emerge clearly.

This obligation represents the fundamental guarantee for preventing unlawful cross-subsidisation of activities within the same entity[20]; however, the current version of the Directive might not be sufficient to entirely achieve the goal.

The first and most important problem is the very high threshold of application of the Directive, i.e. EUR 40 million of total annual turnover, which de facto strongly limits its enforcement.

Arguably, such threshold does not represent an adequate balance between the enforcement of transparency, which is essential to both State aid and public procurement rules, and the administrative burden that the enforcement of this accounting obligations imposes upon economic operators.

Hence, a lower threshold should be set following a more functional approach, which focuses on the real cross-border interest of these transactions and on their actual effect on trade within the EU context[21].

The second problem is that the separation of accounts is not imposed to all undertakings involved at the same time in reserved and competitive activities, but solely to undertakings which are either entrusted with special/exclusive rights or receive public compensation for the discharge of a SGEI. In my view, however, the obligation to separate accounts should be extended to the whole spectrum of public economic operators which are allowed to carry out mixed activities and not solely to those which carry out SGEIs[22]. Indeed, the public resources used by the entity to carry out the service on the procurement market should always be made transparent and the specific costs and revenues attached to that activity should be kept separate.

Thirdly, the Transparency Directive does not impose, as rightly observed[23], a specific method of allocation of the common costs of the different activities carried out, but it merely requires the public undertaking to clarify which method was adopted. On this regard, it is considered that the en-

[17] Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 312, 29.11.2005, p. 47–48).

[18] Article 2 of the Transparency Directive.

[19] Article 1 of the Transparency Directive.

[20] On that regard, the EU acknowledged that *"The requirements imposed by the Transparency Directive have proven to be efficient means by which fair and effective application of the rules of competition to public undertakings can be assured. For instance, they allow the Commission to check that public service compensations do not exceed the costs incurred in discharging the public service obligations and are not used to cross-subsidize commercial activities"* (Roundtable on Competitive Neutrality in competition Enforcement, Note by the European Union, 16-18 June 2015 DAF/COMP/WD(2015)31, para 61).

[21] To that extent, see also the reasoning of the Court in Case C-147/06 *SECAP and Santorso,* [2008] ECR I-03565.

[22] In particular, it is considered essential to include all in-house providers, irrespective of whether they provide a SGEI or not. See for discussion Ølykke G.S. 'A state aid perspective on certain elements of Article 12 of the new Public Sector Directive on in-house provision', Public Procurement Law Review, 1|2015, 1-15.

[23] Hancer L., Ottervanger T. and Slot P. J., *EU State Aids*, (Sweet & Maxwell, 2012), paras 8-015 and 8-051.

forcement at EU level of a uniform and equitable accounting system[24] would facilitating the surveillance task of the Commission and also of the contracting authorities in the verification procedure (see infra).

5 How to detect cross-subsidisation in procurement context: Article 69(4) of Directive 2014/24/EU

It emerges from the above that the cross-subsidisation operated within public undertakings can be challenged in the procurement context only inasmuch as it amounts to a breach of State aid rules. Otherwise said, it must be proved that the public undertaking has benefited from an incompatible State aid - consisting of the cross-subsidisation from the 'public sphere' - for it to be excluded from the tendering procedure.

At the current stage, the fourth paragraph of Article 69 of Directive 2014/24/EU represents the only mechanism, which could – at least in principle - detect and prevent unlawful cross-subsidisation of activities. In particular, the provision allows the contracting authorities to reject abnormally low offers tainted by incompatible aid.

Before entering the analysis of the fourth paragraph, it is preliminary necessary to outline the general principles set by the provision and the rationale regulating the abnormally low tender mechanism (ALT).

5.1 The principles and ratio of the abnormally low tender mechanism

In general terms, Article 69 of the procurement Directive provides a mechanism that allows contracting authorities to refuse to award the contract to the lowest bidder when the tender appears to be abnormally low in relation to the goods, works or services provided for the contract.

Accordingly, when confronted with an offer which appears to be abnormally low, the contracting authorities "must require economic operators to explain the price or costs proposed in the tender[25]". This statement codifies two important and complementary principles.

First, when a given offer appears to be abnormally low compared to the others submitted, the contracting authority cannot award the contract without having previously verified that the offer is economically sustainable and complies with all the relevant provisions.

Secondly, the contracting authority cannot automatically exclude a 'suspect offer', but it shall always give the possibility to the contested tenderer to prove the genuineness and reliability of its offer[26]. On this regard, the Court has indeed established early on that "the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer, to enable the latter to demonstrate that its tender is genuine, constitutes a fundamental requirement of Directive 92/50 [now Directive 2014/24/EU], in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings"[27].

It is worth noticing that the verification procedure represents a guarantee also for the contracting authority, since it limits, when properly conducted, the risk of possible contestations from the other

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[24] Reference could be made also to the cost approaching methods suggested by the new SGEI Framework (European Union framework for State aid in the form of public service compensation, OJ C 8, 11.01.2012, p. 15-22).

[25] Article 69(1) of Directive 2014/24/EU.

[26] Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani,* para 72; Case T-495/04 *Belfass,* paras 102–03.

[27] Case C-568/13, *Azienda Ospedaliero-Universitaria di Careggi-Firenze v Data Medical Service Srl* [2014],

unsuccessful bidders.

Following this approach, the second paragraph of Article 69 provides a non-exhaustive list of possible justifications for the low level of the price submitted and the contracting authority may only reject the offer if the evidence provided by the contested tenderer is not sufficient – taking into account the list of possible explanations - to justify the low price.

Within this framework of procedural guarantees, however, the contracting authority retains a wide margin of discretion to assess the anomaly character of the offer, whose amplitude varies depending on whether the Member State has set a method to calculate beforehand the threshold of anomaly[28].

If the threshold is not set, the discretional evaluation of the contracting authority occurs both at the stage of identification of the anomaly, i.e. whether or not a given price is abnormally low in comparison with the others, and at the stage of the assessment, i.e. whether or not the evidences provided are sufficient to justify the low price submitted.

If, instead, the method of calculation is set, the contracting authority has no discretion in regard to the identification phase, but it retains full discretion regarding the assessment of the genuineness of the offer and its evaluation cannot be questioned unless is manifestly wrong or unreasonable[29].

On this point, it is worth noting that Article 69 sets only one mandatory ground of exclusion: the breach of the applicable obligations referred to in Article 18(2) of the Directive[30]. In other words, if it emerges that the bidder was able to submit an abnormally low price or costs because it does not comply with the applicable social, environmental and labour legislation, then the adjudicating authority is left with no discretion but to reject the offer.

Apart from this case, however, the contracting authority discretionarily assesses the risk of non-performance of the contract, which is to be considered as the risk of financial instability or disequilibrium of the involved tenderer. In other words, the adjudicating authority evaluates whether the abnormally low price or costs submitted is not economically sustainable and, consequently, there is a risk that either the operator will not respect the qualitative standards set by the tender or it will not provide the service at all.

It clearly emerges that the main ratio of the norm is to prevent the award of public contracts to unreliable economic operators, which would ultimately not be able to provide the public service at the conditions set by the tender.

However, since the risk of non-performance of the contract is discretionarily assessed by the contracting authorities, it can possibly be outweighed by the advantageous price offered. Such 'balancing test' represents the core of administrative discretion; nonetheless, it is argued that if the contracting authority identifies a risk of non-performance of the contract and the tenderer is unable to prove during the verification procedure that this risk is not real, then the contracting authority

ECLI:EU:C:2014:2466, para 48.

[28] It is important to note that neither the Directive nor the European case law have provided a general definition (or a method of calculation) of 'abnormally low offer'. Thus, it is for the Member States to determine the method of calculating the threshold of anomaly within the meaning of the provision (Case C-568/13 *Data Medical Service*, para 49-50; Case C-285/99 and C-286/99 *Lombardini and Mantovani*, EU:C:2001:640, para 67).

[29] On this regard, the Italian Consiglio di Stato affirmed that "*il giudice amministrativo può sindacare le valutazioni della Pubblica amministrazione sotto il profilo della logicità, ragionevolezza ed adeguatezza dell'istruttoria, ma non procedere ad una autonoma verifica della congruità dell'offerta e delle singole voci, che costituirebbe un'inammissibile invasione della sfera propria della Pubblica amministrazione e tale sindacato rimane limitato ai casi di macroscopiche illegittimità, quali errori di valutazione gravi ed evidenti oppure valutazioni abnormi o inficiate da errori di fatto*" (Cons. Stato, sez. V, 2 dicembre 2015, n. 5450).

[30] See for analysis Ølykke G.S. 'The provision on abnormally low tenders: a safeguard for fair competition?' in Ølykke G. S., Sanchez-Graells A. (eds) *'Reformation or deformation of the EU Public Procurement Rules'* (Edward Edgar Publishing, 2016).

should not be given unlimited discretion to accept such a risk[31].

5.2 The obligations set by Article 69(4) of the Directive

Having identified the general principles and ratio of the norm, it is now possible to properly assess the rules set by the fourth paragraph of Article 69. The provision states that: "Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107". If the contracting authority rejects the offer on that ground, it shall inform the Commission thereof.

On this regard, it must be acknowledged that the Court of Justice has previously ruled that "the mere fact that the contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers to take part in a procedure for the award of a public service contract does not amount to a breach of the principle of equal treatment laid down in Directive 92/50 [now Directive 2014/24/EU]"[32].

Accordingly, Article 69(2)(f) expressly considers "the possibility of the tender obtaining State aid"[33] - which shall be understood as compatible State aid - as a valid justification for the apparently abnormally low price or costs submitted.

At the same time, however, the Court clarified that "the contracting authorities are required, or at the very least permitted, to take into account the existence of subsidies, and in particular of aid incompatible with the Treaty, in order, where appropriate, to exclude tenderers in receipt of such aid" [34].

In essence, that means that if the tenderer benefits from a compatible aid, then it shall not be banned from tendering; on the contrary, the presence of incompatible aid allows the contracting authority to reject the offer on that ground alone.

It is clear that this aspect becomes crucial – and extremely challenging – when it comes to cross-subsidisation, because it might not always be easy to verify that the public funds were originally incompatible with the internal market.

On this regard, indeed, it is argued that cross-subsidisation amounts, in the majority of cases, to a misuse of compatible aid, rather than plain incompatible aid (see infra), where the funds diverted from the reserved area have been in principle granted for compatible purposes. In other words, had the public funds not been used to cross-subsidise the competitive market, they would have been perfectly in line with both State aid and procurement rules.

Moreover, it is worth noting that the general ratio of the norm, i.e. the prevention of the risk of non-compliance of the economic operator, applies also in the case regulated by the fourth paragraph.

As a matter of fact, if the undertaking is benefiting from an incompatible aid, then there is always a pending risk of recovery of the measure – and possibly also of the payment of damages – upon that operator. This risk, in turn, could ultimately determine the insolvency of the operator or, at the very least, its incapacity to perform the contract according to the qualitative conditions set by the tender.

The Court seems to consider that the tenderer, which appears to be tainted by incompatible aid,

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[31] See for discussion Sanchez-Graells A. *Public Procurement and the EU Competition rules* (Hart, 2015), p. 402-403.

[32] Case C-94/99*ARGE*, para 30.

[33] Article 69(2)(f) of Directive 2014/24/EU.

[34] Case C-305/08 *Conisma*, para 33; Case C-94/99 *ARGE*, para 29; Case C-568/13 *Data Medical Service*, para 44.

should be excluded only insofar as such risk occurs; accordingly, it ruled that “a tenderer may be excluded from a selection procedure where the contracting authority considers that it has received aid incompatible with the Treaty and that the obligation to repay illegal aid would threaten its financial well-being, so that that tenderer may be regarded as unable to offer the necessary financial or economic security”[35].

What the Court suggests with this statement is that the main ratio behind the provision is not the protection of the market from competition distortions per se, but ‘just’ the protection of the contracting authority from unreliable bidders.

However, it is argued that, in specific regard to the case of abnormally low tenders tainted by illegal State aid, the abnormally low offer should be excluded even in the absence of an ultimate risk of non-compliance of the contract. Otherwise said, the breach of State aid law - and the consequent distortion of competition among tenderers - should be treated as a sufficient and self-standing ground of exclusion.

Along the same line, some Authors have stressed that Article 69(2)(f) permits to exclude tenders tainted by unlawful State aid “on that grounds alone” and, consequently, “the word ’alone’ indicates that incompatible State aid is a sufficient reason to reject the offer. It is not necessary to uncover other grounds, for example the risk of non-performance” [36].

6 Critical assessment of the provision

It is considered that Article 69(4) of the procurement Directive is not, in the way it is formulated and applied, an efficient tool to prevent cross-subsidisation, particularly within public undertakings. The present section analyses the main shortcomings of the provision and what could be done to improve the overall efficacy of the mechanism. In particular, it shows the importance of achieving a better interaction between the norm and the obligations set by the State aid legal framework, above all the Transparency Directive.

6.1 The monopoly of the Commission on the substantive assessment of compatibility of the aid

The main problem, at the present stage, is that the contracting authority is given scarce powers of investigation to properly verify whether the aid granted is “compatible with the internal market within the meaning of Article 107”[37].

In particular, the contracting authority is entitled to carry out only a formal scrutiny of compatibility, which is limited to the assessment of whether the aid was either approved by the Commission or felt within one of the exemption Regulations, while the Commission (still) enjoys an exclusive monopoly in relation to the substantial assessment of compatibility.

Otherwise, if the contracting authority considers that the contested tender has benefited from a State aid which has not been already declared compatible by the Commission (and do not fall within the exemption Regulations), it must suspend the procedure and wait for the response from the Commission[38].

[35] Case C-94/99 *ARGE*, para 30.

[36] Kekelekis M. and Neslein K. ‘Public procurement and State aid’ in Bovis C. (ed) *Research Handbook on EU Public Procurement Law* (Edward Edgar Publishing, 2016), p.478.

[37] Article 69(4) of Directive 24/2014/EU.

[38] To that extent, *“the rule may be seen to amount exclusively to an obligation* [for the contracting authority] *to suspend award procedures while an eventual procedure before the European Commission is completed”* (Sanchez-Graells A., op. cit., p. 405, fn 568).

Undeniably, the suspension of the procedure determines an incredible delay in the award of the contract, which is potentially more disruptive to the execution of the contract than the risk of non-performance and of possible contestations from other unsuccessful tenderers. This might be the reason why, in practice, the provision has almost never been applied by the contracting authorities[39].

It emerges from the above that the contracting authority does not have, in practice, the power to contest cases of cross-subsidisation, where a verification of the financial structure of the public economic operator is required. Indeed, the cross-subsidisation of activities might not be immediately 'perceivable' from the tenor of the offer itself and it is necessary to verify, at the very least, the tenderer's compliance with the rules set by the Transparency Directive.

In essence, the contracting authority is somewhat prevented from applying State aid rules in the procurement procedure context, since the enforcement of such rules implies an assessment of the financial structure of the public bidder and – indirectly - of the 'aid'.

In my opinion, to prevent this highly undesirable outcome, the provision should be interpreted so as to permit the contracting authorities to directly and immediately verify the compliance of the (public) tenderer with the obligations set by Transparency Directive – with the proposed amendments presented in the previous paragraphs – and to exclude the tenderer which does not respect such rules.

It could be said, indeed, that the verification of the compliance with the Transparency Directive does not represent a discretionary evaluation of the compatibility of the measure, thus it does not invade the Commission's exclusive sphere of competence. On the contrary, the contracting authorities would merely act as longa manu of the Commission, applying rules and mechanisms which have been set by the Commission itself to facilitate its surveillance role.

6.2 Misused aids cannot be excluded

It is considered that Article 69(4) of the Directive is even less efficient when cross-subsidisation results from the misuse of public funds, which are in principle compatible with the internal market.

This is because the norm does not expressly refer to misused aids but only to 'aids incompatible with the internal market'; thus, it seems that this type of unlawful aids is somewhat left outside the scope of the norm.

In other words, the focus is on the 'original compatibility' of the measure, but the subsequent use of the aid cannot be directly investigated by the adjudicating authority[40], which is not, consequently, entitled to directly exclude an offer tainted by misused aid. Once again, the misuse itself can only be assessed by the Commission, according to Article 108(2) of the TFEU.

In essence, even if the contracting authority was able to detect and to contest that the public tender has misused public funds originally compatible with the internal market to boost its commercial activity, it would not have, at the current stage, the capacity to reject the tender on that ground.

Arguably, this represents a further limit of the norm.

In fact, as previously discussed, cross-subsidisation from the public sphere might very often fall within the category of misused aids rather than originally incompatible aids and "[the] misuse of aid may have effects on the functioning of the internal market which are similar to those of unlawful

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[39] See for discussion Ølykke G. S. 'The Legal Basis Which Will (Probably) Never Be Used', EStAL [3|2011].

[40] It has indeed been argued that "*as long as the tenderer can document that the State aid received and used to make the tender more favorable (in fact, rendering it apparently abnormally low) has been granted legally, the tender is safe and cannot be rejected on the ground that it is tainted by State aid. This State of law means that a misuse of State aid would not be detected, even if contracting authorities were going to use the legal basis in Article 55(3)* [now Article 69(4)] *of the Public Procurement Directive*" (Ølykke G. S. 'The Legal Basis Which Will (Probably) Never Be Used', EStAL [3|2011], p. 465).

aid and should thus be treated according to similar procedures”[41].

6.3 The ratio of the norm fails in case of public undertakings

As presented, in the specific case of bids tainted by unlawful State aid, the prevalent opinion is that the abnormally low offer should be excluded only as far as the risk of the recovery of the measure might determine an ultimate financial disequilibrium of the tenderer. Such approach, however, is considered to be not only incoherent in respect to the general principle of competition law (see supra), but also entirely inefficient in case of public operators.

This is because public undertakings unlawfully benefiting from public resources do not really face a risk of non-performance, even if the measure were to be recovered and they had to provide the service at a loss. In other words, even if cross-subsidisation were to be discovered and prevented, the financial well-being of the public entity would hardly be threatened, since public entities are very unlikely to go bankrupt and ‘the State’ would ultimately pay for the shortfall.

Thus, since such a risk of non-performance of the contract does not seem to exist in case of public tenderers, their abnormally low offers would hardly be rejected by adjudicating authorities. Indeed, according to the contested approach, the contracting authorities would have no direct interest to question the abnormal character of the public offer presented.

As a matter of fact, even if the price paid would not cover the relevant costs to provide the service, neither the contracting authority nor the public tenderer would be directly affected; arguably, the taxpayers would be the only indirect payers for the risk taken by the tenderer[42].

It emerges from the above that the rationale of the ALT mechanism provided by Article 69(4) of the Directive should not be limited to the risk of non-compliance, especially in cases of public bidders. On the contrary, the norm should be used as a tool to ensure competition on a level playing field among all operators in the procurement market. Consequently, an offer abnormally low due to the presence of unlawful State aid should be excluded on that ground alone, without having to further demonstrate that there is a risk of non-performance.

7 The enforcement of the mechanism at national level: Italy as a case study

After presenting the European scenario, this contribution will conclude with a focus on the Italian transposition of the ALT mechanism. The intention is to evaluate whether the critical aspects outlined in the previous paragraphs have had an impact on the enforcement of the provision and, ultimately, whether the mechanism is actually applied at national level.

On this regard, it is considered preliminary necessary to analyse the internal rules regulating the separation of accounts for public entities carrying out ‘reserved’ and ‘competitive’ activities at the same time; in other words, to scrutinise how the Transparency Directive has been transposed within the national legal framework.

Indeed, as discussed at length, the obligations set by the Transparency Directive play a crucial role in preventing the cross-subsidisation of activities; thus, it is important to assess whether and how they are enforced at national level.

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[41] Recital 28 of the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9–29); see in particular Article 20 of the Council Regulation on the ‘Procedure regarding Misuse of aid’.

[42] See for discussion Ølykke G.S. ‘Public Undertakings and Imputability – the case DSB First’, EStAL 2|2013.

7.1 The transposition of the obligations set by the Transparency Directive

The two relevant provisions regarding the separation of accounts at national level are Article 8 of Law 10 October 1990 n. 287, as amended by Article 11 of Law 5 March 2001 n. 57, and Article 6(1) of Legislative Decree 19 October 2016 n. 175.

The first provision imposes a general obligation to act 'by means of separate entities' upon the undertakings, which are entrusted with a special or exclusive right or with the provision of a SGEI and, at the same time, operate in the market with other competitive activities[43].

Furthermore, the Article also sets a general obligation to preventively notify the constitution of these separate bodies to the relevant antitrust authority (AGCOM)[44], which can sanction the undertakings that do not comply with this obligation[45].

Evidently, the norm pursues the same ratio of the Transparency Directive, namely the achievement of transparency between competitive and reserved activities and the prevention of unlawful cross-subsidisation[46].

However, the provision imposes a higher degree of separation than the one required at European level by the Transparency Directive, since it prescribes not only a separation of accounts but the constitution of a different, rectius separate, body to carry out the 'competitive activity' on the market[47].

Arguably, this solution might be perceived as more effective in order to prevent cross-subsidisation and, ultimately, to ensure competition on a level playing field among economic operators, but it determines, on the other hand, a proliferation of public entities in the market.

To reduce this phenomenon – which runs counter the current trend of liberalisation of public entities and dismissal of public shares – the recent national reform regarding State Owned Enterprises has introduced an important derogation the general rule set by Article 8 of the Law 287/1990.

In particular, Article 6(1) of the newly released "Testo Unico in materia di società a partecipazione pubblica"[48] prescribes that all 'undertakings subject to public control'[49] that carry out at the same time exclusive or special rights[50] and other economic activities in the market shall main-

[43] Article 8, comma 2-*bis* of L. 287/1990.

[44] Article 8, comma 2-*ter* of L. 287/1990.

[45] Article 8, comma 2-*sexies* of L. 287/1990.

[46] On this regard, it has been affirmed that "*Le finalità della norma sono trasparenti: se anche con la semplice separazione contabile è possibile evidenziare attività e passività relative ai differenti campi di attività, evitando cosí che l'originaria posizione di privilegio possa essere surrettiziamente utilizzata su altri mercati (tipicamente attraverso un sistema di sussidi incrociati), con l'imposizione della separazione societaria tale risultato dovrebbe essere ottenuto in modo piú netto*" (Meli V., 'La modifica dell'art. 8 della legge antitrust', in *Le nuove leggi civili commentate*, 2001(5), p. 1084).

[47] The provision uses the expression of 'separazione societaria', i.e. separate bodies, as opposed to 'separazione contabile', i.e. the (mere) separation of accounts. For a thoughtful analysis on the different types of separation and, in general, on the application of Article 8 of the Law 287/1990 see Beretta M. and D'Ostuni M. *Il Sistema di controllo delle concentrazioni in Italia*, (Giappichelli, 2017), p. 241 et ss; see also Piron F. 'Separazione Societaria e Obbligo di comunicazione Preventiva secondo l'Articolo 8 della Legge 10 Ottobre 1990 N. 287', <web.jus.unipi.it/documenti/pisarum_joe/collana/03%20-%20articolo%20Piron.pdf>, last accessed 15 March 2018.

[48] Legislative Decree 19 October 2016, n. 175.

[49] The definition of 'public control' provided by Article 2(1)(b) e (m) of the Legislative Decree n. 175/2016 recalls (although it is not identical) the notion of 'dominant influence' introduced by Article 2(b) of the Transparency Directive.

[50] Article 6(1) of Legislative Decree n. 175/2016 establishes that: "*Le società a controllo pubblico, che svolgano attività economiche protette da diritti speciali o esclusivi, insieme con altre attività svolte in regime di economia di mercato, in deroga all'obbligo di separazione societaria previsto dal comma 2-bis dell'articolo 8 della legge 10 ottobre 1990, n. 287, adottano sistemi di contabilità separata per le attività oggetto di diritti speciali o esclusivi e per ciascuna attività*".

tain, 'in derogation to the rule set by Article 8 of the Law n. 287/1990', separate accounts in relation to the different activities.

In other words, the norm has transposed the obligation set by Article 1(2) of the Transparency Directive and, in doing so, it has adopted the softer European standard of separation of accounts for the largest majority of undertakings subject to public control.

In fact, although Article 6(1) of the Legislative Decree n. 175/2016 formally represents an exception to the general rule set by Article 8 of the Law n. 287/1990, its broad scope of application[51] determines a new regime for the financial organisation of all public entities enjoying special or exclusive rights (while the general rule still applies in case of entities entrusted with the provision of SGEIs[52]).

7.2 The abnormally low tender mechanism according to Article 97(7) of Legislative Decree n. 50/2016

The mechanism set by Article 69 of the 2014/24/EU Directive has been diligently transposed at national level within Article 97 of the new Code of Public Contracts[53]. In particular, Article 97(7) entirely reproduces the content of Article 69(4) in relation to abnormally low tenders tainted by unlawful State aid.

Thus, provided that the internal norm regulating abnormally low tenders tainted by State aid is formally identical to the European one, the focus shifts on its enforcement. In other words, the question to be answered is whether (and how) the contracting authorities actually apply such mechanism.

As a premise, it is worth reminding that Italy is one of those Member States which have chosen to codify a (rather complex) general method to calculate the threshold of anomaly (see supra)[54]. Consequently, the discretionary assessment of the contracting authority will concentrate in the evaluation of the justifications for the anomaly, rather than in the individuation of the anomaly itself[55].

Having said that, it is to be acknowledged that the ALT mechanism in relation to offers tainted by State aid is very rarely applied and there is only scarce case law on the matter.

As a matter of fact, in the few pronounces that have occurred over the past decade, the national judge has mostly reaffirmed the two principles already expressed in the norm, i.e. first, that the contracting authorities shall verify, before excluding the contested tenderer, whether the abnormally low price submitted is due to unlawful State aid[56] and, secondly, that undertakings benefiting from

[51] The notion of 'entities subject to public control' as provided by Article 2(1)(b) e (m) of the Legislative Decree n. 175/2016 very ample; thus the scope of application of the norm becomes very broad.

[52] See for discussion Di Nunzio A. and De Carlo E. 'Il decreto legislativo sulle società a partecipazione pubblica' in Meschino M. and Lalli A. (eds) *Le società partecipate dopo la Riforma Madia. Commento organico al D. Lgs. 19 agosto 2016, n. 175'* (Dike, 2016).

[53] Legislative Decree of 18 April 2016, n. 50, as amended by the Legislative Decree of 19 April 2017, n. 56. It is worth noting that the mechanism was already established in Article 55(3) of the 2004/18/EC Directive of public procurement and equally transposed in Article 87(5) of the Legislative Decree of 12 April 2006, n. 163 (i.e. the old Code of Public Contracts).

[54] Article 97(2) and (3) of the Legislative Decree 18 April 2016, n. 50, as amended by Legislative Decree 19 April 2017, n. 56. See for a general analysis Chieppa R. and Giovagnoli R., *Manuale di Diritto Amministrativo* (Giuffrè, 2017), p. 779-782.

[55] On the notion and limits of the discretionary evaluation which can be exerted by the contracting authorities see: Longo A. "Verifica dell'anomalia delle Offerte e limiti del sindacato giurisdizionale – il commento", Urbanistica e Appalti, 2014, 6, 680.

[56] T.A.R. Campania, Napoli, sez. IV, 6 October 2016, n. 4619; T.A.R. Campania, Salerno, sez. I, 31 January 2017, n. 173.

compatible aid cannot be excluded[57].

In general terms, the contracting authorities do not seem to use the mechanism set by Article 97(7) as a tool to prevent cross-subsidisation of public providers; moreover, given the scarce case law on the matter, it appears that also the competitors of the public tenders rarely challenge their offers on this ground.

Such a result is not entirely surprising since, as discussed at length, the norm is currently conceived in a way which cannot be effectively implemented by the contracting authorities, neither can it be successfully invoked by other tenderers before the administrative judge. In other words, the national scenario seems to confirm the criticalities of the mechanism presented in the previous paragraphs.

In addition to that, it is considered that there is another circumstance, with specific regard to the Italian situation, which has further paralysed the application of the norm to public tenders tainted by unlawful State aids.

7.3 The impact of Case C-568/13 to the application of the mechanism in the Italian scenario

It is to be acknowledged that the Consiglio di Stato was not unaware of the issue of the possible distortion of competition deriving from the participation of public undertakings in the procurement market. On the contrary, the landmark case regarding abnormally low tenders submitted by public mixed entities, the Data Medical Service judgment[58], comes from a request of preliminary reference sent by the Consiglio di Stato.

In this case, a public Azienda, entrusted with the in-house provision of regional healthcare, participated in a public tender, submitting an offer with a price much lower than the other bidders. Following an investigation into the potentially abnormal character of that tender, the contracting authority eventually awarded the contract to the Azienda. The runner-up, Data Medical Service, challenged the award claiming that the Azienda should have been a priori excluded due to its public nature. It was contested that a public entity entrusted to manage in-house the public hospital – thus benefiting from unlimited access to public infrastructures and resources - could not fairly compete with private operators.

In its request for preliminary reference[59], the Consiglio di Stato acknowledged that this type of public entity should not be excluded a priori, according to the well-established principle of favor partecipationis set by the European Court. However, the Consiglio pointed out that "the right of an entity in receipt of public funds to participate freely in an invitation to tender raises the issue of equal treatment between disparate competitors, on the one hand those which must be active on the market and, on the other hand, those which can also rely on public funding and are thereby able to submit tenders that no persons governed by private law would ever have been in a position to submit"[60]. Consequently, the Italian supreme administrative Court considered that such participation should not be 'unconditional' and it was essential to identify corrective mechanisms to ensure competition on a level playing field between public and private economic operators[61].

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57 Cons. Stato, sez. VI, 23 January 2013, n. 387; T.A.R. Campania, Napoli, sez. VIII, 5 November 2015, n. 5125.

58 Case C-568/13 *Azienda Ospedaliero-Universitaria di Careggi-Firenze v Data Medical Service Srl* [2014] ECLI:EU:C:2014:2466. Interestingly, the Consiglio di Stato had already raised the issue in 2008 (although without referring to the European Court), see Cons. Stato, sez. V., 25 August 2008, n. 4080.

59 Cons. Stato, sez. III, 30 October 2013, n. 5241.

60 Case C-568/13 *Data Medical Service*, para 28.

61 The Consiglio di Stato submitted two preliminary questions: *(1) Does Article 1 of Directive [92/50], read also in the light of the later Article 1(8) of Directive [2004/18], preclude national legislation which was interpreted as excluding the Azienda, by hint of the fact that it is a commercially-run hospital characterisable as a public economic*

On this regard, the Consiglio doubted that the ALT mechanism was sufficient for this purpose.

In its response, the Court prohibited any automatic exclusion and confirmed that the only mechanism to be used, on a case by case approach, was the one provided by Article 55(3) of Directive 2004/18/EC, now Article 69(4) of Directive 2014/24/EU.

After acknowledging that the contracting authorities are permitted, to take into account the existence of subsidies, and in particular aid incompatible with the Treaty, in order to exclude the recipient tenderers, the Court added that "the fact that the public entity concerned has separate accounts for its activities on the market and for its other activities may make it possible to establish whether a tender is abnormally low as a result of the effect of an element of State aid. However, the contracting authority may not conclude from the absence of such separate accounts that such a tender was made possible by the grant of a subsidy or State aid which is incompatible with the Treaty"[62].

Arguably, this ruling is rather misleading and ineffective.

As a matter of fact, not only does it not provide any clarification to the contracting authority on how to carry out the verification procedure[63], but also it seems to run counter the specific obligation set by the Transparency Directive, which imposes the separation of accounts for certain categories of (public) undertakings.

Indeed, according to the principle of budgetary transparency, an entity which provides the health regional service in-house and, at the same time, other services on competitive terms should maintain separate accounts. Thus, the absence of such separation should not, in my opinion, be regarded as irrelevant.

Only in this way will the contracting authority be able to verify the allocation of costs of the contested offer and, ultimately, determine whether unlawful cross-subsidisation has occurred. As discussed, if this is the case, the adjudicating authority should be enabled to reject the offer on that ground alone.

It could be said that, with this judgment, the European Court has further deprived of any effectiveness the mechanism set by Article 69(4) since it has, although ambiguously, almost exempted the contracting authorities from verifying the compliance of public tenderers with the transparency obligations. Not surprisingly, from then on, the issue has remained almost entirely undisputed at national level, both by the contracting authorities and by the case law[64].

entity, from participating in tendering procedures? (2) 'Does EU law on public procurement — in particular, the general principles of freedom of competition, non-discrimination and proportionality — preclude national legislation under which a body such as the Azienda, which receives public funding on a permanent basis and is directly contracted to provide a public service, is able to derive from that situation a decisive competitive advantage over rival economic operators, as demonstrated by the size of the discount offered, in circumstances in which corrective measures have not been put in place at the same time in order to prevent that kind of distortion of competition?'.

62 Case C-568/13 *Data Medical Service,* para 45.

63 In the case at stance the contracting authority had carried out an investigation procedure to verify the abnormal character of the offer presented, which had shown no evidence of wrongdoing. However, as already discussed, it all depends on the type of control exerted and it is considered that the separation of accounts plays a key role in order to conduct an effective evaluation.

64 It is interesting to report that in the case *a quo*, the parties decided, after the response of the Court, to withdraw the proceedings without further discussing whether, in practice, cross-subsidisation had occurred or not, see Cons. Stato, sez. III, 3 February 2017, n. 472.

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