Changes to the EU Public Procurement Regime

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Introduction

This contribution is concerned with selected elements of change in the European Union legislation on public procurement, and also with selected aspects of the judicial practice of the European Court of Justice in the field of public procurement.

The purpose of this contribution is to present the field of public procurement as a field of study, thus introducing essential elements of the legislation and jurisprudence. However, it should be noted that it does not purport to constitute a comprehensive presentation of public procurement law.

The issues covered comprise:

- Directives and Implementation
- Systematic Changes
- Transparency
- Competitive Dialogue
- Framework Agreements
- Environmental and Social Issues

Directives and Implementation

The public procurement legislation of the European Union in force at the time of the lecture comprised the following acts in the so-called classic sector:

- Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts[1]
- Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts[2]
- Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts[3]

The original legislation was adopted in the 1970's as part of the implementation of the Common Market, which as part of the European Single Act in 1986 was substituted by the Single Market. In addition to the right of free movement across the borders and the common customs tariff of the common market, the internal market introduced the abolition of border controls.

However, cooperation on police and customs enforcement did not become subject to EU competence until the Maastricht treaty in 1992, and only more effectively so after the introduction of new legislative instruments, including framework decisions, with the Amsterdam treaty in 1997.

Thus, the Single Act did in fact to allow for the implementation of a market without border controls, and for all practical purposes it was an ambitious re-launch of the common market at a time when it had been realised, that the market was not reaching its declared goals.

An important element in the second round success of the internal market, which more or less did meet its target date of 1 January 1993, was the landmark decision of the European Court of Justice in the Cassis de Dijon case[4], which introduced the concept of mutual recognition, thus allowing the Commission to limit its legislative initiatives to the areas where the right of free movement could not be achieved on the basis of the principle alone.

The public procurement legislation formed part of the original common market, with the rules on public construction introduced in 1971[5] and the rules on acquisition of goods in 1977[6]. However, the rules on services for the classic sector were not introduced until the end of the drive for the internal market in 1992[7].

The term classic sector refers to the fact that originally the so-called field of utilities was exempted from the procurement directives, since the member states had significant differences as to the extent of privatisation achieved in the field of utilities. This field comprised water, energy, transport and telecommunications.

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As the directives were limited to obligating public entities, it was found unfair to obligate only those member states which had not achieved privatisation. By 1990 the opposite conclusion was reached, and the utilities directive[8] was introduced with obligations for both public entities and private entities holding special rights as is typical of the utilities field.

Reservations were made, for example in the field of telecommunications, for exemption of markets subject to sufficient competition, which in the latest revision of the utilities directive has led to the general exclusion of the field of telecommunications as set out below.

However, this was not yet the case in the directive applicable at the time of the lecture:

- Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[9]

One problem of EU legislation has been the lack of a tradition for codification. Thus in certain fields, such as agriculture, some directives or regulations may need to be read together with up to 20 later modifications. The issue was addressed in the Edinburgh agreement associated with the Maastricht treaty, and later again in the Amsterdam treaty[10], calling upon the EU legislator to use the instrument of codification, thus reissuing the legislation with its modifications integrated into the text.

This procedure has so far been used only to a limited extent and not yet in the field of public procurement. At the time of the lecture, the following modifications applied to the directives in respectively the classic and utilities sector:

- European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively (WTO GPA agreement in the classic sector)[11]
- Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (WTO GPA agreement in the utilities sector)[12]
- Commission Directive 2001/78/EC of 13 September 2001 amending Annex IV to Council Directive 93/36/EEC, Annexes IV, V and VI to Council Directive 93/37/EEC, Annexes III and IV to Council Directive 92/50/EEC, as amended by Directive 97/52/EC, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38/EEC, as amended by Directive 98/4/EC (Use of standard forms in the publication of public contract notices)[13]

When the procurement directives were originally adopted, including the amended versions in force at the time of the lecture, this issue of enforcement was not as such subject to EU legislative powers. Such powers were formally introduced only by the Maastricht treaty in the format of the intergovernmental cooperation in pillar 3, and later by the Amsterdam treaty in the format of supranational legislation as a consequence of the transfer to pillar 1, the classic Community part of the treaties.

However, based on the jurisprudence of the European Court[14] it has been established as a principle of law that EU law may impose obligations on the content of national law, even in fields outside of EU legislative competence, when the national law in question limits the effective applications of rights held under EU law.

In the light of this principle, the EU has adopted several pieces of legislation, setting out requirement for the national enforcement of EU law. In the field of public procurement the following directives on remedies apply:

- Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (Classic Sector)[15]
- Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (Utilities Sector)[16]

The directives on remedies are not affected by the changes to the public procurement legislation that was adopted in 2004, and which is to be implemented in 2006. Thus, the system for enforcement will remain unchanged.

However, the substantive directives that were in force at the time of the lecture will be replaced by the following directives:

- Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[17]
- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors[18]

Already, the directives have been subject to amendment and supplementation by the following measures:

- Commission Regulation (EC) No. 1874/2004 of 28 October 2004 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts[19]
- Commission Regulation (EC) No 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives

2004/17/EC and 2004/18/EC of the European Parliament and of the Council (Text with EEA relevance)[20]

The immediately visible changes are on the one hand, that the three separate directives in the classic field have been combined into a single directive, and that the field of communication in the utilities sector has been reduced to postal services. However, telecommunications are still excluded from the classic sector[21] and thus no longer subject to the procurement directives.

The directives entered into force on the day after their publication in the Official Journal, thus on 1 May 2004. However, as usual in directives, the Member States were given a transition period for implementation, slightly shorter than the normal 2 years, ending on 31 January 2006[22]. At that same time, the directives existing at the time of the lectures would be repealed[23].

Under the jurisprudence of the European Court[24], the directives commenced having indirect effect on the day of coming into force, thus requiring that national law should as far as possible be interpreted in conformity with the new directives as of 1 May 2004. However, this effect is for all practical purposes negated by the direct effect of the pre-existing directives, until the date of their repeal, which is also the date for the coming into direct effect of the new directives on 1 February 2006.

The direct effect of the procurement directives is limited to claims against public entities[25], thus excluding claims against the private companies subject to the utilities directive. Furthermore, the direct effect is limited to provisions of the directive that are clear, precise and unconditional[26]. Several of the new elements introduced by the 2004 directives are in fact not unconditional, as it is explicitly left optional for the Member States whether or not to implement them. Thus, these elements will not meet the conditions of direct effect.

However, it may be in general be claimed that the public procurement directives mainly place obligations on public entities and do so in a manner that is clear, precise and unconditional. Thus, in general the directives will have direct effect and require effective application even where national implementation is late or incorrect, in the latter case requiring the setting aside of the national legislation[27].

Whilst correct national implementation is still a formal requirement under EU law[28], and important for the sake of legal certainty[29], national administrators will need to be aware not only of the content of the national implementation laws, but also of the original text of the public procurement directives. Only with this knowledge will they be able to respect the obligation of direct effect.

At the time of the lecture, only one Member State had implemented the directives, as Denmark had chosen the advance date of 1 January 2005 for implementation. This advance date actually preceded the establishing of new standard forms by the European Commission. Thus, for a first period interim national forms were used until the adoption of the new Commission regulation mentioned above.

The following sections focus on selected elements introduced by the 2004 directives, using the classic sector as the field of examination.

Transparency

The original directive for goods[30] clearly sets transparency as an important measure for achieving the objectives of the directive[31]:

- Whereas restrictions on the free movement of goods in respect of public supplies are prohibited by the terms of articles 30 [now 28] et seq. of the treaty
- Whereas that prohibition should be supplemented by the coordination of the procedures relating to public supply contracts in order, by introducing equal conditions of competition for such contracts in all the Member States , to ensure a degree of **transparency** allowing the observance of this prohibition to be better supervised

It may be noted that in this recital, the perspective on transparency is limited to that of enforcement. In a later judgment[32], the European Court has focussed also on the importance of transparency in the market place[33]:

- In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.
- That principle implies, in particular, an obligation of **transparency** in order to enable the contracting authority to satisfy itself that the principle has been **complied** with.
- That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the **benefit of any potential tenderer**, a degree of advertising sufficient to enable the services market to be **opened up to competition** and the impartiality of procurement procedures to be reviewed.

As set out in the judgment, this principle applies not only within the field of application of the procurement directives, but also to any other case of public procurement. Together with other principles established by the Court, such as a general obligation to use tendering procedures[34], diminish the importance of whether a given contract is or is not subject to the specific rules of the procurement directives, since very similar rules apply in general as a principle of EU law.

This development is explicitly acknowledged in the 2004 directives, where the recitals confirm that much of the development of the text in the directives is in fact a codification of the principles established by the

European Court, both within the fields of the directives and in general[35]:

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

However, the directives also do establish practical consequences of transparency, which probably would probably not yet be seen to apply also outside the field of the directives. One issue concerns the sub-criteria to be used when selecting the economically most advantageous bid, which is the alternative permitted by the directives to selecting only the bid with the lowest price.

The directives in force at the time of the lecture mere requested that the contracting authority preferably should list such criteria in an order of priority[36]. The practical advice given by many lawyers to contracting authorities as to avoid any such listing, as this would limit the freedom of choice at the stage of awarding the contract.

Obviously, this freedom of choice may serve both legitimate interest related to securing the best offer, as well as illegitimate interest related to favouring specific bidders. In any case, the freedom of choice reduces transparency. On that background, the 2004 directives specifically require not only a statement on priorities, but also specific weighting[37]:

- Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a) [criteria: most economically advantageous] the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the **relative weighting** which it gives to each of the criteria chosen to determine the most economically advantageous tender.
- Those weightings can be expressed by providing for a range with an appropriate maximum spread.
- Where, in the opinion of the contracting authority, weighting is not possible for **demonstrable reasons**, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in **descending order of importance**.

As set out, the weighting may be avoided when it is not possible to establish, but the burden of evidence in on the contracting authority to show the demonstrable reasons. Furthermore, even though weighting may be avoided in such cases, the obligation of establishing a list of priority applies in any case.

This development may be viewed by public authorities as a further stiffening of the formal rules of procurement, which many already feel as an unacceptable restraint on practical procurement. However, it may be argued that the obligation of establishing weights has two positive side effects, apart from strengthening transparency.

When deciding upon the weights to be applied, the contracting authority is forced to come to a clearer understanding of the intentions underlying the procurement, which should lead to a more satisfactory outcome of the procurement. Secondly, the award procedure becomes a more mechanical application of the chosen weights, and thus less open to critique from unsuccessful bidders.

A possible complaint might be that the contracting authority may not be entirely sure of the procurement that it wishes to undertake, and would like to have a certain degree of freedom in order to be inspired by the possible solutions presented in the bid, before deciding on the practical application of sub-criteria.

However, this flexibility has had to be surrendered in the interest of transparency, so as to guard against abuse. At the same time, it is left open to the public authority to demonstrate why weighting may not be possible in a specific case, or possibly to apply the competitive dialogue procedure set out below.

The need to enforce transparency as a principle of law and a specific obligation of the directives follows also from the structural positions of the participants in the procurement procedure.

On the one hand, the public authority will typically wish to behave as a Pareto optimal buyer in securing a use of public funds where no shift in spending may lead to any increased advantage. However, on the other hand the public authority as a welfare manager may have other interests of society in mind that do not meet the market criteria, such as the retention of local work places.

At the same time the agent acting on behalf of the public authority may have other interests related to the standing of the agent's own department or individual position. Finally, the participating bidders will be concerned about business secrets being passed to competitors during the procurement procedure.

The transparency principle serves to break through the possible obstacles created by these structural interests, so as to assure the effective application of the market principle in each case of public procurement.

Competitive Dialogue

As set out above, the contracting authority may be uncertain as to the pre-

cise nature of the procurement to be undertaken. To a certain degree this is accommodated by the negotiated procedure, which in the classic sector applies when the contract specifications, or in the case of works the pricing, cannot be established with sufficient precision[38]. In the field of utilities, the use of negotiated procedures is a general option[39].

However, the negotiations are still to be performed on the basis of the same award criteria as in open and restricted procedures, calling for a separate step of selecting the bidders invited to tender. Thus the right of negotiation is limited and should be contrasted with the general principle of equal treatment, which is found to preclude negotiations in general.

This was established by the European Court[40] in the case concerning the Storebælt bridge in Denmark[41]:

- Since the Commission claims in its pleadings, which were re-worded in its reply, that Storebaelt acted in breach of the **principle that all tenderers should be treated alike**, the Danish Government's argument that that principle is not mentioned in the directive and therefore constitutes a new legal basis for the complaint of breach of State obligations must be considered first.
- On this issue, it need only be observed that, although the **directive makes no express mention of the principle of equal treatment of tenderers**, the duty to observe that principle **lies at the very heart of the directive** whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured.

The principle of equal treatment has subsequently been expressly stated in the directives[42], as also witnessed by its inclusion in the list of principles referred to in the preamble as quoted above.

The judgement in the Storebælt case went on to find that negotiation with the winning bidder, on the basis of a non-conforming proposal, constituted a violation of the equal treatment principle. Although technically limited to the specific circumstances of the non-conforming proposal, the judgment has come to be taken as a general expression of the prohibition on negotiation with the bidders on the conditions of their tenders.

In order to meet the complaint, that the formal procedures of the directives, together with the negotiation implications of the equal treatment principle, restrict effect procurement, the 2004 directives introduce the possibility of using the competitive dialogue procedure[43]:

- In the case of **particularly complex contracts**, Member States may provide that where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the latter may make use of the competitive dialogue in accordance with this Article.

The procedure is not available in the field of utilities, possibly reflecting the unqualified access to the negotiated procedure in this field. Furthermore it should be noted, that this is an example of the new initiatives that are left of for Member State discretion as to their implementation, thus not having the possibility of direct effect, except for the case of incorrect implementation.

In the classic sector, the directive does not define the concept of particularly complex contracts, different from several other central concepts that are defined in Article 1, but a guidance in given in the preamble[44]:

- Contracting authorities which carry out particularly complex projects may, without this being due to any fault on their part, find it **objectively impossible** to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions.
- This situation **may arise in particular** with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing the financial and legal make-up of which cannot be defined in advance.

It is clear that this is only an exemplification, but it does place the burden of evidence on the contracting authority, which will have to establish the complexity of the project. In this relation, the preparatory works[45] add a clarification[46]:

- The complexity must be established and able to be **objectively justified** by the contracting authority. This does **not therefore concern subjective impossibility**, i.e. due to deficiencies on the part of the contracting authority itself. The authority may not simply affirm that it is unable to provide a definition or an evaluation.
- On the contrary, the contracting authority must prove that this is **objectively impossible**, given the **nature of the specific contract**. Depending on the case, this might mean that the contracting authority would be required to prove that there are no precedents for the project, or that **disproportionate time or money** would be required to acquire the necessary knowledge.

To a wide extent, the use of a special advisor may give the contracting authority the information necessary to proceed with a normal procurement procedure, thus barring access to the competitive dialogue, unless the use of the special advisor will entail a disproportionate cost in time and money.

Traditionally, the reference to preparatory works has had a very limited use at the European Court, which was well justified by the behind closed doors nature of the legislative procedure prior to the Maastricht treaty. However, with the increased and open involvement of the European Parliament in the legislative procedure, together with the requirements on openness in the Council procedures set out especially in the Amsterdam treaty, references to the preparatory works are now found in the judicial practice[47].

Use of the competitive dialogue procedure requires the publication of a

contract notice and the preselection of bidders as in the restricted procedure[48]:

- Contracting authorities shall publish a contract notice **setting out their needs** and requirements, which they shall define in that notice and/or in a descriptive document.
- Contracting authorities shall open, with the **candidates selected in accordance with** the relevant provisions of Articles 44 to 52, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may **discuss all aspects of the contract** with the chosen candidates during this dialogue.
- The contracting authorities may specify prices or payments to the participants in the dialogue.

The apparent openness, and the limited obligation to set out needs and requirements, should be contrasted with the specific rules on the dialogue, and with the requirement that the final award must be made on the basis of criteria set at the time of the contract notice[49]:

- Contracting authorities shall assess the tenders received on the basis of the **award criteria laid down in the contract notice** or the descriptive document and shall choose the most economically advantageous tender in accordance with Article 53.

The dialogue procedure entails negotiation that in most cases will take place in several stages[50]:

- Contracting authorities may provide for the procedure to take place in **successive stages** in order to **reduce the number of solutions** to be discussed during the dialogue stage by **applying the award criteria** in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option.
- The contracting authority shall **continue such dialogue until it can identify** the solution or solutions, if necessary after comparing them, which are capable of meeting its needs.

Again, the award criteria set prior to the dialogue play a central role. The difficulty is that these criteria will have to be set at a time, where the contracting authority has not yet gained the knowledge that should be the outcome of the dialogue procedure. Thus, the award criteria will probably be set as open as possible, in order to accommodate the outcome of the dialogue, but this possibility is again limited by the requirements of the transparency principle, including the weighting of sub-criteria, as set out above.

Furthermore, the focus on reducing the number of solutions is somewhat upset by the consideration of business secrets, which results from a difficult balance between the equal treatment principle and the transparency principle[51]:

- During the dialogue, contracting authorities shall **ensure equality of treatment** among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.
- Contracting authorities **may not reveal to the other participants solutions** proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement.

It does not seem clear why a bidder should allow information about its proposal to be given o other bidders, and thus the system will in effect promote not a multilateral dialogues between the contracting authority and the bidders, but rather several parallel bilateral dialogues based on different solutions. In turn, this will entail that a reduction in solutions typically also will mean in reduction in bidders.

This result is further confirmed by the restriction on the award procedure, that each bidder remaining must make a final bid based on the specific solution of that bidder, and not on the general outcome of the dialogue[52]:

- Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask them to submit their final tenders on the **basis of the solution or solutions presented and specified during the dialogue**. These tenders shall contain all the elements required and necessary for the performance of the project.
- These tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification, fine-tuning or additional information **may not involve changes to the basic features of the tender** or the call for tender, variations in which are likely to distort competition or have a discriminatory effect.

In accordance with the general prohibition on negotiation, set out above, the final negotiation that is possible after the bids have been submitted in the dialogue procedure is restrained by the fact that it may not involve basic changes to the bid and is limited to fine-tuning. To this is added a limited possibility for further clarification from the winning bidder[53]:

- At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination.

Taken together, these requirements entail an even more limited use that the negotiated procedure in the classical field, and only in case a Member State should decide to allow for the competitive dialogue procedure.

The award criteria will in most cases have to be defined broadly in order thus accommodate the dialogue, but thus infringing on the transparency principle. The confidentiality of the individual dialogue will most like lead to exclusion of bidders and not only solutions, with is further reinforced by the requirement that the final bid be based on the specific solution discussed.

Framework Agreements

In the directives in force at the time of the lecture, framework agreements were regulated only in the field of utilities[54]:

- Framework agreement shall mean an agreement between one of the contracting entities defined in Article 2 and one or more suppliers, contractors or service providers the purpose of which is to establish the terms, in particular with regard to the prices and, where appropriate, the quantity envisaged, governing the contracts to be awarded during a given period.
- Where contracting entities have awarded a framework agreement in accordance with this Directive, they may avail themselves of Article 20 (2) (i) when awarding contracts based on that agreement.
- Contracting entities may use a procedure without prior call for competition in the following cases: . . .. for contracts to be awarded on the basis of a framework agreement, provided that the condition referred to in Article 5 (2) is fulfilled.

This entailed a high degree of freedom in awarding the actual contracts amongst the bidders participating in the framework contract. The setup was typically organised as a central purchasing authority that entered into the framework contracts and from which the contracting authorities would subsequently make their purchases without any further consideration of procurement procedures.

This setup was opposed by the European Commission, especially in the classic field where the directives did not specifically allow for framework contracts. However, the discussions on this issue never led to a case before the European Court on this specific issue. It may be argued that the Court[55] implicitly accepted framework agreements in its jurisprudence[56]:

- Explaining the reasons for its non-compliance with the advertising rules laid down in Article 9 of the directive, the **Greek Government states that the framework agreement is no more than a structure within which numerous supply contracts are awarded**, the value of none of which exceeds the threshold of ECU 200 000 laid down in the first indent of Article 5(1)(a) of the directive. .....
- That argument **cannot be accepted**.
- So far as concerns the argument based on the value of the contracts in question, the framework agreement **turns into a whole the various contracts** which it governs and the total value of those contracts is greater than ECU 200 000. Furthermore, as the Commission has correctly pointed out, any other interpretation of the first indent of Article 5(1)(a) of the directive would allow contract awarders to circumvent the obligations which it imposes.

Although the Court refuses the argumentation of the Greek government, it gives an interpretation of the application of the original procurement directive for goods[57] to framework agreements, in spite of the fact that such agreements were not mentioned as an option in this directive.

Some light on the possible extent of framework agreements, and the use of central purchasing authorities, may be deduced from other parts[58] of the Courts jurisprudence[58]:

- The compatibility of such a provision [for selection of tender that "appears the most acceptable to the awarding authority"] with the directive depends on its interpretation under national law. It would be incompatible with Article 29 of the directive [71/305] if its effect was to confer on the authorities awarding contracts **unrestricted freedom of choice** as regards the awarding of the contract in question to a tenderer.

It may thus be argued on the one hand, that framework agreements do not grant an unrestricted freedom since the original framework will have to be submitted to procurement procedures, as set out by the Court in the previous case. On the other hand, it may be argued that creating a min-market, within the confines of a framework agreement holding central purchasing authority, does create an unrestricted freedom in this mini-market.

These issues have now been settled in the 2004 directives which formally introduce the framework contracts to the classic field. However, the conditions are on the one hand more restrictive, but on the other hand complemented by separate provisions on central purchasing authorities.

Again the use of framework contracts is an option for the Member States, which may decide to include this possibility in the national implementation[60]:

- Member States **may provide** that contracting authorities may conclude framework agreements.
- For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by **applying the award criteria** set in accordance with Article 53.

The framework agreements may be concluded as multiparty agreements on both the side of the contracting authorities and the side of the bidders. However, once the framework agreement has been entered into, it is static[61]:

- Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in paragraphs 3 and 4. Those procedures may be applied only between the contracting authorities and the economic operators **originally party** to the framework agreement.
- When awarding contracts based on a framework agreement, the parties may **under no circumstances make substantial amendments** to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

This may be contrasted with the electronic alternative to framework

agreements, introduced in the 2004 directives as dynamic purchasing systems[62]. These systems are explicitly held open for new entrants on the bidding side, and bidders are at all times allowed to update the indicative tender, which gained them entry to the system.

This flexibility is countered by the fact that awarding of contracts takes place entirely on an electronic basis.

In case a framework agreement is entered into with a single bidder, a slight flexibility is introduced, allowing the bidder to supplement the original tender[63]:

- Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.
- For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to **supplement its tender as necessary**.

On the other hand, this flexibility does not apply to framework agreements with several bidders, which in that case must be more than 2[64]:

- Where a framework agreement is concluded with several economic operators, the latter must be **at least three in number**, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria.

In the case of such multi-bidder framework agreements, it is now made clear that the choice between them in awarding the final contracts is not free, but must be based on the award criteria set up when initiating the framework agreement[65]:

- Contracts based on framework agreements concluded with several economic operators may be **awarded either**:
- by **application of the terms laid down in the framework agreement** without reopening competition, or
- where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, **in accordance with the following procedure**.

The subsequent procedure set out in the directive is a mini competition, based on the additional terms that were not specified in the framework agreement. However, the award criteria to be applied are still those originally set up at the time of initiating the framework agreement[66]:

- For every contract to be awarded, contracting authorities shall **consult in writing** the economic operators capable of performing the contract;
- Contracting authorities shall **fix a time limit** which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
- Tenders shall be **submitted in writing**, and their content shall remain confidential until the stipulated time limit for reply has expired;
- Contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the **award criteria set out in the specifications of the framework agreement**.

This places a severe restriction on the practical use of framework agreements, as they do no longer constitute mini-markets, within which the participating contracting authorities will have a free choice. Instead the call for use of the original award criteria in a procedure that applies only to the participating bidders.

Furthermore, just as for dynamic purchasing systems[67], the duration of a framework contract is now explicit limited to 4 years[68]:

- The term of a framework agreement **may not exceed four years**, save in exceptional cases duly justified, in particular by the subject of the framework agreement.
- Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

However, the provisions on framework agreements are supplemented by the new provisions on central purchasing authorities, which as set out above was the practical form applied to the use of framework agreements in several Member States. Such authorities are defined[69]:

- A "central purchasing body" is a contracting authority which:
- **acquires supplies** and/or services intended for contracting authorities, or
- awards public contracts or **concludes framework agreements** for works, supplies or services intended for contracting authorities.

Again the possibility of using central purchasing authorities is an option that Member States may choose to implement[70]:

- Member States may stipulate that contracting authorities may purchase works, supplies and/or services from or through a central purchasing body.
- Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) **shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it**.

In this manner the mini-market with free choice may be established to the extent that the central purchasing authority is willing to purchase and stock the goods between which the contracting authorities will chose, thus running the commercial risk of building stocks that are not wanted by the final contracting authorities.

In case the central purchasing authority merely is the holder of a framework agreement, under which the contracting authorities may make purchases, the application of the procedures involving use of the original award criteria will still apply.

Environmental and Social Issues

The procurement directives clearly state that only two possible main criteria may be applied[71], either the lowest price or the economically most advantageous offer. As set out above, using the second of these criteria, calls for the setting of sub-criteria that must be weighted, and if this is not possible, then at least specified in an order of priority.

The European Court of Justice was asked[72] to clarify whether non-economic criteria, such as social considerations, may be included in the sub-criteria. The reply was less than clea[73]:

- Under Article 30(1) of Directive 93/37, the criteria on which the contracting authorities are to base the award of contracts are either **the lowest price** only or, when the award is made to **the most economically advantageous tender**, various criteria according to the contract, such as price, period for completion, running costs, profitability, technical merit.
- None the less, that provision **does not preclude all possibility for the contracting authorities to use as a criterion** a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services.

This raised the issue whether social considerations, and likewise environmental considerations, may constitute a proper sub-criteria or whether they constitute additional criteria, and in the latter case what the function of additional criteria might be.

The Commission[74] arrived at the conclusion that such criteria could be used in the award procedure, but only provided that their economic value for the specific contracting authority could be established. However, the European Court[75] invalidated this conclusion by Commission in a subsequent case[76]:

- It follows from the above considerations that, where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50, it may take criteria relating to the **preservation of the environment** into consideration, 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.

In the specific case, the sub-criteria related to nitrogen oxide emissions and the noise level of the buses, which the Court found to have a sufficient link to the subject matter of the contract concerning bus services. This has been followed by a later case[77], where the Court found that environmental criteria, related to production above the level of the contract, did not have a sufficient link to the contract.

In the 2004 directives, the use of environmental and social criteria relate to each of the three stages of procurement:

- preselection of bidders
- award of contract
- contract performance

The exclusion of bidders not found eligible may be based on criteria that include the following[78]:

- Any economic operator may be excluded from participation in a contract where that economic operator: .....
- (c) has been **convicted by a judgment** which has the force of res judicata in accordance with the legal provisions of the country of any offence **concerning his professional conduct**;
- (d) has been guilty of **grave professional misconduct** proven by any means which the contracting authorities can demonstrate;
- (e) has not fulfilled obligations relating to the payment of **social security contributions** in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority.

Apart from social security contributions, the reference to social and environmental criteria is not found explicitly in the above provision, but rather in the recitals[79]:

- If national law contains provisions to 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(15) and 76/207/EEC(16) 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.

In addition to the above, it should be noted that the new directives introduce an obligation to set criteria for the selection of a limited number of qualified bidders, in case a limit has been established[80]. Such criteria must be objective and non-discriminatory, but no other qualifications are established in the directives. Thus, it would seem that environmental and social criteria may also be used for this selection.

In relation to the award procedure, the new directives specify that technical requirement may be specified in terms of both performance and function, where the latter refers to the contracting authority's functional needs, rather than the technical abilities of the product[81]:

- Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated: .....
- in terms of performance or functional requirements; the latter **may include environmental characteristics**. However, such parameters must be **sufficiently precise** to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract.

The restriction on freedom of choice, as set out above, is again apparent in the qualification that such criteria must in any case be sufficiently precise, thus allowing bidders to determine the environmental standards that they must meet.

The actual award procedure is regulated by a different provision which also allows the use of environmental criteria, reading as a clear codification of the European Court case law set out above[82]:

- 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 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.

The above provisions do not explicitly mention social criteria, but also do not exclude them, and may be read only as an exemplification of relevant issues. However, the core issue of understanding the required link as not dealt with. Only a partial indication is given in the recitals[83]:

- This Directive is based on **Court of Justice case-law**, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the **environmental and/or social area**, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2.
- In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be **compared and assessed objectively**. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting **environmental requirements**, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract.

Finally, social criteria may explicitly be taken into consideration when considering whether an offer should be excluded as abnormally low[84]:

- If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.
- Those details may relate in particular to: .....
- (d) compliance with the provisions relating to **employment protection and working conditions in force**.

In relation to the contract performance, criteria may be set by the contracting authority, including social and environmental considerations[85]:

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

The contract performance criteria may play a role in assessing whether a bid conforms to the procurement criteria, but the directive does not explicitly allow for contracting a to require prior proof of the ability to meet the contract performance criteria[86]:

- A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to **indicate that they have taken account**, when drawing up their tender, of the obligations relating to **employment protection provisions and the working conditions** which are in force in the place where the works are to be carried out or the service is to be provided.

The directives also hold specific provisions on the favourable treatment for the disabled, which have not been included in the above presentation. This consideration is also included in the recitals concerning the contract performance criteria[87] :

- Contract performance conditions are compatible with this Directive provided that they are **not directly or indirectly discriminatory** and are **indicated in the contract notice** or in the contract documents.
- They may, in particular, be intended to favour on-site vocational training, the employment of **people experiencing particular difficulty in achieving integration**, the fight against unemployment or the protection of the **environment**.

As set out in the above recital, a major concern of the directives is to ensure that the inclusion of social and environmental considerations does not lead to increased possibilities for hidden discrimination.

Thus the standards of transparency and objective criteria apply as set out above.

Conclusion

The intention of this contribution has been to highlight some elected developments in the new directives on public procurement, and to follow this development through the jurisprudence of the European Court of Justice.

The new directives constitute a major step in making public procurement more transparent and manageable, both for bidders and contracting authorities. However, a number of issues have yet only found a partial solution, or a least a solution that will be subject to further jurisprudence as to its practical application.

Footnotes:

[1] *Official Journal L 199 , 09/08/1993, p. 0001 - 0053*
[2] *Official Journal L 199 , 09/08/1993 P. 0054 - 0083*
[3] *Official Journal L 209 , 24/07/1992 P. 0001 - 0024*
[4] *Judgment of the Court of 20 February 1979, Rewe-Zentral, Case 120/78, European Court reports 1979, p. 00649*
[5] *Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, Official Journal L 185, 16/08/1971, p. 0005 - 0014*
[6] *Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, Official Journal L 013, 15/01/1977, p. 0001 - 0014*
[7] *Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Official Journal L 209, 24/07/1992, p. 0001 - 0024*
[8] *Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, Official Journal L 297, 29/10/1990, p. 0001 - 0048*
[9] *Official Journal L 199, 09/08/1993, p. 0084 - 0138*
[10] *Declaration 39*
[11] *Official Journal L 328, 28/11/1997, p. 0001 - 0059*
[12] *Official Journal L 101, 01/04/1998, p. 0001 - 0016*
[13] *Official Journal L 285, 29/10/2001, p. 0001 - 0162*
[14] *E.g. Judgment of the Court of 21 September 1989 Commission of the European Communities v Hellenic Republic, Case 68/88, European Court reports 1989, p. 02965*
[15] *Official Journal L 395, 30/12/1989, p. 0033 - 0035*
[16] *Official Journal L 076, 23/03/1992, p. 0014 - 0020*
[17] *Official Journal L 134, 30/04/2004, p. 0114 - 0240*
[18] *Official Journal L 134, 30/04/2004, p. 0001 - 0113*
[19] *Official Journal L 326, 29/10/2004, p. 0017 - 0018*
[20] *Official Journal L 257, 01/10/2005, p. 0001 - 0126*
[21] *Article 13 of directive 2004/18*
[22] *Article 80 of directive 2004/18*
[23] *Article 82 of directive 2004/18*
[24] *E.g. Judgment of the Court (Sixth Chamber) of 13 November 1990, Marleasing, Case C-106/89, European Court reports 1990, p. I-04135*
[25] *E.g. Judgment of the Court of 26 February 1986, M. H. Marshall, Case 152/84, European Court reports 1986, p. 00723*
[26] *E.g. Judgment of the Court of 4 December 1974, Yvonne van Duyn, Case 41-74, European Court reports 1974, p. 01337*
[27] *E.g. Judgment of the Court of 9 March 1978, Simmenthal SpA., Case 106/77, European Court reports 1978, p. 00629*
[28] *Article 249 of the EC treaty*
[29] *E.g. Judgment of the Court of 30 January 1985, Commission of the European Communities v Kingdom of Denmark, Case 143/83, European Court reports 1985 Page 00427*
[30] *Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, Official Journal L 013, 15/01/1977, p. 0001 - 0014*
[31] *Recitals 1 and 2*
[32] *Judgment of the Court (Sixth Chamber) of 7 December 2000, Telaustria Verlags GmbH, Case C-324/98, European Court reports 2000, p. I-10745*
[33] *Point 60-62*
[34] *Judgment of the Court (First Chamber) of 13 October 2005, Parking Brixen GmbH, not yet in European Court reports*
[35] *Recital 2 of Directive 2004/18*
[36] *E.g. Article 26, paragraph 2, of Directive 1993/36*
[37] *Article 53, paragraph 2, of Directive 2004/18*
[38] *Article 30, paragraph 1, of Directive 2004/18*
[39] *Article 40, paragraph 2, of Directive 2004/17*
[40] *Judgment of the Court of 22 June 1993, Commission of the European Communities v Kingdom of Denmark, Case C-243/89, European Court reports 1993, p. I-03353*
[41] *Points 32-33*
[42] *E.g. Article 2 in Directive 2004/18*
[43] *Article 23, paragraph 1, of Directive 2004/18*
[44] *Recital 31 of directive 2004/18*
[45] *Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM/2000/0275 final - COD 2000/0115, Official Journal C 029 E, 30/01/2001, p. 0011 - 00111*
[46] *Section III.4.29*
[47] *E.g. Judgment of the Court of 25 November 1992, Commission of the European Communities v Kingdom of Belgium, Case C-376/90, European Court reports 1992, p. I-6153*
[48] *Article 23, paragraphs 2, 3, first section, and 8, of Directive 2004/18*
[49] *Article 23, paragraph 7, first section, of Directive 2004/18*
[50] *Article 23, paragraphs 4 and 5, of Directive 2004/18*
[51] *Article 23, paragraph 3, second and third section, of Directive 2004/18*
[52] *Article 23, paragraphs 6, of Directive 2004/18*
[53] *Article 23, paragraphs 7, second paragraph, of Directive 2004/18*
[54] *Article 1, paragraph 5, Article 5, paragraph 2, and Article 20, paragraph 2, including point i, of Directive 1993/38.*
[55] *Judgment of the Court (Fifth Chamber) of 4 May 1995, Commission of the European Communities v Hellenic Republic, Case C-79/94, European Court reports 1995, p. I-01071*
[56] *Point 13-15*
[57] *Directive 1977/62*
[58] *Judgment of the Court (Fourth Chamber) of 20 September 1988, Gebroeders Beentjes BV v State of the Netherlands, Case 31/87, European Court reports 1988 Page 04635*
[59] *Point 26*

[60] *Article 32, paragraph 1 and 2, section 1 of Directive 2004/18*
[61] *Article 32, paragraph 2, section 2 and 3 of Directive 2004/18*
[62] *Article 33 of Directive 2004/18*
[63] *Article 32, paragraph 3 of Directive 2004/18*
[64] *Article 32, paragraph 4, section 1 of Directive 2004/18*
[65] *Article 32, paragraph 4, section 2 of Directive 2004/18*
[66] *Article 32, paragraph 4, section 2, points a-c of Directive 2004/18*
[67] *Article 33 of Directive 2004/18*
[68] *Article 32, paragraph 2, section 4 and 5, of Directive 2004/18*
[69] *Article 1, paragraph 10, of Directive 2004/18*
[70] *Article 11 of Directive 2004/18*
[71] *Article 53, paragraph 1, of Directive 2004/18*
[72] *Judgment of the Court of 26 September 2000, Commission of the European Communities v French Republic, Case C-225/98, European Court reports 2000, p. I-07445*
[73] *Points 49-50*
[74] *Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement (2001/C 333/07) (COM(2001) 274 final), and Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (2001/C 333/08) (COM(2001) 566 final), Official Journal of the European Communities, 28.11.2001, C 333, p. 12 and 27*
[75] *Judgment of the Court of 17 September 2002, Concordia Bus Finland Oy Ab, Case C-513/99, European Court reports 2002, p. I-07213*
[76] *Point 64*
[77] *Judgment of the Court (Sixth Chamber) of 4 December 2003, EVN AG et Wienstrom GmbH v Republik Osterreich, Case C-448/01, not yet in the European Court reports*
[78] *Article 45, paragraph 2, of Directive 2004/18*
[79] *Recital 43 of Directive 2004/18*
[80] *Article 44, paragraph 3, of Directive 2004/18*
[81] *Article 23, paragraph 3, point b, of Directive 2004/18*
[82] *Article 53, paragraph 1, point a, of Directive 2004/18*
[83] *Recital 1 and 46 of Directive 2004/18*
[84] *Article 55, paragraph 1, of Directive 2004/18*
[85] *Article 26 of Directive 2004/18*
[86] *Article 55, paragraph 2, of Directive 2004/18*
[87] *Recital 33 of Directive 2004/18*