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by

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**Legal Framework and Selected Problems
of Public Procurement
in the EC and in Switzerland**

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Summary

The aim of this paper is to investigate certain aspects of the legal relationship between the EC and Switzerland in the field of public procurement.

Public procurement can be defined as the purchase of goods, services, works and supplies by public authorities and enterprises. It comes as no surprise that public procurement has major economic ramifications, accounting for around 14% of the EC's and Switzerland's GDP.

During the last decade, an enormous increase in legal activity in the field of public procurement could be observed. It commenced with the implementation of six EC-directives, followed by an international agreement, the Government Procurement Act (GPA), based on the regime of the World Trade Union (WTO) and subsequently ratified by both the EC and Switzerland. To comply with the GPA, the former had to amend some of the provisions of its directives. The latter, on the other hand, was forced to enact several laws and decrees, on a Federal as much as on a Cantonal level. Last but not least, the EC and Switzerland ratified a bilateral agreement on certain aspects of public procurement, which entered into force in 2002.

In the field of public procurement, the subject of this paper, a complicated legal framework exists. Different legal orders, different state levels, and different traditions are involved: plurinational agreements, based on WTO-law; primary and secondary EC-legislation; legislation in the Member States; Swiss legislation on both the Federal and Cantonal level; and bilateral agreements.

The plurinational GPA aims at creating a global system of market economies and the liberalisation of international trade. The EC's four material directives strive to overcome trade barriers within its territory. Switzerland's relevant Federal and Cantonal laws primarily aim at transforming the GPA-rules into effective provisions and at the harmonisation of the home market. This picture is completed by the Agreement. Since its entry into force, the legal relationships between the EC and Switzerland are essentially the same as those between the EC and the other EFTA-states.

The Agreement is supposed to have a considerable impact on the economy. So far, only 16% of public procurement works, services or supplies are provided transnationally. It contains rules about the extension of the GPA and about public procurement by telecommunications, railway operators along with certain other utilities. There are some additional important procedural provisions.

Both the EC and Switzerland must provide non-discriminatory, timely, transparent and effective procedures enabling suppliers or service providers

to challenge alleged breaches arising in the context of procurements in which they have, or have had, an interest. It is very likely that they will be considered to be directly invocable, both in the EC and in Switzerland. On the other hand, it is likely that only Switzerland confers on the GPA a direct effect.

In the EC, in its Member States, and in Switzerland, there are remedies, which are similar to ordinary administrative proceedings. There is always a standing to sue for the potential contractor, whereas the procurer is capable to be sued. Interim measures are also foreseen, and the court has the power to set aside decisions of the procuring authority and to order the payment of damages.

During the last years, there has been, especially in the EC, a remarkable discussion going on about the legality of social and environmental clauses in public procurement matters. Until now, it seems to be settled that they are legal, provided certain criteria are fulfilled. However, it is, more or less completely, obscure to what extent. In conclusion, the relevant case law has to be analysed.

At first sight, the legality of social and environmental connotations appears to contradict to the public procurement's main principle of "best value". However, their justification might derive from the fact that they are able to create an over-all economic advantage for the contracting authority. A valid social or environmental criterion has, therefore, to be expressly mentioned in all relevant tender documents; the advantage has to be closely linked to the product or service which is the subject-matter of the contract; the criterion must not confer an unrestricted freedom of choice on the authority; the criterion shall comply with all fundamental principles of their respective legal order; and that the criteria must be applied objectively and non-discriminatorily.

In conclusion, the relationships between the EC and Switzerland are very comprehensive. Each legal order provides an adequate legal protection for undertakings, which take part in any stage of public procurement proceedings. However, it is not always clear to what extent social and environmental clauses may be taken into consideration in public procurement matters.

Abbreviations

Agreement	Agreement between the EC and Switzerland on certain aspects of government procurement
Art.	Article
BGBM	Federal Law on the Internal Market
BGE	(judgment of the) Federal Supreme Court
BoeB	Federal public procurement act
BV	Swiss Federal Constitution
DSU	Dispute Settlement Understanding (part of WTO-rules)
EC	European Community
ECJ	(judgment of the) European Court of Justice
et al.	and more (authors)
et. seq.	following (Art. or p.)
EU	European Union
EEA	European Economic Area
EFTA	European Free Trade Association
fn.	footnote
FTA	Free Trade Agreement between the EC and Switzerland
GATS	General Agreement on Tariffs and Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GPA	WTO-Government Procurement Act
i. c. w.	in conjunction with
IMF	International Monetary Fund
IVöB	Intercantonal Treaty on Public Procurement
nr.	number
NZZ	Neue Zürcher Zeitung
p.	page
para.	paragraph
Switzerland	Swiss Confederation
SR	official systematic collection of Swiss laws
SDR	Special Drawing Rights, currency unit of the IMF
TEC	Treaty of the European Community
TEU	Treaty on European Union
OJ	Official Journal (of the EC/EU)
UN	United Nations
VAT	value added tax
VCLT	Vienna Convention on the Law of Treaties
VGer	Cantonal Administrative Court
VoeB	Federal public procurement regulations
VwVG	Swiss Federal Administrative Procedures Law
w. f. r.	with further references
WTO	World Trade Organisation

1 Introduction

This paper forms the last and mandatory part of the “Master of European Affairs” / LL.M programme at Lund University, Sweden. The task was to thoroughly discuss a topic of European law. The allotted time for the drafting of this paper was six weeks¹.

1.1 Problems in public procurement law and aim of the thesis

The aim of this thesis is fourfold. In chapter 2, the legal framework of public procurement in Europe will be concisely presented. It embraces the GPA, which is based on the WTO-regime, provisions of primary and secondary EC-law, national provisions in the EC-Member States as much as in Switzerland, and international agreements, especially the one between the EC and Switzerland about certain aspects of public procurement.

In chapter 3, the latter will be scrutinised, with a certain focus concerning its temporal and territorial scope of application.

In chapter 4, the legal protection of individuals will be highlighted, in order to provide useful information for European and Swiss undertakings, which wonder specifically about their rights and possibilities before the responsible public procurement authorities and courts in the territory of the other contracting party. Again, a certain focus will be made upon the Agreement.

In chapter 5, an analysis of the legality of social and environmental clauses in public procurement matters will follow. On the one hand, this part aims at showing individuals the limits of such secondary policies, and, deriving from that, their rights in unlawful tender and award proceedings. On the other hand, the procurers should be enabled to recognise their limits of discretion in this aspect of public procurement.

The discussion of those topics mentioned above seems to be very rewarding. First, public procurement issues are economically extremely important, due to a huge amount of public money spent through this instrument. Moreover, public procurement is, at least up to now, rarely given the legal attention it deserves. The underlying reason may lie in the long-lasting underestimation of its importance, and, deriving from that, the surprisingly tardy start of its legal development, oriented around the key-issues of transparency, non-discrimination and legal protection.

1.2 Method

The following thesis is based on an examination of the relevant legal sources applied under international, European and Swiss law. Those three legal orders are understood in their conception as it is expressed by their

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respective courts. The sources of the legal orders concerned are those factors, which are taken into consideration by their respective courts. They include legislation, judgments and academic writing and will be interpreted in the manner in which the European and Swiss courts interpret or must be expected to interpret them.

The international, European and Swiss legal provisions are interpreted literally, contextually and teleologically by means of a comparative and systematic approach. These three methods are not applied in a hierarchical fashion. For the interpretation of European law, the English version of the texts will form the basis of the analysis, as this is the stipulated working-language. The interpretation of Swiss law is mainly based on the German version.

Naturally, a thorough analysis would require the consideration of all language versions of the texts. This practice is not possible here, due to the given time and space frame. Conflicts between the various versions, therefore, may not be discovered and the meaning which best reconciles the texts is not necessarily adopted².

The form of this paper was determined to a very high extent by a mandatory template of the University of Lund. Naturally, the thesis intends to follow an acknowledged international style of academic writing³.

1.3 Questions of delineation

Due to the given space and time frame, delimitations become a necessity, above all in such a wide area like public procurement.

On an international level, the reasons that lead to the ratification of the GPA under the WTO-regime, is not discussed. Furthermore, a comparison with their precedents under the GATT-regime, is also left aside. Concerning the GPA itself, only the provisions that have a close context to the EC and provisions will be discussed⁴.

While investigating the EC public procurement system, there is no clear distinction drawn between the four material directives on the one hand, and on the two procedural directives on the other. Basically, the material ones and the procedural ones are very similar to each other, with some specific rules for the utilities sector. The legal situation and the precise implementation of the EC-directives in the different Member States are hardly analysed. The potential conflict of public procurement matters with the European rules set up for state aid is excluded, too⁵. Furthermore, the

²see, in a similar context, Dingel, p. 33

³With special reference to the lecture of Prof. Hans-Heinrich Vogel, held on January 17th 2003 in Lund and on: Gerhards, Gerhard, Seminar-, Diplom- und Doktorarbeit, 8th ed., Berne 1995.

⁴This is also the reason why the United Nations' UNCITRAL-Model Law is excluded in this paper.

⁵see to that, e. g., Bartosch, Andreas, Vergabefremde Kriterien und Art. 87 I EG: Sitzt das öffentliche Beschaffungswesen in Europa auf einem beihilferechtlichen Pulverfass?, in: EuZW, vol. 8/2001, p. 229, Munich 2002

relation between the public procurement directives and the primary legislation is not investigated thoroughly.

Concerning Swiss legislation, the Federal rules are highlighted. This has to do with easier access to sources and of their predominant comparability to the rules that exist on the Cantonal levels. Two aspects, however, are disregarded: the Federal law on national highways and the alpine-transit resolution.

Apart from that, the specific procurement proceedings of every legal system concerned will be quoted where it is necessary for the general understanding, but not be explored in depth.

The chapter about legal protection focuses on individuals. Therefore, in most of the situations discussed, the rights and duties of the responsible authorities are not scrutinised. And, as a very important introductory remark, only contracts above the value threshold are taken into consideration. The proceedings for tender invitations and awards below the value threshold are different.

Almost only discussing the legality of social and environmental considerations, there are several other interesting aspects excluded, for example the topic of national security and public procurement⁶. Furthermore, a lot of interesting aspects had to be left aside, because of the limited time and space frame.

For the sake of clarity and in order to avoid impreciseness and unnecessary repetitions, there will be some specific remarks concerning more detailed delimitations within the text itself. On the other hand, there will be some recapitulations to facilitate the understanding.

Last but not least, it has to be pointed out that this paper focuses on a description of the public procurement regimes at stake. It does not aim at bringing forward suggestions how the current systems could be improved, or how it should be further developed⁷. In order to fulfil those tasks properly, much more time and space would have been an indispensable prerequisite.

1.4 Public procurement

1.4.1 Definition of public procurement

Public procurement⁸, that is the purchase of goods, services, works and supplies by public authorities and enterprises, constitutes one of the traditional instruments employed by governments of any description to sustain their own operations and to provide various public utilities⁹.

⁶see, to that, e. g., Trybus, Martin, *European Defence Procurement Law*, The Hague 1999, and Trybus, Martin, *Procurement for the armed forces: balancing security and the internal market*, in: *European Law Review*, vol. 27 nr. 6, p. 693 et seq., London 2002

⁷The only exception to this approach is to be found at the very end, in chapter 6.4.5

⁸The notions public procurement and government procurement will be used as synonyms.

⁹see Weiss, p. 1; this covers a huge range of transactions, ranging, e. g., from the purchase

1.4.2 Economical importance of public procurement

Nowadays, it is estimated that within the territory of the EU, public authorities and enterprises yearly spend approximately 720'000'000'000 (720 billions) Euros for the purchase of goods and services; the amount of money used for public procurement in Switzerland is estimated at around 36'000'000'000 (36 billions) Euros¹⁰.

1.4.3 Process of public procurement

The process of public procurement can basically be divided into three steps. First, it starts with a planned decision to make the purchase, which involves determining whether there is a need for the particular goods or services and whether the purchaser has the legal powers to undertake the transaction. The second phase is then to choose which firm is to be the provider of the goods or services required and to conclude a contract with that party. Normally, the contract is considered to be one according to private law¹¹. Finally, once the contract is made, there follows the process often referred to as contract administration. This includes supervising performance to ensure that the promised goods and services are properly delivered, accepting performance, arranging for payment of the contractor, and various other contractual matters¹².

The focus of this paper, however, is on procurement in a narrower sense, covering only the second of the three phases, which is the process of selecting the contractor and making the contract¹³.

1.4.4 Implementation of public procurement provisions

Within the EC as well as in Switzerland, legislative action in the field of public procurement can be considered to be essentially complete. However, this in no way signifies that the effective opening up of public procurement is an achieved objective¹⁴.

of office furniture through to the acquisition of complex satellites and the construction of airports, Arrowsmith 1999, p. 1; similar: Zimmerli, p. 154.

¹⁰Botschaft, p. 74; slightly different numbers: Zimmerli, p. 154, and Biaggini, p. 314 – 315; the amount spent through public procurement is equivalent to around 14% of the Member States' GDP, see Bollinger, p. 643

¹¹Further on, this aspect and problems, which arise from private law, are excluded.

¹²Arrowsmith 1999, p. 2

¹³see Arrowsmith 1999, p. 2, too

¹⁴see further below, chapter 4.1

2 Legal framework surrounding the EC-Swiss Agreement on Public Procurement

2.1 History

2.1.1 Free trade agreement EC – Switzerland (1973)

The fundament of the legal relations between the EC and Switzerland is the FTA, which has been in force since 1973. Its intention is to consolidate and extend the relations between the EC and Switzerland, with due regard for fair conditions of competition, the harmonious development of their commerce for the purpose of contributing to the work of constructing Europe¹⁵. Contrary to the EC, the FTA does not seek to create a common market¹⁶.

The FTA basically covers all trade concerning industrial products within the EC and Switzerland¹⁷, and is of major importance to both parties. In absolute numbers, the EC is by far Switzerland's most important trading partner. On the other hand, Switzerland is, behind the U.S.A., the EC's second biggest¹⁸. None of the seven sectoral agreements is directly interconnected with the FTA¹⁹.

2.1.2 Switzerland's refusal to join European Economic Area (1992)

After the comprehensive EEA-treaty was rejected by a narrow majority of the Swiss electorate and a big majority of the Cantons in a vote held on December 6th 1992²⁰, the government tried to establish a policy of a soft approach to the EC. It enacted to a very large extent Euro-compatible laws and started negotiations for bilateral agreements in specifically named and narrowly defined sectors²¹. Another policy was to strengthen the pre-existing links of the WTO-framework, for example through the ratification of the GPA²².

¹⁵see FTA, recital

¹⁶Maag, p. 197, Baudenbacher, p. 71; if one party infringes the FTA, the other one is, as *ultima ratio*, entitled to enforce retaliation measures, Art. 23 i. c. w. Art. 27 FTA. But before reference has to be made to the Joint Committee. As a retaliation measure, normally a reintroduction of customs tariffs on certain products is undertaken, see Baudenbacher, p. 71.

¹⁷FTA, recitals; Art. 2 et seq. FTA;

¹⁸Zäch, p. 4

¹⁹Botschaft, p. 29

²⁰Norberg et al., p. 68

²¹Botschaft, p. 10

²²similar: Botschaft, p. 74; Biaggini, p. 310; Mayer, p. 665 – 667

2.1.3 Sectoral Agreements EC – Switzerland (2002)

The Agreement forms part of the first package of sectoral agreements between the EC and Switzerland²³ whose negotiations commenced in 1993 and ended in 1998²⁴.

From the viewpoint of the EC, the final step was made on a meeting of the European Council in Vienna in December 1999²⁵. After its initialization on February 26th 1999, the seven agreements were signed on June 21st 1999²⁶. After 67% of the Swiss electorate and 24 Cantons, in a referendum held on May 21st 2000, voted in the sectoral agreement's favour, Switzerland, the EC and all Member States of the EC ratified them according to their own respective legislation²⁷. The treaties have fully been in force since June 1st 2002 and have been warmly welcomed by the EC and Swiss authorities²⁸.

2.2 The WTO – Government Procurement Act

2.2.1 Characterization

The GPA is a plurilateral agreement, which is based on the system of the WTO²⁹. It is, to a large degree, inspired by the EC's procurement directives³⁰, with the important difference that the former intends to create a global system of market economies and to liberalise international trade³¹, while the latter aims at removing barriers to trade³².

The GPA is only binding on those WTO-members that have ratified it³³. This is the case for both the EC and Switzerland³⁴.

²³Sometimes, they are described as bilateral agreements (I) and embrace: 1. scientific and technological cooperation; 2. certain aspects on public procurement; 3. mutual recognition in relation to conformity assessment; 4. trade in agricultural products; 5. air transport; 6. land transport; 7. free movement of persons; see Botschaft, p. 7; currently, the sectoral agreements (II) are negotiated.

²⁴Botschaft, p. 9

²⁵“The European Council warmly welcomes the successful outcome of the negotiations with Switzerland on a global and balanced package of seven important sectoral agreements. This package of agreements will broaden and further strengthen the already close links with Switzerland”, Bulletin EU 12-1998, Conclusions of the Presidency (14/35) External Measures, Switzerland, at: <http://europa.eu.int/abc/doc/off/bull/en/9812/i1015.htm#anch0043> 2003-04-09 14.55

²⁶Botschaft, p. 9 and 16

²⁷Art. 18 (1) Agreement; only for the agreement about free movement of persons, each Member State's signature was necessary due to its nature as a (traditional) mixed agreement, see chapter 3.3.1 further below for more details.

²⁸Botschaft, p. 4 and Patten, Chris, Switzerland: 7 new agreements enter into force 1st June 2002, Brussels 2002, at: http://www.europa.eu.int/comm/external_relations/switzerland/intro/ip02_793htm 2003-04-09 15.02

²⁹Since 1994 (Uruguay-round), the GATT changed its name to WTO and underwent several major changes, for further details see, e. g., Benedek, p. 1 – 37 and Herdegen, p. 107 – 114

³⁰Haagsma, p. 11; on the other hand, the GPA is inspired by its precedent, the GATT Code on Government Procurement, which was adopted at the 1979 GATT Tokyo Round.

³¹Herdegen, p. 115 nr. 20

³²Haagsma, p. 13, who especially refers to Art. III (8) GATT

³³So far, not that many states have signed the GPA. Signing states are: the EC, EFTA

2.2.2 Part of the EC's and Switzerland's internal legal framework

It is important to investigate whether the GPA became part of the internal legal orders of the EC and Switzerland, in order to verify whether they were competent to conclude the Agreement³⁵.

Formally, an international agreement becomes an integral part of Community law if it is concluded between the EC and one or more third countries in accordance with the proceedings laid down in Art. 300 TEC³⁶. Materially, the Commission had the mandate to negotiate the GPA not only on behalf of the EC, but also on behalf of its Member States. Therefore, it is not clear who exactly had the competence to ratify GPA, the EC or its Member States³⁷.

The GPA includes provisions on services involving the movement of physical or legal persons, due to the inability of Art. 133 TEC, governing the common commercial policy, to serve as a sufficient legal basis. Following this reasoning, it can be argued that those provisions of the GPA, concerning the movement of persons, fall outside the exclusive competence of the EC³⁸. However, there also exists the approach of implied competences of the EC³⁹. It is answered in the affirmative when the material content of the agreement, whatever its denomination, is such as to involve a cession of national powers in favour of EC-competence in the field of application of the rules concerned⁴⁰.

Comprehensive internal EC- rules, consisting of TEC provisions and numerous directives, basically regulate the entire internal area that is externally regulated by the GPA. They could be affected if the Member States had the competence to conclude external agreements in the field of public procurement, such as the GPA⁴¹. In conclusion, the view is taken that the GPA has been concluded under the exclusive competence of the Community, due to its integral position within EC-law⁴².

Undoubtedly, the GPA became part of the Swiss legal order. The Federal State was entitled to conclude it⁴³. It is also binding on the Cantons⁴⁴.

Member States, USA, Canada, Japan, South Korea and some others. Hardly any newly industrializing countries have decided to join the GPA.

³⁴for the EC, it was characterized as a trade agreement, Krajewski, p. 101

³⁵The Agreement is partly an extension of the GPA, see to that chapter 3.5.1 further below

³⁶Demirel v Gmuend, para. 7

³⁷This unclearness has not been removed through Council Decision (of 22nd Dec. 1994). It concerns the conclusion on behalf of the EC, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ L 336, 23/12/1994 p. 0001 – 0002, with which the EC has ratified the WTO-agreement.

³⁸Dingel, p. 5

³⁹ERTA (Road transport); Footer, p. 309

⁴⁰ERTA (Road transport)

⁴¹Dingel, p. 6

⁴²see to that also: Materials, GPA

⁴³Art. 55 BV; Materials, GPA

⁴⁴Art. 49 BV

However, the question whether the GPA becomes a part of the internal law of the contracting states does not automatically imply an answer to the question whether the GPA is directly effective⁴⁵.

2.2.3 Content

The GPA's articles are not that detailed; but what complicates the agreement is its different Appendixes and Annexes, which vary for each contracting party. Such a structure is, however, not untypical for international agreements.

The GPA applies to the procurement of supplies by any contractual means, provided that the procurement entity is listed in Appendix I, Annexes 1 – 3⁴⁶. Annex 1 contains a list of all central government entities covered by the agreement. Annex 2 lists the embraced subordinate government entities⁴⁷, and Annex 3 covers all other procurers, most of them in the utilities sector⁴⁸. It applies to works and services insofar as they are listed in Appendix I, Annexes 4 and 5⁴⁹.

Additionally, the sum of the contract at stake has to be above the threshold value, which is also specified in Appendix I, Annexes 1 – 3, and depends on the entity concerned. It is SDR 130'000 for those supplies and services procured by entities listed in Appendix I, Annex 1; SDR 200'000 for those supplies and services procured by entities listed in Appendix I, Annex 2; and SDR 400'000 for those supplies and services procured by entities listed in Appendix I, Annex 3⁵⁰.

The GPA does not apply to the protection of essential security interest matters and other issues, which are necessary to protect public morals; order or safety; human, animal or plant life; health; intellectual property; or issues like products manufactured by handicapped people⁵¹.

2.2.4 General principles

The GPA sets out general principles to be applied by all the contracting states, especially the principle of non-discrimination and national treatment⁵².

⁴⁵see to that further below, chapter 4.2

⁴⁶Art. I GPA

⁴⁷The embraced public authorities must be public in a legal sense, contrarily to the EC-rules, where also factual criteria apply, see Haagsma, p. 16 – 17.

⁴⁸The GPA only applies to entities, which carry out one or more listed utility activity. Because there was no consensus over what constitutes a public undertaking, the actual coverage of individual utility sectors is by far not as broad as under EC-law, with notable exceptions for the distribution of gas and heat, fuel extraction and procurement of telecommunications equipment, see Footer, p. 304.

⁴⁹Generally, consulting and educational services are not embraced, whereas management consulting and related services are.

⁵⁰To see how to convert SDR into Euro, see chapter 3.5.3 further below.

⁵¹Art. XIII GPA

⁵²Art. III and Art. XVII – XX GPA; in the context of the GPA, non-discrimination and national treatment is not the same, see Haagsma, p. 12

Some of the other key provisions include enhanced transparency requirements governing the opening of procedures, with detailed rules on qualification of suppliers and service providers, publication of procurement notices, treatment of information prior to notice and more stringent time-limits, delivery times and so on⁵³. It also contains rules for award procedures for different kinds of tendering. It distinguishes between open, selective and competitively negotiating proceedings⁵⁴.

The WTO's DSU, which is compulsory and binding, applies to the GPA in the context of remedies, even though there are some minor deviations⁵⁵. Furthermore, each contracting state has to provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the agreement arising in the context of procurements in which they have, or have had, an interest⁵⁶.

The GPA must be interpreted in accordance with the VCLT⁵⁷. The national, Community courts respectively, have a discretionary margin in their interpretation of the GPA. It can be expected, therefore, that the ECJ also takes into consideration its principles of efficacy⁵⁸. On the other hand, the BGE is very likely to confer on the GPA a direct effect⁵⁹.

2.2.5 Reservations

Due to its plurilateral nature and according to the important principle of variable geometrics⁶⁰, the GPA is very much open for reservations. Both the EC and Switzerland made use of this possibility. The latter did not subordinate procurements of municipalities and districts under the GPA-rules⁶¹, whereas the former made a reservation concerning Swiss undertakings' access to remedies within its territory⁶². Moreover, most of the contracting parties excluded procurement in the utility sectors of telecommunications, railway transport and procurements of private entities in the areas of water-, electricity and transport-supply⁶³.

⁵³Art. VI, Art. IX, Art. XI – XIV GPA; see Footer, p. 303

⁵⁴Art. VI (1), VII, VIII and XIV GPA

⁵⁵contained in Annex II to the WTO-agreement; Art. XX and XXII GPA; Petersmann, p. 177; Footer, p. 303 – 305; Biaggini, p. 337

⁵⁶Art. XX GPA; see to that chapter 4.3 further below

⁵⁷Art. XXII (1) GPA is hinting to the VCLT, especially Art. 31 – 33 thereof, which was confirmed by the first decisions of the WTO-appellate body, see Dingel, p. 31, with more details.

⁵⁸Furthermore, it can be concluded that the ECJ generally interprets internal Community law in accordance with those principles, which are provided in Art. 31 VCLT, with much emphasis on the teleological interpretation, see van Gend en Loos, and Dingel, p. 31.

⁵⁹see more to that in chapter 4.2.5 further below

⁶⁰This is in contrary to the WTO's most-favoured-nation principle, see Zimmerli, p. 156.

⁶¹Appendix I, Annex 2 GPA; Biaggini, p. 339

⁶²There are remedies according to Art. XX GPA for procurement decisions of non-central governments, Appendix I, Annex 2 GPA, see Biaggini, p. 339 and 353; for other restrictions, see Priess/Pitschas, p. 187, w. f. r.

⁶³Dingel, p. 43

2.2.6 Application

The GPA is applicable within its contracting states. It also applies if there is, on the one side, an EC-Member State and, on the other side, another contracting party to the GPA, which is not a Member State. However, where a public contract falls within the scope of both the Community rules and the GPA, the procurer must follow two different sets of rules⁶⁴. If there are on both sides EC-Member States, then only the EC procurement regime applies.

The EC-procurement regime only applies to the Member States and not to the institutions of the EC itself⁶⁵. In contrast, the GPA applies not only to the Member States, but also to all the organs of the Community⁶⁶.

2.2.7 Basis for further negotiations between the EC and Switzerland

If the EC-Swiss relations in the field of public procurement were limited to the GPA, there would be several gaps, either deriving from reservations made by one of the countries, or from the restricted scope of applicability of the agreement, both in terms of sectoral coverage and in their coverage of contracting entities⁶⁷.

2.3 Public procurement in the EC

2.3.1 Introduction

The underlying reason for the regulation of public procurement throughout the EC is the expectation to eliminate non-tariff barriers arising from discriminatory and preferential purchase patterns, through creating rights for suppliers against unwelcome practices of purchases. It is estimated that substantial yearly savings of 20'000'000'000 (20 billions) Euros are possible⁶⁸.

The EC's common commercial policy in public procurement remains uncertain, as does its future⁶⁹. Apart from that, it is a matter of fact that many Member States have continued to flout EC-law⁷⁰, due to the impenetrability of their markets. On the other hand, it is obvious that the national supplier will always have a better position, due to his familiarity

⁶⁴In this case, e. g. a German contracting entity must apply the internal EC-rules to French suppliers but the GPA to suppliers from the U.S.A.; Dingel, p. 42, who points to the fact that this raises problems where the two regimes are not identical.

⁶⁵see to that chapter 4.3.10 further below

⁶⁶Dingel, p. 45

⁶⁷in a slightly different context: Haagsma, p. 12 – 13

⁶⁸This is equivalent to 0.5% of the Member States' GDP, see Bovis, p. 19, w. f. r.; Haagsma, p. 13. Very critical to the proportion of the directives and claiming that much fewer rules would have been enough: Rittner, p. 9

⁶⁹In the absence of a comprehensive common commercial policy in public procurement, which reflects developments in the internal market, the EC is left with a number of limited measures in place which deal with particular third states or specific areas of procurement, e. g. Art. 36 utilities directive, see Footer, p. 309, and chapter 3.5.2 further below.

⁷⁰Biaggini, p. 328; Footer, p. 294

with the need of the purchaser and due to logistical, informational, cultural or linguistic advantages⁷¹.

2.3.2 Public procurement in the TEC and in the secondary legislation

The TEC does not contain explicit provisions on public procurement. However, there is no doubt that the provisions on non-discrimination⁷², the prohibition to barriers to intra-Community trade⁷³, freedom to provide services⁷⁴, right of establishment⁷⁵, public undertakings and undertakings, to which special or exclusive rights by the Member States are granted, state monopolies providing services of general economic interest⁷⁶, and state aids⁷⁷, are applicable in order to regulate government purchasing and combat discriminatory procurement practices in the Member States⁷⁸.

Currently, the EC's public procurement law is codified in six directives, (i) the works directive; (ii) the service directive; (iii) the supply directive; (iv) the procedures directive; (v) the utilities directive; and (vi) the utilities procedures directive. They embrace every Member State and its organs, which are interpreted in functional terms. They include all levels of state⁷⁹.

It seems to be the safest to always keep both sets of rules, the primary legislation and the secondary legislation, in mind when assessing a case which falls within the field of a public procurement directive⁸⁰.

2.3.3. Content of the directives

The public procurement directives are based on three underlying fundamental principles: EC-wide advertising of public contracts above certain thresholds; prohibition of technical specifications capable of discriminating against potential bidders; and application of objective criteria of participation in tendering and award procedures⁸¹.

The supply directive governs contracts for pecuniary consideration concluded in writing between the supplier and public authorities, having as their object the purchase and delivery of goods⁸². The works directive has as its objective the completion of works or construction projects⁸³. Service contracts are contracts for pecuniary consideration, having as their objective the provision of services, as defined in the UN Product and Service

⁷¹similar: Footer, p. 294 – 295

⁷²Art. 12 TEC

⁷³Art. 28 et seq. TEC

⁷⁴Art. 49 and 50 TEC

⁷⁵Art. 43 TEC

⁷⁶Art. 86 TEC

⁷⁷Art. 87 – 88 TEC

⁷⁸Haagsma, p. 12, Bovis, p. 23; Biaggini, p. 323; in this context, those principles can be regarded as a “safety net”, similar: Haagsma, p. 13.

⁷⁹Art. 1 (b) supply, works and service directive; similar: Bovis, p. 53

⁸⁰similar: Tobler, p. 621

⁸¹Bovis, p. 25 and 59; Tobler, p. 623; see, e. g., Art. 11 works directive, and Art. 15 and 16 service directive. Public contracts have to be published in the OJ. The goal is to enhance transparency and accountability.

⁸²Art. 1 (a) supply directive; Bovis, p. 54; Martín, p. 28

⁸³Art. 1 (a) works directive; Bovis, p. 54; Martín, p. 28

Classification nomenclature⁸⁴. The ambit of the utilities directive and its field of application appear more complicated than those of the other directives⁸⁵. Basically, it embraces public supplies and works contracts with entities operating in transport, water, energy and telecommunications, imposing a lot of exceptions and detailed rules⁸⁶, disregarding whether they are state-controlled or privatised⁸⁷.

2.3.4 The principles of the material public procurement directives

The technical specifications that are set up must be compatible with international and national standards and must not favour certain undertakings⁸⁸. Contracting authorities must follow objectively determined and homogeneously specified selection and qualification criteria for enterprises participating in the award procedures of public procurement contracts. Those criteria may either be legal, technical or economical⁸⁹.

A suitability requirement is the imposition of the form and legal status of participating undertakings⁹⁰. This strengthens the legal certainty and allows a better access to justice in the event of a dispute between the contracting entity and the undertaking in question⁹¹. Moreover, the potential contractor's reliability is controlled through several criteria. He must be neither bankrupt, nor be wound up, nor convicted for an offence concerning his professional conduct, but must have fulfilled his obligations relating to social security contributions, and to the payment of taxes⁹². Generally, the two criteria concern activities in breach of a legal duty that is specifically attached to the profession of the supplier⁹³.

Evidence of the candidate's capability has to be furnished, too. The contractor must have adequate financial resources to remain in business during the contract period, to complete the former, and to meet any legal liability⁹⁴. The technical knowledge, the ability and capacity of a contractor has to be secured⁹⁵.

After that, the stage of the awarding of the contract follows. This may happen through open, negotiated (with or without prior notification) or

⁸⁴Art. 1 (a) service directive; Martín, p. 30 – 31; Bovis, p. 54

⁸⁵Trepte, p. 39 – 40

⁸⁶Art. 6 – 13 utilities directive; Bovis, p. 34 – 41 and 54

⁸⁷Bovis, p. 11

⁸⁸e. g. Art. 10 works directive

⁸⁹Bovis, p. 60

⁹⁰Art. 21 works directive; Art. 26 service directive

⁹¹Bovis, p. 61

⁹²Art. 24 works directive; Art. 29 service directive

⁹³Priess/Pitschas, p. 175, who point at the fact that the provisions in the utilities directive are slightly different.

⁹⁴Art. 22 supply and Art. 31 service directive

⁹⁵e. g. Art. 27 works directive and Art. 32 service directive; The requirements include, among others, the contractor's educational and professional qualifications; a list of the works carried out over the past five years; a statement of the tools, plant and technical equipment available to the contractor for carrying out the work; a statement of the firm's average annual manpower; or a statement specifying the technicians or technical divisions upon which the contractor can call for carrying out the work.

restricted proceedings⁹⁶. Where possible, open procedures should be the norm⁹⁷. They are mostly utilised when the procurement process is relatively straightforward, and are combined with the lowest price award criterion⁹⁸. The latter criterion is self-explanatory: the tenderer who submits the cheapest offer must be awarded the contract. The decision as to what is the most economically advantageous tender offer is to be made on a series of factors and determinants chosen by the contracting entity for the particular contract in question⁹⁹. Both award criteria are purely economic in its nature¹⁰⁰.

The number of candidates that are allowed to tender is limited to five in restricted and to three in negotiated procedures. A number of conditions have to be met by the contracting authorities to justify the award of the contract¹⁰¹. Restricted or negotiated procedures are utilised in conjunction with the most economically advantageous offer award criterion and are suited for more complex procurement schemes¹⁰². All negotiations with candidates or tenderers on fundamental aspects of contracts, in particular concerning price, are prohibited in open and restricted procedures¹⁰³.

It derives from the common EC-principles that foreign undertakings, possessing subsidiaries within the EC, have the same access to public contracts as EC-undertakings and can, therefore, invoke and enforce Community law both at EC and at a national level¹⁰⁴.

2.4 Public procurement in Switzerland

2.4.1 Introduction

The preparations for the possible ratification of the EEA-agreement and the entry into force of the GPA triggered a wave of legislative reforms in the field of public procurement¹⁰⁵. Before that, there were hardly any binding legislative acts, above all on a Cantonal level.

The Federal government is lacking a general competence to enact laws on public procurement that are binding on Cantonal and municipal authorities¹⁰⁶. Therefore, the duties relating to public procurement are implemented in accordance with the constitutional separation of powers¹⁰⁷. Federal legislation governs the award of public contracts that lie within the competence of the Federal authorities. Public procurement at Cantonal and

⁹⁶e. g. Art. 6 supply directive and Art. 7 works directive; Bovis, p. 63; Biaggini, p. 327

⁹⁷e.g. Art. 6 supply directive and Art. 7 works directive

⁹⁸Martín, p. 43 – 44; Bovis, p. 65

⁹⁹e. g. Art. 30 works directive;

¹⁰⁰Priess/Pitschas, p. 181, who refer to Art. 15 supply directive, Art. 23 service directive and Art. 34 utilities directive.

¹⁰¹e. g. Art. 22 works directive; Art. 27 service directive

¹⁰²e. g. Art. 11 service directive; Bovis, p. 65; this is mostly the case for utilities as defined in the utilities directive

¹⁰³e. g. Art. 1 (d) – (f) service directive

¹⁰⁴supply directive, recitals; similar: Bovis, p. 71

¹⁰⁵Bollinger, p. 645, and Biaggini, p. 325

¹⁰⁶see more to that chapter 2.4.4 further below

¹⁰⁷see Art. 3, Art. 43 and 49 BV

municipal level, on the other hand, is subject to Cantonal, intercantonal and municipal legislation¹⁰⁸.

2.4.2 Federal law in general

On the Federal level, the GPA is implemented through the BoeB and the VoeB¹⁰⁹. The BoeB is designed as framework legislation, and the VoeB set these forth in greater detail. Moreover, its objectives go beyond the mere implementation of the GPA¹¹⁰. They also contain rules in case the public contract at stake is below the threshold value¹¹¹. Its scope is limited with regards to the procurer, the contract, and the contractor¹¹².

Generally, the scope of application and most of the main definitions are similar to the ones made in the GPA and in the EC-directives¹¹³.

2.4.3 Content of the Federal legislation

Each invitation to tender or award in open or selective proceedings has to be published¹¹⁴. The purchaser is obliged to treat foreign undertakings in a non-discriminatory manner¹¹⁵.

Equally to the EC public procurement regime, there are specified criteria for enterprises participating in the award procedures of public procurement contracts¹¹⁶, which may either be legal, technical or economical.

Technical specifications must refer to international standards, or to such national standards as implement or reflect international standards¹¹⁷. The legal requirement of a specific legal form¹¹⁸, and the obligation of a conduct of business in accordance with the law¹¹⁹, are also similarly regulated. Evidence of sufficient financial and economic standing may also be provided by different means¹²⁰. The technical knowledge of the contractor and its reliability and capability have to be secured.

¹⁰⁸Merz/Schmid, p. 1

¹⁰⁹Art. 1 BoeB; Cottier/Merkt, p. 60; the implementation of the Agreement does not have as a consequence the replacement of provisions of the BoeB, but might have some minor impact on the VoeB, see to that: Botschaft, p. 83 – 84; the VoeB may be changed by the Federal Executive Council.

¹¹⁰Merz/Schmid, p. 2

¹¹¹However, in such a situation, there are no remedies; Art. 32 i. c. w. Art. 39 VoeB. Biaggini, p. 344, hints to the fact that this is very problematic, especially taking into consideration the constitution's general guarantee for remedies.

¹¹²Art. 2 BoeB refers to procurement agencies, Art. 3 to special types of contracts, and Art. 4 BoeB to the contractor.

¹¹³see, e. g. Art. 3 and 6 BoeB; Biaggini, p. 342; Cottier/Merkt, p. 60; e. g., the same thresholds as those stated in the GPA apply, Art. 6 BoeB.

¹¹⁴Art. 18 BoeB; If it is not published in French, the invitation must at least include a summary in French, English, or Spanish, Art. 24 (4) BoeB; one of the main motives of the public procurement legislation is to enhance transparency and accountability.

¹¹⁵Art. 8 BoeB; Art. 5 Abs. 2 BGBM; *Groupement v La-Chaux-De-Fonds*, para. 7c

¹¹⁶Art. 9 BoeB

¹¹⁷Art. 12 (2) BoeB i. c. w. Art. VI (1) and (2) GPA

¹¹⁸Art. 21 VoeB

¹¹⁹Art. 11 BoeB; Art. 6 VoeB

¹²⁰Art. 9 VoeB i. c. w. Annex 3

After answering the technical and suitability criteria in the affirmative, the contract may be awarded through open, selective or restricted proceedings¹²¹. There is also the possibility to choose between the lowest price and the economically most advantageous offer¹²². A contract may be awarded exclusively on the criterion of the lowest price only for largely standardised products¹²³.

The criterion of the most advantageous tender is split up into various inconclusive subordinate criteria, all of which leave wide discretionary powers of interpretation. Ten such criteria are listed: date of delivery or completion, quality, price, economy, operating costs, after-sales service, suitability for use of the products or services, aesthetic appearance, environmental impact, and technical worth¹²⁴. The risk of abuse of the procurer's powers of discretion in its assessment whether these criteria are met is somehow limited by the requirement that they must be listed in all relevant procurement documents in order of priority¹²⁵.

2.4.4 Cantonal law

Deriving from the constitutional separation of powers, the competence to regulate public procurement within Cantonal responsibility devolves to the Cantons. They must implement the GPA and ensure its observance. Furthermore, they are entitled to set up their own legislative framework¹²⁶.

For the implementation of the GPA, an intercantonal treaty, the IVöB, was concluded. It was to ensure non-discrimination between Swiss and foreign contractors¹²⁷. Each Canton is obliged to enact implementing regulations based on the IVöB and the award directive, which is attached thereto¹²⁸. If the IVöB does not regulate a certain matter, it is at the Cantons' own disposal to set up a provision independently. However, they are still obliged to respect the Agreement and other Federal legislation.

Apart from the implementation of the GPA, there is another principal aim of the IVöB. It harmonises to a considerable extent the internal procurement rules, which are not derived from international treaties¹²⁹. Furthermore, the Cantons are entitled to adopt more far-reaching agreements among themselves and with neighboring countries and regions¹³⁰. Besides statutory corporations, the IVöB also covers private undertakings, which are controlled by public authorities to supply water, energy, or transport, or are engaged in activities in the telecommunications sector¹³¹.

¹²¹ Art. 14 BoeB; Art. 15 BoeB (i. c. w. Art. 12 VoeB); Art. 16 BoeB (i. c. w. Art. 13 VoeB)

¹²² Art. 21 BoeB

¹²³ Art. 21 (3) BoeB

¹²⁴ Art. 21 (1) BoeB

¹²⁵ Art. 21 (2) BoeB

¹²⁶ see to that chapter 2.4.1 further above

¹²⁷ Merz/Schmid, p. 4

¹²⁸ Art. 3 IVöB

¹²⁹ Art. 5bis IVöB

¹³⁰ Art. 2 IVöB

¹³¹ Art. 1 (1) and Art. 8 (1) (c) IVöB

The proceedings are very similar to the ones on a Federal level¹³². The Cantons are obliged to respect Federal principles of the home market, which are regulated in the BGBM, especially non-discrimination, remedies, and basic formalities.

The Cantonal tender procedures, the rules on the qualification of tenderers, and the award proceedings are basically also equivalent to the Federal procurement provisions. In addition to the criteria set forth in Federal law¹³³, the interesting criteria of creativity and infrastructure may also be taken into account. Contrary to the provisions stipulated by Federal law, the criteria other than price and performance must be taken into account only if the former fail to provide an adequate basis for a decision on the tenders submitted¹³⁴.

In the execution of Cantonal tendering rules, many local authorities have established tender regulations to govern their procurement. They are based on Federal and Cantonal law¹³⁵.

¹³²Art. 11 et seq. IVöB

¹³³Art. 21 (1) BoeB

¹³⁴Merz/Schmid, p. 35

¹³⁵Merz/Schmid, p. 6

3 Agreement between the EC and Switzerland on certain aspects of government procurement

3.1 Improvements achieved through the Agreement

The additional market access on a local level and in the fields of municipalities, railway transport, telecommunications, private procurers within the sectors of water, electricity and transport, is supposed to be considerably large¹³⁶. Additionally, actual studies show that, up to now, only 16% of public procurement is transnational¹³⁷.

Basically, Swiss undertakings now have non-discriminatory access to the EC-market and, reciprocally, EC-undertakings have the same rights in the Swiss market. The situation is comparable with the one already set up through the EEA-agreement for the EC and the other EFTA Member States¹³⁸. So far, there is no specific agreement between Switzerland and the other EFTA-states concerning public procurement, even though this is very likely to change in the near future.

3.2 Characteristics of the Agreement

The Agreement is based on the principle of strict equivalence of the European and the Swiss legal order¹³⁹, due to the non-adoption of Swiss law by the EC and vice versa¹⁴⁰. The Agreement is best described as a liberalisation treaty¹⁴¹. The law contained therein cannot be altered unless it is formally amended. Moreover, there is no obligation to consider the other party's judgments.

The Agreement does not interfere with the current Community and Swiss legislation, nor does it infringe any pre-existing agreements between the parties itself or between one of them and a third state¹⁴². It is administered by a Joint Committee, in which the two parties decide unanimously. The former is only entitled to act if this is specifically provided; every party is responsible for the Agreement's correct implementation and enforcement within its own territory¹⁴³.

¹³⁶Botschaft, p. 82

¹³⁷Bollinger, p. 660

¹³⁸Botschaft, p. 82; Biaggini, p. 310; what is lacking is the dynamics of the EEA-agreement. No law whatsoever is taken over by any party, see Biaggini, p. 313.

¹³⁹Agreement, recital, Botschaft, p.29, Thebrath

¹⁴⁰Botschaft, p. 303; Weber/Skripsky, p. 68 – 69; Bollinger, p. 648

¹⁴¹Zäch, p. 7

¹⁴²Thürer/Hillemanns, p. 26, who hint to the GPA.

¹⁴³Botschaft, p. 30-31; Zäch, p. 7

From the viewpoint of the EC, the Agreement is an association treaty. Its legal basis is Art. 310 TEC in conjunction with Art. 300 TEC¹⁴⁴. International treaties concluded by the EC form an integral part thereof and rank between primary and secondary law¹⁴⁵.

Switzerland considers the Agreement – together with the other six sectoral agreements – as an international agreement, which brings about a unification of law, and which is multilateral¹⁴⁶.

The important questions whether the Agreement is directly effective, and whether there are remedies, interim measures and damages are excluded in this chapter¹⁴⁷.

3.3 Scope of application of the Agreement

3.3.1 Territorial scope of application

The Agreement applies, on the one hand, to the territories in which the TEC is applied under the conditions laid down there and, on the other, to the territory of Switzerland¹⁴⁸.

Due to the future enlargement of the EU, the territory of one of the contracting parties is about to extend. This raises some important questions. According to the international law's principle of an international treaty's "movable borderlines", the subsequent radius of its application normally extends automatically to the territory of the acceding states, including their respective territories; provided that the conclusion of the former falls within the sole competence of the EC¹⁴⁹. Naturally, there are several provisions of adjustment and transition in such a case¹⁵⁰.

However, there is a sectoral agreement between the EC and Switzerland, the one about free movement of persons, which is a mixed agreement. It is based on a shared competence between the EC and its Member States¹⁵¹. If this agreement's scope of territorial application is about to extend, according to international law, all contracting parties, which means the EC, its Member States and Switzerland, have to renegotiate¹⁵². This particular point

¹⁴⁴Decision of the Council, and of the Commission as regards the Agreement on Scientific and Technological Cooperation on the conclusion of seven Agreements with the Swiss Confederation OJ L 114 , p. 0001 - 0005, 4th April 2002; Biaggini, p. 312 – 313, hints to the fact that, materially, the Agreement is not an association treaty if it is considered alone.

¹⁴⁵International Fruit v Produktschap; Krajewski, p. 71, w. f. r.; more to that: chapter 4.2.4 further below

¹⁴⁶Art. 54, 44 – 47 and Art. 141 (1) (d) (3) BV; if the Agreement is considered alone, there is no multilateralism and no unification of laws. Therefore, it would not provoke a referendum, see Biaggini, p. 312

¹⁴⁷see to that chapter 4 further below

¹⁴⁸see, e. g., Art. 16 Agreement; this is valid for the other agreements, too; see Thüerer/Hillemanns, p. 27.

¹⁴⁹Schröder, p. 461 nr. 52, referring to Art. 299 (1) TEC

¹⁵⁰Botschaft, p. 9; Thüerer/Hillemanns, p. 28, w. f. r.

¹⁵¹Kaddous, p. 81; Legal Personality, p. 7-8

¹⁵²Art. 34 and 35 VCLT; Botschaft, p. 9; Thüerer/Hillemanns, p. 28

cannot be circumvented by any contractual means¹⁵³, and is superior to the principle of “movable borderlines”. The former stipulates that no treaties are able to create obligations or rights for Switzerland without the express consent of the latter¹⁵⁴. Naturally, this also excludes the accession treaties between the EC and the future Member States. From a Swiss point of view, such express confirmation is given via a legislative act, which, consequently, may result in a referendum¹⁵⁵. To date, it is unclear whether and when such a referendum would take place, but it would in any case decide about the future of the Agreement. The most probable seems to be a date around the end of 2004.

3.3.2 Temporary scope of application

The Agreement’s temporal scope derives from the principle of an adequate parallelism, entailing that the entry into force and the period of validity of the seven agreements depend heavily on each other¹⁵⁶.

The Agreement is concluded for an initial period of seven years. It is renewed for an indefinite period unless the EC or Switzerland notifies the other party to the contrary before the expiry of the initial period. After that, each party may terminate it by notifying the other party of its decision¹⁵⁷. All seven sectoral agreements cease to apply six months after the receipt of notification of non-renewal or of termination of one agreement¹⁵⁸, due to, as previously stated, the inseparable interconnectedness of the agreements’ validity¹⁵⁹.

In 2009, the Swiss Federal parliament will have the possibility to decide whether the agreement about the free movement of persons shall be prolonged¹⁶⁰. This decision can be contested by a referendum¹⁶¹.

3.3.3 Possible future developments of the territorial and temporal scope of application of the Agreement

It is always very difficult to assess a future development, but it has to be underscored that the continuation of the agreement concerning the free movement of persons is uncertain¹⁶².

¹⁵³Thürer/Hillemanns, p. 28

¹⁵⁴Art. 34 and 35 VCLT

¹⁵⁵negotiating mandate enlargement; see, to the effect of the mutual dependence of the sectoral agreements and the likeliness of a negative decision, chapter 3.3.3

¹⁵⁶Thürer/Hillemanns, p. 28; there are only some minor exceptions for the agreement about scientific and technological cooperation.

¹⁵⁷Art. 18 (2) and (3) Agreement

¹⁵⁸Art. 18 (4) Agreement

¹⁵⁹Botschaft, p. 29; Zäch, p. 5; Biaggini, p. 362; sometimes, this is described as “guillotine-clause”.

¹⁶⁰Botschaft, p. 186; negotiating mandate enlargement; misunderstanding: Zäch, p. 9

¹⁶¹Botschaft, p. 186

¹⁶²Especial account has to be taken of the extremely narrowly rejected ‘initiative against the abuse of asylum rights’, which clearly showed a certain xenophobic tendency, see NZZ, Historisch knapp, Eidgenössische Volksabstimmung vom 24. November 2002, 2002-11-24, at: http://www.nzz.ch/dossiers/2002/abstimmung_1124/2002.11.24-il-newzzD8X5RAWJ-12.html 2003-04-19 12.16.

The Swiss electorate clearly tends to have a restrictive approach towards foreign policy issues. Therefore, there is a realistic chance that that agreement, together with the six others, ceases to exist in a couple of years, due to a negative decision in a referendum, which might will be possible in 2004 or in 2009. However, it is a distinct possibility that the referendum will have a positive outcome or, alternatively, the EC does not insist on the inseparable interconnectedness, mainly because it has a particular interest in the other six sectoral agreements¹⁶³. This would mean that those others would continue to exist even though the agreement about the free movement of persons would not. But all those processes are highly political and are currently major issues on the political agenda¹⁶⁴. The ramifications of these issues, therefore, cease to be of interest to the purpose of the current thesis. But it is clear that, should the Agreement cease to exist, EC-Swiss public procurement relations would revert to being solely governed by the GPA again¹⁶⁵.

3.3.4 Material scope of application

The Agreement does not apply to public authorities and other entities if they fulfil certain conditions; for example if they are closely linked to national security matters¹⁶⁶. Moreover, it also does not apply to contracts awarded by telecommunication operators. As soon as the railway, energy and private utility sectors are liberalised¹⁶⁷, the Agreement, under certain circumstances, can cease to apply to service operators in the above areas. However, such cessation is only possible providing that the intended purchases enable such operators to offer services and that other entities are free to offer the same services in the same geographical area under substantially the same conditions¹⁶⁸.

¹⁶³The most rewarding agreement for the EC probably is the agreement on road transport.

¹⁶⁴At least, this is true for Switzerland; wholly understandably, it does not seem to be that interesting from a EC point of view, see Tages-Anzeiger, Angst vor Arbeitern aus dem Osten, 2003-05-06, at: http://65.54.246.250/cgi-bin/linkrd?_lang=DE&lah=6ab755b191a01ca18b1918fadd71fcec&lat=1052481253&hm__action=http%3A%2F%2Fwww.tages-anzeiger.ch%2Fdyn%2Fnews%2Fschweiz%2F276555.html%2Fadd71fcec&lat=1052481253&hm__action=http%3a%2f%2fwww%2etages%2danzeiger%2ech%2fdyn%2fnews%2fschweiz%2f276555%2html 2003-05-09 13.57.; see to that negotiating mandate enlargement, too.

¹⁶⁵Art. 1 Agreement

¹⁶⁶relevant for the EC: Art. 2(4), 2(5), 3, 6(1), 7(1), 9(1), 10, 11, 12 and 13(1) utilities directive; for Switzerland, reference is made to Annexes VI and VIII.

¹⁶⁷Electricity is excluded from the notion energy, see chapter 3.5.2 further below.

¹⁶⁸Art. 3 (5) Agreement; this clearly refers to Art. 8 utilities directive. There, an express provision only exists for telecommunications. A list with excluded services can be found on a Commission homepage at: http://europe.eu.int/comm/internal_market/en/publproc/general/util.htm 2003-04-18 14.26. In Switzerland, there is a comparable one in the field of public transportation, Art. 2 (1) BoeB. What still lacks, within both the EC and Switzerland, are proceedings relating thereto, see Mayer, p. 678, who refers to Switzerland.

3.4 Structure of the Agreement

The Agreement consists of three chapters. Chapter I broadens the scope of the GPA¹⁶⁹. Chapter II governs the public procurement by telecommunications and railway operators and by certain utilities. Because of the fact that the two parties did not have any contractual relationships in this field so far, the provisions are relatively detailed, mainly concerning definitions,¹⁷⁰ but not concerning the procurement and challenge procedures¹⁷¹. For proceedings, the parties rely on their own pre-existing legislative acts¹⁷². Chapter III contains general and final provisions¹⁷³.

Additionally, there are 10 Annexes, which also form part of the Agreement¹⁷⁴. Annexes I – IV list the covered telecommunications and railway operators, the private utilities and the entities active in the field of energy. Annex V relates to the challenge procedures, whereas the two following contain important definitions and Annex VIII mentions the exceptions. Lastly, Annexes IX and X refer to the principle of non-discrimination.

The final act of the Agreement act embraces four joint declarations by the parties, and two single declarations, one by each party. The EC's single declaration states Switzerland's right to be consulted if one of the former's committees discusses a matter which falls into the scope of application of the Agreement. Therefore, Swiss representatives may, in so far as the discussed issues are of a specific interest for Switzerland, attend meetings of certain committees and expert working parties as observers¹⁷⁵.

3.5 Provisions of the Agreement

3.5.1 Broadening the scope of the GPA / Liberalisation at all state-levels

In order to supplement and broaden the scope of its commitments vis-à-vis the EC under the GPA, Switzerland undertakes to amend the Annexes and General Notes thereto. The GPA, therefore, will also be applicable to Swiss authorities and public bodies on a Cantonal and municipal level¹⁷⁶. In order to avoid that non-Member States can additionally profit from this unilateral amendment without granting reciprocity, Switzerland files a specific reservation to the GPA¹⁷⁷. On the other hand, the EC undertakes to amend

¹⁶⁹ Art. 1 and 2 Agreement

¹⁷⁰ Art. 3 Agreement

¹⁷¹ Art. 4 and 5 Agreement

¹⁷² Biaggini, p. 353

¹⁷³ Art. 6 – 18 Agreement

¹⁷⁴ Art. 17 Agreement

¹⁷⁵ Declaration of the European Council; Botschaft, p. 32; this rule is analogous to Art. 100 EEA-agreement, see Norberg et. al, p.161 – 162.

¹⁷⁶ Art. 2 Agreement; declaration by Switzerland on the principle of reciprocity, which refers to the GPA, Appendix I

¹⁷⁷ This concerns the Annex to Art. III GPA, see Botschaft, p. 303 and Biaggini, p. 352 – 352; Therefore, an equivalent liberalization with non-EC Member States depends on separate and new negotiations with that state; see also: Weber/Skripsky, p. 66 and p. 83; Cottier/Panizzon, p. 63. However, one important exception has to be underpinned: disregarding the specific reservation mentioned above, the most-favoured-nation

its Annexes and General Notes to the GPA to enable Swiss suppliers and service providers to challenge the award of contracts by non-central Community procurers¹⁷⁸.

3.5.2 Procurement by telecommunications and railway operators and by certain utilities

The Agreement establishes the reciprocal, transparent and non-discriminatory access of the parties' suppliers and service providers to purchases of products and services. This also includes construction services, telecommunications and railway operators; entities active in the field of energy other than electricity¹⁷⁹; private utilities of both parties, which operate on the basis of special or exclusive rights granted by a competent state authority, and are active in the sectors of drinking water, electricity, urban transport, airports and maritime or inland ports¹⁸⁰. The definitions of entities, which fall within the scope of application of the Agreement, are very complicated and difficult to understand¹⁸¹.

Annex I of the Agreement lists the covered telecommunications operators¹⁸², whereas the railway operators are defined in Annex II¹⁸³. Entities active in the field of energy, excluding electricity, are listed in Annex III¹⁸⁴, and covered private utilities in Annex IV¹⁸⁵.

The Agreement's coverage of railway and telecommunication operators favours Switzerland. First, the EC's provision not to award a contract in the utilities sector, if the proportion of the products originating in third countries exceeds 50% of the total value of the products constituting the tender does

principle applies, if a service is offered by a legal person who is based within the EC, or if the service is offered transnationally, see Weber/Skripsky, p. 83, who refer to GATS.

¹⁷⁸Art. 1 Agreement; altering GPA, Appendix I

¹⁷⁹electricity is already covered by the GPA, Biaggini, p. 354

¹⁸⁰Agreement, recital; Art. 3 (1) Agreement; Botschaft, p. 19 – 21

¹⁸¹This mainly derives from the different techniques of listing the entities in the different Member States; same opinion: Biaggini, p. 354, and Trepte, p. 39 – 40; see also to this: Art. 7 Agreement.

¹⁸²For the EC, the same operators are covered which are already mentioned in the utilities directive; Switzerland makes reference to Art. 66 Fernmeldegesetz (law on telecommunications). This is, according to Biaggini, p. 355, fn. 169, misleading, due to the referred provision's temporary nature.

¹⁸³Depending on the individual country, the covered operators are named directly or indirectly by mentioning the legal basis. Switzerland refers to Art. 1 (2) and Art. 2 (1) Eisenbahngesetz (law on rail transport).

¹⁸⁴Depending on the individual country, the covered entities are split in three categories and named directly or indirectly by mentioning the legal basis. Switzerland refers, e. g., to Art. 2 Rohrleitungsgesetz (law on pipelines) and to "Interkantonales Konkordat betreffend die Schuerfung und Ausbeutung von Erdöl" (intercantonal treaty on oil-extraction).

¹⁸⁵Depending on the individual country, the covered entities are split in five categories and named directly or indirectly by mentioning the legal basis. Switzerland refers, e. g., to Gesetz über die Schwach- und Starkstromanlagen (law on construction of high- and low-voltage currents) and Gesetz über die Nutzbarmachung der Wasserkräfte (law on water energy).

not apply anymore. The same is true for the rule that the offer of a foreign undertaking has to be at least 3% better than the one of a Community undertaking in order to get the award¹⁸⁶.

3.5.3 Threshold values

The Agreement applies to contracts, or series of contracts, the estimated value of which, excluding VAT, is not less than:

- (a) when awarded by telecommunications operators: (i) 600'000 Euros as regards supplies and services; (ii) 5'000'000 Euros as regards works;
- (b) when awarded by railway operators and entities active in the field of energy other than electricity: (i) 400'000 Euros as regards supplies and services; (ii) 5'000'000 Euros as regards works;
- (c) when awarded by private utilities: (i) SDR 400'000 or its equivalent in Euros, as regards supplies and services; (ii) SDR 5'000'000 or its equivalent in Euros, as regards works¹⁸⁷.

3.5.4 Procurement and challenge provisions

The procurement as much as the challenge provisions are based on the GPA. There was, therefore, no necessity to set up too many details. The Agreement only mentions the underlying principles¹⁸⁸.

The procedures and practices for the award of contracts followed by their covered entities have to comply with the principles of non-discrimination, transparency and fairness¹⁸⁹. Furthermore, the parties must provide non-discriminatory, timely, transparent and effective procedures enabling suppliers or service providers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest¹⁹⁰.

3.5.5 Principle of non-discrimination

The parties ensure that in their procedures and practices for the award of procurement contracts above the value thresholds laid, the competent authorities and covered entities established in their respective territories

¹⁸⁶Art. 36 (1) i. c. w. Art. 36 (2) and (3) utilities directive; this means that, concerning railway operators, the liberalization is not unilateral anymore; according to Art. 13 alpine-transit resolution, Switzerland liberalized its railway transport already earlier on, see to that: Biaggini, p. 356, especially fn. 176.

¹⁸⁷Art. 3 (4) Agreement; the values specified in the utilities sector (with the exception of electricity) are equivalent to those set up in Art. 14 utilities directive, see also Botschaft, p. 77 – 78. The minimal threshold values for the other areas covered are equivalent to those specified in the GPA, see Botschaft, p. 78; The conversion of SDR in Euro is made in accordance with the procedures established in the GPA. The value of the SDR is the sum of the values of the following amounts of each currency: Euro (France): 0.1239; Euro (Germany): 0.2280; Japanese yen: 27.200; Pound sterling: 0.1050; U.S. Dollar: 0.5821, see: <http://www.imf.org/external/np/sec/pr/1998/pr9867.htm> 2003-05-09 14:51

¹⁸⁸Biaggini, p. 358

¹⁸⁹Art. 4 (1) Agreement

¹⁹⁰Art. 5 (1) Agreement (i. c. w. Art. XX GPA)

have to treat products, services, suppliers and service providers of the other party equally according to the principles of non-discrimination, national treatment and most-favoured-nation¹⁹¹.

In the parties' respective procedures and practices for the award of procurement contracts below the value thresholds, they encourage their covered entities to treat the suppliers and service providers of the other party non-discriminatorily¹⁹². However, there are no mandatory review proceedings¹⁹³.

3.5.6 Information exchange

The parties inform each other of planned changes to their relevant legislation falling, or likely to fall, within the scope of the Agreement. Additionally, they also let each other know about any further issue relevant to the interpretation and application of the latter. They communicate the names and addresses of 'contact points' responsible for providing information concerning the rules of law falling within the scope of this Agreement and of the GPA; including at local level¹⁹⁴.

3.5.7 Implementation

The Agreement's implementation is monitored, within each party, by an independent authority. The latter is competent to receive any complaint or grievance concerning the application of this Agreement and shall act both promptly and effectively¹⁹⁵. From June 2004 on, it is also competent to initiate proceedings or take administrative or judicial action against covered entities in the event of a breach of the Agreement¹⁹⁶. This is the only contractual exception to the principle of the Agreement's autonomous enforcement¹⁹⁷. The monitoring is clearly subordinate to the normal proceedings. It aims at finding both quick and informal solutions¹⁹⁸.

¹⁹¹Art. 6 (1) Agreement; this embraces direct as much as indirect discrimination, Art. 6 (2) Agreement; an illustrative list of areas where such discrimination is possible is set out in Annex X.

¹⁹²Art. 6 (3) Agreement; this can be described as a best-endeavour clause. The principle is effective like the ones listed in Art. 12 TEC and Art. 2 BGBM; that provision could be characterized as a hidden clause of reciprocity, see Botschaft, p. 20, 80 and 82, and Mayer, p. 672 – 673.

¹⁹³Annex IX i. c. w. Art. 6 Agreement; on a Federal level, there do not exist any review proceedings below the threshold values. Therefore, only the Cantons are mentioned, see Biaggini, p. 360

¹⁹⁴Art. 7 Agreement

¹⁹⁵Art. 8 (1) Agreement; on behalf of the EC, the Commission is in charge; Switzerland introduces a special commission (KBBK; Cantonal-Federal commission in the field of public procurement), which equally consists of Federal and Cantonal representatives, Mayer, p. 674 – 675.

¹⁹⁶Art. 8 (2) Agreement; to its proper establishment, several (political and legal) steps have to be undertaken, see Jaag, p. 41 – 42, which are, in this context, not of a specific interest.

¹⁹⁷Jaag, p. 41

¹⁹⁸Biaggini, p. 361, w. f. r.; see also Botschaft, p. 39

The parties take all the necessary general or specific measures to ensure that they fulfil their obligations. They refrain from any action that could jeopardise the attainment of its objectives¹⁹⁹.

The application and enforcement of the Agreement is to be undertaken by the parties through their ordinarily responsible authorities and courts. This means that, on the one hand, the Agreement is to be enforced by the responsible EC-authorities according to the EC-legislation, and on the other, by the responsible Swiss authorities according to Swiss rules²⁰⁰. However, this does not exclude a direct effect²⁰¹.

Due to the extensive area covered by the Agreement, in both legal orders, several different authorities are involved²⁰². The proper allocation of competences has to be made by each party according to their respective legislation.

3.5.8 Urgent measures and settlement of disputes

There is a possibility for each party to suspend the Agreement partly or completely. A party has to claim that the other has failed to comply with its obligations; or that a law, regulation or practice thereof substantially reduces, or threatens to reduce, the benefits accruing to it under the Agreement. Furthermore, the parties have to be unable to agree promptly on appropriate compensation or other remedial action²⁰³. The scope and duration of such measures shall be proportional²⁰⁴.

Each party may bring a matter under dispute, which concerns the interpretation or application of this Agreement to the Joint Committee, which shall endeavour to settle it²⁰⁵. If the dispute, however, concerns the interpretation or application of the GPA, the WTO's DSU will be in charge²⁰⁶.

Apart from the suspension of the Agreement, a party is entitled to introduce proportional, unilateral retaliation measures, provided that the other party and the Joint Committee are informed. There are no rules about the consequences of the Agreement's infringement. Therefore, the parties have a big discretion²⁰⁷. However, due to the multitude of legal relations between the EC and Switzerland, many possibilities exist for proportional retaliation measures²⁰⁸.

¹⁹⁹ Art. 13 Agreement; this duty to loyalty is similar to the one established in Art. 10 TEC for the EC Member States, see Jaag, p. 40.

²⁰⁰ similar: Jaag, p. 40-41

²⁰¹ see to that chapter 4.2 further below

²⁰² Jaag, p. 41

²⁰³ Art. 9 (1) Agreement; this provision establishes the principle of *pacta sunt servanda*, which is also applicable in international law, see Art. 26 VCLT.

²⁰⁴ Art. 9 (2) Agreement

²⁰⁵ Art. 10 Agreement

²⁰⁶ Art. XII GPA i. c. w. Art. 1 DSU and Annex 2, DSU; Biaggini, p. 337 and 361

²⁰⁷ Cottier/Evtimov 2002, p. 183

²⁰⁸ Cottier/Evtimov 2002, p. 183

3.5.9 Administration of the Agreement

The Agreement will be administered through a Joint Committee²⁰⁹. It is competent to change the Annexes if this is required by one of the parties²¹⁰. Moreover, the parties cooperate to ensure that the full information about procurement issues is guaranteed²¹¹. At the very latest in June 2005, they will review the Agreement's functioning with the aim of improving its operation²¹².

3.5.10 Relation to WTO-Rules

The Agreement affects neither the rights nor obligations of the parties under subsequent agreements concluded under the auspices of the WTO²¹³. It remains unclear, however, whether the WTO-proceedings are still applicable to the provisions of the Agreement, which extend the scope of application of the GPA²¹⁴.

²⁰⁹Art. 11 Agreement; Thebrath

²¹⁰Botschaft, p. 81; for Switzerland, this clause contains an inherent delegation of competences to the Federal Council.

²¹¹Art. 12 Agreement

²¹²Art. 14 Agreement

²¹³Art. 15 Agreement

²¹⁴In the affirmative, one can argue that the Agreement is only an extension of the GPA and, therefore, bases heavily on those provisions. In the negative, which seems more reasonable, one can hint to the fact that the WTO panels and appellate bodies only have jurisdiction for the interpretation and application of the GPA itself. Related agreements may only be taken into consideration in questions concerning the objective assessment of the facts of the case and their applicability of and conformity with the GPA, see Understanding, Art. 11, and Cottier/Evtimov 2003, p. 9.

4 Legal protection

4.1 Introduction / International law

The actual record of implementation of the procurement regime in the EC is poor. On the part of the Member States, substantial efforts must still be made.

The Commission, therefore, considers implementation and enforcement of the directives to be priorities²¹⁵. Likewise, substantial efforts still have to be undertaken in Switzerland. In both legal orders, the procurement proceedings are strongly dominated by local and regional interests. The growing consciousness for the negative financial impact of such behaviour was the starting point to confer on individuals rights in order to ensure that the procurer fulfils its main duty, which is the economical expense of public resources.

4.1.1 Relationship between international agreements and internal law in the EC

There exists neither in the TEU nor in the TEC a provision, which establishes the relationship between an international agreement concluded by the EC and internal Community law. According to settled case-law, the former becomes an integral part of the *acquis communautaire*²¹⁶. However, this does not automatically mean that international law has precedence over any Community law²¹⁷.

The ECJ has the competence to rule as to whether an international agreement is compatible with the TEC. In case of a negative answer, the agreement at stake may only enter into force after the TEC itself has been amended. This leads to the conclusion *e contrario* that the TEC prevails over contradictory norms of international law²¹⁸. Concerning secondary law, the situation is different. International agreements are regarded to be superior to secondary law²¹⁹.

4.1.2 Relationship between international agreements and internal law in Switzerland

Provisions and principles of international law immediately become part of the Swiss legal order. They have to be applied by Federal and Cantonal authorities²²⁰. This very favourable attitude towards international law only knows two very specific exceptions. One is that the Federal legislator has the possibility to deviate from an international agreement if he openly,

²¹⁵Special Sectorial Report

²¹⁶Demirel, para. 9

²¹⁷Cottier/Evtimov 2003, p. 17

²¹⁸Art. 300 (6) TEC and Art. 48 TEU; Cottier/Evtimov 2003, p. 17

²¹⁹The ECJ has the competence to annul secondary law, see Art. 230 and Art. 234 TEC.

²²⁰Art. 5 (4), Art. 189 (1) (c) and Art. 191 BV; The principle of *lex posterior derogat legi priori* is, in this context, not applicable, see Cottier/Evtimov 2002, p. 184.

intentionally and expressly says so. The second is that the core of fundamental rights may not be infringed under any circumstances by international agreements²²¹. However, in the context of the Agreement, those two exceptional facts are not fulfilled. The legislator did not act contrary to a provision of the Agreement²²². And in public procurement law, fundamental rights are not at stake²²³. At the very minimum, it is hardly imaginable that a core of a fundamental right may be infringed by a provision of the Agreement.

There is another reasoning that leads to the same conclusion. The Agreement itself states that the parties are obliged to provide non-discriminatory, timely, transparent and effective procedures enabling suppliers or service providers to challenge alleged breaches²²⁴. Consequently, the Agreement has to become part of national legislation. Otherwise, it would not be possible to derive any procedural rights from it.

4.2 Direct effect

4.2.1 Definition

Direct effect can be defined as the reliance of individuals upon either international law or EC-law respectively before the national courts. It has to be distinguished from direct applicability, which means that there is no need for implementing measures to be taken by the Member States on a European level or by the contracting parties on the level of international law²²⁵.

Verticality of direct effectiveness implies the responsibility of the state is concerned, either as a subject of an international agreement or EC-law respectively, to individuals as far as the fulfilment of the former's obligations²²⁶. On the other hand, horizontal direct effectiveness allows individuals to rely either on international law or EC-law respectively in actions against other individuals. Community directives do not produce a horizontal direct effect, on the grounds that their binding nature exists only in relation to the Member States to which they are addressed²²⁷. International agreements do not, either.

The existence of a direct effect within the EC is answered in the affirmative, provided that TEC provisions, provisions of decisions or directives addressed to the Member States, penetrate into the internal order of any Member State without the aid of any national measure, to the extent that their character makes this appropriate²²⁸. The provisions concerned have to

²²¹Cottier/Evtimov 2002, p. 184

²²²Cottier/Evtimov 2002, p. 185

²²³There might be, though, that the base right of free economy is infringed, e. g. in situations where the procurer establishes too far-reaching social and environmental criteria, see to that chapter 5, which, however, does not expressly refer to this point.

²²⁴Art. 5 Agreement

²²⁵Van Gend en Loos; Ratti, p. 21 – 23

²²⁶see Bovis, p. 89

²²⁷Marshall v Health Authority; Bovis, p. 89 – 90

²²⁸Van Gend en Loos; Gormley et al., p. 83-84; so far, it is established that Art. 18, 27 and 30 works directive are directly effective, see Beentjes v Netherlands, para. 38, which,

impose clear and precise unconditional obligations and lack discretion on the part of the Member States²²⁹. In Switzerland, the requirements for determining the applicability of direct effect are very similar²³⁰. However, the question whether an international agreement is directly effective also depends on internal factors, due to the fact that Community and Swiss courts take different approaches²³¹.

4.2.2 Preliminary remarks and importance

The provisions at stake are mainly Art. 4 and 5 Agreement. Due to the principle of the equivalence of the two legal orders, a binding force of the ECJ's judgments outside the territory of the EC does not exist²³². Any Swiss court is free in its application and interpretation of the Agreement. On the other hand, the ECJ is not obliged to follow the BGE's decisions. Practically, however, the two courts will certainly influence each other to a certain extent; at least the BGE will take the ECJ's rulings into very serious consideration²³³.

The importance of the question whether the Agreement is directly effective is diluted due to both legal orders contain detailed public procurement rules, which are – at least in the contracting parties' viewpoint – sufficient to achieve the goals prescribed by the Agreement²³⁴. The decisive momentum on both sides is, in most imaginable cases, an interpretation and enforcement of the provisions at stake according to international law; the principle that internal provisions which are potentially contradictory to international agreements should not be applied in relation to foreign suppliers²³⁵.

4.2.3 The relation between direct effect and concurring interpretation

The question whether a provision of either international or EC-law is directly effective becomes relevant in instances where no national provision

however, refers to the old provisions (Directive 71/305 EEC) that are basically equivalent to Art. 26 and 27 supply directive; Art. 36 and 37 service directive; and Art. 34 (1), (2), and (5) utilities directive, see Dingel, p. 72.

²²⁹Gormley et al, p. 84 and 529 – 546

²³⁰Studierende v Kanton

²³¹Biaggini, p. 363

²³²like, e.g., in the sectoral agreements about air transport (Art. 1 [2]) and free movement of persons (Art. 16 [2])

²³³same opinion: Cottier/Evtimov 2002, p. 201; even if the case is obviously clear or the principle at stake has already been covered by a court's previous materially identical reference, the national courts feel safer to ask the ECJ for a reference regarding the direct effect of the relevant provisions, Bovis, p. 90, w. f. r.

²³⁴see to that the Agreement's Joint Declaration of the contracting parties on the procedures for the award of contract and on challenging procedures: the parties agree that by requiring, on the one hand, Swiss covered entities to comply with the rules of the GPA, and, on the other, covered entities of the Community and its Member States to comply with the rules of the utilities directives, they each meet the requirements of Art. 4 and 5 Agreement.

²³⁵Biaggini, p. 363 – 364

exists at all or the latter deviates from international or EC-law, without any possibility given for its interpretation concurrent to the provisions of international or EC-law²³⁶.

This means that, firstly, a proper interpretation of the provision in question has to be undertaken, consequently presupposing that the latter leaves at least a margin for interpretation. If this is not the case, or if there is evident tension or incompatibility of the provision at stake with national law, no concurring interpretation of the two legal provisions can be made. In such a situation, the legal issue at stake is reviewed with the help of the criteria of direct effect²³⁷.

The EC-courts' interpretation of the Agreement and whether the former is directly effective does not follow the VCLT, but the *effet utile* doctrine²³⁸. In Switzerland, the Agreement has to be interpreted according to Art. 31 VCLT. Due to the Agreement's special character, a dynamic interpretation as possible has to be applied, using the principles of good faith and of an interpretation conforming to the Agreement's objects and purposes²³⁹. This is contrary to the usually static interpretation of international law.

4.2.4 Direct effect of the Agreement in the EC

Whether the Agreement is directly effective can be investigated through analysing whether the GPA is considered to be directly invocatory within the Community legal order²⁴⁰. The Agreement is partly based on the GPA and contains several provisions, which wording is very similar to the one provided in the former. Furthermore, an analysis how the EC treats association agreements will be undertaken.

Firstly, it is necessary to scrutinise whether a direct effect of the GPA exists according to provisions of international law. According to the former, the EC and its Member States are obliged to give GPA-provisions direct effect within their territory if they must be given direct effect within the internal legal orders of the GPA contracting parties²⁴¹. The GPA does not state this explicitly. However, it requires that providers have the opportunity to complain about a breach thereof before a national court or a similar national review body²⁴². Taking into account the wording of the provisions; the negotiating proceedings; the tradition of international agreements; and the

²³⁶see Krajewski, p. 54; Cottier/Evtimov 2002, p. 192

²³⁷Cottier/Evtimov 2002, p. 189

²³⁸The ECJ does not consider association treaties as ordinary international agreements. Instead, they are regarded to be a mixture between international law and EC-law, see Gilsdorf, Peter, in: Kommentar zum EWG-Vertrag, ed. by Von der Gröben, H./Thiesing, J./Ehlermann, C.-D., 4th ed., Baden-Baden 1991, Art. 238 EWGV, nr. 41.

²³⁹Art. 31 (1) VCLT; see Cottier/Evtimov 2003, p. 33, hinting at the principles applicable to fill legal vacuums.

²⁴⁰the corresponding provisions have a very similar wording: compare Art. XX (2) and (6) GPA to Art. 5 Agreement

²⁴¹Dingel, p. 78

²⁴²Art. XX (2) and (6); Dingel, p. 78

special legal nature of the WTO and GPA framework, it can be concluded that – vis-à-vis the other contracting parties to the GPA – the EC is not obliged to give direct effect to the GPA²⁴³. However, the former has the right to determine whether the GPA is directly invocatory or not within its territory.

Subsequently, a secondary step is taken to investigate whether the GPA is directly effective according to Community law. The ECJ denied the capacity of the GATT-law to be directly invocatory²⁴⁴. This opinion continued with the Council's express statement that it considers the agreement as disqualifying the WTO as immune from being directly invoked in EC or Member States courts²⁴⁵. However, there are some very reasonable doubts whether there really is no direct effect of the GPA. From a legal point of view, the Council's decision cannot have a constitutive impact on the agreement's interpretation²⁴⁶. Until now, when determining whether a provision in an international agreement is directly effective, the ECJ has simply analysed whether it, according to international law, is capable of having direct effect, not whether the contracting parties to the treaty have agreed that it will be like that²⁴⁷. This approach might derive from Art. 300 (7) TEC and reflect that a rule of primary EC-law cannot be overruled by secondary law, hereunder by a Council decision²⁴⁸. Additionally, it can be pointed out that by extending the rights granted to EC-suppliers to suppliers from the GPA contracting states, the EC has sufficiently clarified its obligations under the GPA to render them, at least regarding this specific context, directly effective²⁴⁹. In conclusion, a provision of an international agreement is capable of having direct effect within the territory of the EC if the ordinary requirements are met; additionally, the purpose and nature of the agreement have to be interpreted²⁵⁰.

²⁴³Art. XII (1) (h) and XIII (4) (b) GPA compared to Art. 29 (1) and (2) works directive; Art. 2 (1) (d) VCLT and Art. XXIV (4) GPA, see Dingel, p. 79-80, who is not completely sure, w. f. r.. Not discussing this point: Gormley et al, p. 543; it seems to be important that, during the negotiations, the incorporation of a direct effect was expressly rejected by a large majority of the future participating states, Dingel, p. 79, w. f. r.

²⁴⁴International Fruit v Produktschap; Organisation of banana market; Textile products; the GATT was the WTO's precedent, see chapter 2.2.1 further above.

²⁴⁵Council Decision (of 22nd Dec. 1994), concerning the conclusion on behalf of the EC, as regards matters within its competence of the agreements reached in the Uruguay Round (1986-1994), OJ L 336, 23/12/1994 p. 0001 – 0002, last recital; in that sense, the ECJ might rule that, since the Council has the power to ratify the GPA, it must also have the possibility to ratify it on the condition that its provisions within the EC are interpreted as not having direct effect, since that interpretation does not conflict with the obligations of the EC and its Member States vis-à-vis the other contracting parties to the GPA, Dingel, p. 81. The main reasons brought forward for the non-direct effectiveness is the lack of reciprocity in relation with other important trade partners, and the admissibility of unilateral protective measures within the GPA-system, see Krajewski, p. 57 and 59 – 60.

²⁴⁶Normally, Art. 300 (7) TEC is regarded to have an enforceable character, which renders obsolete an additional decision of the European Council. This leads to the conclusion that the decision whether an international agreement is directly effective is not at the Council's disposal, see Krajewski, p. 69 – 70, w. f. r.

²⁴⁷Bresciani v Amministrazione Finanze, para. 25 and 26; Dingel, p. 82

²⁴⁸Dingel, p. 81 – 82; Krajewski, p. 69 – 70

²⁴⁹Trepte, p. 220

²⁵⁰Hauptzollamt Mainz v Kupferberg, para. 17 – 26, Dingel, p. 82

Thirdly, another line of argumentation has to be investigated. Normally, the ECJ considers association agreements to be directly invocatory²⁵¹. Furthermore, the ECJ confers, or is very likely to confer, on the remedies directives a direct effect²⁵², in order to provide individuals with adequate legal protection. The Agreement also foresees such remedies, in a wording which is very similar to the one provided in the procurement remedies directives.

However, the meaning of a term in an international trade agreement and an identically phrased term in the TEC or in another legislative act is not necessarily the same; thus its interpretation will depend on the objectives of an agreement, as well as on the context of the provision concerned²⁵³. Albeit, it is quite probable that it will be regarded as containing essentially the same. In this way, the ECJ has actually managed to ensure that a significant number of rights conferred by international agreements, to which the EC is party, are not simply made dead letters by national authorities, whose motivation may be less than wholly transparent²⁵⁴. This is especially valid in the field of public procurement and must be valid for the Agreement, too.

From the reflections made above, it is derivable that the Agreement will be conferred a direct effect, especially on its Art. 4 and 5. However, there are some minor doubts occurring, above all, when the argumentation mainly bases itself on the ECJ's case law in relation to the GPA²⁵⁵. In such a negative case, the potential contractor has remedies, including interim measures and damages against the Member State for failing to comply with its obligations deriving from EC-law²⁵⁶.

4.2.5 Direct effect of the Agreement in Switzerland

The requirement for answering the direct effect in the affirmative in a specific case is the existence of a clear and precise provision, enabling the court to rule²⁵⁷. The issue at stake is whether the content, and not the form, of a provision enables the judge to make a decision²⁵⁸. The decisive momentum is, therefore, the suitability of the proper authorities to enact a judgment²⁵⁹.

²⁵¹Association agreements with Greece (ECJ, C – 17/81, *Papst und Richarz KG v Hauptzollamt Oldenburg*), Turkey (*Demirel*), and Portugal (*Hauptzollamt Mainz v Kupferberg*). This case law is also valid for the association agreements concluded with the future Member States, see to that, e. g., *Gloszczuk v Home Department*. The Agreement is an association treaty, see chapter 3.2 further above.

²⁵²This is must also be the case for Art. 1 and 2 remedies and utilities remedies directive, Bedford, p. 3.

²⁵³*Gormley et al.*, p. 544 – 545, w. f. r.

²⁵⁴*Gormley et al.*, p. 545, w. f. r.

²⁵⁵see to that effect: Dingel, p. 88, albeit misunderstanding, and Biaggini, p. 363

²⁵⁶*Brasserie du Pêcheur / Factortame*; see more to that in chapters 4.3.6 and 4.3.8 further below

²⁵⁷*Studierende v Kanton*

²⁵⁸*Cottier/Evtimov 2002*, p. 191

²⁵⁹*Cottier/Evtimov 2002*, p. 191, w. f. r.; hinting to the conditions set up for the proper

So far, the BGE has had a restrictive approach towards the direct effect of international agreements²⁶⁰. It rejected, for example, the direct effect of the FTA's core provisions by characterising the FTA as an ordinary trade agreement, which lacks an integrative element²⁶¹. On the other hand, it has to be pointed out that the sectoral agreements, as a whole, are more than just ordinary trade agreements²⁶². Additionally, Switzerland's economical environment has significantly changed during the last few years, which also might have had an impact²⁶³. The efforts to strengthen and tighten up national competition law provisions, the enactment of a law regarding the home market and the corresponding law concerning the elimination of technological obstacles to trade are clear signs for the current, much different, pro-European approach²⁶⁴. Moreover, the BGE has a favourable attitude towards the direct effect of WTO-provisions²⁶⁵.

There is a small danger, however, that the BGE changes its generous approach should the ECJ explicitly state that the Agreement cannot be invoked directly. But even under such circumstances, there are some reasons to believe that it will stick to its case law. First, the EC Member States still have the possibility to confer direct effect on the GPA²⁶⁶. Secondly, GPA-provisions are also applicable vis-à-vis non-Member States, due to a change in BGE's policy towards the EC that would subsequently influence other third states. Last but not least, the EC would not suffer any disadvantages if the BGE continued with its favourable attitude towards WTO-law and the Agreement²⁶⁷.

4.3 Legal protection within the EC

4.3.1 Introduction

Art. 5 Agreement requires the two parties to provide non-discriminatory, timely, transparent and effective procedures enabling suppliers or service providers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest. It is

delegation of authorization

²⁶⁰Cottier/Evtimov 2002, p. 192

²⁶¹Bosshard v Sunlight; contrarily, the BGE attested to a protocol, which was attached to the FTA, to be directly effective, see *Medigros v Oberzolldirektion*; a general comment is provided in Dicke, p. 114 – 118.

²⁶²see Cottier/Evtimov 2002, p. 196. The scope of the sectoral agreements is just too broad and many rules are too detailed to have a different opinion. Their following argument – on p. 197 – that there is a certain informal, obligation to preserve a balance between the two contracting parties, is, however, not helpful in this context.

²⁶³highlighting this interconnection: Dicke, p. 118 – 119

²⁶⁴Cottier/Evtimov 2002, p. 197

²⁶⁵*ARGE X v Regierungsrat Basel-Landschaft*; *A. SA v Bundesamt für Landwirtschaft*, 14th July 1997, not published, cited in: Cottier/Evtimov, p. 197, who hint, additionally, to the fact that this policy is not well-settled yet; answering a direct effect in the affirmative: Zimmerli, p. 156. Switzerland's policy is, compared to other contracting states of either the GPA or WTO respectively, the exception, see Herdegen, p. 121 – 124, and chapter 4.2.4 further above.

²⁶⁶*Dior v Consultancy*, especially para. 47

²⁶⁷see, but in a slightly different context: Cottier/Evtimov 2003, p. 28

very likely that the parties' duties, which derive from that provision will be implemented according to their current proceedings provisions in public procurement matters.

Due to the several fundamental differences between the two legal orders, there are different actions that have to be taken. It is, therefore, very important to scrutinise the different existing possibilities. Furthermore, it has to be taken into consideration that – within the EC – two regimes apply, one for all Member State organs, and another for the organs of the EC itself. Before it will become entirely focused on the legal protection of individuals, however, a brief overview of the possibilities of the Commission and the Member States towards each other will be provided in the framework of this thesis.

4.3.2 Judicial review on an EC level

The judicial review on an EC level includes proceedings under Art. 226, 227 and 228 TEC, which embrace actions against a Member State for failure to fulfil obligations which derive from the TEC.

According to Art. 226 TEC, the EC's centralised judicial review, it is the Commission that can bring a Member State before court. Other Member States may avail themselves of the provisions laid down in Art. 227 TEC to bring before the court a Member State's infringement of the TEC. Both proceedings lack an enforcement mechanism and the ECJ's judgment has only a declaratory character²⁶⁸.

Even under Art. 228 TEC, where the ECJ may continue to condemn a Member State's failure to comply with a previous judgment, enforcement proceedings are lacking²⁶⁹. It should be mentioned, though, that in the area of public procurement, non-compliance with the directives possibly leads to a withdrawal of Community funds allocated to the defaulting Member State. This appears an effective form of sanction, initiated by the Commission, after a decision of the ECJ pronouncing on the non-compliance issue²⁷⁰.

4.3.3 Characteristics of the remedies directives

The Member States are obliged to provide potential contractors with an effective and rapid means of reviewing contract award procedures due to the infringement of the public procurement regime²⁷¹. The former are required to ensure that the conditions under which remedies will be made available to contractors pursuant to the system of review established in consequence of the directives are not more onerous than the conditions which govern the award of other domestic remedies²⁷². They have to foresee an interim relief, the right to set aside unlawful decisions and damages. The review

²⁶⁸Boesen, p. 53; Bovis, p. 77 and 79

²⁶⁹Bovis, p. 77 – 78; Martín, p. 171

²⁷⁰Bovis, p. 78

²⁷¹Art. 1 (1) remedies and utilities remedies directives; this obligation is directly effective, see chapter 4.2.4 further above. A good overview over the detailed rules in every current Member State is contained in Tyrell/Bedford, p. 25 – 237.

²⁷²Art. 1 (2) proceedings and utilities proceedings directives; Bedford, p. 3

procedures must be conducted before the courts or some other review body whose decisions, in turn, must be amenable to review by a court or an independent tribunal²⁷³.

The majority of litigation initiated before national courts and later referred to the ECJ focus on the application of selection and award criteria defined in the public procurement directives²⁷⁴.

4.3.4 Standing to sue

Any person, who has, or has had, an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, has the right to sue. A denial of the standing to sue is only acceptable where a supplier could not possibly have been awarded the contract²⁷⁵. The Member States may require the person seeking the review to have previously notified the contracting authority of the alleged infringement and of his intention to seek review²⁷⁶.

There is, therefore, one material criterion to obtain the right to sue: the plaintiff has to have an interest, which even may be indirect, and which derives from his exclusion from the proceedings at stake²⁷⁷.

4.3.5 Capacity to be made a defendant

Only the contracting entity has the capacity to be made a defendant. This derives from the lack of a direct vertical effect of Community directives²⁷⁸. There is no possibility to initiate proceedings against another private undertaking or individual.

With respect to contracts awarded by private entities falling outside the notion of state in ordinary EC-law, the remedies exceed those that follow from the general principles of EC-law²⁷⁹.

4.3.6 Interim measures

Review bodies have the power to take, at the earliest opportunity and by way of interlocutory procedures, interim measures for the purpose of correcting an alleged infringement or preventing further damage. Such measures may include the power to suspend contract award procedures or the implementation of any decision taken by a contracting authority²⁸⁰. The

²⁷³ Art. 2 proceedings and utilities proceedings directives; Bedford, p. 3 – 4

²⁷⁴ Bovis, p. 90 – 91; see to that chapter 5.2.4 further below

²⁷⁵ Dingel, p. 228

²⁷⁶ Art. 1 (3) remedies and utilities remedies directives.

²⁷⁷ Schilling, p. 240

²⁷⁸ see to that chapter 4.2.1 further above

²⁷⁹ Dingel, p. 243

²⁸⁰ Art. 2 (1) (a) remedies and utilities remedies directives; Such measures may, e. g., permit the award procedure to continue on terms, for instance re-admitting an excluded tenderer to the bid process, or to correct a technical specification, see Bedford, p. 4.

interim proceedings need not be available for contracts that are already concluded²⁸¹.

It is not required that an application for review should have the automatic effect of suspending a contract award procedure²⁸². Interim measures may only be rejected where their negative consequences exceed their benefits²⁸³. Furthermore, since procedures for the award of public contracts are of such short duration, the infringements need to be dealt with urgency²⁸⁴. Therefore, the court should, besides its duty to consider possible consequences of its order, abstain from a refusal to grant an interim measure²⁸⁵. This triggers a tension regarding its obligation to take the public interest into consideration²⁸⁶. The latter mostly conflicts with the interests of the supplier²⁸⁷.

4.3.7 Power to set aside unlawful decisions

The review body has the power to set aside decisions taken unlawfully, including the removal of discriminatory technical, economic, financial or legal specifications in any document relating to the contract award procedure²⁸⁸. However, the conditions in which unlawful decisions must be set aside are not specified. In that sense, its effect on any contract concluded as a result of that procedure is expressly a matter of national law²⁸⁹. Here again, this measure does not need to be available for contracts, which are already concluded²⁹⁰.

4.3.8 Penalty payments and award of damages

Whether the Member States opt for penalty payments or not²⁹¹, review bodies must have the possibility to award contractors a remedy in damages for infringement of the regime²⁹². Generally, EC-law does not require the

²⁸¹Dingel, p. 243

²⁸²Art. 2 (2) remedies and utilities remedies directives; Boesen, p. 51

²⁸³Art. 2 (4) remedies and utilities remedies directives

²⁸⁴remedies directive, recital

²⁸⁵similar: Schilling, p. 242

²⁸⁶Art. 2 (4) remedies and utilities remedies directive

²⁸⁷Dingel, p. 236

²⁸⁸Art. 2 (1) (b) remedies and utilities remedies directives

²⁸⁹Art. 2 (6) remedies and utilities remedies directives; the two directives specifically permit Member States the right to limit a contractor to a remedy in damages only. Where a contract has already been concluded, the former may deprive the contractor of the right to apply to set aside the contract even though it may have resulted from a flawed bid process.

²⁹⁰Dingel, p. 243

²⁹¹Penalty payments are only foreseen in the utilities sector, Art. 2 (1) (c) utilities remedies directive. The level at which the payments are set must be high enough to dissuade the entity from committing or persisting an infringement, Art. 2 (5) utilities remedies directive.

²⁹²Art. 2 (1) (c) remedies and utilities remedies directive; one possibility to claim damages depends on the fact that the undertaking concerned did not get the award due to an infringement of public procurement provisions by the responsible authorities. The other possibility exists when the Member State's national provisions do not comply with the EC's public procurement directives, see to that: *Francovich v Italy* and *Brasserie du*

provision of a remedy for damages in case of a breach of a directly effective rule²⁹³. Damages may be available as a consequence of national law provisions, making a national authority liable for compensation in the event of a breach of its obligations. Procuring authorities are subject to a duty to observe EC-provisions and are liable for damages in case of the breaching of such rules²⁹⁴.

The notion damage does not include forgone profits and lost opportunities²⁹⁵. A contractor assumes the burden of proof in instances where damages, regarding the cost of preparing a bid or participating in a tender process, are claimed. It is up to the individual to show that there has been an infringement and that he would have had a real chance of winning the contract and that as a consequence of the infringement, the chance was adversely affected²⁹⁶.

With regard to contracts awarded by private entities falling outside the notion of state in EC-law, the remedy of damages goes beyond what follows already from the general principles of state liability.

In this context, two observations must be mentioned. First, undertakings will be hesitant to bring a contracting authority before a court, since they want to maintain good relations in the future. Second, if damages are too greatly and readily awarded, public contracting authorities will find themselves proceeding with such extreme caution as to seriously impede any public work or supplies contract²⁹⁷.

4.3.9 Review bodies

One or more bodies may be established to review contract award procedures, while separate bodies may be given the power to order interim measures, set aside decisions or award damages²⁹⁸. Ordinarily, review bodies will be judicial in character; however, they do not have to be independent of the contracting authority. In such a situation, they must produce written reasons for its decisions, and, furthermore, its decisions must be capable of review by a court, which is independent of both the contracting authority and the initial review body²⁹⁹.

Pêcheur / Factortame. Boesen, p. 52 – 53, hints to the fact that, until now, there has not been such a decision in the field of public procurement. However, according to the ECJ's settled case law, there is no reason to doubt that those two claims will not be applied in procurement matters.

²⁹³Bovis, p. 105

²⁹⁴Francovich v Italy, para. 31 – 37 and 38 – 46

²⁹⁵Martín, p. 226; Bovis, p. 107

²⁹⁶Art. 2 (7) utilities remedies directive; Martín, p. 228

²⁹⁷Bovis, p. 107

²⁹⁸Art. 2 (1) remedies and utilities remedies directive

²⁹⁹Art. 234 TEC and Art. 2 (9) remedies and utilities remedies directive

4.3.10 Legal protection against public procurement decisions by the EC

The EC public procurement directives are not applicable to the Community organs themselves. It is extremely rewarding, therefore, to briefly analyse the most important provisions in an instance where not an organ of a Member State, but one of the EC acts as a procurer³⁰⁰.

According to Art. 230 (4) TEC, any natural or legal person has the *standing to sue* against a decision addressed to that person, or against a decision addressed to another person, provided that it is of direct and individual concern to the former. This must also be valid for public procurement decisions.

The notion 'direct and individual concern' is interpreted very restrictively by the ECJ³⁰¹, which is contradictory to the standing to sue before the courts of the Member states. The interpretation of the aforementioned notion according to the goals and preambles of the procurement regime constitutes one possibility to overcome this³⁰². Thereby, the same result as expressly provided in the procurement directives can be achieved. On the other hand, taking into consideration the ECJ's well-settled and recently confirmed case law, the restrictive interpretation of the standing to sue is very unlikely to change³⁰³.

Not only the expressly mentioned European Parliament, Council, Commission and Central Bank have the *capacity to be sued*, but also the Court of Auditors and the ECJ³⁰⁴. There is no difference, therefore, between the EC's public procurement regime and the rules, which are valid for the Community organs.

An application to suspend the operation of any measure adopted by an institution is admissible only if the applicant is challenging that measure in proceedings before the court³⁰⁵. He has to state the subject-matter of the proceedings; the circumstances giving rise to urgency; and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for³⁰⁶. However, the main focus should not be on the urgency, but on the necessity to grant an *interim measure*. Results are thereby achievable that are similar to those foreseen in the procurement directives. There, an interim measure is granted if its disadvantages are supposedly smaller than its

³⁰⁰In order not to confuse the reader with too many titles, the main topic of each paragraph is highlighted with italics. The order corresponds to the scheme applied to the discussion of the relevant provisions for Member States and Swiss organs, see, chapters 4.3.4 to 4.3.9 and chapters 4.6.3 to 4.6.8.

³⁰¹Plaumann v Commission

³⁰²"Whereas the opening-up of public procurement to EC-competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; effective and rapid remedies must be available in the case of infringements of EC law in the field of public procurement or national rules implementing that law", recital 3 of remedies directive; see also Schilling, p. 241.

³⁰³Pequeños Agricultores, especially para. 44

³⁰⁴Art. 230 (1) i. c. w. Art. 7 TEC; Les Verts v Parliament, especially para 23 – 25

³⁰⁵Art. 83 (1) procedural rules ECJ; wrongly indicated in Schilling, p. 241

³⁰⁶Art. 83 (2) procedural rules ECJ

advantages³⁰⁷. Usually, the ECJ takes into consideration the measure's likelihood to produce definitive effects³⁰⁸, which may lead to different results.

The ECJ has the *power to set aside unlawful Community acts*³⁰⁹. Acts open to review are all measures adopted by the institutions, which are intended to have legal force³¹⁰. An action for annulment must therefore be available for all measures, which are adopted by the institutions, disregarding their nature or form, as long as they may have legal effects³¹¹. This is concurrent with the public procurement directives, where, for example, technical specifications in the tender documents are considered to be a decision³¹².

The EC's contractual liability is governed by the law applicable to the contract in question³¹³. If any organ of the EC infringes on a rule of the EC's public procurement regime, a *damage* is awarded according to the national law at stake. A situation cannot arise, therefore, where the rules applicable to the Community organs deviate from those that apply to its Member States.

4.5 Legal actions within the GPA-system

There is no standing to sue for individuals within the legal structure established under the GPA or the WTO. The latter is a forum for contracting states to air their grievances and seek resolution of, and compensation for, disputes³¹⁴. Likewise, there are no direct remedies against infringements or for damages, which occur under the GPA regime.

Each contracting party, however, has to provide a *standing to sue* thereby enabling suppliers to challenge alleged breaches of the GPA that may arise in the context of procurements in which they have, or have had, an interest³¹⁵. This provision applies to suppliers from all the countries that are contracting parties to the GPA. Thus, the GPA implies that the range of persons having a standing to sue goes beyond the range of persons having standing to sue under the remedies directives³¹⁶. Persons from a contracting party to the GPA, therefore, have a standing to sue in a Member State, provided that the GPA is correctly implemented into national law³¹⁷.

Only the awarding entity has the *capacity to be sued*. There cannot be a direct horizontal effect.

³⁰⁷Schilling, p. 242, see chapter 4.3.6 further above

³⁰⁸Dutch Antilles, summary, para. 7

³⁰⁹Art. 231 (1) TEC; this also includes to enact a part-voidness, see Schilling, p. 242, w. f. r.

³¹⁰Art. 230 TEC

³¹¹AETR, para. 38 and 42

³¹²Art. 2 (1) (b) remedies and utilities remedies directives

³¹³Art. 288 (1) TEC

³¹⁴Dalby, p. 244

³¹⁵Art. XX (2) GPA; here, the same approach of putting the main topic of each paragraph in italics (see chapter 4.3.10) was applied.

³¹⁶Dingel, p. 230

³¹⁷Dingel, p. 230, with more details

The review has to be able to *set aside decisions* conflicting with the rules set up by the GPA³¹⁸. This should be possible even if national law does not expressly provide so³¹⁹.

In the absence of an express regulation concerning the automatic suspensive effect, it is probably left to each contracting party to the GPA to decide whether the review procedure in itself shall have such an effect³²⁰. Other *interim measures* can be granted in cases concerning infringements of the GPA, even where national law does not expressly provide so, because of an interpretation of national law in conformity with the GPA³²¹.

The general EC principle of state liability is also not likely to apply with respect to the GPA. Each country, however, must, in its internal legal order, ensure that *damages* can be obtained for harm incurred due to breaches of the GPA³²². If national law does not expressly provide so, the former has to be interpreted in conformity with the GPA³²³.

Therefore, it can be concluded that remedies, which derive from the GPA are mostly restricted to the point to which a concurring interpretation of national law is possible. Due to the GPA's principle of national treatment, the remedies for enforcing the GPA may even have a wider scope within the EC than they do within the third countries that are contracting parties to the GPA³²⁴.

4.6 Legal protection in Switzerland

4.6.1 Introduction

The jurisdiction and enforcement in public procurement matters mostly follows the ordinary Cantonal and Federal procedure laws³²⁵.

The Swiss legal order lacks a general mechanism to achieve a uniform interpretation of international law. Thus, the Agreement will be interpreted and enforced autonomously by every responsible court. To achieve a uniform case law, it is required that many claims have to pass through the subordinate instances. The non-uniform interpretation of the Agreement, therefore, has to be taken into account at the beginning of its entry into force³²⁶. Furthermore, it is noteworthy that the BGE's approach is very much obliged to the principle of the Cantonal sovereignty³²⁷.

³¹⁸provided that the GPA is implemented correctly into national law, Dingel, p. 240, who hints at Art. XX (7) (c) GPA.

³¹⁹Dingel, p. 240, with more details

³²⁰Dingel, p. 240, who argues that it should be possible to grant an interim effect in cases concerning infringements of the GPA even where national law does not expressly provide so, because of the principle of interpreting the national law in conformity with the GPA.

³²¹Dingel, p. 241, with more details

³²²Art. XX (7) (c); Dingel, p. 242

³²³Dingel, p. 242

³²⁴Dingel, p. 244

³²⁵There is one important exception, see further below, chapter 4.6.2

³²⁶Cottier/Evtimov 2002, p. 205

³²⁷In contrary, the ECJ's argumentation is very often based on the *effet-utile* approach, which leads to a much more integrative impact, see Cottier/Evtimov 2002, p. 205. They

4.6.2 Law applicable and remedies on the Federal level

The law applicable to disputes on a Federal level in the field of public procurement is the VwVG, which is accompanied by the BoeB³²⁸. An appeal to the appeals commission against a decree by the procurement agency is permissible³²⁹. The former's decision is final³³⁰. An appeal to the BGE's administrative-court is expressly excluded³³¹; and so is the constitutional appeal to the BGE, because decrees in the field of public procurement which are governed by the BoeB are not sovereign Cantonal acts, but decisions by Federal agencies³³².

4.6.3 Right to sue on a Federal level

A person has the right to sue provided that he is concerned by the decision at stake, and that he has an interest in the decision's setting aside or of its amendment³³³. It is regarded to be sufficient if the plaintiff is more concerned than any other uninvolved person; the aim is to avoid an *actio popularis*³³⁴. The plaintiff, therefore, might be a third party, which is not concerned directly and immediate to the decision at stake.

4.6.4 Capacity to be sued on a Federal level

The Federal Office, and all the entities to which the right to procure is assigned by Art. 2 BoeB, have the capacity to be sued, provided that they issued the decision³³⁵.

4.6.5 Interim measures on a Federal level

The protest does not automatically have a suspensive effect. But the responsible authority is entitled to grant it upon special request³³⁶. Moreover, it has the competence to grant any other interim measure to achieve that a factual or legal status remains temporarily unchanged³³⁷. During the appellate proceedings before the appeals commission, the procurement agency can, in any case, reverse its decision at any time³³⁸.

give as an example the BGE's federalist interpretation of the BGBM.

³²⁸ Art. 26 (1) BoeB

³²⁹ Art. 27 (1) BoeB; the commissions official name: Rekurskommission für das öffentliche Beschaffungswesen

³³⁰ Art. 31 BoeB i. c. w. Art. 100 (1) lit. x OG and Art. 74 lit. c VwVG.

³³¹ Art. 97 – 114 OG

³³² Art. 84 (1) OG

³³³ Art. 48 VwVG

³³⁴ S. AG v Federal Department of Economics, especially p. 339

³³⁵ Art. 2 BoeB; Art. 47a VwVG

³³⁶ Art. 28 BoeB

³³⁷ Art. 56 VwVG

³³⁸ Merz/Schmid, p. 29

4.6.6 Protest considerations on a Federal level

An appeal cannot challenge a decree on the grounds that it is unreasonable³³⁹. But it may censure infringements of Federal law, including the procurement agency's transgression or abuse of discretionary powers and inaccurate or incomplete ascertainment of legally relevant facts³⁴⁰.

4.6.7 Power to set aside unlawful decisions on a Federal level

The responsible court has the power to set aside unlawful decisions; furthermore, it is entitled to instruct the contracting body or to amend its decision³⁴¹. After the contract has been awarded, the annulment of a decision is not possible anymore³⁴².

4.6.8 Damages on a Federal level

The contracting authority is liable for damage caused by an infringement of the public procurement regime. The liability for compensation is restricted to expenses that the supplier has incurred in connection with tendering, the award, and the appeals procedures³⁴³. Thus, there is a strict limitation to expenses incurred and does not include negative interest incurred in the performance of the contract, lost opportunities and forgone profits³⁴⁴.

It is difficult for the plaintiff to prove his damage³⁴⁵. It includes the evidence that the damage suffered has been declared unlawful by the appeals commission; that the expenses incurred have become useless; and that the tenderer who has suffered damage would have had a chance of being awarded the contract³⁴⁶. This decision is again a decree subject to appeal to the appellate instance³⁴⁷. For the precise proceedings, reference is made to the Federal Law on Liability³⁴⁸.

4.6.9 Law applicable and remedies on a Cantonal level

Insofar as public procurement matters are within the Cantonal sphere of competence, the Cantons have the duty to implement and enforce international agreements that were concluded by the Federal State³⁴⁹. It is

³³⁹Art. 31 BoeB

³⁴⁰Art. 49 VwVG; Merz/Schmid, p. 29

³⁴¹Art. 32 (1) BoeB; Bericht KBBK, p. 42 – 43

³⁴²Art. 32 (2) BoeB

³⁴³Art. 34 (1) and (2) BoeB

³⁴⁴Merz/Schmid, p. 30, w. f. r.

³⁴⁵Bericht KBBK, p. 44

³⁴⁶Merz/Schmid, p. 30, w. f. r.

³⁴⁷Art. 35 (2) BoeB; thus, a tenderer who has suffered damage and claims compensation may not be able to avoid having to argue the case twice before the appellate instance, see Merz/Schmid, p. 30.

³⁴⁸Art. 34 (3) BoeB; Verantwortlichkeitsgesetz (law on liability) of 14th March 1958, SR 170.32

³⁴⁹see to that chapter 2.4.4 further above

important to bear in mind that there are 26 Cantons, and, therefore, 26 different approaches may be possible³⁵⁰.

The contract is awarded by a decree, subject to appeal to an independent Cantonal instance³⁵¹, whose decisions may be challenged by a constitutional appeal to the BGE on the grounds of infringement of constitutional rights³⁵². Cantonal tenders are thus subject to a two-stage procedure for judicial relief, whereas at the Federal level, only a single appeals instance can be invoked³⁵³. However, it has to be taken into consideration that the cognition of the BGE in the constitutional appeal proceedings is restricted to arbitrariness³⁵⁴, which makes it very difficult for the plaintiff to succeed.

The question of who has the *right to sue* is governed by Cantonal law³⁵⁵. Generally, the right to sue is interpreted widely and is very similar to the interpretation made on a Federal level.

Only the contracting authority or private entity assigned by Cantonal law has the *capacity to be sued*³⁵⁶.

Exceptional cases provided, the claim does not have a suspensive effect³⁵⁷. There is a possibility for other *interim measures*, which are not governed by the intercantonal treaty. Basically, the Cantons have a wide discretion for interim measures and make use of this accordingly.

Concerning *protest considerations*, it has to be mentioned that the appropriateness of the principal's decisions cannot be verified. Only a breach of law is within the cognition of the responsible courts³⁵⁸.

As long as the contract is not concluded, the court has the competence to *set aside the decision* at stake and to decide on its own or to turn it back on the procurer, either with or without binding orders³⁵⁹. After the conclusion of a contract, this is not possible anymore.

The question how *damages* can be claimed depends on Cantonal law. The Cantons normally made use of their discretion and refer to their laws on liability. Basically, the same principles, which are valid on the Federal level are applied.

³⁵⁰But, on the other hand, the Cantonal public procurement provisions are very similar to each other, see to that chapter 2.4.4 further above

³⁵¹Art. 9 BGBM

³⁵²Art. 84 (1) OG

³⁵³Merz/Schmid, p. 35

³⁵⁴e. g., among many others: *Tägerig v Kanton Aargau*, para. 3e

³⁵⁵Bericht KbbK, p. 44; here, too, the main topic of each paragraph is highlighted with italics. The main issues appear in the same order as they are discussed for the Federal level, see chapters 4.6.3 to 4.6.8

³⁵⁶Art. 15 (1) IVöB; for a definition, see Art. 8 IVöB

³⁵⁷Art. 17 (1) IVöB

³⁵⁸Art. 16 (1) and (2) IVöB

³⁵⁹Art. 18 (1) and (2) IVöB

5 LEGALITY OF SOCIAL AND ENVIRONMENTAL CLAUSES

5.1 Aim and principles

The aim of this chapter is to investigate whether social, environmental, or other clauses are legal under the public procurement provisions set up by the Agreement; and to ascertain whether its validity also extends to the EC's public procurement directives and under the responsible Swiss legislative bodies. Normally, the primary objective of the public procurement regimes in market economies is “value for money”³⁶⁰.

Especially in the EC, the use of non-procurement, or secondary criteria, in procurement procedures has been a recurrent topic of discussion. It raises the fundamental problem whether and to what extent the national contracting authorities are allowed to use public procurement as a tool to promote the government’s economic, social or environmental objectives³⁶¹. Until now, none of the specification, qualification and award criteria mentioned in the co-ordination directives refer expressly to social and environmental issues³⁶². This is different to the situation in Switzerland³⁶³.

5.1.1 Social and environmental objectives

The term social objective covers a wide range of issues. Generally, it contains all measures, which ensure compliance with fundamental rights; with the principle of equality of treatment and non-discrimination, such as equal treatment of men and women; and preferential clauses, such as the reintegration of disadvantaged persons or of unemployed persons³⁶⁴. The notion environmental objective covers every measure, which is likely to strengthen a sustainable development, like a cleaner, healthier and safer environment³⁶⁵.

The incorporation of social and environmental considerations contradicts to the principles of accountability and transparency of the procurement process. The larger the number of the extraneous criteria that can be taken into account by the procuring entities, the more difficult it is to predict the decision made on the award of the tender³⁶⁶. Therefore, a restrictive interpretation of those considerations is indicated³⁶⁷.

³⁶⁰ Arrowsmith 2002, p. 6, who mentions, as a second main motive, the implementation of an efficient procurement process.

³⁶¹ Priess/Pitschas, p. 171; Martín, p. 59; Arrowsmith 1999, p. 237

³⁶² concerning social issues: Tobler, p. 624

³⁶³ see more to that chapter 5.4 further below

³⁶⁴ social communication, p. 6; see also Martín, p. 64 – 65, who is very doubtfully concerning the EC's competences in the field of social policy.

³⁶⁵ see to that: environmental communication, p. 5

³⁶⁶ Rittner 1999, p. 677; similar: Arrowsmith 2002, p. 7; Steinberg, Introduction; other authors would probably disagree, especially Hauser, see to that chapter 5.4.4 further below

³⁶⁷ The impact of the Commission's communication papers on the decisions of the ECJ and

5.1.2 Economic and closely related objectives

The different national industrial policies aim at supporting domestic industries against competitive imports³⁶⁸, correcting market imperfections³⁶⁹, creating a comparative advantage in imperfect markets³⁷⁰, or at using public procurement as a bargaining tool in trade negotiations³⁷¹. Furthermore, there are preferential public procurement policies that are not purely economic in nature³⁷². However, they will not be discussed in detail further below.

5.2 Legality of social and environmental clauses in the EC

5.2.1 Introduction

The legality of social and environmental considerations is investigated on the basis of the proceedings set up in the material procurement directives. The Member States have a certain margin of discretion when specifying technical issues; assessing the contractor's suitability and capability³⁷³. Furthermore, the directives are not exhaustive regarding the criteria that can be taken into account when determining the most economically advantageous tender. It only indicates certain examples³⁷⁴.

5.2.2 Stage I: Technical specifications

The documents relating to a contract to be awarded may contain technical specifications of the product or service to be supplied³⁷⁵. The procurer is not entitled to use any criteria other than the technical. Criteria, which do not relate to these technical characteristics, but rather to either a producer of a product, its supplier or a service provider, cannot be considered as technical specifications³⁷⁶.

of national courts is not investigated. The legal value of those interpretative documents is not evaluated either.

³⁶⁸e. g. the U.S-american "Buy America Act of 1933", see Arrowsmith 1999, p. 238 – 244

³⁶⁹e. g. policies to provide guaranteed markets for viable national industries, Arrowsmith 1999, p. 244 – 245.

³⁷⁰e. g. the policy to remove barriers to entry into a market to foster the development of new national industries, especially in the field of high technology, Arrowsmith 1999, p. 245 – 246.

³⁷¹A state that opens its own markets unilaterally has no leverage to obtain market-opening commitments from other countries when negotiating international agreements. The reservation made by the EC and Switzerland in context of the GPA illustrates this, see to that, e. g., Arrowsmith 1999, with other examples, p. 247 – 251.

³⁷²e.g. national security or the support of industry in disadvantaged or declining regions, see to that: Du Pont v Unitá Sanitaria, especially the "Mezzogiorno-quota"; also Arrowsmith 1999, p. 251 – 252, and chapter 1.3 further above.

³⁷³CEI v Societé; Tobler, p. 624; however, none of the two refers to technical specifications.

³⁷⁴Beentjes v The Netherlands, para. 19

³⁷⁵Art. 8 supply directive and Art. 14 service directive; provided that they are in line with the definition contained in the Annexes to both Directives.

³⁷⁶Priess/Pitschas, p. 174

Environmental protection considerations can be incorporated into the technical requirements, provided that they relate to the characteristics of a product or service and that this will not reserve the market to certain undertakings. The product required may differ from identical products in terms of its manufacture or appearance because an environmentally sound production process has been used³⁷⁷.

Social considerations embodied in national rules are considered to be legal, if they include, among others, requirements concerning product safety, public health and hygiene or access for the disabled to certain buildings or public transport, or access to certain products or services³⁷⁸. Furthermore, technical requirements, which secure the health of workers and others on the construction site are valid³⁷⁹.

Therefore, technical specifications with a social or environmental connotation are legal, provided that they serve to characterize in an objective way a product or service³⁸⁰. However, the way in which a product is manufactured, or a service is provided, may not be prescribed³⁸¹.

5.2.3 Stage II: Qualification-check

First, the procurer checks the general suitability of a supplier and reserves the right to exclude him from taking part in the tendering procedure. One criterion relates to the financial and economic standing of a supplier. The other relates to the reliability of a supplier³⁸². Generally, the two criteria concern activities in breach of a legal duty that is specifically attached to the profession of the supplier³⁸³. If social and environmental considerations are closely related to that, they may also be taken into consideration, for example, if the contractor does not comply with provisions on equality of treatment³⁸⁴.

³⁷⁷environment communication, p. 11 – 12, giving as examples organically grown foodstuffs or “green” electricity. The procurer must be careful that the prescription of a specific production process is not discriminatory. E. g., he may not prescribe that green electricity is generated by wind-energy only. The technical prescription should, therefore, simply be that it is produced with the use of renewable energy sources.

³⁷⁸social communication, p. 9

³⁷⁹Such requirements can include measures to avoid accidents at work, such as sign-posting, conditions for storage of dangerous products or plans of routes for the passage of equipment, social communication, p. 9.

³⁸⁰For example, the purchase of computer equipment or services adapted to the needs of the visually impaired. Such requirements are used to define the technical characteristics of the product and therefore relate to the subject matter of the contract. On the other hand, requirements relating to the way in which an undertaking is managed are not technical specifications. Thus, requirements concerning the use in a contractor's office of recycled paper; the application of specific waste disposal methods on the contractor's premises; or the recruitment of staff from certain groups of persons (ethnic minorities, disabled persons, women) do not qualify as technical specifications, social communication, p. 9; see also Priess/Pitschas, p. 174, who, however, disagree.

³⁸¹Priess/Pitschas, p. 187

³⁸²Art. 20 supply directive and Art. 29 service directive; see to that chapter 2.3.4 further above

³⁸³Priess/Pitschas, p. 175, who point out that the suitability criteria are exhaustive.

³⁸⁴Other examples are health and safety provisions, see social communication, p. 12, and also environmental communication, p. 15.

Second, the capability of the potential contractor will be substantially examined. The technical assessment establishes whether he has the skills, tools, manpower, relevant experience, and so on, to fulfill the contract at stake³⁸⁵. This may include social and environmental connotations, for example, if the contract necessitates specific know-how³⁸⁶.

There are no other criteria on the basis of which the qualification of a supplier could be tested³⁸⁷. This means that there is no more room for social and environmental considerations as described immediately above.

5.2.4 Stage III: Award criteria

There are two different award criteria and both are purely economic³⁸⁸. If the award is based on economically most advantageous offer, the following criteria are allowed to be taken into consideration: period for completion or delivery period, delivery date, running costs, profitability, technical merit, cost-effectiveness, quality, aesthetic, functional characteristics, technical assistance, after-sales-service, commitments with regard to spare-parts, and security of supplies³⁸⁹. However, those criteria are in no way exhaustive³⁹⁰. Other factors, which are not purely economic in nature, may also influence the award of a contract from the viewpoint of the contracting authority³⁹¹.

Therefore, criteria involving social and environmental considerations may be used where they provide an economic advantage for the contracting authority, provided that the former is linked to the product or service, which is the subject matter of the contract³⁹². Such criteria must be expressly mentioned in the contract documents or the tender notice – where possible in descending order of importance, so that the potential contractor is in a position to be aware of their existence and scope³⁹³. Furthermore, those considerations are not allowed to confer an unrestricted freedom of choice on the authority; and have to comply with all the fundamental principles of

³⁸⁵ Art. 23 supplies and Art. 32 services directive;

³⁸⁶ Either specific experience or know-how respectively is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of candidates and may therefore be required, see environmental communication, p. 17, and social communication, p. 12.

³⁸⁷ Art. 15 supply directive and Art. 23 service directive; *CFI v Soci t *, para. 13; *Beentjes v Netherlands*, para. 17

³⁸⁸ Art. 15 supply directive, Art. 23 service directive and Art. 34 utilities directive

³⁸⁹ Art. 30 (1) (b) works directive, Art. 26 (1) (b) supply directive, Art. 36 (1) (a) service directive and Art. 34 (1) (a) utilities directive

³⁹⁰ *Concordia Bus v Helsinki*, para. 54

³⁹¹ *Concordia Bus v Helsinki*, para. 55; *disagreeing: Priess/Pitschas*, p. 181

³⁹² *Concordia Bus v Helsinki*, para. 58 and 59. The social communication, p. 14, is additionally hinting at the close interconnection between social and economical considerations. The “environmental soundness” of a product, without further specification, is, as such, not measurable and does not necessarily have an economic advantage for the contracting authority. However, the latter can take it into account in context with products or services, e. g., the consumption of natural resources, by “translating” this environmental objective into specific, product-related and economically measurable criteria by requiring a rate of energy consumption, environmental communication, p. 20.

³⁹³ *Beentjes v Netherlands*, para. 31 and 36; *Concordia v Helsinki*, para. 62

EC-law, in particular with the principle of non-discrimination³⁹⁴, the right of establishment and the freedom to provide services³⁹⁵, and the principle of proportionality.

This implies that the EC's public procurement regime does not lay down a uniform and exhaustive body of rules. It is still unclear, however, whether the additional criteria may be used to promote any secondary policy and whether they may be applied at any stage of the procurement process³⁹⁶.

If the contracting authorities were allowed to pursue any secondary policy within the framework of public procurement, the award of public contracts on the basis of a competitive and transparent process would be highly jeopardised³⁹⁷. Therefore, only those criteria, which come under the scope of the TEC, are admissible³⁹⁸. Social and environmental issues are expressly encompassed by the TEC³⁹⁹. Concerning other criteria, there is nothing that supports the view that the Member States may pursue them in the procurement process⁴⁰⁰.

The question whether the award requirements stemming from social or environmental considerations may already be used as selection or qualification criteria is unclear⁴⁰¹. However, as a matter of fact, the contracting authority already takes these specific requirements into account at the selection stage, even though they legally may come into effect only at the performance stage of the contract to be awarded⁴⁰². Therefore, one might argue that those criteria, to a certain extent and at least *de facto*, also constitute suitability criteria⁴⁰³.

5.3 Social and environmental clauses in the GPA

5.3.1 Introduction

The justification for the GPA is entirely economic. Its intention is to open up public procurement contracts to international competition under equal commercial conditions free of any national preferences⁴⁰⁴. It is doubtful, therefore, whether the pursuit of secondary policies when awarding public contracts is compatible with the GPA⁴⁰⁵.

³⁹⁴Cassis de Dijon, para. 15; Beer purity, para. 29

³⁹⁵Concordia v Helsinki, para. 64; CEI v Societe, para. 15; Beentjes v Netherlands, para. 20 and 29

³⁹⁶similar: Priess/Pitschas, p. 182; Tobler, p. 624 – 627; and Steinberg, lit. B.1

³⁹⁷Priess/Pitschas, p. 182; Arrowsmith 2002, p. 12 – 13

³⁹⁸CEI v Societé, para. 15; Beentjes v Netherlands, para. 20 and 29; Priess/Pitschas, p. 182; environment communication, p. 4 – 5 and social communication, p. 4 – 7

³⁹⁹Art. 136 – 145 and Art. 174 – 176 TEC; see also Steinberg, lit. D.1.2

⁴⁰⁰Priess/Pitschas, p. 183

⁴⁰¹see to that: Priess/Pitschas, p. 183; Tobler, p. 626; Trepte, p. 57

⁴⁰²The ECJ set up the requirement that the specific criteria have to be expressly mentioned in the contract documents or the tender notice, see Concordia v Helsinki, para. 64.

⁴⁰³Martín, p. 62 et seq., especially p. 64; Priess/Pitschas, p. 183

⁴⁰⁴see to that chapter 2.2.1 further above

⁴⁰⁵Priess/Pitschas, p. 190, w. f. r.

5.3.2 Stage I: Technical specifications

Technical specification criteria may comprise quality, performance, safety and dimensions, the processes or methods of production, and requirements relating to conformity assessment procedures⁴⁰⁶. They may therefore describe the product as such, and, in contrast to the EC-provisions, the way in which a product is manufactured or a service is provided⁴⁰⁷. However, such criteria shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade⁴⁰⁸. No problems arise in so far as internationally harmonised standards are used, or reference is made to national provisions. In certain circumstances, the procurer even has the possibility to exceed national requirements in social and environmental matters if it is expressly stated⁴⁰⁹. Undoubtedly, the former has a relatively wide area of discretion⁴¹⁰, which is bigger than the one pertaining to the EC.

5.3.3 Stage II: Qualification-check

The procuring entity is entitled to assess the qualification of a supplier in terms of the latter's suitability for the contract in question. The supplier has to provide information on his financial, commercial and technical capacity⁴¹¹. The procurer should mainly focus on these criteria when determining the contractor's suitability⁴¹². However, other criteria may be taken into consideration, provided that they are strictly performance related and essential in ensuring the contractor's capability⁴¹³. Conversely, a procurer may not, under any circumstances, apply a criterion, which goes beyond that essential for performing the contract in question⁴¹⁴.

A supplier may be excluded from participating in the tendering procedure on grounds that cast reasonable doubt on his professional reliability⁴¹⁵. This may also include social and environmental connotations, provided that they are closely related⁴¹⁶. In conclusion, essentially the same situation exists as under EC law.

⁴⁰⁶Art. VI GPA

⁴⁰⁷Priess/Pitschas, p. 187. This opens an additional path to establish social and environmental conditions for the place where the product is produced. That location may be outside the territory of the procuring entity. That approach is not legal under the EC regime, see chapter 5.2.2 further above.

⁴⁰⁸Art. VI (1) GPA

⁴⁰⁹Hauser, p. 352, who is even more generous, but only in an environmental context; similar: Bericht KBBK, p. 14

⁴¹⁰Bericht KBBK, p. 14; Hauser, p. 352

⁴¹¹Art. VIII GPA

⁴¹²Art. VIII (b) GPA i. c. w. Art. IX (6) (f) and Art. XII (2) (f); Priess/Pitschas, p. 188

⁴¹³Art. VIII (9b) i. c. w. Art. VIII (b) GPA; Hauser, p. 355

⁴¹⁴Priess/Pitschas, p. 188; see to that the EC's position towards the US-American legislative "Act Regulating State Contracts with Companies doing Business with or in Burma (Myanmar)"

⁴¹⁵Art. VIII (h) GPA

⁴¹⁶Otherwise, the requirement of the limitation to essential criteria would be deprived of its force, Art. VIII (b) GPA and Priess/Pitschas, p. 189.

5.3.4 Stage III: Award criteria

The economically most advantageous tender is determined according to the specific evaluation criteria set forth in the notices or tender documentation⁴¹⁷. With this purely formal provision, it is at the contracting parties' own discretion to describe the specific criteria that define the most advantageous tender⁴¹⁸. The improvement of environmental quality and the safeguarding of social standards are, therefore, valid criteria⁴¹⁹ – even though there are some restrictions. Because of the nature of the GPA, they should be interpreted very restrictively. The linkage between public procurement and its secondary considerations leads to a politicisation of the procurement regime, and may be used to induce contractors to adopt practices favoured by certain contracting states, but which are rejected in others. Thus, a situation, which undermines the GPA's objective to create a common framework for government procurement emerges⁴²⁰. This conflict can only be avoided if secondary policies are not promoted via the national procurement procedures⁴²¹, seemingly reflecting to be the opinion of the EC⁴²². Moreover, the WTO itself only discusses whether economic policies are an obstacle to a more transparent procurement process⁴²³. Therefore, to be considered as valid, secondary criteria should form part of the public order and of the basic values of a legal system⁴²⁴. This might be the case concerning basic social and environmental connotations⁴²⁵. Moreover, the principles of necessity and proportionality apply⁴²⁶. In conclusion, the award criteria under the GPA-regime are more restrictive than the ones, which apply under the EC directives.

5.4 Social and environmental clauses in Switzerland

5.4.1 Introduction

Due to the fact that provisions on the Federal and Cantonal level are similar, there is no need to draw an explicit distinction between them. There are, however, some legal differences, which might occur and will be highlighted

⁴¹⁷Art. XIII (4) (b) GPA

⁴¹⁸Hauser, p. 358 – 359

⁴¹⁹Priess/Pitschas, p. 191, who disagree; Martín, p. 38 et seq. and 58 et seq.

⁴²⁰Priess/Pitschas, p. 191, who argue from a different basis

⁴²¹Priess/Pitschas, p. 191, w. f. r., and who argue that many states' reluctance to accede to the GPA is linked to the fear that this would curtail their freedom to use public procurement in support of secondary policies.

⁴²²Otherwise, there would have been no reason for the EC to allege the U.S.-American legislative “Act Regulating State Contracts with Companies doing Business with or in Burma (Myanmar)”. This act is a selective purchasing law placing a 10% premium on public contracts with companies doing business in Burma, see more to that: Priess/Pitschas, p. 188 and 191.

⁴²³Priess/Pitschas, p. 191, referring to the “Report of the Working Group on Transparency in Government Procurement” of 20th Jan. 1998

⁴²⁴Art. XXIII GPA; Priess/Pitschas, p. 192 – 193

⁴²⁵An imaginable case might be the prohibition of work undertaken by under-aged children, but not an infringement of minor environmental provisions, e. g. the reduction of noise at the production site to a certain extent.

⁴²⁶Art. XXIII (2) GPA i. c. w. Art. XX GATT, Priess/Pitschas, p. 193

in due course⁴²⁷. Additionally, it is noteworthy that the legality of social and environmental considerations does not form a topic of discussion in Switzerland as much as it does in the EC. But here, too, the legality of those connotations will be investigated based on the current legislation.

5.4.2. Stage I: Technical specifications

The contracting authority is obliged to specify all relevant technical issues at any stage of the procurement process, provided that they are necessary to submit a tender⁴²⁸. To avoid creating obstacles to international trade, they must refer to international standards, or to such national standards that implement or reflect the former⁴²⁹. This requirement observes the stipulation that no unfair technical restraints may be imposed⁴³⁰.

It is possible to set up technical specifications, which either define the product as such or the way in which a product is manufactured, or a service is provided⁴³¹. It is therefore possible to include social and environmental specifications, concerning the product itself, or its production, as long as the product is characterised. Contrarily, it is not permitted to establish requirements defining precisely how the product has to be produced or the service has to be performed⁴³². However, such a characterisation may not favour certain undertakings and must remain objective.

5.4.3 Stage II: Qualification-check

The contracting authority may check the general suitability and capability of a supplier and exclude him from taking part in the tendering procedure⁴³³. A contractor must guarantee the observance of the industrial-safety regulations and labour conditions for its employees while carrying-out the contract⁴³⁴. Local labour conditions are established by law, and by collective and standard labour agreements. Foreign suppliers can only be obliged to meet the core aspects of local labour conditions under private law. For these purposes, the local customary working hours and the provisions on contractually agreed minimum rates are of a particular relevance⁴³⁵. In addition, foreign suppliers are required to adhere to the Swiss industrial-

⁴²⁷Due to the limited size of the paper, it is simply not possible to scrutinize the 27 (one Federal, 26 Cantonal) public procurement regimes. For possible differences, see chapters 2.4.4 and 4.6.9 further above.

⁴²⁸Art. 12 (1) BoeB

⁴²⁹Art. 12 (2) BoeB

⁴³⁰Merz/Schmid, p. 11

⁴³¹Hauser, p. 352, who refers to Art VI GPA. This is contrary to the EC-rules, see chapter 5.2.2 further above.

⁴³²Hauser, p. 352 – 353, who mentions as possible legal examples the requirement of an environmentally sound production of wood; or the requirement to minimize noise and to prevent air and water pollution. On the other hand, it would be illegal to require that a certain specific method has to be used in order to achieve the goals required.

⁴³³see to that chapter 2.4.2 further above

⁴³⁴Art. 8 (1) lit. b and c BoeB; The procurer has the right to monitor observance of the industrial-safety regulations, Art. 8 (2) BoeB.

⁴³⁵Merz/Schmid, p. 11

safety regulations at the place of performance⁴³⁶. Moreover, contracts are to be awarded only to suppliers who guarantee the non-discriminatory treatment of men and women regarding equal pay for employees⁴³⁷, effectively limiting the prohibition of sex discrimination to the question of equal pay. Because this does not take other conditions of employment into account, it puts the foreign contractor at an advantage, since Swiss law concerning equal rights for men and women stipulates that Swiss suppliers treat men and women equally in all respects⁴³⁸. However, it is stated in an explanatory note that the contracting authority should contractually agree with all suppliers that they undertake to observe the industrial-safety regulations, working conditions, and the non-discriminatory treatment of men and women in all respects⁴³⁹. Additional social criteria are imaginable, provided that they are closely interconnected to the subject matter of the contract at stake.

Qualification criteria may embrace environmental aspects, provided that they are necessary for the procurement at stake. This might be the case for requirements in the fields of infrastructure, organisation, know-how, and so on⁴⁴⁰. Additionally, compliance with the environmental provisions conforming to the place of the contractor's headquarters may be required. A limit, however, has to be drawn. It is too far-reaching to demand that the potential contractor has to comply, in all business activities, with the environmental legislation⁴⁴¹. Furthermore, it is unclear whether the procurer is entitled to exclude tenderers due to the fact that, generally, large differences of environmental provisions exist between the place where they effectively produce and to those where the contracting entity is located⁴⁴².

In conclusion, it seems evident that Swiss procurers possess a greater margin of discretion when assessing the social and environmental suitability and capability of a potential contractor than their counterparts within the EC.

5.4.4 Stage III: Award criteria

The contract is normally awarded according to the principle of the economically most advantageous offer; but the possibility of the lowest-price criteria also exists⁴⁴³.

⁴³⁶Merz/Schmid, p. 11, who furthermore argue that this is in restraint of international trade and is a particular impediment for access to contracts in Switzerland by suppliers from economically disadvantaged countries, insofar as this gives local suppliers an advantage and is in breach of the principle of non-discrimination required by Art. III (1b) GPA.

⁴³⁷Art. 8 (1) lit. c BoeB

⁴³⁸Art. 3 GlG

⁴³⁹Merz/Schmid, p. 11; the explanatory note was issued by the Federal Executive Council.

⁴⁴⁰Hauser, p. 355

⁴⁴¹Hauser, p. 355 – 357; especially, where other business activities do not have anything to do with the contract at stake.

⁴⁴²Lang, p. 237, giving the example of § 26 (1) lit. f of the Decree on Public Procurement of Canton Zurich

⁴⁴³Art. 21 BoeB and Chapter 2.4.2 further above

It is obvious that the contractor has to comply with all Federal and Cantonal environmental and social provisions. Additionally, the procurer is allowed to set up a higher standard, provided that certain conditions are fulfilled and this is announced properly⁴⁴⁴. Under no circumstances are the provisions allowed to create a hidden discrimination towards foreign or extra-Cantonal tenderers⁴⁴⁵. It may be possible that the criterion of an environmentally or socially sound execution of a contract puts the local supplier at an advantage compared to the foreign supplier. In order to prevent these two criteria being put forward as a pretext, the advantage has to be evident⁴⁴⁶.

The award criteria must relate specifically to the subject matter of the contract at stake⁴⁴⁷ and be properly announced in their order of importance. They have to refer either to the properties of the products, or to the characteristics of their performance - provided that the latter have a social or environmental impact at its place of performance⁴⁴⁸. If the impact does not occur within the territory of the procurer, the situation becomes much more difficult to assess⁴⁴⁹. One could therefore assert that maybe, a clause is valid, provided that its award criteria are neutral and objective from competition viewpoint⁴⁵⁰. The procurer, therefore, is not allowed to establish criteria, which are of a purely common interest, such as structural, regional or fiscal policies⁴⁵¹ even though they might be very legitimate⁴⁵². They should not be enforced through public procurement provisions, but rather through other channels⁴⁵³.

⁴⁴⁴Lang, p. 244; Otherwise, they cannot be taken into account during the award process.

⁴⁴⁵The criterion of the length of the transport route is generally not in coincidence with the principle of non-discrimination. To be valid, several conditions have to be fulfilled. There has to be a massive negative impact on the local environment, e. g. by means of exhaust fumes and noise; the criterion at stake has to be expressly listed in all tender documents; and there has to exist a uniform concept to restrict the negative influence which has to apply to everybody, not only to the potential contractor, see VGer Zürich, VB.98.00369 of 15th Dec., published in: URP 1999, p. 165 et seq., cited in: Lang, p. 244.

⁴⁴⁶The judgments listed below only refer to the environmental context. The question whether there is a clear advantage is doubtful, especially in circumstances where the ecological criteria consists in measuring the transport route, see Administrative Court of Canton Aargau, judgment of September 9th 1997, published in: AGVE 1997, nr. 95, p. 361 et seq. and Administrative Court of Canton Zürich, judgment of November 3rd 1999, decision nr. VB 99.00204, both cited in: Esseiva, Denis/Stöckli Hubert, Zeitschrift für Baurecht, 2/2000, Vergaberecht, Rechtsprechung, p. 7, at: http://www.unifr.ch/baurecht/mustertexte/vergaberecht_51-66.pdf 2003-05-10 17.58

⁴⁴⁷For example, the requirement that the contractor has to support a public authority's project which aims at preserving the nature is not in correspondence with these principles, VGer Zürich, VB.98.00369 of 15th Dec., published in: URP 1999, p. 165ff., cited in: Lang, p. 244.

⁴⁴⁸Hauser, p. 359 – 360, who mentions as examples the environmental compatibility of the use of the product, its maintenance and utilization.

⁴⁴⁹E. g. requirements which prescribe the protection of the global climate in context with the production site; see to that Hauser, p. 360 – 370.

⁴⁵⁰Hauser, p. 370, who hints to the characteristics of labels and certificates. They may have a competitive impact.

⁴⁵¹Hauser, p. 376, w. f. r.; Lang, p. 241, w. f. r.

⁴⁵²This criterion is essentially the same as the one on the EC level, which requires that the responsible authority does not have a too big discretionary margin.

⁴⁵³Lang, p. 245, who refers to a statement of the Cantonal Government of the Canton Zurich; this statement hints more or less directly at the restrictive interpretation which

This line of argumentation is supported by the fact that both social and environmental considerations are expressly mentioned in the relevant procurement acts. The latter is listed in an inconclusive catalogue as a general award criterion, together with several others⁴⁵⁴. The social considerations may require, among others, that a contractor provides places for apprenticeships⁴⁵⁵, that his employees have to have a certain education and the possibility for its continuation⁴⁵⁶.

should be applied on secondary considerations on an EC level. This is somehow contrary to the arguments brought forward by Hauser, p. 373 – 374, who refers to other authors, and who claims that the goal of a coherent policy of the government concerned urges the former to take into consideration other main legislative goals which are of public interest.

⁴⁵⁴ Art. 21 (1) BoeB; chapter 2.4.3 further above

⁴⁵⁵ see, e. g., Art. 41 (1) lit. a Decree on Public Procurement of Canton Berne, § 5 (4) Law on Public Procurement of Canton Lucerne, § 5 Decree on Public Procurement of Canton Nidwalden

⁴⁵⁶ Art. 30 (1) lit. k Decree on Public Procurement of Canton Glarus

6 Conclusion

6.1 Legal framework surrounding the EC-Swiss agreement about certain aspects of public procurement

6.1.1 History

Due to the conclusion of the Agreement, Switzerland has now, at least in the field of public procurement, the same rights and duties as all the other EFTA-states have due to the ratification of the EEA-agreement. Insofar, Switzerland corrected, at least in this particular area, the decision not to join the EEA of 1992 with the entry into force of the Agreement in 2002.

6.1.2 The Government Procurement Act

The GPA forms an internal part of the law of the EC and of Switzerland. Basically, it strives towards the liberalization of world trade. Especially important are the principles of non-discrimination and national treatment. Due to its nature as a pure international agreement, many reservations were made by its contracting states, including the EC and Switzerland.

If EC-Swiss relations, in the field of public procurement, were therefore limited to the GPA, there would be several gaps, either deriving from reservations made by one of the countries or from its restricted scope of applicability, both in terms of sectoral coverage and in their coverage of contracting entities.

6.1.3 Public procurement in the EC

The main intention of the public procurement rules within the EC is to eliminate non-tariff-barriers arising from discriminatory and preferential purchase patterns.

The legislation at stake is either contained in the TEC itself or in six directives, which are partly material and partly procedural. It is important to keep both sets of rules in mind when assessing a case.

The material directives primarily contain the following: EC-wide advertising of public contracts above certain thresholds; prohibition of technical specifications capable of discriminating against potential bidders; and the application of objective criteria of participation in tendering and award procedures.

6.1.4 Public procurement in Switzerland

The Swiss public procurement legislation takes place at two different levels, a Federal and a Cantonal one, and aims at two incentives. The first is the implementation of the GPA into national law; the second aims at the removal of trade barriers in the home market. Here, too, the three principles

of public advertising, prohibition of discriminatory technical specifications, and objectivity in tender and award procedures are valid.

6.2 The EC-Swiss agreement about certain aspects of public procurement

6.2.1 Most important issues and characteristics of the Agreement

The Agreement clearly signifies a considerable qualitative improvement in public procurement matters between the EC and Switzerland. The relationship in this field is now comprehensive.

Essentially, discrimination no longer exists between European and Swiss undertakings in each of the two respective legal orders. This is achieved through a liberalization treaty according to international law, based on the strict equivalence of the two participating legal orders.

The temporal and territorial scope of application of the Agreement is limited; the former to seven years, the latter to the current territory of the EU. Therefore, either in 2004 or in 2009, or in both occasions, the Agreement has to be renegotiated. This could also mean that it would cease to exist at that time. There are some political factors, which imply that the territorial and temporal extension will not be easy to obtain, above all in Switzerland.

6.2.2 Provisions of the Agreement

Due to the abolition of some reservations made to the GPA by each party, the former will also be applicable to Swiss authorities on a Cantonal and municipal level. On the other hand, Swiss suppliers and service providers can challenge the award of contracts by non-central public authorities within the EC. Additionally, the scope of application of the GPA is extended to the parties' suppliers and service providers in the field of construction services, telecommunications, railway, and activities in the field of energy, with electricity constituting a notable exception.

A necessary condition for the application of the Agreement is that certain defined threshold values are exceeded. In that case, the two parties provide non-discriminatory, timely, transparent and effective procedures enabling suppliers or service providers of the other party to challenge alleged breaches of the Agreement arising in the context of procurements in which they have, or have had, an interest. For procurement contracts below the value thresholds, the parties encourage their covered entities to treat suppliers and service providers of the other parties non-discriminatorily.

6.3 Legal protection within the EC and Switzerland

6.3.1 Direct effect of the Agreement

The question whether a provision of international law is directly effective becomes relevant where no implementing national provision exists at all or the latter manifestly deviates from international law. Apart from that, the legal orders of the two parties have knowledge of detailed public procurement rules which are likely to be sufficient to achieve the goals at which the Agreement aims.

Until now, published judgments, containing an express statement about the Agreement's direct effect, have been published neither in the EC nor in Switzerland. However, after a detailed analysis of the Agreement's relevant provisions, it can be stated that there is a very large probability that the ECJ along with the BGE will confer direct effect upon the Agreement.

6.3.2 Legal actions in the EC and in Switzerland

Due to the requirements set up in the two public procurement remedies directives, the Member States are obliged to provide potential contractors with an effective and rapid means of reviewing contract award procedures on the ground of an infringement of the public procurement regime.

In every Member State of the EC, the right to sue is conferred on any person who has, or has had, an interest in obtaining a particular contract and who has been, or risks being, harmed by an alleged infringement. Only the procurer has the capacity to be made a defendant. Interim measures must be able to correct an alleged infringement or to prevent further damage. Furthermore, the review body has the power to set aside decisions taken unlawfully in the invitation to tender or in any document relating to the contract award procedure. Last but not least, there is a possibility to award damages. This remedy must be effective, but does not include forgone profits and lost opportunities.

In Switzerland, a person has the standing to sue, provided that he is concerned by the procurement authority's decision at stake and that he has an interest in the decision's setting aside or its amendment. The authority, which issued the decision, has the capacity to be sued. Interim measures may be granted upon special request. They may embrace everything to ensure that a factual or legal status remains temporarily unchanged. Moreover, the responsible court has the power to set aside decisions that were taken unlawfully. Additionally, it has the power to instruct the procurer or to amend the decision at stake. The damage is limited to expenses incurred and does not include negative interest in the performance of the contract, lost opportunities and forgone profits.

6.4 Legality of social and environmental clauses

6.4.1 Aims and principles

The primary objective of the public procurement regimes in both the EC and in Switzerland is straightforward economic. At first glance, this seems to contradict the legality of secondary policies such as environmental and social protection. On the other hand, those two objectives form a relatively important part in the relevant European and Swiss legislation.

6.4.2 Stage I of the proceedings: Technical specifications

At the beginning of any public procurement process, technical specifications are set up.

Within the EC, technical specifications must not embrace criteria, which relate to a producer of a product or of a service. On the other hand, they may contain requirements, which relate to the characteristics of the product or service itself, provided that they are objective and non-discriminatory.

Under the GPA-regime, technical specifications may describe the product as such and, differing substantially from the EC-provisions, the way in which a product is manufactured or a service is provided. This gives the procurer a greater margin of discretion. However, those criteria must not be applied with the effect of creating unnecessary obstacles to international trade.

In Switzerland, the situation is similar to the one set up by the GPA. Social and environmental specifications, which concern the product itself or its production are valid, provided that the product is characterised objectively and non-discriminatorily. However, it is not admitted to establish requirements, which define the precise measures through which the product has to be produced or the service has to be performed.

6.4.3 Stage II of the proceedings: Qualification criteria

In a second step, the responsible procuring authority checks the suitability and capability of the potential contractor.

In the EC, as much as in the GPA-Member States and in Switzerland, qualification criteria involving social and environmental considerations may be used where they provide an economic advantage for the contracting authority. The former has to be linked to the product or service, which is the subject matter of the contract, for example, if a specific social or environmental know-how is needed. There seems to exist a greater discretion for Swiss procurers, and those under the GPA, to exclude a contractor by setting up additional requirements, which oblige the latter to generally comply with the procurers prescribed internal social and environmental standards. Furthermore, the Swiss legal order encompasses more criteria already on this stage, compared to the EC, where the similar criteria are to be found at the stage of the award proceedings.

6.4.4 Stage III of the proceedings: Award criteria

The final stage is the one in which the public contract is awarded. The two possible award criteria are either the lowest price or the economically most advantageous offer. The first cannot, *per se*, consider non-economic issues. The second one admits social and environmental considerations where they provide an economic advantage for the contracting authority. The advantage must be linked to the product or service which is the subject matter of the contract.

In the EC, the prerequisites for the legality of social and environmental criteria are as follows: The criteria must be expressly mentioned in the contract documents or in the tender notice, where possible in descending order of importance. They are not allowed to confer an unrestricted freedom of choice on the authority, and have to comply with all the fundamental principles of EC-law, in particular with the principle of non-discrimination, the right of establishment, the freedom to provide services, and the principle of proportionality. Those principles basically apply also to the GPA Member States and to Switzerland. However, there is some more discretionary margin for Swiss procurers, especially in context with criteria that have an impact at the place of the producer's or supplier's headquarters.

6.4.5 Comment

The question whether a specific social or environmental clause is legal in the three legal systems discussed is very difficult to answer. The response strongly depends on case law, and is, therefore, not easy to obtain.

This certainly derives from the fact that the topic itself is highly political. Each state concerned intends to pursue its own policies. The procurer, therefore, as much as the potential contractors, occupies a delicate position. In order to fulfill their duties, increase their chances in the procurement proceedings respectively, they necessitate thorough knowledge of the validity of such criteria. Essentially, this puts at a disadvantage the smaller procurers and undertakings, and naturally, this goes directly against the principle of legal certainty.

On a European level, one approach to facilitate public procurement matters might be that social and environmental criteria are included in the public procurement directives. However, even in such a case, the case-law approach would not be circumvented. In Switzerland, one might be tempted to propose a single public procurement regime on a Federal and on a Cantonal level, which is completely illusory. It seems, therefore, that the current system is not likely to change and that everybody who is involved in public procurement matters has just to live with it.

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