

A Handbook on Discretion in Public Procurement

By

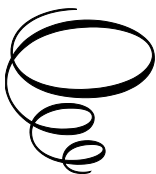
Despoina Kotsi

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*To my family who brought me to The Highway,
and played that much expected role
in my arriving finally in front of a Miracles Cave!*

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INTRODUCTORY CHAPTER

(a) The concept of Discretionary Power

As a preliminary formulation and depiction of the notion of discretion, we shall select a sentence articulated by Denis Galligan, who points out that it has already been precisely demonstrated that: “*discretion is not a precise term of art, with a settled meaning, nor is it a concept which, when found to be present leads to fixed consequences*”¹. Lord Diplock in the Tameside² judgment says: “*The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred*”³. In one of his essays, Judge Smith⁴ distinguishes between two categories of executive acts; “*decisions of will*” and “*decisions of logic*”. We would claim that we have on one side acts of an intense volitional element or even... an essence of extensive desirability, while on the other side there are all the operations with the logical element embedded. Feasibility actions are inherently both political

¹ D. Galligan, "Discretionary Powers: A Legal Study of Official Discretion", Clarendon Press, Oxford, 1990, p.54, as mentioned in the article "State Discretion as a Paradox of EU Evolution," M. Forowicz, European University Institute, Florence, Max Weber Program, EUI Working Paper MWP 2011/27, p. 1, available online at [Http://cadmus.eui.eu/bitstream/handle/1814/18835/MWP_Forowicz_2011_27.pdf?Sequence=1 & isAllowed = y](http://cadmus.eui.eu/bitstream/handle/1814/18835/MWP_Forowicz_2011_27.pdf?Sequence=1&isAllowed=y), last accessed on 15/12/2017.

² Decision Secretary of State for Education and Science v Tameside Metropolitan Borough Council, 1977: “*The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold different opinions as to which is preferable*”

³ JH Gray, "Discretion in Administrative Law", Osgoode Hall Law Journal, 17.01.1979, p.107, available online at [Http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2069&context=ohlj](http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2069&context=ohlj), last accessed on 15/12/2017.

⁴ Loren A. Smith (born 22 December 1944 in Chicago, Illinois) is a US federal judge in the US court, who was appointed a judge by Ronald Reagan on July 11, 1985, and entered duty on September 12, 1985.

and democratic and are subjective if they are to be examined from a typical point of view. There is usually not a safe answer to the description of the background of discretionary acts. There is just an area of execution power that remains free. To illustrate this point with an example, imagine asking if the fence around the city should be painted blue or white. According to Smith, this rationale is that it summarizes the notion of discretionary power. On the other hand, there are the “*rational decisions*” made on an objective basis, such as asking if a person has reached a mature voting age.⁵ Besides, discretion is a mechanism very important for successful policy-making and is always “*woven into the fabric of the Constitution*” as a way of equally spreading power along with conflicting interests (Bryner 1987).⁶ According to Martin Shapiro (1984),⁷ the administrative actors are “*supplementary legislators*” aiming to spread the legislative will through the judgments and interpretations of the rule of law.⁸

Initially, we will come to identify in judgments of the Court of Justice of the European Union itself that the discretion exists as a self-evident recognition, especially when there is a correlation with economic policy choices. We, therefore, observe the following:

“The system of rules which the Court has worked out with regard to Article 215 of the Treaty, particularly in relation to liability for legislative measures, takes into account, inter alia, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question. Thus, in developing its case-law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies. The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review,

⁵ RM Levin, "Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith", Duke Law Journal, 1986, p.259, available online at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2942&context=dlj>, last accessed on 16/12/2017.

⁶ GA Krause, "A Positive Theory of Bureaucratic Discretion as Agency Choice", p.2, available online at http://www.isr.umich.edu/cps/pewpa/archive/archive_00/20000006.pdf, last accessed on 16 / 12/2017.

⁷ Ibid.

⁸ Ibid., pp.2-3.

exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 HNL and Others v Council and Commission [1978] ECR 1209, paragraphs 5 and 6)”⁹.

A separation¹⁰ should be outlined between the concepts of discretion and margin of appreciation, as the difference is often not so clear. For reasons of a scientific purpose, we must move on to this differentiation, as this is indicated by both the theory and the jurisprudence of the EU court, as we should see below. The German theory of vague legal concepts (unbestimmte Rechtsbegriffe) clearly distinguishes the discretionary power (Ermessensspielraum) from the concept of the “margin of appreciation” (Beurteilungspielraum), which is based precisely on vague legal formulations. The theoretical essay derives from the following fact; the two ideas are different and do not correspond to the same function of an administrative body. On the one hand, vague legal concepts imply a judgment or an appreciation or even an interpretation of the concepts themselves -sometimes an interpretation of factual information or an interpretation of the application of EU law- and, on the other hand, the discretionary power refers to the emphatic declaration of a choice, activity, and exercise of will, e.g. related to the design and application form.

The ECJ already in the BP Chemicals Ltd v Commission of the European Communities¹¹ distinguished between the “margin of appreciation” and the “margin of discretion”. The dispute concerned Article 8(2) of Directive 92/81/CEE. The Commission had decided that the aid granted to France under the Directive was compatible with the law of the common market. However, the Court of First Instance did not share the view incorporated

⁹ Judgment in Case C-46/93 Bracherie du Pecheur, paragraphs 43 to 45. See also and Case C-48/93 Factortame.

¹⁰ M. Forowicz, "State Discretion as a Paradox of EU Evolution", European University Institute, Florence, Max Weber Program, EUI Working Paper MWP 2011/27, pp.25-26, available online at [Http://cadmus.eui.eu/bitstream/handle/1814/18835/MWP_Forowicz_2011_27.pdf?sequence=1&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/18835/MWP_Forowicz_2011_27.pdf?sequence=1&isAllowed=y), last accessed on 15/12/2017.

¹¹ ECJ, Judgment T-184/97.

in the decision and decided to annul it. The whole difference was in the expression *“pilot projects for the technological development of more environmentally-friendly products”*¹². The court said that there is a different discretion given by the Commission to the Member States to implement the concept of pilot projects for the technological development of more environmentally friendly products foreseen in the Directive, while there is a whole distinct concept of discretionary margin attributed to the Commission itself by the legislation of Article 93 of the Treaty to determine to what extent State aid is compatible with the common market within the meaning of Article 92 of the Treaty. Accordingly, under the previous articles, the Commission had the discretion to assess the complex economic and social conditions. Although the court used the concept of discretion, it essentially differentiated the two concepts: there was a substantial difference between the discretion of the Commission to decide on the compatibility of the State aid granted and the interpretation of the vague legal concept (margin of appreciation) member states could take advantage of. It is noteworthy here that much more space is to be given to the margin of appreciation rather than to the discretion, since the latter *“...is bound to be significantly reduced as soon as there is a body of precedents enabling the criteria used to be identified and systematically categorized and thus to be known in advance”*¹³. Nonetheless, the distinction could be considered artificial since the two separate processes that have been previously described sometimes occur at the same time. That is why we would say that there is in the last analysis just a single concept; that is the discretionary power that is hybrid in nature. Below we will see the development of this concept in individual legal systems since what we are interested in is exactly the core of its important functionality in plural contexts.

According to the German legal doctrine¹⁴, the notion of discretion is quite complicated but it is possible to be analyzed in depth. In Germany, the

¹² Ibid., par. 43.

¹³ Raija-Liisa Jokela and Laura Pitkaranta, C-9/97 & C-118/97, in "State Discretion as a Paradox of EU Evolution", M. Forowicz, European University Institute, Florence, Max Weber Program, Paper MWP 2011/27, p.26, available online at [Http://cadmus.eui.eu/bitstream/handle/1814/18835/MWP_Forowicz_2011_27.pdf?sequence=1&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/18835/MWP_Forowicz_2011_27.pdf?sequence=1&isAllowed=y), last accessed on 15/12/2017.

¹⁴ M. Forowicz, "State Discretion as a Paradox of EU Evolution", European University Institute, Florence, Max Weber Program, EUI Working Paper MWP 2011/27, p.5, available online at

range of discretion enjoyed by the public administration is much narrower than in other European countries. This reluctance of the Germans to recognize a broad discretion in public administration has its roots in the Nazi past of the country. After the war, we saw the concept of Rechtsstaat emerge and too much emphasis on the judicial control of discretion. So, while in other European countries the courts recognize fluency in administration not only where this is expressly provided but also when the text provides specific general and vague concepts norms, the application of which requires specialized knowledge (see in that regard the case of public contracts below described), German law still offers a very narrow spaced margin of discretion. For example, administrative bodies cannot specify according to their individual views, or evaluate complex sets of event data, or even predict by its decisive competence future developments that will fit in a vague legislative text, which is under formulation. To make this aspect of German law clearer, we need to look at the various distinctions inherent in it, and especially the notion of the Administrative Act, which is not indivisible. In particular, we should examine; Tatbestand (constituents of a provision), Subsumtion (the application of the interpreted concepts to specific events), and Rechtsfolge (the assessment and definition of a specific legal effect). The application of discretion takes place at this last stage of the administrative act. As to the discretion itself, we see some of its more subtle species that are found in German law:

- (a) Ermessenspielraum (margin of discretion in general)
- (b) Entschließungsermessen (decision to apply or not apply an action)
- (c) Auswahlermessen (choice between several legitimate decisions leading to the same legal effect)
- (d) Beurteilungspielraum (assessment/evaluation margin)
- (e) unbestimmte Rechtsbegriffe (the freedom legally attributable to the administrative authorities to define the meaning and scope of vague legal concepts¹⁵)

[Http://cadmus.eui.eu/bitstream/handle/1814/18835/MWP_Forowicz_2011_27.pdf?sequence=1&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/18835/MWP_Forowicz_2011_27.pdf?sequence=1&isAllowed=y), last accessed on 15/12/2017.

¹⁵ “Legal norms use undetermined legal concepts when defining the conditions of administrative action (Tatbestand), such as “public order”, “harmful effect of the environment”, “best available technique”, “important reason”. There are different causes of indeterminacy, and different types of undetermined concepts. Where they are determinable by the verification of facts (empirical concepts, such as “local custom”, scientific concepts regarding which there is consensus), they are in principle subject to full judicial review and may, therefore, have been determined

- (f) normative Ermächtigunglehre (regulatory authorization theory, which essentially wishes to limit the margin of assessment/evaluation to cases where the respective law explicitly or tacitly provides for it)

Thus, it is accepted that the German courts recognize the discretion only when it is emphatically formulated for that purpose, that is when it is provided to the administration with a legislative provision (see the verb "may" or some similar expression set) and indicates a specific plan of action. On the contrary, if the legislator does not use this special language, the overriding view is that the general rule of lawful action requires the only solution, i.e. the correctness of which is drawn directly by the Rechtsstaat tradition. It is irrelevant for Germany's legal system how vague and indeterminate a legal concept may be. However, the problem in this doctrine remains, because when we seek the historical will behind the legislator's words, we find perhaps that the legislative ambiguity is deliberate. In stressing this parameter, we can say that the German tradition is defective in that regard.

According to the French theory¹⁶, the Principle of Legality (Principe de Légalité) has a leading role here, which historically expresses citizens' mistrust towards the Executive Power, while securing trust in the institution of Parliament intended to control the former. Therefore, the rules of law and the principles of legality tend to drastically limit administrative discretion so that the authorities are always subject to the rules. How is the concept of discretion (pouvoir discrétionnaire) perceived in this context? It is provided like the ability of the administrative authority to choose between two judgments or two behaviors that comply with the Principle of Legality. We would say that it favors in one way the concept of legitimate feasibility as long as the administration is allowed to act in this or that way. Contrary to the notion of discretion, there is the

by previous case law, even if the latter may be continuously adapted", 7 H. Wolff, O. Bachof and R. Stober (2006), "Direito Administrativo"-Vol. I, Lisboa: Fundacao Calouste Gulbenkian, in "Law and administrative discretion in the EU: value of a comparative perspective", J. Mendes, p.24, available online at https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_mendes_law.pdf, last accessed on 16/12/2017.

¹⁶ M. Forowicz, "State Discretion as a Paradox of EU Evolution", European University Institute, Florence, Max Weber Program, EUI Working Paper MWP 2011/27, pp.5-6, available online at http://cadmus.eui.eu/bitstream/handle/1814/18835/MWP_Forowicz_2011_27.pdf?sequence=1&isAllowed=y, last accessed on 15/12/2017.

concept of captive competency (*competence liée*), where the governing body is obliged to act in an expected manner. As regards the judicial review of administrative action, this depends accordingly to whether it is exercised at a discretionary level. When it is so, the control is limited. Within the limits of this restricted control, the French courts are based on the principle of a manifest error of assessment, which has been identified as: *“erreur évidente, invoquée par les parties et reconnue par le juge, et qui ne fait aucun doute pour es esrit éclairé”*. This is translated to such a mischievous mistake that can be distinguished from an average normal person, and this latter gives to authorities a wide range of exercising discretion.

We can claim at first sight that the French view is not in line with the scope of discretionary power given already by the English legal doctrine¹⁷. Parliament indeed attributes powers to administrative authorities which at first sight can be regarded as absolute or arbitrary. However, in this case, the courts do implement their control on the exercise of administrative power. For the sake of completeness, they have formulated a series of strict principles that require regulatory powers to be exercised reasonably and in good faith, for proper purposes and in compliance with the spirit and letter of the laws. However, the courts are being reluctant in this case to control discretion and, as a result, both French and English justices converge in controlling the administration's power. In the case of the *Associated Provincial Picture Houses v Wednesbury Corporation*, the unreasonableness of the decisions of public bodies was imposed as the ultimate limit-criterion. The court said it could not overturn the administrative decision simply because it disagreed. For the courts to be able to intervene with corrective action, the following mistreatment must have taken place on part of the administrative authority; factors to have been calculated that should have not been, and those factors that should have been taken into account to have been ignored. Generally, the criterion set is that an administrative decision must be so absurd that no rational authority would ever think of issuing such an act. The phrase "Wednesbury unreasonableness" prevailed to describe this limit.

In Greek law, the delegation of discretionary power to the organs of the Administration is affected *“by the use of indefinite concepts or general clauses which need identification through supplementation”* [StE 2313/1976. See also StE 4198, 715/2012, 4028/2011]. The concept of vague concepts includes concepts such as *'public interest'*, *'important*

¹⁷ Ibid., pp.6-7.

reason', 'serious risk', 'necessary measures', 'urgent and unforeseen need', 'moral and material exaltation of the population', 'socio-economic disruption' , 'Reasonable time', 'particularly high grade', 'obvious employee excellence'. Additional technical concepts are attached to the above-mentioned, such as 'building aesthetic value', 'seismic strength and static adequacy', 'urgent urban planning need', 'dangerously dilapidated building', etc. As mentioned already, the exercise of the discretionary power is always within the framework of the principle of Legality and cannot be arbitrary. In the institutional framework of feasibility that gives more or less power to the governing body, this static organ exercises its decisive or consultative power. The Rechtsstaat, that is the State of Law as a constitutional principle in Greece, provides the foundation of discretionary power. The discretionary margin attributed to the administrative (and indeed the contracting) authorities is an imperative necessity because the rules are rigid but the reality is alive and the social pathogenicity unpredictable. That is why the public administration's maneuver is necessary.¹⁸

However, the decisive competence of the discretionary administrative authority is a *'functionalized choice'*¹⁹ as it takes into account a series of internal barriers to meet social needs. According to Klatt, discretion is anchored in the system of weighing and balancing legal principles²⁰. According to Burke²¹, the wide discretion of the Administration is an unavoidable and indispensable component of the effective implementation of public policy and builds trust in the government. By exercising discretion, the authorities have the opportunity to identify the responsible action by attributing concrete content to it, something that is on the contrary not favored by the rigidity of the rules. For Burke, discretion is giving exactly the utility and reactivity to the state's legal armaments. For the safe use of the discretionary power and avoidance of abuse, he pointed out some general principles as a guide:

¹⁸ E. Prevedourou, "Strict competence and discretion of the Administration (General Administrative Law, 28 and 30-3-2016), available online at <https://www.prevedourou.gr>, last visit 15/12/2017.

¹⁹ "Reasonableness in Administrative Discretion: a Formal Model," P.L.M. Lucatuorto, *The Journal Jurisprudence*, 2010, p.634, available online at <http://www.jurisprudence.com.au/juris8/L.pdf>, last accessed on 15/12/2017.

²⁰ Ibid.

²¹ A. Haque, "Ethics and Administrative Discretion in a Unified Administration-A Burkean Perspective", *Administration & Society*, Issue 35, No. 6, January 2004, pp.704-706, available online at <Http://journals.sagepub.com/doi/abs/10.1177/0095399703256775?journalCode=aasb>, last accessed on 15/12/2017.

*“The discretionary powers which are necessarily vested in the monarch, whether for the execution of the laws, or the nomination to magistracy and office, or for conducting the affairs of peace and war, or for ordering the revenue, should all be exercised upon public principles and national grounds, and not on the likings or prejudices, the intrigues or policies, of a court”.*²²

For Giannini²³, discretion is the margin of assessment that comes from the comparative evaluation of public and private interests in particular circumstances. What is being sought is the solution that best serves the public interest and is driven by the value of legal general rules. The decision-making body, when exercising its discretion, takes into account not only the interest that the rule of law requires as a purpose of the administrative act (primary public interest) but also the other public interests that are also protected (secondary public interests). Because there is no interest that is independent of the rest. We will also see that discretion is a legal construction. In essence, it is a power delegated to the decision-making bodies to choose between several alternatives by specifying the rules of law, while at the same time aiming at the realization of the predetermined goals.²⁴ However, the discretionary power of the governing bodies is the ultimate rationale for public officials to defend the exercise of their competence within the limits of the law but at the same time amid the emerging dynamic developments and constraints.²⁵

Ultimately, to see the viability and the perspective of the notion of discretion in our legal world, we can refer to what Professor Davis answers in his famous work on Discretionary Justice to William Pitt's words, which was exactly that; *“where law ends tyranny begins”*. We are advised, therefore, by the professor's words; *“I think that in our system of government, where law ends tyranny need not begin. Where law ends, discretion begins, and the exercise of discretion may mean beneficence or*

²² Ibid.

²³ J. Mendes, "Law and administrative discretion in the EU: value of a comparative perspective", p.17, available online at https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_mendes_law.pdf, last accessed on 16/12/2017.

²⁴ Ibid., p. 24.

²⁵ H.-S. Kang, "Administrative Discretion in Transparent Bureaucracy", Public Administration Quarterly, 2005, p.162, available online at <https://www.questia.com/library/journal/1P3-947389281/administrative-discretion-in-the-transparent-bureaucracy>, last accessed on 16/12/2017.

tyranny, justice or injustice, either reasonableness or arbitrariness".²⁶ At this point, it should be stressed that the extent to which our political institutions are willing to recognize the potential risks inherent in discretionary power is the best proof of the health of the institutions themselves and of the rules they lay down.²⁷ When institutions are strong, contracting authorities, which are of interest to us here, can be given discretionary mechanisms and procedures to use to proceed to the selection of a tenderer and to the award of a contract. If there are control mechanisms and self-testing to treat internal arrhythmias, corruption is difficult to emerge.²⁸ In the last analysis, the judicial control remains always as a safeguard, which as it will be shown below, delimits the lines of discretion of the Administration in light of the fundamental principles of law.

(b) The Concept of Discretionary Power embodied indicatively in EU public procurement law

Reviewing the latest EU Directives and in particular Directive 2014/24/EU, we find **several examples concerning the ability of the contracting authorities to specify concepts as well as to have a margin of appreciation regarding respectively the identification of their needs and/or how they operate.**

Examples:

1. *“Member States and public authorities remain free to provide those services themselves or to organise social services in a way that does*

²⁶ Davis, "Discretionary Justice: A Preliminary Inquiry," 1969, in "Administrative Discretion and Current Judicial Activism ", HL Molot, Ottawa Law Review, p.360, available online at

https://commonlaw.uottawa.ca/ottawa-law-review/sites/commonlaw.uottawa.ca.ottawa-law-review/files/16_11ottawalrev3371979.pdf, last accessed on 16/12/2017.

²⁷ H.L. Molot, "Administrative Discretion and Current Judicial Activism", Ottawa Law Review, p.360, available online at https://commonlaw.uottawa.ca/ottawa-law-review/sites/commonlaw.uottawa.ca.ottawa-law-review/files/16_11ottawalrev3371979.pdf, last accessed on 16/12/2017.

²⁸ E. Chong, M. Klien, S. Saussier, "The Use and Abuse of Discretionary Procurement Procedures: Evidence from the European Union", February 28, 2016, Norton Rose Fulbright, p.8, available online at [Http://chaire-eppp.org/wp-content/uploads/2016/05/Chong-Klien-Saussier-2016-the-use-and-abuse-of-discretionary-award-procedures.pdf](http://chaire-eppp.org/wp-content/uploads/2016/05/Chong-Klien-Saussier-2016-the-use-and-abuse-of-discretionary-award-procedures.pdf), last accessed on 16/12/2017.

*not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination”.*²⁹

2. *“Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers”.*³⁰
3. *“Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2)”.*³¹
4. *“In open procedures, contracting authorities may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with Articles 57 to 64. Where they make use of that possibility, they shall ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that should have been excluded pursuant to Article 57 or that does not meet the selection criteria set out by the contracting authority”.*³²
5. *“Member States may exclude the use of the procedure in the first subparagraph for, or restrict it to, certain types of procurement or specific circumstances”.*³³
6. *“Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless*

²⁹ Recital 114, in the last paragraph, refers to certain categories of services that, by their very nature, still have a limited cross-border dimension, such as certain social, health and education services.

³⁰ Article 20, par.1, Reserved contracts.

³¹ Article 56, par.1, General principles.

³² Article 56, par.2, General principles.

³³ Article 56, par.2, General principles.

- otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency”.*³⁴
7. *“An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority”.*³⁵
- “Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions”.*³⁶
8. *“Member States may provide for a derogation from the mandatory exclusion provided for in paragraphs 1 and 2, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment. Member States may also provide for a derogation from the mandatory exclusion provided in paragraph 2, where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of taking measures as provided for in the third subparagraph of paragraph 2 before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender”.*³⁷

³⁴ Article 56, par.3, General principles.

³⁵ Article 57, par.2, Exclusion grounds.

³⁶ Article 57, par.2, Exclusion grounds -both passages are cited to stress out that while the introductory wording of the paragraph does not allow the EU legislator to derogate from the exclusion, it gives at the same time the contracting authority the discretion to assess it.

³⁷ Article 57, par.3, Exclusion grounds.

9. *“Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations: [...]”*.³⁸
10. *“Notwithstanding point (b) of the first subparagraph, Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business in the case of the situations referred to in point (b)”*.³⁹
11. *“Selection criteria may relate to: (a) suitability to pursue the professional activity; (b) economic and financial standing; (c) technical and professional ability. Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject-matter of the contract”*.⁴⁰
12. *“With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex. In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership”*.⁴¹
13. *“With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the*

³⁸ Article 57, par.4, Exclusion grounds.

³⁹ Article 57, par.4, Exclusion grounds.

⁴⁰ Article 58, par.1, Selection criteria.

⁴¹ Article 58, par.2, Selection criteria.

*area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance”.*⁴²

14. *“With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract”.*⁴³
15. *“Proof of the economic operator’s economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XII Part I. Where, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate”.*⁴⁴
16. *“Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract”.*⁴⁵
17. *“In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2), by a participant in that group”.*⁴⁶

Ultimately, a definition of the contract award criteria is important enough as it constitutes the **cornerstone of discretion for contracting authorities**.

⁴² Article 58, par.3, Selection criteria.

⁴³ Article 58, par.4, Selection criteria.

⁴⁴ Article 60, par.3, Means of proof.

⁴⁵ Article 63, par.1, Reliance on the capacities of other entities.

⁴⁶ Article 63, par.2, Reliance on the capacities of other entities.

The concept of discretion introduces additionally to the potential verb "may" several generic concepts to be seen below:

18. *“Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance: (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions; (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion”.*⁴⁷
19. *“Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services”.*⁴⁸

Then, of course, the example of the current legislation of the EU implies that the Directive **clarifies the limits of discretion** by establishing that:

⁴⁷ Article 67, par.1-2, Contract award criteria.

⁴⁸ Article 76, par.2, Principles of awarding contracts.

20. *“Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers. 5. The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone. Those weightings may be expressed by providing for a range with an appropriate maximum spread. Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance”.*⁴⁹

⁴⁹ Article 67, par.4-5, Contract award criteria.

BASIC MODULE

The Case-law Approach to the Concept of Discretionary Eligibility Within the public procurement legal context

At this point in the study, we come up with examples from the jurisprudence of the Court of Justice of the European Union (CJEU)- (former ECJ) to give an example of the applicable discretionary power on the part of the contracting authority. The measurement of its tolerable range, as we shall see, is directly related to the entire range of European law and, in particular, to the general principles guiding its very own European spirit.

To formulate a distinct guidelines sheet for practitioners, two table-types are being introduced. Each one of them refers correspondingly to a) the Award Process and b) More core-contract Issues.

Both the EU and WTO grammatical interpretations are being highlighted as the legitimized limits to discretionary power that is exercised by public authorities.⁵⁰ First of all, the plain meaning refers to

⁵⁰ According to the CJEU settled case-law; “As regards the WTO agreements, it must be recalled that, as the applicant has pointed out, it is settled case-law that, given their nature and purpose, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the EU institutions (judgments of 23 November 1999, *Portugal v Council*, C-149/96, EU:C:1999:574, paragraph 47; of 1 March 2005, *Van Parys*, C-377/02, EU:C:2005:121, paragraph 39, and of 18 December 2014, *LVP*, C-306/13, EU:C:2014:2465, paragraph 44). (...) Nonetheless, in two situations the Court has accepted, by way of exception, that it was for the EU judicature, if necessary, to review the legality of an EU measure and of the measures adopted for its application in the light of the WTO agreements (see judgment of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74, paragraph 87 and the case-law cited). The first such situation, noted by the applicant, is where the European Union intended to implement a particular obligation assumed in the context of those agreements (judgment of 7 May 1991, *Nakajima v Council*, C-69/89, EU:C:1991:186) and the second is where the EU measure in question refers explicitly to specific provisions of those

what the legislator strictly decided to put into the text. So, one could genuinely interpret the given statute in its essence just by examining the text word by word. Next to that interpretation, the rule against surplusage becomes also applicable, meaning that the legislator is not expected to rule on the same aspect twice or more in the text, but rather every part of the sentence has its connotation. Subjects of the same nature, as well as references upon the same subject, are justified to come under the unique regulative content of an exact legal provision based on similarity. Under that spirit, the connotation of one subject excludes any other that would, as a result, become inappropriate as unidentified for the same regulation. On the contrary, the canon is elsewhere that a pluralistic legal provision could contain several subjects “referring each to each” legal part of the text. Finally, a simple rule for a proper grammatical interpretation that seeks to be preserved within the scope of the law is that the word is known by the company it keeps, i.e. it is interpreted by the rest of its surrounding grammatical environment.

Next, when we proceed to more core-contract issues, there comes additionally the **principles-based European law**, including the spirit of uniform implementation of an “*EU public procurement acquis*”, i.e. competitiveness, transparency, free movement of goods and services, right of establishment, prohibition of discrimination on grounds of nationality and procedural equality regarding EU member states, to halt the public forceful will. As it will get clearer after progressively reading this study, public procurement is all about policies that must be hindered of being transformed into politics. Apart from paying strict attention to the letter of the law so as not to extend arbitrarily the scope of the law, the scope itself is required to find its origin always in the text. No interpretation can be initiated outside the wording. Something in the letters of the law should indicate the teleological hurricane one could normally visualize. Moreover, the public interest gets primordial in discretionary issues,

agreements (judgment of 22 June 1989, Fediol v Commission, 70/87, EU:C:1989:254).(…) In that regard, in the first place, it should be noted that it is true that, in accordance with settled case-law, EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union (judgments of 14 July 1998, Bettati, C-341/95, EU:C:1998:353, paragraph 20, and of 9 January 2003, Petrotub and Republica v Council, C-76/00 P, EU:C:2003:4, paragraph 57).”, See in relevance the Case T-228/17, Zhejiang India Pipeline Industry Co. Ltd v European Commission, par. 109, 100, 110.