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Rejection of abnormally low and non-compliant tenders in EU public procurement: A comparative view on selected jurisdictions

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1. INTRODUCTION

This paper attempts a concise comparison of the rules applicable to the rejection of abnormally low (§2) and non-compliant tenders (§3) in a number of EU jurisdictions. In order to set the common ground for the analysis of such domestic rules, which are solely applicable to non-negotiated procedures, the paper first offers a description of the rules in the EU public procurement Directives and the case law of the European Courts (ie GC and CJEU), and then proceeds to compare them against this benchmark and amongst themselves. Where possible, the paper highlights innovative or different solutions, as well as potential deviations from EU law.

2. TREATMENT OF ABNORMALLY LOW TENDERS

2.1. EU Rules and Case Law

2.1.1. General Criteria

Needless to say, the treatment of abnormally low tenders is an important issue related to the application of award criteria and the treatment of non-fully compliant bids (discussed below §3). Under the relevant EU rules, the analysis of seemingly abnormally low tenders is configured as a mechanism that allows contracting authorities to depart from the automatic or ‘acritical’ application of award criteria in cases where, for a given contract, certain tenders appear to be abnormally low in

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1 Namely, Denmark, France, Germany, Italy, Poland, Romania, Spain and the United Kingdom. The analysis relies on the national reports prepared for this book by my esteemed co-authors. Nonetheless, I am solely responsible for my interpretation of those reports and for the comparisons made in this chapter.

2 In negotiated procedures, none of these rules are applicable or relevant, since the contracting authority retains significant discretion to check and alter the conditions of the initial offers submitted by the undertakings invited to negotiate. Therefore, the discussion in this paper is basically relevant solely in connection with open and restricted procedures (although it could be of some relevance for design contests and competitive dialogues, depending on their specific rules).

3 For the purposes of this paper, references will only be made to Directive 2004/18, although the findings are equally applicable to utilities, defence and institutional procurement under the relevant rules.

relation to the goods, works or services concerned [see art 55(1) *ab initio* dir 2004/18]. In these cases, contracting authorities are entitled to reject tenders that appear to be abnormally low in relation to any of the relevant parameters and award criteria (ie not only price, at least where the award criterion is that of the most economically advantageous offer).  

To do so and before rejecting those tenders, contracting authorities shall request in writing details of the constituent elements of the tenders which are considered relevant for the appraisal or verification of their apparent anomaly, such as: the economics of the products, processes and methods used; technical solutions chosen and/or exceptionally favourable conditions available to the tenderer; originality of the work; compliance with applicable labour and risk prevention legislation; and the possibility of the tenderer obtaining State aid (see below, §2.1.3) [art 55(1) dir 2004/18]. In view of the evidence supplied by the tenderer upon such consultation, the contracting authority shall verify the constituent elements of the apparently abnormally low tender and reach a final decision on whether to reject it or not [art 55(2) dir 2004/18]. In the case of rejection of the abnormally low tender, the contracting authority is under a special duty to provide reasons for that decision [art 43(d) dir 2004/18].

In this regard, it has been stressed by the EU case law that this is ‘a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it’.

Indeed, as the CJEU has clearly emphasised, this is a positive and unavoidable requirement, and ‘Article 55 of Directive 2004/18 does preclude [...] a contracting authority from claiming [...] that it is not obliged to request a tenderer to clarify an abnormally low price’. To be sure, contracting authorities are not expressly obliged to reject abnormally low tenders—rather, their duty is just to identify suspect tenders and scrutinize them following the *inter partes* procedure established in the directive, whereby ‘the contracting authority must set out clearly the request sent to the tenderers concerned so that they are in a position fully and effectively to show that their tenders are genuine’. In this regard, the CJEU has been clear in stressing that the contracting authority is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders.

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6. Indeed, the requirement to provide for a written procedure has been stressed by the CJEU; Case C-292/07 Commission v Belgium [2009] I-59 ¶161 and Case C-599/10 SAG ELV Slovensko [2012] nyr ¶33.
7. This list ‘is not exhaustive, [but] it is also not purely indicative, and therefore does not leave contracting authorities free to determine which are the relevant factors to be taken into consideration before rejecting a tender which appears to be abnormally low’. See Case C-292/07 Commission v Belgium [2009] I-59 ¶159; and Case C-599/10 SAG ELV Slovensko [2012] nyr ¶30.
Hence, the rules of the directive exclusively impose procedural guarantees to be complied with by contracting authorities prior to rejecting apparently abnormally low tenders;\(^\text{12}\) and, consequently, seem to be mainly oriented towards providing affected tenderers the opportunity to demonstrate that their tenders are genuine—ie are primarily a mechanism to prevent discretionary (or arbitrary) decisions by contracting authorities.\(^\text{14}\) In this regard, contracting authorities are obliged to take into account the explanations and proof provided by the affected tenderers and, consequently, cannot apply automatic or simple mathematic rules to reject apparently abnormal tenders\(^\text{15}\)—although the use of such rules to identify suspicious tenders should not be ruled out. As stressed by the case law, the directives do not provide a definition of ‘abnormally low tenders’, or a method to calculate an ‘anomaly threshold’—which are issues consequently left to Member States’ domestic regulation\(^\text{16}\) (below §2.2.1), and should be determined for each contract according to the specific purpose it is intended to fulfil (ie it must be tender-specific).\(^\text{17}\) Therefore, the rules of the directives seem to be adequately conceived as a check or balance to the general power of contracting authorities to reject abnormally low tenders—which is an instance of exercise of their broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract, or not to award it to a given tenderer.

The justification for this empowerment of contracting authorities to reject abnormally low tenders seems to be that they should not be forced to award the contract under circumstances where there is a reasonable risk of non-performance of the contract or of financial instability or disequilibrium,\(^\text{18}\) or a risk of breach of applicable legislation by the contractor during the execution of the contract under the tendered conditions (particularly as regards labour and risk prevention legislation); since such an award would hardly satisfy the needs of the contracting authorities and/or would force them to assume certain risks that they might not be willing to accept. The appraisal of such risks shall be undertaken by contracting authorities from a neutral or objective perspective and be sufficiently motivated [by analogy with art 55(2) dir 2004/18]. To be sure, contracting authorities cannot exercise unlimited discretion in the assessment and eventual rejection of abnormally low tenders and their decisions should be guided by and be compliant with the general principles of the procurement directives and the TFEU—notably, non-discrimination and competition. In this regard, it should be remembered that the treatment of abnormally low tenders by contracting authorities


might generate competition distortions and/or have a negative impact on innovation and, consequently, its analysis also merits further consideration.

2.1.2. Circumstances in Which There Is an Obligation to Reject Abnormally Low Tenders

In my view, and as already mentioned, the rules contained in the directives do not expressly impose upon contracting authorities the duty to reject abnormally low tenders in all cases. Nonetheless, it is submitted that such an obligation exists, at least when certain circumstances concur. In this regard, once a contracting authority—in view of the evidence supplied by the affected tenderer upon consultation, and adopting a neutral approach—has reached the conclusion that a tender is abnormally low and, consequently, that the tender is not genuine and/or entails a certain risk of non-performance, financial instability or disequilibrium, or a risk of breach by the tenderer of particularly relevant legislation, it seems to be a logical requirement of the principle of diligent administration that the contracting authority should reject the tender unless it can sufficiently motivate a decision not to do so on the basis of overriding legitimate reasons—that is, unless the specific tender provides the contracting authority with advantages that compensate for or exceed the potential risks. Admittedly, a similar reasoning might not be applicable in the event of a potential breach of the relevant legislation by the tenderer, in which case the discretion of the contracting authority to accept the abnormally low tender might even be completely excluded—since, in general, contracting authorities seem to have significant difficulties in accepting illegal tenders.

Other than the general restrictions that domestic or special legislation may impose on contracting authorities preventing them from reaching such a decision of non-rejection of an abnormally low tender (below §2.2.2), the principles of non-discrimination and competition seem to limit even more the possibilities for the contracting authority to do so. In this regard, it should be stressed that contracting authorities cannot exercise unrestricted freedom of choice amongst tenderers and, in my view, granting them discretion to accept tenders found to be abnormally low might result in discriminatory outcomes—since the anomaly of the tender will probably, and by itself, materially affect its ability to satisfy the needs of the contracting authority and, consequently, should be rejected as an unsuitable bid (not merely non-fully compliant; see below §3.1). Moreover, even in the absence of discriminatory features, the principle of competition can still impose additional restrictions on the ability of the contracting authority to accept abnormally low tenders, preventing it from doing so if accepting the abnormally low tender generates or reinforces a distortion of competition in the market concerned.

21 But see C Bovis, EC Public Procurement: Case Law and Regulation (Oxford, Oxford University Press, 2006) 154-155; and ibid, EU Public Procurement Law (Cheltenham, Edgar Elgar, 2007) 68, who considers that ‘the European rules provide for an automatic (sic) disqualification of an “abnormally low offer”’ (emphasis added). In my opinion, and in the light of the arguments developed in the text (particularly the CJEU case law), that position is incorrect under the new directives. Indeed, Bovis himself presents the system as discretionary for contracting authorities ([2006] 264)—therefore blurring the automaticity of his initial position.
22 Along the same lines, emphasising the existence of a possible obligation to reject ‘healthy competition’, see the contributions of Treumer to this book (who supports them in his reading of Slovensko). Also in this line of thought, Telles also stresses in his contribution that ‘if the logic of the abnormally low tender provisions is to protect the market (and the contracting authority) from unrealistic bids it makes no sense to leave any discretion in case the test is failed.’
least be prevented from accepting abnormally low tenders submitted by a dominant undertaking if they can be considered predatory, as well as abnormally low tenders that could be proven to result from collusive agreements amongst tenderers aimed at sharing the market (ie as an instance of bid rotation, boycott of other tenderers, etc.). In these instances, the involvement or cooperation of competition authorities in the assessment of apparently abnormally low tenders seems desirable.23

2.1.3. The Particular Case of Abnormally Low Tenders Tainted by State Aid

As a particular instance of, or an exception to, the general rule regarding the taking into consideration of general competition concerns in the analysis of abnormally low tenders, article 55(3) of Directive 2004/18 sets special rules regarding abnormally low tenders tainted by State aid.24 As anticipated (above §2.1.1), one of the constituent elements of tenders on which contracting authorities can request tenderers to provide additional information is ‘the possibility of the tenderer obtaining State aid’ [art 55(1)(a) dir 2004/18]. In this regard, the special rules contained in the directive as regards abnormally low tenders tainted by State aid determine that

where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can 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 granted legally [art 55(3) dir 2004/18, emphasis added].

In this regard, it seems clear that the test applicable by contracting authorities in these cases—where they intend to reject the apparently abnormally low tender exclusively on the basis that the tenderer has obtained State aid—is limited to the verification of whether the State aid was granted legally to the tenderer submitting an abnormally low tender—ie to request proof that the aid received complies with the requirements for a general exemption (in a block exemption regulation, or otherwise) or has been the object of a positive clearance decision by the Commission (ex arts 107 and 108 TFEU). Failure to prove the legality of the granting of the State aid by the tenderer concerned will entitle the contracting authority to reject the tender as being abnormally low on that ground alone. In such cases, the contracting authority should inform the Commission of this fact [art 55(3) dir 2004/18].

Doubt could be cast on whether contracting authorities can go further and (based on the general criterion of ‘severability’ of authorization and use of State aids)25 analyse whether the use of legally granted State aid to submit the abnormally low tender is illegal in itself—ie whether it

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24 On the inclusion of this special rule in Directive 2004/18, see Trepte (n 4) 474.
25 An issue raised by Trepte (n 4) 60—who, however, also points out that ‘there is a danger that decisions on this issue by the purchaser could lead to little more than political revenge’—and, implicitly, seems to regard this option unfavourably. As developed in the text, there are additional reasons that point in the same direction and that should exclude the possibility for contracting authorities to conduct an analysis of the (mis)use of legally granted State aid.
constitutes a case of misuse of aid\(^{26}\) (as an instance of predatory pricing,\(^{27}\) or otherwise), in which case it could also be considered a valid reason for the rejection of abnormally low tenders on that ground alone. Such an approach would probably allow for a common treatment of all unlawful uses of State aid—whether illegal by reason of its award, its incompatibility with the internal market, or its misuse—and, consequently, might seem desirable as a way to reinforce the State aid prohibition through public procurement rules. However, the exclusive competence of the European Commission to apply articles 107 and 108 TFEU (and the special nature and more limited powers in cases of misuse of State aid),\(^{28}\) prevent contracting authorities from having direct recourse to such a possibility and, consequently, the test that contracting authorities can apply to apparently abnormally low tenders tainted by State aid seems to be limited to the legality of its being granted, not of its use.\(^{29}\) In this regard, it seems relevant to stress that unlike ‘unlawful aid’ [ie aid that was granted without prior notification to the Commission or in disregard of the standstill obligation of art 108(3) TFEU], ‘aid which has possibly been misused’ is aid which has been previously approved by the Commission [see recital (15) reg 659/1999] or that benefits from a general (block) exemption and, consequently, is vested with an appearance of legality (\textit{fumus boni iuris}). Such an appearance of legality requires careful analysis—and this justifies, for instance, the absence of recovery injunction mechanisms that are generally available in cases of unlawful aid.

This rather formal approach—that largely limits contracting authorities’ ability to take the (anti-)competitive effects generated by State aid into consideration in public procurement processes—seems to be consistent with the relevant case law, where the CJEU has clearly held that

the mere fact that a contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to

\(^{26}\) See Ólykke, Submission of Low Price Tenders by Public Tenderers (2009) 263, who considers that ‘\textit{the receipt of legal state aid could ... be an objective justification for an apparently abnormally low tender, as long as this use does not amount to misuse of the aid}’ (emphasis added).

\(^{27}\) In this regard, it is interesting to read the Commission’s Decision of 7 July 2004 on the aid measures implemented by France for Alstom (OJ 2005 L 150/24), where France undertook to monitor the inexistence of predatory pricing in Alstom’s tenders for public contracts in the transport sector. As indicated by the Commission, the measure was ‘\textit{intended to ensure that the aid will not be used by Alstom in the Transport sector to finance predatory pricing policies [..] to the detriment of competitors}’. In such specific case, where refraining from predation is made an explicit condition in the granting of the aid, rejection of the tenders that proved to be predatory ought to be easier than in the general cases—where, as discussed in the text, contracting authorities and review bodies / courts face a significant obstacle due to the exclusive competence of the European Commission to declare the (il)legality of the use of the State aid received.

\(^{28}\) See Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (Regulation 659/1999) [1999] OJ L83/1, particularly recital (1). Along these lines, it is important to stress that according to EU case law (see Case 74/76 \textit{Iannelli} [1977] ECR 557 ¶ 16) even ‘\textit{national courts are not competent to judge the compatibility of State aids with Community law}’; JM Fernández Martín and O Stehmann, ‘\textit{Product Market Integration versus Regional Cohesion in the Community}’ (1990) 15 \textit{European Law Review} 216, 231.

\(^{29}\) This situation is clearly different from that of arts 101 and 102 TFEU, which must be applied by all authorities of Member States; see J Temple Lang, ‘\textit{National Measures Restricting Competition and National Authorities under Article 10 EC}’ (2004) 29 \textit{European Law Review} 397, 399–404. Therefore, a restriction of the effectiveness of the principle of competition in this particular regard, such as that operated by the special rule in art 55(3) of Directive 2004/18 seems compatible with the general system of competition rules in the TFEU. In this respect, a ‘\textit{de–monopolisation}’ or decentralization of the enforcement of State aid rules could be desirable, but reaching such a conclusion requires analyses that go well beyond the limits of this paper.
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 constitute either covert discrimination [or a restriction on freedom to provide services].

In this regard, given the special nature of State aid, the EU judicature seems to have opted for a restriction of the analysis of its effects on competition to the narrow limits of the procedures for the control of State aid, consequently strengthening the exclusive competence of the European Commission in this area. Along the same lines, in very clear terms, it was stressed that ‘aid that has been notified and declared compatible with the common market cannot affect the decision of the contracting authority to admit a tenderer or the assessment of its tender’.

It is submitted that the same reasoning applies to State aid exempted on other grounds. Therefore, the denial of contracting authorities’ power to reject abnormally low tenders apparently tainted by the misuse of State aid on that ground alone [ex art 55(3) dir 2004/18] seems to accord to this ring-fencing of State aid analysis.

2.1.4. Preliminary Conclusion on the Requirements Imposed by EU Public Procurement Rules

To sum up, in my view, contracting authorities are under a duty to reject abnormally low tenders—after complying with the inter partes procedure regulated by article 55 of Directive 2004/18—unless they can sufficiently justify a decision not to do so on the basis of overriding legitimate reasons and only as long as there are no discriminatory or competition distorting effects derived from the acceptance of the abnormally low tender. In the particular case of abnormally low tenders tainted by State aid, the directive sets specific rules whereby contracting authorities can reject abnormally low tenders exclusively on the basis of the reception of State aid if it is not proven that the aid was granted legally. These are the standards against which domestic rules will be assessed.

2.2. Applicable Rules in the Selected Jurisdictions

This subsection explores the three main areas that EU rules and case law leave for Member States to regulate, or where their practice deserves particular scrutiny: namely, the definition of an ‘abnormally low tender’, the potential creation of a rule of mandatory rejection of abnormally low tenders, and the control of abnormally low tenders tainted by illegal State aid.

2.2.1. Definition and Screening of ‘Abnormally Low Tenders’

As we have seen, EU rules and case law do not provide a definition of abnormally low tenders and, consequently, this is left to Member States’ domestic rules. However, maybe not surprisingly, most jurisdictions do not expressly define them, but rather follow a case by case approach (where relatively open-ended criteria are taken into consideration, such as a disproportion between the tendered prices and market conditions, or a perceived risk of default on the part of the tenderer). Given the difficulty of coining a clear and satisfactory definition of abnormally low tenders, this situation is understandable, although it can result in significant legal uncertainty.

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31 Opinion of AG Léger in case C-94/99 ARGE ¶ 105, emphasis added.
32 For a critical appraisal of this situation, see Sanchez Graells (n 23) 328-329.
For instance, Danish law has not established criteria or a general methodology to be used to identify an apparently abnormally low tender, nor does it require the contracting authority to outline the criteria or method for assessment of whether a tender is abnormally low in the tender conditions. The burden of proof of abnormality rests with the contracting authority and there are few cases where it has been successfully discharged. Neither does the United Kingdom, in which legislation there is no indication on what constitutes an abnormally low bid. In addition, there is no provision in the UK legislation regarding the possibility of automatic formulae being used for the assessment of abnormally low tenders and, consequently, contracting authorities are left to decide on what may be constitutes to them an abnormally low tender—which leads to legal uncertainty on how to make that judgment (particularly in view of the contradictions in the existing case law). Similarly, France does not have a definition of abnormally low tenders, nor a methodology to screen them. Also along these lines, Germany does not have a definition of abnormally low tender or a scrutinizing methodology (and indications in the case law offer such big variations as setting the relevant thresholds between 10% and 50% price differences). Poland does not offer a definition or a screening methodology either; there are no statutory provisions on the circumstances under which the duty to require explanations arises (and the case law has so far not been very specific, since it has been considered that there is no duty to ask for explanations if the differences between the offered prices does not exceed 10%, while stressing that there is no threshold of price differences which could be applied in every case).

Other jurisdictions, however, have adopted a screening methodology and, implicitly, a definition of an apparently abnormally low tender. This is the case of Romania, where an offer is prima facie considered abnormally low when the proposed price, without VAT, represents less than 85% of the estimated value of the contract, or, when there are at least five valid tenders, when the price represents less than 85% from their arithmetic mean (excluding the highest and the lowest tenders). There is also anecdotal evidence of screening for ‘unreasonable’ values for criteria other than price if the contract is not awarded solely on the basis of the lowest offer (which, however, only seem to catch rather extreme circumstances of unreasonable, illogical or gratis offers).

Adopting a similar approach, when the lowest price is the relevant award criterion, Spanish law sets a rebuttable presumption of abnormality by reference to certain value thresholds referred to either the tender budget or a given average of the tenders received (which is calculated in different manner depending on the number of valid offers received). More specifically, an offer will, in principle, be considered abnormally low or disproportionate if it is lower than the base budget by more than 25%, in case it is lower than the rest of the offers by more than 20% (when there are two tenderers), or by more than 10% (where there are three or more bidders, with some corrections). On top of that, exceptionally, and considering the subject-matter of the contract and prevailing market circumstances, the contracting authority may reduce by a third these percentage rates, offering a sufficient motivation in the tender documents. And, in any case, in order to assess the bids as disproportionate, the contracting authority may consider the relationship between the solvency of the tenderer and the offer submitted. As we see, this legislation offers a staggered approach to

33 For suggestions as to how to proceed, see Telles’ contribution.
34 However, as indicated in the contribution by Dragos, Neamtu and Suciu, these rules seem to be circumvented sometimes and contracting authorities may reject tenders that are 5% lower than the estimated budget, which is a clearly illegal practice, as the authors rightly point out.
35 For further details, see my other contribution to this book.
the screening of abnormally low tenders that is not without difficulty. In the case of awards based on the most economically advantageous tender (MEAT), in order to screen for apparently abnormally or disproportionately low offers, contracting authorities must establish in the tender documents the objective parameters, if any, that will be used to determine that a proposition cannot be fulfilled due to the inclusion of abnormal or disproportionate low values. If the price offered is one of the objective criteria to be used as a basis for the award, the tender documents can indicate the limits, if any, that will be used to determine that a proposition cannot be fulfilled due to the inclusion of abnormal or disproportionate low price. This gives contracting authorities more discretion than in the case of tenders awarded under the lowest price criterion.

Finally, and along the same lines, Italian law gives broad flexibility to contracting authorities to investigate potentially abnormally low tenders, but also sets two specific screening rules. On the one hand, when contracts should be awarded according to the lowest price, and as long as more than 5 tenders are received, the screening is based on the average discount offered by the tenderers, tempered by excluding the highest and lowest. On its part, when MEAT is used, screening is due of all tenders whose price quotation and the marks gotten for the criteria different from price both exceed 4/5 of the maximum marks possible. As a complement, the costs relating to the workforce and to the security on the workplace are estimated beforehand by the contracting authority; and no tenderer can submit a lower quotation concerning the costs of workplace security.

2.2.2. The Existence of a Duty to Reject Abnormally Low Tenders

A second issue that is open for domestic legislations to regulate is whether, once the authority has found an offer to be abnormally low after completing the required written inter partes procedure, there is an obligation to reject it or, on the contrary, if the contracting authority can accept it on the basis of any other overriding considerations. In this regard, some jurisdictions leave this to the discretion of the contracting authority (with or without imposing general criteria to be taken into consideration), while others expressly mandate the rejection of abnormally low tenders. Indeed, a first group of jurisdictions expressly require the rejection of abnormally low tenders. Under German law, there is a legal prohibition of taking into account tenders that have been officially ascertained to be abnormally low. Equally, under Polish law, contracting entities are obliged to reject tenders containing an abnormally low price in relation to the subject-matter of the contract, and an infringement of this duty to reject abnormally low tenders is a specific ground for appeal. Finally, the situation in Italy is hybrid because the applicable rules are not explicit on whether contracting authorities must or may dismiss abnormally low tenders and, on its part, the case law has interpreted that there is a duty to reject in case of award to the lowest price, and simply a power to do so in case of award to the MEAT.

In a second group of jurisdictions, contracting authorities retain the discretion to reject or accept an abnormally low tender (although they can be subjected to some general criteria in its exercise). This is the case in Romania, where contracting authorities do not have to automatically dismiss abnormally low tenders (although, in practice, they seem to generally opt for rejection). Almost identically, in the United Kingdom, it is not entirely clear what should happen if the bid is deemed as not genuine, serious or viable after the test is conducted, given that the Regulations in

36 It is worth mentioning that, on paper, all jurisdictions have properly adopted a procedure that meets the requirements of EU rules and case law. However, practice may be different, as the Romanian example shows.
the UK adopt the same wording of the directive and mention that the test must be conducted before the tender ‘may’ be excluded (which does not impose an obligation to reject, despite it being the most logical consequence of a finding of abnormality). Similarly, according to Danish law, there is no mandatory requirement to reject abnormally low tenders and contracting authorities in principle enjoy wide discretion in this respect (unless, as a consequence of the abnormally low price, there is a risk that it will be necessary to correct the price subsequently—which would be contrary to the applicable rules). In practice, most Danish contracting authorities consider it irrelevant to reject what appears to be an abnormally low tender and, as a consequence, rejections on this basis are relatively rare. Likewise, under Spanish law, there is no positive obligation to automatically reject abnormally low or disproportionate tenders, but contracting authorities are under serious pressure to make sure that the contract can be satisfactorily executed in the terms of the offer if they opt not to reject it. Finally, under French law, there is no mandatory requirement to dismiss abnormally low tenders. However, rejection can be mandatory if the abnormally low tender was submitted by an undertaking in a dominant position (impliedly, to prevent instances of predatory pricing) and, increasingly, decisions not to reject abnormally low tenders are scrutinized in search for manifest errors of assessment, thereby imposing significant pressure on contracting authorities willing to retain them.

As we see, even in the jurisdictions where rejection is not mandated, there is a clear trend towards rejection of abnormally low tenders, and this may support the future consolidation, as a matter of EU law, of a positive obligation to reject abnormally low tenders unless sufficient overriding reasons can be provided by the authority (subject always to a proportionality analysis).

2.2.3. (In)Existence of Special Rules for Abnormally Low Tenders Tainted with State Aid

Even if there are other potentially interesting aspects for a comparative analysis, the last bit of the domestic rules that we will scrutinize refers to the rules applicable to abnormally low tenders tainted by State aid. It must be stressed that, despite the relevance given to this issue in the EU directives, there are jurisdictions where this is clearly an underdeveloped area of public procurement and competition law. The very limited experiences in Italy, France, Spain, Germany or Denmark show how unimportant this issue is in practice, or that these matters are much more likely to be challenged at the EU level than in domestic jurisdictions (probably in view of the restrictions analysed above §2.1.3). Poland seems to accumulate a larger number of cases, but they seem to have been decided on the grounds of procedural issues (expiry of time limits to provide evidence of the legality of the aid) rather than on their merits. The case law is also more specific in Romania, particularly as regards State aid for social policy goals, where tenderers have been able to successfully justify the viability of their offers on the grounds that they were receiving legal State aid. My impression is that the mere reproduction of the rules in the EU Directive in domestic legislation and the limited powers of contracting authorities and domestic courts in the area of State aid have significantly restricted this area of intersection between public procurement and competition law that, in my view, deserves more attention in the future.

3. TREATMENT OF NON-COMPLIANT BIDS

3.1. EU Rules and Case Law

During the tender evaluation process, and as a result of applying the pertinent evaluation rules, contracting authorities can determine that, without being abnormally low (above §2), a given tender is not fully compliant with the technical specifications or other requirements regulating the tender. This deviation from the tender requirements should be determined in accordance with a general mandate to accept functional and performance equivalents and, consequently, cannot be justified on purely formal terms or by relation to a given standard—at least if alternative standards are available and if the tenderer has proven the equivalence of the proposed solution under the latter [art 23(4) and 23(5) dir 2004/18]. In any case, deviations from the requirements set by the contracting authority in the tender documents can still take place under the test of functional or performance equivalence, and a determination that a bid is not fully compliant with the tender requirements can clearly take place under the regime regulating technical specifications.

In that situation, however, there is room for significant variation as regards the degree of non-compliance of bids. At the one extreme, bids can be completely unsuitable for the purposes intended by the contracting authority and, at the other extreme, tenders can be merely non-compliant with marginal or secondary issues that would not significantly alter the ability of the tender to satisfy the contracting authorities' needs. Any imaginable situation lying in the middle of these two extremes is possible and, consequently, a rigid rule applicable equally to all instances of formal non-compliance seems to offer relatively limited results. The difficulty in this area derives from the silence of the directive, which does not provide a rule applicable equally to all instances of formal non-compliance.

In this regard, it should be stressed that contracting authorities might be willing to accept relatively minor deviations from the tender requirements provided that, overall, the tender is beneficial to their interests. Therefore, interpreting the silence in the directive as imposing an automatic and non-waivable requirement to reject all non-fully compliant bids could limit unnecessarily the alternatives of the contracting authority and may defeat the purpose of the procurement procedure by imposing the contracting of overall second-best solutions. Generally, it is worth recalling that the directive acknowledges that contracting authorities might consider it appropriate to expressly confer on tenderers the possibility to submit alternative solutions that do not fully comply with all the tender requirements, or even that substantially depart from the tender requirements in certain aspects, as long as they can still satisfy the needs intended to be covered by the contract—ie variants that meet the 'standard' or 'core' tender requirements. This alternative is available to contracting authorities as long as they (strictly) comply with certain specific rules laid down in the EU public procurement directives. However, the issue of the treatment of non-compliant bids has recently been stressed. See Opinion of AG Poiares Maduro in case C-250/07 Commission v Greece ¶¶10-13, where it is argued that a tender cannot be rejected as ‘unsuitable’ only because it does not satisfy fully the criteria set out in the call for tenders, and that ‘unsuitability’ rather arises when the tender cannot cover the needs of the contracting entity—ie when there is a substantial departure from the criteria set out in the call for tenders. The argument is implicitly echoed by the CJUE in Case C-250/07 Commission v Greece [2009] ECR I-4369 ¶43, distinguishing between unsuitability and non-conformity that constitutes a mere inaccuracy or a mere detail.

38 Such differentiation between unsuitable and non-fully compliant bids has recently been stressed. See Opinion of AG Poiares Maduro in case C-250/07 Commission v Greece ¶¶10-13, where it is argued that a tender cannot be rejected as ‘unsuitable’ only because it does not satisfy fully the criteria set out in the call for tenders, and that ‘unsuitability’ rather arises when the tender cannot cover the needs of the contracting entity—ie when there is a substantial departure from the criteria set out in the call for tenders. The argument is implicitly echoed by the CJUE in Case C-250/07 Commission v Greece [2009] ECR I-4369 ¶43, distinguishing between unsuitability and non-conformity that constitutes a mere inaccuracy or a mere detail.

39 Generally, on the acceptance of tenders non-compliant with substantive requirements or procedural formalities, see Arrowsmith (n 4) 493-499.
compliant bids will arise where variants are not admitted (or, marginally, where variants do not comply with the core mandatory requirements). Finally, it should also be borne in mind that the treatment granted to non-fully compliant bids can alter the outcome of the tendering process and, more generally, can have an impact on competition\(^{40}\) and on the outcome of the tender procedure. Therefore, it deserves some detailed analysis.

3.1.1. **Restriction of the Criteria available to Determine Compliance**

As a preliminary issue, it should be stressed that determinations of compliance or non-compliance of tenders should be conducted solely on the basis of the criteria set out in the call for tenders. In this regard, the EU judicature has consistently stressed that, when reference has been made to certain standards in the setting of the technical specifications applicable to a given tender, offers that comply (or are certified to comply) with those standards cannot be rejected on technical grounds.\(^{41}\) Also, the principle of equal treatment of tenderers and the ensuing obligation of transparency prohibit contracting authorities from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications, but adopted after the submission of the tenders.\(^{42}\) Therefore, it should be clear that determinations of compliance by contracting authorities are restricted to the criteria set in the contract documentation—primarily as an obligation ensuing from the principle of equal treatment and as a clear rule aimed at preventing contracting authorities from exercising unrestricted freedom of choice amongst tenders.

3.1.2. **The Possibility to Ask for Clarification when a Tender Seems to Be Non-Compliant**

A related issue concerns the degree of discretion or the duty under which the contracting authority may find itself when it identifies an imprecise tender or one which does not seem to meet the technical requirements of the relevant tender specifications (ie a seemingly non-compliant tender). In contrast to the situation concerning abnormally low tenders (above §2.1.1), Directive 2004/18 does not contain any provision which expressly sets out the procedure to be followed in the event that the contracting authority finds that the tender submitted is imprecise or does not meet the technical requirements of the tender specifications.

The CJEU has addressed this issue—although exclusively in connection to restricted procedures (which conclusions can be applied to open procedures)—and has found that

To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment. [...] it does not follow from Article 2 or from any


\(^{41}\) In particular, as regards medical devices that bear a ‘CE’ marking, the CJEU clearly holds that contracting authorities are generally precluded ‘from being entitled to reject [...] on grounds of technical inadequacy, medical devices which are certified as being in compliance with the essential requirements provided for’ by the relevant directive; see Case C-6/05 Medipac-Kazantzidis [2007] ECR I-4557 ¶¶50-52; and Case C-489/06 Commission v Greece [2009] ECR I-1797 ¶43.

\(^{42}\) Case C-6/05 Medipac-Kazantzidis [2007] ECR I-4557 ¶54.
other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned.\footnote{Case C-599/10 SAG ELV Slovensko [2012] nyr ¶¶37-38, emphasis added.}

However, despite the inexistence of such a duty to request clarifications, contracting authorities can, if they so wish, engage in a non-discriminatory process whereby they allow for the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender\footnote{Case C-599/10 SAG ELV Slovensko [2012] nyr ¶40.}, always provided that\footnote{Case C-599/10 SAG ELV Slovensko [2012] nyr ¶45, emphasis added. One can wonder whether the ex post requirement in the test imposed by the CJEU is not impossible to meet (probatio diabolica), and whether it does not set too high a barrier for contracting authorities to effectively engage in clarification exercises.}

In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.\footnote{For critical comments, see D McGowan, ‘An obligation to investigate abnormally low bids? SAG ELV Slovensko a.s. (C-599/10)’ (2012) Public Procurement Law Review NA 165. See also the remarks by Treumer in the first chapter of this book.}

Therefore, differently to what applies in the case of seemingly abnormally low tenders, contracting authorities are not bound to request clarifications but can nevertheless do so, as long as they are scrupulous in avoiding any (perceived) instance of discrimination\footnote{Joined Cases T-376/05 and T-383/05 TEA–CEGOS [2006] ECR II-205 ¶76, emphasis added.}—which may create difficulties where it is unclear whether a tender is non-compliant or abnormally low, particularly if non-compliance would depend on the value given to any specific parameter in the offer.

In my view, the argument can be even taken further and there is scope for the adoption of a ‘possibilistic’ or anti-formalistic approach—oriented towards maintaining the maximum possible degree of competition by avoiding the rejection of offers on the basis of too formal and/or automatic rejection criteria for non-compliant offers. It is important to underline that the relevant case law has already offered some guidance that points in this direction by stressing that ‘the guarantees conferred by the Community legal order in administrative proceedings include, in particular, the principle of good administration, involving the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case’\footnote{Joined Cases T-376/05 and T-383/05 TEA–CEGOS [2006] ECR II-205 ¶83.}—which, in the case of public procurement, should be interpreted as requiring contracting authorities to exercise due care in the evaluation of the bids submitted by tenderers.\footnote{The argument can be even taken further and there is scope for the adoption of a ‘possibilistic’ or anti-formalistic approach—oriented towards maintaining the maximum possible degree of competition by avoiding the rejection of offers on the basis of too formal and/or automatic rejection criteria for non-compliant offers. It is important to underline that the relevant case law has already offered some guidance that points in this direction by stressing that ‘the guarantees conferred by the Community legal order in administrative proceedings include, in particular, the principle of good administration, involving the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case’—which, in the case of public procurement, should be interpreted as requiring contracting authorities to exercise due care in the evaluation of the bids submitted by tenderers.}
adoption of this possibilistic approach in the evaluation of bids (as a specification or particularization of the duty of due care or diligent administration that is required of contracting authorities).

In this regard, as reasoned by the EU case law, the contracting authority is under an obligation to conduct the revision of the bids in accordance with the principle of good administration (art 41 CFREU)\(^\text{49}\) and is, consequently, under an obligation to exercise the power to ask for additional information in circumstances where the clarification of a tender is clearly both practically possible and necessary, and as long as the exercise of that duty to seek clarification is in accordance with the principle of equal treatment.\(^\text{50}\) This means that the contracting authority is to adopt an anti-formalist approach that renders the effective appraisal of the tenders possible—regardless of minor deficiencies, ambiguities or apparent mistakes. Indeed, as stressed by the jurisprudence, in cases where the terms of a tender themselves and the surrounding circumstances known to the authority indicate that the ambiguity probably has a simple explanation and can be easily resolved, then, in principle, it is contrary to the requirements of good administration to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is, consequently, liable to be vitiating by a manifest error of assessment on the part of the contracting authority,\(^\text{51}\) and could result in an unnecessary restriction of competition. Therefore, contracting authorities should ensure that the evaluation of bids leading to the award of the contract is based on the substance of the tenders—by adopting a possibilistic or anti-formalist approach that excludes purely formal decisions that restrict competition unnecessarily; subject, always, to guaranteeing compliance with the principle of equal treatment.

In that vein, it is important to stress that the duty of good administration does not go so far as to require the contracting authority to seek clarification in every case where a tender is ambiguously drafted.\(^\text{52}\) Particularly as regards calculations and other possible non-obvious clerical mistakes, the duty of good administration is considerably more restricted and the authority’s diligence only requires that clarification be sought in the face of obvious errors that should have been detected when assessing the bid.\(^\text{53}\) This is so particularly because, as clearly indicated by the CJEU, the presence of non-obvious errors and their subsequent amendment or correction might result in breaches of the principle of equal treatment.\(^\text{54}\) Therefore, as the general criterion, it seems that the relevant case law intends to favour the possibilistic approach hereby advanced, subject to two restrictions: i) that it does not breach the principle of equal treatment (ie that it does not

\(^{49}\) Article 41 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303/1). On this general principle of EU administrative law, see T Fortsakis, ‘Principles Governing Good Administration’ (2005) 11 European Public Law 207. Of particular relevance here is one of the manifestations of the general principle of good administration, ie the principle of proper functioning of the administration—which implies that ‘administrations are required to carry out their activities not only in accordance with the relevant legal rules but also in a professional manner and in keeping with the facts of common experience’ (ibid at 209). See also HP Nehl, Principles of Administrative Procedure in EC Law (Oxford, Hart Publishing, 1999) 101-165; and J Mendes, ‘Good Administration in EU Law and the European Code of Good Administrative Behaviour’, EUI Working Paper Law 2009/09, available at http://hdl.handle.net/1814/12101, last visited 9 April 2013.


\(^{52}\) See Case T-211/02 Tideland Signal [2002] ECR II-3781 ¶37 ab initio.


jeopardize the neutrality of the evaluation of tenders), and ii) that it does not require the contracting authority to develop special efforts to identify errors or insufficiencies in the tenders that do not arise from a diligent and regular evaluation. In this regard, the additional practical guidance recently offered by the CJEU is valuable:

a request for clarification of a tender may be made only after the contracting authority has looked at all the tenders [...] Furthermore, that request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected. In addition, that request must relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications, without the contracting authority being entitled to reject a tender because of the lack of clarity of a part thereof which was not covered in that request.\footnote{Case C-599/10 SAG ELV Slovensko [2012] Jyr ¶¶42-44.}

In conclusion, and in view of the possibilistic approach adopted by the CJEU itself towards the assessment of imprecise tenders and tenders that seem to be non-compliant, it is submitted that contracting authorities should develop the activities of evaluation of bids and award of the contract on the basis of a neutral and possibilistic approach—which must be aimed at trying not to restrict competition on the basis of considerations that are too formal (ie to effectively appraise which is the tender that actually or in substance offers the best conditions, regardless of minor formal defects or non-fulfilment of immaterial requirements) and, at the same time, ensuring compliance with the principle of non-discrimination and the ensuing transparency obligation. In practical terms, this flexibility in the screening of non-compliant offers prior to rejection should alleviate the problem.

3.1.3. Mandatory Rejection of Non-Fully Compliant Tenders

Despite the previous restriction of the grounds for the consideration of non-compliance and the flexibility and possibilistic approach towards excluding non-compliance, it is impossible to totally suppress the existence of cases where contracting authorities will reach the conclusion that a given tender does not fully meet all applicable tender requirements. And, nonetheless, contracting authorities can be convinced that that specific tender is the one that better meets their needs. In this regard, it is regrettable that Directive 2004/18 does not contain express rules determining whether contracting authorities are bound to reject non-fully compliant bids in all cases or, on the contrary, whether they can retain a certain degree of discretion to accept them. Nonetheless, this issue has been addressed by the case law of the CJEU, which has determined that ‘the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers’\footnote{Case C-243/89 Storebaelt [1993] ECR I-3353 ¶37.} and that ‘[t]hat requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions [...] except where those terms expressly allow them to do so’.\footnote{Case C-243/89 Storebaelt [1993] ECR I-3353 ¶40.} Therefore,

it is also essential, in the interests of legal certainty, that the [contracting authority] be able to ascertain precisely what a tender submitted in the course of a procurement procedure means and, in particular, to determine whether the tender complies with the conditions set out in the contract documents. Thus, where a tender is ambiguous and the [contracting
authority] is not in a position to establish, quickly and efficiently, what it actually means, that institution has no choice but to reject the tender.58

Consequently—unless contract documents expressly allow for specific departures from the basic requirements (ie unless variations were authorised)—there seems to be an absolute obligation to dismiss non-fully compliant bids as a requirement or corollary of the principles of equality of treatment59 and legal certainty. Therefore, the acceptance or rejection of a non-fully compliant bid is not within the discretion of the contracting authority—which must automatically reject all non-compliant bids in order to guarantee equality of treatment. In my opinion, such interpreting case law is unnecessarily restrictive and leads to excessive limitations of competition based solely on largely formalistic criteria that might also diminish the ability of contracting authorities to obtain value for money. However, it must be reckoned that this is the current state of the law at the EU level,60 which can only possibly be tempered by an application of the principle of proportionality61.

3.1.4. Preliminary Conclusion on the Requirements Imposed by EU Public Procurement Rules

As a matter of EU law, then, contracting authorities need to assess tender compliance exclusively on the basis of the requirements included in the tender documents and cannot exclude tenders on the basis of technical defects where functional equivalence or compliance with an existing European standard is proven. Seemingly, as a requirement derived from the principle of good administration, they must adopt a possibilistic and non-formalistic approach in the assessment of tenders and should engage in the clarification of obvious errors whenever they identify an imprecise or seemingly non-compliant tender, always provided that they do it in a non-discriminatory, objective manner. Finally, however, contracting authorities are under an absolute requirement to reject non-compliant tenders as found (as long as it is reasonable and proportionate to do so). Again, these are the standards against which domestic rules will be assessed.

3.2. Applicable Rules in the Selected Jurisdictions

As a matter of their general principles or rules, Member States show a clear convergence around the restrictive approach imposed by the CJEU and tend to uphold rules whereby non-compliance with tender requirements implies tender rejection. However, some Member States have recently implemented regulatory changes and/or their case law has moved in the direction of: i) creating some flexibility by distinguishing between formal and substantial requirements (and, simultaneously, reducing the scope for rejection on the basis of the mere non-compliance of formal requirements), and ii) increasing the duties or powers of clarification by contracting authorities in order to minimise the instances of rejection of non-compliant bids.

3.2.1. Strength of the Principle of Mandatory Rejection of Non-Compliant Tenders

Some EU jurisdictions follow very closely the seemingly absolute requirement for the rejection of non-compliant tenders that can be read in the CJEU leading case of Storebaelt. This is particularly the

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60 For criticism and a proposal to introduce some flexibility in this area, Sanchez Graells (n 23) 322-323.
61 In similar terms, in his contribution to this book, Treumer also indicates proportionality as a correction.
case of France, Romania, Denmark and Poland—and, to a large extent, of Germany, Italy and Spain; whereas the United Kingdom seems to allow for a more flexible approach. Notwithstanding such general approach, most of the jurisdictions have started to create some flexibility, particularly concerning formal requirements, as we shall see in more detail below. However, the overall impression is that the general principle of mandatory rejection of non-compliant tenders is still the default rule of thumb.

Indeed, France seems to be amongst the most restrictive Member States, since a general principle of automatic rejection of non-compliant tenders is clearly set out and there are very limited exceptions available in the case law—so that tenders cannot be completed, or modified, or simply rectified in case of mistakes. As a matter of principle, contracting authorities must reject non-compliant tenders, whether they are non-compliant on the substance or with formal requirements, and when they deviate from any prescriptions present in the tender documentation, even if they are not material or directly relevant to the object of the contract.

Similarly, Romania follows a stringent approach, since contracting authorities are required to reject the tenders if they do not comply with the requirements of the tender documentation (without any legal distinction between formal and substantive requirements), or if they comprise proposals for the disadvantageous modification of the contractual clauses established by the contracting authority (ie where tenderers condition their offers to a ‘softening’ of the contractual requirements).

Denmark also retains a rather restrictive approach and enforces a broad principle whereby acceptance of non-compliant tenders is in general prohibited. Even if a distinction between fundamental and non-fundamental substantive requirements has been developed in the case law, the interpretation of “fundamental” is expansive and, consequently, non-compliance often leads to a duty to reject the tender. The approach is equally restrictive as concerns formal requirements, which has nonetheless triggered criticism by practitioners and scholars, and prompted legal reform in 2011 (below §3.2.2). However, even under the new rules, contracting authorities are always entitled to reject tenders that do not fully comply with even the minor of formalities and, consequently, the general “pro-rejection principle” remains strong in this jurisdiction.

Poland, on its part, also adopts a rather strict rule of rejection, whereby tenders that fail to comply with any statutory requirement (ie those imposed by a law, whether of a substantive or formal nature), or with the specification of the essential terms of the contract, or that contain computational errors in the calculation of prices, must be rejected. The only flexibility introduced in this generally stringent rule seems to be that formal or procedural requirements created by the contracting authority that go beyond the statutorily required are not valid grounds for rejection (but additional substantive requirements are).

Germany enforces a principle of almost mandatory rejection of formally non-compliant bids, whereas it follows a more complex approach concerning substantive requirements (with a more stringent rule of rejection for price-related non-compliance and a seemingly more flexible approach to performance-related deficiencies or variations), which are coupled with a specific rule concerning the ineligibility of tenders where changes or additions have been made to the contractual documents.
In a slightly more flexible approach, Spain retains a very stringent approach that mandates rejection of tenders that do not fully comply with the applicable substantive requirements (since any deviation from the specifications of the tender documentation would make the award invalid on grounds of discrimination against compliant tenderers), but has developed a more nuanced approach towards formal non-compliance. While major formal shortcomings should result in the exclusion of the tender (due to incongruity of the offer), a second type of minor errors is subject to a potential request for clarifications by the contracting authority (below §3.2.3).

Very similarly, in Italy, there is well-established case law mandating rejection of substantially non-compliant tenders, whereby the courts have constantly required rejection of tenders that do not fully meet technical specifications. In contrast, and going beyond the Spanish approach, recent legislative reforms have aimed to reverse the former rule of rejection of all formally non-compliant tenders and to set up a limited number of grounds for rejection (ie a numerus clausus) concerned with major formal defects that question the integrity or validity of the tender. Indeed, given the excessively formalistic pre-existing case law, in 2011, the Italian legislature passed a modification of the relevant rules whereby only very serious formal deficiencies trigger rejection—simultaneously increasing the duties of contracting authorities to seek clarifications where needed (below §3.2.3).

In the most flexible position, and in line with its traditional approach to public contracts, the United Kingdom seems to be the jurisdiction that gives more flexibility to contracting authorities on the basis of the requirements of the principle of proportionality. A 2009 decision by the High Court in England indicates that a contracting authority may, in some circumstances, exercise its discretion to allow bids to stand even if they are technically non-compliant; although it is not a discretion that the contracting authority is required to exercise, particularly where the cause of the non-compliance lies with the bidder and there is a risk of unequal treatment against bidders that submitted compliant tenders. Therefore, contracting authorities are within their rights to use even minor instances of technical non-compliance by bidders to reject otherwise valid tenders, given that the requirement to act proportionally (ie the requirement to avoid rejection on the basis of an excessively formalistic approach) cannot override the requirement to treat all bidders equally in a non-discriminatory fashion and to act transparently. In short, the principle of mandatory rejection of non-compliant bids may not be as tight as in other EU jurisdictions but, in practical terms, the effects seem to be largely the same.

3.2.2. Distinction between Substantive and Formal Requirements, and Reduction of (Merely) Formal Disqualification

As briefly mentioned, even in the jurisdictions where there is a stronger adherence to the general rule of mandatory rejection of non-compliant tenders, either case law or recent legislative modifications have attempted to create some flexibility by distinguishing formal and substantive requirements and, in most instances, distinguishing between essential or core requirements (which will justify or require rejection) and secondary or dispensable conditions (which will, at the very least, require a balanced analysis, if they are not excluded as causes for tender rejection). At face value, these developments seem to contradict the very strict approach followed by the CJEU but, in

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my opinion, can be reconciled on the basis of the principle of proportionality and with a functional re-reading of the seminal cases—where, at the bottom line, the CJEU was (impliedly) requiring that the partial non-compliance did not materially affect the ability of the tender to satisfy the needs of the contracting authority and/or that the waiver of some requirements did not grant the tenderer a material advantage over other competing bidders.64

3.2.2.1. Substantive Requirements as Grounds for Rejection of Non-Compliant Bids

All the jurisdictions analysed retain a very restrictive approach to any deviations from the substantive requirements included in the tender documents. The principles of non-discrimination and legal certainty are, more or less explicitly, the basis for such a restrictive approach. Indeed, except if in accordance with the rules on the acceptance of variants, substantive non-compliance is generally a non-waivable ground for the automatic rejection of tenders. This is clearly the case in France65, Romania, Poland, Italy and Spain.

Germany has developed a more complicated set of rules, where price elements in the offer are subject to strict rejection requirements, whereas other substantive requirements present a state of certain conceptual uncertainty (although there is consensus on the requirement to reject technically non-compliant tenders, unless performance equivalence can be satisfactorily justified which, in the end, is the current EU rule). There is some case law that requires that non-compliance be material and to have the potential to alter the result of the competition—ie that sets out that tenders have to be comparable with regard to any aspect of the contractual specifications, but only within the limits of reasonableness (on which basis, some high courts have denied the ineligibility of tenders where the non-compliant items would be insignificant and would not impair competition). However, the legislature restricted this case law in 2009 by limiting the potential for non-compliance to one price element, and there is growing consensus against the creation of carve outs and exceptions to the general rule of mandatory rejection.66

In Denmark, similarly and as briefly mentioned, the case law has also attempted a more fine-grained approach to substantive requirements by creating a distinction between fundamental and non-fundamental substantive requirements, but the interpretation of “fundamental” is expansive and, consequently, non-compliance often leads to a duty to reject the tender.

Therefore, even in Germany and Denmark, despite the efforts to create a more staggered approach towards substantive non-compliance in the case law, the default position seems to still result in de facto mandatory disqualification of substantially non-compliant bids. Not surprisingly, in all jurisdictions, the strictness of the rule on the rejection of non-compliant bids has created pressure for the development of case law on the duty of contracting authorities to seek clarifications

65 Although, as pointed out by Lichère in his contribution to this book, there seems to be some confusion as to the possibility to accept minor technical deviations even when variants were not expressly admitted as long as they are slight modifications which improve the project.
66 For more information, see the detailed account provided by Burgi in his contribution to this book.
and to test the functional equivalence of the apparently substantially non-compliant tenders, which can work as an escape valve and offer some room for flexibility (as we shall see below §3.2.3).

3.2.2.2. Formal Requirements as Grounds for Rejection of Non-Compliant Bids

It also seems a general feature of all the jurisdictions analysed that they have traditionally held a rule where any formal non-compliance would trigger rejection of the tenders (for reasons such as exceeding the maximum length of the tender, providing improperly paginated documents, failing to sign all pages and annexes, not adhering strictly to the formats and formulaires published by the contracting authority, by using other languages or measurement units, etc). It is also a common feature that commentators have generally criticised such a formalistic approach and, in some jurisdictions, this has prompted the development of case law or legal rules aimed at tempering it. However, some jurisdictions such as France, Romania, Germany and Poland remain very strict regarding formal compliance. In other jurisdictions, such as Denmark, Spain or Italy, some variation is observable as regards the new rules for a more balanced treatment of formal non-compliance as a mandatory ground for tender rejection.

Indeed, a first group of jurisdictions remains very strict in the imposition of formal non-compliance as a mandatory ground for disqualification. This is clearly the case of France, where formal deficiencies trigger rejection and where very limited, anecdotal exceptions can be found in the case law (for instance, in cases where there was an obvious calculation error, or where an otherwise publicly available document was missing, or a signature on an annex was absent). Romania also enforces a very strict approach, since the case law has interpreted in almost absolute terms the requirement of formal compliance (remarkably, getting to the very formalistic point of denying the equivalence between expressing time in minutes and in fractions of an hour), although minoritarian instances of non-formalistic case law can also be found. Similarly, in Germany, tenders are ineligible if they do not comply with the formal specifications of the contracting entities, such as the written form or signature requirements. The same applies in Poland, with the only limited exception of non-statutory formal requirements, which have been interpreted by the case law not to constitute a sufficient ground for tender rejection. In these jurisdictions, the same formalism is generally also predictable regarding the belated submission of tenders, or their submission in the wrong place.

A second group of countries, such as Spain, Denmark and Italy, have adopted rules to try to limit the effects of formal non-compliance or, at least, to offer some flexibility to contracting authorities, to different degrees.

Spain has for a long time had some rules on the treatment of formal aspects of the tenders. According to a 2001 regulation, a distinction is made between, on the one hand, the requisite to submit the tender in accordance with certain formats or models (ie a congruity requirement) or to respect certain limits or restrictions; and, on the other hand, the requisite to provide clear, comprehensive and consistent information throughout the tender, particularly concerning values or prices. Based on this distinction, if some tender is inconsistent with the documentation reviewed and accepted, exceeds the basic tender budget, varies substantially from the established model or contains a manifest error in the amount of the offer, or if there is any recognition by the bidder of internal inconsistencies or of any error that vitiates the offer so as to make it unworkable or non-viable, the tender shall be rejected by the contracting authority. By contrast, the change or omission
of some words included in the models, provided that that does not alter their meaning, will not be sufficient to cause the rejection of the proposal. In principle, then, while the first group of major formal shortcomings should result in the exclusion of the tender (due to incongruity of the offer), the second type of errors is subject to a potential request for clarifications by the contracting authority. However, overall, the treatment of formally non-compliant tenders is still generally very strict. On the contrary, the exclusion of offers due to unclear or potentially inconsistent information is treated in a more cautious manner and subject to a proportionality test. Therefore, the rules on the possibility to request clarifications and the restrictions applicable to such clarifications in order to prevent forbidden changes to the submitted tenders become highly relevant.

Along the same lines, in Denmark, a legislative modification was adopted in 2011 so that contracting authorities that receive tenders that do not fulfil certain formal requirements can reject them, or can chose to: a) neglect the mistake or lacking information, provided that the contracting authority itself is in possession of the required information or documentation; b) collect the information or documentation, provided that it is publicly accessible; or c) request that the tenderers remedy the mistake or shortcoming within a certain deadline. Implicitly, in case the contracting authority decides not to reject the tender (which still remains an option and, consequently, makes the effects of this legislative change uncertain if contracting authorities opt to adopt a conservative approach), it must do so in a transparent and non-discriminatory manner, offering all non-compliant tenderers the same remedial opportunities. Therefore, the new legislation seems to give significant leeway to each contracting authority to decide on the level of formalism it wants to exercise in the assessment of the tenders received, always subject to the checks and balances imposed by the applicable general principles of public procurement.

Going a step beyond, Italy also adopted new legal rules in 2011, whereby it was set that contracting authorities can only reject a tender i) for lack of signature or other essential elements, or ii) if the envelope was broken or badly closed, or in any case if the principle of secrecy of tenders was violated. Any contrary clause in the tender documents is null and devoid of effects and, consequently, the grounds for rejection of formally non-compliant tenders have been subjected to a very limited **numerus clausus**. This regulatory reform followed up on a growing line of case law that criticised the prior very formalistic jurisprudence of the Consiglio di Stato, holding that the rejection of bids could not be justified with purely formal reasons but was possible only if the breach of the formal prescriptions in the tender documents was essentially preventing the tender from achieving its aims. Therefore, Italy presents the most restrictive approach to mandatory disqualification on the basis of formal shortcomings, and has expressly coupled this reform with the imposition of an extended duty of contracting authorities to seek clarifications and corrections of tenders in order to prevent any illegal rejection of non-compliant tenders.

As can be seen, in this second group of jurisdictions, the deactivation or flexibilisation of the rules on the automatic disqualification of formally non-compliant tenders goes hand in hand with an expansion of the powers and/or duties of the contracting authorities to seek clarification of imprecise or unclear tenders. This is a development that is shared, to a large extent (with the exception of France), with the first group of jurisdictions—although in the latter this seems to have

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67 As Treumer clearly emphasis, as well as worrying about the prospect that this legal change may not generate a change in administrative practices soon enough.
been mainly prompted by pressure derived from the interest not to reject substantially non-fully compliant bids (above §3.2.2.1).

3.2.3. Expansion of the Powers and/or Duties to Clarify Imprecise Tenders by Contracting Entities

It is very interesting to see how, rather than substituting the formal rule of mandatory rejection of non-compliant bids (particularly due to substantive shortcomings)—which would run frontally against the CJEU case law—the examined jurisdictions (with the exception of France, that continues to prevent bids from being completed, modified or simply rectified) have tried to pre-empt the problem by expanding the powers and/or duties of contracting authorities to seek clarifications from tenderers. As we have seen in relation to abnormally low tenders (above §2.1.2), there is a substantial body of EU guidance on the exercise of the duty of good administration and the prevention of discrimination in the carrying out of such clarifications. The same principles seem to have been picked up in the examined jurisdictions in the development of the rules and case law controlling contracting authorities’ enquiries when faced with an imprecise or apparently non-compliant bid.

3.2.3.1. Seeking Clarifications as a Duty or a Power of Contracting Authorities

As a preliminary issue, it is interesting to see that some Member States merely empower contracting authorities to seek for clarifications, whereas others have instituted a proper duty to request them and to investigate the potential imprecision or apparent non-compliance in the tenders. Only France seems to completely exclude this possibility by enforcing a very strict rule of ‘tender unmodifiability’.

On the one extreme, Denmark leaves it up to the specific contracting authority to choose whether to default to the rejection rule or embark in a clarification enquiry (and usually considers tenderers liable for the consequences of the defects of their tenders, unless the lack of clarity or imprecision derives directly from the tender documents, on which case the contracting authority’s decision to reject may be open to judicial scrutiny). Again, following a similar approach, the United Kingdom gives substantial room and discretion to contracting authorities to seek for clarifications, but enforces strictly the principle of non-discrimination, so that whatever remedial actions contracting authorities decide to offer to tenderers are offered to all of them in an egalitarian manner. Similarly, Poland merely empowers contracting authorities to seek for clarifications (although they can be found negligent if they fail to do so under certain circumstances). The relevant rules make it clear that the authorities can interpret tenders on their own and, even more, forces them to propose corrections to the tenderers in order to correct obvious misprints, obvious computational errors considering the calculation consequences of the conducted modifications, and other errors which bring about inconsistencies between the submitted tender and the specification of the essential terms of the contract but do not cause essential modifications of the tender (and economic operators will see their tenders rejected in case they do not confirm the corrections suggested by the contracting authority). This cannot imply a negotiation and the explanations may not change or supplement the submitted tender (although it seems clear that such an exchange of

68 See the Judgment of the High Court in Northern Ireland in Clinton (t/a Oriel Training Services) v Department for Employment and Learning & Anor [2012] NICA 48 (13 November 2012).
positions regarding a tender can be prone to litigation, not least on the basis that there are undercover negotiations).

In an intermediate position, and despite the ambiguity in the law, in Romania the relevant courts have ruled that the request for clarifications can be an obligation only when there are unclear or ambiguous elements in the tender, but not when there are missing documents or elements. The courts also seem to have given special relevance to the fact that an apparently non-compliant tender is the lowest-priced and, in those cases, they have tended to strengthen the obligation to seek for clarifications before its rejection. In any case, a general restriction is imposed by stressing that by asking clarifications, authorities cannot create a competitive advantage for one of the tenderers. In a similarly mild position, the relevant administrative practice in Spain is to consider that contracting authorities are under a ‘good administration’ duty to seek clarifications from tenderers (rather than dismissing their bids automatically) in case they experience difficulties understanding the content of their offers. Contracting authorities should effectively exercise their discretion to try to obtain reasonable and limited clarifications from the tenderers where the errors are obvious or a clarification may be provided using exclusively the information already submitted in the original tender. However, they are not under an absolute obligation to do so and, should there be any risk of (perceived) renegotiation or discrimination, they should refrain from requesting such clarifications.

On the opposite extreme, imposing a positive duty of action on contracting authorities, Italy mandates an extensive use of the power of the contracting authority to ask for clarifications to the participants in order to prevent any illegal rejections (since, as we have seen, they are particularly limited in terms of formal non-compliance). Also at this end of the spectrum, Germany requires contracting authorities to seek clarification before they can reject an apparently non-compliant tender. However, an express limitation is set to prevent the conduct of undercover negotiations, so that the contracting authorities may only request tenderers to provide information on the tender or their suitability, but no negotiations may be conducted.

3.2.3.2. The Possibility to Request Additional and Extraneous Information

It is also interesting to see that, generally, the powers and duties of contracting authorities are limited to seeking clarification of the information already submitted, so that no new documents or extraneous information can be submitted at this stage. This is particularly clear in Italian case law, which has clearly set this boundary: the request of a new document not included in the original bid is not allowed, but the request of clarification of an existing document is (which has some specific effects regarding identity documents not submitted with the tenders since, under Italian law, they affect the validity of the declarations therein contained). Along the same lines, Spanish case law also enforces the restriction that contracting authorities can seek for clarifications always provided they do not require or receive information not originally included in the tenders. However, in quite a strong contrast, some jurisdictions such as Germany, allow for a late submission of missing documentation upon request from the contracting authority and within an extended deadline, but this seems to be related to technical specifications and mostly in cases where variants are accepted.

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69 As is indeed the case. For details on the contradicting line of case law that, so far, has derived from such litigation, see Spyra’s contribution to this book.
3.2.3.3. Clarifications and Precisions Regarding Price and Price Sub-Elements

Another interesting area is whether clarifications can affect price or price-related elements of the tender, as it is obvious that such adjustments are likely to have an impact on the outcome of the tender. The stringent case law of the CJEU requires that errors or imprecisions in price are apparent and that they can only be remedied with information already contained in the tender.\(^\text{70}\) And these general guidelines seem to be followed in the examined jurisdictions. As already mentioned, the position is clearly restrictive in Germany, where only one price item can be corrected or clarified, and always as long as the overall price can be calculated with the information already present in the tender and in accordance with some predetermined rules (which, however, is already seen as a too lenient test by relevant commentators). In Denmark, a similarly restrictive approach was followed by the complaints board, which stressed that clarifications regarding price entail a risk of breach of the principle of equal treatment, and only allowed them in instances where the error or imprecision was obvious.\(^\text{71}\) Slightly differently, in Poland the rule is that a tender should be rejected if it contains computational errors in the calculation of prices but, if such an error is obvious, it should be corrected by the contracting authority (and, in this regard, it is interesting to stress that the case law is adopting a growingly flexible interpretation of what is an obvious mistake that must be corrected by the contracting authority, which may run against the principles set in the CJEU case law).\(^\text{72}\) In the other jurisdictions, it seems clear that contracting authorities need to treat any imprecision regarding price under their discretion to seek clarifications (above §3.2.3.1).

3.2.3.4. Clarifications Regarding Technical Matters

On their part, when clarifications are concerned with technical issues rather than with price elements, the approach seems to be more lenient across the board in those jurisdictions that have specific rules concerning the clarification of price-related elements; probably as a result of the mandates of technical neutrality and the obligation to assess tenders under a performance-based approach that the EU rules require. In this regard, it is clear that there is more leeway for technical than financial clarification in Germany, Denmark and Poland. And the general impression is that the same holds true in the rest of the jurisdictions examined (again, with the only exception of France).

4. CONCLUSIONS

The analysis of the domestic rules applicable to the treatment of abnormally low and non-compliant tenders has shown that, overall, Member States seem to have domestic rules and practices already aligned with the requirements and recent developments in EU law.

The specific rules show quite some variety of approaches in the areas not harmonised by EU rules and the case law of the CJEU. Despite this variety, however, some trends of convergence seem


\(^\text{71}\) Although, as Treumer points out, the concept of “apparent” mistake used by the Danish complaints board seems to be narrower than the one adopted at the EU level.

\(^\text{72}\) In this regard, for instance, there is a case where the absence of a price was deemed an obvious error and the appeals authority decided that it should have been corrected by assigning it a value of zero. In my view, this goes beyond the limits of the CJEU case law and may unfairly advantage the tenderer in some cases, or force it to deliver goods or render services for free, which does not seem to be in line with general practice. Therefore, it seems an instance of risky legal interpretation that may need some correction in order to adjust it to the requirements of non-discrimination and transparency imposed by the CJEU.
clear, in terms of trying to escape formalistic assessments and to design rules that take into consideration the effects of rejection decisions on the needs of the contracting authority, the business interests of tenderers and, ultimately, the effects in the market place. In this regard, contracting authorities are increasingly vested with discretion (and the subsequent powers / duties) to assess the likelihood of non-compliant and apparently low tenders being able to meet their needs while not generating significant negative impacts in the competition for the contract (and in the market concerned).

More specifically, comparing both sets of rules, it may be worth stressing that, while the treatment of abnormally low bids is becoming more prescriptive and a rule of mandatory (or strongly encouraged) rejection seems to be the general standard (subject only to limited exceptions based on the implicit requirements of proportionality and neutrality of competitive effects, in some jurisdictions and at the EU level); on its part, the treatment of non-compliant bids seems to be pushing in the opposite direction and to be creating more flexibility for contracting authorities to avoid automatic rejection due to secondary or insignificant tender defects that do not alter the competition and that would exclude the otherwise more advantageous or beneficial tender. Even if these developments are moving in opposite directions, they seem to aim to converge in a common ground where contracting authorities base their decisions whether to reject or not abnormally low and non-compliant tenders on the effects that such decisions can have on competition (for the contract, and in the market concerned) and, in view of those, where contracting authorities can decide whether there are other (proportional and non-discriminatory) reasons that justify non-rejection. This also seems to be in line with the most recent case law of the CJEU and, in particular, with the approach adopted in Slovensko.

In parallel, procedural requirements applicable to both cases seem to be growing closer and the _inter partes_ procedure foreseen for abnormally low tenders has been more or less extended (with some adaptations) to the request of clarifications concerning imprecise or apparently non-compliant tenders, at least in connection with the existence of obvious or apparent mistakes (although this area is showing less uniformity and some countries may be adopting flexible approaches that exceed the room of manoeuvre granted by the CJEU in its case law). In both areas, then, domestic rules and practice are increasingly echoing the development of ‘good administration’ duties and, in that regard, mirror the developments at the EU level (which should be welcome, particularly in view of the upgrade of the contents of the EUCFR to Treaty level after Lisbon).

All in all, in my view, the only area that seems to be significantly underdeveloped is that of the treatment of abnormally low bids tainted with State aid, which may call for a revision of the rules at the EU level and, possibly, for the development of more effective enforcement mechanisms at domestic level—with the desirable implication of the national competition authorities.