SUSTAINABLE PROCUREMENT

AND ITS LEGAL EFFECTS

Dagne Sabockis
PhD Candidate
Stockholm School of Economics
Public procurement amounts to ca 14% of the total EU GDP* or 2 000 billion EUR every year*

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Public Procurement Directives

Public procurement in the EU is regulated in several directives:

• Directive 2014/24/EU on public procurement

• Directive 2014/25/EU of public procurement by entities operating in the water, energy, transport and postal services sectors

• Directive 2014/23/EU on the award of concession contracts

• Directive 2009/81/EC on procurement in the defence sector

• Remedies directives
  • Directive 92/13/EEC utilities sector
  • Directive 89/665/EEC public sector
Public Procurement Directives

• Public contracts of certain types and above certain thresholds:

1. Works

   (a) EUR 5,186,000 for public works;

2. Goods

   (b) EUR 134,000 for public supply and service awarded by central government authorities

3. Services

   (c) EUR 207,000 for public supply and service awarded by sub-central contracting authorities

   (d) EUR 750,000 for public service contracts for social and other specific services
Public Procurement Directives

- Even procurement procedures under the thresholds must comply with the EU public procurement principles:
  - equal treatment
  - non-discrimination
  - mutual recognition
  - proportionality
  - transparency
Why regulate public procurement?
Article 3 TEU

3. 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.
Based on the fundamental freedoms

• Free movement of goods (Article 28 TFEU)
• Freedom of establishment (Article 49 TFEU)
• Freedom to provide services (Article 56 TFEU)
Brief history

1971: Creation of the EEC
- Abolitions of restrictions on freedom of establishment & freedom to provide services
  - Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts

1992: Completion of the single market
- “obstacles to the free movement of services need to be avoided”
  - Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts

1993: Abolition of restrictions + coordination of national public contract award procedures
- Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts
Brief history

2004: requests for simplification and modernisation

• Codification of the CJEU’s case law allowing environmental & social considerations
  • Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

2014: public procurement – an instrument for Europe 2020 Strategy

• Ensure compliance with the free movement of goods, freedom of establishment and the freedom to provide services, but also
• A “market-based instrument to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds”
  • Directive 2014/24/EU on public procurement
Public Procurement Directive, Recital 2:

“Public procurement plays a key role in the Europe 2020 strategy [for smart, sustainable and inclusive growth], as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules [...] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.”
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Utilities Directive, Recital 4:

“Public procurement plays a key role in the Europe 2020 strategy [for smart, sustainable and inclusive growth], as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules [...] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.”
Sustainable procurement

Innovation

Environment

Social inclusion
New Commission Procurement Strategy

2017: “The overall objective is to obtain **better value for public money**, to **deliver better outcomes** for societal and other **public policy objectives** while increasing **efficiency of public spending.”

-The European Commission’s public procurement strategy, October 2017

(Communication from the Commission ‘Making Public Procurement work in and for Europe’, COM[2017] 572 final)
New Commission Procurement Strategy

“Public procurement is a strategic instrument in each Member State’s economic policy toolbox. The 2015 single market strategy made the case for more transparent, efficient and accountable public procurement systems. This requires a shift from a purely administrative approach to a strategically and needs-driven approach, in full compliance with the rules.”

- The European Commission’s public procurement strategy, October 2017

(Communication from the Commission ‘Making Public Procurement work in and for Europe’, COM[2017] 572 final)
Award criteria 2.0

• 2004 Directives:
  
  1. Lowest price; or
  2. The most economically advantageous tender

• 2014 Directives:
  “contracting authorities shall base the award of public contracts on the most economically advantageous tender”
  
  1. Price;
  2. Cost; or
  3. The best price-quality ratio
Best price-quality ratio

• A model for the assessment of the bids in each procurement

• Typically through sub-criteria, by assigning each of them a value

• Criteria should be able to be weighed against each other and against the price
Best price-quality ratio

“Such criteria may comprise, for instance:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

(b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

(c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.”
Sustainable procurement

...at all stages of the project.
TEU, Preamble

Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market 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,

TEU, Article 3

3. 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.
Social criteria in the CJEU’s case law

Beentjes (Case 31/87)

• a public works contract for a part of a land consolidation operation
• Beentjes' tender was rejected because inter alia “it did not seem to be in a position to employ long-term unemployed persons”
• CJEU: The obligation could infringe the prohibition of discrimination on grounds of nationality if
  • it could only be satisfied by tenderers from the member state concerned, or
  • make it difficult for tenderers from other states to comply with it
• CJEU: whether such a condition is directly or indirectly discriminatory must be determined by the national courts, in the light of all the circumstances of the case
Social criteria in the CJEU’s case law

Nord-pas-de Calais (C-225/98)

• public works contracts relating to a construction of a school
• an award criterion linked to a local project for combatting unemployment

CJEU:

• Award criteria linked to campaigns against unemployment are allowed if consistent with all fundamental principles
• principle of non-discrimination flowing from the right of establishment and the freedom to provide services
• must be applied in conformity with the procedural rules, esp. rules on advertising
Environmental criteria in the CJEU’s case law

Concordia (C-513/99)

• Helsinki procurement of busses, limits on nitrogen emission
• CJEU: factors which are not purely economic can influence the value of a tender from the point of the contracting authority and must be allowed
• CJEU: it authorities may take criteria relating to the preservation of the environment into consideration under the MEAT-criterion
  • provided that they are linked to the subject-matter of the contract,
  • do not confer an unrestricted freedom of choice on the authority,
  • they are expressly mentioned in the contract notice
Environmental criteria in the CJEU’s case law

• EVN-Wienstrom (C-513/99)

• Procurement of environmentally-friendly energy

• CJEU: Such criteria are lawful, but the criteria must be verifiable
  • The principle of equal treatment
  • The award criteria must be applied objectively and uniformly to all tenderers
  • Verification - an obligation rising from the principle of transparency
So, where’s the competition?
The definition of ‘undertaking’ in Articles 101 & 102 TFEU

• Public buyers are excluded from the application of Articles 101 and 102 TFEU by the case-law of CJEU
  • an organisation is not an undertaking pursuant to Arts. 101 & 102 when the activity it carries out is well connected with the exercise of public powers and is not in itself economic in nature (FENIN, C-205/03 P)

• The notion ‘state’ comprises bodies that are not part of the state administration in formal terms when
  • a body’s composition and functions are laid down by legislation,
  • it depends on the authorities for the appointment of its members & the observance of its obligations and its financing of the public works contracts (Beentjes, Case 31/87)
States can act as both

• "the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market. In order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the State and to determine the category to which those activities belong”

(Commission v Italy, Case 118/85)
Competition – an underlying aim of EU public procurement law

• Focus on market access

• Inherently connected to the principle of transparency

• 2004 Directive, Recital 4:
  “Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers.”

• Distortion of competition is not as such a breach under the procurement rules
Competition – an underlying aim of EU public procurement law

• Competition concerns are named in various places in the directive:

- SME market access
- Concentration of buyer power
- Negotiated procedures with no prior publication of a contract notice
- Innovation partnerships
- Framework agreements
Starting point

• Hypothesis – the use of non-economic criteria in EU public procurement law is here to stay.

• To what extent?
• In what forms and shapes, under what names?
• Under what conditions?
• How does it affect competition between the tenderers?
Effects on competition

- Any legal effects on competition in markets related to public procurement contracts?

- Specific markets:
  - Many times strongly steered by the governments and/or authorities
    - Energy, water, transport, postal services
  - The buyer = the regulator

- Any TEU / TFEU considerations?

- The SME cooperation & participation in general
What about the social market economy with regard to competition law?

Non-economic values within Articles 101 & 102?
Mergers?
Market perspective: public vs private

• Any differences in private vs public markets with regard to non-economic values?

• If yes, can the two areas of market regulation benefit from one another?

• Ultimately, what is the effect on procuring authorities, tenderers and the companies’ strategic decisions at large?
Why this, why now?

✓ Some research on non-economic values in public procurement exists, however most of it is connected to the old directives

✓ Timing
  • new directives → new cases and papers are expected
  • Commission’s Public Procurement Strategy (03.10.2017)

✓ What will or should happen after Europe 2020?

✓ The new economy; big data → an opening up → room for new questions

✓ There’s no ‘legal vacuum’.
The idea and the intended result

• The idea:
  • A study based on the new procurement directives

• Intended result:
  • An assessment of the legal effects of the use of non-economic award criteria in public procurements
  • A contribution to the legal discussion on sustainable procurement, seen from the angle of 2014 Directives
  • A novel, sustainability-influenced approach to the area between competition law and public procurement law
Thank you.

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