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Strategic Use of Public Procurement – Limits and Opportunities

Abstract

The term 'strategic use of procurement' indicates that the procurement (also referred to as sustainable procurement) is about more than just saving money. Other important interests such as social and environmental considerations can be promoted through public procurement. Procurers can, according to newly proposed Directives on public procurement,[1] make better use of public procurement in support of such societal goals. Thus, the Member States may use their purchasing power to procure goods and services that foster innovation, respect the environment and combat climate change, while also improving employment, public health and social conditions. However, the objective of the procurement rules is primarily to strengthen the single market and the EU's competitiveness. This policy analysis discusses how these new trends in public procurement may be reconciled with the general EU internal market law.[2]

1 Introduction

In the 1992 Single Market Programme, public procurement was particularly highlighted.[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 the grounds of nationality.[5]

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1 The original proposals were presented in COM/2011/895 final and COM/2011/896 final. The proposals, now modified, are presently being discussed in the Council and European Parliament.

2 I have previously discussed these issues in a legal analysis of the possibilities of imposing requirements in public procurement that go beyond the requirements of EU law in Upphandlingsutredningen 2010, Fi 2010:06, in my chapter *Strategisk upphandling – stärkt miljöskydd och socialt ansvar på en konkurrenskraftig inre marknad?* in Bakardjieva, A., Oxelheim, L. and Persson, T. (eds.), Ett konkurrenskraftigt EU till rätt pris (Europaperspektiv 2013), Santérus 2013 and in an article called *Sustainable Public Procurement and the Single Market – is there a conflict of interest?*, EPPPL nr 1 2013, p. 31. This policy analysis is based on these previous texts and summarizes my views on the issue.

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.

The White Paper stated the following:

> 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 in the Treaty on the Functioning of the European Union,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 was thus obvious that the Treaty Articles and fundamental principles were intended to apply fully to decisions by contracting authorities. In this analysis I will discuss whether this is still true and whether this affects the possibility of using public procurement for, *inter alia*, environmental and social purposes.

2 The current regulatory framework

Over the years a comprehensive regulatory framework has been built up relating to 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 and services, and 2004/17/EC, on the coordination of public procurement procedures in the fields of water, energy, transport and postal services, the so-called Utilities Directive.

The link to the Treaty Articles regarding the free movement rules on goods, services and establishment is still clearly visible. According to the preamble of Directive 2004/18:

> 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. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.

This explains 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 that, on account of their value, are not subject to the procedures laid down by Union rules, contracting authorities are nonetheless bound to comply with the fundamental rules of the Treaty and, in particular, the principle of non-discrimination on the grounds of nationality.[6] However, the application of the fundamental Treaty rules and general principles to public procurement is based on the premise that the contracts in question are of certain *cross-border interest*.[7] 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.[8] However, in certain cases account must be taken of the fact that the borders cut through 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.[9]

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6 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.

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

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

9 See Case C-147/06 and C-148/06 *Secap* [2008] ECR I-3565, para 31.

3 The public procurement process

The public procurement process is complicated and is regulated in detail in the Directives. In this context it is sufficient to point out that there are two distinct processes: the selection of tenderers and the award of the contract. The selection of tenderers is a process based on a list of technical and financial requirements expressly stipulated in the relevant Directives. The selection process is followed by an award procedure in which the contracting authority decides which of the qualified selected tenderers has submitted the best tender. The award may simply be based on the lowest price but may also involve consideration of other factors such as quality. According to EU law, the contract must be awarded on the basis of one of two criteria:

1. Lowest price; or
2. Most economically advantageous tender.

Specific provisions regarding this are set out in Article 53 of Directive 2004/18.

Under the lowest price basis, the award goes to the lowest offer. Many authorities use this only for simple purchases where the nature and quality of items offered does not vary much between different suppliers. Under the most economically advantageous tender principle, the authority may award the contract to the firm whose tender is the most advantageous, taking into account all relevant factors. Article 53(1)(a) lists various factors which could be used, such as price, quality, running costs, after-sales service and delivery date, as well as price.

The list in the Directives is not exhaustive, and it has been established in case-law that contracting authorities may use other factors such as, for instance, environmental protection. This is now made clear in the text of the Directive. The relevant case-law will be discussed below.[10]

4 The relationship between the specific public procurement rules and the Treaty rules

The EU Treaty provisions and basic principles can thus apply when a public authority purchases goods or services. This means that rules contained in the Treaties relating to the free movement of goods, services and freedom of establishment must also be considered in procurement cases.

Some examples of the application of the Treaty rules in public procurement cases will be provided in the following. We start with the Treaty provisions on the free movement of goods.

4.1 Free movement of goods and public procurement

The most relevant provision regarding free movement of goods in the context of procurement is Article 34 TFEU, which reads:

> 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*[11] 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 case of *Cassis de Dijon*.[12] 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 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

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[10] See S. Arrowsmith (ed.), *EU Public Procurement Law: An Introduction* (2010), p. 169. The book was prepared as a part of a collaborative project in higher education, the EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation 2009-2011, funded by the EU. It is available online at: http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf

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

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

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.

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).

Article 34 TFEU has also been applied directly in relation to public procurement. In Case 45/87 *Commission v Ireland* ('Dundalk'),[13] the Court assessed 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 was therefore 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 under mandatory requirements, in accordance with the case-law.

In accordance with this case-law, Directive 2004/18, Article 23(8) provides that, unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis and shall be accompanied by the words 'or equivalent'.

However, it follows from the same provision that technical specifications are allowed to include a requirement where this is justified by the subject matter of the contract, on an 'exceptional basis', and when otherwise a 'sufficiently precise and intelligible' description of the subject matter is not possible. Also in these cases the authorities must be willing to accept equivalents that are offered, and to state this in the specification.[14]

It should be added that the provisions on free movement are not without exceptions. Article 36 TFEU sets out the exceptions that, despite the prohibition in Article 34, can be used to uphold national restrictions on trade. It follows from Article 36 that a national 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. These exceptions are also applicable as regards procurement.

However, the CJEU has ruled that Article 36 TFEU must be narrowly interpreted. Objectives that 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 available that are less restrictive to trade. Finally, it is the Member State relying on the justification grounds in Article 36 who must demonstrate that the need for protection exists.[15] Furthermore, in the *Cassis de Dijon* case, the CJEU held that it was possible to justify indistinctly applicable national measures which were based upon certain additional mandatory requirements. 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 to include the protection of the environment, the improvement of working conditions, the promotion of culture, the prevention of the risk of seriously 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. A Member State 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.[16]

The traditional view has been that all these mandatory requirements arising from the *Cassis* doctrine may only be

[13] Case 45/87, *Commission v Ireland* [1988] ECR 4929.
[14] See Arrowsmith, S., (2010), op. cit., p. 126. See above note 10.
[15] See Case 251/78, *Denkavit Futtermittel* [1979] ECR 3369.
[16] See, in general, Oliver, P., *Oliver on Free Movement of Goods in the European Union*, 5th edn., Hart 2010, pp. 239 ff.

used 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* case[17] 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. This seems to imply that *distinctly applicable* measures may also be justified by environmental considerations, provided that they meet the proportionality test.[18] However, the judgment has been questioned with regards to both the reasoning and the result.[19]

4.2 Free movement of services and public procurement

As regards services and establishment, the construction of the Treaty rules and their interpretation are similar. 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.

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).[20] A good example is found in Case C-360/89, *Commission v Italy*.[21] 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.

Moreover, 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* case[22] 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 1,000 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.

There are also exceptions to the provisions on free movement of services (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 which are similar to those relating to the free movement of goods.[23]

We can thus conclude that the general law of the Union, particularly the Treaty provisions on the free movement of goods and services (and also on establishment, which will not be discussed here) influence, alongside

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17 Case C-379/98, *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099

18 See Arrowsmith, S. (2010), op. cit., p. 75. See above note 10.

19 See Oliver, P. (2010), op. cit., pp. 305 f. See above note 16.

20 See Arrowsmith, S. (2010), op. cit., p. 70. See above note 10.

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

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

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

the more detailed provisions of the public procurement Directives, the ability of contracting authorities to impose requirements in public procurement. In some cases, the Court has expressed this as a general test. This appears clearly in the case of *Contse*,[24] and is a test which is later confirmed in *Serrantoni*.[25] In *Contse* the Court held that the general EU law test that contracting authorities must apply, and which a national court must therefore verify, consists of the four general conditions developed in the case-law concerning the four freedoms. 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 that objective.[26]

5 The relationship between the procurement Directives and other secondary legislation adopted by the Union

Another important question is whether the harmonisation rules of the EU outside the area of public procurement (mainly Directives and Regulations) must be taken into consideration by contracting authorities.

The EU has, over the years, adopted a number of rules that are primarily intended to eliminate trade barriers within the internal market, but that 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 are harmonised rules for both goods and services, but the majority are for goods. Harmonised rules apply, *inter alia*, in the areas of 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 that have been developed by the European standardisation organisations. As a general rule European standards are in line with international standards.

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 level of harmonisation, i.e., the degree of legal unity pursued, varies widely within the affected area. It is not in the first place similarity as such which is the aim; rather, the intention of harmonisation is to eliminate the problems created by differences between national legal rules that hamper the development of the internal market.

The most used tool is Directives, even if Regulations are increasingly used for harmonisation purposes.[27] The contents of the Directives can however be very different. Some Directives, called framework Directives, just lay down general principles and therefore give Member States a wide scope when implementing them and also considerable space to maintain 'pure' national regulations in the same area.[28] Others are so detailed that they hardly leave Member States any choice but literally to transfer their legal content into national law.[29] These contain such clear and unequivocal substantive provisions that they in fact lead to unification of national law in the Union. Needless to say, there are also Directives which contain a mixture of principles and more detailed provisions.[30]

The scope for national regulations, i.e., the remaining national regulatory competence, is difficult to determine without first analysing the content of a 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.

The most important distinction is between, on the one hand, full or exhaustive harmonisation and, on the other hand, minimum harmonisation.

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

25 Case C-376/08, *Serrantoni* [2009] ECR I-12169.

26 Para 25 in *Contse*; See also 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.

27 See Hettne, J. and Reichel, J., *Att göra rätt och i tid – Behövs nya metoder för att genomföra EU-rätt i Sverige?*, SIEPS 2012:4, p. 26.

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

29 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).

30 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).

As regards exhaustive harmonisation, 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 room for national regulatory measures is therefore occupied.[31] In such a case recourse to the Treaty exceptions or to mandatory requirements in compliance with the case-law is no longer possible.[32]

The Court tested the level of harmonisation in the case of *Commission v UK*.[33] The background was that Britain had introduced requirements for light signalling devices beyond the technical requirements imposed by the Motor Vehicles Directive.[34] The Court found that there was no scope for additional mandatory requirements beyond those already prescribed by the Directive. The relevant Directive thus resulted in total harmonisation.[35] However, a general possibility for Member States to deviate from the harmonised rules lies in the use of a so-called safeguard clause, which is normally inserted in Directives. The application of a safeguard clause does not entail more than a temporary aberration and is not strictly speaking an exception.

If the Union decides on minimum harmonisation the situation is, however, different. 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, in Article 153(2.b) in respect of employment and working conditions and in 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 room for national regulations.[36]

Minimum harmonisation is often used when demands are made on the production process rather than on the products themselves. It is, for instance, possible for the Union to impose certain air quality levels that must be attained in all working places. This produces 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.

It seems obvious that the existence of harmonisation measures at the Union level affects contracting authorities' discretion. Two different situations can appear.

First, there are harmonisation measures relating to a product or service that the contracting authority is interested in purchasing. In such a case an assessment must be made as to whether the imposed requirement means that the Member State where the contracting authority is situated violates the common harmonised rules. This is illustrated by the case of *Commission v Greece*.[37] This case concerned the practice of certain hospitals in Greece of rejecting tenders for the supply of sutures in certain cases on the grounds that they did not meet health needs, despite the fact that the products in question bore the CE mark indicating that they complied with the requirements of the Medical Devices Directive 93/42,[38] which provided a European standard for the product in question. In a previous ruling in *Medipac*,[39] the CJEU had concluded that rejecting the tender in question was a violation of the TFEU principles of transparency and equal treatment, given that the products offered complied with the Medical Devices Directive. The Court referred to the possibility of using the safeguard clause in the Directive, mentioned above. However, the grounds for this conclusion were not clearly spelled out by the Court. This left some room for arguing that the Court's ruling rested on the fact that the tender documents themselves required merely that the

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

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

33 See Case 60/86, *Commission v UK* [1988] ECR 3921.

34 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.

35 Cf. also Case 237/82, *Jongenell Kaas* [1984] ECR 483 and Case 205/84, *Commission v Germany* [1985] ECR 3755.

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

37 Case C-489/06, *Commission v Greece* [2009] ECR I-1797.

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

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

sutures should meet the standards of the Medical Devices Directive, so that the authority was obliged to accept the tender as one that complied with its own specification.[40] However, in this second case dealing with the same practice, the CJEU, while quoting its previous decision in *Medipac*, stated that 'an authority cannot reject a medical device which bears the CE mark'. According to Arrowsmith, this remark tends to suggest that there is a limit on the discretion to set specifications on health protection in relation to medical devices falling under the Directive. However, the CJEU's remark addresses only devices caught by that specific Directive, and may apply only to that Directive and others that seek to harmonise standards relating to specific product features for a very specific use.[41]

As will be explained in detail below, I think that it is logical from an internal market perspective that a contracting authority is obliged to take account of and respect harmonised Union rules if they are relevant for the subject matter of the contract. I also think that this is the correct understanding of the ruling in *Medipac*, where the Court pointed out that 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. 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 was extended to the contracting authority in its capacity as a body governed by public law (see paragraph 43 in the judgment).

Second, social and environmental considerations can, as such, be the subject of harmonisation. Harmonised rules for the use of different chemical substances are an example of this. An environmental requirement regarding the use or presence of a particular chemical must be assessed against the harmonised rules applying to the area affected.[42] Another example, which relates more particularly to social requirements, is the question of whether a requirement regarding the minimum rate of pay in a collective agreement is compatible with the EU provisions regarding posted workers (Directive 96/71/EC). This question arose in the case of *Rüffert*,[43] where the Court explained that the requirement set must comply with the Posting of Workers Directive and the free movement of services (Article 56 TFEU).[44] The judgment in *Rüffert* indicates that the Posting of Workers Directive and Article 56 TFEU preclude requirements in public contracts that go beyond what is compatible with the Directive.[45]

6 Increased acceptance of social and environmental requirements

There are some rulings by the CJEU which are often invoked to demonstrate that the Court accepts social and environmental considerations to a large extent in public procurement.

In the case of *Beentjes*,[46] 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, and therefore that discretion is conferred on contracting authorities to allow them to specify what would be the most economically advantageous offer for them. The Court held that a condition of performance relating to the employment of long-termed unemployed people 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. The Court however maintained that measures relating to employment could be utilised as a feature of the award criteria only if 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 (paragraph 29).

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40 See Arrowsmith, S. and Kunzlik, P., *EC regulation of public procurement*, in Arrowsmith, S. and Kunzlik, P. (eds.), Social and Environmental Policies in EC Procurement Law, Cambridge University Press 2009, p. 41.

41 See Arrowsmith, S. (2010) op. cit., p. 125. See above note 10.

42 See Sandin, E., *Miljökrav vid offentlig upphandling och EU:s inre marknad: en probleminventering*, in Madell, T, Bekkedal, T. and Neergaard, U. (eds.) Den nordiska välfärden och marknaden, Iustus 2011, p. 325.

43 Case C-346/06, *Rüffert* [2008] I-1989.

44 See Ahlberg, K. and Bruun, N., *Upphandling och arbete i EU*, SIEPS 2010:3, p. 125.

45 See Arrowsmith, S. and Kunzlik, P., Editors' Note – *The decision in Rüffert v Land Niedersachsen* in Arrowsmith/Kunzlik (eds.), Social and Environmental Policies in EC Procurement Law, op. cit., pp. 1 ff. See above note 40.

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

In *Nord-Pas-de-Calais*[47], the Court repeated that choosing the most economically advantageous offer does not preclude any possibility of the contracting authorities using a criterion linked to a campaign against unemployment, provided that that condition is consistent with fundamental principles of Community law, particularly 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 the applicable procurement Directive, it must be applied in conformity with all the procedural rules laid down in the Directive, in particular the rules on advertising. The Court therefore accepted employment considerations as an award criterion, one of the criteria for the most economically advantageous offer, provided these considerations 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*[48] the Court was asked *inter alia* whether environmental considerations such as low emissions and noise levels of vehicles could be included amongst the factors for the most economically advantageous tender, 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 from being taken into consideration by the contracting authorities. In this case the Court also 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 which follows from the provisions of the Treaty on the right of establishment and the freedom to provide services (paragraphs 63 and 64).

In *Wienstrom*[49] 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, if so, under what conditions that criterion could be used. In principle, that question referred to the possibility of a contracting authority laying down criteria that seek advantages that cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment. The Court held that all of the award criteria used by the contracting authorities to identify the most economically advantageous tender need not be of a 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 ecological criteria into consideration, provided that these 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 its 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 where the factors for its assessment are not directly linked to the subject matter of the procurement in question.

47 Case C-225/98, *Commission v French Republic* [2000] ECR I-7445.
48 Case C-513/99, *Concordia Bus Finland* [2002] ECR I-7213.
49 C-448/01, *EVN Wienstrom* [2003] ECR I-14527.

In all these cases the Court has accepted, more or less explicitly, that when a 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 (compliance with the fundamental principles of Union law) is developed by the CJEU in the *Contse* case mentioned above, i.e. the criteria used by the contracting authority must be applied in a non-discriminatory manner, must be justified by imperative requirements in the general interest, must be suitable for securing the attainment of the objective for which they aim, and must not go beyond what is necessary in order to attain that objective.[50] In my view this implies that 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 underlined in *Beentjes.*

The possibility of imposing environmental or social requirements in public procurement is also apparent in Directive 2004/18.

As regards technical specifications, the preamble (recital 29) provides that contracting authorities who wish to define environmental requirements in the technical specifications of a given contract may lay down environmental characteristics, such as a given production method and/or specific environmental effects of product groups or services. According to Article 23(b), technical specifications may therefore be expressed as performance or functional requirements which may include environmental characteristics.

When it comes to social considerations, Article 26 provides that these requirements may be expressed as special conditions relating to the performance of a contract, provided that they are compatible with Community law and are indicated in the contract notice or in the specification. The conditions governing the performance of a contract may also contain environmental considerations. In the preamble (recital 33) it is stated that contract performance conditions are compatible with the Directive provided they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents.

Environmental and social requirements may also, as has been established by the CJEU, be imposed as award criteria (Article 53). In the preamble (recital 46) it is stated that among the award criteria can be quality and not just economic criteria. It is thus provided in Article 53(1) that the award criteria can include environmental characteristics. In the preamble it is further stated that a contracting authority may use criteria aimed at meeting social requirements, in response in particular to the needs – defined in the specifications of the contract – of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong. According to Article 53(1)(a) it is however necessary that the award criteria are connected to the object of the contract. In the preamble (paragraph 46) it is specified that:

> the determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.

7 Strategic use of public procurement

It is now time to explore the possible future use of public procurement in order to foster innovation, respect the environment and combat climate change, while improving employment, public health and social conditions, as was mentioned at the beginning of this paper.

In that regard, it should first of all be pointed out that an increased interest in environmental and social concerns can be found in the TFEU. In the TFEU the Union is encouraged to take action in both the social and the environmental fields. According to Article 8, the Union is, in all its activities, to aim to eliminate inequalities, and to promote equality, between men and women. Article 9 provides that the Union is to 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 is to aim to combat discrimination

[50] Para 25 in *Contse*. See also 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.

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.

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 7–11 TFEU provide instructions aimed at the Union legislator and are therefore not directly applicable. Hence, the result of the ambition and 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, more clearly than before, requires policy coordination in all the activities of the Union.

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, which states 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.[51] The same applies to the prohibition of age discrimination, although this principle has not been applied for as long a time.[52] 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.

The new proposal from the Commission[53] has its roots in a Green Paper published on 27 January 2011 on the modernisation of EU public procurement policy.[54] On the basis of this paper the Commission launched a broad public consultation on options for legislative changes to make the award of contracts easier and more flexible and to enable public contracts to be put to better use in support of other policies. It is the latter aspect which is important in this context (the strategic use of public procurement to promote other policy objectives).

In this context the proposed amendments to Directive 2004/18 (COM/2011/896 final) are relevant as they are representative of the new approach endorsed by the Commission. In its new proposal, 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 Union policies and activities, with a view, in particular, to promoting sustainable development. The Commission affirms that the Directive clarifies how 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.

Accordingly, the new Directive will allow procurers to make better use of public procurement in support of common societal goals such as the protection of the environment, higher resource and energy efficiency, combating climate change, the promotion of innovation, employment and social inclusion and to ensure 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.

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51 See Case 43-75, *Defrenne*, [1976] ECR 455.
52 See Case C-144/04, *Mangold and Helm* [2005] ECR I-9981.
53 COM/2011/896 final.
54 COM/2011/15.

Of special interest from an environmental viewpoint is the proposal giving public purchasers the right to base their award decisions on the 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 goods or service purchased.

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

Furthermore, the new focus on sanctions, when it comes to violations of mandatory social, labour or environmental law, is of importance. 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 establish that the tenders 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 these are indicated in the call for competition or in the specifications. Those conditions may, in particular, relate to social and environmental considerations. Contracting authorities may also include the requirement that economic operators foresee compensation for the risk of price increases that are the result of price fluctuations (hedging) and that could have a substantial impact on the performance of a contract.

8 The limits on the strategic use of public procurement

As stated above, the EU procurement Directives have always aimed to ensure the free movement of goods and services and freedom of establishment. The new Directive is therefore founded on the same premises as the present one. The preamble provides the following identical text:

> The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the Treaty on the Functioning of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition.

A question that should therefore be raised is whether the Directive actually allows more room for environmental and social considerations than has hitherto been the case. Does the clear link to the Treaty provisions on the free movement of goods, freedom of establishment and freedom to provide services, and to the principles deriving therefrom, not preserve the *status quo*?

In order to answer that question a broader perspective must be taken. 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 from a historical perspective – 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 development of 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 must 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 the EU internal market but is at the same time intended to ensure a high level of protection for, *inter alia*, 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 has been discussed above. The famous *Cassis de Dijon* principle means in this respect that a balance must be struck between all the interests which come into play (see above, section 4.1).

This means that today there is a 'regulatory package' which is the expression of distinct but aggregated interests and consists of both case-law and secondary legislation. All the Member States have to respect this package when they adopt 'measures' that 'restrict' 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 this 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 it is reasonable to apply in the Union as a whole. If the Union has opted for minimum harmonisation there is still room for a balancing of interests in individual cases above the minimum level, and if there is no harmonisation legislation at all, such a balancing of interests can be conducted in accordance with the Treaty provisions and relevant case-law.

The situation can be described by the following figure:

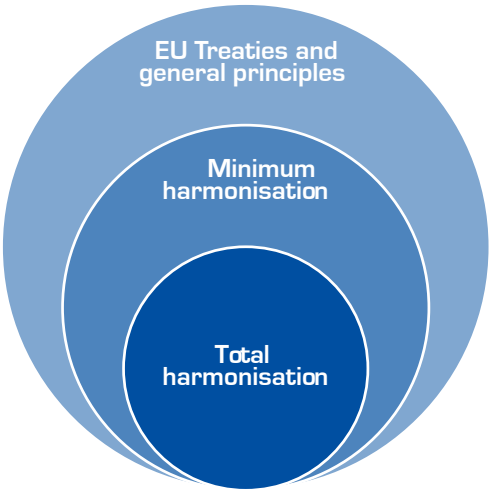

Figure 1 General EU law influence on State measures

In my opinion these principles must be respected in all procurements *that have a cross-border interest* (see above, section 1). If there is no cross-border interest the general and specific EU law requirements will not be applicable.[55]

However, when it comes to procurement it is not sufficient to consider only these general requirements. A decision by a contracting authority is not identical to 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 object of the contract and be suitable for ensuring that this is attained.

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. I therefore conclude that the 'strategic use of public procurement' is associated with corresponding limitations that applied previously under EU law. Accordingly, the new Directive does not alter the present legal situation (outside the procurement Directives), which means that contracting authorities which impose environmental and social requirements must respect EU law in general (the criteria used must be applied in a non-discriminatory manner, must be justified by imperative requirements in the general interest, must be suitable for securing the attainment of their objective, and must not go beyond what is necessary in order to attain that objective). However, these developments underline the fact that the EU pursues a multitude of interests which are not only economic ones. 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 A realistic strategy for the use of strategic procurement

Thus, is all solemn talk of an increased scope for the use of strategic procurement in practice just empty words?

Partly, I believe that this is the case, because the concept is more of a semantic invention than a substantive one. In my view, however, the general EU legal framework provides a fairly large space for social and environmental considerations. This is of course also true in relation to public procurement. But it is important that the contracting authority makes sure that the integration of environmental and social considerations is not done in isolation from the objectives stemming from the Union law in general.

[55] See Case C-507/03, *Commission v Ireland* [1997] ECR I-9777 and Joined Cases C-147/06 and C-148/06, *Secap* [2008] ECR I-3565.

It should be mentioned that contracting authorities should pay special attention in the following three circumstances when imposing environmental and social requirements.

9.1 Defining the subject matter of the contract

Contracting authorities can generally procure what they need at market price and largely according to their own preferences, as long as the principles of the free movement of goods and services and freedom of establishment are respected.[56] The EU Directives contain no rules on what should be procured. This is a task for the contracting authorities to decide. In its two Communications on environmental and social considerations in procurement,[57] the Commission points out that, apart from the issue of equal treatment, Union law does not regulate for the subject matter of a contract. The public procurement Directives do not prescribe in any way what contracting authorities should buy, and consequently are neutral as far as the subject matter of a contract is concerned. Even more clearly the Commission's Handbook on green procurement states: 'In principle [public authorities] are free to define the subject of the contract in any way that meets [their] needs. Public procurement legislation is not much concerned with what contracting authorities buy, but mainly with how they buy it. For that reason, none of the procurement Directives restrict the subject matter of a contract as such.'[58]

Hence, contracting authorities must carefully define what they really want (the subject matter). In some cases it may be perfectly legitimate to define the object of the contract as a very narrow category of goods or services, and also to specify that a particular social or environmental policy is the object of the procurement process.[59] This can certainly be the case when public procurement is used to promote innovation. I therefore agree with the basic reasoning behind the claim that 'what to buy decisions' or 'excluded buying decisions' should normally not be treated as restrictions on trade.[60] The most important question is, however, not, in my view, whether a decision is a decision regarding what to buy, but rather if the decision can be seen as a legitimate way of defining the subject matter of the contract.

In that regard it should be noted that official rules and guidelines that have, as their result, that contracting authorities systematically choose to procure domestic products instead of foreign products may be prohibited even if the choice would have been legitimate in an individual case. Such general conditions are, from a Union perspective, much more harmful to trade than a declared and justified preference for particular goods or services in an individual case. This reasoning is also consistent with the claim that regulatory measures are more likely to be treated as restrictions under Union law than buying decisions.[61] However, applying this clear distinction (buying decisions/regulatory decisions) would in my view not be in line with Union law as it stands today, as it is almost impossible and is not advisable to try to exclude beforehand those measures that can never be in conflict with the free movement rules. In that regard, there is a difference between the present situation in the Union and the one in the US where there is a so-called market-participant exception which makes it possible

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56 See Falk, J-E, *Lag om offentlig upphandling – en kommentar*, 2nd edn, Jure 2011.

57 European Commission, Interpretative Communication on the Community law applicable to public procurement and the possibility for integrating environmental considerations into public procurement, COM (2001) 274 final, and Interpretative Communication on the Community law applicable to public procurement and the possibility for integrating social considerations into public procurement, COM (2001) 566 final.

58 European Commission, *Buying Green! A Handbook on Environmental Public Procurement* (Official Publications of the European Communities, 2004), p. 14.

59 Cf. McCrudden, *EC public procurement law and equality linkages: foundations for interpretation*, in Arrowsmith/Kunzlik (eds.), Social and Environmental Policies in EC Procurement Law, op. cit., p. 290. See above note 40.

60 In the book Social and Environmental Policies in EC Procurement Law Sue Arrowsmith, together with Peter Kunzlik, argues that decisions on whether to make a purchase and what to purchase should not generally be treated as a hindrance to trade, even when they are discriminatory in effect. They call these decisions 'excluded buying decisions'. The reasoning behind this position is a practical and constitutional concern relating to judicial scrutiny at the EU level of these decisions, which distinguish them, according to Arrowsmith and Kunzlik, from measures of a more regulatory nature. A distinction between certain activities of the government as a 'buyer' and its other procurement activity, including its 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 (see Arrowsmith, S. and Kunzlik, P., *Public procurement and horizontal policies in EC law: general principles* in Arrowsmith/Kunzlik (eds.), Social and Environmental Policies in EC Procurement Law, op. cit., p. 25. See above note 40.

61 Ibid., p. 25.

to draw a clear distinction between the state as market regulator and the state as market participant. Decisions from contracting authorities can therefore, under certain conditions, escape the Dormant Commerce Clause which corresponds to the free movement clauses in Union law. [62]

It must also be noted that the harmonised rules in the Union (which have no counterpart in the US) may be of relevance in this context. If the common (and decided) line of action in the EU is that a certain substance will be phased out over a specified period, more stringent national requirements in a procurement procedure would normally be incompatible with EU rules. A certain margin of manoeuvre should, however, exist for the contracting authorities to entice companies that have adopted more stringent standards, but this should be carried out through the application of environmentally-oriented award criteria. This question will be discussed below.

In conclusion, the requirements set for public procurement always have a *potential* effect on trade, and a contracting authority must therefore constantly see the procurement procedure in a pan-European perspective. If there are objectively justified reasons – even from such a perspective – to define the subject matter of the contract narrowly in order to meet the preferences of the contracting authority, this is however entirely possible. The Commission has correctly spelled out the general limitations of defining the subject matter of the contract in the following way:

> A contracting authority, as a public body, has to observe the general rules and principles of Community law. More precisely, these are the principles regarding the free movements of goods and services as laid down in Article 28 to 30 [now Article 34 to 36 TFEU] and 43 to 55 [now Article 49 to 62 TFEU] of the EC Treaty. This implies that subject matter of a public contract may not be defined with the objective or the result that access to the contract is limited to domestic companies to the detriment of tenderers from other Member States.[63]

9.2 A different situation if the common interest of the Union would be promoted

Support for the environmental and social considerations that a contracting authority wishes to promote may also exist in EU law. Most notably, this is the case if the Union itself requires contracting authorities to promote such interests. An example of this is the European Parliament and Council Regulation (EC) No 106/2008 on a Community energy-efficiency labelling programme for office equipment.[64] Article 6 of this Regulation provides that central government authorities shall, without prejudice to Community and national law and economic criteria, specify energy-efficiency requirements not less demanding than the common specifications.[65] There are also mandatory procurement requirements set for achieving specific goals regarding road transport vehicles in Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport.[66]

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

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62 See Denning, P., Graff, S. and Wooten, H., *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. The comparison between the US and the EU as regards states as market participants in relation to public procurement and the environment will be explored in a report from SIEPS by Jason Czarnezki due to be published in April 2013.

63 European Commission, Interpretative Communication on the Community law applicable to public procurement and the possibility for integrating environmental considerations into public procurement, COM (2001) 274 final, p. 12.

64 OJ L 39, p. 1.

65 See Sandin, E., *Miljökrav vid offentlig upphandling och EU:s inre marknad: en probleminventering*, in Madell, T, Bekkedal, T. and Neergaard, U. (eds.) Den nordiska välfärden och marknaden, op. cit., p. 327. See above note 42.

66 OJ L 120, p. 5.

a case the Member State has less to justify. An example of this is Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources,[67] which has proved to have great importance for public procurement.[68] Since the Union has taken legislative steps to create a new market in energy from renewable sources it is not reasonable to contend that contracting authorities are to be excluded from that market.[69] On the contrary, the Directive should be respected by contracting authorities on similar grounds to the Medical Devices Directive 93/42 in *Medipac* and *Commission v Greece* and the Posting of Workers Directive 96/71 in *Rüffert*, discussed above.

Another example is Case C-368/10, *Commission v Netherlands*,[70] concerning the conditions for imposing requirements on labelling on, in the present case, coffee and tea. The Court indicated that when there is relevant Union legislation, the contracting authorities must respect this legislation and are therefore entitled, without further explanation or justification, to refer to the requirements imposed by the relevant legislation. The judgment stated that:

> since the marketing, in the European Union, of products obtained from organic agriculture and presented as such must comply with relevant European Union legislation, a contracting party may, if appropriate, without disregarding the concept of 'technical specification' within the meaning of point 1(b) of Annex VI to Directive 2004/18 or Article 23(3) thereof, state in the contract documents that the product to be supplied must comply with Regulation No 2092/91 or with any other subsequent Regulation replacing that Regulation (paragraph 68 in the judgment).

9.3 The impact on trade must be assessed case by case

If it is ultimately not possible to satisfy the preferences of the contracting authority through the definition of the object of the contract, and the EU has not adopted measures that support the objectives set by the authority, a concrete assessment of the restrictions of the relevant social and/or environmental requirements on the free movement of goods must be carried out.

The restrictions on trade which arise in connection with procurement do not always correspond to the kind of restrictions that the EU Treaties and harmonisation Directives prohibit. *Choosing* a product or service on the basis of requirements relating to the function or performance of the product or the service is, of course, not the same thing as imposing a *restriction* on the free movement of all goods or services which are not chosen. A procurement procedure may however have the same effect if the result is that some suppliers are prevented from launching a bid (exclusion for any reason). An important feature of EU procurement law is to make it possible to carry out a comparison of various tenders. The CJEU has stated that the purpose of the procurement rules is *inter alia* effective competition 'by promoting the widest possible expression of interest among contractors in the Member States'.[71] This explains why it is not possible to justify a requirement that food should be grown in the awarding state as opposed to requirements that focus more directly on environmental damage.[72] The requirement for locally grown food makes it very difficult or impossible for foreign suppliers to launch a bid; this renders the public procurement rules powerless with regard to the market integration objective.

What a contracting authority must achieve is, therefore, to ensure that a comparison may take place between all those bids which cannot on objective and legitimate grounds be excluded from the procedure. Against this background, it is not surprising that the Court found acceptance for environmental considerations through the application of *award criteria* which, unlike the mandatory requirements, allow a comparison of quality and price for all the products or services that meet the requirement of being legally in free circulation on the EU internal market (see Cases C-513/99, *Concordia Bus* and C-448/01, *Wienstrom*). The award criterion in question thus becomes just one of several award criteria

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67 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ L 283, p. 33).

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

69 Cf. Kunzlik, P., *The procurement of 'green' energy* in Arrowsmith/Kunzlik (eds.), Social and Environmental Policies in EC Procurement Law, op. cit., p. 380. See above note 40.

70 Case C-368/10, *Commission v Netherlands*, not yet reported.

71 See, to that effect, Case C−225/98, *Commission v French Republic* [2000] ECR I−7445, para 34; Case C−399/98, *Ordine degli Architetti and Others* [2001] ECR I−5409, para 52; Joined Cases C−285/99 and C−286/99 *Lombardini* and *Mantovani* [2001] ECR I-9233, para 34; Case C−470/99 *Universale-Bau and Others* [2002] ECR I-11617, para 89; and Case C-213/07, *Michaniki* [2008] ECR I-9999, para 39.

72 Cf. Arrowsmith, S., *Application of the EC Treaty and directives to horizontal policies: a critical review*, in Arrowsmith/Kunzlik (eds.), Social and Environmental Policies in EC Procurement Law, op. cit., p. 176. See above note 40.

which also have predictive importance in the weighting that will take place when the most economically advantageous tender is chosen. Designing award criteria is naturally more tedious for contracting authorities, but it is completely in line with the aim of making it possible for as many contractors as possible in the Member States to submit tenders. Award criteria usually provide a more proportionate and effective approach than other mechanisms. [73] They are easier to justify than admission conditions, selection criteria and technical specifications etc., which are capable of totally excluding tenderers who cannot meet them. Award criteria may therefore be an important addition to the permitted ways of narrowing down the object of the contract. A possible comparison is to be found in the case-law regarding *restriction on use*. Such restrictions are not treated as *technical* barriers to trade as long as they allow free circulation of the goods in question. Restriction on use concerning a certain product can therefore fall outside the scope of a harmonisation Directive regarding technical specifications for that product.[74]

However, an award criterion must of course not be formulated so that in practice it constitutes a disguised technical specification or similar. In such a case it is not compatible with the principle of proportionality, which constitutes a general principle of Union law[75] and therefore is of general relevance in procurement situations.[76] How the proportionality test is carried out depends, however, on the circumstances of each case at hand. Particular caution is of course required when requirements are set that are higher than harmonised standards in Union law. It is difficult to tell in general terms when it would be possible to go beyond such standards. However, one should not exclude, for instance, the possibility that it is permissible to encourage technical innovation or environmental protection that goes beyond the relevant harmonised requirements, provided that 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 reason, be formulated in such a way as to preclude the participation of tenderers who satisfy the 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.

It should finally not be forgotten that the award criteria must correspond to the subject matter of the contract.

10 Conclusions

Overall, it is difficult to give a clear answer regarding how much space contracting authorities have at their disposal in order to support social or environmental objectives. Procurement law is part of the legal framework promoting the free movement of goods and services in the EU internal market. It must be determined case by case how much scope there is for a contracting authority to impose social and environmental requirements. In this context, it is important to consider to what extent there are harmonised EU rules that are relevant but also how the social or environmental requirements are constructed, i.e. as mandatory requirements, such as technical specifications, or as award criteria. One area where this has proved to be problematic in Sweden is animal welfare. This area is highly regulated by Union law and it is difficult for the contracting authorities to be certain of how much scope there is to set requirements which go beyond Union law. There is, for the same reason, conflicting case-law from the national administrative courts in this area.[77] Accordingly, the new Directives on public procurement will constitute a starting point but will not be the complete legal framework which can impose limits on sustainable public procurement. Many issues are dealt with, for instance the conditions regarding labels; here the Directives codify the present legal situation, stating that the contracting authorities may require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, provided that they also accept equivalent labels. However, the EU procurement rules cannot be considered separately from the European integration process in general. The procurement rules aim primarily to strengthen the single

[73] Ibid., p. 190 and 242. However, Arrowsmith is less convinced about the need of using award criteria.

[74] See Case C-142/05, *Mickelsson and Roos* [2009] ECR I-4273, paras 20 and 21. In this case, the Swedish regulations on the use of personal watercraft were not product-related since they did not make use depend in particular on the personal watercraft meeting any technical requirements other than those harmonised in the Recreational Craft Directive (Directive 94/25/EC). The restriction on use did not therefore require any modifications to the personal watercraft themselves.

[75] See, inter alia, Case C-210/03 *Swedish Match* [2004] ECR I-11893, para 47.

[76] Cf. Case C-213/07, *Michaniki* [2008] ECR I-9999, para 48.

[77] See Pedersen, K., *Upphandlingskrönika – Djurskyddshänsyn vid livsmedelsupphandlingar*, Europarättslig tidskrift 2011, p. 787.

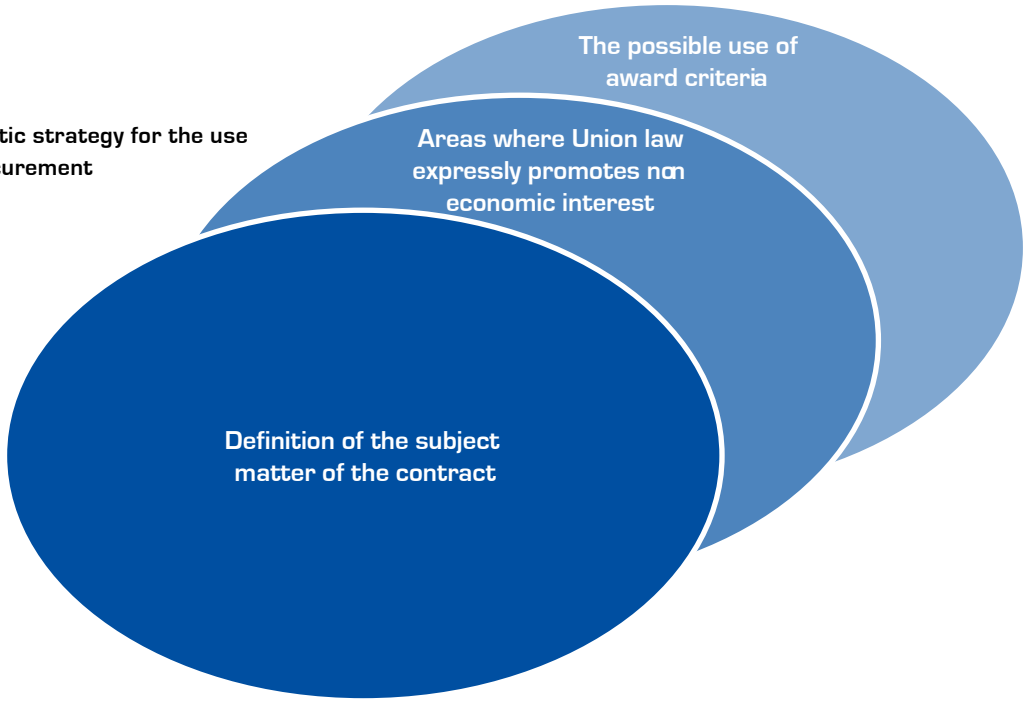

Figure 2 A realistic strategy for the use of strategic procurement

market and the competitiveness of the Union. Contracting authorities within the EU can therefore not be given full freedom to set social and environmental requirements for the award of a public contract. Such a development would undermine the internal market which the EU has built up with great effort during a period of more than 50 years, since a relatively large share of the total trade in the market is covered by public contracts.

However, it is possible to discern a tendency today to increase the room for the strategic use of public procurement outside the EU rules that deal specifically with public procurement. In my view, it is possible for strategic procurement to be used in accordance with the figure above, where the inner circle represents the most efficient way and the outer circle the most risky way, from a legal point of view, of promoting non-economic aims in public procurement. The best strategy is thus to construct the object and the subject matter of the procurement process in a way that fully supports the non-economic aim which the contracting authority wants to realize. In other words, the non-economic interest would be the express object of the tendering procedure. If that is not possible, it may be possible for the non-economic aims to correspond to aims which the Union legislator expressly promotes. Finally, if these aims are not apparent from Union law, it is advisable that the contracting authorities make use of award criteria relating to the subject matter of the contract rather than obligatory requirements, provided of course that the requirements in question could be considered to restrict the free movement of goods or services in the internal market. Otherwise, there is no need for them to be justified in that regard.

To sum up, the use of strategic procurement in support of societal goals, such as fostering innovation, respecting the environment, combating climate change and improving employment, public health and social conditions, is unproblematic if Union law is fully respected. That is probably often the case if foreign goods and services are not treated less favourably than domestic goods and services. However, in some cases a conflict of interests can appear. In such a case it is important to keep in mind that a contracting authority is a body which is subject to the authority or control of a public authority or the State. This means that all obligations arising from Union law extend to the contracting authority.

In this article I have suggested various ways of avoiding conflicts between using public procurement to promote non-economic societal goals and Union law in general. Public procurement law in the European Union is developing, and recognizes to a large extent that such interests may be taken into account. However, it is important to remember that the procurement Directives are only part of a larger and rather complex set of Union rules, the *aquis communautaire*. Hence, the proposed Directives on public procurement show a possible way to foster innovation and improve the environment, public health and social conditions, but this should not be seen as a particularly simple or highly efficient way. Instead, strategic procurement seems to be an instrument that complements other policies in this field that should be integrated in the overall Union policy. This is fully in line with the consistency principle in Article 7 TFEU, which requires policy coordination in all the activities of the Union.

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