



JÖNKÖPING INTERNATIONAL  
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# **Procurement after the entry of the Treaty of Lisbon**

-Will the new provision of social economic market have an impact on  
procurement ?

Master's thesis within Public Procurement

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## Master's Thesis in Commercial Law

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### Abstract

As of 1 December 2009 the Treaty of Lisbon came into force. The Treaty brings along several changes for the physical structure of the EU. There are no changes aimed directly towards procurement, however the Treaty of Lisbon might prove to include changes of major impact. Article 3 (3) NEU includes a change to how the inner market shall be achieved. The Treaty text has gone from an inner market based on competition to include a “social economic market”, however there is no indication of what this means from a procurement perspective. The inner market and procurement had difficulties already before the entry of the Lisbon Treaty. There was arguments as regards to how fair a state could intervene through public procurement to achieve positive social effects. The CJEU has persistently held that the inner market shall be built by the help of the inner market and competition. The Commission has during the last years started to express a different opinion than the CJEU with regards to low value procurements. The legislators has also shown a great interest for the SME's and ensured more leeway for these companies to receive help from the member states. The ECJ has however made it difficult to support further than the actual startup phase of an SME. The European Parliament is critical to the Commissions work with regards to measures supporting the member states and ignoring the CJEU. The EU Parliament fears the consequences a more protectionist approach might have on the development of a free inner market and express concern for the legal uncertainty developed through the lack of attention to the procurement market when introducing the “social market economy” with the Treaty of Lisbon.

The EU Parliament and the CJEU might have to adjust their opinion on competition within the inner market towards the Commissions opinion. The thesis does however conclude that an inclusion of the de minimis principle in the test for equality of suppliers might be all that will be done to clarify this legal uncertainty.

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## Abbriviations

Beentjes	Case – 31/87, Gebroeders Beentjes BV. v. Netherlands [1988] E.C.R. 4635; [1990] 1 C.M-L.R 287.
Cassis de Dijon	Case – 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für branntwein[1979] E.C.R. 649.
CFSP	Common Foreign Security Policy.
CJEU	The Court of Justice of the European Union.
Commission v. Spain	Case – 304/01, Kingdom of Spain v. Commission of the European Communities [2004] E.C.R. I-7655.
Concordia Buses	Case 513/99, Concordia Bus Finland Oy Ab v. Helsingin Kaupunki [2004] All E.R (EC) 87; [2002] E.C.R I-7213; [2003] 3 C.M.L.R 20.
Costa v. ENEL	Case – 6/64, Falminio Costa v. Enel [1964] ECR 585.
Dassonville	Case – 8/74, Dassonville, REG 1974, s. 837, svensk specialutgåva, volym 2, s.343.
Dir 2004/17/EC	Directive 2004/17/EC of the European Parliament and of the Council of 31 March of 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004], O.J L134/114.
Dir 2004/18/EC	Directive 2004/18/EC of the European Parliament and of the Council of 31 March of 2004 coordinating the processes of award public works contracts, public supply contract and public service contracts, [2004] O.J. L134/114. See below for UD.
Dir 2007/66/EC	Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the awards of public contracts, [2007] L. 335/31. See below for Remedy directive.
EC	European Community
EC Treaty	Treaty on the European Union and the Treaty establishing the European Community 2006/C 321.
EPSU	European Federation of Public Services Union.
EURATOM	The European Atomic Energy Community.
ESCS	European Coal and Steel Community.
EU	The European Union.
EVN	Case – 448/01, EVN AG v. Austria [2004] 1 C.M.L.R 22.

FEU	The Treaty of the Functioning of the European Union, Makes the second Treaty in the Treaty of Lisbon.
Keck	Case – 267/91 and C-268/91, Criminal proceedings against Keck; Criminal Proceedings against Mithouard [1993] E.C.R I-6097; [1995] 1 C.M.L.R. 101.
NEU	The new Treaty of the European Union, the first Treaty in the Treaty of Lisbon.
Maastricht Treaty	Treaty on European Union, OJ C 191 of 29.7.1992 [1992].
Para	Paragraph.
PJCC	Police and Judicial Co-operation in Crimminal Matters.
Remedy Directive	Dir 2007/66/EC.
Rome Treaty	Treaty establishing the European Economic Community, 25/03/1957 [1957].
SBA	Small Business Act.
Storebaelt	Case – 243/89, Commission of the European Committies v. Kingdom of Denmark; sub nom. Storebaelt [1993] E.C.R I-3353.
SME	Small and Medium Enterprises
Treaty of Lisbon	Treaty of Lisbon, Amending the Treaty on the European Union and the Treaty establishing the European Community, 2007/C 306/01.
Universale Bau	Case 470/99, Universale Bau AG. V. Entsorgungsbetriebe Simmering GmbH [2002] E.C.R. I-11617.
UD	Directive 2004/18/EC when referring to articles.
Wallon Buses	Case – 87/94, Commission of the European Comminities v. Belgium [1996] E.C.R I-2043.

# 1 Introduction

## 1.1 Background

As of 1 December 2009 the Treaty of Lisbon came into force. The Treaty brings along several changes for the physical structure of the EU. There are no changes aimed directly towards procurement, however the Treaty of Lisbon might prove to include changes of major impact. Article 3 (3) NEU includes a change to how the inner market shall be achieved. The Treaty text has gone from an inner market based on competition to include a “social economic market”, however there is no indication of what this means from a procurement perspective.

The inner market comprises of two different markets aimed at merging into one; the private market and the public market. The private market is recognized by supply and demand together with competitions as the clear indicator of success. The private market on the other hand is based on providing public services i.e. education and health care and will prevail no matter it financially carries itself or not.

The CJEU has persistently held that the procurement markets success in integrating into the inner market shall be based on competition. The EU has also proclaimed to produce the world’s most competitive market by 2010.

However, the issue to successfully integrate the public market into the inner market has been the issue of protectionism showed by the member states and the fact that the market is built as to profit mainly large businesses.

Regulation to ensure that state aid is not interfering with the free market and competition has been done. Also exceptions to try to include SME’s in the procurement market has been on the EU legislators agenda during recent years. The issue has however prevailed and after the new introduction of the current directives in 2004 the procurement process was seen as a protective market with legal uncertainty that lead to that procurement could no longer fulfill the aims of economic efficiency.

By introducing the new provision of “social economic market” into the aim of how to achieve the inner market a policy based agenda can be noticed. The aim to bring the EU and the people of the Union forward, towards a market with overall better living conditions for all people include a policy built angle. For procurement that is already trying to

find efficiency by integrating between two economic systems will now also maybe be forced to balance between fair competition and political policy.

Currently the lack of legal definition and an over one year late manual for how to interpret the new provision of “social economic market” is creating legal uncertainty. The Commission and EPSU has a policy built interpretation of the provision, meanwhile the EU Parliament in a recent report criticize the Commission for this standpoint. The EU Parliament defends and reminds of the earlier interpretations made by the court and ask the Commission to consider whether their interpretation goes according to case law.

## **1.2 Purpose**

The purpose is to present the two different options to interpret the social economic market now found in article 3 (3) NEU and try to established whether earlier interpretations of the inner market will prevail or be overwritten by the CJEU.

## **1.3 Delimitation**

This thesis discusses many areas of law i.e. state aid and public versus private market. The broad area of procurement demands that these discussions are done, they do however not go into deep discussion except for when relevance demands so.

Further, the most used directive is the UD directive. The thesis therefore uses the directive as to exemplify. The other process directive is not brought into discussion, but is can be noted that generally the same issues and solutions apply.

The Remedy directive is not discussed in detail either, this would have been a possibility, but then the size of the thesis would have been un-proportionate on this level of thesis writing. Besides this, the lack of what might constitute a breach and what is lawful is still unsure, why this discussion can be very unconstructive.



## **1.4 Terminology**

The Treaty of Lisbon brought along several changes to the terminology of official EU institutions. Further new numbering and articles earlier not a part of the EC Treaty was made.

This thesis uses the current Treaty articles and current names of EU institutions. Only in the occasion when referral is made to earlier specific Treaty article will the old name and number be used. This is clearly marked in the text and referred to as old or previous legal text.

Procurement has three active directives. This thesis will when presenting directives only reference to the public works, supply and services contract directive, 2004/18/EC and then use the abbreviation UD which is an abbreviation of the common spoken name; Utilities directive. However, when speaking of fundamental and general principles there is no actual difference.

## **1.5 Methodology**

The thesis uses two sets of methodologies. The reason why two methods had to be used is that the legal issue discussed still has no legal definition. The second chapter uses a legal scientific method<sup>1</sup>. This method include theory building and external validity trough presentation of past legislation and interpretations.<sup>2</sup>

In the following chapters a critical legal method<sup>3</sup> is used. The method includes aspect of empirical studies as well as comparative social policy studies.<sup>4</sup> The empirical part consist of test to apply former legislative interpretations onto current law meanwhile the social policy is discussed comparatively trough presentation of reports and communications that have no legal substantial value.

The analysis of this thesis is also done with a comparative method, but then focused on comparing the two sets of interpretations available in chapter four and five which in turn builds on chapter two and three.

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<sup>1</sup> Levit page 267.

<sup>2</sup> Levit page 268 - 270.

<sup>3</sup> Levit page 286.

<sup>4</sup> Levit page 280 – 281 and 286 – 288.

## 1.6 Outline

The second chapter starts by explaining the difference between a public and a private market and how these are aimed to be merged into the free inner market of the EU. These two markets are controlled under two different set of rules; competition law and state aid. There has been, and still is, a level of legal uncertainty as to how far the state aid measure may be taken before it is deemed unlawful, therefore a explanation of the CJEU's and the Commissions interpretation of this legal barrier is presented. For procurement, that reside inside the public market, the interpretation of state aid is important. Further, the public market is forced to balance state aid towards the free inner market. Therefore this chapter which explains the general differences of the market platforms within the inner market will serve as a base to understand the four freedoms. The four freedoms is the second consideration, placed on top of the platform to achieve a borderless transparent inner market.

The third chapter firstly explains the principles and case law that established EU law as the primary legislation for all member states. Fundamental principles that always shall be considered when the member states stipulate law or take legal measures in areas such as procurement follows thereafter. The chapter then continues by explaining secondary legislation. These legal acts can be recognized on their detail and that they normally only relate to one area of law. Since this thesis discusses the Commission's actions with regards to the procurement legislation a part of the chapter contains the work of the Commission. After the chapter have established the legal tools to drive development of the inner market forward it continues to describe one of the corner stone's of the internal market; the four freedoms. The freedoms are compared with firstly primary legislation and then secondary legislation and especially considering the goods; which is the most frequent used freedom within procurement. Thereafter the changes origination from the Single European Act concerning procurement follows. The Single European Act broadened the inner market and thereby materializing not earlier highlighted legal conflicts within procurement. The CJEU then used fundamental and general principles to unlock issues within the procurement legislation. This is why a section regarding the general and fundamental principles follow right after the introduction to the Single European Act.

To summarize chapter two and three an discursive and concise descriptive section has been added into the end of chapter three. This section serves as “tying up the loose ends and repeat the picture of the inner market” before the next chapter that concerns new complex issues that arises together with the Treaty of Lisbon.

Chapter four's initial sections are aimed at explaining the changes that concern procurement directly and indirectly. There is mainly the change of article 3 (3) NEU that might be of great concern. Therefore, the following section is solely dedicated to show this article's changes and to highlight the legal uncertainty that this change brings. Since there is no legal definition, the chapter continues by presenting what a social economic market has meant historically. This is a literal interpretation of available theory text and not a legal interpretation. The chapter then continues with a legal critical method to firstly present the Commission's interpretation. The shortcut to understanding the Commission's angle is to present their interpretation of SME's. The SME's exceptions also broadens the state aid legislation why a comparison is even more fruitful. The EU Parliament's opinion, which is very critical of the Commission's work and legal interpretations, continues the chapter. This section is comparing the two different opinions as their differences evolve. The EU Parliament's opinion will lean more towards the CJEU opinion presented in chapter two and three. The Chapter after this swings back towards the opinion of the Commission by introducing EPSU's opinion. Their opinion is that that the social economic market should have a liberating affect on procurement legislation. However, since the EPSU material is written mainly to lobby for their cause it s a clear positivism in their interpretations. Thereby, the EPSU opinion merely serves as an indicator of that reports presented earlier in the chapter reflect the private market participants opinions. The chapter closes with a short summary reflecting and grouping the two groups on two sides of the same, still not clear, question.

Chapter five uses a practical evaluation by comparing the previous legal interpretations with what might happen if a new policy aims would get influence the CJEU interpretation of how the EU's inner market should be achieved. The first section of the chapter explains the first steps taken in a procurement process. It is in these steps that a social policy can fit in; - if the CJEU decides to allow for the aim to be adjusted. To show more with practical examples how the prior Lisbon aim was interpreted by the CJEU a

presentation of defining case law is done. The Courts standpoints differs from the Commission's and interpretation and trough the case law this becomes evident.

In chapter six the thesis analysis takes place. Analyzing, comparisons and critical legal evaluation has been done trough the thesis, but in this chapter the markets, aims, interpretations and aid legislation comes together.

Chapter seven simply states the outcome of the thesis.

## **2 Inner market**

### **2.1 Introduction**

The EU was created after the Second World War.<sup>5</sup> The goal was to create a close cooperation between countries inside the EU and by doing this achieve an environment where the countries dependence of each other would remove any urge for armed conflict.<sup>6</sup> Dependence and a peacefull environment should be built on trade between the member states.<sup>7</sup> This aim is today referred to as the *inner market* and is still one of the core goals of the EU.<sup>8</sup> Abolition of trade obstacles is normally the first thing that comes to mind at the definition of an inner market. This is correct, but the definition lacks to explain the different markets that will be affected. Markets can not only be defined as geographical areas, but also divided dependent on i.e. products, customers or policies.<sup>9</sup> This chapter shall highlight the development of the inner market as an overall concept, bringing into discussion the different markets and policies within the inner market and the EU's work to make all aspects work together. To understand the legislation of procurement and in what light this legislation shall be viewed, an understanding of the inner market as a concept is necessary. This chapter aims to be a platform to enhance understating of why procurement is important and how it added value and also complexity to the progress of the EU's inner market.

### **2.2 Creating the inner market**

#### **2.2.1 From a common market to an inner market**

The most visible work the EU legislators performed up to date is the work to create an inner transparent market. The so called "four freedoms" and the member states abolition of trade obstacles have been the mechanisms to achieve this.<sup>10</sup>

The creation of the inner market developed from a customs union in 1969 to a common market trough the adaption of the Single European Act in 1985.<sup>11</sup> The Single European

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<sup>5</sup> Bernitz page 11.

<sup>6</sup> Bernitz page 18.

<sup>7</sup> Bernitz page 4-5.

<sup>8</sup> See Article 3 (3) NEU.

<sup>9</sup> Bovis page 6-11.

<sup>10</sup> Bovis page 2.

Act who contained 280 targets for the Union to achieve was active until the end 1992.<sup>12</sup> The targets include different areas of attention. One of the areas of attention is the procurement market. The procurement market has an effect on both the public and private market and the aim is to insert the public market into the private market and by doing this drive the public market into a more transparent borderless market.<sup>13</sup> In 1993 the *single market* becomes a full size target of the EU and the commission is assigned the job to evaluate and release recommendations as to how the member states shall establish or achieve these targets.<sup>14</sup>

To be able to merge these markets, who are rather different, several obstacles and differences has to be overcome. The policy makers of the EU has recognized this difference in character as compared to the private market.<sup>15</sup>

### **2.2.2 The public market versus the private market**

The private market can be segmented by supply and demand of a product or service. The market is run by the demand side, i.e. the customer side, who is the strong party in a private market.<sup>16</sup> The aim of the market is to ensure as much profit as possible to the owners.<sup>17</sup>

Within a public market the segmentation is done solely on geographical prerequisites and its aim is not to make profit, but to serve a public interest.<sup>18</sup> The public interest is many times not dependent on market fluctuations, hence the need of medical care will exist during a recession. The public spending might be tighter, but the market platform still prevails. For private industries the platform and adjourned industries vaporizes the day the market platform disappears, for example there will be no gasoline cars built the day the oil runs out, hence industries only directed towards this market segment will

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<sup>11</sup> Webb History of the Single Market.

<sup>12</sup> Single European Act.

<sup>13</sup> Bovis page 5.

<sup>14</sup> Webb, Internal Market. See i.e. article 106(3) FEU for one area.

<sup>15</sup> Bovis Page 11.

<sup>16</sup> Bovis page 6.

<sup>17</sup> Bovis page 11.

<sup>18</sup> Bovis Page 11.

disappear. The public market and the public interest is thereby not completely run on the same basic principle as the private market of supply and demand. Moreover the public market does not reach further than the need the procurement requires and a commercial interest cannot be pursued further than this demand due to a lack of other market participants.<sup>19</sup> Therefore, the strong party in the public market is the public entity that performs procurement.

Due to this different division of powers between the public and private markets, the rules and regulations for the two markets differ. The private market is recognized by legislation aimed at restraining companies from conducting business on unfair grounds, i.e. anti-trust law, meanwhile the public market is recognized by the need to be open and ensure access to business within the geographical area they represent.<sup>20</sup>

Article 106 FEU is directed to contracting authorities who engage in business that partly or as a whole aims to satisfy public service. The article contains the obligation for the contract authority to act in a manner that does not go against the goals of the EU. However, since many of the public services are performed on a monopoly based right, the rules for competition shall be applied as far as the monopoly in question allows, article 106 (2) FEU. The most common breach of the Treaty that is done by contracting authorities is a breach against the obligation to treat all suppliers equally no matter their origin, i.e. discrimination.<sup>21</sup> Since the public market is divided geographically it is seen that contracting authorities favor suppliers within the geographical area of their supervision.<sup>22</sup> The balance between what can be seen as lawful by a contracting authority and what is a breach against any of the articles is monitored by Commission, article 106 (3) FEU.

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<sup>19</sup> Bovis page 6.

<sup>20</sup> More about this is section about the fundamental principles section 3.5.

<sup>21</sup> Szyszczak page 133, see also section about the fundamental principles section 3.5 .

<sup>22</sup> Szyszczak page 133, see also chapter 4.

### 2.2.3 Protectionism versus state aid as an obstacle to trade

Member states use public procurement as a tool to achieve two effects. Primarily procurement is used to utilize the use of public funds and ensure the best value for money spent.<sup>23</sup> Best value shall be achieved by help of a competitive market.<sup>24</sup> Secondly procurement is used as a tool to enhance industrial, social, environmental and political policies.<sup>25</sup> Member states use procurement in particular to support SME's within these policy areas.<sup>26</sup> The development of SME's state aid differs from the general principles of state aid and the development is a helping interpreter of the Lisbon Treaty, therefor the SME will be discussed in more detail in the next following chapter.<sup>27</sup>

Best value can be seen from two aspects. A pure competitive side where the public will gain a direct lower cost trough the best bid or when a purchase is done to a higher direct price, but where the secondary saving, in the shape of expected less welfare payouts could result in lower overall spending.<sup>28</sup> The first aspect would then represent the primary target meanwhile the second aspect would mirror the political policy plan a member state might have.<sup>29</sup>

State aid, the financial support from the state to commercial participants' active in the inner market, is regulated in EU law. Any primary or secondary action performed has to be controlled as not to disturb competition within the internal market. Article 107 FEU stipulates what kind of state aid that is allowed or when it shall be considered a direct or indirect discrimination that will distort competition. The general rule is that any measure that distorts or threatens to distort competition between member states shall be seen as incompatible with the goal of the internal market, article 107 (1) FEU. There are exceptions to the general rule that *shall* always be seen as not contrary to the inner market

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<sup>23</sup> Sue Arrowsmith I page 1225.

<sup>24</sup> Hjelmberg page 23.

<sup>25</sup> Sue Arrowsmith I page 1225 and Hjelmberg page 23.

<sup>26</sup> Aue Arrowsmith I page 126, se also section 4.4.2.1 for EU actions with regards to SME's and procurement.

<sup>27</sup> See below chapter 4 for this discussion.

<sup>28</sup> Sue Arrowsmith I pages 1225-1227.

<sup>29</sup> Sue Arrowsmith I page 1225.



i.e. support to individuals and disaster relief, article 107 (2) FEU. Further the Treaty opens up for other aids that *may* be considered allowed.

Of the exceptions that *may* be considered not be to contrary to the inner market and is of interest to the procurement and public market is the possibility to give aid to certain economic activities or areas, article 107 (3) (a) FEU. The exception however comes with the limitation that it may not impede on the internal market. The CJEU has in several cases defined different aid's as unlawful due to their discrepancy with the aim of the internal market.<sup>30</sup>

The Commission can after a referral from the Council approve state aid as compatible, 107 (3) (e) FEU. The CJEU has also with regards to this exception overruled the Commission's approval on several occasions due to their interference with the internal market.<sup>31</sup> If an aid been paid out based on an approval from the Commission and this aid is later declared unlawful by the CJEU the aid shall be returned.<sup>32</sup> However, the principle of the protection of legitimate expectations can be relied on by the court, why aid is not always returned.<sup>33</sup> For SME's which should work as a catalyst for the inner markets future development, an obligation to return payment could be fatal, hence there would not be a proportionate measure to risc business for incorrect decisions by the Commission.<sup>34</sup>

The aid is by the CJEU determined on the real advantage theory; hence the advantage the aid gives to a company is examined together with the obligation that follows by receiving this aid.<sup>35</sup> If there are no obligations to fulfill a public service or the purchase does not follow the primary target of lowest price, the purchase should be tested against equality and state intervention of the inner market.<sup>36</sup> Since the line between what can constitutes aid and what can constitute a protectionist policy measure which can impede on the development of the inner market, the Commission releases informative material.

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<sup>30</sup> Case - 730/70 Philip Morris BV v Commission, Case – 142/87 Belgium v. Commission, CFI - Alzetta Mauro v. Commission and CFI BAI v. Commission.

<sup>31</sup> CFI - Alzetta Mauro v. Commission and Sue Arrowsmith II Page 353.

<sup>32</sup> Case C-297/01 Sicilcassa.

<sup>33</sup> State aid enforcement, page 38.

<sup>34</sup> See below section 4.4.3 regarding the EU Parliaments criticism of the Commission interpretation.

<sup>35</sup> Bovis page 169.

<sup>36</sup> Bovis page 169.

The informative material is called Vademecum on State Aid and helps the member states balance their policies. The last “Vademecum” was released in 2008 and states the following to control the definition of a state aid;

- If aid derives directly or indirectly from the state it shall be seen as state aid,
- there has to be an economic advantage gained by the commercial market participant,
- the aid has to be selective; hence it cannot generally apply to a region. The provision selective implies that the power to define recipients for the aid shall to some extent reside with the contributor and
- The effect on competition must be potential and effect trade between member states.<sup>37</sup>

The Commission and the CJEU does however look upon “effect on competition” from different angles. The Commission claims that the *minus rule* shall apply, hence that small aid payments do not interfere with the inner market.<sup>38</sup> The CJEU on the other hand claims that the size of the payment does not exclude an impact on the inner market.<sup>39</sup> The Commission has held their position and developed a balance test as to evaluate the lawfulness of a state aid:

- Aid shall have a well-defined objective. The aid can have both an effective aim i.e. correction of market failure or an equitable aim i.e. help factories start up in disadvantage regions.
- Is aid the best manner to achieve the goal or are there other measures that would have a similar effect and that would not constitute aid, i.e. education.
- The aid shall solve the problem, hence shall be an incentive to promote the solution.
- The measure has to be proportionate and reside on a minimum level. As soon as the aid goes above what is necessary there could arise a commercial profit.<sup>40</sup>

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<sup>37</sup> Vademecum on state aid Page 6-7.

<sup>38</sup> Vademecum on state aid Page 7 and 12-13.

<sup>39</sup> Case – 142/87 Belgium v. Commission and Case C-113/00 Spain v. Commission.

<sup>40</sup> Vademecum on state aid Page 12-13.

The public market with its primary and secondary target is hereby influenced by what the Treaty stipulates and what the Commission recommends as solutions to the fine line between need to merge the different markets and aid as an incentive to develop overall prosperous societies. Further the CJEU case law interprets the goal of an inner market and the four freedoms narrowly with the preference for competition.<sup>41</sup>

The EU has recognized that the goal to create a transparent inner market will enhance the political integration among member states.<sup>42</sup> Further the EU has proclaimed a wish to have the world's most competitive market by the end of 2010.<sup>43</sup> However, in a perspective from a procurement market, these two aims seem difficult to fulfill. The CJEU builds their interpretations of years to remove the obstacles of trade through case law to reach the goal of an inner market. They have been the most important cornerstone during the EU legislative evolution and the development of the four freedoms. The CJEU's weapon to battle protectionism is based on Treaty provisions and not as the case of the Commission who through their communications try to influence the member states behavior.<sup>44</sup>

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<sup>41</sup> See below section 3.4 and 3.5.

<sup>42</sup> Bovis page 1, see also article 2&3 EC.

<sup>43</sup> Bovis page 5.

<sup>44</sup> See below section 4.4.3 for the EU Parliaments criticisms regarding this interpretation.

## **3 The CJEU's use of law to enable the free inner market**

### **3.1 Introduction**

During the late 70's and early 80's the development of the inner market stagnated, partly due to political difficulties to agree on the terms of development.<sup>45</sup> However, the CJEU drove the development vehicle forward by making important Treaty provision interpretations in their judgments.<sup>46</sup> The CJEU's view on protectionism can best be understood by the help of the evolution of the four freedoms and the tests the court has developed to control the lawfulness of obstacles to the inner market. This chapter will present the legal base upon where the development of the inner market resides, how the four freedoms have evolved as the most important aspect of the inner market and the principles used by the CJEU to force the public and private markets to merge.

### **3.2 Primary law and fundamental principles**

The NEU and FEU are the primary sources of law for all member states within the EU. This has not always been clear for the member states nor was it clearly expressed in earlier Treaty texts. Instead this was settled by the CJEU in the case *Costa v. ENEL*.<sup>47</sup> The CJEU proclaimed the Treaty as "a new legal order" which "member states and their courts are bound to apply".<sup>48</sup> By this, the court started the creation of the principle of supremacy and declared that all member states had to ensure that the EC treaty was respected as primary law and that national legislation was never to breach Treaty articles or the EU's aim. The CJEU derived this meaning through the interpretation of the preamble, the goals and aims of the EU together with interpretation of articles of legislative acts.<sup>49</sup> The principle of supremacy is not to be found in the Lisbon Treaty either. The fact that the principle of supremacy is not to be found is based on the intent that the Treaty of Lisbon should restrain from expressions that could be misinterpreted as constitutional.<sup>50</sup> The European Council does however recognize the principle of supremacy as a union

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<sup>45</sup> Webb, History of the Single Market.

<sup>46</sup> Bovis pages 11-12.

<sup>47</sup> Case – 6/64 *Costa mot ENEL*.

<sup>48</sup> Case – 6/64 *Costa mot ENEL*, Case – 106/77 *Simmenthal II* and Case – 106/89 *Marleasing*.

<sup>49</sup> The article of "legislative acts" is now to be found as article 288 NEU.

<sup>50</sup> Sieps page 41.

principle and emphasizes in protocol 17 to NEU that only because it is not present in the NEU it does not mean there has been any changes to the NEU as primary source of law.<sup>51</sup>

Another principle that resides closely to the principle of supremacy is the principle of loyalty. This principle is found in article 4 (3) NEU and stipulates that all member states shall take appropriate measures to fulfill the Treaty obligations and refrain from any activity that can hamper the full enforcement of the Lisbon Treaty. This principle was of importance in the earlier stages of the union, when the principle of supremacy was not yet fully defined.<sup>52</sup> After the Treaty was established as the member states primary source of law, the questions started to arise as to *who* could profit from the protection of the EC Treaty or more precisely – how far does the Treaty reach in question of power and rights for both states and persons.

In the EU's early history the principle of direct effect was created by the CJEU.<sup>53</sup> The principle makes clear that individuals can rely on rights inherited through the Treaty and they can also demand this rights in a national court, so called vertical direct effect. Horizontal direct effect is when rights can be relied on between persons and does also apply for Treaty articles.<sup>54</sup> For an article to have direct effect the article has to be clear, precise and unconditional.<sup>55</sup> Unconditional means that the article does not demand any further legislative actions by the member state in question.<sup>56</sup> There have been no indication of changes as to the ability to rely on direct effect from Treaty articles through the NEU.

The principle of conferral of powers stipulates *how far* the Treaty reaches and the principles of subsidiarity and proportionality stipulates *how* this power shall be used to achieve the goals stipulated in the Treaty, article 5 (1) NEU. The conferral of power means in what areas the member states have given up their sovereignty for the prefe-

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<sup>51</sup> Protocol 17 attached to the Lisbon Treaty.

<sup>52</sup> See for example case; Case – 106/77 Simmenthal II, Case – 213/89 Factortame, Case - 27/98 Fracasso SPA.

<sup>53</sup> Case – 26/62 Van Gend en Loos.

<sup>54</sup> web; EU legislation.

<sup>55</sup> Case – 26/62 Van Gend en Loos, para 13 and 14.

<sup>56</sup> Case – 26/62 Van Gend en Loos, para 14.

rence of the EU. Areas where the member states have given up the sovereign right belongs to the EU's exclusive powers, article 5 (2) *e contrario*. One area of EU exclusive powers is for example the Euro currency.<sup>57</sup> For such a cooperation to work, the power has to reside within the EU.<sup>58</sup> For all the member states to be able to decide separately over the Euro within their territory would make the project impossible and risk the Euro as a recognized currency.

In areas where the EU has not gained exclusive competence it will have to make sure, in accordance with the principle of subsidiarity in article 5 (3) NEU, that its legislative measure does not go further than the situation calls for. This means that it is the responsibility of the EU to ensure that all measures taken have been evaluated as the one with the least impact on member state sovereignty.<sup>59</sup> Further, each measure taken has to be proportionate, article 5 (4) NEU.

For a rule to be proportionate it has to be ensured that it does not impact more than what is necessary to achieve the requested effect. The principle of proportionality is important especially in administrative law.<sup>60</sup> Procurement makes one part of administrative law and the test of proportionality is used during several steps of the procurement process.

Procurement is not directly mentioned in the NEU, but the above principles that stem from the NEU shall always be respected within procurement.<sup>61</sup> The NEU contain more principles for procurement, which also been published in secondary legislation to further emphasize that they are a part of all procurement activity. Secondary legislation is more detailed than the treaty and normally address one area of law.<sup>62</sup> Such a setup can be compared with a nation's constitution and the law that stem from the rights and aims of that constitution.

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<sup>57</sup> See for the EU monetary policy articles 127 through 133 FEU.

<sup>58</sup> See for the power over the European Bank, article 136 FEU.

<sup>59</sup> Sieps page 40.

<sup>60</sup> General principles of community law, page 21.

<sup>61</sup> This follows from the principles explained above.

<sup>62</sup> Hjelmberg page 41.

### 3.3 Secondary legislation

Secondary legislation comes in the form of regulations, directives, decision, recommendations and opinions, art 288 NEU. Regulations are binding as a whole, meaning that they have to be fulfilled in every aspect and shall be implemented and respected in national law in the manner in which the regulation was released, art 288 (2)NEU.

Directives are binding as to the goal it stipulates; meaning that the goal has to be achieved, but the manner in how the member states decides to achieve this goal is dependent on national legislative actions, art 288 (3) NEU. There are currently three major directives active for procurement; Dir 2004/17/EC and Dir 2004/18/EC for procurement processes and Dir 2007/66/EC for remedies concerning incorrect procurements.<sup>63</sup> The procurement legislation framework consists of the Treaty and it's principles and goals, directives and case law form the CJEU. This setup been present before the Lisbon Treaty and will continue like this also under the NEU.<sup>64</sup> The NEU will change manners in how the legal framework is created but it will not change the legislative order of value for the procurement legislation.<sup>65</sup>

Decisions are binding, in full to whom it concerns, art 288 (4) NEU, meanwhile recommendations and opinions have no binding force for anyone, art 288 (5) NEU. For decision it shall be noted that "concern" will mean that equal situations are bound by the decision, no matter a party been directly named in the decision.

The Commission shall ensure the correct application of the Treaty by the member states and EU institutions, article 17 (1) NEU. The Commission has several different tasks to fulfill and for this the Commission has several different committees and task groups.<sup>66</sup> The groups release interpretations and information materials as referred to in article 288 (4) FEU. The material shall act as an indication help as to understand the EU law and goal.

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<sup>63</sup> Dir 2004/18/EC and Dir 2007/66/EC will be discussed more in detail below. Directive 2004/17/EC falls outside the scope of this thesis.

<sup>64</sup> Sieps page 35.

<sup>65</sup> Sieps page 35.

<sup>66</sup> Examples of different taskgroups and their work will be shown in chapter 4.

The Commission also has the option to bring a member state to the CJEU if a member state, after a warning, has not corrected a breach of a Treaty article through national legislation, article 158 FEU. To retort, a member state can direct a breach done by the Commission or any other EU institution to the CJEU if they, after a warning, do not correct their breach of the EU legal framework, article 265 FEU.

The creation of the inner market involves cases regarding both primary and secondary legislation. The extensive case history also probably puts all EU institutions and member states on each side of the table at least once.

### **3.4 The four freedoms of the inner market**

The success story of the EU is the creation of the four freedoms and the transparent inner market. During the years of stagnation the CJEU helped the development of a transparent market by defining what the abolition of trade obstacles as stated in the Treaty actually meant.<sup>67</sup> Member states at this point used protectionism on different grounds in their national legislation to hinder the free flow on the market within the EU. The court therefore developed different rules and tests to ensure that every national rule or measure taken did not, directly or indirectly, hinder the free trade between the member states.

Firstly, the CJEU did however already before the stagnation started, define the provision obstacle as found in the inner market articles of the Treaty. In the case *Dassonville* the court declared that any rule that directly or indirectly could hinder the free movement across borders but within the union was an obstacle to trade.<sup>68</sup> In a following case, *Cassis De Dijon*, the court confirmed this rule and created “the principle of mutual recognition”.<sup>69</sup> The principle means that no matter the origin of the product, it shall be recognized in all member states once it has been lawfully sold in another member state. No matter the size of the obstacle or the impact it may have, the measure shall be seen as primarily prohibited.<sup>70</sup> Hence, there is no de-minimis rule present according to the CJEU. No matter the size of the obstacle it shall not be seen as lawful if it disturbs com-

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<sup>67</sup> Webb, *History of the Single Market*.

<sup>68</sup> Case - 8/74 *Dassonville* Para 5.

<sup>69</sup> Case – 120/78, *Cassis de Dijon*.

<sup>70</sup> Case - 177/82 *Jan van de Haar*.



petition, but if a measure taken by a member state is too uncertain and too indirect, there can be options where national legislation may be considered allowed.<sup>71</sup>

The principle of mutual recognition does however have exceptions. In *Cassis de Dijon*, the court concluded that a national measure could be allowed as long as it could be justified by protection of public health, national tax regulations, purity of traded goods or consumer and environment protection.<sup>72</sup> The CJEU did also make clear that for a measure to fall under these exceptions it has to be proportionate and prove equal to domestic as well as non-domestic products.<sup>73</sup>

The cases stated above refer to the free movement of goods and is the freedom that concerns roughly 75 percent of the intra community trade.<sup>74</sup> The other three freedoms are the freedom of movement for workers; article 45 FEU, freedom to provide service, article 56 FEU and the free movement of capital, article 63 FEU.

Out of a procurement perspective, the two most important freedoms are the free movement of goods and the free movement of services. Capital as a freedom is not used in procurement since it is a payment performed for a debt and not a transfer of money.<sup>75</sup> The freedom of workers can be used within procurement, however since procurement normally is done for a specified amount of work i.e. the collection of household waste, this is often purchased as a service. Even though procurement is not specifically concerned with the freedoms for capital and workers, they still have to ensure that they do not formulate requirements or demands that could in any way serve as a forbidden obstacle to these freedoms.<sup>76</sup>

After these judgments from the CJEU the Single European Act became a more reachable target, since many of the uncertainties as to the meaning of the inner market were

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<sup>71</sup> Case - 379/92 Peralta.

<sup>72</sup> Case – 120/78, *Cassis de Dijon*.

<sup>73</sup> Case – 120/78, *Cassis de Dijon*.

<sup>74</sup> SEC 673 Final page 7.

<sup>75</sup> There is an exception to this which can occur if the state states a cross border partnership and need to transfer money. This however goes outside of the scope for this thesis.

<sup>76</sup> Case - 379/92 Peralta and the explanation of de minimis principle above.

now removed by the court.<sup>77</sup> The Single European act brought along three vital changes, whereof two were of importance for procurement. Firstly, the inner market was now officially the target. Procurement, that involves large sums of public capital, was considered an important factor as to achieve a transparent inner market. Secondly, the decision process became more flexible and third that the area of what should fall under the supervision of the EU under the name internal market became broader.<sup>78</sup> One of the important changes this expansion brought along for procurement, was the ability to entail environmental aspects as an indicator if decision.<sup>79</sup>

Since the internal market came to include many aspects of trade, the legal framework is found on different levels and with different impact into the member states own legal systems. However, the most important thing to remember with regards to procurement is that the legislation borders with many legal areas. To understand *inter alia* what is allowed, how a process shall be performed and the balance of competition one has to cycle between primary and secondary law and use fundamental and general principles. In the following a presentation of the principles that will most probably play a key-role in future procurement shall be done together with a differentiation between these principles.

### **3.5 The general and primary principles in law and the CJEU's interpretations of their functionality**

#### **3.5.1 The principles place in interpreting measures taken by member states**

When reading EU case law there is a blend in terminology of general and fundamental principles. Fundamental principles are principles that are found in clear text in the NEU and FEU *inter alia* article 18 FEU and the principle of non-discrimination. The principle forbids discrimination due to nationality. The four freedoms are based on this principle and article 34 FEU clearly states that any measure that hinders the free trade of goods between member states is forbidden.

Whether the measure directly or indirectly hinders free trade between the states but does not hinder the domestic trade, articles 18 and 34 FEU will define the measure as unlaw-

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<sup>77</sup> Europarättens grunder page 11.

<sup>78</sup> Bovis pages 3-4.

<sup>79</sup> Europarättens grunder page 12.

ful. The only options available to keep a national measure that breaches article 4 FEU is if it can be a justified exception according to Treaty text or case law.

The cycle of the articles for the four freedoms is one article of *general forbiddance*, one for *exceptions* and one for measures that *may* be allowed. It is when interpreting what may be allowed the dependence on the principle versus the aim become important.

### **3.5.2 How to distinguish general and fundamental principles**

Fundamental principles are expressed in Treaty text i.e. proportionality or subsidiarity.<sup>80</sup> General principles are principles that might not be found in Treaty text or they are found in secondary legislation.<sup>81</sup> If they are not found in secondary legislation, they might originally be derived from member states own legal orders or international law.<sup>82</sup> A general principle can be declared as a fundamental principle by the CJEU.<sup>83</sup> When a principle is declared a fundamental principle the legal area of where it can be used expands and becomes a tool of interpretation.<sup>84</sup> Even though a principle can be declared as a fundamental principle by the CJEU it does however not change how the principle will be interpreted in case law.

In short it can be said that a fundamental principle does not have exceptions as long as they are not mentioned in Treaty text. The Exceptions are evaluated by the help of general principles.

### **3.5.3 The use of proportionality to distinguish the difference between non-discrimination and equal treatment**

The principle of non-discrimination and equal treatment are often confused. This could be due to that they often are treated together or that they are very similar, which in turn could explain also *why* they actually are treated together.

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<sup>80</sup> See the explanation of the principles above.

<sup>81</sup> General principles of community law page 164.

<sup>82</sup> General principles of community law page 19.

<sup>83</sup> See for example section 3.2.3 above on the principle of supremacy.

<sup>84</sup> General principles of community law page 162.

The most distinct difference is the non-discrimination principle is a fundamental principle due to its incorporation in the Treaty article 18 NEU. The principle of equality is not found in the Treaty text, but forms a part of the UD.<sup>85</sup>

A breach of the principle of equal treatment, in comparison to the principle of non-discrimination, can be justified on objective grounds. In case C-304/01, Commission v. Spain the court stated that “comparable situations must not be treated differently and that different situations must not be treated in the same way unless objectively justified”.<sup>86</sup> The objectivity spoken of by the CJEU is whether the measure can be seen as proportionate; hence the principle of proportionality is added on top of the principle of equality to find the objectivity of the measure.

Proportionality is, as stated above, used to determine whether a measure taken by the EU or a member state corresponds to what the measure tries to achieve. The CJEU speaks of a “reasonable relationship” between measure and aim.<sup>87</sup> The principle that is found in Treaty text can however be used both as a fundamental as well as general principle.<sup>88</sup> On one hand, the principle may be used to test proportionality for *inter alia* legality of state aid and on the other hand it can be used as a mean to establish a breach of a general principle aimed at protecting a fundamental right i.e. the four freedoms.<sup>89</sup>

In the Storebaelt case the CJEU performed a distinction of the difference between non-discrimination and equality.<sup>90</sup> This is actually the first case within procurement that the CJEU discusses the difference between non-discrimination and equality.<sup>91</sup> The case concerned the construction of a bridge across Store baelt in Denmark. The procurement was advertised with demands to fulfill social policy aims such as; an amount of products had to be Danish and the workforce had to consist to some degree of unemployed Danes. The case came before current directives where the principles were not a part of

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<sup>85</sup> See Article 2 UD.

<sup>86</sup> This statement is repeated in several cases. See for example xxx

<sup>87</sup> Case C-11/70 Frankfurt am Main.

<sup>88</sup> General principles of community law page 21.

<sup>89</sup> Case C-4/73 for recoverable cost for case C-11/70 and also General principles of community law page 21.

<sup>90</sup> Storebaelt.

<sup>91</sup> Sue Arrowsmit I page 424.

the articles but merely stated in the preamble of the old directive; however the court stated that principle of equality was central to the procurement market.<sup>92</sup> The policy aspect of the demands were removed before the contract was awarded, but the CJEU still stated that for the principle of equality to function, advertising needed to be based on demands that was not objectively discriminatory.<sup>93</sup>

Note, that since discrimination due to nationality could not be confirmed since the contract only asked for that a low number of goods and workers should be Danish which was later removed and thereby did not have a direct impact on the award, the court used the principle of equal treatment. When there was no proven discrimination, the court continued further into secondary legislation and used the principle of equality. When unequal treatment was proven, the court used a general principle and established indirect equal treatment. The court held that indirect unequal treatment do interfere with the inner markets competition and declared the Danish authority's behavior as unlawful.

According to Arrowsmith, this is an indication of that the CJEU thereby put emphasis on that discrimination due to nationality might be allowed as long as it does not breach the four freedoms and only make minor impact that objectively can be justified.<sup>94</sup> This would mean that secondary targets such as reaching political aims might be considered lawful.

Arrowsmith's opinion can to some extent be agreed with by Bovis. However, Bovis highlights the court's persistence<sup>95</sup> to balance this towards the provision of competition and evaluates the option to, in reality, use this argument as slim.<sup>96</sup> The possibility to use policy aims in procurement at all is according to Bovis limited.<sup>97</sup> Arrowsmith's interpretation of how limited, in reality, the procurement market actually is depends on an, ac-

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<sup>92</sup> Storebaelt para 31.

<sup>93</sup> Storebaelt para 37.

<sup>94</sup> Sue Arrowsmith I pages 198-199.

<sup>95</sup> Case - 730/70 Philip Morris BV v Commission, Case – 142/87 Belgium v. Commission, CFI - Alzetta Mauro v. Commission and CFI BAI v. Commission..

<sup>96</sup> Bovis pages 75-80.

<sup>97</sup> Bovis page 80.

ording to her, excessive weight put on competition by the CJEU when interpreting procurement matters.<sup>98</sup>

One principle's importance that both authors agree on is the principle of transparency. To be able to obtain, maintain and prove that all procurement is done equally and in a non-discriminatory manner, the principle of transparency is of great importance. The CJEU has declared that openness into the whole process of procurement is a must to ensure transparency and equality.<sup>99</sup> Further, according to the court who determines that transparency "*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.*"<sup>100</sup> The transparency thereby also becomes a very important tool as to ensure that the inner market is achieved in manner that can be proved to be correct and also a proof that the market is possible to be attained. Transparency is thereby the most important tool available to ensure legal certainty and continued integration of the procurement market into the inner market.

### **3.6 Procurement complexity concise**

The policy builders within the EU have proclaimed the aim to make procurement a vehicle of development of the inner market.<sup>101</sup> To be able to do this they have to merge the public market into the private commercial market. These are two different markets with two different aims. The public market is generated by all and should as far as possible also serve all; hence it does not call upon market economy principles as a foundation but instead has a policy built base. Further the public market is not profit driven, but instead aims for the best outfall for money spent. The state aid legislation is an exception to the aim of best money spent, therefore the CJEU interprets the legislation narrowly, but member states who are in charge of the public spending and considers both primary and secondary financial output before calculating best price of the total cost are still prominent to use public spending and state aid to solve social issues i.e. unem-

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<sup>98</sup> Sue Arrowsmith II page 353.

<sup>99</sup> Parken Brixen and TeleAustria.

<sup>100</sup> TeleAustria Para 62.

<sup>101</sup> Bovis page 5.

ployment. Meanwhile the CJEU holds the free market and competition as the solution for social problems.

The private commercial market indirectly concerns all, but the participants are not segmented on geographical bias, but instead on the product or service offered. The private market is built on supply and demand with an aim to produce private profit. Therefore, when public money is spent through competition or procurement, the Treaty and the CJEU demands that the money is spent as not to disturb the market competition. There is a difficulty to balance the merge of the two markets, when exceptions are allowed, but the legal text is firstly interpreted broader by the help of policy aims on one hand and on the other hand the CJEU interprets the legal texts narrower to prevent protectionism.

However, up until the introduction of the Lisbon Treaty, the policy aim could be disregarded by the CJEU considering that the court balanced the objectivity in a measure towards competition. Social policies where primary and secondary aims were added together and was calculated to produce better local markets were closely scrutinized. In these cases the court did not consider that the *minis* principle existed when evaluating a measure that could hamper competition within the public market.<sup>102</sup> The courts judgments can be seen as narratives of what the law stipulates.<sup>103</sup> In comparison, the work of the policy builders and people performing public procurements can be seen trying to use protectionist measure to enhance local or regional development at the cost of the free inner market. This has up until now proven difficult due to that there has been no mention in the goal of the EU to advance the market in a social policy manner. By the introduction of the Lisbon Treaty, the goal of the EU is still an inner market, but there have been changes in wording as to what variables that should be used to achieve this goal. In the following chapter of this thesis we will have a look at and compare how the public market may become even more complex due to the “social economic market”.

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<sup>102</sup> Spain v. Commission.

<sup>103</sup> Sue Arrowsmith II page 365.

## **4 The procurement market and the Treaty of Lisbon**

### **4.1 Introduction**

As of 1 December 2009 the EU entered into a new phase with the Treaty of Lisbon. This chapter is aimed at explaining firstly in general the most visible changes brought by the Treaty of Lisbon and then continue to a more detailed evaluation of what these changes might indicate. Currently there are changes made through the Lisbon Treaty, but some lack legal definitions or explanations. To compare different possible solutions the chapter evaluates four possibilities; the theoretical interpretation, the Commissions interpretation by help of the SME recommendations for state aid, the EU Parliaments interpretation and criticism of the Commissions interpretation and then last EPSU's practical interpretation. At this point there is no overall agreed interpretation from any of these three groups, but by highlighting the available interpretations this chapter can help to determine the procurement market's future. Does this mean that from now on the EU will be striving towards a policy based development where the court will adjust their earlier interpretation of an inner market or will the CJEU maintain their position and force the old meaning of an inner market to stay intact without adding any new dimensions to the interpretation. This chapter will highlight the available grounds to the two different angles and function as a base for the following chapter were these interpretations are dealt with in a practical manner.

### **4.2 Changes made through the Lisbon Treaty**

The treaty of Lisbon makes significant changes to how the structure of the EU looks. Many of the changes will not be visible for the current legislation for procurement; meanwhile some are directly visible. Firstly the Lisbon Treaty will merge the two old concepts of the "Community" established by the Rome Treaty in 1957 and the "Union" established by the Maastricht Treaty in 1992. The EU will from now refer to itself as a "Union", article 1 (1) NEU.

Secondly, the earlier three-pillar system, introduced by the Maastricht Treaty will cease to exist. The system was composed by the EC-, ESCS-<sup>104</sup> and EURATOM Treaties in

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<sup>104</sup> ECSC expired 2002 and after this the pillar only consisted of the EC Treaty and the EURATOM treaty.



the first so called “Community Pillar”. The second pillar consisted of the legal grounds for a common foreign policy through the CFSP Treaty and the third pillar concerned justice and home affairs through the PJCC Treaty.

The decision making and to whom the decisions were directed varied in these three pillars and the monitoring and interpretation performed by the CJEU only stretched as far as to the first community pillar.<sup>105</sup> Through the abolition of the three pillar system by the introduction of the Lisbon Treaty, the manner in how legislation is made, the division and number of votes to make changes and the judicial governance will change.<sup>106</sup> Since all is now merged into one Union the CJEU will gain authority to interpret the new Treaty.

Thirdly, the earlier active Treaties, except EURATOM, will now be merged into one legal packet, divided into two Treaties. The first Treaty will be called “The Treaty of The European Union” and contains the goals and aims of the Union together with the fundamental principles necessary to attain these goals and aims.<sup>107</sup> The second Treaty is the “Treaty on the Functioning of the European Union”. This Treaty shall organize the Union's functions and how competences shall be divided and exercised, article 1 (1) FEU. Both Treaties shall have equal legal value; article 1(3) NEU.

Moreover, many articles have been modified, rearranged or removed.<sup>108</sup> One of the goals with the changes in text was to make the articles clearer without changing their actual meaning.<sup>109</sup> Whether this is actually the case or not will be for the future to prove. However, since the articles stem from different Treaties with different purposes, they might in wording be the same as an earlier article, but combined with other articles and new more detailed Union goals, the meaning might in the end be different to some extent.

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<sup>105</sup> Crowe page 166 and 168.

<sup>106</sup> See for example article 48 (7) FEU with regards to the changes made for qualified majority.

<sup>107</sup> Crowe page 167.

<sup>108</sup> See the appendix for the Treaty of Lisbon or follow the link mentioned in the reference material that is especially for protocol 17..

<sup>109</sup> Sieps page 7.

Article 3 (3) NEU introduces new concepts, not present in any earlier Treaties, to the provision of the internal market. Article 3 (3) FEU stems from the earlier EU Treaty who controlled the second and third pillar of the EU. If there should be no change as to the meaning of the internal market it would either mean that the new provision were already a part of the legislative text through interpretations of the court or other legal texts within the earlier EU legal framework. Since the provision “social economic market did not earlier exist at all, this provision has no legal reference of interpretation.

### 4.3 Article 3 NEU is more detailed but not defined

To briefly explain the three first articles of the NEU could be to call the first article “the declaration of the EU”, the second article could be “the values of the EU” and the third article could be “why, what, how and for whom in the EU”. Article 3 NEU, which is partly taken from the TEU, is thereby a very important article that also serves as a very instructive indicator of how Europe shall develop in the future.<sup>110</sup> Article 3 (1) NEU contain firstly the reason why the EU was initially created, which was to ensure peace and secondly to promote the values of article 2 NEU, i.e. democracy, equality and respect for human rights.

The creation of a new inner market is expressed in article 3 (3). Compared to earlier EC articles, the market is now expressed in more detail. The earlier inner market spoke of an internal market created through the abolition of trade obstacles, article 3 (1) (c) EC. The new internal market however speaks of more defined values or concepts.

#### 3 (3) NEU

*“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 high 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 for human rights of the child.*

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<sup>110</sup> Sieps page 33.

*It shall promote economic, social and territorial cohesion, and solidarity between Member States.*

*It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.”*

There is no definition of what constitutes a “high competitive social market economy”. As for the provisions “competitive.... market economy” there has been no communication that says that the earlier goal to create the most competitive market in the world by 2010 does no longer apply.<sup>111</sup> Hence, competitive should for procurement still mean that openness, effectiveness and non-discrimination is up to the levels earlier states by the CJEU.

What social means is however not defined in clear text. On one hand, according to the social policy decided through the Lisbon Treaty; “the EU shall take into account the promotion of high level of employment”.<sup>112</sup> This sounds like a literal interpretation of the word and could mean that procurement from now also should work on ensuring social progress through procurement. This can however breach the principles of equal treatment and non-discrimination. Especially if the social policy does not get a proper interpretation as to what and how far the social economic markets reaches. Equal treatment could be justified if there were objective reasons for not treating situations equally according to the CJEU, lastly stated the *Storebelt* case.<sup>113</sup> This does however demand that a specification on what constitutes a breach is defined. The questions still remains if, firstly; is this a correct interpretation or how far does the social economic market reach to include and secondly, what will be most important to attain – the social economic market or the fundamental principle of equal treatment.

The EU had already before a social strategy for the development within the Union. This strategy was published as a white paper in 2001.<sup>114</sup> The aim of the paper was to enhance the procurement legislation system and thereby enhance and equalize the balance between cost and benefits. Benefits are referred to as “additional beneficial aspects of a

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<sup>111</sup> Com (2001) 198 final.

<sup>112</sup> Lisbon Guide page 8.

<sup>113</sup> *Storebelt*.

<sup>114</sup> COM 2001 428 Final.

non-economic nature”.<sup>115</sup> The white paper and the strategy therein did however not become parts of the practical procurement market. Further, once the new directives<sup>116</sup> were released; if this was actually the strategy the EU desired, they should have been emphasized in the new directives. This was however not done and therefore the argumentative basis for that the social economic market should mean a balance between cost and benefits can not be confirmed.

Consider there is no legal definition of the provision “ social economic market” an absolute and so exact as possible definition is hard to find. However, the general economic definition combined with the policy aims can offer some guidance.

## **4.4 “ Social Market Economy” as a part of the inner market**

### **4.4.1 Social Market Economy from history and theory**

The social market economy was created after the end of the Second World War by Ludwig Erhard, finance minister together with Konrad Adenauer Prime Minister of West Germany.<sup>117</sup>

According to Erhard, the goal was expressed as “prosperity for all and prosperity through competition belong together inseparably; the first postulate is the goal the second is the path that leads to this goal.” This path can be divided into three different aims;

- A structural reform of society where all market participants are equal. Hence, no powers shall reside with only one actor i.e. monopolies shall be abolished,
- A distribution of wealth over time made possible through market mobility and free market forces,
- All possible market participants shall be allowed access on their own merits and abilities.<sup>118</sup>

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<sup>115</sup> COM 2001 428 Final.

<sup>116</sup> Dir 2004/17/EC, Dir 2004/18 EC and Dir 2007/66/EC..

<sup>117</sup> 2006 (EU Lexicon).

<sup>118</sup> Jena Manifesto page 7.

The perspective is thereby more than a sole economic approach. The social economic market shall instead consider the freedom and wellbeing of individuals rather than sole economic principles.<sup>119</sup> Further, the social market economy shall be sensitive to the culture in which it acts and shall work to implement economic freedom for individuals as well as a competitive market environment.<sup>120</sup>

#### **4.4.2 The commissions interpretation of “Social Market Economy”**

The social policy of the EU and the questions as to whether the internal market and the global competition actually added value to the member states was highlighted in 2006.<sup>121</sup> The Commission then started an investigation as to the result of the social policy.<sup>122</sup> The EU always had a social policy, but now the policy had to be matched to the changed market brought by global developments.<sup>123</sup> The result of the investigation was presented as a renewed social agenda in 2008.<sup>124</sup>

In this report the Commission claims that social policies must keep pace with the changes in society. This should be achieved through all levels of governance across Europe by creating policies that are flexible and responsive to change.<sup>125</sup> The Commission recognizes the EU’s limited influence on national social policies, but emphasizes its possibility through the principles of solidarity to function as a platform of cooperation.<sup>126</sup> However, the Commissions intent with the agenda cannot be misinterpreted as it claims; “This agenda cannot be confined on traditional social domains; it must be cross cutting and multidimensional, covering a wide range of areas from labour market policies to education, health, immigration and intercultural dialogue.”<sup>127</sup>

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<sup>119</sup> Jena Manifesto page 11.

<sup>120</sup> Jena Manifesto page 11.

<sup>121</sup> COM (2007) 63 Final.

<sup>122</sup> COM(2007) 63 final.

<sup>123</sup> COM(2007) 63 final.

<sup>124</sup> COM (2008) 412 final.

<sup>125</sup> COM (2008) 412 final. (page 3)

<sup>126</sup> COM (2008) 412 final. (page 3)

<sup>127</sup> COM (2008) 412 final. (page 3)

The Commission continues to set the level of impact the agendas aims to have by stating that “those individuals and regions that cannot cope with the rapid pace of change need support”.<sup>128</sup> It is according to the communication not the fundamental goals that are to be changed, but the aim of how the goal is to be reached.<sup>129</sup> All policies that will be created shall promote opportunities of access and solidarity.<sup>130</sup> For public procurement the Commission was to release a handbook by 2009 on how the social considerations should be applied when evaluating tenders to find the best offer.<sup>131</sup> This handbook is yet to be issued.

#### **4.4.2.1 The SME approach to understand the Commissions opinion**

A group active within procurement which has been shown particular interest by EU legislators and policy makers during the last years are the SME’s. SME’s account for almost 70 % of total employment opportunities and about 99, 8 % of all enterprises within the EU.<sup>132</sup> They thereby prove that they play a key role in local, regional and social cohesion.<sup>133</sup> SME’s are defined as all companies that do not exceed 250 persons in employment and has a annual balance that does not exceed 43 million euro.<sup>134</sup>

In 2008 the SBA was released.<sup>135</sup> The act, which came in the format of a communication from the Commission, was given this name “act” as to prove the underlying political will to recognize the SME’s importance for the EU economy.<sup>136</sup> However. the name does not refer any more legal status than a communication.<sup>137</sup> The SBA contains 10 principles to guide the implementation and creations of policies at both EU and member state level. Three of these principles are relevant for procurement;

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<sup>128</sup> COM (2008) 412 final. (page 4)

<sup>129</sup> COM (2008) 412 final. (page 4)

<sup>130</sup> COM (2008) 412 final. (page 18)

<sup>131</sup> COM (2008) 412 final. (page 18)

<sup>132</sup> SEC (2008) 2101. (page 6)

<sup>133</sup> SEC (2008) 2101. (page 6)

<sup>134</sup> Commission recommendation 2003/361/EC article 2.

<sup>135</sup> COM (2008) 394 final.

<sup>136</sup> COM (2008) 394 final. (Page 4)

<sup>137</sup> See about the legal status in section 3.3.

- Make public administration listen and react to SME's needs,
- Adapt public policy tools to SME needs; facilitate SME's participation in public procurement and better use state aid possibilities for SME's through the general block exemption regulation on state aid and
- Help SME's to benefit more from the opportunities given through the single market.<sup>138</sup>

As a measure to better react to the needs of the SME, who find the administrative burden through compliancy demands heavy, a goal was set to remove 25 % of this burden by 2012.<sup>139</sup> To further help SME's to become a part of the public procurement market a "guide for best practice" was released by the Commission.<sup>140</sup>

#### **4.4.2.2 Best practice procurement according to the Commission**

The guide was based on a pan-European survey directed toward SME's.<sup>141</sup> The result of the survey showed that on one hand the vendors were unsure as to how the procurement market functioned, but they also felt that the system was protectionist on both national and regional level. On the other hand, if a vendor did partake in bidding they often felt that there was a discrepancy between time invested towards their ability to profit from this investment. The guide for best practice therefore suggests two solutions to develop the procurement market. Firstly, the creation of better information, vendor networks and courses offered to SME's to increase the knowledge of the procurement markets how's and what's.<sup>142</sup> Secondly the Commission suggests that there need to be changes in the procedure of how the public purchasers work.<sup>143</sup>

The idea to educate SME's to become better at understanding the information supplied is suggested to be solved through arrangement of trainings, seminars and information meetings arranged by the member states.<sup>144</sup> Such a solution will however take time

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<sup>138</sup> COM (2008) 394 final. (Page 4)

<sup>139</sup> COM (2008) 394 final. (Page 8)

<sup>140</sup> SEC (2008) 2193.

<sup>141</sup> web; Report SBA.

<sup>142</sup> SEC (2008) 2193. Page 5.

<sup>143</sup> SEC (2008) 2193. Page 13.

<sup>144</sup> SEC (2008) 2193. Page 12-13

away from the SME's core business and depending on the possibility for the SME to become a supplier; the incentive to attend such activities might be lost. There are also suggestions as to supply the vendor with feedback.<sup>145</sup> According to the Commission there is an obligation both in the fundamental principle of transparency and in the procurement directive article 41 to give "feedback" to vendors. This article does not explain to what extent the feedback shall be given, but merely states the right to find out why they were not the selected bidder and who was the winning bidder. There is also an option for the public purchaser to opt out on offering information that could hamper competition or public safety, article 41.3 UD.

More commercial solutions that the Commission wants SME's to use more often are the cooperations between several vendors or sub contracting made through one SME.<sup>146</sup> The vendors rights to co operate in groups are allowed according to the procurement directive.<sup>147</sup> The profit from this is that small vendors can compete with greater companies and not be excluded due to their own inability to supply all that is requested. The ability to co operate does however demand that the SME's can prove how the cooperation is set up already at the time when the hand in a bid since the cooperation is an option to ensure qualification of the bids.<sup>148</sup> Considering the fact that SME's found procurement to be unsure time invested, the time needed to create a cooperation to compete of a bid might be even more uncertain. Sub contracting can possibly concentrate the most workload to one vendor. This might make the option more attractive, but there still needs to be one contractor who decides to partake in the bidding and who is ready to invest the time in creating the chain of sub contracting.

To ensure that as many vendors as possible can partake in a bidding the Commission suggest that the public purchasers put an effort into making sure the demands for the requested service or goods are proportionate to what is required and that they evaluate the option of maybe dividing the contracts into smaller more narrowly defined contracts.<sup>149</sup>

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<sup>145</sup> SEC (2008) 2193. Page 12.

<sup>146</sup> SEC (2008) 2193. Page 8-12.

<sup>147</sup> Several articles , i.e 47(2), 52(1), 48(2-3) UD.

<sup>148</sup> See all articles in section 2 in UD.

<sup>149</sup> SEC (2008) 2193. Page 20 and 7.



To ensure that a request for bid is proportionate means that the subject matter of the contracts has to correspond to what is requested.<sup>150</sup> Demanding that a supplier should be able to provide apples to qualify for the bidding when only pears are needed would be outside of the scope, hence the demand would not be considered proportionate. The SME's to be able to enter into bidding must be able to supply what is requested and the public purchaser ability to only request what is needed is of high importance to enable the SME's to partake.<sup>151</sup> The second option to divide contracts into smaller contracts can be done in several ways, i.e. making several purchases at different times or creating frame agreements. However, it shall be noted that *if* division is done, that the public purchaser prove that the contracts have a natural possibility to be divided. Any division of contract has to be balanced towards article 9 (3) UD that forbid subdivision to avoid falling with the scope of the directive.

One approved manner to subdivide contracts to values below the threshold value would be to compile them into a frame agreement. The total values of all the contracts are then added together, but within the frame agreements smaller contracts can be awarded, article 32 (4) Procurement Directive.

All the suggested solutions to enable SME's to enter into bidding offered in the Code for Best Practices are either already found in available legislation and thereby serve more as suggestions than a code of conduct. Further, the suggestions described imply that the public shall invest more time into ensuring the active participation of SME's in public procurement, but offer no solution to the most highlighted issue for the SME's, namely how the time invested in bidding activity shall become profitable.

In a report to follow up the work of the implementation of the SBA the Commission evaluates the progress made from 2008.<sup>152</sup> The work to remove the administrative burden for the SME's is according to the Commission proving successful.<sup>153</sup> However these are administrative burdens that do not affect the actual procedure of procurement. It is still, as before the implementation of the SBA, the same procedure for creating an

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<sup>150</sup> Case 21/03 Fabricom.

<sup>151</sup> SEC (2008) 2193. Page 14

<sup>152</sup> COM (2009) 680.

<sup>153</sup> COM (2009) 680 page 3.

advert as for evaluating responses. Hence, ability to better invite the SME's into the public market reside in the public purchasers ability to describe and divide a purchase and also apply this according to current legislation

The SBA also introduced the proposal for a General Block Exemption Regulation, which is an exemption from the Treaty principles of state aid.<sup>154</sup> This exemption, which now have become a reality, opens up for support for the start-up of SME's in regions heavily affected by high unemployment.<sup>155</sup> The motivation to activate this exemption was partly due to the still ongoing financial crunch and partly to offer the member states a tool to implement the social Lisbon strategy.<sup>156</sup> Considering that the exemption is only concerning the start-up phase of a company, it does not impact the possibility to increase SME's participation in the public market, but it does indicate that the vision of a social market economy does, as stated in COM (2008) final; Renewed Social Agenda, affect on a multidimensional level.

#### **4.4.3 The European Parliaments opinion on “Social Market Economy” and the current procurement legislation**

The EU Parliament has approved the content in two recent reports with regards to the current procurement market and forwarded these reports to the Commission for action on its content.<sup>157</sup> The legal value of this report is non-existent and on the same level as the Commissions information material. However, the Parliament is the political controlling entity of the EU, article 14 (1) NEU. Before a legislative measure can be taken within the EU, the Parliament will be asked for it's opinion. This report should therefore be seen as an indication of what suggestions for legislation the Commission can suggest and could get approved.

The report highlights issues and uncertainties currently available in the legal procurement system and asks for the Commissions attention on the following;

- Layout, meaning and consequences of the Lisbon Treaty and current Procurement Directives,

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<sup>154</sup> COM (2008) 394 final. Page 4.

<sup>155</sup> Commission Regulation No 800/2008.

<sup>156</sup> Handbook of state aid, page 5.

<sup>157</sup> Parliament Report May 2010.

- clarity and attention to SME aid and
- The Commission should reevaluate their function, goals, achievement and reports who added to the complexity of the procurement market.<sup>158</sup>

Firstly the report claims that the aim to achieve a simpler, more clear and legally certain legislation for the procurement market has not been achieved. Several reports<sup>159</sup> has shown a difficulty for both the private market and the public market participants to fulfill the EU legislation.<sup>160</sup> This is according to the report due to an uncertain wording and lack of definition of important provisions in available legislation.<sup>161</sup>

The reports bring forward the discrepancy in the Commissions interpretations of legal texts in comparison to case law and states that this to be one of the issues with the current confusion.<sup>162</sup> Further the report claims that unsuccessful wording sometimes used in the directives are partly due to the political compromises when finalizing the Procurement Directives.<sup>163</sup>

With regards to the provision “social” as found in article 3 (3) NEU the criticism is harsh. The report questions why the interpretation still unavailable and asks the Commission to re-evaluate their priorities.<sup>164</sup>

More importantly the report brings forward an issue that has up to date been left untouched and that will have impact on the procurement market and state aid. The Parliament request a definition of the “social” provision in co-relation with the inner market concept.<sup>165</sup> Hence, in what sense can public procurement be used with an aim at solving unemployment or other secondary policies.

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<sup>158</sup> Parliament Report May 2010.

<sup>159</sup> web; Report SBA.

<sup>160</sup>Parliament Report May 2010 page 12-13.

<sup>161</sup> Parliament Report May 2010 page 13.

<sup>162</sup> Parliament Report May 2010 page 13.

<sup>163</sup> Parliament Report May 2010 page 15.

<sup>164</sup> Parliament Report May 2010 page 10.

<sup>165</sup> Parliament Report May 2010 page 16.

A clear governmental structure is necessary for the procurement market to function in a competitive manner.<sup>166</sup> The fact that the European initiatives are not organized and consider each other's efforts make the market even more difficult to penetrate and the Parliament asks for pan-European efforts.<sup>167</sup>

For the SME's the report claim, opposite of what the Commission says that the administrative burden has not been lifted for the SME's.<sup>168</sup> The development towards a more time consuming procurement process due to legal uncertainty, higher demands on how to prove to be a suitable supplier for the public sector and more proof of social responsibility is according to the Parliament adding to the difficulty to enable the SME's to enter into the procurement market.<sup>169</sup> This goes against one of the initial aims of the SME program which is to increase accessibility.<sup>170</sup>

To solve the issue for the SME's to enter into the procurement market the Parliament suggest exceptions to the administrative burden.<sup>171</sup> Further the suggestion is to keep on encouraging the subcontracting business among the SME's and through this enable competition and greater market access.<sup>172</sup>

Further the lowest price versus most economically advantageous price evaluation of the bids has become too demanding according to the Parliament.<sup>173</sup> During 2010 most member states will also implement the new remedies directive active in EU law since the start of this year.<sup>174</sup> The remedy directive demands from the member states to ensure an efficient protection and remedy for any breach of the rules active during the procure-

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<sup>166</sup> Parliament Report May 2010 page 14.

<sup>167</sup> Parliament Report May 2010 page 4.

<sup>168</sup> Parliament Report May 2010 page 10.

<sup>169</sup> Parliament Report May 2010 page 15.

<sup>170</sup> Parliament Report May 2010 page 5 and 13.

<sup>171</sup> Parliament Report May 2010 page 10.

<sup>172</sup> Parliament Report May 2010 page 10.

<sup>173</sup> Parliament Report May 2010 page 3.

<sup>174</sup> UD Preamble 1.

ment process.<sup>175</sup> This can result in that the initial target of best possible utilization of public funds is not achieved.<sup>176</sup>

The legal framework is surrounding public procurement is now too difficult for the SME's as well as for smaller public procurement entities according to Parliament.<sup>177</sup> The report highlights the that the development since the release of the current procurement directives have made it even more difficult and the amount of legal appeals with regards to procurement have escalated in numbers faster than any other legal sector.<sup>178</sup>

The report recognizes that change has been made trough the implementation of the “social economic market” into the Treaty and criticizes the Commission for the lack of interpretation of the actual meaning of this change.<sup>179</sup> According to the report the CJEU is busy trying to close down loopholes in the current legislation, but that this work is made more difficult trough the Commissions release of interpretations that go against interpretations the CJEU has stipulated.<sup>180</sup> The report goes as far as requesting the Commission to consider their impact when releasing soft law i.e. communications and test them according to both proportionality and the legal hierarchy.<sup>181</sup> Further a note is made as to coordination of procurement initiatives a Commission level or as the report says;

“..Commission departments have “discovered” public procurement as a means of achieving objectives which the European Union would otherwise lack the financial resources or legislative competence.”

The report does not stop the criticisms of the Commission at such accusations, but instead continues with the prioritization of communication. The Parliament finds it peculiar that all other social areas has gained the Commissions attention *inter alia* environmental and sustainable procurement, and that then “social market economy”, which is

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<sup>175</sup> UD Preamble 1 - 3.

<sup>176</sup> Parliament Report May 2010 page 3.

<sup>177</sup> Parliament Report May 2010 page 16.

<sup>178</sup> Parliament Report May 2010 page 15-16.

<sup>179</sup> Parliament Report May 2010 page 11.

<sup>180</sup> Parliament Report May 2010 page 15.

<sup>181</sup> Parliament Report May 2010 page 16.

integrated into the Treaty does not get the same level of attention – not even after the Treaty came into force.<sup>182</sup>

Considering how recent this report was released, the Commission has not yet responded or released any communicative recognition of its priority within the Commissions workflow. The mindset that is reflected from the Parliaments report however shows both disappointment at lack of action and dissatisfaction as to actions, according to the Parliament, that have been incorrectly executed.

#### **4.4.4 EPSU interpretations of the “Social Economic Market”**

The EPSU organizes workers in the public service sector and consist of about 8 million members spread across EU member states.<sup>183</sup> EPSU also represent their members in the regional organization of Public Service International.

EPSU was one of 40 organizations that together with 13 EU member states that was asked for consultation on the draft for the “Guide for social responsible public procurement”.<sup>184</sup> They criticize the fact that the guide is still not available in February 2010. EPSU considers that the absence of the guide points towards an uncertainty already at the entry of the Lisabon Treaty.

The EPSU interprets the new provision of social economic market, just like the Commission and the Parliament, with an emphasis on the word “social”. EPSU sees the new provision as a possibility for the public market to catch up on their social procurement activities.<sup>185</sup> The key social considerations according to EPSU are;

- equitable wages, collective agreements and demand of gender equality in form of equal pay between men and women for award winning contracts,
- social cohesion trough intergration of vulnerable groups into the inner market and

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<sup>182</sup> Parliament Report May 2010 page 19.

<sup>183</sup> EPSU Report February 2010 page 1.

<sup>184</sup> EPSU Report February 2010 page 4.

<sup>185</sup> EPSU Report February 2010 page 1.

- Transparency as to ensure that the social policies are fulfilled.<sup>186</sup>

Further EPSU interprets that best price does not mean lowest price, but instead the price that offers highest quality aimed at desired objectives and the outcome of award.<sup>187</sup> Hence, secondary objectives within procurement does according to EPSU receive more legal ground with the adding of “social economic market” as a concepts for the internal market.

To be able to better serve the public interest EPSU suggest that public enteties should receive a wider descretion as to whether procurement should be performed or not.<sup>188</sup> If procurement is not done, it would mean that the service remains within the public non-commercial sphere.

Further, EPSU brings attention to an evaluation report regarding the current procurement directives. This report claims, according to EPSU that quality of both procurements and procured goods/services has deteriorated since the introduction of the new Procurement Directives.<sup>189</sup> They also note that information with reagrads to the pro’s and con’s of procurement since the introduction of the new directives had recived a negative tone which also displays the procurement market in a negative manner.<sup>190</sup>

## **4.5 Summary**

When presenting the different angels of how the provision of “social economic market” is viewed, the two sides of the inner market present itself. On one hand there is the CJEU and the European Parliament that aims at an inner market based competition. On the other side the Commission and the public service union, EPSU reside. Their vision of an inner market is also based on competition. However, not competition which in their opinion borders to an absurdum, but instead competition with a social policy aim that allows for exceptions. Both of these visions create a difficult deadlock in the legal development of procurement. This has been noted by two of the most famous authors of

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<sup>186</sup> EPSU Report Febuary 2010 page 1-2.

<sup>187</sup> EPSU Report Febuary 2010 page 2.

<sup>188</sup> EPSU Report Febuary 2010 page 4.

<sup>189</sup> EPSU Report Febuary 2010 page 5.

<sup>190</sup> EPSU Report Febuary 2010 page 4.

procurement books. They do however differ on the size of state aid that can be allowed before the inner market might be disturb. In the following chapter an analyses will be made of the current state of the inner market for procurement and if the provision of “social economic market” has enable the procurement market to develop or if it keeps it in a legal deadlock until the CJEU can communicate an interpretation.



## **5 Test of impact due to “Social Market Economy” in public procurement**

### **5.1 Introduction**

Counted in volume, the changes made to procurement through the Lisbon Treaty are very low. The fundamental and general principles remain and the most detailed legislation is found in the directives. No changes in the directives have been intended. However, all legislation is built on the aim to achieve a transparent inner market. This work is to be guided by the help of the principles found in primary and secondary legislation.

Now, with the changing to a social economic market this aim might be achieved by also adding social economic principles or social aim. Hence, the impact of the adding of just one provision might be substantial. In reality the change means that when a decision is made, a public purchaser would have to find the most competitive offer that also contains the highest level of social policy aim and still do not breach any of the principles. In this chapter we will go through the initial process of procurement and highlight when the lack of definition of the goal could dent the process.

Procurement is one area of law where the practical aspect is important to grasp, it is namely when performing the tasks that legal shortcomings can create deadlocks. It is also in the practical situations where protectionism versus the inner market can be both seen and hopefully correctly balanced.

The chapter will first give a general overview of the legal grounds that determine the process. After determination the process continues by open procedure and brings into discussion interpretations from the previous chapter and use these as a base to try to determine how a process shall be done not to breach the Lisbon Treaty and current directives.

### **5.2 For whom and to what does the directives apply**

The differences between public procurement and an ordinary purchase is the origin of capital, which entity performs the purchase and for who the purchase is intended. Further, public procurement is not an actual purchase of a good or a service but instead the

award of a contract that confirms that a purchase will be done with the award winning company when the good or service is required.<sup>191</sup>

The seller will be a commercial, private entity in a procurement award as well as a private purchase. However, the customer differs between a procurement award and a purchase. In the case of a purchase, a private entity is the customer and makes a part of the private market. In a procurement award the customer is a representative of the public sector who purchases goods or service with public funds.

According to article 1(9) UD an entity that performs a purchase is considered a “contracting authority”. The articles defines that a contract authority is a state, regional or local authority, but also entities- as a whole or by association, which are governed by public law. For an association between a public entity and a private company to be considered an contracting authority article 1 (9) (a-c) UD stipulates that the association has to be established for the purpose of a non commercial nature, be a legal person and financed in the most part by public funds.

A “public contract” can be made between one or more contracting authorities and one or more private companies, article 1 (1) UD. The value of the contract shall include all the costs the public authority is estimated to pay, net VAT, for the procurement; article 9 (1) UD. If a contract is offered by a private actor, but the financial support constitutes 50 percent or more of public funding or if the contract concerns public monopolized markets, i.e. hospitals and road construction it still constitutes a public contract in a legal sense, article 8 UD.

If a contracts total value is above a so called threshold value and the purchasing entity is a contracting authority that is to award a public contract the procurement shall be done according to the rules laid down in the UD. The lowest threshold value is at 162 000 Euro for public supply and services and increases depending on the nature of contract and authority, article 7 UD. The reason why the threshold is at this level is partly due to the administrative cost that comes together with a procurement and the fact that these

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<sup>191</sup> See for example UD Ingress (2) and (8).

contracts offer a higher percentage were competition across borders will be financial sufficient.<sup>192</sup>

The member states can further choose whether they want to use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or a competitive dialog, preamble 16 UD. These options, except for the competitive dialog, do not affect the manner in how the procurement process is performed.

There are three procurement processes common for all EU member states through the directive; Open-, selective and a negotiated procedure, article 1 (11) (a-c) UD. These procedures contain several steps. Firstly an estimate and definition of what is to be purchased has to be done by the contracting authority. Secondly and depending on the value, the procurement has to be advertised according to the process requirement. The contracting authority will after this evaluate the answers, called tenders or bids, according to at least the EU common principles.<sup>193</sup> After a full evaluation of the bids, the award of contract can be done. The general rule is to use the open procedure. The open procedure is the one out of the three that can be used by the greatest number of procurements why this presentation will use this procedure as a base.

### **5.3 Definition and estimate**

One of the most difficult things with procurement is to define what is needed and when. The aim is that the public market is to be efficient, cost saving and effective.<sup>194</sup> This in practice means the correct amount, at the right time and is exactly what is needed. Procurement is often done by a person not actively a part of the usage of what is purchased and the contract award might be done months before delivery, sometimes even years before the final delivery, why the definition of what is needed can serve as a difficulty.

There is however no legislation determining what a state might procure, even if the demand would in the end discriminate towards other participants in the market.<sup>195</sup> Hence, if a procurement entity was to purchase natural snow, there would be some member

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<sup>192</sup> Arrowsmith I page 362-363.

<sup>193</sup> See section 3.5 for the principles.

<sup>194</sup> Bovis page 9.

<sup>195</sup> Arrowsmith I page 361.

states that would be unable to enter into the bidding, but it would not be discriminatory to purchase a good that is only available in some countries. If a procurement entity instead would request Swedish snow, it would constitute a breach of the fundamental non-discrimination principle.

Once a decision is made of what is needed, the state can consider whether this is a product or service that is currently available within its own sphere.<sup>196</sup> If this proves to be the case, they can decide not to procure and use their own in-house service or goods.<sup>197</sup> If the service does not fulfill a public service, i.e. compulsory school or its sole purpose is not to provide this service under the public title, it cannot be considered as within the states own sphere and should be purchased through a competitive procedure. An in-house entity that does not only perform public service can still leave a bid for in a competitive process another state authority has open, but the state then has to ensure that there is now unbalance in the competition between private and publicly funded suppliers.<sup>198</sup>

When a need for competition is established, the need to define what is required becomes essential. It is first when a need has been defined that a value can be calculated and as stated before, the type of the process is determined by the threshold value. If an entity has a difficulty to define the need of what they require, they can use a third party i.e. a consultant for the definition. However, if a consultant is used, the public entity have to ensure that the third party does not profit in the tender process in a way that can distort competition.<sup>199</sup>

A definition shall be done on the base of what is needed, hence the requested good or service shall be defined to the minimum level it must have to be correct, article 44 (2) UD. When a definition is made, it is important to keep in mind that the description of what is needed is not discriminatory. Therefore a description should not refer to a special type or brand of good, but instead describe the function the product should have, UD article 23. If a description uses a brand name or type of brand it shall be followed

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<sup>196</sup> Arrowsmith I page 394.

<sup>197</sup> Arrowsmith I page 414.

<sup>198</sup> UD preamble 3.

<sup>199</sup> UD preamble 8.

by the words “or equivalent”, article 23 (3) (a) UD. Since there are no limitations on what can be procured, the definition can be a tool to insert political policy aims into the procurement process.

When a definition is made clear and describes the level of a minimum, more demands and conditions can be added. Conditions relate to aspects of the vendor and/or the procurement entity and not the goods or service in itself. A procuring entity can have conditions with regards to inter alia delivery time, ordering system and payment. Every condition has to be controlled towards its coherence with the Treaty, Treaty principles and also directives and/or national law.

An open procedure demands that a request is advertised, article 35 (2) UD. Any supplier who wishes to compete can reply with a bid 1 (11) (a) UD. The earlier created definition of a good/service can be used as the base for the advertisement. To make sure that an award is possible, the advert also has to contain the requirements to win the contract award.

The advertisement shall contain the following for the supplier to be able to understand how to reply to the bid;

1. nature defined to the minimum level required and quantity of product and service,
2. timetable for delivery or execution,
3. type of contract; one-off or re-occurring contract. If a re-occurring contract i.e. a frame agreement, the advert has to contain the information of how future bids within the contract shall occur,
4. reservations and/or exceptions i.e. if the contract is awarded only to workshops of disadvantage youth,
5. if solution or products variation are allowed,
6. all details to be able to receive the tender documentation and to deliver valid bid,
7. tender opening times and persons authorized to be present,
8. financial conditions valid for the contract and
9. on what ground the contract shall be awarded; lowest price or most economically advantageous bid. If most economically advantageous is chosen, the advertisement has to clearly state the weight to win of each and every demand.

For the supplier to be able to prove ability and legality to become a supplier to the public entity, there should also be stated what the supplier has to fulfill to be able to pass a supplier qualification;

1. proof of that deposits or guarantees are available if the public entity require them,
2. proof of legal capacity or formation if requested and
3. proof of level of economic and technical standard to be able to perform the contract if this is requested.<sup>200</sup>

If a supplier hands in a bid with the requested information stated above, the supplier should pass through supplier qualification. It shall be noted that additional demands can be added, both mandatory and non-mandatory, depending on the good or service. Non-mandatory requirement cannot serve as an indicator when lowest price is chosen, article 53 UD.

Depending on the selection of award criteria in number nine, the evaluation of any bids differ. If “lowest price” is the selected, it means that all suppliers that are able to supply the minimum level of the good or service and fulfill the other mandatory requirements should qualify. If a bid contains a product or good that offers more than the minimum requirements, it will still only be evaluated at the price. The extra effect a product or service can offer is not considered at lowest price, meaning that a less advanced bid that offers a lesser price, should win the contract award.<sup>201</sup>

Considering the two different interpretations available after the Lisbon Treaty, the lowest price selection of award should not be affected. The only option to interfere with this award criteria would be through making the definition of what is required to only fit i.e. local suppliers and at the same time make sure that none of the principles are breached.

Lowest price is to date the most used criteria.<sup>202</sup> This is due to that the qualification process otherwise turns to complex, uncertain and thereby expensive.<sup>203</sup> The downside to this provision is that the SME's have a difficulty to compete with large scale suppli-

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<sup>200</sup> Annex VII Procurement Directive.

<sup>201</sup> Article 53 (1) (b) Procurement Directive.

<sup>202</sup> Sue Arrowsmit II page 355.

<sup>203</sup> Sue Arrowsmit II page 353 – 358..

ers who have large scale production benefits. This is probably also why the EPSU wants procurement on the most economic advantageous offer to be more often used.<sup>204</sup>

The option to have suppliers offer their own solutions to the request can be used for lowest price, but it is then for the supplier to ensure that they can prove that their product or service offer the same outcome, article 24 UD. The option does however not remove the demand that the option also has to be the lowest price to win the contract award.

If a bid would be offered and can be considered as abnormally low in comparison to the other bids, the procurement entity has an obligation to investigate why this is the case, article 55 UD. Therefore, if a supplier would use a price that is not commercial, simply to get the award and hope for additional contracts, the procurement entity would have to ignore this bid if the supplier cannot objectively justify that the price offered is commercial. Hence, non-commercial offers are to be disqualified due to unfair competition. The article also demands that a lower price cannot be qualified if the low price is due to a suppliers receiving of state aid, articles 55 (1) (e) and 55 (3) UD. The logic behind this article is that competition would be distorted if state aid could be used to help suppliers into the public market sphere.

When using the economic most advantageous offer the qualification process will turn more tedious. All the stated mandatory requirements have to be weighted and expressed in the advert.<sup>205</sup> This means *inter alia* that request definitions could be seen as an indication of a minimum but that other factors also can be crucial. The flexibility for the suppliers and the social policy that comes with this option, comes at the price of legal certainty and workload for the procurement staff.

The CJEU has so far handled a high amount of cases where the best price offer has not been considered competitive, fair or based on enough objectivity. In *Universale-Bau* the CJEU evaluated a method of how to properly qualify and invite suppliers to tender. The

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<sup>204</sup> EPSU Report February 2010.

<sup>205</sup> UD Preamble 40.

general rule of the CJEU is that the advertisement has to be transparent enough and adhere to the fundamental and general principles to be able to pass as a correct method.<sup>206</sup>

First, only bids that have passed qualification can be considered for an award. Grounds for qualification shall not only be the mandatory requirement, but also all the other demands on the supplier that the contract requires i.e. approval of payment terms.

Of the bids that have qualified there are only the two options to determine what bid that should win; lowest bid or best price. The qualification can only be performed as to what the advertisement included as demands for qualification. The case of Walloon Buses demands that a supplier cannot qualify if it is not sure that he fulfills the mandatory requirement. If however a bid has errors were it is clear what should have been meant, a request to correct this can be done and after correction the qualification will continue without any affect.<sup>207</sup> Further the qualifications and the demands set can only be considered as lawful as long as they have a connection with the requested good or service.<sup>208</sup>

In Concordia Buses a part of the qualification was based on the environmental aspect of the supplier. According to the CJEU it was fair to include non-economic aspects in the qualification of suppliers. This was also later confirmed in the case EVN.<sup>209</sup>

Further, the qualification and the award process are strongly linked, but they are still considered as two different set of rules by the EUCJ.<sup>210</sup> By this the court established that the demands have to have relation to what is purchased, but even though a weighting does not include a percentage of weight to supply a proof of legal personality, there is still grounds to disqualify due to this.

In all the court cases stated above, the court holds a firm grip of the fundamental and general principles of the EU. They also sternly return to competition and the objective impact on competition when assessing the validity of a procurement case. The court has early added new possibilities to qualify, especially environmental aspect, which now also are found in legislative text. To add environmental aspects is however not geographi-

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<sup>206</sup> *Universale Bau* para 88-94.

<sup>207</sup> *Sue Arrowsmith I* page 1008.

<sup>208</sup> *Concordia Buses*.

<sup>209</sup> Case C-448/01.

<sup>210</sup> *Beentjes*.



cal, hence they do apply directly equally to all suppliers within the EU. The general rule that one nation's environmental certificate is also enough in all other member states also applies.<sup>211</sup>

The process to qualify and award under the provision of “most economical advantageous offer” requires an abolition of any protectionist measure to be able to function. The Commission and EPSU interprets the new social economic market as a possibility to create a more policy built procurement. They consider that the access to the internal market shall be made possible by the help of a greater flexibility for regions and suppliers not currently competitive enough to win awards.

The EU parliament is critical to the interpretation offered by the Commission. They refer to legislation and the CJEU to integrate the market sectors into the inner market. The lack of a manual on how to interpret the new provision and how to handle the changes brought by the Treaty of Lisbon brings the legal uncertainty forward as an issue when practically performing procurement.

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<sup>211</sup> Keck.

## 6 Analys

This thesis has highlighted many of the areas which has to be balanced when procurement legislation is created and also when performing actual purchases. The current problem, that the aim *might* have changed of how to achieve the goal of an inner market has not made the understanding and possibility to perform correct procurements any easier.

By inserting the provision “social economic market” as an aim to achieve the goal of an inner market without a clear indication, not even a hint as to the meaning for procurement, the legal base upon where procurement reside is challenged.

The legal market is now divided in two camps. On one side the CJEU and the EU Parliament stand together, trying to stick to legislative interpretations valid prior to the entry of the Lisbon Treaty. On the other side, the Commission and EPSU reside. The Commission and EPSU have a view that the changes will bring about better and easier times for procurement.

Normally when legislation is amended it is amended to bring about change. If the legislation is merely modernized, it follows with a clear indication that the visible changes are not to change the actual meaning of a provision. The fact that the principle of supremacy was not taken into the Lisbon Treaty, but was still communicated through a protocol as a fundamental principle supports this interpretation. Therefore the Commission and EPSU might be right in their opinion that the aim now constitutes an ability to foster social policies. If change is intended, the extent of the change is still unknown. Further, it can be noted that the CJEU is the interpreters of the Treaty, if something is unclear; it is their responsibility to ensure that an instruction to the meaning is provided. It can from this angle be difficult to see how the CJEU should be able to ignore the change completely and the most plausible future solution will indicate some degree of change.

There is however two options to get the provision of “social economic market” clarified. Firstly trough a legislative act that interprets how far the provision can reach with regards to policy aims for procurement. Considering that there is no know legislation in the pipeline, this will be a tedious and time-consuming solution.

The second option is that the CJEU will be presented with a case where the “social economic market” is used as a defense for a protectionist measure i.e. state aid, unfair competition or unequal treatment of suppliers due to policy aims. The CJEU will then have to evaluate all the different aspects that belong to the inner market and procurement and determine how far the new provision stretches into the competition provision.

The CJEU has persistently held on to that the inner market shall be created through the abolition of trade obstacles. They consider the primary aim and principles as guides when it comes to interpreting situations not clearly defined in Treaty text. The efficiency of the inner market and the procurement sector is according to the CJEU best created if the public market follows the economic rules of the private market. Hence, fair competition will in the end lead to equality and a full scale merge of the two markets according to the CJEU. So far, the creation of the free inner market has profited from the interpretations of the CJEU, why their stern belief in competition has not been in vain.

The Commission and EPSU are however of another opinion. They do not see competition and financial efficiency as the best way to create the most value for their money spent. They look upon the primary and secondary targets as a combined cost and through this they will end up with the lowest price for national bids; hence the secondary financial benefits of a national supplier will overtake any non-national bids. They consider that more extensive exceptions to the general rule of competition will drive the market participants into more equal standpoints and through this strength merge into the private market.

When comparing the two options like this, the conversation gets very close to the border of allowed state aid and unlawful state aid. Article 107 (3) FEU includes the times when a state aid may be allowed. If the earlier interpretations from the CJEU are still valid, then no changes are possible and public purchasers just have to continue as before. This would however mean that the CJEU would have to state that the “social economic market” has no impact on this market segment. If however the aim is changing, which is the most plausible outcome consider the task of the CJEU, this article will be tested to its limit.

The amount of cases and information with how to draw the line between state aid and unfair competition is already plentiful. On top of that, the reports on how the procure-

ment market is perceived indicate that supplier's feel that state aid is interfering with their possibility to enter the procurement market.

The fact that article 107 (3) FEU became blurry through the implementation of a new provision in the Lisbon Treaty indicates the need not to leave this lack of interpretation unattended for too long.

The legislators of the EU have approved certain changes for certain groups within procurement. The SME's have been given the attention from both state aid perspective as well as from the procurement sector. However, this is a group that is in need of protectionism, represents a large number of employments with secondary profits for the host state and at the same time is this a group also vulnerable for competition from larger companies. Their will to be treated as equals in the procurement process goes opposite to what the defined need for this group has been perceived as.

The measures suggested for the SME's, have however not proven to be sufficient enough according to the Commission, who therefore pushes for further exceptions for the SME's. The reason that the measures might not be successful due to the fact that they request time from SME's without offering any tangible consideration for the efforts is not addressed directly by the Commission. However, their ignorance of the de minimis principle indicate that they do consider it allowed to keep on supplying SME's with support that might breach the principle of equal treatment.

The CJEU has held on to the minimis principle and only making narrow interpretations of when the impact on competition is too farfetched to declare a measure lawful. One possible solution for the EUCJ would be to implement the de minimis principle into the objective evaluation of proportionality when testing for unequal treatment between suppliers. This could have a positive effect on both the SME group and the efficiency of small procurements. It shall however be noted that if the CJEU do remove the de minimis principle, the remedies for unlawful use of state aid has to be watched closely as to ensure that the privilege do not feed the protectionism within local governments. This would then lead to a step back of the development of the inner market.

The current lack of guidance in the procurement market, that has been highlighted by both the EU Parliament and EPSU needs to be put high up on the agenda for the Commission. Firstly to satisfy and help the market and secondly for the remote chance that

the CJEU will consider the expressed aim and interpretations when they themselves have to interpret the meaning of the “social economic market” impact on to goal of the inner market.

Considering what have been stated above, the procurement market is most possibly about to change. The pendulum of the CJEU will also most probably swing towards a more lenient view on smaller social aims integrated into procurement. This is however said with the knowledge of that the EUCJ persistence can sometimes be unbreakable. It should however be noted that the current development of a new undefined provision is highly possible a way for the politicians to force the CJEU to take a step back and re-evaluate earlier competition cases for the procurement within the inner market. If this is the case I just hope that it does not come at the price of a complete deadlock as to how procurement should proceed in the piratical sense until the legal fog has cleared.

## **7 Conclusion**

The conclusion of this thesis is that the inner markets will be redefined with consideration to the “social economic market”. To what extent is however impossible to determine. Based on the result of the analysis and opinions presented in the thesis the most plausible solution would be for the EUCJ to integrate the de minimis principle in the objective test of proportionality when testing procurement procedures for equal treatment of suppliers.

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# REPORT

on new developments in public procurement  
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Committee on the Internal Market and Consumer Protection

Rapporteur: Heide Rühle

PR\_INI

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## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### on new developments in public procurement (2009/2175(INI))

*The European Parliament,*

- having regard to the Treaty establishing the European Community, with particular reference to the changes introduced by the Lisbon Treaty,
- having regard to Directives 2004/18/EC and 2004/17/EC on procedures for the award of public contracts and Directive 2007/66/EC on review procedures concerning the award of public contracts,
- having regard to the Commission communication of 19 November 2009 entitled ‘Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships’ (COM(2009)0615),
- having regard to the Commission communication of 5 May 2009 entitled ‘Contributing to Sustainable Development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes’ (COM(2009)0215),
- having regard to the Commission communication of 16 July 2008 entitled ‘Public procurement for a better environment’ (COM(2008)0400),
- having regard to the Commission interpretative communication of 5 February 2008 on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP) (C(2007)6661),
- having regard to the Commission staff working document entitled ‘European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts’ (SEC(2008)2193),
- having regard to the Commission interpretative communication of 1 August 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives<sup>212</sup>,
- having regard to the following judgments of the Court of Justice of the European Union (CJEU):
  - of 19 April 2007 in Case C-295/05 (Tragsa),
  - of 18 December 2007 in Case C-532/03, *Commission v Ireland* (Irish rescue services),
  - of 13 November 2008 in Case C-324/07 (Coditel Brabant),

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<sup>212</sup> OJ C 179, 1.8.2006, p. 2.

## Appendix

- of 9 June 2009 in Case C-480/06, *Commission v Germany* (Stadtwerke Hamburg),
- of 10 September 2009 in Case C-206/08 (Eurawasser),
- of 9 October 2009 in Case C-573/07 (Sea s.r.l.),
- of 15 October 2009 in Case C-196/08 (Acoset),
- of 15 October 2009 in Case C-275/08, *Commission v Germany* (Datenzentrale Baden- Württemberg),
- of 25 March 2010 in Case C-451/08 (Helmut Müller),
- having regard to the opinion of the Committee of the Regions of 10 February 2010 on ‘Contributing to Sustainable Development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes’ (RELEX-IV-026),
- having regard to the following studies:
  - ‘Evaluation of Public Procurement Directives: Markt/2004/10/D Final Report’, Europe Economics, 15 September 2006,
  - ‘The Institutional Impacts of EU Legislation on Local and Regional Governments: A Case Study of the 1999/31/EC Landfill Waste and 2004/18/EC Public Procurement Directives’, European Institute of Public Administration (EIPA), September 2009,
- having regard to its resolution of 3 February 2009 on pre-commercial procurement: driving innovation to secure sustainable high-quality public services in Europe<sup>213</sup>,
- having regard to its resolution of 20 June 2007 on specific problems in the transposition and implementation of public procurement legislation and its relation to the Lisbon Agenda<sup>214</sup>,
- having regard to its resolution of 26 October 2006 on public-private partnerships and Community law on public procurement and concessions<sup>215</sup>,
- having regard to its resolution of 6 July 2006 on Fair Trade and development<sup>216</sup>
- having regard to Rule 48 of its Rules of Procedure,
- having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinions of the Committee on International Trade and the Committee on Regional Development (A7-0151/2010),
- A. whereas the economic and financial market crisis has highlighted the vital economic importance of public procurement, whereas the effects of the crisis on local authorities are already clearly evident, and whereas at the same time public authorities can perform their tasks properly in the public interest only if they can

<sup>213</sup> OJ C 067E, 18.3.2010, p. 10.

<sup>214</sup> OJ C 146E, 12.6.2008, p. 227.

<sup>215</sup> OJ C 313E, 20.12.2006, p. 447.

<sup>216</sup> Texts adopted, P6\_TA(2006)0320.

count on the requisite legal certainty in this area and if procurement procedures are not too complex,

- B. whereas a well-functioning procurement market is essential for the internal market, in order to encourage cross-border competition, stimulate innovation, promote a low-carbon economy and achieve optimal value for public authorities,
- C. whereas public procurement law serves to ensure that public funds are managed soundly and efficiently and to give interested companies the opportunity to be awarded public contracts in a context of fair competition,
- D. whereas the 2004 revision of the public procurement directives was intended to simplify and modernise the relevant procedures, make them more flexible and establish greater legal certainty,
- E. whereas the Lisbon Treaty has incorporated into European Union primary law the first acknowledgement of the right to regional and local self-government, consolidated the concept of subsidiarity and granted both the national parliaments and the Committee of the Regions the right to bring actions before the CJEU,
- F. whereas the European Court of Justice has examined a disproportionate number of infringement cases in this area, indicating that many Member States have struggled to comply with the public procurement directives,
- G. whereas, with a view to ensuring that European policies develop in such a way as to meet the aspirations of Europe's citizens, the Treaty on the Functioning of the European Union incorporates the notion of a social market economy, a social clause and a protocol on services of general interest defining the shared values of the Union,
- H. whereas ILO Convention 94 stipulates that general public contracts shall contain clauses ensuring equitable remuneration, and labour conditions which are not less favourable than those laid down in collective agreements, for example,

***General remarks and recommendations***

1. Deplores the fact that the aims of the 2004 revision of the public procurement directives have not yet been achieved, particularly with regard to the simplification of procurement rules and the creation of more legal certainty; expresses the hope, however, that the most recent judgments handed down by the CJEU will help to resolve the outstanding legal issues and that the number of appeal procedures will fall; calls on the Commission to have regard to, and actively to pursue, the aims of simplifying and streamlining the public procurement procedure in any review of the European rules;
2. Further deplores the fact that the existing regulations – in combination with incomplete implementation measures at national and regional level, the plethora of soft law proposals put forward by the Commission, and the interpretation of the



relevant legal provisions by European and national courts – have given rise to a complicated and confusing set of rules which is creating, in particular for public bodies, private undertakings and providers of services of general interest, serious legal problems that can no longer be overcome without incurring substantial administrative costs or seeking external legal advice; urges the Commission to remedy this situation and, as part of the ‘Better Lawmaking’ initiative, to examine the impact of soft law proposals, to restrict such proposals to key aspects and to assess them in the light of the principles of subsidiarity and proportionality, taking into account the five principles set out in the 2001 White Paper on European Governance (openness, participation, accountability, effectiveness and coherence);

3. Points out that as a result of this development public procurers often have to prioritise legal certainty above policy needs and, given the pressure on public budgets, frequently have to award the contract or service in question to the cheapest offer rather than the most economically advantageous tender; is afraid that this will weaken the EU’s innovative base and global competitiveness; urges the Commission to remedy this situation and to develop strategic measures to encourage and empower public procurers to award contracts to the most economical, highest-quality offers;
4. Emphasises that European initiatives in the area of public procurement must be coordinated more effectively in order to avoid jeopardising consistency with the public procurement directives or creating legal problems for those applying the rules; calls, therefore, for compulsory coordination measures within the Commission, under the lead of the Internal Market and Services Directorate-General, which is in charge of public procurement, and with the participation of the other relevant Directorates-General; calls for a uniform internet presence and regular information for the contracting authorities, with a view to making the relevant legal provisions more transparent and user-friendly;
5. Criticises the lack of transparency with regard to the composition and work of the Commission’s internal advisory committee on public procurement (ACPP) and the role and competencies of the Advisory Committee on the Opening-Up of Public Procurement (CCO), and calls on the Commission to take steps to ensure that the composition of both this committee and the planned new advisory committee on public-private partnerships is balanced, including trade unionists and representatives of the business community, in particular SMEs, and that they work in a transparent manner; demands that the European Parliament be kept properly informed and receive all the available information at every stage and at the end of the process;
6. Takes the view that, since public contracts concern public funds, they should be transparent and open to public scrutiny; asks the Commission for clarification with a view to ensuring legal certainty for local and other public authorities and enabling them to inform citizens of their contractual obligations;
7. Stresses that public contracts must be awarded under transparent conditions whereby all interested parties are treated equally and the relationship between

price and project performance is the ultimate criterion, so that they go to the best tender and not merely the cheapest tender;

8. Calls on the Commission to carry out an ex-post assessment of the public procurement directives, taking account of the opinions expressed in this report; expects that review to be carried out with the full involvement of all stakeholders and in close cooperation with the European Parliament; advocates that any revision take account of the whole framework and encompass the directive on review procedures concerning the award of public contracts as well as an analysis of the national laws transposing the directive on review procedures, in order to prevent any further fragmentation of public procurement law; takes the view that the practical impact of that directive cannot yet be assessed, as it has not been transposed in all the Member States;

### ***Public-public cooperation***

9. Points out that the Lisbon Treaty, which came into force on 1 December 2009, incorporates an acknowledgement of the right to regional and local self-government into European Union primary law for the first time (Article 4(2) of the Treaty on European Union); emphasises that in several judgments the CJEU has invoked the right to local self-government and made it clear that the ‘possibility for public authorities to use their own resources to perform the public-interest tasks conferred on them may be exercised in cooperation with other public authorities’ (judgment in Case C-324/07); draws attention, further, to the CJEU Grand Chamber judgment of 9 June 2009 in Case C-480/06, which found, further, that Community law does not require public authorities to use any particular legal form in order to carry out their public service tasks on a joint basis; accordingly, regards public-public partnerships, such as cooperation agreements between local authorities and forms of national cooperation, as falling outside the scope of the public procurement directives, provided that the following criteria are all met:
  - the purpose of the partnership is the provision of a public-service task conferred on all the local authorities concerned,
  - the task is carried out solely by the public authorities concerned, i.e. without the involvement of private individuals or undertakings, and
  - the activity involved is essentially performed on behalf of the public authorities concerned;
10. Points out that the Commission has clarified that not every action taken by public authorities is subject to procurement law, and that as long as European law provisions do not require the creation of a market in a certain area, it remains up to the Member States to decide whether and to what extent they want to perform public functions themselves;
11. Points out that the CJEU’s conclusions in the aforementioned judgment not only apply directly to cooperation between local authorities but are generally valid, with the result that they can be applied to cooperation between other public contracting authorities;

12. Points out that, in its judgment of 10 September 2009 in Case C-573/07, the CJEU found that the mere possibility of opening up the capital of a previously publicly-owned company to private investors may not be taken into consideration as a factor making competitive tendering a requirement unless the character of the public capital company changes during the period for which the contract is valid, thereby altering the fundamental conditions of the contract and necessitating a new competitive tender; notes that there have been major developments in relation to the rules in the area of public-public cooperation as a result of the CJEU's case-law, and welcomes the recent judgements handed down by the Court in this area; calls, therefore, on the Commission and the Member States to make information about the legal implications of these judgments widely available;

### *Service concessions*

13. Points out that service concessions within the meaning of Article 1(3)(b) of Directive 2004/17/EC and Article 4 of Directive 2004/18/EC are contracts in connection with which 'the consideration for the provision of services consists either solely in the right to exploit the work or in this right together with payment'; emphasises that service concessions were excluded from the scope of the public procurement directives in order to offer contracting authorities and contractors a greater degree of flexibility; points out that in several judgments the CJEU has confirmed that service concessions are not covered by those directives, but rather by the general principles laid down in the Treaty on the Functioning of the European Union (ban on discrimination, principle of equal treatment and transparency), and that it must remain open to public contracting authorities to ensure the provision of services by way of a concession if they consider that to be the best method of providing the public service in question, even if the risk associated with such an operation is limited, but this limited risk is transferred in full to the concession-holder (judgment in Case C-206/08 of 10 September 2009, points 72-75);
14. Notes the Commission communication of 19 November 2009 on the development of public-private partnerships and awaits the relevant impact assessment with great interest; expects the Commission to draw lessons from failing PPPs; emphasises that due account must be taken of both the complexity of the procedures and the differences between the Member States in terms of legal culture and practice with regard to service concessions; takes the view that the process of defining the term 'service concession' and establishing the legal framework governing such concessions has evolved as a result of the 2004 public procurement directives and the CJEU's supplementary case-law; insists that any proposal for a legal act dealing with service concessions would be justified only with a view to remedying distortions in the functioning of the internal market; points out that such distortions have not hitherto been identified, and that a legal act on service concessions is therefore unnecessary as long as it is not geared to an identifiable improvement in the functioning of the internal market;

### *Public-private partnership*

15. Welcomes the legal clarification of the conditions under which procurement law applies to institutionalised public-private partnerships, particularly given the great importance that the Commission, in its communication of 19 November 2009, attaches to such partnerships in connection with combating climate change and promoting renewable forms of energy and sustainable transport; points out that the public procurement directives always apply if a task is to be conferred on an undertaking which is privately owned, even to a very small extent; emphasises, however, that both the Commission, in its communication of 5 February 2008, and the CJEU, in its judgment of 15 October 2009 in Case C-196/08, have made it clear that a double competitive tendering procedure is not required in connection with the award of contracts to, or the conferral of certain tasks on, newly-established public-private partnerships, but that all the following criteria must be met before a concession can be awarded without competitive tendering to a mixed public-private undertaking specially established for that purpose:
- the private partner must be selected by means of a transparent procedure, with the contract published in advance following a review of the financial, technical, operational and administrative requirements and the characteristics of the tender in the light of the particular service to be provided;
- the mixed public-private undertaking must retain the same corporate purpose throughout the duration of the concession. According to the CJEU, any material change to that corporate purpose or to the task to be performed would necessitate the launching of a new competitive tendering procedure;
- takes the view, therefore, that the matter of the application of procurement law to institutionalised public-private partnerships has been settled, and calls on the Commission and the Member States to issue statements to that effect;
16. Emphasises, however, that the recent financial crisis has shed new light on the ways in which public-private partnerships are often financed and the financial risks shared; asks the Commission to evaluate properly the financial risks associated with the creation of PPPs;

### ***Town planning/urban development***

17. Welcomes the CJEU judgment in Case C-451/08; takes the view that the directive's broad and ambitious aims must be borne in mind when interpreting it, but that it should not be assumed that its scope can be extended indefinitely by appealing to the purpose of the measure, since otherwise there would be a danger that all town planning activities would be subject to the directive, given that, by definition, provisions on the possible execution of building works substantially alter the value of the land in question; takes the view that in the last few years procurement law has permeated areas which are not inherently classified under public purchasing, and suggests, therefore, that the criterion of purchasing be emphasised still more strongly in the application of the rules of procurement law;

### ***Procurement below the threshold***

18. Points out that the European Parliament is a party to the Germany v. Commission case brought before the CJEU on 14 September 2006 against the Commission's interpretative communication of 1 August 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives, and expects a prompt ruling;

*Micro, small and medium-sized enterprises*

19. Asks the Commission to evaluate the impact of the public procurement directives on micro, small and medium-sized enterprises, especially in their role as sub-contractors, and to assess, with a view to a future review of the directives, whether we need further rules on the award of sub-contracts, specifically to avoid SMEs as subcontractors being subject to worse conditions than the main contractor awarded the public contract;
20. Calls on the Commission to simplify public procurement procedures in order to relieve both local governments and companies from spending a large amount of time and money on purely bureaucratic matters; emphasises that simplifying the procedures will facilitate SMEs' access to such contracts and enable them to participate on a more equal and fairer footing;
21. Takes the view that sub-contracting is a form of organisation of labour suited to the specialised aspects of the execution of works; emphasises that sub-contracting contracts must comply with all the obligations imposed on the main contractors, especially as regards labour law and safety; takes the view that, to this end, it would be advisable to establish a link between contractor and sub-contractor in terms of responsibility;
22. Supports the systematic admission of alternative bids (or variants); points out that tender conditions, in particular the admission of alternative bids, are crucial for promoting and disseminating innovative solutions; stresses that specifications referring to performance and functional requirements and the express admission of variants give tenderers the opportunity to propose innovative solutions;
23. Encourages the creation of a single web access portal for all information relating to public contracts, as an upstream network for all calls for tenders; notes that the aim should be to provide training and information, to direct undertakings towards contracts and to explain the applicable legislation, in particular for SMEs (which do not generally have extensive human and administrative resources with expertise in procurement-related terminology and procedures), and that specialist help-desks could also assist them in evaluating whether they genuinely fulfil the conditions of the tender, and if so in completing their bids;
24. Notes that SMEs have struggled to gain access to public procurement markets and that more should be done to develop an 'SME strategy'; calls, therefore, as part of this strategy, on the Member States to work with contracting authorities to encourage sub-contracting opportunities where appropriate, to develop and disseminate best-practice techniques, to avoid overly prescriptive pre-qualifying processes, to use standards in tender documents to ensure that suppliers do not have to

start from scratch, and to establish a centralised advertising portal for contracts; also calls on the Commission to take stock of Member States' initiatives in this area and to encourage wider dissemination of the Small Business Act's European Code of Best Practices;

25. Encourages Member States to promote a 'supplier development programme', as already developed in some countries; notes that such a tool can be used to encourage dialogue between suppliers and procurers, enabling actors to meet at an early stage of a purchasing process; stresses that such a mechanism is essential for stimulating innovation and improving SMEs' access to procurement markets;
26. Urges the Commission to do more to secure a greater role for European SMEs in international public procurement and to intensify efforts to prevent discrimination against European SMEs by matching the specific provisions applied by some parties to the GPA (such as Canada and the USA); notes that measures to improve both transparency and access to national procurement markets would help SMEs to gain access to such markets;
27. Calls on the Commission to secure the inclusion, in the renegotiated WTO Government Procurement Agreement (GPA), of a clause enabling the European Union to give preference to SMEs when awarding public contracts, along the lines of those already applied by other States Parties to this agreement;

### ***Green procurement***

28. Draws attention to the great importance of public procurement for climate and environmental protection, energy efficiency, innovation and stimulating competition, and reiterates that public authorities should be encouraged and empowered to base public procurement on environmental, social and other criteria; welcomes the practical assistance given to public authorities and other public bodies in connection with sustainable procurement; calls on the Commission to explore the possibility of using green public contracts as a tool to promote sustainable development;
29. Reiterates its previous call, in its report of February 2009, for the Commission to produce a handbook on pre-commercial procurement, which should illustrate practical examples of risk-benefit sharing according to market conditions; takes the view, in addition, that intellectual property rights must be vested in the companies participating in pre-commercial procurement, which would foster understanding amongst public authorities and encourage suppliers to become involved in pre-commercial procurement procedures;
30. Welcomes the establishment of the European Commission's EMAS helpdesk, which provides practical information and support to help companies and other organisations evaluate, report on and improve their environmental performance in the context of public procurement; calls on the Commission to consider developing a more generic online portal which could offer practical advice and support for those using the public procurement process, particularly the actors involved in complex and collaborative procurement procedures;

***Socially responsible procurement***

31. Emphasises the lack of clarity in the area of socially responsible public procurement, and calls on the Commission to provide assistance in the form of manuals; draws attention, in this connection, to the changes in the legal framework brought about by the Lisbon Treaty and the Charter of Fundamental Rights, and looks to the Commission to implement the relevant provisions in an appropriate manner; emphasises the underlying problem that social criteria relate to the manufacturing process, so that their impact is generally indiscernible in the final product, and that globalised production systems and complex supply chains make compliance with the criteria difficult to monitor; expects, therefore, precise, verifiable criteria and a database containing product-specific criteria to be developed for the area of socially responsible public procurement as well; draws attention to the problems faced by contracting authorities, and the costs they incur, in verifying compliance with such criteria, and calls on the Commission to offer suitable assistance and to promote instruments which can be used to certify the reliability of supply chains;
32. Calls on the Commission to make it clear that public authorities may base public procurement on social criteria such as the payment of relevant standard wages and other requirements; calls on the Commission to devise guidelines or other practical assistance for public authorities and other public bodies in connection with sustainable procurement, and urges the Commission and the Member States to organise frequent training courses and campaigns to raise awareness of this issue; supports the idea of a transparent process, involving the Member States and local authorities, with a view to developing the relevant criteria further; points out that, in the area of social criteria in particular, such a process offers good prospects for improvements;
33. Calls on the Commission to encourage public authorities to use fair trade criteria in their public tenders and purchasing policies on the basis of the definition of fair trade set out in the European Parliament resolution of 6 July 2006 on fair trade and development and the recent Commission communication of 5 May 2009; reiterates its earlier call for the Commission to promote the use of such criteria by, for example, producing constructive guidelines on fair trade procurement; welcomes the unanimous adoption of the opinion of the Committee of the Regions of 11 February 2010 calling for a common European fair trade strategy for local and regional authorities;

***Practical help: database and training courses***

34. Calls for the development of a frequently updated database of standards, especially those relating to environmental and social criteria, to be made available to public authorities, in order to ensure that procurers have access to appropriate guidance and a clear set of rules when drawing up tenders, so that they can easily verify their compliance with the relevant standard; expects the Member States and all stakeholders to be fully involved in this process; notes that this bottom-up process should take into account the valuable experience and knowledge that often exists at local, regional and national level; draws attention, furthermore, to the negative impact which a market fragmented by the existence of numerous differ-

ent regional, national, European and international labels has on innovation and research;

35. Notes the importance of standards for public procurement in that they can help public procurers meet their targets, allowing them to use tried and tested processes to procure products and services, delivering a more cost-effective tender procedure and ensuring that procurement meets other policy objectives such as sustainability or buying from small businesses;
37. Recognises that training and exchanges of experience between public authorities and the Commission are essential in order to overcome some of the complexities of the public procurement market; is concerned, however, that as public budgets tighten, such initiatives may be undermined; calls, therefore, on the Member States and the Commission to use the existing resources and mechanisms at their disposal, such as the peer reviews envisaged in the Services Directive, to encourage small teams of procurement experts from one region to review the activities of another EU region, which may help to build confidence and establish best practices across different Member States;
36. Urges the Commission and the Member States to organise training courses and campaigns to raise awareness among local authorities and policy-makers, and to include other stakeholders, in particular providers of social services;

### ***Regional development***

38. Stresses that the Court of Auditors regularly indicates in its annual reports on the implementation of the EU budget, as well as in its latest annual report on the 2008 financial year, that failure to comply with EU procurement rules is one of the two most common causes of errors and irregularities in the implementation of European projects co-financed by the Structural Funds and the Cohesion Fund; emphasises, in this context, that irregularities are often caused by improper transposition of EU rules and by differences in the rules applied by Member States; calls on the Commission and the Member States to revise, in cooperation with regional and local authorities, the various sets of rules applicable to public procurement in order to unify them and simplify the whole legal framework for public procurement, in particular with a view to reducing the risk of errors and ensuring more efficient use of the Structural Funds;
39. Takes the view that it is not only costs and complexity which can be prohibitive, but also the time needed to complete the public procurement process, along with the threat of legal action in the form of lengthy appeal procedures that are often obstructed by various actors, and hence welcomes the fact that the recovery plan makes it possible to apply accelerated versions of the procedures outlined in the public procurement directives to major public projects specifically in 2009 and 2010; calls on the Member States to make use of the procedure and to assist local



and regional authorities in implementing and using these procedures, in each case in compliance with the standard public procurement rules and regulations;

40. Calls on the Commission to consider the possibility of continuing to use accelerated procedures in connection with the Structural Funds, even beyond 2010, and extending the temporary threshold increase, with the specific aim of speeding up investment;

***International trade***<sup>41</sup>. Points out that the internal market and international markets are increasingly interlinked; takes the view, in this context, that the EU internal market legislators and EU negotiators in the field of international trade should be mindful of the possible consequences for one another when conducting their activities, and that they should adopt a coherent policy that is always directed to the promotion of EU values in procurement policies, including transparency, a principled stance against corruption and the advancement of social and human rights; invites the Committee on the Internal Market and Consumer Protection and the Committee on International Trade to hold joint briefing sessions in order to foster synergies;

42. Stresses that a sound government procurement framework is a precondition for a fair and free competition-oriented market, and helps to fight corruption;
43. Further points out, in the context of the European Union's commitments in the field of international public procurement, the importance of strengthening anti-corruption mechanisms in this area, and draws attention to the need to focus efforts on ensuring transparency and fairness in the use of public funds;
44. Urges the 22 observer states on the GPA committee to speed up the process of acceding to the GPA;
45. Calls on the Commission to evaluate the possibility of incorporating into public procurement agreements with international partners provisions requiring compliance with the fundamental human rights obligations laid down in conventions and international agreements;
46. While arguing strongly against protectionist measures in the field of public procurement at global level, firmly believes in the principle of reciprocity and proportionality in that area; calls on the Commission to consider imposing proportional targeted restrictions on access to parts of the EU's procurement markets for those trading partners which benefit from the openness of the EU market, but have not shown any intention of opening up their own markets to EU companies, in order to encourage our partners to offer reciprocal and proportional market access arrangements for European companies;
47. Draws attention to the provisions of Articles 58 and 59 of Directive 2004/17/EC; calls on the Member States to make full use of the possibility of informing the Commission of problems relating to access by their undertakings to third-country

## Appendix

markets, and calls on the Commission to take effective measures to ensure that EU undertakings enjoy genuine access to third-country markets;

48. Instructs its President to forward this resolution to the Council and the Commission.

## EXPLANATORY STATEMENT

Total annual expenditure on the public procurement of goods and services in the European Union amounts to EUR 1500 billion, or more than 16% of EU GDP<sup>217</sup>. International public procurement accounts for a mere 3% of that figure, however. The main purpose of public procurement is the cost-effective purchase of goods and services with a view to the performance of public-service tasks.

Public authorities are not typical market participants, however; since they manage public funds they bear a particular responsibility. Wherever possible, public procurement should make a contribution to meeting the major challenges facing society: the global economic and financial crisis, climate change and the ever worsening crisis of poverty in the countries of the South.

There is no doubt that public contracting authorities are benefiting from the European internal market and its rules: larger markets create more choice, which can lead to lower costs and better quality; greater transparency helps to fight corruption and fraud; cross-border cooperation creates new possibilities for action and offers the chance of new experiences.

But there are drawbacks as well: in many Member States regional and local authorities are the largest public contracting authorities and, against the background of the current economic crisis, it is precisely their experiences which are highlighting the way the European public procurement directives are reducing the scope for action and making the process of awarding contracts slower and more costly.

Contractors as well, in particular small and medium-sized undertakings, are suffering under the burden of red tape and legal uncertainty. Many studies have been drawn up showing just how costs are increasing and procedures are becoming lengthier, although they cannot be dealt with in detail in this report.

### *Legal uncertainties*

There are various reasons for this development. The aim of the 2004 revision of the public procurement directives was to simplify and modernise the procedures for the award of public contracts and make them more flexible; that aim has not been achieved, however.

On the one hand, some provisions of the directives themselves are not sufficiently clear: political disagreements in the Council and Parliament resulted in compromises on wording, loopholes and inconsistencies in the texts.

On the other, the transposition process in the Member States proved to be a time-consuming one, the transposed versions often contained more stringent provisions, additional criteria were incorporated, whilst some provision designed to increase flexibility were left out: In short, the letter of the law changed during transposition.

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<sup>217</sup> International Monetary Fund figures for 2006, nominal EU GDP on the basis of the October 2007 exchange rate: US\$ 14 609 840 million, even if a tiny proportion is spent on defence goods.

Legal uncertainties have led to a plethora of appeal procedures and national and European court cases. Attempts have been made, through the case-law of the CJEU and by means of Commission soft law proposals, to close the legal loopholes, an approach which has merely added to the confusion.

All this has left us with a complex set of rules which are creating serious legal problems, primarily for smaller local authorities, but also for small and medium-sized undertakings, problems which they can no longer solve without incurring additional costs or seeking external legal advice. Legal uncertainties or the threat of legal action have brought important procurement projects to a halt and there is hardly another area in which so many legal disputes have flared up. The incorrect application of the rules governing procurement is one of the most common causes of errors in the disbursement of resources under the European Structural Funds.

The main areas of legal dispute concern public-public partnerships, town planning (including the construction of social housing) and service concessions. However, there is also uncertainty surrounding public-private partnerships, the procurement of fair-trade products, the application of the public procurement directives to contracts whose value falls below the relevant thresholds and the scope for taking account of social criteria, such as equal pay, gender equality, compliance with wage agreements and the provision of jobs for the long-term unemployed and young people with poor skills or qualifications.

### ***Inadequate coordination within the Commission***

There is also a lack of coordination within the Commission. Many Commission departments have ‘discovered’ public procurement as a means of achieving objectives for which the European Union would otherwise lack the financial resources or the legislative competence. It of course makes sense to encourage contracting authorities to engage in ecologically and socially responsible procurement and to foster research and innovation. However, the many initiatives which have resulted do not make for legal clarity and are undermining efforts to achieve what is in itself a worthwhile objective. A plethora of soft law measures has merely added to the legal inconsistencies.

When developing soft law, the Commission should consider whether its proposals are consistent with the proportionality principle and their practical implications at local level. The most recent study produced by the European Institute of Public Administration (EIPA), ‘The Institutional Impacts of EU Legislation on Local and Regional Governments, A Case Study of the 1999/31/EC Landfill Waste and 2004/18/EC Public Procurement Directives’, criticises the extensive use of soft law: ‘using soft law to regulate very important aspects of the Directive is another important shortcoming: it is not possible to foresee the institutional impact of soft law’. In keeping with the aims of the Better Lawmaking initiative, the impact of soft law should also be studied and the issue of compliance with the subsidiarity and proportionality principles reviewed (shortened impact assessment).

Unfortunately there has thus far been a lack of political balance to the Commission’s implementation of European public procurement law. Whilst many initiatives have been taken and many manuals and guidelines are available in the area of ecologically responsible and energy-efficient procurement, the Commission’s most recent communication

on socially responsible procurement dates back to 2000, i.e. prior to the revision of the public procurement directives. In the legally particularly complex field of fair trade procurement, only one communication has thus far been issued, and no guidelines or manuals. This could be misconstrued as an indirect reflection of the Commission's priorities.

Your rapporteur is therefore calling for better coordination of public procurement policy among the various Commission departments involved and the development of a joint, public strategy on public procurement, including a uniform web presence, with a view to making the law more transparent.

More initiatives would also be welcome in the areas of the organisation of exchanges of experience, the development of proven practices and methods and support for training courses in the Member States. Moreover, such training courses should not be aimed solely at local contracting authorities, but should also encompass political decision-makers and other individuals and bodies, in particular NGOs, which provide social services. Here, the experience gained with this model in France, where it is currently being tested, could prove instructive.

The report also criticises the lack of transparency regarding the composition and results of the work of the internal Commission advisory committee on public procurement and calls on the Commission to take steps to ensure that both this committee and the planned new committee on public-private partnerships have a balanced composition and work in a transparent manner;

***Legal clarification by the CJEU of the situation regarding public-public partnerships***

The entry into force of the Lisbon Treaty has changed the legal position, above all by strengthening the role of local and regional authorities. For the first time an acknowledgment of the 'right to regional and local self-government' has been incorporated into European Union primary law (Article 4(2) TEU):

*'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.*

Article 1 of the new Protocol on services of general interest (No 26) likewise emphasises the following:

*'the essential role and the wide discretion of national regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users'.*

In a number of judgments handed down prior to the entry into force of the new Treaty the CJEU had invoked the right to local self-government and made it clear that the 'possibility for public authorities to use their own resources to perform the public-interest tasks conferred on them may be exercised in cooperation with other public authorities' (Case C-480/06, Stadtwerke Hamburg). In this way the CJEU has confirmed local authorities' margin for discretion and strengthened local self-government. However, the judgments do not constitute a blank cheque justifying all forms of cooperation between

local authorities. The CJEU regards public-public partnerships, such as cooperation agreements between local authorities and national cooperation, as falling outside the scope of the public procurement directives if they meet the following criteria:

1. the purpose of the partnership is the joint provision of a public-service task conferred on all local authorities,
2. the task is carried out solely by public authorities, i.e. without the involvement of private individuals or undertakings,
3. and the activity involved is essentially performed on behalf of the public authorities concerned.

The CJEU has also confirmed that the mere possibility of a public-public partnership being opened up to private investors does not invalidate the exclusion of such partnerships from the scope of the public procurement directives if there is no real prospect of such a step being taken at the time when the contract is awarded.

A controversial area of public procurement law has thus been adequately clarified. One consequence of this ruling must be that the Commission refrains from bringing Treaty infringement proceedings against Member States in this area and, together with Parliament and stakeholders, begins the work of consolidating the CJEU case-law. This report is intended as the first contribution to that process.

#### ***Clarification of the legal situation regarding service concessions***

The revised public procurement directives take the new step of defining service concessions as contracts in connection with which ‘the consideration for the provision of services consists either solely in the right to exploit the work or in this right together with payment’. The Community legislator explicitly excluded service concessions from the scope of the directives, with a view to offering contracting authorities and contractors a greater degree of flexibility and to taking account of the differing legal cultures and traditions in the Member States, an approach confirmed by the CJEU in its recent judgment of 10 September 2009 in Case C-206/08, *Eurawasser*. Service concessions are not covered by the public procurement directives, but only by the less stringent regime of the EU Treaties. In that judgment, the CJEU also defined the criterion of transfer of economic risk more precisely. In its view, the right to award a service concession for water supply services is not invalidated by the fact that supply contracts are governed by by-laws stipulating compulsory connection and compulsory use of the service. The economic risk justifying the conclusion of a service concession may also be limited. The CJEU has confirmed that it must remain open to public contracting authorities to ensure the provision of services by way of a concession if they consider that to be the best method of ensuring the public service in question. In so doing it has clarified the situation in another area which frequently gives rise to legal disputes.

#### ***Clarification of the situation regarding public-private partnerships***

The Commission and the CJEU have clarified the situation in other areas as well. Both the Commission, in its 2008 communication on public-private partnerships, and the CJEU, in its judgment of 15 October 2009 in Case C-196/08, *Acoset*, have made it clear that no double competitive tendering procedure is required in connection with the award of contracts to and the conferral of certain tasks on newly-established public-private partnerships, but that all the following criteria must be met before a concession can be awarded without competitive tendering to a mixed public-private undertaking specially established for that purpose:

- The private participant must be selected by means of a public procedure, following a review of the financial, technical, operational and administrative requirements and the characteristics of the tender in the light of the particular service to be provided.
- The mixed public-private undertaking must retain the same corporate purpose throughout the duration of the concession. According to the CJEU, any material change to that corporate purpose or to the task to be performed would necessitate the launching of a new competitive tendering procedure.

The legal situation regarding public-private partnerships is thus also sufficiently clear.

### ***Town planning***

This is not the case in all areas, however. The area of town planning is particularly problematical at the moment: an unwarrantedly strict interpretation by German courts in particular of the CJEU judgment in Case C-220/05, *Roanne*, has served to extend the scope of the public procurement directives to areas they were never intended to encompass. However, local authorities must be able to sell plots of land subject to conditions (for example, a stipulation that the plots in question should be built on within two years) without being required to open up the procedure to Europe-wide competitive tendering. If not, *‘one may have to accept the hypothesis, however absurd, that all town planning activities are subject to the directive since, by definition, provisions on the possible execution of building works substantially alter the value of the land in question’* (quote from the final submission made to the CJEU by Advocate-General Paolo Mengozzi on 17 November 2009).

The public procurement directives were never intended to cover such cases and it is to be hoped that the CJEU will agree with the Advocate-General.

### ***Sustainable and innovative procurement***

Whilst there are many instruments (the GPP Toolkit, the ‘Procura+Campaign’ or ‘Top-Ten Pro’) available to help public authorities and other public bodies in the area of ecologically sustainable procurement, and whilst, in the area of innovative procurement, the Commission has issued communications on pre-commercial public procurement and on a lead market initiative for Europe, no such steps have been taken in the area of socially responsible procurement, even though the Lisbon Reform Treaty has confirmed

the importance of a social Europe. In particular the new Article 3(3) of the Treaty on European Union and the now legally binding Charter of Fundamental Rights have broadened the European Union's aims from the purely economic to include binding social objectives. This must also be reflected in the action the Commission takes.

The area of socially responsible procurement in particular suffers from two problems: social criteria chiefly relate to the manufacturing process, so that their impact is generally indiscernible in the final product, and globalised production systems and complex supply chains make compliance with criteria more difficult to monitor. The situation is made even more complex and confusing by the fact that self-issued certificates must be accepted in tendering procedures, in order not to breach the ban on discrimination. Checking the veracity of such certificates is beyond the scope of most public contracting authorities. In addition to drafting a manual, the Commission should therefore also consider developing precise, verifiable criteria and/or developing a database containing product-specific criteria. The establishment of a European body with the task of drawing up and checking compliance with criteria for specific product groups and, if necessary, providing extra-judicial arbitration on complaints should also be considered.

### ***Review of the public procurement directives***

In general it would be welcome if the Commission, when carrying out its proposed review of the public procurement directives, were to take account of the points raised in this report and, at the same time, address the legal and practical shortcomings in the way the directives have been transposed into national law and the legal uncertainties surrounding the application of public procurement law. It would also be useful to clarify where and how the European Union can contribute to administrative simplification in this area, although such a process can only be carried out on the basis of an objective analysis of the existing problems involving all stakeholders - something which is urgently needed.

However, your rapporteur warns against any move to revise the public procurement directives at this juncture - that would be premature for a variety of reasons. Firstly, the directive on review procedures concerning the award of public contracts should certainly be included in any revision, in order to prevent any further fragmentation of public procurement law. However, that directive has not yet been transposed in all the Member States and its practical impact on public procurement cannot yet be assessed. Secondly, the Member States are currently facing a serious economic and financial crisis whose implications for local authorities are as yet largely unforeseeable and which will certainly worsen over the next few years. Changing the legal basis for public procurement at such a time would only create further uncertainty and lead to delays in tender procedures - to the detriment of all concerned.



24.2.2010

## **OPINION OF THE COMMITTEE ON REGIONAL DEVELOPMENT**

for the Committee on the Internal Market and Consumer Protection

on new developments in public procurement  
(2009/2175(INI))

Rapporteur: Oldřich Vlasák

### **SUGGESTIONS**

The Committee on Regional Development calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Points out that although local and regional authorities are among Europe's largest purchasers and therefore play an essential role in implementing public procurement rules, the complexity of the rules laid down in competition law and procurement law means that there is often a lack of expertise concerning the legal framework and its implementation, appropriate training and guidelines on procurement within sub-national authorities; calls on the Member States to set up training courses on public procurement rules (including specific aspects, such as social, environmental, diversity and equality criteria) and to encourage the use of ICTs to improve the understanding of those rules and the administrative capabilities of local and regional authorities; in this context, raises the possibility of establishing public procurement groupings at regional level based on cooperation between local and regional authorities, which would significantly improve the efficiency and effectiveness of public procurement through contacts and mutual exchanges of experience and information; furthermore, points out that efforts to uncover and reduce corruption at regional and local authority level must continue through the introduction of training, the provision of information and publicity;
2. Stresses that the Court of Auditors regularly indicates in its annual reports on the implementation of the EU budget, as well as in the latest Annual Report on the financial year 2008, that failure to comply with EU procurement rules is one of the two most common causes of errors and irregularities in the implementation of European pro-

jects co-financed by the Structural Funds and the Cohesion Fund; highlights, in this context, that irregularities are often caused by improper transposition of EU rules and by differences in the rules applied by Member States; calls on the Commission and the Member States to revise, in cooperation with regional and local authorities, the various sets of rules applicable to public procurement in order to unify those rules and simplify the whole legal framework for public procurement, in particular with a view to reducing the risk of errors and increasing efficiency in the use of Structural Funds;

3. Considers that it is not only costs and complexity which can be prohibitive, but also the time needed to complete the public procurement process, and the threat of legal action in the form of lengthy appeal procedures that are often obstructed by various actors, and hence welcomes the fact that the recovery plan makes it possible to apply accelerated versions of the procedures outlined in the public procurement directives to major public projects specifically in 2009 and 2010; calls on the Member States to make use of the procedure and assist local and regional authorities in implementing and using these procedures, in each case in compliance with the standard public procurement rules and regulations;
  
4. Calls on the Commission to examine the possibility of using, even beyond 2010, accelerated versions of procedures in connection with the Structural Funds and an extension of the temporary increase in thresholds, with the specific aim of speeding up investment;
  
5. Deplores the fact that in some cases Structural Fund allocations for infrastructure projects undertaken in the context of a Public Private Partnership (PPP) and related contracts with private operators based on public procurement carried out at sub-national level have, as a result of very complex procurement procedures, led to a loss of European Union subsidies previously available to fund infrastructure development; believes that it is vital to remove obstacles to PPPs if the European Union wants to have any chance of making the necessary investments in infrastructure and quality services; calls on the Commission to ensure that public procurement and Structural Fund implementation rules set a coherent framework for PPPs in order to create legal certainty for all stakeholders and reduce the pressure on public budgets, in the context of the principle of co-financing and in the aftermath of the global economic crisis;

6. Recognises the right of local and regional authorities to decide democratically on the best means of delivering public services, including decisions to use companies they own or control without any private partner being involved; believes that even without compulsory tendering inter-communal or other forms of public-public cooperation for service delivery should be accepted as a legitimate way of delivering services and that sub-national actors should be able to assign tasks relating to public service provision to companies they own or control;
7. Points out that the Commission's initiatives concerning public procurement need to be better coordinated in order to avoid jeopardising coherence with the European directives on public procurement and causing legal problems for operators; calls in this regard for better coordination within the Commission, including a single website with clear structures to promote legislative transparency in this field;
8. Underlines the need to encourage SMEs to participate in public procurement procedures carried out by local and regional authorities, in accordance with the EU's general objectives in support of SMEs; points out that increased involvement of SMEs can be ensured through the proper provision of information, consultancy and training courses and practical assistance ;
9. Endorses the concerns voiced by many local authorities in response to the interpretation of the rulings<sup>218</sup> of the Court of Justice in the field of urban development; firmly believes that the operationally and legally strict application of public procurement rules might hinder urban development; calls on the Commission to draw up, in close cooperation with Parliament, the Council and regional and local authorities, the corresponding public procurement rules with sufficient clarity to enable contracting authorities clearly to identify which public works contracts and concessions are subject to the procurement rules and thus distinguish between such contracts and concessions and urban development projects which are not subject to those rules, so that land agreements can be facilitated between the public and private sector without the unnecessary requirement of having to issue a call for tenders and without jeopardising the powers and right of local authorities to decide how they want to develop their territory; **awaits** with great interest the judgment of the Court of Justice in Case C-451/08; endorses the view of the Advocate-General of the Court of Justice delivered on 17 November 2009 in Case C-451/08: 'These broad and ambitious aims must be borne in mind when interpreting the Directive but it should not be assumed that, by appealing to the purpose of the measure, its scope can be extended indefinitely.' (paragraph 35); otherwise there is the risk 'that all town planning activities are subject to the Directive since, by definition, provisions on the possible execution of building works substantially alter the value of the land in question'.

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<sup>218</sup> Judgment of the European Court of Justice (First Chamber) of 18 January 2007 in Case C-220/05 Jean Auroux and Others v Commune de Roanne.

**RESULT OF FINAL VOTE IN COMMITTEE**

<b>Date adopted</b>	22.2.2010
<b>Result of final vote</b>	+: 39 -: 1 0: 0
<b>Members present for the final vote</b>	François Alfonsi, Luís Paulo Alves, Charalampos Angourakis, Catherine Bearder, Jean-Paul Basset, Sophie Briard Auconie, Zuzana Brzobohatá, Alain Cadec, Ricardo Cortés Lastra, Tamás Deutsch, Rosa Estaràs Ferragut, Seán Kelly, Evgeni Kirilov, Constanze Angela Krehl, Petru Constantin Luhan, Elżbieta Katarzyna Łukacijewska, Ramona Nicole Mănescu, Iosif Matula, Miroslav Mikolášik, Franz Obermayr, Jan Olbrycht, Wojciech Michał Olejniczak, Markus Pieper, Georgios Stavrakakis, Nuno Teixeira, Michael Theurer, Michail Tremopoulos, Viktor Uspaskich, Lambert van Nistelrooij, Oldřich Vlasák, Kerstin Westphal, Hermann Winkler, Joachim Zeller
<b>Substitute(s) present for the final vote</b>	Vasilica Viorica Dăncilă, Karin Kadenbach, Heide Rühle, Peter Simon, László Surján, Evžen Tošenovský, Sabine Verheyen

2.3.2010

## **OPINION OF THE COMMITTEE ON INTERNATIONAL TRADE**

for the Committee on the Internal Market and Consumer Protection

on new developments in public procurement  
(2009/2175(INI))

Rapporteur: Małgorzata Handzlik

### **SUGGESTIONS**

The Committee on International Trade calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Points out that the Internal Market and international markets are increasingly inter-linked; considers, in this context, that the EU Internal Market legislators and the EU negotiators in the field of international trade should be mindful of the possible mutual consequences when conducting their activities and that they should adopt a coherent policy that should always be oriented at the promotion of EU values in procurement policies, such as transparency, a principled stance against corruption and the advancement of social and human rights; in order to foster synergies invites the Committee on the Internal Market and Consumer Protection, the Committee on International Trade to hold joint briefing sessions;
2. Stresses that a sound government procurement framework is a precondition for a fair and free competition-oriented market and helps to fight corruption;
3. Believes that a plurilateral agreement such as the Government Procurement Agreement (GPA) is the best tool to ensure a level playing field for European enterprises in regarding market access to public procurement at international level; therefore urges the Commission to conclude the negotiations on the provisional text that was agreed upon in 2006 as a revised version of the GPA that entered into force in 1996 and urges the Commission to continue its efforts to conclude the ambitious GPA; points out that in its preamble and in its Article V the GPA recognises Special and Differential Treatment for Developing Countries;
4. Urges the 22 observer states on the GPA committee to speed up the process of acceding to the GPA;
5. Takes the view that the EU public procurement market remains the most open public procurement market at global level;

6. Regrets that our international partners have not yet opened up their internal public procurement markets to EU companies in the same way that the EU internal market is open to third-country enterprises; deeply deplores the fact that our major trading partners employ public procurement practices which discriminate against EU suppliers tendering for public contracts in third countries; deplores the fact that some key trading partners (including GPA members) take protectionist measures in the area of public procurement;
7. Urges the Commission to do more to secure a greater role for European SMEs in international public procurement and to intensify efforts to prevent discrimination against European SMEs by matching the specific provisions that some GPA members (such as Canada and the US) have; notes that measures to improve both transparency and access to national procurement markets would help SMEs to access such markets;
8. While arguing strongly against protectionist measures in the field of public procurement at global level, firmly believes in the principle of reciprocity and proportionality in that field; calls on the Commission to consider imposing proportional targeted restrictions on access to parts of the EU's procurement markets for those trading partners which benefit from the openness of the EU market, but have not shown the intention of opening up their own markets to EU companies, in order to encourage our partners to offer reciprocal and proportional market access arrangements for European companies;
9. Draws attention to the provisions of Articles 58 and 59 of Directive 2004/17/EC; calls on the Member States to make full use of the possibility of informing the Commission of problems concerning access by their undertakings to third country markets and calls on the Commission to take effective measures to ensure that Union undertakings enjoy genuine access to third country markets;
10. Calls on the Commission to secure the inclusion, in the renegotiated WTO Government Procurement Agreement (GPA), of a clause enabling the European Union to give preference to SMEs when awarding public contracts, along the lines of those already applied by other States parties to this agreement;
11. In the context of the European Union's commitments in the field of international public procurement, points out, further, the importance of strengthening anti-corruption mechanisms in the field of public procurement and draws attention to the need to focus efforts on ensuring transparency and fairness in the use of public funds;
12. Calls on the Commission to evaluate the possibility of using green public procurement as an instrument for promoting sustainable development;
13. Calls on the Commission to evaluate the possibility of incorporating into public procurement agreements with international partners provisions requiring compliance with the fundamental human rights obligations laid down in conventions and international agreements.

## Appendix

## Appendix

**RESULT OF FINAL VOTE IN COMMITTEE**

<b>Date adopted</b>	23.2.2010
<b>Result of final vote</b>	+: 16 -: 5 0: 5
<b>Members present for the final vote</b>	William (The Earl of) Dartmouth, Daniel Caspary, Christofer Fjellner, Joe Higgins, Yannick Jadot, David Martin, Emilio Menéndez del Valle, Vital Moreira, Cristiana Muscardini, Godelieve Quisthoudt-Rowohl, Niccolò Rinaldi, Helmut Scholz, Iuliu Winkler, Jan Zahradil, Paweł Zalewski
<b>Substitute(s) present for the final vote</b>	Catherine Bearder, José Bové, George Sabin Cutaş, Mário David, Salvatore Iacolino, Syed Kamall, Elisabeth Köstinger, Jörg Leichtfried, Matteo Salvini, Michael Theurer, Jarosław Leszek Wałęsa
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Patrice Tirolien



## Appendix

**RESULT OF FINAL VOTE IN COMMITTEE**

<b>Date adopted</b>	28.4.2010
<b>Result of final vote</b>	+: 28 -: 0 0: 8
<b>Members present for the final vote</b>	Cristian Silviu Buşoi, Lara Comi, Anna Maria Corazza Bildt, António Fernando Correia De Campos, Jürgen Creutzmann, Christian Engström, Evelyne Gebhardt, Louis Grech, Małgorzata Handzlik, Malcolm Harbour, Philippe Juvin, Sandra Kalniete, Alan Kelly, Eija-Riitta Korhola, Edvard Kožušník, Kurt Lechner, Toine Manders, Mitro Repo, Robert Rochefort, Zuzana Roithová, Heide Rühle, Andreas Schwab, Róza Gräfin Von Thun Und Hohenstein, Kyriacos Triantaphyllides, Bernadette Vergnaud, Barbara Weiler
<b>Substitute(s) present for the final vote</b>	Pascal Canfin, Cornelis de Jong, Frank Engel, Anna Hedh, Othmar Karas, Emma McClarkin, Catherine Soullie, Anja Weisgerber, Kerstin Westphal
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Edward Scicluna