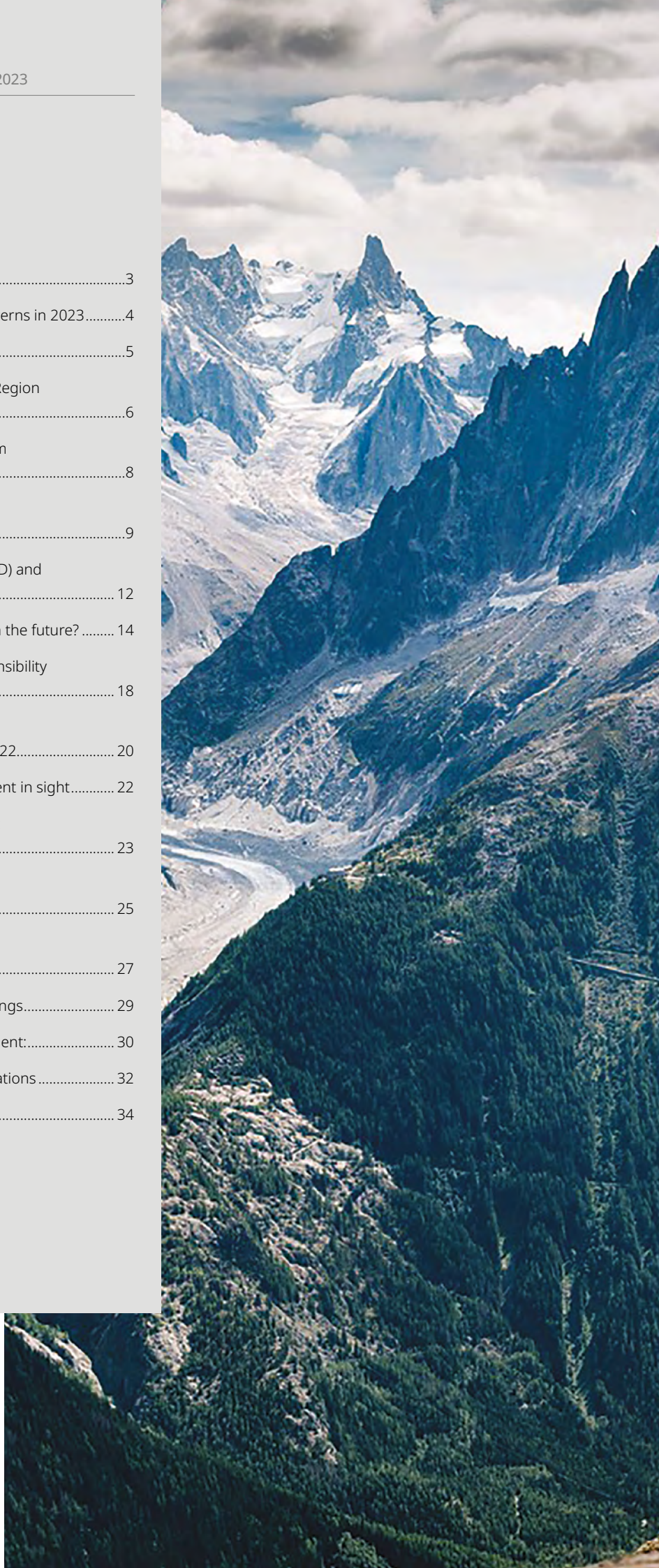
Public Law Annual Review

HIGHLIGHTS FOR 2023

DLA PIPER

Contents



Editorial

Dear reader,

We're delighted to share our Annual Review of what we've identified as salient facts, jurisprudence or trends in 2022 in the public law sector.

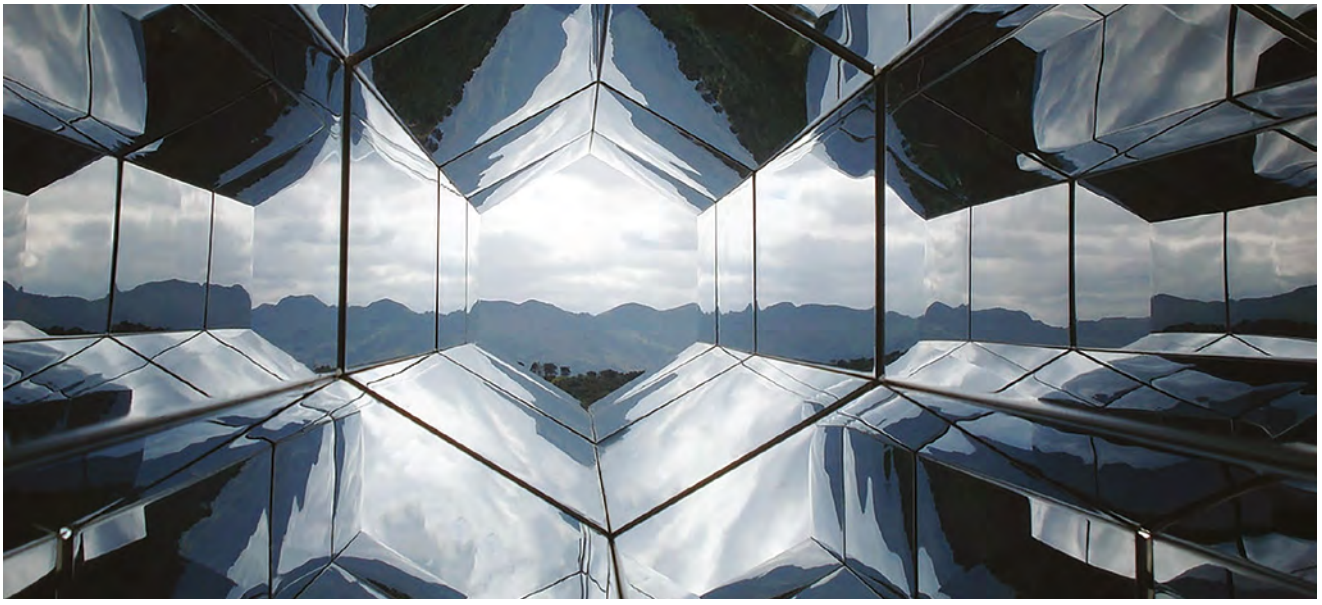
2022 was the first year post-COVID where we happily could meet you in-person again. But 2022 was also marked by the war in Ukraine, increasing climate challenge and the budget squeeze affecting every level of policy. These events also permeate our day-to-day practice, as evidenced by the various contributions from our team.

We're therefore grateful that in this geopolitically turbulent year, we've once again been able to work with you to find solutions to the complex challenges you face. Your trust is the strongest driver for us to always go the extra mile in the interest of each case and your legal needs. We thank you in particular for your trust and collaboration in 2022.

We wish you happy holidays and a healthy, happy and joyful 2023!

Bob, Alec, Andi, Astrid, Bérénice, Birgit, Brent, Tess, Cédric, Félix, Fien, Gauthier, Lieven, Maëlle, Matthias, Tatyana, Renaud, Caroline, Inez, Katrien.

The articles included in this annual review cover the status of the law, case law and legal doctrine until 15 December 2022.



Dispute management – new developments and concerns in 2023

Risk management and financial planning are essential parts of an efficient business strategy, especially in the current economic climate. Legal counsels are also being asked to devise additional measures to achieve legal management optimisation.

Several concerns and opportunities present themselves in this regard.

First is the handling of pending lawsuits. This raises the question, within the framework of a company, institution or government, whether screening and analysing pending disputes might lead to an optimisation of the risk profile (and related provisions). Disputes accumulate over time and (bookkeeping) provisions are made for these disputes on an annual basis. Active management and administration of the litigation portfolio leads to surprising results in many cases. For example, disputes are subjected to a second opinion to re-analyse the chances of success and, if necessary, either seek amicable settlements through confidential discussions between counsels, or appoint a mediator. Mediation is an important and increasingly prominent method of achieving (faster) dispute resolution. Older files are also activated, claims are capitalised where appropriate and litigation provisions can be updated, in an increased or decreased amount, so an accurate reflection of the pending litigations and the associated financial risk can be reflected in the accounts.

A second area of focus is third-party dispute funding. After an external funder completes due diligence, it's ascertained and decided whether it will assume the procedural and legal fees for important ongoing litigations, in exchange for a contribution to the results of the claim. Agreements are also possible in the context of a class action when, for example, several parties bring a claim for damages to the government, for agreements that are no longer held by this government. With regard to this "third party funding," our firm also offers an ideal platform to strive for cost optimisation for dispute resolution, including in Belgium.

Both concerns will require attention in 2023. Striving for the most efficient dispute resolution of ongoing disputes and developing an organisational structure to minimise disputes is the best way forward to overcome the challenges of 2023.

Zero unit prices: Is it time to set the record straight?

The constant jurisprudence of the Council of State, which considers that a zero price is presumed to be abnormal, disempowers contracting authorities. These authorities almost automatically exclude zero prices and negative prices, even though they should question these prices in depth and systematically. An adjudicator should consider the possibility that zero or even negative prices may be awarded within the framework of the contract and take a position in this respect. They can do this by clearly stating their intention (does the adjudicator authorise the awarding of zero or even negative prices or not?) and by ensuring the relevance of the award criteria chosen. In particular they can verify that they will allow such prices to be taken into account (does a rule of proportionality, regularly used in the context of the evaluation of the price criterion, allow a zero or even negative price to be taken into account?).

The traditional view of the Council of State seems to us to be outdated, particularly in view of the socio-economic context in which we are evolving. A zero – or even negative – price could prove to be more "normal" than a positive price in certain cases, and in particular for an item involving a value for the economic operator. It seems clear to us that where the reinvention of models (whether economic, social, sustainable or any other aspect) is essential, an openness in the structure and composition of prices must be resolutely supported by the public sector.

We can only welcome the fact that such an opening is reflected in "the Council of State's judgment no. 254.054 of 21 June 2022," which confirms and clarifies the Council's traditional position. But it also raises new questions and perhaps "opens up new dynamics and perspectives by welcoming the possibility of a global zero price contract," in line with the case law of the Court of Justice.

Let's work to ensure that this promising development in commercial practices is supported from now on, both by contracting authorities in the preparation and drafting of their contracts (including in the definition of their needs), and by economic operators who will be called on to guide contracting authorities in this area by confronting them with the reality on the ground and the possibilities offered by each specific contract.

For a more detailed overview of the issue, we refer you to the contribution "*Prix unitaires nuls: le moment est-il venu de remettre les compteurs à zéro?*" published in *L'Entreprise et le Droit*, Ed. 2022/3, pp. 207-2020, co-written by DLA Piper counsel Bérénice Wathelet, and Kristen Voglaire from Kwidea.

> *"A zero – or even negative – price could prove to be more "normal" than a positive price in certain cases, and in particular for an item involving a value for the economic operator."*

Recent developments in online sales in the Flemish Region with an impact on environmental regulations

Online sales are booming: more and more manufacturers and sellers sell their products from abroad directly to end users in Flanders via their website or online marketplaces. An online marketplace is defined in the VLAREMA (Flemish Regulation on the sustainable management of material cycles and waste) as "a digital platform, portal or any other similar electronic means, application or service that enables a seller to conclude an agreement or distance, in the meaning of Article I.8,15 ° of the Code of Economic Law, to be concluded with users of the online marketplace."

Of course, manufacturers and sellers must comply with the extended product responsibility (EPR) for the products covered by this EPR.

In Flanders an EPR is imposed on the producer of certain products (waste electrical and electronic equipment, batteries, vehicles, packaging, solar panels, waste oil, mattresses, diapers). The EPR means that producers of certain products are responsible for their collection and recycling once they have become waste.

Until recently, a producer was considered to be: "any natural or legal person who professionally develops, manufactures, handles, processes, sells or imports products." However, it was found that companies that sell directly from abroad to Flemish consumers did not always adhere to the rules of the Flemish materials regulations and therefore acted as "freeriders."

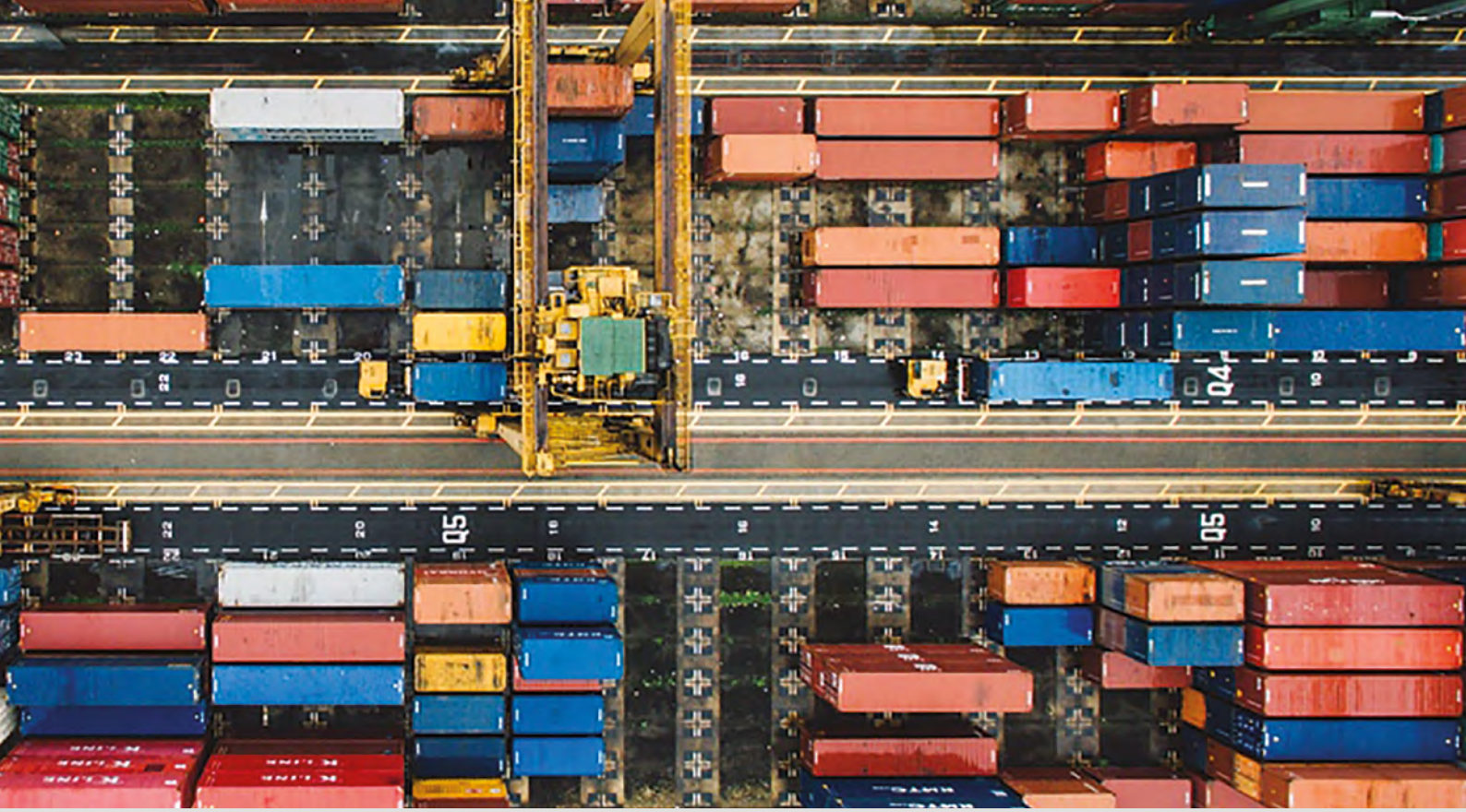
Since the number of products to which the EPR applies is increasing rapidly, it was considered appropriate that certain tasks should also be assigned to the online marketplaces. This was to control and enforcement, all the more so now that the majority of transactions take place on a limited number of marketplaces.

An earlier proposal to amend VLAREMA to impose obligations on online marketplaces was criticized by the legislation department of the Council of State. The Council of State was of the opinion that there was no legal basis for imposing obligations on online marketplaces.

It was then decided to amend Article 21 of the Materials Decree (decree of 21 December 2011 on the sustainable management of material cycles and waste), in particular by means of Decree dd. 20 May 2022 as published in the Belgian Official Gazette of 8 July 2022.

Where previously the EPR was imposed on the person who "sells or imports," this is now extended to "sells, imports or facilitates the sale."

The scope of actors on whom obligations can be imposed in the context of the EPR is being broadened. Notably, online marketplaces are targeted. Online marketplaces partly sell products to consumers themselves (whereby they themselves are automatically subject to the EPR), but also function as a platform on which other manufacturers sell their products.



It is envisaged that a further regulation will ensure a more level playing field between producers operating from Belgium (via online and offline trade) and foreign producers who sell to consumers in Flanders via online marketplaces. This is to stop freeriders (which will also contribute to safeguarding the financial capacity of the existing systems).

The further implementation of the obligations for online marketplaces will probably be given shape in a subsequent amendment to the VLAREMA. The starting point will be that online marketplaces may only allow producers on their platform who are in line with the EPR in Flanders and therefore assume their responsibility when their products have become waste.

Also circulating is a text amending the Cooperation Agreement on the Prevention and Management of Packaging Waste, establishing at national level a framework for the implementation of the EPR through a Cooperation Agreement with force of law.

The draft text also establishes obligations for the operator of an online marketplace.

First, an obligation to inform producers about the EPR.

Next, by imposing that only those producers are allowed on the online platform who either belong to a management body or submit an individual management plan.

The draft text of the Cooperation Agreement provides for the possibility that the operator of the online marketplace ensures the EPR obligations normally incumbent on the producer.

In any event, a check is included: the online marketplace operator will have to submit a list to a consultation platform of the Regions every year. The list must include producers who have operated on the online platform and the way in which the producers have complied with the EPR.

Further developments are expected in the coming months.

“It is envisaged that a further regulation will ensure a more level playing field between producers operating from Belgium (via online and offline trade) and foreign producers who sell to consumers in Flanders via online marketplaces.”

EU plans to protect participants in public debate from judicial intimidation

As part of the Action Plan for European Democracy, the European Commission presented a proposal for a directive to develop a legal framework to protect natural or legal persons who are subject to manifestly unfounded or abusive legal proceedings because of their participation in public debate. The aim is to combat SLAPPs (Strategic Lawsuits Against Public Participation), which silence people who draw attention to certain situations and enable citizens to access reliable information or form an opinion on issues of public interest.

Those protected include journalists, human rights defenders, media, publishers, civil society organisations and researchers.

The directive would apply to matters with a cross-border impact, a concept defined in very broad terms. The European Commission's proposal is accompanied by a recommendation that Member States align their national legislation on the same model to provide uniform protection throughout Europe.

The protection that the European Commission suggests takes several forms:

- The courts may require the claimant to provide a guarantee covering the costs of the proceedings and damages.
- Member States will have to introduce a fast-track procedure leading to the dismissal of manifestly unfounded proceedings and within this fast-track procedure, it will be up to the claimant to prove that the claim is not manifestly unfounded.
- Member States should ensure that courts can order claimants not only to pay the full costs of representation incurred by defendants but also to pay effective, proportionate and dissuasive sanctions.
- To avoid forum shopping, recognition and enforcement of judgments given by third states in proceedings to which the Directive would have been applicable if they had been brought before a court of a Member State should be refused.

The recommendation to the Member States has already entered into force with immediate effect. However, it seems that no legislation on this subject is under consideration in the Belgian Parliament. The proposal for a directive is currently being examined by the European Parliament's Legal Affairs Committee. The European Commission hopes the directive can be adopted before the end of 2023.

In general, Belgian courts are reluctant to characterise proceedings as "rash and vexatious" and to award maximum procedural damages because of the unreasonableness of the situation. Will anti-SLAPP legislation change the way things are done? In the long run, anti-SLAPP legislation could even lead to a general reform of the procedural damages regime. It would probably be discriminatory to provide for full reimbursement of defence costs only for certain proceedings that are clearly unfounded.

Cessation of the tender procedure: No free ride for the contracting authority

The initiation of a public procurement procedure does not, in principle, mean the contracting authority has to actually award and close the contract. Article 85 of the Public Procurement Act of 17 June 2016 (the Public Procurement Act) explicitly allows the contracting authority to refrain from awarding or closing the contract, and then, if appropriate, restart the procedure. Often, contracting authorities also include this cessation option in the contract documents to explicitly point this out to bidders and avoid (pre)contractual liability claims. However, this legal cessation option does not give contracting authorities a free ride.

To protect tenderers, who often make considerable efforts (free of charge) to be designated as contract beneficiaries, a cessation decision must always be based on sound reasons. When taking a cessation decision, the contracting authority must not act arbitrarily. Although the contracting authority has wide discretion in this respect – the competent courts only have marginal power of review – there must be sound reasons for halting an ongoing procurement procedure. Such reasons may include the need to amend the contract documents because of omissions or incompleteness, the conclusion that the envisaged solution is not possible within the proposed budget, the fact that only one tender has been submitted, as a result of which competition cannot play a sufficient role.

In doing so, the motives used by the contracting authority to discontinue an ongoing tender procedure must not give rise to a violation of equal treatment of tenderers. When taking a cessation decision, the contracting authority should ensure that the decision does not create particular advantages (or disadvantages) for one bidder or another (even if there were valid motives for discontinuing the tender procedure). For example, in its judgment of 11 February 2022 (2019/AR/626), the Ghent Court of Appeal ruled that the contracting authority's cessation decision following a suspension procedure initiated by the unsuccessful tenderer and the subsequent retendering procedure, gave the unsuccessful tenderer an unequal advantage. As a result of the halting and retendering, the unsuccessful tenderer was still given the opportunity to submit a new tender taking into account the knowledge they had of the bid of the initially successful tenderer and on the basis of which they could significantly improve their first bid. The fact that the cessation could give rise to unequal treatment had to be taken into account by the contracting authority when examining the reasonableness and proportionality of the proposed decision.

"To protect tenderers, who often make considerable efforts (free of charge) to be designated as contract beneficiaries, a cessation decision must always be based on sound reasons."

It's also important to assess the grounds for cessation according to the stage of the tender procedure. A cessation decision at the start of the tender procedure and at a time when tenderers have not yet made significant efforts, is more justifiable than if the cessation decision were taken during advanced negotiations and a point of no return had actually been reached. After this, tenderers could expect the contract to be awarded and closed. Even in that case, there's little proportionality in terminating a tender procedure without any compensation for the benefit of the participating tenderer(s).

A cessation decision that's not reasonable and proportionate may give rise to pre-contractual liability of the contracting authority. The fact that article 85 of the Public Procurement Act provides a clear basis for a contracting authority to halt an ongoing tender procedure does not affect the liability that the contracting authority may incur if the cessation decision is made unlawfully and bidders would suffer disadvantages as a result. The Court of Appeal of Ghent stated in its judgment that the tenderer who had originally been designated as the beneficiary of the contract had suffered damage because of the disadvantageous position they'd been put in as a result of the cessation decision. The contracting authority was held pre-contractually liable for this, resulting in the payment of damages. This shows once again that despite the legal possibility to do so, a cessation decision should not be taken lightly and a court can decide otherwise.

"A cessation decision that's not reasonable and proportionate may give rise to pre-contractual liability of the contracting authority."

EU Corporate Sustainability Reporting Directive (CSRD) and EU Taxonomy: ready, set, go!

The EU wants to speed up the conversion to the EU Green Deal into concrete actions for private companies. The Corporate Sustainability Reporting Directive is just the first step in a socially just transition towards a sustainable economic system.

What?

A whole new wave of EU reporting obligations is coming our way. Soon, the European Parliament will adopt the Corporate Sustainability Reporting Directive (CSRD). This Directive requires companies to report on the environmental and social impact of their activities on a regular basis.

CSRD is a direct product of the Commission's Action Plan "Financing Sustainable Growth" and sets out to hold corporations more accountable for, and increase transparency about, their impact on people and the environment. As a bonus, CSRD intends to strengthen the relations between business and society by closing the information gap.

Currently, the Non-Financial Reporting Directive (Directive 2014/95/EU, the NFRD) is deemed insufficiently effective: the information that's reported (if any can be found) is often neither sufficiently reliable, nor sufficiently comparable, between companies.

That's where the link with the existing EU Taxonomy Regulations (Regulation 2020/852) comes in. The EU Taxonomy aims to create a classification system of environmentally sustainable economic activities to scale up sustainable investments and to combat greenwashing by determining definitions for which economic activities can be considered environmentally sustainable. The Commission will use this EU Taxonomy as a guideline when adopting sustainability reporting standards.

Ultimately, this would result in an economic system that's more sustainable and climate-friendly by allocating investments to where they're most needed.

Who?

Until now, only public-interest companies with more than 500 employees fell within the scope of the NFRD. This scope will be expanded substantially, making the CSRD applicable to all listed and non-listed companies that meet at least two of the following criteria:

- more than 250 employees; and
- EUR40 million turnover or more; and/or
- EUR20 million or more in total assets.

Also, non-EU companies will be subjected to the sustainability reporting obligations if they have a subsidiary or branch in the EU and a net turnover of more than EUR150 million. Non-listed SMEs can comply with CSRD on a voluntary basis.

When?

Very soon! The reporting obligations will apply to reports published from 1 January 2024 for companies that fall within the scope of the NFRD. This means that the 2023 reporting period is already affected and consistent data on the sustainability of the economic activities need be collected from 1 January 2023.

For other companies within the scope of the CSRD, the reporting duties will start as of 1 January 2025 (financial year 2024). SMEs will get another year and need to start reporting as of 1 January 2026.

Companies need to check whether they fall within the scope and start preparing for this new reporting challenge by collecting data. Ready, set, go!

Will you still receive subsidies for your solar panels in the future?

Anyone who's opened a newspaper in recent months already knows: the Flemish government plans to cut green power certificates for solar panel installations (PV installations). The Flemish government believes that the current system leads to over-subsidization.

By changing the current legislation, the government seeks to reduce subsidies by EUR1.2 billion over the next ten years. In this article we address some pressing questions about this regulatory initiative.

What subsidies are we talking about?

To promote the production of green electricity, producers can claim green power certificates. A green power certificate is a unique, tradable, electronic certificate that proves that a certain production installation has generated an amount of electricity from renewable energy sources over a certain period of time.

The grid operator is obliged to buy back these certificates from the producer, when requested. The amount at which the certificates are bought back (the "minimum price") and the period during which the green certificates can be sold at this price depends on the date of commissioning of the installation and the type of installation.

What would change?

The proposed change involves the following:

- The subsidy cut would apply only to enterprises, not natural persons.
- The regular support period for PV installations with start date before 1 January 2013 which is currently 20 years would end on 31 December 2023.
- Support already received would not be affected.
- The operator can still apply for an extension of the support, however, if it can prove it's necessary to ensure the profitability of its PV plant.
- The change does not apply to cases where the amount of subsidies per beneficiary company does not exceed EUR200,000 in a period of three fiscal years.

Why is there critique?

From different corners criticism is coming against the Flemish government's proposal. More specifically, it's argued that the figures on which the draft decree is based are not reliable and that the Flemish government is relying on incorrect legal grounds. For its amendment, the Flemish government relies on the *de minimis* regulation on the one hand and the new "Climate, Energy and Environmental Aid Guidelines" on the other. However, a number of authorities doubt whether the regulations or guidelines can form a legal basis for the cut in green certificates. The Minaraad, for example, notes that the *de minimis* regulation relates to the past three fiscal years and at the time of granting the new aid and that the CEEAG guidelines in turn only apply to future subsidies. It's also generally argued that the proposed cut in green certificates is detrimental to legal certainty.

When will this change take effect?

The draft decree that would implement the above changes has not yet been adopted by the Flemish Parliament. At the time of writing, the Council of State just issued its opinion on the draft decree. The Council of State concludes that the draft regulation as such does not violate the principle of legitimate expectations. However, the Council of State considers that the choice to target green energy certificates only for the larger installations of companies, and moreover only for installations with a so-called start date (date de début/ startdatum) before 2013, is not reasonably justified on the basis of the current draft. It is therefore clear that the draft decree will have to be substantially refined, taking into account the opinion of the Council of State, after which it can be submitted to the Flemish Parliament for approval.

Will there be an increased extended producer responsibility in the three regions

The topics of climate and the environment can no longer be overlooked. At both European and national level, there's a growing awareness that the road to more sustainable and greener must be taken. This also applies to materials and waste prevention. In environmental policy, the sustainable reuse of materials and the environmentally responsible management of waste have become very important topics. Some good examples are the recent European directive of 5 June 2019 No 2019/904 on the reduction of the impact of certain plastic products on the environment, the so-called single use plastics directive, and the package of proposals presented on 30 March 2022 by the European Commission under the European Green Deal to make sustainable products the norm.

At Member State level, Belgium is one of the forerunners in the EU in 2022 on resource productivity, the use of secondary materials and waste management. Landfilling is also almost non-existent. The applicable regulations in the three regions on extended producer responsibility (EPR) contribute to this. The EPR makes the producer responsible for the entire life cycle of the product.

"Through the EPR, producers of certain waste must take financial and/or organisational responsibility for managing the waste phase in the life cycle of a product."

Producers are actively involved in environmental and waste policy with the aim of closing material cycles for their products. One instrument used to shape the EPR is the take-back obligation, which means that producers are obliged to accept, free of charge, the discarded products they have put on the market and which are returned to them by consumers. In practice, this obligatory take-back and collection often takes place through final sellers, recycling parks or other collection points.

Currently, the EPR and the resulting take-back obligation already apply in the three Belgian regions, through their own regional regulations, to various waste materials, such as batteries and accumulators, electrical and electronic equipment, end-of-life vehicles, old tyres, mattresses and oils.

The aim is to align the various regional regulations on EPR and to impose obligations on producers who market their products at national level in a more legally robust manner. This new cooperation agreement would also identify three new products to which EPR would become applicable: textiles, furniture and nappies. The new cooperation agreement would also introduce a scheme around EPR for litter. The underlying idea here is that producers of products that have a significant impact on litter costs should bear these costs. The following products are being considered: chewing gum, tobacco products, wet wipes and balloons.

Given the high impact this cooperation agreement will have, the preliminary draft of this new cooperation agreement was made available to relevant stakeholders for consultation in July 2022. Stakeholder input will then be taken into account to possibly come up with a revised draft cooperation agreement that can be submitted to the relevant regional governments. No doubt to be continued in 2023.

"The three regions want to create an interregional framework for the EPR policy with a new cooperation agreement."

Correction of the regime on corrective measures: Practical reflections on the Belgian Law of 18 May 2022

This article addresses the practical implications that the Law of 18 May 2022 introduced in the area of corrective measures. A revision of the existing legal framework was imperative because of the recent case law of the European Court of Justice.

According to Article 70 Belgian Law of 17 June 2016 on public procurement, any candidate or tenderer in a situation considered grounds for exclusion, can demonstrate their reliability despite the existence of a relevant ground for exclusion.

Before the Law of 18 May 2022, a candidate or tenderer covered by an exclusion ground had to take corrective measures on its own initiative. And it is precisely in this regard that the Law of 18 May 2022, following the judgment of Court of Justice of the European Union n° C-387/19 of 14 January 2021, fundamentally amended Article 70 of the Belgian Law on public procurement. The new regulation distinguishes between the mandatory and optional grounds for exclusion.

The changes essentially relate to the field of optional grounds for exclusion. The legislator has laid down the following principles:

- In contrast to what used to be the case, evidence of any corrective measures must in principle no longer be submitted on the candidate's or tenderer's own initiative (not even in the European Single Procurement Document (ESPD).

- In other words, before excluding an economic operator, the contracting authority must in principle still give the economic operator who finds themself in situation considered grounds for exclusion the opportunity to submit corrective measures. This is the new basic principle.

- If desired, the contracting authority can deviate from this principle in the procurement documents and still require the candidate or tenderer to state its corrective measures taken at the start of the placement procedure. In line with the transparency principle, the contracting authority should explicitly state in the procurement documents the optional grounds for exclusion to which this deviation applies.

"In contrast to what used to be the case, evidence of any corrective measures must in principle no longer be submitted on the candidate's or tenderer's own initiative."

- The explanatory memorandum to the Law of 18 May 2022 requires extra attention when defining the scope of the exclusion ground concerning "serious professional misconduct" (Article 69, first section, 3° of Belgian Law on public procurement), because this exclusion ground is "defined in the Law in a very general way": in other words, contracting authorities need to fill in more precisely what such a serious professional misconduct exactly entails for them.

Regarding the mandatory grounds for exclusion, the regime is more clear-cut and closer to what applied before. The candidate or tenderer must still be able to demonstrate on its own initiative at the start of the placement procedure (ie in its request to participate or in its tender) that it's taken corrective measures. However, bearing in mind the principle of transparency, this obligation must now be explicitly mentioned in the procurement documents. A reference to Article 70, § 2 of the Belgian Law on public procurement is sufficient in this regard.

Contracting authorities should be extra careful with the measures they take after establishing (especially optional) grounds for exclusion. This is even more important when the ground for exclusion relates to a third party who the candidate or tenderer relies on. Or how the proportionality principle triumphs in this subject matter from now on.

"Contracting authorities should be extra careful with the measures they take after establishing (especially optional) grounds for exclusion."

Reform of the Walloon Code of Territorial Development in sight

On his website, Willy Borsus, the Walloon Minister of Spatial Planning, announced on 25 October 2022 that the government of the Walloon Region had "approved, in first reading, the reform of the Code of Territorial Development (*Code de développement territorial* – CoDT) to meet the challenges facing our society." The preliminary draft is based on five points developed below:

1. "Implementing spatial optimisation (reducing urban sprawl and artificialisation)": "The text establishes the concept of centralities as the keystone of a new spatial planning policy that directs projects preferentially towards the best-equipped locations. These urban and rural centralities will be defined by the cities and municipalities within the framework of their municipal or multi-municipal development plans, which may be specifically dedicated to spatial optimisation. A period of five years is provided for Towns and Municipalities to do this."
2. "Abrogation of the decree of 5 February 2015 relating to commercial establishments, with the consequence that future permits for commercial establishments will become planning permits": in the context of this change, it should be noted in particular that a 15-day public enquiry will be systematically carried out as part of the procedure for granting a planning permit for a commercial establishment.
3. "More flexibility in planning charges": two important points should be highlighted: "the introduction of the possibility for a developer to pay an amount equivalent to the requested charge" and "the possibility to allow the realisation of charges in kind in a separate authorisation from the charged permit."
4. "New measures on flood control": "The supervisory powers of delegated civil servants will be modified to allow them to suspend permits that do not adequately take into account major natural risks or geotechnical constraints, which obviously include flooding." "The integration of natural risk issues as early as possible in the development of land use plans and schemes."
5. "Learning from COVID-19": Many meetings should now be held remotely on a permanent basis ito encourage stakeholder participation.

"The government of the Walloon Region had "approved, in first reading, the reform of the Code of Territorial Development (Code de développement territorial – CoDT) to meet the challenges facing our society.""

Failure to ensure competition in public procurement: An error with far-reaching consequences

Fundamental principle of public order

Ensuring sufficient competition is a fundamental principle in awarding and performing public contracts, the aim of which is to give everyone an equal chance of being awarded a public contract. More than that, it's a principle of public order.

This principle ensures that competition between as many interested market players as possible can flourish, allowing procurers to contract on the most favourable terms and public resources to be spent in the most efficient way. In other words, a win-win situation for both procurers and entrepreneurs.

Absolute nullity in case of failure to ensure competition

The established case law of the Belgian courts and tribunals shows that a failure to ensure competition results in the absolute nullity of the underlying agreement due to a violation of public order and a lack of permissible object. This absolute nullity not only applies with regard to a public procurement agreement, but also extends more broadly to other public contracts, such as a ground lease agreement or a domain concession agreement.

An agreement that's declared absolutely null is deemed never to have existed. That is, the contracting parties return to the state they were in before the conclusion of the void agreement. This also implies that what was performed in the execution of this contract must be undone (either in kind or by equivalent).). But the court may waive absolute nullity for imperative reasons of public interest.

In its judgment of 22 January 2021, the Court of Cassation stated that where the absolute nullity sanction would be manifestly inappropriate, as there would be no other potentially interested market players who could perform the public contract, the annulment of a public procurement contract was deemed not appropriate or necessary (as that competition was in fact not denied). In doing so, the court seems to have taken inspiration from the new contract law (which will not come into force until 2023), which codifies this possibility in Article 5.57 of the new Civil Code.

No right to damages for the contractor

The failure to ensure competition not only leads to an absolute nullity sanction, but also affects the division of mutual liability between contracting parties to the void contract. For example, in its judgment of 20 April 2020, the Brussels Court of First Instance ruled that a claim for damages by the contractor of a public authority, for breach of contract, was inadmissible for lack of legitimate interest. The court ruled that the contractor should have known that public procurement legislation had to be complied with, which meant that the contractor could not invoke its own conduct to obtain an unlawful advantage – damages.

"The court may waive absolute nullity for imperative reasons of public interest."

The Antwerp Court of First Instance, Antwerp Division, also issued a similar judgment on 29 June 2020, in which the court stressed that the government contractor is obliged to find out about the legality of the contract to be concluded. In other words, not only actual knowing, but the question whether one should have known, plays a role in assessing the responsibility or liability of the contractor to a public authority.

"Not only actual knowing, but the question whether one should have known, plays a role in assessing the responsibility or liability of the contractor to a public authority."

Other, additional sanctions also possible

It's clear that the disregard of competition has far-reaching consequences for a contracting authority and its contractor. However, other or additional sanctions are also possible in addition to the absolute nullity sanction, such as the obligation to put (part of) the contract back into competition, criminal liability or, for public contracts reaching the European thresholds, the declaration of ineffectiveness.

Forewarned is forearmed.

Licensing authorities and the need for a climate assessment: Current state of affairs

In 2022, climate change is considered an increasingly urgent social problem. This has led to an ever-growing number of climate law cases. Governments and private companies have to meet their legal responsibilities in the fight against climate change at the risk of (government) liability. This article highlights the impact of climate change in the field of integrated environmental permit.

A comprehensive climate test in terms of integrated environmental permit seemed to have been quasi-existent in Belgium until recently. The "climate" element is often included in Belgian law in a concise and (too) general manner as part of an environmental impact report or exemption dossier. One explanation for this is probably that the real impact of a project on climate change is difficult to estimate. And this means a comprehensive climate test usually turns out to be a dead letter in practice. But a possible turnaround seems to have been introduced recently in Belgian case law via the "petrol station judgment." In the judgement the Council for Permit Disputes explicitly recognised that the incompatibility of a project with climate objectives leads to a permit refusal. The Council established the link between climate objectives and the objectives article 1.1.4 VCRO for the first time, seemingly taking the climate interests of future generations into consideration, when advising on the application of article 4.3.4 VCRO. Of paramount importance, the Council considered climate concern as an objective or a duty of care for the licensing authority and at the same time recognised that climate objectives can be a "substantial assessment criterion" of local licensing policy.

An important nuance here is that an annulment of an integrated environmental permit due to a conflict with article 1.1.4 VCRO is extremely rare, given the discretionary power of the licensing authority. As a result, the practical repercussions of a climate test that has not been adequately implemented seem limited for the time being, as the Council can only verify whether the choice made by the licensing authority exceeds the bounds of reasonableness. In other words, the integrated environmental permit can only be annulled to the extent that the climate context was manifestly not taken into account during the assessment or to the extent that it weighs so heavily that it determines the outcome of the assessment process. Nevertheless, the Council seems to have taken a step further and opened the door to attributing greater weight to the climate test to be carried out in line with the international trend towards greater legal accountability as regards climate change.

In addition, there are a number of other legal grounds which judges can on rely to bring certain projects or permits in line with the climate needs that currently exist. For instance, from an international perspective, it's become clear that Articles 2 (right to life) and 8 (right to respect for private life) of the European Convention on Human Rights can come into play in climate cases for the benefit of both the current and future generations, as has now even been recognised in Belgian case law. In terms of licensing, design, operation and so on, the administrative authorities will (gradually) have an important role to play in providing an effective regime that takes sufficient account of climate change and the desired climate policy. From that perspective, inaction by both Member States or companies could lead to liability (eg following the Dutch Shell judgment). Either way, judges should respect the principle of separation of powers and refrain from interfering (too far) with the executive's actions by devising their own climate policy. Climate considerations can also feed into permit procedures through the application of general environmental law principles such as the precautionary principle.

It's certain that, following jurisprudential (inter) national trends, climate change may constitute an important test criterion in terms of permit policy. More and more, judges seem to give greater weight to the implementation of an appropriate climate test, aided by a flexible or creative interpretation of the legal framework.

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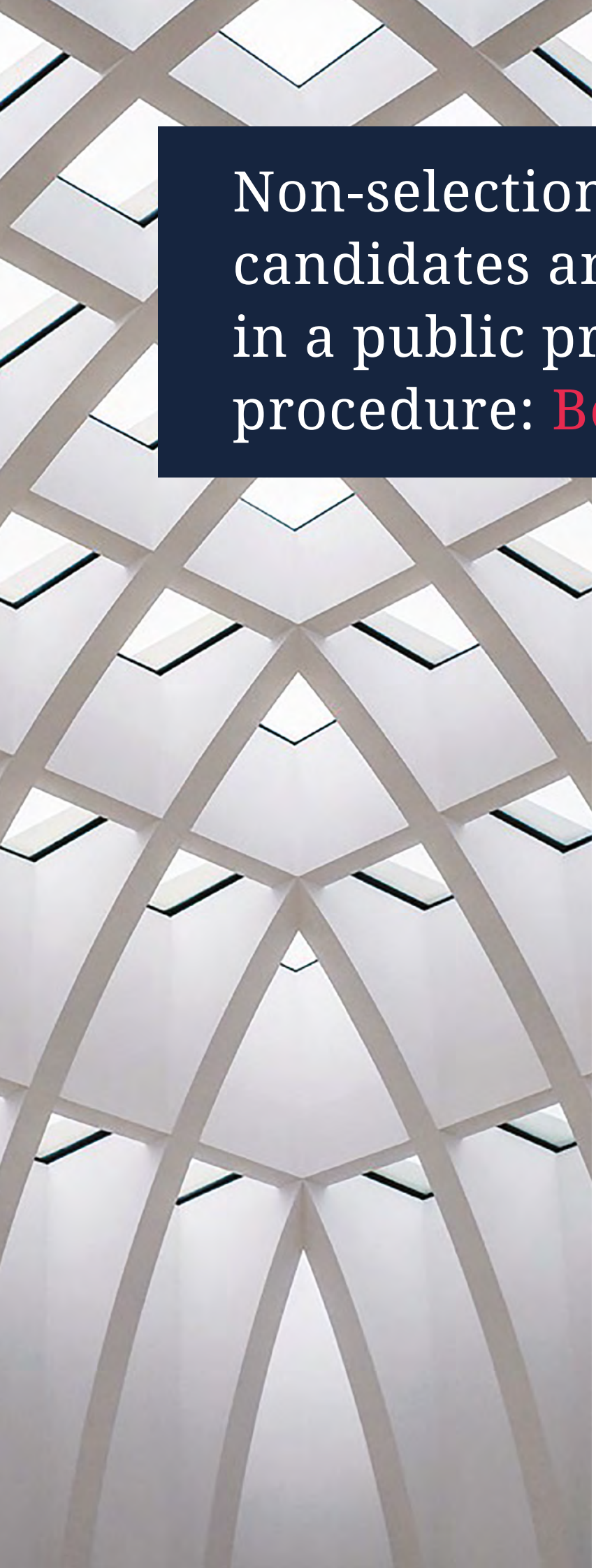

Non-selection of candidates and tenderers in a public procurement procedure: Beware!

As a contracting authority, have you ever excluded a candidate or tenderer from participating in a public procurement procedure? Perhaps you've not selected a particular candidate or tenderer because they didn't meet the selection criteria in the tender documents? An assessment of the exclusion grounds included in the Belgian Public Procurement Act of 17 June 2016 and of the selection criteria as set out in the tender documents is a mandatory step in a public procurement procedure. It allows the contracting authority to evaluate the integrity and reliability of the candidate or tenderer in question in view of the proper performance of the contract. This assessment appears to be self-evident, and, above all, seems to fall within the discretionary discretion of the contracting authority. Or does it?

Courts have reprimanded contracting authorities for wrongfully not selecting a candidate or tenderer. Recently, the Belgian Council of State and the Court of Justice reaffirmed that the ability of a contracting authority to not select a candidate or tenderer is not unlimited. So we'd like to present you with the key points on this matter.

What do you do as a contracting authority when you notice that a candidate or tenderer has included subcontractors in its tender that do not meet the selection criteria? If you choose not to select the candidate or tenderer, you might risk being reprimanded. In its judgment of 14 September 2022 (No. 254.492), the Belgian Council of State fully endorsed the case law of the Court of Justice (see the judgment of 6 October 2021, C-316/21). In the case law a contracting authority is obliged to require a candidate or tenderer to replace a subcontractor when the subcontractor does not meet the predefined selection criteria. The Council of State infers from this case

law a right for the candidate or tenderer to be allowed to replace the subcontractor to avoid non-selection. A contracting authority would be acting wrongfully if they didn't offer such a possibility but immediately proceeded with the non-selection of the candidate or tenderer, unless this resulted in a substantial modification of the original tender (which should always be assessed in concrete terms in the light of the conditions contained in the Royal Decree of 14 January 2013 on the general implementing rules). According to the Council, however, this assessment is only relevant after the replacement of the subcontractor has been allowed and submitted.

In the same vein, what do you do when two undertakings forming an economic unity submit a tender separately, but the tenders turn out to have been signed and submitted by the same person? You should not be too hasty in deciding that this should lead to the non-selection of the candidates or tenderers. The Court of Justice followed its previous case law on the non-selection of affiliated undertakings in its judgment No. C-416/21 of 15 September 2022 (see the judgment of 17 May 2018, C-531/16). This implies that undertakings that are not solely affiliated but in fact form an economic unity, can in principle participate separately in a public procurement procedure, insofar as their tenders are autonomous and independent. However, if those tenders are coordinated or concerted, the non-selection of those candidates or tenderers is justified on the ground that it would give them an advantage over other candidates or tenderers. According to the court, however, the contracting authority must always assess in concrete terms whether, in that specific case at hand, the relations between the tenderers actually influenced the content of the tenders they submitted.

This case law does not mean that, as a contracting authority, you should be any less strict in your assessment of the exclusion grounds and the selection criteria. What it does mean is that you should not automatically and immediately proceed to the non-selection of candidates or tenderers. On the contrary, this requires a concrete assessment of the peculiarities of the specific situation. The contracting authority should exhibit some flexibility towards the candidates and tenderers. Should you decide not to proceed to selection, it's advisable to include this specific assessment in the motivation to rule out any further discussions on that matter.

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COVID-19 and the impact on time limits for proceedings

If you have proceedings pending before the courts and tribunals and the time limit for action is set by the Walloon legislator, and if you or the opposing party are challenging the time limit, the judgment of the Constitutional Court handed down on 27 October 2022 will be of interest to you.

During the COVID-19 pandemic, all procedural deadlines set by the Walloon legislator were suspended. The Constitutional Court issued a ruling confirming that this suspension of time limits also applied to procedural time limits before the courts and tribunals of the Judicial Order if they were set by a Walloon decree or order.

As a historical reminder, on 18 March 2020, the Walloon government adopted a decree of special powers that temporarily suspended the time limits of rigour and procedure fixed in all Walloon legislation and regulations or adopted by virtue of them. It also affected the time limits fixed in the laws and royal decrees falling within the competence of the Walloon Region by virtue of the special institutional reform law of 8 August 1980. This decree was confirmed by Article 2 of the Walloon decree of 3 December 2020. The application of this regulation gave rise to a preliminary question submitted to the Constitutional Court. It was asked to rule on whether the decree violates the principle of equality and non-discrimination referred to in Articles 10 and 11 of the Constitution combined with Article 6 of the European Convention on Human Rights (providing for the right to a fair trial and access to neutral and impartial justice) in that it provides for the suspension of time limits for administrative proceedings before the administrative authorities, but excludes the suspension of time limits for judicial proceedings.

Firstly, the Court noted that it is only specified that the suspension applies to procedural time limits set by the decrees and regulations of the Walloon Region without further specifying the scope of application.

Next, it analysed the time limit in question before the judge *a quo*. This was the time limit set by Article D. 164 of Book I of the Environment Code, which provides for a period of 30 days for sending a copy of the report drawn up by the constating officer. Paragraph 5 of this article provides that the Code of Criminal Procedure applies to proceedings brought against the decisions of the sanctioning official. In this respect, the Court considers that the special powers order must be interpreted in the light of its objectives. So, as long as the time limit is set by a Walloon regulation, it is suspended even if the procedure to be followed is a judicial procedure, governed by reference to federal law.

The Court concluded that the article referred to in the action must be interpreted as meaning that the time limits for lodging appeals set by Walloon regulations against administrative decisions which are brought before the judicial courts are also suspended if they are set by a Walloon decree or order. The alleged difference in treatment therefore does not exist.

This is a direct illustration of the impact of Walloon legislation on the procedure before the courts laid down by the federal legislator in the Judicial Code or the Code of Criminal Procedure.

The impact of the war in Ukraine on public procurement: the Royal Decree of 29 November 2022 offers new relief for contractors

On 24 of February 2022 the world learned of Russia's invasion of Ukraine. The war claimed a devastating human toll, but it has also caused price fluctuations of raw materials like fuel, aluminium, steel and copper creating problems for the execution of public contracts and liquidity issues for contractors. Both contractors and contracting parties have sought practical ways to deal with this fast-changing situation Several questions remain the topic of conversation: can a price revision clause provide for sufficient relief? Do the price fluctuations constitute unforeseen circumstances under which a public contract may be amended? Are there any other forms of relief to aid in the execution problems?

Contractors and contracting authorities can find certain solutions in the applicable legal framework, the Royal Decree of 14 January 2013 (KB AUR) laying down general rules for the implementation of public procurement. Mostly, parties can refer to the price revision clause if one is included in the public contract. A price revision clause defines the modalities or formulas for revising prices in changing economic situations. However, some price revision clauses are coupled with the national index, which sometimes adjusts too slowly to daily fluctuations. The Supreme Court in Belgium has stated that parties are not bound by such revision clauses when they're no longer compatible with what the parties had originally intended. This translates to a price revision clause that's not adapted to rapid everyday price fluctuations. The parties can thus renegotiate this clause and refer to new verifiable parameters and the use of appropriate weighting coefficients.

In the absence of such a clause, the contractor may invoke the existence of unforeseen circumstances, when the contractual balance of the contract is disrupted, to adjust the terms of the public contract (art. 38/9 KB AUR). The Federal Public Service Chancellery has stated that it is appropriate to "in any case" restore the contractual balance when the contract becomes difficult to execute. The Chancellery further states that parties may refer to the "habitual" profit margin of a particular industry to determine the extent of the contractual disruption. In the past, public contracts have been modified due to abnormal price increases of oil and steel and because of the scarcity of certain materials because of war, political instability or environmental changes.

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Moreover, very recently a new Royal Decree of 29 November 2022 was adopted to offer relief for contractors. This Royal Decree provides in the possibility for contractors to request from 19 December 2022 an advance payment of 20% of the original value of the procurement, with TVA included. With this Royal Decree, the Belgian State aims to urgently overcome liquidity problems for contractors in the current economic crisis offering a new unprecedented possibility in the execution of public procurements.

The revision of a public contract on the grounds of a price revision clause or unforeseen circumstances and receiving an advance payment can only occur if it is duly notified by a written notice by the requesting party. If no specific contractual time limit is specified, the law requires that the requesting party notifies the other party of its request to adapt the contract within 30 days of the moment the party realises the disruption of the contractual balance. As this may be open for discussion, it's best to react promptly to price fluctuations or shortages of supply of certain raw materials. It's also necessary to quickly inform the contracting authority if a contractor is unable to execute the public procurement within the stipulated time frame because of the war to avoid fines for execution delays.

Good, clear, and prompt communication between contracting parties is crucial to avoid execution problems, extreme price increases or fines.

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Competition versus technical and functional specifications in public procurement

Public procurement regulations prescribe *how* procurers should place works, services or supplies in the market, not *what* they should place. The latter depends heavily on specific needs.

Nevertheless, tenderers could also discriminate through very technical or functional specifications in the tender documents. This article is a concise overview of some concerns in this area.

A procedural restraint...

The Council of State usually shows great restraint on this issue. Established case law says that it's not the Council of State's place to re-evaluate the specifications or to substitute its own view for that of the contracting authority. As a result, it will often fall to the (potential) bidders to show that specifications are defined in such a way as to truly favour one market player or a particular segment of the market.

... but not in the following cases

However, it's indisputable that specifications cannot merely refer, directly or indirectly, to a particular manufacturer or origin or a particular process that characterises the products or services of a particular company, nor to a brand, patent or type, a particular origin, production or technical guide. These specifications would favour or eliminate certain companies or certain products. Only if the subject of the contract justifies it and no other sufficiently precise and comprehensible description of the subject is possible, are such indications or references allowed, but they must be accompanied by the words "or equivalent."

Points of attention in accordance with case law

The following two additional points can be distilled from the case law of the Council of State and the Court of Justice concerning technical and functional specifications in the tender documents:

- Although there's no obligation on the tenderer to motivate why it sets certain specifications in the tender documents, the Council of State seems to be more accommodating in its assessment of the specifications when such a (comprehensive) justification is before it.

"The procurer is obligated to define specifications in the tender documents in a clear, precise and unambiguous manner and in a way that they do not go beyond what is appropriate and necessary to achieve the subject matter of the tender."

Conclusion

In practice, this matter and whether or not the given specifications are of an anti-competitive nature, will always have to be assessed in view of the concrete circumstances. The following questions can provide guidance:

- Are some firms particularly excluded and/or biased by the specifications?
- Do the specifications go too far in the light of the subject matter of the contract?
- Are the specifications reasonably justifiable?

The answers to these questions can be used as a starting point to assess the legality of the technical and functional specifications given in the tender documents and, if necessary, to decide to challenge them.

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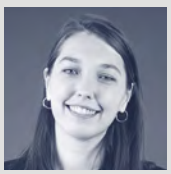

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