

# PART 1

## A THEMATIC APPROACH TO PUBLIC PROCUREMENT REGULATION



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# 1. The principles of public procurement regulation

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## THE PRINCIPLE OF TRANSPARENCY

One of the most important principles of the Public Procurement Directives is the principle of transparency. The principle of transparency serves two main objectives: the first is to introduce a system of openness in public purchasing of the Member States, so a greater degree of accountability should be established and potential direct discrimination on grounds of nationality should be eliminated. The second objective aims at ensuring that transparency in public procurement represents a substantial basis for a system of best practice for both parts of the equation, but in particular relevant to the supply side, to the extent that the latter has a more *proactive* role in determining the needs of the demand side. Transparency in public procurement is achieved through community-wide publicity and advertisement of public procurement contracts over certain thresholds by means of publication of three types of notices in the Official Journal of the European Communities: Periodic Indicative Notices (PIN); Invitations to tender; and Contract Award Notices (CAN).

## THE EFFECTS OF THE PRINCIPLE OF TRANSPARENCY

The principle of transparency, which serves as the ignition of public procurement regulation, has imprinted some significant effects in the regime, namely the effect of price competitiveness, the effect of flexibility and the effect of verification in the delivery of public services.

### **The Effect of Price Competitiveness**

Transparency, as a principle in public purchasing has an obvious trade effect, that of price competitiveness. If more interested suppliers are aware of a contracting authority's determination to procure, an element of competition automatically occurs; this sort of competitive pattern would probably be reflected in the prices received by the contracting authority, when it evaluates the offers. The fact that more suppliers are aware of a forthcoming public contract and the fact that interested suppliers are aware that their rivals are informed about it, indicates two distinctive parameters which are relevant to savings and value for money. The first parameter focuses on value for money for the demand side of the equation of public purchasing and reveals the possibility for contracting authorities to compare prices (and quality). The second parameter has an effect on the supply side of the equation (the suppliers) which amongst other things can no longer rely on the lack of price comparisons when serving

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the public sector. Openness in public procurement, by definition, results in price competition and the benefits for contracting authorities appear achievable.

However, transparency and openness in public purchasing pose a question over long-term savings and value for money considerations. Price competition, as a result of the awareness of forthcoming public contracts, represents a rather static effect in the value for money process. The fact that more and more interested suppliers are aware and do submit tenders, in the long run, appears rather as a burden. If transparency and the resulting price competitiveness are based on a *win-to-win* process, the potential benefits for contracting authorities could easily be counterbalanced by the administrative costs in tender evaluation and replies to unsuccessful tenders. Furthermore, the risk management factor is much higher in a win-to-win purchasing scenario. Price competitiveness represents also some threats for contracting authorities, to the extent that quality of deliverables as well as the delivery process itself could be jeopardised, if contracting authorities deal with different and unknown contractors. It could thus be argued here that price competitiveness, as a trade effect potentially beneficial for the demand side of the public purchasing equation, has a static character. It seems that it does not take into account medium or long-term purchasing patterns, as well as counter effects of competition. Two elements deserve further analysis here:

The first raises questions over the aggregate loss of the economy through transparent competitive purchasing patterns. For example, if a large number of interested suppliers submit their offer to a particular contracting authority, two types of costs should be examined. First, the cost which is attributed to the response and tendering stage of the procurement process: human and capital resources are directed by the suppliers towards the preparation of documents and the submission of the offers. If one of these suppliers wins the contract, those remaining will have suffered an unrecoverable loss. If that aggregate loss exceeds the benefit/saving accomplished by the contracting authority by following transparent and competitive purchasing patterns, value for money has not been achieved. Secondly, along the same lines, the evaluation and selection process during tendering represents a considerable administrative cost to the contracting authorities. If the principle of transparency complements the principle of equal treatment, contracting authorities should give the same attention to all interested suppliers that have submitted a response. Downsizing the list through evaluation and assessment based on stipulated criteria is by no means an inexpensive exercise. Human and capital resources have to be directed by contracting authorities towards meeting that cost. If the latter exceeds the potential savings achieved through the competitive tendering route, then value for money is unaccomplished.

The second element that deserves attention relates to the definition of price competitiveness in public purchasing as well as its interrelation with anti-trust law and policy. A question which arises in price competitive tendering patterns is *what would be the lowest offer contracting authorities can accept*. If the maximisation of savings is the only achievable objective in the public procurement process, the transparent/competitive pattern cannot guarantee and evaluate safeguards in relation to under-priced offers. If the supply side responds to the perpetuated competitive purchasing pattern by lowering prices, contracting authorities could face a dilemma: where to stop. It should be mentioned here that the European rules provide for an automatic disqualification of an 'abnormally low offer'. The term has not been interpreted in detail by the judiciary

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at European and domestic levels and serves rather as a 'lower bottom limit'.<sup>1</sup> Also, when an offer appears low, contracting authorities may request clarifications from the tenderer in question. Contracting authorities face a dilemma in evaluating and assessing low offers other than abnormal ones. It is difficult for them to identify dumping or predatory pricing disguised behind a low offer for a public contract. In addition, even if there is an indication of anti-competitive price fixing, the European public procurement rules do not provide for any disqualification procedure. The suspension of the award procedures (or even the suspension of the conclusion of the contract itself) would be unlikely without a thorough and exhaustive investigation by the competent anti-trust authorities.

**The de minimis Principle**

The public procurement Directives are applicable only if certain value thresholds are met. The application of the Directives is subject to monetary considerations in relation to the value of the relevant contracts. There is a clear-cut distinction of coverage of the public procurement rules upon contracts representing transactions between the public sector and the industry of a certain economic substance and volume. Contracts below the required thresholds are not subject to the rigorous regime envisaged by the Directives. However, contracting authorities are under the explicit obligation to avoid discrimination on nationality grounds and apply all the provisions related to the fundamental principles of the Treaties of Rome and Maastricht. The thresholds laid down are as follows.

One could question the reason behind the separation of public procurement regulation into dimensional and sub-dimensional nature as a result of the relevant thresholds. Interestingly enough, it was thought that contracts above the thresholds laid down by the Directives could embrace the majority of the public procurement requirements in the Member States, thus eliminating the danger of discriminatory public purchasing for those contracts left outside the ambit of the Directives. However, a careful monitoring of procurement systems in the Member States has revealed that sub-dimensional procurement appears at least three times the size of dimensional public purchasing,<sup>2</sup> a fact that renders the application of the Directives only partly responsible for the integration of public markets in the European Community.

**The Dimensionality of Public Procurement**

The dimensional nature of public procurement by virtue of the monetary applicability of the relevant rules introduces a *de minimis criterion*, where certain thresholds in relation to the value of the contracts are utilised for the applicability of the Directives. The dimensional public procurement should, in principle, encompass the majority of

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<sup>1</sup> See Case 76/81, *SA Transporoute et Travaux v Minister of Public Works* [1982] ECR 457; Case 104/75, *SA SHV Belgium v La Maison Ideale et Societe Nationale du Longement*, before the Belgian Conseil d'Etat, judgment of 24 June 1986 of the Belgian *Conseil d'Etat*.

<sup>2</sup> See, European Commission, *The Use of Negotiated Procedures as a Non-Tariff Barrier in Public Procurement*, Brussels, CC 9364, 1995.

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procurement requirements of Member States and their contracting authorities. However, the legislation on public procurement has had little effect on the principle of transparency, as empirical investigation of the patterns of contracting authorities of Member States concerning their publication record in relation to their contracts reveals a rather gloomy picture. The volume of public purchasing which is advertised and tendered according to the requirements of the relevant Directives in comparison with the total volume of public procurement of the Member States appears disproportionate and beyond expectation, bearing in mind the vital importance that has been given to the principle of transparency for the opening-up of the public markets in the European Union. The percentages of public contracts advertised in the Official Journal by Member States reveal the relatively low impact of the public procurement legislation on the principle and objectives of transparency in European public markets. Clarification of the above impact of the law upon the transparency patterns which contracting authorities have established should be sought by exploring three scenarios.

The first scenario is based on the distinction between dimensional and sub-dimensional public procurement in the Member States. The European Directives allow the division of public contracts into lots without any justification from contracting authorities. This in most cases may result in intentional contravention of the Directives, as sub-dimensional (below certain thresholds) public contracts escape their applicability. As sub-dimensional public procurement escapes from the mandatory publication requirement, contracting authorities tend to divide contracts into separate lots. It should be mentioned that the Directives stipulate the prohibition of intentional division of contracts into lots with a view to avoiding the relevant thresholds, but the provision presents practical difficulties in its observance and enforcement. Until the time of writing, there is no case or complaint before national courts or before the European Court of Justice relating to the intentional division of contracts into lots with lower thresholds in order to avoid the application of the Directives. The relevant thresholds which require the mandatory publication requirement clearly result in a segmentation of the public markets in quantitative terms by creating a *dimensional forum* which is subject to the rigorous legal regime. A *de minimis* rule applies to contracts below the thresholds, which exempts them from the provisions of the Directives. The sub-dimensional public procurement is only subject to the principle of non-discrimination at European level, whereas at domestic level, national tendering rules regulate the award of these contracts.

The second scenario is based on the excessive utilisation of award procedures without prior publication. Indeed, the Directives allow, under certain circumstances the award of contracts through direct negotiations with a contractor. Although the European Court of Justice condemned the above practice in a number of cases before it, the actual utilisation of negotiated procedures without prior publication is widespread. Finally, the third scenario implies the blunt violation of Community law by Member States by avoiding the publication of tender notices in the Official Journal of the European Communities.

Bearing in mind the relative absence of complaints and subsequent litigation concerning non-advertisement of public contracts before national courts or the European Court of Justice, the third scenario reflects to a large extent the underlying reason for the lack of transparency in public procurement. In fact, intentional division of

contracts into lots with a view to avoiding the Directives and excessive and unjustified recourse to award procedures without prior publication amounts to a blunt violation of Member States' obligations arising from the relevant Directives and also form primary Treaty provisions.

### **The Flexibility Effect**

Transparency in public procurement is linked with the *flexibility* inherent in the regulatory regime, which is demonstrated through certain doctrines established by the ECJ. These include the doctrines of *functionality* and *dependency* in order to define the notion of contracting authorities, as well as the doctrines of *dualism*, *commercialism* and *competitiveness* in order to determine the remit and thrust of public procurement rules.

### **The doctrine of functionality**

Functionality depicts a flexible and pragmatic approach in the applicability of the procurement Directives. Entities and bodies which have been set up by the state to carry out tasks entrusted to them by legislation, but are not formally part of the state's administrative structure, could not fall under the remit of the term 'contracting authorities', since they are not formally part of the state; neither are all criteria for the definition of bodies governed by public law present.<sup>3</sup> The functional dimension of contracting authorities has earmarked the departure from the formality test, which has rigidly positioned an entity under state control on *stricto sensu* traditional public law grounds.<sup>4</sup> Functionality, as an ingredient of assessing the relationship between an entity and the state demonstrates, in addition to the elements of management or financial control, the importance of constituent factors such as the intention and purpose of establishment of the entity in question.<sup>5</sup> The doctrine of functionality supports the principle of transparency, as its application enhances the span and remit of the public procurement regulation.

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<sup>3</sup> This is particularly the case of non-governmental organisations (NGOs) which operate under the auspices of the central or local government and are responsible for public interest functions. See Article 9 of the Public Sector Directive. In particular, bodies governed by public law (i) must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character; (ii) they must have legal personality; and (iii) they must be financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by these bodies, or having an administrative or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

<sup>4</sup> The formality test and the relation between the state and entities under its control was established in Cases C-249/81, *Commission v Ireland* [1982] ECR 4005; C-36/74 *Walrave and Koch v Association Union Cycliste Internationale et al* [1974] ECR 1423.

<sup>5</sup> See Case 31/87, *Gebroeders Beentjes B.V. v State of Netherlands* [1988] ECR I-4635; Cases C-353/96, *Commission v Ireland* and C-306/97, *Connemara Machine Turf Co Ltd v Coillte Teoranta*, judgment of 17 December 1998; Case C-323/96, *Commission v Kingdom of Belgium*, judgment of 17 September 1998.

**The doctrine of dependency**

The assessment of the third criterion of bodies governed by public law, namely that they ‘must be financed, for the most part, by either the state, or regional or local authorities, or other bodies governed by public law; or must be subject to management supervision by these bodies, or must have an administrative or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law’, assumes that there is a close dependency of these bodies on the State, in terms of corporate governance, management supervision and financing.<sup>6</sup> These dependency features are alternative, thus even the existence of one feature satisfies the entire third criterion and renders the public procurement rules applicable.

Management supervision by the state or other contracting authorities entails not only administrative verification of legality or appropriate use of funds or exceptional control measures, but the conferring of significant influence over management policy, such as the narrowly circumscribed remit of activities, the supervision of compliance, as well as the overall administrative supervision.<sup>7</sup> Dependency, in terms of overall control of an entity by the state or another contracting authority presupposes a control similar to that which the state of another contracting authority exercises over its own departments. However, the ‘similarity’ of control denotes lack of independence with regard to decision-making, thus a contract between a contracting authority and an entity, where the former exercises a control similar to that which it exercises over its own departments and at the same time that entity carries out the essential part of its activities with the contracting authority, is not a public contract, irrespective of that entity being a contracting authority or not.<sup>8</sup> The similarity of control as a reflection of dependency reveals another facet of the thrust of contracting authorities: the non-applicability of the public procurement rules for in-house relationships.

The receipt of public funds from the state or a contracting authority is an indication that an entity could be a body governed by public law. However, this indication is not an absolute one.<sup>9</sup> Only specific payments made to an entity by the state or other public authorities have the effect of creating or reinforcing a specific relationship of subordination and dependency. The funding of an entity within a framework of general considerations indicates that the entity has close dependency links with the state or other contracting authorities.

If there is a specific consideration for the state to finance an entity, such as a contractual nexus, the dependency ties are not sufficiently close to allow the entity

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<sup>6</sup> This type of dependency resembles the Court’s definition in its ruling on state controlled enterprises in Case 152/84 *Marshall v Southampton and South West Hampshire Area Health Authority* [1986] ECR 723.

<sup>7</sup> See Case C-237/99, *Commission v France*, judgment of 1 February 2001.

<sup>8</sup> See Case C-107/98, *Teckal Srl v Comune di Viano*, judgment of 18 November 1999.

<sup>9</sup> See Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, judgment of 3 October 2000. The Court stipulated that the proportion of public finances received by an entity, as one of the alternative features of the third criterion of the term bodies governed by public law must exceed 50% to enable it meeting that criterion. For assessment purposes of this feature, there must be an annual evaluation of the (financial) status of an entity for the purposes of being regarded as a contracting authority.

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financed by the state meeting the third criterion of the term ‘bodies governed by public law’. Such relationship is analogous to the dependency that exists in normal commercial relations formed by reciprocal contracts, which have been negotiated freely between the parties. The existence of a contract between the parties, apart from the specific considerations for funding, indicates strongly evidence of supply substitutability, in the sense that the entity receiving the funding faces competition in the relevant markets.

The doctrine of dependency brings entities which are dependent on public authorities within the remit of public procurement regulation, but exonerates in-house relationships.

### **The doctrine of dualism**

The dual capacity of an entity as a public service provider and a commercial undertaking respectively, and the weighting of the relevant activity in relation to the proportion of its output, should be the decisive factor in determining whether an entity is a body governed by public law. This argument appeared for the first time when it was suggested<sup>10</sup> that only if the activities in pursuit of the ‘public services obligations’ of an entity supersede its commercial thrust, could the latter be considered as a body covered by public law and a contracting authority.

In practice, the suggestion implied a selective application of the public procurement Directives in the event of dual capacity entities. This is not entirely unjustified as, on a number of occasions,<sup>11</sup> the public procurement Directives themselves utilize thresholds or proportions considerations in order to include or exclude certain contracts from their ambit. However, the ECJ ruled out a selective application of the Directives in the case of dual capacity contracting authorities based on the principle of legal certainty. It substantiated its position on the fact that only the purpose for which an entity is established is relevant in order to classify it as body governed by public law and not the division between public and private activities. Thus, the pursuit of commercial activities by contracting authorities is incorporated with their public interest orientation aims and objectives, without taking into account their proportion and weighting in relation to the total activities dispersed, and contracts awarded in pursuit of commercial purposes fall under the remit of the public procurement Directives. The ECJ recognized the fact that by extending the application of public procurement rules to activities of a purely industrial or commercial character, an onerous constraint would probably be imposed upon the relevant contracting authorities, which may also seem unjustified on the

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<sup>10</sup> See Case C-44/96, *Mannesmann Anlagenbau Austria. v Strohalm Rotationsdurck GesmbH*, *op.cit*; For a comprehensive analysis of the case, see the annotation by Bovis in (1999) 36 *Common Market Law Review* 205–25.

<sup>11</sup> For example, the relevant provisions stipulating the thresholds for the applicability of the Public Procurement Directives (Article 3(1) of Directive 93/37; Article 5(1) of Directive 93/36; Article 14 of Directive 93/38; Article 7(1) of Directive 92/50); the provisions relating to the so-called ‘mixed contracts’ (Article 6(5) of Directive 93/37), where the proportion of the value of the works or the supplies element in a public contract determines the applicability of the relevant Directive; and finally the relevant provisions which embrace the award of works contracts subsidised *directly* by more than 50% by the state within the scope of the Directive (Article 2(1)(2) of Directive 93/37).

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grounds that public procurement law, in principle, does not apply to private bodies which carry out identical activities.<sup>12</sup> The above situation represents a considerable disadvantage in delineating the distinction between private and public sector activities and their regulation, to the extent that the only determining factor appears to be the nature of the organization in question. The Court suggested that that disadvantage could be avoided by selecting the appropriate legal instrument or framework for the objectives envisaged or pursued by public authorities.

The doctrine of dualism specifically implies that contracting authorities may pursue a dual range of activities; to procure goods, works and services destined for the public, as well as participate in commercial activities. They can pursue other activities in addition to those which meet needs of general interest not having an industrial and commercial character. The proportion between activities pursued by an entity, which on the one hand aim to meet needs of general interest not having an industrial or commercial character, and commercial activities on the other is irrelevant for the characterization of that entity as a body governed by public law. What is relevant is the intention of establishment of the entity in question, which reflects on the 'specificity' requirement. Also, specificity does not mean exclusivity of purpose. Specificity indicates the intention of establishment to meet general needs. Along these lines, ownership or financing of an entity by a contracting authority does not guarantee the condition of establishment of that entity to meet needs of general interest not having industrial and commercial character.

There is considerable risk of circumventing the public procurement Directives, if contracting authorities award their public contracts via private undertakings under their control, which cannot be covered by the framework of the Directives. Under the domestic laws of the Member States, there is little to prevent contracting authorities from acquiring private undertakings in an attempt to participate in market activities. In fact, in many jurisdictions the socio-economic climate is very much in favour towards public-private sector partnerships, in the form of joint-ventures or in the form of private financing of public projects. The default position is the connection between the nature of a project and the aims and objectives of the undertaking, which awards it. If the realization of a project does not contribute to the aims and objectives of an undertaking, then it is assumed that the project in question is awarded 'on behalf' of another undertaking, and if the latter beneficiary is a contracting authority under the framework of public procurement law, then the relevant Directives should apply. The ECJ applied the *Strohal* lines to *Teckal*,<sup>13</sup> where the exercise of a similar control over the management of an entity by a contracting authority prevents the applicability of the Directives.

The dual capacity of contracting authorities is irrelevant to the applicability of public procurement rules. If an entity is a contracting authority, it must apply public procurement rules irrespective of the pursuit of general interest needs or the pursuit of commercial activities. Also, if a contracting authority assigns the rights and obligations of a public contract to an entity which is not a contracting authority, that entity must

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<sup>12</sup> See C. Bovis, *The Liberalisation of Public Procurement in the European Union and its Effects on the Common Market*, Aldershot: Ashgate, 1998, Chapter 1, p. 16 *et seq.*

<sup>13</sup> Case C-107/98, *Teckal Srl v Comune di Viano*, *op.cit.*

follow public procurement rules. The contrary would be acceptable if the contract fell within the remit of the entity, which is not a contracting authority, and the contract was entered into on its behalf by a contracting authority.

Dualism's irrelevance for the applicability of public procurement represents a safeguard for the *acquis communautaire*. Dualism could be viewed as recognition of contractualised governance, where the demarcation between public and private activities of the public sector has become difficult to define, as well as a counterbalance of commerciality. If commercialism might shield the activities of a contracting authority from the application of public procurement rules, dualism provides for the necessary inferences to subject dual capacity entities to the public procurement *acquis*.

### **The doctrines of commercialism and competitiveness**

Commercialism and its relationship with needs in the general interest represents the most important link between profit-making and public interest, as features which underpin the activities of bodies governed by public law. The criterion of 'specific establishment of an entity to meet needs in the general interest having non-commercial or industrial character' has attracted the attention of the ECJ,<sup>14</sup> where analogy was drawn from public undertakings jurisprudence, as well as case-law relating to public order to define the term *needs in the general interest*.<sup>15</sup> The concept was approached through a direct link with that of 'general economic interest', as defined in Article 90(2) EC.<sup>16</sup> The concept 'general interest' denotes the requirements of a community (local or national) in its entirety, which should not overlap with the specific or exclusive interest of a clearly determined person or group of persons<sup>17</sup>. However, the problematic requirement of the *specificity* of the establishment of the body in question was approached by reference to the reasons and the objectives behind its establishment. Specificity of the purpose of an establishment does not mean exclusivity, in the sense that other types of activities can be carried out without escaping classification as a body governed by public law.<sup>18</sup>

On the other hand, the requirement of non-commercial or industrial character of needs in the general interest has raised some difficulties. The Court had recourse to case law and legal precedents relating to public undertakings, where the nature of

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<sup>14</sup> See Cases C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *aExcelsior Snc di Pedrotti runa & C v Ente Autonomo Fiera Internazionale di Milano*, judgment of 10 May 2001; C-360/96, *Gemeente Arnhem Gemeente Rheden v BFI Holding BV*, judgment of 10 November 1998; C-44/96, *Mannesmann Anlangensbau Austria AG et al. v Strohal Rotationsdurck GesmbH*, judgment of 15 January 1998.

<sup>15</sup> See the Opinion of Advocate-General Léger, point 65 of the Strohal case.

<sup>16</sup> See Case C-179/90, *Merci Convenzionali Porto di Genova*, [1991] ECR I-5889; General economic interest as a concept represents 'activities of direct benefit to the public'; point 27 of the Opinion of Advocate-General van Gerven.

<sup>17</sup> See Valadou, *La notion de pouvoir adjudicateur en matière de marchés de travaux*, *Semaine Juridique*, 1991, Ed. E, No.3, p. 33.

<sup>18</sup> See Case C-44/96, *Mannesmann Anlangensbau Austria*, *op.cit.*

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industrial and commercial activities of private or public undertakings was defined.<sup>19</sup> The industrial or commercial character of an organization depends much upon a number of criteria that reveal the thrust behind the organization's participation in the relevant market. The state and its organs may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market. The key issue is the organization's intention to achieve profitability and pursue its objectives through a spectrum of commercially motivated decisions. The distinction between the range of activities which relate to public authority and those which, although carried out by public persons, fall within the private domain is drawn most clearly from case-law and judicial precedents of the Court concerning the applicability of competition rules of the Treaty to the given activities.<sup>20</sup>

The ECJ in *BFI*<sup>21</sup> had the opportunity to clarify the element of non-commercial or industrial character. It considered that the relationship of the first criterion of bodies governed by public law is an integral one. The non-commercial or industrial character is a criterion intended to clarify the term 'needs in the general interest'. In fact, it is regarded as a category of needs of general interest. The Court recognised that there might be needs of general interest which have an industrial and commercial character, and it is possible that private undertakings can meet needs of general interest which do not have industrial and commercial character. The acid test for needs in the general interest not having an industrial or commercial character is that the state or other contracting authorities choose themselves to meet these needs or to have a decisive influence over their provision.

In the *Agora* case<sup>22</sup> the Court indicated that if an activity which meets general needs is pursued in a competitive environment, there is a strong indication that the entity which pursues it is not a body governed by public law. The reason can be found in the relationship between competitiveness and commerciality. Market forces reveal the commercial or industrial character of an activity, irrespective of the latter meeting the needs of general interest or not. However, market competitiveness as well as profitability cannot be absolute determining factors for the commerciality or the industrial nature of an activity, as they are not sufficient to exclude the possibility that a body governed by public law may choose to be guided by considerations other than economic ones. The absence of competition is not a condition necessarily to be taken into account in order to define a body governed by public law, although the existence of significant competition in the market place may be indicative of the absence of a need in the general interest, which does not carry commercial or industrial elements. The Court reached this conclusion by analysing the nature of the bodies governed by public law contained in Annex 1 of the Works Directive 93/37 and verifying that the intention of

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<sup>19</sup> For example see Case 118/85 *Commission v Italy* [1987] ECR 2599 at para 7, where the Court had the opportunity to elaborate on the distinction of activities pursued by public authorities.

<sup>20</sup> See Case C-364/92, *SAT Fluggesellschaft* [1994] ECR I-43; also Case C-343/95, *Diego Cali et Figli* [1997] ECR I-1547.

<sup>21</sup> See Case C-360/96, *Gemeente Arnhem Gemeente Rheden v BFI Holding BV*, *op.cit.*

<sup>22</sup> see Case C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*, *op.cit.*

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the state to establish such bodies has been to retain decisive influence over the provision of the needs in question.

Certain activities, which by their nature fall within the fundamental tasks of the public authorities, cannot be subject to a requirement of profitability and therefore are not meant to generate profits. It is possible, therefore, that the reason for drawing a distinction between bodies whose activity is subject to the public procurement legislation and other bodies, could be attributed to the fact that the criterion of 'needs in the general interest not having an industrial or commercial character' indicates the lack of competitive forces in the relevant marketplace. The concept of the state encapsulates an entrepreneurial dimension to the extent that it exercises *dominium*. Although the state as entrepreneur enters into transactions with a view to providing goods, services and works for the public, this type of activities does not resemble the characteristics of entrepreneurship, in as much as the aim of the state's activities is not the maximisation of profits but the observance of public interest. The relevant markets into which the state enters can be described as public markets. Public markets are the *fora* where *public interest* substitutes *profit maximisation*.<sup>23</sup>

### **Competitive Markets in Utilities**

Privatized utilities could, in principle, be excluded from the procurement rules when a genuinely competitive regime<sup>24</sup> within the relevant market structure would rule out purchasing patterns based on non-economic considerations. The new utilities Directive should not apply to markets where the participants pursue an activity which is directly exposed to competition on markets to which access is not limited within the relevant Member State. The new utilities Directive has therefore introduced a procedure, applicable to all sectors covered by its provisions, that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision making process, ensuring, within short time limits, uniform application of standards that result in the disengagement of the relevant procurement rules.

Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. The implementation and application of appropriate Community legislation liberalizing a utility sector will be considered to provide sufficient grounds for determining if there is free access to the market in question. Such appropriate legislation should be identified in an annex which will be provided by the Commission. The Commission will, in particular, take into account the possible adoption of measures entailing a genuine opening up to competition of sectors other than those for which legislation is already mentioned in

<sup>23</sup> Flamme et Flamme, *Enfin l'Europe des Marchés Publics*, Actualité Juridique – Droit Administratif, 20 November 1989, p. 653, argue along the same lines.

<sup>24</sup> The determination of a genuinely competitive regime is left to the utilities operators themselves. See Case C 392/93, *The Queen and H.M. Treasury, ex parte British Telecommunications PLC* [1993] OJ C287/6. This is perhaps a first step towards self-regulation which could lead to the disengagement of the relevant contracting authorities from the public procurement regime.

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Annex XI, such as that of railway transport services. Where free access to a given market does not result from the implementation of appropriate Community legislation, it should be demonstrated that such access is uninhibited *de jure* and *de facto*.<sup>25</sup>

## THE PRINCIPLE OF ACCOUNTABILITY

The effects of the principle of accountability on public procurement regulation have been felt through four main effects; the objectivity of the regime, the probity of procurement practices, the regime's contract compliance and finally the regime's judicial redress.

### The Effect of Objectivity

#### Standardization and the doctrine of equivalence

National technical standards, industrial product and service specifications and their harmonization have been considered priority areas for the common market. The ECJ has proactively approached the discriminatory use of specification requirements and standards.<sup>26</sup> It established the 'equivalent standard' doctrine, where contracting authorities are prohibited from introducing technical specifications or trade marks which mention products of a certain make or source, or a particular process which favours or eliminates certain undertakings, unless these specifications are justified by the subject and nature of the contract and on condition that they are only permitted if they are accompanied by the words 'or equivalent'. The rules on technical standards and specifications have been brought in line with the new policy which is based on the mutual recognition of national requirements, where the objectives of national legislation are essentially equivalent, and on the process of legislative harmonization of technical standards through non-governmental standardization organizations (CEPT, CEN, CENELEC).<sup>27</sup>

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<sup>25</sup> According to Article 68(2), for the adoption of a Decision the Commission shall be allowed a period of three months commencing on the first working day following the date on which it receives the notification or the request. However, this period may be extended once by a maximum of three months in duly justified cases, in particular if the information contained in the notification or the request or in the documents annexed thereto is incomplete. The disengagement of the utilities procurement regime as a result of the operation of the relevant entities in competitive markets by virtue of Article 30 of the new utilities Directive does not apply to the WTO Government Procurement Agreement. This represents a legal *lacuna* as the procedural flexibility envisaged in the European procurement regulatory regime does not cover entities covered under the GPA. Rectification of the problem would require amendment to the GPA with the conferral of concessions and reciprocal access rights to the GPA signatories.

<sup>26</sup> See Case C-45/87, *Commission v Ireland*, [1988] ECR 4929; also Case C-359/93, *Commission v The Netherlands*, judgment of 24 January 1995.

<sup>27</sup> See Article 7 of Directive 88/295. See the White Paper on Completing the Internal Market, paras 61–79; also Council Resolution of 7 May 1985 [1985] OJ C136, on a new approach in the field of technical harmonization and standards.

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Standardization and specification can act as a non-tariff barrier in public procurement contracts in two ways: first, contracting authorities may use apparently different systems of standards and specifications as an excuse for disqualification of tenderers. It should be maintained here that the description of the intended supplies, works or services to be procured is made by reference to the Common Product Classification, the NACE (General Industrial Classification of Economic Activities within the European Communities) and the Common Procurement Vocabulary (CPV); however, this type of description is of generic nature and does not cover industrial specifications and standardization requirements. Secondly, standardization and specification requirements can be restrictively defined in order to exclude products or services of a particular origin, or narrow the field of competition amongst tenderers. National standards are not only the subject of domestic legislation, which, of course, need to be harmonized and mutually recognized across the common market. One of the most significant aspects of standardization and specification appears to be the operation of voluntary standards, which are mainly specified at industry level. The above category presents difficulties in the attempts to harmonize, as any approximation and mutual recognition of standards relies on the willingness of the industry in question. Voluntary standards and specifications are used quite often in the Utilities sector, where the relevant procurement requirements are complex and cannot be specified solely by reference to 'statutory' standards, thus leaving a considerable margin of discretion in the hands of the contracting authorities, which may abuse it during the selection and qualification stages of the procurement process.

**Selection and qualification**

During the selection and qualification process of tenderers, contracting authorities vet all candidates according to objectively defined criteria which aim at eliminating arbitrariness and discrimination. The selection criteria are determined through two major categories of qualification requirements: (i) legal, and (ii) technical/economic. Contracting authorities must strictly follow the homogeneously specified selection criteria for enterprises participating in the award procedures of public procurement contracts in an attempt to abolish potential grounds for discrimination on grounds of nationality and exclude technical specifications which are capable of favouring national undertakings.

The relevant provisions of the procurement Directives relating to the criteria of a tenderer's good standing and qualification are directly effective.<sup>28</sup> These criteria comprise of grounds for exclusion from participation in the award of public contracts, such as bankruptcy, professional misconduct, failure to fulfil social security obligations and obligations relating to taxes. They also refer to the technical ability and knowledge of the contractor, where proof of them may be furnished by educational or professional qualifications, previous experience in performing public contracts and statements on the contractor's expertise.

In principle, there are automatic grounds for exclusion, when a contractor, supplier or service provider: (i) is bankrupt or is being wound up; (ii) is the subject of proceedings

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<sup>28</sup> See Case C-76/81, *SA Transporoute et Travaux v Minister of Public Works*, [1982] ECR 457.

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for a declaration of bankruptcy or for an order for compulsory winding up; (iii) has been convicted for an offence concerning his professional conduct; (iv) has been guilty of grave professional misconduct; (v) has not fulfilled obligations relating to social security contributions; and (vi) has not fulfilled obligations relating to the payment of taxes.

However, for the purposes of assessing the financial and economic standing of contractors, an exception to the exhaustive list covering the contractors' eligibility and technical capacity is provided for, where, in particular, contracting entities may request references other than those expressly mentioned therein. 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. The non-exhaustive character of the list of references in relation to the contractors' economic and financial standing was recognized by the ECJ,<sup>29</sup> where the value of the works which may be carried out at one time may constitute a proof of the contractors' economic and financial standing. The contracting authorities are allowed to fix such a limit, as the provisions of the public procurement Directives do not aim at delimiting the powers of Member States, but at determining the references or evidence which may be furnished in order to establish the contractors' financial and economic standing. The Court in another case referred to by a Dutch court<sup>30</sup> maintained that the examination of a contractor's suitability based on its good standing and qualifications and its financial and economic standing may take place simultaneously with the award procedures of a contract.<sup>31</sup> However, the two procedures (the suitability evaluation and bid evaluation) are totally distinct processes which shall not be confused.<sup>32</sup>

### **Award criteria**

Throughout the evolution of the public procurement *acquis*, the procedural phase in the procurement process culminated in the application of objectively determined criteria which demonstrate the logic behind the behavior of contracting authorities. There are two criteria on which the contracting authorities must base the award of public contracts:<sup>33</sup> (a) the most economically advantageous tender, or (b) the lowest price.

*The most economically advantageous tender* When the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for

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<sup>29</sup> See Cases C-27/86, 28/86, 29/86, *Constructions et Enterprises Industrielles S.A (CEI) v Association Intercommunale pour les Autoroutes des Ardennes*; Case 28/86, *Ing.A. Bellini & Co. S.p.A. v. Regie de Betiments*; Case 29/86, *Ing.A. Bellini & Co. S.p.A. v. Belgian State* [1987] ECR 3347.

<sup>30</sup> See Case C-31/87, *Gebroeders Beentjes B.V. v State of Netherlands* [1988] ECR 4635.

<sup>31</sup> See Case C-28/86, *Bellini* [1987] ECR 3347, *op.cit.*

<sup>32</sup> See Case C-71/92, *Commission v Spain*, judgment of 30 June 1993.

<sup>33</sup> Article 53 of the Public Sector Directive.

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example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, can be taken into consideration. The above listed criteria which constitute the parameters of the most economically advantageous offer are not exhaustive.<sup>34</sup>

The Court reiterated the wide interpretation of the relevant award criterion<sup>35</sup> and had no difficulty in declaring that contracting authorities may use the most economically advantageous offer as an award criterion by choosing the factors which they want to apply in evaluating tenders,<sup>36</sup> provided these factors are mentioned, in hierarchical order or descending sequence in the invitation to tender or the contract documents,<sup>37</sup> so that tenderers and interested parties can clearly ascertain the relative weight of factors other than price for the evaluation process. However, factors which have no strict relevance in determining the most economically advantageous offer by reference to objective criteria do involve an element of arbitrary choice and therefore should be considered as incompatible with the Directives.<sup>38</sup>

*Criteria related to the subject matter of the contract* A question arose as to whether and under what conditions 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.<sup>39</sup> In principle, that question referred to the possibility of a contracting authority laying down criteria that pursue advantages which cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment. The Court held that each of the award criteria used by the contracting authority to identify the most economically advantageous tender must not necessarily be of a purely economic nature.<sup>40</sup> The Court therefore accepted that where the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.<sup>41</sup>

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<sup>34</sup> Article 53(1)(a) of the Public Sector Directive.

<sup>35</sup> Case 31/87, *Gebroeders Beentjes v. The Netherlands*, *op.cit.*, para 19.

<sup>36</sup> Case C-324/93, *R. v The Secretary of State for the Home Department, ex parte Evans Medical Ltd and Macfarlane Smith Ltd*, judgment of 28 March 1995, where the national court asked whether factors concerning continuity and reliability as well as security of supplies fall under the framework of the most economically advantageous offer, when the latter is being evaluated.

<sup>37</sup> See para 22 of *Beentjes*.

<sup>38</sup> See para 37 of *Beentjes*.

<sup>39</sup> See Case C-448/01, *EVN AG, Wienstrom GmbH and Republik Österreich*, judgment of 4 December 2003.

<sup>40</sup> See Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123, para 55.

<sup>41</sup> See *Concordia Bus Finland*, para 69.

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*The lowest price* When the lowest price has been selected as the award criterion, contracting authorities must not refer to any other qualitative consideration when deliberating the award of a contract. The lowest price is a sole quantitative benchmark that intends to differentiate the offers made by tenderers.<sup>42</sup> However, contracting authorities can reject a tender, if they regard the price attached to it as abnormally low.

*Abnormally low tenders* In cases where tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority must request in writing details of the constituent elements of the tender which it considers relevant before it rejects those tenders<sup>43</sup>. The clarification details<sup>44</sup> may relate in particular to:

- (a) the economics of the construction method, the manufacturing process or the services provided;
- (b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;
- (c) the originality of the work, supplies or services proposed by the tenderer;
- (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;
- (e) the possibility of the tenderer obtaining state aid.

Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained state aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority that the aid in question was granted legally.<sup>45</sup> Where the contracting authority rejects a tender in these circumstances, it must inform the Commission of their decision.

The debate over the terminology of ‘obviously abnormally low’ tenders surfaced when the Court held<sup>46</sup> that rejection of a contract based on mathematical criteria without giving the tenderer an opportunity to furnish information is inconsistent with spirit of the public procurement Directives. The Court, following previous case-law,<sup>47</sup> ruled that the contracting authorities must give an opportunity to tenderers to furnish explanations regarding the genuine nature of their tenders, when those tenders appear to be abnormally low. Unfortunately, the Court did not proceed to an analysis of the wording ‘obviously’. It rather seems that the term ‘obviously’ indicates the existence of precise and concrete evidence as to the abnormality of the low tender. On the other hand, the wording ‘abnormally’ implies a quantitative criterion left to the discretion of

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<sup>42</sup> See Article 53(1)(b) of the Public Sector Directive.

<sup>43</sup> Article 55 of the Public Sector Directive.

<sup>44</sup> Article 55(1) of the Public Sector Directive.

<sup>45</sup> Article 55(3) of the Public Sector Directive.

<sup>46</sup> See Case C-103/88, *Fratelli Costanzo S.p.A. v Comune di Milano* [1989] ECR 1839; Case 296/89, *Impresa Dona Alfonso di Dona Alfonso & Figli s.n.c. v Consorzio per lo Sviluppo Industriale del Comune di Monfalcone*, judgment of 18 June 1991.

<sup>47</sup> See Case C-76/81 *Transporoute*, [1982] ECR 417, *op.cit.*

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the contracting authority. However, if the tender is just ‘abnormally’ low, it could be argued that it is within the discretion of the contracting authority to investigate the genuine offer of a tender. *Impresa Lombardini*,<sup>48</sup> followed the precedent established by *Transporoute* and maintained the unlawfulness of mathematical criteria used as an exclusion of a tender which appears abnormally low. Nevertheless, it held that such criteria may be lawful if used for determining the abnormality of a low tender, provided an *inter partes* procedure between the contracting authority and the tenderer that submitted the alleged abnormal low offer presents the opportunity to clarify the genuine nature of that offer. Contracting authorities must take into account all reasonable explanations furnished and avoid limiting the grounds on which justification of the genuine nature of a tender should be made. Both the wording and the aim of the public procurement Directives direct contracting authorities to seek explanation and reject unrealistic offers, informing the Advisory Committee.<sup>49</sup> In *ARGE*,<sup>50</sup> the rejection of a tender based on the abnormally low pricing attached to it got a different twist in its interpretation. Although the Court ruled that directly or indirectly subsidized tenders by the state or other contracting authorities or even by the contracting authority itself can be legitimately part of the evaluation process, it did not elaborate on the possibility of rejection of an offer, which is appreciably lower than those of unsubsidized tenderers by reference to the ‘abnormally low’ disqualification ground.<sup>51</sup>

### **The Effect of Probity in Public Sector Integration**

The award of public contracts to economic operators who have participated in a criminal organization or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Where appropriate, the contracting authorities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of *res judicata*. If national law contains provisions to

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<sup>48</sup> See Cases C-285/99 & 286/99, *Impresa Lombardini SpA v ANAS*, judgment of 27 November 2001.

<sup>49</sup> The Advisory Committee for Public Procurement was set up by Decision 77/63 [1977] OJ L13/15, and is composed of representatives of the Member States belonging to the authorities of those States and has as its task to supervise the proper application of Public Procurement Directives by Member States.

<sup>50</sup> See Case C-94/99, *ARGE Gewässerschutz*, *op.cit.*

<sup>51</sup> In *ARGE* the Court adopted a literal interpretation of the Directives and concluded that if the legislature wanted to preclude subsidized entities from participating in tendering procedures for public contracts, it should have said so explicitly in the relevant Directives. See paras 26 *et seq* of the Court’s judgment. Although the case has relevance in the fields of selection and qualification procedures and award criteria, the Court made no references to previous case-law regarding state aids in public procurement, presumably because the *Dupont de Nemours* precedent is still highly relevant.

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this effect, non-compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct. Non-observance of national provisions implementing the Council Directives 2000/78/EC<sup>52</sup> and 76/207/EC<sup>53</sup> concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Article 45 of the public sector Directive deals with the personal situation of the candidate or tenderer. It provides that any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below must be excluded from participation in a public contract:

- (a) participation in a criminal organization, as defined in Article 2(1) of Council Joint Action 98/733/JHA;<sup>54</sup>
- (b) corruption, as defined in Article 3 of the Council Act of 26 May 1997<sup>55</sup> and Article 3(1) of Council Joint Action 98/742/JHA<sup>56</sup> respectively;
- (c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities;<sup>57</sup>
- (d) money laundering, as defined in Article 1 of Council Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering.<sup>58</sup>

### **The Effect of Contract Compliance and the Rule of Reason**

The most economically advantageous offer as an award criterion has provided the Court with the opportunity to balance the economic considerations of public procurement with policy choices. Although in numerous instances the Court has maintained the importance of the economic approach<sup>59</sup> to the regulation of public sector contracts, it

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<sup>52</sup> See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16).

<sup>53</sup> See Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40, amended by Directive 2002/73/EC of the European Parliament and of the Council [2002] OJ L269/15).

<sup>54</sup> See [1998] OJ L351/1.

<sup>55</sup> See [1997] OJ C195/1.

<sup>56</sup> See [1998] OJ L358/2.

<sup>57</sup> See [1995] OJ C316/48.

<sup>58</sup> See [1991] OJ L166/77, as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 [2001] OJ L344/76).

<sup>59</sup> See Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge* [2000] ECR I-8035 at para 17; Cases C-44/96, C-44/96, *Mannesmann Anlagenbau Austria AG et al. v Strohal Rotationsdurck GesmbH* [1998] ECR 73, para 33; Case C-360/96, *Gemeente*

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has also recognised the relative discretion of contracting authorities to utilize non-economic considerations as award criteria.

The term *contract compliance*<sup>60</sup> could be best defined as the range of secondary policies relevant to public procurement, which aim at combating discrimination on grounds of sex, race, religion or disability.<sup>61</sup> When utilized in public contracts, contract compliance is a system whereby, unless the supply side (the industry) complies with certain conditions relating to social policy measures, contracting authorities can lawfully exclude tenderers from selection, qualification and award procedures. The concept is well known and practiced in North American jurisdictions and in particular in the United States,<sup>62</sup> as it has been in operation for some time in an attempt to reduce racial and ethnic minority inequalities in the market and to achieve equilibrium in the workforce market.

Apparently, the potential of public purchasing as a tool capable of promoting social policies has been met with considerable scepticism. Policies relevant to affirmative action or positive discrimination have caused a great deal of controversy, as they practically accomplish very little in rectifying labour market equilibria. In addition to the practicality and effectiveness of such policies, serious reservations have been expressed with regard to their constitutionality,<sup>63</sup> since they could limit, actually and potentially, the principles of economic freedom and freedom of transactions.<sup>64</sup>

Contract compliance legislation and policy is familiar to most European Member States, although the enactment of public procurement Directives has changed the situation dramatically.<sup>65</sup> The position of European Institutions on contract compliance

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*Arnhem Gemeente Rheden v BFI Holding BV*, [1998] ECR 6821, paras 42 and 43; C-237/99, *Commission v France* [2001] ECR 934, at paras 41 and 42.

<sup>60</sup> See Bovis, 'The Compatibility of Compulsory Tendering with Transfer of Undertakings: the case of Contract Compliance and the Acquired Rights Directive', Chapter 21 in Collins, Davies and Rideout (eds), *Legal Regulation of the Employment Relations*, London: Kluwer, 2000.

<sup>61</sup> See ILEA Contract Compliance Equal Opportunities Unit, *Contract Compliance: a brief history*, London, 1990.

<sup>62</sup> For a detailed analysis see P.E. Morris, 'Legal Regulation of Contract Compliance: an Anglo-American Comparison' (1990) 19 *Anglo-American Law Review* 87.

<sup>63</sup> In particular in the US, see Case 93-1841 *Adarand Constructors v Pena*, 1995 Annual Volume of US Supreme Court. The United States Supreme Court questioned the constitutionality in the application of contract compliance as a potential violation of the equal protection component of the Fifth Amendment's Due Process Clause and ordered the Court of Appeal to re-consider the employment of socio-economic policy objectives in the award of federal public procurement contracts.

<sup>64</sup> For an overview of the Social Policy in North American systems, see Cnossen and Bovis, 'The Framework of Social Policy in Federal States: An Analysis of the Law and Policy on Industrial Relations in USA and Canada', (1996) 12 *International Journal of Comparative Labour Law and Industrial Relations*.

<sup>65</sup> For example, in the United Kingdom, every initiative relating to contract compliance has been outlawed by virtue of the Local Government Act 1988. Contract compliance from a public law perspective has been examined by T. Daintith, in 'Regulation by Contract: the new prerogative' (1979) 32 *CLP* 41. For a comprehensive analysis of the issue of contract compliance in relation to public contracts across the European Community, see McCrudden, *Contract Compliance and Equal Opportunities*, Oxford: Oxford University Press 1997.

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has been addressed in three instances before the European Court of Justice.<sup>66</sup> The Court maintained that contract compliance with reference to domestic or local employment cannot be used as a selection criterion in tendering procedures for the award of public contracts. The selection of tenderers is a process which is based on an exhaustive list of technical and financial requirements expressly stipulated in the relevant Directives and the insertion of contract compliance as a selection and qualification requirement would be considered *ultra vires*. The Court ruled that social policy considerations can only be part of award criteria in public procurement, and especially in cases where the most economically advantageous offer is selected, provided that they do not run contrary to the basic principles of the Treaty and that that have been mentioned in the tender notice.

The Court's approach has also opened an interesting debate on the integral dimensions of contract compliance and the differentiation between the *positive* and *negative* approaches. The concept of positive approach within contract compliance encompasses all measures and policies imposed by contracting authorities on tenderers as suitability criteria for their selection in public procurement contracts. Such positive action measures and policies intend to complement the actual objectives of public procurement which are confined in economic and financial parameters and are based on a transparent and predictable legal background. Although the complementarity of contract compliance with the actual aims and objectives of the public procurement regime was acknowledged, the Court (and the European Commission) were reluctant in accepting such an over-flexible interpretation of the Directives and based on the literal interpretation of the relevant provisions disallowed positive actions of a social policy dimension as part of the selection criteria for tendering procedures in public procurement.

However, contract compliance can incorporate not only unemployment considerations, but also promote equality of opportunities and eliminate sex or race discrimination in the relevant market.<sup>67</sup> Indeed, the Directives on public procurement stipulate that the contracting authority may require tenderers to observe national provisions of employment legislation when they submit their offers. The ability to observe and conform to national employment laws in a Member State may constitute a ground of

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<sup>66</sup> See Case 31/87, *Gebroeders Beenjes B.V v The Netherlands* [1989] ECR 4365. Also see Case C-360/89, *Commission v Italy* [1992] ECR 3401.

<sup>67</sup> There are a number of legal instruments relevant to social policy at Community level, that may apply to public procurement. They include, in particular, Directives on safety and health at work (for example, Council Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work, and Directive 92/57 on the implementation of minimum safety and health requirements at temporary or mobile construction sites), working conditions and the application of employment law (for example, Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, and Directive 2001/23 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16, codifying Directive 77/187/EEC), Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16).

disqualification and exclusion of the defaulting firm from public procurement contracts.<sup>68</sup> In fact, under such interpretation, contract compliance may be a factor of selection criteria specified in the directives, as it contains a *negative approach* to legislation and measures relating to social policy.

There are arguments both in favour of and against incorporating social policy considerations in public procurement.<sup>69</sup> The most important argument in favour focuses on the ability of public procurement to promote parts of the Member States' social policy, with particular reference to long-term unemployment, equal distribution of income, social exclusion and the protection of minorities. Under such a positively oriented approach, public purchasing could be regarded as an instrument of policy in the hands of national administrations with a view to rectifying social equilibria. Contract compliance in public procurement could also cancel the stipulated aims and objectives of the liberalisation of the public sector. The regulation of public markets focuses on economic considerations and competition. Adherence to social policy factors could derail the whole process, as the public sector will pay more for its procurement by extra or hidden costs for the implementation of contract compliance in purchasing policies.<sup>70</sup>

#### **A rule of reason in public procurement**

In European Union law, the rule of reason serves as an expansion of the determined exemptions from a prohibition principle.<sup>71</sup> The rule of reason is a juridical development where the Court interprets the margins of discretion allotted to an executive authority (Member States and/or the Commission), as well as the grounds, the limits and the levels of deviation from a prohibition's exemptions. For public procurement, a rule of reason has emerged through the application of the most economically advantageous offer criterion. The Court, through a steady accumulation of case-law adopted a bi-focal stance: positive yet restrictive. Where the rules allow for discretion, the Court did not claw back any margin of appreciation from Member States and their contracting authorities; in fact, in many instances, it gradually expanded the grounds of flexibility in the award procedures.

The meaning of the most economically advantageous offer includes a series of factors chosen by the contracting authority, including price, delivery or completion date, running costs, cost-effectiveness, profitability, technical merit, product or work

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<sup>68</sup> It should be mentioned that adherence to health and safety laws have been considered by a British court as part of the technical requirements specified in the Works Directive for the process of selection of tenderers; see *General Building and Maintenance v Greenwich Borough Council* [1993] IRLR 535. Along these lines, see the Commission's Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM (2001) 566, 15 October 2001.

<sup>69</sup> See Kruger, Nielsen and Brunn, *European Public Contracts in a Labour Law Perspective*, Copenhagen: DJOF Publishing, 1997.

<sup>70</sup> See Bovis, 'Social Policy Considerations and the European Public Procurement Regime' (1998) 3 *International Journal of Comparative Labour Law and Industrial Relations*.

<sup>71</sup> See the application of the rule of reason to the principle of free movement of goods and also the competition law principle prohibiting cartels and collusive behavior.

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quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitment with regard to spare parts and components and maintenance costs, security of supplies. The above list is not exhaustive and the factors listed therein serve as a guideline for contracting authorities in the weighted evaluation process of the contract award.

The Court reiterated the flexible and wide interpretation of the relevant award criterion<sup>72</sup> and had no difficulty in declaring that contracting authorities may use the most economically advantageous offer as award criterion by choosing the factors which they want to apply in evaluating tenders,<sup>73</sup> provided these factors are mentioned in hierarchical order or descending sequence in the invitation to tender or the contract documents,<sup>74</sup> so that tenderers and interested parties can clearly ascertain the relative weight of factors other than price for the evaluation process. However, factors which have no strict relevance in determining the most economically advantageous offer by reference to objective criteria do involve an element of arbitrary choice and therefore should be considered as incompatible with the public procurement Directives.<sup>75</sup>

A debate has arisen whether, under the most economically advantageous offer, each individual award factor has to provide an economic advantage which directly benefits the contracting authority, or, alternatively, it is sufficient that each individual factor has to be measurable in economic terms, without the requirement that it directly provides an economic advantage for the contracting authority in the given contract.

This debate intends to shed light on the integral function of the factors that comprise the most economically advantageous offer for contracting authorities. Although there is wide discretion conferred to them in compiling the relevant factors, subject to the requirements of relevance to the contract in question and their publicity, their relative importance, in economic terms, remains somehow unknown. If the second alternative were accepted, the discretion conferred on contracting authorities would permit a wide range of factors to feature as part of award criteria in public contracts, without the need to demonstrate a direct economic advantage to a contracting authority which is attributable to each of these factors. On the contrary, if each individual factor has to establish a measurable (in quantifiable terms) economic advantage to the contracting authority, which is directly attributed to its inclusion as part of the award criterion, the discretion of contracting authorities is curtailed, since they would be required to undertake and publicize in the tender or contract documents a clear cost-benefit analysis of the relevant factors that comprise in their view the most economically advantageous offer.

There are two instances where the rule of reason as applied in public procurement brought the relevant regime in line with European policy. The first is the case of transfer of undertakings, where the Court expanded the remit of the Acquired Rights

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<sup>72</sup> See Case 31/87, *Gebroeders Beentjes v The Netherlands*, *op.cit.*, para 19.

<sup>73</sup> See Case C-324/93, *R. v The Secretary of State for the Home Department, ex parte Evans Medical Ltd and Macfarlane Smith Ltd* [1995] ECR 563, where the national court asked whether factors concerning continuity and reliability as well as security of supplies fall under the framework of the most economically advantageous offer, when the latter is being evaluated.

<sup>74</sup> See para 22 of *Beentjes*.

<sup>75</sup> See para 37 of *Beentjes*.

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Directive to the public procurement contractual relations.<sup>76</sup> The second instance is the permissibility of environmental factors<sup>77</sup> as part of the award criteria for public contract and the explicit recognition of the environmental policy of the European Union as being complimentary to all legal and policy activities of the common market.

The latter development reveals also the importance of public procurement in relation to harmonization and even standardization of national policies. Public procurement in such cases serves as a conveyor belt for transferring homogenous legal or policy standards across the common market. The protection of the environment as an award criterion in public contracts is a classic example of the potential of public procurement regulation as an instrument of public policy. There will be instances in the future where positive integration will be required by European Institutions and Member States equally in areas such as social security, business ethics and anti-corruption policies. Harmonization of laws and policies within the common market has traditionally sought a common denominator amongst divergences and differences of national administrations. Under an *ordo-liberal* approach, the rule of reason seems an essential tool to convey effectively rights and obligations of Community law.

There is no attempt yet to instil a type of European public policy across the common market. Not only have the legal and political differences of Member States dictated that such an approach would face considerable resistance, the very need for a common denominator of public policy in the European Union has been questionable. However, if the European Union is to become a serious competitor to major trading forces in the world, perhaps the introduction of such a common denominator is something that requires further consideration. Productivity rises, competitiveness, industrial restructuring exercises, privatization, employment relations, taxation, and corporate governance are mere examples of the features which the European Union and its Member States will be facing in a post-enlargement era. Public procurement could play a role in carrying over the European legal and policy standards into national systems.

### **Judicial Redress and its Impact on Accountability**

The inadequacy of existing remedies at national level to ensure compliance and enforcement of the public procurement *acquis* was highlighted by their inability to correct infringements and ensure a correct application of the substantive public

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<sup>76</sup> See Directive 77/62 [1977] OJ C61/26, as amended by Directive 98/50 [1998] OJ L132 and consolidated by Directive 2001/23 [2001] OJ L82/16. For a comprehensive analysis of the implications of transfer of undertakings in public procurement see 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 24/85, *Spijkers v Gebroeders Benedik Abbatoir CV* [1986] ECR 1123; Case C 209/91, *Rask v ISS Kantinservice* [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.

<sup>77</sup> See Case C-513/99, *Concordia Bus Finlandia Oy Ab v Helsingin Kaupunki et HKL-Bussiliikenne* [2002] ECR 7213.

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procurement rules. The enactment of the Remedies Directives<sup>78</sup> has brought a decentralized dimension into the application of public procurement rules. The liberalization of public procurement to community-wide competition demands a substantial increase of the efficiency levels regarding the availability of redress measures introduced within national legal systems which provide interested parties, at least, the same treatment in public procurement litigation, as in other forms of litigation. The remedies Directives have revealed three fundamental doctrines in public procurement regulation; the doctrine of procedural autonomy, the doctrine of effectiveness and the doctrine of procedural equality.

### **The doctrine of procedural autonomy**

Member States have wide discretion to establish the procedural framework for review procedures and the logistics for its operation. The existence of national legislation which provides that any application for review of decisions of contracting authorities must be commenced within a specific time-limit and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period is compatible with public procurement *acquis*,<sup>79</sup> provided that, in pursuit of fundamental principle of legal certainty, such specific time limits are reasonable.<sup>80</sup>

### **The doctrine of effectiveness**

Member States are required to provide for a review procedure so that an applicant may set aside a decision of a contracting authority to award a public contract to a third party, prior to the conclusion of the contract.<sup>81</sup> That right of review for tenderers must be independent of the possibility for them to bring an action for damages once the contract has been concluded.<sup>82</sup> A national legal system that makes impossible to contest the award decision because of the award decision and the conclusion of the contract occurring at the same time deprives interested parties of any possible review in order to have an unlawful award decision set aside or to prevent the contract from being concluded. Complete legal protection requires that a reasonable period must elapse between the decision which awards a public contract and the conclusion of the contract itself, as well as a duty on the part of contracting authorities to inform all interested parties of an awarding decision.

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<sup>78</sup> See the public sector Remedies Directive 89/665 [1989] OJ L395/33, and the utilities Directive 92/13 [1992] OJ L76/14.

<sup>79</sup> See Case C-470/99, *Universale-Bau AG, Bietergemeinschaft* [2002] ECR I-11617.

<sup>80</sup> See Case C-261/95, *Palmisani* [1997] ECR I-4025, para 28, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, para 33.

<sup>81</sup> See Case C-212/02, *Commission v Austria*, judgment of 24 June 2004, unpublished.

<sup>82</sup> See Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671, para 43.

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**The doctrine of procedural equality**

Time limits and periods to contest the legality of act or decisions of contracting authorities<sup>83</sup> remain within the discretion of Member States, subject to the requirement that the relevant national rules are not less favourable than those governing similar domestic actions.<sup>84</sup>

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<sup>83</sup> See Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs- GmbH (HI) and Stadt Wien*, [2002] ECR I-5553.

<sup>84</sup> See Case C-390/98 *Banks v Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117, para 121; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, para 29.