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PO Box 117
221 00 Lund
+46 46-222 00 00

LEGAL ANALYSIS OF THE POSSIBILITIES OF IMPOSING REQUIREMENTS IN PUBLIC PROCUREMENT THAT GO BEYOND THE REQUIREMENTS OF EU LAW

JÖRGEN HETTNE¹

Summary: The EU procurement rules should be regarded as a vital part of the regulatory framework for the internal market in the EU. A contracting authority constitutes, from an EU law perspective, an integral part of the Member State and therefore it cannot ignore the basic principles that have evolved over the years and the political compromises that are the basis for the EU legislation that currently defines the conditions for the internal market. This framework applies with the same force when decisions are made in connection with public procurement contracts as it does when public decisions are made in other contexts. The procurement area is thus by no means unique. A fundamental requirement which must be respected in a public procurement process is that EU law is fully respected. This should not be more surprising than that domestic law must be respected. If harmonised legal requirements have been adopted by the Union, they cannot be ignored. If there are minimum requirements, they must be respected, but more stringent national measures are allowed if they comply with the Treaty provisions, the case-law and the general principles of law; 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 and they must not go beyond what is necessary in order to attain it. If no harmonisation measures have been adopted, only the latter requirements apply.

The conclusion to be drawn is that, regarding a public contract which has a cross-border interest, there is no immunity from EU law. Contracting authorities should evaluate the space available in EU law for imposing social or environmental requirements in two steps; first in relation to EU law in general, and second in relation to the subject-matter of the contract (the criteria must be linked to the objective of the contract and be suitable for ensuring that it is attained).

It is important to note that requirements that go beyond the level set by EU law can be justifiable as award criteria. Such criteria have a less restrictive effect on trade and usually

¹ Senior researcher and deputy head of agency at the Swedish Institute for European Policy Studies (SIEPS), Associate Professor of EU Law at the University of Lund.

provide a more proportionate and effective approach than other mechanisms. The Court of Justice of the EU has accepted that each of the award criteria used by the contracting authorities to identify the most economically advantageous tender must not necessarily be of purely economic nature. These requirements are easier to justify than admission conditions, selection criteria, technical specifications etc., which are capable of totally excluding tenderers that cannot meet them. However, an award criterion must not be formulated so that in practice it constitutes a disguised technical specification or similar. Particular caution is required when requirements are set higher than harmonised standards in EU law. It is difficult to tell when it is possible to go beyond such standards, but it should not be excluded for instance that it is permissible to encourage technical innovation or environmental precaution that goes beyond the harmonised requirements, provided that products or services that meet the harmonised requirements are not excluded from the procurement process. The same reasoning applies to other requirements, such as conditions of performance or conditions imposed on the production process. They should not, for the same reasons, be formulated in such a way as to preclude the participation of tenders satisfying harmonised EU requirements. However, it can be assumed that conditions of performance and conditions imposed on the production process are less likely to be fully harmonised as they are usually not directly related to the characteristics of a product or service.

Neither the new provisions in the EU Treaties regarding environmental and social considerations nor the proposed directive on public procurement alter the present legal situation. However, these developments underline that the EU pursues a multitude of interests which are not only economic. The possibility for the Member States to promote environmental or social interests in public procurement in support of existing EU legislation is therefore increased.

These conclusions apply equally to contracts that are not subject, or are subject to a limited extent (B-services), to the public procurement directives. The basic principles are applicable as soon as there is a cross-border interest.

Contents

- 1. Assignment..... 5
- 2. Disposition 6
- 3. The Role and Function of Procurement Rules in the EU Internal Market..... 6
- 4. Fundamental Internal Market Principles 7
 - 4.1 Introduction 7
 - 4.2 Equal treatment 8
 - 4.3 The principle of mutual recognition 9
 - 4.4 The principle of proportionality 10
 - 4.5 The combined requirements – the general EU law test..... 11
- 5. Procedural Safeguards – the EU’s Administrative Law..... 11
 - 5.1 Introduction 11
 - 5.2 Transparency 12
 - 5.3 The principle of good administration 13
 - 5.4 Right of defence 14
 - 5.5 The obligation to state reasons 14
- 6. Free Movement and Public Procurement 15
 - 6.1 Free movement of goods 15
 - 6.1.1 Introduction 15
 - 6.1.2 The Keck doctrine 16
 - 6.1.3 The issue of market access 17
 - 6.1.4 Article 36 TFEU and the doctrine of mandatory requirements..... 18
 - 6.2 Right of establishment and free movement of services..... 19
 - 6.2.1 Establishment 19
 - 6.2.2 Free movement of services..... 21
- 7. Harmonisation 23
 - 7.1 Legal basis for harmonisation 23
 - 7.2 Different characteristics of the harmonisation directives..... 24
 - 7.3 Methods of harmonisation..... 24
 - 7.3.1 Total or optional harmonisation 24
 - 7.3.2 The old approach and the new approach 25
 - 7.3.3 Minimum harmonisation 27
 - 7.4 The Relation between the Treaty and the Harmonised Rules 27
 - 7.4.1 The purpose of the harmonised rules must be considered 27
 - 7.4.2 Cases C-288/08 *Nordiska Dental* and C-6/05 *Medipac* 28
- 8. The Possibility to Impose Environmental and Social Requirements in Public Procurement 30

8.1 The present state of the law – de lege lata.....	30
8.2 EU procurement in the future – de lege ferenda	37
8.2.1 Discussions in the doctrine.....	37
8.2.2 Impact of new Treaty provisions.....	38
8.2.3 New proposal for a directive on public procurement	40
9. Final Reflections	41

1. Assignment

The present assignment has been entrusted to me by the Procurement Inquiry.² The purpose of the analysis is to shed light on the question of how much space there is for contracting authorities to impose environmental and social requirements that go beyond EU legislation which lays down minimum standards or fully harmonised standards in the affected area. The task includes:

1. Analyse and clarify how EU court cases which allow environmental and social considerations to be taken into account in public procurement are connected with the case-law arising from the case C-234/03 *Contse*. The decisions referred to are mainly C-448/01 *EVN Wienstrom*, C-379/98 *Preussen Elektra*, C-513/99 *Concordia Bus*, C-225/98 *Nord Pas de Calais* and C-31/87 *Beentjes*.
2. Analyse and describe what the ruling in *Contse*, *inter alia*, implies as regards the possibility to set environmental and social requirements that go beyond the EU minimum or fully harmonised level. In this analysis, the EU's general development regarding environmental and social matters should be considered. What is the significance, for example, of Article 11 TFEU, i.e., the obligation to integrate environmental protection requirements into the definition and implementation of the Union's policies and activities, for the possibilities of imposing environmental requirements that go beyond the EU minimum or fully harmonised level? Similarly, the relevant provisions regarding social protection, in particular Articles 8, 9 and 10 TFEU indicating that the Union in all its activities shall eliminate, take into account and aim to combat various problems of a social nature, shall be considered. The analysis shall also describe what effect the so-called mandatory requirements have on the possibility of setting more stringent requirements than those required by EU legislation in public procurement procedures.
3. Describe and analyse different approaches to the main issue that emerges in the relevant legal literature, for example, *Social and Environmental Policies in EC Procurement Law*, edited by Professor Sue Arrowsmith and Peter Kunzlik.
4. Consider how the conclusions in light of the above analysis apply to public procurement that is not subject, or subject only to a limited extent (B-services), to the procurement directives.
5. Analyse whether the European Commission's proposal for a new procurement directive for the classical sector is changing the conditions to set environmental and social requirements that go beyond EU legislation.

² Upphandlingsutredningen 2010, Fi 2010:06.

2. Disposition

I will commence the analysis by describing the role and function of procurement rules in the EU internal market. Thereafter, I will describe the Treaty provisions and principles relevant in this context. I will devote a special section to the issue of harmonisation as I think that a profound understanding of the harmonisation process in the Union is essential for the correct interpretation of the public procurement rules. After that I will discuss in more detail the possibility of imposing environmental and social requirements on public procurement and finally I will give my personal reflections on this issue.

3. The Role and Function of Procurement Rules in the EU Internal Market

In the 1992 Single Market Programme public procurement was highlighted in particular.³ The idea was to foster competition for public contracts throughout the EU. The guiding principles were transparency, non-discrimination and impartiality. These principles should be respected when awarding contracts within the public sector.⁴ The procurement rules were considered to be necessary and integral components of the rules concerning free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality.⁵

The White Paper thus stated:

81. Public procurement covers a sizeable part of GDP and is still marked by the tendency of the authorities concerned to keep their purchases and contracts within their own country. This continued partitioning of individual national markets is one of the most evident barriers to the achievement of a real internal market.

82. The basic rule, contained in Article 30 et seq. of the EEC Treaty [now Article 34 TFEU], that goods should move freely in the common market, without being subject to quantitative restrictions between Member States and of all measures having equivalent effect, fully applies to the supply of goods to public purchasing bodies, as do the basic provisions of Article 59 et seq. [now Article 56 TFEU] in order to ensure the freedom to provide services.

From a historical perspective it is thus obvious that the Treaty Articles and fundamental principles are intended to apply fully to decisions by contracting authorities.

Against this background, a comprehensive regulatory framework has been built up as regards procurement in the Union. An update and consolidation took place on 31 March 2004 through the adoption of Directives 2004/18/EC, on public procurement procedures for works, goods

³ Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985) COM(85) 310, June 1985.

⁴ Cf. Bovis, C., *EC Public Procurement: Case-Law and Regulation*, OUP 2005, p. 12.

⁵ *Ibid.* p. 13.

and services, and 2004/17/EEC on the coordination of public procurement procedures in the fields of water, energy, transport and postal services, the so-called Utilities Directive. In Sweden, these Directives have been implemented by the Act on Public Procurement (2007:1091), and the Act on Procurement in Water, Energy, Transport (2007:1092).

The EU's procurement directives are based upon fundamental internal market principles. EU procurement law therefore must be seen as part of the overall regulatory framework for the EU internal market and must be interpreted in this light.⁶ This is the reason why some procurement principles manifest themselves outside the scope of the specific directives. According to established case-law of the Court of Justice of the European Union (CJEU) concerning the award of contracts which, on account of their value, are not subject to the procedures laid down by Union rules, the contracting authorities are nonetheless bound to comply with the fundamental rules of the Treaty and the principle of non-discrimination on the ground of nationality in particular.⁷ However, the application of the fundamental Treaty rules and general principles in public procurement is based on the premise that the contracts in question are of certain *cross-border interest*.⁸ The possibility of such an interest may be excluded in a case, for example, where the economic interest at stake in the contract in question is very modest.⁹ However, in certain cases, account must be taken of the fact that the borders straddle conurbations which are situated in the territory of different Member States and that, in those circumstances, even low-value contracts may be of certain cross-border interest.¹⁰

It should be noted that even where a particular contract falls below the threshold of one of the EU procurement directives (and even if it lacks cross-border interest), the Swedish public procurement legislation is applicable. The Swedish procurement law therefore has a much broader scope than the EU procurement directives and principles.

4. Fundamental Internal Market Principles

4.1 Introduction

Since procurement law basically expresses fundamental internal market principles and should be interpreted in that light, understanding of these principles is crucial to this assignment. The four freedoms of movement – of goods, persons, services and capital – is articulated as prohibition of discrimination. In the case-law, these prohibitions have gradually grown from

⁶ Cf. Slavicek, *Upphandlings olika ansikten*, ERT 2002, s. 17; B. J. Drijber and H. Stergiou., *Public Procurement Law and Internal Market Law*, CMLRev 2009, 805.

⁷ See Case C-324/98, *Telaustria and Telefonadress* [2000] ECR I-10745, para 60 and order in Case C-59/00 *Vestergaard* [2001] ECR I-9505, para 20. See also Case C-264/03 *Commission v France* [2005] ECR I-8831, para 32 and Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, para 33.

⁸ See, to that effect, Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, para 29.

⁹ See, to that effect, Case C-231/03 *Coname* [2005] ECR I-7287, para 20.

¹⁰ See Case C-147/2006 and C-148/2006, *Secap* [2008] ECR I-3565, para 31.

purely non-discrimination clauses to general prohibitions of all measures imposing restrictions on the freedom of movement within the internal market. Only measures based on so-called mandatory requirements are acceptable. This legal development is based, not only on the principle of equal treatment, but also on the principles of mutual recognition and proportionality. It is therefore important to describe these principles briefly and also to provide examples of their impact on procurement.

4.2 Equal treatment

The principle of non-discrimination or equal treatment can be considered an underlying principle of many areas in Union law. This principle is derived from the general principle of non-discrimination on grounds of nationality, the prohibition of restrictions on the four freedoms (goods, persons, services and capital), the prohibition of fiscal discrimination (indirect taxes), the prohibition against sex discrimination and, finally, the prohibition against discrimination in relation to common organisations of agricultural markets. Each of these prohibitions is illustrative of the underlying general principle of non-discrimination or equality of treatment.¹¹ Hence, the CJEU has developed a general principle of equal treatment which precludes comparable situations from being treated differently unless the difference in treatment is objectively justified. It also precludes different situations from being treated in the same way unless such treatment is objectively justified.¹²

This implies that in public procurement the general rule of equal treatment is concerned with all kinds of unequal treatment between tenderers. The basis for this is that procurement law forms part of EU law, and the principle of equal treatment is a *general* principle of this law.¹³ This means that bidders must be treated equally, both when they formulate their tenders and when tenders are being assessed by the contracting authority.¹⁴ Thus, the Court of First Instance (now the General Court) has stressed that the Commission (when it acts as a contracting authority) is responsible for ensuring equal treatment, and thereby equality of opportunity for all the tenderers, at each stage of a tendering procedure.¹⁵

Unequal treatment can occur in different ways. There may be discriminatory rules or practices, but even so-called indirect discrimination, which will not follow from the rule or practices itself but from its factual effects, is prohibited. A particular difficulty in applying the principle of equality lies in assessing whether the situations to be compared are really equivalent. Only then is it permissible to consider whether there is discrimination and if there might be objectively justified reasons for this.¹⁶

¹¹ See J. Usher, *General Principles of EC Law*, Longman 1998, p. 12.

¹² Cf. T. Tridimas, *General Principles of EU Law*, Oxford University Press, 2nd edn, 2005, p. 61 f.

¹³ Cf. Case C-243/89, *Commission v. Denmark* [1993] ECR I-3353, para 33 and C-19/00, *SIAC Construction* [2001] ECR I-7725, para 33.

¹⁴ Case C-19/00, *SIAC Construction* [2001] ECR I-7725, para 34.

¹⁵ Case T-145/98, *ADT Projekt v Commission* [2000] ECR II-387, para 164.

¹⁶ See J. Hettne, *Rättsprinciper som styrmedel*, Norstedts juridik 2008, p. 122.

In its original form the principle of equal treatment imposes only a requirement for *national treatment*, i.e., foreign goods, services, companies, workers and capital must be accorded the same treatment as domestic goods and services etc. This meaning of the prohibition of discrimination was very important in the past because there was a significant element of national protectionism concealed in national regulations when the European integration process began. However, the principle of national treatment is not enough to make the internal market work. It does not eliminate the differences in national legislation which tend to impede the free movement of goods etc. In theory, all 27 Member States can, according to the principle of national treatment, impose their own requirements for certain products which means that only a foreign product or service that meets the national requirements in a specific Member State can be marketed there. Companies seeking to operate in several countries would then have to split up their production in order to satisfy different national requirements, which would prevent economies of scale and the development of competitive European companies, and thus, it is generally believed, entail higher consumer prices in the EU.

4.3 *The principle of mutual recognition*

In addition to treating foreign goods and services in the same manner as domestic goods and services, the Member States are bound to recognise each other's rules and specifications to be *prima facie* equivalent. This principle, which goes under the name of mutual recognition, was established for the first time in the case *Cassis de Dijon*.¹⁷ That case-law has now been followed with a specific regulation on mutual recognition in the area of free movement of goods.¹⁸ However, the principle has also been applied in relation to free movement of persons and services, particularly in terms of mutual recognition of diplomas and other qualifications. This principle of mutual recognition means that contracting authorities must accept the technical specifications, checks, certificates or similar documents of another Member State if they can be considered equivalent to the domestic counterparts.

The principle presupposes a high level of mutual trust between the Member States. It is obvious that this trust is still lacking to some extent and that the principle is tested each time the number of Member States increases. Quite recently, several cases which concern mutual recognition of driving licences have been referred to the CJEU, showing some resistance to this principle.¹⁹ In the future, the mutual recognition principle is likely to be put under an even more difficult test when the EU criminal law starts to develop, as judgments and proceedings in criminal matters must then be mutually recognised.

¹⁷ Case 120/78, *Rewe Zentral (Cassis de Dijon)* [1979] ECR 649.

¹⁸ Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC, OJ L 218, 13.8.2008, p. 21.

¹⁹ See, for example, the joined cases C-329/06 and C-343/06, *Wiedemann and Funk* [2008] ECR I-4635.

4.4 The principle of proportionality

An effective tool to ensure that legitimate trade restrictions are not too far-reaching is the principle of proportionality. This principle requires that a measure restricting trade must be proportionate to its objectives. The principle of proportionality means that the interests of freedom of movement and other interests have to be balanced. It thus protects individual traders from unnecessarily stringent intervention by public authorities. The principle of proportionality has been important for the development of EU law and has in particular been used by the CJEU to ensure that legitimate restrictions on trade, i.e., restrictions which are based on reasons relating to different public interests, do not cause excessive disruption of trade within the EU. There are several examples of application of the proportionality principle in the case-law. One example is the *Lääpä* case, where the Court stated that national rules concerning lotteries which restrict the free movement of services are permissible only if those measures are justified by overriding reasons relating to the public interest, are such as to guarantee the achievement of the intended aim and do not go beyond what is necessary in order to achieve it.²⁰

The proportionality test is usually divided into two parts:

- (i) a measure must be suitable to achieve a legitimate aim.
- (ii) a measure must be necessary to achieve that aim.

This means also that there should be no other less restrictive means capable of producing the same result.

In public procurement this means that contracting authorities must evaluate if the requirements, e.g. the technical specifications and award criteria, are indeed necessary and appropriate in relation to the subject-matter of the contract. For example, the authority may not impose technical, professional or financial demands on tenderers which are excessive and disproportionate to the objective of the contract.

The principle of proportionality therefore generally implies that the requirements for bidders must be reasonable and not too far-reaching. However, it may also limit the authority's discretion during the procurement procedure. In the case *Tideland Signal v Commission*,²¹ the Court of First Instance observed that where there is a choice between several appropriate measures, recourse must be had to the least onerous. In that case, the Court held that the contracting authority had to choose whether to reject a bid or request clarification of the company Tideland Signal. On the facts of the case the Court found that it was contrary to the principle of proportionality to reject the tender. The Commission's decision was for this reason *inter alia*, declared unlawful.

²⁰ Case C-124/97, *Lääpä* [1999] ECR I-6067, para 31.

²¹ Case T-211/02, *Tideland Signal v. Commission* [2002] ECR II-3781, para 39.

4.5 The combined requirements – the general EU law test

The CJEU summarised the requirements which national authorities have to respect in the *Gebhard* case.²² The Court held in this case that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:

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

By the general wording of this judgment it clearly follows that equal treatment is not enough. In fact, the Court has introduced a general EU law test (or internal market test) that applies to all national measures that hamper free movement on the market. All measures should be non-discriminatory, proportionate and based on a recognised general interest. This test must be respected also by contracting authorities in public procurement which follows very clearly from the case C-234/03 *Contse*²³ (see below). This is a concrete expression of what was already observed above, namely that the Treaty Articles and fundamental principles fully apply to decisions by contracting authorities.

5. Procedural Safeguards – the EU’s Administrative Law

5.1 Introduction

It should further be observed that general principles of administrative law, such as transparency, good administration, rights of defence, the obligation to state reasons and access to justice have also become more and more important in cases regarding free movement, state aid, public procurement and competition law. These principles in the early days provided guidance for the development of EU law especially within the framework of administrative procedures. Such procedures are typically relevant when the Commission is dealing with matters in, for example, competition and state aids and also when power has been attributed to particular EU authority, such as, for instance, the Office for Harmonisation of the Internal Market (OHIM). A reason why general principles of law have been particularly important in this context is that the EU lacks a general administrative law such as normally exists in the Member States. On the basis of general principles of law, the CJEU has instead created an

²² Case C-55/94, *Gebhard* [1995] ECR p. I-4165.

²³ [2005] ECR I-9315, para 25.

unwritten European administrative law. the most basic principles of which are enshrined in the Charter of Fundamental Rights. Article 41, with the heading ‘Right to good administration’, is worded as follows.

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions. ...

In addition, Article 47 provides:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Of particular interest in the present context is that the general principles of administrative law are important not only in connection with administrative processes before EU institutions. The CJEU has also invoked general legal principles of an administrative law nature in order to define the meaning of the four freedoms, i.e., free movements of goods (including the provisions on State monopolies), services, persons and capital. It is therefore permissible to speak of an *administrative law dimension of free movement*.²⁴ This development is highly relevant in the area of public procurement and can explain the emphasis attached to the requirement of transparency.

5.2 Transparency

In the area of public procurement, there is a clear link between the principle of equal treatment and transparency. According to the CJEU, the contracting authorities are permitted

²⁴ Cf. Hettne, *Rättsprinciper som styrmedel*, ch. 4.

a significant margin of discretion in the selection of tenders, which puts them in a similar position to a regulatory authority having power to impede access to the market. To limit this discretion and make sure that the procurement process is fair, i.e., it meets the requirement of equal treatment, contracting authorities must carefully formulate criteria for the evaluation of tenders and the award of contracts in advance. Against this background, the CJEU has held:

that the principle of equal treatment, which underlies the directives on procedures for the award of public contracts, implies in particular an obligation of transparency in order to enable verification that it has been complied with.²⁵

Furthermore, the Court has emphasised that the obligation of transparency consists in ‘ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed’.²⁶ Therefore, the procedure for comparing tenders has to comply at every stage with both the principle of equal treatment of the tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders.²⁷

The Court has explained its case-law by stating that the grant of a contract or concession, in the absence of transparency, to an operator located in the Member State of the awarding authority constitutes a difference in treatment to the detriment of operators located in other Member States, who have no real possibility of manifesting their interest in obtaining the contract or concession in question. Such a difference in treatment is contrary to the principle of equal treatment and the prohibition of discrimination on grounds of nationality, and constitutes indirect discrimination on the grounds of nationality prohibited by Articles 49 and 56 TFEU, unless it is justified by objective circumstances.²⁸

5.3 *The principle of good administration*

The principle of good administration is a general principle of Union law that requires good management in all administrative procedures in the EU.²⁹ The principle might not in itself constitute a specific procedural safeguard, but it can certainly support the interpretation of more specific principles and rules. This view is supported by the Charter of Fundamental Rights in the EU where the principle is mentioned in Article 41.1, quoted above, which includes in good administration; the right of every person to be heard, the right of every person to have access to his or her file and the obligation of the administration to give reasons

²⁵ See, to that effect, case C-275/98 *Unitron Scandinavia and 3-S v Ministeriet for Fødevarer, Landbrug og Fiskeri* [1999] ECR I-8291, para 31; Case C-324/98 *Telaustria and Telefonadress v Telekom Austria* [2000] ECR I-10745, para 61.

²⁶ Case C-324/98 *Telaustria and Telefonadress v Telekom Austria* [2000] ECR I-10745, para 62.

²⁷ Cf. J. Hettne and U. Öberg, *Fritt skön och domstolskontroll vid offentlig upphandling*, *Svensk Juristtidning* 2005, p. 192 and B. J. Drijber and H. Stergiou, *Public Procurement Law and Internal Market Law*, *CML Rev* 2009, p. 805.

²⁸ See, for instance, case C-347/06 *ASM Brescia* [2008] ECR I-5641, paras 59 and 60.

²⁹ Cf. case T-54/99, *max. mobil* [2002] ECR II-313, para 48.

for its decisions. The right to be heard and access to the file form parts of the principle of right of defence which will be discussed below and the obligation to give reasons is also a separate principle.

The Court of First Instance (now the General Court) has stressed several times that the principle of good administration shall be respected by contracting authorities in public procurement procedures.³⁰

5.4 Right of defence

The principle of the rights of defence (Fr. *droits de la défense*) includes a collection of procedural safeguards aimed at achieving a fair trial or administrative procedure, such as the right not to be condemned unheard, and the right to have access to the file. The principle is particularly important in competition law, but has also been applied in other areas, including the procurement area.

A good example is the judgment of the Court of First Instance in *New Europe Consulting and Brown v Commission*.³¹ The applicants in the case complained about a fax sent by the Commission which seriously harmed the image of the company. By sending this fax without either informing them of the accusations made against them or making further investigations, the Commission acted, according to the applicants, in breach of their right to be heard. The Court of First Instance declared that respect for the rights of the defence in any proceeding initiated against a person and liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceeding in question. That principle requires that any person who may be adversely affected by the adoption of a decision should be placed in a position in which he may effectively make known his views on the evidence against him which the Commission has taken as the basis for its decision. Against this background, the Court held that the Commission had infringed the applicants' rights of defence.

5.5 The obligation to state reasons

The CJEU has imposed stringent requirements in its case-law as regards the statement of reasons when it comes to individual acts. The following requirements must be met:

– The act must disclose in a clear and unequivocal fashion the reasoning followed by the Union authority which adopted the measure in question in such a way as to make the persons

³⁰ See e.g. case T-231/97, *New Europe Consulting and Brown v Commission* [1999] ECR II-2403, para 41, Case T-139/99, *AICS v Parliament* [2000] ECR II-2849, para 41 and Case T-211/02, *Tideland Signal v. Commission* [2002] ECR II-3781, para 37.

³¹ *New Europe Consulting and Brown v Commission*.

concerned aware of the reasons for the measure and thus enable them to defend their rights, and

– The Courts must be able to exercise their supervisory jurisdiction.³²

The obligation to state reasons in public procurement procedures was touched upon in the *Renco* case.³³

6. Free Movement and Public Procurement

Given that the general principles of law are applicable in the context of public procurement, it can hardly be surprising that the Treaty provisions also must be observed in this context. This is particularly true as regards the provisions on free movement of goods and services and the freedom of establishment. Some examples will be presented in the following.

6.1 Free movement of goods

6.1.1 Introduction

Article 34 TFEU reads as follows:

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

This provision has been interpreted broadly and the prohibition of measures having equivalent effect to quantitative restrictions therefore has a considerable scope. The root of this wide scope was the Court's ruling in *Dassonville*,³⁴ where it ruled that a measure having equivalent effect could be 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.

After *Dassonville*, the question arose whether any measure having a negative impact on trade was prohibited. The exceptions in the Treaty were few and had to be interpreted strictly. Against this background, the Court created a rule of reason making it possible for different interests to be taken into account. This happened in the above mentioned case of *Cassis de Dijon*.³⁵ In this case, the Court held that in the absence of common rules relating to the production and marketing of a product it is for the Member States to regulate all matters relating to the production and marketing of the product on their own territory. Obstacles to

³² See case C-350/88, *Société française des Biscuits Delacre v Commission* [1990] I-395, para 15.

³³ Case T-4/01 *Renco SpA v Council* [2003] ECR II-171, para 92.

³⁴ Case 8/74, *Procureur du Roi ./. Dassonville* [1974] ECR 837.

³⁵ Case 120/78, *Rewe Zentrale AG ./. Bundesmonopol verwaltung für Brantwein* [1979] ECR 649.

movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. As a general rule, the so-called Dassonville definition still applied, but it was possible to justify indistinctly applicable national measures which were based upon mandatory requirements.

The starting point is therefore that Member States must mutually recognise products that are lawfully produced and marketed in another Member State (the mutual recognition principle, mentioned above). The case-law in connection with the *Cassis de Dijon* case is often referred to as the Cassis doctrine. What is meant by this is the circumstances under which national measures with negative effects on trade may be accepted under Union law. One important condition is that the national measure must not apply differently with regard to imported and domestic goods. Another is that there should be no EU harmonisation which lays down common safety standards in the relevant field. Furthermore, the measure must be based on a recognised public interest (mandatory requirement).

Article 34 TFEU has been applied in relation to public procurement in, for example, Case 45/87 *Commission v Ireland* ('Dundalk').³⁶ This case concerned a specification requiring pipes for construction works to conform to an Irish standard. This applied to domestic and imported products alike. However, in practice it had a greater impact on imported products since, in reality, only one Irish firm produced pipes complying with the standard and the requirement therefore was regarded as involving indirect discrimination that was a hindrance to trade. The CJEU also concluded that such a hindrance to trade could not be justified under any of the derogations in Article 36 TFEU or mandatory requirements in accordance with the case-law.

6.1.2 The Keck doctrine

The scope of Article 34 TFEU has since been clarified and to some extent limited. According to the so-called Keck doctrine³⁷, certain types of non-discriminatory selling arrangements which do not serve to hinder trade between Member States fall outside Article 34. The measures involved are those which are not directly related to the characteristics of the product, but rather concern the conditions for the distribution of the product, such as rules on the sellers opening hours and alike.

In the Keck case, the Court stressed that to be a selling arrangement the measures must apply to all relevant traders operating within the national territory and must affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The case concerned a French rule which, with certain exceptions, provided

³⁶ Case 45/87, *Commission v Ireland* [1988] ECR 4929.

³⁷ Cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] I-6097.

that a retailer was not allowed to sell goods at a loss. The rule was not considered as a measure having equivalent effect to quantitative restrictions. The *Keck* case demonstrates that regulations affecting the sale of a product (selling arrangement) should be regarded differently from rules related to designation, form, size, weight, composition, presentation, labelling or packaging of the product. Rules of this kind, usually called technical barriers to trade, always fall within the scope of Article 34 TFEU, while the rules relating to the sale of a product are not necessarily covered.³⁸

In public procurement the CJEU has held that Article 34 TFEU applies to a specification concerning the characteristics of products. In Case C-359/93, *Commission v Netherlands*,³⁹ the CJEU ruled that a requirement to use the UNIX operating system in a contract for an information technology system infringed Article 34 TFEU even though it did not favour domestic products either directly or indirectly. This is consistent with the approach in *Keck*. So far there is, however, no procurement case involving a requirement concerning a certain ‘selling arrangement’ which can fall outside the scope of Article 34.

6.1.3 The issue of market access

If a selling arrangement falls within the scope of the *Keck* doctrine it is presumed not to impede market access for foreign products, and is for this reason not caught by Article 34 TFEU. However, there are certain types of rules which, despite not affecting the products as such, have been considered to be covered by Article 34 TFEU. One example is the Swedish ban on alcohol advertising in periodicals, which was tried in the so-called *Gourmet* case, and was not considered to be a selling arrangement within the meaning of *Keck*.⁴⁰

Thus, it appears important to determine whether a particular measure impedes market access. The crucial criterion for the *Keck* doctrine to apply is, according to many qualified commentators, whether the measure significantly impedes market access or not.⁴¹ The Court has therefore concluded that an advertising ban would hinder the marketing of the products and hence access to them on the market.⁴² In later cases regarding product use, the Court has instead used the terms ‘considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State’.⁴³ If a non-discriminatory selling arrangement that otherwise meets the conditions of the *Keck* doctrine does not have a significant impact on the behaviour of consumers and therefore does not affect the access of that product to the market, it is therefore not caught by Article 34 TFEU.

³⁸ See cases C-292/92, *Hünermund* [1993] ECR I-6787, C-34-36/95, *De Agostini* [1997] ECR I-3843 and C-405/98, *Gourmet* [2001] ECR I-1795.

³⁹ Case C-359/93, *Commission v Netherlands* (UNIX) [1995] ECR I-157.

⁴⁰ Case C-405/98, *Gourmet* [2001] ECR I-1795.

⁴¹ See e.g. AG Jacobs opinion in Case C-412/93, *Leclerc-Siplec* [1995] ECR I-179.

⁴² Case C-337/95, *Dior* [1997] ECR I-6013, para 51.

⁴³ See cases C-110/05, *Commission v Italy* [2009] ECR I-519, para 56, and C-142/05, *Mickelsson and Roos* [2009] ECR I-4273, para 26.

6.1.4 Article 36 TFEU and the doctrine of mandatory requirements

If the rules do not meet the criteria of the Keck doctrine, it is necessary to consider whether the rules can be justified under Article 36 TFEU, or the doctrine of mandatory requirements, the so-called Cassis doctrine mentioned above.

Article 36 TFEU sets out the exceptions from the prohibition in Article 34 which may be invoked in support of national measures. It follows from Article 36 that a measure can be justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The CJEU has ruled that Article 36 TFEU must be narrowly interpreted. Objectives which are not apparent from the article cannot be invoked. In addition, a national measure must be proportionate to its aim and there should be no alternatives which are less restrictive to trade available. Finally, it is the Member State that relies on the justification grounds in Article 36 that must demonstrate that the need for protection exists.⁴⁴

It should be noted that the CJEU, at an early stage, held that the grounds for justification must be of non-economic nature.⁴⁵

In terms of human health, the Court has held that the exception in Article 36 TFEU may be invoked when there is genuine scientific doubt as to whether a certain substance is harmless. Against this background, the Court accepted in the case of trichloroethylene⁴⁶ that the Swedish ban on this chemical was both appropriate and proportionate. The Court considered that, given the present state of the research, there was no evidence to justify a conclusion by the Court that national legislation such as that at issue in the case went beyond what was necessary to achieve the objective in view. Hence, the Swedish legislation did not go beyond what could be considered necessary to protect the health of humans.

In the abovementioned *Cassis de Dijon* case, the CJEU held that it was possible to justify indistinctly applicable national measures which were based upon certain mandatory requirements. The exceptions in Article 36 may also be invoked in this context, but the Cassis doctrine makes it possible to invoke a number of other, more or less clearly defined, possible justification grounds. The effectiveness of fiscal supervision, the fairness of commercial transactions and consumer protection were mentioned in the *Cassis de Dijon* case. In more recent judgments, the Court has expanded this list with the protection of the environment, the improvement of working conditions, the promotion of culture, preventing the risk of seriously

⁴⁴ See case 251/78, *Denkavit Futtermittel* [1979] ECR 3369.

⁴⁵ See case 7/61, *Commission v Italy* [1961] ECR 317.

⁴⁶ Case C-473/98, *Tolex Alpha* [2000] ECR I-5681.

undermining the financial balance of the social security system, the maintenance of press diversity, the protection of road safety, the fight against crime, the protection of animal welfare and the protection of national or regional socio-cultural characteristics. The Member States wishing to rely on any of these mandatory requirements must, as is also the case with the grounds in Article 36, show that the measure is proportionate to its aim.⁴⁷

The traditional view has been that all these mandatory requirements, arising from the Cassis doctrine, may be used only to justify *indistinctly applicable* measures. However, this can be considered illogical as some of them are as important as the justification grounds in Article 36. This has especially been discussed in relation to environmental protection. In the *PreussenElektra* case⁴⁸ the CJEU seems to have accepted that environmental protection could justify even distinctly applicable measures. Despite the fact that the disputed legislation directly favoured domestic production and must therefore be assumed to have been directly discriminatory, the Court came to the conclusion that the measure was ‘not incompatible’ with what is now Article 34. In reaching its conclusions, the Court referred to international conventions, the Amsterdam Treaty and relevant secondary legislation on environmental protection. The judgment has been questioned both with regard to the reasoning and the result.⁴⁹

6.2 Right of establishment and free movement of services

6.2.1 Establishment

The right to establishment within the EU means that self-employed persons and companies in the EU Member States are entitled to take up and pursue activities in other EU Member States.

Article 49 TFEU reads as follows:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

⁴⁷ See, in general, P. Oliver, *Oliver on Free Movement of Goods in the European Union*, 5th edn., Hart 2010, p. 239 ff.

⁴⁸ Case C-379/98, *PreussenElektra AG v Schleswig AG* [2001] ECR I-2099.

⁴⁹ See *Oliver on Free Movement of Goods in the European Union*, p. 305 f.

The right of establishment under Articles 49–55 TFEU concerns legal persons, i.e., companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union (Article 54) and for natural persons who are nationals of an EU Member State. It is obvious that the companies may be established in several Member States. Pursuant to Article 49 they are entitled to set up agencies, branches or subsidiaries in another Member State. Natural persons may also establish more than one place of work within the Union.⁵⁰ The Court has emphasised that enterprises should be free to choose the legal form that they consider most suitable for carrying out their activities in another Member State.⁵¹ According to the case-law, a Member State may not require that certain activities shall be exercised only by those companies which have their seat in that state and thereby prevent other types of establishment.⁵²

According to Article 54 TFEU, companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making, are covered by the Treaty. However, it is settled case-law that even companies that are not profit-making can be subject to the Treaty provisions on freedom of establishment.⁵³

The concept of establishment is very broad and provides an opportunity for businesses and citizens to participate on a stable and continuous basis in the economic life of a Member State other than the home state and to profit therefrom. Freedom of establishment shall thus promote economic and social integration within the Union.⁵⁴ Restrictions on freedom of establishment can consist of all the requirements associated with a service provider which establishes itself in another Member State, whether imposed at national, regional or local level.

When a company is established or sets up a branch, agency or office in another Member State, it has the same rights, obligations and benefits as the companies in that state. The Court has held that the principle of equal treatment – and thus the requirement for national treatment – not only forbids overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.⁵⁵

In the context of public procurement this means that measures that restrict access to public contracts for companies from other Member States infringe Article 49 TFEU. One example is the *Re Data Processing* case⁵⁶ which concerned Italian legislation limiting participation in certain data processing contracts to firms wholly or mainly in Italian public ownership. This contravened, *inter alia*, Article 49 although non-Italian firms could be owned by the Italian government. The reason for this was that in practice all data processing firms in Italian public ownership were Italian, and the provision thus discriminated against non nationals, both those

⁵⁰ Case 107/83, *Klopp* [1984] ECR 2971, para 19.

⁵¹ Case 270/83, *Commission v France* [1986] ECR 273, para 22.

⁵² Case C-101/94, *Commission v Italy* [1996] ECR I-2691.

⁵³ Cf. case C-70/95, *Sodemar* [1997] ECR I-3395, para 25.

⁵⁴ Cf. case 2/74, *Reyners* [1974] ECR 631, para 21.

⁵⁵ Case C-330/91, *Commerzbank* [1993] ECR I-4017, para 14.

⁵⁶ Case C-3/88, *Commission v Italy* [1989] ECR 4035.

established in Italy (Article 49 TFEU) and those in other Member States (Article 56 TFEU concerning the freedom of services, which will be discussed below).

However, the freedom of establishment is not without exceptions. According to Article 51 TFEU, activities which are connected, even occasionally, with the exercise of official authority, do not fall within the scope of Article 49. According to the CJEU, this article refers to activities which in themselves are directly and specifically connected with the exercise of official authority.⁵⁷ This exception has generally been interpreted narrowly. Furthermore, it follows from Article 52 TFEU that the Member States may restrict freedom of establishment when it is needed in order to protect public policy, public security or public health. This exception has also been interpreted narrowly. In addition, the Member States may maintain the restrictions on freedom of establishment on grounds that have been developed in the case-law in a similar way as in relation to the provisions on free movement of goods. These are generally referred to as either imperative requirements or objective justifications (rather than by the term mandatory requirements). Additional grounds are, *inter alia*, consumer protection, animal health and the protection of the environment. In this regard, the general test of EU law mentioned above applies. That is to say that national measures must fulfil four conditions:

1. they must be applied in a non-discriminatory manner;
2. they must be justified by imperative requirements in the general interest;
3. they must be suitable for securing the attainment of the objective which they pursue;
4. they must not go beyond what is necessary in order to attain it.⁵⁸

6.2.2 Free movement of services

According to Article 57 TFEU, services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

A service can be performed by a person or a company which moves to another Member State and provides services there,⁵⁹ but it can also be performed from the country of origin. In the latter case it is only the actual service that crosses a border, as is the case, for example, with services in the financial sector. Finally, a service recipient is, according to the Treaty, entitled to travel to another Member State in order to receive a service there. This is the case, for example, with services regarding health care.

⁵⁷ Case 2/74 *Reyners* [1974] ECR 631, para 45.

⁵⁸ See case C-19/92, *Kraus* [1993] ECR I-1663, para 32, and case C-55/94, *Gebhard* [1995] ECR I-4165, para 37.

⁵⁹ See e.g. case 113/89, *Rush Portuguesa* [1990] ECR I-1417.

In the context of public procurement, Article 56 TFEU can be infringed by measures that, for example, give preferential treatment to domestic bidders for services contracts, reserve public services contracts for domestic firms or apply qualification conditions to firms from other Member States that are not also applied to domestic firms (for example, requiring non-domestic firms, but not domestic firms, to register on a special ‘approved’ list as a condition of participating in public contracts).⁶⁰

A good example is found in Case C-360/89, *Commission v. Italy*.⁶¹ In this case the CJEU held to be contrary to Article 56 TFEU Italian legislation requiring contractors for certain public works contracts to reserve a proportion of the works for sub-contractors who had their registered office in the region of the works, as this discriminated directly against potential sub-contractors established outside Italy.

Like Article 34 TFEU, Article 56 TFEU applies also to indirectly discriminatory measures, i.e., measures which apply equally to domestic firms and those from other Member States but which have the effect of favouring domestic firms. As regards public procurement, the *Contse* case⁶² should be mentioned. This case concerned a contract to provide home respiratory treatment and other assisted breathing techniques. The CJEU considered that various conditions and criteria concerning the service provision were hindrances to trade under Article 56 TFEU and could not be justified. These were a requirement that at the time of tendering the tenderers should have an office open to the public in the capital city of the province in which the service was provided; an award criterion giving preference to tenderers with offices open to the public in other specified towns in the province; an award criterion giving preference to tenderers with oxygen producing, conditioning and bottling plants within 1000 kilometres of that province; and a provision that, in the event of a tie on points under the other award criteria, the contract was to be awarded to the firm previously supplying the service (see below, 8.1).

There are similar exceptions to the provisions on free movement of services as to the provisions on freedom of establishment (see Article 62 TFEU). Article 52 TFEU in combination with Article 62 provides for derogations on grounds of public policy, public health or public morality. There is also the derogation under Article 51 which in combination with Article 62 excludes activities that ‘are connected, even occasionally, with the exercise of official authority’.

In addition, the Member States may maintain restrictions on the free movement of services on the grounds developed by the CJEU in a similar way, as is the case in relation to free movements of goods.⁶³

⁶⁰ See S. Arrowsmith, *EU Public Procurement Law: An Introduction* (2010), p. 70.

⁶¹ Case C-360/89, *Commission v. Italy* [1992] ECR I-3401.

⁶² Case C-234/03, *Contse and others v Ingesa* [2005] ECR I-9315.

⁶³ See case C-19/92, *Kraus* [1993] ECR I-1663, para 32 and C-55/94, *Gebhard* [1995] ECR I-4165, para 37.

7. Harmonisation

The EU has over the years issued a number of rules that are primarily intended to eliminate trade barriers within the internal market, but which at the same time establish common safety standards for products and services. Since the rules are common to all EU member states, they are usually called harmonised rules. There exist harmonised rules for both goods and services, but the majority are for goods. Harmonised rules include, *inter alia*, pharmaceuticals, cosmetics, telecommunications equipment, vehicles, chemicals, toys, banking and insurance services and electronic commerce. Harmonised rules are often based on the application of common standards, which have been developed by the European standardisation organisations. As a general rule European standards are in line with international standards.

7.1 Legal basis for harmonisation

Article 5.2 TEU provides:

Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

In concrete terms this implies that a special legal basis is needed for any action taken by one of the EU institutions and that a measure adopted in violation of the principle of conferral can be reviewed by the CJEU and declared invalid.

The EU Treaties contain provisions which define the areas in which the institutions can adopt legal acts and in some cases these provisions also define the type of acts that may be adopted. The legal bases also describe the decision making process to be used (which in turn also determines the institutions' respective influence in that process), and in some cases, the legal effect of the act will follow directly from the legal basis. It is thus very important which legal basis the Union will use. Sometimes the choice of legal basis is not obvious and a quite extensive jurisprudence on the criteria for the choice of legal basis has been developed.⁶⁴ It has rarely happened that the CJEU has annulled an act because it lacks the support of the Treaty, i.e., is in conflict with the principle of conferral. However, in two cases concerning the Directive on tobacco advertising, the Court held that the Directive was adopted on the wrong legal basis.⁶⁵

⁶⁴ See R. Barents, *The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation*, CML Rev 30 (1993) 85; K. Bradley, *The European Court and the Legal Basis of Community Legislation*, CML Rev. 13 (1988) 379; N. Emiliou, *Opening Pandora's Box: the Legal Basis of Community Measures before the Court of Justice*, EL Rev. 19 (1994) 488, and S. Douglas-Scott, *Constitutional Law of the European Union*, Pearson/Longman 2002, p. 163 f.

⁶⁵ Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419; case C-74/99, *Imperial Tobacco et al* [2000] ECR I-8599.

General provisions on harmonisation are contained in Articles 114–118 TFEU (Chapter 3, Approximation of Laws) but legal grounds for harmonisation are apparent in many parts of the Treaty. The Single European Act introduced in 1986 the current Article 114 TFEU, under which harmonisation decisions concerning the internal market can be adopted by qualified majority by the Council and European Parliament.

7.2 Different characteristics of the harmonisation directives

The level of harmonisation, i.e., the degree of legal unity pursued, varies widely within the affected area. It is not in the first place the similarity as such but rather the problems created by differences between national legal rules that hamper the development of the internal market and which are intended to be eliminated by harmonisation.

The most used tool is directives. Their content can however be very different. Some, called framework directives, lay down just general principles and therefore give Member States a wide scope when implementing them and also a considerable space to maintain ‘pure’ national regulations in the same area.⁶⁶ Others are so detailed that they hardly leave Member States any choice but literally to transfer their legal content into national law.⁶⁷ They contain such clear and unequivocal substantive provisions that they in fact entail unification of national law in the Union. Needless to say, there are also directives which contain a mixture of principles and more detailed provisions.⁶⁸

The scope for national regulations, i.e., national regulatory competence, is difficult to determine without first analysing the content of each directive carefully. However, it is possible to discern some principles that indicate the remaining scope for national rules. In this context, it is possible to speak of different techniques or methods of harmonisation.

7.3 Methods of harmonisation

7.3.1 Total or optional harmonisation

Total or full harmonisation creates two obligations for the Member States. First, they must allow free movement of goods that meet the requirements stipulated by the harmonised rules. Second, they must not allow trade with products which do not satisfy these requirements. In

⁶⁶ See e.g. Council Directive 75/442/EEC of 15 July 1975 on waste (OJ L 194, p. 39).

⁶⁷ See e.g. Council Directive 76/756/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to the installation of lighting and light-signalling devices on motor vehicles and their trailers (OJ L 262, p. 1).

⁶⁸ See e.g. Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ L 283, p. 23).

practice this means that the national regulatory scope becomes preoccupied with harmonised European rules (preemption). There is no possibility to deviate from them, except if they contain a safeguard clause.⁶⁹

Against this background, the CJEU found in the so-called *Salmonella case* that it was not possible for Sweden to apply inspection of meat and eggs, etc. imported from other Member States to prevent the spread of Salmonella, because the area was harmonised and the control would be carried out in the exporting country.⁷⁰

This method is obviously an effective way to achieve free movement of a particular product category. The method has the disadvantage, however, that it reduces the product range and regional and local variations.

Optional harmonisation includes only the first obligation, i.e., that Member States must allow market access for products that meet EU requirements, but they may maintain a parallel system of rules with which producers may choose to comply instead.⁷¹ The method has the disadvantage that if the State maintains stricter rules than the common standard it usually creates competitive disadvantages for domestic industry. Products that meet the common, less stringent, requirements have to be accepted and can compete freely on the national market. The harmonised level in the optional directives may therefore in practice function as a ceiling on how far the protection goes in the EU. Furthermore, it is often confusing and burdensome for the national administration to apply simultaneously two sets of rules with similar aims. In addition, States must also assess whether any other State's national rules are equivalent to the domestic rules, as they are obliged to grant market access also for products which comply with these rules in accordance with the principle of mutual recognition.

7.3.2 The old approach and the new approach

A distinction has to be made between the old approach, which may include optional or total harmonisation, and the so-called new approach, which means that the Union legislation is concerned with the most important questions in relation to safety but not all the technical details. It is for the European standardisation organisations CEN (Comité Européen de Normalisation), CENELEC (Comité Européen de Normalisation Electro Technique) and ETSI (European Telecommunication Standard Institute) to draw up European standards which set these technical details in accordance with specific mandates from the Commission. These standards are voluntary for manufacturers to apply but create a presumption that the requirements are met. It should be noted that the European standard can also play a major role

⁶⁹ See e.g. Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers (OJ L 42, p. 1).

⁷⁰ Case C-111/03, *Commission v Sweden* [2005] ECR I-8789.

⁷¹ See e.g. Council Directive 83/575/EEC of 26 October 1983 amending Directive 71/316/EEC on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control (OJ L 332, p. 43).

in the non-harmonised area in that it generally represents a common understanding regarding which requirements it is reasonable to impose on a product in the EU.

Directives under the new approach contain, in addition to basic safety standards, rules on the assessment of conformity with the requirements. A proof that a product meets the essential requirements in a certain directive is that it is labelled with the symbol CE. However, not all directives with the new approach contain requirements for CE marking. The new approach directives also contain specific provisions on market surveillance. The directives adopted in accordance with the new approach are *inter alia* the following:

Toys⁷²

Machinery⁷³

Pressure equipment⁷⁴

Medical devices⁷⁵

Electrical and electronic equipment and gas appliances⁷⁶

Information Technology and Telecommunications⁷⁷

Civil aviation⁷⁸

Railway safety⁷⁹

Marine equipment⁸⁰

Recreational craft⁸¹

Weighing instruments⁸²

Explosives⁸³

Equipment for use outdoors⁸⁴

⁷² See Directive 88/378/EEC.

⁷³ See Directive 2006/42/EC, 2000/9/EC, 89/686/EEC, 96/16/EC.

⁷⁴ See Directive 97/23/EC and Directive 87/404/EC.

⁷⁵ See Direktive 93/42/EEC, Directive 90/385/EEC and Directive 98/79/EEC.

⁷⁶ See Direktive 92/75/EEC, Directive 96/57/EC, Directive 92/42/EEC, Directive 90/396/EEC, Directive 2000/55/EC, Directive 73/23/EEC and Direktiv 2004/108/EC.

⁷⁷ See Directive 2002/21/EC, Directive 87/95/EEC and Directive 1999/5/EC.

⁷⁸ See Regulation 3922/91.

⁷⁹ See Directive 2004/49/EC.

⁸⁰ See Directive 96/98/EC.

⁸¹ See Directive 94/25/EC.

⁸² See Directive 90/384/EEC.

⁸³ See Directive 93/15/EEC.

⁸⁴ See Directive 2000/14/EC.

7.3.3 Minimum harmonisation

There are several legal grounds for minimum harmonisation in the TFEU. Such a level of harmonisation is provided for in Article 193 with regard to the protection of the environment, Article 153.2b in respect of employment and working conditions and Article 169.4 in terms of consumer protection. Minimum harmonisation results in a lower degree of regulatory intrusion by the Union, which gives Member States more space for national regulations.⁸⁵

Minimum harmonisation is often used when demands are made on the production process rather than the products. It is, for instance, possible to impose certain air quality levels that all working places must attain. This entails a more level playing field across the Union, even if only a minimum level is imposed.

After minimum harmonisation measures have been adopted, general principles of law and the fundamental Treaty provisions continue to play an important role. When a Member State imposes requirements beyond the minimum level, it must respect the Treaty provisions and, for instance, the principles of equal treatment, mutual recognition and proportionality.

7.4 *The Relation between the Treaty and the Harmonised Rules*

7.4.1 The purpose of the harmonised rules must be considered

The Court has held that Member States can no longer justify national measures which pose restrictions on the free movement of goods when an area has been fully harmonised, as the Member States in that case have transferred legislative power to the Union and the scope for national regulatory measures is therefore occupied.⁸⁶ In such a case recourse to Article 36 or to mandatory requirements in compliance with the case-law is no longer possible.⁸⁷ This is not to say, however, that every directive necessarily provides exhaustive guarantees that oust the application of Article 36. As shown above, this is not the case if the directive is optional or only set a minimum level.

The Court tested the level of harmonisation in *Commission v UK*. The background was that Britain had introduced requirements for light signalling devices beyond the technical requirements imposed by the motor vehicles directives.⁸⁸ The court found that there was no

⁸⁵ Cf. case 382/87, *Buet v. Ministère Public* [1989] ECR 1235.

⁸⁶ See case 5/77, *Tedeschi* [1977] ECR 1555, case 251/78, *Denkavit* [1979] ECR 3369, case 28/84, *Commission v Germany* [1985] ECR 3097 and case C-246/91, *Commission v France* [1993] ECR I-2289.

⁸⁷ Precisely the same approach applies to regulations, see case C-324/99, *DaimlerChrysler* [2001] ECR I-9897, para 42.

⁸⁸ Council Directive 76/756/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to the installation of lighting and light-signalling devices on motor vehicles and their trailers, OJ L 2627.9.1976, p. 1.

scope for additional mandatory requirements beyond those already prescribed by the directive. The relevant directive thus resulted in total harmonisation.⁸⁹

A Swedish example in this regard is the above mentioned *Salmonella* case, where the CJEU found that it was impermissible for Sweden to apply inspections regarding meat and eggs, etc. imported from other Member States to prevent the spread of Salmonella, because the area was harmonised and the control would be carried out in the exporting country.⁹⁰

A further example is the decision of the Swedish Supreme Administrative Court in RÅ 2005 ref. 2, *Monsanto*. The Court found that Sweden could not apply its own more stringent rules concerning the plant protection product glyphosate since the applicable EU rules provided for total harmonisation.⁹¹

One general possibility for Member States to deviate from the harmonised rules is, however, the possibility to use a so-called safeguard clause, which is normally inserted in the directives. However, the application of a safeguard clause does not entail more than a temporary aberration and is not strictly speaking an exception.

7.4.2 Cases C-288/08 *Nordiska Dental* and C-6/05 *Medipac*

In the present context two cases C-288/08, *Nordiska Dental*⁹², and C-6/05, *Medipac*,⁹³ should be mentioned. These cases illustrate how the CJEU deals with harmonised standards. Both the cases concern the new-approach directive on medical devices. *Nordiska Dental* concerns a Swedish export ban on mercury and *Medipac* demonstrates the significance of totally harmonised standards in the context of public procurement.

Nordiska Dental

In *Nordiska Dental* the question was whether Article 4(1) of Directive 93/42 on medical devices⁹⁴ should be interpreted as precluding Swedish legislation under which the commercial exportation of dental amalgams containing mercury and bearing the ‘CE’ marking provided for in Article 17 of that directive was prohibited on grounds relating to protection of the environment and of health.

The Court held that, as is apparent, in particular, from the third recital in the preamble to Directive 93/42, the aim of that directive is the harmonisation of provisions for safety and health protection with regard to the use of medical devices, in order to guarantee the free movement of such devices within the internal market. This directive is intended to promote

⁸⁹ Cf. also case 237/82, *Jongeneel Kaas* [1984] ECR 483 and case 205/84, *Commission v Germany* [1985] ECR 3755.

⁹⁰ Case C-111/03, *Commission v Sweden* [2005] ECR I-8789.

⁹¹ See U. Bernitz and A. Kjellgren *Europarättens grunder*, 3rd edn, Norstedts juridik 2007, p. 354. See also case C-162/97, *Åklagaren mot Gunnar Nilsson e.a.* [1998] ECR I-7477.

⁹² [2009] ECR I-11031.

⁹³ [2007] ECR I-4557.

⁹⁴ Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, OJ L 169, 12.7.1993, p. 1.

the free movement of medical devices which have been certified as being in compliance with that directive by replacing the various measures which have been taken in this field in the Member States, and which may amount to an obstacle to that free movement. In view of that purpose, Article 4(1) of Directive 93/42, which requires Member States not to create any obstacle to the placing on the market or the putting into service within their territory of medical devices bearing the 'CE' marking provided for in Article 17 thereof, must be interpreted as precluding the adoption by Member States of measures liable to constitute an obstacle to the free movement of medical devices bearing that marking, such as, for example, an export prohibition. In that regard, the Court pointed out that, in accordance with Article 17(1) of Directive 93/42, medical devices bearing the 'CE' marking are considered to meet the essential requirements referred to in Article 3 of that directive.

The Court then stressed that the presumption of compliance can be rebutted in certain circumstances. In particular, Article 8(1) of Directive 93/42 places Member States which have found there to be risks, linked to medical devices which have been certified as being in compliance with that directive, to the health and/or safety of patients or users or, where applicable, other persons, under a duty to take all appropriate interim measures to withdraw those medical devices from the market, or to prohibit or restrict their being placed on the market or put into service. In those circumstances, the Member State concerned is required under that provision to notify the Commission immediately of the measures taken, indicating in particular the reasons for those measures. Under Article 8(2) of Directive 93/42, the Commission must in turn examine whether those interim measures are justified and, where that is found to be the case, it must immediately inform the Member State which initiated the measures, as well as the other Member States, accordingly.

The Court further held that a measure prohibiting the exportation of dental amalgams containing mercury could be regarded as outside the scope of Directive 93/42 merely by virtue of the fact that, although one of the aims of that legislation is health protection, it is also based on considerations relating to protection of the environment.

Medipac

In *Medipac*, a public hospital issued an invitation to tender for the supply of surgical sutures bearing the CE marking provided for in the Medical Devices Directive, but then excluded as technically unsuitable a particular tender for sutures bearing that marking.

The Advocate General pointed out that even a legitimate desire from a contracting authority to protect public health must find expression in a way that does not cut right across the principles of free movement, equality of tenders, transparency and proportionality arising from the EC Treaty. The Advocate General distinguished two situations. In the first situation, no new-approach directive providing for the CE marking of (or other directive establishing harmonised standards for) the supplies in question is applicable. In the second situation, there is a new-approach directive (or similar) in place.

In the former, a certain margin of discretion is conferred on the contracting authority if it can show a legitimate public health concern and place all tenders on an equal footing and respect

the principles of transparency and proportionality. However, in the latter situation, the line of analysis is different. By rejecting a tender for goods which are CE certified on grounds of public health, the contracting authority is questioning the validity of the presumption conferred upon the goods by their CE marking. It is thus contesting either the assessment of conformity made by the competent certification authority granting the CE marking, or, where harmonised European standards have been used by the supplier to show compliance with the essential requirements, the validity of the harmonised standard itself, or both. The Advocate General underlined that specific procedures are laid down in new-approach directives, designed to deal with such situations. Those procedures balance the protection of public health and safety against the requirements of free movement of goods. They are mandatory procedures, which Member States are required to follow.

The CJEU followed the same line of reasoning. First, it held that it follows from settled case-law that the obligations arising from Community directives are binding, *inter alia*, on bodies or entities which are subject to the authority or control of a public authority or the State.⁹⁵ Consequently, the obligation to presume that medical devices which meet the harmonised standards and bear the CE marking comply with the requirements of Directive 93/42 extends to contracting authorities in their capacity as bodies governed by public law.

According to the Court, once the hospital had doubts as to the technical reliability of the surgical sutures proposed by Medipac, it was required, by virtue of the obligation imposed on it as an entity governed by public law, to assist in the correct application of Directive 93/42 and to inform the competent national authority so that the latter could conduct its own checks and, where necessary, implement such safeguard measures.

However, a contracting authority is precluded from rejecting, outside that safeguard procedure and on grounds of technical inadequacy, medical devices which are certified as being in compliance with the essential requirements provided for by that directive.

8. The Possibility to Impose Environmental and Social Requirements in Public Procurement

8.1 The present state of the law – de lege lata

It appears relatively clear from the case-law, especially from *Contse*,⁹⁶ which general EU legal requirements contracting authorities have to respect in public procurement. In *Contse* two questions were discussed (see above, 6.2.2).

⁹⁵ See, to that effect, Case 152/84 *Marshall* [1986] ECR 723, para 49; Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paras 30 and 31; Case C-188/89 *Foster and Others* [1990] ECR I-3313, para 18; order in Case C-297/03 *Sozialhilfverband Rohrbach* [2005] ECR I-4305, para 27

⁹⁶ Case C-234/03, *Contse and others v Ingesa* [2005] ECR I-9315.

The first one was whether Articles 12, 43 and 49 EC [now Articles 18, 49 and 56 TFEU] and Article 3(2) of Directive 92/50 precluded a contracting authority from laying down, in the tendering specifications for a public contract for the provision of health services of home respiratory treatments and other assisted breathing techniques, *an admission condition* which required the tenderer at the time the tender was submitted to have an office open to the public in the capital of the province where the service was to be provided.

The second question was whether the same rules precluded the contracting authority from laying down *evaluation criteria* for the tenders which took account, by awarding extra points, of the existence at that time of oxygen producing, conditioning and bottling plants situated within 1000 kilometres of that province or of offices open to the public in other specified towns in that province and which, in the event that there was a tie on points between a number of tenders, favoured the undertaking which was previously providing the service in question.

The Court held that the general EU law test that contracting authorities must apply and which a national court therefore must verify is the four general conditions developed in the case-law concerning the four freedoms which have been discussed above (see 4.5). The criteria used by the contracting authority must:

- be applied in a non-discriminatory manner,
- be justified by imperative requirements in the general interest,
- be suitable for securing the attainment of the objective which they pursue, and
- not go beyond what is necessary in order to attain it.⁹⁷

Moreover, it follows from *Contse* that in procurement cases an additional test is relevant. It should be verified that the criteria laid down are linked to the objective of the contract and are suitable for ensuring that it is attained (see para 70).

I would describe this approach as a two-step process where two separate tests are conducted. The first is a general EU law test regarding the conditions imposed by the contracting authority (macro-assessment). This is basically the same test as is undertaken when national measures impose trade restrictions on the internal market. The second is a more specific test where it will be considered whether the requirements laid down by the contracting authority are linked to the subject-matter of the contract (micro-assessment).

A conclusion to be drawn from this is that EU law is fully applicable to all decisions by contracting authorities which affect the free movement of goods and services on the internal market and have a cross border interest, as originally intended (see above section 3).

However, it should be stressed at this point that the Court has accepted that each of the award criteria used by the contracting authorities to identify the most economically advantageous

⁹⁷ Para 25; See Case C-19/92 *Kraus* [1993] ECR I-1663, para 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, para 37; and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paras 64 and 65.

tender *must not necessarily be of purely economic nature*. The fact that a criterion does not necessarily serve such a purpose can, according to the Court, be irrelevant (see case *EVN Wienstrom*, below). It is thus permissible to insert criteria based on environmental or social considerations as long as they are compatible with Union law in general and the subject-matter of the contract in particular. The EU procurement law is, in principle, based on the same conciliation of interests as Union law in general. This follows from Directive 2004/18 where it is stated in the preamble that:

... This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2.

(2) The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.

...

In *Contse*, no relevant EU legislation which lays down fully harmonised standards was applicable. However, if such legislation is applicable, the conditions laid down must be respected. In such a case all the interests involved have already been considered on the Union level. This complex character of the internal market rules is clearly expressed in Article 114.3 TFEU, which provides that the Commission in its proposals regarding new internal market legislation concerning health, safety, environmental protection and consumer protection, shall take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council shall also seek to achieve this objective. Hence, a directive or a regulation adopted under Article 114 does not merely foster the free movement of goods and services within EU internal market but is at the same time intended to ensure a high level of protection as regards the environment, *inter alia*. As was clearly held by the CJEU in *Medipac*, the obligations arising from Union directives are binding, *inter alia*, on bodies or entities which are subject to the authority or control of a public authority or the State. Consequently, the obligation to presume that products meet the harmonised standards and comply with the requirements of Union directives extends to contracting authorities in their capacity as bodies governed by public law (see above, 7.4.2). This evaluation of relevant EU legislation (and the imposed level of harmonisation) will accordingly be part of the first step, the macro-assessment.

It should finally be noted that the principles of EU administrative law can play a crucial role in the assessment of the subject-matter of the contract. The general principles, such as good administration, transparency and predictability, here play a role in the assessment of the Court. The criteria set must therefore be in line with these principles also (see above, section 5). The award criteria, for instance, may not give unfettered discretion, they must be objective

and quantifiable, and their application must be capable of verification. These conditions impose some limits on the use of social and environmental criteria.⁹⁸

For my part, I cannot distinguish any strong inconsistencies in the case-law. The cases C-31/87 *Beentjes*, C-225/98 *Nord Pas de Calais*, C-513/99 *Concordia Bus* and C-448/01 *EVN Wienstrom* reveal how this dual test has been applied and how it differs in relation to the type of requirements that have been set by the contracting authorities. These cases did not raise the question whether Union law must be applied or not but rather the question whether social and environmental concerns are compatible with the criteria that the award of contracts must be based on the lowest price only or the most economically advantageous tender (conditions mentioned in the procurement directives). The CJEU has been willing to accept further integration of social and environmental concerns in public procurement as long as the requirements imposed are linked to the subject-matter of the contract. However, the Court has never eased the requirements following from Union law in general, which implies that harmonised safety standards must be respected and that a balancing of interests (EU law test) must be carried out where there is no harmonisation.

In *Beentjes*⁹⁹ the Court ruled that social policy considerations and in particular measures aimed at combating long-term unemployment could be part of the award criteria for public contracts, especially in cases where the most economically advantageous offer is selected. The Court accepted that the latter award criterion contains features that are not exhaustively defined in the Directives, therefore discretion is conferred on contracting authorities to specify what would be the most economically advantageous offer for them. However, contracting authorities cannot refer to such measures as a selection criterion and disqualify candidates that could not meet the relevant requirements. The selection of tenderers is a process, based on a list of technical and financial requirements expressly stipulated in the relevant Directives, and the insertion of contract compliance as a selection and qualification requirement would be considered illegal.¹⁰⁰ The Court held that a condition of performance relating to the employment of long-termed unemployed persons is compatible with the Public Procurement Directives, if it has no direct or indirect discriminatory effect on tenders from other Member States. Furthermore, such a condition must be mentioned in the tender notice. Rejection of a contract on the grounds of a contractor's inability to employ long-term unemployed people has no relation to evaluation of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability. The Court maintained that measures relating to employment could be utilised as a feature of the award criteria only and on condition that they do not run contrary to the fundamental principles of the Treaty; they must comply *with all the relevant provisions of Union law*, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services (para 29).

⁹⁸ See S. Arrowsmith and P. Kunzlik (ed.), *Social and Environmental Policies in EC Procurement Law*, Cambridge University Press 2009, p. 242.

⁹⁹ Case 31/87, *Beentjes* [1988] ECR 4635.

¹⁰⁰ See C. Bovis, *EC Public Procurement: Case-law and Regulation*, OUP 2005, p. 275.

In *Nord-Pas-de-Calais*¹⁰¹, the Court considered whether a condition linked to a local project to combat unemployment could be considered as an award criterion for the relevant contract. The Commission alleged that the French Republic had infringed Article 30 (1) of Directive 93/37 purely and simply by referring to the criterion linked to the campaign against unemployment as an award criterion in some of the disputed contract notices. Under Article 30 (1) of Directive 93/37, the criteria on which contracting authorities are to base the award of contracts are the lowest price only or, when the award is made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability and technical merit.

The Court held, as in *Beentjes*, that the most economically advantageous offer does not preclude all possibility for the contracting authorities to use a criterion linked to the campaign against unemployment provided that that condition is consistent with fundamental principles of Community law, in particular the principle of non-discrimination deriving from the provisions of the Treaty on the right of establishment and the freedom to provide services. Furthermore, even if such a criterion is not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in the Directive, on particular the rules on advertising. The court therefore accepted employment considerations as an award criterion, part of the most economically advantageous offer, provided they are consistent with the fundamental principles of Community law, in particular the principle of non-discrimination, and that they are advertised in the contract notice.

In *Concordia Bus*¹⁰² the Court was asked *inter alia* whether environmental considerations such as low emissions and noise levels of vehicles could be included amongst the factors in the most economically advantageous criterion, in order to promote certain types of vehicles that meet or exceed certain emission and noise levels. The Court followed the *Beentjes* principle, and established that contracting authorities are free to determine the factors under which the most economically advantageous offer is to be assessed and that environmental considerations could be part of the award criteria, provided they do not discriminate between alternative offers, and that they have been clearly published in the tender or contract documents. However, the inclusion of such factors in the award criteria should not prevent alternative offers that satisfy the contract specifications being taken into consideration by contracting authorities. Clearly the Court wanted to exclude any possibility of environmental considerations being part of the selection criteria or disguised as technical specifications, capable of discriminating against tenderers that could not meet them.¹⁰³ Also in this case the Court held that the purpose of coordinating at Union level the procedures for the award of public contracts is to eliminate barriers to the free movement of services and goods (para 56). Furthermore, the Court underlined that the criteria adopted by the contracting authority must comply with all the fundamental principles of Union law, in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services (para 63 and 64).

¹⁰¹ Case C-225/98, *Commission v French Republic* [2000] ECR I-7445.

¹⁰² Case C-513/99, *Concordia Bus Finland* [2002] ECR I-7213.

¹⁰³ See *Bovis*, *EC Public Procurement*, p. 277.

In *Wienstrom*¹⁰⁴ a question arose as to whether a contracting authority can apply in its assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources, and under what conditions. In principle, that question referred to the possibility of a contracting authority laying down criteria that pursue advantages which cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment. The Court held that each of the award criteria used by the contracting authorities to identify the most economically advantageous tender need not be of purely economic nature. The Court therefore accepted that where the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

The criterion requiring that the electricity supplied be produced from renewable energy sources had a number of characteristics which posed further questions as to their compatibility with Union law. In particular, the criterion that the electricity supplied should be produced from renewable energy sources which had a weighting of 45 % was not accompanied by requirements which permitted the accuracy of the information contained in the tenders to be effectively verified. The Court also discussed a number of other aspects of the award criteria.

The Court concluded that Union legislation on public procurement *does not preclude* a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45 % which requires that the electricity supplied be produced from renewable energy sources. On the other hand, public procurement law *does preclude* such a criterion where it is not accompanied by requirements which permit the accuracy of the information contained in the invitation to tender document to be effectively verified and it contains factors for its assessment which are not directly linked to the subject-matter of the procurement in question.

In all these cases the Court has accepted, more or less explicitly, that when the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration environmental or social criteria, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Union law, in particular the principle of non-discrimination. The latter requirement (fundamental principles of Union law) is developed and clarified by the CJEU in *Contse*, i.e. the criteria used by the contracting authority must be applied in a non-discriminatory manner, be justified by imperative requirements in the general interest, be suitable for securing the attainment of the objective

¹⁰⁴ C-448/01, *EVN Wienstrom* [2003] ECR I-14527.

which they pursue, and not go beyond what is necessary in order to attain it.¹⁰⁵ This implies that the contracting authorities, where relevant, must respect Union legislation (directives and regulations), which is merely the concrete expression of these fundamental principles, i.e. the contracting authorities must comply with *all the relevant provisions of Union law*, as was confirmed in *Beentjes*.

The other requirements relate to the additional test mentioned above that the criteria laid down must be linked to the objective of the contract and are suitable for ensuring that it is attained.

It follows from the case-law that an admission condition, selection criterion or a technical specification which is not compatible with EU law is more or less impossible to justify, while an evaluation or award criterion is more likely to be accepted. This is because these latter criteria have a less restrictive effect on trade and usually provide a more proportionate and effective approach than other mechanisms. Thus, award criteria are easier to justify than an admission condition, selection criterion or a technical specification which entails the exclusion of a tender.¹⁰⁶ A reason for this is that an award criterion is only one of several criteria of relevance for the award of a contract and therefore allows, even if not fulfilled by all tenderers, a fair comparison between their offers. As the Court has held, in order to determine the economically most advantageous tender, the contracting authority must be able to assess the tenders submitted and take a decision on the basis of qualitative and quantitative criteria relating to the contract in question.¹⁰⁷ Thus, it is important that a real and objective comparison of the tenders can be carried out and that they all have a fair chance. Moreover, an award criterion must of course not be formulated so that in practice it constitutes a disguised technical specification or similar. Particular caution is required when requirements are set higher than harmonised standards in Union law. It is difficult to tell when it is possible to go beyond such standards, but it should not be excluded, for instance, that it is permissible to encourage technical innovation or environmental precaution that goes beyond the harmonised requirements provided that the products or services which meet these requirements are not excluded from the procurement process. The same reasoning applies to other requirements, such as conditions of performance or conditions imposed on the production process. They should not, for the same reasons, be formulated in such a way as to preclude the participation of tenders satisfying harmonised EU requirements. However, it can be assumed that conditions of performance and conditions imposed on the production process are less likely to be fully harmonised as they are usually not directly related to the characteristics of a product or service. However, as discussed above, all the requirements must pass the general EU law test and be consistent with the subject matter of the contract.

¹⁰⁵ Para 25; See Case C-19/92 *Kraus* [1993] ECR I-1663, para 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, para 37; and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paras 64 and 65.

¹⁰⁶ See S. Arrowsmith and P. Kunzlik (ed.), *Social and Environmental Policies in EC Procurement Law*, Cambridge University Press 2009, p. 242, p. 190. However less convinced.

¹⁰⁷ See Case 274/83 *Commission v Italy* [1985] ECR 1077, paragraph 25.

8.2 EU procurement in the future – de lege ferenda

8.2.1 Discussions in the doctrine

There has been a discussion in the doctrine whether it is reasonable always to see the contracting authorities as part of the Member States and to require that they assume the same responsibility for the functioning of the internal market as the Member States are required to do. Should not contracting authorities at least under certain circumstances be considered as simply purchasers and be entitled to buy what they want? If contracting authorities were considered primarily as economic operators in a market when purchasing goods and services and public works, it could be argued that their choices of product features would fall outside Union law. Professor Sue Arrowsmith, among others, has put forward the opinion that contracting authorities' choices of product features define the market rather than restricting access to it.¹⁰⁸

In the book *Social and Environmental Policies in EC Procurement Law*, Arrowsmith argues, together with Peter Kunzlik, that decisions on whether to make a purchase and what to purchase should not generally be treated as hindrance to trade, even when they are discriminatory in effect. They call these decisions 'excluded buying decisions'. The reasoning behind this position is practical and constitutional concern relating to judicial scrutiny at EU level of these decisions, which distinguish them, according to Arrowsmith and Kunzlik, from measures of more regulatory nature. A distinction between certain activity of the government as a 'buyer' and its other procurement activity, including activity as a regulator, according to the authors, gives reasons for a lower degree of scrutiny than is applied to many governmental decisions affecting the internal market. However, they do not consider it appropriate to characterise this distinction as one between 'government as regulator' and 'government as purchaser': certain decisions that in general language and for other legal purposes (including under directives) could be labelled as 'purchasing' decisions probably are (and should be) subject to justification requirement, because of their significance for trade, notably those concerning the workforce used on the contract, such as requirements to employ long-term unemployed persons.

Arrowsmith and Kunzlik claim that this position is consistent with the case-law¹⁰⁹ and refer in particular to *Concordia Bus*.¹¹⁰

These arguments are intellectually very stimulating and go back to a discussion of principle regarding how far-reaching the scrutiny of the CJEU should be in general, in relation to the four freedoms.¹¹¹ The discussion furthermore alludes to the market-participant exception in

¹⁰⁸ See Arrowsmith, *EU Public Procurement Law*, p. 69.

¹⁰⁹ See Arrowsmith and Kunzlik (ed.), *Social and Environmental Policies in EC Procurement Law*, p. 25.

¹¹⁰ *Ibid.*, p. 80.

¹¹¹ See in particular, M. P. Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights', *European Law Journal*, 3, 1997, 55-82 and *We the Court – The European Court of Justice & the European Economic Constitution*, Hart Publishing 1998.

American law in relation to the Dormant Commerce Clause. This doctrine includes a distinction between market regulator and market participant which implies that decisions from contracting authorities under certain conditions can escape the Dormant Commerce Clause which corresponds to the free movement clauses in Union Law.¹¹²

However, in my opinion, this view is not supported by the present state of Union law which does not contain a market-participant exception and has a different objective and origin than American law. Moreover, *Concordia Bus* cannot sustain the conclusion that government purchasers enjoy a broad (and in some cases unrestricted) discretion to set requirements on social and environmental matters, including requirements that exceed those in mandatory European standards.¹¹³ As explained above, even if it may be possible to include ambitious environmental or social requirements in the award criteria, this does not mean that Union law can be ignored and that alternative tenders that satisfy harmonised standards can be excluded by the contracting authorities. The case-law does not permit that environmental or social considerations are part of the selection criteria or the technical specifications if they are not fully in compliance with Union law.¹¹⁴ Accordingly, if harmonised legal requirements have been adopted by the Union, they cannot be disregarded. If there are minimum requirements in Union law, they must be respected, but more stringent national measures are allowed if they comply with the Treaty provisions, the case-law and the general principles of law (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 and they must not go beyond what is necessary in order to attain it). If no harmonisation measures have been adopted, only the latter requirements apply.

By the way, it seems that Arrowsmith recognises that the ‘excluded buying decisions’ doctrine is rather weak with regard to the present case-law of the CJEU. She admits that in many past cases the CJEU seems to have assumed that the TFEU rules apply even to individual contracts even though as a general rule the TFEU has been considered to apply only to ‘measures’, requiring a decision or conduct of a general nature. Thus, failing to apply the TFEU rules on non-discrimination even to a single contract, or failing to advertise even a single contract, might violate the TFEU.¹¹⁵ In my opinion there is no doubt that this is how the law stands today.

8.2.2 Impact of new Treaty provisions

In the TFEU the Union is encouraged to take action within both the social and environmental fields. According to Article 8, the Union shall, in all its activities, aim to eliminate inequalities, and to promote equality, between men and women. Article 9 provides that the

¹¹² See P. Denning, S. Graff and H. Wooten, Laws to require purchase of locally grown food and constitutional limits on state and local government: Suggestions for policymakers and advocates, *Journal of Agriculture, Food Systems and Community Development*, 1, 2010, 139.

¹¹³ See Arrowsmith and Kunzlik, (ed.), *Social and Environmental Policies in EC Procurement Law*, p. 162.

¹¹⁴ Cf. Bovis, C., *EC Public Procurement: case-law and regulation*, OUP 2005, p. 277.

¹¹⁵ See Arrowsmith, *EU Public Procurement Law: An Introduction* p. 78.

Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. It follows from Article 10 that the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Finally, in Article 11 it is stated that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

Articles 12 and 13 should also be mentioned in this context. Article 12 states that consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities and Article 13 provides that in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

All these Articles are concrete expressions of the general principle of consistency in Article 7 TFEU which declares that the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

In my view, these articles do not entail any major shift in the policy of the Union. They rather clarify that in the European integration project a lot of different interests must be taken into account. The EU legal framework is the result of a comprehensive reconciliation of different interests, not only an expression of free trade and competition. Articles 7–13 TFEU provide instructions aimed at the Union legislator and are therefore not directly applicable. Hence, the result of the level of ambition and the desire for policy coordination that these articles express remains to be seen. This issue is significant in the current revision of the public procurement directives. However, in the day to day application of the public procurement rules these articles are less crucial, although they can of course serve as interpretation guidelines. In my opinion, the main development resulting from the Lisbon Treaty in this context is the consistency principle in Article 7 TFEU, which requires policy coordination in all the activities of the Union more clearly than before.

That said, however, it must be added that certain principles which find support in Articles 8–11 TFEU come to a much more concrete expression in later sections of the Treaty or in the case-law. The principle of equal pay for men and women is reflected in Article 157 TFEU, stating that each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. This principle has for a long time constituted a fundamental legal principle which has direct effect. The same applies to the prohibition of age discrimination, although this principle has not been applied for such a long time. These principles are therefore binding on contracting authorities and must be respected in public procurement in the same way as the principles of free movement of goods and

services. They are part of the EU regulatory framework which contracting authorities are bound to respect.

8.2.3 New proposal for a directive on public procurement

In a new proposal for a directive on public procurement,¹¹⁶ the Commission seems to take these new indications in the TFEU seriously. The Commission observes that under Article 11 TFEU, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. The Commission affirms that the Directive clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

The proposal has two complementary objectives:

- 1) Increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification and flexibilisation of the existing public procurement rules. Streamlined, more efficient procedures will benefit all economic operators and facilitate the participation of SMEs and cross-border bidders.
- 2) Allow procurers to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.

The Commission declares that ‘strategic use of public procurement’ is permissible. The proposed directive therefore allows the Member States to use their purchasing power to procure goods and services that foster innovation, respect the environment and combat climate change while improving employment, public health and social conditions.

Of special interest from an environmental viewpoint is the proposal giving public purchasers the right to base their award decisions on life-cycle costs of the products, services or works to be purchased.

Moreover, as regards the production process, contracting authorities may refer to all factors directly linked to the production process in the technical specifications and in the award criteria, as long as they refer to aspects of the production process which are closely related to the specific production or provision of the good or service purchased.

¹¹⁶ COM/2011/0896 final.

As regards labels, the contracting authorities may require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, provided that they accept also equivalent labels.

Of importance is furthermore the new focus on sanctioning when it comes to violations of mandatory social, labour or environmental law. Under the proposed Directive, a contracting authority can exclude economic operators from the procedure, if it identifies infringements of obligations established by Union legislation in the field of social, labour or environmental law or of international labour law provisions. Moreover, contracting authorities will be obliged to reject tenders if they have established that they are abnormally low because of violations of Union legislation in the field of social, labour or environmental law.

Finally, contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may, in particular, concern social and environmental considerations. They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.

In my opinion, the proposed directive does not alter the present legal situation which means that the contracting authorities which impose environmental and social requirements must respect the EU law in general (the criteria used must be applied in a non-discriminatory manner, be justified by imperative requirements in the general interest, be suitable for securing the attainment of the objective which they pursue, and not go beyond what is necessary in order to attain it) and the subject-matter of the contract in particular (the criteria must be linked to the objective of the contract and be suitable for ensuring that it is attained). However, these developments underline that the EU pursues a multitude of interests which are not only economic. The possibility for the Member States to promote environmental or social interests in public procurement in support of existing EU legislation will therefore increase.

9. Final Reflections

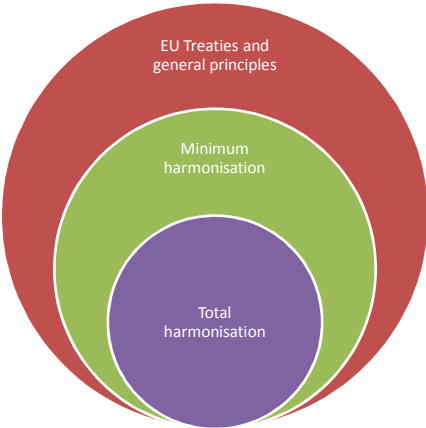
The EU internal market rules, both the Treaty provisions and secondary legislation, are often regarded as essentially promoting free trade. This is possibly an accurate assessment in a historical perspective – the European integration was originally fairly economically oriented – but it is not as true with regard to the present situation. The internal market rules are now based on very different interests. This complex character of the internal market rules is clearly expressed in Article 114.3 TFEU – the most important legal basis for the internal market – which provides that the Commission, in its proposals regarding new internal market legislation concerning health, safety, environmental protection and consumer protection, shall take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council shall also seek to achieve this objective. Hence, a directive or a regulation adopted

under Article 114 does not merely foster the free movement of goods and services within EU internal market but is at the same time intended to ensure a high level of protection *inter alia* for the environment.

Similarly, the CJEU has for more than fifty years reconciled the interests of free trade with other essential interests in its case-law, which have been discussed above. The famous Cassis principle means in this respect that a balance must be struck between all the interests which come into play (see above, 6.1).

This means that today there exists a ‘regulatory package’ which is the expression of distinct but aggregated interests, consisting of both case-law and secondary legislation. All the Member States have to respect this package when they adopt ‘measures’ that ‘restrict’ the economic freedoms in the EU internal market. When it comes to the possibility of going beyond the requirements set by Union law, the position is quite clear when the Union has adopted a directive or regulation which imposes a level of protection which is common to all the Member States, i.e., total harmonisation. In such a case, all relevant interests have already been taken into consideration and a compromise has been reached between the Member States (within the Council) and the European parliament on the safety level which is reasonable to apply in the whole Union. If the Union has opted for minimum harmonisation there is still room for balancing of interests in individual cases above the minimum level, and if there is no harmonisation legislation at all, such a balance of interests can be conducted in accordance with the Treaty provisions and relevant case-law.

The situation can be described by the following figure.



Figur 1 General EU law influence on state measures

As has been explained in detail above, it is my opinion that these principles must be respected in all procurements *that have a cross-border interest*. If there is no cross-border interest the general and specific EU law requirements will not be applicable.¹¹⁷ This shows an understanding from the CJEU that the application of Union law in all situations makes life unrealistically complicated in particular at the local level in the Member States. This is not without controversy because in general there is no *de minimis* rule as regards the four freedoms.¹¹⁸

Moreover, it should be added that since the Union pursues a multitude of interests nowadays and not only those which are economic, the Member States wishing to promote certain environmental or social interests in public procurement will more often find support in existing EU legislation. If that is the case, the actions by the Member States should not be considered as merely exceptions to the principles of free movement. Member States will under those circumstances not only promote their own special interests but rather contribute to the realisation of the EU's common objectives. This can be quite important when defining the scope for national actions in relation to EU law. The burden of proof is reasonably different if the state endorses a policy which is already encouraged by the Union. In such a case the Member State has less to justify.

However, when it comes to procurement it is not sufficient to consider only these general requirements. A decision by a contracting authority is not fully comparable with general regulatory measures issued by a Member State. The context is much more specific and the Court has therefore held that a contracting authority must not go beyond the subject-matter of the contract. Thus, the criteria set by the authority must be linked to the objective of the contract and be suitable for ensuring that it is attained.

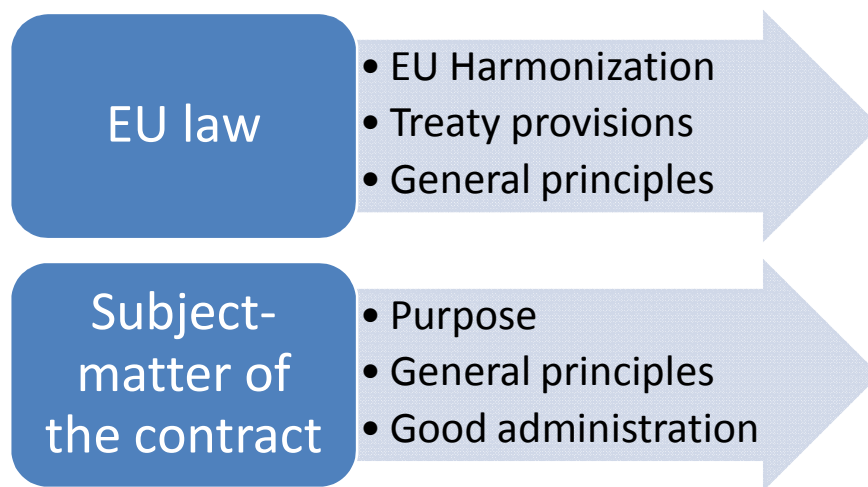
It should further be noted that the procurement process is an administrative procedure, therefore, certain general principles of administrative law must be observed. The general principles such as good administration, transparency and predictability play a role in the EU procurement law. The criteria set by the contracting authorities must therefore be in line with these principles (see above, section 5). For instance, the award criteria may not give unfettered discretion, they must be objective and quantifiable, and their application must be capable of verification (see 8.1).

It can therefore be concluded that the scope for contracting authorities to include environmental and social requirements is limited by two categories of law; first, general EU law requirements, second, principles in relation to the subject-matter of the contract.

This impact of EU law can be outlined as follows.

¹¹⁷ See case C-507/03, *Commission v Ireland (An Post)* [1997] ECR I-9777 and Joined Cases C-147/06 and C-148/06, *SECAP and Santorso v Comune di Torino (SECAP)* [2008] ECR I-3565.

¹¹⁸ See *Oliver on Free Movement of Goods in the European Union*, p. 91.



Figur 2 Impact of general EU law on public procurement

The conclusion to be drawn is that, if the contract has a cross-border interest and falls within the general scope of EU law, there are no exclusive areas in public procurement where EU law does not apply. Contracting authorities should evaluate the space available in EU law for imposing social or environmental requirements in two steps; first in relation to EU law in general, second, in relation to the subject-matter of the contract.

It is important to note that requirements that go beyond the level set by EU law can be justifiable as award criteria or other criteria which do not exclude tenders. Such criteria have a less restrictive effect on trade and usually provide a more proportionate and effective approach than other mechanisms. They are easier to justify than admission conditions, selection criteria, technical specifications etc., which are capable of totally excluding tenderers that cannot meet them. However, an award criterion must of course not be formulated so that in practice it constitutes a disguised technical specification or similar. Particular caution is required when requirements are set higher than harmonised standards in Union law. It is difficult to tell when it is possible to go beyond such standards, but it should not be excluded, for instance, that it is permissible to encourage technical innovation or environmental precaution that goes beyond the harmonised requirements provided that the products or services which meet the common requirements are not excluded from the procurement process. The same reasoning applies to other requirements, such as conditions of performance or conditions imposed on the production process. They should not, for the same motive, be formulated in such a way as to preclude the participation of tenders satisfying harmonised EU requirements. However, it can be assumed that conditions of performance and conditions imposed on the production process are less likely to be fully harmonised as they are usually not directly related to the characteristics of a product or service.

These conclusions apply equally to contracts which are not subject, or are subject only to a limited extent (B-services), to the public procurement directives. The basic principles are applicable as soon as there is a cross-border interest.

**On Jürgen Hettne's Legal analysis
of the possibilities of imposing requirements in public procurement
that go beyond the requirements of EU law (2012-04-19)**

1. Introduction.

Professor Hettne report analyses the possibilities of imposing requirements in public procurement that go beyond the requirements of EU law in the light of the general internal market law, and specifically with reference to the doctrines developed over the years concerning the four freedoms and harmonisation (page 7).

The conclusion is that the decisions taken by contracting authorities can be treated as measures imposing restrictions on the internal market and as such must not just comply with the non-discrimination and proportionality principles but also must be justified by imperative requirements in the general interest; additionally, the requirements must be linked to the subject-matter of the contract (page 31).

Professor Hettne accepts that the conclusion, which substantially sees the contracting authorities as market regulators instead than market participants, is not shared by some commentators,¹ but he believes that it is warranted by the case law (pages 37 ff).

While there is no denying that EU public procurement law was originally firmly and exclusively grounded in the Treaty provisions on the internal market, and the analysis of general internal market law by Professor Hettne is accurate, it is submitted here that

- since long public procurement law has – so to say – come of age, meaning that it is ruled by a discrete body of rules – the first directives dating from 1971 – which, while not running counter to internal market rules, qualify the principle which are relevant;
- this allows more room for taking into account environmental and social considerations;
- indeed, the case law *does not* uphold the claim that the choices by contracting authorities as to what to buy must be justified by imperative requirements in the general interest; quite on the contrary, the relevant TFEU principles binding contracting authorities are non-discrimination (and equal treatment) and transparency (at times the latter being considered a duty flowing from the non-discrimination principle), with proportionality being relevant at the qualification and award stages;
- the proposed alternative reading is confirmed by a number of pieces of secondary legislation and by a number of communications by the commission;
- finally, recent legislative proposals strengthen the tendency to both decoupling public procurement from purely internal market considerations *and* strengthening the possibilities to introduce environmental and social considerations in the procurement process.

2. The case law.

In line with the assignment, the report focuses very much on *Contse*.² The facts of *Contse* are illustrated in Professor Hettne's report. A few legal background information are however useful. *Contse* is not a particularly important procurement case, not having been quoted often in the

¹ The reference is to some of the writings collected in S. ARROWSMITH and P. KUNZLIK (eds.) *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009), including the long introductory chapter by the editors.

² Case C-234/05 *Contse* [2005] ECR I-9315.

following case law, possibly because it sits somewhat uncomfortably in a well-known line of cases originating in *Telaustria*.³

This line of cases originates from the limits to the scope of application of the directives (these days Directives 2004/17/EC and 2004/18/EC). A number of public contracts are not covered by the directives, notably below the thresholds contracts and – more irksome considering the possibly very high value – service concessions; list B or non-priority services on the other hand are only to a limited extent bound by the directives.

Telaustria itself was a services concession case. The Court of justice, while confirming that service concessions do not fall within the scope of the procurement directives also held that this does not rule out any relevance of what is now EU law. More specifically, the Court of justice held that the contracting entities concluding them are «bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular».⁴ Moreover, following the judgment in *Unitron Scandinavia*,⁵ the Court added that «that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with».⁶

On the one hand it is true that the Court refers to the fundamental rules of the Treaty in quite general terms; however, and on the other hand, the only relevant principle in that case, and in the following cases, is the principle of non-discrimination assorted with the duty of transparency.⁷

Taking for instance a list B services case,⁸ the Grand Chamber of the Court of justice moved from the assumption that the Community legislature based itself on the assumption that non priority service contracts are not of cross-border interest and therefore do not justify award EU-wide award procedure.⁹ The Court was however fast in pointing out that it was common ground among the parties that «the award of public contracts is to remain subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services».¹⁰ After recalling that the purpose of public contracts directives is to eliminate barriers to the freedom to provide services and goods, the Court held that the specific advertising arrangement provided for non-priority services contracts «cannot be interpreted as precluding application of the principles resulting from Articles 43 EC and 49 EC, in the event that such contracts nevertheless are of certain cross-border interest».¹¹ As a consequence, the award without any transparency of such contract «amounts to a difference in treatment to the detriment of undertakings which might be interested in that contract but which are located in other Member States».¹²

The doctrine is very wide, but its application is focused on the non-discrimination principle assorted with the duty of transparency.

Contse is a somewhat different case. The Spanish contracting authority maintained that the contract at issue was a service concession and as such Directive 92/50/EEC then in force did not apply. The Court of justice considered that the elements of the case pointed out to a normal service

³ Case C-324/98 *Telaustria* [2000] ECR I-10745.

⁴ Paragraph 60.

⁵ Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291.

⁶ Paragraph 61.

⁷ E.g. Case C-458/03 *Parking Brixen* [2005] ECR I-8585; Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, and Case C-231/03 *Coname* [2005] ECR I-7287, all again service concession cases

⁸ Case C-507/03, *Commission v Ireland* [2007] ECR I-9777; another case was Case C-226/09 *Commission v Ireland* [2010] ECR I-0000, concerning translation services.

⁹ Paragraph 25.

¹⁰ Paragraph 27; Case C-92/00 *HI* [2002] ECR I-5553, paragraph 42 is referred to.

¹¹ Paragraph 29.

¹² Paragraph 30; C-324/98 *Telaustria* [2000] ECR I-10745, paragraphs 60 and 61, and Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 17, are referred to; paragraph 31 refers to the non-discrimination principle; see also Case C-119/06 *Commission v Italy* [2007] ECR I-168, paragraphs 63 f.

procurement contract, leaving however the final determination to the referring national court. On this basis, the Court referring to *Coname*, affirmed the application of the Treaty principles but, unlike the precedents, went on performing a full fledged internal market analysis.

It is to be noted, however, that the restrictions relevant in this case could have easily been considered in breach of the non-discrimination principle according to the well established public procurement case law.¹³

In the subsequent judgments of the Court of justice *Contse* has been quoted only twice and both times only to the effect of distinguishing procurement and concession contracts.¹⁴

The classic internal market analysis of a procurement case in *Contse* has so far not commanded any following and the question of the possibility of imposing requirements in public procurement that go beyond the requirements of EU law can't be said to be settled by that case.¹⁵

3. Other indications.

If the case law does not really clarify the possibilities of imposing requirements in public procurement that go beyond the requirements of EU law, we must look for other indications.

According to Recital 2 of Directive 2004/18/EC, “The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency”.¹⁶

The indication is quite generic, and it is specified by the different provisions of the Directive. It is not enough to rule out the choice of contracting authorities on what to buy; simply, in line with the integration purpose of the Treaty, discriminations are ruled out, and contracting authorities must be ready to accept the qualifications of foreign economic operators in so far as they are equivalent to national ones (see Articles 45 ff of the same directive).

However, the general Treaty principles which are really relevant in public procurement are spelt out in Article 2 of Directive 2004/18/EC (Principles of awarding contracts): «Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way».

Again, not all internal market Treaty principles are relevant in public procurement (or to put it more gently, some principles are much more relevant than others).

The most relevant indications are to be found in different documents (communications and guides) issued by the Commission.

The first one is the Interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement.¹⁷

The objective of the Communication is to analyse and to set out the possibilities of the existing Community legal framework with regard to the integration of environmental considerations into public procurement.

¹³ E.g. Case 21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889.

¹⁴ Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraph 68, and Case C-274/09 *Privater Rettungsdienst und Krankentransport Stadler* [2011] ECR I-0000, paragraph 24.

¹⁵ A similar analysis can be found in Case C-346/06, *Rüffert* [2008] ECR I-1989, concerning German rules in breach of the posted workers directive; this again was a procurement case, but legislative provisions rather than contracting authorities choices were at stake.

¹⁶ Recital 6 affirms the applicability of the derogations to the freedom of movement.

¹⁷ COM(2001) 274 final; concerning social considerations see COM (2001) 566 final.

According to the Commission, «The first occasion for taking into account environmental considerations relative to a public contract, is the phase just before the public procurement directives will be applicable: the actual choice of the subject matter of the contract or, to simplify the question “what do I, public authority, wish to construct or purchase”? At this stage, purchasing authorities have a “wide” opportunity to take into account environmental considerations and choose an environmentally sound product or service» (page 7).

True «existing environmental or other legislation, either Community legislation or national legislation compatible with Community law, may well limit or influence this freedom of choice» (the duty to have Environmental impact assessment is mentioned in the footnote).

However, the main point is that «The public procurement Directives do not prescribe in any way what contracting authorities should buy and are consequently neutral as far as the subject matter of a contract is concerned. If different possibilities exist for fulfilling their needs, contracting authorities are *free to define the subject matter of the contract in the way that they consider to be the most environmentally sound*» (page 8, emphasis added).

Indeed, as was remarked, this freedom of choice is implied in the democratic system – basically a preference setting mechanism – and EU law could hardly curtail it.¹⁸

The Commission’s favoured approach, which predates *Contse*, has been confirmed all along the way, including in the 2010-2011 Guides on buying social and on buying green.¹⁹

The latter clearly states that in principle contracting authorities are free to define the subject of the contract in any way that meets their needs. «Public procurement legislation is not so much concerned with what contracting authorities buy, but mainly with how they buy it. For that reason, the procurement directives do not restrict the subject matter of a contract as such». Sure this freedom is not unlimited: «In some cases the choice of a specific product, service or work may distort the level playing-field in public procurement for companies throughout the EU». To avoid this – please note, a specific product, not a specific category of products, such sustainable timber or bio-food – the Treaty provisions of on non-discrimination, the freedom to provide services and the free movement of goods apply, but this in practice that the definition of the contract will not affect access to the tender by other EU operators or operators from countries with equivalent rights. Moreover, technical specifications must not be defined in a discriminatory way (page 22).

The Commission is referring here to the Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, to which we will come soon.

The 2010 *Buying social A guide to Taking Account of Social Considerations in Public Procurement* anticipated almost word by word the approach of the Buying green handbook (page 23). Additionally, when expressly considering the stages of the procurement procedure relevant for socially responsible public procurement, indicates that «there are now at least four basic approaches to how social issues are currently addressed in public procurement. The *first* arises when the purchaser decides to include social criteria in the subject matter of the contract itself and/or in the technical specifications that must be met by successful contractors in a way that includes social criteria» (page 20).

Another interpretative communication relevant here focused on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives.²⁰

¹⁸ S. ARROWSMITH and P. KUNZLIK ‘Public procurement and horizontal policies in EC law: general principles’ in S. ARROWSMITH and P. KUNZLIK (eds.) *Social and Environmental Policies in EC Procurement Law* above fn. 1, at 17.

¹⁹ <http://ec.europa.eu/environment/gpp/pdf/handbook.pdf>

²⁰ 2006/C 179/02.

As already remarked, it is with reference to contracts not covered by the directives that the case law has had to make explicit those obligations derived from the Treaty and binding on contracting authorities.

According to this communication, «Contracting entities from Member States have to comply with the **rules and principles of the EC Treaty** whenever they conclude public contracts falling into the scope of that Treaty. These principles include the **free movement of goods** (Article 28 of the EC Treaty), the **right of establishment** (Article 43), the **freedom to provide services** (Article 49), **non-discrimination and equal treatment, transparency, proportionality and mutual recognition**. The ECJ has developed a set of **basic standards for the award of public contracts** which are **derived directly from the rules and principles of the EC Treaty**. The principles of equal treatment and nondiscrimination on grounds of nationality imply an **obligation of transparency** which, according to the ECJ case-law, *‘consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed’*» (page 1, emphasis in the original).

As was the case in the judgments already discussed above, the reference to the Treaty is very wide. However, what contracting authorities must comply with is non discrimination and transparency.

This is confirmed by the reference to *Telaustria*: «The ECJ stated in the *Telaustria* judgment that the obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition and the **impartiality of the procedures** to be reviewed. The guarantee of a fair and impartial procedure is the necessary corollary of the obligation to ensure a transparent advertising» (page 7).

The Communication is very explicit as to the relevant principles: «It follows that the award has to be in line with the **rules and principles of the EC Treaty** so as to afford fair conditions of competition to all economic operators interested in the contract. This can be best achieved in practice through:

— Non-discriminatory description of the subject-matter of the contract

The description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production unless such a reference is justified by the subject-matter of the contract and accompanied by the words ‘or equivalent’. In any case, it would be preferable to use more general descriptions of performance or functions.

— Equal access for economic operators from all Member States

Contracting entities should not impose **conditions causing direct or indirect discrimination** against potential tenderers in other Member States, such as the requirement that undertakings interested in the contract must be established in the same Member State or region as the contracting entity.

— Mutual recognition of diplomas, certificates and other evidence of formal qualifications

If applicants or tenderers are required to submit certificates, diplomas or other forms of written evidence, documents from other Member States offering an equivalent level of guarantee have to be accepted in accordance with the principle of mutual recognition of diplomas, certificates and other evidence of formal qualifications.

— Appropriate time-limits

[...]

— Transparent and objective approach

All participants must be able to know the applicable rules in advance and must have the certainty that these rules apply to everybody in the same way» (page 7 f; emphasis in the original).

The above quotation from the interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement

Directives is quite extensive, but it is plain that there is no application of the internal market test described by Professor Hettne's report (page 31).

In case of public procurement, the test is different. Basically, the freedom of choice of the contracting authorities can't be abused to discriminate economic operators from other Member States.

Of course interpretative communications are not among the sources of EU law, and the Court of justice is the ultimate interpreter of EU law. However, the legality of the interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives was challenged by a number of Member States, but the (then) Court of first instance held the action inadmissible because the communication contents itself with reproducing the case-law of the Court.²¹

Beyond the interpretative communications, a number of initiatives specifically focusing on green procurement confirm the freedom of contracting authorities to pursue higher environmental standards.²²

Finally, in the past few years, EU procurement legislation has added a new focus on the substance of what is bought ('what to buy'). Contracting authorities are at time prodded other times ordered to procure products having given characteristics, and this especially so with EU legislation aimed at bettering the environment.²³

For instance, the Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles) and office equipment (Regulation (EC) No 106/2008 on a Community energy-efficiency labelling programme for office equipment).

It is difficult to say why contracting authorities should wait for the Union before pursuing the same policies with reference to other products or services?

4. The reform of public procurement.

According to Professor Hettne's report, the proposed directive does not alter the present legal situation concerning recourse to environmental and social considerations (page 41).

It is to be remembered that the proposal was anticipated by the Commission Green Paper 'on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market'.²⁴

The Green Paper talks of 'complementary objectives' of public procurement regulation, in a way putting sustainability on the same footing as other objectives. A specific part of the Green paper is dedicated to what is referred to as 'strategic use of public procurement'. The overall idea is that these complementary objectives may reinforce one another, for instance 'by moving focus from lowest initial price to lowest life-cycle cost'.²⁵

The explanatory memorandum to the proposal for a new directive expressly refers to sustainability concerns: «The Europe 2020 strategy for smart, sustainable and inclusive growth [COM(2010) 2020] is based on three interlocking and mutually reinforcing priorities: developing an economy based on knowledge and innovation; promoting a low-carbon, resource-efficient and

²¹ Case T-258/06 *Commission v Germany* [2010] ECR II-0000; see Z. PETERSEN 'Below-threshold Contract Awards under EU Primary Law: Federal Republic of Germany v Commission (T-258/06) [2010] *PPLR* NA215.

²² E.g. *Buying Green. A handbook on green public procurement 2nd*, pag. 21.

²³ See also the Commission Communication "*Public Procurement for a Better Environment*" - COM(2008) 400; see more generally the Europe 2020 strategy for smart, sustainable and inclusive growth - COM(2010) 2020.

²⁴ COM(2011) 15 final.

²⁵ Page 5.

competitive economy; and fostering a high-employment economy delivering social and territorial cohesion. Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve these objectives by improving the business environment and conditions for business to innovate and by encouraging wider use of green procurement supporting the shift towards a resource efficient and low-carbon economy» (page 1).

True internal market provisions are still the legal bases for the proposed directive. However, Recital 2 expressly refers to the Europe 2020 strategy and states that procurement rules «have to be revised and modernised in order to [...] to enable procurers to make better use of public procurement in support of common societal goals». Moreover, the requisite that sustainability considerations are linked to the subject-matter is taken out from Recital 1; it pops up here and there, but in a context of accrued relevance of the production processes (e.g. Recital 44).²⁶ Finally, but the two aspects are linked, a totally new emphasis is placed on life-cycle costs (e.g. Recitals 39 f).

Contracting authorities are not just empowered but clearly pushed towards sustainable procurement.

5. Conclusions

It is submitted that Professor Hettne's report, while providing a fine account of the internal market general principles, possibly due to the way the terms of reference were drafted, fails to take into full account the specific dynamic of public procurement law and policy.

The different approach followed here of course leads to different, not to say opposite conclusions. The principle is the freedom of contracting authorities on what to buy, provided the freedom is not abused to discriminate against foreign producers or suppliers. Differently from what would be the result of the application of the internal market test, procurement choices excluding some products or providers are not necessarily unlawful. In *Concordia Bus* the Court of justice held quite clearly that «the principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, *solely because the contracting entity's own transport undertaking is one of the few undertakings able to offer a bus fleet satisfying those criteria*».²⁷

Even full harmonisation is by itself not an absolute limit. True, in *Medipac* the Court of justice held that the purpose of the harmonisation system precludes a contracting authority from rejecting, outside that safeguard procedure and on grounds of technical inadequacy, medical devices which are certified as being in compliance with the essential requirements provided for by that directive.²⁸

However, under Article 23 of Directive 2004/18/EC, technical specifications, while affording equal access for tenderers (in the *Concordia Bus* meaning) and not having the effect of creating unjustified obstacles to the opening up of public procurement to competition, may be formulated: «in terms of performance or functional requirements; the latter may include environmental characteristics».

The problem is whether anyone on the market is producing goods more performing than the standards set by the harmonisation measures? Moreover, managing performance based specifications require more work from contracting authorities when compared with reference to

²⁶ The recent judgment in Case C-368/10 *Commission / Netherlands*, handed down on May 10, 2012, and not yet reported, made it clear that «there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof» (paragraph 91); of course this could not be considered in the report.

²⁷ Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 86 (emphasis added).

²⁸ Case C-6/05, *Medipac-Kazantzidis* [2007] ECR I-4557, paragraph 50.

Roberto Caranta
Professor in Administrative Law
University of Turin

existing standards (the parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract).²⁹

But this are a factual question and a practical problem, not legal constraints.

Legally speaking, the mistake in *Medipac* was the reference to a harmonised standard coupled with the pretence to exclude one producer which was supposed to comply with the same standard under the applicable EU legislation.

Turin, June 4, 2012

Roberto Caranta

²⁹ See now case Case C-368/10 *Commission / Netherlands*, paragraphs 109 f; see also Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraphs 34 ff; see TH. GLIOZZO 'L'admissibilité d'un critère environnemental au regard de la réglementation communautaire des marchés' Act. Jur. Dr. Adm. 2004, 334.

Comment on Professor Jürgen Hettne's Paper, 'Legal Analysis of the Possibilities of Imposing Requirements in Public Procurement that Go beyond the Requirements of EU Law' and Professor Roberto Caranta's Commentary

Professor Peter Kunzlik, Professor of Law, City University London

I have been asked to comment on Professor Hettne's Paper and Professor Caranta's Commentary thereon. With the very greatest respect to those distinguished scholars my comments are as set out below.

1. The appropriate approach

So far as *purely regulatory conduct* is concerned the only area in which I differ from Professor Hettne concerns the importance of the Court's decision in *PreussenElektra*¹ (discussed below). So far as *public procurement* is concerned I respectfully disagree both with the implicit premiss upon which Professor Hettne's approach appears to be based, and with his key conclusion. His analysis falls within a tradition which sees attempts by public purchasers to exercise their discretion to favour environmental or social objectives as being potentially sinister in terms of the internal market and, accordingly, as requiring strict control in the same way as national regulatory measures. From that perspective, assuming that a contract is of sufficient cross-border interest, a public purchaser's decision that it will only acquire a purchase which attains high environmental or social standards is itself suspect: it is portrayed as excluding some suppliers (those who cannot achieve the high standard in question, some of whom may potentially be from other Member States) and therefore as a 'hindrance' to intra-community trade as defined by *Dassonville*² so as to be lawful only if justified on the basis of imperative interests. Since environmental and social objectives will often, however, be recognised as legitimate interests by EU law, the effect of this approach is that the legality of such purchasing decisions is made to depend upon proof that they are not discriminatory and that they are proportionate. The latter principle, *if it truly did apply*, would require that, to be lawful, the decision must be proportionate to the objective to be achieved (in the sense of being both apt to achieve its ostensible environmental or social objective and being not more restrictive of intra-Union trade than is necessary to do so).

The European Court has, however, never portrayed environmental or social procurement as inherently suspect. See *Beentjes*,³ *Nord Pas-de-Calais*,⁴ *Concordia Bus Finland*,⁵ *EVN*,⁶ and *Dutch Coffee*.⁷ Furthermore, the values that public purchasers seek to advance in such cases are normally the same as those that are now enshrined in the Union Treaties. Indeed the internal market itself can no longer be understood only in terms of the fundamental freedoms (important though they remain). Instead the Treaty itself expresses various 'non-trade' values *and requires that these must be infiltrate EU policies generally*. Thus the 'integration principle' stated in Article 11 TFEU requires that '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'; and similar (but differently worded) principles require that various social values must also infiltrate Union activities.⁸ Indeed such values are also inherent in the very notion of the internal market as now defined by Article 3 TEU.⁹ Furthermore, Article 26 TFEU (which confers competence upon the Union to adopt measures 'with the aim of establishing or ensuring the functioning of the internal market') expressly provides that the Union must do so 'in accordance with the relevant provisions of the Treaties.' Such provisions, of course, include both Article 3 of the TEU and Articles 8- 13 TFEU, which provide the various integration principles mentioned above.

The multi-valued nature of the EU system necessarily affects the way in the Treaty's fundamental freedoms are applied. The Court in *PreussenElektra* recognised both this, and the importance of the environmental 'integration principle,' so as to accept on environmental grounds (even in the purely regulatory context) that a national measure which discriminated against producers of renewable energy from other Member States did not violate the Treaty rules on free movement of goods. In my view *PreussenElektra* was not an aberration as implied by Professor Hettne's Paper but a necessary

¹ Case C-379/98, *PreussenElektra AG v Schlesweg AG* [2001] ECR I-2099.

² Case 120/78, *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 ('*Dassonville*').

³ Case 31/87, *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635.

⁴ Case C-225/98, *Commission v French Republic* ('*Nord Pas-de-Calais*') [2000] ECR I-7445.

⁵ Case C-513/99, *Concordia Bus Finland Oy Ab v Helsingin kaupunki* [2002] ECR I-7212.

⁶ Case C-448/01, *EVN AG & Wienstrom GmbH v Republic Österreichische* [2003] ECR I-14527.

⁷ Case C-368/10, *European Commission v Kingdom of the Netherlands* ('*Dutch Coffee*'), judgment of 10 May 2012, not yet reported.

⁸ As to such social values see Articles 8, 9, 10 and 12 TFEU.

⁹ Article 3 states that '[t]he Union shall establish an internal market. It shall work for the development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between men and women, solidarity between the generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's heritage is safeguarded and enhanced.'

consequence of the multi-valued nature of the Treaty and of the need to ensure that free movement law was not applied so as to curtail the Union's own essential environmental policies and principles. The consequence of *PreussenElektra* is that, even in the case of national regulatory measures, it remains possible that national environmental measures, aligned with Union policy, may escape being characterised as 'hindrances' to intra-Union trade even if they are directly discriminatory. To the extent that procurement decisions are to be regarded as potential 'hindrances' within the *Dassonville* doctrine the same position would logically apply.

The European Court's judgments in the procurement cases cited above, the Treaty amendments that shaped the multi-valued Treaties, and the specific recognition of environmental and social aspects of procurement in Directive 2004/18 ('the Public Contracts Directive')¹⁰ mean that the sceptical approach to environmental and social procurement, and to its compatibility with the internal market, is no longer appropriate.¹¹

2. Are public purchasers prohibited from seeking to buy things meeting higher standards than those laid down by EU law?

For public contracts within the scope of the Public Contracts Directive, the Directive itself does not explicitly lay down any rule which prevents a public purchaser from seeking to buy only things which achieve higher standards than those laid down by EU law. The legitimacy of such a decision therefore depends upon the way in which the Court applies the Treaty principles. The same, of course, is true as regards public contracts that are outside the scope of the Directive, or not fully covered by it. The remainder of my comments address that question.

If a public contract is not of a 'certain cross-border interest' the Treaty provisions on free movement will not apply so there will be no question that the purchaser's decision to purchase something attaining higher standards than those required by EU law could amount to a 'hindrance' to intra-Union trade so as to require justification on the basis of imperative interests.

If a public contract *is* of a certain cross-border interest a different analysis applies. Here a distinction must be drawn between, on the one hand, the public purchaser's decision as to what it wishes to buy and such of its ancillary decisions as are essential to ensure that the thing it purchases corresponds to that decision (referred to hereafter as 'what to buy' decisions) and decisions restricting the persons who will have access to the contracting procedure and the terms on which they will have access (referred to hereafter as the 'access to the contract' decisions). In either case a public purchaser's decisions will be unlawful if they infringe the principle of equal treatment (including but not limited to discrimination on grounds of nationality) or if they are not sufficiently transparent (a duty of transparency being inferred from the principle of equal treatment). On the other hand, the legal treatment of *non-discriminatory* decisions differs according to whether they are 'what to buy' decisions or 'access to contract decisions.' In my view the Court has refrained from treating 'what to buy' decisions as 'hindrances' to trade within the *Dassonville* doctrine so as to require their justification on grounds of imperative interest. This has meant, in particular, that such decisions have not been required to be justified in terms of proportionality.

Thus, reflecting the importance of the fact that public purchasers are market participants rather than simply market regulators the Court has tended to refrain from characterising 'what to buy' decisions as 'hindrances' to trade within the *Dassonville* doctrine. Instead, within certain legal limits,¹² it has accepted that public purchasers are free to determine the conditions and criteria that are essential to ensure that, having decided what they wish to purchase, their purchase will in fact correspond to that decision. Thus in *Concordia Bus Finland* the Court emphasised the discretion of the public purchaser as regards choice of contract award criteria when letting a contract on the 'most economically advantageous' ('MEAT') basis rather than on the basis of the lowest price only. It held that when the MEAT criteria are applied, the purpose is to identify

¹⁰ Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts (OJ L134, 30.4.2004, p. 114) Recitals 1, 5, 28, 29, 33, 43, 45 & 46; and Articles 19, 23(1), 23(3)(b), 23(6), 26, 27, 48(2)(f), 50, & 53(1)(a).

¹¹ Thus, as Advocate General Kokott stated in *Dutch Coffee*, Opinion of 15 December 2011, para. 36, not yet reported, '[f]or a long time the pursuit of environmental and social objectives was disapproved of in public procurement law, as was manifested not least in the use of the phrase "objectives irrelevant to the contract." However, it is now generally recognised that public purchasers may also take account of environmental and social factors when awarding contracts, and the Commission has not challenged this in principle. On the one hand, this is clear generally from its public statements on this matter. On the other, in the present case the Commission expressly recognised ... that public purchasers may in particular make the purchase of organic and fair trade products the subject-matter of public supply contracts.' Accordingly '[w]hether and to what extent environmental and social considerations must be taken into account... is a question of fundamental importance for the further development of public procurement law. In giving its answer the Court is faced with the challenge of finding an equitable balance between the requirements of the internal market and environmental and social concerns without, however, ignoring the practical requirements of award procedures. On the one hand there can be no discrimination between potential tenderers or partitioning of markets. On the other hand, public purchasers must be allowed to procure environmentally friendly, organic and fair trade products without excessive administrative burdens'; *ibid.* (emphasis added).

¹² The limits are that the contract award criteria must be 'linked to the subject matter of the contract,' that they must not be so vague or otherwise drafted as to give the Public purchaser an unfettered discretion, they must be *applied* in conformity with the Treaty principles, notably the principle of non-discrimination, and they must be applied respecting the procedural rules of the Directive, notably on advertising: *Concordia Bus Finland*.

the bid that, overall, is the economically most advantageous bid *from the point of view of the contracting authority*.¹³ Thus, if the public purchaser considered that environmental protection by way of reducing pollution or noise emissions was important from its perspective, it was entitled to use clearly defined, non-discriminatory, award criteria (linked to the subject matter of the contract) relating to such factors since to do so would help it decide whether *from its point of view* a particular bid was overall most economically advantageous.¹⁴

Furthermore in *EVN*, when accepting that, in an electricity supply contract, a public purchaser could in principle adopt an award criterion favouring bids that offered electricity from renewable energy sources, the Court expressly declined to consider whether such a criterion would be apt to achieve the policy goal at which it was ostensibly aimed (increasing the supply of 'green' electricity.)¹⁵ The reference for a preliminary ruling had asked whether such an award criterion 'infringes Community law in so far as it is not necessarily capable of helping to increase the amount of electricity produced from renewable energy sources.'¹⁶ The Court's response was simply that '...it need only be noted that *even if that is in fact the case, such a criterion cannot be regarded as incompatible with the Community provisions in the field of public procurement simply because it does not necessarily serve to achieve the objective pursued.*'¹⁷ Yet, if the 'hindrance' to trade doctrine been at all relevant, the fact that the criterion was not apt to achieve its ostensible objective would have condemned it as being disproportionate and so incapable of justification.¹⁸ The fact that the Court declined to apply the proportionality principle to control the choice of award criteria in *EVN* therefore clearly shows that it recognises that public purchasers have a greater degree of autonomy than when regulating and that non-discriminatory award criteria relating to 'what to buy' questions are not to be treated as 'hindrances' to trade. The same conclusion is supported by another aspect of the case. A weighting of no less than 45% had been ascribed to the 'green electricity' criterion. The national court had asked whether this might be unlawful 'since it could be objected that the public purchaser is prohibited from allowing a consideration which is not capable of being assigned a direct economic value from having such a significant influence on the award decision.'¹⁹ The Court replied that 'provided that they comply with the requirements of Community law, *public purchasers are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria,* provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.'²⁰ In the circumstances the 45% weighting did 'not appear to present an obstacle to an overall evaluation of the criteria applied in order to identify the most economically advantageous tender'²¹ and was 'not incompatible with the Community legislation on public procurement.'²² Again it is striking that the Court did not think it necessary to consider whether, by making it more difficult for electricity suppliers which did not generate electricity from renewable energy sources to win the contract (including potentially those from other Member States), the 45% weighting amounted to a 'hindrance' to intra-Union so as to call for justification the basis of imperative interests.

Moreover, the proposition that a public purchaser is not to be regarded as causing a hindrance to trade simply because it chooses (on a non-discriminatory basis) to purchase something achieving a higher standard than can be met by many suppliers (including potentially suppliers from other Member States) is supported by *Concordia Bus Finland*. There it was alleged that the public purchaser's decision to use contract award criteria favouring bidders whose bus transportation fleets would not exceed certain stated emissions limits was discriminatory and so infringed the principle of equal treatment. This was put on the basis that the use of such criteria would disadvantage those potential bidders whose fleets did not achieve the required standards and that, in fact, only a very small number of fleet operators would be able to satisfy the criteria, including, in particular, the commercial undertaking owned by the public purchaser itself.²³ The Court rejected that argument, holding that 'the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender *could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity,* is not in itself such as to constitute a breach of the principle of equal treatment.'²⁴ Such a ruling was

¹³ Thus the Court held that '[i]t cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the public purchaser'; *Concordia Bus Finland*, para. 55. See also *Beentjes*, and Case C-324/93, *Ex parte Evans Medical and Macfarlan Smith* [1995] ECR I-563 'which allow a contracting entity to choose the criteria it regards as relevant when it assesses the tenders submitted'; *Concordia Bus Finland*, para. 45.

¹⁴ Furthermore the fact that a public purchaser's award criteria are to assist it to decide which tender is the most economically advantageous from its own perspective has been incorporated into Directive 2004/18 (the 'Public Contracts Directive') itself: Article 53 (1)(a) permits the award of a public contract on the basis that 'the award is made to the tender most economically advantageous *from the point of view of the public purchaser...*' (emphasis added).

¹⁵ *EVN* para.53.

¹⁶ *Ibid.*

¹⁷ *Ibid.* emphasis added.

¹⁸ See e.g. Case C-234/03, *Contse SA v Ingesa ('Contse')* [2005] ECR I-9315, paras. 42 & 61-66.

¹⁹ *EVN*, para. 35.

²⁰ *Ibid.* para. 39, emphasis added.

²¹ *Ibid.* para. 42.

²² *Ibid.* para. 43.

²³ *Concordia Bus Finland*, paras. 19,30, 71.

²⁴ *Concordia Bus Finland*, para. 85, emphasis added.

entirely justified because, as Advocate General Mischo pointed out, discrimination (direct or indirect) can only arise when operators in a like situation are treated differently, or those in unlike situations are treated in the same way.²⁵ On the facts of the case, however, 'the two undertakings were treated differently only because they were not in identical situations. One of them was able to offer the fleet requested and the other was not.'²⁶ Having disposed of the equal treatment argument the Court did not think it necessary to consider whether the high weighting amounted to a 'hindrance' to trade within the **Dassonville** doctrine, even though the setting of a high standard might be argued potentially to hinder intra-Union trade by excluding those unable to meet the standard. Nor did it suggest that the lawfulness of the emissions criteria was to be judged under the proportionality principle. This was entirely consistent with the view that, so long as it did not involve unequal treatment, the decision whether or not to use award criteria favouring fleets which met the relevant emission limits was legitimately a question for the public purchaser, not the Court, to determine.

Furthermore, the contention that for a public purchaser to require that its purchase must have characteristics which go beyond those which can be met by a large number of suppliers (or to favour such products in terms of its contract award criteria) would amount to a hindrance to intra-Union trade (because many suppliers in other Member States would be unable to achieve the requisite standard) and therefore require justification on grounds of imperative interests, would severely curtail such a purchaser's ability to buy goods, works or services 'at the state of the art.' Such an outcome would be inconsistent with the view expressed by Advocate General Mischo in **Concordia Bus Finland** that (as regards a public contract for bus transportation services) so long as award criteria are linked to the subject matter of the contract ' [a] public purchaser cannot be prohibited from requiring the use of a fleet having state of the art characteristics, even if it gives prime importance to one of the qualities of such a fleet, namely its characteristics in relation to gas emissions and engine noise.'²⁷

The result seems to be that 'what to buy' decisions are unlawful if truly discriminatory since they will then infringe either the rule against discrimination on grounds of nationality or the equal treatment principle. Non-discriminatory 'what to buy' decisions have not, however, been treated as hindrances to trade. They do not therefore need to be justified under the proportionality principle. Quite apart from anything else, if this were not the case, the Court's judgments in the above-mentioned cases would make little sense: they each emphasised that the decisions with which they were concerned could be lawful, *inter alia*, so long as they were not discriminatory. Yet even non-discriminatory measures can, in the regulatory context, amount to hindrances to trade within the **Dassonville** doctrine. Thus if that doctrine really did apply to 'what to buy' decisions in procurement in the same way in which it applied in the purely regulatory context, the Court's emphasis on the legality of such decisions depending on the absence of discrimination would be wholly misleading.

Furthermore, the view that non-discriminatory 'what to buy' decisions are not to be treated as hindrances to trade can be justified on the basis that the public purchaser's requirement as to what it wants to buy defines the market rather than creating a hindrance within it. Moreover, to subject such decisions to the need for justification on the grounds of imperative interest would involve a disproportionate impact upon the procurement process, requiring purchasing officers acting in a commercial (not regulatory) context to undertake a complex legal assessment which they are not equipped to make, thereby inflating transaction costs and, potentially, prompting a wave of proportionality litigation which could easily crowd the European Court's docket. Furthermore it would substitute the courts (including the European Court) for public purchasers when deciding the nature of the things upon which taxpayer's money should be spent. This would be undemocratic and would, in any event, require the courts to undertake a role for which the judicial process is ill-adapted.

By contrast, if a contract is of 'certain cross-border interest,' decisions that relate not to 'what to buy' but to 'access to contract' may be regarded as hindrances to trade and require justification on the grounds of imperative interest. **Contse** was such a case.²⁸ It concerned (i) conditions for the admission of tenderers to a procurement procedure for the letting of a public service contract (for the provision of home respiratory treatments in a part of Spain); and (ii) the public purchaser's contract award criteria.²⁹ The former required, as a condition of participating in the tender process, that potential tenderers must, *at the time of bidding*, have an office open in the provincial capital of the office in question.³⁰ The latter awarded extra points to bidders which, *at the time of bidding*, already had oxygen producing, conditioning and bottling plants within 1,000 kilometres of that province or offices open to the public in other towns of that province.³¹ These requirements clearly did *not* relate to

²⁵ Advocate General Mischo's Opinion, para. 149.

²⁶ *Ibid.* para. 150.

²⁷ *Ibid.* para. 77.

²⁸ Case C-234/03, *Contse SA v Ingesa* [2005] ECR I-9315. See also Case C-147/06, *SECAP Spa v Comune di Torino* [2008] ECR I-3565, which concerned a national regulatory measure that, although non-discriminatory, potentially curtailed suppliers from other Member States from being able to compete for a public contract on the basis of their competitive advantages in terms of low wage (and therefore) price levels.

²⁹ *Contse*, para. 20.

³⁰ *Ibid.*

³¹ *Ibid.*

any 'what to buy' decision since they concerned, not to the existence of facilities to be used in providing the services which were the subject-matter of the contract, but to the existence of facilities *at the time of bidding*. They related instead to access to the contract. The Court therefore treated them as hindrances to trade so that they would only be lawful only if non-discriminatory, justified on the basis of imperative interests, and proportionate.³²

So far as the application of Treaty principles to cases not covered (or not fully covered) by Directive 2004/18 is concerned, I agree with Professor Caranta that the Court has generally been concerned to ensure transparency and a sufficient degree of advertising to open such contracts up to competition.³³ These are the specific principles that it has adopted as analogues of the basic rules applied by Directive 2004/18.³⁴ I also agree with Professor Caranta that in such cases the Court, whilst making general reference to the fundamental rules of the Treaty and to the provisions on freedom of establishment and freedom to provide services, has in fact *applied* these narrower principles. On the other hand, when applying those principles (which, since they relate to *advertising* obligations, clearly relate to 'access to contract' and not 'what to buy' aspects of the procurement) the Court has invoked the hindrance to trade doctrine. Thus, for example, in **Commission v Italian Republic**, the Court (when condemning Italy's renewal of some 329 licences for certain horse race betting operations without advertisement) not only held that the 'complete failure to invite competing bids' did not 'accord with Articles 43 and 49 EC, and, in particular infringes the general principle of transparency and the obligation to ensure a sufficient degree of advertising'³⁵ but also treated that failure as a hindrance to trade and so went on to consider whether renewal of the licences could be justified on grounds of imperative interests.³⁶

3. Does the existence of harmonising legislation affect the position?

Medipac³⁷ does not justify the assertion that there is a general principle forbidding public purchasers from seeking to buy things that attain higher standards than those laid down by harmonising legislation. It concerned the application of Directive 93/42 (the Medical Devices Directive), which provided that surgical sutures complying with the European Pharmacopoeia would comply with the harmonised standard set under the Directive.³⁸ Furthermore, it required Member States to presume that sutures bearing the 'CE' mark complied with the harmonised standard.³⁹ It also prescribed a safeguard procedure whereby, if Member States ascertained that sutures bearing the 'CE' mark might nonetheless jeopardise the health or safety of patients, they could, having initiated the safeguard procedure, take measures to withdraw them from the market.⁴⁰ A Greek hospital had invited tenders for the supply of surgical sutures (the contract to be awarded on the 'lowest price' basis and not the MEAT basis) and had specified only that they had to comply with the European Pharmacopoeia and bear the 'CE' mark. The hospital later rejected a bid that had proposed supplying such sutures.

The contract was outside the scope of the Public Contracts Directive as its value was below the threshold for its application.⁴¹ The Court held that the principles of equal treatment and transparency (derived from the Treaty) nonetheless applied. On that basis it held that the hospital had infringed two rules of EU law. First, it had violated the general principles of equal treatment and transparency because it had rejected a tender that had complied with the hospital's invitation to tender and technical specification on grounds that had not been set out in the technical specification.⁴² Having specified only the minimum standard provided by the Medical Devices Directive and that the sutures must bear the 'CE' mark, the hospital could not later reject a bid that complied with those requirements. Second, the Medical Devices Directive required that goods bearing the 'CE' mark were to be presumed to meet the harmonised standard so as to be entitled to free circulation. Since the hospital had specified that the sutures to be supplied under the contract must meet that standard, the Court regarded its subsequent rejection of sutures bearing the 'CE' mark as a breach of its obligation under the Medical Devices

³² *Ibid.* paras. 33 *et seq.* The conditions and contract award criteria at issue in *Contse* were clearly indirectly discriminatory (favouring those already established in Spain and closely neighbouring counties).

³³ See e.g. Case C-324/98 *Telastra* [2000] ECR I-10745; Case C-458/03 *Parking Brixen* [2005] ECR I-8585; Case C-26/03; Case C-231/03, *Coname* [2005] ECR I-72879; Case C-260/04 *Commission v Italy* 13 September [2007] ECR I-7083 (each concerning service concessions which are excluded from the Directive); and Case C- 507/03, *Commission v Ireland* [2007] ECR I-9777; Case C-226/09, *Commission v Ireland* [2010] ECR I-000 (concerning non-priority services).

³⁴ Steen Treumer & Erik Werlauff, 'The leverage principle: secondary Community law as a lever for the development of primary Community law' (2003) E.L. Rev. 124.

³⁵ Case C-260/04, *Commission v Italy* [2007] ECR I-7083, para. 25.

³⁶ *Ibid.* paras. 26 - 36.

³⁷ Case C-6/05, *Medipac-Kazantzidid AE v Venizelio-Panania* [2007] ECR I-4557.

³⁸ Directive 93/42, Article 5(2).

³⁹ *Ibid.* Article 5(1).

⁴⁰ *Ibid.* Article 8.

⁴¹ *Medipac*, para. 31.

⁴² *Ibid.* paras 53 & 54.

Directive to presume that goods bearing that mark complied with the harmonised standard.⁴³ This was something that Greece was not permitted to do unless it had invoked the safeguard procedure, a step that it had failed to take.⁴⁴

The case was therefore simply a case in which a public purchaser, having specified that goods to be purchased must comply with a harmonised standard, had rejected such goods in breach of the principles of equal treatment and transparency and of the specific presumption laid down by the harmonising directive in question. It was *not* a case in which the public purchaser had either specified goods attaining a higher standard than the harmonised standard or used the MEAT award criteria to give additional evaluation points to goods exceeding such requirements. The Court itself emphasised this point stating (in response to the Austrian Government's argument that a public purchaser was indeed 'free to impose qualitative requirements which go beyond the minimum required at Community level')⁴⁵ that 'the file does not show that, ... the contracting authority imposed particular requirements going beyond the minimum required by Community law.'⁴⁶ Furthermore the Court was careful to frame its decision in terms that made clear that it addressed only the situation before the Court. Thus it held that 'the principle of equal treatment and the obligation of transparency *preclude a contracting authority, which has issued an invitation to tender for the supply of medical devices and specified that those devices must comply with the European Pharmacopoeia and bear the CE mark, from rejecting, directly and without following the safeguard procedure [of the Medical Devices Directive], on the grounds of public health the materials proposed.*'⁴⁷ The case is, therefore, *not* authority for the proposition that public purchasers cannot specify for higher standards than those stated in harmonising legislation.

Furthermore in the current state of Community law and policy, so far as 'what to buy' decisions are concerned, a general rule preventing public purchasers from specifying that their purchases must meet standards higher than those stated in harmonising legislation, or precluding them from using award criteria favouring purchases which meet such higher standards, would, for two reasons in particular, be perverse.

First, the internal market is supposed to be a single market encompassing all Member States in which competition is not to be distorted.⁴⁸ Furthermore, one of the objectives of the Public Contracts Directive itself is to open the procurement market up to competition, and the Directive contains a number of provisions to ensure that competition is not distorted.⁴⁹ This objective would be seriously harmed if a general rule existed which precluded public purchasers from specifying that the products they wish to buy must meet higher standards than those set out in harmonizing legislation or from using award criteria which favour such products. The reason is obvious. Competition is more than just competition on price. The Public Contracts Directive itself recognises this by accepting that 'lowest price' is often not an appropriate basis on which to award a contract and therefore permitting contract evaluation on the basis of the MEAT criteria. In fact competition includes, in particular, dynamic competition – competition through innovation. Harmonising legislation, by contrast, sets minimum standards that must be recognised by Member States for admission of the products to which they relate to the market. It tends to prohibit the marketing of products not meeting such minimum standards. If however the law were to prohibit public purchasers from requiring or favouring goods which exceed such minimum standards it would discriminate in favour

⁴³ *Ibid.* paras. 42 & 43.

⁴⁴ *Ibid.* paras. 44 – 49, 53.

⁴⁵ *Ibid.* para. 40.

⁴⁶ *Ibid.* paras. 41.

⁴⁷ *Ibid.* paras. 55.

⁴⁸ Article 3(f) of the Treaty of Rome stated that the 'activities of the Community' were to include 'a system ensuring that competition in the common market is not distorted.' This provision remained in the treaties as they were successively amended prior to the Treaty of Lisbon. It was re-numbered as Article 3(g) by the Maastricht Treaty (1992), and again as Article 3(1) (g) by the Treaty of Amsterdam (1997). The abortive European Constitution had used a rather different formulation, Article I-3(2) stating that '[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers and an internal market where competition is free and undistorted.' Although such words were omitted from the Lisbon Treaty, Protocol No. 27 of the Lisbon Treaty 'on the Internal Market and Competition,' expressly states that the Contracting Parties 'CONSIDERING that the internal market as set out in Article 3 of the [TEU] includes a system ensuring that competition is not distorted,' have agreed to take action to that end. Thus, as Piris notes, 'the change made to the Treaty, which might have had a political impact, will not have any legal consequences'; J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge, 2010), p. 309.

⁴⁹ Recital 2 of the Directive states that one of its purposes is to 'guarantee the opening-up of public procurement to competition.' Recital 4 requires that Member States must ensure that participation by a body governed by public law as a tenderer in a procedure for the award of a public contract 'does not cause any distortion of competition in relation to private tenderers.' Recital 8 states that whilst a public purchaser may seek advice for use in preparation of its specification such advice must not 'have the effect of precluding competition.' Recital 15 notes that certain centralised purchasing techniques by virtue of the large volumes are purchased can 'help increase competition.' Recital 21 explains that '[i]n view of the situation of effective market competition in the telecommunications sector 'public contracts in that area are excluded from the scope of the Directive. Recital 31 states that a flexible procedure is needed for complex projects where public purchasers may find it objectively impossible to define appropriate solutions but that 'this procedure must not be used in such a way as to restrict or distort competition....' Recital 36 explains that publication of contract notices is necessary '[t]o ensure development of effective competition in the field of public contracts.' Recital 46 states that award criteria must, inter alia, 'guarantee that tenders are assessed in conditions of effective competition.' Art 23 (2) states that technical specifications must 'not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.'

of less innovative firms and against those firms whose innovation ability would permit it to reach higher than the minimum standards. It would thereby distort competition in the internal market by preventing innovative firms from reaping the rewards of responding to demand by means of dynamic competition: in short it would rig the internal market, so far as public contracts are concerned, in favour of less innovative firms. This cannot conceivably be the purpose of the free movement rules in general or of harmonising legislation in particular. Apart from anything else it would prevent innovative firms from being able to compete for public contracts on the basis of their specific competitive advantage.

Indeed the Court itself (in the context of applying the free movement principles to 'access to the market' cases) has stressed the importance of allowing firms to exploit their competitive advantages when bidding for public contracts. Thus, for example, in *SECAP*⁵⁰ (which concerned a public works contract having a value lower than the threshold for application of the Public Contracts Directive) the Court held that so long as the contract was of 'certain cross border interest' certain Italian legislation (which required public purchasers, in cases where the number of valid tenders exceeded five, automatically to exclude tenders which appeared abnormally low in accordance with certain stated mathematical criteria) would be a hindrance to intra-Union trade and so unlawful unless justified on the grounds of imperative interests. This was because it would prevent tenderers who had submitted abnormally low tenders from having an opportunity to demonstrate that their bids were 'viable and genuine.' Although the rule was objective and not itself discriminatory it 'could constitute indirect discrimination since, in practice, it places at a disadvantage operators from other Member States which, as they have different cost structures, may benefit from significant economies of scale or, intending to cut their profit margins in order to enter the market in question more effectively would be in a position to make a bid that was competitive and at the same time genuine and viable but which the contracting authority would not be able to consider as a result of that legislation.'⁵¹ Accordingly application of the Italian legislation to a contract of a 'certain cross-border interest could deprive economic operators from other Member States of the opportunity of competing more effectively with operators located in the Member State in question and thereby affect their access to the market in that State, thus impeding the exercise of freedom of establishment and freedom to provide services...'⁵² By parity of reasoning any rule which prevented public purchasers from requiring that their purchases exceed the minimum standards stated in harmonising directives would preclude innovative firms from the opportunity of competing effectively, on the basis of their specific competitive advantages, against others in terms of the very dynamic competition. By doing so such a rule would distort competition in the internal market.

Secondly, such a rule would also seriously harm *Europe 2020's* key economic, environmental, and energy security policies. The *Europe 2020 strategy*⁵³ is the EU's key economic policy intended to secure recovery from the post 'Credit Crunch' recession and assure future prosperity. It seeks to advance three 'mutually reinforcing priorities,' namely 'smart growth: developing an economy based on knowledge and innovation'; 'sustainable growth: promoting a more resource efficient, greener and more competitive economy'; and 'inclusive growth: fostering a high-employment economy delivering social and territorial cohesion.'⁵⁴ To achieve these priorities, the Commission has set out 'seven flagship initiatives to catalyse progress under each priority theme.'⁵⁵ Several of these conceptualise public procurement in a new way. No longer is the EU interested only in coordinating national procurement procedures to protect the internal market in public contracts in the traditional way. Instead public procurement is seen as being of interest to the EU itself as a 'market-based instrument' or 'demand-side policy'⁵⁶ to achieve the Union's vital economic, environmental and energy security goals by creating demand for innovative products, thereby supporting the development of innovation industries and increasing Europe's competitive advantage in green and energy-efficient technologies.⁵⁷

⁵⁰ Case C-147/06, *SECAP Spa v Comune di Torino*, *supra* note 28.

⁵¹ *Ibid.* para. 26.

⁵² *Ibid.* para 28. Similar logic also formed part of the Court's reasoning in Case C-346/06, *Dirke Ruffert v Land Niedersachsen* [2008] ECR I-1989.

⁵³ Communication from the Commission, 'Europe 2020' – A strategy for smart, sustainable and inclusive growth' Brussels 3.3.2010 COM(2010) 2020 final.

⁵⁴ *Ibid.* p. 5

⁵⁵ *Ibid.*

⁵⁶ Europe 2020, p. 12 identifies the need for 'full use of demand side policies, e.g. through public procurement....' to create the necessary framework conditions for innovation.

⁵⁷ The 'Resource Efficient Europe' initiative seeks to 'enhance a framework for the use of market-based instruments' including 'encouraging wider use of green public procurement...' to achieve ambitious climate change and efficient energy goals; Europe 2020, 15. Member States are to 'deploy market-based instruments such as ...procurement to adapt production and consumption methods'; *ibid.* 16. A second flagship initiative to achieve 'sustainable growth' is '[a]n industrial policy for the globalisation era.' This also has implications for procurement as it commits the Commission to work at EU level for the development of 'a horizontal approach to industrial policy combining different policy instruments' including "'smart" regulation, modernised public procurement, competition rules and standard setting;' *ibid.* 16. At national level Member States were to 'improve the business environment especially for innovative SMEs, including through public sector procurement to support innovation incentives'; *ibid.* 17 (emphasis added). The Commission Communication on 'An Integrated Industrial Policy for the Globalisation Era Putting Competitiveness and Sustainability at Centre Stage' Brussels, 28.10.2010 COM(2010) 614 final, suggests the need for 'wider use of green public procurement' to help develop the EU market for environmental goods and services; *ibid.* p. 20. Commission Communication 'Energy 2020 – A strategy for competitive, sustainable and secure energy,' Brussels, 10.11.2010 COM (2010) 639 final, (seen as a key contribution to achieving the Europe 2020 priorities; *ibid.* 5) seeks to '...to rebalance energy actions in favour of a demand-driven policy...'; *ibid.* 5. It affirms that '[p]ublic authorities have to lead by example.' *ibid.* 5. Accordingly, '[p]ublic procurement rules should insist on efficiency conditions to increase

Finally I would add that, although space constraints do not permit me to elaborate more fully upon the point, I respectfully agree with Professor Caranta's view that to the extent that the Commission's various communications are relevant as 'soft law' they are quite consistent with the view that the Treaty principles are neutral as to the subject matter of the contract, subject of course to the requirement that the purchaser's freedom of choice must not be abused to discriminate against operators from other Member States. Merely demanding high standards does not, however, amount to discrimination: see *Concordia Bus Finland*.

Does the proposed revised Directive alter the position?⁵⁸

So far as 'what to buy' decisions are concerned I agree with Professor Caranta that the Proposed Directive should be understood as re-emphasising the ability of public purchasers to require (through specifications) or favour (through the use of appropriate award criteria) purchases which are innovative and / or which advance high levels of environmental protection or advance appropriate social policies. Furthermore, like Professor Caranta, I consider that since the Proposed Directive has been put forward as part of the Europe 2020 initiative it necessarily follows that the Directive should be interpreted to permit public purchasers full scope to play their part under that initiative.⁵⁹ This includes creating demand, through their purchasing activity, for innovative products so as to foster innovative industries.⁶⁰ It includes creating demand for environmentally sensitive products generally, and for renewable energy and energy efficient product in particular. This being the case the Proposed Directive, in my view, confirms what I consider already to be the legal position, namely that there is no general rule as regards 'what to buy' decisions which precludes public purchasers from requiring that their purchases must meet standards which exceed harmonised requirements, or from adopting award criteria which favour products, works, or services which do so.

On the other hand, I consider that one particular provision of the Proposed Directive might be used (in my view, contrary to the overall purpose of revision of the Directive) as the basis for an argument which might (if accepted by the European Court) seriously curtail public purchasers' freedom to require that their purchases meet standards exceeding those laid down as minimum standards by EU law, or to favour such purchases through their contract award criteria. I have already noted that the Court has until now declined to treat 'what to buy' decisions as 'hindrances to trade. The effect has been that, so long as they are non-discriminatory, such decisions may be lawful without the need to show that they are 'proportionate.' This approach is consistent with the 'principles of awarding contracts' stated by Article 2 of the Public Contracts Directive since these make no mention of proportionality. Instead Article 2 states that '[c]ontracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.' By contrast, however, Article 15 of the Proposed Directive states that '[c]ontracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent *and proportionate way*' (emphasis added). I have no doubt that, if this text comes into law, those who seek to curtail purchaser discretion to advance environmental or social policies will use it to argue that specific attempts to do so, even as regards 'what to buy' decisions, are unlawful because they are argued to be not apt to achieve their desired goal or because they are claimed to be more restrictive than necessary to do so. As already indicated I think that such an outcome would be highly unfortunate and inconsistent with the Court's development of the law to date. However, until the Proposal is adopted and the Court speaks, we cannot altogether rule out the possibility that Article 15 might be interpreted in this way.

energy savings and spread innovative solutions, notably in buildings and transport'; *ibid*. Again stating that '[t]he public sector needs to lead by example' the document argues that '[a]mbitious objectives ought to be set for public sector [energy] consumption. *Public procurement should support energy efficient outcomes*'; *ibid*. 7 (emphasis added). Thus 'Priority 1' of the strategy (to achieve an energy-efficient Europe) is to involve exemplary action by public authorities so that '[e]nergy criteria (regarding efficiency, renewables and smart networking) should be used in all public procurement of works, services or products'; *ibid* 8. The drive to create an innovation economy in Europe includes the an initiative on 'lead markets,' namely markets in which coordinated policy-making and enhanced cooperation with stakeholders can speed up market development without inhibiting competition; see Commission Communication, 'A lead market initiative for Europe,' Brussels, 21.12.2007 COM(2007) 860 final. The six 'lead markets' identified include sustainable construction, recycling, bio-based products and renewable energy and the Communication notes, with respect to construction, that '[t]here is a lack of knowledge on possibilities within the existing legal framework for public procurement...that could facilitate demand for *innovation-orientated solutions*. An anticipative approach is also needed for regulation as well as for [public procurement] decisions'; *ibid*. 5 (emphasis added). Indeed the Communication identifies public procurement (along with legislation, standardisation, labelling and certification, and complementary instruments) as one of the four 'main policy instrument' to facilitate the emergence of lead markets; *ibid* 7. Mobilising public authorities to act as 'launching customers' by promoting the use of PP practices supportive for innovation is therefore a frequent point in the action plans; *ibid* 7.

⁵⁸ Proposal for a Directive of the European Parliament and of the Council on Public Procurement, Brussels, 20.12.2011, COM(2011) 896 final.

⁵⁹ Recital 2 of the Proposal Directive states that it is for the 'purpose' of allowing public procurement to play 'a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth...' that the existing Directives 'have to be revised and modernized in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals.'

⁶⁰ See Recital 17 of the Proposed Directive.

Professor Peter Kunzlik

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