

# “Objective justification” of differential treatment - where are we?

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# Public Contract Regulations 2015

Reg 18: All contracting authorities shall

- (a) Treat economic operators equally
- (b) Without discrimination
- (c) Acting in a transparent and proportionate manner
- (d) The procurement must not be designed to artificially narrow competition or to discourage certain economic operatives.

These are the core principles.

# What is equal treatment?

- Emerges from the concept to permit competition and to stop discrimination between EU countries
- But it has now become a general principle of law and is not necessarily limited to cases of differential based upon nationality (eg Wiesenstrom: in that case there was a finding of unequal treatment because the tender had discriminated in favour of larger suppliers - without this being something that was linked to the subject matter of the contract) .

## Designing and weighting award criteria

- There is considerable freedom as to the choice and weighting of such criteria

(see *EVN v Wienstrom GMBH Austria* [2003] ECR 1- 14527 at 39

*Lion v Firebuy* [2007] EWHC 2179 at 93:

Having scoring systems which favour one bidder compared to another does not make it manifestly wrong. There must be something else wrong before the court will interfere.

# How do you assess the award criteria?

- Must be done in the same way for all bidders
- In some of the case where contracting authorities have been found wanting, this is because the marking has been different between bidders
- Must make sure that you can show your working out
- Keep notes: make sure those notes make sense (not as easy as it looks)
- If you are interviewing, have a marks scheme for answers based upon competence, rather than instinct
- If you are asking for presentations, what are you trying to achieve? Can this be objectively set out as a criteria?
- No nebulous criteria (“better” - better than what?).

# The starting point

“Comparable situations are not to be treated differently or different situations comparably without objective justification” (*Fabricom v Belgium* [2005] ECR1-01559)

- What is alike?
- And therefore what is different?

Has to be considered in context

Has to be seen against the general purpose of ensuring “effective” competition

## Setting the criteria

- As stated above, criteria are not meant to necessarily lead to equal treatment: you cannot turn a minnow into a whale (and vice versa)
- But you must make sure that the terms of the tender are applied equally to all.
- And you cannot design the playing field so that only one bidder could only ever get it (unless there is absolutely no other way to get the services/goods )

## Equal treatment - how do you assess it?

1. Are the bidders in a comparable position? (this does not mean an identical position - no -one is identical)
2. Is there a requirement that they should be treated equally (not every situation requires equal treatment: only if the situations are the same)?
3. Has this been breached - giving a margin of appreciation/discretion to the contracting authority.
4. If it has been breached, how can it be objectively justified by the contracting authority so that there is no breach of the regulations.

## Equal/different - is there a margin of appreciation

- *Abbie v NHS Commissioning Board* [2019] EWHC 61 ,
- Court had to decide if there was a margin of appreciation in deciding if there is a failure to confer equal treatment.
- Court held that whilst there is no margin of appreciation or discretion once it has been decided that there is a breach of equal treatment, but when deciding if there has been such a breach, it can examine whether the treatment can be objectively justified by way of context, scale or purpose.
- I.e. it could be reasonable to have criteria which may cause one bidder to have another advantage over another if that is justified by way of context, or to encourage wider competition.

## *R(Rotherham) v DBIS* [2015] UKSC 6

- Distribution of EU structural funds.
- Not a PCR case but engages general provision of equal treatment.
- South Yorks argued that the principle of equality in EU law meant that they should have been treated the same as other regions which got more money and there was no “margin of judgement” on that question.

## *Rotherham (2)*

- Judges rejected in Rotherham a 2 stage analysis: eg is there differential treatment - can it be justified as useful for Equality Act cases but it was not a rule of law
- Relied upon Lord Hoffman in *R(Carson)* [2006] 1 AC 173 at 29-31 where the courts have found that whether two situations are comparable will often overlap with whether something is justifiable.
- For example, a relevant difference may be the justification for the differences in treatment.
- The SC found that there was no clear measure of comparability between different regions or different ways of treating them (para 28)

## When are bidders in the same or different positions?

- As *Abbvie* shows (see [76]) where bidders in a market are in different positions (in this case because they had different drugs to supply different sorts of patients) , and the procurement may reflect this, this does not mean that there has been unequal treatment. If a procurement does not create a difference but just reflects the difference in position of those in the marketplace, then that cannot be de facto unequal treatment
- Simply being in the same procurement or satisfying a condition to be able to bid does not mean that they are in the “same position”
- The purpose in this case of the procurement design was to try and encourage more bidders to enter the procurement and so complied with procurement rules

## Same/different positions

- Different treatment is permissible but only if such treatment is not arbitrary or excessive
- And only if it can be objectively justified: ie it was a proportionate means of meeting a legitimate aim.
- Such aims would include - increasing competition, having greater value, reducing costs, to enable better assessment of the bids in question or to provide better services or outcomes by those served by the procurement and were all held to be legitimate in the context of the claim in *Abbvie* (procurement of drugs to treat and manage Hep C).
- Others would be environment or social reasons: employment reasons etc.

# Proportionality

Once you have a “legitimate aim”, differential treatment is permitted providing that it is a proportionate means of meeting that aim. The current test *Lumsdon v Legal Services Board* [2016] AC 697):

- (a) Is the treatment suitable for securing the stated aim?
- (b) Does it go beyond that which is necessary
- (c) Were there other (potentially less onerous) means available to achieve those aims? This is a nuanced fact, and context sensitive approach, and giving a margin of appreciation to the decision maker so long as the means chosen were not inappropriate.

## Abbvie and proportionality

- NHS in *Abbvie* argued that its decision to assess the market by using a particular price mechanism was proportionate as:
  - (a) It enabled the comparison of bids on a “whole market” basis
  - (b) Enabled more competition
  - (c) Would encourage more competitive pricing
  - (d) Would allow better treatment of patients by encouraging investment and ideas

Claimant said that this should be read as “lower prices” and these aims was assertion without evidence (and there was no modelling produced in evidence). The judge said that modelling did not always have to be done: it is a standard device: and other means were not as effective.

# Incumbent advantage?

- The courts in effect have to make policy decisions in equal treatment cases to balance equality of treatment against other goals of the procurement processes.
- *Europaiki Dynamiki v Commission* - Case T 345/03: how do you create fairness where there is an incumbent? The differential treatment intended to neutralise the advance enjoyed by the incumbent did not breach the equal treatment principle, but any advantage can only be neutralised as far as it is
  - (a) Technically feasible
  - (b) Economically acceptable
  - (c) Does not infringe the rights of the existing provider

# Differential treatment not unfair?

*Amplexor Luxembourg SARL v Commission - T-211/17*

- (a) An incumbent challenged the decision made to allow new tenderers a funding allowance to finance take over costs in the transition phase into the new contractual arrangements , whilst allowing a significantly smaller funding allowance for the incumbent.
- (b) The ECJ found that this was lawful: the differential treatment was designed to encourage effective competition and ensure broad competition: without it, the incumbent would likely to have been the only bidder.

## *Stagecoach v SOS for Transport [2020] EWHC 1568*

- Disqualification of certain railway operators from next franchise round because of concerns over the pension liabilities of the operators.
- The Government offered the contract terms for the franchise, but this placed the risk of pension liabilities on the Train Operating Companies.
- They did not like that: they submitted bids which offered to split the risk of pension liabilities on different terms . The So S disqualified them.

## Stagecoach (2)

- Again, like Rotherham, this challenge involves high level economic policy, allowing central government a wide margin of discretion before the judiciary will interfere
- The judge emphasised the wide margin of discretion in designing and setting award criteria and the fact that some bidders may find it easier than others did not establish or even provide evidence of the breach of equal treatment (para 26).
- Once the terms of the tender have been laid down, it is obliged to require strict compliance with the basic terms (*Commission v Denmark*: ECLI:EU:C:1993:257) to ensure an objective comparison. It cannot change on of the essential conditions for an award if that may enable others tenderers to have submitted a substantially different tender.

## *Ryhurst v Whittington* [2020] EWHC 448

- Abandonment of a tendering process: Ryhurst argued that this was politically motivated (because the company was part of Rydon who were involved in Grenfell)
- Any abandonment must follow general EU principles including equal treatment
- Court allowed a wide margin of appreciation to the hospital and allowed a wide range of factors and interests to be used .

## Questions to ask yourselves

- Have you set the tender terms so that it does not exclude potential bidders?
- If you are treating bidders differently, is this for reasons relating to the contract, and not just personal animus
- If there is an incumbent, have you ensured that you do not inappropriately favour them (or make it impossible for anyone else to get the contract)
- Have you ensured that your technical specifications use equivalents/variants where required.
- Does your marks scheme use weightings or listings and are those designed to secure like treatment where required?
- Can you justify any differential treatment?