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Public Procurement

Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions

CONTENTS

- General context: The Treaty of Rome, general principles of law, the EU Directives
- The scope of the Directives
- The 'legal effect' of the Directives
- The basic principles of public procurement: Competition, equal treatment and non-discrimination, transparency
- The role of the European institutions

In order to understand the basics of public procurement in the EU, it is necessary to look not only at the procurement Directives themselves but also at the context within which they were adopted. Even with the Directives in place, more general provisions contained in the Treaty of Rome will apply, as well as more general principles of law, which will guide the interpretation of the Directives. It is also important to understand the role of the various community institutions.

The Treaty of Rome: The Treaty of Rome 1957 (and subsequent treaties amending the Treaty of Rome) does not include any explicit provisions relating to public procurement. The Treaty does, however, establish a number of fundamental principles that underpin the EU. Of these fundamental principles, the most relevant in terms of public procurement are:

- prohibition against discrimination on grounds of nationality
- free movement of goods
- freedom to provide services
- freedom of establishment

General Principles of Law: In addition to these fundamental Treaty principles, some general principles of law have emerged from the case law of the European Court of Justice (ECJ). These general principles are important because they will often be used by the ECJ to fill in gaps in the legislation and to provide solutions to situations that are often very complex. The most important of these general principles of law in the procurement context are the following:

- equality of treatment
- transparency
- mutual recognition
- proportionality

These general principles apply independently of the Directives so that, even if the Directives do not apply, the principles may still apply to the procurement and award of contracts by contracting entities.

The EU Directives: To underpin the Treaty principles in the field of public procurement and to provide the necessary guidance to member states, the Community adopted a series of procurement Directives.

There two procurement Directives which cover procedural issues are the public sector Directive 2004/18/EC and the utilities sector Directive 2004/17/EC.

There are two other “remedies” Directives, which apply to complaints and review. These are the public sector remedies Directive 89/665/EC and the utilities sector remedies Directive 92/13/EC. These two Remedies Directives have both been significantly amended by a new Directive 2007/66/EC, which was due to be implemented by the member states by 20 December 2009.

In addition there is now a new Directive, which applies a more flexible and confidential regime to the procurement of military supplies and related works and services - Directive 2009/81/EC.

The European Commission has supplemented these procedural and remedial Directives by further legislation dealing with various aspects of the procurement process.

What is the scope of the Directives?

The Directives do not seek to impose a new *common* regulatory regime on EU Member States in the field of procurement, and member states can continue to apply their national procedures *adapted* to the Directives. They thus permit the member states to maintain or adopt substantive and procedural rules to the extent that these are not in conflict with the Directives or with Treaty provisions. As a result, the member states remain free to regulate a number of issues, mainly practical matters.

In essence, the common rules of the Directives consist of applying the basic principles, notably non-discrimination, equal treatment and transparency in the:

- publicity of proposed procurement contracts;
- design of technical specifications;
- choice of procurement procedure;
- qualification and selection of candidates and tenderers;
- award of contracts.

Rather than seeking to regulate with precision all public procurement contracts within the EU, the Community legislator chose to regulate in the Directives only those contracts that were most clearly capable of affecting trade between member states. Those falling within this broad definition include:

- contracts that are of a sufficiently high value to attract economic operators from other member states (i.e. where the potential benefits of winning the contract outweigh the extra costs of providing the goods, works or services from a greater distance); and/or
- those contracts concerning objects that are amenable to cross-border trade.

What is the 'Legal Effect' of the Directives?

Member states are bound to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Community. The procurement Directives, like all Directives, are by definition not directly applicable which means that they do not apply automatically.

In order to produce their effects within the member states, they need to be implemented or 'transposed' into national law. The member states are, therefore, required to take the measures necessary to give full effect to the provisions of the Directives in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

The Directives are binding only in terms of the result to be achieved but leave to the national authorities the choice of form and methods. Thus, it is not necessary for EU Member States to produce an exact copy of the Directives in their national legislation, although some member states have done precisely that.

Failure to implement the Directives correctly or on time does not mean, however, that the Directives have no effect. Member states are not entitled to deprive the subjects of those Directives (contracting authorities and economic operators) of the rights they are intended to enjoy under the Directives. In accordance with the ECJ's doctrine of 'direct

effect', individuals may enforce in national courts the rights conferred by the Directives wherever the appropriate conditions are satisfied.

The conditions necessary to give rise to the direct effect of a particular Directive are as follows:

- the obligation imposed on member states is clear and precise;
- the obligation is unconditional;
- in the event of implementing measures, the member states or Community institutions are not given any margin of discretion.

The ECJ has stated that many of the provisions of the Directives do have direct effect but that each provision will be considered individually.

What are the basic principles of public procurement?

From its origins, one of the main objectives of the EU has been to create a common market that eliminates barriers to trade in goods and services between EU Member States. Creating a common procurement market means removing any barriers to trade arising from the procurement context.

Barriers to trade can be erected by means of legislation or by the actions of contracting authorities or economic operators. Legislation can create barriers by imposing 'buy national' requirements. Contracting authorities can impose barriers by making discriminatory award decisions. Economic operators can also create barriers by colluding together to rig tender prices. All of these barriers have the effect of distorting competition in the common procurement market. One of the primary purposes of public procurement legislation is to eliminate existing barriers and prevent the erection of new barriers. It does so by applying the basic principles flowing through the legislation.

Whilst they are all inter-linked, these principles can be reduced to a series of core principles:

- **Competition**

From an economic perspective, 'competition' operates as a discovery procedure by allowing different economic operators to communicate the prices at which goods and services are available on the market. Those prices act as guideposts and reflect the demand and supply conditions at any given moment. They also reflect the differences in quality and in terms and conditions of sale of the different (non-homogenous) products available.

This is why advertising is so important. Advertising guarantees the widest possible publicity and competition, enabling economic operators from all over the Community to participate, thus ensuring the greatest possible choice. Keeping competition fair (or maintaining a 'level playing field') is a key concern for achieving efficient and economic procurement results. Procurement legislation seeks to prevent any distortions or restrictions of competition within the Community, and any attempt to prevent economic operators from being able to tender will be prohibited.

Such attempts can take many forms and can affect the products or services or the economic operator itself. As a result, the legislation prohibits barriers to the free movement of goods such as import restrictions and 'buy national' policies and barriers to the freedom to provide services such as attempts to restrict foreign economic operators from tendering through the use of local registration requirements.

Protecting competition is also a question of maintaining equality of treatment, avoiding discrimination, applying mutual recognition principles (of equivalent products and qualifications), and ensuring that any exceptions are proportional.

- **Equal treatment and non-discrimination**

The concepts of equal treatment and non-discrimination are not the same. In general terms, all procurement legislation will seek to maintain equality between economic operators. In the European context, however, that equality will also be based on 'nationality'.

Equal treatment is a concept that generally requires identical situations to be treated in the same way or different situations not to be treated in the same way, and it requires the identical treatment of identical people. In a sense, it implies that contracting authorities will not take into account the different abilities or difficulties faced by individual economic operators but will judge them purely on the results of their efforts, i.e. on the basis of the tenders they submit. It provides for an objective assessment of tender prices and tender qualities and ignores any considerations that are not relevant to the discovery of the economically efficient tender.

In the European context, the concept of equal treatment requires yet another definition since, in this context, the concept of equality is, in addition, based on nationality or on the origin of goods, such that all economic operators of Community nationality and all bids including goods of Community origin must be treated equally (this is the principle of non-discrimination).

This is more than simply an extension of the concept of equal treatment. It implies that any condition of eligibility or origin (based on nationality or local provenance) will automatically give rise to unequal treatment, since those conditions will, by definition, discriminate against a certain group of (foreign) economic operators or favour another. However, whilst discrimination in a given context will produce unequal treatment, unequal treatment does not always give rise to discrimination.

- **Transparency**

'Transparency' has only recently emerged as a principle in its own right, although it is probably better to think of it as a tool to be used to achieve other objectives. For example:

- publication and accessibility of the legislation provides clarity and certainty for all stakeholders and enables contracting authorities and economic operators to be aware of the rules of the game.
- requirements of advertising guarantee transparency in the discovery process.

- publicising in advance the technical specifications and the selection and award criteria permits stakeholders to check that these are fair and non-discriminatory.
- recording and reporting requirements ensure that the actions of the contracting authorities may be verified where appropriate.

The latter objectives are also a fundamental aspect of ‘accountability’, i.e. holding procurement officers accountable for their decisions and actions. ‘Accountability’ is also often an explicit objective of national procurement systems, and the transparency provisions reinforce this accountability.

The importance of the principle of transparency in the EU context, however, is that it applies independently of the legislation. So, if a particular procurement contract falls outside the scope of the Directives then it is possible that the principle of transparency will continue to apply so as to impose advertising requirements. The ECJ confirms that this is the case.

Some of the above principles are articulated differently or combined in national legislation. You might find, for example, principles stated in legislation, such as: “economy and efficiency”, “value for money” and “probity” or “integrity”.

Value for money

A key economic driver underlying procurement processes is the need to ensure that all purchasing represent value for money. The Directives do not specifically address this issue but it is important not to lose sight of the need to ensure that value for money is one of the main outcomes of the procurement process. The term value for money means the optimum combination between the various cost-related and non-cost related factors that together meet the contracting authority’s requirements. The elements that constitute the optimum combination of these various factors differ from procurement to procurement and depend on the outputs required by the contracting authority for the procurement exercise concerned.

What is the role of the European institutions?

A number of different organisations are implicated in procurement at the European level. These organisations are the following:

Role of the Community Legislator: Although the Treaty (Treaty of Rome 1957 and treaties amending the Treaty of Rome) uses different terminology, the Community Legislator is, in effect, the Council of the European Communities, acting either alone or in co-operation with the European Parliament. All recent procurement Directives were adopted by these two institutions acting together, using the “co-decision” procedure.

The Council has been conferred the role of ensuring co-ordination of the general economic policies of the member states, the power to take decisions, and the power to confer on the Commission, in the acts that it adopts, powers for the implementation of the rules laid down by the Council.

Crucially, however, the Council does not have the right of initiative. Thus, it does not have the power to enact legislation that has not been proposed by the Commission.

Role of EU Member States: For the purposes of the EU, the member states are bound to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Community. They are required to facilitate the achievement of the Community's tasks and must abstain from any measure that could jeopardise the attainment of the objectives of the Treaty.

In terms of the Directives, the member states are therefore required to take the measures necessary to give full effect to their provisions in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

It is important to note that although the Directives are directly effective where specific conditions are met (as discussed above) in that they can convey rights even if not implemented, they are not directly applicable, i.e. they need to be transposed into national law.

Moreover, they are binding only in terms of the result to be achieved but leave to the national authorities the choice of form and methods. Thus it is not necessary for the member states to produce an exact copy of the Directives in their national legislation.

Provided they achieve the same results, national authorities can reproduce the provisions of the Directives in identical fashion by amending existing legislation or by creating new legislation or codes, etc.

Role of the European Commission: In addition to acting as the proposer of legislation, the European Commission has also been given by the Treaty the role of its guardian. It is given the explicit task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant to it are applied.

So as well as acting as the primary policy-maker in the field of procurement, the Commission is also responsible for the application and general enforcement of the Directives. In the case of procurement, the responsible directorate-general is DG-Markt. Implementation measures taken by DG-Markt include the adoption of secondary legislation.

Whilst enforcement in national courts/review bodies against contracting entities in breach of their obligations is at the suit of interested economic operators, infringements by those public authorities, as emanations of the member state, will simultaneously amount to a failure of the member state to fulfil its obligations under the Treaty. Such a failure may be challenged directly by the Commission before the European Court of Justice (ECJ).

Role of the European Court of Justice: There are two Community level courts, each with its own jurisdiction: the General Court (previously the Court of First Instance {CFI}), which deals with actions against community institutions, and the European Court of Justice (ECJ). In most cases related to procurement, it is the ECJ that is of most interest.

The ECJ ensures the observance of the law in the interpretation and application of the Treaty and its implementing rules. To this end, a number of powers have been expressly conferred on the ECJ. These powers are mainly intended to enable the ECJ to judge the acts and omissions of the institutions and the member states in accordance

with Community law and to ensure uniformity in the interpretation of Community law and in the application of this law by the national courts.

There are three areas of the ECJ's work that are important in the case of procurement:

- **Dispute Resolution**

The ECJ has jurisdiction to hear disputes between the Commission, acting as guardian of the Treaty, and member states in respect of a member state's failure to fulfil its obligations under the Treaty. These are often referred to as the Commission's infringement proceedings.

- **Preliminary Rulings**

A critical power conferred on the ECJ is the power to pronounce, by means of a preliminary ruling, on the *interpretation* of the Treaty and on the *validity* and *interpretation* of acts of institutions of the Community if a question on this subject is raised before a national court or tribunal.

Thus in disputes between member states and private persons or between private persons themselves, questions relating to the interpretation, application and validity of Community law that arise in the context of national proceedings may be referred to the ECJ. Where such questions arise in the context of a procurement dispute that has been brought in a national court/review body under the Remedies Directive, for example, the national courts may refer them for interpretation to the ECJ. Under this procedure, the national court/review body will establish the facts of the case and formulate questions of interpretation for the ECJ, the answers to which are necessary for the resolution of the case.

- **General Principles of Law**

In the exercise of its jurisdiction, the ECJ has cause to apply and interpret Community law and, in so doing, has often sought to fill *lacunae* in Community law by reference to general principles of law. These are unwritten rules, not contained in the Treaty but inspired by those common general principles of law recognised in the national legal systems of EU Member States.

Further reading: The various texts that make up the EU legislative framework, along with a range of other useful documents and links, can be found on the DG Markt website at:

http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm

The EU Treaty texts can be found at: <http://www.eurotreaties.com/eurotexts.html>

[SIGMA Public Procurement Training Manual](#)