

The Interaction of the UNCRPD with the Public Procurement Regime of the European Union

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- **Directive 2004/18, OJ L 134, 30.4.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.**
 - **Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.**
 - **Directive 2007/66/ 11.12. 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts**

Principles of Public Procurement Regulation

- Transparency
- Accountability
- Objectivity
- Non-discrimination

What does public procurement stand for?

- Procedural safeguard of competition
- Conceptual instrument
 - **Public policy**
 - **Public services**

What has changed?

Codification of administrative laws

- Public sector rules
- Utilities rules
- Remedies

What has influenced the change?

- ECJ: *rule of reason approach*
- Magnitude of public procurement
 - **EURO 1 trillion**
 - **17% of GDP**

The ECJ Influence

- Centralised interpretation of public procurement rules
 - **Reference procedures under Article 267 TFEU**

The doctrine of objectivity

1. *equivalence test* to eliminate non-tariff barriers

- technical standards
- product specification
- standardization

2. *restrictive interpretation*

- selection procedures
- quantitative and qualitative suitability criteria
- award procedures, in particular negotiated procedures

The doctrine of flexibility

- *functionality*

- *dependency*

in order to define the notion of contracting authorities

- *dualism*

- *commercialism*

- *competitiveness*

in order to determine the applicability of public procurement rules

The doctrine of complementarity

- *compatibility* of socio-economic and environmental policies
- *contract compliance*

The doctrine of procedural autonomy

- wide discretion afforded to Member States to create the appropriate *fora* to receive complaints against decisions of contracting authorities and utilities, as well as actions for damages.

The doctrine of procedural equality

- Review procedures for public procurement disputes, as well as procedures for actions for damages must not differ, in a discriminatory context, from other review procedures and procedures for actions for damages under national law.

The doctrine of effectiveness

- Swift dispute resolution at national level
- Enforceability of decisions of national courts or tribunals

Common Breaches by Member States

- Applicability of Directives
 - Notion of contracting authorities
 - Bodies governed by public law
- Selection and Qualification
- Award Procedures
- Award Criteria
- Review procedures

Socially responsible public procurement (SRPP)

Features:

- employment opportunities
- decent work
- compliance with social and labour rights
- social inclusion (including persons with disabilities)
- equal opportunities
- accessibility and universal design (design for all)
- sustainability criteria, including ethical trade issues
- corporate social responsibility (CSR)
- environmental considerations

SRPP

Benefits

- Compliance with social and labour law
- Stimulating socially conscious markets
- Demonstrating socially responsive governance
- Stimulating integration
- Ensuring more effective public expenditure

UNCRPD and the economic approach to the regulation of public procurement

- Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, [2000] ECR 8035 at paragraph 17;
- Case C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, [1998] ECR 73, paragraph 33;
- Case C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821 at paragraphs 42 and 43;
- C-237/99, *Commission v. France*, [2001] ECR 934, at paragraphs 41 and 42.

UNCRPD and the socio-economic approach to public procurement

- Case C-31/87, *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635
- Case C-225/98, *Nord-Pas-de-Calais Commission v. French Republic*, [2000] ECR 7445

Procurement and environmental factors

- Case C-513/99, *Concordia Bus Filandia Oy Ab v. Helsingin Kaupunki et HKL-Bussiliikenne*, [2002] ECR 7213.
- C-448/01, *EVN AG, Wienstrom GmbH and Republik Österreich*, judgment of 4 December 2003.

Public Procurement and the Acquired Rights Directive

- Case C-29/91, *Dr Sophie Redmond Stichting v. Bartol*, [1992] ECR 3189;
- Case C-382/92, *Commission v. United Kingdom*, [1994] ECR 2435;
- Case C-24/85, *Spijkers v. Gebroeders Benedik Abbatoir CV*, [1986] ECR 1123;
- Case C-209/91, *Rask v. ISS Kantinenservice*, [1993] ECR 5735;
- Case C-392/92, *Schmidt v. Spar und Leihkasse der fruherer Amter Bordersholm, Kiel und Cronshagen*, [1994] ECR 1320;
- Case C-392/92, *Schmidt v. Spar und Leihkasse der fruherer Amter Bordersholm, Kiel und Cronshagen*, [1994] ECR 1320;
- Case C-48/94, *Rygaard v. Stro Molle Akustik*, [1995] ECR 2745;
- Case C-324/86, *Tellerup*, [1998] ECR 739.

Technical standards

Irish authorities specified a certain standard for pipelines

The *Neerlands Inkoopcentrum* used trade marks as compulsory specifications for the purchase of meteorological equipment

The “equivalent standard” doctrine

- C-45/87, *Commission v. Ireland*, [1988] ECR 4929;
- C-359/93, *Commission v. The Netherlands*, judgment of January 24, 1995.

Selection and qualification

Evidence of financial and economic standing may be provided by means of references including:

- i) appropriate statements from bankers;
 - ii) the presentation of the firm's balance sheets or extracts from the balance sheets where these are published under company law provisions; and
 - iii) a statement of the firm's annual turnover and the turnover on construction works for the three previous financial years.
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- **C-76/81, *SA Transporoute et Travaux v. Minister of Public Works*, [1982] ECR 457.**
 - **C-27/86, *Constructions et Enterprises Industrielles S.A (CEI) v. Association Intercommunale pour les Autoroutes des Ardennes*; case C-28/86, *Ing.A. Bellini & Co. S.p.A. v. Regie de Betiments*; case C-29/86, *Ing.A. Bellini & Co. S.p.A. v. Belgian State*, [1987] ECR 3347.**

The exceptional nature of negotiated procedures without prior advertisement

- In cases C-199/85, *Commission v. Italy*, [1987] ECR 1039 and C-3/88, *Commission v. Italy*, [1989] ECR 4035, the Court rejected the existence of exclusive rights and regarded the abuse of this provision as contrary to the right of establishment and freedom to provide services which are based on the principle of equal treatment and prohibit not only overt discrimination on grounds of nationality, but also all covert forms of discrimination, which, by the application of other criteria of differentiation, lead to the same result.
- In case 199/85, *Commission v Italy, op.cit*, the Court elucidated that exclusive rights might include contractual arrangements such as know-how and intellectual property rights.
- For urgency reasons brought by unforeseen events to contracting authorities the Court established two tests: i) the need of a justification test based on the proportionality principle, and ii) the existence of a causal link between the alleged urgency and the unforeseen events (see C-199/85, *Commission v Italy*; C-3/88, *Commission v Italy*; C-24/91, *Commission v Spain*, [1994] CMLR 621; C-107/92, *Commission v Italy*, judgment of August 2, 1993; C-57/94, *Commission v Italy*, judgment of May 18, 1995; C-296/92, *Commission v Italy*, judgment of January 12, 1994).

The restrictive interpretation of the grounds for using negotiated procedures with prior advertisement.

The grounds for using this procedure are confined to:

- i) the nature of the works or services or risks attached thereto do not permit overall pricing and
- ii) the nature of the services is such that specifications cannot be established with sufficient precision.

Award Criteria

- *Publicity of weighting of criteria*
- *Variants*
- *Criteria related to the subject matter of the contract*

Award criteria

- Inherent flexibility

- MEAT (most economically advantageous tender)
 - Opens the door for policy pursuits

Reserved contracts

Article 19 of the Public Sector Directive


Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities cannot carry on occupations under normal conditions.

Contractual performance

Subcontracting

Article 25 of the Public Sector Directive

In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors. This indication must be without prejudice to the question of the principal economic operator's liability.



Contractual performance (cont)

Socio-economic conditions

Article 26 of the Public Sector Directive

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Contractual performance (Cont)

- *Obligations relating to taxes, environmental protection, employment protection provisions and working conditions*
- Article 27(1) of the Public Sector Directive
- A contracting authority may state in the contract documents, or be obliged by a Member State to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which must be applicable to the works carried out on site or to the services provided during the performance of the contract.

Contractual performance (Cont)

- Article 27(2) of the Public Sector Directive
- A contracting authority must request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the works are to be carried out or the service is to be provided.

Concessions as Public Contracts

- *The notion of public concessions*
 - the right to economically exploit the concession, although this right may be accompanied by a requirement to pay some consideration to the grantor
 - Risk transfer

- case C-360/96, *Arnhem and Rheden*, [1998] ECR I-6821

- *Vertical procurement* (subcontracting)
 - C-31/87 *Beentjes* [1988] ECR 4635, paragraph 11;
 - C-360/96 *BFI Holding* [1998] ECR I-6821, paragraph 62.

Service concessions as public contracts

Public procurement rules non-applicable BUT
TFEU fundamental principles applicable

Some degree of publicity required to ensure
competition

- case C-324/98 *Telaustria and Telefonadress*
- case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*
- C-458/03 *Parking Brixen*

Sub-dimensional public contracts

- Contracts below thresholds are subject to publicity requirements if there is material interest of cross-border nature in public contracts

case C-59/00, Bent Moustén Vestergaard and Spøttrup

Boligselskabcase C-6/05, *Medipac-Kazantzidis AE v Venizelio-Pananio (P.E.S.Y. KRITIS)*,

Joined Cases C-147/06 and C-148/06, *SECAP SpA (C-147/06)* and *Santorso Soc. coop. arl (C-148/06)*

case C-59/00 *Vestergaard*

case C-412/04 *Commission v Italy*