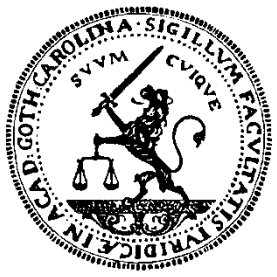

FACULTY OF LAW
Lund University

Karl-Henrik Persson

The Public Procurement Fallacy

-Why EU Public Procurement rules can counteract common goals of the Union

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Contents

Summary

The area of public procurement has a significant financial impact on the Union market, proven by the fact that 18% of the Union's GDP is spent by public authorities on resources that are regulated by the legislative framework surrounding public procurement. Such a significant spending therefore has the possibility of controlling the behaviour of the supply side on the market by demonstrating what public resources are preferably spent on. As a consequence, social and environmental responsibility among the member states has been given a strong position within public procurement as an effective tool to implement policies. However, this development has also encountered opposition, mainly from the Union itself otherwise supporting this kind of development. The opposition stems from the economical heritage that the Union is founded on. The area of public procurement was developed as one of many measures to maintain a fully functioning internal market, hence public contracts are meant to be awarded to the economically most advantageous tenders. Such a prerequisite ensures that there is competition between tenderers and the most competitive tenderer will therefore be awarded the contract. When taking social and environmental aspects into consideration, the lowest tender is seldom the tender that manages to include these considerations to the greatest extent possible.

These aspects are discussed in this thesis, and continue to discuss to what extent the current public procurement system nevertheless can be used in order incorporate other considerations than economic ones, without breaching the same system. This subsequently leads to a conclusion on whether the current public procurement system enables not only the member state's, but also the Union's policies to be fully implemented. As will be shown, there is discretion to incorporate such non-economic policies, although to a differing extent depending on the specific contract to be awarded.

Sammanfattning

Offentlig upphandling har en avgörande betydelse för EU:s inre marknad, något som inte minst bekräftas av det faktum att 18% av EU:s BNP utgörs av den offentliga sektorns utgifter som på något vis regleras av den offentliga upphandlingens regelverk. Således kan den offentliga sektorn också påverka marknaden genom att indikera vilken typ av varor eller tjänster som föredras framför andra. Därav har socialt- och miljömässigt ansvarstagande intagit en betydande roll inom offentlig upphandling som ett effektivt verktyg för att implementera strategier för ett ökat socialt-och miljömässigt ansvarstagande. Denna utveckling har dock mött visst motstånd, huvudsakligen från EU som i övrigt stöttar denna typ av utveckling. Motståndet härstammar sannolikt från det ekonomiska arv som Unionen en gång baserades på. Offentlig upphandling utvecklades som en av flera åtgärder ämnade att stärka den inre marknaden, varav en upphandling normalt tilldelas det anbud som är det ekonomiskt mest fördelaktiga. Nämnda rekvisit säkerställer nämligen att anbudsgivarna konkurrerar på lika villkor, följaktligen vinner den mest konkurrenskraftiga anbudsgivaren upphandlingen. När sociala- och miljömässiga kriterier skall vägas in i ett tilldelningsbeslut är det dock sällan det ekonomiskt mest fördelaktiga budet som lyckas väga in ovannämnda kriterier på bästa sätt.

Dessa aspekter diskuteras i denna uppsats och fortskrider med en analytisk diskussion om huruvida det nuvarande regelverket för offentlig upphandling ändock kan användas som en metod för att inkorporera sociala- och miljömässiga krav. Detta är inte är en självklarhet eftersom de ekonomiska grundvärderingarna i offentlig upphandling inte får frångås. Nämnda diskussion fortsätter med en slutsats gällande möjligheten att inkludera inte bara medlemsländernas, utan också EU:s ambitioner om socialt- och miljömässigt ansvarstagande i en offentlig upphandling. Såsom uppsatsen kommer visa så finns där visst utrymme att inkludera denna typ av målsättningar. Detta utrymme är emellertid avhängigt den enskilda upphandlingen.

Preface

Writing a thesis during a long period of time is known, to those who have done it, as being more or less challenging. There are many hurdles to overcome and many thoughts to formulate. Additionally, the thesis is the crown of a long education, which is something that one hopes is evident when someone reads your work. During this process some people around you become invaluable in order to reach the finish line. Therefore the author wants to express gratitude firstly to Professor Jörgen Hettne who has not only supervised the thesis, but also been a great forum for exchanging ideas. Secondly, my girlfriend deserves an acknowledgement for listening to all the problems that one encounters during the course of writing. Finally, and most importantly, my parents deserves special recognition not only for enabling all my studies but also for being of constant support at all times.

Lund, 13th of May 2013
Karl-Henrik Persson

Abbreviations

Art.	Article
CJEU	Court of Justice of the European Union
EU	European Union
GDP	Gross Domestic Product
LOU	Lagen om offentlig upphandling (2007:1091)
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union

1 Introduction

1.1 Background

The field of public procurement is of significant importance within the Union.[1] An efficient functioning of public procurement among the member states produce substantial economic efficiency gains that every Union citizen is the beneficiary of. Approximately 18% of the member states GDP is spent by public authorities on supplies and services that falls within the application of public procurement requirements.[2] In Sweden, this amounts to 50 billion Euros, exemplifying why efficient public spending can affect both economic as well as social welfare of a member state.[3]

It seems that the Union considers this substantial amount of public spending to be used efficiently as long as the principles contained in the Treaties, the market freedoms and the general principles of EU Law that now governs public procurement, is respected.[4] Accordingly, some form of regulatory framework was deemed necessary by the Union legislator in order to give effect to these sources of law. Therefore, a public procurement directive was adopted in 1971 concerning procurement of construction works.[5] This was followed by a procurement directive on goods in 1977 and subsequently a procurement directive on services as late as 1992.[6] The current regime within public procurement is provided through one Directive on the procurement within water, energy, transport and postal service sectors,[7] and one Directive on the procurement of public works, public supplies and

[1] See: Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: *Towards a Single Market Act,* COM(2010)608 final.
[2] See: Commission Communication: *Proposal for a Directive of the European Parliament and of the Council on public procurement.* p. 2. COM(2011) 896 final.
[3] See: Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: *Towards a Single Market Act,* COM(2010)608 final.
[4] Directive 2004/18 EEC, recital 2.
[5] Directive 71/305 EEC.
[6] Directive 77/62 EEC and Directive 92/50 EEC.
[7] Directive 2004/17 EEC.

public services.[8] There is furthermore one specific Directive for defence- and sensitive security procurement and one Directive setting down a level of remedial standards to be met by the member states in the event that a contract has been unfairly awarded.[9] Clearly, there is an extensive regulatory framework for the area of public procurement within the Union, however, since it is regulated by the Union in the form of Directives it is for the member states themselves to achieve the results set out in the Directive.

The national implementing measure in Sweden, aimed at achieving the results set out by the Directive on public works, supplies and services, is the *Law on Public Procurement.*[10] A significant feature of the Swedish public procurement law is its broadened scope in comparison to the Directive it transposes. This is evident by a comparison between Art 7(a)-(c) in the Directive, and Section 1, 2§ in conjunction with Section 15 in the Swedish procurement law. This comparison shows how Swedish public procurement rules are susceptible to all procurements regardless of their value, as opposed to the Directive having certain value thresholds in order for it to be applicable. However, there is an alteration within the Swedish procurement law, e.g. different tender procedures dependent on if the total value of the procurement is below the thresholds set out by the Directive.[11]

1.2 The dual character of Public Procurement

From an economic perspective, public procurement is commonly seen as a measure concerned with regulating an efficient public spending amongst the member states within the Union.[12] However, public procurement has a somewhat multifaceted character due to the fact that it is implementing many other objectives as well, hence it can be studied from many different

[8] Directive 2004/18 EEC.
[9] Directive 2009/81 EEC and Directive 89/665 EEC.
[10] Lagen (2007:1091) om offentlig upphandling.
[11] See Section 3, 1§ in the Swedish law on Public Procurement.
[12] See: Commission, *The Cost of Non-Europe, Basic Findings, The Cost of Non-Europe in Public Sector Procurement*, Vol. 5 Part A; Luxembourg, [1988]; Cechinni Report 1992, *The European Challenge* Aldershot, Wildwood House, [1988].

perspectives. In order to understand public procurement, one needs to be aware of these different objectives, as they are all considerations enshrined in the public procurement directives and therefore important to the understanding and interpretation of the same.[13]

It must however be seen as undisputed that the main objective of public procurement regulation is to facilitate a fully functioning internal market.[14] In particular, the directive makes reference to the provisions on free movement of goods, services and freedom of establishment.[15] Public procurement was identified as a non-tariff barrier early in the course of creating a common market within the Union, hence it is part of the regulation of the four freedoms and gives effect to it.[16]

Another essential element of EU law necessary for the achievement of the internal market is competition law, which is also an area closely related to public procurement.[17] The regulation of public procurement can to some extent be seen as competition law for public bodies among the member states in the Union.[18] However, the main difference between competition rules and public procurement is not only that the latter solely concerns public bodies, but also the fact that it only aims to regulate the demand side of public procurement, leaving it for competition rules to regulate the supply side where the private entities conduct their business.[19] Public procurement, in conjunction with competition rules, is therefore an essential instrument for the EU and the member states to continuously improve fair competition on the Union market, even on the public side of the market.

[13] Directive 2004/18 EEC mentions for instance fair competition, transparency, non-discrimination, equality and the fulfilment of the internal market as its objectives.
[14] Bovis, Christopher., *EC Public Procurement: Case-law and Regulation*. pp. 9-11.
[15] Directive 2004/18 EEC Recital 2.
[16] Bovis, Christopher., *EC Public Procurement: Case-law and Regulation*. pp. 12-13.
[17] Commission Green Paper; *on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market.* pp. 30-32.
[18] Graells, Sánchez., *Public Procurement and The EU Competition Rules.* pp. 9-10
[19] Ibid.

Furthermore, as public procurement stands in the intersection between free movement regulation and competition rules it has also become evident that issues may arise in the same intersection.

The issue that will be of interest in this thesis is the negative effects that the economically based prerequisites for awarding a contract in public procurements have shown to cause. Mainly concerning the prerequisite in abovementioned Directive 2004/18 EEC binding public bodies to award contracts to the tenders that are the "economically most advantageous". This is a criterion that has shown to be problematic in many areas where not only economic considerations are necessary to consider in order for a public body to make "the best deal".[20]

An exemplification from Sweden, which will be used as a practical exemplification towards the end of this thesis, is the procurement of foodstuffs and especially products of animal origin. The area of animal welfare is regulated on a Union level through minimum directives, the level of protection for animal welfare in Sweden is however higher in regard to many areas. The effect of which is that production costs increase accordingly in comparison to most other member states.[21] The consequence is that Swedish public bodies are generally excluded from buying Swedish foodstuffs since they seldom constitute the economically most advantageous tender due to the higher prices.[22]

The criticism has therefore been that while a member state aims to be competitive by setting a high social and environmental legally regulated standard for animal welfare, public procurement regulation excludes the producers from benefitting from that competitive advantage. Under the current regime it is therefore difficult for a public body to procure foodstuffs

[20] See: Commission guide; *Buying Social - A Guide to Taking Account of Social Considerations in Public Procurement.* [2010].
[21] Swedish competition authority; *Mat och Marknad – Offentlig marknad.* [2011] p. 121.
[22] See: http://upphandling24.idg.se/2.1062/1.481462/livsmedelsupphandling--ett-juridiskt-fiasko and http://upphandling24.idg.se/2.1062/1.454344/darfor-har-kammarratten-fel-i-djurskyddsmalet

taking into account anything but the lowest price. This excluded possibility of socially responsible procurements has been acknowledged as problematic by the Commission.[23] Swedish courts, sometimes lacking the Union perspective, have treated the question of whether these social or ethical values can be taken into consideration by public bodies somewhat differently.[24] This thesis will accordingly explore what the limits are to the use of social, ethical or environmental values in public procurements and what the stance taken by the Union is.

1.3 Definitions

Since this thesis will primarily be concerned with one of the abovementioned procurement directives, when the phrase procurement directive or Directive is referred to it will mean Directive 2004/18 EEC unless otherwise stated.

When the term public body or contracting body is referred to it shall mean public- and contracting bodies that fulfils the criteria necessary in order to be such a body that is subject to the duties contained in the procurement directives.

Throughout the thesis reference will be made to socially- and/or environmentally responsible procurements. Unless otherwise stated these terms will be used separately or in conjunction with each other as an overarching reference to procurements that include considerations other than purely economic.

1.4 Purpose

The purpose of this thesis is to assess what criterions that can be taken into consideration within the prerequisite of "the economically most

[23] See: Commission communication; *Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement.*
[24] See the opposing views of two Swedish appeal courts in the cases of; 2091-11 Rättviks kommun and 2841-11 Sigtuna kommun.

advantageous tender" in Art 53(1)(a) in Directive 2004/18, without breaching the purpose of that prerequisite. That evaluation will not only be contained on a Union level. In addition, Sweden will be used simultaneously in order to exemplify the possible implications of mentioned prerequisite in a member state. In order to reach a conclusion in regard to this purpose, three main research questions will be of importance;

- What overriding principles control the interpretation of the prerequisite "economically most advantageous" as stated in the Directive?
- To what extent does these overriding principles provide flexibility for public authorities in interpreting that prerequisite, in order to take into consideration criterions other than purely economic.
- Is the current system of public procurement efficient to the extent that it can include contracting authorities' considerations that are not of an economic nature and if not, does the current system make possible a change where economic considerations are given less importance?

1.5 Research approach and Method

The primary question raised for the purpose of this thesis is what type of considerations that legitimately can form part of the assessment being made under the prerequisite of "economically most advantageous tender". In exploring this issue the thesis will, by guidance of the abovementioned research questions, essentially consist of two parts.

The first part will consist of the first two research questions posed, concerning the actual meaning of the prerequisite "economically most advantageous", which are primarily objective in nature and aims to describe what the law is *(de lege lata)* on an epistemic level. This will be conducted through a descriptive presentation of substantive data. It will include an account of relevant legal instruments, review of literature by scholars and presentation of relevant case law as to make clear what the factual meaning of the prerequisite is.

The second part will consist of the third research question presented, depending on the findings in the first part of the thesis, the second part will aim to provide an overview of what the law should be *(de lege ferenda)*. The question, as it is more theoretical in nature, will aim to evaluate whether the different objectives of the Union being enshrined in public procurement, can be fully aligned when the prerequisite evaluated in the first part is applied.

The results stemming from this research will come from a dogmatic legal research method as described above. However, this method will be assisted rather than complemented by an overriding awareness of how also policy considerations interact with law. This is deemed necessary by the author firstly because the area of EU law, which forms part of this thesis, can seldom be studied in isolation from politics, due to the unique nature of EU law. Further, as public procurement to a large extent is driven by economic considerations, a legal study of public procurement is bound to include economic values and norms as it stems from policy considerations within the Union.

1.6 Delimitations

This thesis will predominantly have an EU law perspective. However, since the main legislation being studied in this thesis is contained in a directive it must by its nature take into account the implementation of the directive, which will be delimited to the implementation in Sweden. The relationship between Union law and member states implementation of the same will therefore be of significant importance throughout the thesis.

Furthermore, the procedure under which a public procurement is being conducted consists of several steps, from the construction of the specifications of the procurement to the actual acceptance of a tender. The area of study in this thesis is not isolated to one specific stage in this procedure. Nonetheless, the prerequisite being studied is by its nature of significant importance in the stage where a public authority chooses which

criteria to be used in the assessment of different tenders as well as the final award of the contract. The thesis will therefore have its main focus towards the initial- and final stage of a public procurement. Accordingly, procedural aspects of public procurement will not be dealt with, apart from mentioning the directive laying down certain remedial requirements to be met by the member states.[25]

Additionally, the area of public procurement is also an area of law that is regulated on an international level, namely by the World Trade Organisation through the Government Procurement Agreement.[26] This thesis will however not pay specific regard to this, as there is a presumption that EU public procurement legislation is in accordance with abovementioned agreement, as confirmed in Directive 2004/18 itself.[27]

As stated in the purpose, this thesis will only be concerned with an evaluation of the prerequisite in Art 53(1)(a) of Directive 2004/18 EEC. Accordingly, it will not be concerned with the other of the two prerequisites in the same Article which is the acceptance of a tender based on the lowest price only, therefore lacking those further qualifications that are within the area of interest to this thesis.

Finally, this thesis will not give special attention to the newly proposed directive on public procurements.[28] This is mainly because the proposal does not significantly change functioning or meaning of the prerequisite in Art 53(1)(a) in the abovementioned directive.[29] Although, it will be mentioned towards the end of the thesis in order to highlight how the directive could have been used from a *de lege ferenda* perspective.

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[25] Directive 89/665 EEC.
[26] http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm
[27] Directive 2004/18 EEC; Art 5 in conjunction with recital 7-8.
[28] Proposal for a Directive of the European Parliament and of the Council on public procurement. SEC(2011) 1585 final.
[29] Van den Abeele, Éric., *The reform of the EU's public procurement directives: a missed opportunity?*. [2012]. pp. 31-32.

1.7 Disposition

Initially, chapter 1 which sets out the framework for how the research questions posed are going to be researched in order to provide the reader with a conclusion, chapter 2 and 3 will aim to present the overarching principles that controls public procurement.

Chapter 2 describes the area of free movement, how it aims to maintain a fully functioning internal market and why this relates to the area of public procurement. Furthermore, it also aims to demonstrate for the reader why this internal market perspective controls the limits to public procurement and why public procurement, as a consequence, can not function independently from the provisions on free movement.

Chapter 3 will then continue with the same aim as chapter 2 by demonstrating how the area of free movement must be studied in conjunction with general principles of EU law when the limits to public procurement is evaluated. The importance of Chapter 2 and 3 in this regard is also confirmed by the explicit mentioning of free movement as well as general principles of EU law in the public procurement directive.

Chapter 4 therefore continues with a deeper description of the public procurement system, the public procurement directive and the Swedish implementing act of that directive. This will provide the reader with an understanding of how the principles presented in chapter 2 and 3 is meant to be implemented through the rather detailed procedures laid down by the directive.

Subsequently, chapter 5 continues by presenting the system of animal welfare in Sweden. This in order to give a pragmatic exemplification of how the objective behind public procurement can collide with high social and environmental aspirations among the member states.

Finally, Chapter 6 which is more analytical aims to use the partial conclusions in the previous chapters and analyse them in a broader perspective by using the Court's case law. This will aim to provide the reader with a deeper understanding of the limits to making socially- and environmentally responsible procurements and more importantly, where and how are those limits drawn. The chapter will also have an efficiency perspective in the sense that it will be discussed how the current public procurement system relates to other objectives of the Union.

2 Free movement

As mentioned above, the area of public procurement is complimentary of the single market project and seen as essential in order to develop and improve that market.[30] Accordingly, one need to understand the underlying provisions regulating the functioning of the single market in conjunction with the general principles applicable, in order to study the area of public procurement. The contracts concluded or awarded under a public procurement by public bodies are susceptible to the provisions contained in the TEU and TFEU. The provisions contained in Art 34, 56, and 49 TFEU especially, expresses directly effective principles that generally prohibits discrimination by one member state against other member states in terms of products, services undertakings and so forth.[31] The framework of these provisions will therefore be considered below due to their importance to the public procurement area.

2.1 Free movement of goods

The free movement of goods within the Union is regulated in Art 34 TFEU. This provision states that all quantitative restrictions on imports to a member state, as well as measures having equivalent effect to quantitative restrictions, shall be prohibited. Quantitative restrictions are more easily detected than those having equivalent effect, and generally refer to visible restrictions such as import quotas towards other member states.[32] Measures having equivalent effect must generally be assessed on its substance analysing the actual effects of a certain measure.[33] The general test established by the Court in this regard is that all measures which are capable of directly or indirectly hindering, actually as well as potentially the trade within the single market shall be considered of having equivalent effect to

[30] See: Commission communication; *A strategy for smart, sustainable and inclusive growth*. COM 2020 [2010].
[31] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 66.
[32] Barnard, Catherine., *THE SUBSTANTIVE LAW OF THE EU; The Four Freedoms*. [2010] pp. 71-72.
[33] Ibid. pp. 72-73.

quantitative restrictions.[34] The extensive application established in this so-called Dassonville formula is striking. The prerequisite for applicability is only an indirect potential effect on trade, such a prerequisite can be seen as a way of maximizing the opportunities for anyone willing to participate on the Union market.[35] There is thus a strong ambition underlying Art 34 TFEU to the extent that market access is essential in terms of access to the Union market.

2.2 Quantitative restrictions

A quantitative restriction generally makes a distinction between domestic and non-domestic products, providing more favourable treatment to the domestic products through discrimination. Such a measure is commonly referred to as a distinctly applicable measure,[36] and is accordingly prohibited under Art 34 TFEU.[37]

The general framework provided above applies *mutatis mutandis* to public procurement.[38] To exemplify what kind of conduct that would fall within the application of Art 34 TFEU in terms of public procurement, one could envisage a decision by a public body to buy certain kinds of products from the domestic market to be of such a nature. This is closely related to member states having a specific policy giving preference to domestic products, which would equally fall within the prohibition in Art 34 TFEU.[39] An example can be given from Denmark where a construction contract, required from the construction company party to the contract, to use Danish

[34] Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837. para 5.
[35] Barnard, Catherine., *THE SUBSTANTIVE LAW OF THE EU; The Four Freedoms*. [2010] p. 73.
[36] There is a variety of terminology used in order to describe this type of discrimination; see for instance Case C-320/93 Ortscheit [1994] ECR I-5243, para 9 where the Court states that ”a national measure applies solely” to a certain product.
[37] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 67.
[38] Ibid.
[39] Case 21/88, *Du Pont de Nemours Italiana SpA v Unita Sanitaria Locale No.2 Di Carrara* [1990] E.C.R. I-889.

construction materials as far as possible. This was accordingly deemed contrary to Art 34 TFEU.[40]

Quantitative restrictions can thus be found in a variety of circumstances and they can all occur within the sphere of public procurement. Other examples of this has been found when a national standard is a referred to as a requirement,[41] when a requirement is imposed to give all products within a market brands of national origin[42] or when certain domestic rules limit the channels of distribution to the extent that a distinction is made between domestic and non-domestic entities that are in comparable situations.[43] The common denominator between these examples is the direct discrimination towards non-domestic products. The dividing line between distinctly and indistinctly applicable can however be diffuse, as will be seen below, it seems however that the Court looks at the concrete result of a measure and not the intentions behind it.[44]

2.3 Measures having equivalent effect

As an introductory comment it was mentioned that Art 34 TFEU is also applicable to what is commonly referred to as indistinctly applicable measures. These measures can be determined on a purely effects based analysis, as opposed to quantitative restrictions, since they are indirectly discriminatory measures.[45] A general characteristic of an indistinctly applicable measure is that the discrimination cannot be found in law as such, but in concrete where there is a heightened discriminatory burden on imported goods.[46] These indistinctly applicable measures can be found not only when there is a direct barrier to trade but in mere hindrance to market

[40] Case C-243/89, *Commission v Denmark* [1993] ECR I-3353.
[41] Case 45/87 *Commission v. Ireland* [1988] ECR 4929; *Case C-67/97 Criminal Proceedings against Ditlev Bluhme* [1988] ECR I-8033.
[42] Case 113/80 *Commission v. Ireland* [1981] ECR 1625.
[43] Case 104/75 *De Peijper* |1976] ECR 613 para 13.
[44] Case 207/83 *Commission v. UK* [1985] ECR 1202 para 20.
[45] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 68.
[46] Sometimes referred to as protective effect. See: Case 16/83 *Prantl* [1984] ECR 1299 para 21.

access for non-domestic products.[47] An exemplification of what the Court would consider to be a typical indistinctly applicable measure can be found in the case of *Keck*,[48] where "product requirements" would be such a typical measure.[49] These product requirements, which are also reflected in Art 3 of Directive 70/50 EEC, are aimed at protecting the actual access to a market,[50] and less concerned with whether or not there is a discriminatory behaviour behind certain requirements.[51]

Within the area of public procurement the classification of indistinctly applicable measures has also been used. For instance in the case of "*Dundalk"*[52] where in a tender specification it was stated that pipes had to conform to an Irish standard. *Prima facie* this applied equally to domestic as well as non-domestic products, however, not surprisingly the effect was that only one producer in Ireland could fulfil the specification.

The aforementioned case of *Keck* is highly important also in another regard than merely providing a list where indistinctly applicable measures are exemplified. *Keck* can be seen as a response to the Courts prior development of the case law where member states were concerned that the expanded application of Art 34 TFEU started to stretch further than simply to indistinctly applicable measures.[53] The concern was that the analysis by the Court of whether or not there was a hinder to market access would go so far as to leaving the element of discrimination redundant.[54] That would put the member states in a position where all rules imposed possibly hindering market access would have to be justified before the Court.

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[47] Case C-448/98 *Criminal Proceedings against Jean Pierre Guimont* [2000] ECR-I10663 para 26; Case 261/81 *Walter Rau v. De Smedt* [1982] ECR 3961 para 13.
[48] Joined Cases C-267 and 268/91 *Keck* [1993] ECR I-6097 para 15.
[49] Barnard, Catherine., *THE SUBSTANTIVE LAW OF THE EU; The Four Freedoms*. [2010] p. 90.
[50] Ibid.
[51] Case C-366/04 *Schwarz v. Bürgermeister der Landeshauptstadt Salzburg* [2006] ECR I-10139 para 30; See also: Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE* [2006] ECR I-8135 para 20 where the matter was between nationals.
[52] Case 45/87 Commission v. Ireland [1988] ECR 4929.
[53] Spaventa, Eleanor., *Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Mickelsson and Roos*. [2011] pp. 5-6. See also: Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 68.
[54] Ibid.

The prior reasoning by the Court causing this concern was however remedied in the case of *Keck* where the Court qualified their position on the applicability of Art 34 TFEU.

The case of *Keck* concerned the parties Keck and Mithouard who sold beverages in France. The products were however sold at a loss compared to the wholesale price, which was prohibited by French law and the parties were therefore prosecuted.[55] The parties argued that the French law restricted their access to fully promote their products on the market, hence there was a hindrance to their market access contrary to Art 34 TFEU. The Court did however not agree with the parties and found the French law compatible with Art 34 TFEU due to its underlying purpose.[56] It furthermore stated that the Courts own case law needed to be revisited and further distinctions needed to be made in order to stop private parties from using Art 34 TFEU in a discretionary manner.[57]

In this clarification a distinction was made between measures taken by the state relating to the characteristics of the product,[58] and member states national provisions on "selling arrangements".[59] Selling arrangements could for instance be provisions on mandatory closing hours,[60] requirements on undertakings having physical selling premises in a member state[61] or reservation for authorised distributors to be retailers.[62] The first category, would continue to fall within the scope of Art 34 TFEU in accordance with the Courts prior case law. The second category did however not, according

[55] Joined Cases C-267 and 268/91 *Keck* [1993] ECR I-6097.
[56] Ibid para 12.
[57] Ibid para 14.
[58] Ibid para 15.
[59] Ibid para 16.
[60] Joined cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, *Semeraro Casa Uno Srl and Others* [1996 ECR I-2975; Joined cases C-69 and 258/93 *Punto Casa SpA v. Sindaco del Commune di Capena and others* [1994] ECR I-2355.
[61] Case C-322/01 0800 *DocMorris* [2003] ECR I-2975;
[62] Case C-387/93 *Criminal Proceedings against Banchero* [1995] ECR I-4663.

to the Court, constitute a hindrance to trade for the purposes of Art 34 TFEU since it did fall within the *Dassonville* criteria.[63]

The area of public procurement is equally susceptible to the Courts reasoning in regard to indistinctly applicable measures. This has for instance been expressed by the Court in the case of *UNIX* were it was confirmed that the specifications for submitting a tender that related to the characteristics of a product, falling within one of the two categories mentioned in *Keck*, could fall within the ambit of Art 34 TFEU.[64] However, this does not necessarily mean that all non discriminatory specifications would be of such a nature that they fall within the ambit of Art 34 TFEU.[65] According to *Arrowsmith*, one can draw a distinction between specifications excluding equally compatible products as in the case of *UNIX*, or specifications that merely define the market by setting down what level of a certain performance a product must meet.[66] It is however an area still surrounded by uncertainty as to how the Court will adjudicate upon public procurement in this regard.

2.4 Freedom to provide services

The freedom to provide services, and the prohibition on restrictions of the same, is laid down in Art 56-57 TFEU. A service is generally considered, in accordance with Art 57 TFEU, a service when it is provided for remuneration,[67] on a temporary basis and insofar as they are not within the ambit of the provisions regulating free movement of goods, capital and persons.[68] A service can for the purposes of Art 56-57 TFEU be provided for both when the service provider is moving and when only the service is moving as such.[69] Accordingly, a broad range of categories can fall within the notion of a "service". For instance, we have seen from the Courts case

[63] Joined Cases C-267 and 268/91 *Keck* [1993] ECR I-6097 para 16.
[64] Case C-359/93 *Commission v. Netherlands* [1995] ECR I-157 para 25-27.
[65] See in this regard: Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] pp. 69-70.
[66] Ibid.
[67] Case C-281/06 *Jundt v. Finanzamt Offenburg* [2007] ECR I-12231 para 32-33.
[68] Barnard, Catherine., *THE SUBSTANTIVE LAW OF THE EU; The Four Freedoms*. [2010] p. 361.
[69] Hettne, Jörgen., *Legal analysis of the possibilities of imposing requirements that go beyond the requirements of EU law.* 2012-04-19 p. 21.

law that services can be provided within areas such as tourism,[70] debt-collection work,[71] lotteries,[72] insurances[73] and sporting activities[74] to name a few of the more unusual areas.

In its' structure, the provision in the treaty on freedom to provide services is very similar to the one presented above on free movement of goods, insofar as both directly and indirectly discriminatory measures can fall within the prohibition in Art 56 TFEU.

In regard to directly discriminatory measures an exemplification would be a differential treatment between national- and non-national service providers. This could be done directly by reserving certain contracts for domestic bidders,[75] or by the public bodies adapting their qualifications conditions to make it practically impossible for non-domestic undertakings to participate in the procurement.[76]

Measures that are indistinctly applicable between domestic- and non-domestic service providers have been found in a number of instances also within the area of public procurement. For example in the case of *Contse*[77] where a contract was out for the procurement of home respiratory treatment. However, out of the admission conditions that needed to be fulfilled in order to be qualified for the contract, several were deemed to be incompatible with both Art 49 TFEU on freedom of establishment and Art 56 TFEU on freedom to provide services according to the Court.[78] The award criterions incompatible with aforementioned treaty articles were e.g. that the undertaking submitting a tender was required to have an office open in the city where the service was provided. These award criterions could not be

[70] Case C-198/89 *Commission v. Greece* [1991] ECR I-727.
[71] Case C-3/95 *Reisebüro Broede v. Sandker* [1996] ECR I-6511.
[72] Case C-275/92 *Schindler* [1994] ECR I-1039.
[73] Case C-118/96 *Safir* [1998] ECR I-1897.
[74] Joined Cases C-51/96 and 191/97 *Deliége* [2000] ECR I-2549.
[75] Case C-360/89 *Commission v. Italy* [1992] ECR I-3401.
[76] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] pp. 69-71.
[77] Case C-234/03 Contse and others v. Ingesa [2005] ECR I-9315.
[78] Ibid para 43, 55, 79.

legitimately justified and did by their very nature discriminate indirectly against service providers coming from other member states.[79]

Worth mentioning in regard to services and social considerations that will be explored subsequently in the thesis is the Court's approach to foreign service providers and the possibility of using your own labour in different member states. Labour, and the policy surrounding it are generally a sensitive topic for many member states and a topic which they wish to control themselves. This is however not something the Court has given much significance, something that can be seen for instance in the case of *Rush Portuguesa*.[80] This case made clear the importance of equality between undertakings in the Union and prohibited any requirements that in this case would make foreign labour susceptible to French rules on social permits since it would put the service provider at a disadvantage.[81] Conclusively, one could draw from this as well as other cases that the principles underpinning the treaty articles on free movement have a strong position in the Courts reasoning.[82]

Finally, it should also be mentioned that the Courts reasoning on "market access" discussed above in relation to free movement of goods applies in the same manner to the freedom to provide services. Therefore it seems that Art 56 TFEU applies to all measures hindering market access regardless of whether it is directly- or indirectly discriminatory.[83] Interestingly, no distinction has been developed by the Court so far similar to the ruling in abovementioned *Keck* were certain exceptions were made to market access reasoning.[84] Conclusively, the area of freedom to provide services can in many circumstances overlap with public procurement due to the nature of

[79] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 71.
[80] Case C-113/89 *Rush Portuguesa v. Office national d'immigration* [1990] ECR I-1417.
[81] Ibid para 15, 17, 19.
[82] See also the case of "Storebaelt": Case C-243/89 *Commission v. Denmark* [1993] ECR I-3353.
[83] Case C-384/93 Alpine Investments B.V. v. Minister van Financien [1995] ECR I-1141 para 36, 37, 38.
[84] Barnard, Catherine., *THE SUBSTANTIVE LAW OF THE EU; The Four Freedoms*. [2010] p. 377.

what constitutes a service and what can be found to impede the right to provide the same service.

2.5 Freedom of establishment

Freedom of establishment is regualted through Art 49-55 TFEU and concerns the right to establishment for companies and self-employed, protecting the ability to conduct economic activities through a permanent establisment for an idefinite period in another member state.[85] Furthermore, there are two ways in which one can enjoy the right of establishment in another member state. In accordance with the first paragraph of Art 49 TFEU there is a right of secondary establishment, meaning that you can set up agencies, branches and subsidiaries in another member state provided you already have a permanent establishment.[86] Furthermore, you also have a right to get a primary establishment in a member state other than your own. This is provided in the second paragraph of Art 49 TFEU and provide a right to move to another member state and establish your primary undertaking there.[87]

Moreover, the right to establishment applies to legal entities and natural persons alike. Art 49 TFEU is applicable to legal entities insofar as two cumulative prerequisites are fulfilled. Firstly they need to be a legal entity for the purposes of the law applicable in their country of origin and secondly they need to pursue a genuine economic activity.[88] For natural persons the freedom of establishment is applicable when the natural person wishes to pursue an economic activity as self-employed, which is also regulated through a directive.[89]

Art 49 TFEU enshrines the principle of equal treatment in the same way as the abovementioned provisions on goods and services do. Accordingly, the

[85] Case C-221/89 *R. V. Secretary of State for Transport, exp. Factortame* [1991] ECR I-3905 para 20.
[86] Barnard, Catherine., *THE SUBSTANTIVE LAW OF THE EU; The Four Freedoms*. [2010] p. 297.
[87] Ibid.
[88] Case C-196/04 *Cadbury's Schweppes v. Commissioners of the Inland Revenue* [2006] ECR I-7995 para 54.
[89] Directive 73/148/EEC.

distinction explained above regarding distinctly and indistinctly applicable measures applies to Art 49 TFEU as well. Distinctly applicable measures, or directly discriminatory, could for instance be a measure where the possibility of performing your profession is explicitly tied to your nationality.[90]

An indistinctly applicable measure have for instance been found by the Court, in regard to freedom of establishment, when a member state requires a non-domestic undertaking to hold a license or registration with a certain body in the member state before they can actually conduct their business.[91] Even though this might apply equally to all undertakings, national or not, it is likely to put a dual burden on the non-national undertaking depending on the requirements of the host state.[92]

Furthermore, also within the area of establishment one can see how the Court has used the same approach concerning the "market access" analysis as seen above. Therefore, the Court is likely to find measures contrary to Art 49 TFEU, even if they merely makes a market entrance by a non-domestic undertaking less attractive.[93]

In conclusion, freedom of establishment and its judicial framework is highly relevant for the area of public procurement, which is therefore a commonality between the different provisions discussed above. In terms of establishment any award criterion that makes a market entry less attractive or outright distinguishes towards non-domestic establishments could be caught under the provision in Art 49 TFEU.[94]
Another commonality between the provisions discussed above is that they all provide for possible derogations both expressly in the provision but also

[90] See e.g: Case C-2/74 Reyners v. Belgian State [1974] ECR 631.
[91] See e.g: Case 292/86 Gullung v. Conseils de l'ordre des avocats du barreau de Colmar [1988] ECR 111.
[92] Barnard, Catherine., *THE SUBSTANTIVE LAW OF THE EU; The Four Freedoms*. [2010] pp. 333-335.
[93] Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECR I-4165 para 37.
[94] See e.g: Case C-3/88 *Commission v. Italy* [1989] ECR 4035.

through the Court's case law. These derogations will be discussed briefly in order for the reader to understand which interests the Courts has been willing to balance against the otherwise strong principle of equality as seen above.

2.6 Limits to free movement

The area of free movement, which is shared competence between the Union and its' member states,[95] has limits to the extent that it has been recognized that member states must in some circumstances have the possibility to restrict free movement in order to protect other interests. These has been justified for instance when it comes to the protection of environment or public health, the question is however how the balance should be struck between these competing interests. For public procurement this is important due to the fact that the Court's reasoning in these cases can act as guidance when different award criterions are held to restrict free movement, at the same time as they aim to protect other interests. In general, there are two different ways for a member state to justify any derogation from the free movement provisions, these are divided into explicit derogations and implicit derogations provided through case law.

2.7 Explicit derogations

In terms of free movement of goods, regulated by Art 34 TFEU, there are certain exhaustive grounds in Art 36 TFEU that a member state can invoke in order to derogate from aforementioned article. In order to invoke these derogations it needs to be the question of for instance the protection of public morality, public policy or the protection of health and life of humans. However, these grounds cannot be invoked for the protection of economic objectives by a member state, something that has been declared by the Court in a number of instances.[96] Hence, it can be said that one requirement for

[95] Art 4(2)(a) TFEU.
[96] Case 238/82 *Duphar BV v. Netherlands* [1984] ECR 523 para 23. The Court mentions that Art 36 TFEU cannot be invoked for budgetary reasons. See also: Case 7/61 *Commission v. Italy* [1961] ECR 317, page 329 where restrictions on imports was not justified on the basis of Italy having financial distress in that area of business.

using these derogations is that there is an objective reason in support thereof. [97] This is evident also when reading the second sentence of Art 36 TFEU, explicitly stating the use of Art 36 derogations shall not constitute arbitrary discrimination or disguised restrictions on inter-state trade. This is also the first step in the more overarching test which the Court has explained as necessary to be fulfilled in order for a restriction to be put in place on the market freedoms by a member state. This was explained in the case of *Gebhard*,[98] in which the Court said that:

- they must be applied in a non-discriminatory manner;
- they must be justified by imperative requirements in the general interest;
- they must be suitable for securing the attainment of the objective which they pursue;
- they must not go beyond what is necessary in order to attain it.[99]

The "threshold" of objectivity would thus constitute the first half of the abovementioned test stemming from *Gebhard*, where the second half is in essence a proportionality test.

Furthermore, the same methodology as explained above applies also within the areas of services and establishment,[100] although the explicit grounds of derogation are slightly altered between the different provisions. Derogations from Art 49 and 56 TFEU are provided in Art 52 and 62 TFEU respectively, and refer to grounds such as public policy, health and morality.

2.8 Implicit derogations

Even though there are many instances in which abovementioned derogations would not apply, simply because the member states defence could never fall within one of the explicit derogations, the Court has recognised further

[97] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 73.
[98] Case C-55/94, *Gebhard* [1995] ECR I–4165.
[99] Ibid para 37. See also; Case C- 19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663 para 32.
[100] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 74.

justifications that can be used by the member states. These additional defences to be used by the member states, regularly referred to as "mandatory requirements", stems from the well known case of *Cassis de Dijon.*[101]

The case of *Cassis* came after the abovementioned case of *Dassonville* and established the important principle of mutual recognition.[102] This was developed as an important qualification to the Dassonville approach which made possible a very wide application of Art 34 TFEU. In the case of *Cassis,* which concerned the dual regulation of a product not governed by a harmonised area of EU law, established that something legally produced in one member state should be equally accepted in another member state.[103] However, the exceptions to this, called mandatory requirements, were provided by the Court in order to make possible the balancing of different interests. These mandatory requirements were for instance related to the protection of public health, consumer protection, fair trading practices and efficient fiscal supervision.[104] These justifications for putting restrictions on trade between member states, has generally been considered valid in regard to indistinctly applicable measures only.[105]

In regard to public procurement, at many times it is conceivable that the subject matter of a contract may very well fall within one of the categories to be found in either the explicit- or implicit grounds of derogation. However, it is important to be aware of the fact that simply because the subject matter of a contract falls within one of these justifications it does not necessarily mean that the procurement can act outside the scope of the

[101] Case 120/78 *Rewe Zentrale AG/Bundesmonopol verwaltung für Brantwein* [1979] ECR 649.
[102] Barnard, Catherine., *THE SUBSTANTIVE LAW OF THE EU; The Four Freedoms*. [2010] pp. 91-95.
[103] Case 120/78 *Rewe Zentrale AG/Bundesmonopol verwaltung für Brantwein* [1979] ECR 649 para 12,13,14.
[104] Hettne, Jörgen., *Legal analysis of the possibilities of imposing requirements that go beyond the requirements of EU law.* 2012-04-19 pp. 15-16.
[105] Barnard, Catherine., *THE SUBSTANTIVE LAW OF THE EU; The Four Freedoms*. [2010] pp. 90-95.

treaties.[106] As the Court has established, when the justifications are invoked by a member state it is for the member state to demonstrate not only that the subject matter of a contract falls within one of the specified grounds, they must also show that there is a threat to that specific interest.[107] This is of course in line with the test discussed earlier in regard to the case of *Gebhard*.

Furthermore, the Court has likewise been willing to accept justifications for derogating within the area public procurement as well. This has been confirmed for both the explicit as well as the implicit justifications. The overriding consideration to keep in mind at all times is the proportionality test and the fact the objective sought by a derogation shall not be possible to achieve through less restrictive means.[108]

2.9 Concluding remarks

In conclusion, this chapter aims to highlight the importance of free movement in relation to understanding public procurement. These two areas cannot be studied in isolation, hence this chapter aims to set the general framework for answering some of the questions to be answered in this thesis. Before turning to public procurement as such, another important area will be briefly discussed in the next chapter which is closely related to this chapter, namely general principles. Only those principles that are directly relevant to public procurement and the questions of this thesis will be dealt with, aiming to complement the framework set out in this chapter.

[106] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 75.
[107] Case C-3/88 *Commission v. Italy* [1989] ECR 4035 para 15. See also the opinion by Advocate General Mischo para 33.
[108] See e.g: Case C-379/98, *PreussenElektra AG v Schleswag AG* [2001] ECR I- 2099 para 68-75.

3 General Principles

Even though the principles to be discussed below can be observed as an integral part of the provisions to be found within free movement, it is nevertheless deemed necessary to deal with them separate from each other. This is due to the fact that some of these principles are not only expressing the objective of specific provisions but they also act as general principles of EU law. Accordingly, they can be used in a more extensive manner than separate provisions since they are not bound in application to a specific prerequisite.[109]

3.1 Equal treatment

The principle of equal treatment is a widely recognized principle of EU law, possibly held as one of the most fundamental principles due to its close connectivity to the actual concept of justice.[110] It is a principle to be respected by any and all courts as confirmed through the case law of the CJEU.[111] Not only has it been recognised as of fundamental importance within free movement as discussed in the previous chapter, but also as core principle underpinning the public procurement directives.[112] The principle of equal treatment can be expressed as a prohibition against comparable situations being treated differently and different situations from being treated in the same way, both having the exception of objectively justified measures.[113]

In the context of public procurement this would generally be applicable when it concerns a public body evaluating tenders in order to assign a contract. Therefore the specifications in the award criterions must be applied equally to equal tenders and differently to different tenders. Accordingly,

[109] Tridimas, Takis., *The General Principles of EU Law*. pp. 1-5.
[110] Ibid. p. 59.
[111] See e.g: Case 8/78 *Milac* [1978] ECR 1721 para 8.
[112] Case C-243/89 *Commission v. Denmark*, [1993] ECR I-3353 para 33.
[113] Case C-292/97 *Karlsson and Others* [2000] ECR I-2737 para 39. Case C-122/00 Omega Air and Others [2002] ECR I-2569 para 79.

the specification requirements cannot be used by the procuring public body in a discriminatory manner in order to "direct" the award of the contract to a specific tenderer,[114] something that has to be respected through all the stages of a procurement.[115] Furthermore, as discussed in the chapter on free movement, this principle of equal treatment is applicable to both directly discriminatory measures and those measures having a discriminatory effect or result giving the principle of equal treatment a wide area of application within public procurement.[116] Equal treatment is therefore overriding in nature and in the context of public procurement it has been expressed by the Court as ensuring that the internal market is opened up to competition with the financial gains that such a development will carry.[117]

3.2 Transparency

Another essential principle underpinning the area of public procurement, that is also imperative in order to enable fair competition among tenderers as mentioned above, is the principal of transparency.[118] From the beginning it was assumed that the treaty provisions was only applicable to public procurement insofar as there could be no discrimination, although in different forms as discussed above, the principle of transparency did however add further obligations.

The Court established that the principle of transparency applies to public procurement in the sense that there should be advertising made by procuring public bodies enabling the relevant market to be transparent and thereby increase competition and the judicial review of procurement processes.[119] The obligation of transparency is *prima facie* fulfilled by a procuring body

[114] Case 45/87 *Commission v. Ireland* [1988] ECR 4929.
[115] Case T-145/98 *ADT Projekt v Commission* [2000] ECR II-387 para 164.
[116] Case C-410/04 *ANAV v Comune di Bari and AMTAB Servizio* [2006] ECR I-3303 para 20.
[117] Case C-324/98 *Telaustria* [2000] ECR I-10745 para 61, 62. See also: *Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*. [2006] pp 1-3.
[118] Bovis, Christopher H., EU Public Procurement Law. [2012] pp 250-251.
[119] Case C-324/98 *Telaustria* [2000] ECR I-10745 para 61, 62.

by three different means of publishing a forthcoming procurement:[120]

- There is the Periodic '**Indicative Notice (PIN)'** which sets out a non-compulsory annual obligation on procuring authorities to make an estimate of planned procurements and purchases. These notices gives better certainty for the supply side on the market for procurements in order for it to adapt, the notices therefore increase the flexibility as well.[121]
- Furthermore, there is the '**Invitations to a tender'** procedure which can be held to be of fundamental importance for the current public procurement system within the Union. This is the procedure whereby the procuring body sends out an invitation to tender alongside the award criterions. The respect of this obligation is deemed essential in order to achieve transparency and open access to the Union market for public procurements.[122] The same open access means that tenderers must be aware of all the elements that the procuring authority takes into consideration in identifying the economically most advantageous tender.[123]
- Lastly, there is the non-compulsory **'Contract Award Notices (CAN)'.**[124] This is a "post award" notification providing information about which undertaking that was successful, commonly at what price as well as other reasons for that tenderer being selected.[125] Even though the factual price for the winning tender is commonly withheld due to confidentiality, this system of transparency gives all the tenderers on the procurement market better access to information on public bodies' purchasing behaviour.

As can be observed above there is a set structure for how public bodies can achieve transparency in their procurements. The effect of this transparency

[120] Bovis, Christopher H., *EU Public Procurement Law*. [2012] pp. 250-251.
[121] http://europa.eu/legislation_summaries/energy/internal_energy_market/l22010_en.htm
See also: Bovis, Christopher H., *EU Public Procurement Law*. [2012] pp. 250-251.
[122] Ibid.
[123] Case C-532/06 *Emm G. Lianikis AE v. Alexandroupolis* [2008] ECR I-251 para 36.
[124] http://europa.eu/legislation_summaries/energy/internal_energy_market/l22010_en.htm
[125] Bovis, Christopher H., *EU Public Procurement Law*. [2012] pp. 250-25.

is generally price competitiveness, that competitiveness is in turn essential for the efficiency of public procurement in achieving the aim of maximising the return of public spending across the Union.[126]

3.3 Proportionality

As has become apparent during the previous chapter the principle of proportionality is not only a principle used by the Court in their adjudication.[127] It is also a principle that e.g. public bodies needs to be familiar with when drafting their award criterions for a procurement and thereby deciding how different interests should be balanced. Hence, if a public body aims to procure on award criterions more strict than customarily, they have to make certain that the potential tenderers' interests as well the market freedoms are not overly restricted in comparison to the objective aimed to be achieved.[128] Accordingly, there is no "one size fits all" approach to be used when making such an assessment since the proportionality test and the evaluation must be made in relation to the specific object of each contract.[129]

Furthermore, the abovementioned situation where the principle of proportionality is held to apply to the drafting of award criterions is the more common one. However, another situation in public procurement where the principle has been of significance is when a contracting authority applies measures that exclude potential tenderers from participating altogether.[130] This is by its nature a more delicate situation since tenderers are excluded directly and therefore, unless the proportionality test proofs otherwise, such exclusion would be directly discriminatory as discussed in the previous chapter.

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[126] In regard to the efficency of public procurement see: *Public Procurement in Europe – Cost and effectiveness.* [2011] pp. 93-117.
[127] For a discussion on the complete scope of the principle of proportionality see: Barak, Aharon., *Proportionality – Constitutional Rights and Their Limitations*. [2012]
[128] Both interests are covered by the principle of proportionality, see: Tridimas, Takis., *The General Principles of EU Law*. p. 140.
[129] Hettne, Jörgen., *Legal analysis of the possibilities of imposing requirements that go beyond the requirements of EU law.* 2012-04-19 p. 10.
[130] Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 397.

When such exclusionary measures are taken by a public body, the principle of proportionality is therefore essential, which has been confirmed in for instance the case of *Michaniki*.[131] In this case a contracting body prohibited all media companies from participating as tenderers since it was held that this could call their impartiality into question due to the nature of the service being procured.[132] Even though the Court was of the opinion that such exclusionary measures fell within the competence of the member states, granting them a wide margin of discretion,[133] there still had to be a proportionality test made.[134] In that regard the Court gave guidance in stating that while a legitimate objective was being pursued, it was to far reaching in excluding all tenderers connected to the media sector without further qualification.[135]

There have been additional cases as well establishing the importance of proportionality and especially what level of vigilance that is required from contracting authorities.[136] Vigilance in the sense that the public body must have the ability of analysing their award criterions beyond the wording of the public procurement directives. Simply because whenever a public body wishes to procure something that requires more from the tenderers than simply the ability to deliver the contracted product or service, it is likely to be appealed by those excluded.

3.4 Concluding remarks

As will be seen in the forthcoming chapter on the current public procurement system, one can see that there is quite a detailed procurement process that must be followed by contracting authorities. These overriding

[131] Case C-213/07 *Michaniki AE v. Ethniko Simvoulio Radiotileorasis v. Ipourgos Epikratias and others*. [2008] ECR I-9999.
[132] Ibid para 50-60.
[133] Ibid.
[134] Ibid para 61.
[135] Ibid para 69.
[136] See e.g; Case 538/07 *Assitur Srl v. Camera di Commercio Industria Artigianato e Agricoltura di Milano* [2009] ECR I- I-04219 para 30. Case C-376/08 Serrantoni Srl and Consorzio stabile edili Scrl v. Comune di Milano [2009] ECR I-12169 para 38.

principles as explained above can therefore be seen both as problematic and helpful for procuring bodies. Problematic in the sense that if one is not familiar with them the principles can overturn a whole procurement, e.g. due to lack of proportionality, even though the procurer consider that the relevant legislation has been complied with.

For someone familiar with the principles they can be helpful in the sense that these principles provide an aid for more flexibility beyond the "black letter" limits of the public procurement legislation. This has been exemplified above in relation to proportionality. In that regard, the Court expressed that the exclusion of tenderers, *prima facie* contrary to the principle of equality, can be acceptable if the exclusion fulfils the test of proportionality.

Conclusively, these principles are always of relevance and will be subject to more discussion below. For the purpose of this study it will be shown that when one wish to make a procurement not fully regulated by the Directives themselves, these principles are even more significant to be familiar with.

4 Public Procurement in Sweden

The two previous chapters can be seen as providing the framework upon which the public procurement directives have been developed in the sense that free movement and the general principles of EU law is fundamental to the understanding of public procurement.[137] This chapter will aim to provide a more pragmatic description of the different steps in a public procurement, this in order to demonstrate where these steps interrelate to the previous chapters. The primary focus will be on the Swedish implementing measure of the public procurement directive, although with interpretative guidance from the Court's case law.

4.1 The Swedish Public Procurement Law

As discussed in the introduction of this thesis there are primarily two directives laying down the legal framework for public procurement among the member states.[138] These procurement directives have been transposed in Sweden through two pieces of legislation,[139] one of which will be the main focus of this chapter due to its relation with the research questions posed.

Accordingly, the Swedish legislation of focus will be the *Lag om offentlig upphandling (LOU)* which concerns the so called 'classic sector'[140] generally including the procurement of goods and services. An initial prerequisite for the LOU to be applicable to an organisation is that the body or organisation is 'governed by public law' as stated in Chapter 2, 12§ LOU.[141] The Court has expressed by reliance on the directive, that the interpretation and application of what constitutes a 'public body' must be

[137] See e.g: Directive 2004/18 EEC recital 2 and the explicit mentioning of free movement and the principles presented in Chapter 3.
[138] Directive 2004/17 EEC and Directive 2004/18 EEC.
[139] Lagen om offentlig upphandling (2007:1091) and Lagen om offentlig upphandling (2007:1092) inom områdena vatten, energi, transporter och posttjänster.
[140] Prop 2006/07:128. *Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster* p. 128.
[141] The prerequisite is corresponding to Art 1(9)(a-c) in Directive 2004/18 EEC.

interpreted autonomously with a uniform interpretation throughout the Union. Accordingly, the Court's case law is therefore guiding even when interpreting the wording of Chapter 2, 12§ LOU.[142] Initially there are three cumulative conditions that must be fulfilled if the LOU is to be applicable:

- Firstly, the body needs to be established for a specific purpose acting in general interest without a strict commercial character.
- Secondly, the body must have a legal personality.
- Thirdly, the body should be financed by the state, or regional as well as local authorities also governed by public law.[143]

These cumulative requirements might seem well defined in exemplifying what falls outside the application of the LOU. However, before proceeding to the next section it is important to mention the development of the 'functional approach'.[144] The functional approach can be seen as the Courts response to situations where bodies have not strictly fallen within the three stepped prerequisite, but it has nevertheless been deemed necessary to consider them as public bodies due to other overriding interests. This was first seen in the case of *Beentjes* where the Court diluted the requirement of a public body having a legal entity.[145] The Court considered that the attainment of the free movement objectives, which public procurement facilitates, could not simply be endangered by a formalistic approach to the notion of a 'public body'.[146]

A similar attitude by the Court was seen in subsequent cases where the requirement of a body being governed by public law was given a wide interpretation.[147] By referring to both public interest and the attainment of

[142] Bovis, Christopher., *EC Public Procurement: Case Law and Regulation*. [2006] p. 376.
[143] Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 288.
[144] See Case 31/87 *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635 where the functional approach was first established.
[145] Ibid para 12-13.
[146] Ibid.
[147] Case C-353/96 *Commission v. Ireland* [1998] ECR I-08565, connected to Case C-306/97 *Connemara Machine Turf Co Ltd v. Coillte Teoranta* [1998] ECR I-08761.

the internal market, the Court confirmed the ruling in *Beentjes*[148] by stressing that the functionality of the three stepped prerequisite had priority over its literal meaning, in order not to endanger the objectives of public procurement.[149]

4.2 The procurement process

The LOU, as well as the procurement directives, aims to regulate the process in which a public procurement is made. Hence, it is solely at the public bodies' discretion to decide what is to be procured in relation to what the public body requests.[150] However, since the process is controlled through legislation, it is of significant importance that a procuring body fully comprehends this regulated process, in order to procure exactly what was initially intended. The first step of procuring what a public body requests is to construct the description of what is supposed to be procured and what the conditions are for making a tender. These specifications for making a tender, which are susceptible to the principle of transparency as explained above, set an absolute framework for what can be procured.

4.3 Specification for making a tender

The specifications describing the object of a specific procurement contract, as well as the conditions for making a tender, are of significant importance for suppliers as well as the procuring unit in order to increase the efficiency of the procurement process.[151] There are several elements that the specifications shall consist of and will be discussed briefly.

i. There should generally be a description of what is required by the supplier in terms of financial status, criminal records etc. These requirements can be taken into consideration in different steps of the

[148] Case C-353/96 *Commission v. Ireland* [1998] ECR I-08565 para 32.
[149] Case C-353/96 *Commission v. Ireland* [1998] ECR I-08565 para 36-37 and Case C-306/97 *Connemara Machine Turf Co Ltd v. Coillte Teoranta* [1998] ECR I-08761 para 35.
[150] Ahlberg, Kerstin & Bruun, Niklas., *Upphandling och arbete i EU*. [2010] p. 23.
[151] Pedersen, Kristian., *Upphandlingens grunder – En introduktion till offentlig upphandling och upphandling i försörjningssektorerna*. [2012] p. 89.

process, in the qualification of tenderers or in the award of the actual contract.[152]

ii. Furthermore, there should be an actual specification of the object of the contract. [153] This part, which contain many difficulties and will be discussed further below, can usually contain technical requirements or other requirements related to the characteristics of the product.[154]

iii. Another predominant element that must be visible for the suppliers before submitting a tender is which award criteria that will be used in the procurement. The award criteria, which will also be discussed further below, can as previously mentioned be either the tender with the lowest price or the economically most advantageous tender.[155]

iv. Generally, there should also be requirements or specifications in regard to what different commercial- or business related conditions that will apply during the contract period. This could be related to matters such as payment conditions, financial fees and so forth.[156]

v. Finally, there should also be different administrative information made available in the specifications for a tender. For instance in relation to when the actual deadline for submitting a tender is, which award procedure that will be used and for how long a tenderer will be contractually bound to their tender.[157]

Among the essential elements to be found in a specification for a tender, as exemplified above, there are primarily two elements more relevant than the others in regard to the questions that this thesis aims to evaluate. Firstly, the specification of the object of the contract is essential. While at the same time as it is susceptible to the provisions and principles discussed in the previous chapters, it is also to a large extent regulated in the Directive and the LOU

[152] This is regulated separately in , see; Chapter 10 1-2§§ and Chapter 11 1-2§§.
[153] Bovis, Christopher H., *EU Public Procurement Law*. [2012] pp. 271-272.
[154] See; Chapter 6 LOU. See also: Semple, Abby., *Reform of the EU Procurement Directives and WTO GPA: Forward steps for sustainability?* [2012] pp. 9-10.
[155] Bovis, Christopher H., *EU Public Procurement Law*. [2012] pp. 410-412.
[156] Konkurrensverket., *Upphandlingsreglerna – En introduktion.* [2011] pp. 13-14.
[157] Pedersen, Kristian., *Upphandlingens grunder – En introduktion till offentlig upphandling och upphandling i försörjningssektorerna*. [2012] p. 91.

how this specification can be used without infringing the objectives that public procurement is trying to achieve.

Secondly, the award criterion chosen by the procuring body is an element of the procurement process that is also essential to the questions of this thesis. As previously mentioned, the criterion explored in this thesis is the 'economically most advantageous tender' and what limits it has in terms of socially responsible procurements.

These two elements will therefore, as opposed to the others, be considered in more detail below when the qualification and selection as well as the award procedures are discussed.

4.4 Qualification and Selection

Once the specification for a tender has been created and duly advertised according to the principle of transparency the tenderers can submit their tenders. By the submission of tenders a new phase will commence where the procuring body will have to qualify the tenders, and then award the contract to the supplier considered to have the economically most advantageous offer.

Before the actual qualification of the received tenders is made, which is limited to the advertised specification, the procuring body must make an initial control of the tenderers in comparison to the explicit exclusion grounds in Chapter 10, 1§ LOU.[158] If the tenderer falls within the ambit of these exclusion grounds, participation in the procurement is prohibited. The exclusion grounds are for instance if the tenderer has been criminally convicted for fraud, money laundering or participation in organised crime. Furthermore, there are also exclusion grounds that the procuring body may use as exclusion grounds on a voluntary basis in accordance with Chapter

[158] See: Directive 2004/18 EEC Art 45 (1) (a)-(d). See also: Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] pp. 140-143. and: Bovis, Christopher., *EC Public Procurement: Case Law and Regulation*. [2006] pp. 224-225.

10, 2§ LOU. [159] These exclusion grounds are generally more concerned with the financial standing of the tenderers, thus making it possible for the procuring body to ensure a sustainable relationship with the tenderer. Accordingly, the voluntary exclusion grounds are for instance if the tenderer is currently under investigation for bankruptcy, has outstanding taxes or has been found guilty of malpractice within its' line of profession.[160] These grounds, as well as those previously mentioned are as a general principle to be considered non-exhaustive grounds for exclusion.[161] However, specifications set out in terms of technical capacity etc. which will be discussed further below, is a list considered to be exhaustive.[162]

Once it is established that all the tenderers comply with these legislative minimum standards the next phase is to evaluate the tenderers in comparison to the specifications for the contract.[163] That evaluation should only be conducted in order to give an affirmative answer of whether the tenderers fulfil the specifications or not. Thus, at this stage there should be no examination by the procuring body to what extent the tenderers can fulfil the specified criterions in a qualitative sense.[164] This phase can therefore be seen as an addition to the legislative minimum level discussed above.

Furthermore, it is important to note that it is considered highly important to keep these different stages separate, in the sense that abovementioned qualification only constitutes a *prima facie* evaluation without further assessment.[165] This is simply a matter of equality between the tenderers, all tenderers with a potential to deliver the subject matter of the contract should

[159] See: Directive 2004/18 EEC Art 45 (2) (a)-(g).
[160] Prop 2006/07:128. *Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster* p. 128.
[161] Joined cases C-27/86, *Constructions et Enterprises Industrielles SA v. Association Intercommunale pour les Autoroutes des Ardennes*; C-28/86, C-29/86 *Ing A. Bellini & Co. S.p.A. v. Belgian State* [1987] ECR 3347. p. 3376.
[162] Joined Cases C-226/04-C-228/04 *La Cascina v Ministero della Difesa* [2006] ECR I-1347 para 22. See also: Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 378.
[163] Bovis, Christopher., *EC Public Procurement: Case Law and Regulation*. [2006] pp. 227-230. & Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 378.
[164] Ahlberg, Kerstin & Bruun, Niklas., *Upphandling och arbete i EU*. [2010] p. 24.
[165] Case T-345/03, *Evropaiki Dynamiki v Commission* [2008] ECR II- 341 para 177-178.

be equally allowed to at least qualify. Hence the general effect is an increase of eligible tenderers subsequently providing a higher level of competition.

Once the qualification and selection of which tenderers that will take part of the procurement and thus compete against each other is conducted, the final phase of the contract award procedure is to award the contract. Awarding the contract can be made through different procedures and conditions which will be briefly discussed below. One of these conditions or prerequisites is the 'economically most advantageous tender', which will be discussed more thoroughly below.

4.5 Award procedures

A procuring body is not only controlled by legislative provisions in terms of which conditions or aspects that are allowed to control the final award of the contract. The procedure in which this is done is likewise regulated through legislative provisions. There are different procedures a procuring body can use depending on the circumstances, all having different rationales and limits for being used.[166]

The choice of award procedures is regulated in Chapter 4 LOU,[167] and can generally be divided into two main categories, open and restricted[168] procedures.[169] The open procedure is merely what has been described above, any interested tenderer can submit their tender, get qualified and subsequently be evaluated by the procuring body. In such a procedure the procuring body can not engage in any kind of negotiation with a tenderer.[170]

The other category of restricted procedures provides for a more nuanced range of procedures which can be used in different sets of circumstances.

[166] Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 398.
[167] See also: Directive 2004/18 EEC Art 28.
[168] Terminology used by the author for the purpose of clarity.
[169] There are certain value thresholds on the procurement which controls the available procedures, however, for the purpose of this thesis only procedures above the value thresholds will be discussed. For full description of the procedures see: Bovis, Christopher., *EC Public Procurement: Case Law and Regulation*. [2006] p. 233 & Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 164.
[170] Konkurrensverket., *Upphandlingsreglerna – En introduktion.* [2011] p. 57.

The first restricted procedure that can be used is a so called selective procedure. In a selective procedure the procurement is advertised but only to the extent that potential tenderers are given an opportunity to report their interest for submitting a tender.[171] This is followed by the procuring body evaluating and qualifying these notifications of interest, and then invites a selected number to submit their tenders.[172] Equal to the open procedure, the procuring body is not allowed to negotiate with the different tenderers prior to awarding the contract in order not to distort the equality among the tenderers.[173]

Another procedure available is the negotiated procedure, regulated in Chapter 4, 3§ LOU, which is similar to the selective procedure but gives discretion to the procuring body to negotiate with the tenderers.[174] The negotiated procedure is generally advertised as the procedures above, but can under certain circumstances be initiated without advertising the procurement.[175] Once the tenders has been qualified, the procuring body can choose to award the contract or initiate a negotiation in order to fully customize a otherwise complex contract.[176]

These are the general procedures that can be used, although there are further procedures available that are not fully relevant for the purpose of this thesis but still exemplifies how there have been attempts by the legislator to make

[171] Pedersen, Kristian., *Upphandlingens grunder – En introduktion till offentlig upphandling och upphandling i försörjningssektorerna*. [2012] p. 63 & Konkurrensverket., *Upphandlingsreglerna – En introduktion.* [2011] pp. 57-58.
[172] Ibid.
[173] See e.g: Directive 2004/18 EEC Art 30(3).
[174] Konkurrensverket., *Upphandlingsreglerna – En introduktion.* [2011] p. 58 & Pedersen, Kristian., *Upphandlingens grunder – En introduktion till offentlig upphandling och upphandling i försörjningssektorerna*. [2012] p. 64 & Prop 2006/07:128. *Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster* p. 485.
[175] Directive 93/37 EEC Art 7(3)(b). See also: Bovis, Christopher., *EC Public Procurement: Case Law and Regulation*. [2006] p. 316. Prop 2006/07:128. *Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster* p. 204.
[176] Bovis, Christopher., *EC Public Procurement: Case Law and Regulation*. [2006] pp. 316-317. Konkurrensverket., *Upphandlingsreglerna – En introduktion.* [2011] p. 58. & Bovis, Christopher H., *EU Public Procurement Law*. [2012] pp. 178-180, 398-400.

public procurement more flexible to the complex environment it is designed to function in.[177]

A significant feature within all these procedures is however the regulated award criterions, one of which the procuring bodies must use whenever conducting a procurement. There are, as previously mentioned two predominant methods in which a contract is awarded. These will be discussed below in order to highlight the complexity surrounding these criterions.

4.6 Award criterions

The two different award criterions, the lowest- and alternatively the economically most favourable tender, are fundamentally different in nature when it comes to the evaluation and application of the same. The choice between them as well as the application is regulated in Chapter 12 LOU and describes how the conditions in the specifications for tender can be weighed against each other.[178] This is necessary in order guarantee that the procuring body can find either the lowest- or the economically most favourable tender while still respecting the overarching principles controlling public procurement.[179] Furthermore, it is also important to be aware of the fact that these two different criterions are equal, meaning that there is not a presumption that a procuring body should first and foremost choose one over the other.[180]

4.6.1 Lowest tender

When a procuring body chooses to use 'the lowest tender' as an award criterion, the application can generally be considered as unproblematic. There is however a restriction on the procuring body that needs to be borne in mind, when applying this criteria the procuring body cannot refer to any

[177] For further reading on these procedures see: Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] pp 152-168 & Bovis, Christopher H., *EU Public Procurement Law*. [2012] Chapter 8.
[178] See also Directive 2004/18 EEC Art 53.
[179] See Chapter 1 & 2 above as well as Chapter 1, 9§ LOU expressing the same principles.
[180] Prop 2006/07:128. *Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster* p. 405.

other qualitative criterion than the price when awarding the contract.[181] The specifications for tender, and the conditions stated therein, can therefore only be applied as a pure qualification for all tenderers interested in participating in the procurement. This means that the procuring body cannot make any qualitative assessment of the appropriateness of a specific tenderer beyond the qualification. The prerequisite of 'lowest tender' is therefore a "singular qualitative benchmark"[182] to be used when differentiating the tenderers.[183]

4.6.2 Most economically advantegeous tender

When the complexity of a contract, from the contracting authorities point of view, makes the criterion of the lowest tender unsuitable in order to procure exactly what is required by the contracting authority, the economically most advantageous tender is the alternative.[184]

Using this prerequisite provides for a significantly wider margin of discretion for the procuring body, generally resulting in a procurement as close to the subject matter of the contract as possible.[185] When this criteria is used, the contracting authority can take several aspects into consideration such as: quality, price, technical merits, functional characteristics, running costs, cost-effectiveness and technical assistance to name a few out of a non-exhaustive list.[186]

Bearing in mind the principles and legislative provisions discussed in the previous chapters, due to the margin of discretion granted to the contracting authority under this award criteria, the specifications for tender becomes

[181] Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 182. & Prop 2006/07:128. *Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster* pp. 405-410.
[182] Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 182.
[183] See: Directive 2004/18 EEC Art 55(1)(b), confirming that only suspicion of 'abnormally low tenders' can engage further weighing of other aspects of the tender by the request of the procuring body.
[184] See Directive 2004/18 EEG Art 53(1)(a) corresponding to Chapter 12, 1§ LOU.
[185] Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 180. & Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 168.
[186] Chapter 12, 1(2)§ LOU, & Prop 2006/07:128. *Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster* pp. 405 & Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 181.

highly relevant in order to safeguard mentioned principles. The specifications for tender must describe which aspects the contracting authority will take into consideration when determining which tender that is the most advantageous,[187] mere reference to e.g. legislation is not sufficient.[188] Furthermore, it must also be clear for the tenderers how these different considerations are weighted against each other, in essence a hierarchical order.[189] This can be expressed in different ways, the contracting authority can indicate the importance of each condition in e.g. percentages or by giving certain points to each condition, awarding the contract to the one getting the highest score.[190]

4.6.3 'Subject matter of the contract'

As highlighted above there is an intrinsic connection between the technical specifications and the award of the subsequent contract. The technical specifications can be held to delimit what the contracting authority can procure. Accordingly, the Court has expressed the importance of these technical specifications to be connected to the 'subject matter of the contract' in order to protect the objectives public procurement.[191] This is furthermore regulated explicitly in Chapter 12, 1§ LOU.[192]

This is of importance since the technical specifications controls the award procedure, hence 'the subject matter of the contract' can be seen as a safety valve towards the margin of discretion that is inherent in the application of the economically most advantageous tender.[193]

The Court has not considered that the 'subject matter of the contract' puts a contracting authority under an obligation to solely use criterions in the

[187] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 176.
[188] Case C-225/98, *Commission v. France* [2000] ECR I-7445 para 71.
[189] Directive 2004/18 EEC Art 53(2). & Bovis, Christopher., *EC Public Procurement: Case Law and Regulation*. [2006] p. 263.
[190] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 176.
[191] Bovis, Christopher H., *EU Public Procurement Law*. [2012] p. 419. Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 169.
[192] See also: Directive 2004/18 Art 53 (1)(a).
[193] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 335.

award procedure that are connected to economic benefits only.[194] However, as repeatedly mentioned, the principles and treaty provisions underpinning public procurement still had to be respected fully.[195] Conclusively, the notion of 'subject matter of the contract' can be seen as yet another measure from a Union level, assuring that the internal market principles cannot be overridden by extensively applied award criterions on a member state level.

4.7 Legislative foundation for socially responsible procurement

Socially responsible procurement, which for the purpose of this thesis can include a variety of considerations such as environmental, fair trade or more specifically animal welfare, has to some extent found its way into the legislative framework of public procurement.[196]

Chapter 1, 9a§ LOU explicitly refers to the possibility of expanding the economic foundation of the award criterions to include socially responsible considerations, even to the extent that it is expressed as something a contracting authority "should" do.[197] From a Swedish perspective this can be seen as a policy commitment where the state has made an active choice to encourage socially responsible public procurements. It should however be borne in mind that this provision does not in itself constitute a foundation for legal redress if the contracting authority fails respect this provision.[198]

As this provision stems from the Directive there are, although very limited, legislative provisions on socially responsible public procurement. Hence there is a certain flexibility afforded to contracting authorities in their

[194] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123 para 55. See also: Case C-379/98 *PreussenElektra* [2001] ECR-I-2099 para 73. demonstrating the indirect need for non- economic criterions to be objective in nature and protecting a common interest of the Union and its' member states.
[195] Ibid para 69. See also: Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617 para 91 & Case C-315/01 *GAT* [2003] ECR I-06351 para 73 stressing the importance of these principles being protected.
[196] See e.g: Semple, Abby., *Mixed offerings for sustainability in proposed EU Procurement Directives.* [2012].
[197] See also: Directive 2004/18 EEC Art 26. & Recital 1, 5, 46.
[198] Prop. 2009/10:18. *Nya rättsmedel på upphandlingsområdet.* p. 317.

assessment when awarding a contract. There is furthermore an express provision in the treaty concerning e.g. animal welfare, namely Art 13 TFEU. This treaty article clearly states how the Union has a common objective in protecting animals and their wellbeing. How this can be balanced against the other treaty provisions on free movement mentioned above is still a question left unanswered by the Court.

4.8 Concluding remarks

At this point of the study it is appropriate not only to conclude this chapter, but also to conclude the previous ones since the current state of law *(de lege lata)* has been described, and it should therefore be possible to provide guidance in response to the first two questions posed for this thesis.

It has become apparent that even though the Directive, as well as the LOU, gives detailed guidance on how the public procurement objectives are to be achieved there are still a variety of other judicial sources that affects the area of public procurement. As expressed in the Directive itself, amongst other things it aims to complement the achievement of a fully functioning internal market. Accordingly, the provisions on free movement and its' case law provide guidance on how the prerequisite of 'economically most advantageous tender' is to be interpreted and cannot simply be ignored.

Furthermore, general principles of EU law are another source of law that influences the area of public procurement as discussed above. Concerning the interpretation of the actual extent to which above mentioned prerequisite can be used in order to conduct socially responsible procurements, the principle of equal treatment and proportionality are, according to the author, of significant importance. This is so because at the current state of law, where the case law on the suitability of environmental and social criterions in public procurement is very limited,[199] the Court is likely to rely on these general principles.

[199] See e.g: http://ec.europa.eu/environment/gpp/case_law_en.htm

This has been demonstrated in the few cases that have reached the Court concerning the question of what criterions can be included in the notion of 'economically most advantageous'.[200] In these cases it is demonstrated how especially the Court gives primacy to the principle of equal treatment and the objective of a functioning internal market.[201]

As discussed in the previous chapter, the procedure surrounding public procurement is quite complex and detailed even for someone familiar with the legislation. However, there is also discretion granted to the contracting authority, mainly at the stage where the subject matter of the contract is defined as this defines the relevant market for the procurement. Additionally, discretion can also be found where the contract is awarded through the application of the regulated the award criterions. It is also evident, especially through the wording of LOU, that other criterions than purely economical can be taken into consideration. This can be seen as a codification of the above mentioned case law stating that nothing excludes a contracting authority from taking this into consideration. However, this is still dependent on the overriding principles being respected, such as free movement and equality among tenderers.

So forth, according to the author it is quite clear what principles that controls the interpretation of 'economically most advantageous', it is the principles controlling the area of law that public procurement forms part of, namely the internal market principles. As will be discussed further in the final chapter of this thesis, this conclusion is equal to having an internal market perspective, as opposed to the multipolicy perspective that will also be evaluated further below.[202]

[200] See: Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123 & Case C-448/01 *EVN AG and Wienstrom GmbH v Republic of Austria* [2003] ECR I-14527 & Case C‑462/10 *Evropaïki Dynamiki v EEA* [2012] n.y.r.
[201] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123 para 82 & Case C-448/01. *EVN AG and Wienstrom GmbH v Republic of Austria* [2003] ECR I-14527 para 66-72.
[202] For further distinction between them see: SOU 2013:12 *Goda affärer – en strategi för hållbar offentlig upphandling*. pp. 387-388.

Conclusively, the flexibility afforded to contracting authorities can therefore be viewed differently. If one is familiar with the internal market principles and its' case law, a contracting authority will have a considerable margin of discretion in their procurements as long as the foundational prerequisites are fulfilled. This is naturally premised on the "safety valve" test explained above, namely that everything a contracting authority does must be related to the subject matter of the contract.[203]

However, if the contracting authority is not familiar with these principles and how they interact with the national piece of legislation that implements the public procurement directive, understanding the scope 'economically most advantageous' can be extraordinarily difficult. Added to this issue is the national courts' understanding of the same question and how for instance in Sweden it is yet to be found a common understanding from the courts as well the legislator. Before expanding on these issues in the final chapter, the Swedish exemplification of animal welfare in public procurement will be given a background. This in combination with another complicating factor for this discussion, which is the system of harmonisation and how it affects the award criterions.

[203] For the full list provided by the Court see: Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123 para 64.

5 Animal welfare and Harmonisation

In Sweden, the area of animal welfare is primarily regulated through two pieces of legislation, the animal welfare act,[204] and the supplementary animal welfare ordinance.[205] In addition, there are several legislative acts from the Union in the form of regulations and directives regulating the area of animal welfare,[206] these acts are implemented and transposed through the Swedish legislation mentioned above.[207]

In regard to public procurement, the area of animal welfare of interest concerns animals that are produced for the purpose of being consumed as foodstuffs. Animal welfare for the protection of wild animals or animals kept for domestic use are not considered relevant, since for the purpose of public procurement, these animals are seldom subject to a procurement contract.

5.1 EU legislation and Swedish animal welfare

In general, legislative acts from the Union concerning the regulation of animal welfare are of a minimum harmonisation character.[208] Naturally, this means that among the member states of the Union some variances can be found if a comparison is made between the levels of protection that is afforded to animals.[209] One of these variances can be found in Sweden, which already before becoming a member of the Union in 1995 had a very high level of protection for animals in general, but for production animals in

[204] Djurskyddslag (1988:534). See also: Government offices of Sweden., *The animal welfare act & The animal welfare ordinance*. [2009] Jo. 09. 021.
[205] Djurskyddsförordning (1988:539). See also: Government offices of Sweden., *The animal welfare act & The animal welfare ordinance*. [2009] Jo. 09. 021.
[205] Djurskyddsförordning (1988:539).
[206] SOU 2011:75., *Ny Djurskyddslag*. pp. 182-190. See also: http://ec.europa.eu/food/animal/welfare/farm/index_en.htm
[207] SOU 2011:75., *Ny Djurskyddslag*. p. 173.
[208] See e.g: Directive 98/58 EEC Art 1.
[209] Svensson, Harald., *De ekonomiska verkningarna av de svenska djurskyddsreglerna för grisar*. [2011] Jordbruksverket (Swedish Board of Agriculture).

particular.[210] The effect of which, when Sweden entered into the Union, was that no significant harmonising effect occurred in this area of law since the Swedish level was already beyond satisfactory.[211]

As discussed during the introduction, this also meant that Sweden, by going beyond the harmonised level, incurred costs on the domestic production that was not present in the other member states. It is widely recognised that member states other than Sweden have a competitive advantage, in terms of production costs, by having more lenient rules regulating their production.[212] This has been particularly evident within the production of pigs where a few examples can be provided.

- Due to stricter requirements in Sweden, concerning the surface that must be available for each individual pig, the construction costs for stables have been significantly higher in Sweden than in other member states.[213]
- In Sweden, the floor surface for pigs have stricter requirements, generally meaning that the unobstructed floor area required in Sweden is higher than in other member states.[214] A low percentage of unobstructed floor area generally means a lower amount of work in terms of cleaning, resulting in lower costs for labour.[215]
- In terms of surgical procedures, there are general prohibitions that are harmonised on a Union level, e.g. concerning reduction of sharp corner teeth's or docking of tails in order to reduce injuries on the pigs.[216] In Sweden these prohibitions are even stricter, and surgical

[210] Dahlén, Björn & Kättström Helena., *Sveriges första femton år som medlem i EU – Djurskydd.* [2012] Jordbruksverket (Swedish Board of Agriculture). p. 1.
[211] Ibid.
[212] Svensson, Harald., *De ekonomiska verkningarna av de svenska djurskyddsreglerna för grisar*. [2011] Jordbruksverket (Swedish Board of Agriculture) p. 8.
[213] Ibid.
[214] Minimum requirements see: Directive 2001/88 EEC Art 1(1)(a)-(b). Swedish requirements see: http://www.jordbruksverket.se/amnesomraden/djur/grisar/mattistallochbyggnader.4.6beab0f111fb74e78a780001374.html
[215] Svensson, Harald., *De ekonomiska verkningarna av de svenska djurskyddsreglerna för grisar*. [2011] Jordbruksverket (Swedish Board of Agriculture) pp. 11-14.
[216] Directive 2001/93 EEC. Chapter 1(8).

procedures mentioned as possible under certain circumstances in Directive 2001/93 EEC are not even mentioned as possible in the Swedish animal welfare act.[217]

Abovementioned exemplifications only provide differences that are considered unfavourable from an economic perspective. There is another element that is commonly held as the counterweight to these financial repercussions. That counterweight is the heightened animal welfare that these differences provide for. There are naturally benefits for the animals as such with a high level of protection for their welfare, these benefits should produce positive financial effects.[218] Regardless of which, it should be possible to conclude without greater opposition that due to the Swedish animal welfare system as a whole, it is more expensive to produce animalistic products. It should be borne in mind that this conclusion does not necessarily mean that the profit in Sweden is lower than in other member states, at least not in the private demand side for foodstuffs.

5.2 Harmonisation through directives

Closely related to the animal welfare system put in place in Sweden is the system of harmonisation and its objectives. As mentioned, the area of animal welfare is generally regulated through so called minimum directives, namely directives that only set out the minimum regulatory level pursued by the Union. The opposite method is full harmonisation, setting out the objective pursued by the Union in the directive, leaving no margin of discretion to the member states to apply a higher level of protection.[219] Both systems aims to achieve the same overarching objective in the end, which is to enable free movement within the internal market by eliminating barriers to trade as far as possible.[220]

[217] See: Prop 1987/88:93 *om djurskyddslag m.m.* p. 27. Djurskyddsförordning (1988:539) 25§.
[218] Svensson, Harald., *De ekonomiska verkningarna av de svenska djurskyddsreglerna för grisar*. [2011] Jordbruksverket (Swedish Board of Agriculture) pp. 6-7.
[219] Hettne, Jörgen., *Legal analysis of the possibilities of imposing requirements that go beyond the requirements of EU law.* 2012-04-19 pp. 24-25.
[220] Ibid.

As ‘trade between member states’ and the functioning thereof is pivotal to the objective of directives, nothing precludes member states under EU law to impose a higher level than prescribed by a directive as long as the effect of which is purely internal.[221] However, when there is an effect on trade between member states there is an important distinction to be made between full- and minimum harmonisation in regard to public procurement. The distinction, which has developed through the Court’s case law,[222] turns full harmonisation directives into a maximum level for what can be required in public procurements. When the technical specifications are constructed one needs to be aware of this distinction because the margin of discretion for a contracting authority differs depending on the legislative framework surrounding the subject matter of the contract.

Specifically in two cases concerning a fully harmonising directive, namely the cases of *Medipac* and *Nordiska Dental* [223] which both concerns medical devices and their ‘CE’ marking, the Court has developed on the effect of fully harmonising directives.[224]

In the case of *Medipac* a hospital initiated a public procurement where the subject matter of the contract was surgical sutures, the sutures being procured was required to bear the ‘CE’ mark regulated by abovementioned directive. However, during the evaluation of tenders a certain product provided by *Medipac* was excluded from the procurement since it was considered technically unsuitable for the subject matter of the contract, even though it had the ‘CE’ mark.[225]

[221] See e.g: Case C-288/08 *Kemikalieinspektionen v. Nordiska Dental* [2009] ECR I-11031 para 19.
[222] See: Case C-6/05 *Medipac-Kazantzidis AE v. Venizelio-Pananio* [2007] ECR I-4557 & Case C-288/08 *Kemikalieinspektionen v. Nordiska Dental* [2009] ECR I-11031
[223] Ibid.
[224] Directive 93/42 EEC.
[225] Case C-6/05 *Medipac-Kazantzidis AE v. Venizelio-Pananio* [2007] ECR I-4557 para 22-24.

The Court reached a conclusion where they extended the state-obligation to accept products from other member states produced in compliance with a directive without possibility of further national regulation, to the contracting body as an agent of the state.[226] In the case, the concerns leading to the exclusion of Medipac's products was due to public health and safety. However, due to the safeguard procedures provided by the directive the contracting authority could only contact the responsible national authority in Medipac's country of origin.[227] The underlying principles that prevailed was therefore the principle of equal treatment and transparency, since the Court was not willing to grant the contracting authority the margin of discretion necessary in order for them to evaluate whether Medipac's product could endanger public health or safety.

In *Nordiska Dental* a question arose whether a Swedish legislative act prohibiting the exportation of dental amalgams due to environmental protection was compatible with EU law. The prohibition applied regardless of the fact that the products were already compliant with the 'CE' marking regulated in the medical devices directive.[228]

The Court concluded, with reference to *Medipac,*[229] that free movement of goods was the essential objective pursued by the directive. Accordingly, the directive aimed to replace all national legislation that was a possible obstacle to trade between member states.[230] As such, the directive therefore precluded the Swedish legislation from staying in effect, hence the directive set a maximum standard even in areas not strictly falling within the ambit of the directive. In this case Sweden advocated for the national legislation by reference to environmental protection, something the Court considered was already within the ambit of the directive.[231]

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[226] Ibid para 48.
[227] Ibid para 52-55 & Hettne, Jörgen., *Legal analysis of the possibilities of imposing requirements that go beyond the requirements of EU law.* 2012-04-19 p. 30.
[228] Case C-288/08 *Kemikalieinspektionen v. Nordiska Dental* [2009] ECR I-11031 para 12-16.
[229] Case C-288/08 *Kemikalieinspektionen v. Nordiska Dental* [2009] ECR I-11031 para 20.
[230] Ibid para 19-20.
[231] Ibid para 30.

5.3 Concluding remarks

The overview provided in this chapter on animal welfare is naturally very general and only aims to provide an exemplification for the reader. However, there is no denial that the Union's legislative framework in this area is very extensive and reaches all aspects of animal welfare. There is also no denial that the same legislative framework makes the procurement of foodstuffs all the more complex for a country like Sweden who has chosen to go beyond the harmonised level. This complexity will be addressed further in the final chapter.

Furthermore, from the cases discussed one can conclude that it is highly relevant for a contracting authority to be aware of the legislative background for the subject matter of the contract. The author believes that these cases make it clear that when the subject matter of a procurement contract falls within the ambit of a fully harmonising directive, the contracting authority cannot set out specifications that go beyond the harmonised level. The only possibility would be as an ex post measure when an overriding public interest needs to be protected, although within a limited set of circumstances as demonstrated by the cases above.

This means that for minimum harmonising directives, such as those in the area of animal welfare, the directives does not prohibit specifications for tenders going beyond the minimum harmonised level *per se*. However, one must not forget that the other requirements discussed still applies such as the respect of free movement provisions and general principles of EU law, something that will also be discussed further in the final chapter.

6 Social considerations in Public Procurement

Protecting the internal market, and the four freedoms within that market, must be held as the primary common denominator in all the chapters presented above. This can be seen as proof of the fact that the Union as we know it today was constructed as a purely economic cooperation among just a few member states. An economic cooperation that above all realised the value of unhindered trade as an engine for welfare, the importance of which is highlighted repeatedly by the Court as demonstrated above. This economic cooperation therefore has a teleological importance for the understanding of Union law, but can to some extent be seen as an anchor against the "new policy era" currently coming from the Union legislator. A policy development reflecting that the Union no longer delimits itself to reflecting economic aspirations between member states,[232] but also fundamental rights and as discussed in this thesis, social and environmental values. One can thus conclude that there is a tension between the old formation of an economic cooperation and the new Union of a social market economy. This tension is particularly evident when the limits of imposing social and environmental requirements in public procurements are analysed.

6.1 The limits of imposing social and environmental requirements

With the current state of law where the award criterions in the public procurement directives mainly refer to economic considerations, it should not be controversial to conclude that requirements or specifications going beyond economic considerations carries a burden of proof to be upheld. As demonstrated in chapter 2 and 3 this initially requires a "internal market test" as provided by the *Gebhard* case discussed above,[233] which needs to be

[232] See e.g: Adonnino, Pietro., *A People's Europé – Reports from the ad hoc Committe.* Bulletin of the European Communities. Supplement 7/85.
[233] Case C-55/94, *Gebhard* [1995] ECR I–4165 para 37.

fulfilled to the extent that requirements in a procurement going beyond the ordinary level of the award criterion must:

- be applied in a non-discriminatory manner;
- they must be justified by imperative requirements in the general interest;
- they must be suitable for securing the attainment of the objective which they pursue;
- they must not go beyond what is necessary in order to attain it.[234]

This test is known to everyone familiar with EU law and is a general test applying to many areas of Union law. However, within the area public procurement we know that there are further requirement to fulfil in order to go beyond economic requirements in your procurement specifications. As discussed, all requirements in a procurement must be connected to the subject matter of the contract.[235] For the author this means that when environmental or social requirements are set out in the tender specifications it must be relevant with such requirements for the specific product. At this stage the provisions in the procurement directive, discussed in chapter 4.7, supporting social or environmental requirements become relevant. Meaning that there is judicial support for expanding the award criterions beyond economic requirements although only if it is defendable within the legal framework just discussed.

So forth, the *de lege lata* position shows that one cannot solely focus on the procurement directive and the principles contained therein in order to be certain that a procurement is judicially defendable. The origin of public procurement, namely free movement and the general principles of EU law must be considered, as well as recognized as being superior to the provisions in the directive.

[234] Ibid para 37. See also; Case C- 19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663 para 32.
[235] Case C-234/03 Contse and others v. Ingesa [2005] ECR I-9315 para 70.

6.2 The Court's approach

There are a few cases provided by the Court of Justice where these limits to public procurement have been considered. According to the author, the Court has been more or less consistent in their reasoning throughout the limited amount of case law currently existing. Especially when it comes to demonstrating how public procurement first and foremost is an aid to achieve free movement on the internal market, and secondly a tool to implement new policies encompassing values going beyond economic cooperation.

The first case of relevance in that regard is a case already mentioned, namely the case of *Beentjes*.[236] In essence the facts of the case concerned whether it was possible in a procurement for public contracts to include in the specifications certain criterions that was aimed at combating long-term unemployment. Such a criteria, which then formed part of the evaluation of what would constitute the economically most advantageous tender, could be seen as something primarily stemming from a social policy and not an economic consideration, at least not in a short-term perspective.[237] The Court therefore had to consider whether such a condition could pass the test discussed above.

The Court acknowledged that a criterion such as this one could be compatible with the procurement directive, especially due to the nature of the directive as it makes possible for these "extensions" of the award criterions.[238] The Court therefore recognised such a requirement as being a condition of performance, something also recognised by the Commission,[239] and therefore compatible with the procedure in a procurement. The same reasoning was subsequently confirmed in a case brought by the Commission

[236] Case 31/87 *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635
[237] Hettne, Jörgen., *Legal analysis of the possibilities of imposing requirements that go beyond the requirements of EU law.* 2012-04-19 p. 33.
[238] Ibid.
[239] Case 31/87 *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635 para 28 & 37.

against France also concerning the combating of unemployment.[240] The Commission was of the opinion that such condition in the award criteria was incompatible with the directive. The Court was however of a differing opinion and held that the ambit of 'economically most advantageous tender' could include these types of social considerations.

What is interesting with both these cases is however that the Court does not leave the reasoning at this conclusion. In both cases, with the latter referring to the former, the Court points out that the compatibility of these social considerations in the award criteria is dependent on an unhindered free movement and a preservation of the principles therein.[241] Another interesting aspect of these two cases is that they possibly were the first step towards a change in the Commissions attitude towards this expansion of the award criterions. Following these cases the Commission published two different communications on how to include social and environmental considerations into public procurement.[242]

Another case that has been of significant importance to many scholars within this area of law is the case of *Concordia Bus* which has also been discussed previously in this thesis.[243] This case, although relating to a different directive,[244] concerned environmental considerations in public procurement for bus transportation and faced the Court with a question of whether it was compatible with EU law to have environmental requirements as part of the award criterions. The contracting authority had chosen to use the prerequisite of the 'economically most advantageous tender'. However,

[240] Case C-225/98, *Commission v France* (Nord-pas-de-Calais) [2000] ECR I-7445.
[241] Case 31/87 *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635 para 29 & Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] pp. 313-314.
[242] *Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement* [2001] OJ C 333/12. & *Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement* [2001] OJ C 333/27.
[243] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123.
[244] Directive 93/38/EEC.

in addition to evaluating price and quality of the service procured, extra points were awarded to tenderers who for instance had low gas emissions or noise levels on their transportations. The question of whether this was compatible with the procurement procedures laid down in the directive then arose in a dispute between *Concordia Bus, the city of Helsinki* and *HKL-Bussiliikenne.*

The Court's reasoning was similar to the previous cases, they started out by saying that the directive and the award criteria that could be used did not provide for an exhaustive list of what could be taken into consideration when evaluating what the economically most advantageous tender was.[245] Environmental protection or environmental considerations could therefore form part of the principal economic evaluation. However, the Court still maintained economic considerations to be of a superior nature while environmental or social considerations was recognised to have an influence.[246]

Furthermore, not surprisingly the Court concluded that although these non-economical considerations was compatible with the directive the main objective, which was decisive, was the preservation of the internal market and the principles it encompasses.[247] This was naturally closely connected to the overall requirement, which was reiterated by the Court, that the requirements must be connected to the subject matter of the contract in order for contracting authorities not being able to circumvent their limited margin of discretion.[248]

It has been suggested that this case took a leap forward compared to the previous case by the Court giving greater acceptance for social and

[245] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123 para 53-54. See also: Case C-19/00 *SIAC Construction Ltd v. County Council of the County of Mayo.* [2001] ECR I-07725 para 35.
[246] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123 para 55-57.
[247] Ibid para 61. Se also: Case 31/87 *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635 para 26 & C-19/00 *SIAC Construction Ltd v. County Council of the County of Mayo.* [2001] ECR I-07725 para 37.
[248] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123 para 59.

environmental considerations in public procurements.[249] However, this author is of a differing view since the Court, just as in the previous cases, stressed not only the importance of protecting the internal market but also how the 'subject matter of the contract' is crucial. When referring to the subject matter of the contract it means that when expanding the award criteria to include social or environmental considerations those considerations must still be able to form part of the main economic award criteria.[250] This means, according to this analysis, that the Court did not recognise environmental considerations as a freestanding award criterion in *Concordia Bus.* What they recognised was that economic considerations are not of a purely monetary nature at all times, but they can also include other values like it did in *Concordia Bus.* Therefore it can be held that the Court actually took a step back by stressing the importance of the criterions being connected to the subject matter of the contract. Mainly because Advocate General Mischo seemed to take a progressive view in concluding that the previous case law unquestionably made it possible to have an environmental award criterion.[251] This was stated without mentioning the 'subject matter of the contract' and the Court therefore approached the question more restrictively.

Lastly, an additional case deserves mentioning in this regard which is the case of *Wienstrom* where 'the subject matter of the contract' came to be of central importance once again.[252] In this case the contracting authority, i.e. the Austrian government, had initiated a public procurement on the supply of electricity. The question was whether it was compatible with EU law for the Austrian government to have as a requirement that a certain share of the electricity delivered should originate form renewable energy sources.[253]

[249] See e.g: Caranta, Roberto & Trybus, Martin., *The law of green and social procurement in Europe*. [2010] p. 22.
[250] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123 para 58.
[251] Ibid. Opinion by Advocat General Mischo para 91.
[252] Case C-448/01 *EVN AG and Wienstrom GmbH v Austria* [2003] ECR I-14527.
[253] Ibid para 15-26.

Again, the Court reiterated that the economically most advantageous tender could, in addition to economic considerations, consist of criterions that could not be translated into direct economic values.[254] It then continued by using the same reasoning as in the previous cases where it was stated that these award criterions could be used but only insofar as it is linked to the subject matter of the contract, does not give a unreasonable margin of discretion for the contracting authority, fulfils the principle of transparency by including the award criterions in the contract documents- and notice as well as with fundamental principles of EU law.[255]

According to the Court, nothing in this case suggested that electricity from renewable energy sources would not be related to the subject matter of the contract, hence their reasoning fell in line with the previous case law. According to the author however, a common denominator in these cases is the fact that even though social and environmental criterions have been accepted, they have still been of an inferior character to the economic criterions.[256] This is surely of significant importance to the Court since it means that it is still possible to "measure" in financial terms whether a contract has been awarded on the basis of objective criterions or predominantly on criterions of a more subjective character.

The importance of abovementioned cases cannot be underestimated. The Court has shown that within the system of public procurement as it stands today the primary objective is to ensure that member states conduct their business on the basis of economic considerations in order to ensure a competitive, price regulated market that first and foremost protects free movement. This definitely gives cause for concern among the member states, because as we will see, ambitious policies and legislation can be difficult to protect under the current public procurement system.

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[254] Ibid para 32-33.
[255] Ibid para 34. See also: Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123 para 69.
[256] See e.g: Case C-448/01 *EVN AG and Wienstrom GmbH v Austria* [2003] ECR I-14527 para 18.

6.3 The Swedish courts – dual conceptions

As previously discussed, the system of public procurement has encountered some difficulties in merging its' interests with the new era of a Union that encompasses social and environmental values. This has been particularly manifest in regard to the high level of animal welfare that Sweden has adopted, a level that generally cannot be used as an award criterion in procurements. This is due to the fact that when contracting authorities have set out award criterions that goes beyond the harmonised level of animal welfare, Swedish courts have been partly inconsistent in their adjudication on its' compatibility with EU law. Primarily two cases can be seen as proof of this statement where two Administrative Courts of Appeal, *prima facie* have reached two opposing conclusions.[257]

Both cases concerned more or less identical subject matters of the contract that was advertised for procurement. Two different municipalities initiated procurements for foodstuffs, primarily in the form of animalistic products such as milk, eggs and meat. In the specifications for tender the contracting authorities had specific requirements in regard to the products that went beyond the harmonised level in the Union. As opposed to previous Swedish case law were these requirements relied on the Swedish animal welfare act,[258] which due to the provisions on free movement of goods is a distinctly applicable measure, the contracting authorities referred to recommendations published by the Swedish organisation SEMCo.[259] These recommendations can be seen as a guide on how a contracting authority can use specifications and award criterions that are progressive without infringing EU law.

The requirements set out by the municipalities were e.g. that antibiotics had been used restrictively on the production animals, the animals had been

[257] Swedish Administrative Court of Appeal. Case nr: 2841-11 ("*Sigtuna*") & Swedish Administrative Court of Appeal Case nr: 2091-11 ("*Rättvik*")
[258] Pedersen, Kristian., *Upphandlingskrönikakrönika – Livsmedelshänsyn vid livsmedelsupphandlingar* p. 789.
[259] SEMCo is the Swedish government's expert body on environmental and other sustainable procurement. See: http://www.msr.se/en/

transported for a maximum duration of 8 hours and all animals had been anesthetized before slaughter.[260] The same contractor called Servera, a large organisation purchasing foodstuffs commonly providing these products for Swedish municipalities, appealed both cases. It was claimed that the contracting authorities could not control nor verify the requirements set out in the specifications, hence the principles underpinning public procurement had been breached.

In the first case *(hereinafter "Rättvik")* the Court found in favour of Servera and annulled the whole procurement. The Court was of the opinion that, as mentioned above, the contracting authority could not verify that the requirements were actually fulfilled by the means of an independent control mechanism.[261] The Court also found that certain certifications that were used in the award stage were incompatible with the directive since it had not been published in the call for tender or the specifications, hence the principle of transparency had been breached.

In the subsequent case *(hereinafter "Sigtuna")* an opposite conclusion was reached. The Court found that both the directives and regulations that regulated all the requirements set out, made it possible for a higher level of protection in the member states.[262] The Court therefore concluded that nothing precluded the contracting authority from setting higher requirements than the harmonised level in the specifications. The Court also added that all the requirements were possible for the contracting authority to verify within reasonable limits, taking a more lenient view than the Court did in the case of *Rättvik*.[263]

[260] Administrative Court of Appeal Case nr: 2091-11 ("*Rättvik*") pp. 5.
[261] Ibid pp. 8-9.
[262] Swedish Administrative Court of Appeal. Case nr: 2841-11 ("*Sigtuna*") p. 8.
[263] Ibid pp. 11-13.

6.3.1 Swedish court's reasoning – consistent with EU law?

When contrasting the abovementioned judgments against each other the administrative courts appear to have dual conceptions on how the area of public procurement is supposed to integrate itself with other areas of EU law. In the case of *Rättvik* the central question was whether the contracting authority was able to verify that all the requirements set out were actually fulfilled by those who submitted a tender. Naturally, the possibility of verification is important in the sense that requirements set out by a contracting authority shall not be possible to "misuse" without further consideration in order to give preferential treatment to a certain tenderer. However, the mere fact that the requirements set out goes beyond the harmonised level should not put an unreasonable burden on the contracting authority either. This has been confirmed by the CJEU which in essence accepts quite a low burden of controllability by the contracting authority.[264]

Furthermore, in the case of *Sigtuna* where a more lenient approach was taken, the administrative court managed to fully neglect the distinction between minimum- and full harmonisation. The administrative court firstly found that the requirements set out were consistent with EU law, as long as they fulfilled the general test discussed above, including the question of proportionality. The more unanticipated conclusion was however that the administrative court explicitly stated that it had no bearing on the case whether the area was fully harmonised or not.[265] It seemed to be the position of the administrative court that the obligation on the state not to legislate beyond the harmonised level was not applicable to a contracting authority,[266] disregarding previous statements by the CJEU that public bodies are an emanation of the state.[267]

[264] Case 368/10 *Commission v Netherlands* n.y.r. p. 65.
[265] Swedish Administrative Court of Appeal. Case nr: 2841-11 ("*Sigtuna*") p. 10.
[266] Ibid.
[267] See by analogy: C-188/89 Foster and others v British Gas [1990] ECR I-3313 para 20, 22. See also: Case C-6/05 *Medipac-Kazantzidis AE v. Venizelio-Pananio* [2007] ECR I-4557 & Case C-489/06 *Commission v Greece* [2009] ECR I-1797.

In conclusion, when studying these cases one can understand that *prima facie* the administrative courts have reached opposite conclusions in a similar set of circumstances, something that has been heavily criticised for making social and environmental procurements even more difficult.[268] However, there are differences in between the cases that make such criticism partly misguiding. In *Rättvik* the question was in essence not about the limits to public procurements, instead it was about respecting the equality between tenderers. What the administrative court in *Rättvik* should be criticised for is the overly restrictive interpretation of what is required by a contracting authority in terms of verification.

The case of *Sigtuna* is nevertheless more problematic in the sense that there was what seems to be a wrongful interpretation of EU law, specifically what obligations the system of harmonisation puts on a member state and their state controlled bodies. In *Sigtuna*, the administrative court essentially disregards the primacy of EU law by circumvention, in saying that a fully harmonised area does not constitute limits on what a contracting body can use as award criterions in a procurement. By making such a statement, the author is of the opinion that the administrative court disregards what public procurement is aimed at achieving, namely a fully functioning internal market. As has been repeatedly discussed, at the current state of law the treaty articles on free movement should act as guidance for the administrative court in this case. Hence, if a contracting authority is allowed to set requirements in a procurement beyond the harmonised level, the door is open for e.g. both distinctly and indistinctly applicable measures contrary to the free movement of goods.

For the purpose of this analysis, the Swedish courts' reasoning is relevant in the sense that even though the legislative framework for making social or

[268] http://upphandling24.idg.se/2.1062/1.481462/livsmedelsupphandling--ett-juridiskt-fiasko?queryText=r%E4ttvik & http://upphandling24.idg.se/2.1062/1.434320

environmental procurement is quite clear from an internal market perspective, the adjudication on a member state level can be equally unclear. As mentioned, the administrative court in *Sigtuna* seems to put public procurement outside the ordinary framework of free movement. Such a perspective will also form part of the final *de lege ferenda* discussion in this thesis. From a *de lege lata* perspective, it is however undeniable that public procurement is an integral part of free movement, and constructed to act as support for the same.

6.4 Socially responsible procurements – is it possible?

As previously mentioned, this thesis has taken an internal market perspective in the sense that the objective of public procurement has been the predominant guidance in understanding the limits of public procurement. There is however no denial that a limited group of scholars would strongly disagree with such an internal market perspective. The opposing view would thus be that the internal market perspective, which considers contracting authorities as market regulators, is founded on an ancient understanding of what the Union represents today.[269]

In the alternative to this ancient view, it has been held that public procurement is not as strictly bound to the internal market principles and the achievement thereof as might otherwise be suggested.[270] This is explained by the fact that public procurement was introduced already in 1971 and cannot be held to reflect the same values in the 21st century. It is held that the case law supports this in the sense that the Court e.g. in abovementioned cases have found social and environmental considerations to be compatible with EU law. Lastly, the newly proposed directive on public procurement is also held to support this position by giving further support for conducting public procurements going beyond economic considerations.

[269] Caranta, Roberto., *Commentaries on Jörgen Hettne's Legal analysis of the possibilities of imposing requirements in public procurement that go beyond the requirements of EU law*. [2012] p. 1.
[270] Ibid.

Aforementioned view is according to the author problematic in the sense that it tends to disregard essential elements that explains the current legal framework for public procurement. Although it is true that public procurement was introduced already in 1971 it does not mean that it represents an ancient view that the Court has remedied through its' subsequent case law. Firstly, the directives on public procurement have been repeatedly modified and the one most frequently discussed in this thesis was introduced in 2004.[271] As mentioned, in that particular directive it was clarified, and not necessarily supplemented, that it was possible to take environmental and social considerations into consideration in procurement.

This is more or less synchronised with the Court's case law. When studying the main cases in this area one can see that the Court did not expand public procurement into areas that was previously off limits. The Court clarified, similar to the Directive, what the limits were to public procurement. As has been repeatedly held in this thesis, the limits have always been what is consistent with free movement.

Surely, the view that has been presented in this thesis can come across as striving backwards, while many contracting authorities wish to strive forwards through more socially responsible procurements. As this thesis has demonstrated, the current system for public procurement with an economic prerequisite for awarding contracts as seen above, definitely limits the possibility of public procurements where environmental and social values are equal to the economic ones. The author is furthermore not of the opinion that the present legislative framework for public procurement can be stretched so far as to make environmental and social considerations a self-standing award criterion as suggested by e.g. *Roberto Caranta*.

In order for contracting authorities to be fully capable of procuring e.g. 'the socially most advantageous tender' a complete reform would be necessary

[271] Directive 2004/18 EEC.

where the strong connection between free movement and public procurement is removed. Such a reform would most likely be consistent with *Arrowsmith's* suggestion that contracting authorities defines the market rather than limit access to it when they procure a product.[272] Such a view puts contracting authorities outside the scope of EU law and merely gives them the position of a market participant. It is however quite clear that contracting authorities have to apply public procurement rules due to the simple fact that they are not market participants but part of state, hence they possess the power of a market regulator.

At present, the situation is different and economic considerations are still primary within public procurement. As a result there is a contradiction within the Union that remains to be solved. While the *Commissions 2020 Vision*[273] speaks quite ambitiously about how the Union must stay in the forefront of social and environmental development in order to maintain a competitive economy, legislative acts of the Union partly prevents this. We have seen how public procurement aims to protect a fully functioning internal market; such a protection does not necessarily include the values promoted by the 2020 Vision. Therefore the current public procurement system can counteract common goals of the Union. The system can naturally be reformed, the question is however if it would still be possible to protect the internal market if member states are given such a wide discretion for awarding public contracts. There is however no denial that this is a conflict that remains to be solved if the Union fully wishes to achieve the ambitious goals they have set out for the future.

[272] Arrowsmith, Sue et al., *EU Public Procurement Law: an Introduction*. [2010] p. 69
[273] Commission communication; *A strategy for smart, sustainable and inclusive growth.* COM 2020 [2010] p. 12.

7 Conclusion

As a conclusion it is interesting to discuss what the public procurement law could- or should be in order to overcome the difficulties discussed in this thesis. To some extent that would be a system that is not primarily driven by economic considerations. According to the author there are two alternative routes that can be taken if the Union wish to establish a new system that fully enables contracting authorities to have socially- or environmentally responsible procurements at their disposal.

The first route would be a Court driven development where the case law forces the system to change significantly; as a consequence, the procurement directives would subsequently have to be redrafted. The author believes that the Court could quite easily do so within the frame of the internal market test discussed above, something that can partially be advocated as happening already. As was seen in the abovementioned case of *Wienstrom,* there was an underlying directive specifically promoting the member states to use electricity produced from renewable energy sources.[274] The Court went further by stressing the fact that mentioned objective in the directive was a Community priority.[275] In essence, this gave the Court a judicially defendable counterweight against economic priorities, which was compatible with the internal market test even though the contracting authority was given wide discretion. This balancing act is where the Court could, in a more active manner change the current public procurement system significantly. Regrettably, the Swedish administrative court in the case of *Sigtuna* did not make a reference to the CJEU, something that in itself could be questioned since the case involved many complex EU law questions that remains unsolved. Had a reference been made however, the Court could have used Art 13 TFEU expressly promoting animal welfare as a common objective of the Union. Since it is a treaty article it could even

[274] Directive 2001/77 EC recital 18.
[275] Case C-448/01 *EVN AG and Wienstrom GmbH v Austria* [2003] ECR I-14527 para 41.

override the issues mentioned above about the harmonising level acting as a constraint on what can be requested in a public procurement. To take a step further, the Court could have made an exception in such a case for the otherwise distinctly applicable measure by a rule of reason approach. Advocate General Bot in the recent case of *Essent Belgium N.V.* has suggested such an expansion of the express derogations in Art 36 TFEU.[276]

As demonstrated, regardless of the fact that economic considerations and the protection of the internal market are primary within public procurement, there are ways in which the Court can override these constraints. Possibly, this might occur in a long-term perspective as we can observe how harmonising directives continue to enter into new fields, something that an activist Court could use in order for public procurement to catch up with the *2020 Vision.*

The second alternative would be a complete transformation of the public procurement system to the extent that public procurement is no longer connected to the free movement provisions, and the economic prerequisites for awarding a contract is completely reformulated. Not only would this be a much more far-reaching reform, it would also be a decision beyond the Union courts and require comprehensive policy decisions.

There are however many difficulties, according to the author, if such a transformation were to take place. Firstly, if the public procurement system were to be detached from the free movement provisions there would no longer be a safeguard against national protectionism. Secondly, to change the current prerequisite of the economically most advantageous tender would create issues in the sense that it would be much more difficult for the CJEU and the member states' courts to "measure" if a tender is awarded on objective considerations only.

[276] Case C-204/12-C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektricitets- en Gasmarkt* n.y.r.

Therefore, according to this conclusion the most realistic method to change the current public procurement system would be the "Court driven" approach. There is significant potential for the Court to initiate such a change if the Union legislator counters with harmonising measures that the Court can use within the internal market test to push social- and environmental procurements forward. However, this will of course raise another issue, namely the policy considerations behind further harmonising measures. It is unlikely that all the member states would be positive to extensive harmonising measures, especially if the Court then uses it to expand the internal market test within public procurements to include considerations that are not economic. This is due to the fact that it cannot be denied that many member states are still likely to use public procurements in a protectionist way if possible, confirming the importance of public procurement being connected to the free movement provisions. As mentioned initially in this thesis, there is a new draft on a public procurement directive, there are however no substantial changes that would push the development forward as proposed above. One could suggest that this is due to reluctance within the system towards leaving the strong economic link in the directive behind.

Therefore one can see that public procurement is more than just an isolated piece of legislation functioning independently. As a consequence it is not likely that the current system is about to change dramatically within the near future, and the economic cooperation that the Union started out to be will remain strong, regardless of the Union's new visions for the future.

"The market controls everything, but the market has no heart."

- Anita Roddick

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