

# EU PUBLIC PROCUREMENT LAW: AN INTRODUCTION



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## **Preface**

This text provides an introduction to European Union (EU) law on public procurement. It is designed, in particular, as a text for students of the subject at university level, but will also be a useful introduction to the subject for lawyers, procurement officials and policy-makers. The book seeks throughout to place the legal rules in their practical context, examining the implications that the legal rules have for the conduct of the procurement process and for the procurement policy of the Member States that must apply them.

The book is written so as to be accessible to those from outside the European Union who have no prior knowledge of EU law. Thus as well as chapters on the procurement rules themselves it includes an introductory chapter to the Union itself, focusing on those matters that are of particular relevance for understanding how public procurement law is made and developed within the EU.

As explained on the cover page, the book was prepared as a part of a collaborative project in higher education, the EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation 2009-2011, funded by the EU. This project involved several universities in Europe and Asia and has sought to promote and support the teaching of public procurement in Europe, Asia and globally. This text is one of five books produced under the auspices of the project that are designed to be used as resources in the teaching of public procurement law and regulation. The main editors and chapter authors are listed on the cover pages, but it should be recognised that the text is a collaborative effort of all the partners to the extent that it has benefited from input by, and discussions between, many different persons at the different partner institutions. In addition to the authors and editors mentioned on the cover pages, the text has benefited from editing and proof reading by Elly Aspey and Gabor Soos at the University of Nottingham, whose assistance the project would like to acknowledge gratefully.

The contents of the book are up to date as of July 2010. It has also been possible to include later developments in some parts of the book.

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# CHAPTER 1: INTRODUCTION TO THE EU

## 1.1 Introduction to the European Union legal system<sup>1</sup>

### 1.1.1 Introduction to the European Union

The European Union is a complex organisation that currently has 27 Member States. The European Union as it exists today began essentially with the creation of three European Communities, which were set up in Europe under separate Treaties after the Second World War. These Communities aimed to promote economic co-operation, which itself was seen as a means to the further end of securing peace and prosperity in Europe after the devastation of the Second World War.

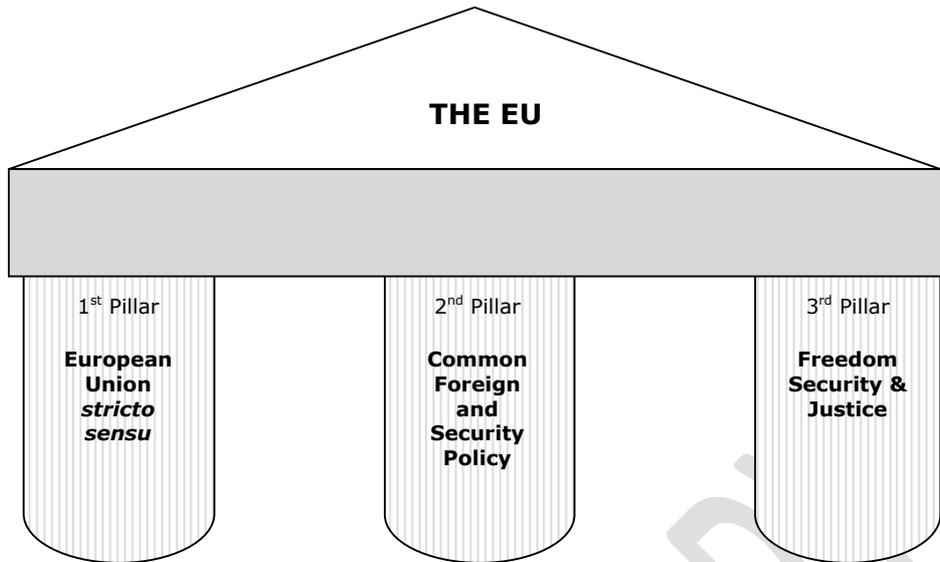
The most significant of the European Communities from the perspective of public procurement has always been the European Community (EC). This was first established under the first Treaty of Rome in 1957. Before 1993 it was called the European Economic Community (EEC), but in 1993 the term European Community was applied in recognition of the fact that the Community now also pursued significant non-economic objectives (this was done under the Treaty of Maastricht of 1992). According to the recent Treaty of Lisbon, which entered into force on 1 December 2009, the European Union (EU) is now to replace and succeed the EC.

Another of these European Communities is the European Atomic Energy Community (Euratom), set up under the second Treaty of Rome of 1957, which deals with issues relating to atomic energy. A third community, the European Coal and Steel Community (ECSC) was set up under the Treaty of Paris of 1951, but this expired in 2002.

The EU and Euratom together constitute one element - or "pillar" - of the broader "European Union", and are referred to as "the first pillar" of the Union structure. There are two other so-called "pillars", which are more recent creations - the "second pillar", concerned with a Common Foreign and Security Policy, and "the third pillar", concerned with Freedom, Security and Justice. The second and third pillars have limited relevance for procurement; however, the second pillar is of some relevance for procurement of defence equipment (as will be explained in Chapter 9).

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<sup>1</sup> See further G. Slapper and D. Kelly, *The English Legal System* (10th edition) (Abingdon: Routledge, 2010), pp. 597-601 and pp. 605-618.



The original European Communities had only 6 Member States – the founding members were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Following several subsequent “waves” of accessions, there are now 27 Member States.

**Table 1: EU Member States and year of accession**

<b>Member State</b>	<b>Year of Accession</b>
Austria	1995
Belgium	Founding member
Bulgaria	2007
Cyprus	2004
Czech Republic	2004
Denmark	1973
Estonia	2004
Finland	1995
France	Founding member
Greece	1981
Germany	Founding member
Hungary	2004
Ireland	1973
Italy	Founding member
Latvia	2004
Lithuania	2004
Luxembourg	Founding member
Malta	2004
Netherlands	Founding member
Poland	2004
Portugal	1986
Romania	2007
Slovak Republic	2004
Slovenia	2004
Spain	1986
Sweden	1995
United Kingdom	1973

The main means by which the European Communities sought to create prosperity and entrench peace in Europe was by creating a free market in the Member States (the “single market” or, as it was formerly called, the “common market”), by removing barriers to free economic competition – for example, by removing customs duties and import quotas, and by allowing workers from the Member States to work in other Member States. In Europe, this means economic prosperity was also seen as a primary means for achieving peace: it was felt that a close trade-economic dependence would reduce the risk of future hostilities.

Removing barriers to trade in *public* markets as one aspect of this policy of removing trade barriers provides the rationale and the legal basis for the EU’s regime on public procurement.

### **1.1.2 The institutions of the European Union**

The following are the main institutions of the European Union:

#### **1. The Council**

The Council is the main legislative authority of the EU. It is a body made up of one ministerial representative of each Member State of the EU. Which minister from each Member State attends will depend on the subject matter of the action or meeting in question. There must be a meeting of each national head of State in the Council (“summit meetings”) at least twice each year (and in practice these are held four times a year).

The Council must approve most legislation in the EU, such as directives and regulations (as to which see section 1.2 below), before it becomes law. (There is a limited exception for a few rare cases in which the Commission can legislate alone).

There are a number of different legislative procedures involving the Council, used for different areas of EU law, some of which involve participation by the European Parliament, as well as the Council. In particular, the procedure known as the co-decision procedure under Article 294 TFEU (ex Article 251 TEC), which is used for adopting the directives on procurement, requires the European Parliament’s approval of legislation (see section 1.2 below).

The Council itself does not meet on a continuous and permanent basis but there is a full time committee of permanent representatives to the Council which also consists of representatives from each Member State, of the rank of ambassador. This Committee examines legislative proposals in between Ministerial meetings to determine which should be discussed at the Council itself and which are uncontroversial and can merely be “rubber stamped” by the Council after being unanimously approved by COREPER.

There are a number of voting systems in operation in the Council for approving legislation, which vary according to the nature of the legislation in question. The main types are unanimous voting (for example, for fiscal measures); simple majority; and qualified majority (which is a system of voting whereby voting is weighted so that the votes of larger states count for more than those of smaller states, and which applies in adopting the directives on public procurement). There are also some matters in which individual states can exercise a veto if they

choose, even though unanimous voting is not generally required. From 2014 the current weighting of votes for a qualified majority will be changed to a simpler weighting system.

Note that it is important not to confuse the Council of the European Union with the Council of Europe which is a separate body (and is not an EU institution) with responsibility in the area of Human Rights. Furthermore, the Council of the European Union should not also be confused with the European Council, whose role is to provide the EU with the necessary impetus for its development and to define the general political guidelines; it does not enact legislation.

## **2. The European Parliament**

The European Parliament consists of members who are directly elected by the electorates of the Member States (although this was not the case until 1979). Prior to the Lisbon Treaty the power of the European Parliament was much more limited than the power of the Parliaments in the Member States. In the Member States the Parliament is the main legislative authority, but that was not the case in the EU prior to the Lisbon Treaty, when the main legislative authority lay with the Council. However, the Parliament does now have an important role in most legislation as, with some exceptions, the Lisbon Treaty provides for the European Parliament and the Council to be treated equally in the legislative procedure.

Most significantly, the agreement of the Parliament as well as the Council is necessary before certain types of legislation can become law. We have already mentioned above that this is now the case with the directives on public procurement – the most recent directives on public procurement (including the Public Sector Directive 2004/18 and Utilities Directive 2004/17) had to be approved by both the Council and Parliament, under the co-decision procedure.

In addition, the Parliament has an advisory and debating role in other legislation – for some legislation Parliament must be consulted before the legislation can be adopted by the Council.

The European Commission must also report to Parliament and can be called upon to answer questions there. Parliament can also force Commissioners to resign or dismiss the Commission as a whole. The Council must also report formally to Parliament, although there are no mechanisms for the Parliament to actually exercise any political control over the Council.

## **3. The European Commission**

The European Commission can most simply be described as the executive branch of the EU, which has a rough parallel with the civil service of a national government. It is based for the most part in Brussels.

The Commission itself consists of a Commissioner from each Member State, each responsible for a different area of EU policy. In contrast with the national representatives on the Council of Ministers the Commissioners are not political representatives of their national governments but act independently and objectively for the EU itself.

The Commission has three responsibilities:

- First, the Commission is responsible for *initiating* new EU legislation that promotes the objectives of the EU. Thus, whilst any directives on public procurement must be approved by the Council and Parliament as we have seen above, these directives are conceived and proposed in the first place by the European Commission.
- Secondly, the Commission acts as the guardian of the TFEU by enforcing its rules. In particular, the Commission has the power under Article 258 TFEU (ex Article 226 TEC) to investigate whether Member States (or bodies in those states) have violated EU law. It may ultimately bring proceedings in the Court of Justice of the European Union (CJEU) against a Member State if a violation that is attributable to the Member State is not corrected.

As we will see in the section on the CJEU below, Member States are held responsible for all violations of EU law by their public authorities, and this includes violations of public procurement law. We should note that not just the European Commission but also other Member States can bring before the CJEU violations of EU law by a Member State. However, this has very rarely happened – in practice, Member States leave enforcement through this channel to the European Commission.

The enforcement function of the European Commission is very important in practice in the area of public procurement – as it is also in many other areas of EU law - and is considered in detailed in the chapters below.

- The third responsibility of the Commission is to act as an executive body in administering certain specific areas of EU law. For example, the TFEU generally prohibits Member States from giving aid (subsidies, cheap loans etc) to their industries, as this is considered to distort competition, but allows this in a limited number of specifically justified circumstances. In some of these cases it is provided that such aid will only be allowed when authorised by the Commission. The Commission has some of these executive functions in the area of public procurement. For example, the Utilities Directive 2004/17 provides in Article 30 for exemption from the directive of certain utilities that operate in competitive markets, but such exemptions must be approved by the Commission, so that it can be established that the conditions for the exemption are met. (This subject is again considered in the chapters below).

Most of the Commission's activities are carried out through divisions called Directorates General. The Directorate General responsible for public procurement in the Internal Market and Services Directorate General (abbreviated to DG MARKT), which deals generally with the Commission's work relating to the European Single Market.

#### **4. The Court of Justice of the European Union (CJEU) and the General Court (GC) [(formerly Court of First Instance (CFI))]**

##### ***The Court of Justice of the European Union (CJEU)***

The Court of Justice of the European Union (CJEU) is concerned with the interpretation and enforcement of EU law. It is the institution that has the ultimate authority to determine how EU law is to be interpreted, and it does so

with the main purpose of ensuring that EU law is interpreted and applied in the same manner throughout the EU. The CJEU also has the role of determining certain specific disputes that arise out of EU law (as set out below).

It is important to note that its jurisdiction is limited to certain specific matters relating to EU law. It does not have any jurisdiction on other matters – for example, it does *not* act as a general appeal court from court decisions in Member States.

The judges of the CJEU are composed of one judge from each Member State. However, these judges are in no way there to represent the interests of that member state but to decide cases in an impartial and objective manner – a justification for drawing them from each Member State is to ensure knowledge of the legal traditions and law of all Member States, which the CJEU will draw on, and to reinforce the authority of the CJEU in the states that must apply its judgments. For most cases all of the judges do not sit, but the CJEU sits in “divisions” made of several judges (usually three – for the simplest cases – or five). However, more important cases are heard by either:

- i) A “full court” – which is in theory made up of all the judges of the CJEU but whose decisions are valid if 15 judges sit. This is required to be used in certain (very rare) cases, but is also used in practice for cases that are considered to be of exceptional importance.
- ii) A “Grand Chamber” – which consists of 13 judges but whose decisions are valid if 9 judges sit. Any Member State or EU institution may request that a case in which it is involved be heard by a Grand Chamber, and is also used in other cases of particular difficulty or importance.

In addition to the judges, there are a number of Advocates General, whose role is to present an independent and impartial “Opinion” on the case to the CJEU before it gives its judgment (Article 252 TFEU, ex Article 222 TEC). (A similar function is served by persons attached to the higher courts in many civil law countries, but there is no “common law” equivalent of this position and function). These Opinions set out of the facts of the case and relevant legislation, discuss previous cases of the CJEU and the policy issues, and conclude with recommendations on how the CJEU should dispose of the case. In the vast majority of cases the CJEU follows the Opinion of the Advocate General in the way it decides the case. As is explained later below, CJEU judgments generally include much less discussion of the facts and legal reasoning of a case than a typical English court judgment, and the Advocate General’s Opinion to some extent compensates for this by providing information on the possible reasons for a judgment and hence how it might be applied in future cases.

Previously it was required that an Advocate General’s Opinion should be given in every case, but it is now provided by the Statute of the CJEU that an Opinion is not required when the case does not raise any new point of law (and Article 252 TFEU, ex Article 222 TEC, refers to the fact that an Opinion is required only when required by the Statute).

An Advocate General has precisely the same status as a judge of the CJEU (for example, is subject to the same rules of appointment).

An explanation of the system of numbers and titles for the different types of cases that come before the CJEU is found later below in considering the different types of legal proceeding before the CJEU.

The easiest way to find cases of the CJEU is at <http://www.curia.europa.eu>.

The main areas of the CJEU's jurisdiction are the following:

- a. It determines cases brought before it by the European Commission under Article 258 TFEU (ex Article 226 TEC) (or by other Member States) against Member States for violations of EU law;
- b. It gives rulings on the interpretation of EU law at the request of national courts of the Member States to assist them in resolving cases that involve EU law issues, in a procedure under Article 267 TFEU (ex Article 234 TEC). (These rulings are referred to as "preliminary rulings");
- c. It decides whether the EU's international agreements are legally compatible with the EU Treaties;
- d. It determines challenges made to the validity of EU legislation (for example, on the basis that the legislation exceeds the competence of the EU, which has powers to legislate only in limited areas as provided for in the relevant Treaties);
- e. It exercises judicial control over the European Commission and other institutions to ensure that they act in accordance with EU law;
- f. It acts as an appeal court for cases which are determined in the first instance by a lower level court, the General Court (formerly Court of First Instance). This applies, for example, to employment disputes between the EU and its staff and to actions for annulment, inaction or damages against the EU institutions (see further below on this).

The main way in which cases on public procurement come before the CJEU are as set out under a. and b. below. These are the main ways in which the CJEU fulfils its role in interpreting EU law, both in the area of public procurement and more generally. We will now consider these in more detail. Note that the legal reasoning techniques that the CJEU uses to resolve cases are considered separately in section 1.3 below.

#### **a. Cases brought by the European Commission against Member States under Article 258 TFEU (ex Article 226 TEC)**

As we have already noted briefly above, the European Commission has the power under Article 258 TFEU (ex Article 226 TEC) to investigate whether Member States (or bodies in those states) have violated EU law and may ultimately bring proceedings in the CJEU against a Member State if a violation that is attributable to the Member State is not corrected.

The procedure is inter-governmental – the proceedings are brought against the relevant Member State, and not against any individual body within the Member State which is in breach of the rules. However, Member States are held responsible under Article 258 TFEU (ex Article 226 TEC) not merely for the actions of the central executive of the state but also for the actions of other public bodies within the state, including regional and local entities, public universities etc.

In the area of public procurement, proceedings can be brought for, for example, failing to implement directives on procurement into national law or for implementing them incorrectly (on directives see section 1.2 below), or simply for practices of procuring entities (such as local authorities or universities) that do not comply with the directives' procedures (for example, failure to follow the directives' requirements to advertise contracts).

If the CJEU finds a breach of the rules, it merely declares the Member State in breach. No immediate sanctions may be applied.

However, the Member State is obliged under Article 260 TFEU (ex Article 228 TEC) to take the “necessary measures” to comply with the judgment – for example, by repealing or amending any legislation in the Member State that the CJEU has declared to be in violation of EU law, or – where a Member State has failed to implement a directive, by adopting measures to implement the directive in question. If it is still possible to comply with a judgment and the Member State does not do so, the Commission may bring it before the CJEU again, for failure to comply with Article 260 TFEU (ex Article 228 TEC). Penalty payments could then be imposed under Article 260(2) TFEU. Under Article 260(2) sanctions may be imposed if a breach has been declared to exist by the CJEU, but only where it has not been corrected, and a second action has been instituted for breach of the obligation to correct. In Case C-70/06, *Commission v Portugal*<sup>2</sup>, the CJEU imposed a penalty on Portugal for failing to correctly implement EU law obligations on providing for a damages remedy for suppliers that are contained in Remedies Directive 89/665.

- An example of proceedings in the CJEU against a Member State by the European Commission for violation of EU law is Case C-236/95, *Commission v Greece*<sup>3</sup>. In this case proceedings were brought against Greece for failing to correctly implement Remedies Directive 89/665, which requires certain remedies to be provided for suppliers in national law to enforce the EU rules on public procurement.

Such cases are identified by a name and a letter/number reference. As can be seen from the *Greece* case just referred to the case designation commences with “C”, which indicates that the case is a case that originates in the CJEU. Cases in the General Court (GC) [formerly Court of First Instance (CFI)] commence with the letter T. Note that older cases do not have a C or T. From this follows a number: the first number indicates that the case is the nth case to be brought before the CJEU in a particular year, and the second number indicates the year in which the CJEU proceedings were instituted (note that this is when the proceedings were *instituted*, not when the case was finally decided or the preliminary ruling given – which is likely to be at least a year or two later). Thus C-236/95 was the two hundred thirty-sixth case brought to the CJEU in 1995.

In the course of determining these cases the CJEU will often be required to interpret provisions of EU that are not clear. These interpretations will be relevant not only to resolving the specific proceedings before the CJEU, but also more generally. For example, they will then to be applied in national courts throughout the EU in resolving disputes before them, and will serve as guidance to all interested persons (national governments, private firms etc) on how to conduct themselves in future with regard to the relevant legal rule.

The role of the Commission in enforcing the law on public procurement through Article 258 TFEU (ex Article 226 TEC), and the detailed legal rules that apply in such enforcement proceedings (for example, the principles for awarding interim measures and when concluded contracts must be set aside) are discussed in chapter 9 on remedies and enforcement.

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<sup>2</sup> Case C-70/06, *Commission v Portugal* [2008] ECR I-1.

<sup>3</sup> Case C-236/95, *Commission v Greece* [1996] ECR I-4459.

As we have mentioned above, the TFEU (Article 259, ex Article 227 TEC) also allows proceedings by one Member State against another before the CJEU. However, in practice, the institution of proceedings has been left to the Commission: if Member States feel there has been a breach of the rules they generally prefer to report the matter to the Commission and then leave it to deal with the question. (Only one action - which did not concern procurement - has ever been instituted by another Member State under Article 259 TFEU, ex Article 227 TEC).

#### **b. Preliminary rulings under Article 267 TFEU (ex Article 234 TEC)**

Whilst the European Commission (and other Member States) may take proceedings before the CJEU when a Member State violates EU law, the option of proceedings directly before the CJEU is *not* open to individuals affected by a violation of EU law. However, individuals – either natural persons or companies – who are affected by a violation of EU law may still generally bring proceedings against the violator. This is done in the *national courts* of the state concerned. There is a general principle requiring Member States to provide effective remedies in their national courts for persons whose rights are affected by a violation of most rules of EU law.

For example:

- Suppose a local authority in the UK fails to comply with EU rules on public procurement – for example, fails to advertise a major public works contract that the directives require should be advertised. A firm from another Member State that wished to tender for the contract could bring proceedings in the UK courts to require the local authority to advertise the contract and to allow any interested firm to be considered. (It could not, however, bring proceedings itself in the CJEU on the matter – that could be done only by the European Commission or a Member State).

In public procurement there are in fact now special directives – Remedies Directive 89/665 and Remedies Directive 92/13 – that state a requirement for effective remedies and specify the remedies that must be given for complaints concerning most major contracts. However, even without these directives a right to some effective remedy would exist under the general principle referred to above. This general principle is also relevant for contracts not caught by the procurement directives (such as smaller contracts which fall below the directives' thresholds), for which there is no specific legislation setting out the remedies available.

In proceedings before the national courts questions may arise as to how relevant provisions of EU law are to be interpreted. For example, in the case above the local authority might argue that it did not need to advertise the contract, on the basis that it fell within one of the exceptional cases in the relevant directive when contracts do not need to be advertised, namely "extreme urgency", because the recession required work to be done quickly to boost economic activity. It would then be necessary to decide whether such a reason does indeed give rise to "extreme urgency" within the sense of the directive.

To obtain assistance in resolving such questions of interpretation of EU law the national court can call upon the assistance of the CJEU through the preliminary ruling procedure of Article 267 TFEU (ex Article 234 TEC). This procedure is also important in helping to ensure the correct and uniform application of EU law throughout the EU. Through this procedure the national court asks the CJEU to

provide an answer to a question of law relevant to the case before it, which it phrases in an abstract manner. (If the national court formulates the question in such a way as to ask how the court should decide the case the CJEU will reformulate it in an abstract manner).

- An example of a procurement case in which a court sought a preliminary ruling is Case C-103/88, *Fratelli Costanzo SpA v Comune di Milano* ("*Costanzo*")<sup>4</sup>. The case involved a request for a preliminary ruling from a court in Italy, in which the Italian court put to the CJEU questions concerning: i) the interpretation of a provision in the procurement directives about the procedure for rejecting abnormally low tenders and ii) the interpretation of EU law rules on what must happen when national legislation on such matters is incompatible with the rule laid down in the directive – must national procuring authorities disregard the directive in such a case?

It is important to note that the CJEU does not itself *decide* the case that is before the national courts – it merely provides the national court with an answer to the legal question, and the national court will then itself decide the case before it, using the answer providing by the CJEU to the specific legal question. Nor is the CJEU in any way considering an *appeal* from the national court – even on the specific legal issue (which the national court that makes the request for a ruling will not have decided at all itself – it will only do so once it has the answer to the question from the CJEU).

The CJEU generally takes more than a year to deliver a preliminary ruling, and only once the preliminary ruling is given can the national court actually decide the case before it. Obviously in public procurement cases it is often quite inconvenient to wait such a long time for an answer to a legal question from the CJEU.

The title of the CJEU case in such a case will have a case number in the same way as proceedings in the CJEU. Thus it will start with "C". There then follows a number indicating that the case is the nth case to be brought before the CJEU in a particular year, and a second number indicates the year in which the CJEU preliminary ruling was sought (not when the preliminary ruling was given or the case finally decided by the national court – which is likely to be a considerable time later). Thus C-103/88, *Costanzo*, was the one hundred and third case brought to the CJEU in 1988.

When will a national court seek a preliminary ruling from the CJEU?

- First, Member State courts have a *discretion* to seek a ruling in many cases. In this respect Article 267 TFEU (ex Article 234 TEC) states, first, that where a relevant question of interpretation "is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the CJEU to give a ruling thereon".
- Secondly, there are certain cases in which a court *must* seek a preliminary ruling. In this respect Article 267 TFEU (ex Article 234 TEC) states: "Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no

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<sup>4</sup> Case C-103/88, *Fratelli Costanzo SpA v Comune di Milano* ("*Costanzo*") [1989] ECR 1839.

judicial remedy under national law, that court or tribunal shall bring the matter before the CJEU”.

The CJEU has ruled (in Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (“CILFIT”)<sup>5</sup>) that a reference is not to be considered “necessary” under the above provisions when:

- i) the question of EU law is irrelevant to the national proceedings. Thus a court cannot seek a ruling just because it thinks it would be useful for future cases or to guide the conduct of affected persons generally;
- ii) the provision has already been interpreted by the CJEU; and
- iii) the correct application of the law is obvious.

So far as ii) and iii) are concerned there is often room for a difference of opinion on whether the condition applies to a particular case.

The CJEU has established that the discretion of a national court to seek a ruling is a wide one. It cannot be restricted by a national system of precedent. Nor can it be made dependent on the request of the parties to the proceedings in the national court.

### ***The General Court (formerly Court of First Instance)***

As we have mentioned briefly above, as well as the CJEU there is also a General Court (GC) [formerly Court of First Instance (CFI)]. This was set up to relieve the CJEU of the burden of deciding certain types of cases. As we have mentioned it deals, for example, with employment disputes between the EU and its staff and to actions for annulment, inaction or damages against the EU institutions. It also deals with actions arising out of arbitration clauses in contracts entered into by the EU institutions.

The GC deals with some cases concerning the EU public procurement rules as the EU institutions themselves are subject to some of the EU rules on public procurement, in particular because – although they are not obliged to apply the directives directly – they are subject to the directives’ rules on contract award procedures under the EU’s financial regulations. Aggrieved firms can bring proceedings in the GC to challenge procurement decisions made by the EU institutions under these rules, through, in particular, applications for annulment or damages. It is sometimes necessary in deciding these cases for the GC to interpret the EU rules on public procurement.

However, it should be noted that in addition to being subject to rules applicable also to Member States, the EU institutions are subject to additional rules. It is sometimes difficult in the cases to see whether the GC is purporting to apply rules in the directives or is relying on other rules applicable to the EU institutions but not to the Member States.

- An example of such a case is Case T-345/03, *Evropaiki Dynamiki v Commission* (“Evropaiki Dynamiki”)<sup>6</sup>. (This concerned the application of the EU’s equal treatment principle to i) the position of an incumbent supplier and ii) the provision of equal information to tenderers and is

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<sup>5</sup> Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (“CILFIT”) [1982] ECR 3415.

<sup>6</sup> Case T-345/03, *Evropaiki Dynamiki v Commission* (“Evropaiki Dynamiki”) [2008] ECR II-341.

examined further below). The "T" indicates that the case originated in the General Court (formerly Court of First Instance) and the number shows that it is the three hundred and forty fifth case brought in 2003.

Unlike the statements of law made by the CJEU, those of the GC are not required to be followed by national courts. However, they are sometimes referred to and considered by the CJEU and Member States' courts in making their decisions, and thus are of some relevance in predicting how EU law might be interpreted in those courts.

## 1.2 EU legislation<sup>7</sup>

### 1.2.1 The Treaties

The institutional structure and certain core legal rules of the EU have been laid down through a series of international Treaties concluded between the Member States. The provisions of the various Treaties are currently contained in one consolidated Treaty: Treaty on the Functioning of the European Union (hereafter TFEU) [formerly Treaty establishing the European Community (hereafter TEC)]. The TFEU contains, in particular:

- i) The aims and objectives of the EU;
- ii) The basic institutional structure of the Union;
- iii) Provisions on how further legislation is to be made (including different forms of legislation, voting rights of Member States etc);
- iv) Certain core legal rules to promote the objectives of the Union. Of particular relevance to public procurement, these include:
  - The rules on "free movement" providing for free trade and competition within the EU – for example, the rules which prohibit Member States from levying customs duties on products from other Member States, or from imposing import quotas (which are examined further in chapter 3);
  - Rules on competition law, including rules regulating anti-competitive behaviour in the private sector (such as operation of cartels and abuse of monopoly buying power) (some of which are examined further below).

In reading literature and primary sources on EU it is useful to have some understanding of the historical development of the Treaties. The key stages of historical development are set out in the box on the next page.

The rules in the Treaties, and amendments to them, are *directly applicable*. This means that they are legally binding directly on those addressed - both on Member States themselves and on individuals (natural persons, companies etc). Unlike directives (see below), they do not require any further action by Member States.

Under EU law a directly applicable provision of the TFEU will override any inconsistent national legislation. This is an example of a general principle of the supremacy of EU law over national law (Case 6/64, *Flaminio Costa v Enel* ("*Costa*")<sup>8</sup>). Thus if national courts are faced with a piece of national legislation that is inconsistent with the TFEU they must disregard the national legislation to

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<sup>7</sup> See further P. Craig and G De Burca, *EU Law: Text, Cases and Materials* (4<sup>th</sup> ed) (Oxford: OUP, 2008), pp.114-118; G. Slapper and D. Kelly, *The English Legal System* (10th edition) (Abingdon: Routledge, 2010), pp. 605-618.

<sup>8</sup> Case 6/64, *Flaminio Costa v Enel* ("*Costa*") [1964] ECR 585.

the extent that there is a conflict. Similarly, the administrative authorities of Member States must apply the directly applicable EU rules above conflicting national rules, or they will be in violation of EU law. Thus, for example, the TFEU rules referred to above on public procurement must be adhered to by procuring entities in Member States when awarding their procurement contracts, even if national law specifies something different – for example, requires that contracts be reserved for national suppliers.

Sections of the TFEU are referred to as Articles. When citing Articles of the TFEU a common form in legal literature is “Article” followed by the number of the relevant article followed by TFEU - e.g. Article 30 TFEU (for Article 30 of the Treaty on the Functioning of the European Union).

### **Development of the EU Treaties**

As we have seen above, the original Treaties were:

- i) The first Treaty of Rome in 1957, establishing the European Economic Community (EEC);
- ii) The second Treaty of Rome of 1957, establishing Euratom;
- iii) The Treaty of Paris of 1951, establishing the ESCS.

There have been a number of subsequent Treaties to deal with new developments. The key Treaties were:

- iv) The Single European Act (1986). This provided a framework for political unity. It also introduced measures to complete the removal of trade barriers within the EU by 1992.
- v) The Treaty on European Union or EU Treaty (Maastricht Treaty, 1992). This Treaty, inter alia, introduced the second and third “pillars” of the EU (dealing with the Common Foreign and Security Policy, and justice and home affairs – now Freedom, Security and Justice). As noted above, this Treaty also changed the name of the EEC (“first pillar” activities) to EC.
- vi) The Treaty of Amsterdam (1997). This dealt with various matters, one of the most notable being greater co-operation in immigration policy (including moving this area to the first pillar). This Treaty also amended and renumbered the EC Treaty and the EU Treaty.
- vii) The Treaty of Nice (2001). This introduced various constitutional changes, including to the voting systems used for new legislation, in light of the enlargement of the EU.
- viii) The Treaty of Lisbon (2009). This introduced various substantive amendments to the Treaties. In particular, it introduced certain constitutional reforms, including increasing the European Parliament's powers. It also made the Charter of the Fundamental Rights part of EU law. It also renumbered and renamed the existing EU Treaties. This has resulted in the current position whereby the basic rules of the EU are set out in two core treaties, namely:
  - The Treaty on European Union
  - The Treaty on the Functioning of the European Union (TFEU)

## 1.2.1 Secondary legislation

### 1.2.1.1 Introduction

The legal rules in the TFEU itself are relatively limited and the TFEU provides for the creation of new laws by the institutions of the EU to give further effect to its objectives. These are often termed “secondary legislation” – in contrast with the “primary” laws of the Treaties themselves.

Note that the EU does not have a general power to legislate on any matter but only has power to legislate to the extent that such power has been conferred on it by the relevant Treaties. In other words, it has *limited legislative competence*.

There are two main types of secondary legislation, directives and regulations. The EU has considerable freedom in choosing which to use in any particular case (although for some situations the TFEU stipulates that directives must be the form used).

### 1.2.1.2 Directives

The EU’s policy on public procurement is found mainly in the free movement provisions of the TFEU (see above) and in a series of legislative measures that take the form of directives. The main public procurement directives are the following:

- i) Directive 2004/18/EC – the Public Sector Directive (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114). This regulates the procedures for awarding most major contracts of public bodies (government departments, local authorities etc). For example, it requires major contracts to be advertised through the EU’s *Official Journal* so that they are publicised to all interested parties and regulates the criteria that can be used for selecting firms to tender and awarding contracts.
- ii) Directive 2004/17/EC – the Utilities Directive (Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1). This regulates the procedures for awarding major contracts for bodies engaged in certain activities in the sectors of water, transport, energy and postal services (“utility activities”). It contains similar kinds of obligations to those in the Public Sector Directive.
- iii) Directive 89/665/EEC – the Public Sector Remedies Directive (Directive 89/665/EEC of 21.12.1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] O.J. L395/33). This deals with remedies for firms to enforce the EU procurement rules applying to contracts governed by the Public Sector Directive.

- iv) Directive 92/13/EEC - the Utilities Remedies Directive (Directive 92/13/EEC of 25.02.92, coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, [1992] O.J. L76/7). This deals with remedies for enforcing the EU procurement rules applying to contracts governed by the Utilities Directive.

The directives on remedies have recently been significantly amended by Directive 2007/66/EC (hereafter 2007 Amending Remedies Directive). These directives are considered in detail in chapter 10.

There is also a separate new directive on defence procurement, Directive 2009/81/EC [2009] O.J. L216/76 (which should be implemented by Member States by 21 August 2011) (see further chapter 9).

As we have mentioned above, directives in the area of public procurement must be approved by both the Council and the Parliament, under the procedure in Article 294 TFEU (ex Article 251 TEC).

It is necessary to consider the nature and effect of directives in some detail.

Directives are provided for in Article 288 TFEU (ex Article 249 TEC). In principle, as is stated in Article 288, a directive is a measure of general application which requires Member States to *achieve certain results* but leaves to each Member State the precise *form and method of implementation*. Unlike the TFEU and regulations, a directive envisages that Member States will need to take action to give it effect within that Member State's own legal system: action is unnecessary *only* in those very rare cases in which the legal system of the Member State concerned is *already* adequate to achieve the results in question. Directives are used when it is considered that the rules in question might need to be implemented in different ways in different Member States to take account of different circumstances – such as different administrative, social or political arrangements (that is, when it may be desirable in principle to allow for different approaches); and are also useful if it is not practical to provide for every detail of the rules at EU level.

**Q. What must be done by Member States to implement a directive?**

- A. This is not stated in the TFEU. However, the CJEU has clarified various aspects of this. In this respect the CJEU has held that what exactly is required to implement a directive depends on the nature of the directive: national law must simply provide for measures that are effective to secure the objectives of the particular directive. In the context of rules intended to be enforceable in law by third parties, a method of implementation is required *which provides for legally enforceable rights within the domestic system*. Generally, this will involve legislation: other methods of implementation, such as administrative circulars of a type which are not generally enforceable in domestic law, are not adequate for these cases (Case C-433/93, *Commission v Germany*<sup>9</sup>, in which this long-established principle was applied in a public procurement case).

Most of the rules in the procurement directives governing award procedures – for example, obligations to advertise procurements in the EU

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<sup>9</sup> Case C-433/93, *Commission v Germany* [1995] ECR I-2303.

are intended to be enforceable by aggrieved firms (and this was the case even prior to the adoption of the specific Remedies Directives referred to above): this is indicated clearly by the cases indicating the at these rules on procurement award procedures have direct effect (see further below).

This means that in general Member States must implement the procurement directives by enacting – in legislation that takes a form that in domestic law is legally binding on procuring entities, and enforceable by affected firms – the obligations to advertise etc that are required under the directives. This principle is illustrated by Case C-433/93, *Commission v Germany*<sup>10</sup>, in which the CJEU ruled that Germany had not implemented the procurement directives in the required form.

There are probably only a very few rules in the Public Sector Directive and Utilities Directive that the CJEU would consider not to be intended to be legally enforceable by firms (for example, one can speculate that the obligation for Member States to send statistical reports to the European Commission might not be considered to be intended to be legally enforceable by firms).

**Q. *What are the different ways in which Member States have approached implementation of the procurement directives?***

A. In general, there have been two different approaches by Member States in implementing the rules on award procedures in the directives through legally binding national provisions. The different approaches originally used by Member States have both advantages and disadvantages<sup>11</sup>.

The first approach used is implementation by reference. This approach has been adopted to a large extent in Denmark, for example. Under this approach states enact legislation to state that covered entities must follow the rules in the directives, without setting out all the details of coverage and procedures in detail in national legal instruments.

The second main approach is detailed implementation in national legal provisions. This is much more common than implementation by reference. There are two key variations of this second approach. First, detailed implementation may involve simply repeating the directives' text in the national provisions. This is, for the most part, the approach to implementation adopted by the UK. Alternatively, it may involve adopting a distinct national text, which may involve rewording the provisions, restructuring them, and/or integrating them with other national legal provisions on public procurement.

**Q. *What is the position if a Member State does not implement a directive properly? (The principles of the direct and indirect effect of directives)***

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<sup>10</sup> *Ibid.*

<sup>11</sup> As discussed in detail in Arrowsmith, "Legal Techniques for Implementing Directives: a Case Study of Public Procurement", ch.24 in Craig and Harlow (eds), *Lawmaking in the European Union* (London: Kluwer Law International, 1998) (although note that this is now rather out of date and some states have even changed their approach to implementation since this was written).

- A. A very important question in EU law – including for public procurement – is what is the position when a Member State does not implement a directive properly in its national law by the time that the time limit for implementation has passed, either because it does not implement the directive at all on time (not uncommon) or because there is some kind of error, omission or other defect in implementation. As we will see below one possibility is for the Commission (or another Member State) to take action to get the Member State to correct the failure – but can an individual affected by non-implementation have any direct redress for failure to adhere to the directive? For example, if a state does not implement the obligation to advertise contracts in the *Official Journal* of the EU, and procuring entities do not advertise them, does an aggrieved supplier who has missed a contract opportunity have any redress?

First, it needs to be mentioned that the CJEU has held that national courts must, where possible, interpret national law in a manner that complies with relevant EU directives. The CJEU stated in Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen*<sup>12</sup> that national courts must interpret the national law in light of the wording and the purpose of the directives themselves, in so far as they have discretion to do so under the principles of interpretation applied in national law<sup>13</sup>.

This principle has also been stated in the context of public procurement: for example, Case C-54/96, *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin* (“Dorsch Consult”)<sup>14</sup>.

National courts must also interpret other provisions of national law that are not specifically concerned with implementing the directive – including those that predate the directives – in manner that is consistent with the directives (Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* (“Marleasing”)<sup>15</sup>). Thus, when a provision is ambiguous, for example, and one of the possible meanings but not another gives effect to the directive, the courts must adopt the former meaning. This is sometimes referred to as the doctrine of the “indirect effect” of directives.

However, in some cases it may not be possible to interpret national law in a manner compliant with the directives. If a procuring entity acts in a way that is prohibited by the directives but not by any enforceable national legal rule, the question arises as to whether an individual may enforce the rule in the directive even though it has not been implemented. The CJEU held in the important case of *Van Gend en Loos* (Case 26/62, *N.V. Algemene Transport - EN Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* (“Van Gend en Loos”)<sup>16</sup>) that *sometimes* rules in the directive may indeed be enforced directly in such a case. This is the important doctrine of *the direct effect of directives*.

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<sup>12</sup> Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

<sup>13</sup> On the limits of this doctrine imposed by the existing principles of interpretation under national law see Craig and De Burca, *EU Law: Cases, Text and Materials* (3<sup>rd</sup> Ed) (Oxford: OUP, 2003), pp.211-220.

<sup>14</sup> Case C-54/96, *Dorsch Consult Ingenieurgesellschaft v Bundesbaugesellschaft Berlin* (“Dorsch Consult”) [1997] ECR I-4961.

<sup>15</sup> Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* (“Marleasing”) [1990] ECR I-4135.

<sup>16</sup> Case 26/62, *N.V. Algemene Transport - EN Expeditie Onderneming Van Gend & Loos v Netherlands Inland Revenue Administration* (“Van Gend en Loos”) [1963] ECR 1.

To have direct effect a provision must meet certain conditions that have been developed in *Van Gend en Loos* and in subsequent case law of the CJEU. They must:

1. Be sufficiently clear and unambiguous in its content for judicial application;
2. Establish an unconditional obligation (for example, must not be subject to conditions which themselves require the exercise of a choice by member States for their implementation);
3. Not depend on further measures being taken by the Member State; and
4. Be capable of creating rights for individuals.

Where a directive has direct effect and must be applied under the doctrine of direct effect entities to which the doctrine applies must – as with TFEU obligations – disregard any conflicting national legislation. This was indicated by the CJEU in *Costanzo*.

An important limit on the principle of the direct effect of directives is that direct effect applies only against the state and bodies providing a service under state control and which enjoy special powers (Case C-188/89, *Foster v British Gas*<sup>17</sup>). Direct effect will apply against most of the bodies subject to the EU's public procurement rules, since these rules regulate mainly public bodies. However, there are some procuring entities regulated under these rules – for example, utilities with special or exclusive rights – which are on the border or outside the “public sector”, to which it is not quite clear whether the doctrine of direct effect applies.

**Q. How does the principle of direct effect apply to the procurement directives?**

- A. The CJEU has indicated that the rules in the procurement directives that regulate the procedures for awarding contracts – such as the obligations on advertising, conducting the competition, evidence and criteria for selection and award criteria – in general have direct effect.

Thus in *Costanzo* the CJEU ruled that the obligation to examine tenders that appeared abnormally low that was contained in Directive 71/305 on public works contracts (a predecessor of the current Public Sector Directive) has direct effect.

Later in Case C-76/97, *Walter Tögel v Niederösterreichische Gebietskrankenkasse* (“Walter Tögel”)<sup>18</sup> the CJEU indicated more generally that the various Titles of Services Directive 92/50 (also a predecessor of the current Public Sector Directive) that regulated award procedures have direct effect – although the CJEU also commented that there may be some exceptions.

On the other hand, certain obligations of the Remedies Directives do not generally have direct effect, as they require a choice by Member States over how their obligations are to be given effect.

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<sup>17</sup> Case C-188/89, *Foster v British Gas* [1990] ECR I-3313.

<sup>18</sup> Case C-76/97, *Walter Tögel v Niederösterreichische Gebietskrankenkasse* (“Walter Tögel”) [1998] ECR I-5357.

The main example is the obligation that these directives contain (discussed further in chapter 10) to provide remedies for aggrieved firms either in a court or in a forum that meets certain other requirements of fair procedure etc. The designation of the precise forum for review is a matter for Member States, and if a Member State has not designated the appropriate forum the obligations on remedies cannot be given direct effect, as was also held in the case of *Walter Tögel*.

However, some of the obligations in the Remedies Directive do meet the conditions for direct effect – for example, a requirement not to impose time-limits for challenge that are too short to comply with the requirement of effectiveness. Thus in Case C-327/00, *Santex v Unita Socio Sanitaria Locale n.42 di Pavia*<sup>19</sup>, the CJEU stated that the Italian courts were required to disapply a time limit in national legislation for bringing proceedings in public procurement which the CJEU considered was too short to comply with EU law requirements to provide reasonable time limits for aggrieved firms to bring proceedings.

Some EU rules on public procurement might not have direct effect because they do not meet the condition that they are intended to create rights for individuals. For example – as has already been mentioned above – the CJEU might consider that the rules requiring Member States to make statistical reports to the European Commission might not be considered to create rights for individuals, even though they impose legally binding obligations on Member States.

The fact that a directive has direct effect does not relieve states of the obligation to implement those rules by means that give third parties enforcement rights within the domestic legal system. This was stated in the context of public procurement by Case C-433/93, *Commission v Germany*.

Further, the fact that legislation that does not appear to confer the required rights is given a creative interpretation by national courts in order to secure those rights does not mean that the Member State has complied with its obligation to implement the rules: rights conferred in this way are not sufficiently clear (see Case C-236/95, *Commission v Greece*).

It should finally be noted that, where certain conditions are met, an individual who suffers loss from the failure of a Member State, may obtain damages from the Member State concerned: Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italy* (“Francovich”)<sup>20</sup>. This applies when: i) the directive was intended to confer rights on individuals; ii) the breach of EU law in not implementing the directive was “sufficiently serious” (to which various factors are relevant as developed in subsequent case law, including whether the breach was intentional, and whether the relevant legal rule (as interpreted in the case law) was clear and precise); and iii) there is a causal link between the breach and the loss (with the detailed rules on causation e.g. the nature of proof required and the probability with which loss must be shown, being left to the legal systems of Member States).

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<sup>19</sup> Case C-327/00, *Santex v Unita Socio Sanitaria Locale n.42 di Pavia* [2003] ECR I-1877.

<sup>20</sup> Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italy* (“Francovich”) [1991] ECR I-5357.

### **1.2.1.3 Regulations**

This is a law of general application. Like the TFEU, a regulation binds both Member States and individuals directly and will override any inconsistent provision of national law; and does not envisage the need for any further action by Member States to give it effect.

As we have seen above, regulations have not been generally used as a form of legislation on public procurement: the main legislation on public procurement has taken the form of directives. However, regulations are used for some minor and straightforward matters. Thus the financial thresholds for the application of the procurement directives, which are amended every two years, are amended by means of a Commission regulation.

### **1.2.1.4 Decisions**

Another type of legislative measure is a Decision. Decisions can be made by various EU institutions acting alone or with others e.g. by the Council, the Council together with the Parliament or the Commission. Decisions are generally concerned with the implementing of other legislation.

An example in the field of public procurement is Commission Decision 2005/15/EC of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2005] O.J. L7/7. Article 30 of Directive 2004/17, the Utilities Directive, provides for the Commission to grant exemptions from the directive for certain utilities that operate in competitive markets (since it is considered that the pressure of competition will ensure that they buy commercially without favouring national industry, so that regulation is not needed). Decision 2005/15/EC lays down the detailed procedure that the Commission will follow in deciding whether to grant such exemptions.

## 1.3 Legal method in the CJEU: interpreting EU legislation<sup>21</sup>

### 1.3.1 Approach to interpretation

We can now turn to consider the approach that the CJEU uses in making its decisions and delivering its preliminary rulings.

The EU legal system has been influenced more substantially by the civil law systems of Europe than by the common law (in large part a result of the fact that the original Member States had civil law systems). This affects both the drafting and interpretation of legislation and the approach to case law – and drafting is in turn influenced by the expected approach to interpretation. Both drafting and interpretation follow primarily a “civil law” approach which (as a broad generalisation) places more weight on the objectives of the legislation than on the wording, in particular showing a greater willingness to interpret the legislation to give effect to its purposes even when this involves departing from or supplementing the wording of the legislation. The actual wording of the texts still provides the starting point for interpretation. However, the CJEU draws very heavily on purposive approaches, including the “teleological” approach of looking at the whole social, economic and political context of the legislation.

Reflecting the emphasis on objectives and context, the Treaties and secondary legislation contain pre-ambls setting out their aims and objectives, which are intended to be used to aid interpretation. The Treaties are in general drafted in very broad terms, it being specifically envisaged that they will be developed and applied by the CJEU in accordance with their objectives in a flexible manner. Although the EU’s secondary legislation is much more precise it still has many features that are different from those of English legislation, including the inclusion of pre-ambls. The EU institutions are in fact bound under Article 296 TFEU (ex Article 253 TEC) to state the reasons on which acts are based. Further, whilst secondary legislation does tend to be drafted more precisely, often there has been disagreement between Member States in the Council, or between the Commission and Parliament, which has led to the use of ambiguous language that deliberately does not resolve certain issues, leaving them to be addressed by the CJEU.

Another notable feature that tends to lead to less reliance on the literal wording of the legislation in some cases is the fact that EU legislation is drafted in all the official languages of the Member States, and that all these versions are equally authentic; it may be necessary to examine many versions of the text, the language of which is not always consistent, to determine the text’s meaning. This is one factor that places limits on the possibility of relying on the literal approach as a method for interpreting EU law: it may simply not be possible to ascribe meaning to the text that is consistent with all the language versions<sup>22</sup>. It may in

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<sup>21</sup> See further A. Arnall, *The European Union and its CJEU* (2<sup>nd</sup> ed.) (Oxford: OUP, 2006), chapter 16, pp. 607-621.

<sup>22</sup> As Arnall has stated, “The Court’s general approach is to seek to interpret the provisions in a way which is consistent with all (or nearly all) of the language versions. If that does not prove possible, it turns for guidance to the purpose and context of the provision” (*Ibid* p.608).

such cases ascertain the meaning in this way, and use one or more language versions as confirmation of the meaning – even if it is not consistent with all.

Some illustrations in a procurement context are set out below.

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**Example 1: Reasoning by analogy and the general principle of transparency**

(On the substantive area of EU procurement law to which this case relates see further chapter 6, section 6.7).

In Case C-470/99, *Universale-Bau and others v Entsorgungsbetriebe Simmering GmbH (EBS)* ("Universale-Bau")<sup>23</sup> para.97, a procuring entity in Austria, EBS, had drawn up a detailed methodology for selecting which firms were to be invited to tender. EBS had informed interested providers that it would select to tender the five top-ranked candidates in its selection procedure. It also informed them that the ranking would take account of technical operating capacity over the previous five years, by reference to five listed types of works. This was to be done according to a scoring system that the entity had deposited with an independent third party (a notary). However, this scoring system was not disclosed to candidates. The procurement was governed by Directive 93/37/EEC on public works contracts, a predecessor to the current Public Sector Directive 2004/18/EC. The question arose as to whether the entity should have disclosed the scoring method to tenderers.

At that time the directives were totally silent on whether criteria for the selection phase and any weightings etc. given to them needed to be disclosed to tenderers. However, the directive did state that for *award criteria* used to compare tenders in the evaluation (price, quality, etc.) the criteria must be disclosed and they must be stated in descending order where possible. It should also be noted that at that time there was no general principle of transparency expressly stated in the directive.

The CJEU ruled that the selection methodology that had been developed *should have been disclosed*. The CJEU reached this conclusion by referring to the provision on disclosing award criteria and their order of importance, pointing out that this obligation was included in the directive to support equal treatment and transparency (para.98). The CJEU then concluded that, since transparency was a general principle underlying the directive:

"where, in the context of a restricted procedure, the contracting authority has laid down prior to the publication of the contract notice the rules for the weighting of the selection criteria it intends to use, it is obliged to bring them to the prior knowledge of the candidates, is the only interpretation which complies with the objective of Directive 93/37, as explained in paragraphs 88 to 92 of this judgment, since it is the only one which is apt to guarantee an appropriate level of transparency and, therefore, compliance with the principle of equal treatment in the procedures awarding contracts to which that directive applies" (para.99).

In this case it can be seen that that CJEU effectively "implies" into the directive an obligation of disclosure in relation to selection criteria that is not stated expressly. It does this by referring to the underlying purposes and principles of the directive – transparency and equal treatment – and using reasoning by analogy, namely the fact that there is an explicit disclosure obligation in relation to *another* aspect of the procedure (the award phase) that indicates that disclosure of information is intended by the directive as a means of ensuring transparency and equal treatment. (Note, however, that the CJEU did not consider whether the entity had to formulate any selection criteria and weightings – merely that it had to disclose them if it did so). This case represents one important milestone in the CJEU's more general development of a "principle of transparency" in the procurement directives, which it has used both to interpret explicit provisions that are ambiguous *and* (as in this case) to "supplement" the directive's obligations. (This principle has since been effectively "adopted" by the legislature which has written the principle of transparency expressly into Directive 2004/18).

(Note there have been changes to the rules in the directive since this ruling: as well as explicitly including the transparency principle, Directive 2004/18 has expanded the obligation on formulating and disclosing award criteria and added some explicit rules on disclosing selection criteria: see chapter 6, section 7.

<sup>23</sup> Case C-470/99, *Universale-Bau and others v Entsorgungsbetriebe Simmering GmbH (EBS)* ("Universale-Bau") [2002] ECR I-11617.

**Example 2: The purposive approach and the leverage principle - the Telaustria case**

(On the substantive area of EU procurement law to which this case relates see further chapter 3).

In Case C-324/98, *Telaustria Verlags GbmH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG* ("Telaustria")<sup>24</sup> the Federal Procurement Office of Austria sought a preliminary ruling from the CJEU to establish whether the procurement directives applied to a contract for the compilation and production of telephone directories, under which the provider was paid by being permitted to exploit the directories for commercial purposes.

The directives require contracts to be advertised and awarded through a competition. A key objective of this is to ensure that public bodies' behaviour in awarding public contracts can be monitored to prevent "hidden" discrimination. In this respect the directives were adopted with the aim of supporting prohibitions on discrimination against firms and products from other Member States that are enshrined in the TFEU with the aim of creating a free market in the EU. In the case of services the applicable TFEU provision is Article 56 (ex Article 49 TEC), which states that (subject to certain exceptions):

"restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a State of the Union other than that of the person for whom the services are intended".

This provision prohibits states from limiting access to their markets (public or private) by imposing any kinds of restrictions, including those that discriminate on grounds of nationality – for example, by restricting access to public contracts in services to national firms only.

The CJEU concluded in this case that the relevant directive did *not* apply to a contract of this type, however, as it was a concession and concessions were not covered by the directive – for historical reasons these had been omitted.

However, the CJEU noted that the TFEU itself still applied. It then concluded that Article 56 TFEU (ex Article 49 TEC) not merely prohibits actual restrictions but implies an obligation of transparency in awarding government contracts, which "consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed" (para.62). Thus the CJEU indicated that transparency obligations apply *even to those public contracts that are excluded from the transparency obligations of the directives*.

In this case the CJEU adopted a creative interpretation of the negative prohibition in Article 56 TFEU (ex Article 49 TEC), in order to better give effect to the objective of that provision in prohibiting discrimination. Clearly the CJEU considered that the prohibition on discrimination could not be made to work effectively if contracts are not awarded in a transparent way and thus – drawing inspiration from the secondary legislation (directives) adopted for some public contracts – developed such a "positive" obligation for contracts in general under the TFEU itself. (This approach of drawing inspiration from solutions in secondary legislation to interpret the primary obligations of the TFEU themselves had been called by Treumer and Werlaff the "leverage principle": Treumer and Werlaff, "The Leverage Principle: Secondary Law as a Lever for the Development of Primary Community Law" (2003) 28(1) ELRev 124).

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<sup>24</sup> Case C-324/98, *Telaustria Verlags GbmH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG* ("Telaustria") [2000] ECR I-10745.

We can conclude this section by noting the importance for interpretation of what the CJEU refers to as “general principles of law”. These have been derived from various principles of law found in the national law of Member States and are considered as part of EU law with which the CJEU must ensure compliance. In the context of the primary legislation of the TFEU these principles are used to inform interpretation – although TFEU provisions can override these principles. They are also used to interpret secondary legislation such as directives. In addition, secondary legislation must be consistent with these principles and may be challenged if it violates such principles. Examples of these principles that have been important in public procurement are:

### 1. The principle of proportionality

This requires that a measure must be both:

- i) *suitable* to promote the objective sought – that is, there must be a reasonable connection between the measure and its objective; and
- ii) *necessary* to achieve that objective. A measure is only necessary if it is no more onerous than necessary. This entails that the objective to be achieved could not be attained by some *other* approach which is *less onerous*. It also entails that the measure should not have an excessive effect on trade in light of the significance of the objectives sought.

This principle has been applied, for example, in interpreting the scope of exceptions and limitations to the TFEU rules that prohibit discrimination on grounds of nationality including in public procurement (for example, by reserving contracts for national suppliers). There are certain limits on these prohibitions that states can invoke for reasons of public interest – e.g. for reasons of national security or environmental protection – but this applies only when the state measure satisfies the proportionality principle. This means, for example, that there must be no other way to achieve the state’s objective of protecting national security (or whatever) that is less restrictive of trade. This application of the principle is discussed further in chapter 3.

### 2. The principle of legal certainty.

This requires that persons should not be in a position of uncertainty as regards their legal rights and obligations. It has been invoked, for example, to justify the possibility of placing time limits for bringing proceedings to challenge decisions that contravene EU law, including unlawful procurement decisions. Whilst the principle of effectiveness generally requires that remedies are available to challenge such decisions, the principle of legal certainty makes it permissible to place limits on those challenges.

### 3. The principle of equal treatment

The equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified (see, for example, Joined Cases C-21/03 and C-34/03, *Fabricom v Belgium* (“Fabricom”)<sup>25</sup>, para.27 of the judgment, in the context of public procurement). This principle has been very important in interpreting the public procurement directives and the directives now

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<sup>25</sup> Joined Cases C-21/03 and C-34/03, *Fabricom v Belgium* (“Fabricom”) [2005] ECR I-1559.

state expressly that procuring entities must adhere to such a principle of conducting procurement under the directives. (See further chapter 6, section 1).

### 1.3.2 Aids to interpretation

The CJEU generally makes use of *travaux préparatoires* in interpreting EU secondary legislation, referring to whatever materials from the legislative history it considers useful in particular cases.

Whilst the CJEU has ruled out reliance on preparatory materials for the Treaties themselves (which are in any case limited) as those from earlier Treaties are not published, greater availability of material relating to subsequent TFEU amendments may change that position.

We have also already noted above that the CJEU makes reference to the *recitals* to secondary legislation as part of the context that is relevant for interpreting their provisions.

It is also appropriate to note the status of Statements of the Member States and EU institutions which are recorded in the minutes. The CJEU has said that these are not relevant for interpreting the legal rules, even if they are published. Thus the CJEU has said that declaration contained in the minutes of a meeting of the Council adopting a directive (concerned with free movement of workers) had "no legal significance" when no reference was made to the declaration in the wording of the legislation itself (Case C-292/89, *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* ("Antonissen"))<sup>26</sup>. However, it can be noted that documents of this kind have been referred to on occasion by the Advocates General.

For example, in public procurement the Council and Commission have made a joint declaration on the extent to which the rules of open and restricted tendering procedures permit any discussions with tenderers after the tender deadline ([1994] O.J. L111/114). This states that "all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out". It is also stated, however, that discussions may be held "but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of contracting authorities, and provided this does not involve discrimination". This particular statement was referred to with approval by Advocate General Tesouro in the *Storebaelt* case<sup>27</sup>.

The EU institutions, like national governments, also issue various other documents that purport to offer legal interpretations of the EU rules. These take various forms. Some of the most important in the area of public procurement are:

- i) Formal Interpretative Communications from the Commission that present the Commission's official view of how certain legislation should be interpreted.
- ii) Commission internal working documents, that set out the Commission's position on certain points for the benefit of Commission staff dealing with the matter.

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<sup>26</sup> Case C-292/89, *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* ("Antonissen") [1991] ECR I-745).

<sup>27</sup> Case C-243/89, *Commission v Denmark* ("Storebaelt") [1993] ECR I-3353.

- iii) Documents of the Advisory Committee on the Opening Up of Public Procurement and the Advisory Committee on Public Procurement (which are committees that advise the Commission on policy-making in this area).

It is important to note that none of these documents represents any kind of authoritative statement of the law and the CJEU can, and does, reject statements of law set out in such documents. However, they do in practice provide a guide to the likely stance of the European Commission in dealing with particular issues e.g. in arguing or intervening in case before the CJEU, or in acting in response to supplier complaints made to the Commission.

The Opinions of the Advocates General also often refer to the writings of academic authors in offering their interpretations of the rules.

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## 1.4 The status and approach of cases

### 1.4.1 Is there a system of precedent?

There is no system of binding precedent in the CJEU – in theory the CJEU is not required to follow its *own* decisions in future cases. This is closely connected with the fact that the EU system is modelled to an extent on civil law systems in which the law is considered in theory to be stated in the legislation and court decisions merely to apply that legislation to the facts.

Nevertheless, it is clear that even the single, individual decisions of the CJEU have a highly persuasive value. It is in fact extremely rare for the CJEU to fail to follow previous decisions on the law. Decisions of the full court or of a Grand Chamber are considered to have a particularly strong value in this respect.

It is pertinent in this respect to note that:

1. The CJEU itself has stated that national courts are not *bound* to refer questions of law to the CJEU where the CJEU has already given an interpretation (see section 1.1 above); and
2. The CJEU's Rules of Procedure allow it to proceed by way of reasoned order rather than the usual form of judgment when a question referred to the CJEU in a preliminary ruling is identical to a question on which the CJEU has already ruled, or where the answer to the question put may be "clearly deduced from existing case law".

Both of these points involve effective recognition of the strong persuasive value of the judgments that it has given previously on legal issues.

It is important to note – as mentioned earlier – that the CJEU's rulings on matters of law *are* binding on national courts. Thus a national court must either follow a legal ruling of the CJEU, or must seek another ruling on the matter in which the CJEU might depart from its previous decision – a national court cannot decline to follow the CJEU.

Alongside the fact that the CJEU is not *bound* to follow its previous judgments, its room for manoeuvre is also somewhat greater than that of English courts as a result of the less detailed style of its judgments, as discussed below.

There is also no system of precedent operating in relation to the General Court (formerly Court of First Instance). This means that the Court is not formally bound by its own previous decisions. It also considers that it is not formally bound by the judgments of the CJEU – although it treats these as highly persuasive.

It is perhaps also worth noting that decisions made by one national court on EU law have no precedent value in EU law, binding or otherwise, for the courts of other Member States. (However, a preliminary ruling by the CJEU itself given in a case arising from one Member State must be followed by the courts of *all* Member States, of course).

### 1.4.2 Style of judgments

In contrast with the approach of English law, CJEU judgments are given in the form of a single judgment of the CJEU as a whole. Judges agreeing with the decision do not give separate judgments. The fact that the different judges involved do not necessarily agree on the precise legal principle on which their decision is based, or on which a ruling is sought, may be one reason for lack of clarity in the way in which the stated legal principles are formulated.

There are also no dissenting judgments. Thus it will not be known whether or not the decision or ruling was unanimous.

In general, the CJEU's style of judgment is more typical of the civil law system, than the common law system. In this respect the approach taken is in part because of the civil law origins and approach to case law, as noted above, and is also influenced by other factors such as the open-textured nature of the TFEU, and the difficulties of amending that document, which require a flexible approach. Regarding their explanation and consideration of the facts of each case, their legal reasoning (including reference to past cases), and when setting out the reasons (including policy) behind their decisions, CJEU judgments are not very detailed.

However, more detail on the facts, the arguments of the parties and the policy issues that arise, as well as more detailed reference to past CJEU judgments and their significance for the current case, is provided in the Opinions of the Advocates General. These are published alongside the judgment. They often in practice contain material that can explain why the CJEU reached its decision, as well as show how the judgment might fit with previous CJEU cases. At one time the CJEU itself did not expressly link its conclusions with the reasoning of the Advocate General or refer to the Opinions at all, but now increasingly does so.

The "civil law" character of the CJEU should not be exaggerated – the CJEU's approach is in some respects a mixture of civil law and common law styles, and has perhaps been evolving more towards the latter over time (for example, by providing more detailed reasoning, including reference to past cases, in later judgments). There are several reasons for this, including the influence of the common law approach following the accession to the EU of Ireland and the UK; and the special nature of preliminary ruling proceedings, in which the CJEU cannot simply apply the law to the facts in traditional civil law style but must by definition give guidance on points of law to other bodies. It is also significant to note that at one time a detailed account of the facts of the case and the arguments made were published at the start of the judgment, separately from the main part of the judgment on the law, which (in contrast with the common law approach) did not itself generally link its statements of law closely to the facts. The practice of publishing this separate part on facts and arguments was largely abandoned by 1994 in order to reduce the burden of translating large amounts of material. However, this then had the consequence of leading the CJEU to integrate a more detailed examination of the facts and arguments into the main part of the judgment – bringing the style of judgment a little more closely to that of the common law in its more recent cases.

One important and relatively recent development is that the CJEU now refers more readily to previous cases that are not consistent with the approach that it takes in the case before it, and expressly indicates its intention to depart from past cases where it intends to do so. Traditionally, where it had appeared to depart from previous judgments it had not made clear its intention to do so, which often left the law in a state of much uncertainty, as it was not clear how

possibly conflicting cases fitted together. However, there are still cases in which the relationship of past and future cases is left unexplained.

### **1.4.3 The retrospective nature of CJEU decisions**

In general judgments of the CJEU effectively have retrospective effect.

However, the CJEU has taken the view that in exceptional cases it may limit the temporal effect of its rulings. Thus in Case 24/86, *Blaizot v University of Liege*<sup>28</sup> the CJEU ruled that certain charges made by the university to foreign students were unlawful under EU law but that, contrary to the normal requirement that unlawful charges are recoverable by those who have paid them, charges collected prior to the ruling should be irrecoverable to prevent undue disruption to the university's financial arrangements.

### **1.4.4 Language**

In contrast with the position of legislation, discussed above, in which many language versions have equal status, the single authentic version of a CJEU judgment is the version in the "language of the case". This language is the language used in all written and oral pleadings in the case.

In direct actions – i.e. those which start and finish in the CJEU – the language of the case is usually chosen by the applicant. An important exception to this, however, is the case of actions against a Member State (including proceedings brought by the Commission against Member States under Article 258 TFEU (ex Article 226 TEC)) or national of a Member State, in which case the case is brought in the official language of the Member State concerned. In applications for preliminary rulings from national courts, the language of the case is the language of the referring court.

The language of the case is different from the "working language" of the CJEU – that is the language in which the judges deliberate between themselves and draft their judgments, which in practice is French. This position has arisen because French was the language most used and understood amongst the 6 original Member States of the EU. The judgments are translated from French into the language of the case – but, as noted above, it is the version of the language of the case which is the authentic version, not the original French draft.

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<sup>28</sup> Case 24/86, *Blaizot v University of Liege* [1988] ECR 379.

## CHAPTER 2: THE EU PROCUREMENT REGIME - OBJECTIVES AND OVERVIEW<sup>1</sup>

### 2.1 The objective of the EU procurement rules: a free market in public procurement

#### 2.1.1 Why a free market?

The main means by which the EU has sought to create prosperity and entrench peace in Europe is by creating a single market by removing barriers to trade. The creation of prosperity through trade is based on the premise that opening up markets to foreign competition will improve economic welfare, as is discussed further below. In Europe, economic prosperity was also seen as a primary means for achieving peace: it was felt that a close trade economic dependence would reduce the risk of future hostilities. Removing barriers to trade in *government* markets is one aspect of this policy of removing trade barriers, and it is this which provides the rationale and the legal basis for the EU's regime on public procurement.

The rationale behind the creation of the single market in general is the theory of comparative advantage which was elaborated by Ricardo. This is a fundamental theory underlying most free trade agreements. In brief, it states that both total economic welfare of the free trade group *and* the welfare of each individual country will be maximised by free trade between the members: such free trade leads each state to specialise in those areas in which it has a comparative advantage, resulting in the most efficient use of resources and thus enhancing wealth.

If state A makes cars more efficiently than state B, and state B makes wine more efficiently than state A (here we say that A has an *absolute advantage* in making cars and B an *absolute advantage* in making wine), economic free trade theory states that use of resources is optimised if state A specialises more in cars and state B in wine, and the two trade these products. According to free market theory the laws of supply and demand – the “invisible hand” of the market – will operate to produce this optimum allocation of resources if persons are allowed to trade freely between countries.

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<sup>1</sup> See further Y. Allain, “The new European Directives on Public Procurement: Change or Continuity?” (2006) 35 *Public Contracts Law Journal* 517; S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed.) (London: Sweet & Maxwell, 2005), chapter 3; S. Arrowsmith, “An Assessment of the New Legislative Package on Public Procurement” (2004) 41 *Common Market Law Review* 1; S. Arrowsmith, “Legal Techniques for Implementing Directives: a Case Study of Public Procurement”, in *Lawmaking in the European Union*, P. Craig and C. Harlow eds. (London: Kluwer Law International, 1998), 491; Cecchini, *The European Challenge: the Benefits of a Single Market*, section 3 (1988), pp. 16-21; J. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, (2<sup>nd</sup> ed.) (Cambridge, Mass: MIT Press, 1997), pp 8-21; J.M. Hebly (ed.), *European Public Procurement: History of the 'Classic' Directive 2004/18/EC* (London: Kluwer Law International, 2007); P. A. Trepte, *Public Procurement in the European Union* (Oxford: OUP, 2007), pp. 27-28.

According to the theory of comparative advantage, the same also applies if state A is more efficient than B at making both cars *and* wine (that is, if state A has an absolute advantage in both products), but its advantage in making cars is greater than its advantage in making wine (i.e. it has a *comparative advantage* in car making, and B has a *comparative advantage* in wine-making). In this situation, the theory states that the market will lead to states specialising in those products or services in which a comparative advantage exists, and that in this case again not only is *total overall wealth of the countries maximised* by trading freely, but that state A and state B are *both better off individually* than if they tried to be self sufficient and did not trade.

Thus the theory suggests that even a poor state that cannot produce any goods or services *better* than other countries (for example, because of poor education, poor climate and natural resources etc) will be better off by allowing the market to operate. This will lead to the state concerned specialising in the products or services in which it enjoys a comparative advantage (although it does not enjoy any absolute advantage in producing them) and trading them with other countries for other products and services.

In addition to the benefits resulting from trade, specialisation based on comparative advantage also produces further benefits, including from the ability of firms to take advantage of economies of scale which are gained from serving larger markets, and from the dynamic effects (such as greater product innovation) of greater competition. (However, it can be noted that development of new technology has to some extent reduced the potential for economies of scale in many industries in which this was previously important).

The theory also suggests that states will benefit economically from opening their markets even if they do this unilaterally – that is, without being given reciprocal access to foreign markets.

To many, the proposition that one might gain economically by removing protection from national industry or by failing to erect barriers to protect new national industry seems counterintuitive. It is perhaps easier to see how this might be by focusing on the costs of protectionism, rather than merely on the benefits. The benefits of protectionism are certainly very visible in terms of, for example, creation or preservation of jobs in the protected industries, and creation or preservation of profits in national firms. However, there are also costs. For example, protecting national industry adversely affects the quality and price of the products of that industry both for consumers and for businesses that use those products. Protecting the national car industry, for example, means that both consumers and businesses in the country may have access only to expensive and poor quality vehicles – which for other national businesses will increase the price and/or reduce the quality of their own products and services, making those in turn less satisfactory for domestic consumers and making it harder to export them abroad. Economic free trade theory states that the costs actually outweigh the benefits in purely economic terms.

Free trade theory is contentious in various respects. Further, even its strongest supporters do not argue for *unfettered* free trade, and accept that some limits are desirable. A number of (sometimes related) considerations need to be mentioned in this respect.

First, some question whether the maximisation of economic wealth that is sought to be achieved by free trade is desirable in principle.

Secondly, the theory on which free trade is based is premised on certain assumptions that do not apply in all cases – for example, that where some industries decline as a result of international companies factors of production can easily switch to other industries. Where this is not the case, the value of free trade may be limited or even called into question for a particular country or a large part of its economy.

Thirdly, there is significant debate amongst economists about the extent to which states can in certain circumstances contribute to advancing economic wealth by intervening in the economy – for example, by establishing certain types of industries that might not develop under free market conditions.

Fourth, free trade can potentially generate various specific problems, both economic and non-economic. These may need to be addressed if the overall costs of free trade are not to outweigh the economic benefits. For example, complete free trade could lead to imports of products that could harm consumers or the environment. Unchecked free trade may also lead to a rapid decline in certain industries that means that certain groups suffer immediate reductions of income and/or that there is an increase in inequalities of wealth between different groups or regions. Limiting reductions and inequalities effects might be considered more important than increasing *total* national wealth; that is, equitable wealth distribution may be a relevant policy. Trade can also, for example, impact on various cultural values – for example, where domestic media industries are affected by imported films – and on variety (the availability of different types of products and services), which might be considered desirable for its own sake.

In some cases it may be appropriate to deal with these potential problems by *placing limits* on free trade. Thus governments might limit imports of products that do not meet certain health or environmental standards. They might also, for example, wish to give aid to, or place government contracts with, firms in poor parts of the country, in order to reduce regional inequalities. Of course, some – although not all – of these problems can be dealt with by measures other than limiting trade, and it might be appropriate to consider these other possibilities in considering whether it is desirable to place limits on free trade. We will see that this is required in the EU system as a result of the application of the principle of proportionality to control the imposition of restrictions on trade, both in public procurement and in other areas.

We can also note that it is not merely the impact of free trade per se that can have adverse effects on “non-trade” interests, but also the *particular means* chosen to achieve it. We will see that in the area of public procurement one criticism sometimes made of the application of the transparency principle as a means to combat discrimination against foreign firms and products is that it prevents states from utilising discretion in procurement that could in some circumstances enhance value for money in procurement, or that it requires use of procurement methods that are not efficient in terms of the cost of the process (which can, in turn, also affect value for money by deterring the best firms from participating in government procurement).

Free trade regimes are often criticised for striking the wrong balance between trade and other, competing, interests of the kind referred to above, by favouring free trade at the expense of these other interests.

In setting out the theory behind free trade above, we are not making any value judgment about the value of free trade per se nor the way in which it has been given effect in practice in any system, including the EU, but are merely explaining

the basis on which the EU single market - including the single market in public procurement - is constructed.

### **2.1.2 The role of trade agreements in opening markets**

If free trade is in principle considered beneficial by governments that are party to free trade agreements, this raises the question of why these governments do not simply unilaterally open up their markets, and why it is necessary to conclude international agreements on free trade to assist in this process.

One reason, of course, can be that national governments do not accept the basic value of wealth maximisation on which free trade is based or – for the various reasons above – do not consider that it is in general a suitable strategy for their own country (for example, they may consider that they are acting in exceptional circumstances in which the economic benefits of protection outweigh the costs (such as to promote “infant industries”). They may participate in free trade agreements because of various external pressures, rather than from a belief in the value of free trade – for example, pressure from international financing institutions, such as the EU, or fear of being excluded from trade altogether if they do not open their markets in ways required by their trading partners.

However, even governments that do accept the desirability of significant free trade in principle often do not unilaterally open their markets. A large part of the explanation for this lies in the fact that, even for governments that accept the benefits of free trade, it is often difficult to achieve within the political system.

To a large extent, this is because – as noted above – the costs of free trade are more visible to the general public than the benefits, and are also concentrated in their impact on specific individuals or communities who have an incentive to act politically (whether through the exercise of a vote or other means). Removing protection from an industry, for example, will lead to immediate job losses that can significantly affect behaviour. On the other hand, the costs of protection in terms of higher prices are broadly distributed across the consumer and business community, and are often too hidden, and too limited in their impact on individuals, to affect their political behaviour.

Trade agreements are useful instruments to help overcome the domestic political constraints in achieving open markets for governments that consider free trade to be beneficial. In particular:

1. Under trade agreements some domestic constituencies will gain, by obtaining access to foreign market for their own goods and services, and these will offer political support to government that can offset any political opposition from the immediate losers from free trade (such as those who will lose jobs in an industry that is opened up to foreign competition).
2. Once markets have been opened the existence of international commitments to that effect can help guard against “backsliding”, including as a result of a change of government or economic crisis. The global free trade system under the General Agreement on Tariffs and Trade (GATT), now administered through the World Trade Organisation (WTO), was instituted largely from a desire to avoid the erection of trade barriers as a response to economic crisis, something which had happened after the Wall Street Crash of 1929 and was considered to have played a large part in the subsequent economic crisis known as the Great Depression. The more recent global economic crisis has, as such crises generally do, precipitated

calls for protection, and so far the existing free trade agreements have assisted in maintaining open markets (including in the area of public procurement).

3. It is also sometimes said that international organisations or free trade agreements can provide a "scapegoat" that can deflect criticism from national governments – governments can blame "Brussels" or "Geneva" for job losses etc that result from opening up particular markets.

Of course, in a world of free trade agreements, governments may also hold off from opening their markets unilaterally even if they are able and willing to do so, in the expectation that greater benefits can be achieved by using the opening of their own markets as a bargaining chip to motivate trading partners to open markets to them in return, than by purely unilateral market opening.

### **2.1.3 Public procurement practices as barriers to trade**

Practices in public procurement that do not allow for free competition from other states to serve the public market are a possible source of distortion in the natural patterns of trade, and thus may be detrimental to maximising national and global economic welfare, as discussed above. Various types of practices can be identified that fall into this category.

#### **1. Protection of industry that does not enjoy a comparative advantage**

First, governments deliberately engage in discriminatory procurement to support national industry that does not enjoy a comparative advantage over its international competitors, with the aim of maintaining or increasing national profits and employment in the sector concerned.

From the perspective of maximising *global* welfare such policies are in principle unsupportable as they go against the principle of comparative advantage.

In addition, such policies may lack economic merit *from the point of view of the procuring state*. First, the impact of protectionist procurement policies in limiting imports and increasing domestic output is sometimes limited or non-existent; such policies will have an effect on trade only when government demand for a product or service is larger than domestic supply. (This appears to be more likely in developing countries, where the domestic supply industry for the kind of products and services normally bought by government is relatively smaller than in developed states). Where there is no effect on trade, the effect of the policy is simply to raise the prices paid by government, resulting in a transfer of wealth from the government to the protected industries. Secondly, where trade effects do result and there is a benefit to the national economy in the increased benefits to domestic as opposed to foreign firms, these are outweighed by the costs, in terms of higher prices paid by government, the diversion of national resources to less productive uses (in the protected industry) and the adverse long term impact of protection on the efficiency of the protected national industry.

As we have seen above, the reasons why governments engage in such policies despite their adverse economic impacts are often political rather than economic.

After the Second World War, as trade agreements began to reduce governments' ability to protect their industry through other types of trade barriers - such as tariffs and quotas - discriminatory procurement became increasingly more important.

## **2. Protection of potentially competitive industries**

Another justification for discriminatory procurement is to support industries which are potentially competitive but are held back by market imperfections such as inadequate access to capital, or to create a comparative advantage in industries which themselves are affected by market imperfections such as high entry barriers ("infant industry" arguments). The use of procurement to develop competitive national supply markets in this way may be particularly important in developing countries and economies in transition.

From a *global* perspective, such policies are often unobjectionable in principle as they do not go against the principle of comparative advantage, and from a *national point of view* they may produce economic benefits if implemented successfully. However, the practical problems of putting such policies into effect mean that often the anticipated results do not materialise, and the costs involved (which, as in (1) above, are higher prices paid by government, diversion of resources to less productive uses and inefficiency from lack of competition) outweigh any benefits. These problems include the difficulties of selecting the correct industries for protection; the challenge of providing incentives for the protected industry to operate in an efficient manner; and the distorting effects of lobbying by industry. Even where such policies do produce net benefits, it must always be considered whether preferential procurement is the most effective method of achieving the government's objectives when compared with possible alternatives such as state loan guarantees, training, direct financial aid etc.

## **3. Support for social and environmental objectives**

Another reason why government procurement operates as a barrier to trade is that it is frequently used as a tool for promoting social, political and environmental objectives, such as the economic participation of women, the handicapped or disadvantaged ethnic groups, or the development of poor regions of a country. This may involve, *inter alia*, setting aside some government requirements for these groups; giving them price preferences; requiring sub-contracting to such groups; or requiring all government contractors to demonstrate that their own businesses are conducted in accordance with anti-discrimination or affirmative action policies. Many of these policies have the effect of excluding or limiting foreign competition as an inevitable by-product of advancing the interests of the national group. For example, a price preference of 5% given to a national ethnic group disadvantages foreign firms as well as national firms that are not owned by the relevant group.

In some cases governments accept that the policies concerned are not efficient in the sense of maximising *economic* welfare, from either a global or national viewpoint, but accept the inefficiencies as a justifiable cost of other goals, such as social or regional equality or political harmony. In addition, however, these policies may be compatible with both national and international goals of economic efficiency if they bring into the economy those who have previously been relatively inactive because of market imperfections.

As with other procurement policies there is, however, a danger that the anti-competitive effects of the policies may outweigh the benefits. A first condition for avoiding this is, of course, that the policies should achieve their purported objectives, and this is not always easy to ensure or to measure. For example, programmes to improve the position of ethnic groups must ensure that firms

benefiting from the programme provide a genuine, and not merely a token involvement, of the targeted group.

Striking a balance between the benefits of trade and the legitimate objectives of government in using procurement to promote social and environmental goals is one of the most difficult problems for systems that seek to open up markets in procurement and will be considered in detail in chapter 11.

#### **4. National security**

National security concerns are another common reason for placing contracts with national industry, particularly in the defence sector. For example, defence contracts may be given to national firms in order to ensure that spare parts and maintenance are easily available in time of conflict, or to ensure that the country retains its own capability to manufacture, say, tanks or radar systems. As with social goals, where national security goals are concerned any adverse economic effects are accepted on the basis that they are secondary to other objectives. However, as with other procurement policy measures, there are potential problems in ensuring that decisions are taken on genuine security grounds rather than being influenced by the economic interests of lobby groups. This is a particular problem with defence because the industries involved often support a large number of jobs. The special problem of opening up defence procurement markets in the EU is considered in detail in chapter 9.

#### **5. Corruption and patronage**

Another barrier to trade is the influence of corruption and patronage. For example, contracts may be awarded to firms that have paid bribes or to firms in which politicians, purchasers or their families have a financial interest, or which have contributed to an election campaign. Exploitation of comparative advantage requires that purchasing decisions should be based on commercial criteria. Such policies can also have a discriminatory effect in favour of national industry (for example, when contracts are awarded to firms with personal connections to politicians) and can distort trade patterns as between foreign firms (since some countries have stricter rules than others on bribing foreign officials to obtain contracts).

#### **6. Absence of commercial pressures**

Barriers to trade in government markets may also be presented by the nature of government purchasing. In general, government procurement as compared with private sector procurement is characterised by an absence of market pressures to seek value for money. Thus there is a danger that public contracts may be placed with traditional (national) suppliers as a result of "inertia" factors: for example, purchasers may feel more comfortable dealing with familiar faces; there may be resistance to new technology; or purchasers may lack the resources to evaluate products made to unfamiliar specifications. The natural tendency of purchasers to behave in this way will be counteracted in the private sector by market pressures, but in the public sector other mechanisms are needed to achieve a commercial approach. Like corruption, such inefficient practices may affect both foreign and domestic suppliers, but will have a disproportionate effect on foreign suppliers.

#### **7. Absence of transparency**

A lack of transparency – that is, an absence of the information needed to compete – is often a problem for those seeking to enter foreign markets. For example, foreign suppliers need to know the safety regulations applicable to the products which they sell in all their potential export markets, whether public or private. However, the problem of transparency is particularly acute with government procurement. For example, it may be difficult for firms to obtain the information on procurement procedures and opportunities which they need in order to overcome the barriers to participation, and these information difficulties are likely to be particularly acute for firms without a commercial presence in the purchasing state.

This “information problem” may be made more significant by the fact that government procurement tends in general to be more bureaucratic than private procurement because, in particular, of the greater use of regulatory controls to achieve value for money, and greater concern with preventing corruption. To some extent this problem of dealing with complex procedural rules might be overcome by the development of *common* procedures between different countries.

Where there is an absence of transparency over the procedures to be applied in awarding contracts, non-domestic firms or firms offering non-domestic products or services may also be deterred from participating in government procurement procedures because they may not have an expectation of being fairly treated due to considerations (1)-(5) above. In view of the tendency of many governments to use procurement to promote non-commercial objectives, firms may need specific assurances on these issues before they are willing to invest in the bidding/negotiating process.

## **8. Inefficient procurement procedures**

Inefficient procurement procedures also operate as trade barriers. For example, if there are long delays in making decisions about who has won a contract, or too many firms are being invited to tender to make investment in the tendering process worthwhile, the most efficient firms will simply seek business elsewhere rather than trying to win government contracts.

### **2.1.4 The benefits of liberalising public procurement markets**

Policies to open up government markets to free trade are based on the view that this can make an important contribution to economic growth because of the size of these markets. The European Commission recently estimated that public procurement accounts for 16.3 per cent of the EU’s GDP: European Commission, *A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future* ([http://ec.europa.eu/internal\\_market/publicprocurement/studies\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/studies_en.htm)). In addition, much government procurement is in sectors in which there is significant scope for economies of scale through restructuring, such as high-technology products.

In the 1980s when the European Commission was seeking to invigorate its single market policy it carried out a detailed study to assess the potential benefits of the European single market. This study included what is probably the most comprehensive attempt to assess the extent and nature of the benefits of opening procurement markets to trade.

This report assessed the benefits from open procurement for the 12 Member States of that time in several categories, as set out in the Table, and estimated that the total quantified benefits amounted to 1/2 per cent of *total* EU GDP. (The study attempted to quantify benefits only in the first few categories and not in the last three as this was considered too speculative). These benefits were expected to arise particularly in sectors in which the government was a dominant or major purchaser, in which there were significant entry costs and/or which presented the potential for economies of scale (with consequent gains from restructuring) – for example, railways and telecommunications.

**Table 1: Benefits of open public procurement**

<b>Effect</b>	<b>Estimated Saving</b> (billions of ECUs per annum)
Static Trade Effect: displacing of domestic products with cheaper imports in public markets	4-9
Competition effect: from domestic firms lowering prices to compete with foreign firms	1-3
Restructuring Effect: from the effects of restructuring (including through take-overs and mergers) leading to economies of scale	3-5
Savings for private sector purchasers, as a result of leverage from public sector purchasers – for example, in markets such as construction	n/a
Innovation and Growth Effects: through more effective use of R&D and marketing expenditure	n/a
External Effects: benefits from greater sales outside the EU as a result of increased competitiveness of EU industry	n/a

**Notes:** i. values refer to 1984 prices;  
ii. ECU refers to European Currency Unit. This was a basket of currencies of the EU Member States used as the unit of account for the European Community from 1979-1998. It was replaced by the euro (at parity) from 1999.

Source: Cecchini, *The European Challenge: the Benefits of a Single Market* (1988), section 3.

It is important to emphasize a number of points, however. First, the figures are mere approximations, and the study itself pointed out the possibility of wide margins of error. Secondly, the study did not suggest that these savings were necessarily *likely* – it merely sought to describe the benefits that would be achieved *if* the single market were realized. Thirdly, the analysis did not attempt to factor in the costs of achieving a single market, such as underemployment of resources during periods of adjustment.

## **2.2 Overview of the current key legal instruments: the TFEU and Directives**

The rules on procurement that the EU has created to implement this internal market policy in public procurement derive mainly from two sources:

- the Treaty on the Functioning of the European Union (TFEU) [formerly Treaty establishing the European Community (TEC)], and
- the procurement directives.

As to the former, the TFEU contains general rules that, inter alia, prohibit Member States from discriminating against other Member States – for example, by reserving contracts for domestic firms. As we will see, these rules apply in principle (but with limited exceptions) to *all public procurement measures* and *all types of government contracts*. We can refer to these as the “negative” obligations of the TFEU. These rules are applicable and enforceable in Member States without the need for any implementing measures.

However, these TFEU principles alone were considered insufficient to open procurement markets. In particular, it was considered that it was necessary for contracts to be awarded by transparent procedures so that authorities awarding public contracts could not disguise any discriminatory behaviour under a cloak of discretion. Further, special provisions were considered desirable to ensure that the rules could be effectively enforced by aggrieved tenderers.

To ensure this, the EU has adopted directives which regulate award procedures for major contracts - these require, for example, that states should advertise their contracts across Europe and should award them using only commercial criteria. It has also adopted special directive on remedies. As we have seen a directive is a form of legislation which requires each Member State to ensure that it has appropriate laws in its own legal system to implement the rules of the directive. Most member States have had to adopt new legislation to give effect to the obligations contained in these directives. The detailed titles, amendments and references for all the directives mentioned here are set out in Table 2.

**Table 2: EU Procurement Directives**

<b>Public Sector Directive</b>	<b>Utilities Directive</b>
Directive 2004/18/EC <sup>2</sup> , as amended by: <ul style="list-style-type: none"> <li>- Directive 2005/51/EC<sup>3</sup>,</li> <li>- Directive 2005/75/EC<sup>4</sup>,</li> <li>- Directive 2006/97/EC<sup>5</sup>,</li> <li>- Directive 2009/81/EC<sup>6</sup>,</li> <li>- Commission Decision 2008/963/EC<sup>7</sup>,</li> <li>- Commission Regulation 213/2008/EC<sup>8</sup>,</li> <li>- Commission Regulation 1177/2009/EC (on current thresholds)<sup>9</sup></li> </ul>	Directive 2004/17/EC, <sup>10</sup> as amended by: <ul style="list-style-type: none"> <li>- Directive 2005/51/EC<sup>11</sup>,</li> <li>- Directive 2006/97/EC<sup>12</sup>,</li> <li>- Directive 2009/81/EC<sup>13</sup>,</li> <li>- Commission Decision 2008/963/EC<sup>14</sup>,</li> <li>- Commission Regulation 213/2008/EC<sup>15</sup>,</li> <li>- Commission Regulation 1177/2009/EC (on current thresholds)<sup>16</sup></li> </ul>

<sup>2</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O.J. L134/114; and Corrigendum to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O.J. L351/44.

<sup>3</sup> Commission Directive 2005/51/EC of 7 September 2005 amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European Parliament and the Council on public procurement [2005] O.J. L257/127.

<sup>4</sup> Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005 correcting Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2005] O.J. L323/55.

<sup>5</sup> Council Directive 2006/97/EC of 20 November 2006 adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania [2006] O.J. L363/107

<sup>6</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] O.J. L216/76.

<sup>7</sup> Commission Decision 2008/963/EC of 9 December 2008 amending the Annexes to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards their lists of contracting entities and contracting authorities [2008] O.J. L349/1.

<sup>8</sup> Commission Regulation (EC) No 213/2008 of 28 November 2007 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV [2008] O.J. L74/1.

<sup>9</sup> Commission Regulation (EC) No 1177/2009 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts [2009] O.J. L314/64.

<sup>10</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1; and Corrigendum to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] O.J. L358/35.

<sup>11</sup> Commission Directive 2005/51/EC of 7 September 2005 amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European Parliament and the Council on public procurement [2005] O.J. L257/127.

<sup>12</sup> Council Directive 2006/97/EC of 20 November 2006 adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania [2006] O.J. L363/107.

<sup>13</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] O.J. L216/76.

<p><b>Remedies Directive</b>  Directive 89/665/EEC<sup>17</sup>, as amended by:  - Directive 92/50/EC<sup>18</sup>,  - Directive 2007/66/EC<sup>19</sup></p>	<p><b>Utilities Remedies Directive</b>  Directive 92/13/EEC<sup>20</sup>, as amended by:  - Directive 2006/97/EC<sup>21</sup>,  - Directive 2007/66/EC<sup>22</sup></p>
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Drawing inspiration from the directives, the CJEU has also recently ruled that the TFEU itself, by implication, imposes obligations to award contracts in a transparent way. In reaching this conclusion, the CJEU has sought to fill the gap that arises from the fact that some important contracts are excluded from the directives – since all contracts are subject to the TFEU, the finding that the TFEU also requires transparent award procedures has effectively brought these contracts under a similar regime to other contracts (see chapter 3).

## 2.3 Development of the directives and the 2004 reforms

To understand the current directives and also the references in past CJEU cases it is useful to know something of the history of the directives. The current procurement directives were adopted only in 2004, and required to be implemented in Member States by 1 January 2006. However, procurement

<sup>14</sup> Commission Decision 2008/963/EC of 9 December 2008 amending the Annexes to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards their lists of contracting entities and contracting authorities [2008] O.J. L349/1.

<sup>15</sup> Commission Regulation (EC) No 213/2008 of 28 November 2007 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV [2008] O.J. L74/1.

<sup>16</sup> Commission Regulation (EC) No 1177/2009 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts [2009] O.J. L314/64.

<sup>17</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] O.J. L395/33.

<sup>18</sup> Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts O.J. L209/1.

<sup>19</sup> Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31.

<sup>20</sup> Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, [1992] O.J. L76/7.

<sup>21</sup> Council Directive 2006/97/EC of 20 November 2006 adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania [2006] O.J. L363/107

<sup>22</sup> Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] O.J. L335/31.

procedures had been regulated to an extent by similar rules right back to the 1970s: the 2004 directives merely consolidated and amended the pre-existing legal framework.

The current legal framework has emerged through five distinct phases of legislative activity and reforms, as follows:

**Phase 1 - the 1970s: introduction of a system of regulation for public works and supplies contracts**

The history of the directives regulating contract award procedures goes back to 1971, when a directive was adopted to regulate public works contracts: Directive 71/305/EEC. In 1977 a directive was adopted applying similar rules to public supply contracts: Directive 77/62/EEC.

**Phase 2 - the late 1980s and early 1990s: expansion and strengthening of the regime in the drive towards the single market and consolidation of the provisions**

The late 1980s and early 1990s saw a wave of reforms of the public procurement rules. These formed part of the European Commission's drive to complete the single market by 1992, which followed the Cecchini report that was referred to above. This phase saw:

1. Revisions to Directive 71/305/EEC on works and Directive 77/62/EEC on supplies (in 1989 and 1988 respectively, by Directives 89/440/EEC on works and 88/295/EEC on supplies), to bring about some improvements to those directives. The various provisions on works and supplies were brought together in 1993 in two consolidated texts (which also introduced some small amendments); Directive 93/36/EEC on supply contracts and Directive 93/37/EEC on public works contracts;
2. Extension of the regulatory system to works and supply contracts awarded in previously excluded "utilities" sectors in 1990, by Directive 90/531/EEC;
3. Extension of the regulatory system to public services contracts in 1992, by Directive 92/50/EEC and to services contracts awarded by utilities in 1993, by Directive 93/38/EEC;
4. Adoption of the two directives on remedies referred to above (in 1989 for the public sector and 1992 for the utilities sector).

**Phase 3 - 1997: co-ordination with the WTO's Government Procurement Agreement**

In a third round of legislation the directives on award procedures were amended in light of the fact that the EU and its Member States had become party to the new WTO Agreement on Government Procurement (GPA). This was done by two directives Directive 97/52/EC, for the public sector, and Directive 98/4/EC, amending the Utilities Directive. Under the GPA the EU and Member States provide access to EU procurement markets to certain third countries (e.g. the USA and Japan) whilst those countries in turn undertake similar obligations towards Member States (and to each other). The GPA does not, however, govern the relationship of the EU Member States *inter se* - for example, the access of

German or French firms and products to the UK market; this is dealt with by the TFEU and directives. In some respects the GPA gave access to EU market on terms that were more favourable than the access to EU firms given by the directives – meaning that in some cases firms from (non-EU) GPA Parties could have received *more favourable* access to the markets of EU states under the GPA than Member States enjoyed in relation to each other! The 1997 directives were enacted to prevent this (e.g. by adding to the directives certain obligations found in the GPA but not previously in the directives). They also aimed to ensure that entities complying with the directives automatically comply with the GPA.

#### **Phase 4 – 2004: consolidation and amendment**

Immediately prior to the 2004 directives the main directives were thus:

1. Directive 93/36 on public supply contracts;
2. Directive 93/37 on public works contracts;
3. Directive 92/50 on public services contracts;
4. Directive 93/38 on utilities contracts (works, supplies and services);
5. Directive 89/665 on remedies for contracts governed by Directives 93/36, 93/37 and 92/50; and
6. Directive 92/13 on remedies for contracts governed by Directive 93/38 (utilities).

In the 1990s an extensive reform programme occurred, leading to substantial revisions and consolidation. In 1996 the European Commission produced a Green Paper, *Public Procurement in the European Union: Exploring the Way Forward* to launch a debate on public procurement policy. This publication did not, however, envisage wide-ranging changes. Rather, the Green Paper stated that “A complete legislative framework has been set in place of public procurement” and that “A period of stability in this framework is desirable and it is not therefore intended to make any fundamental change”. What the Green Paper did was to identify a number of issues for consideration, that focused mainly on ensuring that entities applied the existing rules and that firms were able to take advantage of them. The Commission apparently expected these issues to be addressed mainly through practical measures or limited legislative revisions e.g. facilitating market access through information and training. However, the process did ultimately lead to significant changes to the existing legal framework as the responses to the Green Paper suggested strongly a need for this, and this was accepted in the Communication issued in 1998 as a follow-up to consultations on the Green Paper. In this Communication, *Public Procurement in the European Union* the Commission stated that legislation was needed for two main reasons. One was to “simplify” the current complex rules, both by clarification and, where necessary, amendment. The other was to introduce increased flexibility to take account of “new practices or market reality”.

After a lengthy legislative process (nearly four years), involving many amendments to the original proposals and including a conciliation procedure, two new directives were adopted. These are Directive 2004/18 covering most public sector contracts and Directive 2004/17 covering utilities contracts – often referred to together as the “legislative package”. The basic approach and provisions of these are the same as the old directives and thus much of the old case law remains relevant. However, many important changes were introduced.

These changes can be classified into three groups, according to the objectives of the changes, as follows:

- 1. Amendments for the purpose of simplification and clarification.** In particular, the three public sector directives – the Works, Supply and

Services Directives – were consolidated into a single directive, and past rulings of the CJEU have been written expressly into the directives.

- 2. Amendments to provide increased flexibility for Member States.** New measures in this respect included, in particular, new provisions on framework agreements in Directive 2004/18, a new competitive dialogue procedure in Directive 2004/18; provisions to encourage and facilitate electronic procurement, including electronic auctions; and exemptions from Utilities Directive 2004/17 for entities and activities in competitive markets.
- 3. Other amendments, including to enhance transparency.** These included changes to enhance transparency (for example, by requiring weighting and disclosure of weightings for award criteria) and some other important changes (for example, changes to the rules on specifications, including to make reference to European standards optional rather than – as before – compulsory).

Despite these simplifying provisions the rules remain complex and detailed.

The main changes in each group are summarised in the Tables set out in the Appendix to chapter 2.

#### **Phase 5 – post-2004: Further expansion and strengthening of the EU regime**

Since the adoption of the 2004 legislative package the EU has completed or commenced certain other initiatives for strengthening the procurement regime. In particular:

1. It has adopted Directive 2007/66/EC (hereafter 2007 Amending Remedies Directive). As noted above, this directive amends the two Remedies Directives and, in particular, strengthens the remedies available to aggrieved firms to enforce the procurement rules;
2. It has adopted Directive 2009/81/EC on contracts, which is a specific directive to govern contracts in the field of defence and security (and amending Directives 2004/17/EC and 2004/18/EC) (to be considered in chapter 9 below);
3. The European Commission has considered new legislation to regulate concession arrangements, which are largely excluded from the current directives (see further chapter 4 below).

## **2.4 The purpose of the rules governing contract award procedures: the means for achieving a free market**

As we have observed above, the objective of the EU's public procurement rules is to achieve an internal market in public procurement. We have outlined above the key legal instruments that it uses to achieve this and the kind of obligations that they impose. However, there is some confusion over the precise *means* by which the EU does, and can in law, seek to achieve this internal market. An understanding of this can be important for interpreting specific developing EU provisions.

One means of opening up markets to trade is to harmonise procurement procedures *simply for the sake of a common approach* - it is considered that

foreign suppliers are more likely to bid for contract when they are familiar with the procedures involved. This facilitation of trade through harmonisation for its own sake is the main aim of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, for example<sup>23</sup>. Interestingly, although the EU regime on procurement has certainly had a substantial *effect* in bringing about greater commonality of procurement procedures between Member States, the development of common procedures is not per se the justification given for the EU regime (and in fact it is questionable whether the EU legislature has legal powers to harmonise EU laws *simply for the trade effect that follows from common laws*).

On the other hand, it is clear that the EU regime seeks to develop the internal market through at least three means.

1. **Prohibiting discrimination in public procurement.** As we have seen above, this is done by the TFEU itself, and non-discrimination provisions are also included in explicit provisions in the directives, as we will see later below.
2. **Requiring Member States to award contracts through procedures that are transparent,** to prevent them from concealing discriminatory behaviour behind a cloak of subjective decision-making. This has always been the primary aim of the directives. Thus, whilst the recitals to the first directive on works (Directive 71/305/EEC) refer merely to the need for 'co-ordination of national procedures', later recitals refer to this purpose: see Directive 77/62/EEC (the original coordination directive on public supply contracts), stating the need for transparency 'allowing the observance of [the prohibition on measures restricting imports] to be better supervised' and Directive 89/440/EEC (amending Directive 71/305/EEC on public works, referring to the need to improve transparency 'in order to be able to monitor compliance with the prohibition of restrictions [on freedom of establishment and freedom to provide services] more closely'. The requirement for transparency in public contracts under the TFEU has been implied by the CJEU for the same purpose, namely to allow monitoring for compliance with non-discrimination rules (see chapter 3 below).
3. **Removing certain restrictions on access to the market – even, in certain cases, non-discriminatory restrictions – that are disproportionate in light of their objectives.** For example the Public Sector Directive contains a limited list of evidence that purchasers may require from firms to assess their technical capacity, in order to limit the burden of participation (see chapter 6 below).

Another possible objective for the regime has also been suggested, which can be considered more debatable:

4. **To ensure that Member States obtain "value for money" in procurement.** This requires some further discussion.

Value for money in obtaining the goods, works and services required for governmental activities is an important objective – probably the most important objective – of most *national* regimes on public procurement. National systems generally seek to achieve value for money by requiring public purchasers to use procedures that are broadly similar to those in the EU directives, in particular by

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<sup>23</sup> On this see S. Arrowsmith and C. Nicholas, "The UNCITRAL Model Law on Procurement: Past, Present and Future", chapter 1 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (Eagan, MN: West, 2009).

requiring a publicly-advertised competitive award process. The Commission has sometimes suggested that ensuring value for money is an objective of the EU procurement regime. For example, in its recent *Communication concerning Corporate Social Responsibility: a business contribution to sustainable development* (COM (2002) 347 final.) in the section on public procurement policy (section 7.5), the European Commission refers to previous Communications on social and environmental issues in public procurement, stating that these clarify how the EU regime allows public purchasers to take account of such issues '*whilst at the same time ensuring respect of the principle of value for money for taxpayers and equal access for all EU suppliers*' (emphasis added).

Better value for money in public purchasing is certainly one of the benefits intended to *follow from* the internal market, and, in particular, from the procurement directives – for example, because of lower prices obtained from suppliers from other Member States. On the other hand, the EU procurement rules are not directed at achieving value for money *per se* in a way that is *separate* from internal market objectives. Ensuring the wise expenditure of public money and improving the quality of public services are not *per se* objectives that the EU is, in general, competent to pursue, and general power to implement policies to this effect cannot be found in the powers to adopt secondary legislation derived from Articles 53(1), 62 and 11 TFEU (ex Articles 47(2), 55 and 95 TEC), on which the procurement directives are based. Saving public expenditure and improving the quality of services simply do not in and of themselves *contribute to* the creation of an internal market.

A more specific argument to support the view that the EU regime is – or, at least, can be – concerned to ensure value for money might be that an internal market can only work if public purchasers behave 'efficiently' in choosing the best supplier. The "Invisible Hand" of the market can work to allocate resources effectively, including in international trade, only if purchasers that seek value for money actually do so effectively, and only in these circumstances will the most efficient firms survive and develop, ensuring that the benefits of competition in the market are realised. It can be argued that whilst commercial pressure ensures that private sector firms obtain their requirements from the most competitive source, this cannot be assumed to be the case with the public sector, even if it does not engage in discriminatory behaviour. Thus, it might be argued, it is necessary to regulate the award of contracts in the public sector to ensure efficient behaviour.

Is this objective of ensuring efficient public procurement to ensure, in its turn, effective allocation of resources through the market an objective of EU procurement policy?

So far as the TFEU is concerned, the CJEU has stated that the purpose of the positive obligation to advertise is to ensure monitoring of the obligation not to discriminate (and, later, equal treatment). The CJEU itself has not mentioned value for money as being a purpose of the TFEU rules.

As for the directives, as we have just seen above the recitals to the earlier directives indicate clearly that they aim at supporting the obligation not to discriminate through transparency and removing barriers that prevent suppliers from other Member States from accessing the market – and the recitals to Directive 77/62 clearly treat competition as a *means for creating the transparency needed to prevent non-discrimination*, and not as a means to obtain value for money:

"Whereas that prohibition [on free movement in the TFEU (ex-TEC)] should be

supplemented by the coordination of the procedures relating to public supply contracts *in order, by introducing equal conditions of competition for such contracts in all the Member States, to ensure a degree of transparency allowing the observance of this prohibition to be better supervised*"

Whether the directives and the competitive procedures that they require might be considered as concerned with ensuring value for money as a means to efficient allocation of resources has never been carefully analysed by the CJEU.

In favour of the view that the directives *are not* concerned with this, it is possible to cite the Opinion of Advocate General Jacobs in Case C-19/00, *SIAC Construction Ltd v County Council of the County of Mayo* ("SIAC")<sup>24</sup> (para.33 of the Opinion):

"...the main purpose of regulating the award of public contracts in general is to ensure that public funds are spent honestly and efficiently, on the basis of a serious assessment and without any kind of favouritism or quid pro quo whether financial or political. *The main purpose of Community harmonisation is to ensure in addition abolition of barriers and a level playing-field by, inter alia, requirements of transparency and objectivity*" (emphasis added).

This contrasts the objective of efficient spending with the more limited internal market objective. This view also finds support in several cases that emphasise the purpose of the directives in preventing discrimination when interpreting the scope of entities and contracts covered: if one aim of the directives was to ensure value for money it would be expected that this would also be taken into account in analysing their scope: Case C-380/98, *R v HM Treasury ex parte University of Cambridge* ("University of Cambridge")<sup>25</sup>, para.16, cited in many later cases. Some of these refer to avoiding risk of preference *and* the possibility of a body being guided by considerations other than economic ones (e.g., Case C-470/99 *Universale-Bau*<sup>26</sup>, para.52; Case C-237/99, *Commission v France*<sup>27</sup>), but it appears that this refers to non-economic considerations deriving from preference – the actual analysis in the cases focuses on the risk of discrimination.

It can be argued that the view of the current directives as being concerned with value for money is, however, supported by Recitals 5 and 12 of the Public Sector Directive and Utilities Directive respectively. These state that the directives seek to integrate environmental protection into the procurement regime as required by Article 11 TFEU (ex-article 6 TEC) 'whilst ensuring the possibility of obtaining the best value for money'.

We have so far considered what is the intended purpose for which the directives were adopted. It might also be argued, however, that the EU does not *have legal competence* to legislate to ensure value for money under the single market provisions. This may be invoked only to i) support the four freedoms (free movement of goods, freedom to provide service, free movement of workers, and free movement of capital) or to ii) eliminate appreciable distortions of competition: Case C-376/98, *Germany v Parliament and Council*<sup>28</sup>. It seems open to question whether legislating for value for money relates to either objective.

<sup>24</sup> Case C-19/00, *SIAC Construction Ltd v County Council of the County of Mayo* ("SIAC") [2001] ECR I-7725.

<sup>25</sup> Case C-380/98, *R v HM Treasury ex parte University of Cambridge* ("University of Cambridge") [2000] ECR I-8035.

<sup>26</sup> Case C-470/99, *Universale-Bau and others v Entsorgungsbetriebe Simmering GmbH (EBS)* ("Universale-Bau") [2002] ECR I-11617.

<sup>27</sup> Case C-237/99, *Commission v France* [2001] ECR I-939.

<sup>28</sup> Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419.

The means by which EU law can, or does, intend to achieve an internal market may be relevant when interpreting the scope of the current directives, or determining the possible scope of future EU legislation. To give some examples to illustrate this point:

- If ensuring value for money is an objective of the directives, then this principle might be taken into account in deciding matters such as what is a body governed by public law that is covered by the directives (see chapter 4 below), or the extent to which Member States can make changes to contracts once awarded. (In fact (as noted above) the CJEU has not considered value for money when addressing the first of these questions, but only whether the body in question might be influenced to discriminate against industry from other Member States).
- If ensuring value for money is not an objective of the directives, then the balance between commercial considerations (price, quality etc) and what can be called "horizontal" considerations in procurement (that is, use of procurement to promote social and environmental objectives) can be considered not to be addressed by the directives. This would mean, for example, that the balance between social and commercial considerations would be entirely for Member States who could, thus, for example, give a weighting of 90% to the former if they wished, in applying the directives' rules on award criteria. However, if value for money is considered an objective of the directives, the CJEU might decide to interpret the rules on award criteria (and other rules) as placing significant limits on the weight that can be given to social considerations. This subject is considered further in chapter 11 below.
- If value for money is not, whether directly or more indirectly (as a means to ensure efficient allocation of resources), within EU competence the EU could not legislate to *require* Member States to use electronic auctions. It does not do this at present; the directives merely require that if Member States choose to use auctions they should do so in the (transparent) manner laid down in the directives. Whether the EU could require Member States to use auctions if it considered that this was an effective procurement method that all Member States *should* use depends on whether or not it has the power to regulate for "value for money" reasons.

## Appendix to chapter 2: Summary of the 2004 changes to the directives

### 2004 changes: simplification and clarification

<b>1.</b> Consolidation of the rules in the three previous directives on public sector works, supplies and services) (93/37, 93/36 and 92/50).
<b>2.</b> Removal of some anomalous differences between works, supplies and services contracts (for example, the overall pricing ground of negotiated procedure extended to supplies). However, some differences remain (e.g. in using negotiated procedures for research and development contracts).
<b>3.</b> Re-ordering of provisions so as to present in the order of the steps of an award procedure.
<b>4.</b> Simplification of the financial thresholds for applying the directives, by expressing all thresholds in Euros and reducing the number of different thresholds.
<b>5.</b> Inclusion of reference in all cases to the EU's special nomenclature for public procurement, the Common Procurement Vocabulary (CPV), to describe which contracts are covered or excluded by various provisions. (However various other nomenclatures are still retained and are authoritative).
<b>6.</b> Express inclusion of significant CJEU interpretations (for example, the requirement for award criteria to be linked to the subject matter of a contract).
<b>7.</b> Clarification of other points (such as the position of contracts made for the purpose of more than one activity).
<b>8.</b> Express inclusion of the general principles of equal treatment, non-discrimination and transparency, which the CJEU has held to underlie the directives, in the directives in the same manner for all contracting authorities/contracts.

## 2004 changes: increased flexibility

<p><b>1.</b> Addition of competitive dialogue procedure to Directive 2004/18, in order to provide a more flexible award procedure for awarding complex contracts (aimed particularly at contracts for privately financed infrastructure).</p>
<p><b>2.</b> Inclusion of explicit provisions to authorise and regulate framework agreements (arrangements for repeat purchases) in Directive 2004/18, providing legal certainty and greater controls over use.</p>
<p><b>3.</b> Addition of provisions to encourage and facilitate electronic procurement (one of the main drivers of the reforms), in particular to:</p> <ul style="list-style-type: none"><li>- ensure that electronic communications can be used for most communications and that procuring entities can, if they choose, <i>require</i> economic operators to use electronic means;</li><li>- control use of electronic means to prevent them from operating as a barrier to access;</li><li>- reduce the minimum time limits in award procedures to take account of the time saved using electronic means;</li><li>- provide explicitly for electronic auctions, and regulate their operation. Probably auctions were already allowed, but the new provisions provide legal certainty;</li><li>- introduce a new mechanism for repeat standard purchases, "the dynamic purchasing system".</li></ul>
<p><b>4.</b> Addition of new provisions on central purchasing bodies, extending the possibilities for regulated entities to purchase from other government bodies without following the directives.</p>
<p><b>5.</b> Introduction of exceptions/exclusions for utilities that are subject to competitive pressures and therefore considered likely to procure in a commercial manner without regulation:</p> <ul style="list-style-type: none"><li>- exclusion of the liberalised telecommunications sector;</li><li>- a new definition of "special and exclusive rights" that removed from the Utilities Directive private entities operating in sectors open to competition;</li><li>- introduction of a new mechanism ("Article 30 exemption") providing for the Commission to exclude entities engaged in activities that are open to competition.</li></ul>
<p><b>6.</b> Extension of the exemptions under the Utilities Directive applying to affiliated undertakings and joint venture in some important respects, in particular to allow their use for works and supplies contracts as well as services.</p>
<p><b>7.</b> Addition of the possibility for reserving contracts for sheltered workshops or sheltered employment programmes for handicapped persons.</p>
<p><b>8.</b> For Directive 2004/18, extension of exemptions from competition to allow use of exemptions previously found only for utilities (for purchasing supplies from a commodity market and for purchasing from bankrupt etc suppliers on particularly advantageous terms).</p>

## 2004 changes: other key amendments

<b>1.</b> Addition of the postal services sector to the list of sectors covered by the utilities rules.
<b>2.</b> Introduction of a requirement for public bodies to exclude from public contracts firms convicted of certain criminal offences connected with organised crime, money laundering, fraud on the EU and corruption in public contracts.
<b>3.</b> Revision of the rules on technical specifications, including to make reference to European standards optional (previously compulsory for non-utilities contracts).
<b>4.</b> Addition of new transparency requirements requiring weighting of award criteria and disclosure of weightings and disclosure of criteria for selection.
<b>5.</b> For Directive 2004/18 (but not Directive 2004/17) addition of explicit provisions on conducting the negotiated procedure with a notice.
<b>6.</b> Addition of an explicit obligation to take account of the complexity of the contract and time needed to tender when setting time limits.
<b>7.</b> Addition of explicit new rules on confidentiality of information.
<b>8.</b> Addition of explicit rules on the form of communications in general, to ensure, inter alia, that the form used does not present a barrier to trade.
<b>9.</b> Addition of certain new obligations on utilities to provide information to tenderers (found already in the rules for other entities).

## CHAPTER 3: THE TFEU RULES<sup>1</sup>

### 3.1 The prohibitions on discrimination and other trade restrictive measures

#### 3.1.1 Introduction

Most public procurement contracts are governed by the TFEU (ex-TEC). Certain provisions of the TFEU prohibit, in general, government action which discriminates against firms or products from other Member States, and this includes discriminatory public procurement. As we have already mentioned above, these principles of the TFEU have direct effect – that is, they are binding on Member State governments and enforceable against them. It should also be stressed that these TFEU provisions apply in principle to *all* contracts awarded by public bodies. This includes those contracts which are outside the scope of the EU procurement directives (for example, because their value is below the financial thresholds for the EU directives to apply: see chapter 4 below).

The most important are:

- Article 34 TFEU (ex Article 28 TEC) on free movement of goods (formerly Article 30);
- Article 56 TFEU (ex Article 49 TEC) on freedom to provide services (formerly Article 59); and
- Article 49 (ex Article 43 TEC) on freedom of establishment (formerly Article 52).

Note that the numbers of the TFEU articles have changed since the time of the cases which refer to the old numbers given in brackets above or, in some cases, to different Article numbers from even earlier versions of the Treaty.

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<sup>1</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 4; S. Arrowsmith and P. Kunzlik, "EC Regulation of Public Procurement", chapter 2 (pp.55-107) in Arrowsmith and Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009, Cambridge: CUP); P. Braun, "A Matter of Principle(s): the Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives" (2000) 9 *Public Procurement Law Review* 39; A. Brown, "Seeing Through Transparency: the European Court's Case Law on the requirement to Advertise Public Contracts and Concessions under the EC Treaty" (2007) 16 *Public Procurement Law Review* 1; European Commission, *Commission Communication on the Community law applicable to contract awards not or not fully subject to the provision of the Public Procurement Directives*, 23.6.2006; P. Horijk and M. Meulenbelt, "A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be Dismissed" (2005) 14 *Public Procurement Law Review* 123; M. Kruegner, "The Principles of Equal Treatment and Transparency and the Commission Interpretative Communication on Concessions" (2003) 12 *Public Procurement Law Review* 181; D. McGowan, "Clarity at Last? Low Value Contracts and Transparency Obligations (2007) 16 *Public Procurement Law Review* 274; F. Neumayr, "Value for Money v. Equal Treatment: The Relationship Between the Seemingly Overriding National Rationale for Regulating Public Procurement and the Fundamental EC Principle of Equality of Treatment" (2002) 11 *Public Procurement Law Review* 215; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), pp. 3-27; S. Treumer and Werlauff, "The Leverage Principle: Secondary Law as a Lever for the Development of Primary Community Law" (2003) 28(1) *E.L.Rev* 124; F. Weiss, *Public Procurement in European Community Law* (1993, London: Athlone Press), p. 18-32.

The TFEU also forbids Member States from giving assistance to industry ("state aid"), except in certain circumstances. The award of a public contract may constitute unlawful state aid under the TFEU when the contract is not in the nature of a commercial transaction - for example, when the state pays a contractor a higher price than the market price.

### 3.1.2 Article 34 (ex Article 28) on free movement of goods

Article 34 TFEU (ex Article 28 TEC) prohibits "all quantitative restrictions on imports and all measures having equivalent effect" between Member States. Quantitative restrictions refer to, in particular, measures such as quotas on imports. The CJEU has ruled that measures "having equivalent effect" to quantitative restrictions include all measures "which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade": Case 8/74, *Procureur du Roi v Dassonville*<sup>2</sup> ("Dassonville").

As well as applying to measures that affect the whole of the domestic market - for example, technical regulations that set safety standards that products must meet before they can be imported into the market at all - Article 34 TFEU (ex Article 28 TEC) (like the other TFEU provisions on free movement) applies to measures that affect *only the public procurement market*.

Article 34 TFEU (ex Article 28 TEC) covers three types of measures. These *may* need to be distinguished from each other for some purposes in applying the law - although as we will see, it is not quite clear whether these distinctions still have much, or any, significance.

#### 1. Measures that discriminate directly between domestic and imported products.

A first type of measure covered is a measure that applies a different rule to imported and domestic products. Such measures are sometimes referred to as distinctly applicable measures, and this kind of discriminatory treatment as direct discrimination. An example outside the procurement context would be a technical regulation requiring that all imported furniture should meet fire safety standards which are not also applied to domestic products.

In the case of public procurement examples of this kind of measure would be:

- A decision to buy certain products *only* from the domestic market;
- A policy which gives a *preference* to domestic products, such as a price preference.

This principle was applied in public procurement in the CJEU Case 21/88, *Du Pont de Nemours Italiana SpA v Unita Sanitaria Locale No.2 Di Carrara* ("Du Pont de Nemours")<sup>3</sup>. This case involved a reservation of certain supplies contracts awarded by Italian authorities for firms from the underdeveloped *Mezzogiorno* region of southern Italy which offered products processed at least partly in the region. This constituted direct discrimination in favour of Italian products as against those from other Member States, since only Italian products could benefit from the reservation. The CJEU indicated that such a measure was a measure having equivalent effect to a quantitative restriction under Article 34 TFEU (ex

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<sup>2</sup> Case 8/74, *Procureur du Roi v Dassonville* ("Dassonville") [1974] ECR 837.

<sup>3</sup> Case 21/88, *Du Pont de Nemours Italiana SpA v Unita Sanitaria Locale No.2 Di Carrara* ("Du Pont de Nemours") [1990] E.C.R. I-889.

Article 28 TEC) - and violated the TFEU as it could not be justified by any exceptions to Article 34.

A later example is found in Case C-243/89, *Commission v Denmark* ("Storebaelt")<sup>4</sup>, in which the CJEU held contrary to Article 34 TFEU (ex Article 28 TEC) a clause in a Danish construction contract requiring the use of Danish materials as far as possible.

## **2. Measures which apply equally to domestic and imported products but which have the effect of favouring domestic products as against imports**

Article 34 TFEU (ex Article 28 TEC) also covers measures which apply equally to domestic and imported products (sometimes referred to as "indistinctly applicable" measures) but which *have the effect of favouring domestic products as against imports* - that is, measures which are discriminatory in their effect (sometimes referred to as indirect discrimination).

Article 34 TFEU (ex Article 28 TEC) has been applied to an indirectly discriminatory measure relating to the supply in public procurement in, for example, Case 45/87 *Commission v Ireland* ("Dundalk")<sup>5</sup>.

This case concerned a specification requiring pipes for construction works to conform to an Irish standard. This applied to domestic and imported products alike. However, in practice it had a greater impact on imported products - only one firm, an Irish firm actually produced pipes complying with the standard - and it was regarded as involving indirect discrimination that was a hindrance to trade. The CJEU also concluded that such a hindrance to trade could not be justified under any of the derogations and limitations on Article 34 TFEU (ex Article 28 TEC). (It is particularly notable that the justifications of the need to ensure the quality of the pipes was such that there was no threat to the quality of drinking water (with potential adverse health effects) and to ensure compatibility with existing pipes in the network did not require that pipes should necessarily meet the precise Irish standard in terms of the way the pipes were made - pipes that were equivalent in these aspects of health protection and compatibility would have been equally suitable, even if the pipes were not made in exactly the same way).

## **3. Measures that have an equal impact on domestic and imported products**

Article 34 TFEU (ex Article 28 TEC) even covers some measures that are indistinctly applicable and that are equal in their impact on domestic and imported products - that is, which are not even discriminatory in their effect.

At one time the CJEU appeared to be developing a principle that Article 34 TFEU (ex Article 28 TEC) applies to *all* national measures that might hinder imports - even if they had an equal impact on domestic products. This case law appeared to suggest that all types of national rules that could affect the access of products to a Member State market would be caught by Article 34 TFEU (ex Article 28 TEC), and would thus be allowed only if they could be specifically justified under one of the specific TFEU derogations to Article 34 TFEU (ex Article 28 TEC) (health,

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<sup>4</sup> Case C-243/89, *Commission v Denmark* ("Storebaelt") [1993] ECR I-3353.

<sup>5</sup> Case 45/87, *Commission v Ireland* ("Dundalk") [1988] ECR 4929.

security etc) or as “mandatory requirements” (see section 3.1.5 below on these derogations and limitations). Such rules range from technical regulations - concerning the quality and safety of products, their impact on the environment etc - through to all kinds of rules that affect sale of products, such as the permitted opening hours of shops, rules on how products may be advertised, rules restricting sale of products to persons above a certain age, etc.

However, a concern developed that such a broad scope for Article 34 TFEU (ex Article 28 TEC), meaning that all such rules would potentially have to be justified by national governments before the courts, would unreasonably restrict the remaining regulatory autonomy of Member States, clog up at the courts, and catch many cases having little connection with intra-Community trade.

This led the CJEU to reconsider its broad approach in the Joined Cases C-267/91 and C-268/91, *Keck & Mithouard* (“Keck”)<sup>6</sup>. In this case the CJEU drew a distinction between two types of measures hindering trade.

- i) Measures that relate to the *characteristics* of the products in question e.g. regulations on the environmental standards or safety levels that products must meet before they can be imported. These are considered to have the greatest potential impact on imports of any kind of government measures. The CJEU stated in *Keck* that measures of this kind are covered by Article 34 TFEU (ex Article 28 TEC) whether discriminatory or not i.e. even when they have an equal impact on domestic and imported products.
- ii) ‘Selling arrangements’ - for example, rules on opening hours of retail outlets. These were considered to have less potential impact on imports. The CJEU stated that they will not be considered to fall within Article 34 TFEU (ex Article 28 TEC) when they have an equal impact on domestic and imported products, but only if they are directly or indirectly discriminatory.

In public procurement the CJEU has held that Article 34 TFEU (ex Article 28 TEC) applies to a measure - a specification - concerning the characteristics of products (that is, a measure of type i) above) in Case C-359/93, *Commission v Netherlands* (“UNIX”)<sup>7</sup>. In that case the CJEU held that a requirement to use the ‘UNIX’ operating system in a contract for an information technology system infringed Article 34 TFEU (ex Article 28 TEC) even though it did not favour domestic products either directly or indirectly - it excluded firms using systems other than ‘UNIX’. This is consistent with the approach in *Keck*. (Note that we will also consider it, as with the *Dundalk* case, in chapter 5 below).

It is not necessarily the case, though, that *all* non-discriminatory specifications in procurement can be considered as falling within Article 34 TFEU (ex Article 28 TEC). It can be pointed out that in the *UNIX* case the purchaser was excluding systems that could have been equally suitable for its operational requirements, since it did not even accept systems that were totally equivalent in every way. This seems clearly to be a hindrance to access to the market. However, it could possibly be argued that specifications in procurement that *set* the purchaser’s requirements - for example, the level of quality or environmental performance required in a project - do not hinder access to the market but merely *define* the market - specify what the government wants - and should not be treated as hindrances to trade. The policy rationale for this would be that such procurement decisions - unlike technical regulations on product characteristics that regulate entry into the general market - do not generally have a sufficiently significant impact on trade to be worthy of bringing within the *Keck* rule on product characteristics.

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<sup>6</sup> Joined Cases C-267/91 and C-268/91, *Keck & Mithouard* (“Keck”) [1993] ECR I-6097.

<sup>7</sup> Case C-359/93, *Commission v Netherlands* (“UNIX”) [1995] ECR I-157.

However, it is quite possible that the CJEU will consider *any* specification on product characteristics to be a hindrance on trade that must be justified. If so, it will mean that every aspect of a specifications has to be potentially justified before the courts as necessary to meet some public interest such as health, environmental protection etc (in accordance with the rules on justification discussed at 3.1.5 below).

The importance of this, and the potential to generate litigation, will depend on whether the TFEU catches even individual procurement decisions or whether it is limited to general practices in public procurement – something considered in section 3.2 below.

What about non-discriminatory procurement measures that are not concerned with product characteristics but with other things – for example, qualifications of supplier, whether technical or financial capability to fulfil the contract, or related to other matters (such as the supplier's record on equal opportunities)? Neither of two types of measures referred to in *Keck* – those relating to the characteristics of products, and “selling arrangements” – seem apt to refer to these kinds of measures, so it is not clear how they might be treated under the *Keck* doctrine.

### **3.1.3 Article 56 TFEU (ex Article 49 TEC) on freedom to provide services**

Article 56 TFEU (ex Article 49 TEC) is concerned to open the market for nationals of one Member State who wish to provide services (including construction) in another, whilst based in their home State. It covers both those who wish to base themselves *temporarily* abroad (for example, a consultant travelling to work on a project in another State) or send their employees abroad, as well as those who propose to carry out services in other States whilst remaining in their home State. The provision prohibits a Member State from preventing EU enterprises from other Member States from providing services within its territory. This includes restricting their participation in government contracts.

As with Article 34 TFEU (ex Article 28 TEC), Article 56 TFEU (ex Article 49 TEC) may be infringed by three types of measures:

#### **1. Measures that discriminate directly on grounds of nationality of the service provider**

An example of this would be a rule that prohibits all foreign bidders from providing a particular type of consultancy service in the market.

In the context of public contracts Article 56 TFEU (ex Article 49 TEC) is infringed by measures that – for example - give preferential treatment to domestic bidders on services contracts, reserve public services contracts for domestic firms or apply qualification conditions to firms from other Member States that are not also applied to domestic firms (for example, requiring non-domestic firms, but not domestic firms, to register on a special “approved” list as a condition of participating in public contracts). An actual example is found in Case C-360/89, *Commission v. Italy*<sup>8</sup>. In this case the CJEU held contrary to Article 56 TFEU (ex Article 49 TEC) Italian legislation requiring contractors for certain public works contracts to reserve a proportion of the works for subcontractors who had their

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<sup>8</sup> Case C-360/89, *Commission v. Italy* [1992] ECR I-3401.

registered office in the region of the works - this discriminated directly against potential sub-contractors established outside Italy (it being irrelevant that some firms established in Italy were also affected).

## **2. Measures which apply equally to domestic firms and those from other Member States but which have the effect of favouring domestic firms**

Like Article 34 TFEU (ex Article 28 TEC), Article 56 TFEU (ex Article 49 TEC) applies also to indirectly discriminatory measures – here measures which apply equally to domestic firms and those from other Member States but which *have the effect of favouring* domestic firms. Examples from the case law in the area of public procurement of services include:

- Case C-360/89, *Commission v Italy*, already mentioned above. In this case the CJEU held to be contrary to Article 56 TFEU (ex Article 49 TEC) Italian legislation giving preferences – in selecting contractors to tender - to consortia and joint ventures involving the participation of firms whose main activity was in the region of the works. This was held to favour enterprises established in Italy, which were more likely than other enterprises to have their main activities in the region concerned.
- Case C-3/88, *Commission v Italy* ("Re Data Processing")<sup>9</sup>. This case concerned Italian legislation limiting participation in contracts for certain data processing systems to firms whose shares were wholly or mainly in Italian public ownership. The CJEU ruled this to be discriminatory and contrary to Article 56 TFEU (ex Article 49 TEC): although in theory non-Italian firms might be owned by the Italian government, in practice all data processing firms in Italian public ownership at that time were Italian.
- Case C-234/03, *Contse and others v Ingesa* ("Contse")<sup>10</sup>. This case concerned a contract to provide home respiratory treatment and other assisted breathing techniques, in which the CJEU considered that various conditions and criteria concerning the service provision i) were hindrances to trade under Article 56 TFEU (ex Article 49 TEC) and ii) could not be justified. These were: a requirement that at the time of tendering the tenderers should have an office open to the public in the capital city of the province in which the service was provided; an award criterion giving preference to tenderers with offices open to the public in other specified towns in the province; an award criterion giving preference to tenderers with oxygen producing, conditioning and bottling plants within 1000 kilometres of that province; and a provision that, in the event of a tie on points under the other award criteria, the contract was to be awarded to the firm previously supplying the service.

Article 56 TFEU (ex Article 49 TEC) also covers any limitations on bringing the provider's own labour force into the host state in order to work on the contract - Article 56 TFEU (ex Article 49 TEC) generally requires that firms are permitted to bring their existing workers (or they will be at a disadvantage against domestic firms, in not being able to use their own workers). This is illustrated by Case C-113/89, *Rush Portuguesa v. Office national d'immigration* ("Rush Portuguesa")<sup>11</sup>, in which the CJEU ruled to be unlawful requirements that foreign nationals working on contracts in France should either hold a special permit or be recruited through the national labour office. Although the case concerned a public works contract, the requirement was general; obviously, though, similar restrictions

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<sup>9</sup> Case C-3/88, *Commission v Italy* ("Re Data Processing") [1989] ECR 4035.

<sup>10</sup> Case C-234/03, *Contse and others v Ingesa* ("Contse") [2005] ECR I-9315.

<sup>11</sup> Case C-113/89, *Rush Portuguesa v. Office national d'immigration* ("Rush Portuguesa") [1990] ECR I-1417.

applying only to government contracts are equally unlawful. Thus in the *Storebaelt* case a clause requiring use of Danish labour as far as possible in a contract for the construction of a bridge was also held to be contrary to Article 56 TFEU (ex Article 49 TEC). It should be noted that such limitations will also generally infringe Article 45 TFEU (ex Article 39 TEC) on free movement of workers (although this was not so in *Rush Portuguesa* because this provision was not at that time in effect in relation to the Portuguese workers concerned).

### **3. Measures that have an equal impact on domestic and non-domestic firms**

In its general case law on Article 56 TFEU (ex Article 49 TEC) the CJEU has taken the approach that *all* measures that have an impact on trade in services are prima facie covered, even when these do not discriminate directly or indirectly against service providers from other Member States (Case C-384/93, *Alpine Investments B.V. v Minister van Financiën* ("Alpine Investments")<sup>12</sup>). In other words, the CJEU takes the view that in general any measures that hinder trade in services are prima facie caught by Article 56 TFEU (ex Article 49 TEC), and are allowed only if they can be justified by TFEU derogations on public interest requirements (as discussed below). In contrast with its position in the *Keck* jurisprudence governing trade on goods, which was discussed above, the CJEU has not yet restricted this general approach. It is not clear whether it will do so.

This approach seemed also to be applied by the CJEU in relation to procurement in the case of *Contse*, where the CJEU simply repeated the general statements made in cases such as *Alpine Investments* that treat all measures hindering access to service markets as caught by Article 56 TFEU (ex Article 49 TEC). The CJEU seemed to assume in that case that any kind of restrictions on access to public contracts – such as conditions on the qualifications of bidders – must be justified (which will include showing that the measure was necessary and proportionate). For example, an authority might decide to set a condition that a firm should have 20 years experience to bid for a contract to provide accountancy services. If justification is necessary, this would be very difficult to justify on any grounds of quality etc, and probably would thus breach the TFEU, even though it is a condition which affects domestic and foreign firms in the same way. (However, it can be pointed out that all the measures considered in *Contse* had a greater impact on non-domestic firms than on domestic firms i.e. were indirectly discriminatory).

In public procurement, the rule that even non-discriminatory measures that restrict access to procurement contracts are allowed only if justified can also be based on the (controversial) general principle of "equal treatment" which the CJEU has held to apply in public procurement, which is concerned with all kinds of unequal treatment between tenderers and tenderers, not just those based on nationality.

#### **3.1.4 Article 49 TFEU (ex Article 43 TEC) on freedom of establishment**

Article 49 TFEU (ex Article 43 TEC) is concerned with the freedom of persons from one State to set up business ("establish") on a permanent basis in another State: States must allow persons from other Member States both to establish in their territory and to operate under the same conditions as nationals.

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<sup>12</sup> Case C-384/93, *Alpine Investments B.V. v Minister van Financiën* [1995] ECR I-1141.

Measures that restrict access to public contracts for such persons may infringe this provision: see, for example, *Re Data Processing* case above, which concerned Italian legislation limiting participation in certain data processing contracts to firms wholly or mainly in Italian public ownership. This contravened Articles 49 and 56 TFEU (ex Articles 43 and 49 TEC): although non-Italian firms could be owned by the Italian government, in practice all data processing firms in Italian public ownership were Italian, and the provision thus discriminated against non-nationals, both those established in Italy (Article 49 TFEU (ex Article 43 TEC)) and those in other Member States (Article 56 TFEU (ex Article 49 TEC)).

### **3.1.5 Derogations and limitations on the TFEU rules**

#### **3.1.5.1 Introduction**

As mentioned above, a measure considered a hindrance to trade under Article 34, 49 or 56 TFEU (ex Article 28, 43 or 49 TEC, respectively) is not automatically prohibited. It is recognised that there are many legitimate reasons that states may wish to restrict to their markets – for example, to prevent the import of products that are not safe or which damage the environment – and that the interest in free access to the market must be balanced against these other interests. The question of exactly *how* this balance between trade and other national interests should be struck is one of the most difficult for trade regimes.

There are two types of justification that may be relied on under the free movement rules: explicit derogations and implicit limitations.

#### **3.1.5.2 Explicit derogations**

First, the TFEU provides for certain explicit exceptions “derogations” from its provisions.

Article 36 TFEU (ex Article 30 TEC) allows Member States to derogate from Article 34 TFEU (ex Article 28 TEC) on grounds of ‘public morality, public policy or public security, the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial policy’.

Use of the derogations is subject to a number of conditions.

First, any discrimination is justifiable on objective grounds (for example that it is not ‘arbitrary discrimination’) and that it does not imply a ‘disguised restriction on trade’. This latter condition is directed at ensuring that measures taken ostensibly on permitted grounds such as health protection are not really taken with a motive of protecting national industry.

Secondly, the measure must satisfy a “proportionality test”. This requires that any restriction on trade is proportionate in that it is both:

- i) a measure that is *suitable* to promote the objective sought – that is there must be a reasonable connection between the measure and its objective; and
- ii) a measure that is *necessary* to achieve that objective. A measure is only necessary if it is no more restrictive of trade than necessary. This entails that the objective to be achieved could not be attained by some *other* approach which is *less restrictive* of trade. It also

entails that the measure should not have an excessive effect on trade in light of the significance of the objectives sought.

The margin of discretion that the courts give to Member States in making judgements on all these questions will vary according to the nature of the case and interest (and is sometimes hard to predict). For example, in cases involving national security – especially defence – the court is inclined to give Member States more discretion to judge (e.g. what is a suitable measure and whether it has an excessive impact on trade in the light of the objective pursued) than in other cases.

Articles 52 and 62 TFEU (ex Articles 46 and 55 TEC) provide for express derogations from Articles 49 and 56 TFEU (ex Articles 43 and 49 TEC) on grounds of public policy, public health or public morality. (Article 52 sets out these derogations for Article 49 and Article 62 then provides for the same derogations for Article 56 by cross reference to Article 52). Although the list does not include everything mentioned in Article 36 TFEU (ex Article 30 TEC), the additional grounds mentioned there can be relevant as grounds of general interest, as discussed below. Similar conditions regarding justification apply. For Articles 49 and 56 TFEU (ex Articles 43 and 49 TEC) there is also a further derogation under Articles 51 and 62 TFEU (ex Articles 45 and 55 TEC): Articles 49 and 56 TFEU (ex Articles 43 and 49 TEC) do not apply to activities that “are connected, even occasionally, with the exercise of official authority”.

There are also certain other exceptions in other article of the TFEU. One of the most important in relation to procurement is Article 346(1)(b) TFEU (ex Article 296(1)(b) TEC). This provides that Member States may take the measures that they consider necessary for their essential security interests which are connected with the production of or trade in “arms, munitions and war material” – for example tanks and missiles. The scope of this derogation and others relevant to defence procurement are considered in chapter 19.

### **3.1.5.3 Implicit limitations: general interest requirements**

Even when no explicit TFEU derogation applies, the CJEU has recognised that a measure will not infringe Article 34 TFEU (ex Article 28 TEC) where the measure can be justified on the basis of one of a number of other public interest grounds – referred to as “mandatory requirements” - recognised by the CJEU. These include protection of consumers, environmental protection, the effectiveness of fiscal supervision and improvement of working conditions. This is a non-exhaustive list which the CJEU may add to if it considers it appropriate to recognise a particular interest. Such measures are also subject to the proportionality principle. Articles 49 and 56 TFEU (ex Articles 43 and 49 TEC), similarly, are inapplicable when measures can be justified by general interest considerations recognised by the CJEU. In the context of Article 56 TFEU (ex Article 49 TEC) these are generally referred to as either imperative requirements or objective justifications (rather than by the term mandatory requirements).

The traditional view has been that all these general interest requirements may be used only to justify *indistinctly applicable* measures - that is, those that do not draw a direct distinction between domestic and imported products (see *Du Pont de Nemours* case). However, many commentators have argued that this is illogical. In Case C-379/98, *PreussenElektra AG v Schleswag AG*

("PreussenElektra")<sup>13</sup> the CJEU accepted that environmental protection could justify even distinctly applicable measures. However, the judgment is not clear whether the CJEU's ruling was based on environmental protection being a special case, or a more general rejection of the view that distinctly applicable measures can be justified as general interest requirements. Even if this the latter is correct in principle, however, it will be difficult to justify distinctly applicable measures in practice, since generally there will be indistinctly applicable measures available that are adequate to achieve the objective sought.

#### **3.1.5.4 Derogations in public procurement cases**

It is important to note that in public procurement the mere fact that *the subject matter of a contract* is concerned with one of the general interest requirements will not mean that the measure is outside the TFEU. This point was made clearly in *Re Data Processing*.

In this case, as we have seen above, the CJEU held unlawful, as contrary to Articles 49 and 56 TFEU (ex Articles 43 and 49 TEC), Italian legislation providing that only firms with the majority of their shares in Italian public ownership could be eligible for certain contracts to supply data processing systems to the Italian government. Italy suggested that because some of the systems related to the functions of public security (such as systems concerned with the fight against organised crime) and health (systems concerned with health-care service), measures relating to these contracts were exempt from Article 34 TFEU (ex Article 28 TEC). This argument was, however, rejected. As Advocate General Mishco pointed out, it must be shown that the prohibition on participation of firms not in Italian ownership would actually prejudice the relevant interest, such as public security or public health. This can be considered as an example of the requirement under the proportionality test for the measure to be suitable (that is, to have a reasonable connection with the objective sought).

The case of *PreussenElektra* provides one example of how a justification may apply in a procurement case. That case involved an application for a preliminary ruling from the CJEU concerning German legislation that required electricity supply undertakings to purchase electricity from renewable sources within their area of supply, at prices above economic value, with the aim of improving the competitive position of producers of electricity from renewable sources. The CJEU ruled that *prima facie* these measures fell within Article 34 TFEU (ex Article 28 TEC), but concluded that there was no violation of Article 34 TFEU (ex Article 28 TEC), in view of the environmental objectives of the measure and its objectives of protecting health. This seemed to imply that the provision could be justified both by environmental considerations under the mandatory requirements principle and under the health derogation of Article 36 TFEU (ex Article 30 TEC), including that it met the proportionality test.

The "security" derogation under Article 36 TFEU (ex Article 30 TEC) is also significant in practice in public procurement. Authorities might invoke this to protect the confidentiality of security-related information (such as details of criminal or terrorist activity, or details of defence purchases) or where there is a need to ensure the safekeeping of sensitive supplies, such as equipment which could be useful to criminals or drugs. However, the scope of such arguments is limited by the proportionality test, as is indicated by some cases that have come before the CJEU.

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<sup>13</sup> Case C-379/98, *PreussenElektra AG v Schleswag AG* ("PreussenElektra") [2001] ECR I-2099.

Thus:

- In *Re Data Processing* the CJEU rejected an argument by the Italian government that the need for confidentiality in relation to data to which providers would have access justified restricting contracts to firms in Italian public ownership. The CJEU considered that this could be achieved by less restrictive measures, in particular by imposing a duty of secrecy on the provider's staff with possible criminal sanctions. The CJEU considered that the effectiveness of such measures would not be affected by whether or not the company was under Italian public ownership.
- In Case C-324/93, *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith* ("Evans Medical")<sup>14</sup> the CJEU suggested that the interest in preventing unauthorised diversion of drugs purchased by public authorities could be safeguarded adequately by a measure that was less restrictive of trade – that is, by taking into account a firm's relative abilities to apply security measures as a criterion in awarding the contract. (This case concerned the application of the proportionality test to derogations under the Public Sector Directive but the reasoning is equally applicable to the TFEU).

This suggests that confidentiality and security concerns of this type do not generally justify restricting contracts to one, or a specially selected small group, of providers.

As already mentioned, however, it is possible that the CJEU may take a less strict approach to the proportionality test when applying the security derogation from the TFEU to defence-related measures. This issue is considered in chapter 9.

Other cases where the CJEU has rejected the possibility of justifications in public procurement are *Du Pont De Nemours* and Case C-360/89, *Commission v Italy*.

In *Du Pont De Nemours*, as we have seen, the CJEU rejected the possibility of justifying legislation providing for preferential treatment for products made in underdeveloped regions of the state concerned. The CJEU considered that such measures do not fall within Article 36 TFEU (ex Article 30 TEC) since the aim of regional development is not concerned with any of the interests (health, security etc) referred to in that Article (para.15 of the judgment). The CJEU considered that such legislation cannot be justified by reference to any "mandatory requirements": it stated that these do apply to directly discriminatory measures, but only to those applicable to domestic and imported products without distinction (para.14). As we have just seen above, this principle that mandatory requirements may not be used to justify distinctly applicable measures may no longer apply since *PreussenElektra* (although this is not entirely clear).

However, even if this is not the case, there may be other reasons why such measures cannot be justified, which were given by Advocate General Lenz in that case. First, he stated that regional development measures cannot be justified by reference either to the Article 36 TFEU (ex Article 30 TEC) derogations or mandatory requirements, since this is an "economic" objective and economic objectives cannot be justified (paras.42 and 45 of the Opinion). Secondly, he considered the fact that the achievement of the objective of the procurement measure – regional development – is guaranteed by other machinery under the TFEU – namely the provision of authorised state aid under Article 107 TFEU (ex Article 87 TEC), is also a reason why such a measure cannot be justified as a mandatory requirement (para.45 of the Opinion).

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<sup>14</sup> C-324/93, *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith* ("Evans Medical") [1995] ECR I-563.

Case C-360/89, *Commission v Italy*, as we have also seen, concerned Italian provisions on public works requiring: i) that the main contractor for certain public works contracts should reserve a percentage of the work for undertakings whose registered office was in the region where the works were to be carried out; and ii) that where more than 15 contractors sought to be invited to tender for a works contract in deciding which contractors to invite authorities should give preference to consortia and joint ventures which included undertakings carrying out their main activity in the area where the works were to be executed. The CJEU held these contravened Article 56 TFEU (ex Article 49 TEC). Italy argued that such measures were justified as they were intended to assist SMEs. However, the CJEU stated that such considerations were not covered by TFEU derogations or reasons of general interest, citing two cases in which it had ruled that economic objectives cannot provide derogations.

The general principle relied on to some extent in both these cases, namely that economic objectives cannot form a basis for justifying measures that hinder access to the market, can be criticised.<sup>15</sup>

SME development, for example, is an important element of national and EU policies for ensuring competitiveness, and policies directed at this that hinder trade in the short term should be assessed on their merits. It seems clear that the decision in Case C-360/89, *Commission v Italy* is correct on its facts, as the policy was wholly disproportionate to any objective of SME development – for example, in that sub-contracting did not have to be to SMEs and was limited to firms in a particular region. Further, the decision in *Du Pont de Nemours* can be considered as correct even without the general rule against economic derogations, because of the specific machinery in the TFEU for dealing with regional development through state aid, as stated by the Advocate General. It can be argued, however, that SME policies, and also other industrial policies that hinder trade but have objectives compatible with the underlying principles of the single market, should be considered on a case by case basis on their merits rather than ruled out automatically by a general principle that rejects any economic derogations – even if it is unlikely that many such policies can be justified. (Note that Article 173 TFEU (ex Article 157(1) TEC) entrusts the EU and Member States with securing the conditions for the competitiveness of EU industry ‘in accordance with a system of open and competitive markets’ [emphasis added]).

### **3.2 Do the free movement rules apply to all individual procurement decisions?**

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<sup>15</sup> S. Arrowsmith [“Application of the EC Treaty and Directives to Horizontal Policies: a Critical Review”, chapter 4 (pp.147-248) in Arrowsmith and Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009, Cambridge: CUP)] suggested that “...such a general principle is too unsophisticated and needs to be nuanced. This so-called principle was first adopted to preclude economic objectives that were clearly incompatible with the scheme of the Treaty. It provides a neat way to encapsulate the principle that Treaty derogations cannot be used to justify objectives that are ‘mere’ protectionism or objectives that merely address the broad social or political consequences of inequality or economic decline in certain areas or activities. However, other policies that are economic in the sense of affecting industrial development – or, indeed, other financial or commercial interests of the state – should not be caught by a general principle that automatically precludes justification”.

It can be noted that in many past cases the CJEU seems to have assumed that the TFEU rules apply even to individual contracts (e.g. in the *Telaustria* case<sup>16</sup>) – even though as a general rule the TFEU has been considered to apply only to “measures”, requiring a decision or conduct of a general nature (Case 21/84, *Commission v France*<sup>17</sup>). Thus, failing to apply the TFEU rules on non-discrimination even to a single contract, or failing to advertise even a single contract, might violate the TFEU. It is not clear whether or not this strict position involves a mere oversight of the general case law, or whether the CJEU consciously adopted such a position in order to ensure more stringent regulation of public procurement.

Whether or not a general practice is required, it appears that there is now some limit on the application of the TFEU (at least under Articles 49 and 56 TFEU (ex Articles 43 and 49 TEC)), in that the TFEU obligations will apply only to contracts that are considered of “certain cross-border interest” – that is, of interest to firms from other Member States. This was stated in:

- Case C-507/03, *Commission v Ireland* (“An Post”)<sup>18</sup>, concerning the transparency obligation; and
- Joined Cases C-147/06 and C-148/06, *SECAP and Santorso v Comune di Torino* (“SECAP”)<sup>19</sup>, which applied the same approach to the non-discrimination obligation – even though this test of cross border interest had not been mentioned previously by the CJEU outside the context of the new “transparency” obligation.

Furthermore, when the Commission brings a violation of EU procurement law before the CJEU, and this is based on an act of the administration (such as failure to advertise contracts by procuring entities, or discrimination against firms from other Member States) rather than inadequate legal rules, a declaration that the state has failed to fulfil its obligations can be made only by showing a general practice of a consistent and general nature. This was indicated recently in a public procurement case, Case C-489/06, *Commission v Greece*<sup>20</sup>.

### 3.3 The equal treatment principle

In two Communications on procurement, the Commission put forward the view that there is a general equal treatment principle under the TFEU that is similar to that under the directive and applies to all discriminatory treatment, not just discrimination on grounds of nationality. (See European Commission, *Interpretative Communication on Concessions under Community Law* [2000] O.J. C121/2 and European Commission, *Commission Communication on the Community law applicable to contract awards not or not fully subject to the provision of the Public Procurement Directives*, 23.6.2006).

The jurisprudence cited by the Commission for its arguments based on the principle of equality (the *Storebaelt* case and Case C-87/94, *Commission v Belgium* (“Walloon Buses”)<sup>21</sup>) was in fact concerned with a principle of equal treatment derived from the *directives*, not from the TFEU itself. In particular, whilst the Commission in its arguments in the *Walloon Buses* case sought to

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<sup>16</sup> Case C-324/98, *Telaustria Verlags GbmH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG* (“Telaustria”) [2000] ECR I-10745.

<sup>17</sup> Case 21/84, *Commission v France* [1985] ECR 1355.

<sup>18</sup> Case C-507/03, *Commission v Ireland* (“An Post”) [1997] ECR I-9777.

<sup>19</sup> Joined Cases C-147/06 and C-148/06, *SECAP and Santorso v Comune di Torino* (“SECAP”) [2008] ECR I-3565.

<sup>20</sup> Case C-489/06, *Commission v Greece* [2009] ECR I-1797.

<sup>21</sup> Case C-87/94, *Commission v Belgium* (“Walloon Buses”) [1996] ECR I-2043.

locate the principle in issue in the TFEU rather than the directives, the CJEU in that case deliberately based its findings of the effect of the principle on the directives alone. Many academics have taken the view that no such principle exists under the TFEU, which imposes only an obligation not to treat firms unequally *on grounds of nationality*<sup>22</sup>. This seemed to be supported by previous CJEU case law, which had never recognised a general principle of equal treatment under the TFEU.

However, recent CJEU jurisprudence accepts the Commission's view that such a general principle exists in the public procurement context: see, in particular, Case C-410/04, *ANAV v Comune di Bari and AMTAB Servizio* ("ANAV")<sup>23</sup> para.20, where the CJEU seemed to clearly accept this. If this is correct, it seems to mean that even non-discriminatory procurement measures are caught by the TFEU in the area of public procurement, even to the extent that they are not caught in other fields of activity under the *Keck* principle (as was discussed above).

It appears that this principle will apply in a similar way to the equal treatment principle under the directives: see further the material on the directives in chapter 6, section 1.

In addition, the CJEU now appears to be using the equal treatment principle to impose for contracts outside the directives obligations on specific issues that are very similar to the explicit obligations applying under the directives. This was particularly notable in *SECAP*. This case effectively applied many of the directives' detailed rules on how to treat "abnormally low tenders" (those that appear uneconomic and therefore present a risk that the contractor will default) to contracts below the directive' thresholds.

## **3.4 Publicity and competition under the TFEU under the obligations of transparency**

### **3.4.1 The transparency obligation in *Telaustria***

For a long time it was assumed that the impact of the TFEU on public procurement was merely to prohibit positive measures that restrict access to contracts, such as discriminatory conditions for participating or discriminatory award criteria, as discussed above.

However, *Telaustria* suggested that certain positive obligations apply under the TFEU, including an obligation to advertise contracts. The case concerned a services concession contract which the CJEU held to be outside the directives (see further chapter 4, material on concessions below). However, the CJEU further stated that the TFEU non-discrimination principle implies an obligation of transparency entailing "a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed" (para.61-62 of the judgment).

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<sup>22</sup> See, for example, S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), at 4.16; P. Braun, "A Matter of Principle(s): the Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives" (2000) 9 *Public Procurement Law Review* 39.

<sup>23</sup> Case C-410/04, *ANAV v Comune di Bari and AMTAB Servizio* ("ANAV") [2006] ECR I-3303.

### 3.4.2 What does transparency involve?

It is not clear what is necessary to satisfy the requirement of transparency in the context of concessions (which were the subject of *Telaustria*), or in the context of other contracts that are outside the directive but covered by the TFEU, namely non-priority services contracts and below-threshold contracts (see below).

- First, it is not clear whether contracts must be advertised in Europe-wide media, such as the *Official Journal*.
- Secondly, it is not clear what the required extent of advertising is. It seems unlikely that each individual contract needs to be advertised since, for some covered entities this is not even required by the directives: a general notice of contracts or a notice of a qualification system will suffice (see chapter 7 below).
- Third, it is not clear what obligations follow after the contract has been advertised – whether a formal competition must be held and, if so, in what form. There have been some cases on this issue since *Telaustria*, but so far they have not clarified the matter to any great extent since they have concerned total failure to advertise the contract. In Case C-231/03, *Conorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* (“Coname”)<sup>24</sup> the CJEU suggested, first, that there is not necessarily an obligation to hold a tender, and that all the detailed obligations of the procurement directives will *not* apply. However, the CJEU’s decision in *SECAP* seems to support the Commission’s view that when a procuring entity compares offers from different firms obligations apply that are similar in many respects to those of the directive, although not identical.<sup>25</sup>

The European Commission has set out its own views on what obligations apply in its two Interpretative Communications referred to above, one on *Concessions*, and one on *Contract awards not or not fully subject to the provision of the Public Procurement Directives*.

According to the Commission the obligations for most contracts include not just an obligation to advertise but also an obligation to hold a competition (although not necessarily a formal tender). According to the Commission the competition must be held in accordance with the general principle of equal treatment, similar to that of the directives (see further the section on equal treatment above), which includes requirements for things like reasonable time limits, disclosure of award criteria etc similar to those found in the directives – though it considers that not all of the rules in the directives will apply in the same way under the TFEU.

The Commission’s views on the scope of regulation under the TFEU are controversial. The most recent Communication on *Contract awards not or not fully subject to the provision of the Public Procurement Directives* has been the subject of a legal challenge by the German government for the reason, *inter alia*, that it involves “legislation”, which is beyond the powers of the Commission – the complaint is that the Commission is setting out detailed legal rules that have no

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<sup>24</sup> Case C-231/03, *Conorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* (“Coname”) [2005] ECR I-7287.

<sup>25</sup> For summary and analysis of the key statements of the Advocates General see also A. Brown, “Seeing Through Transparency: the European Court’s Case Law on the requirement to Advertise Public Contracts and Concessions under the EC Treaty” (2007) 16 *Public Procurement Law Review* 1.

foundation in the text or case law of the TFEU (Case T-258/06, [2006] O.J. C-179/2, CJEU judgment of 20 May 2010<sup>26</sup>).

Even if there is no obligation to advertise and hold a competition in a particular case, the equal treatment principle will no doubt apply to govern the conduct of any competition that *is* held, and may involve again many obligations similar to those in the directives.

### **3.4.3 To which contracts does the transparency obligation apply?**

The question has also arisen as to what obligations, if any, apply to other contracts outside the directive. *Telaustria* concerned concessions which are important contracts that are clearly of interest to cross-border trade. But what of contracts:

- below the financial thresholds of the directives;
- non-priority services contracts; and
- contracts which the directive itself exempts from the obligations of advertising and competition (e.g. on grounds of urgency).

Such contracts were deliberately omitted from the directives in part because it was considered that they are NOT always of interest to cross border trade. (Note: the concept of non-priority services contracts is explained in chapter 4 below).

#### ***Non-priority services contracts***

It now appears clear that a transparency obligation may apply to non-priority services, but only if they are shown to be of "certain cross-border interest". This was decided in *An Post* case. The Irish government had given a contract for provision of services relating to welfare payments to An Post, the Irish postal service, without any advertising. The CJEU stated that a transparency obligation applies to non-priority services contracts where there is a "certain" cross border interest. (However, it also concluded there had been no violation of transparency shown in the present case since the Commission had not proven that there was cross border interest in the contract).

This creates much uncertainty since authorities must decide on a case by case basis whether a contract is of cross border interest, and the criteria for deciding and proving this are not yet elaborated by law (although some guidance was provided in the *SECAP* case).

#### ***Below-threshold contracts***

What about contracts below the directives' financial thresholds?

The application of the TFEU to individual contracts below the directive's thresholds was doubted in the Opinion of Advocate General Sharpston of 18 January 2007, in Case C-195/04, *Commission v Finland*<sup>27</sup>. The AG's view was basically that although there is in principle an obligation to publicise such contracts under the *Telaustria* principle, the content of that obligation to publicise is very much within the discretion of Member States, not the CJEU. The Opinion implies also that the Commission cannot challenge the award of individual contracts of a value below the thresholds before the CJEU, but should limit itself

<sup>26</sup> Noted by A. Brown in (2007) 16 *Public Procurement Law Review* NA84.

<sup>27</sup> Case C-195/04, *Commission v Finland* [2007] ECR I-3351.

to challenging general national rules on publicity if it thinks them insufficient. The CJEU did not address the issue, however, since it found the proceedings inadmissible.

However, recent case law tends to support the view that positive obligations of transparency do apply to below-threshold contracts in principle.

Thus in Case C-412/04, *Commission v Italy*<sup>28</sup> the CJEU stated that where a contract with a value below the applicable financial threshold “is of certain cross-border interest”, the direct award of that contract (i.e. award without any advertising) amounts to indirect discrimination against undertakings located in other Member States contrary to Articles 49 and 56 TFEU (ex Articles 43 and 49 TEC), unless justified by objective circumstances. This seems to imply that some degree of positive action is necessary even for contracts below the thresholds of the directives, although the CJEU did not discuss *Telaustria* specifically. As with non-priority services contracts the CJEU seems to adopt a *requirement of cross-border interest*, to be applied on a case-by-case basis and thus leading to the same uncertainty as applies with non-priority services contracts.

In addition, in Case C-220/06, *Asociación Profesional de Empresas de reparto y Manipulado de Correspondencia v Administración General del Estado*<sup>29</sup> the CJEU stated that if the contract in the case concerned was below the directive’s threshold an award without competition could contravene the TFEU obligations of equal treatment and transparency (para.88). Obligations of the kind found in the directives were also applied to below-threshold contracts in the *SECAP* case (although referring to the equal treatment principle rather than transparency).

### **Contracts excluded from the directive’s obligations of advertising and competition**

The directive itself exempts entities from the obligations of advertising and competition in certain circumstances for contracts that are in principle covered by the directives (e.g. on grounds of urgency: see chapter 6 below on the negotiated procedure without a notice). Advocate General Stix-Hackl in the *Coname* case (para.79) urgency could be taken into account, indicating that the CJEU might take its inspiration from the directives to some extent in determining the limits of the TFEU obligation – and this view has been endorsed by other Advocates General. She also suggested that other factors reflected in the directive’s exclusions (mentioning the exclusion of certain services contracts awarded to entities with exclusive rights: see chapter 4 below) might be taken into account. We can note that the “implied” exclusion for on-house contracts first developed by the CJEU in relation to the directives has also been applied to the TFEU’s transparency obligation: see section 3.5 below.

### **3.4.4 Critique**

There has been extensive academic criticism of the transparency principle as developed in *Telaustria*. The main criticisms are:

1. That it exceeds the bounds of acceptable judicial interpretation and amounts to legislative activity that undermines the proper division of responsibility between legislative and judicial branches of the EU (and is particularly inappropriate since the rules created are directly contrary to

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<sup>28</sup> Case C-412/04, *Commission v Italy* [2008] ECR I-619.

<sup>29</sup> Case C-220/06, *Asociación Profesional de Empresas de reparto y Manipulado de Correspondencia v Administración General del Estado* [2007] ECR I-12175.

- specific decisions of the legislature to exclude certain types of contracts from detailed regulation);
2. That it creates significant uncertainty for procuring entities, Member States and tenderers: and
  3. Potentially, at least, it imposes unreasonable constraints on Member States freedom of action to ensure value for money etc in the manner they think fit for contracts excluded by the directives – especially since judges are ill-suited to balance the different policy considerations involved in public procurement.

However, despite the criticism of the *Telaustria*<sup>30</sup>, it was later confirmed by a Grand Chamber of the CJEU in the *Coname* case<sup>31</sup>.

The transparency principle means that it may be very important to decide which private entities, such as private utilities, are subject to the TFEU obligations. Some of these entities are regulated by the Utilities Directive because they are considered to be subject to state influence: see chapter 7 below. However, those operating in commercial markets are exempt under an exemption in Article 30 of the Utilities Directive (this point is covered further in chapter 7). Obviously if they are still subject to positive obligations under the TFEU many of the benefits of the proposed exemption will be lost.

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<sup>30</sup> Above note 16.

<sup>31</sup> Above note 24.

## Impact of the TFEU on public procurement: summary of key points

### RESTRICTIONS ON TRADE

1. The TFEU free movement provisions Article 34, 49 and 56 TFEU (ex Article 28, 43 and 49 TEC, respectively) prohibit measures that discriminate directly or indirectly against firms/products from other Member States, unless justified for some good reason of public interest (e.g. environmental reasons).

Examples are:

- Reserving contracts for domestically made products (direct discrimination) e.g. *Du Pont de Nemours* case;
  - A requirement for products to be made to a national standard, unless this merely implements a European standard (indirect discrimination) e.g. *Dundalk* case.
2. The TFEU free movement provisions also prohibit some measures that hinder access to the public procurement market *even though these have the same impact on both domestic products/firms and those from other Member State*. (Again they are allowed, though, if justified by the public interest).

Definitely in this category is a specification that excludes products that can meet the government's functional needs e.g. *UNIX* case.

It is not yet clear, however, what other sorts of measures fall into this category – this is a grey area. However, quite possibly *all* restrictions on access to services contracts are caught e.g. qualification conditions. It is probably best to assume that this is the case!

3. Reasons that states can use to justify restrictions are of two types:
  - a. Explicit exceptions in the TFEU (e.g. health, security);
  - b. Exceptions implied by the CJEU – sometimes referred to as mandatory requirements or general interest requirements (e.g. environmental considerations). It is not entirely clear whether all these implied exceptions can be used to justify direct discrimination, though.

However, economic protectionism, such as protecting national employment, can *never* be a justification for restrictions on trade (*Du Pont de Nemours* case)

4. The courts are quite strict in allowing use of both the express and implied exceptions. They are allowed only for measures that pass a *proportionality test*. Two important aspects of this test are:
  - a. The measure must not have the intention of favouring national firms or products (it must be not “disguised discrimination”);
  - b. The measure is not allowed if its objective could have been achieved in some other way that is less restrictive of trade: e.g. *Evans Medical* case.
5. Probably these rules only apply to contracts of certain cross border interest (*SECAP*).

## Impact of the TFEU on public procurement: summary of key points cont'd

### POSITIVE OBLIGATIONS: TRANSPARENCY

1. The free movement rules also require a degree of transparency in awarding contracts to help monitor that the above restrictions on discrimination etc are observed: *Telaustria* case.
2. This can apply to contracts that are outside the procurement directives (as well as to contracts that are covered) e.g.
  - Concession contracts (*Telaustria*);
  - Non-priority service contracts (*An Post* case);
  - Below-threshold contracts (Case C-220/06).
3. However, transparency is only required for contracts that are of "certain cross border interest": *An Post* case.
4. Transparency requires some degree of publicity. It is not clear what else is required - but in *SECAP* the CJEU was willing to apply most of the directive's abnormally low bid rules (based on equal treatment) showing a willingness to look at the directives in defining obligations.

### **3.5 Application of the TFEU rules to “in-house” arrangements**

A recent important issue in practice has been how the TFEU rules apply when a public body wishes to award contracts to companies that it has set up itself, which may be wholly owned subsidiaries or which may be owned both by the public body and by private investors.

The CJEU has ruled that “in-house” arrangements, whereby a public body does work with its own internal resources, are not covered by the TFEU rules (and so need not be advertised etc under the *Telaustria* principle), and that a subsidiary company can be considered “in-house” for this purpose even when it is a separate legal entity from the public body, under certain conditions: see, in particular, Case C-458/03, *Parking Brixen v Gemeinde Brixen* (“Parking Brixen”)<sup>32</sup>. However, these are strictly applied. They are the same conditions that apply when deciding whether an entity is an “in-house” entity for the purpose of applying the directives. On this see further the material on the public procurement directives in chapter 4.

### **3.6 To which entities do the TFEU rules apply?**

Article 34 TFEU (ex Article 28 TEC) does not apply to persons generally, but (it is implied) only to actions by public bodies.

The scope of Article 34 TFEU (ex Article 28 TEC) in this respect was discussed in the *Buy Irish* case. In this case the CJEU ruled that Article 34 TFEU (ex Article 28 TEC) applied to a “Buy Irish” campaign conducted by a private company limited by guarantee, where its management committee was appointed by public authorities and its objectives set by those authorities, and it was government funded. This might indicate that Article 34 TFEU (ex Article 28 TEC) applies *prima facie* to the procurement of those entities covered by the public sector procurement directives as “contracting authorities” (on the definition of these see chapter 4). It would appear at least to apply to the state, and local and regional authorities, and to bodies that are within the definition of bodies governed by public law because they are financed or appointed by the state. Whilst the CJEU did not mention bodies supervised by the state, it seems likely that these will be covered: it is quite possible that in practice the CJEU will look at the definitions in the procurement directives to guide it in determining the scope of the TFEU itself in this respect, both in a positive sense – which entities are covered – and a negative sense (which are not) – especially as it has applied the same definition to “in-house” contracting under the TFEU and the directives. Article 34 TFEU (ex Article 28 TEC) also applies to regulation of activities (professional activities etc) by bodies to which such regulation is delegated and left by the state.

Even if a body is not sufficiently connected with the state for its procurement in general to be subject to Article 34 TFEU (ex Article 28 TEC), direct state involvement in the measure may lead to the TFEU being applied – at least to the action of the state itself – for example, where the state orders a private firm to discriminate.

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<sup>32</sup> Case C-458/03, *Parking Brixen v Gemeinde Brixen* (“Parking Brixen”) [2005] ECR I-8585.

It is logical that the TFEU provisions on services and employment should have the same ambit. However, there is some suggestion in the cases that they may be wider. In particular, in Case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* ("Angonese")<sup>33</sup> the CJEU ruled that Article 39 E.C. on free movement of workers applies to employment decisions of individual private employers as well as to the exercise of collective powers affecting employment. However, this ruling is arguably either confined to discrimination in employment or will not be applied in future: in the later Case C-309/99, *Wouters and others v Algemene Raad van de Nederlandse Order van Advocaten* ("Wouters")<sup>34</sup> on Articles 49 and 56 TFEU (ex Articles 43 and 49 TEC) the CJEU merely indicated that these articles apply to collective regulation of activities – as is well accepted as a delegated function of the state – without any suggestion that these articles apply to private acts generally.

It has never been determined how far the TFEU applies to procuring entities that are public undertakings or private entities that enjoy special or exclusive rights for the purpose of regulation under the Utilities Directive, but which are not "contracting authorities". It can be noted that Article 106 TFEU (ex Article 86 TEC) contains special provisions on such companies but their precise application is not yet determined by the CJEU (the scope of regulation of these entities is considered in chapter 7).

There are also other EU rules that apply, in a loose sense, to the public sector but not the private sector – for example, on the direct effect of directives and on state responsibility in proceedings in the CJEU under Article 258 TFEU (ex Article 226 TEC). The CJEU has not made it clear whether or not these rules, or some of them, have the same scope.

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<sup>33</sup> Case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA* ("Angonese") [2000] ECR I-1439.

<sup>34</sup> Case C-309/99, *Wouters and others v Algemene Raad van de Nederlandse Order van Advocaten* ("Wouters") [2002] ECR I-01577.

# CHAPTER 4: THE PUBLIC SECTOR DIRECTIVE 2004/18: SCOPE OF COVERAGE

## 4.1 Which authorities are covered?<sup>1</sup>

### 4.1.1 Introduction and general principles

The modern state employs a wide variety of institutional forms to carry out its functions; and this may make it difficult and uncertain to establish an appropriate boundary for rules that apply to “public bodies” but not to “private” ones, including to define the general scope of administrative/public bodies for states that adopt a general distinction between administrative/public law and private law.

The different EU Member states traditionally have had different approaches to distinguishing between public and private law. Some states have never made a general distinction, although they may have various different rules that apply only to “public” bodies or activities. Other Member States have separate systems of administrative/public law and have traditionally adopted general classifications of particular bodies or activities in their economies as “public” or “private” for the purpose of deciding which system will apply to them, including for the purpose of determining the scope of their domestic public procurement rules.

However, in terms of the entities covered (as well as the type of contracts covered) the public procurement directives have a common scope for all Member States. Thus the CJEU has emphasized that the concept of a “body governed by public law”, for example (which we will see below is a concept important in defining entities covered) has a common meaning for all Member States, and thus does not necessarily correspond with the definition of “public” or “administrative” bodies in states’ domestic law. In other words, the relevant definition is the one in the directives themselves, not the definition used in the domestic law of the Member State (e.g. Case C-283/00, *Commission v Spain* (“SIEPSA”)<sup>2</sup>).

We will also see below that the precise way in which the CJEU has interpreted the provisions of the directive concerning the entities covered has been clearly influenced by the purpose of the rules, in particular of the need to prevent concealed discrimination. The CJEU has often referred expressly to this purpose when resolving legal difficulties of interpretation, taking the view that a guiding principle in interpretation is that the directives were intended to apply to those entities that present a risk of discrimination in their procurement. (In particular, the need to consider this purpose in deciding what constitutes “financing” of a body by another contracting authority was emphasised first in *University of*

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<sup>1</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 5; J. Garcia-Andrade and P. Athanassiou, “Reflections on the status of independent national authorities under Community public procurement law” (2007) 16 *Public Procurement Law Review* 305; E. Papangeli, *The Application of the EU’s Works, Supplies and Services Directives to Commercial Entities* (2000) 9 *Public Procurement Law Review* 201; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), chapter 2.

<sup>2</sup> Case C-283/00, *Commission v Spain* (“SIEPSA”) [2003] ECR I-11697.

*Cambridge* case<sup>3</sup> and has been applied (see section 4.1.2.3 below) and this approach has also been used to interpret the concept of management supervision and to determine whether an entity has a commercial or industrial character – again see section 4.1.2.3 below).

There are different ways to approach the question of identifying which entities are to be covered by public procurement rules, using general definitions, lists of entities, or various combinations of the two. We will see that the EU has used a combination approach. It has used general definitions as the definitive legal basis to determine the type of entities covered. This helps ensure that coverage is the same for all Member States. It also ensures both that coverage is comprehensive and that entities are not included when this is not appropriate (entities are not excluded or included when this is inappropriate – whether through error or where they are newly created or change in form or substance, for example). At the same time, as we will see, the EU has also included a purely illustrative list of entities to assist those affected by the system to understand its coverage in certain respects.

## **4.1.2 Application of the directives to “contracting authorities”**

### **4.1.2.1 The concept of a contracting authority**

The public sector bodies covered by the directive are referred to as “contracting authorities”. This concept is defined in Article 1(9) of the Public Sector Directive to cover four distinct categories:

1. The State
2. Local and regional authorities
3. “Bodies governed by public law”
4. Associations formed by the above.

### **4.1.2.2 The state and local and regional authorities**

This category of the directive covers, inter alia, central government departments and ministers and local authorities. For federal states (such as Germany) it covers the regional and provincial government authorities.

### **4.1.2.3 Bodies governed by public law**

#### **The general concept**

The concept of a body governed by public law is intended to bring within the Public Sector Directive all entities that are not part of the “traditional state” apparatus of government departments and local authorities, but are nevertheless closely dependent on the state such as there is a risk that they will be influenced to discriminate in their purchasing. A “body governed by public law” is further defined in detail in Article 1(9) to cover a body which meets *all* of the following three conditions:

1. It has legal personality;
2. It meets *at least one* of the following criteria:
  - a. It is financed for the most part by a contracting authority;

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<sup>3</sup> Case C-380/98, *R v HM Treasury ex parte University of Cambridge* (“University of Cambridge”) [2000] ECR I-8035.

- b. It is subject to management supervision by a contracting authority;  
or
  - c. It has a board more than half of whose members are appointed by a contracting authority;
3. It is “established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character...”. Thus state-owned companies run on a profit making basis are sometimes *not* covered (see further below) (although note that many of them are now regulated by the Utilities Directive: see chapter 7).

There is a list of bodies considered to be bodies governed by public law for the various Member States set out in Annex III to the directive. However, as Article 1(9) makes clear, this is for illustrative purposes only: a body is covered *only* if it falls within the definition, even if listed, and is *always* covered if it falls within the definition, even if not listed. We have noted in section 6.1 above the possible advantages of the EU’s approach to coverage in adopting this approach of combining a general definition with an illustrative annex. However, the annex is considered by many to be rather unhelpful as it is generally incomplete and out of date.

To give some examples of entities covered from one Member State, the United Kingdom, the definition in the directive covers, for example, bodies such as the publicly-funded universities, (see further below), bodies in the health sector, housing associations (see further below) and quangos set up to serve specific functions, such as parole boards, the Office of Fair Trading, etc.

Various elements of the concept of a body governed by public law have been elaborated in jurisprudence of the CJEU, which is important for interpreting the concept. These interpretations are elaborated below. (Elements not discussed at those that have not been subject to significant interpretation by the courts).

### **Financed for the most part by a contracting authority**

The meaning of “financed” by a contracting authority for the purpose of the definition of body governed by public law was considered by the CJEU in some detail in the case of *University of Cambridge* case. The case concerned the question of whether UK universities are covered by the directives. The CJEU first stated that the concept of financing does not include all payments made to a body but only those that “have the effect of creating or reinforcing a relationship of dependency” (para.21 of the judgment). This could be deduced from the purpose of the directives, which is to regulate award procedures by bodies which the government can influence to favour national industry. This means that the provision only covers financing provided to an institution without any “specific consideration” being provided by the institution.

Applying this test the CJEU concluded that, in relation to universities, the provision does cover:

- i. Awards or grants made for the support of research work;
- ii. Monies paid by government in the United Kingdom to cover the tuition fees of specific students.

On the other hand, the provision does not cover money paid by the government in return for *contractual* services such as research work, consultancy and organisation of conferences. The CJEU considered that in this case the nature of the relationship of the body with the government is a normal commercial one, rather than the kind of dependent relationship intended to be within the

directives. This indicates that, in general, when funding is provided by government to a body through a normal commercial contract for services that funding does not count as financing of the body for the purposes of the definition of body governed by public law.

The CJEU in this case also concluded that the phrase "for the most part" means "more than half" (para.33 of the judgment). It also concluded that *all* sources of income – including that from commercial sources – must be included in determining the university's total income that will be used for calculating whether financing is for the most part from the state etc. It can be noted that the higher the percentage of income a university – or other body – has from ordinary commercial activity such as commercial contracts or letting of land (which, as explained above, does not count as public finance), the less likely it is that "more than half" of its income will be public finance, and the less likely it is that it will be covered by the directives.

The CJEU has also stated that the "financing" in question does not have to be direct. Thus in Case C-337/06, *Bayerischer Rundfunk and others v GEWA Gesellschaft für Gebäudereinigung und Wartung*<sup>4</sup> the CJEU indicated that broadcasting authorities funded through a state-imposed licence fee paid by all those with receivers, regardless of the actual broadcasting services each receives, is financed by the state.

### **Subject to management supervision by a contracting authority**

So far as the "management supervision" criterion is concerned, the CJEU has stated that it is necessary to consider whether the controls to which entities are subject render them "dependent on the public authorities in such a way that the latter are able to influence their decisions in relation to public contracts": Case C-237/99, *Commission v France*<sup>5</sup>, para.48 (which dealt with the status of entities responsible for providing social housing in France). The CJEU also stated in that case that the supervision exercised must give rise to dependence on the public authorities equivalent to that which exists when one of the other criteria (financing or appointment) are met (para.49). As we have just seen in the context of the financing criterion, the relevant consideration is whether there is a *general* dependency on a contracting authority; it is not necessary that financing should be of a form that allows influence over specific contracts in order to be counted as public financing. Similarly, it does not appear necessary to show that any management supervision that exists is concerned specifically with the process for awarding contracts. In general, it seems clear that a power actually to intervene in the management decisions of an entity can constitute management supervision.

In addition, Case C-237/99, *Commission v France*, the French social housing case, also established the principle that "management supervision" does not have to involve a power actually to intervene in the management decisions of an entity, at least when there are "detailed" rules of management that the entity must follow. In such circumstances the CJEU considered that supervision over whether the entity complies with the rules may be sufficient to establish significant influence (para.52). At least this is the case when, as in Case C-237/99 itself, this is coupled with some power to take action over management

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<sup>4</sup> Case C-337/06, *Bayerischer Rundfunk and others v GEWA Gesellschaft für Gebäudereinigung und Wartung* [2007] ECR I-11173.

<sup>5</sup> Case C-237/99, *Commission v France* [2001] ECR I-939.

decisions: in that case, as explained below, the government had ultimate powers to wind-up the entities, suspend management and appoint an administrator.

It also seems that, if observance of compliance with pre-set rules can be sufficient, a general power to scrutinise the management activity of an entity should also be sufficient, even when the management is not conducted according to pre-set rules – again, at least if accompanied by some ultimate powers of redress and/or sanction.

These principles seem sound, but are not easy to apply. In particular, it is not clear exactly what sort of intervention in management decisions is required, nor on the sort of rules or supervision and accompanying powers of redress/sanction that are necessary to establish management supervision without direct intervention in management decisions. In Case C-237/99, *Commission v France*, the CJEU concluded that the “management supervision” criterion was satisfied in the case before it. The judgment highlights a number of relevant factors, as set out below. However, the judgment does not indicate the precise significance of each one.

The features highlighted by the CJEU in that case were as follows:

1. That the activities of the entities concerned (letting and constructing social housing) and the objectives of their activities were closely circumscribed, and the characteristics and the cost of the housing to be provided were determined by administrative decision. The CJEU seems to regard these limitations as constituting “detailed rules of management” which could in principle (at least if accompanied by appropriate powers of supervision and redress/sanction, as described below) establish the existence of management supervision without direct powers of intervention in management. This seems to be quite a broad view of what constitutes detailed rules of management.
2. That there was legal provision for the entities to be supervised by the ministers responsible for finance and for construction and housing, without any limitations on this supervision being specified. The significance of this apparently broad power did not receive much attention, possibly because it was of little significance in practice.
3. That the responsible Minister had a power to wind-up the entity or to suspend the management and appoint a liquidator and administrator. This could be done because of irregularities and also because of serious management fault or failure to act. The CJEU emphasised that the power thus related to deficiencies in management policy and not just illegality. These powers could be relevant on the basis that they provide a form of redress/sanction to back up the supervision referred to under 1 and 2 above. In addition, it seems that the CJEU regarded the existence of such powers as being alone sufficient to establish management supervision, since it considered that the mere existence of such powers implied “permanent” supervision, as the only means of detecting management failure etc. In other words, a supervisory role in law, at least, was to be deduced from the mere existence of the powers, without the need for other specific supervisory powers. This conclusion is questionable, since it is possible for powers of this kind to exist as a last-resort measure to be used as response to problems uncovered by other means. Even without the implication of such permanent supervision, such powers might be considered sufficient on the basis that they involve direct intervention in management. However, as argued by the French government, it is unlikely that such exceptional powers can really be considered to create a sufficient dependency relationship.

4. That the Minister could intervene when the entity's activity fell below a "minimum level of dynamism" or limit any excessive activity. Again, however, it is questionable whether such powers by themselves really create a relationship of dependency, and they should arguably be considered relevant only as a supplement to more general supervisory powers.
5. That an inter-ministerial task force had the power to inspect these entities and draw up proposals for action, and also to ensure that such entities were implementing measures adopted by government ministers.

The supervision criterion was also satisfied in Case C-373/00, *Adolf Truley v Bestattung Wien* ("Truley")<sup>6</sup>, which dealt with the application of the directives to an entity involved in the provision of funeral services. The entity was a wholly owned subsidiary of another company, which in turn was wholly owned by the City of Vienna. In this case the CJEU stated that the criterion is met where other contracting authorities supervise the annual accounts of the procuring entity and its conduct from the point of view of "proper accounting, regularity, economy, efficiency and expediency" and are able to inspect its business premises/facilities and to report the results to its owner. This was contrasted with "mere review" (apparently a reference to review merely of the legality of the entity's actions and the annual accounts) which the CJEU said would alone be insufficient in light of the requirement for the relevant contracting authority to be able to influence the entity's decisions in relation to public contracts.

Apart from knowing which sorts of powers, rules and controls suffice, another difficulty is whether the focus is to be solely on the existence of legal powers of supervision, or whether the analysis should also take account of the practice of the supervisory entities to establish whether there is any real threat of intervention such as might actually influence the supervised entity in practice. Arguably it should do so. In places, the judgment in the French social housing case seems to support a more formalistic approach. In particular, the CJEU did not accept the relevance of an argument that the powers of winding-up etc referred to under 3 above were not significant since they were rarely exercised: the CJEU seemed to regard the fact that permanent supervision could be "implied" from their existence to be sufficient, without investigating whether the Minister actually exercised any supervision in practice.

In *Truley* the CJEU also said that direct supervision existed because the company was owned by a company that was itself owned by a contracting authority. This suggests that ownership by a contracting authority is sufficient for an entity to be classified as a body governed by public law, whenever it meets needs in the general interest and is not wholly commercial. In the *Truley* case the procuring entity was wholly-owned by its parent, which was in turn wholly-owned by a contracting authority (the City of Vienna).

### **Needs in the general interest not having an industrial or commercial character**

One of the more difficult aspects of the "body governed by public law" test is deciding when a body is "established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character...". It is possible that when this concept was first envisaged it was intended generally to exclude public entities that sell goods and services on a market. However, it has been interpreted in quite a narrow way that takes into account the purpose of the

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<sup>6</sup> Case C-373/00, *Adolf Truley v Bestattung Wien* ("Truley") [2003] ECR I-1931.

directive in regulating entities that may be influenced to discriminate on grounds of nationality. In this respect it has been held, effectively, to exclude only those entities that operate in a fully commercial manner which: because of their need to operate commercially, it considered that these entities should be able to resist any governmental pressures to purchase from national firms or to buy national products rather than to buy on commercial terms.

More precisely, the meaning of “established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character...” has been interpreted as follows.

First, it seems (according to the Advocate General in Case C-360/96, *Gemeente Arnhem v BFI Holding BV* (“BFI”)<sup>7</sup>) that this is a two part test:

- First, does the body carry out an activity of meeting needs in the general interest? and
- Secondly, does it carry out the activity in question on an industrial or commercial basis?

It also seems that (like the general concept of body governed by public law itself) these concepts are EU law concepts: their application does not depend on whether national law deems particular needs as being needs in the general interest, for example (see the *Truley* case).

As to the first part of the test, an authority set up to provide service to the public directly is obviously likely to be considered to meet needs in the general interest – for example, a separate legal entity set up by government to run museums or collect refuse. (The *BFI* case concerned a body set up to collect refuse). The CJEU in *BFI* emphasised that there is no closed category of activities considered to involve needs in the public interest – in fact, probably anything a government decided it needs to provide for the public good could be covered. In Joined Cases C-223/99 and C-260/99, *Agorà di Pedrotti Brune & C. v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc. Coop. arl* (“Agorà”)<sup>8</sup> the CJEU held that organising trade fairs to promote trade involved meeting needs in the general interest.

An entity set up to provide support services for other government services, such as printing services or information technology services, could also be covered; that this kind of activity can be considered to meet needs in the public interest is illustrated by Case C-44/96, *Mannesmann Anlagenbau Austria AG and others v Strohal Rotationsdruck GesmbH*, (“Mannesmann”)<sup>9</sup>. In this case the CJEU indicated that the criteria were satisfied by an Austrian authority engaged in printing and publishing, where the authority was established to produce for the state, on an exclusive basis, documents affected by secrecy or security concerns, and documents intended for disseminating “legislative, regulatory and administrative documents of the state”; where prices for its products were fixed by a body whose members were appointed by government departments; and where its production of matter involving security measures was monitored by the State control service. The CJEU emphasised that the documents were closely linked to “public order” and the “institutional operation of the state” and required observance of confidentiality and security. However, it is possible that the criteria are met even where without such special features in any case where the reason

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<sup>7</sup> Case C-360/96, *Gemeente Arnhem v BFI Holding BV* (“BFI”), [1998] ECR I-6821.

<sup>8</sup> Joined Cases C-223/99 and C-260/99, *Agorà di Pedrotti Brune & C. v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc. Coop. arl* (“Agorà”) [2001] ECR I-3605.

<sup>9</sup> Case C-44/96, *Mannesmann Anlagenbau Austria AG and others v Strohal Rotationsdruck GesmbH*, (“Mannesmann”) [1998] ECR I-73.

for establishing the entity is to ensure that there is adequate service provision to government (rather than for the purpose of raising revenue or pursuing a privatisation). (See also the *SIEPSA* case ruling that a company providing support services – such as procurement and property management – for prisons was covered).

It may be that an activity will be considered to meet needs in the public interest in most cases where it has been established at public initiative, *except* where an entity has been set up in a market where public needs are *already met* by the private sector *and* the government is acting merely to raise revenue for government (for example, where the government starts to sell novels in government book stores in order to make profits). The view that an entity is not covered when its main aim is to make a profit finds some support in *SIEPSA*, above (para.88, where the CJEU said it was relevant to consider whether making profits was the chief aim of the company).

In addition to considering the question of general interest, it is necessary to consider whether in meeting these needs the entity is operating on an industrial or commercial basis. This aspect of the test has been interpreted as concerned with whether the entity is carrying out the activity in a competitive market: if that were the case it would be subject to commercial pressures to make its purchases in a commercial manner rather than to favour national suppliers. Thus, despite the wording of the provision as referring to whether the *needs* are commercial/industrial, the courts seem really to be concerned with whether the activity is carried out on a commercial basis.

In this respect the CJEU in the *Agorà* case, above, stated that whether the entity is faced with competition in the market place is a significant factor. The CJEU also treated as a key factor the way in which the entity in that case (which was involved in organising trade fairs) was managed: the fact that the entity was managed according to criteria of “performance, efficiency and cost-effectiveness” suggested that it was not caught. This is consistent with the approach taken in *BFI* by the Advocate General, who suggested that bodies that act in meeting general interest needs “outside the rules of normal commercial management” are covered. In Case C-18/01, *Arkkitehuuritoimisto Riitta Korhonen Oy and others v Varkauden Taitotalo Oy*<sup>10</sup> the CJEU stated that an entity that seeks to make profits and bears the risk of its activities is likely not to be meeting needs of a commercial/industrial character. The CJEU in *Agorà* also stated that the needs in question could be considered of a commercial character when the entity was managed in this way even though the entity was not profit-making.

However, even when an entity is operated under commercial rules, it may be covered if the state is likely to bail it out to stop it ever going bankrupt: see the *SIEPSA* case, in which the CJEU concluded that this was the case without any evidence other than the important nature of the entity’s activities in supporting the prison service. If the courts will readily find that there is a likelihood of state intervention to support failing state companies, it may be difficult to show that an entity is operated on a commercial basis to bring it outside the directives.

The CJEU in *Mannesmann* indicated that it was not relevant to its conclusion that the OS was established to meet “needs in the general interest, not having an industrial or commercial character” that the OS was in addition engaged in other “commercial” activities, such as publication and distribution of books.

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<sup>10</sup> C-18/01, *Arkkitehuuritoimisto Riitta Korhonen Oy and others v Varkauden Taitotalo Oy* [2003] ECR I-05321.

The CJEU in *Mannesmann* also concluded that *all* the contracts of an entity governed by public law are caught. This means, for example, that contracts awarded by OS in connection with its business in publishing books would be caught, even though that activity does not involve meeting needs in the general interest. This is an important point as it means that government bodies which are run largely on a commercial basis will have all their contract regulated by the directives even if only a very small part of them are “non-commercial”. This principle was confirmed in the *BFI* case. Further, in Case C-393/06, *Ing. Aigner and Wasser- Warmer- Umwelt GmbH v Fernwärme Wien GmbH*<sup>11</sup> the CJEU held that this applies even if the commercial functions are clearly separated from the “non-commercial” functions of the entity.

#### **4.1.2.4 Associations**

The third type of entity covered is an association formed by any one or more of the bodies covered by Category i) or ii) above. In *BFI* the CJEU ruled (para.27 of the judgment) that there is no overlap between the definition of bodies governed by public law and the provision on associations, and that the latter fulfils only a residual function. Thus it is first necessary to consider whether an entity that involves other contracting authorities acting together is a body governed by public law; only if it is not might it be caught by the “association” provision.

Since most entities that are composed of authorities acting together and have a separate legal personality are bodies governed by public law, the provision is relevant mainly for entities without legal personality. An example might be a purchasing consortium composed of representatives of different contracting authorities.

#### **4.1.3 Application of the directives to bodies that are not “contracting authorities”**

As well as applying to contracting authorities the directives in addition impose some obligations on other bodies – largely private bodies that are not particularly connected with the public sector.

##### **4.1.3.1 Subsidised works and services contracts**

First, the directives regulate certain works and services contracts which are subsidised by more than 50% by contracting authorities, even though the purchaser is a private entity. These rules are set out in Article 8 of the Public Sector Directive.

Note that – in contrast with the case of a contracting authority which is subject to regulation for *all* its contracts - the procurement rules will not apply in this case to all the contracts of an entity which is not a contracting authority, but only to the subsidised contracts that fall within the above provisions. We have seen that bodies whose activities *as a whole* are financed mainly by other contracting authorities are themselves within the definition of contracting authorities, with the result that all their contracts are generally regulated by the directive, regardless of how the particular contract is funded. The provisions on subsidized contracts in Article 9 are concerned with the case where the awarding entity is

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<sup>11</sup> Case C-393/06, *Ing. Aigner and Wasser- Warmer- Umwelt GmbH v Fernwärme Wien GmbH* [2008] ECR I-2339.

not in general financed by public money, but lets a particular contract that is publicly funded.

The rules apply to the following types of contracts:

1. Contracts which involve:
  - a. Civil engineering activities within the meaning of Annex I of the directive. It can be noted that the Annex refers to both the NACE nomenclature and EU's Common Procurement Vocabulary (see below), but provides in footnote 1 to the Annex that in the event of any difference in interpretation the NACE nomenclature is to apply. This covers general civil engineering such as construction of bridges, roads, tunnels and subways, pipelines and power lines; and
  - b. Building work for: hospitals; facilities intended for sports, recreation and leisure; school and university buildings; and administrative buildings. They would apply, for example, to a private body financing a sports facility with money from the national lottery.
2. Services contracts which are connected with a works contract within the meaning of 1 above.

Thus these provisions could cover, for example, contracts awarded by private bodies that have been appointed to undertake publicly-funded urban renewal projects, or sports facilities funded from the National Lottery. They could also cover services contracts for the planning or design of such projects and facilities. It can be noted that the services contracts covered are generally "non-priority" services contracts and so subject to the full regime of the regulations. (On non-priority services see section 4.2 below). The provisions do not, on the other hand, cover subsidised contracts for the building of private homes, since these types of contracts are not covered by the concept of civil engineering works under the relevant provisions. There are no obligations applying to any kind of subsidised supplies contracts.

As with other contracts covered by the directives, these rules only apply to contracts above certain financial thresholds: see section 4.2.4 below.

The rules in the directive must be applied to these subsidised contracts when they are "subsidised directly by contracting authorities by more than 50%" (Article 8 of the directive). The requirement in the directive for a direct subsidy probably means that the rules will cover only those cases in which the contracting authority gives a direct subsidy towards the price of the contract, and not where indirect subsidies are provided, such as interest-free loans.

The directive does not require Member States to impose an obligation to comply with the directive's procedures directly on the entity awarding the contract (as is arguably required with the obligations on contracting authorities). Instead, it requires Member States to take "necessary measures" to ensure that the contracting authorities awarding the subsidies ensure compliance when they award the contracts themselves (as well as to ensure that contracting authorities themselves comply when awarding the contracts themselves on behalf of the entity receiving the subsidy).

#### **4.1.3.2 Private bodies holding concessions**

In addition, limited rules also apply to private bodies holding works concessions to help ensure, in particular, that they do not discriminate in awarding their sub-

contracts. In this respect the directive place obligations on a party holding a works concession, when awarding its own works contracts (sub-contracts) for the purpose of the concession, even though the concessionaire is not itself a contracting authority (Articles 62-65). (Where the concessionaire is a contracting authority, it must follow the ordinary rules of the Works Directive in awarding its works contracts). These require the concessionaire to advertise the contract in the *Official Journal* and to respect certain minimum time limits for bidders to respond: 40 days from the despatch of the notice where bids are called for directly, or, where the notice merely requests an indication of interest from those wishing to bid, 37 days for expressions of interest (which may be reduced by 7 days to 30 when the concessionaire transmits the notice in the electronic form laid down in the directive) and a further 40 days from the invitation for the submission of bids (which may be reduced by 5 days to 35 when the concessionaire provides unrestricted full and direct electronic access to the documents). An important exemption applies to allow the award of contracts to entities related to the concessionaire.

On the definition of concession for this purpose see section 4.2.5.7 below.

## **4.2 Which contracts are covered?<sup>12</sup>**

### **4.2.1 The distinction between public works contracts, public supply contracts and public services contracts**

The directives apply to public contracts in writing for pecuniary interest (consideration), which are either public works contracts, public supply contracts or public service contracts. These are defined in Article 1(2) of the Public Sector Directive.

**Works contracts** are contracts for carrying out works or a work. Works are activities listed in Annex I to the Public Sector Directive (which is based on the outdated NACE classification of activities). A works contract also covers a contract for procuring "by any means" a complete work to the authority's specification, a provision which was introduced for the first time in 1989. This brought within the directive contracts under which an authority appoints a firm to let contracts as agent on behalf of the authority. It also covers contracts under which a developer or landowner builds on land not owned by the authority, but to specifications set by the authority, and then transfers the land.

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<sup>12</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 6; F. Avarkioti, "The application of EU public procurement rules to "in house" arrangements" (2007) 16 *Public Procurement Law Review* 22; P. Badcoe (ed.) *Public Private Partnerships and PFI* (looseleaf), 8.039-8.056 (concessions); A. Brown, "Getting to Grips with Aggregation under the E.C. Public Procurement Rules" (1993) 2 *Public Procurement Law Review* 69; R. Cavallo Perin and D. Cassalini, "Control over In-house Providing Organisations" (2009) *Public Procurement Law Review* 227; F. Hausmann, "Public Private Partnerships and the Award of Concessions" (1999) 8 *Public Procurement Law Review* 269; T. Kaarresalo, "Procuring in-house: the impact of the EC procurement regime" (2008) 17 *Public Procurement Law Review* 242; U. Neergaard, "Public service concessions and related concepts - the increased pressure from Community law on Member States' use of concessions" (2007) 16 *Public Procurement Law Review* 387; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), chapter 4; K. Weltzein, "Avoiding the Procurement Rules by Awarding Contracts to an In-House Entity: the Scope of the Procurement Directives in the Classical Sector" (2005) 5 *Public Procurement Law Review* 237.

A **supply contract** is one for the acquisition (purchase, lease etc) of products.

A concept of a **services contract** covers procurement contracts which are not works or supply contracts and have as their object services listed in Annex II of the directive (basically, all services since there is an "other services category"!).

Previously the three types of contracts were dealt with by different directives, as we saw in section 2.3 above. However, the main rules that apply to the three different types are virtually identical – unlike some procurement regimes the directives apply the same framework of rules to all three types of contracts, leaving Member States to draw any appropriate distinctions between them – for example, over the types of award procedures suitable for different contracts. (Member States may also leave this to procuring entities). There are, however, some differences between the different types, in particular:

- i) Much higher thresholds apply to works contracts than to supplies and services (see section 4.2.4);
- ii) There are some differences in the availability of the negotiated procedure with a notice for the different types of contracts (see chapter 6); and
- iii) Some services contracts are not fully regulated but subject only to very limited obligations (see section 4.2.2 below).

#### 4.2.2 The division between priority and non-priority services

Services contracts are divided into:

1. **"Priority" services**, which are subject to the full rules under the directives, as outlined below, and
2. **"Non-priority" services**, which are subject only to the rules on technical specifications, award notices (at the discretion of the purchaser), and certain obligations on provision of statistics.

Categories of "priority" services are listed in an Annex IIA. This category includes things like maintenance of vehicles and refuse collection, as well as professional services such as accountancy, IT services and consultancy. All those not listed, which includes, for example, legal and medical services, are non-priority.

These rules are set out in Articles 20-21 of the Directive. The priority services have been selected on the basis of the potential scope for cross-border trade, the potential savings, and the availability of information on the service.

Contracts for both are classified as priority if the value of the consideration attributable to the priority services exceeds that of non-priority (Article 22).

Services are classified by comparing the activities to be undertaken with those listed under the relevant CPC codes, and not by looking at the purpose of the contract, as established by the CJEU in Case C-411/00, *Felix Swoboda GmbH v Osterreichische Nationalbank*<sup>13</sup>.

That case arose out of proceedings before an Austrian review body relating to a contract awarded by the Austrian Central Bank for removal services. The Bank had considered that the full rules of the Services Directive did not apply, on the basis that the contract was a contract mainly for non-priority services, namely "supporting and auxiliary transport services". Swoboda challenged this view,

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<sup>13</sup> Case C-411/00, *Felix Swoboda GmbH v Osterreichische Nationalbank* [2002] E.C.R. I-105670.

claiming that the contract mainly involved various logistic and planning services relating to the move, and was therefore one for priority services. The CJEU ruled that it was necessary to classify the various services involved in the contract individually as belonging to the priority or non-priority categories, and to classify the contract as a whole according to their relative value, rejecting an alternative approach of identifying the "main purpose" of the contract and then classifying the contract by reference to that purpose. In some cases what might appear naturally to be a single service must be broken down into its component activities for classification purposes: in *Walter Tögel* case<sup>14</sup> the CJEU ruled that the provision of services consisting of the transport of sick and injured persons with a nurse in attendance to provide medical assistance contains both services within the priority category (the transport element, categorised as "land transport") and services within the non-priority category (the medical element, categorised as "health and social services). Such a contract must then be classified as either a priority or non-priority services contract according to the relative value of the different types of services.

### **4.2.3 "Mixed" contracts**

Some contracts are mixed in the sense that they contain work, supplies and/or services in a single contract.

The rules state that a contract for both products and services is a supply contract if the value of the consideration attributable to the supplies is greater than that for the services; otherwise it is a service contract (Article 1(2)(d) of the Directive). For contracts involving sitting or installation of goods e.g. fitting kitchen equipment, it is stated that the value of the sitting or installation work is treated as part of the "supply" element of the contract for classification purposes.

Before 2004 there were no explicit provisions on mixed works/services contracts. However, the new Public Sector Directive now contains an explicit provision on contracts containing both works and services, in Article 1(2)(d), third paragraph. This provides: "A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service contract". This makes it clear that, at least for cases in which the contract has a principal object, classification is to be based on a main object test rather than (as with supply/services contracts) a test based on the relative value of the services/works. However, it is not inconsistent with this new provision to apply a relative value test when the contract has no main object. This approach was confirmed by Case C-412/04, *Commission v Italy*. This stated that such a mixed contract is to be classified by considering the main purpose of the contract *and* that the relative value of the works and the services is just one factor in determining the contract's main purpose.

### **4.2.4 Thresholds**

#### **4.2.4.1 General principles and current thresholds**

The directive applies only to contracts above certain financial values (thresholds). These seek to identify contracts for which there is likely to be cross-border

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<sup>14</sup> Case C-76/97, *Walter Tögel v Niederösterreichische Gebietskrankenkasse* [1998] ECR I-5357.

competition. In many EU Member States (as in the national procurement systems of many other countries) competition is mandatory at much lower thresholds, to promote domestic objectives such as value for money and elimination of corruption; but the directives are concerned merely with opening up trade across borders and so have not regulated smaller contracts.

The current thresholds are set out in the separate Table of Thresholds below. They are lower for certain authorities, namely most central/federal contracting authorities, such as government departments. This is because the WTO's Government Procurement Agreement (GPA) regulates these contracts at lower thresholds than for other contracts, and the EU wished to align the directives with the GPA.

The thresholds for applying the directive have been simplified in the 2004 directive. They are now all stated in Euro, which was not the case before.

The thresholds are revised every two years to make sure that they are in line with the thresholds in the GPA (which are set out in SDR, not Euro). They have already been revised so that the current Euro figures differ slightly from those in the text of the original directives included in your Legislation Pack. The current Euro figures were adopted in Regulation (EC) No 1177/2009 [2009] OJ L 314/64, which amends the directives to insert the current figures. For countries that are not in the Euro-zone, the Euro thresholds are converted into national currencies when the Euro rates are established, and that conversion value (which is based on the exchange rate in the previous two years) is applied for the next two years. Note that they will change again for the years 2012-2013.

The main current thresholds for contracting authorities covered by the public sector rules, set out in Euros, are as follows:

**Table of Thresholds:** Main thresholds under the EU procurement directives 1 January 2010 – 31 December 2011

	<b>Supplies</b>	<b>Priority services</b>	<b>Works</b>
<b>Most central/federal contracting authorities (those listed in Public Sector Directive Annex IV)</b>	€125,000	€125,000*	€4,845,000
<b>Other contracting authorities</b>	€193,000	€193,000	€4,845,000

\*Except that a threshold of €193,000 applies to Research & Development Services (Category 8) and certain telecommunications services in Category 5, namely CPC 7524 - Television and Radio Broadcast services, CPC 7525 - Interconnection services and CPC 7526 - Integrated telecommunications services. The threshold of €193,000 also applies to *non-priority* services in all cases.

#### **4.2.4.2 Valuation of contracts for threshold purposes**

The Public Sector Directive, Article 9, contains a number of rules on how the value of a contract is to be calculated for the purpose of deciding whether the financial thresholds are met and, hence, whether the directive is to apply.

The rules basically provide that value of the contract for the purpose of the threshold rules is its estimated value net of value added tax (Article 9(1)). The Directive makes it clear that it is for the contracting authority to estimate the value. This suggests that there is some margin of discretion available.

The time for estimation for this purpose is the time at which a contract notice should have been sent to the Official Journal. For award procedures covered by the directives but for which no notice is required, it is the time at which the authority commences the procedure. (See Article 9(2)). It can be noted that the latter refers to the time at which a notice would have been sent if required, but this is rather artificial.

The estimated value refers generally to the "total amount payable" (Article 9.1).

Taking account of the purpose of the directives of subjecting to competition contracts of a value likely to be of interest to cross-border trade, this probably includes not just any amount payable by the contracting authority but also any amounts payable by others (e.g. public users of the service, where applicable), since these amounts are relevant for judging the interest of the contract in terms of its size. For the same reason it would seem that in calculating the value for the contract it is necessary to take into not merely financial payment but also other consideration. Thus contracts of exchange or part-exchange are covered.

The following further rules are also laid down or clarified in the directive:

1. When the procuring entity intends to provide goods for a contractor to use in carrying out a public works contract, the value of the consideration is to be calculated to include the estimated value of those goods (Article 9(4)). There is no requirement for services provided by the authority to be taken into account (for example, electricity or security services); this is anomalous (and differs from the position under the utilities rules). There is, further, no provision for taking account of the value of goods provided by the authority in relation to a services contracts or services provided in relation to a supply contract, which is also anomalous: an authority might provide services, for example, to a supplier installing goods under a supply contract. It might have been expected that this kind of anomaly would have been addressed in the consolidation of the rules on works, supplies and services which took place in 2004, but this was not done.
2. In the case of a public services contract, Article 8.9 provides that, where appropriate, the authority shall, in determining the value, use as a basis the premium payable and other forms of remuneration for insurance services; the fees, commissions interest or other forms of remuneration payable for banking and financial services; and the fees or commission payable or other forms of remuneration for design services. There is, anomalously, no explicit requirement in the directive itself relating to works or supply contracts although such fees, etc. could be payable under works or supply contracts, including in connection with any services provided under those contracts. However, it can be argued that these anyway need to be taken into account for all contracts on the basis that even without these express provisions such payments are relevant in establishing the value of the contract.
3. Article 9.1 states that when the contracting authority provides for prizes or payments to the "candidates or tenderers" these must be taken into account in calculating the estimated value of the contract.
4. Public Sector Directive - Article 9(1) states generally that the calculation of estimated value shall take account of the estimated total amount

"including any form of option". Unlike the previous directives this provision covers works contracts as well as supply and services contract. Previously the directives required it to be assumed that the option would be exercised and so take account of the highest possible value of the contract, but this seems no longer to be required.

5. For a supply contract for a fixed term the estimated value of the contract is – as might naturally be expected – the amount that the authority expects to pay over the contract term (Article 9.6(a)).
6. For a services contract which indicates a total price it appears that the contract is to be valued by taking the total price. Where no total price is indicated for a services contract the valuation for any contract of 48 months (four years) or less will be the total that the authority expects to pay (Article 9.8(b)(i)). However, for a services contract under which services are to be provided over a period *exceeding* four years, even where the duration of the contract is certain, the value is not the total value of the contract: instead the estimated value of the contract is to be the value of the consideration which the authority expects to give in each month, multiplied by 48 (Article 9.8(b)(ii)). Thus a contract is treated as one for only four years. There is no equivalent provision for supply contracts of more than four years; for these contracts, as we have seen, the value is always the total value.
7. For supply contracts of hire which have no fixed term (for example, hire for an indefinite period subject to termination) or the term of which cannot be defined (for example, because the hire is to terminate on the happening of a certain event). For this case, rather than requiring a speculative estimate of the likely length, and hence value, of the contract, the estimated value is the value of the consideration which the procuring entity expects to give in each month of the hire, or service provision, multiplied by 48 (Article 9.6(b)). The same principle applies for services contracts of indefinite duration that do not have a total price (Article 9.8(b)(ii)).

#### **4.2.4.3 The aggregation rules**

##### **1. Introduction**

In principle, the relevant value for threshold purposes is the value of each individual contract. However, in certain cases an authority must add together the value of purchases made under a number of similar contracts, and the regulations will apply if the value of these taken together exceeds the threshold. These "aggregation" rules make it difficult for authorities to evade the regulations by splitting their purchases into separate contracts, each of which fall below the threshold. There is also an express prohibition that probably prohibits deliberate "contract splitting" to avoid the directives, as explained below, but this is difficult to prove. The aggregation rules avoid the need for proving motive, by applying the regulations in certain "objective" situations where it is reasonable for the authority to make its purchases in the form of a single large contract. In this respect the aggregation rules have a potentially important role in securing the effectiveness of procurement rules. The efficacy of these aggregation rules is, however, hampered by the uncertainties over how they are to be applied, as we will see.

The aggregation rules also have the effect of ensuring that the regulations are not rendered inoperative by inefficient purchasing, as well as by deliberate evasion. Their effect is that where there is a package of work that is likely to attract the

attention of a single firm and is sufficiently large to warrant Europe-wide advertisement, all that work must be awarded under the regulations. The need to identify and advertise all such work operates as an incentive for authorities to award it in a single package, which might attract cross-border competition.

It is important to note that when requirements must be aggregated, it does *not* follow that the whole requirement must be advertised as a single procurement – there is sometimes confusion on this point. Thus purchasers may split up the requirement into smaller periodic contracts (which they might do, in particular, to make the work more attractive to the market or to encourage participation by small or medium-sized enterprises). The important point, however, is that all the relevant contracts, however small, *must be awarded in accordance with the procedures of the regulations*, unless some specific exemption applies. This may in practice lead to a tendency to advertise the requirements as a single procurement (although possibly in lots), because of the expense and inconvenience of using the regulations' procedures for lots of separate, small contracts. One effect may be to discourage procuring entities for dividing up requirements to encourage participation by smaller firms. There is, however, an exception to the rules to allow for this possibility, which is explained further below.

The EU's aggregation rules are quite complex and are not replicated in other systems such as that of the WTO or UNCITRAL. However, they may provide a model for consideration for other systems seeking to deal with the problem of "contract splitting" to avoid thresholds, which is a well-recognised phenomenon.

## **2. Goods and services**

There are two types of aggregation rules for goods and services – one that requires aggregation of different contracts of the same type awarded over a period of time, and one that requires aggregation of contracts awarded to fulfill a single requirement (i.e. contracts divided into lots). We will consider each in turn.

### ***Requirements over time***

Rules on aggregation apply for public supply and public services contracts when a purchaser has a requirement over a period of time for goods or services of a particular "type", and enters into a number of contracts for those goods or services (Article 9.7 and 9.8). In this case value of the separate contracts must be added together and if the total value of the contracts exceeds the threshold the directive must be applied to all the contracts, even though, individually, they are for an amount below the threshold. The same principle applies where there is a single "renewable" contract – the value of each new agreement under the arrangement must be aggregated (Article 9.7 and 9.8).

This "aggregation" may be done in one of two ways, as set out below. The choice of method is for the contracting authority (but it may not choose the method with the intention of avoiding the directive) (Article 9.7).

- (i) (Where there have been contracts of the same type in the past) by aggregating the value of the consideration given under contracts of the same type in the previous year, adjusted to take account of any expected changes in quantity and cost in the next twelve months (Article 9.7). The previous year may be taken either as the twelve months ending immediately before the time the notice would be published, or the last financial year ending before this time.

- (ii) By estimating the amount to be paid in the next twelve months, for cases in which the contract is for an indefinite term or a definite term of twelve months or less (Article 9.7). The twelve-month period is calculated from the time of the first date for delivery under the contract.

The directive states that these rules apply to contracts of the same "type". The meaning of "type" is not clear, but an accepted view<sup>15</sup> is that goods or services are of the same "type" where they are *typically available from the same firm*. This reflects the objective of the rules as being to require aggregation when it is commercially reasonable for requirements to be packaged in a single contract. Services will generally need to be aggregated only at much lower levels than the "categories" of services listed in Annex II to the directive, which typically cover a very wide range of services which would not typically be provided by a single firm.

Following a similar approach, the test for what are contracts "with similar characteristics" would seem to be whether the same firms would be likely to be interested in the contracts. This could depend on many factors, including, for example, whether the contract is for hire or for purchase – although each case will depend on its facts (for example, in some industries the same firms will be involved in supply selling and in hiring out certain products, whilst in other this may be done by different firms.

#### ***A single requirement divided into lots***

In addition, where a proposal for the acquisition of "similar" supplies may result in contracts being awarded at the same time in the form of separate lots, it is necessary to take account of the value of all the lots in applying the aggregation rules (Article 9.5 of the directive). The value of all the relevant contracts must be aggregated in this case. The same principle applies to services where the authority has a single requirement for services (Article 9.5).

There is an exception to this rule set out in Article 9(5) of the Directive (which previously applied only to works and services but was extended also to supplies in 2004). This is designed to encourage contracting authorities to divide contracts into lots in order to provide opportunities for small and medium-sized enterprises. In doing so it aims to mitigate the potential adverse impact on small and medium-sized enterprises which we have noted above may follow from the aggregation rules, which tend to encourage the packaging of contracts into larger amounts. The exemption provides that where the value of a contract for works is less than one million Euros, or for supplies or services 80,000 Euros, that contract may be excluded, even though the directive would otherwise apply because the total value of relevant contracts under the aggregation rules exceeds the threshold. The authority may take advantage of this exemption for contracts worth up to 20 per cent of the total value of the lots.

These provisions appear to affect only the exempt lots themselves: the value of the exempt lots may not be disregarded in determining the value of the non-exempt part of the contract.

An example of how this operates in relation to works contracts is set out at below.

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<sup>15</sup> A. Brown, "Getting to Grips with Aggregation under the E.C. Public Procurement Rules" (1993) 2 *Public Procurement Law Review* 69.

### **Example of the exemption from the aggregation rules for small lots**

A contracting authority has decided to undertake a construction project with an estimated value of £5.2 million. It proposes to award a contract for the main part of the construction, valued at £3.2 million, and four contracts worth around £500,000 each. Generally, the aggregation rules require the Regulations to be applied to all the contracts if the value of all the contracts added together exceeds the threshold. This is the case here, since the total is £5.2 million, which exceeds the threshold of £3,927,260.

However, under the exemption two of the contracts worth £500,000 may be excluded. They are not individually subject to the directives, since their value is only £500,000. The exemption for lots may be used since:

- each is worth less than the maximum value for exempt lots, namely £810,583; and
- together (totaling £1 million) they account for less than 20 per cent of the total (£5.2 million) value of the work.

The exemption can only be applied, however, to two of the lots. If it were applied to three, the exempt amount would be worth £1.5 million, which exceeds 20 per cent of the total value of £5.2 million.

The value of the exempt lots may not be disregarded in determining the value of the non-exempt part of the contract. Thus if the authority decided not to apply the directive to two of the £500,000 lots, the value of these lots would still need to be aggregated to decide whether the other work on the same work that forms part of the requirement should be subject to the directive. (In fact, in that case the threshold is exceeded even without the £500,000 lots).

### **3. Works**

As explained, the Public Sector Directive and apply both to contracts for the carrying out of works, and to contracts for the carrying out, or procurement by any means, of "a work". These situations need to be considered separately for the purpose of the aggregation rules.

So far as *the carrying out of works* is concerned, there is no requirement to aggregate different contracts to procure works under contracts of the same "type", such as applies to supply and services contracts.

So far as contracts *for the carrying out or procurement of a work* are concerned, on the other hand, Article 9.5(a) of the directive requires that an authority must aggregate the value of separate contracts awarded at the same time in different lots for the purpose of carrying out a "work". For example, a university erecting a new hall of residence which lets separate contracts for different building phases must aggregate the value of each separate contract; thus it must advertise them if the total costs of the building exceeds the threshold. The definition of a "work" for this purpose was discussed earlier.

Some aspects of the equivalent provision on aggregation of works in the Utilities Directive were considered by the CJEU in Case C-16/98, *Commission v France*<sup>16</sup>.

The CJEU ruled that separate contracts for extension and maintenance work on an electricity supply system, which were similar and awarded at the same time, and co-ordinated by the same entity were required to be aggregated, where they related to different parts of an inter-connected system. This was so even though

<sup>16</sup> Case C-16/98, *Commission v France* [2000] ECR I-8315.

the system fell within the area of various different local authorities and it may have been these authorities, rather than the co-ordinating body which acted for all the authorities in the procurement, which were actually the procuring entities.

This demonstrates that contracts awarded by different entities may sometimes need to be aggregated.

It also shows that maintenance work etc on existing constructions – and not merely new construction – can amount to a “work”.

The CJEU in Case C-16/98, *Commission v France* also ruled that it had not been shown that separate contracts in the different local authority areas for work on street lighting related to the same “work”. This was so even though again the contracts were similar and awarded at the same time and co-ordinated by the same entity: the key factor seems to have been that here, unlike with the electricity supply work, there was no technical connection between the networks of the different authorities.

There is an exception to the aggregation rule for works on lots under Article 9(5) of the Directive for certain small “lots” (up to 1 million Euros in size each) worth up to 20% of the whole. An example of how this exemption operates in relation to works contracts is set out above.

#### **4. The prohibition on contract splitting**

The Public Sector Directive provides in Article 9.3 that no works project or proposed purchase of a certain quantity of supplies and/or services may be subdivided to prevent it coming within the scope of the directive. This provision appears to deal with the case in which had the directive not existed, the entity would have awarded one single contract of a value above the relevant threshold, but because of the directive it instead awards two or more distinct contracts, with the motive of avoiding applying the regulations. In practice, many of the situations that result from such conduct are now caught by the “objective” aggregation rules discussed above – introduced, as we have seen, because it is difficult to police contract splitting using a rule that depends on proving a motive of avoidance on the part of the contracting authority.

It should be noted that some doubt over the meaning of the above provision in Article 9.3 is created by Case C-16/98, *Commission v France*. In that case the CJEU considered a similar (although slightly differently worded provision) of the Utilities Directive, and came to the conclusion that it was not an independent prohibition on deliberate contract splitting but merely prohibited the procuring entity from violating the “objective” aggregation rules! However, it is rather doubtful whether this interpretation is correct since it deprives the splitting provisions of any independent meaning. The Advocate General took the more commonly accepted view that the provision is an independent prohibition along the lines suggested in the previous paragraph.

#### **5. The issue of “discrete operational units”**

In some cases a public body that is a single legal entity may function in practice as a number of independent units. For example, many schools in the UK are legally part of the local authority but function in an independent manner with a separate budget, and carry out their own procurement. The question arises as to whether the purchases of all the units must be aggregated. To do this is

inconvenient: if the principle of the unit's autonomy and control over procurement is to be retained, the effect is that units are required to follow the regulations in the award of a number of small contracts.

The directives do not contain any express provisions on this issue.

It can first be pointed out that the aggregation rules do not state clearly that aggregation must be carried out at the level of the contracting authority rather than the purchasing unit: it is merely provided, for example, that "regular" contracts must be aggregated, and it could be suggested that contracts are only "regular" when awarded by the same part of the authority. Considerations of policy support this view. There are good reasons why purchasing authority may be delegated to separate units – for example, to improve accountability, to reduce overheads (where economies of scale are outweighed by extra bureaucratic costs from centralising the purchasing function), or to improve responsiveness of purchasers to user needs. To preclude such appropriate administrative organisation (or, as is the alternative, to require advertisement of a large number of small contracts by the separate units) is an unacceptable cost to impose for the benefit gained for the open-market policy. Further, it emphasises form, rather than substance: it is often purely chance whether or not a body that is effectively independent has a separate legal identity. The need to consider substance rather than form has often been emphasized by the CJEU including in a manner that provides for a limited rather than expansive application of the regulations in its recent jurisprudence concerning contracts between public sector bodies (see section 4.2.6 below on in-house contracting). The Commission has indicated unofficially in a working document that it may accept provisions on "discrete operational units" in relation to the utilities rules: European Commission, *Policy Guidelines on Contracts Awarded by Separate Units of a Contracting Entity under Dir. 90/531/EEC (Utilities)*, January 20, 1993 (favourably considered by the Commission's Advisory Committee on the Opening Up of Public Procurement and Advisory Committee on Public Procurement). The Commission also accepted the provisions on "discrete operational units" in the United Kingdom regulations when it considered the United Kingdom draft of the provision. Where the concept of a separate unit is clearly defined, the possibility of abuse should be precluded.

Another view, however, is that the directives require aggregation of all purchases made by a contracting authority which is a single legal entity, and that provisions on "discrete operational units" are incompatible with the directives. The Commission indicated in 1993, in reply to a question from the European Parliament, that this is the case ([1993] O.J. C207/38).

## **4.2.5 Contracts expressly excluded from obligations in the directives**

### **4.2.5.1 Introduction**

Once it has been established that a contract is a works, supply or services contract and is above the threshold of the directives, and so is *prima facie* covered, it is necessary also to consider whether either:

- (i) the contract is excluded; and
- (ii) whether there are any other limits on the application of the directive.

In this section we will outline the list of contracts that are expressly excluded. There are also some further exclusions relating to contracts made with other public bodies, which are considered in section 4.2.6 below.

#### **4.2.5.2 Exclusions for contracts for defence purposes and contracts affected by security considerations**

Article 10 of the directive states that it applies in principle to contracts for defence purchases, but that this is subject to Article 346 TFEU (ex Article 296 TEC). Article 346 TFEU excludes from the TFEU altogether procurements of military equipment – such as tanks and missiles – where this is necessary for security reasons.

There are also certain more general exclusions applicable on security grounds in Article 14, which are relevant both for defence procurement and for other procurement affected by security considerations. These exclusions cover:

- i) contracts classified as secret;
- ii) contracts the performance of which must be accompanied by special security measures; and
- iii) when the protection of essential security interests requires exclusion.

In Case C-324/93, *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith* ("Evans Medical")<sup>17</sup>, the CJEU indicated that this exclusion could not be invoked for a contract for delivery of drugs, as this would not satisfy the proportionality test: the objective of preventing improper diversion could be achieved in an open or restricted procedure by an approach that was less restrictive than a total exclusion, namely taking account of a firm's ability to provide security as an award criterion. However, a less strict approach to the application of proportionality may possible apply in cases which – unlike *Evans Medical* – involve military security issues. This is indicated by Case C-252/01, *Commission v Belgium*<sup>18</sup>, concerning a contract for surveillance of the Belgian coastline by aerial photography. The Commission contended that Belgium had violated the Services Directive by extending an existing contract without advertising but the CJEU accepted that the exemption for contracts accompanied by special security measures applied. Belgium argued that the contract was open only to those holding a military security certificate allowing access to classified data, sites etc subject to rules (such as rules requiring the holder of the certificate to conceal classified objects before publishing any photographs). The CJEU indicated that this was sufficient for the exemption to apply and did not mention the "less restrictive means" test relied on in *Evans Medical*.

These exemptions, including their specific application to defence contracts are all considered in more detail in chapter 9. Note that the treatment of defence and security procurement was significantly affected by the EU's new Defence Procurement Directive (Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009, on the coordination of procedures for the award of certain works contracts, supplies contracts and service contracts by contracting authorities or entities in the fields of defence and security). This provides, inter alia, for special procedural rules for procuring military equipment in cases in which Article 346 TFEU (ex Article 296 TEC) does not actually apply because there is no security reason to exempt the purchase from the TFEU.

#### **4.2.5.3 Certain international contracts**

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<sup>17</sup> Case C-324/93, *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith* ("Evans Medical") [1995] ECR I-563.

<sup>18</sup> Case C-252/01, *Commission v Belgium* [2003] ECR I-11859.

There are also exemptions under certain conditions for contracts governed by different procedural rules connected with joint projects with certain non-member states, those by international bodies (for example, the United Nations or World Bank), and those made pursuant to international agreements on the stationing of troops. (Article 15).

#### **4.2.5.4 Contracts for certain services**

Also excluded are some types of services contracts such as arbitration or conciliation services; certain financial services connected with the issue, purchase, sale or transfer of securities or other financial instruments; and certain research and development services (Article 16).

#### **4.2.5.5 Subsidised housing schemes**

Authorities are also permitted to dispense with some of the usual rules, where necessary in certain cases, and to the extent necessary, in awarding contracts for the design and construction of public housing schemes (Article 34).

#### **4.2.5.6 Utility contracts**

Contracts connected with "utility" activities are covered by the Utilities Directive rather than the Public Sector Directive, even when awarded by public bodies (Article 12). The coverage of the Utilities Directive is discussed in detail in chapter 7.

#### **4.2.5.7 Concessions**

##### **1. Introduction**

Arrangements classified as works concessions or services concessions are covered by different rules from other procurement arrangements under the directives. In essence, as we will see below services concessions are wholly excluded whilst works concessions are subject only to limited obligations.

##### **2. The definition of concession**

A public works concession is defined in the Public Sector Directive, Article 2(1)(3), as a contract "of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment". A parallel definition applies under Article 2(1)(3) of the Directive for services concessions.

An example of a works concession would be where a contractor who has built a road or bridge is remunerated by being permitted to collect tolls from users for a set period. An example of a services concession is the arrangement considered in the *Telaustria* case<sup>19</sup>. In this case, as we have seen, a service provider was allowed to exploit for commercial purposes an electronic telephone database that it was required to compile under the contract. Other examples of this kind of contract are where a consortium is required to build and operate an urban

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<sup>19</sup> Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG* ("Telaustria") [2000] ECR I-10745.

tramway system, and is paid by being permitted to collect fares from users; or where a firm contracts to build and operate a leisure centre for a local authority and is remunerated by charging users of the facilities.

Exploitation entails that the provider assumes the economic risk arising from the provision and management of the services: Case C-382/05, *Commission v Italy*<sup>20</sup> (Italy waste processing contract) (and for another recent example of an arrangement considered not to be a concession, see Case C-437/07, *Commission v Italy*<sup>21</sup>). Under a typical service concession the risk arises out of the fact that the service provider bears the cost of providing the service, and obtains income to cover those costs and make a profit only if it is successful in generating revenue by exploiting the services by selling them to the public. In such a case, a significant element of the economic risk is the demand risk – the risk concerning the extent to which third parties will choose to use the service. An arrangement is not a concession if the terms of the contract remove or substantially limit any element of risk for the provider. For example, if an agreement were to provide a guaranteed reasonable level of income from the procuring entity if the user fees were not sufficient, this might not be a service concession. (The Commission's *Interpretative Communication on Concessions under Community Law* [2000] O.J. C121/2 suggests that if "recovery of expenditure" is guaranteed there is an insufficient element of risk for a concession – footnote 9).

For a concession it is also necessary that the remuneration for providing the services should not come from the contracting authority itself: see again Case C-382/05, *Commission v Italy* (Italy waste processing contract).

As can be seen from the definition in the directives as stated above, something can be a concession if only part of the income comes from exploitation, but it is not clear how great that part must be.

### 3. Current rules on concessions

Services concessions are expressly excluded from the Public Sector Directive (Article 17). There was no explicit exclusion until 2004, but under the old directive the CJEU had ruled that such contracts were not covered: see the *Telaustria* case (concerning the Utilities Directive but equally applicable to the public sector).

In Articles 56-61 of the Public Sector Directive there are special rules for public works concession contracts.

The award of a works concession by a contracting authority is not subject to the same rules as the award of other works contracts, but only to an obligation to advertise the contract in the *Official Journal*, and to give at least 52 days (as a general rule) for firms to respond. As with open procedures, extension may be required for on-site visits etc and may be reduced by 7 days when the authority transmits the notice in the electronic form laid down in the directive). There are no explicit rules concerning, for example, the kind of procedure to be used – indeed there is not even any requirement to hold a competition - or the award criteria to be applied.

Note also that in addition, the directive place obligations on a party holding a works concession, when awarding its own works contracts (sub-contracts) for the

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<sup>20</sup> Case C-382/05, *Commission v Italy* [2007] ECR I-6657.

<sup>21</sup> Case C-437/07, *Commission v Italy* [2008] ECR I-153\*.

purpose of the concession, even though the concessionaire is not itself a contracting authority (Articles 62-65: see further section 4.1.3.2. above).

A key reason why concessions have been treated differently under the directives is that in the legal system of some Member States they are not regarded as ordinary procurement but as a different type of legal relationship altogether, and have not been regulated by public procurement law. However, this kind of contract is of particular interest to cross border trade as the contracts involved are very large, extending over a long period of time (25-30 years, or more in some cases) and potentially very profitable.

#### **4. Proposals for the future**

One of the subjects that the Commission has been addressing since completion of the recent (2004) reforms is concessions and other public-private partnerships. The Commission has published a Green Paper on the subject, European Commission, *Green Paper on public-private partnerships and Community law on public contracts and concessions* COM(2004) 327 final (and see, earlier, the Commission's Communication, *Public Procurement in the European Union* (COM(98)143) at 2.1.2.4), followed up by a Communication, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions*, 15 November 2005, COM (2005) 569 final.

In the Communication, the Commission states that it is:

- Proposing to regulate concessions
- To do this by a separate legal instrument for concessions, rather than bringing concessions into the existing directives.

It is quite likely that the proposal will include an award procedure similar to that of the negotiated procedure with competition under the directives.

This approach of having a separate set of rules can be criticised since the award procedures for concessions are often very similar to those for awarding contracts that are not concessions – such as long-term projects for private parties to build and operate hospitals, schools, prisons etc. They involve exactly the same problems – very long-term contracts, long award procedures, bids submitted mainly by consortia, high procedural costs, involvement of private finance, need for discussions to design and adjust the project, etc.

Apart from the plans for the Commission (possibly) to propose a general regime for regulating the award of concessions, there has already been specific legislation on the award of contracts for passenger transport services: see Regulation 1370/2007 [2007] OJ L315/1.

#### **4.2.6 Limits on the application of the directives to arrangements with public bodies: in-house arrangements, quasi in-house arrangements and other forms of public sector co-operation**

##### **4.2.6.1 Introduction**

In most cases of public procurement we are talking about arrangements made for the acquisition of supplies, works and services from the private sector. However, in many cases the public sector may itself supply the supplies, works or services that it needs.

A public body may do this through its own internal resources, through purely “in-house” arrangements rather than through a contract or other arrangement with another entity. The CJEU has made it clear that in this case the arrangement is not covered by the TFEU or procurement directives, and thus such arrangements can be made without the need for any transparency or competitive process under the procurement rules: Case C-107/98, *Teckal Srl v Comune de Viano* (“Teckal”)<sup>22</sup>. For example, a local authority can decide to employ its own internal workforce to maintain roads, or to clean streets, without following the directives.

However, in other cases a public body may enter into some kind of formal arrangement with another legal entity from the public sector for that other entity to supply goods, works or services to it. This may sometimes be a body that the procuring entity has itself set up for this very purpose – for example, a subsidiary company of a local authority that has been set up to fulfil a specific task such as carrying out waste treatment and collection for the authority. In other cases a public body may co-operate with other bodies in setting up such an entity to serve those bodies jointly; or it may simply enter into an arrangement with another public body that it considers can provide the service efficiently to it.

The *Teckal* case, above, made it very clear that the starting point for these cases is that the procurement directives apply in principle – the fact that the arrangement is with another public body does not automatically exclude it. In other words, the directives apply in principle to contracts made by one public sector body with another public sector body.

However, there are a number of very important exceptions to this principle. These are outlined below. Some of these are stated in explicit provisions in the directives; this is the case with the first two exceptions considered below for service providers with special or exclusive rights, and for central purchasing bodies. Others have been developed by the CJEU and are still being refined in a rapidly evolving case law. In these cases the CJEU has to strike a balance between considerations of opening up markets and other legitimate interests of Member States in providing for the provision and goods and services through a purely public sector framework rather than through the market – for example, because of a desire for closer control over the service provision than can be provided through a contractual framework with an external provider, or because of greater trust in the public sector ethos above commercial arrangements as a way of ensuring quality in service provision.

It should also be noted as a general point at the outset that competition law issues – as well as issues under the free movement rules and public procurement directives – may arise when a contracting authority entrusts a task to another contracting authority or to a body linked with the public sector, in an exclusive arrangement. There are thus often two questions to consider in these cases – one, whether or not there should have been a competition under the directive or TFEU’s free movement provisions and the second whether the arrangement under which the task is entrusted to the provider violates competition law.

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<sup>22</sup> Case C-107/98, *Teckal Srl v Comune de Viano* (“Teckal”) [1999] ECR I-8121.

#### **4.2.6.2 Exclusive rights relating to services**

Services contracts are exempt where services are provided by another contracting authority with an exclusive right to provide them, or an exclusive right necessary for their provision (Article 18 of the Directive). This covers, for example, a rule requiring public bodies to buy certain services (such as auditing services) from a centralised public service provider. There is no similar exemption for any exclusive right to provide supplies or works. In the *Teckal* case, a case decided prior to the 2004 Public Sector Directive the CJEU ruled that this exception, which applied at that time only under the Services Directive 92/50, could not be extended by analogy to the Supply Directive since the listed exceptions are exhaustive. This limited approach of applying this express exception only to services was continued under the new consolidated Public Sector Directive in 2004.

#### **4.2.6.3 Contracts with central purchasing bodies**

Central purchasers are bodies set up to provide supplies or services to a range of public bodies. For example, they might purchase products such as motor cars or stationary and the resell them on to other government bodies. The Public Sector Directive allows authorities to buy from another contracting authority – a central purchasing body - without following the directive, in the case of supplies and services contracts.

Article 1(10) defines a central purchasing body as a contracting authority which "acquires supplies and/or services intended for contracting authorities" or "awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities".

Article 11(1) indicates that authorities may procure requirements directly from central purchasing bodies – that is, that a central purchasing body may act as a direct provider. This is already possible – but only, as we have seen above, if the central purchasing body competes for the procurement in a competition held under the directive (unless the *Teckal* "in-house" exception applies (see 4.2.6.4. below). Article 11(2) of the directive adds a further exception to the directive's usual rules for purchases from other public bodies, by stating that contracting authorities that purchase works, supplies or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with the directive in so far as the central purchasing body has complied with it. One effect of this is that a contracting authority can buy supplies or services directly from the central purchasing body if the latter has itself complied with the directive in making its purchases.

The exemption applies only if the CPB has followed the directive in making its own purchases. It is not clear what happens here if the central purchasing body makes the supply out of general stock e.g. in a warehouse. Does this mean the central purchasing body must have complied with the directive in making all its purchases of that stock in order for the purchase from the central purchasing body to be lawful?

From a practical perspective contracting authorities will only wish to rely on this provision for making direct purchases from a central purchasing agency if they can be confident that the agency has itself complied with the directive. If the agency fails to do so the contracting authority using the agency will probably itself be liable to suppliers for the consequences just as with any other

procurement. Thus, its procurement from the agency will be subject to direct challenge and there will also be a theoretical liability to suppliers denied of the opportunity to compete for the contract: see chapter 10 (although note that there have as yet been no cases at CJEU level dealing with the consequences of such a situation). It may be advisable for the authority to include explicit provisions in any agreement with the agency to require it to comply and addressing the consequences of non-compliance.

Note that the definition of central purchasing body requires the body to be a *contracting authority* – it cannot be a private company. The reasoning behind this is that the central purchasing body (CPB) will generally have followed the directive itself in making its own purchases, so it is not necessary for the directive to apply to those purchases again.

#### **4.2.6.4 The in-house (or quasi in-house) exception in Teckal for entities subject to the control of the procuring entity**

One of the most significant exceptions to the EU procurement rules, which has been the subject of much case law of the CJEU in recent years, is what is often referred to as the “in-house” exception.

In this respect, the CJEU has ruled, first, that purely “in-house” contracts - those performed with a contracting authority’s own internal resources - are not covered by the directives.

Also of great importance, the CJEU in *Teckal* dealt with another question which is not dealt with expressly in the directives or regulations but of much practical importance: to what extent may a public body award a contract to another legal entity over which it has some ownership or control? This may be, for example, 100% ownership and control or a limited interest with the rest of the interest being with either the private sector (for example, because the public body wants to attract investment or private expertise into the subsidiary company) or other public sector bodies. One example of the latter case is where several contracting authorities act together to set up separate authorities to act for all of them in providing common services. For example, local authorities might set up a jointly owned company to provide refuse collection services for all of them, to take advantage of economies of scale. How far are such arrangements with a body in which the awarding authority has some interest or control to be considered procurements for the purpose of the directives, rather than measures of internal administrative organisation?

The CJEU ruled in *Teckal* that *in principle* the procurement directives apply to a contract concluded by one authority with a person that is legally separate from that authority – even in the case of a contract with another contracting authority.

*However*, the CJEU also ruled that work may sometimes be regarded as done under an “in-house” arrangement even when it is carried out not by the contracting authority itself but by another legal entity that the contracting authority controls. These are sometimes referred to as “quasi-in-house” arrangements. However, such an arrangement will be regarded as in-house only in limited cases. According to *Teckal* the arrangement is “in-house” only when two conditions are met:

- i) that the procuring entity exercises over the party awarded the arrangement “a control which is similar to that which it exercises over its own departments”; this, later cases have indicated, requires a power of

decisive influence over both strategic objectives and significant decisions of the body awarded the contract (*Parking Brixen* case<sup>23</sup>);

and

- ii) that the entity awarded the arrangement carries out “the essential part” of its activities for the controlling entity.

These *Teckal* conditions have been interpreted in many respects in such a way as to make it difficult to rely on the in-house provision – for example:

1. Case C-26/03, *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Termische Reatabfall- und Energieverwertungsanlage TREA Leuna* (“Stadt Halle”)<sup>24</sup>, indicating that any private interest in the entity awarded the contract, however, small, will preclude the possibility of the test being satisfied;
2. *Parking Brixen* case: in this case the CJEU indicated that neither the kind of powers exercised generally by shareholders of a company, nor influence through a power of appointing members of a board is sufficient to satisfy the “control” test: direct control over specific decision-making is required for the company to be considered an in-house entity, even when it is 100% owned by the contracting authority;
3. Case C-340/04, *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SA* (“Carbotermo”)<sup>25</sup>, concluding that even in a case where there was almost a 100% shareholding by the government there was insufficient de facto control because it was merely the control exercised by ordinary shareholders under company law, which is not alone sufficient; and also suggesting that control may not be sufficient when exercised through a holding company.

On the other hand, in the *Carbotermo* case (paras.37 and 69 of the judgment) the CJEU accepted that the conditions could in principle be satisfied where control of the supplying entity is shared by several entities, e.g. several local authorities, to which the supplying entity provides services – something that previously was not clear.

This was confirmed in Case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* (“Tragsa”)<sup>26</sup> (para.57). Further, in *Tragsa* the CJEU also stated that the fact that a contracting authority holds – either by itself or with other contracting authorities – 100% of share capital “tends to indicate, generally” that it exercises sufficient control (para.57). Further, the CJEU expressly rejected the argument that the fact that the Autonomous Communities themselves held only 1% of the shares between them was not sufficient (para.59).

In Case C-324/07, *Coditel Brabant SA v Commune d’Uccle and Région de Bruxelles-Capitale* (“Coditel”)<sup>27</sup> the CJEU found the *Teckal* test to be satisfied in a case in which control of a company called Brutélé, awarded a contract for managing a municipality’s cable television network, was shared with other

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<sup>23</sup> Case C-458/03, *Parking Brixen v Gemeinde Brixen* (“Parking Brixen”) [2005] ECR I-8585.

<sup>24</sup> Case C-26/03 *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Termische Reatabfall- und Energieverwertungsanlage TREA Leuna* (“Stadt Halle”) [2002] ECR I-1.

<sup>25</sup> Case C-340/04, *Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SA* (“Carbotermo”) [2006] ECR I-4137.

<sup>26</sup> Case C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* (“Tragsa”) [2007] ECR I-2999.

<sup>27</sup> Case C-324/07, *Coditel Brabant SA v Commune d’Uccle and Région de Bruxelles-Capitale* (“Coditel”) [2008] ECR I-8457.

municipalities. In this case the governing council consisted of representatives of the affiliated municipalities. These representatives were appointed by the general assembly of Brutélé, which was itself appointed by the municipal council of each municipality from among the municipal councillors, mayor and aldermen. The CJEU considered that the fact that Brutélé's decision making bodies were composed of representatives of the affiliated public bodies indicated that they were under the control of those public bodies. The CJEU stated that it was irrelevant that voting on individual decisions was by majority. These two cases suggest that the CJEU may be moving towards a less strict approach to the rules.

What if an in-house body is awarded work under the in-house rule but later privatised, so that the "in-house" control test no longer applies? There has been a trend in some countries (eg. UK, Denmark, Sweden and Germany) of selling to the private sector government factories and service agencies (such as government printing units). Often when these are sold as businesses to the private sector the government wants to guarantee the new business some government contracts for a few years, so that the business will be viable whilst it "finds its feet" in the private sector. Is this permitted, or must the contracts be advertised under the directives – even if it is business which the unit was carrying for the government when it was itself part of government?

In Case C-29/04, *Commission v Austria* ("Mödling")<sup>28</sup> the CJEU made it clear that the in-house rule cannot be relied when an authority sets up a separate entity that it controls with the *intention* of privatising it once it has been given the work under the in-house rule – this is simply a device to get round the directives.

What is the position, however, if there is no intention to privatise when the supply arrangement is made, but such privatisation later occurs? This issue was considered in Case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA* ("ANAV")<sup>29</sup>, but the answer of the CJEU was not very clear. In this respect, the CJEU commented that "If, for the duration of the contract at issue in the main proceedings, the capital of AMTAB Servizio [the supplying company] is open to private shareholders, the effect of such a situation would be the award of a public services concession to a semi-public company without any call for tenders..." (para.30 of the judgment); that any participation of private capital precludes the derogation (para.31); and that therefore if the company "is open" to private capital" (para.32) the derogation cannot apply. It is possible that the CJEU is suggesting that any actual participation of private capital in the company whilst it holds the concession would infringe the TFEU (or the directive, as applicable). This appeared to be the view of the Advocate General, who seems to consider that the in-house conditions must be met on a continuous basis (see paras.19-20 of the judgment). However, it is also possible that the CJEU is referring merely to the situation in which there is an intention at the outset to award a contract to a company involving private participation, since that was a possibility that had been raised on the facts of the case itself. It can also be pointed out that the Advocate General relies on the *Mödling* case for the conclusion that the conditions must be met on a continuous basis – yet (as noted above) the *Mödling* case clearly does not support such a narrow view of the derogation.

It can be noted that a public body may, however, sometimes be able to buy from another body in which it has an interest, under the directive's new provisions on central purchasing bodies, outlined above (for example, when it is a member of a

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<sup>28</sup> Case C-29/04, *Commission v Austria* ("Mödling") [2005] ECR I-9705.

<sup>29</sup> Case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA* ("ANAV") [2006] ECR I-3303.

consortium that has set up a central purchasing body jointly owned by its members).

It should also be noted that performance of contracts by in-house entities in the above sense may create problems under EU competition law: see, in particular, the Opinion of the Advocate General in *Tragsa*.

This “in-house” limitation on the EU procurement rules also applies to the application of the TFEU i.e. the TFEU, as well as the directives, does not apply to in-house arrangements in the sense defined in *Teckal* and the subsequent case law. This was clearly established in the *Parking Brixen* case and was applied, for example, in *Coditel*.

#### **4.2.6.5 Other forms of public sector co-operation**

In some further cases the CJEU has indicated that public bodies may entrust a task to another public sector body without following the Public Sector Directive and without advertising under the TFEU, but without making it very clear what are the precise principles that govern this limitation on the procurement rules.

One such case is Case C-532/03, *Commission v Ireland*<sup>30</sup>. This case concerned proceedings under Article 258 TFEU (ex Article 226 TEC) brought by the Commission against Ireland. The proceedings concerned an arrangement for provision of emergency ambulance services. These services were provided in the area of the Eastern Regional Health Authority by Dublin City Council and the finance for the service was provided in part by the Health Authority. The Commission accepted that the arrangement was not covered by any procurement directive since it did not involve a contract *in writing* as required by the directives. However, the Commission argued that the failure to advertise the service provision violated the above transparency obligation under Articles 49 and 56 TFEU (ex Articles 43 and 49 TCE).

The CJEU ruled that there had been no violation of transparency shown in the case, since the Commission had not proven that there was an award of a “public contract” that would attract the application of the transparency principle.

The CJEU rejected the Commission’s contention considered that the Commission had not provided sufficient evidence to make out its case. Ireland argued that the arrangement in question was not subject to the transparency obligation, on the basis that the arrangement in this case did not amount to a “public contract”: rather, Ireland argued, the City Council itself had statutory powers to provide ambulance services and the activity in question merely involved the exercise of the City Council’s own statutory powers to provide ambulance services, albeit pursuant to an arrangement agreed with another authority. The CJEU concluded that the Commission had not adduced sufficient evidence to show that there was indeed a public contract in this case: it found that the City Council did indeed have its own statutory powers to provide such a service and the Commission had not shown that the arrangement involved a public contract rather than the City’s exercise of its own powers (paras.35-37). The CJEU emphasised that the mere fact that another authority makes a financial contribution towards the provision of the services is not alone sufficient to demonstrate that that authority has awarded a public contract covered by the TFEU (para.37).

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<sup>30</sup> Case C-532/03, *Commission v Ireland* [2007] ECR I-11353.

This judgment does not necessarily imply that *only* the award of a “public contract” is the subject of the transparency obligation in the TFEU, but does at least imply that there are certain arrangements for service provision between public bodies that are not covered by the TFEU, even when financed to a large extent by a different public body from the one providing the service. Apart from the brief indications noted above, however, the CJEU does not give any guidance on how to define the scope of these co-operative arrangements for service provision that are outside the TFEU. The CJEU does not consider, for example, the relevance of factors such as the extent of funding provided by each authority, whether the services are provided at the request of the other authority, and the extent of the other authority’s control over the services and conditions of provision.

An arrangement for provision of services by another public sector body was also considered lawful in Case C-480/06, *Commission v Germany*<sup>31</sup>. The case concerned a 20-year arrangement for waste disposal concluded between four administrative districts of Lower Saxony in Germany and Stadtreinigung Hamburg (the City of Hamburg Cleansing Department), without any call for tenders. In this case the CJEU rejected an argument by the Commission that the arrangement should have been tendered under Services Directive 92/50, concluding that it was a municipal co-operation agreement of a type to which the EU procurement rules in general did not apply. The CJEU did not set out any general principle as a basis for this exclusion, but confined itself to listing the factual features of the arrangement in question. However, an essential factor appeared clearly to be that the co-operation had an objective that went beyond the simple acquisition of requirements by one party from another, that enabled the public service activity of the disposal of waste to be carried out – for example, that the arrangement had the effect of making feasible a facility with a significant capacity as a result of the “pooling” of waste disposal requirements (para.38). This might suggest quite a wide scope of exemption from the directive for co-operative activities.

However, in addition the CJEU referred to another feature of the case, namely the fact that the arrangement provided for payment by the administrative districts only to the party operating the facility under a contract with Stadtreinigung Hamburg, and did not involve financial transfers to Stadtreinigung Hamburg itself (para.43). (Payments would be made to Stadtreinigung Hamburg only to the extent of reimbursing it for the charges that it paid to the operator for the use of the facility by the districts). The CJEU made it clear throughout its judgment that it was not dealing with the position under the directive of contracts awarded by Stadtreinigung Hamburg itself relating to the processing of waste (which presumably are caught by the EU procurement rules) and the CJEU commented that in the present case the co-operation between the authorities did not prejudice any private undertaking as against its competitors (para.51) – presumably because any person would be able to tender for the actual waste disposal function. This might suggest that co-operation falls outside the directive to the extent that it concerns the arrangement of tasks but that the actual performance and implementation of these tasks *cannot* be entrusted to another public body under such a co-operative arrangement without applying the directive. This would significantly limit the scope of this limit on the directive.

Whilst this case concerned only an alleged violation of the directive, it seems likely that the limits on the application of the procurement rules that it lays down will apply also to the application of the TFEU rules on free movement, since the CJEU refers in its judgment to the public procurement rules in general (and also

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<sup>31</sup> Case C-480/06, *Commission v Germany*, CJEU judgment of 9 June 2009.

does not make any suggestion that transparency under the TFEU would be required if the directive did not apply).

#### **4.2.7 Only one possible provider**

In addition, the CJEU has ruled that the EU procurement rules (which apparently means both the TFEU and procurement directives) do not apply when there is only one firm *authorised by law* to provide a particular service: see Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*<sup>32</sup>, in which the CJEU held that it was lawful to entrust the provision of certain postal services to the Spanish government to a company that was the only company allowed by law to provide these services. According to the CJEU the EU rules cannot be applied when there is only one possible service provider by law since their objective is to open up markets to competition. Although this case concerned a state company, the reasoning of the CJEU arguably indicates that the public procurement rules cannot apply in any situation in which the services in question are lawfully reserved in the market for one provider, even if that provider is not a state company.

It should be noted, however, that EU competition law contains rules that limit how far Member States may reserve certain services for one provider – and the non-application of the rules on public procurement will be relevant only when that reservation to one provider is itself lawful under EU law.

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<sup>32</sup> Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [2007] ECR I-12175.

# CHAPTER 5: THE PUBLIC SECTOR DIRECTIVE 2004/18 – RULES ON DRAFTING SPECIFICATIONS<sup>1</sup>

## 5.1 Introduction to standards

Standards define the characteristics which a product (or service) must meet in order to be acceptable. They frequently define minimum acceptable standards of quality, safety or environmental protection – for example, the minimum proportion of cream in a product labelled "ice cream"; the level of safety protection which must be given by a cycling helmet; or the degree of fire resistance required of a piece of furniture. Standards may also define technical characteristics of products with the object of ensuring that products in the market are compatible (for example, the size of credit cards).

Standards may be voluntary - that is, manufacturers may adopt them if they wish but are not compelled to do so - or mandatory in the sense that any product made or sold in a particular state or area must by law conform to the standard.

Standards operate as barriers to trade in a number of ways:

- i. **Legal barriers:** where standards for the same product differ, products manufactured for the market of one state cannot lawfully be sold in others.
- ii. **Commercial barriers:** even where there are no different *mandatory* standards, purchasers in one state are likely to specify according to their national voluntary standards.
- iii. **Technological barriers:** the existence of different voluntary and mandatory standards means that there may be technical incompatibility between products used in different states (eg. equipment used in telecommunications networks; rolling stock used on the railways). This will mean that trade is restricted (in the short term) even if there is a change to the legal rules and commercial practice.

## 5.2 The general policy on standards in the EU

The most effective way to ensure the removal of trade barriers arising from the use of different national standards (mandatory or voluntary) is to introduce mandatory standards at EU level, which supersede "national" standards. From 1969 the EU therefore adopted a policy of formulating detailed mandatory standards in Directives. Once these are in place states must cease to apply their own national standards. This approach effectively tackles all three barriers to trade. *However:*

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<sup>1</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 17; S. Arrowsmith and P. Kunzlik, "EC Regulation of Public Procurement", chapter 2 in Arrowsmith and Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009, Cambridge: CUP), pp.59-67; M. Sieverling, "Choice in Government Software Procurement: A Winning Strategy" (2006) 15 *Public Procurement Law Review* 338; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), pp.272-292.

- obtaining agreement for EU standards is a very slow and difficult process – which means that relatively few products have been covered by such standards.
- requiring the use of detailed standards can stifle innovation.

Thus in its 1985 White Paper to the Council on completing the internal market, the Commission suggested a **new approach** to EU mandatory standards. Under this approach, instead of setting out in Directives *detailed* requirements for particular products, the Directives set out instead broad *performance* requirements – referred to as "*essential requirements*". These Directives usually supersede any stricter national standards applying to the product. However, products made to various different specifications may adequately satisfy the performance criteria: the details of the product are not specified in the Directive.

However, for many of the products covered by these Directives, the Commission has given a mandate to relevant European bodies to develop a more detailed *voluntary* standard which meets the requirements of the Directive. Manufacturers of products which comply with the "European" standard issued by these bodies can be *sure* that they comply with the Directive – though other products may comply too. Once these European standards have been adopted for a product, states must withdraw any national standards covering the same product. The main bodies responsible for issuing standards are:

- **CEN – the European Committee for Standardisation**
- **CENELEC – the European Electro-technical Committee.**
- **ETSI – the European Telecommunications Standards Institute**

The main type of standard issued by CEN and CENELEC are **ENS**, which must be implemented nationally. Standards issued by ETSI are called **ETS**.

There are still many cases where there is no mandatory standard at all EU level. In this case all three of the trade barriers (legal, commercial and technological) identified above may apply.

The CJEU dealt with the issue of **legal** barriers to trade in the Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* ("Cassis de Dijon")<sup>2</sup>. In this case the CJEU established a presumption that products which may lawfully circulate in the state in which they were produced (ie. which satisfy the mandatory standards of that state), should also be allowed into other states; if they are forbidden, then *prima facie* there is a breach of Article 34 TFEU (ex Article 28 TEC) (concerned with the free movement of goods). In other words, states must normally accept each others' standards: it will be very difficult to persuade the CJEU that a standard set by another EU state is not adequate.

This does not, however, deal effectively with the **commercial** barriers to trade resulting from national standards: individuals and firms are generally still free to specify what they want using national standards, if they wish. Since there is no single universal standard, it also does not deal with the problem of **technological** barriers. To deal with these commercial and technological barriers to trade in areas where there is no mandatory EU standard, the Commission has sought to encourage the development of *voluntary* standards on a Europe wide basis by CEN and CENELEC and other similar bodies. It is hoped that the industry will choose to use these European standards, even though not required to do so.

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<sup>2</sup> Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* ("Cassis de Dijon") [1979] ECR 649.

## 5.3 The rules on specifications and standards in public procurement

### 5.3.1 Introduction

The adoption of mandatory standards by the EU, and the mutual recognition principle established in *Cassis de Dijon*, considered above, obviously contribute to the opening of government procurement markets, as much as private markets. Thus:

(i) the adoption of mandatory standards means that legal, commercial and (in some cases) technological barriers are removed for access to government markets, as well as private markets; and

(ii) the *Cassis de Dijon* principle removes legal barriers to access to government markets, as well as private markets, for many products made in accordance with the standards set by other Member States.

In addition to the above, there are special rules on government procurement, found both in the TFEU and in the procurement directives. The main objective of these rules is to ensure that the way in which specifications for government contracts are drafted, including the way in which standards are used, do not operate as barriers to trade in government markets. These are considered below.

### 5.3.2 The rules of the Treaty on the Functioning of the European Union (TFEU)

The TFEU rules have an important impact on ensuring that the way in which contract specifications are drafted does not restrict competition. It should be remembered that these apply not just to contracts covered by the directives but to all government contracts, or at least to those of cross-border interest: see chapter 3.

First, the general TFEU provisions prohibiting discrimination in public procurement (Articles 34 and 56 TFEU in particular, ex Articles 28 and 49 TEC, respectively) mean specifications must not discriminate, directly or indirectly, against products, services or firms from other Member States. A requirement that products meet non-mandatory national standards – such as those established by national standardising institutions – will generally contravene this rule.

This principle was first applied by the CJEU in Case 45/87, *Commission v Ireland* ("Dundalk")<sup>3</sup>. In this case an Irish municipality seeking a contractor to construct a water supply system required that pipes used in the system should comply with an Irish national standard. The CJEU ruled that this infringed Article 34 TFEU (ex Article 28 TEC). Although the same standard applied to both imported and domestic products, in practice it favoured Irish products. The CJEU indicated that an authority must accept "equivalent" products and not just those made in accordance with a specific standard. It should be noted that there is some important ambiguity over what is meant by "equivalent" here, notably whether it refers to an exact equivalent, or whether the CJEU will require authorities to accept products which are broadly equivalent but do not offer *precisely* the same standards as specified.

The CJEU went even further than this in the *UNIX* case<sup>4</sup>. In that case the CJEU ruled that Article 34 TFEU (ex Article 28 TEC) prohibits even specifications which are not

<sup>3</sup> Case 45/87, *Commission v Ireland* ("Dundalk") [1988] ECR 4929.

<sup>4</sup> Case C-359/93, *Commission v Netherlands* ("UNIX") [1995] ECR I-157.

discriminatory on grounds of nationality, when these exclude products which can meet the purchaser's requirements. Here a reference to "UNIX" (a de facto industry standard) as the required operating system for connecting computers in a contract for a weather station was held to infringe Article 34 TFEU (ex Article 28 TEC), since other systems could be equally suitable for the authority's needs. Essentially, this means that either:

1. specifications must be drawn up by reference to "performance" requirements, rather than by a detailed description of the product characteristics; *or*,
2. if a detailed description of product characteristics is used, it must be stated expressly that products which are functionally "equivalent" will be accepted.

This can be seen as an illustration of the general principle accepted in the *Keck* case<sup>5</sup> that non-discriminatory measures hindering access to the market for products may be hindrances to trade where they concern the characteristics of products.

Note that the above cases were concerned merely how an authority must treat a product that meets its *set functional requirements*. A more difficult question is how the TFEU affects specifications that *set* the functional requirements for the contract, such as the level of health or environmental requirements that products must meet. One view might be that product specifications in public procurement – including specifications governing the health and safety requirements for products etc – are like other government measures generally to be treated as hindering access to the market, and thus are allowed only if specifications justified under the TFEU derogations or on the basis of mandatory requirements. For example, specifications relating to health features need to be justified as falling within the TFEU derogation relating to public health, including by meeting the requirements of the proportionality test.

However, an argument that this is *not* the case is made by Arrowsmith and Kunzlik.<sup>6</sup> They argue that there exists a doctrine – not yet articulated by the CJEU but consistent with the CJEU case law – according to which decisions which set out the government's requirements are not generally to be treated as *hindrances to access to the market* but as *defining what the market is* (what the government wants to buy) and thus are not hindrances to trade. They refer to this as the doctrine of "excluded buying decisions". The policy reasons for adopting this approach are elaborated in the reading.

Whatever the general position, however, it appears that the discretion of public purchasers to set their own standards is at least in one way more limited than the discretion of private purchasers. This applies when there is an EU Directive providing for a harmonised standard for a product that is designed for a particular use, and the procuring entity purchases the product for that purpose. This is indicated by Case C-489/06, *Commission v Greece*<sup>7</sup>.

This case concerned the practice of certain hospitals in Greece of rejecting tenders for the supply of sutures in certain cases on the grounds that they did not meet health needs, despite the fact that the products in question bore the CE mark indicating that they complied with the requirements of the Medical Devices Directive 93/42, which provided a European standard for the product in question. In its previous ruling in Case C-6/05, *Medipac-Kazantzidis v Venizelio-Panania* ("Medipac")<sup>8</sup>, the CJEU had concluded that it violated the TFEU principles of

<sup>5</sup> Joined Cases C-267/91 and C-268/91, *Keck & Mithouard* ("Keck") [1993] ECR I-6097.

<sup>6</sup> S. Arrowsmith and P. Kunzlik, "EC Regulation of Public Procurement", chapter 2 in Arrowsmith and Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009, Cambridge: CUP), pp.59-67.

<sup>7</sup> Case C-489/06, *Commission v Greece* [2009] ECR I-1797.

<sup>8</sup> Case C-6/05, *Medipac-Kazantzidis v Venizelio-Panania* ("Medipac") [2007] ECR I-4557.

transparency and equal treatment to reject the tender in question, given that the products offered complied with the Medical Devices Directive. However, the grounds for this conclusion were not entirely clear. It may have rested on the fact that *the tender documents themselves* required merely that the sutures should meet the standards of the Medical Devices Directive, so that the authority was obliged to accept the tender *as one that complied with its own specification*. Further, even if *Medipac* is not explained solely on this basis, it may be based on the fact that the Greek government *had not expressed a wish to adopt higher standards* than those in the directive but was merely contesting whether the product in question met the Directive's standard, without using the procedure for contesting it that the directive itself provided. If either were the case, the judgment would not involve any limitations on the authority's ability to specify health standards that are higher than those in the directive.

In this second case dealing with the same practice the CJEU again did not clearly determine whether specifying standards higher than those in the Medical Devices Directive violates the TFEU, since the Greek government accepted that the conduct of the Greek hospitals violated EU law. However, the CJEU does make a remark on this subject that might be followed in later cases: it quotes from its previous decision in *Medipac*, in particular para.55 of that judgment (para.43 of the present judgment), stating that an authority cannot reject a medical device which bears the CE mark. This remark tends to suggest that there *is* a limit on the discretion to set specifications on health protection in relation to medical devices falling under the directive. (It can also be noted that on the facts of the case it appeared that the hospitals had set health specifications different from/higher than the directive, so that it was assumed by the Greek government, also, that it is not permitted to reject medical devices complying with the directive, even when this is stated in the specifications). Further, the Advocate General also considered that the principle that an entity cannot reject products meeting the requirements of the directive was settled by that case, and thus did not address that issue (para.33 of the Opinion). However, the CJEU's remark addresses only devices caught by that specific directive, and may apply only to that directive and others that seek to harmonise standards relating to specific product features for a very specific use.

### **5.3.3 The rules on standards and specifications in the directive**

There are also additional rules on specifications in the directive. These rules are contained in Article 23 of the Public Sector Directive.

For contracts that are covered by the directive, these provisions require entities to define requirements in one of two ways:

1. The specifications may be set out by reference to certain specified European-level standards (such as national standards that give effect to European standards) or international standards (such as those of the ISO), or, where these do not exist, certain national-level standards (Public Sector Directive - Article 23(3)(a)). Definitions of the permitted standards are given in Annex VI of the Public Sector Directive. However, when this is done, the reference must be accompanied by the words "or equivalent" and functional equivalents *must* be accepted (as is anyway required by the TFEU under the *UNIX* case, as explained above, even for contracts not covered by the directive).
2. Entities may alternatively use performance or functional requirements as a means of description (Public Sector Directive - Article 23(3)(b)).

Entities may also use a combination of the two for different characteristics of the works, supplies or services (Public Sector Directive - Article 23(3)(d)).

The effect of these obligations is that when the listed types of specification, such as European standards, exist, entities have a choice of using either these recognised standards *or* performance *or* functional requirements to describe their requirements. When the listed specifications do not exist, the procuring entity must use performance or functional specifications.

The reason for requiring entities to use performance or functional specifications is that such specifications are often more transparent than detailed ad hoc specifications or references to standards that are not familiar to, or easily accessible to providers. The new rules thus allow an alternative to performance or functional specifications only in the case of listed standards that are considered sufficiently accessible. However, to draft performance or functional requirements (and to assess tenders for compliance) may, in practice, be difficult and burdensome for procuring entities in some cases.

Article 23(8) expressly prohibits entities from using technical specifications that refer to goods of a specific make or source or to a particular process, or to trademarks, patents, types, origin or means of production, where this has the effect of favouring or eliminating certain firms. Thus in the *UNIX* case, summarized above, the CJEU held that (subject to the possibility of limitations and exceptions discussed below) it is prohibited under the directives as well as under the TFEU to specify that the "UNIX" software system should be provided, since this is a reference to a particular make. It was irrelevant that the specification in question had been drawn up by an unofficial body of consumers and producers and had become a *de facto* industry standard, nor that it was understood in the industry that other "equivalent" products were generally acceptable. The prohibition highlights that procuring entities may not under the directive generally insist that a product is produced according to a particular process, even if the process is not protected by intellectual property rights; nor, for example, that goods should be made from material quarried from a particular site.

*However*, the same provision states that such specifications *are* allowed to *describe* the requirement where justified by the subject matter of the contract, on an "exceptional basis", when otherwise a "sufficiently precise and intelligible" description of the subject matter is not possible. However, under this provision authorities must also be willing to accept equivalents that are offered and to state this in the specifications. Note that in the *UNIX* case the CJEU seemed to consider that reference to UNIX fell within this provision.

Article 23(2) of the new directive also states that technical specifications "shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition".

For the purpose of the above obligations "technical specifications" are defined in Annex VI of the Public Sector Directive.

A final important point concerns the burden of proof that products offered by suppliers are equivalent to those specified through use of standards or (where allowed) detailed descriptions, patents etc. In Article 23(4) the directive deals with the former situation by providing that the contracting authority may not reject a tender in such a case "once the tenderer proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications". The important point here is that *the burden of proof may be placed on the tenderer*. A similar principle may possibly be applied by analogy in other similar cases (and see also Article 23(5)) – this possibly includes

demonstration of compliance when the authority uses functional or performance specifications, also.

The directive specifically states that an appropriate means of proof may be a dossier from the manufacturer or a test report from a recognized body – perhaps implying that there is some kind of (no doubt rebuttable) presumption that such evidence must be considered acceptable.

### **5.3.4 The IT Standards Decision**

There is also another piece of legislation, Council Decision 87/95 (1987] O.J. L36/81) the "IT Standards Decision", which imposes some obligations relating to standards and specifications in contracts for the supply of equipment relating to information technology (IT). This predates the standards rules in the directives. The obligations are in general quite similar to those in the *old* directives, requiring use of European standards.

### **5.3.5 The consequence of using unlawful specifications**

We have already considered in general terms the possible consequences of not drafting the specifications in accordance with applicable legal requirements, with the result that the specification restricts the access of products or services that should lawfully be admitted to the procurement. We pointed out that failure to comply with legal rules on specifications can have significant practical consequences and delay the procurement. As explained, the issue may arise in practice in different ways. In particular:

1. It may be raised by a tenderer that challenges the specification as being unlawful. In this case the procuring entity may be able simply to issue a modification to the specification to make it lawful.

As mentioned previously, however, problems may arise if a proposed modification affects some aspect of the project that was referred to in the advertisement – for example, where the contract advertisement itself refers to a particular patented product and it then transpires that this reference was unlawful. In this case there may be tenderers who saw the notice but did not ask for the contract documents because they could not supply the product referred to – but who might be interested in the procurement with the modified (lawful) specification. As we have seen in section 8 above on changes to the contract, EU law probably requires the contracting authority to publish a new notice in such a case: where there is a "material" change, i.e. a change likely to affect participation in the contract, it would generally violate equal treatment not to issue a new notice.

Where the specification in question is not referred to in the notice itself, but only in the contract documents issued to tenderers later, the equal treatment principle may not require a new notice, but merely require that the revised specification be issued *to all those who have seen the original specification*. This seems to follow from the logic of the equal treatment principle – this will be adequate to ensure that all those concerned with the procurement have had the opportunity to tender to the new specification. Those who have not expressed any interest in the procurement at all are in no way prejudiced by the change. This principle seems equally relevant where the change is made because the specification is unlawful as where the change is made for other reasons.

2. The issue of unlawful specifications may arise because a tenderer submits a tender that does not actually comply with the specification, but would comply if the specification had been lawfully drafted. This was the case in the *UNIX* case, which was summarised above. In such a case the contracting authority may be tempted to accept the tender if it offers better value for money than other tenders. However, it will violate EU law to do so. One reason is because the contracting authority is not permitted to accept tenders that do not comply with fundamental requirements of the contract documents (see further chapter 6). The authority would also be violating the equal treatment principle by failing to correct the illegality and allow all potential tenderers a chance to tender to a lawful specification. A lawful course of action here would be to cancel the procurement and commence a new tendering procedure (although this may be problematic if details of the tenders submitted in the first procedure are now known). Arguably if the unlawful specification was not referred to in the notice but included only in the later contract documents a re-tender based on a corrected specification could be limited only to those who obtained the contract documents, as per point 1 above. However, it is also possible that the law make take a different view of the case where tenders have already been opened, requiring a new procedure that might attract new tenderers, whose tenders will not be known to the others.

If the procuring entity does attempt to accept the non-compliant tender a challenge might come from a rival tenderer. However, it would appear that a tenderer will not generally be able to require the procuring entity to continue with the same evaluation process minus the non-compliant tender - since the specification is unlawful - but only to go back and modify the specification. Thus rival tenderers will often not have a real interest in challenging the decision in practice. An undertaking that could have competed if the specification had been lawful may have an interest in making a challenge so that it can have the opportunity to compete - but that will happen only if it is aware of the violation and significantly motivated to bring legal proceedings (bearing in mind that such a firm will not have invested anything in the procedure so far). If there is no likelihood of challenge, and especially if significant remedies are not available once the contract has been concluded, the contracting authority may in practice be tempted to consider accepting such a tender, especially if there are time pressures and it is considered unlikely that there will be any new tenderers joining the process with a modified specification.

# CHAPTER 6: THE PUBLIC SECTOR DIRECTIVE 2004/18 – CONTRACT AWARD PROCEDURES

## 6.1 The general principles: transparency, equal treatment and non-discrimination<sup>1</sup>

### 6.1.1 Introduction

The directives lay down lots of detailed rules about how major contracts should be awarded. In addition, it is very important to note that the CJEU held, prior to the adoption of the new directives (see Case C-243/89, *Commission v Denmark* ("Storebaelt")<sup>2</sup> and Case C-87/94, *Commission v Belgium* ("Walloon Buses")<sup>3</sup>, that there are some fundamental general principles underlying the directives, in particular:

1. **The principle of equal treatment** and;
2. **The principle of transparency.**

The new directive expressly sets out in Article 2 three principles:

1. **Transparency** – reflecting the principle set out above that is already implied
2. **Equal treatment** – again stating expressly the principle referred to above.
3. **That entities must act "non-discriminatorily"**. This appears to restate the principle of non-discrimination on grounds of nationality under the TFEU, and is simply one specific application of the more general equal treatment principle under the directives.

Both the equal treatment principle and transparency principle have been used:

- as an aid to interpreting the express provisions of the directives; and
- to impose additional obligations which are *not* expressly stated in the directives.

These are examples of the application of "general principles of law" used by the CJEU in EU law more generally for interpreting and developing EU law, as was discussed in chapter 1.

### 6.1.2 Equal treatment

The equal treatment principle under the procurement directives has been defined as follows in Joined Cases C-21/03 and C-34/03, *Fabricom v Belgium* ("Fabricom")<sup>4</sup>:

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<sup>1</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), pp.424-432; S. Treumer, "Technical Dialogue Prior to Submission of Tenders and the Principle of Equal Treatment of Tenderers" (1999) 8 *Public Procurement Law Review* 147; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), section 1.31-1.34.

<sup>2</sup> Case C-243/89, *Commission v Denmark* ("Storebaelt") [1993] ECR I-3353.

<sup>3</sup> Case C-87/94, *Commission v Belgium* ("Walloon Buses") [1996] ECR I-2043.

<sup>4</sup> Joined Cases C-21/03 and C-34/03, *Fabricom v Belgium* ("Fabricom") [2005] ECR I-1559.

***"...the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified"***

There is significant discretion for the CJEU in applying a principle of this kind.

It will be clear that certain matters violate this principle: this will be the case, for example, when decisions are made on the basis of considerations that are illegal under the system in question. For example, if one firm is given a contract rather than another because it has given a bribe, that clearly violates the equal treatment principle. (As we have noted above, to this extent rules against corruption might be regarded as one aspect of the equal treatment principle – but there are also reasons for treating integrity as a separate objective of procurement systems). Similarly, under a procurement system that prohibits discrimination on grounds of nationality, awarding a contract to one firm rather than another on the basis that the former is a national firm would also violate any equal treatment principles.

However, in many cases such definitions cannot, however, be applied automatically to give solutions to a problem, but involve the CJEU or other regulator in making policy decisions on how to balance the principle of equality of treatment with other goals of the procurement process when deciding what is a justification/relevant consideration for different treatment. Under the EU definition above, for example, this is done at two stages – first in deciding who is in a “comparable” position and who is not and, secondly – if two firms are considered to be in comparable position – in deciding whether there are objective grounds for different treatment.

Take, for example, the case of a procedure for complex services which allows discussions between the procuring entity and potential providers based primarily on negotiations and culminating in a best and final offer from those involved, in which a procuring entity has commenced negotiations with four providers. Suppose it quickly becomes apparent in the negotiations that one firm is very unlikely to offer the kind of technical solution that the procuring entity can accept or that its financial terms will be unaffordable. On the one hand, it might be argued that certain objectives of the procurement process favour allowing a final offer from the firm – arguments in favour of this are, in particular, equal treatment as an independent objective (the right to participate in government business), the (small possibility) that it might produce the best offer and the danger of abuse of any discretion that the procuring entity is given to reject certain firms before they have submitted an offer. On the other hand, the objective of an efficient process might suggest the procuring entity should be allowed to reject the firm early on if there will be significant costs to continuing negotiations, which will be wasted. Can the procuring entity decide not to invite that firm to submit a detailed final offer after balancing these different considerations – or should this be considered a violation of the principle of equal treatment in the procurement process?

In answering this question under the EU definition of equal treatment the CJEU might say:

- i) that rejection is possible on the basis that the firm that cannot submit a strong offer is not in a comparable position with one that can; or
- ii) that the firms are in a comparable position as both have been invited into negotiations but that there is an objective justification for rejecting one before the final offer stage i.e. cost considerations.

Which view is adopted will essentially depend on how the regulator wishes to give effect to the different policy considerations involved in the procurement process – including the policy of equal treatment as an independent objective or as a means

to support other objectives. Simply invoking the concept of equal treatment here does not dictate a particular answer, however.

Other cases have clarified other important general points about the equal treatment principle:

- In Case C-16/98, *Commission v France*<sup>5</sup>, the CJEU made it clear that this principle – which was originally referred to in the jurisprudence as the principle of equal treatment of *tenderers* – applies not just to firms that have actually participated in an award procedure, but also to those that hope to participate. Thus, for example, giving more information to domestic firms than foreign so that foreign firms are deterred from tendering at all can be a breach of the principle.
- As clarified in the *Walloon Buses* case the idea of equal treatment does not simply mean that other EU bidders must be treated equally with domestic bidders: it means that *all* bidders must be treated equally. Thus a domestic bidder can complain if that firm feels that it has been treated unequally as compared with other foreign bidders or other domestic firms.

The concept of equal treatment can be seen as an objective in its own right concerned with the equal right of firms to benefit from opportunities to do business with the public sector, or as a means to other objectives such as ensuring value for money and preventing corruption. The CJEU has not clearly articulated its concept of equal treatment in EU public procurement law. Arguably it is to be seen purely as a means for achieving the objective of a single market.

The equal treatment principle has now been applied in many cases including, for example, to deal with the issue of how the procuring entity must treat non-conforming tenders. This is discussed in section 6.6 below.

### 6.1.3 Transparency

The CJEU has not yet given a general definition of the principle of transparency. Arrowsmith has suggested, however, that in general in public procurement this concept as four distinct dimensions, namely:

- publicity for contracts;
- publicity for the rules of the process;
- limits on discretion; and
- provision for verification and enforcement<sup>6</sup>.

The principle as it applies in the EU procurement directives seems capable of covering all four dimensions.

An example of the principle of transparency is found in Case T-203/96, *Embassy Limousine and Services v European Parliament*<sup>7</sup>:

- In this case the General Court (formerly Court of First Instance) held that the principle of transparency involved an obligation to provide to a company involved in a tendering procedure prompt and precise information about the conduct of the award procedure. That case concerned a contract procedure run by the European Parliament for the provision of chauffeur driven car

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<sup>5</sup> Case C-16/98, *Commission v France* [2000] ECR I-8315.

<sup>6</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 3.

<sup>7</sup> Case T-203/96, *Embassy Limousine and Services v European Parliament* [1998] ECR II-4239.

services for the Members of the European Parliament. The relevant committee recommended that Embassy be awarded the contract and Embassy was told of this decision and asked to prepare for the contract which they did (e.g. by arranging drivers and insurance), even though the committee's view was just a recommendation and not a final award. However, doubts were later raised about their integrity and a few months later it was decided not to give them the contract after all. However, the mistaken impression given to them originally that they had effectively got the contract had never been corrected. This failure to keep them informed of the subsequent doubts was held to be a breach of the transparency principle.

We will see that the principle of transparency has also been used by the CJEU to add extensive obligations to disclose the criteria and approach that procuring entities will use in selecting of firms (see section 6.5 below) and in comparing tenders at the award stage (see section 6.7 below).

#### **6.1.4 Implications of the general principles**

The importance of these principles cannot be emphasised too much. They mean that even if a procuring entity complies with the *detailed and specific* rules of the directives it cannot be sure that it has acted legally. The potential for applying these principles to require particular conduct that the CJEU considers is part of a fair and transparent competition is almost totally open ended.

From the perspective of a lawyer, the existence of these principles can be seen to create opportunities to argue for the illegality of any conduct that might possibly be considered as unfair in some way – even where different procuring entities take different views on whether conduct is unfair or not, and whether it is justified (for example, by considerations of efficient procurement), it is quite possible that the CJEU might decide against a particular approach and conclude that it violates one of the general principles.

From the perspective of a procuring entity, the existence of these principles creates a good deal of uncertainty and clearly adds to the legal risks faced by purchasers.

### **6.2 The available procurement methods**

Contracting authorities covered by the directives must use one of five types of award procedure:

1. open procedure
2. restricted procedure
3. competitive dialogue
4. negotiated procedure with a notice
5. negotiated procedure without a notice

Note that the last two are both currently called simply “negotiated procedures” in the Public Sector Directive - but they are in reality two very different procedures, as explained below.

- **Open and restricted procedures**

As a general rule contracting authorities must use either the open procedure, where any party is permitted to submit a bid for the contract, or the restricted procedure, under which only those specifically invited may bid (Public Sector Directive - Article 28). Both are formal tendering procedures,

under which the authority must establish clear specifications as the basis for submission of bids; must advertise the contract in the EU's Official Journal; and must evaluate the bids, as received, on objective criteria, without entering into significant negotiations with interested parties.

These two procedures are formally defined in Article 1 of the directive (the definitions article) as follows:

Article 1(11)(a) "Open procedures" means those procedures whereby any interested economic operator may submit a tender.

Article 1(11)(b) "Restricted procedures" means those procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender.

Authorities have a *free choice* as to which of these two procedures to apply for any contract. In 1989 the original rules on supply contracts were amended to require authorities to justify use of the restricted as opposed to open procedure for supply contracts but the procedures were placed back on an equal footing in 1993. Some EU states, however, still require the use of open tendering as a general rule, at least for some procuring entities. (They are permitted to have rules which are *stricter* than those in the directives if they wish).

The rules are very similar for the two procedures, with the exception that there is an additional stage in the restricted procedure of choosing a limited number of firms to tender. Thus they are considered together below.

There is often confusion between the restricted procedure under the EU procurement directives and the method of tendering called restricted tendering under the UNCITRAL Model Law on Procurement of Goods, Construction and Services<sup>8</sup>. Despite the similarity in names the two are very different. As we will see below, the restricted procedure in EU law:

- requires a public advertisement of the contract; and
- requires all those who respond to be considered on an objective basis – although it is not necessary to invite all of them to tender, they must all be considered for invitations and objective criteria used to select between them.

The UNCITRAL procedure, on the other hand, does not require a public advertisement but allows procuring entities simply to approach firms already known to it. Nor does it provide for any criteria for choosing between available suppliers who might be interested in the contract. The EU's restricted procedure does not really have an equivalent under UNCITRAL – in most ways it is like UNCITRAL's tendering procedure with a pre-qualification process, but with the important difference that the EU restricted procedure allows the procuring entity to limit the numbers of qualified persons who are allowed to submit tenders, rather than insisting (as does the UNCITRAL tendering procedure) that all qualified firms should be allowed to tender.

- **Competitive dialogue**

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<sup>8</sup> On restricted tendering under the Model Law see S. Arrowsmith and C. Nicholas, "The UNCITRAL Model Law on Procurement: Past, Present and Future", chapter 1 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009, Eagan, MN: West), section 1.12.

Competitive dialogue is a new procedure introduced for the first time in Directive 2004/18. This was introduced to provide more flexibility in procedures for complex contracts.

The need for more flexible procedures was perceived in the United Kingdom since at least the late 1980s, most notably for PFI contracts, and was addressed in the new public sector directive mainly because of the EU's own policy of promoting public-private partnerships (PPP) for European transport infrastructure. Open and restricted procedures are often considered unsuitable for many such projects because of, inter alia, the limited scope for dialogue. The negotiated procedure with a notice is suitable, but there was some uncertainty over whether it was available for PFI projects - and certainly it has not been generally available for all projects in which flexible procedures are important for obtaining value for money.

Competitive dialogue was thus introduced in the Public Sector Directive to provide a more flexible procedure for situations in which the negotiated procedure is not necessarily available. In form it provides a halfway house between the relatively unstructured negotiated procedure (see below) and the rigid open and restricted procedures (see above). In essence it provides a lot of flexibility in the first part of the procedure, including to engage in dialogue with providers - but, unlike the negotiated procedure with a notice, requires a formal and complete tender to be submitted at the end of the procedure as the basis for making the final choice of contracting partner.

The directive formally defines the procedure as follows:

Article 11(1)(c): "Competitive dialogue" is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender.

Unlike the open and restricted procedures the competitive dialogue cannot be used for any contract but - as stated in Article 28 of the Public Sector Directive - only in specified cases, which are referred to in Article 29. In this respect it is available, in brief, for "complex" procurements - those for which the entity is unable to define the technical, financial or legal aspects of the project (overlapping with, but in some respects broader than, the situations covered by the negotiated procedure).

This procedure can be compared *very broadly* with the UNCITRAL procedures of request for proposals, principal method for procurement of services with simultaneous negotiation<sup>9</sup> under the Model Law. Unlike the first two of those procedures, however, note that competitive dialogue always requires a notice advertising the contract.

- **Negotiated procedure with a notice**

The directive also provides for use of procedures called negotiated procedures which, like competitive dialogue, can be used only in specific cases which are laid down in the directives (as stated by Article 28). These procedures are defined as follows:

Article 1(11)(d) "Negotiated procedures" means those procedures whereby the

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<sup>9</sup> See Arrowsmith and Nicholas above, section 1.11.

contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of these

There are actually two distinct types of negotiated procedure. Under the first type, the "negotiated procedure with prior publication of a contract notice" (abbreviated here to negotiated procedure with a notice) the entity must advertise the contract and hold a competition, and must follow various strict rules on, for example, how to select firms to invite and on use and disclosure of award criteria which are the same or similar to those of open and restricted procedures. However, the form of the competition is very flexible and the procuring entity may simply hold discussions with firms if it wishes. It is more flexible than competitive dialogue in that it does not even require any detailed final tender from those participating in the process. As we will see, it is used when formal procedures are not appropriate, such as for intellectual services where a specification suitable for formal tendering cannot be set.

Whilst the negotiated procedure with a notice is subject to a number of requirements to ensure a degree of competition and transparency, it does not provide the same guarantees as other procedures for monitoring and objectivity, and is confined therefore to exceptional cases. The precise grounds and the conditions for the use of the negotiated procedure with a notice are laid down in Article 30 of the directive.

- **Negotiated procedure without a notice**

The final type of procedure is the "negotiated procedure without publication of a contract notice" (abbreviated here to negotiated procedure without a notice). Under this procedure the authority may simply negotiate a contract with one or more providers, without any advertisement and usually without any kind of competition. This is allowed only in very exceptional cases, as discussed further below.

The grounds for using the negotiated procedure without a notice are set out mainly in Article 31 of the Public Sector Directive. They are in many respects similar to the grounds for using the single source method of procurement under the UNCITRAL Model Law on procurement<sup>10</sup> and include, for example, cases of extreme urgency and cases where there is only one possible contracting partner (for example, for reasons of intellectual property rights).

The very vague definition of negotiated procedure in Article 1(11)(d) that was quoted above covers both types of negotiated procedure. The negotiated procedure with a notice and the negotiated procedure without a notice are, however, very different procedures, and it is confusing to refer to both under the single name of "negotiated procedure" and to include them in a single definition.

The grounds for using each of the five procedures (where applicable) and the obligations that apply under each procedure (advertising, selecting firms to tender, time limits etc) are set out in sections 6.3-6.12 below.

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<sup>10</sup> See Article 22, discussed in S. Arrowsmith, J. Linarelli and D Wallace, *Regulating Public Procurement: National and International Perspectives*, (2000, The Hague: Kluwer Law International), chapter 8.

The different stages of the procedure are also summarized in the table below: *Main Stages of the Procurement Procedures under Directive 2004/18/EC.*

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	<b>OPEN Procedure</b>	<b>RESTRICTED Procedure</b>	<b>COMPETITIVE DIALOGUE</b>	<b>NEGOTIATED Procedure <u>with</u> a Contract Notice</b>	<b>NEGOTIATED Procedure <u>without</u> a Contract Notice</b>
ADVERTISING Phase	Contract notice in O.J.	Contract notice in O.J.	Contract notice in O.J.	Contract notice in O.J.	N/A (but optional notice of intent to award without notice or competition)
SELECTION Phase (technical and/or professional ability; economic and financial standing; Article 45 criteria) Articles 44-52	N/A at this point (though qualification process may be undertaken during time of award phase)	Suitability (Qualification)	Suitability (Qualification)	Suitability (Qualification)	
		Selection of candidates to tender from suitable ones	Selection of candidates to tender from suitable ones	Selection of candidates to tender from suitable ones	
AWARD Phase (choice of lowest price or most economically advantageous tender [MEAT]) Article 53	N/A	N/A	Dialogue Phase - may include: a) Outline/initial proposals; b) Discussions; c) Elimination of some participants.	Negotiations - may include: a) Outline/initial proposals; b) Discussions; c) Elimination of some participants.	Negotiation of the contract with one or more providers
	Submission of tenders	Submission of tenders	Submission of final tenders	Final offers?	
	Clarification and supplementation of tenders	Clarification and supplementation of tenders	Clarification, supplementation and fine-tuning of tenders		
	Choice of lowest price or MEAT	Choice of lowest price or MEAT	Choice of lowest price or MEAT	Choice of lowest price or MEAT	
POST-TENDER Phase			(Clarification and confirmation of commitments)	(Further negotiation?)	
STANDSTILL Phase	✓	✓	✓	✓	
CONCLUSION of contract	✓	✓	✓	✓	
POST-CONTRACT	Contract award notice	Contract award notice	Contract award notice	Contract award notice	

## 6.3 Advertising the contract: the contract notice<sup>11</sup>

### 6.3.1 The obligation to publish a contract notice

Under the Public Sector Directive contracts (except those awarded by the negotiated procedure without a notice) must generally be advertised by an EU-wide advertisement referred to as a "contract notice": Public Sector Directive - Article 35(2). These must be sent to the Commission which is obliged to publish them in accordance with various requirements set out in the directive and outlined below. In practice, these obligations are met by publication of the notices in the *Official Journal of the European Union* (which also contains details of EU legislation and certain other matters. The form of publication of contract notices is described below).

The obligation to publish these notices is designed to ensure that all interested EU firms can find out about contracts in other EU Member States.

Notices must be sent in a standard form. These have been adopted by Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council. The information that must be contained in the notice includes things like the contact details of the contracting authority, a description of the subject matter of the contract, and the time for delivery or performance.

The notice is sent to the *Office for Official Publications*. To avoid delays purchasers are encouraged to send notices electronically where possible. In cases in which notices are submitted electronically the minimum time limit for firms to respond to the notice (as to which see further section 6.5 below) is reduced by 7 days (although currently 90% of notices are still sent in paper form). The EU has developed software to facilitate electronic submission and automatic verification of receipt, under the auspices of a wider programme on electronic procurement, referred to as "SIMAP" (which stands for *Système d'information pour les marchés publics*). However, there have been some operational problems with the system, including the automatic return of notices for insignificant errors or omissions. In practice some entities use private firms to check and submit their notices to avoid this.

The Commission is obliged under the directives to publish contract notices sent to the Office within 12 days of dispatch by the authority, or 5 days when they are sent in the prescribed electronic form. The key information is published in all the official languages of the EU, and the cost of translation is born by the EU itself. The notice is published in a special database, "Tenders Electronic Daily" (TED), in CD-ROM form (available on subscription) and also on the Internet free of charge. Until 1998 the information was also available on subscription in hard copy form as a

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<sup>11</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), pp.440-448; M. Dischendorfer, "New Functionalities of the SIMAP Web Services" (1999) 8 *Public Procurement Law Review* CS 1; T. Laudal, "Advantages of a Common Product Nomenclature in Public Procurement" (1995) 4 *Public Procurement Law Review* CS 112; T. Street, "The Common Procurement Vocabulary (CPV): Development of the Community Nomenclature" (1995) 4 *Public Procurement Law Review* CS 86; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), sections 8.02-06; T. Westphal, "European Tenders on the Internet: the Policy Context" (1998) 7 *Public Procurement Law Review* CS 151; R. Williams, "Proposed Adoption of Mandatory Common Procurement Vocabulary" (2002) 11 *Public Procurement Law Review* NA 19.

supplement to the OJ but this had become unwieldy and was abolished in July 1998. The Commission has been increasingly concerned to develop tools to help contractors search through the vast amount of information for contracts relevant to them. Various search tools are available on the Commission's SIMAP website. The SIMAP web site also contains links to various national procurement databases which include information also on contracts which are not covered by the directives because they are below the threshold. The SIMAP home page address is <http://simap.europa.eu>.

### 6.3.2 The CPV

One tool which is important for effective advertising (as well as for other purposes) is the Common Procurement Vocabulary (CPV). The CPV is a detailed system for describing products purchased by government by means of a reference number, which was given formal status as a EU nomenclature by Regulation (EC) No 2195/02 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) of 5 November 2002 [2002] O.J. L340/1 (as amended). The current version was adopted by Regulation (EC) No 596/2009 of the European Parliament and the Council of 18 June 2009 [2009] O.J. L188/14. Under Directive 2004/18 it is intended (according to the Commission at <http://simap.europa.eu>) that the CPV must be used in contract notices (e.g. to describe the subject matter of the contract), although the wording of the directive does not appear to require this. (See Article 1(14) which refers to the CPV but does not clearly impose such an obligation). The CPV is also used elsewhere in the directives – e.g. to describe what are priority/Part A services - but only alongside the other, original, nomenclatures (CPC for services), and where there is a conflict the old nomenclatures are stated to prevail.

The CPV can be found in all its languages on the SIMAP web site (<http://simap.europa.eu>).

One of the main benefits of the CPV is the possibility it provides for suppliers to search by electronic means for contracts of interest. (For example, using different words such as "lorry" and "truck" for the same type of vehicle can cause difficulties but if the CPV is used each similar item is referred to by the same standard number). Another is that it avoids the need for individual translation (bearing in mind that the *Official Journal* is published in all official languages) – each number has a corresponding entry for all the various languages.

There are, however, a number of problems with the CPV. One is the fact that the CPV system still provides an insufficiently detailed breakdown of different requirements for some important products. Another, more fundamental, problem is that the system is often difficult for purchasers to use as it is a producer-based rather than user-based system, which describes and classifies products by reference to features of interest to producers, such as material of manufacture (which is relevant for some suppliers), rather than end-user features (which is relevant for purchasers). This is because the system is based on more general nomenclatures designed for different purposes (the EU's *Classification of Products According to Activities* (CPA), which is in turn based on the United Nations *Central Product Classification* (CPC)).

The system is still being developed and refined to deal with some of these problems. However, it is very difficult to develop a system that is appropriate for both purchasers and suppliers.

### 6.3.3 Additional notices

There is nothing in the directives to prevent Member States from publicizing contracts through additional means, as well as the EU's Official Journal – for example, through notices in the national press. However, to ensure that national firms do not get an unfair advantage it is expressly stated that notices may not be published in the national press prior to their despatch to the O.J., nor may national notices contain additional information (see Public Sector Directive - Article 35(5)). It can probably also be implied by analogy and by reference to the general principle of equal treatment that firms should not be contacted directly until the OJ notice has been despatched, nor given information not given to other firms who might be interested.

Some Member States require publication elsewhere – such as in an official national gazette – by law, at least for some contracts. In the UK there is no general legal obligation of this kind. However, many purchasers have found the level of response to the mandatory EU contract notices to be quite low, and often take additional steps to publicise their contracts.

### 6.3.4 Purchaser profiles

To encourage public purchasers to provide more and better quality advance information about their purchasers, the European Commission helps purchasers to establish “purchaser profiles” on the Internet, either through purchasers’ own websites or through the Commission’s own “SIMAP” site, which purchasers without their own site can register their details on.

## 6.4 Suitability of firms (qualification and eligibility)<sup>12</sup>

### 6.4.1 General principles

In any public procurement, procuring entities will generally exclude from a procurement suppliers who are not considered capable of performing the contract reliably or who do not meet other relevant conditions (e.g. where the contract is reserved for small and medium sized enterprises, it will exclude suppliers who are

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<sup>12</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 12; S. Arrowsmith, H-J. Priess and P. Friton, “Self-Cleaning as a Defence to Exclusions for Misconduct – An Emerging Concept in EC Public Procurement Law?” (2009) 6 *Public Procurement Law Review* 257; M. Gabriel, “The establishment and participation of bidding consortia in award and review procedures in Germany and Austria” (2007) 16 *Public Procurement Law Review* 174; G. Hayken, “Comparative study: the evolution of organisational conflicts of interest law in Europe and the United States” (2006) 15 *Public Procurement Law Review* 137; E. Piselli, “The Scope for Excluding Providers who have Committed Criminal Offences under the EU Procurement Directives” (2000) 9 *Public Procurement Law Review* 267; H-J. Priess, “Distortions of Competition in Tender Proceedings: How to Deal with Conflicts of Interest (Family Ties, Business Links and Cross-representation of Contracting Authority Officials and Bidders) and the Involvement of Project Consultants” (2002) 11 *Public Procurement Law Review* 153; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), 6.31-6.92; D. Tryantafyllou and D. Mardas, “Criteria for Qualitative Selection in Public Procurement: A Legal and Economic Analysis” (1995) 4 *Public Procurement Law Review* 145.

not within that category). This process of excluding suppliers who do not meet the required conditions for participation in the procurement we referred to there as “qualification”. In the Public Sector Directive the term “suitability” is used to refer to this process of deciding which firms meet the *minimum standards* set by the contracting authority to make them qualified to participate in a contract. (See the heading to Article 44 and Article 44(1)).

In all award procedures under the Public Sector Directive the process of deciding which suppliers are to be excluded for these kinds of reasons is regulated by the directive.

The directives significantly limit an authority's discretion in this area in two ways:

1. They permit firms to be excluded only on certain limited grounds listed in the directives, including financial position and technical capacity (but subject to certain exceptions to give effect to the equal treatment and transparency principles).
2. They also control the *process* of exclusion, including the evidence that may be used.

These rules seek to ensure:

- that authorities provide fair opportunities of participation; and
- that *procedures* for assessing qualification are not unduly burdensome and do not provide opportunities for authorities to conceal discrimination.

It should be noted that the directives do not expressly *require* that purchasers should exclude firms on any of the specified grounds. They merely regulate the position where authorities decide to set conditions for qualification. In practice, of course, authorities almost always wish to check at least the financial and technical position of firms before awarding them a contract, and countries may have national legislation which requires their contracting authorities to undertake such checks.

The directive deals with suitability in Articles 44-52.

Note that in restricted procedures, competitive dialogue and negotiated procedures with a notice not all suitable (qualified) firms will necessarily be invited to tender – in these procedures contracting authorities may follow a *shortlisting* process: that is they may choose from amongst the qualified firms only a limited number to invite to tender. This shortlisting process is dealt with in section 6.5 below. We will see there that many of the same rules apply in shortlisting as apply in determining whether the suppliers meet the minimum standards for participating. However, it is important to be clear that determining suitability and choosing are distinct processes in the procedure.

## **6.4.2 The grounds for excluding suppliers under the directive**

### **6.4.2.1 General approach**

The explicit grounds for excluding suppliers under the directives for lack of suitability can be divided into four main categories, concerned with:

- Economic and financial standing;
- Technical and professional ability;
- Enrolment on a trade or professional register and possession of a licence; and
- Professional honesty, solvency and reliability

The CJEU has stated as a general principle that entities can only exclude firms on these grounds, a principle recently confirmed in clear terms by the CJEU in Joined Cases C-226/04-C-228/04, *La Cascina v Ministero della Difesa* ("La Cascina")<sup>13</sup>.

However, it has recently emerged that the CJEU is prepared to place some significant limitation on this general principle: it has stated in Case C-213/07, *Michaniki AE v Ethniko Simvoulío Raidotileorasis and Ypougos Epikrateias* ("Michaniki")<sup>14</sup> that the grounds listed in the directives are exhaustive of the grounds for exclusion *relating to professional qualities*, but are *not* exhaustive of *all* grounds of exclusion: entities may also exclude for further reasons to ensure transparency and equal treatment in the procurement process. This can be seen to introduce a fifth category of exclusions – those based on equal treatment and transparency. As explained below, it is possible that these categories of exclusions are not closed and that others may possibly be allowed by the CJEU (see section 6.4.2.7 below).

We will now consider in turn these different grounds for exclusion.

#### **6.4.2.2 Economic and financial standing**

Firms may, first, be excluded because they lack "financial and economic" standing: see Public Sector Directive - Article 47.

##### ***What is meant by economic and financial standing?***

This is not defined. However, it clearly refers to whether firms have adequate financial resources to perform the contract alongside their other commitments.

##### ***The relevant standards***

It is in principle for national authorities to determine the standards which firms must meet – for example, the size of turnover required. (See Joined Cases 27-29/86, *S.A. Construction et Entreprises Industrielles (CEI) and others v Société Coopérative "Association Intercommunales pour les Autoroutes des Ardennes" and others* ("CEI and Bellini")<sup>15</sup> paras. 26-28 – summarised below).

However, an important qualification to this is that any minimum standards set for participation must be "related to and proportionate to" the subject matter of the contract (Article 44(2)). This means, for example, that the contracting authority can only set conditions such as minimum annual turnover requirements when these are reasonably appropriate to deciding if the firm has adequate resources to carry out the contract – if the contract is a small one near the thresholds, the procuring entity cannot set turnover requirements that would exclude all but the largest suppliers. It can be noted that this condition that requirements must be proportionate was *not* expressly stated in the directives at the time of *CEI and Bellini* and could possibly lead the CJEU to adopt a more critical view of the kinds of requirements set in those cases.

<sup>13</sup> Joined Cases C-226/04-C-228/04, *La Cascina v Ministero della Difesa* ("La Cascina") [2006] ECR I-1347).

<sup>14</sup> Case C-213/07, *Michaniki AE v Ethniko Simvoulío Raidotileorasis and Ypougos Epikrateias* ("Michaniki") [2008] ECR I-9999.

<sup>15</sup> Joined Cases 27-29/86, *S.A. Construction et Entreprises Industrielles (CEI) and others v Société Coopérative "Association Intercommunales pour les Autoroutes des Ardennes" and others* ("CEI and Bellini") [1987] ECR 3347.

Although this is not entirely clear, it seems that contracting authorities do not necessarily have to deal with financial standing by setting specific minimum requirements such as levels of turnover, but could instead simply undertake an overall discretionary assessment of whether a firm's financial situation is adequate. This would involve more discretion than an approach that relies solely on specific stated minimum requirements, and would not be so transparent, but it might be necessary in order to give a proper picture, necessary both to exclude unsuitable firms and to ensure that suitable ones are not excluded, thus fostering broad competition.

### **Rules on proof**

As regards the *proof* of economic and financial standing, the directives list certain evidence which authorities may demand: for example, bankers' statements, and statements of turnover in the previous three financial years. For matters relevant to financial and economic standing but which cannot be deduced from this evidence – for example, the level of the firm's existing contractual commitments – authorities may call other evidence. This was made clear in *CEI and Bellini, supra*.

However, firms which cannot produce the particular evidence specified by the authority – whether that listed in the directives or not – may always offer other "appropriate" evidence instead. (The directives actually state that this applies to evidence which the authority "thinks" is appropriate; but it is probably implied that its decision whether to accept the evidence offered must be reasonable).

### **Transparency requirements**

Information required from firms on their financial and economic standing must be set out in the contract notice or tender invitation (Public Sector Directive - Article 47(4)).

Any specific minimum requirements (such as a minimum annual turnover requirement) must be specified in the contract notice (Article 44(2)).

#### **6.4.2.3 Technical and/or professional ability**

Firms may also be excluded where they lack the "technical or professional ability" to perform the contract: see Public Sector Directive - Article 48. An entity may consider technical capabilities only in so far as these relate to the actual contract being awarded in the procedure.

As with financial standing, any minimum conditions must also be "related to and proportionate to" the subject matter of the contract (Public Sector Directive - Article 44(2)).

The point that requirements on technical capabilities must relate to the contract means that contracting authorities cannot lay down conditions relating to the conduct of the firm's business as a whole, but only conditions that refer to the ability to perform the particular contract being awarded.

- For example, an authority cannot exclude a firm simply because it considers that that firm does not follow sound environmental policies in managing its business, when these have no connection with anything required in delivering the goods, works or services under the contract. Thus authorities

cannot use the threat of withdrawing public contracts as a kind of sanction to get firms to follow government policies that are not connected with the contract.

As with financial standing the technical *standards* (levels) for determining whether firms are qualified to perform the particular contract – for example, the amount and type of equipment needed – are for national authorities to determine: *CEI and Bellini* and Case 31/87, *Gebroeders Beentjes BV v Netherlands* (“Beentjes”)<sup>16</sup>.

The rules on this list certain evidence which authorities may demand as *means of proof* of standing: for example, these include:

- a statement of the tools, plant, and technical equipment available;
- the education and professional qualifications of the contractor and/or the contractor’s staff; and
- a list of works or services or deliveries carried out over the last five years (for works) or three years (for supplies and services).

In contrast with the position for financial standing, authorities may not demand evidence other than that listed in the directives (Case 76/81, *S.A. Transporoute et Travaux v Minister of Public Works*<sup>17</sup>; *CEI and Bellini*; Case C-71/92, *Commission v Spain*<sup>18</sup>).

This means, for example, that an authority cannot insist that a firm is registered on its “approved” list of contractors for the contractor to obtain a contract with the authority, since a domestic approved list is not a form of evidence listed in the directives. (On approved lists see further below). It also makes it difficult for an authority to get details of a firm’s employees’ working conditions, even if the authority thinks this may be relevant to the firm’s ability to perform the contract.

Further, only those *criteria* which can be deduced from the listed evidence can be taken into account – for example, the nature and type of a firm’s equipment, which can be ascertained from the statement of equipment, or the firm’s past experience, which can be seen from past contracts performed (Advocate General Darmon in *Beentjes*, para.29 of the Opinion). This could include past performance on contracts with the contracting authority itself.

For service contracts, authorities sometimes like to require that firms have been assessed for conformity with certain quality assurance procedures. Authorities must request only quality assurance systems based on European standards and must accept other quality assurance measures offered by firms when these provide evidence of equivalent quality (Article 49). This is important since obtaining certification to European standards maybe very burdensome, especially for small firms. The wording of this is not entirely apt to *require* authorities to accept measures that are equivalent to quality assurance certificates, rather than merely to allow it, but probably must be interpreted to do so in accordance with the directive. A similar principle applies with requirements for firms to be certified in accordance with environmental management standards (Article 50 of the directive). Probably in any case a general principle of this kind – that contracting authorities cannot require specific certifications but must also accept other evidence that shows the required technical capabilities - also applies under the TFEU, and so applies to all types of certifications.

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<sup>16</sup> Case 31/87, *Gebroeders Beentjes BV v Netherlands* (“Beentjes”) [1998] ECR 4635.

<sup>17</sup> Case 76/81, *S.A. Transporoute et Travaux v Minister of Public Works* [1982] ECR 417.

<sup>18</sup> Case C-71/92, *Commission v Spain* [1993] ECR I-5923.

As with financial standing, information required from firms on technical capacity/capability must be set out in the contract notice or tender invitation (Public Sector Directive - Article 48(2)). Again, any specific minimum requirements (such as a certain number of years of experience) must be specified in the contract notice (Public Sector Directive - Article 44(2)).

#### **6.4.2.4 Enrolment on trade/professional registers and possession of licences**

Authorities may require firms to be registered on certain trade or professional registers in their state of establishment (Public Sector Directive - Article 46). For some Member States which have relevant registers these are listed expressly listed in Annex IX. Certain special provision is made for states where no registers exist.

#### **6.4.2.5 Professional honesty, solvency and reliability**

Entities are also permitted to exclude firms on other grounds, which the CJEU in *La Cascina* has described collectively as relating to "professional honesty, solvency and reliability" (Public Sector Directive - Article 45). These are where the provider:

1. Is bankrupt, subject to a winding up order or similar;
2. Has been convicted of an offence relating to the firm's professional conduct;
3. Has been guilty of "grave professional misconduct" "proven by any means that the contracting authority can demonstrate";
4. Has failed to pay tax or social security contributions either in the country in which the firm is established or the country of the contracting authority; or
5. Has been guilty of serious misrepresentation in supplying information required under the directive relating to the above, or has not supplied such information.

In *La Cascina* the CJEU also emphasised that these grounds for exclusion are optional for Member States (as is clear from the directives).

These grounds are sometimes relevant to proving a firm's financial and technical capacity to perform the contract (for example, a firm which is subject to a winding up order because it is insolvent is unlikely to have the financial standing required!). However, they are not *necessarily* connected with the ability to perform the contract. There are various different reasons why states might potentially disqualify firms from participating in public procurement on because of criminal convictions, grave misconduct etc. In addition to ensuring reliability this could be:

- a. To avoid associating the government with unlawful behaviour, both to set an example and to avoid public criticism;
- b. To provide an additional enforcement tool for securing compliance with the general law and/or sanctioning violations;
- c. To ensure a level playing field; or
- d. To ensure that government funds are not used to support enterprises that engage in illegal activity.

It is not clear whether the directive envisages that the last four grounds above may be used only to determine the reliability of a firm in performance – establishing a presumption that a firm with a conviction, for example, is not reliable – or whether they can be invoked for the other reasons referred to above. This is an important question for the issue of implementation of horizontal policies in procurement (social and environmental policies etc), which are considered further in chapter 11 below. Can a procuring entity exclude firms because they have convictions for environmental offences, for example, even though these have no relationship to

contract performance, simply because it wishes to use its procurement power to promote compliance with environmental policies? This question has yet to be resolved by the CJEU.

Another area of uncertainty arises over what the “grave misconduct” ground refers to. There are two main possibilities:

- One view is that it refers only to the case in which a firm has been judged by an appropriate body (such as professional disciplinary tribunal or competition authority) to have violated some normative rule which does not, however, constitute a criminal offence – for example, violation of a professional code of ethics or competition law rules that are subject to administrative, but not criminal, sanctions. In other words, it can be seen as a kind of equivalent to the criminal offences provision for conduct that is not technically a criminal offence. This interpretation would mean that there are thus safeguards against discrimination and to protect firms from other abuses and unfairness on the part of the procuring entity.
- Another view, however, is that it may be applied for any kind of misconduct – including criminal conduct – even though there has been no external adjudication that the misconduct has occurred. Clearly there are risks involved in relying on this provision when the decision that misconduct has occurred is based solely on the judgment of the procuring entity rather than on any external decision.

It can be noted that in Case C-71/92, *Commission v Spain*, Advocate General Gullman (para.95 of the Opinion) stated that an authority might be able to exclude under the grave misconduct provision for *deliberate* omission to perform contracts awarded previously. If in general it is required for there to be some form of external adjudication that a violation exists, however, it might be argued that this should apply only if the violation has been determined by a relevant court or tribunal, which would obviously limit its importance.

In all cases the discretion to exclude on the grounds above must be exercised in accordance with the general principles of the directives and of EU law in general. Two important principles in this context are:

1. Proportionality, which requires that a measure restricting access to the market should be proportionate to its objectives. This will place limits on, for example, the amount of time for which a firm can be excluded. (For an example of the application of this principle to a different type of exclusion see the cases of *Fabricom* and *Michaniki*, discussed at 6.4.2.6 below). It would also seem to limit the possibility of excluding for very minor offences, especially those not involving any kind of intentional or negligent misconduct. It can also be argued that the proportionality principle requires contracting authorities take account of “self-cleaning” measures undertaken by suppliers – that is measures to remove from the company persons involved in the violation and to ensure that such violations are not repeated.<sup>19</sup>
2. Transparency. This principle was applied in the context of exclusions under Article 45 in the case of *La Cascina*, where the CJEU indicated that the detailed conditions of exclusion needed to be set out in advance. Thus in the

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<sup>19</sup> For the arguments see further S. Arrowsmith, H-J. Priess and P. Friton, “Self-Cleaning as a Defence to Exclusions for Misconduct – An Emerging Concept in EC Public Procurement Law?” (2009) 6 *Public Procurement Law Review* 257.

context of exclusion for non-payment of tax or social security contributions the CJEU considered that Member States must set the date by which payments must have been made or by which any relevant “regularization” of the situation must have occurred for a provider to avoid exclusion: this could be at the deadline for lodging the request to participate; at the date of issuing invitations to participate; at the deadline for tenders; at the date at which tenders are considered; or at the date for award. (See para.31). Based on the obligations of transparency and equal treatment, this period must be determined with absolute certainty and made known to participants (para.32 of the judgment). The CJEU stated that this time period can be fixed either in legislation or by procuring entities themselves. This avoids the possibility of using these grounds of exclusion in a discriminatory manner to favour or exclude certain firms, once the tenders or applications are received. Whilst that case concerned the non-payment of taxes and social security contributions it may be relevant to some extent for the other grounds of exclusion also.

There are various practical issues that arise in applying such provisions, such as the extent to which they allow exclusion of companies associated with the violating company (such as parent companies) or of natural persons associated with the violating company. These are not dealt with in the directives. It may probably be presumed, however, that related persons of this kind may be excluded if Member States wish to exclude them, subject to the principle of proportionality (which may, for example, prevent a very wide exclusion). Quite how this would be applied by the CJEU is impossible to predict.

This and other issues are more important in the context of the mandatory exclusions (that *require* exclusion for corruption and certain other offences): see further section 6.4.2.11 below).

#### **6.4.2.6 Exclusion to support equal treatment and transparency, including to remove conflicts of interest**

As we have noted above, in the *Michaniki* case the CJEU stated that the grounds listed in the directives are not totally exhaustive of the grounds for exclusion: whilst they are exhaustive of grounds *relating to professional qualities* they are *not* exhaustive of *all* grounds of exclusion and entities may also exclude for further reasons to ensure transparency and equal treatment in the procurement process.

This principle was first applied in the case of *Fabricom*. This case dealt with conflict of interests arising out of the fact that a firm has participated in preparing specifications, but is potentially relevant also to other types of conflict of interest.

In this case, the CJEU ruled that a Belgian law which prohibited from tendering all persons who were themselves involved in preparatory work, even if they could show there was no risk for competition, was contrary to the directives, because it was not proportionate to the objective at which it was directed – it went beyond what was necessary to achieve the objective of the national rule. This was because the objective of ensuring equal treatment of those participating in the competition could be safeguarded by a less restrictive method, namely by prohibiting participation only by those who are unable to prove that there is no risk to competition involved (paras.32-36). However, this also implied that it is permitted to exclude a firm from participating in an award procedure when it has been involved in the preparations, when the firm *cannot* prove that there is no risk.

The CJEU in *Fabricom* did not explain how its ruling that exclusion was allowed to prevent conflicts of interest fits with the scheme of the directive: it did not comment on the fact that the public sector directives do not expressly provide for this ground for exclusion, but only list certain other grounds for exclusion (technical capacity, absence of financial and economic standing and certain “miscellaneous” criteria, such as conviction of criminal offences) – which the CJEU stated in *La Cascina* are exhaustive. However, the ruling can now clearly be seen as based on the principle that exclusion is permitted when it is necessary to ensure compliance with the equal treatment principle or with other objectives of the directives. This was stated by Advocate General Léger in his Opinion in *Fabricom* (para.36) and later confirmed by the CJEU in the *Michaniki* case, which, as we have noted, set out a general principle that the directives permit exclusion to give effect to equal treatment and transparency.

In the *Michaniki* case the CJEU further considered what types of exclusion fall within the principle and how such exclusions are controlled by the principle of proportionality. In that case, the CJEU accepted that these principles allow a Member State to exclude companies with media interests from a procurement. However, it stated that this is allowed only to a limited extent in compliance with the principle of proportionality. In the view of the CJEU the proportionality principle was not satisfied by an exclusion, such as the one in *Michaniki*, that is so wide as to totally exclude a contractor who is an owner, partner, main shareholder or management executive of an undertaking active in the media sector, from also being an owner, partner, main shareholder or management executive of a government contractor, without any possibility for the contractor to show that the interest held does not actually create any risk to equal treatment (paras. 62 and 69). A fortiori the CJEU also appeared to rule out certain prohibitions based on the involvement of an “intermediary” in the companies concerned (spouse, relative or financially dependent person), which were in issue in the case before the Greek court. The CJEU commented that its conclusion was reinforced by a very wide definition given to the concept of shareholder and intermediary in the Greek legislation (para.68).

Similarly, in Case C-538/07, *Assitur v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* (“Assitur”)<sup>20</sup> the CJEU concluded that it is permitted to exclude tenderers linked by a relationship of control (e.g. ownership by one of another) or affiliation from participating in the same award procedure when the connection creates a risk to transparency and equal treatment in the process. However, the CJEU then went on to conclude that an absolute prohibition on participation of connected tenderers that precludes any opportunity for the tenderers to demonstrate that the relationship *did not* influence the conduct of the tendering procedure does not comply with the proportionality principle.

Note: We should note here a point of terminology, namely that the term “suitability” used in the directives to refer to whether firms meet the requirements for participating laid down in relation to technical capability, financial standing and the criteria in Article 45 (what the CJEU calls collectively “professional qualities”) might not be appropriate when considering the equal treatment ground for exclusion.

#### **6.4.2.7 Other grounds for exclusion: equal treatment and other considerations**

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<sup>20</sup> Case C-538/07, *Assitur v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* (“Assitur”) [2009] ECR I-4219.

The CJEU in *Mechaniki* did not consider in detail whether any grounds for exclusion exist other than those listed in the directive and those necessary to ensure equal treatment and transparency. However, the CJEU arguably implied that as well as permitting exclusion of firms with media interests for reasons of equal treatment and transparency, exclusion of firms with media interests could also be justified on the grounds of punishing fraud and corruption (para.60) – although it is also possible that the CJEU regarded this as a side effect showing that such a measure is consistent with the public interest, rather than as a permitted *reason* for exclusion.

If the CJEU does consider this a permitted *reason* for exclusion, it might open up the possibility of exclusions for other objectives, including social and environmental objectives - at least for objectives of certain kinds that are positively supported by EU policy. This issue is considered further in chapter 11.

#### **6.4.2.8 A note on approved lists**

It was the practice of many authorities prior to the directives to award contracts only to those firms registered on the authority's "approved lists" (sometimes referred to as "qualification lists"). However, the CJEU has ruled in Case C-71/92, *Commission v Spain*, that the directives' rules on qualification mean that this practice can no longer be followed for contracts covered by the directives, at least for firms from other Member States. In the case of financial standing the reason is probably that firms are always entitled to submit their own evidence of financial standing as an alternative to that requested by the authority, so that if registration were requested as proof of financial standing, the contractor could submit other evidence instead. Where technical capacity is concerned, authorities can only require evidence listed in the directives, and as evidence on an approved list is not listed, they cannot require registration.

However, there is nothing to stop the authority from maintaining lists which are *optional* for supplier from other Member States, in that they merely indicate that suppliers are qualified for a particular contract. Such optional lists can save time and effort for both the authority and suppliers: once a supplier is registered, it does not generally have to submit new evidence of its position for every contract, and the authority does not have to check that evidence on each occasion.

#### **6.4.2.9 The legal status of tenderers, including bids by consortia**

For complex contracts, in particular, firms with different areas of expertise often get together and bid as a consortium. For example, with contracts for building and operating a prison, a firm with construction expertise will often get together with other firms with expertise in management and in security in order to submit a bid. Authorities are expressly prohibited from rejecting bids because they are submitted by consortia, because of a general rule that authorities may not require entities to take a particular legal form when submitting tenders (Public Sector Directive - Article 4(2)). However, they may insist that any consortium form a legal entity before entering into a contract, when necessary for the proper performance of the contract (Public Sector Directive - Article 4(2)). The authority then only has to deal with a single legal entity rather than several different firms. In practice, most consortia wish to do this anyway. They may, for example, create a separate company for the project, in which each of the participating firms owns a proportion of the shares.

The general rule of Article 4(2) also means that authorities may not, for example, limit participation in tenders to companies with share capital: Case C-357/06, *Frigerio Luigi & C. Snc v Comune di Truggio* ("Frigerio Luigi")<sup>21</sup>.

Article 4(1) of the Directive provides that authorities cannot prevent an undertaking from accessing public contracts merely because it takes a particular legal form when (as in this case) the undertaking is permitted to provide the services in question through that legal form in the state in which it is established (para.23 of the judgment). This was another reason held to apply in *Frigerio Luigi* to prevent authorities from limiting participation in tenders (in that case for services contracts) only to companies with share capital.

In general, authorities may insist that firms possess legal capacity as a condition for contracting, but may only seek proof of that fact based on the evidence referred to in the directives (such as registration on a trade register): see Case C-71/92, *Commission v Spain*, above.

#### **6.4.2.10 The use of "official lists" kept by other states**

The directives provide that firms which are on official lists of providers in their home state ("official lists") may use their registration, in a limited way, to assist in proving to other states that they meet qualification requirements for the contract (Article 52(4), which says that information in official lists may not be questioned without justification). Basically, where registration on a list in the home state depends on proof that certain factual criteria are met – for example, that the firm is registered in a professional register, or has not been convicted of an offence – the registration must be accepted by purchasers in other states as conclusive evidence of the fact in question. However, these provisions do not affect an authority's freedom to set its own *standards* for qualification (for example, the necessary level of turnover, or previous experience) (*CEI and Bellini*).

#### **6.4.2.11 The new mandatory exclusion of convicted firms<sup>22</sup>**

In general it is for Member States to decide on which of the permitted grounds they will exclude firms from participation. However, the Public Sector Directive 2004/18 (Article 45) contains a provision which *requires* states to exclude firms convicted of participation in a criminal organisation, corruption, fraud and money laundering, as defined in relevant EU instruments, in order to support the EU's own policies of combating these crimes.

There is a derogation from this obligation for "for overriding requirements in the general interest" (Article 45(1)). No doubt this can be invoked when the requirement cannot be obtained at all from another source, but it is not clear how it applies when the exclusion will lead simply to a higher price or delay. It is also arguable that the exclusion could apply when the firm has undergone a self-cleaning process, as mentioned at 6.4.2.5 above.

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<sup>21</sup> Case C-357/06, *Frigerio Luigi & C. Snc v Comune di Truggio* ("Frigerio Luigi") [2007] ECR I-12311.

<sup>22</sup> See S. Williams, "The Mandatory Exclusions for Corruption in the New EC Procurement Directives" (2006) 31 *European Law Review* 711.

The original proposal required states to exclude all entities convicted in the last 5 years, but the adopted provision leaves the time period to Member States. The domestic regulations do not yet specify a time period for exclusion.

As we have noted above, one of the problems in applying exclusion provisions of this kind is how they apply to firms or persons associated with the company that has a conviction.

It is unclear how far the obligation in the directives extends to those associated with a convicted firm, such as other firms run by the same directors, and whether it requires disqualification of a firm when those associated with it have relevant convictions. An obligation limited to a firm that itself has a conviction will be of limited effect, since frequently those involved operate through a network of organisations (often set up deliberately to conceal connections and to evade penalties placed on one organisation or individual). On the other hand, a more extensive obligation involving extensive checks on participants means significant additional bureaucracy that may deter good contractors, and is anyway difficult to apply effectively.<sup>23</sup> In this respect, the wording of the obligation to disqualify refers, itself, only to "Any candidate or tenderer who has been the subject of a conviction by final judgment...". However, confusingly, the provision on investigations states that "Having regard for the national laws of the Member State where the candidate or tenderers are established, such requests [for information] shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer". This seems to imply at least the possibility of using such information in making disqualifications. One interpretation is that the provision merely *permits* Member States to investigate associated persons, and to disqualify persons associated with a convicted firm or firms associated with a convicted person. Another is that investigations of associated persons, and disqualifications based on the findings, are required when already required by national law in the context of these and other criminal offences.

The directive in Article 45 requires exclusion when the contracting authority has "actual" knowledge of a relevant conviction.

Is there, however, any duty to make enquiries of firms, or seek other evidence, on whether a conviction exists?

The directive does not state expressly that there is any duty to make enquiries of an economic operator as to the existence of a conviction, or to seek any evidence to establish the position. In the final paragraph of Article 45(1), the Directive states that authorities *shall* "where appropriate" ask operators to supply evidence of criminal convictions in the form of an extract from the judicial record etc, and that they *may*, where they have doubts on the matter, seek other information.

Is it necessary to make enquiries on this matter? Since the directive requires entities to seek evidence of criminal convictions only "where appropriate", it does seem that it is not necessary to seek *evidence* in every case, by contacting the relevant authorities for a record of the convictions of each firm and its directors etc. On the other hand, to give any real effect to the provisions it is arguable that is necessary under the directive at least to ask providers themselves to confirm that they do not have relevant convictions, and to exclude those who do not confirm

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<sup>23</sup> On the experience in New York on this point see, in particular, Anechiarico and Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (1996, Chicago: University of Chicago Press); Anechiarico and Jacobs, "Purging Corruption from Public Contracting: the Solutions are Now Part of the Problem", (1995) 40 *New York Law School Law Review* 143.

this, and that entities are required to seek evidence of convictions at least when they have, or possibly should have, suspicions of a conviction. As we have seen, however, the domestic implementing regulations take the view that not even these steps minimal steps are required of procuring entities.

## **6.5 Open and restricted procedures: obtaining tenders<sup>24</sup>**

### **6.5.1 The procedure for obtaining tenders: open procedures**

The steps of the open procedure are scattered throughout the Public Sector Directive.

Under the open procedure any interested firm may tender on a contract. Obviously, however, the authority will not wish to accept tenders from firms which do not meet its minimum conditions on suitability (financial standing, technical capacity etc), and a procedure will in practice need to be set up by the authority to check the qualifications of tenderers at some point. Often this is done after bids are received.

The normal procedure is for interested firms to contact the authority to request the contract documents (that is, the detailed specifications, the contract terms etc), which obviously they need to prepare their bids. As a general rule, these must be sent to firms requesting them within six days of receipt of the request (Public Sector Directive - Article 39(1)). As an alternative to sending the documents directly, a contracting authority may offer "unrestricted and full direct" access to the documents by electronic means (Public Sector Directive - Article 39(1)). It is suggested that contract notices submitted to the Office for Official Publications in electronic form should include a "hyperlink" to the relevant contract documentation on the purchaser's web site.

The regulations lay down certain minimum time limits for firms to be able to submit tenders. The purpose of these rules, and other rules of the directives on minimum time limits, is to prevent authorities from stipulating unreasonably short response periods which could disproportionately disadvantage non-domestic providers (who may, for example, need time to translate documents).

First, in fixing time limits for the receipt of tenders entities must (as in all procedures) take account of all circumstances, in particular, of the complexities of the contract and the time required for drawing up tenders (Public Sector Directive - Article 38(1)), which means that in certain cases it may be necessary to give longer than the usual minimum period set out below.

Secondly, firms must generally be given at least 52 days to tender (Public Sector Directive - Article 38(2)), calculated from the *date of despatch of the contract notice* (not the date of publication).

This period may need to be longer in certain cases, both under the principle in Article 38(1) stated above, and under a specific provision requiring a longer period

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<sup>24</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005. London: Sweet & Maxwell), pp.455-481; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), section 7.13-7.26; S. Treumer, "The Selection of Qualified Firms to be Invited to Tender under the EC Procurement Directives" (1998) 7 Public Procurement Lau Review 147.

when the documents are not supplied to tenderers in time or when a visit to the site or on-the-spot inspection of documents is needed (Public Sector Directive - Article 38(7)).

The 52-day period may also be *reduced* in certain cases:

1. Under Public Sector Directive - Article 38(4), when a "Prior Indicative Notice" (PIN) has been published within the previous year (and at least 52 days ago), which mentions that the specific contract is coming up and gives certain details of it. A PIN is basically an advance notice of the contract: if the bidders have such advance notice it is considered to justify shortening the usual time given to bidders to prepare, since they have already had some time to get ready for the contract. As a general rule the reduced period should be at least 36 days, but the period may be reduced even as far as 22 days. A 22-day period might be used, for example, for simple standard purchases where bids will not take much time to prepare. Requirements governing PINs are set out in Articles 35 and 36 of the directive.
2. When the contract notice is drawn up and transmitted by electronic means as specified in the directive, the usual time limit for tendering may be shortened by 7 days (Public Sector Directive - Article 38(5)). Thus when no relevant PIN is published, the time for tenders is 45 days (rather than 52); and when a relevant PIN has been published it is 29 days as a general rule, with a possible minimum of 15 days in certain cases (rather than 36 and 22). This takes account of the fact that with electronic transmission the notice must be published within 5 days rather than 12, so that (since the time runs from the date the notice is sent) in general the time by which the notice is guaranteed to be available to providers is increased by 7 days anyway.
3. The time limit may be reduced by a further 5 days when the entity offers "unrestricted and full direct access by electronic means" to the contract documents and any supplementary documents, from the date of publication of the contract notice, specifying the Internet address in the relevant notice (Article 38(6)).

The directive makes it clear that this reduction of 5 days may be added to the 7 day reduction applying when notices are drawn up and transmitted electronically. Thus when electronic means are used to send notices *and* to make documents available the general minimum time limit for tendering is 40 days when no relevant PIN is published, and, when a relevant PIN is published, 24 days as a general rule, and as low as 10 days in special cases.

The time limits that apply in a procedure in which no PIN has been published are summarized in the diagram at the end of this section, *Minimum timescales for the open procedure*.

**NB. A note on the provisions on PINs**

Under the old directives authorities were apparently required to publish PINs for all contracts, and not just when they wished to reduce time limits for tendering. Under the Works Directive, a notice was required to be sent as soon as possible after the decision approving the planning of any proposed works contract. The Supply and Services Directives did not require advance notices for specific contracts, but simply notices each year of the total supplies or services of different types which they expected to purchase in the next twelve months, where the authority expected its total purchases to exceed a particular threshold value over the course of the year.

In a bizarre decision on the old directives, in Case C-225/98, *Commission v France* ("*Nord-pas-de-Calais*")<sup>25</sup>, the CJEU adopted a controversial interpretation of the rules on PINs, concluding that – contrary to what is stated above – a notice was *not* required for every contract, but was only necessary where the contracting authority wishes to take advantage of the possibility for reduced time limits in tendering that are permitted when a PIN has been published. This was quite patently not what the old directive intended, or said, and the CJEU's reasoning in the case was wholly unsound.

However, it was decided in the new directive to follow the CJEU's approach and to remove any obligation to publish a PIN in all cases. Although the CJEU's reasoning was legally unsound the substance of the judgment had much to recommend it, since PINs were widely regarded as quite unhelpful and an unnecessary burden. Under the new directive, which deals with PINs in Article 35(1) and Article 36, there is no general requirement to publish a PIN: PINs referring to an intention to award a particular contract may simply be published on an optional basis, in order to reduce time limits for the procurement procedure for that particular contract, as set out above.

Unfortunately, however, the new directive sets out this rule and gives effect to the judgement in the France case not in a new clear and simple provision stating that PINs can be published to reduce time limits, but simply by amending the old provision on PINs by adding at the end of what is now Article 35(1) a statement that PINs are required only to take advantage of short time limits. There is a lot of material in Article 35/reg.11 that would only make sense if it were still the case that there is a general obligation to publish PINs covering all contracts. In particular, it does not make sense to require procuring entities to publish an advance notice referring to all contracts over the year, if the only point of the notice is to give advance warning of one specific contract in order to reduce time limits for that contract.

The above historical account has been necessary to explain the very strange wording of the current rules on PINs!

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<sup>25</sup> Case C-225/98, *Commission v France* ("*Nord-pas-de-Calais*") [2000] ECR I-7445.

## **6.5.2 The procedure for obtaining tenders: restricted procedures**

### **6.5.2.1 General**

The steps of the restricted procedure are also scattered throughout the Public Sector Directive.

The restricted procedure is different from the open procedure in that only a limited number of invited firms are permitted to submit tenders. Under this procedure, firms which find out about the contract will generally contact the purchaser to express their interest in receiving an invitation. This contact is referred to as the "request to participate".

### **6.5.2.2 Time limits for making the request to participate**

As with open procedures, in fixing time limits for the receipt of tenders entities must (as in all procedures) take account of all circumstances, in particular, of the complexities of the contract and the time required for drawing up tenders in setting the time for receiving tenders *and* in setting the time for receiving requests to participate (Public Sector Directive - Article 38(1)), which means that in certain cases it may be necessary to give longer than the usual minimum period set out below.

In addition, generally firms must be given 37 days to respond after despatch of the contract notice by the contracting authority (Public Sector Directive - Article 38(3)(a)). This time limit may be reduced by 7 days to 30 days when the notice is drawn up and transmitted by the designated electronic means (Public Sector Directive - Article 38(5)).

The general time limits that apply in a procedure in which no PIN has been published are summarized in the diagram at the end of this section, *Minimum timescales for the restricted procedure*.

When the usual time limits are impracticable for reasons of urgency, purchasers may invoke an "accelerated" version of the procedure under which the 37 day period becomes a period of not less than 15 days (or 10 when the notice is sent by the designated electronic means): Public Sector Directive - Article 38(8)(a).

- Note that in a press release of 12 December 2008 the European Commission has suggested that the need to stimulate the economy in the current financial crisis justifies the general use of the accelerated version of the restricted procedure. The Commission states: "The Commission recognises that the exceptional nature of the current economic situation can justify the use of the accelerated procedure reducing considerably the overall time limit of the procedure from 87 days to 30 days. Such presumption of urgency should apply throughout 2009 and 2010 for all major public projects". This indicates that the Commission itself is not likely to challenge use of the procedure during this period. However, an argument can be made that the use of the procedure will, in the terms of the directive, require specific justification on the facts of the particular case, in light of the likely actual impact of speedy award of the specific contract.

### **6.5.2.3 How many firms must be invited?**

Often in a restricted procedure there are more firms interested in tendering than the authority wishes to invite. Indeed, the very reason for choosing a restricted procedure is to avoid wasting the resources of tenderers and/or the authority which would be employed in submitting and evaluating a large number of bids, when this would not be outweighed by any gains in terms of better value for money. The directive requires that a minimum number of 5 be invited, and in all cases the number must also be sufficient to ensure "genuine competition" (Article 44(3)).

What is an appropriate number in any particular case will depend on the nature of the contract. In a contract for off the shelf items ten or so bids may sometimes be appropriate, but in the case of a complex contract for an information technology system, for example, a smaller number (say 5 or 6) might be chosen, since the cost of preparing and evaluating bids might be quite high.

Under these provisions the minimum number to be invited must be stated in the contract notice, and also the maximum number "where appropriate". Thus the contracting authority need not predict a precise number in advance, just a minimum. It may want to invite more than the minimum – for example, if several scores in a similar way when the shortlisting criteria are applied (see the next section below).

### **6.5.2.4 Shortlisting: which criteria are to be used for selection when there are too many firms interested?**

First, an authority clearly will not invite to tender any firms that are not qualified (e.g. which do not meet its minimum qualification criteria on financial and technical matters etc, as discussed earlier).

However, it may often be the case that even where unqualified firms are excluded there are still too many interested firms. The process of reducing the number of interested firms to the desired number to receive invitations can be referred to as "shortlisting". (Note that the term shortlisting is not used in the EU directives, however). There are a number of ways in which purchasers in both public and private sectors have traditionally done this in practice. They include the following (which could be used in combination as well as separately):

- (i) Selecting firms based on their general financial and technical position – that is, using the same type of criteria for shortlisting as are used for qualification. For example, an authority which wishes to invite five firms to tender might set a requirement for a certain amount of experience of similar projects, and if more than 5 firms meet this standard may then shortlist the 5 firms which have the most or most directly relevant experience. One variation of this approach is to score firms under the various headings used for qualification, and then (from those firms that obtain the minimum scores necessary to be considered qualified for the contract) to shortlist those firms that obtain the *best* scores.
- (ii) Selecting different types of firms, such as some large firms and some small firms.
- (iii) Selecting by reference to "policy" factors which do not relate to the performance of the specific contract – for example, giving preference to small businesses.

- (iv) Selection on the basis of consideration of substantive equity e.g. gender equity or equity by reference to nationality, in order to ensure that discrimination on such grounds is avoided, and to express a commitment to non-discriminatory policies.
- (v) Selecting by rotation.
- (vi) Random selection (such as drawing lots).
- (vii) Selecting firms which are likely to make the best offer in terms of price, quality etc without actually seeking an offer for the specific work (i.e. trying to anticipate which firms will best meet the contract award criteria discussed further below) - for example, looking at the firms' offers in past tenders, or (for simple products where price is the main factor) looking at the firms' list prices.

The directives themselves have never been really clear in the wording entirely clear which of these methods may be used. However, the view traditionally taken in the Commission's Guides was that contracting authorities must only look at the firms' relative performance in relation to the qualification criteria – that is, are required to use method (i) and this view is widely accepted and is supported by Case C-360/89, *Commission v Italy*<sup>26</sup>:

- In that case, as we have seen the Commission instituted proceedings in the CJEU in respect of an Italian Law which applied where more than 15 contractors sought to be invited to tender for a works contract. In this case the Law stated that at least fifteen should be invited, and that in deciding which to invite authorities should give preference to consortia and joint ventures which included undertakings carrying out their main activity in the area where the works were to be executed. The CJEU ruled that this provision infringed the Works Directive, and indicated that only the contractor's relative financial standing, technical capacity etc could be taken into account in shortlisting. (It can be noted that the CJEU also found the provision contrary to the TFEU rules on freedom to provide services. It discriminates indirectly against foreign firms which are much less likely than Italian firms to have their main activities in a region of Italy).

Whilst useful for many cases, the requirement to use this approach in all cases has been criticised. In particular:

- It excludes a number of useful and important methods of shortlisting, such as the mini-proposals approach for complex contracts. (However, the possibility of a mini-proposals stage in the competitive dialogue procedure as part of the award process may mitigate this problem). It also tends to favour larger companies, even though an important EU policy is to promote the development of small and medium sized enterprises (SMEs).
- It can also be very arbitrary if it is not applied in a careful and nuanced manner. If many firms very easily exceed the required level of qualified personnel and other resources for performing the contract, such that none of them present any risk of non-performance, it is difficult to see what policy is furthered by choosing those firms with the most extensive resources, or how the extent of available resources is relevant. For example, there are many contracts which can be performed with as little risk involved by a firm with a €5 million turnover as by one with a turnover of €500 million, and in such a case the shortlisting method of the directives is arbitrary. A requirement to use only the "qualification" criteria for shortlisting may encourage entities to adopt this sort of approach when it is not appropriate. Probably this would not in fact be permitted under the directive. Some rational link between the

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<sup>26</sup> Case C-360/89, *Commission v Italy* [1992] ECR I-3401.

shortlisting criteria and the objective of the shortlisting exercise probably needs to be shown. Thus it would be appropriate to allocate maximum scores to all those reaching a certain level, rather than giving ever-higher scores for increasing levels of resources.

- For some contracts where there are many potential tenderers of a good standard, however, it may be difficult to limit the number to a suitable one by using this method

The advantages and disadvantages of allowing reference to method vii (ability to meet the award criteria) for choosing whom to invite to tender are discussed by Treumer<sup>27</sup>. He concludes that despite providing scope for discrimination it should be allowed under all the directives, as it is preferable to the alternative of requiring entities to look at the relative financial and technical position of potential candidates.<sup>28</sup>

The wording of the new directive on the point is slightly different from the old, and is as follows (Article 44(1)):

"Contracts shall be awarded on the basis of the criteria laid down in Articles 53 and 55, taking into account Article 24, after the suitability of the economic operators not excluded under Articles 45 and 46 has been checked by contracting authorities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3".

Article 44(3) simply states that entities "shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply."

It seems unlikely that any substantive change in the law was intended by the new reference to objective and non-discriminatory rules and criteria – this is intended merely to emphasise that the criteria used must be objective and non-discriminatory as well as fitting the usual criteria as interpreted in the case law above.

Some ways in which these criteria are often applied in practice include:

- Scoring all potential tenderers against the qualification criteria. Those reaching a certain threshold (which may include a requirement for specific minimum scores on certain criteria as well as overall totals for all or part of the criteria) are considered to be suitable. The contracting authority then takes forward to invite to tender (i.e. shortlists) those who obtained the *highest* scores.
- Scoring tenderers based on their general technical abilities and their financial standing to determine who is suitable. From amongst those suitable the contracting authority then shortlists those who have the most/best specialist experience for the contract in question. For example, for a contract for building and operating a hospital the contracting authority may require simply experience of major building construction work at the suitability stage – but may consider at the shortlisting stage also what experience potential tenderers have of construction *in the hospital sector*.

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<sup>27</sup> "The Selection of Qualified Firms to be Invited to Tender under the EC Procurement Directives" (1998) 7 Public Procurement Law Review 147.

<sup>28</sup> He also argues that this is not ruled out by Case C-360/89, *Commission v Italy*, since he does not consider that that case unequivocally deals with choosing between suitable candidates, rather than simply with determining which are suitable. However, it is hard to make such an argument since in para.21 of the judgment the CJEU is clearly addressing the legality of the "preference" in the Italian provision that applies when there are more undertakings than the authority wishes to invite.

### 6.5.2.5 The group from which selection may be made

The 2004 Public Sector Directive includes in Article 44(3) a new provision stating that a procuring entity may not include economic operators who did not request to participate. (Instead it should proceed with the qualified candidates, even if below the set number).

This reference to a “request” seems to refer to a request that is submitted in response to the initial invitation to participate in the contract made in accordance with the directive. These could be national advertisements or other solicitations, but the principle of non-discrimination would require the same deadline for responses to these as in the *Official Journal* notice. This might indicate that a procuring entity cannot generally accept or solicit applications after the deadline set in the contract notice: it might be argued that to distinguish requests within this provision, and “economic operators who did not request to participate” as a result of the initial invitations, only those received by the stated deadline are eligible. It is difficult to see justification for this and it is particularly unjustified to apply such a rule when there are insufficient qualified firms.

### 6.5.2.6 Formulation and disclosure of the rules and criteria for selection

The pre-amble to the directive (recital 40) makes it clear that it is *not* required to set out in advance, and to disclose, weightings for the shortlisting criteria (how important each is as compared with the others). This is different from the position for award criteria for which Public Sector Directive 2004/18 *does* generally require the procuring entity to draw up and disclose weightings for the criteria.

*If an authority does, however, draw up a detailed methodology for applying the selection criteria before requests are submitted or considered, it will probably need to disclose it under the principle of transparency, prior to potential tenderers submitting their applications to be selected to tender.* This is a result of the CJEU’s decision under the old directives, in Case C-470/99, *Universale-Bau and others v Entsorgungsbetriebe Simmering* (“Universale-Bau”)<sup>29</sup>.

- This case concerned a restricted procedure for the award of a contract for the construction of part of a sewage treatment plant, which had been run under Works Directive 93/37. In this case EBS had informed interested providers that it would select to tender the five top-ranked candidates in its selection procedure. It also informed them that the ranking would take account of technical operating capacity over the previous five years, by reference to five listed types of works. This was to be done according to a scoring system that the entity had deposited with an independent third party (a notary). However, this scoring system was not disclosed to candidates. The CJEU ruled that where the entity “has laid down in advance the rules for weighting the criteria for selecting the candidates who will be invited to tender” it must state these in the contract notice or tender documents, because of the general principle of transparency. The CJEU noted by analogy that award criteria must be disclosed according to express provisions and concluded that transparency also required the same disclosure in the case of selection criteria. However, this reasoning is unsatisfactory since the express provisions on award criteria do not (and did not then) in fact refer to the kind of detail that the CJEU required to be disclosed in this case, but merely

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<sup>29</sup> Case C-470/99, *Universale-Bau and others v Entsorgungsbetriebe Simmering* (“Universale-Bau”) [2002] ECR I-11617.

to the basic criteria themselves. (On this see section 6.7 on award criteria below).

This is an example of the use of the general transparency principle to “add to” the explicit rules of the directive. It highlights the extreme importance of taking account of the cases in public procurement as well as the legislation itself.

It is not entirely clear whether this principle still applies under the new directive: the old directive said nothing about disclosing selection criteria at all, but the new one includes specific provisions, as noted above. It might be argued that these are now exhaustive of any disclosure obligations under the directive. However, recent case law of the CJEU requiring extensive disclosure of the methodology for the contract award phase (see section 6.7 on award criteria below) seems to lend support to the view that the disclosure requirement of *Universale-Bau* does still apply under the new directives.

#### **6.5.2.7 Sending invitations**

Written invitations must be sent simultaneously and without discrimination to each selected firm (Public Sector Directive - Article 44(1)). Certain listed information must be sent with each invitation (Public Sector Directive - Article 44(2) and Article 44(5)).

#### **6.5.2.8 Time for tendering**

Following the despatch of invitations, in addition to the general principle on adequate time for tendering, as discussed above, firms must be given 40 days to bid (Public Sector Directive - Article 38(3)(b)). As with the open procedure this time limit may be reduced if there has previously been publication of a PIN referring to the contract. In this case the reduction may generally be up to 36 days, but a period of as little as 22 days is possible by way of exception to the 36-day requirement, where justified (which may be, for example, by the simple nature of the purchase).

The time period (probably including the 22-day period) may also be reduced by a further 5 days under Public Sector Directive - Article 38(4) when the authority gives unrestricted full and direct electronic access to the documents.

When the “accelerated” form of the restricted procedure is used the time for tendering must be not less than 10 days (Public Sector Directive - Article 38(8)(b)). There is no provision for reducing this period.

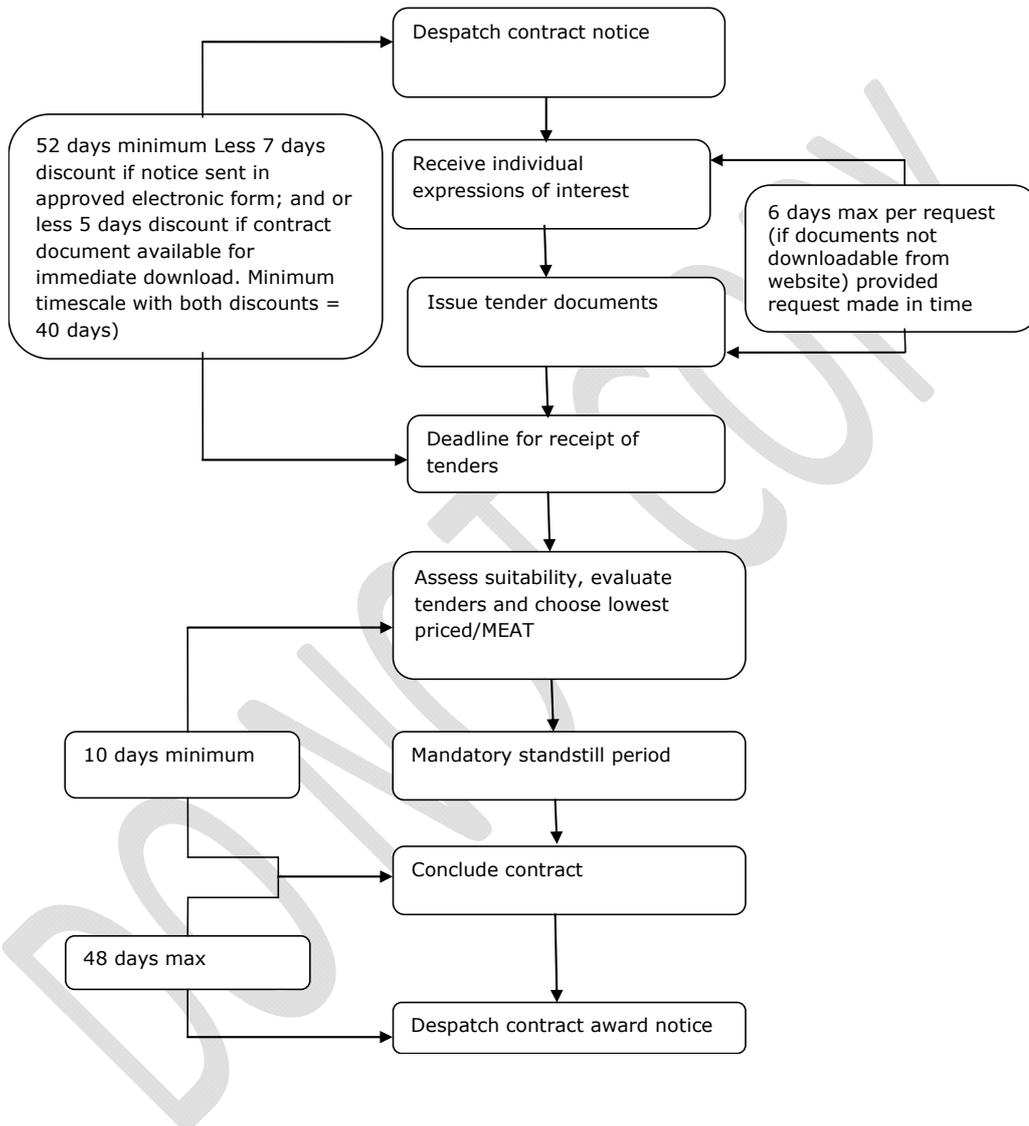
The time limits that apply in a procedure in which no PIN has been published are summarized in the diagram at the end of this section, *Minimum timescales for the restricted procedure*.

### Minimum timescales for the open procedure

This is a modified version of a diagram originally produced by Achilles Information for the THEMIS system; we are grateful for their permission to use it here.

**Notes:**

- i) This assumes a procedure not publicised through a PIN
- ii) Timescales longer than the stated minima may be needed in some cases

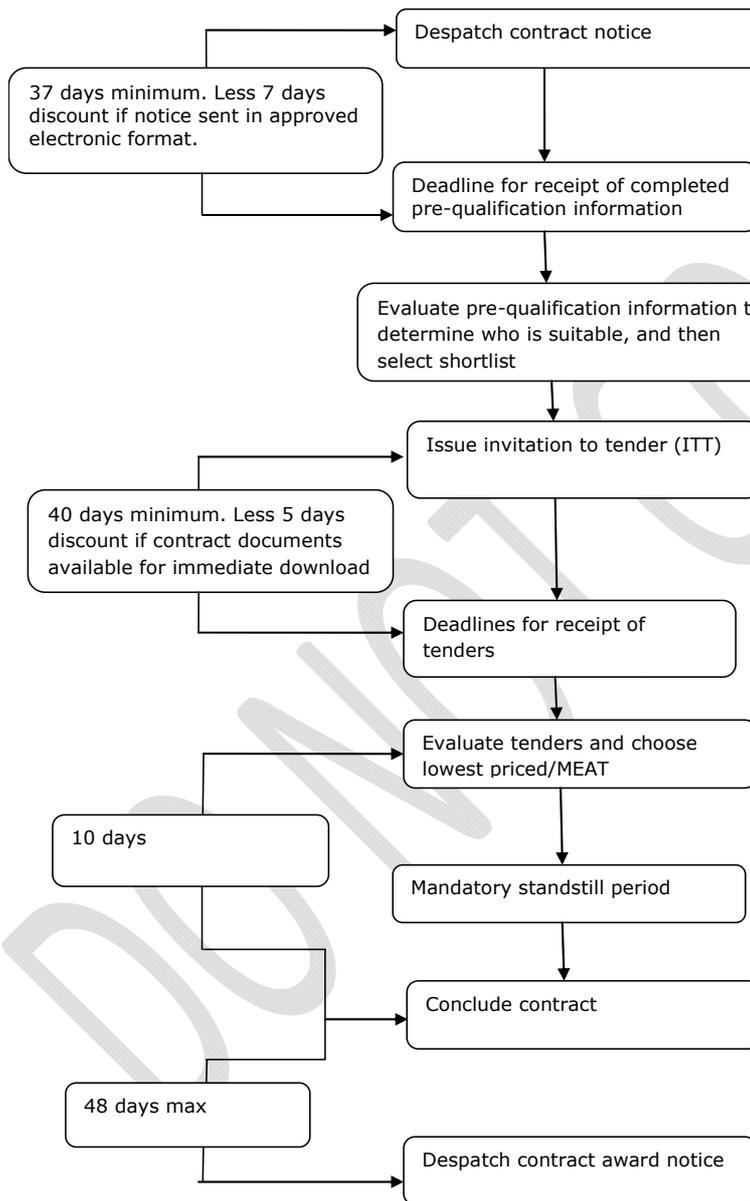


### Minimum timescales for the restricted procedure

This is a modified version of a diagram originally produced by Achilles Information for the THEMIS system; we are grateful for their permission to use it here.

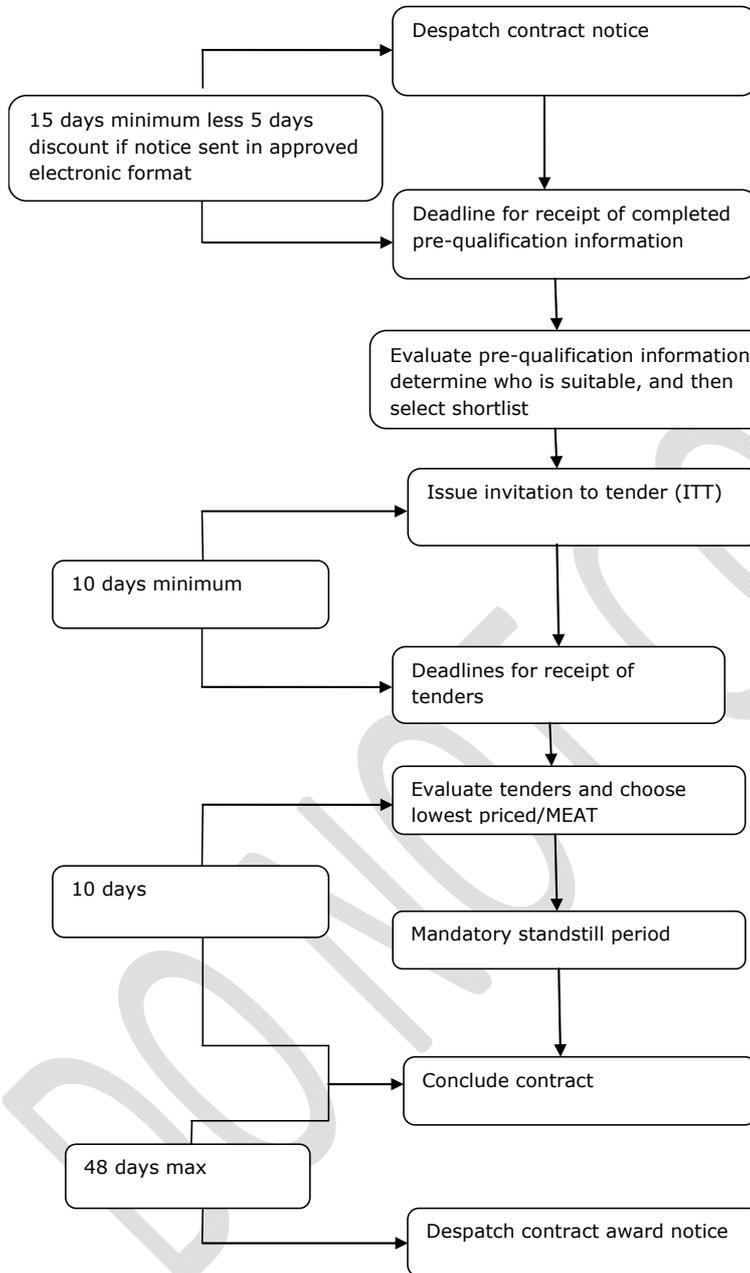
#### Notes:

- i) This assumes a procedure not publicised through a PIN
- ii) Timescales longer than the stated minima may be needed in some cases



### Minimum timescales for the accelerated version of the restricted procedure

This is a modified version of a diagram originally produced by Achilles Information for the THEMIS system; we are grateful for their permission to use it here.



## 6.6 Open and restricted procedures: non-conforming tenders<sup>30</sup>

In some cases tenderers might submit tenders that do not comply with requirements of the contract documents – either substantive requirements (such as the specifications or the conditions on payment) or procedural requirements (such as the deadline or presentation of the tender). There are various policy issues involved in allowing, or requiring, procurement entities to accept/reject non-conforming tenders. In the context of EU law a particular concern is the possibility that allowing discretion over either the acceptance or rejection of non-conforming tenders will provide an opportunity for the procuring entity to favour national suppliers.

There are several possible responses to a non-conforming tender:

- **Option 1:** To consider the tender as it stands (i.e. as a non-conforming tender);
- **Option 2:** To consider the tender once it has been corrected to conform. This could involve a correction by the procuring entity or a correction by the tenderer itself;
- **Option 3:** To reject the tender;
- **Option 4:** To treat the tender as one that must be rejected but conduct a new tendering or other procurement exercise that may involve participation by the non-conforming tenderer.

The position in the EU is that the EU directives do not contain any clear and explicit rules on non-conforming tenders. There is some limited case law on the matter from the CJEU which have made some basic principles clear – but to a large extent it is still not clear what are the requirements of EU law, and these will have to be developed in future by the courts bearing in mind the policy considerations that we have already discussed. In dealing with the grey areas yet to be clarified – for example, in predicting what the courts are likely to do or making arguments in court – it is necessary to consider those policy issues alongside a consideration of how the courts in the relevant jurisdiction tend to respond generally to those kinds of arguments.

We will consider the availability to a Member State of each of the options in turn:

### Option 1 – accepting the non-conforming tender

One thing that the CJEU has made clear under the directives is that where a tender does not comply with “fundamental” requirements set by the contracting authority the authority cannot consider the tender as it stands (i.e. option 1). This was made very clear in Case C-243/89, *Commission v Denmark* (“Storebaelt”)<sup>31</sup>.

- This case concerned proceedings by the Commission in the CJEU against Denmark, in relation to a restricted procedure for a contract for the construction of a bridge. The specifications had proposed three possible construction methods for the bridge and also stated that contractors could propose alternative methods. This was, however, subject to certain conditions, one of which was that the contractor would assume responsibility for the details of the alternative design. The authority accepted a tender

<sup>30</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), pp.455-481; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), section 7.13-7.26.

<sup>31</sup> Case C-243/89, *Commission v Denmark* (“Storebaelt”) [1993] ECR I-3353.

which involved an alternative proposal but did not meet this condition. The CJEU ruled that this infringed the equal treatment principle of the directives, since any tender accepted must meet the fundamental conditions in the specifications. Clearly the other bidders will have drawn up their bids on the basis of the conditions laid down, and it is thus unfair to accept a bid which does not comply with the conditions without also giving other contractors a chance to submit bids on this different basis.

Another illustration of the principle set out in *Storebaelt* prohibiting acceptance of non-compliant tenders is Case C-87/94, *Commission v Belgium* ("Walloon Buses")<sup>32</sup>.

This case concerned proceedings brought by the European Commission in the CJEU, relating to a procurement of buses by the Société Regionale Wallonia du Transport (SRWT) in an open procedure. (The contract was actually covered by the Utilities Directive, but the same rules apply with open procedures under all the directives). Several of the lots under the contract had been awarded to EMI. Van Hool, a rival bidder, instituted proceedings in the Belgian national courts to challenge this award to EMI, and also complained to the Commission which instituted the present proceedings in the CJEU. One of the complaints was that SRWT had not complied with prescriptive conditions which it had laid down in the tender documents. SRWT had required firms to provide information for calculating the spares and maintenance costs of each bid (for example, time taken to dismantle certain parts), but had stated that the costs of spares and maintenance would be calculated using figures stated in the contract documents regarding the frequency with which certain parts would need to be replaced. EMI had provided its own frequency figures for its own products, which were more favourable than those stated by SRWT, and these had been accepted by SRWT in calculating EMI's spares and maintenance costs. The CJEU ruled that there was a breach of the principle of equal treatment, as only EMI had had the opportunity to provide its own figures on frequency of replacements.

The *Walloon Buses* case is a good illustration of the importance for purchasers of not being too prescriptive in the way conditions are drawn up. There is no good reason for the authority to decide how frequently parts will need replacing, but it should leave different bidders to make their own suggestions on this if it is to get the best possible value for money.

These cases do not, however, rule out the possibility that a contracting authority might be able to accept tenders that exhibit non-compliance *in minor respects*. *Storebaelt* refers only to non-conforming in minor matters. It is conceivable that this might be allowed where, for example, there is no real advantage to the tenderer in not complying, and/or where the non-compliant element can be objectively quantified and taken into account.

## **Option 2 – allowing correction**

### ***Is there ever a duty on the contracting authority to allow correction?***

It seems that there is no general *duty* imposed by the directives on contracting authorities to allow a tenderer to correct a fundamentally non-conforming tender, at least where the correct version of the tender is not obvious. The CJEU has not considered this point explicitly but this was the view finds support in the decision of the General Court (formerly Court of First Instance) in the case of Case T-19/95,

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<sup>32</sup> Case C-87/94, *Commission v Belgium* ("Walloon Buses") [1996] ECR I-2043.

*Adia Interim SA v Commission* ("Adia")<sup>33</sup>. In this case the GC held that a tenderer had no right to insist on being allowed to correct a pricing error in its tender. This case does not deal specifically with a non-compliant tender, but is relevant in that it deals with correction of tenders in general.

An argument might be made that there is a duty to allow correction of a tender in other cases of non-conformity, based on the principle of proportionality. The argument would be that to exclude a tender for non-compliance in certain circumstances, in particular where there is no adverse impact or problem in considering it (for example, where the tenderer has gained an advantage and there is no or limited opportunity for abuse of the opportunity to correct) is disproportionate to any benefit in sticking to the stated rules, especially given the EU's interest in wide access to markets (since, as mentioned before, excluding tenders for minor non-conformity without the opportunity for correction obviously narrows the scope of competition for the contract).

This view might find some support in the General Court (formerly Court of First Instance) case, Case T-211/02, *Tideland Signal Ltd v Commission* ("Tideland")<sup>34</sup>.

This case concerned an invitation to tender issued by the European Commission for the procurement of navigation equipment for ports in certain countries of the former Soviet Union under one of the Commission's aid programmes (the TACIS programme). The applicant's tender for one of the lots was rejected on the basis that it did not include an agreement to keep the tender open until 90 days after the tender deadline. The tender stated that it was valid "for a period of 90 days from the final date for submission of tenders, i.e. until 28/07/02". In fact the 90 period ended not on 28/07/02 but later – the reason for the reference to that date was the Commission had extended the tender deadline and *Tideland* had submitted the same documents as for the original tender, forgetting to amend the date of expiry of validity. *Tideland* successfully sought an annulment from the General Court (formerly Court of First Instance) of the Commission's decision to reject its tender. The GC held that the above statement concerning the period of validity was ambiguous; and that where there is an ambiguity in a tender that "probably has a simple explanation and is easily resolved" the Commission should have exercised a power that it had (as stated in the tender documents) to seek clarification of the ambiguity. The GC held that to apply here since the error made in the date should have been apparent from the circumstances. The GC referred to the principle of proportionality to justify its conclusion on this point.

This was not a case of clear non-conformity but a case in which the GC considered the tender to be ambiguous. However, a similar approach might be taken if the tender itself were unambiguous, but the date included were an error – either an error that should have been identified by the contracting authority, or an error later brought to the attention of the contracting authority by the tenderer itself. By analogy with *Tideland*, where clarification of the ambiguity was required, it can be argued that, based on the principle of proportionality, correction of the error should be allowed where it is clear what the error is and it is clear what the provision in the tender should actually be.

It seems clear that there will be no duty to allow correction in cases of substantial non-conformity in which the correct content of the tender is not clear – for example, non-conformity with fundamental conditions in the sense of those capable of affecting the value of the tender to the authority.

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<sup>33</sup> Case T-19/95, *Adia Interim SA v Commission* ("Adia") [1996] ECR II-321.

<sup>34</sup> Case T-211/02, *Tideland Signal Ltd v Commission* ("Tideland") [2002] ECR II-3781.

**May Member States allow their contracting authorities to accept corrections of non-conforming tenders or to correct those tenders themselves?**

A more difficult question is how far a Member State *may allow* its contracting authorities to accept corrections to bring non-conforming tenders into conformity, or to correct those tenders themselves. As we have seen above in some limited cases there might indeed be a right of correction for a tenderer – but, to the extent that there is not, may a contracting authority allow a tenderer to correct its tender *if the contracting authority chooses to allow a correction*? For example, could the authority have allowed the tenderer in *Adia Interim* to correct the tender had it wished to allow such a correction (assuming that those decisions are correct in deciding that the authority was not required to allow a correction)? If correction *is* a permitted option under the directive, a Member States could also probably introduce its own law to require a contracting authority to allow corrections in certain cases should it wish to do so.

There are currently no cases at EU level that deal directly with this issue. As we have noted above, in the EU context one of the main arguments against allowing acceptance is that the contracting authority could abuse its discretion to allow correction to favour a national supplier. This could be done by generally allowing national suppliers but not others to correct their tenders. Where the intended content of the tender is not clear allowing correction could also enable national suppliers effectively to “improve” their tenders through the guise of correction (and, if they are in collusion with the contracting authority, they may be able to do this with knowledge of the other tenders). It could be argued that allowing correction is against the equal treatment principle in that it allows the correcting supplier to gain an advantage, either by having more time for completion, or through the possibility for improving or otherwise changing its tender. On the other hand, allowing correction of tenders widens competition, promoting the EU principle of competition and allowing national authorities better to achieve their objectives of value for money. It can be argued that there is no violation of the equal treatment principle in that provided that the discretion *is* exercised in an even-handed way all suppliers in a comparable position are treated in the same way, those in a comparable position being all those who submit non-conforming tenders. It is not yet clear how the CJEU will balance these competing considerations in interpreting the directives.

**Option 3 – rejecting a tender**

As we have seen above, there appears *generally* to be no duty to allow correction of a tender that does not conform to the authority’s requirements. In this case authorities may be given a discretion to reject the tender – and indeed with tenders that do not conform to requirements, as we have seen above, authorities may possibly be required to reject it under EU law.

**Option 4 – a retender**

An authority may want to know if it can issue a retender – for example, if non-compliance by one or more tenderers has resulted from the fact that the authority has not drafted a very good specification. May it correct its error of judgment by amending the conditions to make them less prescriptive, and allowing *all* bidders to bid on the revised basis, without beginning a new tendering procedure? In the *Walloon Buses* case itself the CJEU expressly declined to consider this issue as it was not necessary to decide the case. However, it might be argued that such amendments are permitted, provided that the changes are not so great as to make

the contract a “new” contract which needs a new award procedure. This issue of whether a new tendering round is allowed is discussed further in section 6.9 below, which deals generally with amendments and corrections to tenders.

## **6.7 Award of the contract<sup>35</sup>**

### **6.7.1 Introduction**

We can use the phrase “contract award” to refer to the stage of the award procedure in which the procuring entity decides which of the qualified and responsive tenderers has submitted the best tender. As noted there, the award may sometimes be based on simply the lowest price or may also involve consideration of other factors such as quality. This applies also under the EU rules.

Under the EU rules the same rules on contract award apply to both open and restricted procedures. Under the EU rules the main purpose of the rules on award criteria is to secure transparency in the application of the award criteria so that, in particular, discriminatory decisions cannot be concealed. However, the rules possibly also have other purposes – for example, the rule requiring award criteria to be linked to the subject matter of the contract could be seen as ensuring wide access to contracts (although its rationale has actually never been really discussed).

### **6.7.2 The award criteria that may be used**

#### **6.7.2.1 Basic principle: lowest price or most economically advantageous tender**

Once tenders have been received, in both an open or restricted procedure the contract must be awarded on the basis of one of two criteria:

1. Lowest price or
2. Economically advantageous tender

The rules on this are set out in Public Sector Directive - Article 53.

Under the lowest price basis, the award goes to the lowest tenderer. Many authorities use this only for simple purchases where the nature and quality of items offered does not vary much between different suppliers.

Under the most economically advantageous tender principle the authority may award the contract to the firm whose tender is the most advantageous, taking into account all relevant factors. Public Sector Directive - Article 53(1)(a) lists various factors which could be used, such as price, quality, running costs, after sales service and delivery date, as well as price. For example:

- an authority purchasing a new information technology system to replace an old paper-based system for dealing with employee salaries and benefits etc will not just be interested in the up-front cost. In deciding which system to purchase it might also want to consider, for example, other financial aspects (such as how many staff will be needed to run the system, and what training it will need to provide to any existing staff for them to run the system); quality aspects (such as how quickly the system can process information; how well it could cope with increased transaction volumes in the future; how

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<sup>35</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), pp.499-531; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), pp.297-299 and pp.462-474.

good back-up systems are in case of system failure; and how quickly the new system can become operational.

The list in the directives is not exhaustive, however: authorities may use other factors (as was previously established in the cases and is now made clear in the text of the directive): Case C-19/00, *SIAC Construction Ltd v County Council of the County of Mayo* ("SIAC")<sup>36</sup>; Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Buses")<sup>37</sup>.

### 6.7.2.2 Requirement for a link to the subject matter of the contract

The illustrations of permitted criteria given in the directive all relate to the performance of the contract being awarded, and all factors used must likewise relate only to the performance of that contract. This was stated by the CJEU in *Concordia Buses*, above, and is now stated expressly in the current directive (Article 53 requiring criteria to be "linked to the subject matter of the contract").

An illustration of a criterion that was not permitted because it did not relate to the subject matter is provided by the Case C-448/01, *EVN AG and Wienstrom GmbH v Austria* ("EVN")<sup>38</sup>.

In this case the contract award criteria were price (weighted at 55%) and the amount of energy that the tenderer could supply in excess of 22.5 GWh per annum from renewable energy sources (weighted at 45%). 22.5 GWh was the amount of energy that it was estimated would be needed under the contract. The award criterion gave preference to tenderers who could supply from renewable sources more than the amount needed under the contract.

The CJEU held that such a criterion, which concerns exclusively the total amount which the tenderer will be able to supply *in general* (to other customers), and not the amount which the tenderer will be able to supply specifically to the procuring entity, is not lawful. This criterion appeared to be directed simply at increasing the overall supply of renewable energy in the market, rather than at how the supplier performed its contract with the government. The Austrian government had argued that this criterion was concerned with reliability of supply but the CJEU concluded an award criterion that is concerned with *the largest possible amount* that tenderers can produce in excess of the contract cannot be an award criterion (para.70). It is thus clear that if an entity wishes to use reliability as a criterion it must formulate a criterion linked in a more proportionate and direct manner to the reliability issue – for example, by providing for a preference for tenderers who supply amounts exceeding the estimate by more than a specified limited percentage.

### 6.7.2.3 Dealing with uncertainties

In the *SIAC* case the CJEU confirmed that authorities may use criteria that involve estimating facts not known when the tenders are assessed:

- The notice in that case stated that the contract was to be awarded on the basis of the most economically advantageous tender criterion, and that the factors to be taken into account were "cost" and "technical merit". Tenderers

<sup>36</sup> Case C-19/00, *SIAC Construction Ltd v County Council of the County of Mayo* ("SIAC") [2001] ECR I-7725.

<sup>37</sup> Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Buses") [2002] ECR I-7213.

<sup>38</sup> Case C-448/01, *EVN AG and Wienstrom GmbH v Austria* ("EVN") [2003] ECR I-14527.

were required to submit prices for the different items involved in the contract. Estimates of the quantities of each item that would be involved in the contract were given in the documents. Tenderers were required to fill in a price for their tenders, calculated by reference to the cost of each item multiplied by the estimated quantities. The actual price to be paid under the contract would be based on the actual quantities of each item during the contract period, not the estimated quantities. The two lowest were judged equal on technical merit. The tender of SIAC offered the lowest price, calculated in the manner set out in the previous paragraph, but the authority selected the tender of another firm. One reason for this was that this tender was likely to result in the lowest contract price, and thus, in the authority's view, the lowest "cost" within the meaning of the contract award criteria. The reason for this was that SIAC had not filled in any amounts for some of the items listed ("zero-rated" items). The documents stated that costs of any zero-rated items were deemed to be subsumed in the costs of other listed (related) items. However, the authority concluded that the effect of including such a large number of zero-rated items could be to distort the eventual pricing and also to make it more difficult for the authority to control the costs by varying the quantities. (This was because in such a case costs charged are not precisely equated with the items to which they relate). The CJEU concluded that in principle it was possible to take this factor into account.

The principle that entities may base the award on estimates of the price that will be paid, based on likely future events (such as quantities needed), is also confirmed in Case T-4/01, *Renco SpA v Council* ("Renco")<sup>39</sup>.

#### **6.7.2.4 The width of authorities' discretion**

It is generally for authorities to decide how the different award criteria should be weighted, and they have a wide discretion in this respect: see *EVN* case, where the CJEU ruled that it is perfectly acceptable to adopt a weighting of 45% for environmental criteria.

#### **6.7.2.5 Other restrictions and conditions**

Member States are not permitted to adopt general rules that require purchasers to use lowest price for all works contracts: Case C-247/02, *Sintesi ApA v Autorità per la Vigilanza sui Lavori Pubblici* ("Sintesi")<sup>40</sup>. The principle behind this decision is that to a certain extent entities must be permitted the freedom to do what is appropriate to ensure competition for each contract.

In *SIAC*, above, the CJEU stated that award criteria must be applied "objectively" and uniformly to all tenderers, and that any opinion must be "based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made" (para.45). This indicates that the CJEU will undertake scrutiny of the way in which criteria are applied to ensure that purchasers' discretion cannot be used to conceal discriminatory decisions.

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<sup>39</sup> Case T-4/01, *Renco SpA v Council* ("Renco") [2003] ECR II-171.

<sup>40</sup> Case C-247/02, *Sintesi ApA v Autorità per la Vigilanza sui Lavori Pubblici* ("Sintesi") [2004] ECR I- 9215.

In *Concordia Buses*, above, the CJEU also stated that environmental criteria (which in that case concerned the level of toxic emissions from buses and the noise levels of the buses) must be:

1. "specific"; and
2. "quantifiable".

As for the requirement for specificity, it arguably would not be sufficiently specific for the procuring entity to take into account the "adverse effects on the environment of the provider's offer", without specifying more precisely the environmental effects (noise levels, pollution etc) that will be considered. This seems to suggest that *environmental* award criteria must be more specific than the illustrative criteria referred to in the directives.

The second requirement, that the criteria must be quantifiable, arguably entails that it is necessary to be able to measure the environmental impact of particular tenders without subjective input, in order to be able to assess them in the award process. Clearly it is possible to measure noise levels and levels of toxic emissions without difficulty. In other words, it seems that the CJEU was considering whether the impact of the product or service referred in the award criteria can be "quantified" by reference to some objective measurement – but not necessarily a financial one.

It is not clear whether and how these criteria will also apply to other types of award criteria, such as technical quality. Arguably they do apply since the previous case law relied on by the CJEU in *Concordia Buses* in developing these two requirements was not concerned exclusively (in that context) with commercial-type criteria.

If the two requirements do apply, so far as specificity is concerned, it is arguable that for criteria mentioned in the specific illustrative lists in the directives, this requirement is satisfied by referring to criteria in the exact way that they are mentioned in the directives themselves. The directives explicitly require entities to refer only to the "criteria" that they intend to employ, not to more detailed aspects of those criteria. For example, it may be sufficient to provide simply that the entity will consider the "technical merit" of proposed public works, without referring in more detail to the precise technical aspects to be considered. In particular, to require more precise formulation would make it difficult for procuring entities to consider characteristics of products, works or services with which they are unfamiliar, so undermining the directives' objectives of preventing unjustified favouritism towards known providers.

So far as quantifiability is concerned, on a strict view, this might be thought to rule out any award criteria that cannot be measured in strictly objective terms – such as "culture fit" between the procuring entity and provider. However, it is clear that this cannot be the case since the directives themselves refer explicitly to the possibility of using criteria that require a high degree of subjective judgement (notably with the case of "aesthetic characteristics"). It seems difficult to reconcile this fact with the principle of quantifiability stated in *Concordia Buses*. One possibility is to take the view that the principle requires a higher degree of objective measurability for criteria relating to the environmental impact of goods, works and services than for criteria relating to other aspects of the contract.

The view that the *Concordia Buses* conditions do not apply in the same way to commercial award criteria find some support in the *Renco* case, a case concerning a maintenance contract for council buildings.

- The award in the *Renco* was to be based on the most economically advantageous tender. The contract documents referred to eight criteria as "especially important". These were the conformity of the tender; the price of

the tender; the experience and competence of the permanent team in providing similar services; the experience and technical competence of the undertaking; the proposal made with regard to the safety co-ordinator; the quality of the proposed sub-contractors; technical quality of the equipment and materials proposed; and the means proposed for ensuring compliance with the contractual deadlines. One of Renco's complaints was that many of the above criteria were too imprecise, giving to the Council too significant a margin of discretion. This argument was rejected by the CJEU. In reaching its conclusion the CJEU emphasised that the criteria used did not have to be "quantitative" in nature (a condition the CJEU thought was met only by the first two criteria above) but could involve qualitative elements (para.68). Thus the CJEU concluded that all the above criteria were acceptable and specifically mentioned that they did not violate principles of equality of treatment or transparency. (See para.70). However, the value of this judgment is limited by the fact that i) the CJEU did not even refer to the *Concordia* case and ii) that the CJEU does not in its judgment clearly distinguish between award criteria and qualification/selection criteria.

#### **6.7.2.6 The relationship between selection and award criteria<sup>41</sup>**

An important and controversial issue relating to permissible award criteria is the extent to which award and selection criteria overlap. In particular, there is some uncertainty over the extent to which the qualities of the tendering firm and/or the individuals who will carry out the work on the contract can be taken into account at the award stage. Under the UNCITRAL Model Law on Procurement of Goods, Construction and Services, in the principal method for procurement of services it is provided that procuring entities may take account of these matters. For example, under Article 39, in the principal method for procurement of services, entities may consider "The qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services". Such matters can often be relevant to determining the quality of the service that will be delivered. For example, the qualifications and knowledge from past experience of the personnel involved in delivering professional services may affect not just their ability to deliver the services to the minimum standard required under the contract but the quality of the services they can offer relative to other firms. When pricing is by the hour these factors may also affect the cost, since knowledge from past experience may enable a bidder to perform the same service more quickly. Thus it might be thought that these are matters that could be considered in assessing the most economically advantageous tender – for example, service quality when this is a stated award criterion.

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<sup>41</sup> See further M. E. Comba, "Selection and Award Criteria in Italian Public Procurement Law" (2009) 18 *Public Procurement Law Review* 122; L. Folliot-Lalliot, "The Separation between the Qualification Phase and the Award Phase in French Procurement Law" (2009) 18 *Public Procurement Law Review* 155; K. Krüger, "Superiority in Experience and Skills may Distinguish a Better Tender Bid! Critical Reflections from Norway on the *Lianakis* Ruling" (2009) 18 *Public Procurement Law Review* 138; P. Lee, "Implications of the *Lianakis* decision", 2010 (2) *Public Procurement Law Review* 47; A. Rubach-Larsen, "Selection and Award Criteria from a German Public Procurement Law Perspective" (2009) 18 *Public Procurement Law Review* 112; W. Timmermans and T. Bruyninckx, "Selection and Award Criteria in Belgian Procurement Law" (2009) 18 *Public Procurement Law Review* 128; S. Treumer, "The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exception?" (2009) 18 *Public Procurement Law Review* 103; S. Treumer, "The Distinction between Selection and Award Criteria in EC Public Procurement Law: The Danish Approach" (2009) 18 *Public Procurement Law Review* 146.

The position in this respect in the EU, however, has recently been thrown into doubt by the CJEU's judgment in Case C-532/06, *Emm. G. Lianakis AE v Dimos Alexandroupolis and others* ("Lianakis")<sup>42</sup>.

This case involved an application of a preliminary ruling from the CJEU by a Greek review body. The proceedings before the Greek review body related to an award procedure for services for a project in respect of the "cadastre, town plan and implementing measure" for an area of Greece. The procedure was carried out under the Services Directive 92/50, a predecessor to the current Public Sector Directive 2004/18. Although the question referred by the review body concerned the use and disclosure of sub-criteria in applying the contract award criteria, the Commission raised doubts over the legality of some of the criteria used in the case, and the CJEU therefore, of its own motion, first considered the legality of the award criteria in question.

The award criteria were as follows:

- i) the proven experience of the expert on projects carried out over the last 3 years;
- ii) the firm's manpower and equipment; and
- iii) the ability to complete the project by the deadline, together with the firm's commitments and professional potential.

The CJEU stated that these criteria were not permitted as award criteria. The CJEU drew a distinction between, on the one hand, criteria that are aimed at identifying the tender that is the most economically advantageous, and, on the other, those "instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question", stating that only the former are permitted award criteria under what is now Article 53 (para.30). The CJEU considered that the above criteria in the present case were criteria that related principally to the experience, qualifications and means of ensuring proper performance of the contract in question" which relate to "suitability to perform the contract" (a process governed currently by Articles 44-52 of the directive). The CJEU considered that these were thus not permitted under Article 53.

What are the implications of this case? Three main views have been put forward:

1. That the abilities (including experience etc.) of the tenderer and of individuals who will carry out the project cannot be considered at all at the award stage but only at the stage of determining which firms are suitable and which should be invited to tender. In other words, there is no overlap between the selection stage and the award stage. This seems to be the view of the European Commission, as argued in *Lianakis*. If this view is correct, then it seems that in taking account as an award criterion the quality of services to be provided under a contract a contracting authority may consider only the content of the tender itself – such as the proposed methodology for carrying out the services – and not the qualities of the tenderer or individuals involved. This would be of some concern since these qualities are very important in practice in ensuring value for money in many types of services contract, such as contracts for complex services such as facilities management and contracts for professional services.
2. That the abilities (including experience etc.) of the tenderer cannot be considered at all at the award stage but only at the stage of determining which firms are suitable and which should be invited to tender; however, *Lianakis* does not rule out considering the qualities of the individuals or team

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<sup>42</sup> Case C-532/06, *Emm. G. Lianakis AE v Dimos Alexandroupolis and others* ("Lianakis") [2008] E.C.R. I-251.

who will actually carry out the project, which may be considered to the extent they are relevant to judging the quality of the work to be done under the contract.

- This view is put forward by Lee<sup>43</sup>, who analyses in detail the judgment in *Lianakis* and the other case law relevant to this subject. His argument for this interpretation is based in large part on the fact that – despite the fact that the award criterion as stated appeared to refer to the project team – in practice the contracting authority had been concerned with the experience of the tenderer. In a case of the General Court (formerly Court of First Instance) subsequent to *Lianakis* the GC has interpreted *Lianakis* as not precluding award criteria relating to the ability of those performing the services: see Case T-211/07, *AWWW v EFILWC*<sup>44</sup>.
3. That *Lianakis* does not preclude considering either the abilities of the tenderer or the qualities of the individuals or team that will be working on the contract *to the extent that these are actually relevant to the quality of the work that will be done under the contract* i.e. to determining which offer is the most economically advantageous. In this respect, it can be argued that on the facts of *Lianakis* the experience and manpower of the tenderer was not actually used to assess the quality of the services but in an arbitrary fashion that had no relevance to that question – tenderers were given higher scores for different types and extent of experience without actually considering the relevance of this to the services to be performed (which were actually of relatively low value).

There are a number of arguments that might be put forward to support the second and/or third interpretations – these could be relevant both to the extent that the CJEU's ruling in *Lianakis* can be regarded as ambiguous *or* (if the judgment itself is considered clear) in making a case for the CJEU not to follow that ruling in future.

1. **The CJEU does not cite any reason of policy relating to the objectives of EU procurement law as to why the abilities of tenderers and individuals should not be considered at the award stage.** On the other hand, forbidding this prevents Member States from implementing their legitimate procurement objectives in obtaining value for money in acquiring what they need. These abilities are clearly relevant in practice for assessing both whether a particular firm can meet the minimum standards required and should be selected and (the award stage) for assessing the quality of what will be done above the minimum required standards, and thus for comparing offers.
2. **The judgment is not consistent on this point with previous case law, which was not cited or discussed.** Thus in the *Renco* case, in the context of a contract for the maintenance of buildings for the Council, the General Court (formerly Court of First Instance) accepted without comment as award criteria the conformity of the tender; the price of the tender; the experience and competence of the permanent team in providing similar services; the experience and technical competence of the undertaking; the proposal made with regard to the safety co-ordinator; the quality of the proposed sub-contractors; technical quality of the equipment and materials proposed; and the means proposed for ensuring compliance with the contractual deadlines. It can also be noted that use of references (which are listed as relevant evidence for selection) was apparently accepted as a method to determine

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<sup>43</sup> P. Lee, "Implications of the *Lianakis* decision", (2010) 2 *Public Procurement Law Review* 47.

<sup>44</sup> Case T-211/07, *AWWW v EFILWC* [2008] ECR II-106.

quality of performance the CJEU itself in its judgment in Case C-315/01, *Gesellschaft für Abfallentsorgungs-Technik (GAT) v Österreichische Autobahnen und Schnellstrassen AG (ÖSAG)*<sup>45</sup>. This concerned an award procedure by an Austrian contracting authority for road-clearing equipment for use on mountain roads. One criterion that was used in comparing tenders to determine which was the most advantageous was the number of references that the supplier could provide from clients in alpine areas of the EU. One question arising was whether the Supplies Directive prohibits a procuring entity from using references not just to assess a firm's ability to perform the contract but also as an award criterion in comparing the merits of different tenders. The CJEU concluded that it was not acceptable to use as an award criterion the information available from a simple list of previous clients, since award criteria must be concerned with establishing which is the most economically advantageous tender. Clearly the mere number of references and type of clients does not provide any information on the quality of performance. However, the CJEU took care not to rule out the possibility that references may be used in applying the award criteria *where these references do refer to matters that are relevant to the question of the most advantageous tender*. For example, in para.57 of the judgment the CJEU makes it clear that the issue in the case is whether the mere number of references can be considered without regard to whether the experience of the other clients with the products is good or bad. From this statement, it seemed possible that the CJEU was willing to accept that, for example, ratings from previous clients can be used to assess the quality of products or services offered by different tenderers when quality of the product or service is one of the pre-stated award criteria *and the references are used to assess that quality*.

3. **The CJEU in *Lianakis* relied in coming to its conclusion on a passage in the case of *Beentjes* which does not, however, actually address the issue in question.** (Paras.15-18 of *Beentjes* case).
4. **Consideration of these matters is accepted as a matter of good practice in public procurement** as indicated in the rules of UNCITRAL mentioned above. It can be noted that prior to *Lianakis* the abilities of tenderers and individuals was an accepted award criterion in many Member States and states have since generally adopted an interpretation of the judgment that allows this to continue.

What are the practical implications?

First, it can be said that we may at present consider the implications of *Lianakis* to be unclear. Obviously that decision creates a legal risk for contracting authorities who wish to use award criteria relating to the qualities of the tenderer or individuals performing the work. However, it is far from clear that such criteria cannot be used.

Secondly, any authority using such criteria would certainly be advised to make a very *explicit* link between those criteria and the quality of performance to reduce the risk of the criteria being considered unlawful since, as we have seen, if such criteria are allowed as award criteria this link is necessary. For example, rather than stating simply that experience will be an award criterion, it would be advisable to state that quality (and/or specific aspects thereof) is/are the award criterion, and to indicate that experience is one consideration to be taken into account in judging that quality.

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<sup>45</sup> Case C-315/01, *Gesellschaft für Abfallentsorgungs-Technik (GAT) v Österreichische Autobahnen und Schnellstrassen AG (ÖSAG)* [2003] ECR I-6351.

Finally, on a different but related point, as we have seen from the facts of the case as set out earlier, the ruling in *Lianakis* also appears to indicate that it is not possible to consider the *relative* likelihood of different tenderers completing performance on time as an award criterion. In other words, the case seems to suggest that an authority may take into account in selection (determining suitability and shortlisting) whether the tenderer is able to complete and complete to the deadline stated, but may not consider the different likelihood of different tenderers doing so as an award criterion. However, again this seems to be a relevant criterion to consider in practice to ensure value for money in many cases. It can be argued that this aspect of the *Lianakis* case will not necessarily be followed, however, since it seems inconsistent with the *EVN* case: that case seems to accept the possibility of considering as an award criterion the relative likelihood of different tenderers being able to actually supply energy from renewable sources as required under the contract. However, the CJEU does not mention that case in *Lianakis*. Thus again it appears that the position is unclear – and, whilst there may be some legal risk in including such a criteria, it is by no means clear that it is ruled out.

### 6.7.3 Disclosure of the award criteria and sub-criteria

Where the authority proposes to use the most economically advantageous criterion for award, Public Sector Directive - Article 53(2) expressly requires that it must disclose in the contract notice or in the documents the criteria to be used and the “relative weighting” of these award criteria. This weighting may be expressed as a range with a minimum and maximum weighting, where the authority considers this appropriate (Public Sector Directive - Article 53(2)). (For example, an authority could perhaps assign in the documents a weighting of 80% to price and 20% to quality; or state in the documents that the weighting will be 80-85% for price and 15-20% for quality, and later decide on the more precise weighting).

Note that there is nothing to indicate that the concept of weighting refers to percentage weighting – an indication of how criteria are to be weighted could thus involve other approaches such as a points system.

There is an exception to the requirement for weighting when “in the opinion of the contracting authority” it is not possible to provide weightings on objective grounds (Public Sector Directive - Article 53(2)). However, even here the entity must indicate the criteria in descending order of importance (Public Sector Directive - Article 53(2)). The requirement to give a weighting to the criteria was introduced for the first time in the 2004 Public Sector Directive.

In the Case C-225/98, *Commission v France* (“Nord-pas-de-Calais”)<sup>46</sup>, the CJEU ruled that it was a violation of the directives to state the award criteria only by reference to national legislation, rather than stating these explicitly in the notice or documents. Such a conclusion can be supported by the general principle of transparency that the CJEU has ruled underlies the directives, although it can be noted that the CJEU in this case did not make explicit reference to the transparency principle to support its conclusion on this point.

An authority is not permitted to apply factors which it has not stated in advance to tenderers.

- An illustration of this is the *Walloon Buses* case, above. One of the contentions of the Commission in this case was that SRWT had breached the directive by taking into account in evaluating EMI's bid factors which it had

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<sup>46</sup> Case C-225/98, *Commission v France* (“Nord-pas-de-Calais”) [2000] ECR I-7445

not notified to bidders. SRWT had stated that technical quality was relevant, but had then listed in an exhaustive manner all the precise technical features which would be taken into account under this heading. EMI had in its bid made reference to certain "cost saving" features of its buses, such as a window demisting mechanism which had not been specifically listed. The CJEU took the view that in doing so SRWT had breached the express provision of the directive requiring purchasers to state in advance the factors to be used in evaluating bids, and also that this was a breach of the equality principle. This illustrates the importance of careful drafting of the documents: if an authority wishes to specify relevant technical features (as suggested above) it should do so in a list which is merely illustrative, rather than definitive, in case it overlooks some relevant features that might be offered by bidders.

Important recent case law now indicates that – under the transparency principle – authorities are not merely required to disclose the “headline” criteria that they propose to use as referred to expressly in the directives (quality, running costs, after-sales service etc), but also that they must disclose:

- any formal sub-criteria that they intend to use (e.g. where quality is formally divided into different quality elements such as durability, comfort etc they must disclose the different elements); and
- the weightings of those sub-criteria – at least to the extent that these sub-criteria and weightings may affect preparation of tenders.

These principles were laid down in Case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc and others v ACTV Venezia Spa and others* (“ATI EAC”)<sup>47</sup> and in *Lianakis*.

We have seen that a similar approach was applied to selection criteria in *Universale-Bau*, discussed earlier<sup>48</sup>, which requires disclosure of any detailed methodology that has been developed for the selection stage.

- *ATI EAC* concerned a call for tenders by an Italian authority for the provision of an urban transport service, in which the authority had stated that the award would be made on the basis of the most economically advantageous tender criterion, using four award criteria. One of these criteria, allocated a maximum of 25 points out of 100, was organizational and support structures. The contract documents stated that account must be taken of at least five matters (sub-criteria), including, for example, procedures for and numbers of employees involved in, supervision of the service; and numbers of drivers and licences held. The evaluation jury had decided (after receipt of tenders but before they were opened) to allocate 5 points of the 25 to each of the five sub-criteria. The CJEU ruled that it is permitted to allocate points to sub-criteria provided that certain conditions are met, including that the approach does not “contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation”. This has been interpreted in UK case law to mean that if any entity uses sub-criteria and allocates points/weightings, the details must be made known to tenderers in the notice or contact documents. *Lianakis* seemed to confirm that any sub-criteria used must be disclosed.

However, that these cases do not indicate that sub-criteria must be used and/or if used must be given weightings – merely that if sub-criteria and weightings are developed by the authority, they must be disclosed. It may still be permitted to

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<sup>47</sup> Case C-331/04, *ATI EAC Srl e Viaggi di Maio Snc and others v ACTV Venezia Spa and others* (“ATI EAC”) [2005] ECR I-10109.

<sup>48</sup> Above, note 37.

apply the award criteria in a general discretionary manner without using specific sub-criteria at all.

As a matter of practice, contracting authorities may want to consider whether it is advisable to allocate percentage points to criteria and to state them exhaustively. This fetters discretion to a very considerable degree, leaving no flexibility to respond to matters not predicted by the authority.

It is not yet clear the extent to which the transparency principle requires disclosure of other aspects of the methodology applied in the award procedure, such as systems used in applying the weightings, the details of the basis of any sensitivity analysis etc – the CJEU has not yet considered this.

#### **6.7.4 Changing the award criteria**

A question not fully resolved by the CJEU is whether the authority may change the criteria part way through the procedure, where these changes are publicised to all participants.

The CJEU in *Walloon Buses* expressly declined to consider this issue as it was not relevant in the case. It can be argued that there is no problem with this as it does not impede the underlying objectives of transparency and equality, provided that bidders are given reasonable time to prepare bids based on the new criteria. The CJEU in *EVN* commented that changes to award criteria are not possible – but that concerned a case of changes to criteria *after* tenders have been submitted and without any notification to participants, which clearly would violate the equal treatment principle.

#### **6.7.5 Two-stage evaluation**

Another question that has not been addressed by the CJEU is whether the directive allows use of a two-stage approach when the MEAT criterion is used, whereby tenders are first considered to see if they meet a certain quality threshold, and only those that meet such a threshold are then taken forward to be considered by reference to all the stated award criteria to see if they are the most economically advantageous tender. Such an approach is recognised in some UNCITRAL procedures such as the principal method for procurement of services under the Model Law on Procurement of Goods, Construction and Services.

There does not seem to be anything in the directive to prevent such an approach. It would appear that the principle of transparency would, however, require that the contracting authority should disclose that it intends to use such an approach.

This case may also imply that it is possible to reject tenders because they exceed a certain price – if a threshold can be set for quality there is no reason in principle why it should not also be possible to set a threshold relating to financial aspects of the contract. However, if any such threshold needs to be disclosed, for simple contracts in which price is the main criterion a contracting authority often will not wish to do this, since it may well influence upwards the price submitted by tenderers. (This may, however, be more relevant for complex contracts of the type awarded through competitive dialogue or negotiated procedures, where there may be substantial variation in nature and quality of solutions, in which the procuring entity may well wish to set and disclose any limits on affordability, in order that tenderers can submit appropriate offers).

## 6.7.6 Variants

The directives contain specific rules on variants.

A variation is a proposal for a solution to a requirement that differs from the solution set out by the purchaser. A variation could offer certain additional features not included in the standard requirements—for example, in a contract for an IT system, a variant bid might offer certain additional functions not referred to in the standard specification. It could also in some cases exclude certain features referred to in the standard specification. It might also simply offer a different approach – for example, by providing for a contract length that is greater than that referred to in the standard specification, or by proposing a different technical solution for a construction project. (In the case of different technical solutions, however, it needs to be remembered that the TFEU requires that an entity should always indicate that is prepared to accept any bids that meet its functional requirements, as discussed further below). The procuring entity will be concerned to ensure that any variations meet the minimum requirements of the specifications or conditions. It may also wish to take account of the nature of the variation in deciding which is the best offer – for example, by taking account of the value of any additional function offered in a variant bid for an IT system.

The EU rules on variants are set out in Article 24 of Directive 2004/18. Article 24 of the directive provides in this respect as follows:

### Article 24

#### Variants

1. Where the criterion for award is that of the most economically advantageous tender, contracting authorities may authorise tenderers to submit variants.
2. Contracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.
3. Contracting authorities authorising variants shall state in the contract documents the minimum requirements to be met by the variants and any specific requirements for their presentation.
4. Only variants meeting the minimum requirements laid down by these contracting authorities shall be taken into consideration.

In procedures for awarding public supply or service contracts, contracting authorities which have authorised variants may not reject a variant on the sole ground that it would, if successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

## 6.8 Abnormally low tenders<sup>49</sup>

### 6.8.1 Introduction

The directive contain explicit provisions on “abnormally low offers”. This concept it is not defined, but it refers to an offer that, because of its favourable terms, raises a suspicion that the provider will not be able to perform according to the terms offered. In such a case the provider may either not deliver properly or may seek extra payment (either for the agreed work or through excessive remuneration from later variations).

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<sup>49</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), pp.499-531; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), pp.462-474.

The directives do not generally prevent rejection of low bids but provide that where a bid appears abnormally low, a purchaser must seek a written explanation before rejecting it for that reason (Public Sector Directive - Article 55(1)). In this respect Article 55(1) of the directive states:

"If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant".

This provision was introduced to prevent, in particular, rejection of bids which appear low but which reflect the cost advantages (for example, lower labour costs) of the provider's home state.

### 6.8.2 Procedure

In Case C-103/88, *Fratelli Costanzo SpA v Comune di Milano* ("Costanzo")<sup>50</sup> the CJEU ruled that it violates the above provision to reject a bid as abnormally low simply on the basis of a mathematical formula, without seeking explanations.

In Joined cases C-285/99 and C-286/99, *Impresa Lombardini SpA v ANAS*<sup>51</sup>, the CJEU elaborated on the implied procedural safeguards required by this process of seeking explanations. The Italian legislation and practice in that case required each tenderer to submit, along with its tender, explanations of the most significant elements of its prices. These elements were designated in the contract documents for each contract and were required to cover elements accounting for at least 75% of the total estimated price. If a tender was considered to appear abnormally low the contracting entity could consult the explanations submitted along with the tender to see if there was a satisfactory explanation of the low price. If there was not, it was permitted to reject the tender without seeking further explanations.

The CJEU was required to consider whether the directive is complied with when explanations for the low price are required to be submitted at the same time as the tender without the possibility for the tenderer to supply further explanations at a later point. The CJEU concluded that the directive is not complied with in such a case, since the provision requires an *inter partes* procedure. According to the CJEU this requires that the entity should request explanations of *those parts of the tender* that give rise to suspicion in the particular case and to assess the response to that request. This, stated the CJEU, entails that the tenderer be given the opportunity to provide explanations:

- after knowing that the tender is abnormally low;
- after knowing the threshold applied to determine that the particular tender is abnormally low (although it is not clear whether information on this must be given when the tender is considered abnormally low based on a discretionary judgment rather than the application of a formula); and
- after knowing *which parts* of the tender the entity considers problematic.

The CJEU considered that it is not possible for the tenderer to provide "useful and complete" explanations when the tenderer is not aware of the precise aspects of the tender that are considered problematic.

The CJEU also stated that the procedure must involve:

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<sup>50</sup> Case C-103/88, *Fratelli Costanzo SpA v Comune di Milano* ("Costanzo") [1989] ECR 1839.

<sup>51</sup> Joined cases C-285/99 and C-286/99, *Impresa Lombardini SpA v ANAS* [2001] ECR I-9233.

- a "proper exchange of views" at an appropriate time (para.57). This may even imply that the tenderer needs to be given a chance to reply to the entity's decision to reject a tender as abnormally low after receiving the original requested explanations, although the CJEU does not state this.

The CJEU also stated that the fact that explanations were sought only for 75% of the price element would also infringe the directive since tenderers must be able to provide explanations of all constituent elements (para.52 of the judgment).

The CJEU stated, however, that a requirement to provide explanations in advance was not in itself in violation of the directive (para.66). Explanations can be sought in advance, provided that tenderers whose tenders are still considered abnormally low after the explanations have been considered are given the opportunity to submit further explanations in accordance with the requirements set out above.

### **6.8.3 The discretion to accept or reject**

The rules are not wholly clear, however, on the extent of the discretion to accept or reject low bids once an explanation has been sought.

Clearly it is implied by the provision on explanations that such bids may at least sometimes be rejected after seeking an explanation. It is, further, stated that the purchaser "may" take into account explanations which are justified on objective grounds, such as the technical solutions suggested and the exceptionally favourable conditions available (Public Sector Directive - Article 55(1)). Where the bid is low for these reasons there is no commercial justification for rejecting it, and to do so would be contrary to the directive's purpose of ensuring that the most competitive provider wins the contract. Thus although it is not expressly provided that the purchaser *must* accept in these circumstances, this is probably to be implied.

Where, on the other hand, consideration of the reasons for the low offer lead to the conclusion that there *is* an unacceptable risk of non-performance, there will be a *power* to reject the offer.

Rejection is also expressly allowed even when there is no specific risk of default, when the reason that the tender is low because of the receipt of state aid which is unlawful under EU law (i.e. it is low because it is being unlawfully subsidised by the government): see Public Sector Directive - Article 55(3). In the latter case the authority must inform the Commission of the rejection (Public Sector Directive - Article 55(3)) (to assist the Commission in its function of controlling unlawful state aid). If the tender is affected by aid, it is for the tenderer to prove that that aid was lawful (Public Sector Directive - Article 55(3)).

Procuring entities are not expressly obliged to reject low tenders affected by aid and many might choose not to do so, both in order to take advantage of the favourable deal on offer and to avoid any delay to the procurement procedure that would result from an investigation over the state aid issue.

## 6.9 Open and restricted procedures: amendments and corrections to tenders and post-tender negotiations<sup>52</sup>

Although the basic idea of tendering is to choose the contractor based on the tenders submitted during a formal tendering procedure, for various reasons authorities may want to engage in discussions with firms after their bids have been submitted and/or allow firms to revise their bids. For example, this may be done to:

- Clarify ambiguities in tenders;
- Allow amendments where tenderers have made errors, such as where there are arithmetical mistakes or where they have misinterpreted the specification, or for other reasons submitted a non-compliant tender;
- Suggest improvements to tenders which might meet the authority's needs better; or
- Get firms to improve their offers if the authority feels they do not offer value for money.

Some or all of these practices may be thought objectionable because they may (i) undermine the transparency of the process, thus allowing authorities to give opportunities to favoured firms to improve their offers to win the contract once the authority knows the content of the other offers are known; and (ii) undermine the principle of equal treatment by giving some firms the chance to improve their offers which are not given to other participants. It is necessary to achieve a suitable balance between these basic principles of equality and transparency and the need (as outlined above) for some discussions or amendments if the authority is to obtain the best possible value for money.

The current law on these issues is not very clear as the directives themselves contain no express provisions dealing with the extent to which these practices are permitted.

One point which has, however, been clarified by the CJEU in the *Walloon Buses* case is that to the extent that any amendments or discussions are allowed, tenderers must be treated equally. In that case one of the complaints made by the Commission was that a tenderer had been permitted to amend the figures which it had submitted concerning the fuel consumption of its vehicles, after the close of tenders. The CJEU accepted the Commission's argument that to consider the revised figures constituted a breach of the principle of equal treatment: the CJEU stated that there is a breach of this principle when the CJEU takes into account an amendment made by one tenderer only.

The *Walloon Buses* case did not, however, deal with the question of how far amendments are permitted, *if* all tenderers in the same position are given equivalent opportunities. For example, is it permitted to ask all to submit new tenders if the authority is not satisfied with those received? Or is it permitted to allow a tenderer to correct any arithmetical mistakes in the bid, provided that all

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<sup>52</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), pp.540-546; S. Arrowsmith, "The Problem of Discussions with Tenderers under the EC Procurement Directives: the Current Law and the Case for Reform" (1998) 7 *Public Procurement Law Review* 65; K. Kruger, "The Scope for Post-Tender Negotiations in International Tendering Procedures", Chapter 10 in S. Arrowsmith and A. Davies (eds), *Public Procurement: Global Revolution* (1998, London: Kluwer Law International); K. Kruger, "Ban on Negotiations on Tender Procedures: Undermining Best Value for Money?" (2004) 4 *Journal of Public Procurement* 397; M. Steinicke, "Public Procurement and the Negotiated Procedure—A Lesson to Learn from US Law" (2001) 22 *European Competition Law Review* 331; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), pp.309-317.

who make such mistakes are permitted to do so? May tenderers be permitted to clarify an ambiguity?

The Council and Commission have made a joint declaration on how the directives should be interpreted on this point ([1994] O.J. L111/114, relating to the Works Directive, but relevant to all the public sector directives since they are effectively identical). It should be emphasised that this is not legally binding and, is not, according to the CJEU, relevant in interpreting the rules - although this particular statement was referred to with approval by Advocate General Tesouro in the *Storebaelt* case. This states that "all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out". It is also stated, however, that discussions may be held "but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of contracting authorities, and provided this does not involve discrimination".

This might indicate, first, that purchasers may not permit amendments to aspects of the bid relevant to evaluation – price is expressly mentioned, but this would apply equally to other factors, such as delivery date, which are part of the award criteria (although see further below on the possibility of a second tendering round). However, it certainly opens the possibility for some clarification and correction of ambiguities or correction of errors by tenderers.

We will consider separately various cases:

#### **1. Negotiations to seek improvements to tenders**

Negotiations to seek improvements to tenders once submitted seem to be ruled out – at least this is the position envisaged in the Council and Commission statement above. However, EU law provides for more flexible procedures that do allow negotiation for cases in which this is considered necessary, namely the competitive dialogue procedure and the negotiated procedure with a notice, as are discussed further below.

The arguments for this approach in formal tendering rely on both a (national) value for money perspective and on preventing abuse. In the case of EU's regime, the reason for restricting negotiations and amendments to tenders in the formal open and restricted procedures is to prevent contracting authorities abusing negotiations in order to favour national suppliers.

A related question is whether the directives rule out a second round of tendering if the first round does not produce satisfactory bids (because either they do not offer good value for money or they are not compliant), even when amendments to price etc *are* involved. If this possibility is indicated in advance and a second round of tenders is permitted to a set deadline in a transparent manner it might be argued that there is no violation of equal treatment and transparency, nor of any express provision of the directive (nor any "distortion" of competition in the sense of the Council/Commission statement above). Further, where the authority believes that none of the tenders offers value for money, or at least where they exceed the authority's budget perhaps, or result from collusion, it *may* be possible effectively to negotiate with all tenderers by switching to the negotiated procedure, although this is not clear (see section 6.12 below). It is surely more transparent to hold a second round of tendering in the existing procedure. On the other hand, it can be argued that if it is envisaged this may be needed entities should use the competitive dialogue procedure – but this in turn raises the question of whether that procedure is available in all cases where re-tendering might be needed; probably it is not.

## **2. Correction of errors or ambiguities**

We have already considered above the question of whether corrections may be made to non-conforming tenders to bring them into conformity. The following relevant principles can be stated in that respect:

1. There is no general *duty* to allow correction of tenders after the deadline to bring the tender into conformity;
2. However, in certain cases the contracting authority has a duty to allow correction after the deadline. This may apply when i) the contracting authority is at fault in the situation and/or ii) a right to correct arises because of the principle of proportionality. It was suggested that the proportionality principle may give a *right* to correction where there is an error or ambiguity known to (or which should be known by) the contracting authority and the correct content of the tender is apparent, such that there is no scope for an unfair advantage to the tenderer or abuse of the power to correct.
3. In cases in which there is no *duty* to allow a correction it is unclear as yet how far the contracting authority may allow a correction at its discretion.

Arguably the same principles will apply in considering the correction of errors that do not lead to non-conformity, since largely the same policy considerations appear relevant. Thus:

- i) There is no general duty to allow correction of tenders affected by an error. This is indicated by the *Adia* case already discussed in the context of non-conforming tenders, which did not concern a non-conforming tender but a pricing error.
- ii) There may be a similar *duty* to allow correction of errors or ambiguities in the cases set out in 2. above (where the correct content of the tender is clear), whether or not this results in non-conformity. This is indicated by the *Tideland* case already discussed above, in which the General Court (formerly Court of First Instance) considered a case of ambiguity.
- iii) How far a Member State may allow a contracting authority to accept corrections in other cases – where there is an error and the correct content of the tender is not clear – is not yet known.

The case of pricing errors under the EU procurement rules has not been considered by the CJEU itself.

## **3. Clarifications to obtain further information**

It appears also that there is scope for clarification of individual bids if the authority needs further information to satisfy itself of the viability or merits of the bid, without amendments being made. This seems to be contemplated by the Council/Commission Declaration referred to above.

## **4. Negotiations with the winning tenderer**

Arguably there is nothing to prevent purchasers from negotiating with the winning bidder to seek an improvement to that bid, once the winner has been selected in accordance with the evaluation rules. On the other hand, any agreement prior to the contract which benefits the provider – for example, an increase in price – must probably be ruled out, since this would enable favoured firms to win by submitting favourable bids, based on an understanding that these would later be revised.

## 6.10 Competitive dialogue<sup>53</sup>

### 6.10.1 Introduction

As noted in section 6.2 above, competitive dialogue is a new procedure introduced for the first time in Directive 2004/18, to provide more flexibility in procedures for complex contracts. The need for more flexible procedures was perceived in the United Kingdom since at least the late 1980s, most notably for contracts under the Private Finance Initiative (PFI) (for major privately financed infrastructure projects). The need for a new procedure was addressed in the new public sector directive mainly because of the need for it for such projects in some Member States and also EU's own policy of promoting public-private partnerships (PPP) for European transport infrastructure. Open and restricted procedures are unsuitable for many such projects for a number of reasons including: their limits on iterative procedures, in particular for eliminating participants during the procedure through discussions/outline tenders; the need for at least 5 tenderers in restrictive procedures, which is disproportionate in high-cost PFI procedures; and the limited scope for post-tender dialogue in these procedures. The negotiated procedure with a notice is suitable, but there was some uncertainty over whether it was available for PFI projects, and the European Commission had cast doubt on the UK practice of using the negotiated procedure with a notice in the context of PFI (on this procedure see further section 6.11 below).

Competitive dialogue was introduced in the new public sector directive with the aim of providing a more flexible procedure for situations in which the negotiated procedure is not necessarily available, including (but certainly not limited to) the above privately financed infrastructure contracts. The European Commission has issued some guidance on the procedure in its *Explanatory Note – Competitive Dialogue – Classic Directive* (2005), available at <http://simap.europa.eu>.

Many states that have implemented Directive 2004/18 have included the competitive dialogue procedure. In general, states have simply added the procedure to their laws largely in the form that it appears in the directive itself, without elaborating on the way in which it is to be applied by contracting authorities beyond what is stated in the directive itself – for example, they have not put in place detailed rules on how the “dialogue” phase is to be conducted by contracting authorities (we will see below that the directive gives significant discretion on this). This applies not only in states whose traditional approach is to simply copy out the directives – for example, the United Kingdom – but also to other states which have traditionally regulated procurement procedures through their own rules (such as

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<sup>53</sup> See further A. Brown, “The Impact of the New Directive on Large Infrastructure Projects: Competitive Dialogue or Better the Devil You Know” (2004) 13 *Public Procurement Law Review* 160; S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 10; C. Kennedy-Loest, “What Can be Done at the Preferred Bidder stage in Competitive Dialogue?” (2006) 15 *Public Procurement Law Review* 317; A. Rubach-Larsen, “Competitive Dialogue” in R. Nielsen and S. Treumer (eds), *The New EU Public Procurement Directives* (2005, Copenhagen: Djøf); P. Telles, “Competitive dialogue in Portugal”, (2010) 1 *Public Procurement Law Review* 1; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), pp. 445-453; S. Treumer, “The Field of Application of Competitive Dialogue” (2006) 15 *Public Procurement Law Review* 307; S. Treumer, “Competitive Dialogue” (2004) 13 *Public Procurement Law Review* 178; S. Verschuur, “Competitive Dialogue and the Scope for Discussion after Tenders and Before Selecting the Preferred Bidder—What is Fine-Tuning Etc?” (2006) 15 *Public Procurement Law Review* 327.

Spain). An exception is Portugal, which has adopted its own precisely elaborated version of the procedure<sup>54</sup>.

The United Kingdom has been the largest user of the competitive dialogue procedure so far – not surprisingly since it is a large member state and the procedure quite closely reflects previous UK practice in awarding major infrastructure projects under the old negotiated procedure (although there are important differences – notably the need for a fully complete tender at final tender stage in the competitive dialogue procedure). As of the end of August 2009 there had been well over 1500 procedures advertised in the *Official Journal*. Other significant users of the procedure include France, Germany, Poland and (especially in proportion to its size) Denmark. On the other hand, some states that have the procedure in their laws have not yet used it or used it only in a very few cases (e.g. Lithuania and Portugal).

### **6.10.2 Grounds for using the procedure**

The procedure is available for “particularly complex contracts”. These are defined as contracts for which the entity is “objectively” unable to define the technical means capable of satisfying its objectives, or to specify the legal and/or financial make-up of the project (Article 1(9) of Directive 2004/18). These grounds appear to overlap with, but in some respects are broader than, the situations covered by the negotiated procedure.

It can be argued that this refers to the case in which the authority is unable to find the *best* solution itself. This can be deduced from the fact that the purpose of the dialogue is stated to be to enable the authority to identify the means based *best* suited to its needs, as stated in Article 29(3) of the provision – thus a reading of Article 1(9) in context suggests that this is the appropriate interpretation.

An authority may also only use the competitive dialogue procedure to award a complex contract as defined above where it “considers that the open or restricted procedure will not allow the award” (Article 29(1) of the directive).

Unfortunately, the legislation does not make clear whether competitive dialogue is an exceptional procedure that is to be interpreted and applied strictly (like the negotiated procedure without a notice – as discussed further below) or a “standard” procedure like the open and restricted procedures. This could be very important in interpreting the extent of the provision. For example, this could be relevant to answering many of the questions discussed in the literature, such as whether it can be used in cases in where using other approaches would involve excessive costs, and also whether the suggestion above is correct that the procedure can be used to allow the authority to determine what is the *best* solution.

The grounds for using this procedure have not yet been subject to judicial interpretation and their precise meaning thus remains a matter for theoretical debate.

### **6.10.3 The rules of the competitive dialogue procedure**

#### **6.10.3.1 Introduction**

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<sup>54</sup> See P. Telles, “Competitive dialogue in Portugal”, (2010) 1 *Public Procurement Law Review* 1.

The procedure to be followed in competitive dialogue is set out in Article 29 of Directive 2004/18.

The form of the procedure and its different phases are specified in more detail than in the negotiated procedure. The phases of the procedure in comparison with the open, restricted and negotiated procedures under the directive can be seen in the table of procedures set out in section 6.2. By way of example, one way in which it is very often applied in practice in the UK is set out in the diagram, *Competitive dialogue procedure: a common approach in the UK*, found later in the present section.

It should be noted that to a large extent the rules that apply in the different phases (e.g. selection and award) are the same as, or very similar to, those of the restricted procedure that have already been discussed above. Key differences are noted below and in the reading.

What follow below is merely an outline of the procedure. There has as yet been no case law of the CJEU – although there have been cases in some EU Member States (e.g. Denmark).

#### **6.10.3.2 The main phases of the procedure: an overview**

The following comments can be made on the main phases of the procedure that are set out in the diagrams above.

1. **Advertising phase.** A contract notice for competitive dialogue must be published in the EU's *Official Journal* for all competitive dialogue procedures, with no exceptions.
2. **Selection phase.** Here the contracting authority will select participants for the award phase (from amongst those responding to the notice), considering first which potential participants are suitable (meet the minimum standards for participation) and (if there are too many) which of the suitable participants should be invited. The authority must here use only the same selection criteria that apply for restricted procedures, as were outlined in sections 6.3 and 6.5 above (economic and financial standing; technical and professional ability; and the criteria under Article 45 of the directive (criminal convictions etc)). The main difference between competitive dialogue and the restricted procedure is that the minimum number to be invited is 3 (like the negotiated procedure with a notice), rather than the 5 required for the restricted procedure (although subject also to the rule that there must always be a sufficient number invited for genuine competition): Article 44(3).
3. **Award phase.** In the case of competitive dialogue this involves several distinct processes:
  - a. **The dialogue phase.** There is first a distinct phase referred to in the legislation as the "dialogue" phase. There is significant flexibility under the directive over how to conduct this phase. It can include tendering/proposal phases, discussions etc, as designed by the authority. For example, the authority can ask for initial outline tenders that set out the firm's proposed solutions and key terms, discuss these with firms, and then ask them to revise them to improve them to better meet the authority's needs in light of the discussions, prior to final tenders. For example, some tenderers might indicate in their initial

solutions for providing accommodation for hospital staff that they will provide various services in the accommodation such as catering or crèche services. The authority may consider that these are a low priority and would make the facility unaffordable and thus might suggest to tenderers after receiving the initial proposals that they should consider omitting some or all of these types of services.

The directive makes it clear that authorities may use this dialogue phase to eliminate some of the proposed solutions, which need not thus be admitted into the final tendering round – provided this possibility is stated in the contract notice. This possibility can be useful in complex procedures where submitting and evaluating final tenders is very expensive (perhaps costing tenderers several hundred thousand Euros). It is currently possible to do these things when negotiated procedures are used, but probably not under restricted procedures.

By way of example, the way in which the dialogue stage typically operates in a PFI procurement in the UK is given in the box below, *Competitive dialogue procedure: a common approach in the UK*.

- b. Final tenders.** There is then a formal closing of the dialogue phase (item 3 above) and then a call for “final tenders” from remaining participants. These tenders are required to be complete in the sense that they must contain all “the elements required and necessary for the performance of the contract”: Article 29(6). It is necessary at this stage to ensure that there are sufficient participants invited to submit final tenders to ensure “genuine competition”.

In the open or restricted procedure tenders must all be based on a single specification, to ensure a clear comparison (although it is possible to allow for variations from tenderers around the single specification). However, in competitive dialogue there are two basic approaches that appear possible under the procedure:

1. At the end of the dialogue the authority specifies a single solution and asks all tenderers to submit their final tenders against that solution (possibly being allowed variations);
2. Tenderers are invited to submit a tender that includes the tenderer’s own solution – thus each tenderer may tender a different solution.

- c. Choice of most economically advantageous tender.** The contracting authority must then choose the most economically advantageous tender based on these final tenders. When this competitive dialogue procedure is used authorities can only use the “most economically advantageous tender” as the basis for award, and may not (as is possible with all the other procedures) choose “lowest price” as the basis for the award (Article 29(1)).

4. **Post-tender phase.** There is a possibility for post-tender dialogue and possibly for amending or completing tenders at this stage but subject to conditions: Article 29(7). In this respect Article 29(7) states:

“At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.”

The exact scope for discussions and amendments etc in this phase in a competitive dialogue procedure as governed by the provision is not at all clear<sup>55</sup>. However, given the inherently complex nature of the procurement involved, there may well be more scope for completing and amending tenders at this stage than under open or restricted procedures (which was discussed in section 18 above).

The general principles of transparency, equal treatment and non-discrimination as set out in Article 2, apply to competitive dialogue also.

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<sup>55</sup> For discussion, see see S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 10; and C. Kennedy-Loest, "What Can be Done at the Preferred Bidder stage in Competitive Dialogue?" (2006) 15 *Public Procurement Law Review* 317.

## Competitive dialogue procedure: a common approach in the UK

	<b>COMPETITIVE DIALOGUE</b>
<b>ADVERTISING Phase</b>	Contract notice in O.J.
<b>SELECTION Phase</b>  (technical and/or professional ability; economic and financial standing; Article 45 criteria)  Articles 44-52	Suitability  (Qualification)
	Selection of candidates to tender from suitable ones
<b>AWARD Phase</b>  (Award on basis of most economically advantageous tender [MEAT])  Article 53 and Article 29(1)	Dialogue Phase  i) Outline proposals from e.g. 3-6 participants (often no or limited financial information)  ii) Authority chooses e.g. 2-3 to submit further proposals  iii) Discussion of proposals with the 2-3 chosen  iv) Submission of detailed financial and technical proposals from the chosen 2-3  v) Further discussions if required
	Submission of final tenders by 2-3 tenderers
	Clarification, supplementation or fine-tuning of final tenders
	Award on basis of MEAT (and notification to all tenderers)
<b>POST-TENDER Phase</b>	Clarification and confirmation stage with "preferred bidder"
<b>STANDSTILL Phase</b>	✓
<b>CONCLUSION of contract</b>	✓
<b>POST-CONTRACT</b>	Contract award notice

The above diagram illustrates the way in which competitive dialogue is often operated in practice in the UK in relation to privately financed infrastructure projects. Taking a typical example of a PFI project, one to provide school facilities, the way in which the dialogue phase is structured can be explained as follows:

**i. Outline proposals from e.g. 3-6 participants (often no or limited financial information)**

The authority will first invite outline proposals from a limited number of suitable providers. These will set out providers' solutions for the project. For example, in the case of a school these might include (depending on the conditions laid down by the contracting authority) refurbishing an existing school on an existing site; demolishing the existing school and constructing a new one on the same site; or constructing a new school on other sites (which could be owned by the authority or by tenderers or others) and using the existing site for other purposes - these might generate revenue for the provider that can be used to enable it to offer favourable terms for providing the school or benefits for the authority. These proposals may or may not include some financial information (e.g. authorities may ask for some indication of this if the affordability of the project is in question).

**ii. Authority chooses e.g. 2-3 to submit further proposals**

Applying the pre-stated contract award criteria, the authority then selects a smaller number of providers to submit fuller proposals. The number tends to be limited, often to 2, because of the very cost of submitting fuller proposals. (For example, the authority might decide not to take forward some of the providers who are offering alternative sites for the school development because it does not consider that these sites are suitable e.g. because of their distance from the catchment area or because of access problems).

**iii. Discussion of proposals with the 2-3 chosen**

There then follow discussions on the chosen 2-3 providers' outline proposals so that they can refine their basic proposals e.g. to better adjust them to the authority's priorities (e.g. determine exactly what kind of services and facilities should be provided beyond those specified as essential), and the applicable contract terms can be developed.

**iv. Submission of detailed financial and technical proposals from the chosen 2-3**

It is then common prior to the formal final tender stage for providers to first submit fully detailed and costed proposals that are not treated as the final tenders under the directive. This ensures that no problems emerge in the final tenders, given that the scope for adjustment after the formal final tender stage in the directive is both limited and uncertain.

**v. Further discussions if required**

Further discussions will then be held if needed e.g. to consider how aspects of the full proposals that are not considered satisfactory to the authority can be amended.

The authority will then call formally for final tenders, which are fully detailed and costed proposals.

### **6.10.3.3 The confidentiality provisions**

Article 29(3) of the new directive states:

"The contracting authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement".

This was inserted so that bidders are not deterred from participating by a fear that the entity might reveal confidential information and, in particular, details of its proposed solutions that might be used by other tenderers.

It is not entirely clear whether Article 29(3) covers only information classified as confidential under domestic law (such that its disclosure would violate the provider's existing legal rights) or establishes an independent "EU" requirement for confidentiality especially so far as a provider's "solutions" are concerned. The Commission's Explanatory note seems to take the former view. This leaves much uncertainty on what information is confidential and what information is not confidential under the provision. Clearly solutions might be based on "ideas" that are not protected by any kind of intellectual property, some of which are obvious and some less so – and it is not clear which of these may and may not be used. There is no case law on this provision.

Another question is what is sufficient "agreement" to exclude the confidentiality requirement. This clearly leaves it open for a participant to agree, for example, that all others should be asked to tender on the basis of that participant's solution (for example, in return for payment). It can also be argued that if the authority makes it clear in the notice or contract documents that it reserves the right to reveal certain information and that this is a condition of participation, participants are in this case, also, considered to have agreed to disclosure: this is the view, for example, of S. Treumer, "Competitive Dialogue" (2004) 13 P.P.L.R. 178 at p.182, and also is accepted in the Commission's Explanatory Note. However, firms may be unwilling to participate on this basis.

A practical approach that has often been adopted in the UK to deal with this situation is to ask tenderers to designate which specific information they regard as confidential and not for disclosure, whilst maintaining a principle of general openness and information sharing. This policy will need to be made clear in the contract documents. The extent of confidentiality may need to be discussed, however – for example, it would not be appropriate for a tenderer to designate as confidential information all material that it submits. The lack of clarity in the law will still create problems if no agreement can be reached in such cases.

### **6.10.3.4 Payments for participants**

Article 29(8) of the new directive states expressly that "The contracting authorities may specify prices or payments to the participants in the dialogue".

This provision was included in the directive to recognise that the costs of participating in some award procedures for complex contracts can be very high, and that entities may thus wish to make some payment to participants to induce participation and improve competition. Entities may also wish to compensate providers whose proposals are incorporated into requirements presented to the other participants, as discussed above.

Nothing in the directives in fact prevents entities from making such payments in any award procedure, and they thus appear possible in all types of procedures, not just competitive dialogue. The fact that such an explicit provision is included for competitive dialogue does not appear to mean that payments are precluded in other award procedures; probably the provision merely clarifies the possibility in competitive dialogue, because it was a particular concern in the context of this procedure. Another possible interpretation of this provision is that in the specific case of competitive dialogue (but not in other procedures) it prevents Member States from prohibiting such payments by their individual procuring entities.

## **6.11 Negotiated procedure with a notice<sup>56</sup>**

### **6.11.1 Grounds for using the procedure**

#### **6.11.1.1 Introduction**

As we saw in section 6.2, authorities are permitted to use the negotiated procedures – both with a notice and without a notice – only in specific cases which are laid down in the directives (as stated by Article 28). The grounds and the conditions for the use of the negotiated procedure *with* a notice are laid down in Public Sector Directive – Article 30.

Whilst the negotiated procedure with a notice still requires the contract award to be made on the basis of objective criteria that are generally related to the contract, it does not provide the same guarantees as other procedures for monitoring objectivity – in particular, the submission of formal tenders to a set specification – and are confined therefore to exceptional cases.

#### **6.11.1.2 General principles – interpretation of the grounds and the burden of proof**

We can first note that, as we will see in section 6.12 below, in cases concerning the negotiated procedure without either a notice or competition the CJEU has set out two important principles governing the grounds for use, namely that they should be interpreted strictly, and that the purchaser has the burden of proving the circumstances their justifying use.

The CJEU has not yet considered whether these principles apply to the negotiated procedure with a notice. The CJEU's statements are not expressly confined to procedures without a notice, but the position of a negotiated procedure with a notice was not in issue in the cases and it is a very different procedure from single source procurement, involving – as we will see – both publicity, competition, and a significant degree of transparency (for example, regarding use and disclosure the selection criteria and award criteria). It can be argued that the above principles should not apply as: "This form of the procedure is not truly a derogation from the directives' general principles, but merely a modified application of those principles, that takes account of the special features of some procurements".<sup>57</sup>

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<sup>56</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 8; M. Steinicke, "Public Procurement and the Negotiated Procedure – a Lesson to Learn from US Law" (2001) 22 *European Competition Law Review* 331; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), section 7.137-7.157.

<sup>57</sup> S. Arrowsmith, *ibid*, chapter 8.

On the other hand, it should be acknowledged that the organization of the provisions in the 2004 Public Sector Directive could support a different view. In this respect, Article 28 of the directive sets out the general rule that entities must use open or restricted procedures; and it then states that in "the specific circumstances expressly provided for in Article 29" entities may use the competitive dialogue and in the "specific cases and circumstances referred to expressly in Articles 30 and 31" the negotiated procedure. The CJEU might deduce from the fact that competitive dialogue is treated separately and the two negotiated procedures are treated together that, whilst competitive dialogue may be a non-exceptional procedure, both negotiated procedures are exceptional.

A second general issue of interpretation to consider is whether there is any formal "hierarchy" of procedures. It is conceivable that the CJEU might adopt a concept of hierarchy of procedures based on the transparency principle, which requires use of the most transparent procedure that is suitable for the case. If that is the case, the negotiated procedure with a notice could then be used only when other suitable procedures, including the competitive dialogue procedure introduced in 2004, are not available. Against this view it can be argued that the directive indicates quite clearly in its explicit terms the availability of the different procedures and in certain cases a choice between them when more than one is available – for example, it allows a free choice between open and restricted procedures. Where no choice is intended this is indicated specifically in the directive (for example, as section 6.9 explained, the directive specifically indicates that competitive dialogue is available only when a contract cannot be awarded by open or restricted procedure). However, as we will see below, there are some limited cases in which the availability of the negotiated procedure with a notice is affected by the existence and availability of other procedures, including the new competitive dialogue procedure, either under explicit rules in the directive or by implication or analogy.

When entities choose the negotiated procedure, the record of the procedure must include the reasons why the procedure was selected: Public Sector Directive - Article 43(f). As in all cases in which the legality of procurement decisions is subject to review, maintaining a detailed audit trail that includes detailed reasons and evidence may be a significant help in preventing challenges being brought and in defending them successfully.

### **6.11.1.3 Availability**

#### **5. When specifications cannot drawn up (services)**

The Directive first allows use of the negotiated procedure insofar as – in the words of the directives – "the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures" (Public Sector Directive - Article 30(1)(c)). The difficulty of formulating specifications does not provide a reason to dispense with a competition altogether but makes a formal and rigid procedure inappropriate.

The above provision of the directive specifically states that this ground may apply "inter alia" to "intellectual services", and to those specified in category 6 of Annex IIA to the directive – that is, financial services. "Intellectual services" are not defined. It appears that they are limited to services using intellectual rather than manual skills. However, use of the provision may not be apt for some white-collar services: probably the concept refers to services involving significant discretionary or creative elements, such as advertising or management consultancy. Whether all professional services can be categorised as "intellectual" services is not, however,

critical: the specific (but non-exhaustive) reference to these services simply means that the courts are likely to be more sympathetic to attempts to invoke the derogation in these cases.

For such services it is often difficult to define requirements in detail because these cannot be precisely measured in *output* terms: an entity seeking advice on improving its management system, for instance, will find it difficult to define the result to be achieved in the same way as with a refuse-collection service. It may not be able to specify the result in terms of cost savings, nor tasks to be carried out, since it may have no idea of what is possible until it receives advice as part of the initial contract work.

A point of principle not addressed explicitly in the directive and that is related to the discussion above is whether this ground for using the negotiated procedure with a notice is available when the contract could be awarded using the competitive dialogue procedure. We have already noted above the possibility that the CJEU might adopt a formal general hierarchy of procedures and if that were the case then reliance on this ground for using the negotiated procedure would depend on showing that the competitive dialogue procedure, also, is not suitable for the award of the contract. However, we suggested above that no such hierarchy exists. However, even if there is no *general* hierarchy of procedures it might be argued that it is to be implied into the directive – by analogy from the explicit provisions making the procedure subject to use of the open and restricted procedures – that this ground for using the negotiated procedure is also subject to the non-availability of the more transparent competitive dialogue procedure. It might be argued that the failure to make use of the negotiated procedure explicitly subject to non-availability of competitive dialogue when competitive dialogue was introduced is a mere oversight (the issue simply was not considered), rather than indicating any positive intention to provide for a broad overlap between the negotiated procedure and competitive dialogue; and that the scheme of the provision in permitting negotiated procedures only as a “last resort” when open and restricted procedures cannot be used requires that it be considered subject to the non-availability of competitive dialogue also. It seems likely that such an argument will find some sympathy with the courts. However, even if this is the case it seems likely that the procedure will still be widely available in the case of the type of services – financial services and intellectual services – for which the directive expressly envisage its use.

Even if the non-availability of competitive dialogue is not a formal condition for using this ground for the negotiated procedure, it seems likely that the introduction of competitive dialogue will lead the CJEU to give this ground for the negotiated procedure a rather narrower interpretation than it might otherwise have had, taking the view that the ground is only available in extreme cases of unsuitability of the open or restricted procedures, rather than whenever the open or restricted procedures are not commercially suitable.

## **6. Availability: overall pricing not possible (works and services)**

Under the Public Sector Directive a contract may be awarded by the negotiated procedure with a notice where the nature of the goods, work(s) or services, or the risks attaching to performance, are such “as not to permit prior overall pricing” (Public Sector Directive - Article 30(1)(b)).

Linguistically, the concept of whether overall pricing could have a number of meanings:

1. That fixed pricing is not possible, and instead cost-plus pricing is used to a significant degree. This may apply, for example, when the very nature of the work is not known at the time of the procedure – for example, because the

works are to be carried out in unknown archaeological terrain. However, this does not seem alone to be sufficient reason for using a negotiated procedure, which a pricing structure can be established.

2. That it is not possible to establish a single pricing *structure* (or payment mechanism) when the award phase commences. This is arguably the most satisfactory interpretation. The impossibility of pricing must derive either from the nature of the goods/works/services or the risks attaching thereto. An example of the former that fits this interpretation is where the construction of a tunnel is affected by unknown geological conditions. Here negotiations on price structure may be necessary to establish whether different bidders will take the risk of the unknown conditions, or whether the payment should include an element of "cost-plus" pricing (where bidders receive the cost of construction plus a profit element, thus placing the risk on the procuring entity).

Impossibility can also arguably derive from the nature of the works/services where there is uncertainty over what will be delivered because of the scope for flexibility in proposals. For example, when in a major services or facilities project there is scope for bidders to propose, in a first tendering phase, additional services not mentioned expressly in the output specification, it is not possible to establish the pricing system for all services when the award phase begins since the procuring entity does not know what those services might be. (To this extent there is some overlap between the "overall pricing" ground and the "no specifications" ground).

Impossibility of pricing may, in addition, result from risks attached to the works or services that do not relate to their "nature". This could arguably be, for example, uncertainty of user demand. Discussions may be needed to determine the extent to which each party can manage the risk and hence how it should be allocated through the pricing mechanism.

However, in its Green Paper on public-private partnerships and EU law on public contracts and concessions COM(2004) 327 final, para.24, the Commission states: "This derogation is to cover solely the exceptional situations in which there is uncertainty a priori regarding the nature or scope of the work to be carried out, but is not to cover situations in which the uncertainties result from other causes, such as the difficulty of prior pricing owing to the complexity of the legal and financial package put in place".

3. That the authority cannot, *at the time of bid evaluation*, reasonably ascertain the sum it would be likely to pay under each bid. This applies in numerous cases, some fairly simple – for example, with contracts in which different elements are included in a single contract – for example, snow removal and pothole repairs in a roads maintenance contract: the actual cost of bids will vary according to future conditions, making it difficult to know which will provide the best deal, and usually requiring a sensitivity analysis to test the value of the bids against alternative future scenarios. The price will also be uncertain where cost-plus pricing is used. Negotiations may be useful in all these case to explore the reasons for different pricing and to obtain information relevant to assessing economic advantage. However, this interpretation seems far too broad for an "exceptional" provision.
4. That *at the time the procedure is launched* the authority cannot predict bid prices. The rationale for such an interpretation would be that the provision seeks to accommodate discussions not so that the authority can evaluate

bids, but so that it can adjust the project during the procedure to take account of budgetary constraints and overall value for money, once price information emerges. However, this interpretation would also embrace many cases where discussions are not really needed and seems clearly incorrect.

The overall pricing ground has not yet been considered by the CJEU. Thus which of the above is the appropriate interpretation remains unclear.

As with the "no specification" ground discussed above, the introduction of the competitive dialogue procedure in the 2004 directive may have an impact on the way that this ground is interpreted and applied.

## **7. Research and development (works)**

The Public Sector Directive (Public Sector Directive - Article 30(1)(d)) allows use of the negotiated procedure with a notice for public works contracts where the work(s) to be carried out are purely for research, experiment or development. This does not apply, however, where they are to be carried out with the aim of ensuring profitability or of recovering research and development costs. There is a parallel provision for supply contracts allowing use of negotiated procedures *without* a notice for such cases, and its meaning is discussed in that context (see section 6.12 below). It may apply, for example, where a work is to be constructed for the authority using an experimental technique (for example, by using new natural materials for housing) to test the suitability of that technique for future works. There is no special provision at all on research and development in the context of services contracts.

It is arguably anomalous to treat works, supplies and services contracts differently in this respect, but this anomaly was not corrected in the "consolidating" 2004 Public Sector Directive.

## **8. Failure of open or restricted procedures**

When an open or restricted procedure fails to result in an award because all bids from qualified bidders are irregular (for example, non-compliant) or unacceptable an authority may under certain conditions use the negotiated procedure without a notice if all qualified providers who bid are brought into the negotiations (on this and for details of the applicable conditions see section 6.12 below). In some cases, however, the authority may not wish to negotiate with all such providers. In this case, it is not necessary to open a new open or restricted procedure; the authority may award the contract by negotiated procedure with a notice rather than using a new open or restricted procedure: Public Sector Directive - Article 30(1)(a).

### **6.11.2 Procedure**

The negotiated procedure with a notice involves, like open and restricted procedures, a contract notice and competition. Many of the specific rules set out for open and/or restricted procedures or competitive dialogue apply also to this form of negotiated procedure, including those on choosing providers to submit offers in the award phase and on award criteria (in the case of the number who must be invited to participate in the award phase the numbers are akin to those of competitive dialogue rather than the restricted procedure).

However, in many respects the negotiated procedure is more flexible, in particular in the "award" phase. This procedure allows entities significant freedom to structure the procedure in this phase, including through iterative tendering, by phased

elimination of participants (where notified in advance, as in competitive dialogue), through selection of a preferred bidder without submission of complete offers, and through significant possibilities for participants to amend their offers after negotiations.

The procedure that is laid down in the directive is outlined alongside an outline of the other award procedures under the directives in the Table in section 6.2.

Note that although the directives' explicit constraints in the award phase are quite limited, further requirements may also be implied under the equal treatment and transparency principles. These principles may, for example, require that contracting authorities adhere to any rules laid down in the tender documents, at least unless changes are notified to participants in good time.

## **6.12 Negotiated procedure without a notice<sup>58</sup>**

### **6.12.1 Grounds for using the procedure**

#### **6.12.1.1 Introduction**

As we have noted above negotiated procedure without a notice is effectively equivalent to single-source procurement under the UNCITRAL Model Law on Procurement of Goods, Construction and Services – sometimes known as single-source contracting.

As a general principle, *neither a notice nor competition* is required under this procedure (although we will see below that there is one exception to this when a competitive procedure is required: this applies when a more formal competition has failed to produce a satisfactory outcome and the procuring entity holds a competition with the participants in the failed procedure, without publishing a new contract notice).

Clearly this kind of procedure has extremely limited provision for the transparency that is generally applied under the EU procurement to prevent discrimination. Thus its use is very closely confined to those cases in which it is considered that national governments have a very good reason to depart from competitive and transparent procedures.

Undertaking a procedure without any notice in the Official Journal has recently become more risky in the EU Member States because of the significant sanctions attached to the unjustified use of the negotiated procedure without a competition under the new Remedies Directive (Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC) (which had to be implemented by 20 December 2009). However, Member States may allow their procuring entities to avoid this risk by publishing a notice in the *Official Journal* by publishing an OJ notice of their intention to award a contract and giving a ten-day standstill. (See Article 2d(4) of the Remedies Directive amended version). Member States can also provide for a 30-day time limit for challenges to the contract following publication of an award notice: Article 2f of the Remedies Directive amended version. This subject of remedies is discussed further in chapter 10.

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<sup>58</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 9; P. A. Trepte, *Public Procurement in the European Union* (2007, Oxford: OUP), sections 7.31-7.65.

### 6.12.1.2 General principles – interpretation of the grounds and the burden of proof

As we have already mentioned, contracting authorities may use the negotiated procedures without a notice only in specific cases which are laid down in the directives (as stated by Public Sector Directive - Article 28). The grounds and the conditions for the use of the negotiated procedure *with* a notice are laid down in Public Sector Directive - Article 31.

In Case 199/85, *Commission v Italy*<sup>59</sup>, para.14 the CJEU laid down two very important principles for interpreting these grounds, that have been repeated and/or applied in many subsequent cases such as Case C-318/94, *Commission v Germany* ("Ems")<sup>60</sup>.

1. That the grounds for using the procedure should be strictly interpreted. This is based on a general principle that derogations from basic principles of EU law – in this case transparency and competition – are to be strictly interpreted: Case 199/85, *Commission v Italy*, para.14 (and applied in many subsequent cases such as the *Ems* case).
2. That the party invoking the derogation (for example, the procuring entity or Member State that relies on it) has the burden of proving that the circumstances justifying use of the procedure have been met. This does not mean that the overall burden of proof of a violation is reversed (Case C-337/98, *Commission v France* ("Rennes Railway")<sup>61</sup>, Opinion of AG Jacobs, at para.64). Rather it means merely that the entity must put forward evidence to justify its reliance on the derogation, rather than requiring the other party to show that the conditions for its use are not met. Once this is done, the other party may be required to refute that evidence. However, the evidence provided by the procuring entity must be detailed in nature. Thus in C-385/02, *Commission v Italy*<sup>62</sup>, Italy claimed that use of the procedure was justified because for technical reasons new construction works for providing flood basins could only be carried out by the contractor that had undertaken previous works on the same flood defence project. The CJEU ruled that it was insufficient for Italy merely to refer to the relevant public authority's advisory opinion that it was necessary to use the same contractor for reasons of continuity, namely the difficulty of establishing liability when different contractors are used for different lots. Rather, Italy was required to provide "detailed explanations" to satisfy the burden placed on it.

When entities choose to use the negotiated procedure, the record of the procedure must include information on the reasons why this type of procedure was selected: Public Sector Directive - Article 43(f)).

A summary of the grounds for using the negotiated procedure without a notice is found in the Table below and these are explained further in the text below.

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<sup>59</sup> Case 199/85, *Commission v Italy* [1987] ECR 1039.

<sup>60</sup> Case C-318/94, *Commission v Germany* ("Ems") [1996] ECR I-1949.

<sup>61</sup> Case C-337/98, *Commission v France* ("Rennes Railway") [2000] ECR I-8377.

<sup>62</sup> C-385/02, *Commission v Italy* [2004] ECR I-8121.

Grounds for using the negotiated procedure without a notice under Directive 2004/18

1. Contracts for research and development (supplies only)
2. Where there is only one possible provider (works, supplies and services), for:
  - Technical reasons
  - Artistic reasons
  - Reasons related to exclusive rights
3. Where strictly necessary for reasons of extreme urgency (works, supplies and services)
4. Follow-on contracts with an existing provider:
  - Additional unforeseen work that cannot easily be separated from earlier work or which is essential to it (works and services);
  - A repetition of previous work that is referred to in the contract notice (works and supplies)
  - Partial replacement for, or addition to, existing supplies, where to purchase from another supplier would lead to incompatibility or disproportionate technical difficulties (supplies)
5. Where open and restricted procedures produced no tenders or no suitable tenders (works, supplies and services)
6. Where open and restricted procedures produced only irregular or unacceptable tenders (works, supplies and services)
7. Procedures following a design contest
8. Purchases on commodity markets (supplies)
9. Purchases on particularly advantageous terms (supplies)

### **6.12.1.3 Availability: contracts for research and development (supplies)**

For supply contracts an authority may use the negotiated procedure without a notice "when the products involved are manufactured purely for the purpose of research, experimentation, study or development" (PDS, Article 31(2)(a)). This is intended to refer to the purchase of a prototype product using, for example, a new technique or materials. (It is quite clear from the context that it is necessary not intended to refer to products of which the function is the carrying out of research, etc – for example, laboratory equipment – many of which are quite simple items: "for the purpose of" refers to the purpose of the manufacture, not the purpose of the end product). This ground could apply, for example, where the Government seeks a new type of surveillance equipment to assist the police: it may use the negotiated procedure to choose a provider who is to develop the prototype and supply it to the authority.

The provision does not apply, however, when the goods are to be acquired to establish their commercial viability or to cover research and development costs. This is intended to exclude the case where the authority purchases a quantity that is sufficient to enable the product to be marketed commercially or for the developer to recover costs, rather than confining itself to the acquisition of the original prototype. If the authority requires items additional to the original prototype it must acquire these through an open or restricted procedure. Thus the new product on offer must compete with other comparable products in the market.

For works contracts an advertisement and competition is required when the negotiated procedure is used for this reason (see section 6.11 above) and there is no provision at all on services. There is no obvious logical explanation for the differences.

### **6.12.1.4 Availability: only one possible provider (works, supplies and services)**

#### **General considerations**

The directive and regulations allow use of the negotiated procedure without a notice, where the contract can only be awarded to "a particular" economic operator for "technical" reasons, "reasons connected with the protection of exclusive rights" or "artistic reasons" (Public Sector Directive - Article 31(1)(b)).

Since the directives are concerned only with opening up markets within the EU it appears that the availability of non-EU providers need not be considered. However, it may be necessary to consider them under parallel provisions in international agreements with third countries, such as the WTO's Government Procurement Agreement.

It is not clear whether entities must prove that no other provider actually exists, or merely that this *could not reasonably be foreseen* at the start of the procedure. A strict interpretation of the provision would suggest the former.

It should be emphasized that *it will often be risky to rely on this provision since there may be firms or products etc in existence of which the procuring entity itself is not aware.*

This raises the question of what enquiries must be conducted. The problems of proof of this ground that arise in such cases are illustrated by the *Rennes Railway* case. This case concerned a contract of a French utility for an urban light railway system. France claimed that under the utilities directive the procuring entity was entitled to dispense with a call for competition in the *Official Journal* under a provision similar to the above, both for technical reasons and reasons connected with exclusive rights. France offered evidence that a major competitor was unable to provide a compatible system within the strict time limits required, in the form of a letter and minutes showing that that the competitor had been consulted but was unable to meet the requirement in time. The Commission sought to rebut this evidence by producing an earlier letter from the same firm indicating that it could supply such a system, and also specifications for similar systems that the competitor had installed in the United States and Canada. Advocate General Jacobs considered this sufficient to rebut France's claim. If this rebutting evidence had not been available the ground might have been made out. However, reference to the lack of willingness and ability to compete of known competitors will be sufficient evidence only in a few markets with a very limited number of competitors.

In most markets it is possibly necessary to produce positive evidence that other competitors do not exist—for example, that recent advertisements for comparable requirements have received no response. In many cases the easiest course of enquiry may be simply to publish a notice advertising the requirement!

### **Technical reasons**

"Technical reasons" could be that there is only one enterprise with the expertise to do the work, or which produces the product; or that only one firm has the capacity to complete on the scale required. It will be insufficient to demonstrate that a particular provider is able to produce the most efficient performance; rather, it is required to show that only that provider can produce what is required

In Case C-385/02, *Commission v Italy*, seemed to accept that a need to give additional works to the same contractor for reasons of continuity (specifically, to avoid the need to apportion liability for problems between different contractors) could, in principle, constitute "technical reasons" under this provision although this need was not proven on the facts.

An interesting question is the relationship between this provision and the EU rules in drafting specifications. These require the procuring entity to accept any product, work or service that is "equivalent" to the one that it wishes to specify and also to refer to this in the specifications. If the entity does not comply with these rules in drafting its specifications, it presumably cannot use the negotiated procedure without a notice even if only one firm can meet the stated specification.

But what if there is only one provider that can meet a *lawfully drafted* specification. There are two possible views:

- i) That the negotiated procedure without a notice can be used. For example, if there is only one firm that can construct a waste disposal plant to the environmental standards required by the authority the procuring entity could dispense with a notice. (However, the entity would probably need to justify its choice of specification to the CJEU – which might possibly apply a particular stringent burden of proof);
- ii) That the above is incorrect and that an entity must *always* hold a competition when there are reasonable alternatives or substitutes. It can be noted that such a rule is stated explicitly in Article XVI(1)(b) of the WTO's Government Procurement Agreement and we have also seen such a rule is

found in Article 22(1) of the UNCITRAL Model Law on procurement. Here the difference between the entity's preferred specification and the alternative product or service that does not quite meet that preferred specification can always be taken into account as an award criterion in comparing tenders.

Clearly there is some risk in using the negotiated procedure without a notice in this case, and an authority that wishes to avoid any risk might prefer either to open up the contract to substitutes *or* at the very least to hold a competition based on its preferred requirements that may allow a chance to any competitors that do exist.

### **Exclusive rights**

The provision on "exclusive rights" contemplates the case in which for legal reasons there is only one possible economic operator, notably where that person holds relevant intellectual or industrial property rights such as patents or copyright. To use this ground it will be necessary to show that there is no available "equivalent" that could be offered by some other provider - if an equivalent exists the entity will violate the rules on specifications by insisting on the protected product or service. Even in the rare case in which the entity's needs can be met only by a product or process protected by exclusive rights, it will not be able to use this ground if use of these rights is licensed to more than one producer or there is more than one supplier of the protected product, for example.

### **Artistic reasons**

This ground could apply where an entity wishes to purchase a unique work of art, or to contract with a particular artist or performer.

As with technical reasons and legal reasons, the negotiated procedure without a notice can be used only when the specified requirement for a particular artist or work is itself lawful, which is not the case when an "equivalent" is available. This concept of equivalence is particularly difficult to apply to artistic matters. Whilst on the one hand a painting by Picasso presumably has no equivalent, could the same be said of the works of artists with a purely local or national reputation? A test suggested in Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet and Maxwell), chapter 9, is that where an artist's work commands a premium above ordinary commercial rates there is a rebuttable presumption that there is no "equivalent" work available; but where this is not the case there is a rebuttable presumption that it is possible to purchase equivalent work from another provider.

#### **6.12.1.5 Availability: urgency**

Use of the negotiated procedure without a notice is allowed when for reasons of "extreme urgency", and only when it is "strictly necessary", the time limits that are specified if open, restricted or negotiated procedures with a notice are used, cannot be met (Public Sector Directive - Article 31(1)(c)). The provisions may be relied on only where the event giving rise to urgency is:

- i) "unforeseeable" by the procuring entity; and
- ii) not "attributable to" that entity.

This ground has been strictly interpreted and applied in accordance with the general principles of strict application outlined earlier. In several cases where authorities have relied on this provision the European Commission has launched proceedings

against that state before the CJEU and in no case so far has reliance on the provision been found to be justified.

Two important points of principle that have been established are:

- i) That entities may not use this procedure when the contract could be awarded in time using the special accelerated version of the restricted procedure. This now allows an award within as little as 20 days (providing for 15 days for providers to respond to the notice or 10 when electronic means are used, and 10 days for submitting offers. An illustration is Case C-24/91, *Commission v Spain* ("Madrid University")<sup>63</sup>, concerning a contract for extension and alteration of a building at Madrid University. Spain contended the matter was urgent in view of the need to complete the building before the start of the new academic year, when an increase in student numbers was expected. The CJEU concluded that the derogation did not apply in this case, since the work could be completed in time by using the specially shortened version of the restricted procedure ("the accelerated restricted procedure"), instead of the negotiated procedure (and see also Case C-107/92, *Commission v Italy*<sup>64</sup>).
- ii) Purchasers must plan ahead and leave sufficient time after completing relevant internal and external approval procedures. Many cases have failed because the "urgency" claimed was foreseeable. An example the *Ems* case, from which the principle just stated can be seen to emerge (although not couched in quite this manner by the CJEU). This makes it clear that purchasers must plan ahead. It is important either to leave enough time for all the relevant processes to be complete or at least draft the notice in such a way as to ensure (as far as possible) that changes can be made within the context of any ongoing award procedure (that is, that any likely changes will still fall within the scope of the notice).

Where difficulty cannot be avoided entirely by using the accelerated procedure and the conditions relating to foreseeability and absence of fault are met, in assessing whether there is an urgency to justify departing from the usual procedures the courts will consider, first, the nature and extent of the interest to which the contract relates and, secondly, the likelihood of prejudice to that interest if delay occurs.

Presumably the highest priority will be given to interests in health and safety, and in preventing damage to property. With certain other interests, however, one might expect that the CJEU may be less willing to countenance the negotiated procedure. One case that did not involve health and safety or property damage was the *Madrid University*, where Madrid University relied on the negotiated procedure for a contract to construct a new faculty building, to avoid overcrowding at the start of the new academic year. However, since the ground was held inapplicable for other reasons, the CJEU did not discuss whether such an interest would suffice. Even where health and safety is at stake, use of this ground might be denied when the likelihood of damage during the period of delay is low. In Case C-328/92, *Commission v Spain*<sup>65</sup>, concerning proceedings by the Commission against Spain for using the negotiated procedure for purchasing pharmaceuticals, the CJEU ruled that the procedure could not be relied upon merely to ensure security of supply to prevent future shortages, but only when a shortage actually occurred.

In cases in which the conditions on unforeseeability and absence of fault are not met, the need for the work to be done is subordinated to the overall policy of the

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<sup>63</sup> Case C-24/91, *Commission v Spain* ("Madrid University") [1992] ECR I-1989.

<sup>64</sup> Case C-107/92, *Commission v Italy* [1993] ECR I-4655.

<sup>65</sup> Case C-328/92, *Commission v Spain* [1994] ECR I-1569.

public procurement rules of requiring competition to open up markets. When a pressing need for work arises that cannot be met adequately within the time-scales of the accelerated procedure but was foreseeable or was the fault of the procuring entity, the entity is thus faced with the choice of either:

- accepting the damage that may occur to the public interest (delay to the procurement); or
- violating the procurement rules.

If the entity chooses the latter course of action the courts might decide not to suspend the award procedure, particularly if there is a threat to life or health. It might be held liable to pay damages to a firm that can show it would have won the contract if a competition had been held – but this possibility is generally rather remote, because of the difficulty such a firm would have in proving it would have won the contract (or had a good chance of winning). Under the new Remedies Directive there is also a risk of ineffectiveness or penalties. This is discussed further in chapter 10.

#### **6.12.1.6 Availability: further contracts with an existing economic operator**

In certain cases the regulations provide for use of the negotiated procedure without a notice for concluding a follow-on contract with an existing contracting partner. As a general principle entities cannot simply negotiate a new agreement with an existing partner: these will be new contracts that require a new award procedure (although extensions and renewals to contracts are possible in certain cases). However, the rules outlined below provide for defined exceptions to that principle in certain defined cases, where there is a special objective justification for continuing with the same firm.

- **Additional works and services that were unforeseen**

Contracting authorities may use the negotiated procedure without a notice to award work to an existing provider in the case of public works or services contracts – although not supplies contracts – where this is additional to work under the previous contract that arises through "unforeseen circumstances" (Public Sector Directive – Article 31(4)(a) where:

- i) the new works or services cannot be technically or economically separated without "major inconvenience" to the authority. This might apply, for example, where an extension is required to works on an existing site on which a contractor is already present and it would be very troublesome and expensive to remove and replace that contractor; or
- ii) the new works or services can be carried out separately but they are "strictly necessary" to the later stages of the original contract. This could apply, for instance, where an unexpected landslip during the course of construction work necessitates earthmoving services not envisaged in the original contract, in order for the construction to be completed.

In these cases the objective circumstances make it almost certain that the existing provider will offer best value for money for the additional work, and it thus appears disproportionately wasteful to launch a new award procedure.

The provision can only be relied upon where the consideration for the additional works does not exceed 50 per cent of the value of the consideration under the original contract.

Under the WTO's Government Procurement Agreement (GPA) the possibility of using a non-competitive procedure in the above circumstances applies only for works ("construction services") and not for most services (GPA Article XV(1)(f)). For contracts covered by the GPA it thus violates the GPA to use this provision for other services.

- **Additional works or services referred to in the contract notice**

The negotiated procedure without advertisement may also be used to allow an award to the existing provider where an entity wishes to obtain works or services which are a repetition of those under the original contract, and which are in conformity with a "basic project" for which the original contract was awarded: Public Sector Directive - Article 31(4)(b). Again this applies only in relation to public works and services contracts and not to supplies contracts. This could apply, for example, where a contractor is engaged to build two halls of residence for a university as part of a new campus development, and the advertisement states that a contract for a third, similar, hall might also be awarded to the contractor at a later stage.

The provision applies under the directive only when the possibility of using the negotiated procedure without a notice for the further work is disclosed "as soon as the first project is put up for tender" (Public Sector Directive - Article 31(4)(b)). The new award procedure must begin within three years of the time that the original contract is entered into (Public Sector Directive - Article 31(4)(b)).

Under the GPA the possibility of using a non-competitive procedure in the above circumstances applies only for works ("construction services") and not for most services (GPA Article XV(1)(g)). For contracts covered by the GPA it thus violates the GPA to use this provision for other services.

- **Additional purchases from a previous supplier**

For public supply contracts in certain cases authorities may use the negotiated procedure without advertisement to award a contract to an existing (or previous) supplier, when the contract is for supplies required as a partial replacement for existing supplies or installations, or is for supplies that are required as an addition to existing goods or installations (Public Sector Directive - Article 31(2)(b)). This applies where to use someone other than the existing/previous supplier would oblige the authority to acquire material with "different technical characteristics", and this would result in either (i) incompatibility with the existing supplies/installation or (ii) "disproportionate technical difficulties" in their operation and maintenance. This exception, like the exception for certain additional unforeseen works and services discussed above, identifies specific circumstances where it is objectively very likely that the previous supplier will offer the best value for money.

The directive provides that this ground may only be invoked "as a general rule" if the term of the contract or of any other contract entered into for the same purpose is for three years or less: Public Sector Directive - Article 31(2)(b). This might apply, for example, when the nature of the contract makes a longer period a necessity for economic reasons.

It is not clear what the position is when there is equipment available from a different supplier that could be adapted to make it compatible. The rule of strict interpretation might suggest that the ground is not available in such a case; a

competition is required, in which the costs of adapting the equipment may be considered as an award criterion. A more flexible approach is that the ground applies when the equipment cannot be adapted without disproportionate expense. This can be supported by analogy with the "unforeseen works and services" ground discussed earlier, which applies when not awarding the work to the original provider would involve great inconvenience.

It is not necessary that the need for replacement or additions should be unforeseen for this provision to be invoked. Further, if the need for replacement or additions is foreseen, it is not required this should be indicated in the original advertisement.

It seems doubtful whether this provision can be relied on when the equipment in question was itself purchased in violation of the EU rules on specifications.

#### **6.12.1.7 Availability: failure of open procedures, restricted procedures or competitive dialogue**

It is possible to use the negotiated procedure without a notice in certain cases where the contracting authority has already run an advertised competition, but this has failed to produce a satisfactory outcome. This applies as follows:

- **No suitable tenders or applications**

The negotiated procedure without a notice can be used, first, when an open or restricted procedure was held but no tenders, no "suitable" tenders, or no applications were received (Public Sector Directive - Article 31(1)(a)). The concept of suitable tenders appears to refer to tenders that meet the procuring entity's key needs in the procurement. The rationale of this provision is that in a case in which the procuring entity has held an advertised competition but has been unable in this competition to find any tenderers who are able to fulfil its needs, it would be pointless to advertise again, and the entity should be able to use any method that it chooses to try to identify a provider that is able to do so.

The precise meaning of "suitable" tenders was considered by the CJEU in the context of a provision in the Utilities Directive (now contained in Utilities Directive Article 40(3)(a)) in Case C-250/07, *Commission v Greece*<sup>66</sup>.

- This case concerned proceedings in the CJEU against Greece regarding an award procedure for a contract to supply thermo-electric units and certain auxiliary equipment for a power station, conducted by DEI, a public power corporation. DEI had published a call for competition for an award procedure (the first award procedure) but then terminated the procedure when it found that the Board of Directors was not satisfied with certain criteria in the tender. It then published a call for competition for a new procedure with some differences (the second award procedure). However, it rejected all five tenders received in this second procedure on the basis that the tenders did not comply with certain technical requirements relating to emission levels. The procuring entity then asked the tenderers to submit a further financial offer within 5 days (the third award procedure). In this offer they were required, inter alia, correct the non-compliant parts of their offers referred to above that led to rejection. Greece argued that DEI was entitled to launch this third procedure without a call for competition since there were no "suitable" tenders. However, the Commission claimed that the tenders in this case were not "unsuitable" under the above provision.

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<sup>66</sup> Case C-250/07, *Commission v Greece*, CJEU judgment of 4 June 2009.

In this respect the Commission sought to define tenders that are unsuitable as tenders which are “different in their substantive terms” from that described in the call for tenders, such that the situation is “equivalent” to receiving no tenders at all in that the procuring entity’s needs are not met (para.19 of the judgment). The Commission sought to distinguish unsuitable tenders from those that are merely “irregular” in the sense of the Public Sector Directive (although the concept of “irregular” tenders does not appear in the Utilities Directive); the Commission apparently considered that most tenders that do not comply with the specifications fall into this category. Greece, on the other hand, argued that the concept of an unsuitable tender refers to *any* tender that does not meet the technical specifications, whilst irregular tenders refers merely to “failure to meet a formal condition for participation in the tender”. Although the judgment is not entirely clear, it appears that the CJEU, like Advocate General Poiares Maduro (para.13 of the Opinion) accepted the Commission’s definition: the CJEU drew a contrast between non-conformity that is “a mere inaccuracy or a mere detail” and tenders that do not meet the needs of the contracting authority, with only the latter involving an “unsuitable” tender. However, the CJEU differed from the Commission in applying the test to the facts – the CJEU concluded that, contrary to the Commission’s arguments, the procuring entity was entitled to consider the tenders unsuitable in this case. The CJEU noted that the failings in this case related to the fact that tenderers did not meet the guarantees of volumes that were fixed in light of national and EU-level obligations concerning protection of the environment and that it would thus not have been possible to bring the thermo-electric station in question legally into operation (para.41-42).

It appears that the same definition will apply under the Public Sector Directive: the Commission argued that this was the case, and this was clearly accepted by the Advocate General (para.17 of the Opinion).

It remains to be seen in future cases exactly what deviations from the specification will render a tender unsuitable. The *Greece* case indicates that this is the case with deviations from important requirements that must be met by law. It is not clear whether *every* deviation that is “fundamental” for the purpose of the rule that non-compliant tenders cannot be accepted will render a tender not “suitable” – this concept may possibly apply to very significant deviations which mean that the tenderers in question simply cannot meet the procuring entity’s needs at all.

Until there is further case law on this it is clearly risky to rely on this ground for using a negotiated procedure without a notice unless there is very substantial non-compliance with the specification. It will be much less risky to commence a new negotiated procedure based on the fact that the tenders are “irregular”, which also allows the procuring entity to proceed without a new notice *if* all qualified tenderers are brought into the negotiations. This possibility is discussed in the next section below, on irregular and unacceptable tenders.

It is a condition of invoking this ground for using the negotiated procedure that the initial conditions of contract are not “substantially altered” (Public Sector Directive - Article 31(1(a))), which provides that the ground can be used only if “the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered in the open procedure”). In this case there is, in effect, a new contract, which demands a new award procedure.

The CJEU stated in Case C-250/07, *Commission v Greece*, that the test for determining whether the conditions of contract are substantially changed in this

context is in fact equivalent to the test that is to be applied more generally for determining when a change to a contract is a new contract. On this test it is relevant in the present context, according to Case C-250/07, *Commission v Greece*, to ask whether the amended condition, had it been part of the initial award procedure, would have allowed tenders submitted in the procedure with a prior call for competition to be considered suitable or would have allowed tenderers other than those who participated in the initial procedure to submit a tender (para.52 of the judgment). The Commission in Case C-250/07, *Commission v Greece* alleged that a substantial change *had* been made in that in the third award procedure from the second, in that the second award procedure allowed tenderers to include certain technical deviations from the stated conditions without paying any extra costs resulting from the deviation, whereas the third required tenderers themselves to pay the costs of deviation. However, the CJEU concluded that in this case the change was not substantial.

An entity invoking this ground is required to send a report is sent to the Commission *if the Commission so requests* (Article 31(1)(a)). This monitoring provision was included because it is thought that procuring entities might deliberately make the terms unattractive to deter bids, leaving them free to negotiate with a favoured economic operator.

A procuring entity that invokes this provision need not conduct any kind of competitive procedure when using the negotiated procedure without a notice. However, it may do so and the CJEU seemed to indicate in Case C-250/07, *Commission v Greece* (where the procuring entity launched a new competition between those who participated in the failed procedure) that a decision to do this might be indicative of the fact that there was no abusive intention by the procuring entity (para.47 of the judgment).

This ground, unlike the provision made for irregular and/or unacceptable tenders discussed further below, does not refer specifically to the case in which no offers or suitable offers are received in a competitive dialogue or a negotiated procedure with a notice. Thus in the case in the case in which these kinds of procedures fail to produce any suitable tenders another notice is arguably needed to proceed. This appears to be rather illogical, however. Thus it is possibly arguable that this is an oversight and that the provisions can be extended to this case by analogy. It can be noted that in the case of competitive dialogue, at least, if this option is not available the contracting authority can at least follow a new procedure without issuing a further notice by relying on the provisions on irregular or unacceptable tenders that are discussed immediately below.

- **Only irregular or unacceptable tenders**

A contracting authority may also use a negotiated procedure without a notice where an open or restricted procedure or competitive dialogue has been held, but all tenders were either irregular or unacceptable (Article 30(1)(a)). This applies on condition that:

- a. the authority negotiates with all the qualified tenderers who submitted tenders (in the wording of the directive) that were "in accordance with the formal requirements of the tendering procedure"; and
- b. the authority does not include any additional tenderers in the procedure (Public Sector Directive - Article 30(1)(a)).

Thus although no new notice is needed, the procedure is still in general required to be a competitive one – in contrast with the position in other cases in which the negotiated procedure without a notice is used, when the procuring entity can

generally just negotiate with one chosen firm. Essentially it is considered that in such a case it is an appropriate option to effectively continue the old procedure (although in formal terms it is a new one), but allowing tenderers to correct previous defects in, or problems with, their tenders, and in a more flexible way.

It appears that the concept of irregular tenders includes those that do not comply with the specifications (as the Commission seemed to suggest in Case C-250/07, *Commission v Greece*). Tenders that do not meet other formal requirements stated in the documentation can also probably be considered irregular – for example concerning the manner of presentation of bids (such as language of bids).

According to the directive the concept of unacceptable tenders refers to “tenders which are unacceptable under national provisions which are compatible with Articles 4 [dealing with the form of economic operators], 24 [on variants], 25 [on sub-contracting], 27 [provision of information on obligations to pay taxes etc] and Chapter VII [which covers Article 44-52 on suitability]”. Thus the concept of an unacceptable tender seems to cover a tender that has been rejected because the tenderer or tender fails to meet requirements that relate to matters listed in these Articles – for example, because the tenderer lack the technical capability to perform the contract. Obviously tenderers rejected under many of these provisions will not need to be included in the subsequent negotiations that occur without a new notice since, as we have just seen, the procuring entity needs to include in the negotiations only those tenders who are qualified to perform the contract.

It is not entirely clear how far the above provisions cover reasons other than those listed, for which procuring entities may legitimately wish to reject tenders. One such case is where a procuring entity rejects a bid to ensure equal treatment – for example, to reject those involved in preparing the specifications where this involves a conflict of interest. The underlying principles of this ground for the negotiated procedure suggest that it should apply, also, when these kinds of reasons exist for rejecting some of the tenders. Another reason for which a procuring entity may wish to reject a tender is that it is abnormally low.

A purchaser may also be dissatisfied with an award procedure because the best tender does not offer good value for money. This is especially likely when the number of bids has made for inadequate competition—for example, where there is only one responsive bid—or where there has been collusion between tenderers. A guide to some of the pre-2004 directives published by the Commission suggested that one case that this covers is where all tenders exceed the procuring entity's budget (*Guide to the Community rules on public procurement of services* p.21 n.55; *Guide to the Community rules on public works contracts* p.25 n.27; *Guide to the Community rules on public supply contracts*, p.23, n.28. Note that the Guides state that they do not necessarily represent the Commission's views on interpretation). If this interpretation is correct, it is surprising, since it provides a broad discretion to disregard the outcome of a tender process and enter into negotiations. It seems illogical to allow this, but not to allow a second, transparent, tender round in such a case, and if it is allowed it supports the view that a second tender round is allowed. It may be that this provision is directed mainly at the case of collusion when a new round of formal tendering or new tendering procedure is not suitable, and thus might be interpreted as available only when collusion is suspected. This might be explained on the basis that rejecting those involved in collusion is permitted in order to implement the principle of equal treatment.

As with use of the negotiated procedure without a notice where there are no tenders or applications or not suitable tenders, the negotiated procedure may be used in the case of irregular or unacceptable tenders only when the

contract conditions from the original procedure are not substantially altered (Article 30(1)(a)).

Unlike the provisions applying where there are no tenders or no suitable tenders the above provision on irregular and unacceptable tenders applies in the context of a competitive dialogue.

On the other hand, as with the provision applying where there are no tenders or no suitable tenders there is no explicit reference to what is to happen when a negotiated procedure with a notice fails to produce a satisfactory outcome. Whilst problems might not arise so frequently with a negotiated procedure with a notice – since there is probably greater scope for correcting irregularities within the context of the procedure itself – they may occur – for example, when no qualified economic operators respond to the notice. It seems illogical not to provide for the use of a negotiated procedure without a notice for this kind of case.

#### **6.12.1.8 Availability: procedures following a design contest**

Under Public Sector Directive - Article 31(3) authorities may also use the negotiated procedure without advertisement where a design contest has been held to select potential service providers in the context of a design contest in accordance with the directive's rules on design contests (set out in Public Sector Directive - Articles 66-74), and the contract is negotiated with those who were successful in the design contest. Design contests are not considered further in this book.

#### **6.12.1.9 Availability: purchases on commodity markets (supplies)**

Article 31(2)(c) of the Public Sector Directive also provides for use of the procedure "for supplies quoted and purchased on a commodity market". A commodity market is a market where products are bought and sold for future delivery, with prices being set through the exchange – for example, this is the case with many metals, livestock, coffee and tea. They are designed to ensure a secure advance price for these commodities to avoid price fluctuations that would otherwise occur. This exemption allows procuring entities to purchase directly from the exchange without advertising. This is usually the cheapest option and since the markets are generally international there is no danger of discrimination.

#### **6.12.1.10 Availability: Purchases on particularly advantageous terms (supplies)**

Public Sector Directive - Article 31(2)(d) provides for use of the procedure for "the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations". This recognises that a closing-down sale or sale by a liquidator may provide opportunities for a particularly favourable purchase which may be lost if the normal procedures are followed. Favourable conditions need not be confined to a favourable price.

### **6.12.2 Procedural requirements**

Under the negotiated procedure without a notice there is no requirement under the directives to publicise the contract – and we have seen in section 10 that the

principles of equal treatment and transparency under the TFEU likewise impose no such obligation.

In most cases where this procedure is permitted this is because there is only one possible provider or because the work is being awarded to a previous contracting partner: here the other party to the contract is already decided and negotiations will seek merely to settle the terms and conditions of the contract.

In other cases such as urgency, or where there are not suitable tenders, however, it may be appropriate to negotiate with more than one firm. In practice, it will generally contact known providers directly to initiate negotiations.

The wording of the directive is very unclear on how far obligations are intended to apply and it does not appear that much thought has been given to this issue.

- For example, it could be argued that even for the negotiated procedure without a notice rules on the qualification of candidates (the rules on permitted qualification criteria and evidence etc as set out in Chapter VII, Articles 44-52 of the directive) and on award criteria in Articles 53 and 55 apply, on the basis that Article 44(1) simply states generally that "Contracts shall be awarded" on the basis of the provisions of these articles, whilst Article 44(2) setting out rules on minimum capacity are also stated in general terms. On the other hand, it can be noted that Article 44(3), which allows entities to limit the number of persons to be invited to tender from amongst those qualified states that this is allowed in restricted procedures, negotiated procedures with a notice, and competitive dialogue and also refers to the rules on how this is to be done, does not mention negotiated procedures without a notice. This seems to suggest that the particular rules on how to select candidates do not apply to negotiated procedures without a notice. This may possibly reflect an assumption that the whole of Article 44, and the remainder of Title II, chapter VII to which Article 44 refers, do not apply to negotiated procedures without a notice – it might be argued that Article 44(2) mentions the restricted procedures, negotiated procedures with a notice, and competitive dialogue to make it clear that this is not allowed – and thus that the rules on how it is to be done are irrelevant – for *open* procedures but does not mention the negotiated procedure without a notice simply because it is assumed this chapter generally has no application to that procedure. (Of course, even if the rules on qualification do generally apply, in situations where providers have not submitted specific requests for consideration it is difficult to review the authority's discretion in selecting invitees since specific firms cannot show that they are entitled even to be considered). The rules on time limits, electronic communications etc are similarly unclear.

The lack of clarity in the directive means that the CJEU will have considerable discretion to develop the rules on this procedure as it thinks fit. It is not quite clear how far the rules of the directives will apply in these cases when there is some scope for competition. At one extreme it might be argued that the principles of transparency and equal treatment require that the procuring entity should be as competitive and transparent as possible in the circumstances, and that the courts should review on a case by case basis whether this standard has been met. At the other end of the spectrum, there is a strong argument, based on the principle of legal certainty, that obligations apply only when this is very clearly indicated by the wording of the directive. In the absence of jurisprudence there is little evidence which approach it will take. This absence of "positive" jurisprudence applying rules to the negotiated procedure without a notice will of course, limit the likelihood of a challenge to measures taken under a negotiated procedure without a notice – the

possibility of a challenge can to a large extent be considered theoretical rather than real.

However, it can be expected, however, that there are a few requirements that will almost certainly be applied to the procedure without a notice, taking into account their purpose and nature – most notably the requirement to exclude from public contracts firms convicted of corruption and certain other criminal offences under the “mandatory exclusions” of the directive.

## 6.13 Terminating contract award procedures

A procuring entity may in practice wish to terminate a contract award procedure for any number of reasons. For example, it might wish to abandon the purchase because the goods or services are not longer needed, or are too expensive; or it might terminate one procedure and commence a new one to correct legal or other mistakes made in the first procedure.

The CJEU has indicated in several cases that under the EU directives entities may in principle abandon the project or commence a new procedure<sup>67</sup> and they enjoy a broad discretion to do so. In particular, there is no requirement in EU law to terminate only in exceptional cases or on serious grounds.<sup>68</sup>

However, as in any decision under the directives entities must comply with general principles of EU law and the directives in terminating. Thus it would not be lawful, for example, to commence a new procedure because the winner under the first procedure was not a national supplier.

## 6.14 Framework agreements<sup>69</sup>

### 6.14.1. Introduction

Framework agreements are arrangements whereby a purchaser and a provider establish the terms on which purchases may or will be made over a period of time. Their basic rationale is to allow the parties to establish the terms of (future) transactions in advance of specific orders, leading to more rapid procedures and reduced costs when it comes to actually placing an order. This is especially important for procuring entities which are required to follow detailed transparent

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<sup>67</sup> E.g. Case C-27/98, *Metalmeccanica Fracasso* [1999] E.C.R. I-5697; Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs- GmbH (HI) v Stadt Wien* [2002] E.C.R. I-5553; Case C-244/02, *Kaupatalo Hansel v Imatran Kaupunk* [2003] ECR I-12139.

<sup>68</sup> *Metalmeccanica Fracasso*, above, paras 23 and 25; *Kaupatalo Hansel*, above, para.32.

<sup>69</sup> See further S. Arrowsmith, *Methods for purchasing on-going requirements: the system of framework agreements and dynamic purchasing systems under the EC Directives and UK procurement regulations*, chapter 3 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009, Eagan, MN: West); S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), Ch. 11; P. Trepte, *Public Procurement in the EU: a Practitioner's Guide* (2007, Oxford: OUP), pp.436-445; S. Arrowsmith, “Framework Purchasing and Qualification Lists under the European Procurement Directives” (1999) 8 *Public Procurement Law Review* 115 (part I) and 168-186 (part II); C. R. Yukins, “Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting” (2008) 37 *Public Contract Law Journal* 545.

procedures when undertaking procurement, as in the case of entities covered by the EU procurement rules.

Framework arrangements are often used in practice when contracting authorities have recurring or continuing needs to purchase certain particular products or services - for example stationary, computers or maintenance services - and in particular, where contracting authorities do not know the exact *timing* or *quantity* of their requirements.

Framework agreements can be divided generally into two basic categories. The first is a single-supplier framework, which may be either a binding contract, or setting the terms for future contracts with a legal commitment only when an order is agreed.

Frameworks may also take the form of multi-supplier arrangements. These involve:

- An initial competition to select several potential suppliers;
- Then, when a requirement arises the entity chooses one of these several "framework suppliers" to fulfil the order.

Reasons for multi-supplier rather than single-supplier frameworks include that they allow entities to choose the best supplier for each order, whilst avoiding a new procedure; they help entities to ensure security of supply; and they can secure benefits of centralised purchasing - such as cost savings from aggregation - whilst retaining user flexibility. Framework agreements can facilitate the participation of Small and Medium Enterprises (SMEs) in the procurement process - "call-off" orders under a framework agreement are smaller in size than a single large procurement and also are spread over a longer period of time.

#### **6.14.2 The Directive's rules on framework agreements**

The Utilities Directive has always contained express provisions on frameworks, but the old Works, Supply and Services Directives did not contain any explicit provisions on this subject. However, many types of framework were probably, in fact, permitted. To introduce some legal certainty, and also to provide for adequate explicit controls over frameworks, the 2004 Public Sector Directive introduced explicit rules on frameworks. These rules:

- expressly authorizes many frameworks
- regulate them to ensure transparency and competition; and
- adapt some of the directive's rules (such as those on aggregation and award notices) to the specific context of frameworks.

Article 1(5) defines a framework agreement as:

"an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular, with regard to price and, where appropriate, the quantity envisaged".

This covers both multi-supplier frameworks and single-supplier frameworks that do not involve an immediate award, so that both the authorizing and regulating provisions apply to both types.

Article 32(1) expressly authorizes frameworks.

In awarding them, entities must follow the directive's usual rules for all phases up to the award (Article 32(2)).

For multi-supplier frameworks, Article 32(4) generally requires the entity to select at least 3 framework suppliers. It then provides that for each order the winner may be selected *either*:

- Without a new competition (based on original tenders) *or*
- Through a reopening of competition, under a transparent "mini-tender" procedure (in writing, to specified time limit that is sufficiently long for tenders, and confidential). All framework operators capable of meeting the requirement must be invited to participate in the mini-competition (Article 32(4)). This mini-tender process may be used to supplement original tenders by adapting them to the particular requirement. For example, with a framework for consultancy on management issues, the initial framework may involve tenders on matters such as hourly rate, whilst the mini-tender can be used to obtain proposals for the specific project (such as how many hours it will take the supplier, and the supplier's proposals for addressing it) which by their nature cannot be included in the original tender. Mini-tenders can also be used to changes to the terms of the original tender – e.g. changes to prices in markets where prices are very volatile.

The procuring entity may not add new framework suppliers during the framework's life (Article 32(2)). In this respect a framework agreement differs from a dynamic purchasing system, and also from a qualification system under the Utilities Directive (a concept discussed further in chapter 7 below).

Regarding controls, the following can be noted:

- First, frameworks must not exceed four years "save in exceptional cases duly justified, in particular by the subject of the framework agreement" (Article 32(2)), and set out in the notice.
- Article 34(2) states that entities may not use framework agreements improperly or in such a way as to restrict or distort competition.
- One problem with frameworks is that the parties may wish to make amendments either to the tendered terms or to the entity's specification or conditions – for example, to add new products. The same issue can arise in any award procedure, but since with frameworks there is generally a longer period before awarding each contract, it is a particular problem. Here Article 32(2) states that the parties may under no circumstances make substantial amendments to the terms in the framework agreement, "in particular" with frameworks with a single operator; and Article 32(3) that with a framework with a single operator contracts shall be awarded within the limits of the terms laid down in the framework. This latter provision appears, however, to be subject to the possibility of making non-substantial changes to terms as envisaged in Article 32(2). In fact, these provisions probably just reflect more general principles on change during an award procedure.

The directive also deals explicitly with certain details of framework agreements.

- For example it provides that the value of contracts for threshold purposes is the *maximum* estimated value of all the contracts envisaged under the framework (Article 9(9)), the same rule that already applies for utilities.
- For award notices it is provided that notices need be published only when framework suppliers are selected, and that notices need not be published for

every order placed (Article 35(4)). For other information obligations (e.g. notification of the award) there are explicit provisions requiring information to be given when framework suppliers are selected, but nothing explicit on whether information is needed notices needed for every order placed, leaving the position in the latter respect unclear.

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# CHAPTER 7: EU RULES FOR THE UTILITIES SECTOR

## 7.1 Introduction to utilities procurement<sup>1</sup>

### 7.1.1 Introduction to the EU regime on utilities procurement

Whilst public procurement under the EU procurement regime is regulated for the most part by Public Sector Directive 2004/18, some procurement is regulated by a different directive, Directive 2004/17/EC – which we refer to as the Utilities Directive. This directive regulates bodies engaged in certain activities in the sectors of:

- Water;
- Transport;
- Energy; and
- Postal services (“utility activities”).

For example, in the United Kingdom it covers contracts made by electricity generating companies and water suppliers.

Bodies whose procurement is, in general, covered by the public sector directive are covered by the Utilities Directive when they engage in the utility activities. The Utilities Directive is not confined to the public sector but also applies to a number of other bodies engaged in “utility” activities, including many in the private sector (as with the companies referred to above).

Water, energy and transport were first regulated by a directive adopted in 1990 as part of the drive to complete the European single market by 1992. This 1990 directive covered only supply and works contracts; the regulation of services contracts in the utility sectors was added in 1993. The reason given by the EU as to why they were regulated later was that in some Member States these activities were carried on by public bodies (such as local authorities or state-owned companies) whilst in others they were carried out by private firms. It was thought that it would be unfair to regulate these activities only in those states in which they were carried out by the public sector; but it was not previously considered acceptable to regulate private sector bodies. There was also a lack of political will to regulate most of the utility sectors, because of their political sensitivity. This explains why these sectors were originally omitted altogether and regulated only in the 1990s.

The changes that were introduced by the 2004 Directive are listed in the Appendix to chapter 2 above, along with the changes introduced into the Public Sector Directive. The most important were concerned with:

- i) adapting the directive to the use of electronic communications;
- ii) taking out of the directive certain entities and activities that effectively operate in competitive markets; and

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<sup>1</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), 4.51-4.58; S. Arrowsmith, “An Assessment of the New Legislative Package on Public Procurement” (2004) 41 *CMLRev* 1 at pp.1306-1311 (section 8); A. Brown, “The Extension of the Community Public Procurement Rules to Utilities” (1993) 30 *CMLRev* 721; P. Trepte, *Public Procurement in the EU: a Practitioner’s Guide* (2007, Oxford: OUP), passim.

iii) adding the postal services sector.

The fact that the initial sectors covered by the Utilities Directive – water, energy, and transport (and also telecommunications, which is no longer covered) – were not regulated until 1991, and postal services not until the 2004 Utilities Directive led to the utilities sectors sometimes being referred to as the “excluded” sectors.

The basic principles and procedures of the Utilities Directive are similar to those of the other directives, but they are simpler and give purchasers more flexibility in a number of important ways.

Remedies in the utilities sector are governed by a separate directive on remedies, Directive 92/13. Like the public sector Remedies Directive, it has been significantly amended by Directive 2007/66/EC. Again, the rules applying are similar to those for the public sector but with more flexibility.

In the following sections we will provide an introduction to the EU’s utilities regime, focusing on the key principles and rules, and the ways in which these rules *differ* from those of Directive 2004/18.

### **7.1.2 Application of the TFEU to utilities**

As explained above, the free movement provisions of the TFEU – e.g. Article 34 on free movement of goods (formerly Article 28 EC) and Article 56 on freedom to provide services (formerly Article 49 EC) – probably apply in general to the procurement of public bodies but not that of private bodies.

There is as yet little indication in the cases, however, on how the line is to be drawn here between public and private – whilst it is almost certain that the free movement rules will apply to bodies that are contracting authorities under the Public Sector Directive, there is uncertainty over their application to bodies that are covered by the Utilities Directive solely as public undertakings or as entities that operate on the basis of special or exclusive rights. We can note that in the original Utilities Directive it appears to have been assumed that not all utilities are subject to obligations not to discriminate under the TFEU, and (in contrast with the original directives applying to the public sector) a specific obligation not to discriminate was included in the directive.

This point may be of importance for some utilities in view, in particular, of the positive obligation of transparency that applies under *Telaustria*<sup>2</sup> – this may mean that some utilities must advertise their contracts even though these contracts are excluded from the directive e.g. as concessions or because they fall below the threshold.

Also of potential importance in this area is Article 106 TFEU (formerly Article 86 TEC). Article 106(1) provides that Member States shall neither enact nor maintain in force with respect to “public undertakings” or undertakings given “special or exclusive rights”, measures contrary to the TFEU. In relation to free movement it seems that the State violates this provision when it takes measures in relation to public undertakings or entities with special or exclusive rights that also involve a violation by the State itself of the free movement provisions, such as when the State directs a public undertaking to buy only national products.

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<sup>2</sup> Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG* (“Telaustria”) [2000] ECR I-10745.

## 7.2 Coverage of the utilities rules: activities and entities covered<sup>3</sup>

### 7.2.1 Introduction

The idea of the Utilities Directive was to regulate the purchasing of all entities which it was felt were likely to discriminate in favour of national industry in their purchasing. Thus the directive covers not only traditional "public bodies" but also certain other bodies which it was felt were likely to give in to pressure from the government to "buy national", including certain private sector bodies. The regulated entities are seen to be susceptible to pressure because they depend on the government in some way – for example, for the award of their operating licence. They are thought to be unlikely to resist this pressure because they do not operate in fully competitive markets and therefore are not under commercial pressure to get the best possible value for money in their purchasing.

- For example, in industries such as water supply or electricity supply many suppliers have traditionally enjoyed a local or national monopoly over supply, and depended on governments to grant this monopoly. In such a case it was thought that they would comply with government demands to buy national products, because they might fear the loss of their monopoly if they did not do so, and because there was no danger of losing their markets even if they operated inefficiently: the higher costs would simply be passed on to customers.

To determine whether the Directive applies it is necessary to ask:

- First, whether the entity in question is engaged in one of the regulated "utilities" activities; and
- Secondly, whether it is the kind of purchaser covered by the directive.

We will consider these questions in turn.

### 7.2.2 Which activities are covered?

The directive applies only where a covered entity makes contracts in connection with certain listed "utility" activities. These are set out in Article 2 of the Directive. As already indicated, they cover four sectors:

- water;
- energy;

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<sup>3</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 15; S. Arrowsmith, "Deregulation of Utilities Procurement in the Changing Economy: towards a Principled Approach?" (1997) 7 *E.C.L.Rev.* 4; T. Briggs, "First Exemption Decision under Article 30 of the Utilities Directive Relating to Electricity Generation in Great Britain" (2006) *Public Procurement Law Review* NA127; M. Bronckers, "The Position of Privatized Utilities under WTO and EU Procurement Rules" 1996/1 *Legal Issues in European Integration* 145; T. Kotsonis, "The Definition of Special or Exclusive Rights in the Utilities Directive: *Leased Lines or Crossed Wires*" (2007) 1 *Public Procurement Law Review* 68; P. Trepte, *Public Procurement in the EU: a Practitioner's Guide* (2007, Oxford: OUP), chapter 3; R. Williams, "Commission Decision on Which Entities are Exposed to Competition" (2005) 14 *Public Procurement Law Review* NA69; R. Williams, "Swedish Exemption Granted for Some Services within the Postal Sector; Czech Exemption Refused for Production of Electricity" (2009) 18 *Public Procurement Law Review* NA144.

- transport; and
- postal services.

The activities covered are basically those in which the European Union considers that there is no competitive market operating in the whole of Europe, meaning that the operators in some Member States, at least, are unlikely to resist government pressure to “buy national.

The directive also previously regulated telecommunications (companies providing telecommunications services). However, this sector has now been removed because of the view that entities selling services in this area operate in competitive markets in all Member States (basically because of EU legislation requiring states to liberalise their markets in this sector).

- ***The water sector: Article 4***

In the water sector the most important activity covered is the provision or operation of a fixed network for supplying drinking water to the public.

The reference to a fixed network indicates that the directive does not apply, for example, to firms producing bottled mineral water for sale!

Contracts connected with hydraulic engineering, land drainage and irrigation are also covered in some cases where they are carried out by bodies engaged in supplying drinking water through a fixed network, and more than 20% of the volume of water made available by these activities is for drinking water. It also applies to contracts made by these entities relating to the disposal or treatment of sewage. (Contracts relating to hydraulic engineering etc, and disposal or treatment of sewage are not covered when carried on by entities which do not also provide or operate fixed water networks).

The directive also covers the supply of water to fixed networks.

Entities in this sector are not covered where they make contracts to purchase water. At the time the directive was adopted it was felt that water needs to be procured from close to its source and there would be no competition for its supply in such a case; hence applying the directive would be pointless. However, it is expressly provided that this exemption should be re-examined.

- ***The energy sector: Article 3***

The directive covers, first, provision or operation of a fixed network for the supply of electricity, gas or heat to the public. Thus it covers companies which are involved in the generation of electricity. It also covers companies which purchase electricity from the generators and supply it to homes and industry.

In the energy sector the directive also covers exploitation of a geographical area for the purpose of exploration for, or extraction of, oil, gas and solid fuels. This means it applies in principle to companies like Shell which are engaged in exploring for and extracting oil from the North Sea. In respect of these activities, however, the key states involved in these activities already had substantial exemptions, obtained under the old Directive 93/38 and which will carry on under the 2004 directive, which allowed them to apply only limited principles to their procurement rather than the full requirements of the Utilities Directive: see the section below “Exclusion from the directive of entities operating in competitive markets”. Complete exemptions may now be available for many of these activities under Article 30 of

the directive – for example, the United Kingdom has obtained a full exemption in this area under Article 30 of the Utilities Directive.

For all activities in the energy sector there is an exemption for the purchase of energy and of fuel for the production of energy. Thus entities involved in electricity generation do not have to follow the directives when they purchase coal for the purpose of generating electricity. It was considered that the absence of a competition for cross-border supplies would make the directive's application pointless. However, there is provision for re-examination of the exemption in the future, which may be appropriate if cross-border competition increases.

- **The transport sector: Article 5**

In the transport sector the directive covers the provision of air terminal facilities, and the provision of port and similar facilities. This means that entities running airports, such as BAA (British Airports Authority, which operates Heathrow and other major airports) are covered by the directive when, for example, they make contracts for the construction of a new runway or terminal building.

The actual activity of transportation is not included, but merely the provision of facilities. Thus, for example, British Airways or Lufthansa are not bound by the directives when they make their own contracts for purchasing aeroplanes, catering services etc. This activity was not included because it was thought that, in contrast with the provision of airport and other transport facilities, the actual operation of air and sea transport took place in competitive markets which would ensure competitive purchasing by the entities involved.

The directive does, however, cover the operation of certain other transport networks which provide a public service, namely those in the field of transport by railway, automated systems, tramway, trolleybus, bus and cable. A "network" is defined as existing where a service is provided under operating conditions laid down by a competent authority of a Member States, relating to matters such as routes to be served, the capacity to be made available or the frequency of the service. This means, for example, that London Underground (which runs the tube system in London) has to follow the Utilities Directive when making its purchases, as does a consortium operating an above-ground city transport system such as the Docklands Light Railway or Sheffield Passenger Tram system. Firms operating bus transport networks are also included in principle.

The scope of activities covered in the rail sector, in particular, whether entities that merely provide networks but do not operate them, are covered, was considered in Joined Cases C-462/03 and C-463/03, *Strabag v Österreichische Bundesbahnen*<sup>4</sup>. Unfortunately, however, this case does not give a clear answer to the question presented to the CJEU.

- **The postal services sector: Article 6**

Under the directives prior to the 2004 Directives entities providing services in this sector – basically delivery of mail - were regulated by the public sector directives when carried out by bodies covered by those directives, and not at all when carried out by other entities.

The 2004 utilities directive, Article 6, brought this sector within the Utilities Directive as from 2009. Covered postal services are set out in Article 6(2)(b),

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<sup>4</sup> Joined Cases C-462/03 and C-463/03, *Strabag and Kostmann v Österreichische Bundesbahnen* ("Strabag") [2005] ECR I-5397.

namely "services consisting of the clearance, sorting, routing and delivery of postal items".

This means, first, that postal services provided by "public sector" bodies (contracting authorities) will be regulated under the more flexible utilities provisions and, second, that postal services provided by other entities - more important with increasing privatization and liberalization - will be regulated for the first time.

Article 6(1) also provides for the directive to apply to certain other services, when provided by an entity that also provides postal services as defined in the new directive.

These other services are (Article 6(2)(c)): mail service management services (services both preceding and subsequent to despatch, such as "mailroom management services"); added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail); services concerning postal items that are not within the definition of postal items as set out above, such as direct mail bearing no address; certain financial services; philatelic services; and logistics services (services combining physical delivery and/or warehousing with other non-postal functions).

The reason for applying the directive to these services is that entities might use their special position in respect of postal services to gain an advantage in providing the other listed services (for example, because of the special access they have to postal customers or through cross-subsidisation). These other services are not, however, covered when the postal services are provided in accordance with the exemption conditions of Article 30.

## **7.2.3 Which purchasing entities are covered?**

### **7.2.3.1. The categories of entities covered; contracting authorities, public undertakings and entities with special or exclusive rights**

Article 2(1) provides that the Utilities Directive covers three groups of entities:

- Contracting authorities
- Public undertakings
- Entities carrying out the covered activities on the basis of special or exclusive rights.

Definitions of the concepts used in Article 2(1) are found in Article 1 of the Directive.

#### ***1. Contracting authorities***

First, Article 2(1) provides that the directive applies to entities which are contracting authorities within the meaning of the Public Sector Directive. The contracts of most of these entities are governed by the Public Sector Directive. However, their contracts in relation to "utility" activities are, in general, excluded from those directives, and governed instead by the Utilities Directive.

- Thus, for example, if a local authority is responsible for water supply and sewage treatment for its area, its contracts relating to these activities – such as contracts for the purchase of water pumping stations, or for laying water pipes – are governed by the Utilities Directive, but its other contracts (for

example, for building local roads or a public library) are governed by the Public Sector Directive.

## **2. Public undertakings**

Secondly, the directive applies to entities that are "public undertakings".

A public undertaking is defined in Article 2(1)(b) as an undertaking over which public authorities may exercise, directly or indirectly, a dominant influence, by virtue their ownership, financial participation in the entity, or the rules which govern it.

A dominant influence is presumed where public authorities hold the majority of an entity's subscribed capital; where they control the majority of the votes attached to its shares; or where they can appoint more than half the members of its administrative, managerial or supervisory body. However, it is not limited to these cases, and a dominant influence may well exist in reality through, for example, control over much less than half of the voting rights is attached to shares.

This category probably overlaps with the category of public authorities, but includes many entities which are not within the first category - for example, those which are mainly controlled or financed by public authorities, but which are not within the definition of public authorities because their activities are of a "commercial or industrial" nature.

## **3. Entities with special or exclusive rights**

The third category of regulated entities comprises those which engage in the "utility" activities listed in the directive, and which operate on the basis of "special or exclusive rights" granted by a Member State.

Article 2(3) of the Utilities Directive provides that:

"For the purposes of this Directive, "special or exclusive rights" mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of [the utility activities] to one or more entities, and which substantially affects the ability of other entities to carry out such activity".

One common case in which special or exclusive rights exist is where a licence is required to carry out an activity. Entities engaged in the activities covered by the directives have traditionally depended on state licences to be able to operate: it has not generally been possible, for example, for anyone to set themselves up as an electricity generator or water supplier. The reason for regulating these entities is that it was considered that governments can influence them to buy national products etc, because of the power that the government has over their operating licences.

However, the need for an operating licence granted by government will not necessarily constitute a special or exclusive right.

At one end of the spectrum it may be that any applicant is entitled to a licence without limitation of numbers: in this case it does not appear any "special" right is

created: Case 13/77, *Inno v ATAB*<sup>5</sup>. In that case the CJEU ruled that no special or exclusive rights exist where they have been conferred upon the undertaking as a member of a class carrying on an activity which is open to everyone.

At the other end of the spectrum, the right to carry in an activity may be given automatically to a historical state monopoly: in this case, it is clear that an exclusive right exists.

More difficult are cases between these two extremes:

- where licences are limited to one, or a specific number, of entities, but awarded on the basis of open competition; or
- where licences are awarded without limitation of numbers to any applicant who can satisfy objective conditions.

The definition of special or exclusive rights in the 2004 Utilities Directive – which differs from the definition in the old Utilities Directive 93/38 – is *not* intended to cover cases of the second type, that is where licences are awarded without limitation of numbers to any applicant who can satisfy objective conditions, *provided that* the licensing system is objective, proportional and non-discriminatory.

- Although the definition does not actually state this clearly, this intention is clear from the history of the directive and the recitals: these make it clear that one important objective of the new definition is to apply to the Utilities Directive the principle applied by the CJEU in Case C-302/94, *R v Secretary of State for Trade and Industry ex parte British Telecommunications plc* (“Leased Lines”)<sup>6</sup>. In this case the CJEU, interpreting the notion of special and exclusive rights under one of the EU’s telecommunications directives made it clear that licences of this type were *not* to be considered special or exclusive rights. (This intention is indicated by the Commission’s Explanatory Memorandum, and also by the pre-ambles, recital 25, final sentence: “Nor may rights granted by a Member State in any form, including by way of acts of concession, to a limited number of undertakings on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling those criteria to enjoy those rights be considered special or exclusive rights”.)

The rationale for this principle under the new definition is that when anyone who meets the conditions can obtain the licence, and the process is transparent so that the government cannot easily withhold licences from those who qualify, there is no room for government to influence those receiving the licences to make them favour national industry. Further, since others can obtain licences to carry on the activity, there is also likely to be competitive pressure on those holding licences which will lead them to purchase from the supplier offering best value for money rather than to favour national firms – if they do not purchase commercially, they will find it hard to survive in the market.

What of cases of the first type – that is when an entity is the holder of a licence awarded to one entity or a limited number only, but pursuant to a fair and open competition? For example, an entity holding a concession for a transport activity – such as running a tramway system – may be the sole concession-holder, but may have had to compete in an open competition to win that concession. It could be argued that such a party does not have special or exclusive rights because although only a limited number can enjoy the rights, they are open to all to enjoy, as anyone

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<sup>5</sup> Case 13/77, *Inno v ATAB* [1977] ECR 2115.

<sup>6</sup> Case C-302/94, *The Queen v Secretary of State for Trade and Industry, ex parte British Telecommunications plc* (“Leased Lines”) [1996] ECR I-6417.

can compete for them and, if the awarding process is transparent, there is no possibility for the government to influence the concessionaire. It is not clear whether the concession in this case falls within the definition of a special or exclusive right.

### **7.2.3.2 Exclusion from the directive of entities operating in competitive markets: the Article 30 exemption**

When utilities supply their services in competitive markets, it is considered that there is no need to regulate their procurement, since the pressure of the market will make them procure in a commercial way, without favouring national firms or products – if they do not procure commercially, their competitors will have lower costs and gain a competitive advantage. The old Utilities Directive 93/38 included several exemptions for utilities operating in competitive markets that applied to specific utility sectors, namely bus transport, telecommunications and (a limited exemption only) oil and gas. These were sectors in which competitive markets existed in at least some Member States at the time the original utilities rules were adopted. It was decided at that time to include exemptions only for sectors in which competitive markets existed at that time, and to introduce further sector-specific exemptions into the Directive if and when competitive markets should develop in other sectors. However, although during the 1990s there was substantial liberalization in many sectors, either under EU measures or in individual Member States, no new sector-specific exemptions were added, leaving many entities in competitive markets still subject to regulation.

It was decided in the new directive that further measures needed to be introduced to exempt these other “competitive” industries from the detailed provisions of the Utilities Directive. It was illogical and unfair to exempt some sectors where competitive markets existed, but not others, especially when some of these sectors competed against each other (for example, bus transport – which enjoyed an exemption under the old directive – with rail transport – which did not).

Thus the 2004 directive added an exemption mechanism to allow the Commission to exempt from the directives entities that operate in competitive markets. This is contained in Article 30 of the 2004 Utilities Directive. This allows exemptions to be given for entities in any sectors as and when an appropriate degree of liberalisation occurs in the relevant market.

Specifically, Article 30(1) provides that the directive does not apply to an activity when, in the Member State in which the activity is performed, that activity “is directly exposed to competition on markets to which access is not restricted”.

With regard to the requirement that access to the market must not be restricted, where there are EU measures for achieving liberalisation in the sector concerned (listed in Annex XI), and these measures have been implemented and applied in the relevant Member State, access is “deemed” not to be restricted. In other cases, Article 30(3) requires that it must be demonstrated that access to the market in question is free *de jure* and *de facto*.

The second requirement, of exposure to competition, is elaborated in Article 30(2): this “shall be decided on the basis of criteria that are in conformity with the TFEU provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question”.

However, Member States and/or entities may not act on their own judgement: the exemption applies only if the Commission adopts a positive Decision to this effect *or* fails to adopt any Decision within the time allowed. A Decision may result from a request by a Member State itself; a request by a procuring entity (possible only when a state permits this); or the Commission's own initiative. The Commission must normally adopt a Decision on request within three months, but can extend this for up to a further three months in "duly justified cases". Article 30(6) requires the Commission to adopt further rules governing the exemption procedure.

The detailed procedure for applying for an exemption is governed by Commission Decision 2005/15/EC of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

Requiring Commission approval means that entities cannot make their own judgment to apply the exemption in disputed circumstances and thereby throw the burden of challenge onto affected operators. The old exemptions on telecommunications and bus transport did not require such an approval, although the Commission has a monitoring role.

By April 2010 the Commission had issued 15 Decisions on applications under the Article 30 procedure. They also include Decisions *rejecting* the application of the exemption to certain sectors of the electricity industry in the Czech Republic and Poland.

## **7.3 Coverage of the utilities rules: contracts covered<sup>7</sup>**

### **7.3.1 General**

The Utilities Directive, like the public sector directives, applies to contracts in writing for pecuniary interest. As with the Public Sector Directive, a single directive covers works, supply and services contracts. The basic definition of a "works", "supply" and "services" contract is effectively the same for the utilities sector as for the public sector (Article 1(2)(a)-(d)).

As with services under the Public Sector Directive, services under the Utilities Directive are divided into two types: those listed in Annex XVII A (often called "priority services") which are subject to the full rules, and other services, for which only limited obligations apply.

### **7.3.2 Thresholds**

The Utilities Directive, like the Public Sector Directive, also applies only to contracts above a certain threshold value, set with a view to identifying those contracts for which there is likely to be reasonable cross-border competition.

These thresholds are governed by Articles 16-17 of the Utilities Directive and are set out in the separate table of thresholds below.

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<sup>7</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 15.

It will be seen that for supply and works contracts the thresholds are much higher than under the Public Sector Directive 2004/18, reflecting the greater flexibility given under the Utilities Directive.

Note that as with the Public Sector Directive the thresholds are revised every two years to make sure that they are in line with the thresholds in the GPA (which are set out in SDR, not Euro). The current Euro figures were adopted in Regulation (EC) No 1177/2009 ([2009] OJ L 314/64) which amends the directives to insert the current figures. Note that they will change again for the years 2012-2013.

**Table of Thresholds: Main thresholds under Utilities Directive 1 January 2010 – 31 December 2011**

	<b>Supplies</b>	<b>Priority services</b>	<b>Works</b>
<b>All entities</b>	€ 387,000	€ 387,000	€ 4,845,000

Like the Public Sector Directive the Utilities Directive contains (in Article 17) detailed rules on the valuation and aggregation of contracts.

The main difference between this and the other directives is that there appears to be no prohibition on the splitting of contracts with the intention of avoiding the directive. Article 17(2) of the Directive might appear to have this effect, since it prohibits splitting contracts. However, the CJEU in Case C-16/98, *Commission v France* [2000] ECR I-8315, appeared to adopt a rather strange interpretation of the predecessor to this provision, contained in Article 14(3) of the old Utilities Directive. The Court seemed to take the view that is not concerned with *subjective* intention, but merely restates the requirement for procuring entities to adhere to the directives' objective rules on aggregation (requiring all contracts for a single work to be aggregated etc).

### **7.3.3 Exclusions**

The Utilities Directive contains various exclusions which parallel those in the public sector. They cover:

- Secrecy and security (Article 21);
- Contracts connected with joint projects with certain non-member states, those awarded by international bodies and those made pursuant to international agreements on the stationing of troops (Article 22); and
- Contracts for services which are provided by a public authority which has an exclusive right to provide them, or an exclusive right which is necessary for their provision (Article 25).

As with the Public Sector Directive, the Utilities Directive also excludes contracts for the acquisition of land, and contracts for certain specified types of services (such as arbitration or conciliation services; certain financial services; and certain research and development services) (see Article 24).

So far as concessions are concerned, Article 18 of the Utilities Directive expressly excludes both works and services concessions from its scope. In respect of services concessions the position is thus the same as under the Public Sector Directive –

services concessions are excluded from that directive also; works concessions, on the other hand, are not totally excluded from the Public Sector Directive but subject to limited obligations under that directive. Like the Public Sector Directive, the Utilities Directive is silent on supply concessions.

The definition of concession under the directives (which is the same in both Public Sector Directive and Utilities Directive and to be interpreted in the same way).

A recent case of the CJEU, Case C-206/08, *WAZV Gotha*<sup>8</sup>, has elaborated further on this definition by indicating that the existence of a concession is not precluded by the fact that the risk undertaken is "very limited", because the service provision is regulated by rules of public law: it is merely necessary for a concession that the procuring entity transfers to the service provider "at least a significant share" of the risk that does exist. This is important in the utility sector where many arrangements for service provision are of this kind – as is illustrated by the facts of the *WAZV Gotha* case.

There are also some further additional exemptions not found under the Public Sector Directive:

**1. For activities involving the physical use of a network or geographic area outside the Communities** (Article 20)

For example, the activities of EU companies exploring for oil in Asia are not covered.

**2. For contracts made for the purpose of acquiring goods, works or services in order to resell them, or to hire or provide them to another (unless the purchaser has a special or exclusive right to re-sell, hire etc, or others are not free to do so on the same terms)** (Article 19)

This is justified on the basis that in cases covered by the exemption the entity will be operating in a competitive market, which should ensure commercial procurement.

**3. For contracts with companies in the same group as the purchaser - referred to as "affiliated undertakings" - and for joint ventures** (Article 23)

Article 23 of the Utilities Directive provides for two exemptions not found in the Public Sector Directive – for affiliated companies and for those forming part of the same joint venture. Entities relying on these exemptions must provide certain information to the Commission: Article 23(5).

• **The affiliated undertakings exemption**

This "affiliated undertakings exemption", stated in Article 23(2), is designed to catch the case where the affiliated company is created mainly for the purpose of allowing a separate entity to provide a certain type of service etc to a group of companies. This is sometimes done because it is convenient for some services or products – such as accounting services - to be provided by a separate entity, which serves a variety of companies in a group, than for each company to provide the services "in-house" itself, or to purchase it on the market. Effectively the service is being provided "in-house" within the company group in such a case, rather than being procured from outside; it is only a technicality that it is actually being rendered by a company which has a separate legal identity.

An "affiliated undertaking" is defined more precisely in Article 23(1):

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<sup>8</sup> Case C-206/08, *Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurowasser Aufbereitungs- und Entsorgungsgesellschaft mbH*, CJEU judgment of 10 September 2009 (unpublished).

- An "affiliated undertaking" is defined, first, by reference to seventh Council Directive 83/349/EEC [1983] O.J. L193/1 (the Transparency Directive). This Transparency Directive provides for the consolidation of accounts for certain entities within the same corporate group. For utilities falling within this directive, an affiliated undertaking is one of which the accounts are, under the directive, consolidated with those of the utility.
- For utilities which do not fall within Directive 83/349, an affiliated undertaking is defined as one:
  - over which the procuring utility may exercise a dominant influence (i.e. a subsidiary of the procuring utility), directly or indirectly - in the sense of the definition used for defining dominant influence in the context of the definition of "public undertaking" for the purpose of the coverage of the Utilities Directive (see section 9 above);
  - which may exercise a dominant influence over the procuring utility (i.e. a parent of the procuring utility); or
  - which in common with the procuring utility is subject to the dominant influence of another (i.e. a sister company) by virtue of ownership, financial participation or the rules that govern it.

To ensure that the exemption applies only where it is really an effective "in-house" provision, the exemption requires that 80% of the provider's EU turnover from providing services/works/supplies comes from providing to the group (or, in the case of new entities, is projected to come from that source), rather than to the market more generally: Article 23(3).

- Under this provision this 80% requirement must be met with regard to the average turnover over the affiliated undertaking over the last 3 years with respect to services, supplies or works (according to whether the contract for which the exemption is claimed is for services, supplies or works). When, because of the date on which the affiliated undertaking was created or the activities began no turnover figures are available for three years, it is required merely to show that the 80% figure is credible, "particularly by means of business projections". Article 23(3) as written seem to require that 80 per cent of the affiliate's turnover of services or works or supplies in general should be provided to affiliated undertakings, and not merely 80 per cent of its turnover with respect to the *type of services* (or works or supplies) that are the subject of the exempt contract, as appeared to be the case under the previous version of this exemption in Article 13 of Utilities Directive 93/38. However, that the provision relates to services, supplies or works of the same type may be implied, since this is assumed by the provisions dealing with situation in which more than one affiliated undertaking provides services, as discussed in the next paragraph. It appears that the omission of any reference to the same "type" of works/supplies/services is simply a defect in drafting.

As just alluded to above, the directive makes express provision for the situation in which more than one affiliated undertaking provides the same or similar services or (under the new provision) supplies or works. For this case Article 23(3) provides that the relevant percentages for applying the 80% condition are to be calculated taking into account the total turnover deriving from services, works or supplies (as appropriate) of *all* the affiliated undertakings.

- **The exemption for joint ventures**

This exemption covers contracts between entities which do not have any "group" connection, but which have joined together for a particular activity. This could be, for example, for a one-off project, a project extending over a period of years (for example, operation of a transport concession over a fixed term), or a collaboration of unspecified duration in a particular utility activity – for example, ongoing collaboration in exploring for fuel.

The exemption covers:

- a. The award of contracts *by the joint venture to the contracting partners* (Article 23(4)(a) and also an award by the joint venture to undertakings affiliated to the contracting partners in the joint venture (Article 24(2)(b)) (the definition of affiliated undertakings given above, along with a requirement for the "80%" condition to met apply here, also, for exempting contracts to affiliated undertakings); and
- b. The award of contracts *by the contracting partners to the joint venture* (Article 23(4)(b)) – an extension added in 2004. This provision applies when the joint venture has been set up to carry out the activity over a period of at least three years, and the instrument setting up the joint venture stipulates that the contracting entities that form it will be part of it for at least three years. (This provision does not, though, appear to apply to contracts awarded to a joint venture by undertakings *affiliated to one of the partners* - it appears that this may not have been included simply because it is not a common situation).

Note, however, that this exemption does *not* cover contracts awarded *by one of the joint venture partners to one of the other joint venture partners* in connection with the joint venture.

The exemption applies only in respect of joint ventures (either for contracts awarded to the joint venture or contracts awarded by it) when the joint venture is "formed exclusively by a number of contracting entities for the purpose of carrying out [utility activities]": Article 23(4). This could suggest, first, that the exemption for joint ventures does not apply when one of the partners is not a utility. (The current rules merely refer just to a joint venture by "number of" contracting entities which does not involve such a limitation). It could alternatively indicate an intention that the joint venture should be formed exclusively for the relevant utility purpose and not also have other purposes. Arguably neither limitation is justified and either interpretation could prejudice co-operation with entities that are not regulated by the utilities rules.

- **Relationship with the TFEU's free movement provisions**

There is an "exemption" from both the TFEU and Utilities Directive (or, rather, an implied limit on their scope of application) for certain in-house and quasi-in-house procurement under the principle established by the CJEU in *Teckal*<sup>9</sup>. This applies only under certain fairly strict conditions.

So far as the *Utilities Directive's* obligations are concerned, the affiliated undertakings exemption is an exemption that is *in addition* to the *Teckal* doctrine's limitations on the scope of the directive.

However, what is not so clear is the position under the TFEU's free movement rules of contracts awarded to an affiliated undertaking or joint venture that fall within the directive's Article 23 exemption. Are these contracts still subject to the TFEU as a general principle, and excluded only when they fall within the strict conditions of the *Teckal* doctrine? If that is the case then some of the contracts falling within the affiliated undertakings exemption could still be subject to obligations similar to those of the directive, including advertising, under the TFEU's principles of transparency and equal treatment, as developed in cases such as *Telaustria*<sup>10</sup>. For example, an affiliated undertaking exemption from the Utilities Directive under

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<sup>9</sup> Case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) die Reggio Emilia* ("Teckal") [1999] ECR I-8121.

<sup>10</sup> Above, note 2.

Article 23 in which a private party owns 10% of the capital could be caught by the TFEU if the possibility of exclusion rests solely on the *Teckal* doctrine.

Advocate General Kolkott in the case of Case C-458/03, *Parking Brixen v Gemeinde Brixen*<sup>11</sup>, suggested that it would be “absurd” if the exceptions to the TFEU rules were narrower than those of the directives (para.46 of the Opinion), implying that if at all possible the scope of the TFEU should be interpreted as being *no wider* than that of the directives. It is not clear, however, how the CJEU could achieve this in relation to utilities, given the narrow definition of the “in-house” exemption as defined in the “Teckal” case law.

The importance of this point will depend on the extent to which utilities are covered by the TFEU in the first place – something that is not clear. As we have seen in section 8 above, certainly utilities that are contracting authorities are covered but it is less clear whether the TFEU’s free movement obligations, which apply in principle to the public sector, apply to all entities that are covered by the Utilities Directive solely because they are public undertakings or undertakings with special or exclusive rights.

#### **7.3.4 Contracts awarded by contracting authorities in connection with utility activities**

Contracts that are awarded by bodies that are contracting authorities but which relate to activities in the regulated utilities sectors are not covered by the Public Sector Directive, but by the Utilities Directive.

- For example, a general municipal authority that is responsible for the network that supplies water to the inhabitants of its area is subject to the Utilities Directive and not the Public Sector Directive when it tenders a contract for laying pipes for the network.

This results from Article 12 of the Public Sector Directive which expressly excludes from the scope of that directive contracts awarded by contracting authorities exercising one or more of the activities referred to in Articles 3-7 of the Utilities Directive.

Contracts that are awarded by contracting authorities in the utilities fields but are not actually regulated by the Utilities Directive because they are carried out in competitive markets and thus subject to express exclusions from the Utilities Directive are also outside the Public Sector Directive. Since the reason for excluding such contracts from the Utilities Directive is that competitive pressures make it unnecessary to regulate such contracts at all, it is also considered inappropriate to regulate them under the Public Sector Directive when they are awarded by contracting authorities. (It can be pointed out, though, that activities undertaken by contracting authorities in competitive markets *outside* the above utilities fields are subject to regulation in many cases - there is no more general exclusion for activities carried out by contracting authorities in competitive markets, which is rather anomalous).

This also results from Article 12 of the Public Sector Directive: it provides that the Public Sector Directive does not apply to any contracts that are excluded from the Utilities Directive under a number of provisions that exclude contracts awarded under competitive market conditions This applies to exclusions under Article 5(2) (preservation of existing exclusions for bus transport), Article 19 (resale and hire to

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<sup>11</sup> Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* (“Parking Brixen”) [2005] ECR I-8585.

third parties), and Article 30 (general exemption mechanism for activities in competitive markets).

Article 12 also excludes from the Public Sector Directive contracts Article 26 (purchase of water and of energy or fuel for production of energy): again these are excluded from the Utilities Directive because its regulation is considered inappropriate and this rationale is considered also to justify exclusion from the Public Sector Directive.

The above principles have the important effect that contracts for specific utility activities are generally subject to the same legal rules in each Member State, regardless of whether Member States provide the utility services in question through public or through private bodies.

### **7.3.5 Contracts partly for utility activities and partly for other activities**

Bodies involved in both utility activities and other activities sometimes make contracts that relate to both groups of activities.

- For example, the different activities may be managed from a central headquarters: in this case buildings and equipment, such as computers, purchased for the headquarters may be used for both utility and non-utility activities.

What is the position of contracts that relate both to utility *and* non-utility activities of an entity? Are they covered by the Utilities Directive or not? In the case of bodies that are contracting authorities under the Public Sector Directive, if such contracts are not within the Utilities Directive they are caught by the Public Sector Directive instead. For bodies that are not contracting authorities, contracts that are not within the Utilities Directive will be unregulated.

Prior to 2004 there was uncertainty on this but the 2004 Utilities Directive has clarified the position to a great extent. In this respect Article 9(1) sets out a general rule that:

"A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended".

It is not entirely clear what is meant by "principally intended", in particular whether the test is one of subjective purpose or of whether the greater part of the value of the consideration, or greater part of use of an asset, is for utility or non-utility purposes. A value test would offer greater legal certainty.

#### **Contracts for both utility activities and unregulated activities**

This rule in Article 9(1) is relevant, first, for contracts awarded by entities that are not covered by the public sector rules, whose non-utility contracts are thus unregulated. In this case, if the contract is principally intended for a utility activity the contract is regulated by the Utilities Directive, whilst if it is intended principally for a non-utility activity the contract is wholly unregulated. When it is "objectively impossible to determine for which activity the contract is principally intended", Article 9(3) states that the contract is to be awarded in accordance with the Utilities Directive.

Thus there is a presumption in favour of regulation, in accordance with the philosophy (applied in interpreting some exemptions from the directives) that

exceptions and limitations to the EU procurement rules should be strictly applied or interpreted.

This rule in Article 9(3) could apply (as stated in recital 29) when there is no information available on the likely use of the purchase – for example, when the procuring entity procures the construction of new office space based on its overall requirements but has not at that time allocated or reallocated use of the existing and new space between different departments; or when a piece of equipment, such as a computer, is bought for shared use between two new activities and there is as yet no information on the relative demand from the two activities. This rule in Article 9(3) probably also applies when the purchase is likely to be used equally for both activities.

Article 9(1) provides that "the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding [a contract] from the scope of [the new utilities directive]". This prevents utilities aggregating purchases to bring the whole purchase outside the Utilities Directive (although probably it should not be interpreted as precluding entities from separating their utility and non-utility purchases to avoid regulation *of the latter only*).

#### **Contracts for both utility activities and activities of a contracting authority that are regulated under the Public Sector Directive**

The general rules in Article 9(1) classifying a contract by reference to "the activity for which it is principally intended" are also relevant when the procuring entity is a body subject to the public sector rules (i.e. a contracting authority), and the contract is partly for a utility activity and partly for an activity that is (in general) subject to the public sector rules. In this case, if the contract is principally intended for a utility activity it is regulated by the Utilities Directive, whilst if it is principally intended for another of the public body's activities it is subject to the stricter Public Sector Directive.

For cases of this kind in which it is "objectively impossible to determine for which activity the contract is principally intended", Article 9(2) states that the contract is to be awarded in accordance with the Public Sector Directive. Thus there is a presumption in favour of regulation in accordance with the stricter of the two regimes (the public sector regime), rather than the more flexible of the two (the utilities regime).

Again, an anti-avoidance provision applies under Article 9(1). This provides for this case that the choice between a single contract and a number of contracts cannot be made with the objective of excluding a contract from the scope of the public sector rules. This prevents authorities aggregating purchases to bring the whole requirement under the lighter utilities regime.

The rule might also be interpreted as preventing purchases from separating their purchases in order to apply the lighter regime to the utilities element only. However, this is arguably unjustified since an appropriate degree of regulation still applies to each element in that case. Thus it should arguably be interpreted in accordance with another possible meaning, namely that it only precludes packaging contracts to exclude from the Public Sector Directive purchases for activities that are themselves covered by that Public Sector Directive.

## **7.4 Award procedures under the utilities rules, including the use of supplier lists<sup>12</sup>**

### **7.4.1 Introduction and summary of the key differences in procedures between the Public Sector and Utilities Directive**

In this section we now consider the award procedures that apply under the Utilities Directive.

As mentioned earlier, many of the requirements and details of the procedures under the Utilities Directive are very similar to those that apply under Public Sector Directive 2004/18, and in this section we will focus mainly on the differences. In general, these reflect the fact that greater flexibility in procedures is afforded to utilities.

The Commission introducing the original Utilities Directive suggested that this flexibility was justified by the different nature of the entities and contracts involved. Certainly it is the case that the Utilities Directive covers many entities that are relatively, though not entirely, commercial in nature, and that many of the contracts covered are complex. However, the political need to afford flexibility in order to secure regulation of the utility sector, including the need for common treatment of entities in different Member States, is probably also a factor in explaining the approach adopted: after all, some entities are subject to both directives meaning that different procedures apply to different contracts of the same entity, and the same types of contracts are covered by different procedures according to which directive applies - so that the differing nature of the entities and contracts concerned is not a totally consistent factor between the two directives.

The key differences in applicable procedures between the two directives are summarised in the box that follows, and elaborated further in the following text.

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<sup>12</sup> S. Arrowsmith, *Government Procurement in the WTO* (2003, London: Kluwer Law International), pp.232-236; S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet & Maxwell), chapter 16; S. Arrowsmith and C. Maund, "CSR in the utilities sector and the implications of EC procurement policy: a framework for debate", chapter 11 (pp.436-478) in S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009, Cambridge: CUP); C. Maund, "The Development of Vendor Registration Systems for European Utilities" (1996) 5 *Public Procurement Law Review* CS51.

## **The Main Differences between Contract Award Procedures for Utilities and those under the Public Sector Directive**

### **1. Choice of award procedures**

- Utilities have a free choice between the open procedure, restricted procedure and the competitive form of the negotiated procedure; under the Public Sector Directive open or restricted procedure must be used unless specific grounds justify other procedures.
- No formal provision for competitive dialogue under Utilities Directive (but utilities can use that kind of approach within the competitive form of the negotiated procedure)

### **2. Advertising**

- Utilities have three methods to advertise contracts:
  - i) Contract notice
  - ii) Periodic indicative notice (PIN)
  - iii) Advertisement of a qualification system.

Under the Public Sector Directive contracts must be advertised by a Contract Notice

### **3. Exceptions to the requirement for an advertisement and competition**

- Utilities Directive contains an exemption from competitive procurement not found in the Public Sector Directive, for particularly advantageous opportunity available only for a very short time and when the price is considerably lower than the market price.

### **4. Suitability and selecting firms to tender/negotiate**

- The rules for utilities on selecting firms to participate in restricted and negotiated procedures allow the utility to use any "objective" rules and criteria; the Public Sector Directive contains more precise express exclusion criteria. (However, it is not clear how far, if at all, this difference in wording gives more flexibility to utilities)

### **5. More flexible tender deadlines in restricted procedures and competitive negotiated procedures**

- The deadlines for tendering under the Public Sector Directive are fixed; under the Utilities Directive the time limit can be agreed with suppliers. If there is no agreement there is a fixed period but this can be reduced by the utility for good reason - such as the fact that it is a very simple purchase. Under the Public Sector Directive, such a reduction is permitted only for the case of urgency.

### **6. Use of supplier lists**

- Utilities can exclude firms which are not on their qualification lists, provided that these lists are run in accordance with the Utilities Directive; the Public Sector Directive does not allow exclusion of firms merely because they are not registered on supplier lists.

### **8. Rules on third country offers**

- Utilities may give preference to goods originating in the EU as opposed to third countries and in certain cases, EU goods *must* be given a preference; no such rules apply under the Public Sector Directive

### **9. Time limits for publishing contract award notices**

- Utilities have two months to submit contract award notices to the *Official Journal*; under the Public Sector Directive only 48 days is given.

## **7.4.2 General principles**

We can first note that the general principles of the Public Sector Directive, notably equal treatment and transparency, apply to the Utilities Directive. As with the Public Sector Directive, the principles of transparency, equal treatment and non-discrimination are stated expressly in the directive – in Article 10.

We have seen in section 8 above that it is not clear how far the TFEU rules regulate procurement of some utilities that are covered by the Utilities Directive, but the inclusion of the general principles means that obligations comparable to those under the TFEU will apply to all utilities covered by the directive, even when not otherwise stated. No doubt other principles found under the TFEU, such as the principle of proportionality, will be implied into the directive based on various specific provisions in the directive that reflect this principle or as general principles of EU law.

## **7.4.3 Choosing the contract award procedure under the Utilities Directive**

### **7.4.3.1 Available procedures**

Utilities must use one of the following procedures for awarding contracts covered by the directive:

- the open procedure;
- the restricted procedure;
- a negotiated procedure with a call for competition; or
- a form of negotiated procedure without a call for competition.

The basic requirements of the procedures are similar to those of the Public Sector Directive, although there are differences of details - for example, on time limits.

### **7.4.3.2 Choice of procedure**

However, there is a very important difference between the procuring entity's ability to choose which procedure to use between the Utilities Directive and the Public Sector Directive. In this respect the utilities regime is much less rigid than that for the public sector, in that it allows purchasers a free choice between the open procedure, the restricted procedure, and the negotiated procedure with a call for competition: see Article 40(2). Thus instead of giving priority to formal tendering procedures - the open and restricted procedures - and permitting the negotiated procedure only in exceptional cases, the Utilities Directive permits use of a (competitive) negotiated procedure in all cases.

A flexible approach, rather than the formal and bureaucratic approach set out in the restricted procedure, is often preferred by commercial organisations as a means of obtaining value for money and may similarly often be used by regulated utilities for this reason, even for relatively simple procurements. By using a negotiated procedure a utility can be sure that it is permitted to engage in discussions with suppliers after tenders have been received, which is a "grey area" where the open and restricted procedures are concerned. It is also less likely to be subject to legal actions as a result of mistakes in interpreting or applying the more rigid requirements of the other procedures. This procedure may be chosen even if the

utility decides to use a procedure that is based on a single-tendering phase with limited provisions for discussions: a formal tendering stage can be incorporated into the negotiated procedure, but the choice of the negotiated procedure offers the utility more flexibility than the restricted or open procedures in setting the rules of the tendering process.

However, a utility might want to choose an open or restricted procedure to demonstrate to the market the clear intention to use formal procedures and to ensure that providers have redress if this intention is not carried out. It might also sometimes want to use an open procedure to avoid the need to consider the qualifications of all interested persons in a competition involving many participants: in an open procedure it is probably only necessary to do this for the firm that submits the best offer.

It could also be argued that a utility cannot choose a negotiated procedure when it does not have a good reason for wanting to depart from the rules of open or restricted tendering – that is, that the negotiated procedure cannot be used, for example, just because of the fear that a mistake might be made in using the other procedures, when the utility merely intends a single-stage and formal tender process.

Note that the Utilities Directive does *not* explicitly include the competitive dialogue procedure found in the new Public Sector Directive: it is not necessary since utilities have free use of negotiated procedures (which are even more flexible) for any contract.

#### **7.4.4 Advertising the contract: the call for competition**

##### **7.4.4.1 The requirement for a call for competition and methods for making the call**

There is a requirement to give publicity to each regulated contract. Under the Utilities Directive this publicity is called the "call for competition" (Article 42).

This fulfils the same purpose as the contract notice under the public sector rules, of providing firms throughout Europe with an opportunity to be considered for participation. However, the requirements are less onerous than the contract notice requirements of the public sector rules: it is not necessary to publish a notice for each separate procurement.

There are in fact three methods of making the call for competition (Article 42(1)):

- Individual contract notice
- PIN notice
- Advertisement for a qualification system

##### *1. Individual contract notice*

The first method for making a call for competition is an individual contract notice sent to the Office for Official Publications - the same method as for the public sector. This is the only method available for the open procedure, but may also be chosen for contracts awarded by the restricted or negotiated procedure. As with the public sector it is stated that national notices may not be published until after despatch of the OJ notice and may not contain additional information.

##### *2. Periodic Indicative Notice (PIN).*

A PIN notice may also be used as a means of satisfying the call for competition requirements. This is a general notice that gives the market advance notice of purchasing requirements.

To be used as a call for competition for a specific contract the notice must make it clear that offers are being sought for that contract through a restricted or negotiated procedure without publication of a further notice; and must request persons interested in the contract to express their interest in writing. At the time the purchaser wants to award the contract it must then send all those who expressed interest detailed information on the contract, including the various information which is normally found in a contract notice (such as the delivery date, type of procedure to be used, economic and technical requirements of bidders etc). Before selecting firms to bid it must invite them to confirm their interest in writing. Any periodic indicative notice used as a call for competition in this way must be published no more than 12 months before the invitation to confirm is sent.

The contract may then be awarded later by a restricted or negotiated procedure, in which participants are selected from those who expressed interest in the contract in response to the earlier indicative notice. See further Article 42(3).

### *3. Advertisement of a qualification system*

The third possible method of publicity is advertising through the Office for Official Publications the existence of a qualification system.

This is a system under which firms interested in supplying future needs of a particular entity may apply to registered on a list of "approved" firms. This list can then be used to select firms to participate future award procedures where the restricted or negotiated procedure is used. This method of making a call for competition can be used only when all the participants are drawn from the list; if the entity wishes to invite firms who are not on the lists to participate, the contract will have to be publicised by a contract notice or indicative notice.

The system must be run in accordance with various rules set out in the directive (see further section 7.4.6 below). It must be advertised when first established *and*, if it has operated, or is expected to operate, for more than three years, must be re-advertised annually.

A notice of a qualification system cannot be used to advertise a contract awarded using the open procedure, however – for this procurement method one of the other two methods must be used (i.e. a contract notice or PIN).

Many utilities use qualification systems as an important method of advertising their contracts. Many of the important lists are advertised on behalf of many utilities and often cover all groups of products and services within the CPV.

One problem with both shared lists and frameworks is that it is not clear how precisely user entities must be identified in the notice; with frameworks it is possible that rules on this may restrict the possibility for extending frameworks to new users after the framework has been advertised. However, this problem can be avoided with qualification systems by placing a new notice for each new user, which serves as a notice of the qualification system for that user. This enables providers interested in that user's contracts to be aware of the need to register on the system for the future.

#### **7.4.4.2 Exemptions from the call for competition**

In a number of specified circumstances the utility is exempt from making a call for competition, either because it would be pointless (for example, where there is only one possible provider), or unduly inconvenient. These cases are set out in Article 40(3).

In these cases the purchaser may conclude a contract simply by negotiating with a firm, or firms.

In practice, where an entity relies on these exceptions it is effectively in the same position as an authority using the negotiated procedure without advertisement under the public sector rules, and the circumstances allowing an exception to the call for competition rules in the utility sector are almost the same as those allowing use of the negotiated procedure without advertisement in the public sector.

- For example, they include the case where there is only one possible provider for technical or artistic reasons or reasons connected with exclusive rights, or where there is extreme urgency which was neither foreseeable nor the fault of the purchaser.

In addition, utilities may dispense with a competition in the case of supplies for "bargain purchases" - where there is a particularly advantageous opportunity available for a very short space of time at a price considerably lower than normal market prices (Article 40(3)(f)). This exemption from advertising and competition requirements does not apply under the Public Sector Directive and provides another example of the greater flexibility given to utilities.

#### **7.4.5 Suitability of firms (qualification or eligibility)**

##### **7.4.5.1 Discretionary grounds for exclusion**

The concept of suitability in EU procurement law refers to whether a firm can meet the minimum conditions for participation set by the purchaser. The rules on suitability under the Public Sector Directive were outlined in section 6.4. There we saw that that directive lays down an exhaustive and specific list of criteria that may be used to exclude firms because of their professional qualities, and that the CJEU has also recognised other grounds for exclusion, notably to ensure equal treatment.

The main provisions on this in the Utilities Directive state simply that "objective" criteria and rules must be applied: Article 54(1) and (2). The same provisions state that these objective rules and criteria must be made available to all interested economic operators.

It seems clear that this allows at least exclusion on the same grounds relating to professional qualities that allow exclusion under the Public Sector Directive. Clearly this allows (as in under the Public Sector Directive) exclusion of firms which do not have the requisite financial and technical capabilities. The directive also states expressly that firms may be excluded on the grounds of exclusion in the Public Sector Directive relating to professional reliability, honesty and solvency such as conviction of an offence or gross misconduct (Article 54(4)).

It is also clear that exclusion to ensure equal treatment will be allowed, especially as this principle is stated in the Utilities Directive also.

What is not clear, on the other hand, is how far the utilities provisions also allow for wider grounds for exclusion than exist under the Public Sector Directive – in particular, to allow utilities to exclude for horizontal policy reasons.

Other provisions on issues relating to suitability are generally similar to those applying under the Public Sector Directive

- e.g. the Utilities Directive also contains rules forbidding rejection of consortium bids, and of bids from service providers on the grounds of their legal form, which are the same as those in the public sector; and it contains the same rules on use of quality assurance standards apply as in the public sector (Article 52(3)).

For the utilities sector the rules on evidence which purchasers may demand as proof or qualification are also less restrictive than under the Public Sector Directive, especially in relation to technical capacity (where public sector bodies are confined to specific evidence listed in the directives). However, purchasers may not require tests of proof which duplicate objective evidence already available (Article 52(1)(b)). Thus it appears that purchasers must accept any reasonable evidence of qualifications offered by providers.

#### **7.4.5.2 The mandatory exclusion provision in the utilities sector**

The obligation that applies under Article 45 of the Public Sector Directive to exclude all firms convicted of certain criminal offences (fraud, corruption, money laundering etc) – i.e. the “mandatory exclusion” – which was discussed in section 6.4.2.11, also exists in the Utilities Directive: see Article 54(4), second indent (which applies the mandatory exclusion by cross-reference to Article 45 of the Public Sector Directive).

However, it applies only to utilities that are contracting authorities, and not to those that are covered by the Utilities Directive merely because they are public undertakings or have special or exclusive rights.

#### **7.4.6 Qualification systems (mandatory supplier lists) under the Utilities Directive**

##### **7.4.6.1 The concept of a qualification system**

Very broadly defined they are simply lists of suppliers that are interested in particular types of procurement<sup>13</sup>.

One type of list, which is considered to have both significant potential problems and significant potential benefits, is a mandatory list – i.e. one on which suppliers must register to be eligible for certain contracts. Contracting authorities under the Public Sector Directive are not allowed to use mandatory lists, at least for suppliers from other Member States.

The position is, however, different under the Utilities Directive. Under this Directive mandatory lists can be used, provided that the lists are run in accordance with the strict rules set out in the directive. These are designed to ensure that procuring

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<sup>13</sup> For the different types of supplier lists that are used, and the benefits and problems of supplier lists as a procurement tool, see S. Arrowsmith, *Government Procurement in the WTO* (2003, London: Kluwer Law International), pp.232-236.

entities can reap the benefits of mandatory lists, whilst at the same time minimising the disadvantages.

Such authorised mandatory lists are referred to in the directive as “qualification systems”. (Such lists are known in different legal systems and in practice by various other names, including approved lists, qualification lists and qualification systems – the last is simply the name used in the Utilities Directive).

#### **7.4.6.2 The rules on qualification systems**

Qualification systems are dealt with mainly in Article 53 and Article 49. Article 53(1) basically states that utilities may in principle authorise and operate qualification systems.

As we have seen above, advertising a qualification system can serve as the means for advertising a contract in the case in which restricted or negotiated procedures are used. When this is done there is not merely a power but an *obligation* under the Utilities Directive to limit those invited to tender to persons on the list – other interested persons cannot be admitted in that case. This rule that *only* registered firms can be admitted can be criticised – it serves only to limit competition. It can be argued that utilities themselves should be able to decide for each procurement whether or not it is justified e.g. by efficiency, to limit participation only to registered suppliers.

As well as there being a requirement to advertise regularly any list used, so that anyone can know of its existence and apply to register, certain rules apply to the *operation* of the system, the most significant of which are as follows:

- i) The system must be based on objective rules and criteria (Article 53(2));
- ii) Criteria and rules for qualification must be made available to providers, and their updating communicated to those providers (Article 53(6)). When a utility has developed in advance a more detailed methodology for registering providers than is actually required under these rules, such as weightings or a points system, this must no doubt be disclosed in accordance with the general principle of transparency;
- iii) Applicants must be informed of the qualification decision within six months. If the decision will take longer than four months from the application, the applicant must be informed within two months of the application of the reason for this, and when the decision will be given (Article 49(3));
- iv) Applicants refused qualification must be informed of this and the reasons for refusal, which must be based on the qualification criteria stated in advance (Article 49(4));
- v) A written record of qualified firms must be maintained (Article 53(7));
- vi) A registration may be brought to an end only based on the criteria for registration; and a decision to end the qualification of a supplier must be notified at least 15 days in advance together with reasons (Article 49(5));

- vii) Interested firms must be allowed continuous access to the system. (That is they must be able to apply at any time and not, for example, only at the start of each year) (Article 53(1)).

These rules are intended to work together to ensure that the mandatory systems do not operate as barriers to participation as a result of i) delays and practical problems in getting onto the lists; or ii) inability of suppliers to monitor decision-making about their application – something that is a potential danger with mandatory supplier lists. Note that these rules are very similar to the rules that apply to mandatory lists (for cases in which mandatory lists are allowed) under the WTO's Government Procurement Agreement.

Note also that the Utilities Directive *requires* utilities that are public authorities to apply as a criterion for registration the mandatory exclusion requirement for firms convicted of certain criminal offences (Article 54(4), second para.).

#### **7.4.6.3 Use of qualification systems**

Many utilities use qualification systems as an important method of advertising their contracts. Many of the important lists are advertised on behalf of many utilities and often cover all groups of products and services within the CPV. Many utilities delegate the operation of the first stage of their systems, at least, including advertising and registration processes, to third parties who operate common lists for many utilities<sup>14</sup>.

To ensure the optimum balance between costs and benefits in using qualification systems utilities need to consider carefully both what information – if any - to request on qualifications, and how far – if at all – to verify this information before registering the provider. The optimum approach may vary depending on factors such as the nature of the products and services covered, the extent of competition in the market and the advantages sought from using the list approach.

At one extreme the utility may wish to permit registration by any provider interested in the type of contract covered by the system, without even seeking information on qualifications. This approach does not produce the cost and time savings that can result from assessing qualifications as part of a general registration process, rather than for each contract, but such a list is still very valuable. It can reduce the costs of advertising and reduce providers' costs in searching for contracts, and can speed up the procurement process, since it is not necessary for the utility to wait for responses to a specific advertisement for each contract.

At the other extreme, a utility could undertake a full assessment of the qualifications of all interested firms to determine whether they meet all the qualification criteria for certain types of contract – for example, whether they have the financial and technical capacity to undertake works contracts of a certain type and value. This can involve significant benefits in saving time for particular procurements and avoiding duplication of assessments, but it may be inappropriate if it involves assessing the full qualifications of many firms.

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<sup>14</sup> On the advantages of this see S. Arrowsmith, *Government Procurement in the WTO* (2003, London: Kluwer Law International), pp.232-236. On the operation of qualification lists in practice under the early years of the directive, for example, see C. Maund, "The Development of Vendor Registration Systems for European Utilities" (1996) 5 *Public Procurement Law Review* CS51.

Many systems operate somewhere between these two extremes. For example, suppliers are commonly asked to provide the kind of information needed to assess capability for most contracts – on financial turnover, past experience and criminal convictions. This information can then be used to make a preliminary selection of providers for specific contracts (for example, of providers that are large enough for the contract). The utility may or may not verify the information provided at this stage. Further information, specific to the project, is then sought only when particular procurements begin. This avoids duplication in assessing information that is frequently required, whilst limiting more specialised assessments to those suppliers and contracts for which they are actually relevant. It also enables the other benefits of lists to be realised.

All these approaches are permitted under the Utilities Directive: a utility has a broad discretion over the extent to which it will require providers to possess certain qualifications as a condition of registration. The directive imposes no obligation on a utility actually to assess any of a provider's qualifications to undertake particular work, either fully or in part, before registering a provider. Further, Article 53(2) states that a qualification system may involve different stages. This clarifies the possibility for considering some aspects of qualification when a provider first registers, and others at a later point, including when the utility chooses firms to invite to tender.

Note, however, that the rule that *requires* utilities that are public authorities to apply as a criterion for registration the mandatory exclusion requirement for firms convicted of certain criminal offences is an exception to the discretion that generally exists for utilities to decide their own criteria for registration.

## **7.4.7 The procedure for obtaining tenders under the Utilities Directive**

### **7.4.7.1 Open procedures**

The process of obtaining tenders under the open procedure in the utilities sector, and the time limits for submitting bids, are similar to those under the Public Sector Directive – there must be sufficient time for tendering (Article 45(1)) and a general minimum of at least 52 days (Article 45(2)). As under the Public Sector Directive the time for tendering may be shortened:

- where a PIN relating to the contract has already been published, by usually to up to 36 days but even as far as 22 days (Article 45(4));
- by 7 days when the contract notice has been sent electronically (Article 45(5));
- and by 5 days when there is direct electronic access to the documents (Article 45(6)).

As already noted above, an open procedure must be advertised by a contract notice; the other methods of publicity are not available.

### **7.4.7.2 Restricted and negotiated procedures**

With restricted procedures, tenders are invited from those responding to a contract notice or periodic indicative notice, or those registered on a qualification list, according to which of the three methods was chosen for the call for competition.

Where a contract notice is used 37 days must generally be given for firms to respond to the notice "as a general rule", and at least 22 days in all cases (Article

45(3)(a)). Specific justification will be needed for a period shorter than 37 days, such as urgency or the simple nature of the procurement. The rules here are more flexible than those in the other directives where periods may be shortened only for urgency. Where a periodic indicative notice is used the purchaser must ask firms who earlier responded to the notice to confirm their interest, and the same time periods must be allowed for a response. Further shortening by 7 days is possible when notices are sent electronically.

Where participants are selected from qualification lists the entity simply invites firms from its list; it is not necessary to ask them to confirm their interest.

The selection of firms to tender/negotiate is governed by Article 54.

How many firms must be invited? In selecting from those qualified and interested, the directive requires that entities must take account of the need for "adequate competition" in deciding how many firms to invite to bid (Article 54(3)). This provision also expressly states that utilities may take into account the need to reduce the number of candidates "to the level which is justified by the need to balance the particular characteristics of the contract award procedure and the resources required to complete it".

What criteria are to be used for selection when there are too many firms interested? As with the determination of suitability of suppliers – whether they meet minimum qualifications – it is stated that selection must be based on "objective" rules and criteria which the utilities must make available (Article 54(1)). This simple reference to objective criteria possibly allows more discretion than in the Public Sector Directive, but how much is simply not clear<sup>15</sup>.

The directive provides that the tender deadline is to be fixed by agreement between the purchaser and participants, subject, however, to a principle that sufficient time must be available to tender (Article 45(3)(b)). In this respect the utilities rules appear more flexible than the Public Sector Directive which (probably) does not allow the directive's time limits to be waived by agreement. If no agreement is reached, the deadline must "as a general rule" be at least 24 days from the issue of invitations, and at least 10 days (Article 45(3)(c)). As with the time limits for sending expressions of interest, the very short 10-day period could be used for urgency and also possibly for other cases such as for purchases of simple items where tenders can easily be prepared very quickly.

With negotiated procedures, once invitations are issued the authority will negotiate with invited parties. This may, or may not, involve a tendering stage, according to the choice of the purchaser. Since no tendering stage is required, it seems likely that this process is merely governed by a requirement to allow sufficient time for preparing offers.

#### **7.4.8 Non-conforming tenders**

The rules on non-conforming tenders in open and restricted procedures under the Public Sector Directive were considered in section 6.6. The rules for utilities appear here to be the same as under that directive: indeed, one of the leading cases on

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<sup>15</sup> As with the question of scope for exclusions for not meeting qualification criteria, see Arrowsmith and C. Maund, "CSR in the utilities sector and the implications of EC procurement policy: a framework for debate", chapter 11 (pp.436-478) in S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009, Cambridge: CUP).

this issue, *Walloon Buses*<sup>16</sup>, was a case brought under the Utilities Directive. As with the Public Sector Directive the rules derive from the principles of transparency and equal treatment rather than from detailed and explicit Articles of the relevant directive.

#### **7.4.9 Award of the contract**

Under the Utilities Directive, like the Public Sector Directive, the contract must be awarded on the basis of either "lowest price", or "economically most advantageous tender". This principle is stated in the Utilities Directive in Article 55(1). The detailed obligations that apply are in general the same as under the Public Sector Directive, as discussed in section 6.7.

The only significant difference is that in the utilities sector there are special rules providing for certain preferences for products from the EU itself (Article 58). These rules do not, however, give EU products preference over products from countries which have themselves opened their utilities markets up to EU suppliers (such as countries which have opened their markets to the EU under the rules of the WTO's Government Procurement Agreement). The stated purpose of these rules is not to protect EU industry but to try to induce other countries to open up their own markets. They do not appear to have practical importance for a number of reasons, and in any case are arguably contrary to the rules on free movement of goods which requires that foreign goods imported into the EU should be treated like EU products. Special provision is also made in relation to services from outside the EU see Article 59.

The rules on abnormally low bids are dealt with in Article 57, and are in general the same as under the Public Sector Directive, as discussed in section 6.8.

#### **7.4.10 Amendments and corrections to tenders, and post-tender negotiations**

The rules that apply here to open, restricted and negotiated procedures are again the same as for the Public Sector Directive. These were discussed in section 6.9. Again, it can be noted that one of the leading cases is the *Walloon Buses* case, which was a case brought under the Utilities Directive.

It is important to remember, however, that purchasers covered by the Utilities Directive are free to choose the negotiated procedure for any procurement. Thus it is largely possible to avoid the problems created by the uncertainties and restrictions which exist in relation to open and restricted procedures on this issue, by choosing to use the negotiated procedure.

#### **7.4.11 Conduct of the negotiated procedure**

In view of the importance of the negotiated procedure for utilities it is important to be familiar with the rules governing the conduct of this award procedure when considering the utilities sector. The conduct of this procedure was considered in section 6.11.

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<sup>16</sup> Case C-87/94, *Commission v Belgium* ("*Walloon Buses*") [1996] ECR I-2043.

### **7.4.12 The rules on specifications**

The rules on specifications under the Utilities Directive are essentially the same as those applying for the public sector: see Article 34 of the new Utilities Directive (and see also Article 35). These were considered in chapter 5.

### **7.4.13 Contract award notices**

Procuring entities covered by the procurement directives are required to notify contract awards to the EU's Office of Official Publications, which then publishes a notice of the award in the EU's *Official Journal*. Under the Utilities Directive entities must send the award notice no later than 2 months after the award (Article 43). This is a longer period than the 48 days allowed under the Public Sector Directive for the despatch of these contract award notices.

### **7.4.14 Framework agreements**

The subject of framework agreements and their application under Public Sector Directive 2004/18 was examined in the section 6.14. As was explained in the reading there, the Utilities Directive has had provisions on frameworks agreements from the outset, whereas explicit provisions on framework agreements were introduced for contracts covered by the public sector rules only in the 2004 directive (Directive 2004/18).

The provisions on framework agreements in the Utilities Directive are formulated slightly differently from those of the Public Sector Directive: there has been no attempt to streamline the approach adopted in the two directives. In general, the rules under Directive 2004/18 are more explicit and detailed. However, it is very likely, as noted further below, that the CJEU will take some inspiration from the explicit rules provided for the public sector for framework agreements when applying the general principles of transparency and equal treatment to frameworks under the utilities rules.

The key points of principle are as follows:

1. Essentially, the Utilities Directive deals with frameworks simply by providing that contracts may be placed under a "framework agreement", provided that agreements themselves have been awarded in a competition held under the directive: Article 40(3)(i) and Article 14(2). This effectively makes clear that framework agreements can be used to call off contracts under the Utilities Directive without the need to advertise those call-offs.
2. As we have seen, under the Public Sector Directive on frameworks, a contracting authority must choose from between the framework suppliers either based on the original tenders or a formal mini-tender process with a common deadline. We also saw that the award criteria to be used under that directive in placing call-offs are not entirely clear. In the Utilities Directive there no explicit rules on how call-off contracts are to be placed. It can be argued that the placing of these contracts is governed either by the rules of one of the specific award procedures, as chosen (open, restricted or negotiated) or simply by the general principles of equal treatment, transparency etc. Either way, it seems likely that the CJEU will draw inspiration from the explicit rules of the Public Sector Directive in deciding what exact procedures are acceptable

for call-offs. However, given the context of the Utilities Directive of allowing more flexibility, including free use of negotiated procedures and the more flexible remedies regime for frameworks (see section 12 below) it is perhaps likely to allow more flexibility in the way any mini-competition is held for call-offs. For example, given the general flexibility for utilities to use negotiated procedures, it is arguably not necessary in a call-off for a framework to require formal “mini-tenders”, but merely an informal competition involving discussions with suppliers may be acceptable. It is simply not clear whether the CJEU would apply rules found in the Public Sector Directive such as the requirement to invite all suppliers on the framework to compete in the mini-competition.

3. We saw that the Public Sector Directive contains various explicit provisions designed to control use of framework agreements. The Utilities Directive, like the Public Sector Directive, expressly states that such agreements must not be used to hinder, limit or distort competition (Article 5(4)). However, most of the other explicit controls designed to regulate frameworks in the public sector do not appear in the Utilities Directive. However, it seems very likely that these might be applied by analogy, being considered simply as examples of the general principles of equal treatment, transparency and competition that apply anyway under the Utilities Directive – for example, the requirement to have a justification for a framework that is more than 4 years, or the prohibition on adding new firms to the framework after the framework has been awarded.
4. The provisions on remedies in the context of call-offs under framework agreements are less stringent for contracts covered by the Utilities Directive than they are for contracts covered by the Public Sector Directive (see chapter 10 below).

# CHAPTER 8: ELECTRONIC PROCUREMENT

## 8.1 Introduction

Electronic communications and technologies are used by government procuring entities (i) for dealing with suppliers, (ii) in communicating with the public and other public bodies, and (iii) in the government's internal administrative processes. They can be employed at all stages of the procurement cycle: in planning; in the procurement process itself (advertising, transmitting documents and information (such as specifications and invitations to tender), tendering etc); and in administering the contract (ordering, invoicing, payment etc).

Electronic means can assist Member States in furthering many of their national procurement objectives, including value for money, efficiency in the procurement process, integrity, accountability and transparency. Potential advantages include improved value for money from access to more suppliers or more competitive techniques (such as auctions); savings on transaction costs (for example, the costs of paper processing); time savings (for example, from speedier communications and easier access to supplier and contract information); improved compliance with rules and policies (including through better monitoring); stimulating a more competitive local supply base by speeding up private sector adoption of modern practices and promoting standardisation; and driving e-government more generally. From the perspective of opening up markets to trade, use of electronic means can also have specific benefits: for example, electronic advertising can provide accessible information for suppliers from other Member States.

However, full use of electronic means may be hampered by considerations such as lack of technical knowledge and resistance to change and absence of technical standardization. These and other considerations mean that care is needed to ensure that electronic procurement is used in such a way that it is beneficial rather than detrimental to effective procurement. For example, requiring certain kinds of electronic tenders could limit rather than competition when the supply side is unwilling to tender in this way; or a requirement for electronic signatures could create a barrier to trade in the absence of widely accepted standards for electronic signatures.

Prior to 2004 the EU procurement directives said almost nothing explicit about electronic procurement. The new directives, however, contain many provisions on this specific subject: as we have seen in chapter 2, the desire to modernise the directives to deal with this issue was in fact one of the main drivers of the 2004 reforms to the EU's procurement directives<sup>1</sup>. These provisions seek to ensure that the EU's legal framework promotes, rather than hinders, use of electronic means in public procurement. In this respect the directives, first, provide expressly for the use of electronic means and techniques, including the possibility for entities to compel providers to use electronic means; and also provide expressly for use of electronic auctions. These possibilities probably existed under the previous

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<sup>1</sup> On the provisions discussed below see generally R. Bickerstaff, "The New Directives' Rules on E-communication Mechanisms in Public and Utilities Procurement" (2004) 13 *Public Procurement Law Review* 277; Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (2005, London: Sweet and Maxwell), chapter 18; R. Bickerstaff, "Review: Commission Staff Working Document on the Requirements for Conducting Public Procurement Using Electronic Means" (2005) 14 *Public Procurement Law Review* NA17.

directives<sup>2</sup>, but this was not clear and the 2004 directives now provide for legal certainty on this point. The 2004 directives also provide for a new form of procurement arrangement, the "dynamic purchasing system". Secondly, the new directives adapt the existing rules to electronic purchasing, notably by reducing time-limits to take account of the use of electronic communication.

In addition, however, the 2004 directives introduced new *controls* over electronic means. These include, in particular, rules to ensure confidence in electronic systems and accessibility of the means used, and controls over the way in which auctions are conducted. These latter rules aim ensure that procuring entities can reap the benefits of new technologies whilst safeguarding against the potential problems of these new technologies, including their potential effect in hindering trade between Member States that were referred to above.

The main provisions on the subject are outlined below.

## **8.2 Means of communication**

### **8.2.1 Introduction**

A first key group of provisions in the procurement directives is those addressing the use of electronic means in general in the procurement process. An important principle that underlies these provisions is set out in the recitals to both directives, namely that "electronic means should be put on a par with traditional means of communication and information exchange" (Public Sector Directive recital 35 and Utilities Directive recital 36).

### **8.2.2 The possibility for using electronic means in procurement**

Most notably, the directives now make it clear that all communications between procuring entities and suppliers can be conducted in electronic form and that contracting authorities can in fact *require* suppliers to deal electronically (rather than simply providing this as an option). This could include, for example, electronic submission of tenders. This results from a general provision in Article 42(1) of the Public Sector Directive and Article 48(1) of the Utilities Directive which states that communications and information exchange may be by post, fax, electronic means or a combination of those means "according to the choice of the [procuring entity]".

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<sup>2</sup> On the position under the previous directives see A. Haagsma, "Information and Communication Technology Issues in International Public Procurement", Chapter 9 in S. Arrowsmith and A. Davies, *Public Procurement: Global Revolutions* (1998, London: Kluwer Law International); A. Erridge, R. Fee, and J. McIllroy, "European Public Procurement Policy and Electronic Commerce: Problems and Opportunities" (1998) 98 *European Business Review* 252; A. Davies, "Electronic Public Procurement Initiatives within the European Community: Potential Benefits and the Need for Caution" (2000) 25 *European Law Review* 632; S. Arrowsmith, "E-commerce policy and the EC procurement directives: the chasm between rhetoric and reality" (2001) 38 *Common Market Law Review* 1447; S. Arrowsmith, "Electronic Reverse Auctions under the EC Public Procurement Rules: Current Possibilities and Future Prospects" (2002) 6 *Public Procurement Law Review* 299.

The directives include an explicit definition of "electronic means" as "means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electronic magnetic means" (Public Sector Directive Article 1(13) and Utilities Directive Article 1(12)).

In addition, Article 1(12) of the Public Sector Directive and Article 1(11) of the Utilities Directive provide generally that "written" or "in writing" means "any expression consisting of words or figures which can be read, reproduced and subsequently communicated". This makes it clear electronic means can be used for any actions or communications that the directives require to be writing or written form (for example, notifying suppliers of reasons for decisions in writing), provided, of course, that those electronic means meet the stated conditions. Communications by e-mail or CD-ROM would, of course, generally meet these conditions.

### **8.2.3 Controls over electronic means**

As we have noted above, the current directives also, however, introduced certain controls over use of electronic means in public procurement with the aim of avoiding the potential problems that these might create, including for opening of public procurement markets.

These are as follows:

#### **1. Means of communication must be available, non-discriminatory and interoperable with products in general use**

In this respect it is first relevant to note that the directives state certain requirements of *all* means of communication, whether electronic or not: these must be "generally available and thus not restrict economic operators' access to the tendering procedure" (Article 42(2) of the Public Sector Directive and Article 48(2) of the Utilities Directive). For example, it appears that the cost of access to communication methods must be reasonable for suppliers who do not already use the designated means. The directives also lay down a more specific rule on access for electronic means of communication, stating that "The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use" (Article 42(4) of the Public Sector Directive and Article 48(4) of the Utilities Directive). This requires not just that the tools be available but also that they should be compatible with those in general use. These provisions will preclude, for example, a requirement for suppliers to tender through an entity's bespoke electronic system, which requires significant investment by the supplier.

#### **2. Requirements for ensuring integrity and confidentiality of data**

The directives also seek to ensure that the electronic communications used are sufficient to ensure confidentiality, and to ensure the integrity of data – that is, that the data is attributable to the purported originator, including that it has not been altered by any unauthorised person. Inter alia, this can assist the directives' objectives of preventing discrimination in favour of national suppliers (for example, by accessing and providing information on the tenders of competitors) and promote confidence.

In this respect there is, first, a general requirement that exchange and storage of information (whether through electronic means or otherwise) shall be carried out in such a way as to ensure the integrity of data (Article 42(3) of the Public Sector

Directive and Article 48(3) of the Utilities Directive). This obligation does not, however, necessarily entail use of electronic signature technology that can detect modifications to documents – for example, the recitals make it clear that electronic signatures are merely "encouraged" and not required (recital 37 of the Public Sector Directive and recital 48 of the Utilities Directive) and probably the steps required depend on the context, such as the significance of the data and the risks of data corruption<sup>3</sup>.

The directives also require entities to ensure that communications and exchange and storage of information are carried out in such a way as to ensure confidentiality of data in requests to participate and in tenders (Article 42(5) of the Public Sector Directive and Article 48(5) of the Utilities Directive).

In addition, communications and exchange and storage of information must be carried out in such a way as to ensure that entities examine the content of tenders and requests to participate only after the time-limit set for submitting them has expired (Article 42(3) of the Public Sector Directive and Article 48(3) of the Utilities Directive). These provisions are concerned with ensuring that other suppliers, third parties or officials of the procuring entity do not have access prior to the deadline. The directives also contain further rules on how these principles are to be complied with for cases in which electronic communications are used for requests for tender and for tendering (although no such detailed rules are set out for traditional paper tendering). These rules are set out in Annex X to the Public Sector Directives and Annex XXIV of the Utilities Directive, as discussed further below. Entities may comply with these requirements on confidentiality and limiting access for electronic communications by including a requirement for encryption, but this is probably not always necessary. Thus, as an alternative, procuring entities might use, for example, password protection of the relevant e-mail accounts, which can give a similar level of protection as the administrative arrangements that traditionally apply in paper tendering.

More specifically, the Annexes referred to above provide that "devices" for the electronic receipt of tenders and of electronic requests to participate, must guarantee, through technical means and appropriate procedures, several objectives. The requirements are:

- a. That the exact time and date of receipt of the above communications can be determined precisely;
- b. That it may be reasonably ensured that, before the time-limits laid down, no-one can have access to data transmitted under these requirements;
- c. That the devices are such as to guarantee that if the access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable.
- d. That the devices are such as to guarantee that only authorised persons may set or change the dates for opening data received;
- e. That the devices are such as to guarantee that during the different stages of the contract award procedure or of the contest access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons; and that simultaneous action by authorised persons must give access to data transmitted only after the prescribed date; and

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<sup>3</sup> R. Bickerstaff, "The New Directives' Rules on E-communication Mechanisms in Public and Utilities Procurement" (2004) 13 *Public Procurement Law Review* 277 at 280.

f. That the devices are such as to guarantee that data received and opened in accordance with the requirements of the Annexes must remain accessible only to persons authorised to acquaint themselves therewith.

### **3. Further explicit controls**

When documents, certificates or declarations to be submitted do not exist in electronic form, the new directives require that tenderers must undertake to submit these documents before the expiry of the time-limits for submitting tenders or requests to participate: Article 42(5) of the Public Sector Directive and Article 48(5) of the Utilities Directive.

The directives also state (again in Article 42(5) of the Public Sector Directive and Article 48(5) of the Utilities Directive) that information regarding the specifications necessary for electronic submission of tenders or requests for participation, including encryption, must be available to interested parties.

Finally, the directives also require procuring entities to take appropriate steps to document the progress of award procedures conducted by electronic means: Article 43 of the Public Sector Directive and Article 50 of the Utilities Directive.

### **8.2.4 Electronic signatures**

The use of electronic signatures in the EU is governed by the Electronic Signatures Directive<sup>4</sup> which requires all Member States to establish a framework for electronic signatures. Signatures meeting certain requirements are referred to as advanced electronic signatures. Under Article 5 of the Electronic Signatures Directive these must be treated in the same manner as handwritten signatures for legal purposes and also are admissible as evidence in legal proceedings. This directive also provides that other forms of electronic signatures cannot be denied legal recognition on certain specified grounds, such as the mere fact that they are electronic in form, or that they are not created by a secure signature creation device. Article 3(7) of the Electronic Signatures Directive, however, expressly allows Member States to impose stricter requirements for recognition of electronic signatures in public sector transactions which could, of course, include public procurement.

As regards electronic signatures the procurement directives first state that "devices" for the electronic receipt of tenders and of electronic requests to participate must guarantee that electronic signatures relating to tenders, requests to participate comply with *national* provisions adopted pursuant to the Electronic Signatures Directive. These requirements vary from state to state, however, and in some, such as the United Kingdom, there are in fact no particular requirements specified by law for recognition of an electronic signature.

The directives also expressly state that Member States may require that electronic tenders in public and utilities procurement may be accompanied by an advanced electronic signature (Article 42(5) of the Public Sector Directive and Article 48(5) of the Utilities Directive) and the recitals state that electronic signatures, particularly advanced electronic signatures, are "encouraged".

Another type of electronic signature is the qualified electronic signature which provides a higher level of security than an advanced electronic signature and which cannot be created merely by encryption as is possible with an advanced electronic

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<sup>4</sup> Directive 1999/93/EC, [2000] O.J. L13/12.

signature. These have sometimes been required by Member States in public procurement transactions – this used to be the case in Germany, for example. However, the burden of providing these signatures can prove a deterrent to participation – it has been suggested that this is the case in Germany and this requirement has now been abolished there<sup>5</sup>.

## 8.3 Time limits for tendering

Another set of measures relating to electronic communications that was introduced in the 2004 directives provides for reducing the minimum time limits for various stages of the procurement procedure when electronic means are used.

These have already been considered in the course of examining the time limits that apply under the different award procedures (open procedures, restricted procedure etc) in chapter 6 of this book. However, it is worth highlighting here the main implications for timescales of using electronic means that were explained in detail in chapter 6. These are as follows:

1. A reduction in the minimum time limit by 7 days for tendering in open procedures, and for submitting requests to be invited to participate in other procedures, when notices are submitted for publication electronically, using software developed by SIMAP for verification of their accuracy. This is justified by the fact that the usual delays between submission of notices to the OJ and publication will not occur. (The time limit for bids etc. under the EU rules start from when the notice is sent not when it is published, and the time periods are currently set on the assumption that there may be 12 day delay between submission and publication). Such a change should also provide an incentive for entities to use the new electronic submission procedures
2. Reduction of time limits for tendering in all procedures by 5 days when specifications are made available electronically at the time of the notice.

Note, however, that, as was explained in chapter 6, time limits must generally take account of the time needed for tendering, implying that periods longer than the specified minimum periods may be needed in some cases even when electronic means are used.

## 8.4 Electronic reverse auctions

### 8.4.1 Introduction

Another set of provisions introduced for the first time in 2004 directives concern electronic reverse auctions. A reverse auction is a procurement procedure that enables suppliers to adjust their tenders in the light of information on the tenders submitted by other suppliers. If used in an appropriate manner, this procurement technique has significant possibilities for improving value for money for specific purchases and generally enhancing price transparency in the relevant markets<sup>6</sup>.

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<sup>5</sup> M. Burgi, "The Policy on Regulating Electronic Communications in Germany", chapter 9 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009, Eagan, MN: West).

<sup>6</sup> For a review of benefits – and potential costs – see S. Arrowsmith, "Regulating Electronic Reverse Auctions under the UNCITRAL Model Law on Procurement", chapter 11 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009, Eagan, MN: West), section III.

Probably it was possible to conduct some types of auctions under the pre-2004 directives<sup>7</sup> but some Member States were reluctant to undertake such auctions without greater legal certainty than the old directives provided. The original version of the Commission's proposals for the 2004 directives did not include anything on electronic auctions but at a late stage provisions authorising electronic auctions were added to the directives, in order to give the certainty that auctions are allowed and to regulate how auctions should be conducted<sup>8</sup>.

Article 1(7) of the Public Sector Directive defines an electronic auction as:

"a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which is held after an initial full evaluation of tenders, enabling them to be ranked using automatic evaluation methods"

(And see also Article 1(6) of the Utilities Directive).

Electronic auctions in the above sense may be used as part of open, restricted or negotiated procedures, and also when awarding contracts through framework agreements or dynamic purchasing systems. It needs to be highlighted that auctions are not a separate kind of award procedure in addition to the open procedure, restricted procedure etc, but rather simply a particular way of conducting the award process in one of the ordinary procedures.

Empirical research into the operation of the auction provisions and the perception of users of how these provisions work in the UK (which is by far the greatest user of electronic auctions in the EU so far under the new provisions) indicates that the perception has in general been favourable<sup>9</sup>. However, one or two criticisms were made, in particular: i) that certain requirements of the provisions on automatic evaluation hinder the use of collaborative auctions; and ii) that the requirement to disclose current rankings of tenderers is unnecessary and may facilitate collusion<sup>10</sup>.

#### **8.4.2 Availability of auctions**

One issue that must be addressed by any public procurement system is the question of which procurements are suitable for electronic auctions. Some systems confine use of electronic auctions to the procurement of standardised goods and services, for which they are generally considered most valuable and appropriate<sup>11</sup>. However, under the EU directives auctions are permitted in all cases, provided that "the contract specifications can be established with precision" (Public Sector Directive Article 54(2); Utilities Directive Article 56(2)). Use is thus not limited to standardised products or services and it is in general for Member States to decide whether to allow their contracting authorities to use auctions for all kinds of products and services or only for some.

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<sup>7</sup> S. Arrowsmith, "Electronic Reverse Auctions under the EC Public Procurement Rules: Current Possibilities and Future Prospects" (2002) 6 *Public Procurement Law Review* 299.

<sup>8</sup> On these provisions see further see S. Arrowsmith and A. Eyo, "Electronic Auctions in the EC Procurement Directives and a Perspective from UK Law and Practice", chapter 12 in *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009, Eagan, MN: West); S. Arrowsmith, "Electronic Auctions under the new EC Procurement Directives" (2005) 14 *Public Procurement Law Review* 203; O. Soudry, "Promoting Economy: Electronic Reverse Auctions under the EC Directives on Public Procurement" (2004) 4 *Journal of Public Procurement* 340.

<sup>9</sup> See Arrowsmith and Eyo, above.

<sup>10</sup> *Ibid.*

<sup>11</sup> See Arrowsmith, note 6 above.

However, there is one possible limitation on use at EU level that arises from the definition. Following the definition set out above of a repetitive process involving ranking using automatic evaluation the definition in the directives adds in the same provisions:

*“Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual services such as the design of works, may not be the object of electronic auctions”*

(Public Sector Directive Article 1(7) and Utilities Directive Article 1(6); emphasis added).

This could mean that procedures for intellectual services can never involve an auction phase because contracts *cannot ever* be awarded using automatic evaluation (which, as explained below, is a requirement in auctions). However, another possible interpretation is that the above provision of the directives merely indicates that auctions cannot be used when *on the facts* an entity determines that it is not appropriate to identify the best tender through an automatic approach<sup>12</sup>.

### **8.4.3 The conduct of auctions**

Regarding the conduct of the auction, entities must specify in advance their intention to use an auction; and include certain information in the specifications. Article 54(4) Public Sector Directive (implemented in reg. 21(8)(a)) also requires that before the auction phase entities must make a “full” evaluation of tenders. This, and a requirement for bidders to submit “new” prices and/or values later (also in Article 54(4)), seems to imply that indicative tenders must always be complete tenders, including even aspects (usually price) that are subject to change during the auction.

The rules permit only auctions in which suppliers can ascertain their ranking during the auction, and thus can establish at any time whether they have submitted the best tender. This is an important feature of auctions under the EU provisions which should motivate suppliers successively to improve their tenders to the level necessary to win the contract, enhancing value for money for the procuring entity. It results from several key rules.

The first is a requirement for the automatic ranking of tenders during the auction (Public Sector Directive Article 54(5) and Utilities Directive Article 56(5)). This entails a full evaluation prior to the auction of any aspects of tenders that are to be compared in the award procedure but are *not* subject to revision during the auction. It is then necessary to apply in the auction phase a mathematical formula that allows the results of this pre-auction evaluation to be added to the evaluation of any criteria - usually price - that are open to change by tenderers during the auction itself, allowing the rankings of tenderers to be established by an automated process during the auction phase. Thus a procuring entity using both price and quality criteria in an auction for motor vehicles will need to establish before the auction the financial value to entity of the different quality aspects of the vehicles offered by different tenderers. The prices offered by tenderers will be subject to revision during the auction, and as the prices are changed the auction software must automatically re-rank the tenders taking into account both the current prices tendered and quality features as evaluated prior to the auction.

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<sup>12</sup> For further analysis of the different interpretations and critique of this provision see Arrowsmith and Eyo, note 8 above.

The directive also requires entities to provide information to participants during and at the close of the auction on whether they are the highest-ranked tenderer at any particular time. Thus Article 54(6) of the Public Sector Directive states as follows:

“Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment”.

(See also Article 54(6) of the Utilities Directive).

This seems to indicate that tenderers need to know where they are ranked overall in the competition, and arguably how many tenderers are participating, and not merely whether or not the tenderer is the highest-ranked. In the empirical study referred to earlier two electronic service providers interviewed expressed concern that providing such detailed information creates greater scope for collusion and considered that a rule allowing for disclosure only of whether the tender is the first-ranked bidder would be preferable<sup>13</sup>. Article 54(6) of the Public Sector Directive also states that entities may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. (See also Article 56(6) of the Utilities Directive). Thus it is not *required* to inform tenderers of how much their tender must improve to be ranked first but entities may choose to provide this information if they wish.

Finally, a further key rule that ensures that suppliers know during the auction whether theirs will be the winning tender is a requirement that entities must generally award the contract *on the basis of the results of the electronic auction* (Public Sector Directive Article 54(8) and Utilities Directive Article 56(8)).

The directives allow for the possibility that during the auction phase of the award procedure tenderers may be permitted to revise not just their prices but also other aspects of their tenders. Thus Article 54(2) of the Public Sector Directive provides that the auction may be based either solely on prices or (when the most economically advantageous tender basis is used for the award) on prices and/or on the "new values of the features" of the tenders (see also Utilities Directive Article 56(3)). However, the aspects of tenders that may in practice be revised in the auction are in practice quite limited since the rules outlined above mean that it is necessary that any revisions can be fed into the automatic evaluation process without any subjective assessment. The directives also states expressly in Article 54(3)(a) (public sector) and Article 56(3) (utilities) that the non-price features that can be revised in the auction phase must be "quantifiable" and must be able to be expressed in "figures and percentages". In practice, however, revisions to tenders in auctions seem almost always limited to price alone, with other elements of tenders being the subject merely of fixed offers submitted prior to the auction phase<sup>14</sup>.

The directives also contain rules on commencing and closing the auction (Public Sector Directive Article 54(7) and Utilities Directive Article 56(7)); and provide that an auction may take place in successive phases (Public Sector Directive Article 54(4) and Utilities Directive Article 56(4)).

There is also a general provision prohibiting improper recourse to auctions and using them in such a way as to prevent, restrict or distort competition (Public Sector Directive Article 54(9) and Utilities Directive Article 56(9)).

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<sup>13</sup> See Arrowsmith and Eyo, note 8 above.

<sup>14</sup> See Arrowsmith and Eyo, note 8 above.

## 8.5 Dynamic purchasing systems

As well as providing for electronic auctions the 2004 directives also made provision for the first time for a procurement mechanism that the directives refer to as a “dynamic purchasing system”<sup>15</sup>. The provisions on this are found mainly in Article 33 of the Public Sector Directive and Article 15 of the Utilities Directive. A dynamic purchasing system is a list of registered suppliers that also submit the terms on which they are willing to supply products or services. Anyone submitting a compliant tender must be allowed to register on the system. A dynamic purchasing has some similarities with a framework agreement except that new suppliers can be added to the lists any time (which is not possible with framework agreements). It is again not a separate procedure but a variation of the ordinary open procedure. The aim of the dynamic purchasing system is to allow entities to use data on the maximum possible number of suppliers. It is available only for “off the shelf” purchases: see the definition below.

A dynamic purchasing system is defined as “a completely electronic process for commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in its duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification” (Public Sector Directive Article 1(6) and Utilities Directive Article 1(5)).

The entity must first advertise the system in a notice, and provide detailed procedural information, and it must offer direct electronic access to the specification (Article 33(3) of the Public Sector Directive and Article 15(3) of the Utilities Directive). Interested firms then submit tenders (“indicative tenders”) at any time during the duration of the system, and these tenders must normally be evaluated within 15 days (Article 33(4) of the Public Sector Directive and Article 15(4) of the Utilities Directive). The entity must admit to the system *all* qualified firms submitting compliant tenders and must admit new compliant tenderers at any time (Article 33(2) of the Public Sector Directive and Article 15(2) of the Utilities Directive). Registered firms can then improve their tenders on an on-going basis (Article 33(2) of the Public Sector Directive and Article 15(2) of the Utilities Directive).

When the entity wishes to place an order, it invites tenders from all registered tenderers (Article 33(6) of the Public Sector Directive and Article 15(6) of the Utilities Directive). The entity must also at the time of each order place a new notice (a “simplified contract notice”) in the *Official Journal* to give notice of the system to those not yet registered, and give 15 days for registration before calling for tenders for the order (Article 33(5) of the Public Sector Directive and Article 15(5) of the Utilities Directive).

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<sup>15</sup> See further S. Arrowsmith, “Dynamic Purchasing Systems under the New EC Procurement Directives—a Not So Dynamic Concept?” (2005) 14 *Public Procurement Law Review* 16; S. Arrowsmith, “Methods for purchasing on-going requirements: the system of framework agreements and dynamic purchasing systems under the EC Directives and UK procurement regulations”, chapter 3 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009, Eagan, MN: West), section XIII.

The system may last no more than four years apart from “duly justified exceptional cases” (Article 33(7) of the Public Sector Directive and Article 15(7) of the Utilities Directive).

It is also provided that procuring entities may not use dynamic purchasing systems to prevent, restrict or distort competition and that no charges may be billed to economic operators or other interested parties (Article 33(7) of the Public Sector Directive and Article 15(7) of the Utilities Directive).

We have seen in chapter 6 that another type of purchasing mechanism for repeat purchases under the EU directives is the framework agreement, and in practice it is these frameworks that are used for repeat purchases, not dynamic purchasing systems. Dynamic purchasing systems offer some of the benefits of frameworks, in particular allowing competition for periodic purchases whilst reducing costs. They are similar to frameworks in involving tenders at the start of the process, but differ in that these initial tenders are not used to reduce the number of suppliers - all must be admitted, regardless of the merits of the tender - and in that there is no possibility of inviting only a limited number to tender (possible with frameworks under restricted or negotiated procedures). Thus an entity using a dynamic purchasing system might need to consider many tenders. Another important difference is the requirement for entities to publish a new notice for every order. In these respects the dynamic purchasing system involves the maximum degree of competition, but also significantly greater administrative costs and delay in ordering. The requirement for a new notice for each order, in particular, means that such systems may not be practical for low value orders. Many of the advantages of the dynamic purchasing systems can in any case be obtained through an open procedure framework, in which the entity chooses a large number of framework suppliers. The main advantage of the dynamic purchasing system is that new firms can be admitted: with a framework this is not possible.

As a result of the practical difficulties with the dynamic purchasing system concept as discussed noted above, dynamic purchasing systems have been used rarely in Europe so far. For the United Kingdom, for example, a search of EU *Official Journal* notices going back before January 2006, when the provisions were first implemented in the UK, and extending up to 19 September 2008, revealed only two authorities had set up systems at that time - one a system for purchasing gas and electricity, and another a system for purchasing catering and hospitality services<sup>16</sup>.

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<sup>16</sup> See Arrowsmith and Eyo, note 8 above.

# CHAPTER 9: DEFENCE PROCUREMENT

## 9.1 The Specificities of Defence Procurement

### 9.1.1 Introduction

Defence procurement within the European Union (EU) could be broadly defined as the section of *public procurement performed for the benefit of the armed forces of the EU Member States*. Defence procurement therefore covers a wide scope of activities, ranging from the development and production of complex military equipment to the purchase of food and clothing for soldiers in the field. Within this broad definition, we should distinguish the procurement of 'hard' or 'war-like' defence materiel, such as tanks and missiles, from the procurement of other more mundane items, such as uniforms and food. Hard defence materiel can be subject to specific rules, as we will see in this chapter.

Production and trade in defence equipment is closely related to the sovereignty of the State, and both are therefore highly symbolic and political.<sup>1</sup> Arms trade is also very often used as a tool of political and economic influence.<sup>2</sup> In discussing defence procurement, one should therefore remember that it is not only an economic issue, and that other factors, strategic operational and political, are and will remain important.<sup>3</sup>

Defence procurement also plays an important economic role in the EU. In 2007, the defence expenditures of the EU Member States amounted to about €204 billion, or 1.69% of the EU Gross Domestic Product, as shown on Figure 1 (to be compared with €454 billion and 4.5% respectively for the United States).<sup>4</sup> Of that amount, about 35-40% is spent through procurement.

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<sup>1</sup> Mezzadri S., *L'ouverture des Marchés de la Défense: Enjeux et Modalités*, Occasional Paper No 12, (Institute for Security Studies: 2000), p.6; Schmitt B. (rapporteur), *Defence Procurement in the European Union – The Current Debate* (2005, EU Institute for Security Studies), p.11; Trybus M., *European Defence Procurement Law – International and National Procurement Systems as Models for a Liberalised Defence Procurement Market in Europe* (1999, London: Kluwer Law International), p.25.

<sup>2</sup> Mawdsley J., Quille G. et.al., *Equipping the Rapid Reaction Force – Options for and Constraints on a European Defence Equipment Strategy*, Paper 33 (Bonn International Centre for Conversion: 2003), p.29.

<sup>3</sup> Cox A., 'The Future of European Defence Policy: The Case for a Centralised Procurement Agency' (1994) 3(2) *Public Procurement Law Review* 65, at 77; Georgopoulos A., *European Defence Procurement Integration: Proposals for Action within the European Union*, PhD thesis, (University of Nottingham: 2004), §1.4.3.

<sup>4</sup> European Defence Agency, *European - United States Defence Expenditure in 2007*, Brussels, December 2008 (EU data except Denmark).

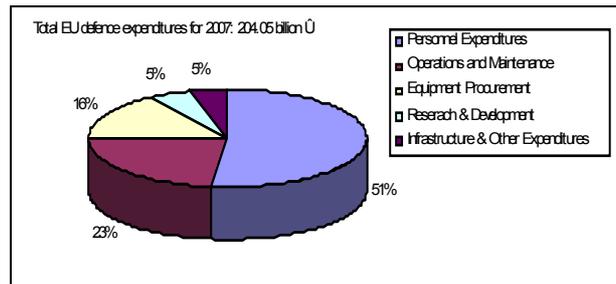


Figure 1: EU Defence Expenditures for 2007<sup>5</sup>

But first, if we are to analyse defence procurement law, we should first have an understanding of the European defence market and of defence procurement in general.

### 9.1.2 Context Evolutions since the End of the Cold War

The end of the Cold War saw the nature of military operations to be performed by Western forces evolve radically.<sup>6</sup> Most military missions of European forces now take place abroad, and regional conflicts, ethnic struggles, civil wars and the peace enforcement and peacekeeping operations that follow have led the defence establishment to look for different type of defence equipment, especially reducing drastically the need for heavily armoured territorial defence forces and increasing the need for air transport capacity, for air-transportable materiel, and for individual protection systems.<sup>7</sup>

In addition, the increasingly integrated nature of worldwide military operations, such as the creation of the Eurocorps, and peacekeeping operations in the former Yugoslavia or in Afghanistan, to which large coalitions participate, requires more and more interoperable equipment, both operationally (e.g. the ability of forces to communicate between themselves) and technically (e.g. the ability of the technicians from one country to repair the equipment of another country).<sup>8</sup>

On the other hand, the end of the Cold War led the EU Member States to reduce their defence budget in line with the poetic-economic (but maybe overly optimistic) notion of 'peace dividends', thereby leading the European defence industry to scale

<sup>5</sup> European Defence Agency, *Defence Data 2007*, Brussels, November 2008 (all data except Denmark).

<sup>6</sup> Flournoy M., Smith J. et.al., *European Defense Integration: Bridging the Gap between Strategy and Capabilities* (Center for Strategic and International Studies: 2005), pp.18 et.seq.; Neuman S., *Defense Industries and Dependency: Current and Future Trends in the Global Defense Sector* (International Relations and Security Network: 2006), p.6.

<sup>7</sup> Van Eekelen W., *The Parliamentary Dimension of Defence Procurement – Requirements, Production, Cooperation and Acquisition*, Occasional Paper N° 5 (2005, Geneva Centre for the Democratic Control of Armed Forces), p.1; Vlachos K., *Safeguarding European Competitiveness – Strategies for the Future European Arms Production and Procurement*, Occasional Paper No 4 (1998, Institute for Security Studies), §2.5; Andresson J.J., *Cold War Dinosaurs or High-Tech Arms Providers? The West European Land Armaments Industry at the Turn of the Millennium*, Occasional Paper No 23 (2001, Institute for Security Study), p.6; Maulny J-P. et.al., *Cooperative Lessons Learned: How to Launch a Successful Co-Operative Programme*, Final Report for Study 06-EDA-008, IRIS/CER/DGAP/IAI, 30 November 2006, pp.10 et.seq.

<sup>8</sup> Flournoy, Smith et.al., *European Defense Integration*, above, p.30; Communication from the Commission: 'European defence – industrial and market issues – Towards an EU Defence Equipment Policy', COM(2003) 113, 11 March 2003, page 6; Wolsztynski R., 'The French Air Force: European Integration Factors' (2006) 8(3) RUSI Defence Systems, p.26.

down their activities substantially.<sup>9</sup> The reduction of defence budgets especially led to a reduction in investments and modernisation of the forces, which in turn required keeping existing equipment in service longer, especially major weapon systems, which led to increases in maintenance and support costs as the equipment become older.<sup>10</sup>

In addition, a growing number of defence-related technologies, components and services now have both military and civilian applications (what is called 'dual-use goods'), and it is therefore more and more difficult to define clearly the boundaries separating the European defence industry from the civilian industry.<sup>11</sup> Whereas in the past, military R&D was used to fuel the civilian industry, now the reverse is becoming true, and innovation is now mainly coming from civil-type products.<sup>12</sup>

Lastly, whereas during the Cold War period, most if not all multinational defence discussions in Europe were held within the scope of the North Atlantic Treaty Organisation (NATO) and the institutionally weaker Western European Union (WEU), 1992 saw the birth of the EU and its Common Foreign and Security Policy (CFSP).<sup>13</sup> The TFEU now includes provisions related to a European Security and Defence Policy (ESDP), which cover the progressive framing of a common defence policy among the EU Member States, which 'might lead to a common defence'.<sup>14</sup> A number of initiatives have been taken since then within the scope of the EU to improve European defence capabilities.<sup>15</sup> In this context, the recent European Defence Agency (EDA) will be discussed in a later section.<sup>16</sup>

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<sup>9</sup> Georgopoulos, *European Defence Procurement Integration*, above, pp.31-32 and § 2.3; Schmitt B., *From Cooperation to Integration: Defence and Aerospace Industries in Europe*, Chaillot Paper No 40 (2000, Institute for Security Study), p.5; Dehn G. (Ed.), *Blowing the Whistle on Defence Procurement (Speaking Up by Sector)* (1995, Public Concern at Work), p.15; Communication from the Commission: 'The Challenges Facing the European Defence-Related Industry, a Contribution for Action at the European Level', COM(96)10, 24 January 1996, §§1 and 2.1.1.

<sup>10</sup> Flournoy, Smith et.al., *European Defense Integration*, above, pp.22-23; Schmitt, *Defence Procurement in the European Union – The Current Debate*, above, p.15; Rich M. and Dews E., *Improving the Military Acquisition Process, Lessons from RAND Research*, RAND Paper R-3373 (1986, RAND), pp.21-25; Kirat T. and Bayon D., *Les Marchés Publics de la Défense – Droit du Contrat Public, Pratique Administrative et Enjeux Economiques* (2006, Bruylants), pp.28 and 64-66.

<sup>11</sup> COM(96)10, above, §2.1.1.

<sup>12</sup> COM(2003)113, above, p.6; Vlachos, *Safeguarding European Competitiveness*, above, §2.4; Schmitt, *From Cooperation to Integration*, above, p.8; see also European Defence Agency, 'An Initial Long-Term Vision for European Defence Capability and Capacity Needs', 3 October 2006, pp.11-12.

<sup>13</sup> Lenaerts K. and Van Nuffel P., *Constitutional Law of the European Union* (1999, London: Sweet & Maxwell), §§3-102 et.seq.; Trybus M., *European Union Law and Defence Integration* (2005, Oxford: Hart Publishing), pp.51 et.seq.

<sup>14</sup> Consolidated Version of the Treaty on European Union (TEU), OJ 2010 C 83/15, Article 3(2) (ex Article 2(2)) and Article 42 (ex Article 17).

<sup>15</sup> See the summary in Taylor C., 'UK Defence Procurement Policy', House of Commons Research Paper 03/78, London, 20 October 2003, pp.28 et.seq.; 'A Secure Europe in a Better World: European Security Strategy', 12 December 2003; GAERC Council, 'Headline Goal 2010', 17 May 2004; European Defence Agency, 'An Initial Long-Term Vision for European Defence Capability and Capacity Needs', 3 October 2006; EDA Press Release, 'EU Governments Endorse Capability Plan for Future Military Needs, Pledge Joint Efforts', 8 July 2008.

<sup>16</sup> Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ 2004 L 245/17; WEAG web site <http://www.weu.int/weag>, accessed on 02 November 2010.

### 9.1.3 Specificities of the European Defence Equipment Market

The first, and probably most important, characteristic of the defence market is that of a monopsony, a market form with only one buyer, in this case the State, and potentially a high number of sellers.<sup>17</sup> It is an instance of imperfect competition, symmetrical to a monopoly, in which there is only one seller, but many buyers.<sup>18</sup>

In national defence equipment markets, monopsony is evident. The State, on its territory, holds a 'monopoly on the legitimate use of physical force',<sup>19</sup> and this often implies an almost exclusive right to the ownership of arms, munitions and war materiel. The State can therefore unilaterally affect the defence equipment market on its territory by imposing its military requirements, schedule and specifications on its defence equipment suppliers.<sup>20</sup>

One could argue that this monopsony power exists only within a national market and can only be preserved as long as such markets remain closed: if the European defence equipment market was fully open, there would be as many buyers of defence equipment as there are EU Member States. However, only six EU Member States (France, Germany, Italy, Spain, Sweden and the United Kingdom) represent 90% of the EU defence industrial capability, 85% of its defence spending, and 98% of its R&D spending.<sup>21</sup> An open European defence equipment market would therefore still be some form of oligopsony, a market form in which the number of buyers is small while the number of sellers could be large.<sup>22</sup>

A second characteristic of the European defence equipment market is its industrial fragmentation,<sup>23</sup> which is a consequence of the closed national defence equipment markets of many European countries. This fragmentation led to duplication of resources between the industries of each EU Member State, but also sometimes to monopolistic situations within some Member States. Most people agree that improved cross-border competition could bring about economies of scale and

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<sup>17</sup> Trybus, *European Defence Procurement Law*, above n.1, p.24; Commission Green Paper on Defence procurement, COM(2004) 608, 23 September 2004, §2.1; Vlachos, *Safeguarding European Competitiveness*, above, §I.B (using the term 'oligopsonistic national procurement' with the same meaning); Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, p.4.

<sup>18</sup> Atkinson S.E. and Kerkvliet J., 'Dual Measures of Monopoly and Monopsony Power: An Application to Regulated Electric Utilities' (1989) 71 *Review of Economics and Statistics* 2, pp.250-257.

<sup>19</sup> As explained by Max Weber in *Politics as a Vocation*, 1919: see: Baudouin J., *Introduction à la Science Politique*, 5<sup>th</sup> Edition (1998, Dalloz-Sirey), p.33.

<sup>20</sup> Mawdsey J., *The European Union and Defence Industrial Policy*, Paper 31 (Bonn International Centre for Conversion: 2003), p.6; Heartley K., 'Competition in Defence Contracting in the United Kingdom' (1992) 1(6) *Public Procurement Law Review* 440, p.441.

<sup>21</sup> Communication from the Commission to the Council and the European Parliament on the results of the consultation launched by the Green Paper on Defence Procurement and on the future Commission initiatives, COM(2005) 626, 6 December 2005, p.2.

<sup>22</sup> Bhaskar V., Manning A. and To T., 'Oligopsony and Monopsonistic Competition in Labor Markets' (2002) 16 *The Journal of Economic Perspectives* 155; Georgopoulos, *European Defence Procurement Integration*, above, §1.4.1.

<sup>23</sup> COM(96) 10, above, §2.1.3; Schmitt B., *The European Union and Armaments – Getting a Bigger Bang for the Euro*, Chaillot Paper No 63 (Institute for Security Studies: 2003), p.10; Dehn, *Blowing the Whistle on Defence Procurement*, above, p.18; Georgopoulos A., 'The Commission's Green Paper on Defence Procurement' (2005) 14(2) *Public Procurement Law Review* NA34; Creasey P., 'The Options and Prospects for Defence Procurement Collaboration', in Creasey P. and May S. (Eds.), *The European Armaments Market and Procurement Cooperation* (1988, Houndmills: Palgrave Macmillan), pp.165 et.seq.

reduce the costs of defence equipment.<sup>24</sup> Even though some consolidation has been seen in the last ten years, the European defence market nevertheless remains fragmented.<sup>25</sup>

Another characteristic of the defence equipment market, at least for major equipment, is that it is almost solely 'demand-driven' and not 'supply-driven'. The defence industry usually does not develop and produce major weapons systems of its own initiative to offer them ready to buy on the market: the initiative is usually taken by the State, which drafts requirements based on its defence policy and military doctrine and then requests the defence industry to develop and produce equipment that meets this requirement.<sup>26</sup>

#### 9.1.4 Specific Defence Procurement Requirements

Not only does the European defence market have specificities, but defence procurement itself often includes specific requirements that are seldom found in other areas of procurement.

Security of supply is one of the key requirements of defence procurement, and aims to ensure the continuing supply of defence materiel and/or services to the armed forces, without regard to external circumstances such as war, international unrest, shifts in alliances, and disruption of the supply chain.<sup>27</sup> Security of supply has both long-term and short-term (operational) aspects, the latter aiming to ensure that peaks in demand ('surges') can be catered for.

The easiest way, but most disrupting for market efficiency, to accommodate security of supply has often been to award defence contracts only to national companies.<sup>28</sup> Another possibility is the use of offsets to build or consolidate a defence equipment capability on national soil, an issue we discuss below. Short-sighted enforcement of security of supply is one of the most likely causes of the current European defence equipment market fragmentation.<sup>29</sup> Security of supply is also often used as a convenient excuse to support the national industry for purely economic or social reasons.

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<sup>24</sup> Valasek T., 'EU Wants More Defence Competition, Lower Costs', ISN Security Watch, 1 December 2005; Lord Garden, 'We Need Capability Integration – Not Equipment Cooperation' (2004) 7(1) RUSI Defence Systems, p.13; Kirat and Bayon, *Les Marchés Publics de la Défense*, above, p.111.

<sup>25</sup> COM(2004) 608, above, p.4; See also Andresson, *Cold War Dinosaurs or High-Tech Arms Providers?*, above, pp.8 et.seq.; Valasek, 'EU Wants More Defence Competition, Lower Costs', above; Mawdsey, *The European Union and Defence Industrial Policy*, above, §3.1.

<sup>26</sup> Jones S., 'The Rise of a European Defense' (2006) 121 *Political Science Quarterly* 241, at 242; UK House of Commons Public Accounts Committee, *Ministry of Defence: Maximising the Benefits of Defence Equipment Co-Operation*, House of Commons document 2001/02 HC 586, 2002, §§29-30, citing a few counter-examples.

<sup>27</sup> See further the discussion in Georgopoulos, *European Defence Procurement Integration*, above, pp.37 et.seq.; Heuninckx B., 'Towards a Coherent European Defence Procurement Regime? European Defence Agency and European Commission Initiatives' (2008) 17(1) *Public Procurement Law Review* 1, p.14.

<sup>28</sup> Vlachos, *Safeguarding European Competitiveness*, above, §2.1; COM(2004) 608, above, §2.2; The United Kingdom Defence White Paper – Defence Industrial Strategy, Parliament document number Cm 6697, 2005, still requires the preservation of maintenance and upgrade capability in the UK for a number of major systems; Antonakis N., 'Offset Benefits in Greek Defence Procurement Policy: Developments and Some Empirical Evidence', in Martin S. (Ed.), *The Economics of Offsets: Defence Procurement and Countertrade* (1996, London: Routledge), p.163.

<sup>29</sup> See further the discussion in Schmitt, *From Cooperation to Integration*, above, pp.60-62; COM(2003) 113, above, p.18; Mezzadri, *L'ouverture des Marchés de la Défense*, above, p.6.

As mentioned above, operations since the end of the Cold War are more and more difficult to plan in advance in terms of timing, location and duration. Measures have therefore to be taken to cope urgently with surges in demand, but also with unexpected operational requirements, such as countering new threats, or operating in specific terrains that were not envisioned when the equipment was initially procured. This characteristic is one of the causes of the requirements for security of supply.<sup>30</sup>

In addition, it is quite obvious that the characteristics and specifications of defence equipment should not be made available to potential enemies. States are therefore often reluctant to show transparency in their defence budgets and procurement processes for fear that this might be an indication of their operational priorities. Moreover, this secrecy also applies to the defence industry, not only because it has to protect the classified requirements used to develop equipment, but also because, the defence equipment market being highly competitive, the defence industry wants to protect the results of its R&D.<sup>31</sup>

Moreover, defence procurement has to cater for specific technical requirements. As mentioned above, forces and their equipment are now required to be highly mobile and flexible, and to operate in varied geographical locations against widely different types of threats.<sup>32</sup> Military operations have to be performed under any climatic conditions, from arctic to deserts, in dust, sand or ice. As a result, high-end modern military equipment became more and more technologically complex since the end of the Cold War (e.g. long-range precision-guided weapons, network-centric warfare, and stealth technology), which is one of the reasons for its high price.<sup>33</sup>

Lastly, defence procurement contracts very often include offset requirements, whereby the purchasing country requires the contractor to buy from, or invest in, the industry of the purchasing country.<sup>34</sup> Such offsets may be 'direct', in the form of orders or transfers of know-how and technology related to the subject matter of the original contract (such as licensed production), or 'indirect' when they benefit industrial sectors other than the one covered by the subject matter of the contract in question, even non-military ones.<sup>35</sup> A number of different classifications of offsets have been proposed.<sup>36</sup> Offsets can be a way to ensure security of supply, but can also be a convenient excuse for developing or sustaining an ailing national industry for social or political reasons.

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<sup>30</sup> As stated in a number of places in the UK Defence White Paper – Defence Industrial Strategy, above.

<sup>31</sup> Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, p.1; Georgopoulos, 'The Commission's Green Paper on Defence Procurement', above.

<sup>32</sup> Vlachos, *Safeguarding European Competitiveness*, above, §2.4

<sup>33</sup> Neuman, *Defense Industries and Dependency*, above, p.6; Trybus, *European Defence Procurement Law*, above, p.25.

<sup>34</sup> For a detailed analysis of offsets, see Martin S. (Ed.), *The Economics of Offsets: Defence Procurement and Countertrade* (1996, London: Routledge); Brauer J. and Dunne J-P. (Eds.), *Arms Trade and Economic Development: Theory, Policy and Cases in Arms Trade Offsets* (2004, London: Routledge); Bourne J., *Ministry of Defence: Collaborative Projects*, UK National Audit Office, House of Commons document 1990/91 HC 247, 1991, §2.33; Eriksson E.A. et.al., *Study on the effects of offsets on the Development of a European Defence Industry and Market*, Final Report of 06-DIM-022, FOI and SCS, 12 July 2007.

<sup>35</sup> COM(2004) 608, above, §2.3; Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, pp.6-7; Georgopoulos, *European Defence Procurement Integration*, above, pp.46-47.

<sup>36</sup> See e.g. Taylor T., 'Using Procurement Offsets as an Economic Development Strategy', and Markowski S. and Hall P., 'Mandatory Defence Offsets – Conceptual Foundations', in Brauer and Dunne, *Arms Trade and Economic Development*, Ch.2 and 3 respectively.

### 9.1.5 Collaborative Defence Procurement

European States sometimes resort to collaborative procurement for their defence equipment, whereby they agree to procure and manage together the development and/or production of a complex military system and/or its support. Collaborative procurement is expected to have cost benefits during the development and the production phase of the system, operational benefits because of interoperability and standardisation of equipment across the participating States, industrial benefits such as technology transfers, and political benefits by helping the participating States foster mutual understanding. We will not discuss collaborative defence procurement in details in this chapter, but the reader should refer to the available literature on the subject.<sup>37</sup>

## 9.2 Defence Procurement and the TFEU

### 9.2.1 TFEU Principles Applicable to Public Procurement

The TFEU itself imposes a number of obligations on public procurement within the EU, such as non-discrimination on the grounds of nationality, a positive obligation of transparency (which requires sufficient advertising), proportionality, and equal treatment of tenderers (which implies some form of competition).

Applying these principles to the characteristics of defence procurement that we discussed above clearly shows that the direct award of contracts to national companies or the use of offsets would breach the principles of non-discrimination, equal treatment and proportionality.<sup>38</sup> However, the TFEU includes a number of exemptions that would free EU Member States from the obligation to comply with these principles. We will discuss now the impact and use of these exemptions.

### 9.2.2 General Principles of TFEU Exemptions

One of the main reasons for which EU Member States may wish to invoke exemptions to the applicability of the TFEU is to protect their public security. Within the scope of the TFEU, the concept of public security covers both a Member State's internal security and its external security.<sup>39</sup> EU Member States are, in principle, free

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<sup>37</sup> Heuninckx B., 'A Primer to Collaborative Defence Procurement in Europe: Troubles, Achievements and Prospects' (2008) 17(3) *Public Procurement Law Review* 123; UK House of Commons Public Accounts Committee, *Ministry of Defence: Maximising the Benefits of Defence Equipment Co-Operation*, above; Lorell M. and Lowell J., *Pros and Cons of International Weapons Procurement Collaboration* (RAND: 1995), pp.7 et.seq.; Hayward K., *Towards a European Weapons Procurement Process – The shaping of common European requirements for new arms programmes*, Chaillot Paper No 27 (Institute for Security Study: 1997); Bourne, *Ministry of Defence: Collaborative Projects*, above; Maulny et.al., *Cooperative Lessons Learned*, above.

<sup>38</sup> Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement (presented by the Commission), COM(2006) 779, 7 December 2006.

<sup>39</sup> Case C-186/01, *Alexander Dory v Germany* [2003] ECR I-2479, [32]; Case C-423/98, *Alfredo Albore*, [2000] ECR I-5965, [18]; Case C-367/89, *Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC*, [1991] ECR I-4621, [22]; Case C-83/94 *Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, [1995] ECR I-3231, [26]; Case C-273/97, *Angela Maria Sirdar v The Army Board and Secretary of*

to determine the requirements of public policy and public security in the light of their national needs, but those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the EU institutions.<sup>40</sup> Measures taken by the EU Member States are not excluded in their entirety from the application of EU Law solely because they are taken in the interests of public security or national defence.<sup>41</sup> Specific exemptions contained in the TFEU have to be invoked.

The only articles in which the TFEU provides for derogations in situations which involve public security are Articles 36, 45, 52, 65, 72, 346 and 347 (ex Articles 30, 39, 46, 58, 64, 296 and 297 TEC), which all deal with exceptional and clearly defined cases. It cannot be inferred from those articles that the TFEU contains an inherent general exemption excluding all measures taken for reasons of public security from the scope of EU Law.<sup>42</sup> Public policy and public security may be relied on to invoke an exemption from EU law only if there is a genuine and sufficiently serious threat to a fundamental interest of society,<sup>43</sup> and aims of a purely economic nature cannot justify restricting the free movement of goods or capital, or the freedom to provide services.<sup>44</sup> Moreover, the requirements of public security cannot justify derogations from the TFEU rules unless the principle of proportionality is observed, which means that any derogation must remain within the limits of what is appropriate and necessary for achieving the aim considered.<sup>45</sup>

In addition, relying on one of those exemptions would not authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms that form an integral part of the general principles of EU law.<sup>46</sup> Any person affected by a restrictive measure based on such exemptions must have access to legal redress.<sup>47</sup>

Furthermore, some of the derogations provided for by the TFEU only allow deviations from the rules relating to free movement of persons (Articles 45 and 71 – ex Articles 39 and 64 TEC), goods (Article 36 – ex Article 30 TEC), capital (Article 65 – ex Article 58 TEC) and freedom to provide services (Article 52 – ex Article 46 TEC), and not from the other provisions of the TFEU, such as the principle of equal treatment of men and women, which is of general application.<sup>48</sup> However, the

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*State for Defence*, [1999] ECR I-7403, [17]; Case C-285/98, *Tanja Kreil v Bundesrepublik Deutschland*, [2000] ECR I-69, [17].

<sup>40</sup> Case 36/75, *Rutili v Minister for the Interior*, [1975] ECR 1219, [26]-[27]; Case C-54/99, *Association Église de Scientologie de Paris and Scientology International Reserves Trust v The Prime Minister*, [2000] ECR I-01335, [17].

<sup>41</sup> Case C-186/01 *Dory*, above, para 30; Case C-337/05, *Commission v Italy (Agusta Helicopters)*, [2008] ECR I-2173, [42] – for a commentary of that case, see Heuninckx B. 'A Note on Case Commission v Italy (Case C-337/05) (Agusta Helicopters Case)' (2008) 17(5) PPLR NA187.

<sup>42</sup> Case C-186/01 *Dory*, above, para 31; Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para 26; Case C-273/97 *Sirdar*, above, [16]; Case C-285/98 *Kreil*, above, [16]; Case C-337/05 *Agusta Helicopters*, above, [43].

<sup>43</sup> Case 36/75 *Rutili*, above, [28]; Case C-348/96, *Criminal proceedings against Donatella Calfa*, [1999] ECR I-11, [21]; Case C-54/99 *Église de Scientologie de Paris*, above, [17].

<sup>44</sup> C- 322/01, *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval*, [2003] ECR I-14887, [122]; Case 36/75 *Rutili*, above, [30] and [32]; Case C-54/99 *Église de Scientologie de Paris*, above, [17].

<sup>45</sup> Case C-423/98 *Albore*, above, [19]; Case 222/84 *Johnston*, above, [38]; Case C-54/99 *Église de Scientologie de Paris*, above, [18].

<sup>46</sup> Joined Cases C-402/05 P and C-415/05, P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, judgement of 3 September 2008, not yet reported, [302]-[303]; see Article 6(1) EU.

<sup>47</sup> Case 222/86, *Unectef v Heylens and Others*, [1987] ECR 4097, [14]-[15].

<sup>48</sup> Case C-186/01 *Dory*, above, [33]; Case C-273/97 *Sirdar*, above, [18]; Case C-285/98 *Kreil*, above, [18].

derogations provided under Articles 346 and 347 TFEU (ex Articles 296 and 297 TEC) can apply to the whole TFEU, and are considered 'safeguard clauses'.<sup>49</sup>

## 9.2.3 Exemptions from Compliance with the TFEU as a Whole

### 9.2.3.1 The Article 346 TFEU (ex Article 296 TEC) Exemption

We will see that the applicability of the Public Sector Directive to defence procurement is subject to Article 346 TFEU (ex Article 296 TEC), which is also a generic exemption from the applicability of EU Law aiming to draw a line between the competences of the EU and of its Member States in the defence sector when those competences overlap.<sup>50</sup> Article 346 TFEU (ex Article 296(1) TEC) states that:

"(a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security.  
(b) Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes".<sup>51</sup>

Moreover, "the Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958,<sup>52</sup> of the products to which the provisions of paragraph 1(b) apply".<sup>53</sup> A loose procedure, involving Commission oversight and direct *in camera* review by the CJEU, exists to correct abusive use of these provisions.<sup>54</sup> This procedure was invoked only once for an alleged infringement of Article 347 TFEU (ex Article 297 TEC) to which this procedure also applies, and this case was later struck from the CJEU.<sup>55</sup>

There have not been any CJEU ruling related to Article 269(1)(a), and its actual scope is still relatively unclear, even though it does not seem limited by the 1958 list.<sup>56</sup>

The 1958 list, although never officially published, but widely available,<sup>57</sup> generally covers all 'warlike' or 'hard' defence materiel, but remains very general, thereby

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<sup>49</sup> Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, above, p.267.

<sup>50</sup> Aalto E., 'Interpretations of Article 296', in Keohane D. (Ed.), *Toward a European Defence Market*, Chaillot Paper n° 113 (EU Institute for Security Studies: 2008), pp.13-49, at 16.

<sup>51</sup> Note the probable confusion between 'material' and 'materiel'. A similarly worded exclusion can be found in the WTO Government Procurement Agreement: see Uruguay Round of Multilateral Trade Negotiations (1986-1994) – Annex 4 – Agreement on Government Procurement (W.T.O.), OJ 1994 L 336/273 (GPA 1994), Article XXIII, but its actual scope is yet unclear and might be different from the Article 346 TFEU exemption.

<sup>52</sup> Council Decision 255/58 of 15 April 1958 defining the list of products (arms, munitions and war material) to which the provisions of Article 346(1)(b) TFEU (ex Article Article 296(1)(b) TEC and formerly Article 223(1)(b)) apply (not published).

<sup>53</sup> TFEU, above, Article 346(2) (ex Article 296(2) TEC).

<sup>54</sup> TFEU, above, Article 348 (ex Article 298 TEC).

<sup>55</sup> Case C-120/94, *Commission v. Greece*, [1996] ECR I-1513; see Eikenberg K., 'Article 296 (ex 223) EC and External Trade in Strategic Goods' (2000) 25 EL Rev 116, p.123.

<sup>56</sup> Aalto, 'Interpretations of Article 296', above, pp.13-49, at 17.

<sup>57</sup> Trybus, *European Defence Procurement Law*, above, pp.14-15; Eikenberg, above, p.129; The list was most recently published in Trybus M., 'The List of Hard Defence Products under Article 296 EC' (2003) 12(3) *Public Procurement Law Review* NA15; Written Question E-1324/01 by Bart Staes (Verts/ALE) to the Council, OJ 2001 C 364E/85.

allowing diverging interpretations.<sup>58</sup> Despite broadly abusive uses of the Article by the EU Member States,<sup>59</sup> the list was never amended, making it somewhat obsolete in the eyes of some commentators,<sup>60</sup> even though some others consider it sufficiently broad to be still up-to-date.<sup>61</sup>

Article 346 TFEU (ex Article 296 TEC) deals with clearly defined and exceptional cases and does not lend itself to any wide interpretation.<sup>62</sup> Moreover, it does not create a general or automatic exemption,<sup>63</sup> and a Member State seeking to rely on Article 346 TFEU (ex Article 296 TEC) must provide evidence that it does not go beyond the limits of what is necessary for the protection of the essential interests of its security,<sup>64</sup> but the exemption then has a general effect affecting all the TFEU provisions.<sup>65</sup> Member States invoking Article 346 TFEU (ex Article 296 TEC) do not have to notify the Commission in advance of their intention to use the exemption.<sup>66</sup>

Member States have, depending on the circumstances, a certain degree of discretion when adopting measures which they consider necessary to guarantee public security but, in the circumstances of the case, the measures taken must in fact have the purpose of guaranteeing public security and be appropriate and necessary to achieve that aim.<sup>67</sup> However, it is not clear what degree of discretion the Member States have in using the exemption, and what test has to be applied for the review of their decision.<sup>68</sup> Many such tests have been proposed.<sup>69</sup>

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<sup>58</sup> Trybus, *European Defence Procurement Law*, above, p.94; Eikenberg, above, p.129: this raises problems of legal certainty.

<sup>59</sup> COM(96) 10, above, §3.1.1, p.14; COM(2005) 626, above, §II 3; Schmitt B. (Ed.), 'European Armaments Cooperation - Core Documents', Chaillot Paper No 59 (2003, EU Institute for Security Study), p.10; Schmitt, *The European Union and Armaments*, above, p.9; Michel J. and Rivière J., rapporteurs, *Rapport d'information sur les nouveaux défis de la construction de l'Europe de la défense*, Commission de la Défense Nationale et des Forces Armées, French National Assembly, N° 2531, 2005, pp.41-42; Mezzadri, *L'ouverture des Marchés de la Défense*, above, §I.1.2.

<sup>60</sup> Eikenberg, above, p.128; Schmitt, 'European Armaments Cooperation - Core Documents', above, p.10; COM(2005) 626, above, §II 3; Van Eekelen, *The Parliamentary Dimension of Defence Procurement*, above, pp.6-7; Georgopoulos, *European Defence Procurement Integration*, above, p.54.

<sup>61</sup> Trybus, *European Union Law and Defence Integration*, above, p.147.

<sup>62</sup> Case C-414/97, *Commission v Spain*, [1999] ECR I-5585, [21]; Case 222/84 *Johnston*, above, [26].

<sup>63</sup> Case 222/84 *Johnston*, above, [26]; Case C-273/97 *Sirdar*, above, [16]; Case C-285/98 *Kreil*, above, [16]; see also Rapp B., *Defence Procurement and Internal Market* (Institut für Strategie- Politik- Sicherheits- und Wirtschaftsberatung, no date).

<sup>64</sup> Case C-337/05 *Agusta Helicopters*, above, [44]; Case C-157/06, *Commission v Italy*, judgement of 2 October 2008, nyr, [23]; Case C-414/97 *Commission v Spain*, above, [22]; for an analysis of the case, see Trybus M., 'The Recent Judgment in *Commission v. Spain* and the Procurement of Hard Defence Material' (2000) 9(4) *Public Procurement Law Review* NA99 and Trybus M., 'Case Comment: On the Application of the EC Treaty to Armaments' (2000) 25 *EL Rev* 663; Mezzadri, *L'ouverture des Marchés de la Défense*, above, p.8; this position has been criticised for lack of legal grounds in Bratanova E., *Legal Limits of the National Defence Privilege in European Union*, Paper 34 (Bonn Internationalo Center for Conversion: 2003), p.19.

<sup>65</sup> Case T-26/01, *Fiocchi munizioni SpA v Commission*, [2003] ECR II-3951, [58]-[59].

<sup>66</sup> Case T-26/01, *Fiocchi Munizioni*, above, [59]; Commission Decision 1999/763/EC of 17/03/1999 on the measures, implemented and proposed, by the Federal State of Bremen, Germany, in favour of Lürssen Maritime Beteiligungen GmbH & Co. KG, O.J. 1999 L301/8; COM(2006)779; COM(2006) 779, above, §6.

<sup>67</sup> Case C-273/97 *Sirdar*, above, [27]-[28]; Case C-285/98 *Kreil*, above, [24]-[25].

<sup>68</sup> Arrowsmith S., *The Law of Public and Utilities Procurement*, (2<sup>nd</sup> Ed) (2005, London: Sweet and Maxwell), pp.241-242; Aalto, 'Interpretations of Article 296', above, pp.13-49, at 21-23.

<sup>69</sup> Trybus, 'Case Comment: On the Application of the EC Treaty to Armaments', above, pp.666-667; Georgopoulos A., 'Defence Procurement and EU Law' (2005) 30 *European Law Review* 559, p.569; Koutrakos P., *Trade, Foreign Policy and Defence in EU Constitutional*

The Article 346 TFEU (ex Article 296 TEC) exemption cannot apply to activities relating to products that are not included in the 1958 list, and are not intended for specifically military purposes,<sup>70</sup> but most commentators consider that it can probably be applied not only to the actual procurement of the products, but also to services contracts related to their use, such as maintenance.<sup>71</sup>

The fact that a good is dual-use is, on its own, no justification for Article 346 TFEU (ex Article 296 TEC) to apply: the exemption may not be invoked for the procurement of equipment the use of which for military purposes is hardly certain or only a possibility, or when the equipment is procured for the military, but for the purpose of civilian use.<sup>72</sup> This does not seem to entirely exclude dual-use goods from application of the exemption, but requires that the common market for their civilian applications not be affected by the use of the exemption. This reasoning seems to show that indirect civil offsets could not be justified on the basis of Article 346 TFEU (ex Article 296 TEC). Still, there remains some uncertainty about the use of the exemption for the procurement of dual-use goods.<sup>73</sup> This issue is especially significant, as a growing number of defence-related technologies, components and services now have both military and civilian applications.<sup>74</sup>

Because of the many uncertainties concerning the use of the Article 346 TFEU (ex Article 296 TEC) exemption, the Commission produced an interpretative communication on its application to defence procurement.<sup>75</sup> Of course, such communication is not legally binding,<sup>76</sup> but could be a good indication of the position of the Commission in future actions against EU Member States for breach of EU law.

The Commission clarified that, in its view, the 1958 list is sufficiently generic to cover new technology, but that the Article 346(1)(b) TFEU (ex Article 296(1)(b) TEC) exemption could only apply to equipment developed and procured specifically

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*Law*, (2001, Oxford: Hart Publishing), p.191 – However, this test might be invalidated by the CJEU ruling in Case C-414/97 *Commission v Spain*, above; Eikenberg, above, p.124; COM(2006) 779, above.

<sup>70</sup> Case C-337/05 *Agusta Helicopters*, above, [47]; Case C-157/06 *Commission v Italy*, above, [26]; Case T-26/01 *Fiocchi munizioni*, above, [61]-[62].

<sup>71</sup> Arrowsmith, *The Law of Public and Utilities Procurement*, above, p.245; European Commission, *Public Procurement in the European Union – Guide to the Community Rules on Public Procurement of Services other than in the Water, Energy, Transport and Telecommunications Sectors (Directive 92/50/EEC)* (European Commission: 1995), §2.3.1; Commission Decision 1999/374/EC of 28 October 1998 on aid granted by Germany to Neptun Industrie Rostock GmbH, OJ 1999 L 144/21, p.29; Commission State aid Case No N191/2002 – United Kingdom – DERA – Public Private Partnership, C(2002) 1799, 7 May 2002, [4] and [21].

<sup>72</sup> Case C-337/05 *Agusta Helicopters*, above, [45]-[48]: see Heuninckx B., 'A Note on Case Commission v Italy', above, at NA189; Aalto, 'Interpretations of Article 296', above, pp.41-42; Case C-157/06 *Commission v Italy*, above, [26]-[28].

<sup>73</sup> Heuninckx, 'A Note on Case Commission v Italy', above; Arrowsmith, *The Law of Public and Utilities Procurement*, above, pp.243-244; Eikenberg, above, p.125; for arguments that Article 346 TFEU (ex Article 296 TEC) cannot be invoked for dual-use goods, see Georgopoulos, *European Defence Procurement Integration*, above, p.84, and Trybus M., 'Procurement for the Armed Forces: Balancing Security and the Internal Market' (2002) 27 *European Law Review* 692, p.695.

<sup>74</sup> COM(96) 10, above, §2.1.1; Flournoy, Smith et.al., *European Defense Integration*, above, pp.73 et.seq.; Creasey P. and May S., 'The Political and Economic Background', in Creasey and May, *The European Armaments Market and Procurement Cooperation*, above, p.17.

<sup>75</sup> COM(2006) 779, above; see also Schmitt, *Defence Procurement in the European Union – The Current Debate*, above, p.17 et.seq., for a analysis of the potential impact of such interpretative communication.

<sup>76</sup> See further Aalto, 'Interpretations of Article 296', above, pp.27 et.seq.

for military security needs. On the other hand, Article 346(1)(a) TFEU (ex Article 296(1)(a) TEC) may be invoked in relation to dual-use goods or goods to be used for non-military security purpose.<sup>77</sup>

According to the Commission, Article 346 TFEU (ex Article 296 TEC) does not provide an automatic exemption, and can only apply to measures *necessary* to protect *essential* interests of the *security* of the Member States, considered from a European perspective, and not those taken to protect non-essential or general economic interests. Under this view, indirect offsets could not be exempted.<sup>78</sup> The Commission defined a four-part test to be applied case-by-case in order to validly invoke the Article 346(1)(b) TFEU (ex Article 296(1)(b) TEC) exemption.<sup>79</sup>

The Commission confirmed that the definition of the security interests of the Member States was their prerogative, but stated that it reserved the right to investigate in confidence uses of the exemption. Within the scope of these investigations, the Member States would be required to provide the Commission with evidence when requested.<sup>80</sup>

### 9.2.3.2 The Article 347 TFEU (ex Article 297 TEC) Exemption

Another generic exemption from the TFEU as a whole is Article 347 TFEU (ex Article 297 TEC), which deals with situations of serious internal disturbances, war, or threat of war. That Article states:

“Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security”.

The same procedure of oversight as for Article 346 TFEU (ex Article 296 TEC) applies to Article 347 TFEU (ex Article 297 TEC).<sup>81</sup> It is worth noting that this exemption includes an obligation of consultation between the EU Member States.

As other security exemptions, this Article deals with clearly defined and exceptional cases and does not lend itself to any wide interpretation.<sup>82</sup> It seems that Article 347 TFEU (ex Article 297 TEC) could not be invoked unless extreme conditions are present, such as serious internal disturbances making judicial review impossible, or if measures needed to protect public security would be deprived of their effectiveness because of such review by the national courts.<sup>83</sup> A mere reference to the requirements of defence of the national territory, where the situation of the Member State concerned does not fall within the scope Article 347 TFEU (ex Article

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<sup>77</sup> COM(2006) 779, above, §3.

<sup>78</sup> COM(2006) 779, above, §4.

<sup>79</sup> COM(2006) 779, above, §5: (1) Which essential security interest is concerned?, (2) What is the connection between this security interest and the specific procurement decision?, (3) Why is the non-application of the Public Procurement Directive in this specific case necessary for the protection of this essential security interest?, (4) Does the use of the exemption adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes?

<sup>80</sup> COM(2006) 779, above, §6.

<sup>81</sup> TFEU, above, Article 347 (ex Article 297 TEC).

<sup>82</sup> Case C-13/68, *SpA Salgoil v Italian Ministry of Foreign Trade*, [1968] ECR 453; Case 222/84 *Johnston*, above, [26].

<sup>83</sup> Case 222/84 *Johnston*, above, [60].

297 TEC), cannot suffice to justify discrimination on grounds of nationality.<sup>84</sup> It has been argued that the CJEU would scrutinise with less intensity the use of this exemption than for other exemptions, even though the scope of application of Article 347 TFEU (ex Article 297 TEC) remains very narrow.<sup>85</sup>

The only case in which this exemption was to be substantially discussed was struck from the CJEU before a judgement was rendered.<sup>86</sup> The exemption could potentially be used in public procurement to impose sanctions on third countries.<sup>87</sup>

#### 9.2.4 Exemptions from Specific Parts of the TFEU

The TFEU also includes exemptions from the applicability of some of its specific parts on grounds of public security. These exemptions could also potentially be used within the scope of defence procurement, especially as some of the public procurement principles identified by the CJEU as flowing from the TFEU emanate from these parts.

Within the provisions dealing with the free movement of goods, Article 36 TFEU (ex Article 30 TEC) provides in relevant part:

“The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [...] public security [...]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

Whilst for what concerns the right of establishment and freedom to provide services, Article 52 TFEU (ex Article 46(1) TEC) and Article 62 TFEU (ex Article 55 TEC) provide in relevant part:

“The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of [...] public security [...].”

We have seen above that Article 346 TFEU (ex Article 296 TEC) cannot apply to activities relating to products that are not listed in the 1958 list, and are not intended for specifically military purposes.<sup>88</sup> Therefore, when contracting authorities in the field of defence wish to use an TFEU exemption to justify the procurement of civil products or related services outside of the framework of EU law, they would have to rely on Article 36, 52(1) or 62 TFEU (ex Article 30, 46(1) or 55 TEC).

As for Articles 346 and 347 TFEU (ex Articles 296 and 297 TEC), these exemptions deal with clearly defined and exceptional cases that do not lend themselves to any wide interpretation and do not create general or automatic exemptions,<sup>89</sup> even though Member States have a degree of discretion when adopting the relevant

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<sup>84</sup> Case C-423/98 *Albore*, above, [21]-[23].

<sup>85</sup> Trybus, *European Union Law and Defence Integration*, above, p.194-195.

<sup>86</sup> Case C-120/94 *Commission v. Greece*, above; Case C-120/94R *Commission v. Greece*, [1994] ECR I-3037.

<sup>87</sup> Arrowsmith S., *The Law of Public and Utilities Procurement*, above, p.247.

<sup>88</sup> Case C-337/05 *Agusta Helicopters*, above, [47]; Case T-26/01 *Fiocchi munizioni*, above, [61]-[62].

<sup>89</sup> Case 222/84 *Johnston*, above, [26]; Case C-273/97 *Sirdar*, above, [16]; Case C-285/98 *Kreil*, above, [16]; Case C-13/68 *Salgoil*, above.

measures.<sup>90</sup> The purpose of these exemptions is not to reserve certain matters to the exclusive jurisdiction of the EU Member States, but only to allow national legislation to derogate from the principles of the free movement to the extent this is and remains justified to achieve public security.<sup>91</sup> They will not apply, however, in situations where all the facts are confined within a single Member State and do not have any connecting link with one of the situations envisaged by EU law.<sup>92</sup>

Public security derogations may in some cases be implemented by economic means, including the award of strategic contracts, but have to meet a three-part proportionality test: the measure must be justified by objective circumstances corresponding to the needs of public security, the measure may not restrict intra-Community trade more than is absolutely necessary, and no other measure, less restrictive to the free movement principles concerned, must be capable of achieving the same objective.<sup>93</sup> This probably allows using the exemptions to preserve strategic domestic industries, but not to promote domestic industry in general, such as to preserve employment or facilitate regional development.<sup>94</sup>

Recourse to these exemptions is no longer justified if existing EU rules already provide for the necessary measures to ensure protection of the interests set out in these Articles.<sup>95</sup> In addition, they cannot be relied on to justify rules or practices which, even though they are beneficial, aim at lightening the administration's burden or reducing public expenditure, unless these would clearly exceed the limits of what can reasonably be required.<sup>96</sup> Also, they may not be used to justify restricting access to confidential data to national firms, as there are less restrictive measures for ensuring data confidentiality.<sup>97</sup>

Even though it has been argued that the applicability of these public security exemptions is likely to be factually limited,<sup>98</sup> it seems that the CJEU allows the EU Member States a greater margin of discretion when these exemptions are invoked in relation with defence procurement.<sup>99</sup>

In addition, within the scope of the right of establishment and freedom to provide services, Articles 51 and 62 TFEU (ex Articles 45 and 55 TEC) provide in relevant part:

"The provisions of this Chapter shall not apply [...] to activities which in [an EU Member State,] are connected, even occasionally, with the exercise of official authority."

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<sup>90</sup> Case C-83/94 *Leifer*, above, [35]; Case C-273/97 *Sirdar*, above, [27]; Case C-285/98 *Kreil*, above, [24].

<sup>91</sup> Case 153/78, *Commission v Germany*, [1979] ECR 2555; Case 72/83, *Campus Oil Limited and others v Minister for Industry and Energy and others*, [1994] ECR 2727, [32]; Case C-367/89, *Richardt*, above, [19].

<sup>92</sup> Case C-108/98, *RI.SAN. Srl v Comune di Ischia, Italia Lavoro SpA and Ischia Ambiente SpA*, [1999] ECR I-5219, [23].

<sup>93</sup> Case 72/83 *Campus Oil*, above, [35] et seq.; Case C-347/88, *Commission v Greece*, [1990] ECR I-4747; Case C-367/89 *Richardt*, above, [21]; See further Craig P. and De Burca G., *EU Law: Text, Cases and Materials*, 3<sup>rd</sup> Ed. (Oxford University Press: 2003), pp.630-631.

<sup>94</sup> Arrowsmith S., *The Law of Public and Utilities Procurement*, above, pages 202-204.

<sup>95</sup> Case 72/83 *Campus Oil*, above, [27]; Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, [1997] ECR I-81, [46].

<sup>96</sup> Case 104/75, *Adriaan de Peijper, Managing Director of Centrafarm BV*, [1976] ECR 613, [18].

<sup>97</sup> Case C-3/88, *Commission v Italy*, [1989] ECR 4035 (*data processing*), [11] and [15].

<sup>98</sup> Craig and De Búrca, *EU Law, Text, Cases and Materials*, above, p.631.

<sup>99</sup> Arrowsmith S., *The Law of Public and Utilities Procurement*, above, p.203, on the basis of Case C-367/89 *Richardt*, above.

This exemption could be important in defence procurement, considering the growing trend in outsourcing maintenance and support activities of military equipment. However, the exemption must be restricted to activities which involve a direct and specific connection with the exercise of official authority and does not apply to activities of a 'technical' nature.<sup>100</sup> It cannot be extended to a whole profession if that profession also performs activities that do not fall within the exemption, when they are separable from those connected with the exercise of official authority.<sup>101</sup> This exemption has been interpreted narrowly by the CJEU, and is likely limited to judicial and legislative authority, as well as police powers and high-level policy decision.<sup>102</sup>

Therefore, we can see that the exemptions from specific parts of the TFEU not only have to be specifically invoked, but also are interpreted narrowly, are subject to a well-defined rule of proportionality, and to the judicial review of the CJEU through the usual TFEU procedures.<sup>103</sup> Even though they can still be used to deviate from the TFEU provisions for defence procurement, it would probably be more difficult for the EU Member States to justify using these exemptions than Article 346 TFEU (ex Article 296 TEC). However, for public contracts not related to products on the 1958 list, they would constitute the only way for EU Member States to avoid their obligation to award these contracts in accordance with EU law.

## **9.3 Defence Procurement and the Public Procurement Directives**

### **9.3.1 Applicability of the Public Sector Directive**

#### **9.3.1.1 General Principles**

When the Public Procurement Directives apply to a specific procurement activity, the consequences for the practitioner are significant indeed, as he or she would have to comply with the prescribed rules on advertising, technical specifications, selection and award procedures, and remedies. We will now turn to the question of the applicability of the Public Procurement Directives to defence procurement.

The Public Sector Directive applies only to procurement activities performed by contracting authorities,<sup>104</sup> which include the Ministries of Defence and related defence procurement agencies of the EU Member States.<sup>105</sup> Moreover, the Directive is specifically said to apply to public contracts awarded by contracting authorities in the field of defence, subject to Article 346 TFEU (ex Article 296 TEC),<sup>106</sup> and as long as the Defence and Security Procurement Directive discussed in the next section does not apply.<sup>107</sup> Most seem now to agree that the directive applies automatically

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<sup>100</sup> Case 2/74, *Reyners v Belgium*, [1974] ECR 631, [45]; Case C-3/88 *Data Processing*, above, [13]; Case C-272/91, *Commission v Italy*, [1994] ECR I-1409 (*Lottomatica*), [6]-[13]

<sup>101</sup> Case 2/74 *Reyners*, above, [46]-[55].

<sup>102</sup> Craig and De Búrca, *EU Law, Text, Cases and Materials*, above, pp.769-771; Arrowsmith, *The Law of Public and Utilities Procurement*, above, p.215.

<sup>103</sup> Trybus, *European Union Law and Defence Integration*, above, p.139.

<sup>104</sup> Directive 2004/18/EC, above, Article 1(2)(a): a public contract, to which the Directive applies, is a contract concluded by a contracting authority.

<sup>105</sup> Listed amongst the central government entities of each EC Member State in Directive 2004/18/EC, above, Annex IV.

<sup>106</sup> Directive 2004/18/EC, above, Article 10.

<sup>107</sup> Directive 2009/81/EC of the European Parliament and of the Council on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ 2009 L 216/76, Article 71.

as long as an exemption does not apply,<sup>108</sup> and such exemption would have to be invoked on a case-by-case basis.

However, some EU Member States still maintain publicly-owned depots for the maintenance of their military equipments. It is therefore worth noting that the Public Sector Directive will not apply to agreements concluded within the same contracting authority ('in-house' contracts),<sup>109</sup> although it will apply to contracts with other public authorities or public bodies.<sup>110</sup>

### 9.3.1.2 Thresholds

The Public Sector Directive only applies to contracts of an estimated value above a certain threshold.<sup>111</sup> A lower threshold (€125,000) has to be applied to public supply and service contracts awarded by central government authorities,<sup>112</sup> but for contracting authorities in the field of defence, this lower threshold only applies to contracts involving 'dual-use' products specifically listed in the Directive.<sup>113</sup> For other contracts awarded by contracting authorities in the field of defence, the higher threshold (€193,000) would apply.

The reason for that distinction is that dual use items are covered by the WTO Government Procurement Agreement (GPA), and that their procurement has therefore to comply with the lower threshold defined in that agreement,<sup>114</sup> whilst other defence materiel is generally exempt from complying with the GPA.<sup>115</sup>

### 9.3.1.3 Security Exemption

Additionally, a number of exemptions from the applicability of the Public Sector Directive, may have specific relevance to defence procurement. If one of such exemption can be invoked, the contracting authority would not have to comply with the Public Sector Directive, even though it would still have to comply with the principles flowing from the TFEU. In addition, the list of exclusions of the Directive is exhaustive and has to be interpreted restrictively.<sup>116</sup>

First of all, the Directive will not apply to:

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<sup>108</sup> See the position of all the parties as summarised in Case C-337/05, *Commission v Italy (Agusta Helicopters)*, Avocate General's opinion of 10 July 2007: none of them questioned that the Public Supply Directive would apply to defence procurement and developed their arguments only on the basis of exemptions.

<sup>109</sup> Case C-360/96, *Gemeente Arnhem and Gemeente Rheden v BFI Holding B.V.*, [1998] ECR I-6821; Case C-107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*, [1999] ECR I-8121, [49]-[50]; Case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-1, [48].

<sup>110</sup> Case C-107/98 *Teckal*, above; Case C-26/03 *Stadt Halle*, above, [47]; Case C-84/03 *Commission v Spain*, [2005] ECR I-139, [40].

<sup>111</sup> Directive 2004/18/EC, above, Article 7.

<sup>112</sup> Directive 2004/18/EC, above, Article 7(a); The list of central government authorities can be found in Annex IV of the Directive.

<sup>113</sup> Directive 2004/18/EC, above, Annex V.

<sup>114</sup> GPA 1994, above, Article I(4) and Appendix I.

<sup>115</sup> Trepte P., 'Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation' (2004, Oxford: OUP), page 33; GPA 1994, above, Article XXIII(1).

<sup>116</sup> Case C-3/88 *Data Processing*, above, [23]-[24]; Case C-71/92, *Commission v Spain*, [1993] ECR I-5923, [7]-[18], and especially [10], and [22]; Case C-328/92, *Commission v Spain*, [1994] ECR I-1569, [15].

“[P]ublic contracts when they are declared to be secret, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the essential interests of that Member State so requires.”<sup>117</sup>

The concept of security classification is more multifaceted than usually assumed by the layman. Not all classified documents or information are ‘secret’. Four distinct security classification levels are recognised by EU and NATO Member States (in decreasing order of classification): ‘top secret’, ‘secret’, ‘confidential’ and ‘restricted’.<sup>118</sup> Each security classification level requires specific security measures that have to be complied with to ensure the protection of the classified equipment, documents or information.<sup>119</sup>

It is important to note the distinction between the first two parts of this exemption. Even if the performance of the contract requires adherence to specific security measures because of the security classification level of the equipment or information to be handled by the contractor, it does not automatically follow that the contract itself will have the same classification level. Very often, the contracts themselves are ‘unclassified’, unless their contents are actually classified (e.g. equipment specifications or quantities ordered). This single article of the Directive therefore merges three different exemptions: a ‘contract secrecy exemption’, a ‘security measures’ exemption, and an ‘essential interests’ exemption, each to be analysed separately.

Considering the explanations provided above on security classification levels, the application of the ‘contract secrecy’ exemption should be quite straightforward: either the contract is classified at the ‘secret’ level in line with applicable law or regulations, or it is not. It could apply in cases not covered by Article 346(1)(a) TFEU (ex Article 296(1)(a) TEC).<sup>120</sup> It has been argued that the exemption could also potentially cover commercial secrets that have to be protected from competitors.<sup>121</sup> It could apply to some public contracts to which Article 346 TFEU (ex Article 296 TEC) could not apply because they are unrelated to products on the 1958 list, but must be classified as ‘secret’, for instance contracts for intelligence gathering or to build a nuclear shelter.

On the other hand, the scope of the ‘security measures’ exemption is open to debate. The CJEU in one case applied some form of proportionality test to the use of the exemption for the procurement of medicines,<sup>122</sup> but in another applied very little scrutiny in ruling that the exclusion would apply when the contractor had to be in possession of a military security certificate and meet stringent security requirements in subsequent operations.<sup>123</sup> It has been argued that this apparent contradiction had to be interpreted as meaning that, when the case concerns military security, the EU Member States would have significant discretion to decide

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<sup>117</sup> Directive 2004/18/EC, above, Article 14.

<sup>118</sup> For more on security classification, refer to Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations, OJ 2001 L 101/1, as amended, especially its Annex, Part II, §II, and Appendix 2.

<sup>119</sup> See Council Decision 2001/264/EC, above, Part II, §IV.

<sup>120</sup> Trybus, *European Union Law and Defence Integration*, above, p.214.

<sup>121</sup> Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.91.

<sup>122</sup> Case C-324/93, *The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd*, [1995] ECR I-563, [49]; see Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.92.

<sup>123</sup> Case C-252/01, *Commission v Belgium*, [2003] ECR I-11859.

on which means are required for achieving the level of security required.<sup>124</sup> However, it is more likely that the difference rests in the fact that, in the first case, contrary to the second case, the Member State did not provide a clear explanation as to why the exemption had to be invoked, and what security measures were concerned.<sup>125</sup> If an EU Member State wishes to use that exemption, it must state the reasons why the confidentiality of the information to be provided to the contractor justifies the non-application of the Directive.<sup>126</sup>

The exemption cannot be used to justify the award of contracts outside the scope of the Directive if less restrictive or disproportionate means could preserve the confidentiality of the information to be provided under the contract and still allow the use of competitive tendering,<sup>127</sup> such as requiring all tenderers to apply specific security measures under strict supervision.

The exemption related to the protection of the 'essential interests' of a Member State probably applies as the TFEU exemptions discussed above,<sup>128</sup> even though it does not seem to refer only to interests related to public security. This exemption is interpreted strictly by the CJEU,<sup>129</sup> but would allow an EU Member State to avoid applying the Public Sector Directive altogether in cases when Article 346(1)(a) TFEU (ex Article 296(1)(a) TEC) would apply, thereby resolving the dilemma on how a contracting authority could apply the Directive while at the same time not disclosing information that could compromise the essential security interests of its Member State. It has been argued that this exemption might be used to preserve a certain strategic industrial capacity in civil or dual-use goods or services, but that it would have to be subject to a strict proportionality test.<sup>130</sup>

#### 9.3.1.4 International Rules Exemptions

Second, the Directive does not apply to public contracts governed by different procedural rules and awarded<sup>131</sup>:

- “(a) Pursuant to an international agreement concluded in conformity with the [EU] Treaty between a Member State and one or more third countries and covering supplies or works intended for the joint implementation or exploitation of a work by the signatory States or services intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission [...];
- (b) Pursuant to a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;
- (c) Pursuant to the particular procedure of an international organization.”

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<sup>124</sup> Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.93, on the basis of the AG's opinion.

<sup>125</sup> As explained in more details in Heuninckx, 'A Note on Case *Commission v Italy*', above, pp.NA191-NA192.

<sup>126</sup> Case C-337/05 *Agusta Helicopters*, above, [51]; Case C-157/06 *Commission v Italy*, above, [32]-[33].

<sup>127</sup> Case C-337/05 *Agusta Helicopters*, above, [52]-[53]; see Heuninckx, 'A Note on Case *Commission v Italy*', above; Case C-157/06 *Commission v Italy*, above, [30]-[31].

<sup>128</sup> Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.94.

<sup>129</sup> Case C-3/88 *Data Processing*, [23]-[24]; Case C-324/93, *Evans*, above, [49].

<sup>130</sup> Trybus, *European Union Law and Defence Integration*, above, p.219-221; Trybus, 'Procurement for the Armed Forces', above, pp.707-708.

<sup>131</sup> Directive 2004/18/EC, above, Article 15.

The first of these exemptions can be relevant to defence procurement because a number of international agreements are routinely signed between States in the field of defence, for instance within the scope of the Foreign Military Sales (FMS) with the United States government,<sup>132</sup> or in the form of Memorandums of Understanding (MOU).<sup>133</sup> Unfortunately, a number of issues remain unresolved with this exemptions, but it is clear that it may be invoked only in two cases:

- For supplies or work procured for 'the joint implementation or exploitation of a work'. A work is a building or a project of civil engineering,<sup>134</sup> so that case refers only to construction (e.g. building a highway from Warsaw to Moscow).
- For services procured for 'the joint implementation or exploitation of a project'. The word 'project' is not defined in the Directive (it does not seem to refer only to construction), but it is clear that this case only applies to services. This would probably cover for instance architecture services for a new building, or the design and development of a new aircraft.

This means that the exemption may not be applied for the procurement of supplies that are not related to some construction work. For instance, the exemption could not apply if an EU Member State concludes an international agreement with the United States for the procurement of off-the-shelf fighter aircraft. Even if such procurement would include some design services, the exemption would probably not be applicable if their value was smaller than that of the supplies, or be only applicable to the development contract.<sup>135</sup> Considering this, it seems that the possible applicability of this exemption is fairly narrow, even though the utter lack of case-law on the subject makes it difficult to evaluate.<sup>136</sup>

The exemption related to international agreements for the stationing of troops was probably initially meant to refer to the Status of Forces Agreements (SOFA)<sup>137</sup> concluded to govern the stationing of forces in other countries, especially NATO forces, during the Cold War, but could also potentially apply to MOU concluded within the scope of peacekeeping operations. Unfortunately, no guidance exists on the use of this exemption.

The exemption related to the rules of international organisations is quite important to defence procurement, as collaborative defence procurement is currently usually performed by an international organisation acting as agent of the States participating in the programme.<sup>138</sup> Again, there is very little guidance on the actual

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<sup>132</sup> USA Defence and Security Cooperation Agency, *Security Assistance Management Manual*, DoD 5105.38-M, 3 October 2003.

<sup>133</sup> On MOU, see Aust A., *Modern Treaty Law and Practice* (2000, Cambridge: CUP), p.26 et.seq and Appendix G.

<sup>134</sup> Directive 2004/18/EC, above, Article 1(2)(b).

<sup>135</sup> See the rule in Directive 2004/18/EC, above, Article 1(2)(d)§2.

<sup>136</sup> See further Arrowsmith, *The Law of Public and Utilities Procurement*, above, §6.109.

<sup>137</sup> Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, London 19 June 1951 (NATO SOFA); Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA), OJ 2003 C 321/02.

<sup>138</sup> Maulny et.al., *Cooperative Lessons Learned*, above, pp.19-20; See the detailed organisation description in Covington T., Brendley K. and Chenoweth M., 'A Review of European Arms Collaboration and Prospects for its Expansion under the Independent European Programme Group', Note N-2638-ACQ (1987, RAND), pp.30 et.seq.; Creasey, 'The Options and Prospects for Defence Procurement Collaboration', above, p.186.

scope of this exemption. Some commentators consider that the exemption should be interpreted as covering all international organisations, including those of which only EU Member States are members,<sup>139</sup> but there is a contrary view that the exemption should only apply to international organisations of which non-EU Member States are members, and that other international organisations should be considered as contracting authorities within the meaning of the Directives.<sup>140</sup> This issue has never been ruled on by the CJEU. The only possible indication is that the CJEU used the term 'international organisation' broadly in cases related to the free movement of workers<sup>141</sup> or competition law,<sup>142</sup> without distinction between those of which only EU Member States are members and those including other States. Moreover, even though it did not seem to take into account the international organisation exemption in its reasoning, the General Court (formerly Court of First Instance) held that the purpose of the Public Sector Directive was to coordinate national laws, and that it was therefore not applicable to international bodies set-up by the EU institutions, which were not, just like other international organisation, subject to the public procurement law of the EU Member States.<sup>143</sup> In this ruling, the General Court (formerly Court of First Instance) seems to have identified another ground on which international organisations would not have to be subject to the Public Sector Directive.

### 9.3.2 The New Defence and Security Procurement Directive

During the recent debates on defence procurement, it became clear that many considered, because of the specificities of defence equipment, that the Public Sector Directive was unsuitable for the procurement of arms, munitions and war materiel and related services when the Article 346 TFEU (ex Article 296 TEC) exemption was not or could not be invoked, and that this led EU Member States to use the exemption in cases where it should not have been used.<sup>144</sup> Therefore, a specific Defence and Security Procurement Directive was adopted.<sup>145</sup>

<sup>139</sup> EU Institute for Security Studies, 'Contribution to the Consultation 'Green Paper on Defence Procurement', Answers and Comments made by the EU ISS Task Force on the establishment of a European Defence Equipment Market', 15 February 2005, p.9; United Kingdom Permanent Representation to the European Union, 'UK Government Response to the Commission Green Paper on Defence Procurement', 15 February 2005, p.7; COM (2004)608 DEF., Groenboek Overheidsopdrachten op Defensiegebied (Reactie Nederland), 2005, p.7; Heuninckx B., 'Defence Procurement in the EU: Time to Listen to the Wake-up Calls' (2006) 7(2) BLI 208.

<sup>140</sup> Trybus, 'Procurement for the Armed Forces', above, pp.709-711; Georgopoulos, *European Defence Procurement Integration*, above, p.92.

<sup>141</sup> Joined Cases 389/87 and 390/87, *GBC Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen*, [1989] ECR 723; Case C-310/91, *Hugo Schmid v Belgian State, represented by the Minister van Sociale Voorzorg*, [1993] ECR I-3011; Case C-411/98, *Angelo Ferlini v Centre hospitalier de Luxembourg*, [2000] ECR I-8081, especially [17].

<sup>142</sup> Case C-364/92, *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)*, [1994] ECR I-43; Case C-113/07 P, *SELEX Sistemi Integrati SpA v Commission and European Organisation for the Safety of Air Navigation (Eurocontrol)*, judgement of 26 March 2009, not yet reported.

<sup>143</sup> Case T-411/06, *Società generale lavori manutenzione appalti Srl. (Sogelma) v European Agency for Reconstruction (EAR)*, judgement of 8 October 2008, not yet reported, [115].

<sup>144</sup> Schmitt, *Defence Procurement in the European Union – The Current Debate*, above, pp.15-16; COM(2005)626, above; Press Release: Public procurement – New Commission initiatives on more open and efficient defence procurement, IP/05/1534, 6 December 2005; Michel and Rivière, *Rapport d'Information sur les nouveaux défis de la construction de l'Europe de la défense*, above, pp.42 et seq.; Briggs T., 'The New Defence Procurement Directive' (2009) 18(4) *Public Procurement Law Review* NA129, at NA130; Georgopoulos A., 'The European Commission proposal for the enactment of a Defence Procurement Directive' (2008) 17(3) *Public Procurement Law Review* NA81.

<sup>145</sup> Directive 2009/81/EC, above.

The Directive applies to contracts awarded for the supply of 'military equipment' (including their parts), works, supplies and services directly related to these equipment, and works and services for specifically military purposes, subject to Articles 36, 51, 52 and 346 TFEU (ex Articles 30, 45, 46, 55 and 296 TEC).<sup>146</sup> When the Defence and Security Procurement Directive applies, the Public Sector Directive and the Utilities Directive do not apply.<sup>147</sup>

Military equipment is further defined as equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war materiel.<sup>148</sup> This definition is to be 'understood' by reference to the 1958 list, which is to be interpreted 'broadly', 'for instance' on the basis of the Common Military List (which is a more detailed list of military equipment to which the EU Code of Conduct for arms exports, discussed below, applies), but also to cover products initially designed for civilian use and later adapted to military purposes.<sup>149</sup> This probably means that the Directive would apply to products to which the Article 346 TFEU (ex Article 296 TEC) could apply, but does not, either because the Member State decides not to invoke the exemption, or because the other conditions for invoking it are not met.

The Defence and Security Procurement Directive is very similar to the Public Sector Directive, but with a number of differences, some of them significant.

First, the threshold for the applicability of the Directive is €387,000 for supply and service contracts,<sup>150</sup> which is significantly higher than for the Public Sector Directive, but is the same as for the Utilities Directive.

Second, the exemptions from applicability of the Directives, although generally similar to those of the Public Sector Directive, are sometimes worded somewhat differently or even quite dissimilar.<sup>151</sup> Among those exemptions are, notably, contracts awarded by international organisation purchasing for their purposes, contracts for which the application of the Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security, contracts for the purpose of intelligence activities, contracts awarded in the framework of a cooperative programme based on research and development, contracts awarded in a third country when forces are deployed outside the territory of the EU, contracts awarded by a government to another government, and research and development contracts.

Third, the contracting authority may, or be required to, ask the successful tenderer to subcontract to third parties a share of the contract, up to 30% of the value of the contract.<sup>152</sup> This provision aims at ensuring that the benefits of defence

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<sup>146</sup> Directive 2009/81/EC, above, Article 2 – The Directive also applies to 'sensitive equipment' (defined as equipment for security purposes, involving, requiring and/or containing classified information) but this is outside the scope of this chapter; Directive 2009/81/EC, above, Recitals 15 and 16; Briggs, above, NA131.

<sup>147</sup> Directive 2009/81/EC, above, Article 71, amending Article 10 of Directive 2004/18/EC; Briggs, above, NA130.

<sup>148</sup> Directive 2009/81/EC, above, Article 1(6); Briggs, above, NA131.

<sup>149</sup> Directive 2009/81/EC, above, Recital 10; Common Military List of the European Union (equipment covered by the European Union Code of Conduct on Arms Exports), OJ 2006 C 66/1.

<sup>150</sup> Directive 2009/81/EC, above, Article 8 and Recital 14; Briggs, above, NA132.

<sup>151</sup> Directive 2009/81/EC, above, Articles 12 and 13; Briggs, above, NA132-NA133.

<sup>152</sup> Directive 2009/81/EC, above, Articles 21 and 50 to 53.

contracts are flowed down the supply chain, and in particular to small and medium enterprises (SME).<sup>153</sup>

Fourth, the Directive includes specific provisions on security of information and security of supply that set-out what can be required from a tenderer in that regard.<sup>154</sup>

Fifth, and probably most significantly, the contracts may be awarded through the use of the restricted procedure or of the negotiated procedure with publication of a contract notice, and in some cases of the competitive dialogue or of the negotiated procedure without publication of a notice (the latter may for instance be applied in cases of 'surges' in demand for operational reasons).<sup>155</sup> This means in practice that the default procedure for awarding contracts under the Directive will most likely be the negotiated procedure with publication. This would satisfy the requirement of more flexibility for defence contracts, but one could wonder why the competitive dialogue is still included among the possible procedures now that the negotiated procedure with publication may be used in all cases.

Sixth, the term of framework agreements concluded within the scope of the Directive may usually not exceed seven years, to be compared with four years for those concluded under the Public Sector Directive.<sup>156</sup>

Seventh, economic operators may be excluded from participating in a defence contract on additional grounds than the Public Sector Directive, such as when they have broken applicable laws on arms exports or on security of information.<sup>157</sup>

Lastly, the Directive includes specific provisions on remedies, which are generally similar to those of the Remedies Directive, as amended.<sup>158</sup>

It has been argued that the interpretative communication on the use of the Article 346 TFEU (ex Article 296 TEC) exemption would threaten the Member States with the 'stick' the Commission would use if invoking exemption was unwarranted, while the Defence Procurement Directive would provide a 'carrot' allowing the Member States to use more flexible procedures should they not invoke the exemption.<sup>159</sup> As the Defence and Security Procurement Directive has to be transposed in national law by the end of August 2011,<sup>160</sup> it remains to be seen how this 'stick and carrot' approach will work.

## **9.4 The EDA Intergovernmental Regime for Defence Procurement**

We have seen above that the Public Sector Directive would generally apply to procurement in the field of defence, but that it is not considered adequate for the

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<sup>153</sup> Directive 2009/81/EC, above, Recital 40.

<sup>154</sup> Directive 2009/81/EC, above, Articles 22 and 23 respectively; Briggs, above, NA133-NA134.

<sup>155</sup> Directive 2009/81/EC, above, Articles 25 to 28 and Recital 46; Briggs, above, NA135.

<sup>156</sup> Directive 2009/81/EC, above, Article 29 and Directive 2004/18/EC, above, Article 32(2); Briggs, above, NA135.

<sup>157</sup> Directive 2009/81/EC, above, Article 39; Briggs, above, NA134-NA135.

<sup>158</sup> Directive 2009/81/EC, above, Articles 55 to 64.

<sup>159</sup> Georgopoulos A., 'Commission's Communication on the Results of the Consultation Process on European Defence Procurement', 15(4) *Public Procurement Law Review* NA119, 2006; see also Schmitt, *The European Union and Armaments*, above, pp.55 et.seq., who clearly anticipated the Commission's action plan.

<sup>160</sup> Directive 2009/81/EC, above, Article 72.

procurement of complex military equipment such as those to which the Article 346 TFEU (ex Article 296 TEC) exemption could apply. For this defence materiel, a specific Defence Procurement Directive has been approved. Even when an exemption from the applicability of these directives applies, the procurement principles flowing from the TFEU would still apply. However, if a TFEU exemption, in particular Article 346 TFEU (ex Article 296 TEC), is validly invoked for a specific defence procurement contract, none of the EU law provisions would apply.

Studies have shown that more than 50% of equipment procurement in the EU was performed outside the framework of the Public Sector Directive because of the Article 346 TFEU (ex Article 296 TEC) exemption.<sup>161</sup> Therefore, initiatives have been taken outside of the EU to attempt to increase the efficiency of the defence market in this case.

There had been talks for a long time of the creation of a European defence procurement agency that would centrally procure defence equipment for the benefit of the EU Member States.<sup>162</sup> However, when finally deciding on the issue, the Member States did not want to duplicate the numerous existing defence procurement agencies, and decided to create a European Defence Agency (EDA) with broader – but shallower – powers.<sup>163</sup>

The mission of the agency is to support the Council and the Member States in their effort to improve the EU defence capabilities in the field of crisis management and to sustain the ESDP.<sup>164</sup> To that end, its responsibilities cover capabilities development, armaments cooperation, defence industry strengthening, and research and technology.<sup>165</sup> All EU Member States, except Denmark, participate in the EDA<sup>166</sup> and are referred to as 'participating Member States' (pMS).

One of the concrete actions quite swiftly taken by the EDA has been the adoption of an intergovernmental voluntary and non-binding regime that aims to increase cross-border competition in the European defence equipment market for defence procurement activities to which the Article 346 TFEU (ex Article 296 TEC) exemption applies.<sup>167</sup> The participants to this regime are referred to as "subscribing

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<sup>161</sup> European Defence Agency Press Release, 'EU Governments Agree Voluntary Code for Cross-Border Competition in Defence Equipment Market', 21 November 2005; European Defence Agency Press Release, 'EDA Welcomes European Commission Move on Defence Procurement Rules', 6 December 2005.

<sup>162</sup> Declaration (No 31) on Western European Union Annexed to the Final Act of the Maastricht Treaty, OJ 1992 C 191/1, para 5; Cox A., 'The Future of European Defence Policy', above; Hayward, *Towards a European Weapons Procurement Process*, above; Cornu C., 'Fortress Europe – real or virtual?', in Schmitt B. (Ed.), *Between cooperation and competition: the transatlantic defence market*, Chaillot Paper No 44 (Institute for Security Studies: 2001), p.83, citing an initiative dating from 1978.

<sup>163</sup> Council Joint Action 2004/551/CFSP, above; see also European Convention, Final report of Working Group VIII – Defence, CONV 461/02, 16 December 2002, paras 64 and 65.

<sup>164</sup> Council Joint Action 2004/551/CFSP, above, Article 2.

<sup>165</sup> Council Joint Action 2004/551/CFSP, above, Article 5; see also Unisys study, *Intra-Community Transfers of Defence Products*, February 2005, § 3.2.5; Georgopoulos A., 'The New European Defence Agency: Major Development or Fig Leaf' (2005) 14(2) *Public Procurement Law Review* 103; Schmitt, *The European Union and Armaments*, above, pp.40 et.seq., actually submitted a blueprint for the work of a European Armaments, Research and Capability Agency (ARCA) that is eerily similar to the current structure and working of the EDA.

<sup>166</sup> Council Joint Action 2004/551/CFSP, above, Recital 21.

<sup>167</sup> See in particular Heuninckx, 'Towards a Coherent European Defence Procurement Regime?', above; Heuninckx B., 'The European Defence Agency Electronic Bulletin Board: A Survey after Two Years' (2009) 18(3) *Public Procurement Law Review* 43; Georgopoulos A., 'The European Defence Agency's Code of Conduct for Armament Acquisitions: A Case of Paramnesia?' (2006) 15(2) *Public Procurement Law Review* 55; Georgopoulos A., 'European

Member States" (SMS) and currently include all EDA participating Member States except Romania, as well as Norway.<sup>168</sup>

The main component of this regime is a Code of Conduct on defence procurement<sup>169</sup> that may be applied to all defence procurement opportunities of €1 million or more where the conditions for application of Article 346 TFEU (ex Article 296 TEC) are met, except for procurement of research and technology, collaborative procurement, procurement of nuclear weapons and nuclear propulsion systems, procurement of chemical, bacteriological and radiological goods and services, and procurement of cryptographic equipment.

The Code of Conduct does not define procurement rules in any details and is more a set of principles that the subscribing Member States should comply with. These principles are in fact quite similar to the procurement principles flowing from the TFEU, but it is important to note that the EDA regime authorises the use of offsets:

- It is voluntary and non-binding, and applies on a reciprocal basis;
- Suppliers from other subscribing Member States should be treated fairly and equally;
- Procurement should generally be performed through competitive procedures, except in cases of operational urgency, for supplementary work, or for extraordinary and compelling reasons of national security;
- Contract award may take into account costs, technical compliance, quality, security of supply and offsets;
- Subscribing Member States should provide mutual transparency on their use of the Code of Conduct and be mutually accountable ('institutionalised peer pressure');
- Subscribing Member States should provide each other mutual support to ensure security of supply;
- A complementary Code of Best Practice in the Supply Chain should be used to achieve mutual benefits, especially for SME.

As a complement to the Code of Conduct, the EDA approved a Code of Best Practice in the Supply Chain.<sup>170</sup> This Code is an integral part of the intergovernmental regime, is voluntary and complementary to national procedures and applies when the Code of Conduct does. It aims at increasing transparency and fair competition at the contract and sub-contract level. The Code of Best Practice promotes opportunities for qualified and competent suppliers, including SME, to participate in

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Defence Agency: The New Code of Best Practice in the Supply Chain' (2006) 15(5) *Public Procurement Law Review* NA145; European Defence Agency, *A guide to the EDA's new European Defence Equipment Market*, EDA, Brussels, 2007.

<sup>168</sup> European Defence Agency press release, 'Bulgaria Joins Code of Conduct for European Defence Equipment Market', 25 April 2008; European Defence Agency press release, 'EDA Agrees on Norway's Participation in Regime on Defence Procurement', 26 May 2008; Letter from the EDA Chairman SGS6/02751 dated 7 March 2006 and acceptance letter from the Norwegian Minister of Defence 2005/00445-5/FD IV 4/LWE dated 7 March 2006.

<sup>169</sup> EDA Steering Board Decision on an Intergovernmental Regime to Encourage Competition in the European Defence Equipment Market, November 21, 2005; European Defence Agency Press Release, 'EU Governments Agree Voluntary Code for Cross-Border Competition in Defence Equipment Market', 21 November 2005; The Code of Conduct on Defence Procurement of the EU Member States Participating in the European Defence Agency, 21 November 2005, found at <http://www.eda.eu.int/reference/eda/EDA%20-%20Code%20of%20Conduct%20-%20European%20Defence%20Equipment%20Market.htm> accessed on 25 November 2005; For a specific discussion of the Code of Conduct, see: Georgopoulos A., 'The European Defence Agency's Code of Conduct for Armament Acquisitions', above.

<sup>170</sup> EDA Steering Board Decision Approving the Code of Best Practice in the Supply Chain, May 15, 2006; for a discussion of the Code of Best Practices, see Georgopoulos A., 'European Defence Agency: The New Code of Best Practice in the Supply Chain', above.

competitions down the supply chain on a level playing-field when such competition would be appropriate. It includes subcontractor selection principles similar to those of the Code of Conduct, such as selection of the most economically advantageous bid, the use of best practices, and the monitoring of subcontracting opportunities through advertising.<sup>171</sup>

A framework arrangement on security of supply in circumstances of operational urgency was also approved by the EDA as another complement to the Code of Conduct.<sup>172</sup> Its provisions are generic, and are based on the principles of consultation and mutual support. It only covers 'short term' security of supply in case of operational emergency ('surge' in demand). In addition, the EDA decided that subscribing Member States would use the EU Council security regulations,<sup>173</sup> and agreed common minimum standards on industrial security.<sup>174</sup>

Finally, the EDA agreed a Code of Conduct on offsets that is also an integral part of the EDA regime.<sup>175</sup> This Code of Conduct aims to increase transparency in the use of offsets by requesting subscribing Member States to report their offset requirements to the EDA and make such requirements more explicit to the contractors, whilst still attempting to promote some competition in the use of offsets.

The EDA intergovernmental regime is supported by an Electronic Bulletin Board (EBB) where notices are published in a similar way as on the TED database for contracts awarded under the Directives, but where prime contractors may also publish subcontracting opportunities.<sup>176</sup> In the year following the entry into force of the regime, governments have advertised nearly 200 contract opportunities worth approximately €10 billion on the Electronic Bulletin Board.<sup>177</sup>

Despite the fact that the EDA intergovernmental regime can be seen as a positive development to increase transparency and the effectiveness of the EU defence equipment market, the fact that an EU Member State invokes Article 346 TFEU (ex Article 296 TEC) to protect its essential security interests, but nevertheless agrees to advertise the opportunity in the EBB and comply with the principles of the Code of Conduct, which are similar to those of the TFEU, seems inherently

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<sup>171</sup> The Code of Best Practice in the Supply Chain Approved by Aerospace and Defence industries Association on 27 April and agreed by the EU Member States Participating In The European Defence Agency, 15 May 2006, found at <http://www.eda.europa.eu/reference/eda/E.D.A.%20-%20Code%20of%20Best%20Practice%20in%20the%20Supply%20Chain%20-%20European%20Defence%20Equipment%20Market.htm>, accessed on 26 May 2006.

<sup>172</sup> EDA Steering Board Decision on a Framework Arrangement for Security of Supply between Subscribing Member States (sMS) in Circumstance of Operational Urgency, 20 September 2006, <http://www.eda.europa.eu/reference/sbd/sbd-2006-09-0.htm>.

<sup>173</sup> Council Decision 2001/264/EC, above.

<sup>174</sup> Security of Information Between Subscribing Member States (sMS) – Common Minimum Standards on Industrial Security, 20 September 2006, <http://www.eda.europa.eu/reference/sbd/SoI.pdf>; EDA Steering Board Decision on Security of Information Between Subscribing Member States (sMS), 20 September 2006, <http://www.eda.europa.eu/reference/sbd/sbd-2006-09-1.htm>.

<sup>175</sup> The Code of Conduct on Offsets, 24 October 2008, <http://www.eda.europa.eu/documents.aspx>, accessed April 23 2009; see also Eriksson et.al., *Study on the effects of offsets on the Development of a European Defence Industry and Market*, above.

<sup>176</sup> Accessible at <http://www.eda.europa.eu/ebbweb>; European Defence Agency Press Release, 'Steering Board Agrees Key Measures for Launch of Defence Procurement Code of Conduct in July', 7 April 2006.

<sup>177</sup> European Defence Agency Press Release, 'Spain to Join Code of Conduct for European Defence Equipment Market', 19 June 2007; Heuninckx, 'The European Defence Agency Electronic Bulletin Board', above.

contradictory.<sup>178</sup> It has been argued that, once the Defence Procurement Directive is approved, the EDA regime should simply be abolished.<sup>179</sup>

## 9.5 Trade in Arms with Third Countries

### 9.5.1 EU Rules on Arms Exports

All the regimes described above, whether the Public Procurement Directives or the EDA voluntary intergovernmental regime, only apply to the procurement activities of the EU Member States. However, in addition to the regulation of defence procurement within the EU, the latter has adopted instruments that regulate the trade in arms with non EU Member States (both imports and exports).<sup>180</sup>

In particular, the Council of the EU adopted a code of conduct for arms export,<sup>181</sup> and agreed a list of items to which it applies, which is revised regularly (the so-called 'Common Military List').<sup>182</sup> This code is not legally binding and has been criticised as being too broad,<sup>183</sup> but is nevertheless seen as a welcome development.<sup>184</sup> Reports are published regularly on the status of activities under this code of conduct.<sup>185</sup>

It is interesting to note that the Common Military List to which the code of conduct on arms exports applies is similar in scope and structure to the 1958 list to which Article 346 TFEU (ex Article 296 TEC) applies, but is much more detailed and updated regularly, whilst the 1958 list is fairly succinct, was not officially published, and was never reviewed since its adoption. There had been calls for the Common Military List to replace the 1958 list, but we have seen in our discussion of the Defence and Security Procurement Directive that the Common Military List should only be used to interpret the 1958 list for the purpose of that Directive.<sup>186</sup>

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<sup>178</sup> Heuninckx, 'The European Defence Agency Electronic Bulletin Board', above, p.65.

<sup>179</sup> Position taken by a number of French officials at the European Institute of Public Administration (EIPA) conference on European Defence Procurement, Maastricht, the Netherlands, 11 May 2009.

<sup>180</sup> For a detailed overview, see Michel Q., *Arms and Related Items Export Control Regime, The Eternal Quest to Reconcile Foreign Policy and Economic Interests* (University of Liege: 2005); and Michel Q., *The European Union Export Control Regime: Comment of the Legislation Article by Article*, Revision 5 (2006, University of Liege); see also Schmitt B., *A Common European Export Policy for Defence and Dual-Use Items?*, Occasional Paper No 25 (2001, Institute for Security Studies).

<sup>181</sup> Found in Schmitt (Ed.), 'European Armaments Cooperation – Core Documents', above, p.23.

<sup>182</sup> Council Declaration of 13 June 2000, issued on the occasion of the adoption of the common list of military equipment covered by the European Union code of conduct on arms export, OJ 2000 C 191/1; most recently published as the Common Military List of the European Union (equipment covered by the European Union Code of Conduct on Arms Exports), OJ 2006 C 66/1.

<sup>183</sup> Schmitt B., *A Common European Export Policy for Defence and Dual-Use Items?*, above, pp.12-15.

<sup>184</sup> See further Schmitt, *The European Union and Armaments*, above, pp.32-34.

<sup>185</sup> See e.g. Eighth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, OJ 2006 C 250/1.

<sup>186</sup> European Parliament, Draft Report on the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security (COM(2007)0766 – C6-0467/2007 – 2007/0280(COD)), 2007/0280(COD), 3 July 2008, p.6.

In addition to the code of conduct on arms exports, the Council adopted a common position on arms brokering,<sup>187</sup> which provides a framework that the EU Member States' legislation has to fulfil related to the trade of arms with third countries by private parties, a joint action on the control of technical assistance for military end uses,<sup>188</sup> and a joint action aiming at combating the spread of small arms.<sup>189</sup> The latter is subject to regular activity reports similar to those for the code of conduct for arms exports.<sup>190</sup>

### 9.5.2 EU Dual-Use Goods Export Control Regime

Under the provisions of the TFEU, the Council adopted a regime for the control of the export of dual-use goods.<sup>191</sup> This regime is based on the mutual recognition of export authorisations granted by EU Member States for dual-use goods, defined as items, including software and technology, which can be used for both civil and military purposes.<sup>192</sup>

Contrary to the code of conduct on arms exports, the provisions on dual-use goods are legally binding. However, a Member State may exceptionally adopt measures restricting the export of dual-use goods to non-member countries to prevent serious disturbances to its foreign relations that may affect its internal or external public security.<sup>193</sup> In addition, of course, the regime would still be subject to exemptions from applicability of EU law, such as Article 346 TFEU (ex Article 296 TEC).

The regime only constitutes a common framework for different national policies, and some have argued that this framework is so vague that it can be subject of diverging interpretations.<sup>194</sup>

### 9.5.3 Waiver of Import Duties for Defence Goods

The EU also took measures to waive import duties for some defence equipment imported from third countries.<sup>195</sup> This measure is significant, considering the important proportion of arms import from the US into Europe. The list of goods to which this waiver applies is specifically identified from the EU Common Customs Tariff and is not exactly the same as the Common Military List or the 1958 List.<sup>196</sup>

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<sup>187</sup> Council Common Position 2003/468/CFSP of 23 June 2003 on the Control of Arms Brokering, OJ 2003 L 156/79.

<sup>188</sup> Council Joint Action 2000/0401/CFSP of 22 June 2000 concerning the control of technical assistance related to certain military end uses, OJ 2000 L 159/216.

<sup>189</sup> Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP, OJ 2002 L 191/1.

<sup>190</sup> Third Annual Report on the implementation of the EU Joint Action of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons (2002/589/CFSP), OJ 2003 C 312/1.

<sup>191</sup> Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, OJ 2000 L 159/1, as amended .

<sup>192</sup> *Idib.*, Article 2(a).

<sup>193</sup> Case C-83/94 *Leifer*, above, [30]; Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Germany*, [1995] ECR I-3189, [29].

<sup>194</sup> See further Schmitt, *The European Union and Armaments*, above, pp.30-31.

<sup>195</sup> Council regulation (EC) No 150/2003 of 21 January 2003 suspending import duties on certain weapons and military equipment, OJ 2003 L 25/1.

<sup>196</sup> Council regulation (EC) No 150/2003, above, Annex I; see Commission Regulation (EC) No 1832/2002 of 1 August 2002 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, OJ 2002 L 290/1.

The exemption only applies when these goods are used by the military forces of an EU Member State for military purposes.<sup>197</sup>

## 9.6 Intra Community Transfers of Defence Materiel

Despite the fact that the transfer of defence goods is not defence procurement, it obviously is a related topic. Intra-community transfer of defence goods is currently regulated by national law and consists of a very complex and incoherent system of authorisations.<sup>198</sup> In order to resolve these issues, the EU recently adopted common licensing rules on the intra-community transfer of defence products.<sup>199</sup> The materiel to which these rules apply is the one from the Common Military List for arms exports,<sup>200</sup> which greatly increase the coherence between both regimes.

The EU rules on intra-community transfer remain subject to the Article 346 TFEU (ex Article 296 TEC) and Article 36 TFEU (ex Article 30 TEC) exemptions.<sup>201</sup> However, when such an exemption is invoked, subscribing Member States could use the provisions of the framework agreement on security of supply agreed by the EDA, whereby they agreed to support efforts to simplify amongst them intra-community transfers and transits of defence goods and technologies.<sup>202</sup>

## 9.7 Coherence of the EU Defence Procurement Regimes

In this chapter, we have analysed the multilayered regime applicable to defence procurement in the EU. Considering the number of instruments concerned, the coherence of the ongoing initiatives in the area has been rightly questioned.<sup>203</sup> However, at least from a principle point of view, this multifaceted regime, although complex, could potentially be coherently applied<sup>204</sup>:

- The Commission interpretative communication clarifies its views on when the Article 346 TFEU (ex Article 296 TEC) exemption could be invoked by EU Member States, and in which circumstances the Commission would take legal actions should it consider that the exemption has been misused;
- When the Article 346 TFEU (ex Article 296 TEC) exemption is rightfully invoked by a Member State, which should now happen in exceptional cases, the EDA voluntary intergovernmental regime should be used for that procurement. Failure to do so would be subject to the peer review system of the Code of Conduct;

<sup>197</sup> Council regulation (EC) No 150/2003, above, Article 2.

<sup>198</sup> COM(2003) 113, above, p.13; European Commission, 'Consultation Paper on the Intra-Community Circulation of Products for the Defence of Member States', ENTR/C, 21 March 2006; see also Mölling C., 'Options for an EU Regime on intra-Community Transfer of Defence Goods', in Keohane, *Toward a European Defence Market*, above, pp.51-88; Unisys study, *Intra-Community Transfers of Defence Products*, above, §2.

<sup>199</sup> Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community OJ 2009 L 146/1.

<sup>200</sup> Directive 2009/43/EC, above, Articles 3(1) and 13(1).

<sup>201</sup> Directive 2009/43/EC, above, Article 1(2).

<sup>202</sup> EDA Steering Board Decision on a Framework Arrangement for Security of Supply between Subscribing Member States (sMS) in Circumstance of Operational Urgency, above.

<sup>203</sup> Georgopoulos A., 'The European Defence Agency's Code of Conduct for Armament Acquisitions', above, pp.57 and 62-63; Heuninckx, 'Towards a Coherent European Defence Procurement Regime?', above, pp.16-20.

<sup>204</sup> See also Schmitt, *Defence Procurement in the European Union – The Current Debate*, above, pp.47 et.seq.

- When an EU Member State would not wish to, or cannot, invoke the Article 346 TFEU (ex Article 296 TEC) exemption for the procurement of military equipment, the Defence and Security Procurement Directive would apply, allowing some more freedom in awarding defence contracts than the Public Sector Directive would;
- For the procurement of non-military equipment by contracting authorities in the field of defence, the Public Sector Directive would apply.

However it is too early to tell if this apparent coherence would be effectively applied. It could be undermined by a number of factors:

- Some types of defence procurement activities (e.g. collaborative procurement, research and technology) would still fall outside the scope of each of these regimes and would remain managed through different sets of rules;
- The conditions for the applicability of the Article 346 TFEU (ex Article 296 TEC) exemption are still legally unclear, as the Commission's interpretative communication only clarifies its own views. Only the CJEU is empowered to interpret EU law;
- This seemingly coherent regime would only be effective if the subscribing Member States use in good faith the Article 346 TFEU (ex Article 296 TEC) exemption and the EDA voluntary intergovernmental regime;
- The definition of 'military equipment', which constitutes the boundary between the Defence and Security Procurement Directive and the Public Sector Directive, remains somewhat unclear, referring both to the 1958 list and the Common Military List;<sup>205</sup>
- The procurement procedures and processes of the Defence and Security Procurement Directive are not entirely coherent with those of the Public Sector Directive, which could create some confusion for the practitioners.<sup>206</sup>

Even if all or most of the issues mentioned above are clarified, the defence procurement practitioner could still be faced with a wide variety of procurement processes depending on the type of procurement and the applicable exemptions, therefore potentially leading to errors or abuses. Defence procurement in the EU will remain for the foreseeable future a complex activity sensitive to politics.

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<sup>205</sup> Directive 2009/81/EC, above, Article 1(6) and Recital 10.

<sup>206</sup> See further Schmitt, *Defence Procurement in the European Union – The Current Debate*, above, pp.30-34.

# CHAPTER 10: REMEDIES AND ENFORCEMENT

## 10.1 Introduction

Efficient enforcement of a field of law is of utmost importance for compliance with the rules and the European legislator has made extra efforts in order to ensure effective enforcement of the EU public procurement rules at national level. The European Commission showed early awareness of the need of fast and efficient enforcement of the public procurement rules and this led to the early adoption of the so-called Remedies Directives, namely Directive 89/665 and Directive 92/13 applicable for the classic sector and the utilities sector respectively. The Remedies Directives were recently amended and developed by the Remedies Directive 2007/66. The Remedies Directives allow a wide degree of discretion for the Member States and there are substantial differences between the enforcement regimes at national level in the EU.

Enforcement of the public procurement rules also takes place at supranational level as the European Commission supervises the compliance of Member States with their obligations under EU law. It follows from Article 258 of the Treaty on the Functioning of the European Union (formerly 226 of the EC Treaty) that the Commission can bring a Member State before the Court of Justice of the European Union (hereinafter the Court of Justice) if it considers that it has failed to fulfil an obligation under the Treaty including compliance with specific Directives. The Commission has used the procedure in several cases in the field of public procurement.

Section 2 will consider enforcement at supranational level whereas section 3 is an analysis of enforcement of the EU public procurement rules at national level.<sup>1</sup>

## 10.2 Enforcement at supranational level

The European Commission has limited resources and can only follow up on a fairly limited number of cases each year. Nevertheless, enforcement at supranational level is a very important part of the enforcement regime. Cases brought before the Court of Justice will frequently have major impact on the development of the law in a Member State or in the Union as such.<sup>2</sup>

The Court of Justice can grant interim measures, establish that the rules have been breached and has also recently established that a Member State had not terminated a contract concluded in breach of the public procurement rules even though it had a

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<sup>1</sup> A couple of works with an in-depth analysis of the issue of enforcement include S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed. 2005), chapter 21 where the reader will find elaborate references to other works in the field and P. Trepte, *Public Procurement in the EU (A Practitioner's Guide)*, (2<sup>nd</sup> ed. 2007) chapter 9,. See also J. Fejø and S. Treumer (eds.), *EU's Udbudsregler – implementering og håndhævelse i Norden (The EC Public Procurement Rules-Implementation and Enforcement in the Nordic Countries)*, 2006 with articles in both English and Danish.

<sup>2</sup> Case C-243/89, *Commission v Denmark ("Storebaelt")* [1993] ECR I-3353 is an example of a case that has influenced the approach in a Member State to a very high degree. After this case the Danish legislator has clearly prioritized the field of public procurement law and taken enforcement in this field much further than what is required from EU public procurement law.

duty to do so in order to comply with Article 260 of the TFEU (formerly Article 228 of the EC Treaty). The latter development is very important and linked to the new remedy of ineffectiveness introduced by Remedies Directive 2007/66.

### **10.2.1 Interim measures**

It follows from Article 279 of TFEU (formerly Article 243 of the EC Treaty) that the Court of Justice has a general power to grant interim measures in a case before it. The Rules of Procedure of the Court of Justice spells out the conditions for the grant of interim relief and that the application for interim measures must be made by a party to the case before the Court. In the current context a case would be based on Article 258 of TFEU and a tenderer who has complained to the European Commission is not a party to the proceedings brought by the Commission.

There have been relatively few cases concerning interim measures before the Court of Justice in the field of public procurement.<sup>3</sup> In this respect there is a clear difference from the pattern in national enforcement of public procurement law. It is very common to apply for interim measures in national case law even though these are very difficult to obtain at least in some Member States.

The Rules of Procedure contains specific conditions for the grant of interim relief and these conditions have been developed in the case law of the Court of Justice. The first condition is that the party applying for interim measures establishes that he has a prima facie case. The second condition is urgency which usually<sup>4</sup> implies that the applicant has to show that it will suffer serious and irreparable harm if interim measures are not granted. It appears that the condition of urgency is satisfied whenever there is a threat of a breach of EU law and this constitutes a serious breach. The breach must also be "irreparable" which in the procurement case law appear to have been applied in the sense of "irreversible".<sup>5</sup> The Court of Justice has in the few procurement cases emphasized the need to prevent a breach and to avoid presenting the Court with a *fait accompli* and has even granted interim measures where a contract has been concluded.<sup>6</sup> Finally, there is a balance of interest test. Interim measures will be granted if the first two conditions are fulfilled unless the contracting authority can show that it would also suffer serious and irreparable harm.

### **10.2.2 Enforcement proceedings against Member States according to Article 258 TFEU**

This procedure has been used in several cases in the field of public procurement. The procedure can be initiated by the Commission on its own initiative but can also be the result of a complaint by an individual. Some of these cases have been

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<sup>3</sup> See C-45/87 R, *Commission v Ireland (Dundalk)* Order of 16 February 1987, [1987] ECR 783; Order of 13 March 1987, [1987] ECR 1369, C-194/88 R, *Commission v Italy (Lottomatica)* Order of 20 July 1988, [1988] ECR 4547; order of 27 September 1988, [1988] ECR 5647 and C-87/94 R, *Commission v Belgium (Walloon Buses)* [1994] ECR I -1395. The Commission had also applied for interim measures in C-243/89, *Commission v Denmark ("Storebaelt")* [1993] ECR I-3353 but as Denmark acknowledged the breaches the Commission withdrew the application.

<sup>4</sup> This is the usual approach even though the Court of Justice does not always explicitly or consistently assess the condition this way, cf. Peter Trepte, note 1 above, p. 586.

<sup>5</sup> Cf. P. Trepte, note 1 above, p. 587.

<sup>6</sup> Cf. C-194/88 R, *Commission v Italy (Lottomatica)*, note 3 above.

striking examples of success<sup>7</sup> but as mentioned above the Commission only has resources to bring a few cases each year in the field of public procurement. If the Court of Justice finds that the Member State has failed to fulfil an obligation under the Treaty, the State shall take the necessary measure to comply with the judgment of the Court of Justice, cf. Article 260 TFEU.

### **10.2.3 Enforcement proceedings against Member States according to Article 260 TFEU**

If the Commission considers that the Member State concerned has not taken such measures it could have taken, after following certain procedural steps, may bring the case before the Court of Justice and the Court may impose a lump sum and/or penalty payment on the Member State, cf. Article 260 TFEU (formerly Article 228 of the EC Treaty).

This procedure has not been used on many occasions but was applied in C-503/04, *Commission v Germany*,<sup>8</sup> with far-reaching implications. This case was a follow up to the judgment in the joint cases C-20/01 and C-28/01, *Commission v. Germany*.<sup>9</sup> It concerned 30 years service contracts awarded without notice and the view of the Commission was that the contracts had to be terminated which had not been done originally. The argument of the Commission was that the duty to terminate the contracts followed from the Court's establishment of the breach and Article 228 EC (now Article 260 TFEU). From the latter provision, it follows that a Member State is required "to take the necessary measures to comply with the judgment".

In order to motivate Germany to comply with its obligation the Commission requested the Court to impose a daily payment of €126,720 with regard to one of the contracts and €31,680 with regard to the other contract until compliance. Not surprisingly Germany found that the local authorities in question terminated the contracts. Interestingly enough it took more than half a year from the time the action in C-503/04 was brought until the contract that could potentially cost €126.720 in daily payments was terminated.<sup>10</sup> Germany then thought the matter had been settled but the Commission insisted that the case continued before the Court of Justice. Because of the terminations of the German contracts before the judgment, the Court only had to consider the possible breach of EC law with regard to one of the contracts, cf. para 20 of the judgment.<sup>11</sup> This resulted in the landmark judgement of 18 July 2007, C-503/04, *Commission v Germany*, where the Court

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<sup>7</sup> P. Trepte, *Public Procurement in the EU A Practitioner's Guide* (2<sup>nd</sup> ed., 2007) p. 579 mentions C-243/89, *Commission v Denmark* ("*Storebaelt*") [1993] ECR I-3353 as an example. Another example is C-503/04, *Commission v. Germany* [2007] ECR I-6153 concerning the duty to set aside a contract concluded in breach of the EU public procurement rules.

<sup>8</sup> [2007] ECR I-6153

<sup>9</sup> [2003] ECR I-3609

<sup>10</sup> The action was brought on 7 December 2004 and the city of Braunschweig and BKB agreed to cancel the contract on 4-5 July 2005, cf. M. Niestedt, "Penalties Despite Compliance? A Note on Case C-503/04, *Commission v Germany*", *Public Procurement Law Review* 2005 NA 164 (NA 165). The slow termination of this contract was eventually decisive for the admissibility of the action.

<sup>11</sup> Germany supported by The Netherlands argued that the action had become void of purpose and thereby inadmissible because of the termination of the contracts prior to the judgment, cf. para 17 of the judgment. This argument was set aside as the contract concluded by the City of Brunswick had not been terminated on 1 June 2004 which was the date of the expiry of the period prescribed in the reasoned opinion issued under Article 228 EC.

established that a breach of EC public procurement rules in the concrete case led to a duty to terminate the public contract in question.

However, the reader should also be aware of a parallel development in the recent amendment of the Remedies Directives, cf. Remedies Directive 2007/66. It follows from this Directive that concluded contracts in specific circumstances can become ineffective, cf. Article 2d. These circumstances also cover the situation where the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union in violation of Directive 2004/18/EC. This change is analyzed in more detail in section 3.3 of this chapter.

The first important issue to consider is whether there is a duty to terminate the contract as a main rule. It is striking that the Court of Justice in C-503/04, *Commission v Germany*, does not waste many words on the justification for imposition of a duty to terminate the contract and that it does not come up with many references to the particularities of the breach of the public procurement rules in the concrete case even though they are special. Nevertheless, the Court of Justice stresses that without termination of the contract in question the failure to fulfil obligations would continue for decades, cf. para 29 as it was a 30 years service contract. The Advocate General also stressed the length of the contract and that this circumstance made the termination of the contract a proportionate measure, cf. recital 78 of her opinion.

One possibility would be to interpret the judgment as implying that the contract as a main rule has to be terminated once the Court has established under Article 258 TFEU that the public procurement rules have been violated. However, it is submitted that this would not be a correct interpretation of the judgment.<sup>12</sup> It is submitted instead that the judgment must be interpreted more narrowly in the light of the particularities of the case in question. The case concerned what is considered to be the most serious violation of the public procurement rules by the Court, cf. case C-26/03, *Stadt Halle*<sup>13</sup>, at para 37, as the contract was awarded without notice and thereby in breach of the EC public procurement rules. As it has been pointed out<sup>14</sup> it would be a paradox if in such a situation there would not be an obligation to terminate the contract. This would have led to a lacuna in the legal protection<sup>15</sup> as competitors could have forgotten about the contract as per se it would be "protected" due to it having been concluded, and the possibility of obtaining damages where there has been no tender is almost impossible. This has to be borne in mind when reading the judgment together with the fact that the disputed contract was a particularly long-running contract.

Nevertheless, the laconic formulations of the Court seem to indicate that a duty to terminate contracts is not only limited to situations where there has been no tender and thus there is an obligation with a broader scope. The Court would surely have taken care to specify otherwise if the opposite had been intended. It is submitted that it will take a careful examination of the concrete circumstances in each individual case to establish whether there is an obligation to terminate a contract

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<sup>12</sup> It can be added that it would also lead to an undesirable legal situation as it would not take into account the need for basic legal certainty with regard to contracts concluded on the basis of the EC public procurement rules.

<sup>13</sup> [2005] ECR I-1

<sup>14</sup> See S.Treumer, "The Discretionary Powers of Contracting Entities – Towards a Flexible Approach in the Recent Case Law of the Court of Justice?" (2006) 15 P.P.L.R. 71 at p. 81.

<sup>15</sup> Compare with L.Hummelshøj and H.Bang Schmidt, "EU-udbud: Retsvirkningen af at undlade udbud" (EC public procurement: The legal effect of lack of tenders) (2006) *Ugeskrift for Retsvæsen* B 80. These authors also pointed out the lacuna but argued in favour of legislative action on the issue in Denmark and not that there was a Treaty based obligation to terminate contracts concluded in breach of the EC public procurement rules.

concluded in breach of the EC public procurement rules and that it will not become the prevailing rule that a breach leads to such an obligation.

It is possible to identify various situations where an obligation to terminate the contract appears to be particularly relevant. It is evident that the duty to terminate the contract can frequently materialize where the breach consists of a direct illegal award like in C-503/04, *Commission v Germany*. The same applies where the contract has been concluded with a tenderer who should have been excluded, e.g. because of illegal state aid or because of technical dialogue prior to the submission of bids. Termination also appears to be highly relevant where the contract has been concluded with a tenderer whose bid should have been rejected because it did not comply with the tender conditions. This scenario is seen in practice, and quite often competitors in Denmark argue that the winning bid should have been rejected because it did not comply with the tender conditions. These breaches can lead to annulment of the decision to conclude the contract by a national court or review body. An annulment of the decision to conclude the contract makes it particularly relevant to consider whether there is an obligation to terminate the contract.<sup>16</sup> The breaches in the above-mentioned situations are substantial because they have or are likely to have influenced the outcome of the competition for the award of the public contract.

As follows from above it is presumed to be necessary to make an individual assessment of the circumstances in each case in question and that no breach leads per se to the obligation to terminate the contract.<sup>17</sup> A number of circumstances that are likely to be relevant in the assessment of whether there is a duty to terminate the concluded contract is a) whether the breach is sufficiently serious b) the impact on the internal market if the contract is not terminated c) the degree of completion of the contract and d) the public interest and the interest of the party contracting with the contracting authority.<sup>18</sup>

C-503/04, *Commission v Germany*, is a very important step forward for the efficient enforcement of EC public procurement rules and is likely to lead to increased compliance with the rules just like the changes of the Remedies Directives and the new remedy of ineffectiveness in this Directive which is considered in section 3 of this chapter. The case gives rise to numerous questions and uncertainties even though it clarifies that a breach of public procurement rules can lead to an obligation to terminate a concluded contract.

The judgment in C-503/04, *Commission v Germany* concerned a violation of the public procurement directives but as it is well known the Court of Justice has in reality developed a secondary public procurement regime in its recent case law, cf. C-324/98, *Telaustria*<sup>19</sup> and subsequent case law. The Court of Justice here imposed a duty to act – a transparency obligation – based on primary law and general

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<sup>16</sup> The dominant view of Danish legal literature has agreed with this with regard to the follow up on the enforcement bodies' annulment of decisions to conclude the contract.

<sup>17</sup> Compare with Joined Cases C-21/03 & 34/03, *Fabricom* [2005] ECR I-1559. It clearly follows from this case that it is mandatory to make a concrete assessment of whether a firm previously engaged in technical dialogue may or shall be excluded from the tender procedure based on this ground and that the firm in question cannot be excluded per se. See further on this S. Treumer, "Technical Dialogue and the Principle of Equal Treatment-Dealing with Conflicts of Interests after *Fabricom*" (2007) 16 P.P.L.R. 99.

<sup>18</sup> See S. Treumer, "Towards an Obligation to Terminate Contracts Concluded in Breach of the EC Public Procurement Rules: the End of the Status of Concluded Public Contracts as Sacred Cows", (2007) P.P.L.R. p. 371, section 4 (pp. 378-382) for an analysis on this.

<sup>19</sup> [2000] ECR I-10745

principles with a very unclear content<sup>20</sup> which subsequently led to many other cases on the issue. One could ask whether a breach of this secondary public procurement regime could equally entail a duty to terminate the contract in question. The Court of Justice considered the issue recently in the preliminary ruling in C-91/08, *Wall*<sup>21</sup> with regard to *national* enforcement and clarified that this is not the rule “in every case”, cf. para 65 of the judgment.

### 10.3 Enforcement at national level

As a starting point remedies and procedural law concerning breach of EU law are to be considered matters for the national legislator, according to the principle of national and remedial autonomy. This autonomy is subject to a number of limitations, namely the principles of equivalence and effectiveness. It follows from the principle of equivalence that the substantive and procedural conditions for a remedy for breach of EU law must not be less favourable than those relating to similar domestic claims. It follows from the principle of effectiveness that the conditions for a remedy must not make it virtually impossible or excessively difficult to obtain reparation, cf. the formulation in the Joined Cases C-6/90 & 9/90, *Francovich*,<sup>22</sup> at para 43.

As mentioned in the introduction to this chapter the European legislator has issued the Remedies Directives in the field of public procurement. The Remedies Directives apply only to tender procedures falling within their scope. The Remedies Directive 89/665 applies to contracts falling within the scope of the Public Sector Directive whereas Remedies Directive 92/13 applies to the contracts falling within the scope of the Utilities Directive. The approach is similar in the two Remedies Directives and the material differences that do exist will not be considered here as a main rule. Both Directives have recently been amended by Directive 2007/66 which introduced a number of important changes including the new remedy of ineffectiveness, cf. Article 2d. The Remedies Directives are only intended to establish a minimum level of protection of the rights and obligations in the public procurement Directives.

The fact that a contract is not falling within their scope does *not* imply that the rights of the tenderers in question are not protected. Their rights are instead protected by the common principles such as the principles of equivalence and effectiveness. The following analysis concentrates on the enforcement regime created by the Remedies Directives.

The first generation of the Remedies Directives adopted around 1990 essentially sought to ensure that decisions taken by the contracting authorities could be reviewed effectively and as rapidly as possible and that specific remedies for breach of the public procurement Directives were available at national level. It follows from Article 2(1) of the Remedies Directives that Member States shall ensure that aggrieved tenderers<sup>23</sup> can apply for interim measures, annulment of illegal decisions taken by a contracting entity and for damages.

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<sup>20</sup> This has been covered in several works. See A. Brown, “EU Primary Requirements in Practice: Advertising, Procedures and Remedies for Public Contracts Outside the Procurement Directives” (2010) 19 P.P.L.R. 169 and S. Treumer, op.cit in note 11 above at pp. 82-84.

<sup>21</sup> ECJ judgment of 13 April 2010 (unpublished)

<sup>22</sup> [1991] ECR I-5357

<sup>23</sup> Persons having or having had an interest in obtaining a particular contract and who have been or risks being harmed by an alleged infringement, cf. Article 2(3) of the Remedies Directives.

The recent changes of the Remedies Directives introduced the new remedy of ineffectiveness, alternative penalties depending on the chosen approach to the remedy of ineffectiveness,<sup>24</sup> preclusive time-limits for review and a complex set of standstill provisions.

Article 2a(2) of the Remedies Directives introduced a basic standstill provision according to which a contract may not be concluded following the decision to award a contract before the expiry of 10 or 15 calendar days depending on the chosen means of communication of the award decision. Another important standstill provision was introduced by Article 2(3) according to which Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for a review.

A few Member States have created new bodies responsible for the enforcement of the EU public procurement rules, but this has not been mandatory even though this probably would have made the enforcement system more efficient. This has several advantages compared to bringing a case before a national court. The Complaints Board will typically be able to ensure a fast assessment, impose lower costs on the parties and have more insight into the complex field of public procurement than a typical court or tribunal. In the following discussion a number of selected issues related to the remedies above will be considered.

### **10.3.1 Interim measures**

Access to interim measures is crucial in order to ensure an efficient enforcement of the public procurement rules, especially since it is difficult to challenge successfully a public contract already concluded.

It follows from Article 2(1)(a) that Member States shall ensure that interim measures can be granted in the course of the review procedures. Member States may provide that the body responsible for review procedures may take into account the likely consequences of interim measures for all interests that can be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits, cf. Article 2(5). The criteria suggested in this Article are heavily inspired by the case law of the Court of Justice on interim measures, cf. section 2.1 of this chapter. However, Article 2(5) does not establish the criteria for the assessment of whether interim measures should be granted or not. As a consequence the national legislator has a wide legislative discretion and therefore the criteria and procedures established in national legislation on interim measures vary to a considerable extent. Typically it is difficult to obtain interim relief at national level<sup>25</sup> and in Denmark it has been so difficult that it has been questioned whether the requirements following from the principle of effectiveness has been met.

Remedies Directive 2007/66 introduced new rules on automatic suspension for review in the standstill period. The background for the introduction of these rules is spelled out in recital 12: Seeking review shortly before the end of the minimum standstill period should not have the effect of depriving the body responsible for

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<sup>24</sup> See Article 2e(1) of the Remedies Directive.

<sup>25</sup> A. Brown, "Effectiveness of Remedies at National Level in the Field of Public Procurement", *Public Procurement Law Review* 1998 p. 89. See also section 3 in the article of S. Treumer, *National håndhævelse af EU's udbudsregler – er håndhævelsessystemet effektivt på EU-udbudsområdet?* p.99 in J. Fejø and S. Treumer (eds.), *EU's Udbudsregler – implementering og håndhævelse i Norden (The EC Public Procurement Rules-Implementation and Enforcement in the Nordic Countries)*, 2006.

review procedures of the minimum time needed to act, in particular as to extend the standstill period for the conclusion of the contract. It is stated in Article 2(4) of the Remedies Directives that review procedures need not automatically have an automatic suspensive effect on the contract award procedures to which they are related except where provided for in Article 2(3) and Article 1(5) of the Directive. It follows from Article 2(3) that Member States shall ensure that the contracting authority cannot conclude the contract before the review body has decided on the application either for interim measures or for a review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5). Furthermore it follows from Article 1(5) in the Remedies Directives that Member States may require that the person concerned first seek review within the contracting authority. In that case Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

### 10.3.2 Damages

In the middle of the 1990s it was rightly stated<sup>26</sup> that a striking feature of the case law in the field of enforcement of public procurement rules was the almost<sup>27</sup> total absence of successful actions for damages. This position has changed as now there are several examples in various Member States, including cases where damages for loss of profit has been granted.<sup>28</sup>

It follows from the Remedies Directives that the review bodies must be able to award damages to persons injured by the infringement of the rules. However, the details of the issues concerning damages are not regulated in detail and their formulation does not contribute much to the creation of a clear legal situation and even generates doubt on some points. It is not even clear from these directives whether they require the possibility of an award of lost profit or not, which is of crucial importance for the efficiency of the remedy of damages. A high percentage of aggrieved tenderers do not consider it worthy of effort to initiate an action seeking to recover the costs of preparing a bid or participation in the procurement procedure. However, it is normally presumed in both theory and frequently in the case law of the Member States that tenderers under certain conditions can claim an award of lost profit for breach of the EU public procurement rules although this has been unclear from the outset.

It is not clear from the wording of the Remedies Directives whether damages are available for all violations of the EU public procurement rules or whether other conditions apply. Article 2(1)(c) of the Remedies Directives indicates only that the Member States are obliged to award damages to persons harmed by an infringement. However, it is clear from the ruling of the European Court of Justice in C-275/03, *Commission v Portugal*,<sup>29</sup> that it violates the Remedies Directive to

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<sup>26</sup> See A. Brown, "Effectiveness of Remedies at National Level in the field of Public Procurement", (1998) 7 P.P.L.R. 89 at p.93. This article is of particular interest as some of the information in the article of Adrian Brown was derived from a study, which his employer Herbert Smith law firm co-ordinated for the European Commission in 1996, involving a comparative assessment of procurement remedies in all of the Member States (15 at that time).

<sup>27</sup> A. Brown, op.cit. mentions that an isolated example occurred after the ruling in the Storebaelt case (C-243/89, *Commission v. Denmark*, [1993] E.C.R I-3353) where a number of unsuccessful tenderers were awarded damages to cover wasted bid costs, rather than loss of potential profit.

<sup>28</sup> See S. Treumer, "Damages for Breach of the EC Public Procurement Rules – Changes in European Regulation and Practice" (2006) P.P.L.R. 159.

<sup>29</sup> ECJ judgment of 14 October 2004 (unpublished)

make damages conditional on proof of intentional or negligent breach. The recent case C-314/09, *Stadt Graz*,<sup>30</sup> is important as it seems to follow from this case that any breach in principle is sufficient ground for damages.

### 10.3.3 Ineffectiveness

The remedy of ineffectiveness is a very important remedy introduced by Remedies Directive 2007/66. It is in particular a remedy against direct illegal award of contracts. It follows from Article 2d(2) that the consequences of a contract being considered ineffective shall be provided for by national law. Nevertheless, according to the same provision national law may provide for the retroactive cancellation of all contractual obligations or limit it to obligations which still have to be performed. Furthermore, recital 13 makes clear that ineffectiveness essentially implies that “the rights and obligations of the parties under the contract should cease to be enforced and performed”.

The Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in circumstances outlined in that provision, cf. Article 2d(1) of the Remedies Directives, including direct illegal award. Article 2d(1) concerns in principle a duty to consider the contract ineffective. Article 2e(1) of the Remedies Directives requires less as it establishes that the review bodies should have competence to provide for ineffectiveness or to impose alternative sanctions in certain situations.

Contracting entities can avoid the sanction of ineffectiveness by following a specific procedure outlined in the new provisions of the Remedies Directive. These stipulate in Article 2d(4) that Member States shall provide that ineffectiveness in the case of a direct illegal award, cf. Article 2d(1) does not apply where the contracting authority considers that the award of the contract without prior notice in the Official Journal of the European Union is permissible and has published a notice as described in Article 3a of the Remedies Directives expressing its intention to conclude the contract. It is an additional condition that the contract must not have been concluded before the expiry of at least 10 calendar days with effect from the day following the date of the publication of the notice.

At first sight this provision seems straightforward and it appears that you as a contracting entity can be sure that the far-reaching remedy of ineffectiveness is not applied if you follow the procedure outlined in Article 3a. However, it is presumed in some Member States that the protection against ineffectiveness is not absolute and that there is a noteworthy exception in situations where the contracting authority has known or ought to have known that a tender procedure was necessary but was willing to take a chance and published a notice according to the procedure outlined in Article 3a.

Article 2d(3) of the Remedies Directives opens up another important exception to ineffectiveness. This exception applies to the situations covered in Article 2d(1). It follows from this provision that Member States may allow review bodies not to consider a contract ineffective where overriding reasons relating to the general interest require that the effects of the contract should be maintained. Member States will surely be inclined to create such a legal basis in their national regulation as consideration to the general interest in such cases is likely to be considered highly relevant. However, the European legislator has in a remarkable way limited the possibilities of taking into consideration *economic* reasons relating to the

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<sup>30</sup> Judgment of 30 September 2010

general interest as they may only be considered if in exceptional circumstances ineffectiveness would lead to disproportionate consequences. It is furthermore specified that economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest and that they include, inter alia, the cost resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness,<sup>31</sup> cf. Article 2d(3). It is highly likely that these costs would have been considered by national courts and complaints boards in the absence of this explicit provision that excludes their consideration. This exception therefore would not typically rule out the application of the sanction of ineffectiveness. It is actually rather difficult to come up with many examples of considerations that could fall under the scope of the exception in Article 2d(1).

Preclusive time limits can also be introduced by the Member States according to the Remedies Directive. Article 2f(1)(a) allows the stipulation of a time limit of 30 calendar days relating to the review of ineffectiveness in accordance with Article 2d(1) either from the contract award notice or from the date on which the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract. The Remedies Directive also ensures that the Member States can stipulate that a complaint concerning ineffectiveness based on Article 2(d)(1) in any case must be made before the expiry of a period of 6 months with effect from the day following the date of the conclusion of the contract.

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<sup>31</sup> This could involve damages to the contracting party losing the contract due to its ineffectiveness.

# CHAPTER 11: SOCIAL AND ENVIRONMENTAL POLICIES IN EU PUBLIC PROCUREMENT LAW

## 11.1 Introduction to Social and Environmental Policies

Social and environmental policies have played a varying role in the different EU Member States since the beginning of the Union in the early 1950s. In some Member States these policies have played an important role in the general approach to regulating society whereas in other Member States the importance of these policies has been of a more distant character.

There exists, however, a widely accepted urge to enhance social and environmental policies where this can be done without further drawbacks, and this will have increased considerably over the decades. In a recent report, the so called "Monti Report"<sup>1</sup>, it is thus made one of the key recommendations to make public procurement work for innovation, green growth and social inclusion by imposing specific mandatory requirements.<sup>2</sup>

In public procurement law social and environmental policies have been handled with a shifting approach over the years and a general description of the history can be that social and environmental policies have started from a low position of interest to being developed into an everyday issue drawn into public procurement when applied. In the Monti Report it is thus stated under the heading of "Harnessing public procurement for Europe's policy goals"<sup>3</sup> and after having made a strong recommendation of EU public procurement law that "There is however a mounting call for a review of public procurement policies, for different reasons and with different objectives. Two questions are at the heart of the debate: whether public procurement policy should be reformed and whether such a review should lead to a greater integration of horizontal policy objectives into public procurement. The Commission has launched an across-the-board evaluation of the 2004 public procurement directives, as a basis for future reform. This sets the scene for reflection on the issue. A re-think of the policy seems well-warranted, first of all in order to simplify, continue to modernise and sharpen public procurement rules".<sup>4</sup>

One should not, however, ignore the fact that social and environmental issues are not only part of public procurement but present themselves in almost every angle of modern European society. This has the implication that these issues are discussed and drawn into the politics of many, if not all, elements of society, and for that reason it is natural to debate and concentrate the efforts on social and environmental issues in relation to public procurement.

In the EU, however, it is striking to see the development from the first Treaty (the Treaty constituting the European Coal and Steel Community, TECSC, from 1951) over the Treaty on the European Community, TEC (from 1957) to the last Treaty, the Lisbon Treaty that came into force on 1<sup>st</sup> December 2009 and includes the two Treaties, the Treaty on the European Union, TEU, and the Treaty on the Functioning of the European Union, TFEU. Thus the TECSC did not include a provision that

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<sup>1</sup> Mario Monti: A new strategy for the Single Market at the Service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May 2010.

<sup>2</sup> Monti Report at 78.

<sup>3</sup> Monti Report at 76.

<sup>4</sup> *Loc.cit.*

might rightly be described as social or environmental provisions apart from phrases such as “real solidarity” and “the establishment of common bases for economic development”, etc.

On the other hand the two Treaties of the Lisbon Treaty include several social and environmental provisions. Thus, for instance, the Treaty on the European Union in its Preamble already points to the inspiration from the cultural, religious and humanist inheritance of Europe, from which the Member States have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law. It is also said that the Member States confirm their attachment to fundamental social rights, among which are those found in the Charter of the Fundamental Social Rights of Workers. The reference to the solidarity between their peoples and especially to their determination to promote economic and social progress for their peoples, taking into account the principle of sustainable development and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields can furthermore be seen as a basis for taking social and environmental issues into day-to-day policy and life. To this comes the wording of the Preamble to facilitate the free movement of persons, while ensuring the safety and security of peoples. This elegant wording of the Preamble of the TEU is followed by many of the proper provisions of the Treaty; see below.

As to the Treaty on the Functioning of the European Union, this Treaty also already includes in its Preamble wording regarding the witnessing of the same intention of giving effect to social and environmental policies. Thus the Preamble refers for instance to the intention to “ensure the economic and social progress of their States”, and to “the constant improvements of the living and working conditions”. It also mentions the intention of “reducing [...] the backwardness of the less favoured regions”. This wording of the Preamble of the TFEU is followed by many of the proper provisions of the Treaty; see below.<sup>5</sup>

On the other hand, neither the Government Procurement Agreement (GPA) from 1994 nor the UNCITRAL Model Law refers expressly to environmental considerations.<sup>6</sup>

## **11.2 What is Covered by the Social and Environmental Policies**

Before going deeper into the topic of social and environmental policies in relation to public procurement, it might be worth making a sort of definition of the various phenomena of this important issue. In this chapter, the social and environmental policies refer to all policies that are taken besides economic policies that are pursued by public procurement policies. As an illustrating example one might thus mention the situation where a municipality is eager to procure services and other supplies that benefit the environment in one way or other. That might be done under the prequalification phase by requiring the participants in a procurement process to demonstrate their results in relation to environment issues in fulfilling

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<sup>5</sup> See to this *i.a.* Sue Arrowsmith and Peter Kunzlik in Sue Arrowsmith and Peter Kunzlik (Eds.), *Social and Environmental Policies in EC Procurement Law, New Directives and New Directions*, (Cambridge University Press, 2009), 9 ff, and 55; and see for instance in relation to Danish Regulation and Practice, Steen Treumer in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 53 ff.

<sup>6</sup> See e.g. Roberto Caranta in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 18.

previous tasks as well as by demonstrating under the final bidding how much material of a certain environmental kind they will apply in fulfilling the contract. One would often talk here about “green procurement” or “sustainable procurement”<sup>7</sup>, but the phrases “secondary procurement” or “secondary procurement”/“secondary considerations” can also be seen sometimes.<sup>8</sup> With reference to the fact that the elements of social and environmental Policies are not always of a secondary character, some authors have chosen to use the terminology of “horizontal” procurement,<sup>9</sup> as in earlier chapters of the present text.

In relation to Social Policies one might think of a situation where a government or a municipality is interested in integrating unemployed persons or persons from regions where the integration of foreign workers is low. Such policies may often be combined with other policies, such as wanting to build a multi-ethnic workforce or having families with toddlers involved in the workforce. But there may be many other policies that may naturally be classified as Social and Environmental Policies. This, for instance, goes for situations where a public authority is interested in promoting disabled persons in the workforce or where one form of energy is preferred over another. It might also be called Social and Environmental Policies where a municipality will prefer an architecturally interesting building instead of a functional *ditto*.

### **11.3 Provisions in primary EU legislation recognizing Social and Environmental Policies**

In the introduction to this Chapter, it has been stressed already that the TEU and the TFEU in their Preambles refer to Social and Environmental Policies several times.<sup>10</sup> This, however, is more of an expression of an intention than binding language. But the two treaties also include in their proper provisions a long list of prescriptions that include Social and Environmental Policies. This is worth noting in light of the fact that the CJEU in its judgments is putting much stress on the principles as they have been expressed in the treaties. For that reason it is worth surveying the wording of the two treaties that demonstrate this approach.

#### **11.3.1 TEU**

The proper provisions of the TEU have in many ways pointed to Social and Environmental Policies. Thus in Article 2 it is said that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between

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<sup>7</sup> See e.g. Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010).

<sup>8</sup> See e.g. Joel Arnould, *Secondary policies in public procurement: the innovations in the new Directives*. 13 P.P.L.R. 2004, 4, 187-197.

<sup>9</sup> Sue Arrowsmith and Peter Kunzlik (Eds.), *Social and Environmental Policies in EC Procurement Law, New Directives and New Directions*, (Cambridge University Press, 2009), xvii. See also to this Roberto Caranta in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 17. See also e.g. Rolf H. Weber, *Development promotion as a secondary policy in public procurement*, P.P.P.L 2009, 4, 184-200.

<sup>10</sup> See to this e.g. see Sue Arrowsmith in Sue Arrowsmith and Peter Kunzlik (Eds.), *Social and Environmental Policies in EC Procurement Law, New Directives and New Directions*, (Cambridge University Press, 2009), 147 ff.

women and men prevail". This is followed by Article 3, paragraph 3 stating *i.a.* that "It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child". In Article 6 of the TEU it is said that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 [...] which shall have the same legal value as the Treaties". Furthermore, it is said in Article 6 that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. [...]. Article 9 proclaims that "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies [...]."

### **11.3.2 TFEU**

Looking at the TFEU, one finds that Article 2 already provides that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". This provision is followed by Article 3 in which the three first paragraphs highlight a variety of values by referring right from the opening of the Article to "1. The Union's aim is to promote peace, its values and the well-being of its peoples." This is followed by paragraph 2 stating that "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime." And in Article 3, paragraph 3 it is stated that "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

After having referred to the establishment of an economic and monetary union in Article 3, paragraph 4, of the TEU, the TFEU goes on in Article 3, paragraph 5, by requiring that "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

The text of the TFEU deals with Social and Environmental Policies in many other ways. Thus it can be mentioned that the TFEU in Article 4 states that the Union shall share competence with the Member States in economic, social and territorial cohesion and on environment and consumer protection. In Article 9 it is stated that "In defining and implementing its policies and activities, the Union shall take into

account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". This line is further developed in Article 10 stating that "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". This is followed by Article 11 stating that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". Part II of the TFEU deals with "NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION" and prescribes for example in Article 21 that "the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection". In the various special Chapters of the TFEU dealing with various policies of the Union, several special provisions can be found. Thus in Article 107 in the provision against State Aid, it is found that "aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned" is compatible with the internal market. Article 114 on "APPROXIMATION OF LAWS" provides in paragraphs 3 that "The Commission, in its proposals [...] concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective". Paragraphs 4 and 5 hereafter deal with the possibility for the Member States, if they deem it necessary to maintain national provisions on grounds of major needs such as *i.a.* the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or relating to the protection of the environment or the working environment, to notify the Commission of these provisions as well as the grounds for maintaining them. And a Member State may deem it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure.

In relation to employment, Article 145 stipulates that "Member States and the Union shall [...] work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives [...] of the Treaty on European Union". TITLE X, Articles 151 to 161, is devoted to "SOCIAL POLICY". Thus Article 153 enumerates areas where the Union supports and complements activities of the Member States in such fields as improvement of the working environment to protect workers' health and safety, working conditions, social security and social protection of workers, protection of workers where their employment contract is terminated, information and consultation of workers, integration of persons excluded from the labour market, equality between men and women with regard to labour market opportunities and treatment at work, combating of social exclusion, and modernisation of social protection systems without prejudice to the third point. In accordance with Article 157, "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied." Further, the provision explains that equal pay without discrimination based on sex means that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement and that pay for work at time rates shall be the same for the same job. But in Article 157, paragraph 4, it is said that with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to

pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

By Articles 162 to 166 a European Social Fund administered by the Commission is established aiming to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

Articles 165 to 166 deal with education, vocational training, youth and sports and are *i.a.* directed towards creating a collaboration between the Union and the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

Article 168 deals with Public health and states that a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Consumer protection is covered by Article 169 whereas Articles 174 to 178 are from the Chapter on Economic, social and territorial cohesion.

Union policy on the environment, presented in Articles 191 to 193, aims at a high level of protection at preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular at combating climate change.

The Chapter on Energy, Article 194 prescribes in connection with Union policy on energy that it shall aim to ensure the functioning of the energy market, ensure security of energy supply in the Union, promote energy efficiency and energy saving and the development of new and renewable forms of energy.

Title III on "Cooperation with third countries and humanitarian aid" in Article 214 in this context especially deals with humanitarian aid.

It is also worth mentioning that the Charter of Fundamental Rights of the European Union has introduced certain political, social, and economic rights for European Union citizens and residents, into EU law. It thus includes an open-ended prohibition against discrimination in Article 21 where it is stated about "Non-discrimination" that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

## **11.4 Provisions in the EU Public Procurement Directives recognizing Social and Environmental Policies**

### **11.4.1 Introduction**

Specific instructions for a part of the general policy of the European Union, the Directives on Public Procurement – the general Directive 2004/18 and Directive

2004/17 on utilities have been formulated in light of the Treaties and as a consequence of the political development in the Union. For that reason the present Directives have incorporated into their Preambles and proper provisions elements of Social and Environmental Policies. Some of the more important points will be mentioned at this point.

#### **11.4.2 The Public Sector Directive 2004/18**

The general Public Sector Directive 2004/18 has thus in its Preamble, recital (1) spelled out that "This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital (2)." And in recital (2) it is then said, that "The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty."

A further development of this approach is developed in recital (5), where it is said that "Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts."

In recital (6) it is then said that "Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty."

The preamble spells out in recital (28) that "Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for public contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes."

As to technical specifications, recital (29) points to the possibility for contracting entities to define environmental requirements for the technical specifications of a given contract. In that case they may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. The preamble goes on expressing that they can use, but are not obliged to use appropriate specifications that are defined in ecolabels, such as the European Eco-label, (multi-)national eco-labels or any other eco-label provided that the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and provided the label is accessible and available to all interested parties. It is also stated that contracting authorities should, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting authority cover.

In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, recital (32) advises the Member States to include provisions on subcontracting.

Recital (33) deals with contract performance conditions, pointing out that "They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements – applicable during performance of the contract – to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation."

The Preamble in recital (34) deals with laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work. Such laws, etc. apply during performance of a public contract, providing that such rules, and their application, comply with Community law. Furthermore, it is stated that in cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, the Directive concerning the posting of workers in the framework of the provision of services lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

Recital (44) provides that "in appropriate cases", in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required. Environmental management schemes, whether or not they are registered under Community instruments can demonstrate that the economic operator has the technical capability to perform the contract. Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.

The Preamble outlines in recital (46) the award procedure. Here, in the very beginning, it is said that "(46) Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: 'the lowest price' and 'the most economically advantageous tender.'" By this introduction the Preamble clearly forms the background of the proper rule in Article 53 (see below).

The fourth part of recital (46) deals with equal treatment, but it also makes reference to environmental and social requirements, stating "In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs – defined in the specifications of the contract – of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong."

In the Directive 2004/18 itself, various provisions deal with issues in relation to Social and Environmental Policies. Thus Article 19 on "Reserved contracts" provides that "Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions [...]." And in the provision on "Technical specifications" in Article 23 in chapter IV on "Specific rules governing specifications and contract documents", it is stated in Section 1 that "Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users." And in Section 3 is said "Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated: either by reference to technical specifications defined in [...]; (b) or in terms of performance or functional requirements; the latter may include environmental characteristics [...]. And Section 6 the Directive prescribes that "Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-)national eco-labels, or by any other eco-label, provided that:

- those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,
- the requirements for the label are drawn up on the basis of scientific information,
- the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and
- they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body."

Article 26 deals with "Conditions for performance of contracts" and includes the words: "The conditions governing the performance of a contract may, in particular, concern social and environmental considerations."

Article 27 relates to "Obligations relating to taxes, environmental protection, employment protection provisions and working conditions" and states in Section 1 and in the first part of Section 2 that "1. A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, environmental protection, the employment protection provisions and the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or the services provided during the performance of the contract." "2. A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided".

### **11.4.3 The Utility Directive 2004/17**

The Utility Directive<sup>11</sup> is in many ways formulated in the same way as the Public Sector Directive including its provisions on social and environmental policies. For this reason it suffices to make only a few references here.

The Utility Directive thus on the same line as the Public Sector Directive in its preamble recital (1) includes the words that "This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting entities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the contracting entity, are expressly mentioned and comply with the fundamental principles mentioned in recital 9". And recital 9 mentions the "the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality, as well as the principle of transparency".

In recital (12) it is then mentioned that "environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of the Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts". The Preamble further in several recitals refers to social and environmental policies, *i.a.* recital (39) that "Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market". Furthermore, in recital (42) it is said that "[..] it should be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it should be

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<sup>11</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors Official Journal L 134/1.

possible to draw up the technical specifications in terms of functional performance and requirements and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety should be considered by the contracting entities [...]”.

In the Directive 2004/17 itself, various provisions then deal directly with social and environmental policies. Just a few examples will be sufficient and here one can point to Article 28 that deals with the possibility that “Member States may reserve the right to participate in contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes [...]”. Furthermore, Article 38 on “Conditions for performance of contracts” in accordance to which provision “Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice used as a means of calling for competition or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations”. Article 55 on the “Award of the contract” in relation to the situation where the contract is awarded on the basis of “the most economically advantageous tender from the point of view of the contracting entity”, mentions in relation to the various criteria linked to the subject matter of the contract in question, that “environmental characteristics” may be included among them.

In Annex XXI on “the definition of certain technical specifications” the Directive states that ‘technical specifications’ means a specification in a document defining the required characteristics of a product or a service, “such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product or safety [...]”.

## **11.5 EU Case Law Dealing With Social and Environmental Policies**

The European Court of Justice has been engaged with the question on social and environmental values early in the history of public procurement. Before going into the case law, it is, however, important to take note of the fact that in relation to public procurement there are two different areas where the social and environmental policies might be of importance. On the one side the procuring entity may want to stress social and environmental policies already by the qualification of the possible suppliers, whereas the procuring entity on the other side might strive towards promoting social and environmental policies also later in the fulfilment of the contract. This two-sided approach can be seen from an elementary example. If the procuring entity, e.g. a municipality, in relation to the prequalification of the possible suppliers is inclined to select those firms that have a good record for using long-term unemployed persons or for using disabled persons will be preferred. The other situation occurs if the municipality has made it clear that it will prefer tenders that take into consideration environmental considerations, and the municipality may for instance specify in the tender documents that this is part of the quality assessment with a certain percentage.

It is often claimed<sup>12</sup> that the first case where the Court had an opportunity to deal with matters of social and environmental policies was the *Beentjes* judgment from

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<sup>12</sup> See e.g. *Roberto Caranta* in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), p. 19.

1988<sup>13</sup>. And it is correct that already in this judgment the CJEU highlighted the fact that green or sustainable public procurement might be taken into consideration at various levels of the public procurement processes.

## 11.5.1 The Beentjes judgment 1988<sup>14</sup>

### 11.5.1.1 The Judgment

In that case the CJEU was asked by a national, Dutch, court to deal with several questions that had come up during a public procurement dispute. Among these questions were problems about the examination of the suitability of contractors to carry out the contracts to be awarded and about inability of the contractor to employ long-term unemployed persons.

The CJEU, Fourth Chamber, started answering the questions in a rather broad way<sup>15</sup> by pointing to the fact that the relevant provision of the then existing Directive<sup>16</sup>, Article 20, provided that the suitability of contractors was to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical knowledge or ability referred to in [Articles 25 to 28]<sup>17</sup>. The purpose of these articles was to determine the references or evidence which may be furnished in order to establish the contractor's financial and economic standing and technical knowledge or ability. The CJEU hereby referred to its own previous judgment in "CEI and Bellini"<sup>18</sup>. Nevertheless, the CJEU said, it was clear from these provisions that the authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability.<sup>19</sup> The Court, however, went on, pointing to the criteria for the award of contracts. This was provided for in the then existing Directive 71/305, Article 29 (1) where it was said that the authorities awarding contracts must base their decision either on the lowest price only or, when the award is made to the most economically advantageous tender, on various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.<sup>20</sup> The CJEU went on explaining<sup>21</sup> that although the second alternative left it to the authorities awarding contracts to choose the criteria on which they propose to base their award of the contract, their choice was limited to criteria aimed at identifying the offer which is economically the most advantageous. The Court continued by saying that indeed, it was only by way of exception that Article 29 (4) provided that an award may be based on criteria of a different nature "within the framework of rules whose aim is to give preference to certain tenderers by way of aid, on condition that the rules invoked are in conformity with the Treaty, in particular" the Articles dealing with state aid. Furthermore, the CJEU remarked,<sup>22</sup> the directive did not lay down a uniform and exhaustive body of Community rules; within the framework of the common rules which it contains, the Member States remained free to maintain or adopt substantive and procedural rules in regard to public works contracts on

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<sup>13</sup> Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands*, [1988] ECR 4635.

<sup>14</sup> Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands*, [1988] ECR 4635

<sup>15</sup> Paragraph 17.

<sup>16</sup> Directive 71/305 on public works contracts.

<sup>17</sup> These provisions are in Directive 2004/18 now reformulated and placed in Articles 44-52.

<sup>18</sup> Joined Cases 27-29/86, *S.A. Construction et Entreprises Industrielles (CEI) and others v Société Coopérative "Association Intercommunales pour les Autoroutes des Ardennes" and others* ("CEI and Bellini") [1987] ECR 3347.

<sup>19</sup> See below about the wording today in Directive 2004/18.

<sup>20</sup> See now Article 53 of the Directive 2004/18.

<sup>21</sup> Paragraph 19.

<sup>22</sup> Paragraph 20.

condition that they complied with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty with regard to the right of establishment and the freedom to provide services. The CJEU hereby made a reference to the previously mentioned "*CEI and Bellini*" judgment.<sup>23</sup> And in order to meet the directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which governed each contract must be given sufficient publicity by the authorities awarding contracts.<sup>24</sup> To this end, the CJEU said,<sup>25</sup> the directive had set out rules for Community-wide advertising of contracts drawn up by awarding authorities in the Member States so as to give contractors in the Community adequate information on the work to be done and the conditions attached thereto, and thus enable them to determine whether the proposed contracts were of interest. At the same time additional information concerning contracts must, as was customary in the Member States, be given in the contract documents for each contract or else in an equivalent document.

These general statements from the CJEU came to form the background to the answer from the CJEU to the national Dutch court.

First the CJEU dealt with the element of the case where specific experience relating to the work to be carried out was a criterion for determining the technical knowledge and ability of the tenderers<sup>26</sup>. The CJEU therefore found that that was a legitimate criterion for checking contractors' suitability under some specifically mentioned provision of the directive<sup>27</sup>. The CJEU explained this by pointing to the fact that the exclusion of a tenderer because its tender appeared less acceptable to the authorities awarding the contract was provided for in the Dutch so-called "Uniform Rules" and according to this legislation "the contract shall be awarded to the tenderer whose tender appears the most acceptable to the awarding authority". And the compatibility of such a provision with the directive depended on its interpretation under national law. It would be incompatible with the directive<sup>28</sup> if its effect was to confer on the authorities awarding contracts unrestricted freedom of choice regarding the awarding of the contract in question to a tenderer. But on the other hand, such a provision would not be incompatible with the directive if it was to be interpreted as giving the authorities awarding contracts discretion to compare the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in Article 29 (2) of the then existing directive.<sup>29</sup>

Then the Court went on to deal directly with the question on the exclusion of a tenderer on the ground that it would not be in a position to employ long-term unemployed persons.<sup>30</sup> The Court noted here in the first place that such a condition had no relation to the checking of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability, or to the criteria for the award of contracts referred to in Article 29<sup>31</sup> of the directive. And it

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<sup>23</sup> Joined Cases 27-29/86, *S.A. Construction et Entreprises Industrielles (CEI) and others v Société Coopérative "Association Intercommunales pour les Autoroutes des Ardennes" and others* ("CEI and Bellini") [1987] ECR 3347.

<sup>24</sup> Paragraph 21.

<sup>25</sup> Paragraph 22.

<sup>26</sup> Paragraphs 24 to 27.

<sup>27</sup> Articles 20 and 26 of the directive. These provisions are today Articles 44 *ff.* of Directive 2004/18.

<sup>28</sup> Article 29 of the then existing directive. See now Directive 2004/18 Article 53.

<sup>29</sup> See now Directive 2004/18 Articles 53.

<sup>30</sup> Paragraphs 28 to 36.

<sup>31</sup> This is now Article 53 in Directive 2004/18.

followed from the "*CEI and Bellini*" judgment<sup>32</sup> that in order to be compatible with the directive, such a condition must comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty with regard to the right of establishment and the freedom to provide services. The obligation to employ long-term unemployed persons could inter alia infringe the prohibition of discrimination on grounds of nationality laid down in the second paragraph of Article 7 of the Treaty as it stood at that time<sup>33</sup> if it became apparent that such a condition could be satisfied only by tenderers from the State concerned (i.e. the Netherlands) or indeed that tenderers from other Member States would have difficulty in complying with it. But it was for the national court to determine, in the light of all the circumstances of the case, whether the imposition of such a condition was directly or indirectly discriminatory. The CJEU, however, did not stop here. It went on stating<sup>34</sup> that even if the criteria considered above were not in themselves incompatible with the directive, they must be applied in conformity with all the procedural rules laid down in the directive, in particular the rules on advertising. It was therefore necessary to interpret those provisions in order to determine what requirements must be met by the various criteria referred to by the national court. And it appeared from the documents before the CJEU that in this case the criterion of specific experience relating to the work to be carried out and that of the most acceptable tender were not mentioned in the contract documents or in the contract notice; these criteria were derived from the Dutch legislation, the "Uniform Rules", to which the notice made a general reference. On the other hand, the requirement regarding the employment of long-term unemployed persons was the subject of special provisions in the contract documents and was expressly mentioned in the notice published in the Official Journal of the European Communities<sup>35</sup>. As regards the criterion of specific experience relating to the work to be carried out, the CJEU stated that although the directive required the authorities awarding contracts to specify in the contract notice which of the references concerning the technical knowledge and ability of the contractor were to be produced, it did not require them to list in the notice the criteria on which they propose to base their assessment of the contractors' suitability. Nevertheless, in order for the notice to fulfil its role of enabling contractors in the Community to determine whether a contract was of interest to them, it must contain at least some mention of the specific conditions which a contractor must meet in order to be considered suitable to tender for the contract in question. However, such a mention could not be required where, as in this case, the condition was not a specific condition of suitability but a criterion which was inseparable from the very notion of suitability.

Furthermore, the CJEU dealt with the criterion of "the most acceptable offer".<sup>36</sup> As regards the criterion of "the most acceptable offer", the CJEU noted that even if such a criterion were compatible with the directive in the circumstances set out above, it was clear from the wording of Article 29 of the then existing directive<sup>37</sup> that where the authorities awarding the contract did not take the lowest price as the sole criterion for awarding the contract but had regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they were required to state these criteria in the contract notice or the contract documents. Consequently, a general reference to a provision of national legislation

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<sup>32</sup> Joined Cases 27-29/86, *S.A. Construction et Entreprises Industrielles (CEI) and others v Société Coopérative "Association Intercommunales pour les Autoroutes des Ardennes" and others* ("CEI and Bellini") [1987] ECR 3347.

<sup>33</sup> See now TFEU Article 18.

<sup>34</sup> Paragraphs 31-34.

<sup>35</sup> Today OJEU.

<sup>36</sup> Paragraph 35.

<sup>37</sup> See now Article 53.

could not satisfy the publicity requirement. And the CJEU continued by saying<sup>38</sup> that a condition such as the employment of long-term unemployed persons was an additional specific condition and had therefore to be mentioned in the notice, so that contractors may become aware of its existence.

These various considerations led the CJEU to give the answer<sup>39</sup> to the question from the national Dutch court that

(i) the criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents;

(ii) the criterion of "the most acceptable tender", as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice. It followed from [...] the directive that where the authorities awarding contracts did not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents;

(iii) the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice.

#### **11.5.1.2 Comments on the Beentjes judgment**

In the author's view the *Beentjes* judgment is first of all important in stating that the award criterion of the most economically advantageous tender may include criteria other than pure economic elements. It has, however, been argued that *Beentjes* can hardly be read as an unconditional manifestation of support for sustainable public procurement since the traditional concerns as to non-discrimination and free movement are very much at the heart of this judgment.<sup>40</sup> However, this statement might be questioned. It is thus clear from the judgment that the interpretation made by the CJEU of the relevant directive gave full credit to the wording of the provisions laying down the possibilities for the contracting authorities to also take into consideration elements other than those that are purely economic. The focus of the Court was thus first of all to point to the possibility for the public entity to choose elements of other kinds than just money as their preference. The fact that the Court at the same time reminded us of the provisions on the free movement and other principles, such as transparency, from the European Union has in no way been intended to be counterproductive in relation to secondary procurement. By taking the strict interpretation of the wording of the directive, the Court has expressed the view that if the legislator – here the Council of Ministers – has expressed its inclination in a clear direction it is not for the Court or other bodies to attribute another meaning to that wording.

### **11.5.2 The Nord-pas-de-Calais judgment 2000**

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<sup>38</sup> Paragraph 36.

<sup>39</sup> Paragraph 37.

<sup>40</sup> R. Caranta in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 20.

### 11.5.2.1 The Judgment

In the *Nord-pas-de-Calais* judgment<sup>41</sup> the CJEU's earlier findings were further developed. The background to the case was that the European Commission had received a complaint that led it to initiate proceedings against the Republic of France. The point of focus was a tendering procedure for a public works contract issued by open procedure and relating to the construction of a multipurpose secondary school in Wingles in the Département du Pas-de-Calais. A contract notice had been published in the Official Journal of the European Communities in accordance with former Directive 71/305. The Commission, however, took the view that Directive 71/305 had not been complied with.

Meanwhile, pursuant to Directive 93/37, the Nord-Pas-de-Calais Region published a series of 14 contract notices in the Official Journal in connection with an operation known as Plan Lycées (Secondary School Plan). The notices were identical for all the contracts and concerned restricted invitations to tender relating to the completion of contracts of modernisation and maintenance works over a period of 10 years. Groupings of undertakings were permitted to tender and minimum standards for participation were imposed, in particular concerning references and qualifications. Furthermore, those notices stated that the tenders would be assessed by taking account of various award criteria, including the quality/price ratio of the technical response and the services, the time-limit for completion of the works of construction and renovation excluding maintenance, and the mode of action and an additional criterion relating to employment. A further contract notice was published in the Official Journal concerning the design and building of a secondary school to a high environmental standard, which required higher levels of qualification and that the architect should be qualified to practise in France.

Later on an agreement was signed between the President of the Commission PME-Marchés des Constructions Scolaires of the Fédération Régionale du Bâtiment, the President of the Fédération Régionale des Travaux Publics and the Nord-Pas-de-Calais Regional Delegate of the Syndicat National du Béton Armé et des Techniques Industrialisées in order to define the detailed arrangements according to which regional and local small and medium-sized firms, represented by the signatories, could tender for the global contract for the construction and maintenance of the secondary schools of the Nord-Pas-de-Calais Region in the form of joint groupings of mutually supportive undertakings divided into three categories per contract notice published. That agreement was published in the French *Moniteur du Bâtiment et des Travaux Publics* in the section entitled 'official instruments'.

After having had some correspondence with France, the Commission brought an action before the CJEU based on eight complaints which related *i.a.* to an additional criterion relating to employment.

As to the latter complaint relating to a campaign against unemployment, the Commission claimed that, in expressly setting forth as an award criterion in a number of contract notices a condition relating to employment linked to a local project to combat unemployment, the French authorities had infringed Article 30 of the then valid Directive 93/37. This provision stated that the criteria on which the contracting authorities shall base the award of contracts should be (a) either the lowest price only, or (b) when the award was made to the most economically advantageous tender, various criteria according to the contract: *e.g.* price, period for completion, running costs, profitability, or technical merit<sup>42</sup>.

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<sup>41</sup> Case C-225/98, *Commission v France* ("Nord-pas-de-Calais") [2000] ECR I-7445.

<sup>42</sup> Article 30 (1) of Directive 93/37 was thus similar to the present Directive 2004/18 Article 53.

The Commission acknowledged that the taking into account of employment-related projects may be regarded as a condition of performance for the purpose of the rule in *Beentjes*<sup>43</sup>, but the Commission pointed out that, in the present case, that possibility was characterised as an award criterion in the contract notices in question. Under Article 30 of Directive 93/37, award criteria had to be based either on the lowest price or on the most economically advantageous tender.

The CJEU firstly noted that, by this complaint, the Commission had alleged that France had infringed Article 30 (1) of Directive 93/37 purely and simply by referring to the criterion linked to the campaign against unemployment as an award criterion in some of the disputed contract notices. And under Article 30 (1) of Directive 93/37, the criteria on which the contracting authorities were to base the award of contracts were either the lowest price only or, when the award was made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit.

But the CJEU spelled out that none the less, Article 30 (1) did not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition was consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services.<sup>44</sup> Furthermore, even if such a criterion was not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising.<sup>45</sup> It followed that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence.<sup>46</sup> As regards the Commission's argument that the *Beentjes* judgment concerned a condition of performance of the contract and not a criterion for the award of the contract, the CJEU rejected that merely by observing that, as was clear from the *Beentjes* judgment<sup>47</sup>, the condition relating to the employment of long-term unemployed persons, which had been at issue in that case, had been used as the basis for rejecting a tender and therefore necessarily constituted a criterion for the award of the contract. In the present case the Commission had only criticised the reference to such a criterion as an award criterion in the contract notice. The Commission did not claim that the criterion linked to the campaign against unemployment was inconsistent with the fundamental principles of European Union law, in particular the principle of non-discrimination, or that it was not advertised in the contract notice. In those circumstances, the Commission's complaint relating to the additional award criterion linked to the campaign against unemployment had to be rejected.

### **11.5.2.2 Comments on the Nord-pas-de-Calais judgment**

Also here it must be noted that the CJEU is accepting elements of sustainable procurement but only to remind us that this must at the same time recognize the fundamental EU principles such as non-discrimination and transparency. It can be added that shortly after the time when the Commission had been arguing the *Nord-*

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<sup>43</sup> Case 31/87, *Gebroeders Beentjes BV v Netherlands* ("*Beentjes*") [1998] ECR 4635, paragraphs 28 and 37. See above in the text for this judgment.

<sup>44</sup> Here referring to Case 31/87, *Gebroeders Beentjes BV v Netherlands* ("*Beentjes*") [1998] ECR 4635, paragraph 29.

<sup>45</sup> Here referring to *Beentjes*, paragraph 31.

<sup>46</sup> Here referring to *Beentjes*, paragraph 36.

<sup>47</sup> *Beentjes*, paragraph 14.

*pas-de-Calais* case it published in 2001 two communications on the possibilities for integrating environmental<sup>48</sup> and social<sup>49</sup> considerations into public procurement.

It has been argued, however, that this Judgment – like the *Beentjes* judgment – “could hardly be said to be promoting or even endorsing sustainable public procurement”.<sup>50</sup> The present author is not of the same opinion on this point.

### **11.5.3 SIAC Construction judgment 2001**

#### **11.5.3.1 The Judgment**

In the *SIAC Construction* judgment<sup>51</sup> the Irish Supreme Court referred to the CJEU for a preliminary ruling a question concerning the interpretation of Article 29<sup>52</sup> of the then existing Council Directive 71/305/EEC on public procedures for the award of public works contracts. That question had been raised in a dispute between SIAC Construction Ltd and the County Council of the County of Mayo. The wording of article 29 was:

“1. The criteria on which the authorities awarding contracts shall base the award of contracts shall be:

- either the lowest price only;
- or, when the award is made to the most economically advantageous tender, various criteria according to the contract: e.g. price, period for completion, running costs, profitability, technical merit.

2. In the latter instance, the authorities awarding contracts shall state in the contract documents or in the contract notice all the criteria they intend to apply to the award, where possible in descending order of importance.”

The County Council advertised in the EU Official Journal for tenders for a public works contract to be awarded by open procedure and involving, *inter alia*, the laying of sewers, storm overflows, ventilating columns, storm water drains, rising mains and water supply pipes. This contract was a measure-and-value contract, under which the quantities estimated for each item were set out in the bill of quantities. For this type of contract, the tenderer had to complete the bill of quantities by filling in a rate for each item and a total price for the estimated quantity. The price payable was determined by measuring the actual quantities on completion of the work and valuing them at the rates quoted in the tender.

Under the heading “Award criteria (other than price)”, the contract notice provided that: “the contract shall be awarded to the competent contractor submitting a tender which is adjudged to be the most advantageous to the Council in respect of cost and technical merit, subject to the approval of the Minister for the Environment”.

Twenty-four contractors submitted tenders. Among the three lowest tenders submitted was SIAC’s. The consulting engineer appointed by the County Council to judge the tenders stated in his report, among other things, that the three lowest

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<sup>48</sup> Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, [2001] OJ C 333/12.

<sup>49</sup> Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, [2001] OJ C 333/27.

<sup>50</sup> See R. Caranta in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 21.

<sup>51</sup> Case C-19/00, *SIAC Construction* [2001] ECR I-7725.

<sup>52</sup> Similar to the present Article 53 of Directive 2004/18.

tenders were equal from the point of view of their technical merit. On the other hand, he had serious reservations regarding the tender submitted by SIAC and that the pricing system which it had used greatly reduced the freedom of the consulting engineer to properly and fully administer the contract in a way that, in his view, was the most economically advantageous to the County Council. The consulting engineer also pointed out that, under the heading "Materials", a provisional sum of IEP 90 000 was included to which each tenderer was instructed to add a percentage for overheads, profit, and so on. SIAC, however, deducted this provisional sum in the amount of 100%. The consulting engineer took the view that SIAC was not entitled to make such a deduction. The consulting engineer's report went on to state that the approach adopted by SIAC greatly reduced control over all the items in the bill of quantities, which would in one way or another vary on final measurement. More specifically, SIAC had zero-rated 27.5% of the items, whereas another tenderer, Mulcair, for example, had zero-rated only 18% of the items and had, according to the consulting engineer, priced all major items of measured work. The report of the consulting engineer concluded that Mulcair had submitted a tender that was "more balanced" than that of SIAC, and that Mulcair's tender might give better value for money and might even cost less. In his recommendations, the consulting engineer stated that the tender submitted by a third tenderer had to be rejected simply on the ground that its price, as corrected, came to IEP 115,047.33 more than that of Mulcair. He recommended that the tender submitted by SIAC should not be accepted on the following grounds: SIAC's failure to submit a "time for completion" at the date of tender, and that SIAC's withdrawal, by means of a 100% reduction, of a provisional sum of IEP 90 000 against which it was allowed only to add a percentage for overheads, profit, and so forth, and thirdly because of SIAC's failure to price major items of measured work throughout the various bills of quantities, which distorted its bill of quantities and rendered proper management and control extremely difficult, if, indeed, not impossible. The consulting engineer recommended for those reasons that Mulcair's corrected tender be accepted and the County Council accordingly entered into a contract with Mulcair that was afterwards completed.

When the case came before the Irish Supreme Court, it put a question to the CJEU which was reformulated by that Court essentially to be whether Article 29(1) and (2) of Directive 71/305 must be construed as allowing an awarding authority which has chosen to award a contract to the most economically advantageous tender to award that contract to the tenderer who has submitted the tender the ultimate cost of which is likely to be the lowest according to the professional opinion of an expert.

This gave the CJEU an opportunity to express *i.a.* that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority<sup>53</sup>. Furthermore, the CJEU stated that as for the criteria which may be accepted as criteria for the award of a public works contract to what is the most economically advantageous tender, Article 29(1), second indent, of Directive 71/305, does not list these exhaustively. However, although that provision thus leaves it to the adjudicating authorities to choose the criteria on which they propose to base their award of the contract, that choice may relate only to criteria aimed at identifying the offer which is economically the most advantageous.<sup>54</sup> Further, an award criterion having the effect of conferring on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer would be incompatible with Article 29 of Directive 71/305.<sup>55</sup>

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<sup>53</sup> With reference to Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 54.

<sup>54</sup> With reference to Case 31/87, *Gebroeders Beentjes BV v Netherlands* ("Beentjes") [1998] ECR 4635, paragraph 19.

<sup>55</sup> Beentjes, paragraph 26.

After this the CJEU gave the following answer to the national court:  
"Article 29(1) and (2) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts,[...] must be interpreted as permitting an adjudicating authority which has chosen to award a contract to the most economically advantageous tender to award that contract to the tenderer who has submitted the tender the ultimate cost of which, in the professional opinion of an expert, is likely to be the lowest, provided that the equal treatment of tenderers has been ensured, which presupposes that the transparency and objectivity of the procedure have been guaranteed and in particular that:  
- this award criterion was clearly stated in the contract notice or contract documents; and  
- the professional opinion is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made".

### **11.5.3.2 Comments on the SIAC Construction judgment**

Although this judgment does not deal directly with social and environmental policies, it is of interest as it highlights the possibility for procuring authorities to choose the award criterion when that is done with due respect to the fundamental EU law principles.

## **11.5.4 Concordia Buses judgment 2002**

### **11.5.4.1 The Judgment**

The *Concordia Buses* judgment<sup>56</sup> was a full court judgment thus indicating a special importance to the issues under scrutiny. The Supreme Administrative Court of Finland had put questions to the CJEU regarding the Directive on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>57</sup> and on the Directive relating to procedures for the award of public service contracts<sup>58</sup>. Those questions were raised in proceedings between Concordia Bus Finland and the City of Helsinki and HKL-Bussiliikenne concerning the validity of a decision of the commercial service committee of the City of Helsinki awarding the contract for the operation of a route in the urban bus network of Helsinki to HKL-Bussiliikenne.

The background was that the Helsinki City Council had decided to introduce tendering progressively for the entire bus transport network of the City of Helsinki, in such a way that the first route to be awarded would start operating from the autumn 1998 timetable. According to the tender notice for i.a. lot no 6, the contract would be awarded to the undertaking whose tender was most economically advantageous overall to the city. That was to be assessed by reference to three categories of criteria: the overall price of operation, the quality of the bus fleet, and the operator's quality and environment management. As regards, first, the overall price asked, the most favourable tender would receive 86 points and the number of points of the other tenders would be calculated by using the following formula: Number of points = amount of the annual operating payment of the most favourable tender divided by the amount of the tender in question and multiplied by

<sup>56</sup> Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Buses") [2002] ECR I-7213.

<sup>57</sup> Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 L 199/ 84.

<sup>58</sup> Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209/1.

86. As regards, next, the quality of the vehicle fleet, a tenderer could receive a maximum of 10 additional points on the basis of a number of criteria. Thus points were awarded inter alia for the use of buses with nitrogen oxide emissions below 4 g/kWh (+2.5 points/bus) or below 2 g/kWh (+3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus). Finally, regarding the operator's quality and environment programme, additional points were to be awarded for various certified quality criteria and for a certified environment protection programme.

The purchasing office of the City of Helsinki received eight tenders for lot 6, including those from HKL-Bussiliikenne and from Swebus Finland Oy Ab ('Swebus', subsequently Stagecoach Finland Oy Ab, then Concordia). The latter's tender comprised two offers, designated A and B.

The commercial service committee decided to choose HKL-Bussiliikenne as the operator for the route in lot 6, as its tender was regarded as the most economically advantageous overall. According to the order for reference, Concordia (then Swebus) had submitted the lowest-priced tender, obtaining 81.44 points for its A offer and 86 points for its B offer. HKL-Bussiliikenne obtained 85.75 points. As regards the bus fleet, HKL-Bussiliikenne obtained the most points, 2.94 points, Concordia (then Swebus) obtaining 0.77 points for its A tender and -1.44 points for its B tender. The 2.94 points obtained for the vehicle fleet by HKL-Bussiliikenne included the maximum points for nitrogen oxide emissions below 2 g/kWh and a noise level below 77 dB. Concordia (then Swebus) did not receive any extra points for the criteria relating to the buses' nitrogen oxide emissions and noise level. HKL-Bussiliikenne and Concordia obtained maximum points for their quality and environment certification. In those circumstances, HKL-Bussiliikenne received the greatest number of points overall, 92.69. Concordia (then Swebus) took second place with 86.21 points for its A offer and 88.56 points for its B offer.

Questions were put to the CJEU which reformulated them and spelled out that by the second question, which the CJEU took up firstly, the national court essentially had asked whether Article 36(1)(a) of Directive 92/50<sup>59</sup> was to be interpreted as meaning that, where in the context of a public contract for the provision of urban bus transport services the contracting authority decides to award that contract to the tenderer submitting the most economically advantageous tender, it may take into account the reduction of nitrogen oxide emissions or the noise level of the vehicles in such a way that, if those emissions are or that noise level is below a certain ceiling, additional points may be awarded for the purposes of comparing the tenders.

The CJEU when answering the question thus reformulated, started by pointing to the fact that Article 36(1)(a) of Directive 92/50 provided that the criteria on which the contracting authority may base the award of contracts may, where the award is made to the economically most advantageous tender, consist of various criteria relating to the contract, such as, for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, or price. It then continued by saying

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<sup>59</sup> Article 36(1)(a) of Directive 92/50 was very close to the now valid Article 53 of Directive 2004/18 since it was headed "Criteria for the award of contracts" and read: "1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be: (a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or (b) the lowest price only.

2. Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance."

that in order to determine whether and under what conditions the contracting authority may, in accordance with Article 36(1)(a), take into consideration criteria of an ecological nature, it must be noted, first, that, as was clear from the wording of that provision, in particular the use of the expression “for example”, that the criteria which may be used for the award of a public contract to the economically most advantageous tender were not listed exhaustively.<sup>60</sup> Second, Article 36(1)(a) could not be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It could not be excluded that factors which were not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion was also supported by the wording of the provision, which expressly referred to the criterion of the aesthetic characteristics of a tender. Moreover, the CJEU went on recalling its own previous practice by reminding that it already had held that the purpose of coordinating the procedures for the award of public contracts at Community level is to eliminate barriers to the free movement of services and goods.<sup>61</sup>

This led the CJEU to a general conclusion saying that in the light of that objective and also of the wording of the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, transferred by the Treaty of Amsterdam in slightly amended form to Article 6 EC, which laid down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 did not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender.<sup>62</sup>

But the CJEU added, however, that that did not mean that any criterion of that nature may be taken into consideration by the contracting authority. Since while Article 36(1)(a) of Directive 92/50 left it to the contracting authority to choose the criteria on which it proposes to base the award of the contract, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender.<sup>63</sup> Since a tender necessarily relates to the subject matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject matter of the contract. The CJEU continued by recalling, first, that, as it had already held, in order to determine the economically most advantageous tender, the contracting authority must be able to assess the tenders submitted and take a decision on the basis of qualitative and quantitative criteria relating to the contract in question. Further, the CJEU said, it also appeared from the case-law that an award criterion having the effect of conferring on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer would be incompatible with Article 36(1)(a) of Directive 92/50.<sup>64</sup> Next, it should be noted that the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising. It followed that, in accordance with Article 36(2) of that directive, all such criteria must be expressly mentioned in the contract documents

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<sup>60</sup> The CJEU hereby referred to Case C-19/00, *SIAC Construction* [2001] ECR I-7725, paragraph 35.

<sup>61</sup> Referring here to, *inter alia*, Case C-19/00, *SIAC Construction* [2001] ECR I-7725, paragraph 32.

<sup>62</sup> Paragraph 57.

<sup>63</sup> With reference to *i.a.* Case 31/87, *Gebroeders Beentjes BV v Netherlands* (“Beentjes”) [1998] ECR 4635, paragraph 19, and Case C-19/00, *SIAC Construction* [2001] ECR I-7725, paragraph 36.

<sup>64</sup> With reference to *Beentjes*, paragraph 26, and Case C-19/00, *SIAC Construction* [2001] ECR I-7725, paragraph 37.

or the tender notice so that operators are in a position to be aware of their existence and scope.<sup>65</sup> Finally, such criteria must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination as it followed from the provisions of the Treaty on the right of establishment and the freedom to provide services.<sup>66</sup>

The conclusion from this was said to be that, where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.<sup>67</sup>

Turning to the main proceedings of the case, the CJEU stated, first, that criteria relating to the level of nitrogen oxide emissions and the noise level of the buses, such as those at issue in those proceedings, could be regarded as linked to the subject matter of a contract for the provision of urban bus transport services. Next, criteria whereby additional points were awarded to tenders which meet certain specific and objectively quantifiable environmental requirements were not such as to confer an unrestricted freedom of choice on the contracting authority. And in addition the criteria at issue in the main proceedings were expressly mentioned in the tender notice published by the purchasing office of the City of Helsinki. Finally, whether the criteria at issue in the main proceedings complied in particular with the principle of non-discrimination fell to be examined in connection with the answer to the third question, which concerned precisely that point.

Consequently, in the light of all the foregoing, the answer to the second question was that Article 36(1)(a) of Directive 92/50 was to be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.<sup>68</sup>

The CJEU then turned to the third question and reformulated it to be, essentially, whether the principle of equal treatment precluded the taking into consideration of criteria concerned with protection of the environment, such as those at issue in the main proceedings, because the contracting entity's own transport undertaking was one of the few undertakings able to offer a bus fleet satisfying those criteria.

To this the CJEU stated that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition. Thus the award criteria must observe the principle of non-discrimination as it follows from the Treaty provisions on freedom

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<sup>65</sup> Reference concerning public works contracts to *Beentjes*, paragraphs 31 and 36, and Case C-225/98, *Commission v France ("Nord-pas-de-Calais")* [2000] ECR I-7445, paragraph 51.

<sup>66</sup> With reference to *Beentjes*, paragraph 29, and *Nord-pas-de-Calais*, paragraph 50.

<sup>67</sup> Paragraph 64.

<sup>68</sup> Paragraph 69.

of establishment and freedom to provide services.<sup>69</sup> In the present case, it should be noted, first, that, as was apparent from the order for reference, the award criteria at issue in the main proceedings were objective and applied without distinction to all tenders. Next, the criteria were directly linked to the fleet offered and were an integral part of a system of awarding points. Finally, under that system, additional points could be awarded on the basis of other criteria linked to the fleet, such as the use of low-floor buses, the number of seats and tip-up seats and the age of the buses. Therefore if it was held that, in such a factual context, the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, was not in itself such as to constitute a breach of the principle of equal treatment. In those circumstances, the answer to the third question was that the principle of equal treatment did not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, solely because the contracting entity's own transport undertaking was one of the few undertakings able to offer a bus fleet satisfying those criteria.

The CJEU then turned to the first question by which the CJEU found that the national court essentially had asked whether the answer to the second and third questions would be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Directive 93/38. To this the CJEU noted, first, that the provisions of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38 had substantially the same wording. Second, the provisions concerning award criteria of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1) and those of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p.54) also had substantially the same wording as those of Article 36(1)(a) of Directive 92/50 and Article 34(1)(a) of Directive 93/38. It should be observed, third, that those directives taken as a whole constituted the core of Community law on public contracts and were intended to attain similar objectives in their respective fields. In those circumstances, there was no reason to give a different interpretation to two provisions which fell within the same field of Community law and had substantially the same wording. The CJEU added that it should also be noted that the Court had already held in the "Storebaelt" Judgment<sup>70</sup> that the duty to observe the principle of equal treatment lies at the very heart of all the public procurement directives. The documents in the main proceedings had not disclosed anything to show that, as regards the contracting entity's choice of award criteria, the interpretation of that principle should depend in the present case on the particular directive applicable to the contract in question. The answer to the first question therefore was that the answer to the second and third questions would not be different if the procedure for the award of the public contract at issue in the main proceedings fell within the scope of Directive 93/38.

#### **11.5.4.2 Comments on the Concordia Buses judgment**

It has been argued that this judgment was a much more forthcoming case.<sup>71</sup> However, it is worth noting that the CJEU in this case was referring to "the subject matter of the contract" as a limitation on the free choice of the contracting authorities. The CJEU thus clearly made a reservation in relation to what had been

<sup>69</sup> Referring to Case 31/87, *Gebroeders Beentjes BV v Netherlands ("Beentjes")* [1998] ECR 4635, paragraph 33.

<sup>70</sup> Case C-243/89, *Commission v Denmark ("Storebaelt")* [1993] ECR I-3353, in paragraph 33.

<sup>71</sup> See on this subject R. Caranta in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 22.

argued by the Advocate General in the case, who had said that when dealing with the application of the CJEU's case-law to the present matter, "I am of the view that it may unquestionably be inferred from the abovementioned judgments that an environmental criterion may be included in the criteria for the award of a public service contract. The point common to the *Beentjes* and *Commission v France* judgments is that the Court recognised in each that it was permissible to include a criterion whose purpose was to serve the public interest among the criteria for the award of a public contract. In the *Beentjes* judgment the criterion in question was the obligation of a tenderer to employ long-term unemployed persons, and in *Commission v France* a condition linked to a local campaign against unemployment".<sup>72</sup> But, as mentioned above, the CJEU spelled out "However, that does not mean that any criterion of that nature may be taken into consideration by the contracting authority.[...] Since a tender necessarily relates to the subject matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject matter of the contract".<sup>73</sup> For the next case to be reported here, the *ENV and Wienstrom* judgment, the connexion between the subject matter of the contract and the criterion was a vital point.

### **11.5.5 ENV and Wienstrom judgment 2003**

#### **11.5.5.1 The ENV and Wienstrom judgment**

In the *ENV and Wienstrom* judgment<sup>74</sup> the CJEU was further confronted with a green perspective. The contracting authority was the Austrian Republic and the case stemmed from a tender procedure for the award of a public supply contract in respect of which the EVN AG and *Wienstrom GmbH* had submitted a tender.

The Austrian Republic had invited tenders by way of an open procedure for the award of a public contract for the supply of electricity. The contract to be awarded consisted of a framework contract followed by individual contracts for the supply of electricity to all the Federal Austrian Republic's administrative offices in the Land of *Kärnten* (Carinthia). The contract term ran from 1 January 2002 to 31 December 2003. The invitation to tender, which was published in the Official Journal of the European Communities, included the following provision under the heading "*Award criteria*": "The economically most advantageous tender according to the following criteria: impact of the services on the environment in accordance with the contract documents."

It was required by the contracting authority that the tender had to state the price in Austrian schilling (ATS), the Austrian currency at the time, per kilowatt hour (kWh). This was to apply for the whole contract term, and was not to be subject to any revision or adjustment. The electricity supplier had to undertake to supply the Federal offices with electricity produced from renewable energy sources, subject to any technical limitations, and in any case not knowingly supply those offices with electricity generated by nuclear fission. The supplier was not, however, required to submit proof of his electricity sources. The contracting authority had a right to terminate the contract and a right to punitive damages in the event of a breach of either of those obligations.

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<sup>72</sup> Advocate General Mischo, point 91.

<sup>73</sup> Paragraphs 58 f. See a commentary to the judgment by Pablo Charro, *Case C-513/99, Concordia Bus Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne, Judgment of the Full Court of 17 September 2002*, C.M.L:Rev. 40, 179-191, 2003.

<sup>74</sup> Case C-448/01, *EVN AG and Wienstrom GmbH v Austria* ("EVN") [2003] ECR I-14527.

It was stated in the contract documents that the contracting authority was aware that for technical reasons no supplier could guarantee that the electricity supplied to a particular consumer was actually produced from renewable energy sources but that the authority had nevertheless decided to contract with tenderers who could supply at least 22.5 gigawatt hours (GWh) per year of electricity produced from renewable energy sources, since the annual consumption of the Federal offices was estimated to be around 22.5 GWh. In addition, it was specified that tenders would be eliminated if they did not contain any proof that "in the past two years and/or in the next two years the tenderer has produced or purchased, and/or will produce or purchase, and has supplied and/or will supply to final consumers, at least 22.5 GWh electricity per annum from renewable energy sources". The award criteria laid down were net price per kWh, with a weighting of 55%, and "energy produced from renewable energy sources", with a weighting of 45%. It was stated in relation to the latter award criterion that "only the amount of energy that can be supplied from renewable energy sources in excess of 22.5 GWh per annum will be taken into account".

Four tenders were submitted and they were opened on 10 May 2001. The tender submitted by the Kärntner Elektrizitäts-AG and Stadtwerke Klagenfurt AG group of tenderers ("KELAG") stated a price of 0.44 ATS/kWh and, under reference to a table showing the amounts and origin of electricity produced or supplied by those companies, affirmed that they were able to supply a total amount of renewable electricity of 3,406.2 GWh. Another supplier, Energie Oberösterreich AG, also submitted a tender, in which it proposed a price of 0.4191 ATS/kWh for annual consumption in excess of 1 million GWh and, in a table relating to 1999 to 2002, showed the various amounts of the electricity from renewable energy sources that it was able to supply for each of the years in that period. The highest amount stated in that connection was 5,280 GWh per annum. A third supplier, BEWAG, also submitted a tender, which stated a price of 0.465 ATS/kWh. The table included with its offer showed the proportion of the electricity produced or supplied by BEWAG that came from renewable energy sources, on the basis of which the contracting authority deduced that the amount stated in that connection was 449.2 GWh.

The tender submitted by the EVN AG and Wienstrom GmbH stated a price of 0.52 ATS/kWh. Those applicants did not provide any concrete figures for the amount of electricity that they could supply from such sources, but instead merely stated that they had their own electricity generating plants in which they produced electricity from such sources. In addition, they had purchase options on electricity produced by hydroelectric power stations belonging to the Österreichische Elektrizitätswirtschafts-Aktiengesellschaft and other Austrian hydroelectric power stations, and other electricity purchased by them derived predominantly from long-term coordination contracts with the largest supplier of electricity certified as coming from renewable energy sources. In 1999 and 2000, they had purchased exclusively hydroelectric power from Switzerland, and this would continue to be the case. The total amount of electricity from renewable energy sources was several times the amount of electricity referred to in the invitation to tender.

The awarding authority considered that, of the four tenders submitted, the best was KELAG's, and that group received the most points for each of the two award criteria. The EVN AG and Wienstrom GmbH received the fewest points in respect of both criteria.

The EVN AG and Wienstrom GmbH considered that various provisions in the invitation to tender, including the award criterion relating to "electricity produced from renewable energy sources", were unlawful and they initiated a complaints procedure under the Austrian legal system. Before the Bundesvergabeamt, they

were seeking, inter alia, annulment of the invitation to tender in its entirety, of a series of individual provisions in the contract documents and of a number of decisions of the contracting authority. Those decisions included, in particular, the decision to make the absence of proof of the production and purchase of electricity from renewable energy sources in a defined period or the absence of proof of future purchase of such electricity grounds for elimination, the decision to make proof of the production or purchase of a defined amount of electricity from such sources over a defined period a selection criterion, the decision to make the availability of electricity from renewable energy sources in excess of 22.5 GWh per annum an award criterion, and the decision refusing to cancel the invitation to tender.

By decision, the Bundesvergabebamt granted the EVN AG and Wienstrom GmbH's application and, initially, prohibited the contract from being awarded until a date stipulated in the decision. On a further application by the EVN AG and Wienstrom GmbH, the Bundesvergabebamt made an interim order permitting the contracting authority to award the contract on condition that the award would be cancelled and the contract rescinded in the event that even only one of the applications made to that body by the applicants in the main proceedings were granted or the decision to award the contract in question to one of the EVN AG and Wienstrom GmbH's co-tenderers proved to be unlawful on the basis of any other finding of the Bundesvergabebamt. Hereafter the framework contract was awarded by the awarding authority to KELAG, subject to the conditions subsequent laid down in the decision referred to above.

The Bundesvergabebamt took the view that the interpretation of a number of provisions of EU law was necessary in order to resolve the dispute before it. It therefore decided to stay proceedings and to refer four questions to the CJEU for a preliminary ruling.

Only the first question is of relevance in relation to the topic discussed here. The CJEU here expressed the view that it was clear from the explanations provided by the Bundesvergabebamt that the first question had to be understood as having two parts. First of all, it sought to determine whether the Community legislation on public procurement, in particular Article 26 of Directive 93/36, precluded a contracting authority from applying, in its assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources. Secondly, if the first part of its question was answered in the affirmative, the Bundesvergabebamt asked for clarification of the Community law requirements as regarded the concrete application of such a criterion, given the specific wording of the criterion at issue in the dispute before it, and, consequently, the second part of its question could be broken down into several sub-questions. More specifically, the Bundesvergabebamt had been unclear as to the compatibility of such a criterion with EU law given the circumstances set out in points (a) to (d) below, in other words, given that the criterion (a) had a weighting of 45%; (b) was not accompanied by requirements which permitted the accuracy of the information contained in the tenders to be effectively verified, and did not necessarily serve to achieve the objective pursued; (c) did not impose a defined supply period, and (d) required tenderers to state how much electricity they could supply from renewable energy sources to a non-defined group of consumers, and allocated the maximum number of points to whichever tenderer stated the highest amount, where the supply volume was taken into account only to the extent that it exceeded the volume of consumption to be expected in the context of the contract to which the invitation to tender related.

The CJEU chose to start its considerations with the first part of question no 1. The CJEU here pointed to the fact that by referring to the lack of clarity of the

expression “the most economically advantageous tender” used in Article 26 of Directive 93/36, the Bundesvergabebamt had first asked as a question of principle whether Community law allows the contracting authority to lay down criteria that pursue advantages which cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment. To this the CJEU noted that, in a judgment that had been delivered after the lodging of the order for reference in the present case, the Court had had occasion to rule on the question whether and in what circumstances a contracting authority may take ecological criteria into consideration in the assessment of the most economically advantageous tender. The CJEU hereby referred to its judgment in the *Concordia Buses* case,<sup>75</sup> which had concerned the interpretation of Article 36(1)(a) of Directive 92/50, but, as the CJEU now said, whose wording was more or less identical to that of Article 26(1)(b) of Directive 93/36, and where in the *Concordia Buses* judgment the CJEU in paragraph 55 of the judgment had held that Article 36(1)(a) of Directive 92/50 cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must necessarily be of a purely economic nature. The Court had therefore accepted that where the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender, it may take into consideration ecological criteria, provided that they are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

The first part of question no 1 in the *EVN AG and Wienstrom GmbH v Austria* case could therefore be answered by stating that it followed that the Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources, provided that that criterion is linked to the subject matter of the contract, does not confer an unrestricted freedom of choice on the authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of Community law, in particular the principle of non-discrimination.<sup>76</sup>

As to the second part of question no 1, the CJEU started with point (a) where it pointed to the fact that the Austrian referring court, the Bundesvergabebamt, had stated that even if an award criterion which related to environmental issues, such as the one applied in the case at issue in the main proceedings, had to be regarded as compatible in principle with the Community rules on the award of public contracts, the fact that it was given a weighting of 45% would create another problem since it could be objected that the contracting authority was prohibited from allowing a consideration which was not capable of being assigned a direct economic value from having such a significant influence on the award decision. The Austrian government had on the other hand in that regard submitted that given the discretion enjoyed by the contracting authority in its identification of the most economically advantageous tender, only a weighting which resulted in an unjustified distortion would be unlawful. In the case at issue there was not only an objective relationship between the criteria of “price” and “electricity produced from renewable energy sources”; in addition, precedence was accorded to purely arithmetical economic considerations, since the price had a weighting of 10 points higher than that given to the capacity to supply such electricity.

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<sup>75</sup> Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* (“*Concordia Buses*”) [2002] ECR I-7213; see above under point 11.5.4.

<sup>76</sup> Paragraph 34.

Confronted with these arguments the CJEU first recalled that according to settled case-law it was open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer.<sup>77</sup> And such criteria must be applied in conformity with both the procedural rules and the fundamental principles laid down in EU law.<sup>78</sup> It followed from that that, provided that they comply with the requirements of EU law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.

The CJEU went on, considering the award criterion in the present case and expressed the view that as regards the award criterion at issue in the main proceedings, the Court had already held that the use of renewable energy sources for producing electricity was useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases, which are amongst the main causes of climate change which the European Union and its Member States had pledged to combat.<sup>79</sup> The CJEU added to this that moreover, as was clear, in particular from Recital 18 and Articles 1 and 3 of Directive 2001/77<sup>80</sup>, it was for precisely that reason that that directive aimed, by utilising the strength of market forces, to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity, an objective which, according to Recital 2 of the directive, was a high EU priority. Having regard, therefore, to the importance of the objective pursued by the criterion at issue in the main proceedings, its weighting of 45% did not appear to present an obstacle to an overall evaluation of the criteria applied in order to identify the most economically advantageous tender. In those circumstances, and since there was no evidence to support a finding that the requirements of EU law had been infringed, it was held that the application of a weighting of 45% to the award criterion at issue in the main proceedings was not incompatible with the EU legislation on public procurement.

As to the second part, point (b) the CJEU reformulated the question from the Austrian Bundesvergabamt essentially to be whether the EU law provisions governing the award of public contracts preclude a contracting authority from applying an award criterion which was not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified. And that the Bundesvergabamt had also been uncertain as to the extent to which such an award criterion was capable of achieving the objective which it pursued. Since there were no plans to verify how far the recipient of the award in

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<sup>77</sup> The CJEU here referred to Case 31/87, *Gebroeders Beentjes BV v Netherlands* ("Beentjes") [1998] ECR 4635, paragraphs 19 and 26; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 36 and 37; and Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Buses") [2002] ECR I-7213, paragraphs 59 and 61.

<sup>78</sup> Here referring to Case 31/87, *Gebroeders Beentjes BV v Netherlands* ("Beentjes") [1998] ECR 4635, paragraphs 29 and 31, and Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Buses") [2002] ECR I-7213, paragraphs 62 and 63.

<sup>79</sup> Here referring to Case C-379/98, *PreussenElektra* [2001] ECR I-2099, paragraph 73.

<sup>80</sup> Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283, 27.10.2001, p. 33.

fact helped by its production structure to increase the amount of electricity produced from renewable energy sources, it was possible that the application of that criteria might have no effect on the total amount of electricity produced in that way.

The CJEU gave the answer that it should be recalled that the principle of equal treatment of tenderers which, as the Court had repeatedly held, underlies the directives on procedures for the award of public contracts<sup>81</sup> implies, first of all, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority.<sup>82</sup> That meant, more specifically, that when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers.<sup>83</sup> Second, that the principle of equal treatment implied an obligation of transparency in order to enable verification that it has been complied with, which consists in ensuring, inter alia, review of the impartiality of procurement procedures.<sup>84</sup> Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria. It was thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure. The conclusion on this point from the side of the CJEU was therefore that an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement.

As regards the question from the Bundesvergabebamt as to whether the award criterion at issue in the main proceedings infringed EU law in so far as it was not necessarily capable of helping to increase the amount of electricity produced from renewable energy sources, it needed only be noted that even if that was in fact the case, such a criterion could not be regarded as compatible<sup>85</sup> with the EU provisions in the field of public procurement simply because it did not necessarily serve to achieve the objective pursued.

Turning to the second part, point (c), the CJEU found that the Bundesvergabebamt had considered that since the contracting authority omitted to determine the specific supply period in respect of which the amount that could be supplied was to be stated, the criterion applied was incompatible with the principle of comparability of tenders, which derived from the requirement of transparency. As regards the proof required for the examination of the suitability of the tenderers, it was the period covering the two years preceding the invitation to tender and the period covering the following two years which were stated to be relevant as regards the amount of electricity which would in fact be required. According to the Bundesvergabebamt, even if that provision were also applied in the context of the award criterion, there would be no definite supply period allowing for an exact calculation of the amount which in fact had to be taken into account. On the

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<sup>81</sup> Referring in particular to Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 91, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 73.

<sup>82</sup> With reference to Case C-19/00, *SIAC Construction* [2001] ECR I-7725, paragraph 34; see about this case above point 11.5.3.

<sup>83</sup> Referring to the *SIAC Construction* judgment, paragraph 44.

<sup>84</sup> With reference to Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 91 and 92.

<sup>85</sup> An error occurs here in the English version of the judgment para 54 by using the expression "cannot be regarded as incompatible". The meaning of the Court was just the opposite, see e.g. the French version of the judgment.

contrary, in a period of four years, it might be that different amounts of electricity could be supplied. It would even be conceivable that tenderers would state amounts which relied on assumptions as to the construction of power stations or other merely potential means of production of electricity from renewable energy sources. The Austrian government, however, had explained that in Austria the electricity market was fully liberalised and that it has been possible to set up trading companies whose object was to buy and sell on electricity. As the invitation to tender was published approximately six months before this full liberalisation had come into force, it had been obliged to formulate the award criterion in terms which made it possible for both companies already on the market with their own means of electricity production and electricity trading companies which were only authorised to operate from after the liberalization date to submit tenders. It therefore sought to give undertakings the possibility of stating the amount of electricity from renewable energy sources that they had produced or bought over the two years preceding the invitation to tender or to provide such information for the two coming years. Finally, all the undertakings provided in fact only information relating to the two years preceding the invitation to tender, and where the annual amounts were different the best tender was determined on the basis of the average.

These arguments were met by the CJEU by a reference to its earlier case-law. Thus it said it was clear from that case-law that the procedure for awarding a public contract must comply, at every stage, with both the principle of the equal treatment of potential tenderers and the principle of transparency so as to afford all parties equality of opportunity in formulating the terms of their tenders.<sup>86</sup> More specifically, this meant that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way.<sup>87</sup> Consequently, in the case at issue in the main proceedings, the fact that in the invitation to tender the contracting authority omitted to determine the period in respect of which tenderers had to state in their tenders the amount of electricity from renewable energy sources which they could supply could be an infringement of the principles of equal treatment and transparency, if it transpired that that omission made it difficult or even impossible for tenderers to know the exact scope of the criterion in question and thus to be able to interpret it in the same way. That was for the national Austrian court to determine, taking account of all the circumstances of the case, whether, despite that omission, the award criterion at issue in the main proceedings was sufficiently clearly formulated to satisfy the requirements of equal treatment and transparency of procedures for awarding public contracts.

As to the Second part, point (d) the Bundesvergabebamt had explained that the award criterion at issue in the main proceedings consisted in the allocation of points for the amount of electricity from renewable energy sources that the tenderers would be able to supply to a non-defined group of consumers, where the supply volume was taken into account only to the extent that it exceeded the volume of consumption expected in the context of the invitation to tender. In so far as that criterion concerned exclusively the total amount which the tenderer would be able to supply in general and not the amount which the tenderer would be able to supply specifically to the Austrian government, the Bundesvergabebamt was uncertain whether it was linked to any direct economic advantages for the contracting authority.

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<sup>86</sup> With reference to Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 93.

<sup>87</sup> With reference to Case C-19/00, *SIAC Construction* [2001] ECR I-7725, paragraph 41; see above point 11.5.3.

To this point the CJEU firstly recalled that earlier in this judgment<sup>88</sup> it had stated that ecological criteria used by a contracting authority as award criteria for determining the most economically advantageous tender must, inter alia, be linked to the subject matter of the contract. In the present case, however, the award criterion applied did not relate to the service which was the subject matter of the contract, namely the supply of an amount of electricity to the contracting authority corresponding to its expected annual consumption as laid down in the invitation to tender, but to the amount of electricity that the tenderers had supplied, or would supply, to other customers. But an award criterion that related solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, could not be regarded as linked to the subject matter of the contract. The CJEU added to this that the fact that, in accordance with the award criterion applied, it was the amount of electricity in excess of the expected annual consumption as laid down in the invitation to tender which was decisive, was liable to confer an advantage on tenderers who, owing to their larger production or supply capacities, were able to supply greater volumes of electricity than other tenderers. That criterion was thus liable to result in unjustified discrimination against tenderers whose tender was fully able to meet the requirements linked to the subject matter of the contract. Such a limitation on the circle of economic operators in a position to submit a tender would have the effect of thwarting the objective of opening up the market to competition pursued by the directives coordinating procedures for the award of public supply contracts.

The CJEU finally added, even assuming that that criterion was a response to the need to ensure reliability of supplies,<sup>89</sup> it should be noted that while the reliability of supplies could, in principle, number amongst the award criteria used to determine the most economically advantageous tender, the capacity of tenderers to provide the largest amount of electricity possible in excess of the amount laid down in the invitation to tender could not legitimately be given the status of an award criterion. It therefore followed that in so far as it required tenderers to state how much electricity they could supply from renewable energy sources to a non-defined group of consumers, and allocated the maximum number of points to whichever tenderer stated the highest amount, where the supply volume was taken into account only to the extent that it exceeded the volume of consumption expected in the context of the procurement, the award criterion applied in the case at issue was not compatible with the EU legislation on public procurement.

In the light of all the foregoing, the answer to the first question submitted to the Court turned out to be that the EU legislation on public procurement did not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion did not necessarily serve to achieve the objective pursued is irrelevant in that regard.

On the other hand, that legislation did preclude such a criterion where

- it was not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified,
- it required tenderers to state how much electricity they could supply from renewable energy sources to a non-defined group of consumers, and allocated the maximum number of points to whichever tenderer stated the highest amount,

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<sup>88</sup> In paragraph 33.

<sup>89</sup> This would be an assumption which it was for the national court to verify.

where the supply volume was taken into account only to the extent that it exceeded the volume of consumption expected in the context of the procurement.<sup>90</sup>

#### **11.5.5.2 Comments on the ENV and Wienstrom judgment**

By this judgment the CJEU has made it very clear that a connection between the “green” part of a tender and the contract is vital and cannot be avoided just by looking at a the preferable “green” elements without linking them to the contract (or the ability in general to act “greenly”). Moreover, the CJEU expressed the view that each of the award criteria must not necessarily be of a purely economic nature. The contracting authority may also take into consideration ecological criteria when it decides to award a contract to the tenderer who submits the most economically advantageous tender. But, as stated earlier by the Court, it is required that these criteria are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.<sup>91</sup>

### **11.6 Further considerations in relation to Social and Environmental Policies**

#### **11.6.1 Introduction**

It has been argued that Directive 2004/18, despite the fact that it announced<sup>92</sup> to have followed the lead of the case law of the CJEU, has failed to clarify all the issues arising from the possible reference to sustainability in public procurement.<sup>93</sup> At the same time it has been pointed out that the general procurement rules have to be read in conjunction with a growing number of regulations and directives specifically insisting on procuring entities to get involved in the cause of green procurement. If one follows the different stages of public procurement, it becomes clear that the application of sustainable procurement becomes possible and relevant under shifting conditions. This will briefly be demonstrated in the following sections.<sup>94</sup>

#### **11.6.2 Overview**

As has been seen, the CJEU judgments have almost all dealt with situations where social or environmental policies have been drawn into the picture at the stage where it was to be decided to whom the contract should be awarded. However, the CJEU has been aware of the possibility of also including such policies in other steps of the public procurement procedures. Thus in a judgment against *Germany*<sup>95</sup> the

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<sup>90</sup> It was, however, for the national court to determine whether, despite the contracting authority’s failure to stipulate a specific supply period, the award criterion was sufficiently clearly formulated to satisfy the requirements of equal treatment.

<sup>91</sup> See a commentary to the judgment by Martin Dischendorfer, *The Rules on award under the EC procurement Directives and the effect of using unlawful criteria: the ENV case*, 3 P.P.L.R. 2004, 3, NA 74-84.

<sup>92</sup> See above about the recitals 1 and 12 and 5 and 6.

<sup>93</sup> See to this R. Caranta in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 27.

<sup>94</sup> The following has partly found inspiration *i.a.* from the approach taken by R. Caranta in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 27 ff.

<sup>95</sup> Joined Cases C-20/01 and C-28/01, *Commission v Germany*, [2003] ECR I-3609.

CJEU stated that a contracting authority may take account of criteria relating to environmental protection at various stages of the procedure for the award of public contracts. Therefore it was not impossible that a technical reason relating to the protection of the environment could be taken into account in an assessment of whether the contract at issue might be awarded to a given supplier. But the procedure used in that case had to comply with the fundamental principles of European Union law which was not done in the case. Thus there is reason to stress the fact that social and environmental policies might be taken into consideration at various steps.

From the start, the first question would be whether the procuring entities may take into consideration social and environmental policies when they check *the suitability of the candidates* who will be invited to tender. In this regard Directive 2004/18 provides in Article 48 (2) (f), concerning the verification of the suitability and choice of participants, especially in relation to criteria for qualitative selection, when dealing with "technical and/or professional ability", that evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services: "(f) for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract". Furthermore, Article 50 on "Environmental management standards" expands on this by requiring that if contracting authorities, in the cases referred to in Article 48(2)(f), require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators. Hereby it is indicated in the Directive that social and environmental policies may already be taken into consideration at the prequalification phase.

The *subject matter of the contract* will be relevant for this and other considerations and also when dealing with "green" procurement.

In addition *technical specifications* may include "green" considerations.

As can be seen from the reference to the judgments of the CJEU above, it is possible, under the conditions laid down in the Directive, especially Article 53, and the conditions spelled out in the judgments, to include social and environmental policies in *the award criteria* when they are linked to the subject matter of the contract.

But social and environmental policies may also be pursued at the stage where *the contract is to be carried out* when this has been clear and transparent from the outset. They must therefore be expressly mentioned in the contract documents or in the tender notice. Furthermore, they must comply with the fundamental principles of Union law, in particular the principle of non-discrimination and transparency. In addition they must not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer. These points will be dealt with in further detail here.

### **11.6.3 The selection phase**

As to the selection phase of the public procurement process, the Directives include exhaustive lists of qualitative selection criteria that may be applied when selecting applicants. This must be understood from the *Beentjes* judgment,<sup>96</sup> where the CJEU found that the authorities awarding contracts can check the suitability of the contractors only on the basis of criteria relating to their economic and financial standing and their technical knowledge and ability.<sup>97</sup> It is, however, an open question how much “green” consideration may be included in this.<sup>98</sup>

The Commission’s recent Staff Working Document on Buying Social<sup>99</sup>, in a nutshell, said the following in relation to selection:

“Consider potential contractors’ ability to deliver the particular contract in question. Establish selection criteria based on the exhaustive list set out in the Procurement Directives.

Does the contract require social capability or capacity (e.g. particular skills, training or adequate equipment to deal with the social aspects of the contract)? If so, include social criteria to demonstrate technical capacity to perform the contract.

The assessment of technical capacity must relate to the candidate’s ability to deliver the contract.

Where relevant, consider suppliers’ track record for delivering on similar contracts in relation to required social standards. Consider the possibility of excluding tenderers if the conditions of the Procurement Directives permitting such exclusion are met”.<sup>100</sup>

#### **11.6.4 The subject matter of the contract**

From a practical point of view, it is most relevant to find out what is the subject matter of the contract. This is necessary in order for the contracting authority to be sure that its application of social and environmental policies is consistent with EU legislation. It is most likely that it must be done when drafting the technical specifications (see below). In the Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement from before the 2004 directive,<sup>101</sup> it was already stated that “The main possibilities for “green purchasing” are to be found at the start of a public purchase process, namely when making the decision on the subject matter of the contract. These decisions are not covered by the rules of the public procurement directives; they are, however, covered by the Treaty rules and principles on the freedom of goods and services, notably the principles of non-discrimination and proportionality. The public procurement directives themselves offer different possibilities to integrate environmental considerations into public purchases, notably when defining the technical specifications, the selection criteria and the award criteria of a contract”.<sup>102</sup> Therefore it is written in the text of the Communication that “In order to enhance transparency, the Directives oblige contracting authorities to indicate the technical specifications in the general or contractual documents relating to each contract. The objective of these rules is the opening up of public markets, the creation of genuine competition and preventing markets being reserved for national

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<sup>96</sup> Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands*, [1988] ECR 4635.

<sup>97</sup> Paragraph 17.

<sup>98</sup> See Ruth Nielsen, *Udbud af offentlige kontrakter* (4th ed., Copenhagen 2010), 345.

<sup>99</sup> Commission Staff Working Document on Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, Brussels, 19.10.2010, SEC(2010) 1258 final.

<sup>100</sup> Staff Working Document on Buying Social, 40.

<sup>101</sup> Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, [2001] OJ C 333/12.

<sup>102</sup> Executive Summary, points 6 and 7.

or specific undertakings (*i.e.* avoiding discrimination). Technical specifications include all characteristics required by the contracting authority in order to ensure that the product or service fulfils the use for which it is intended. These technical specifications give objective and measurable details of the subject matter of the contract and therefore have to be linked to the subject matter of the contract”.<sup>103</sup>

This approach may bring forward the question whether there is a difference between the subject matter of the contract and the performance conditions of the contract; see below.

However, before leaving the subject matter of the contract issue, it should be stressed that one might consider this in relation to the production process as well as in relation to the technical specifications as such.

In the first situation, the relation to the production process, the Interpretative communication of the Commission,<sup>104</sup> under heading 1.2. “The possibility to require the use of a specific production process” stated<sup>105</sup> that “The definition of technical specifications in the Directives does not explicitly refer to production processes [...]. However, provided that this will not reserve the market to certain undertakings [...], the use of a specific production process may be required by contracting authorities if this helps to specify the performance characteristics (visible or invisible) of the product or service. The production process covers all requirements and aspects related to the manufacturing of the product which contributes to the characterising of the products without the latter being necessarily visible in the end-product.

This implies that the product differs from identical products in terms of its manufacture or appearance (whether the differences are visible or not) because an environmentally sound production process has been used, e.g. organically grown foodstuffs [...], or “green” electricity. Contracting authorities must be careful that the prescription of a specific production process is not discriminatory.<sup>106</sup> Requirements which do not relate to the production itself, like the way how the firm is run, on the contrary, are not technical specifications and can therefore not be made mandatory”.<sup>107</sup>

### **11.6.5 Technical specifications**

In the second situation, it has been made clear above that there are wide possibilities for the procuring authorities to make reference to social and environmental policies when drafting the technical specifications. In this connection it should be remembered that Directive 2004/18 in its preamble as well as in the articles has clearly broadened the possibilities for including such policies.

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<sup>103</sup> Interpretative communication of the Commission on environmental considerations, point II, 1. See also Roberto Caranta in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 28.

<sup>104</sup> Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, [2001] OJ C 333/12.

<sup>105</sup> Interpretative communication II, 1.2.

<sup>106</sup> In an explanatory footnote 22 to the Communications’ text it is said: “They may not prescribe that green electricity is generated by wind-energy only; indeed, water-energy and solar energy can also be used for the production of green electricity and the technical prescription should therefore be that the green electricity is produced by using renewable energy sources.”

<sup>107</sup> In an explanatory footnote 23 the Communication states: “For example, the use of recycled paper in offices, the application of specific waste disposal methods on the contractors premises, the engagement of specific groups of workers (ethnic, handicapped, women)”.

Thus, at the stage of specification, Directive 2004/18 in Annex VI dealing with "Definition of certain technical specifications" has said that "technical specification", in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. The Annex then goes on stating that "These characteristics shall include levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling and production processes and methods. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve".<sup>108</sup> And Annex VI continues by stating that "technical specification", in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures".<sup>109</sup> This corresponds to recital (29) of the Directive<sup>110</sup> that points to the possibility for contracting entities to define environmental requirements for the technical specifications of a given contract. It has also been stressed above that Article 23 of Directive 2004/18 in chapter IV on "Specific rules governing specifications and contract documents" spells out that "Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users". And furthermore that "Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated: either by reference to technical specifications defined in [...]; (b) or in terms of performance or functional requirements; the latter may include environmental characteristics [...]. Section 6 of the Directive prescribes that "Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels [...].

The Commission in a very recent Staff working document on Buying Social in Public Procurement<sup>111</sup>, as regards defining the requirements of the contract in the technical specifications has given the following advice:

"Draw up clear and precise technical specifications. Make sure that specifications are linked to the subject matter of the contract, reflect all appropriate social requirements and are transparent and non-discriminatory.  
Build on the 'best practices' of other contracting authorities. Use networking as a way of obtaining and spreading information.

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<sup>108</sup> Annex VI, 1 (a).

<sup>109</sup> Annex VI, 1 (b).

<sup>110</sup> See above.

<sup>111</sup> Commission Staff Working Document on Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, Brussels, 19.10.2010, SEC(2010) 1258 final.

Use performance-based or functional specifications to encourage innovative socially responsible offers. Consider taking social concerns into account in production and process methods.

If you are uncertain about the actual existence, price or quality of socially responsible products or services, you may ask for socially responsible variants.

Where appropriate, consider reserving the contract for sheltered workshops or provide for the contract to be performed in the context of sheltered employment programmes.

Make sure that all intended outcomes are included – they cannot be added later in the process”.<sup>112</sup>

### **11.6.6 The awarding of the contract**

As the case law of the CJEU has shown, there are many possibilities at the stage of awarding the contract to draw “green” considerations into the process. The focus here is on the wording of “the tender most economically advantageous from the point of view of the contracting authority”.<sup>113</sup>

Here it should only be mentioned that the Commission’s Staff Working Document on Buying Social<sup>114</sup> in relation to the tender evaluation has recommended the following:

“Establish award criteria: where the criterion of the ‘most economically advantageous tender’ is chosen, relevant social criteria may be inserted either as a benchmark to compare socially responsible offers with each other or as a way of introducing a social element and giving it a certain weighting.

Social (and also economic or environmental) award criteria must:

- be linked to the subject matter of the contract;
- not confer unrestricted freedom of choice on the contracting authority;
- be expressly mentioned in the contract notice and tender documents;
- be consistent with EU law (including the fundamental principles of the TFEU: transparency, equal treatment and non-discrimination);
- help identify the bid offering the best value for money for the contracting authority; and
- be consistent with the relevant rules of the Procurement Directives.

Consider whether the bid is ‘abnormally low’ because the tenderer is breaching social standards”.<sup>115</sup>

### **11.6.7 The performance conditions of the contract**

In the *Beentjes* judgment<sup>116</sup> the CJEU spelled out that a “condition such as the employment of long-term unemployed persons is an additional specific condition and must therefore be mentioned in the notice, so that contractors may become aware of its existence”.<sup>117</sup> It has been argued<sup>118</sup> that this remark led the

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<sup>112</sup> Commission Staff Working Document on Buying Social, 36 f.

<sup>113</sup> Directive 2004/18, Article 53.

<sup>114</sup> Commission Staff Working Document on Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, Brussels, 19.10.2010, SEC(2010) 1258 final.

<sup>115</sup> Staff Working Document on Buying Social, 48.

<sup>116</sup> Case 31/87, *Gebroeders Beentjes BV v Netherlands* (“Beentjes”) [1998] ECR 4635.

<sup>117</sup> Paragraph 36.

<sup>118</sup> See in that direction Roberto Caranta in Roberto Caranta & Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010), 46 with reference to Joel

Commission to make a distinction between technical specifications and contract performance conditions in the same way that the Commission in its Interpretative Communication on the possibilities for integrating social considerations into public procurement<sup>119</sup> made an interpretation of the *Beentjes* judgment, where it made such a distinction. However, after the *Nord-pas-de-Calais* judgment<sup>120</sup> and now the 2004 Directive, this distinction can hardly be upheld.<sup>121</sup>

As mentioned, it follows from the Preamble recital (44) of Directive 2004/18 that in appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required. Furthermore, Article 50 of Directive 2004/18 has introduced a rule on "Environmental management standards" in accordance with which contracting authorities, if they require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. And they shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators. By these requirements certain restraints may be said to be put on the contracting authorities barring them from having unlimited freedom.

As to the fulfilment of the contract, there seems to be no disagreement about the right for contracting authorities to make requirements in this relation. Before the 2004 directives, the directives did not regulate the carrying out of the contract. As mentioned above, the present Article 26 deals with "Conditions for performance of contracts" and includes the words: "The conditions governing the performance of a contract may, in particular, concern social and environmental considerations".

In the Commission's Staff Working Document on Buying Social<sup>122</sup> it is now stated *i.a.* on "Contract conditions, contract management and contract monitoring" that: "Contract performance clauses are generally the most appropriate stage of the procedure for including social considerations relating to employment and labour conditions of the workers involved in the performance of the contract.

Make sure the contract performance clauses are:

- linked to performance of the contract;
- consistent with achieving the best value for money;
- included in the tender documentation; and
- compatible with EU law (including the fundamental principles of the TFEU).

Ensure that compliance with the conditions of contract can be monitored effectively.

Work in partnership with the supplier to manage performance and maximise achievement of objectives and compliance with conditions of contract.

Maintain appropriate records on the performance of suppliers, contractors and service-providers.

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Arnould, *Secondary policies in public procurement: the innovations in the new Directives*. 13 P.P.L.R. 2004, 4, 187-197, 189.

<sup>119</sup> Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, [2001] OJ C 333/27.

<sup>120</sup> Case C-225/98, *Commission v France* ("Nord-pas-de-Calais") [2000] ECR I-7445.

<sup>121</sup> For further discussion of this, see especially Joel Arnould, *Secondary policies in public procurement: the innovations in the new Directives*. 13 P.P.L.R. 2004, 4, 187-197.

<sup>122</sup> Commission Staff Working Document on Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, Brussels, 19.10.2010, SEC(2010) 1258 final.

Use variance clauses to envisage changes that may be required to the contract over time, provided these are compatible with the provisions of the Procurement Directives and with the principle of transparency.

Work with suppliers for continuous improvement — on a voluntary basis — and keep up to date with developments on the market generally. In particular, work with suppliers to facilitate compliance with the principles of decent work and corporate social responsibility all along the supply chain”.<sup>123</sup>

## 11.7 Concluding remarks

It can be concluded that social and environmental policies now occupy a natural and frequent place in European public procurement situations and that various Member States and their public entities, including municipalities, are increasingly focused on these policies. It is to be expected that this trend will develop further in the future.

Another aspect of secondary criteria, closely linked to social and environmental policies in procurement procedures, has come to light in a discussion that started from a situation in Germany.<sup>124</sup> The German Minister of the Interior had recommended that the Federal Government and the German Länder took measures in order to protect state activities against the influence of psychological methods based on the technology of L. Ron Hubbard (Scientology) when awarding public contracts. This was based *i.a.* on the assumption that the Scientology organisation might be said to strive for nothing less than the global leadership by trying to put its members in key positions and eliminate its perceived enemies once it had acquired global leadership. In accordance with the German Minister’s recommendation, an ad-hoc working group at ministerial level agreed upon a protective clause in the form of a Declaration which was to be signed by candidates and tenderers who bid for the award of contracts on consulting and educational services. Later on it was applied also in situations other than the award of consulting and educational services. Its wording was in essence that companies should guarantee that they were not managed in accordance with the technology of L. Ron Hubbard and that they did not use this technology within the contractual relationship or otherwise spread the technology, that the management did not recommend or permit its employees to participate in courses or seminars based on the technology of L. Ron Hubbard, and that the management rejected the technology of L. Ron Hubbard in connection with the industry concerned. If the company violated these obligations, the contracting authority should be entitled to cancel the contract without a notice period, as these circumstances constituted an important reason. In an administrative circular it was stressed that a company refusing to sign the Scientology Declaration must be deemed unreliable. At the same time, however, the circular underlined that the protective clause should only be used in the awarding of those consulting and other services that were susceptible of having an “intrinsic relationship” with the technology of L. Ron Hubbard. These statements showed<sup>125</sup> that the Declaration actually related to two different aspects: on the one hand, the Declaration sought to ensure the suitability of a company participating in a tendering procedure. On the other hand, the

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<sup>123</sup> Staff Working Document on Buying Social, 57.

<sup>124</sup> See to this Christian Pitschas and Hans-Joachim Priess, *Secondary policy criteria and their compatibility with E.C. and WTO procurement law. The case of the German Scientology Declaration*, P.P.L.R. 2000, 4, 171-195. The description of this problem is mainly based on this article of Christian Pitschas and Hans-Joachim Priess.

<sup>125</sup> See to this Christian Pitschas and Hans-Joachim Priess, *Secondary policy criteria and their compatibility with E.C. and WTO procurement law. The case of the German Scientology Declaration*, P.P.L.R. 2000, 4, 171-195, 172.

Declaration was linked to the characteristics of the product or service to be supplied. The Scientology Declaration did not refer to products but only to consulting and educational services. It could therefore not be considered to be a technical specification for products. This was because the technology of L. Ron Hubbard mentioned in the Declaration sought to influence human behaviour in a way not to be a technical characteristic of a product.<sup>126</sup>

One might ask whether the German Scientology declaration was a suitability criterion. This will not be answered here, but an interesting discussion has been made by Christian Pitschas and Hans-Joachim Priess<sup>127</sup>, as to whether the state is allowed to take measures against the Scientology organisation if these are necessary to protect the values of a democratic society. The conclusion is that the analysis demonstrates that the law of public procurement under the framework of the [EU] and the WTO is not the appropriate area for such measures.

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<sup>126</sup> See op. cit. 174.

<sup>127</sup> Christian Pitschas and Hans-Joachim Priess, *Secondary policy criteria and their compatibility with E.C. and WTO procurement law. The case of the German Scientology Declaration*, P.P.L.R. 2000, 4, 171-195.