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*This paper discusses the law of the European Union (EU) on public procurement by providing an overview of both the primary law principles and foundations emanating from the Treaty on the Functioning of the European Union (TFEU) and the detailed rules of a set of secondary procurement Directives. The latter have to be transposed into the national laws of the 28 Member States and are then applied by their contracting authorities and entities. The analysis also includes the relevant case law of the Court of Justice of the European Union (CJEU) and a short evaluation of the principles applying to contracts falling outside the field of application of the procurement Directives.*

## 1 Introduction[1]

The 28 Member States of the EU form the largest public procurement market in the world. In 2015, about 250,000 contracting authorities on the national, regional, and local levels awarded contracts for about €3 trillion.[2] This is an average 14 per cent of the national GDP in the Member States, or 13.1 per cent of the Union's GDP (excluding utilities and defence).[3] While the

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1 Part of this introduction are based on the introduction to Trybus, Caranta, and Edelstam (eds.), *EU Law of Public Contracts: Public Procurement and Beyond* (Bruylant: Brussels, 2014), at 1-2. The author also used extracts from Trybus, *Buying Defence and Security in Europe: the EU Defence and Security Directive in Context* (CUP: Cambridge, 2014) and Trybus, "Public procurement in European Union internal market law", in R. Nogouellou and U. Stelkens (eds.) *Comparative Law on Public Contracts Treatise* (Bruylant: Brussels, 2010) 81-121. Leading Spanish language literature on EU public procurement law (including on its effect on Spanish procurement law) includes: Gimeno Feliú, *El control de la contratación pública: las normas comunitarias y su adaptación en España* (Cívitas: Madrid, 1995); *La nueva contratación pública europea y su incidencia en la legislación española: la necesaria adopción de una nueva ley de contratos públicos y propuestas de reform* (Madrid: Editorial Civitas, 2006); *El nuevo paquete legislativo comunitario sobre contratación pública: de la burocracia a la estrategia : (el contrato público como herramienta del liderazgo institucional de los poderes públicos)* (Aranzadi: Cizur Menor, Navarra, 2014); and Moreno Molina, *El nuevo derecho de la contración pública de la Únion Europea, directivas 4.0* (Chartridge Books Oxford, 2015) https://ruidera.uclm.es/xmlui/bitstream/handle/10578/7893/9781911033097.pdf?sequence=1 [accessed 14 March 2017]. Thanks to Dr Albert Sánchez Graells (University of Bristol) for providing this selection.

2 According to 2016 figures provided by the European Commission the annual procurement volume of public authorities and utilities in the EU of 27 in 2015 was 3 trillion or 13.1 per cent of the GDP (excluding utilities and defence). See: European Commission: *Public Procurement Indicators 2015*, DG Growth, Brussels, 16 Dec 2016: https://www.pianoo.nl/sites/default/files/documents/documents/publicprocurementindicators2015-eu-december2016.pdf [accessed 21 March 2017].

3 Ibid.

importance of public contracts for the economy varies from Member State to Member State, the significance is always considerable.

The law of the EU affects public contracts to varying degrees, depending on the 'phase' the contract is in. The 'life' of a public contract can be divided into three more or less distinct phases: (1) the definition of a need for a good, service or work, (2) the procurement procedure leading to the award of the contract, and finally (3) the contract management during the lifetime of the concluded contract. The first phase defining the need of the public entity or utility is largely unaffected by EU law. National, regional, and local constitutional rules regulating the budget and decision-making provide the only relevant legal frameworks here. This might change with the emergence of an 'economic government' for the EU or the Eurozone but currently there is no EU law on this first phase. The third or contract management phase is affected, but only to a very limited extent. It is the second phase, from the publication of the contract notice until the award of the contract, the public procurement phase *strictu sensu*, which is most extensively affected by EU law. This is due to the fact that while the first phase deals with *what* to buy and the third phase with *how* the eventual contract is administered, the second phase addresses the question of *who* to procure the good, service or work from. The question who to conclude the contract with might be answered with a provider from another Member State, and this makes the second phase relevant for the Internal Market, the core regime of the EU.

This paper discusses the public procurement law of the EU. First, the primary EU law emanating from the core regimes of the TFEU is discussed. Second, the relevant secondary law, based on legal bases in the TFEU, passed by the EU institutions created by the TFEU, and enshrined in a set of detailed procurement Directives, is addressed. Third, the crucial contribution of the case law of the CJEU to EU public procurement law is highlighted. Fourth, the role of Member States transposing the EU Directives into their national procurement laws is explained. Fifth and finally, the chapter returns to both the role of the TFEU and the Court when discussing the EU law principles applying to contracts falling outside the scope of the Directives. The entire chapter aims to show the crucial role of the TFEU in all the other addressed dimensions of EU procurement law.

## 2 Primary EU law: the Treaty on the Functioning of the European Union[4]

The establishment of an Internal Market between EU Member States is at the very heart of European integration. The second indent of the Preambles of the TFEU (the former EC Treaty, before that EEC Treaty) declares that the Member States are: "Resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe, […]." The Internal Market is then stipulated partly as an area of exclusive EU competence in Article 3 TFEU but mainly as an area of shared competence between EU and the Member States in Article 4 TFEU. Moreover, the commitment to establish an Internal Market is reiterated in Article 26(3) TFEU which provides that: "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." The Internal Market regimes of the TFEU most relevant to public and utilities procurement are the free movement of goods, the free movement of services, and the freedom of establishment. Furthermore, the general prohibition of discrimination on grounds of nationality in Article 18 TFEU is to be mentioned. These Internal Market regimes and Article 18 TFEU essentially consist of prohibitions of protectionist behaviour directed at the Member States. In other words, the respective provisions of the Treaties ban Member States from

[4] This section of the chapter lends from Trybus, "Public procurement in European Union internal market law", supra note 1.

practices raising barriers to trade for goods and services and the freedom of establishment. In addition to the Internal Market regimes and Article 18 TFEU, a number of other economic regimes dealing with distortions of competition in the Internal Market and partly directed at the Member States and partly at companies have a certain relevance to public procurement.[5] These shall not be discussed in the context of this chapter on EU law and public procurement.

## 2.1 Free movement of goods

At the core of the EU Internal Market is the free trade area for goods (Article 28 TFEU).[6] 'Goods' are very widely defined as "products which can be valued in money and which are capable of forming the subject of commercial transactions."[7] A crucial provision is Article 30 TFEU which prohibits all customs duties on imports and exports of goods between Member States and all charges having equivalent effect. The notion of 'charges having equivalent effect to a customs duty' is also very widely defined.[8] If the Internal Market is the core of European integration, then the free trade area for goods is at the centre of that core. A Common Customs Tariff in relation to goods from third countries outside the EU 'upgrades' this free trade area to a customs union. According to Article 29 TFEU goods from third countries are treated like goods originating in a Member State once they are in free circulation. The prohibition of customs duties and charges having equivalent effect has no direct connection to the EU public procurement regime. However, the abolition of these charges eliminates barriers to trade and therefore also allows access to the public procurement markets of other Member States. It would obviously be difficult to offer the lowest price or be the economically most advantageous tender when you have to add eight per cent or more for customs duties to your bid price in another Member State. Hence Article 30 TFEU is an essential prerequisite for a liberalised European procurement market.

### *2.1.1 Prohibition of quantitative restrictions and measures having equivalent effect*

The most important Internal Market provision with respect to the procurement of goods (supplies) is Article 34 TFEU according to which "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

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[5] The rules on State aid are regulated in Articles 107 *et seq* TFEU. On the relevance of this regime to public contracts see Arrowsmith, *The Law of Public and Utilities Procurement* (OUP,3rd ed. 2014) at 302-324. The competition rules are regulated in Articles 101 and 102 *et seq.* TFEU (ex 81 and 82 *et seq.* EC Treaty). On the relevance of this regime to public contracts see: Arrowsmith, ibid. at 324-337.

[6] On the free movement in general see: Oliver et al, *Oliver on Free Movement of Goods in the European Union* (Hart: Oxford, 5th ed. 2010); Barnard and Scott (eds.), *The Law of the Single European Market* (Hart: Oxford, 2002); Craig and de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 6th ed. 2015), at 638-720 (hereinafter *EU Law*); J. Weiler, "From Dassonville to Keck and Beyond: An Evolutionary Reflection on the Text and Context of the Free Movement of Goods", in Craig and de Búrca (eds.), *The Evolution of EU Law* (OUP: Oxford, 1999), chapter 10; Snell, *Goods and Services in EC Law* (Oxford University Press, 2002).

[7] The CJEU in Case 7/68, *Commission* v. *Italy* ('Arts Treasures') [1968] ECR 423. This definition also applies to the important prohibition of quantitative restrictions and measures having equivalent effect discussed below.

[8] The CJEU defined a charge having equivalent effect to a customs duty as: "[…] any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a custom duty in the strict sense, constitutes a *charge having equivalent effect* […] even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product."

See: Case 24/68, *Commission* v. *Italy* ('Statistical Levy') [1969] ECR 193; [1971] CMLR 611; Joint Cases 2&3/69, *Sociaal Fonds for de Diamantarbeiders* v. *Brachfeld* ('Diamond Workers') [1969] ECR 211; [1969] CMLR 335; Case C-29/87, *Dansk Denkavit Aps* v. *Danish Ministry of Agriculture* [1988] ECR 2965.

This prohibition is complemented by a similar provision for exports.[9] A 'quantitative restriction' is defined as "any measure of a Member State that restraints the import, transit or export of a certain good [according to quantity or value]."[10] However, quantitative restrictions in the strict sense do not occur very often in practice. Member States are not that unsophisticated and not that openly opposed to EU law. Thus the notion of "a measure having equivalent effect to a quantitative restriction" in Article 34 TFEU is crucial. It was given a very wide definition by the CJEU in the *Dassonville*[11] judgment as: "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade […]." Provided the EU has not introduced harmonising legislation on a particular good, the prohibition thus applies to all obstacles to the free movement of goods where they derive from rules regarding the characteristics of the good. These include rules regarding the form, size, weight, composition, labelling, packaging, or presentation, provided the good in question was lawfully manufactured in the other Member State. This is the case even when the rules in question apply without distinction to both domestic and non-domestic goods.

In the traditional understanding, a measure can be considered outside the field of application of the prohibition of Article 34 TFEU if it represents a proportionate response to an overriding public interest or mandatory requirement. This principle of mandatory requirements was established by the Court of Justice in its famous *Cassis* judgment and includes "[...] the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defence of the consumer."[12]

Mandatory requirements are an open case law based category to which the Court of Justice has been adding new concepts, most notably the protection of the environment,[13] the preservation of the variety of the media,[14] or a peril to the financial balance of the social security system.[15] The aim of the concept is to give Member States sufficient flexibility to respond to important public interests needs not foreseen in the Treaty which override the Internal Market without having to violate the Treaty. However, the use of these mandatory requirements or overriding public interest grounds is subject to the important principle of proportionality. This applies equally in the context of the derogations in Article 36 TFEU discussed below.

The wide definition of a 'measure having equivalent effect to a quantitative restriction' in *Dassonville* led to an increasing tendency of traders to invoke Article 34 TFEU as a means of challenging any rules whose effect is to limit their commercial freedom. This was the main reason for the controversial *Keck* judgment in which, while upholding the previous case law regarding rules concerning the characteristics of the goods, the Court of Justice ruled that "[c]ontrary to what has previously been decided […] certain selling arrangements shall no longer be regarded as

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9 Article 35 TFEU reads: "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States."

10 Case 2/73, *Geddo* v. *Ente Nazionale Risi* [1973] ECR 865, [1974] 1 CMLR 1.

11 Case 8/74, *Procureur du Roi* v. *Dassonville* [1974] ECR 837, [1974] 2 CMLR 436. Commission and Council had aimed providing some clarity on the notion with an illustrative list in Articles 1-3 Directive 70/50/EEC [1970] OJ Sp. ed. I-17 which included minimum or maximum prices specified for imported products, conditions in respect of packaging, composition, identification, size, weight, etc., which only apply to foreign goods, limiting publicity in respect of imported goods as compared with domestic products, and making it mandatory for importers of goods to have an agent in the importing MS.

12 Case 120/78, *REWE – Zentrale AG* v. *Bundesmonopolverwaltung für Branntwein* (‚Cassis de Dijon') [1979] ECR 649, [1979]3 CMLR 494.

13 Case C-302/86, *Commission* v. *Denmark* ('Danish Bottles') [1986] ECR 4607.

14 Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH* v. *Heinrich Bauer Verlag* ('Familiapress') [1997] 3 CMLR 1329.

15 Case C-120/95, *Decker* [1995] ECR I-1831, [1998] 2 CMLR 879.

hindering State trade within the meaning of *Dassonville*."[16]

This introduced an important differentiation, whereby regulations concerning the characteristics of the goods are (still) covered by Article 34 TFEU whereas regulations concerning certain selling arrangements are (no longer) covered by Article 34 TFEU as long as they apply equally to all traders and have the same effect on imported and domestic goods.

### *2.1.2 Application to public procurement*

It appears from the jurisprudence of the CJEU that not only procurement laws and policies and wider practices but also independent decisions taken in the context of procurement activities can constitute a measure having equivalent effect to a quantitative restriction in the sense of Article 34 TFEU.[17] There is no *de minimis* rule whereby an act would be so insignificant that it would fall outside the prohibition.[18] Article 34 TFEU applies to all central, federal, regional, and local authorities of the Member States and their emanations and all bodies governed by public law for which the Member States can be held responsible,[19] to the executive, legislative, and judicial branches of government.[20] It is clear that it applies to the acts of contracting authorities subject to the Directives discussed in section 3 below. It is not clear whether it also applies to private utilities operating on the basis of special or exclusive rights, but it appears that it does not apply to other private persons or entities.[21] Hence all public procurement related laws and actions have to satisfy the requirements of the TFEU regime on the free movement goods. The procurement of goods (supplies) is covered by Article 34 TFEU.

### *2.1.3 Justifications and proportionality*

The prohibitions in Articles 34 and 35 TFEU are not absolute. Article 36 TFEU provides: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

Therefore, in addition to the flexibility provided through the case law based concept of mandatory requirements, the TFEU itself stipulates a number of public interest grounds that can justify proportionate Member State measures derogating from the prohibition of quantitative

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[16] Cases C-267 and C-268/91, *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, [1995] 1 CMLR 101.

[17] See: Case C-243/89, *Commission* v. *Denmark* ('Storebaelt') [1993] ECR I-3353 where the contracting entity's requirement in the specifications to include national products and labour was held to be incompatible with Article 34 TFEU (then Article 30 EEC); Case C-359/93, *Commission* v. *The Netherlands* ('UNIX') [1995] ECR I-157; Case C-59/00, *Bent Mousten Vestergaard* v. *Spøttrup Boligselskab* [2001] ECR I-9505. See also Arrowsmith, *supra* note 5, at 239; Trepte, *Public Procurement in the EU* (Oxford University Press, 2007), at 8.

[18] Trepte, *Public Procurement in the EU*, ibid. On the discussion and arguments for a *de minimus* test in the context of the free movement of goods see: Arnull, *The European Union and its Court of Justice* (OUP, 2nd ed. 2006), at 434-435 and 440-441. This was discussed by several Advocates General, for example Advocate General Jacobs in Case C-412/93, *Leclerc-Siplec* v. *TFI Publicité and M6 Publicité* [1995] ECR I-179. However, such a test would not apply to measures which discriminated against imports as they are prohibited by Article 34 TFEU as such, even where their effect was only slight, see Arnull, ibid., at 435.

[19] Joined Cases C-1/90 and C-176/90, *Aragonesa de Publicidad Exterior SA and Publivia SAE* v. *Departamento de Sanidad y Seguridad Social de la Generalidad de Cataluña* [1991] ECR I-4151.

[20] For example: Case C-50/80, *Dansk Supermarked A/S* v. *A/S Imerco* [1981] ECR 181.

[21] Joined Cases C-177/82 and 178/82, *Jan van der Haar and Kaveka de Meern BV* [1984] ECR 1797. See: Gormley, *Prohibiting Restrictions on Trade within the EEC* (North-Holland, 1985), at 261.

restrictions and measures having equivalent effect. The derogation may even apply to measures that discriminate against foreign goods. The aim is to provide Member States with the flexibility to take necessary measures to protect a number of interests within their responsibility, which are so well known and crucial that they could already be directly accommodated in the text of the TFEU itself. Exceptions reflecting grounds justifying derogation in Article 36 TFEU are also part of the Directives discussed in section 3 below.[22]

Article 36 TFEU and the *Cassis* jurisprudence do not give a blank cheque to the Member States. Measures have to be proportionate. Proportionality requires first, the suitability of the measure for the attainment of the desired objective, second, the necessity of the measure, meaning that there is no measure less restrictive to the Internal Market at the disposal of the Member State in question, and third, the proportionality *strictu sensu* of the measure, requiring a certain balance between the objective and the restriction.[23] Only when the requirements of this three-part proportionality test are met, a balance between the respective public interest ground and the internal market interests in the free movement of goods are met.

## *2.2 Free movement of services and the freedom of establishment*

The Treaties take a similar approach to the Internal Market regimes on the free movement of services in Article 56 TFEU and the freedom of establishment in Article 49 TFEU. The earlier protects the rights of nationals of the Member States to provide and receive commercial or professional services in another Member State on a temporary basis. It is often referred to as the freedom to provide services although this is not entirely accurate since the freedom also covers the reception of services. The individual or company does not permanently leave its Member State of origin and integrates into the economic framework of another Member State; that would come under establishment. Although involving the free movement of persons, the temporary nature of services makes them similar to goods. Therefore, the Court of Justice has been developing principles first developed for goods also for services,[24] as will be explained further below.

The freedom of establishment protects the right of nationals of the Member States to establish themselves or an agency, branch or subsidiary in another Member State on a permanent basis. The self-employed individual or company integrates into the economic framework of another Member State, which involves a social dimension for the economic actors and their family members which is in many ways akin to the free movement of workers regime of the Treaties. The application and principles of these two freedoms are largely identical[25] and consequently many issues are regulated in the same provisions on the freedom of establishment to which the section the free movement of services merely refers.[26]

Similar to the mandatory requirements or overriding public interest grounds of the *Cassis* jurisprudence in the context of the free movement of goods, the Court of Justice ruled that a measure can be considered outside the field of application of the prohibition of Articles 56 and 63 TFEU if it represents a proportionate response to an overriding public interest or imperative

[22] See for example Article 15(3) Public Sector Procurement Directive 2014/24/EU on secret contracts and contracts requiring special security measures.

[23] Formulated by Advocate General van Gerwen in Case C-159/90, *SPUC* v. *Grogan* [1991] ECR I-4685 including the more controversial third element. Also in favour of the three-part test (based on the same test in German administrative law, see Craig and de Búrca, *EU Law*, *supra* note 6, at 550), Schwarze, *European Administrative Law* (Sweet & Maxwell: London, 1992), at 712. On proportionality see the seminal article of de Búrca, "The Principle of Proportionality and its Application in EC Law", (1993) 13 *Yearbook of European Law* 105, 11-112.

[24] See especially the book by Snell, *supra* note 6.

[25] On the common ground: Case 48/75, *Royer* [1976] ECR 497. On the differences: Case C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Precuratori di Milano* [1995] ECR I-4165.

[26] Article 62 TFEU reads: "The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter."

requirement. This applies for example in relation to professional rules justified by the common good[27] or consumer protection.[28]

Moreover, similar to the public interest grounds that allow derogation from the free movement of goods according to Article 36 TFEU outlined above, in Article 52 TFEU the Treaty itself stipulates a number of public interest grounds that can justify proportionate Member State measures derogating from the prohibition of restrictions of the free movement of services and the freedom of establishment. The list is shorter than that of Article 36 TFEU. Moreover, Article 51 TFEU is a free movement of persons-specific exemption for certain services connected to the exercise of official authority. However, again similar to mandatory requirements and justifications in the free movement of goods regime, the Member State measures have to be proportionate.

Procurement laws and policies, wider practices, and independent decisions taken in the context of procurement activities can constitute a measure in the sense of Article 56 TFEU.[29] Examples from the case law of the Court of Justice include a requirement for companies tendering for contracts involving certain data processing systems to be mainly or partly in Italian public ownership,[30] a contract clause for the use of Danish labour,[31] or a French limitation on bringing a labour force from Portugal to perform a contract in France.[32]

Similar to Article 34 TFEU there is no *de minimis* rule whereby an act would be so insignificant that it would fall outside the prohibition. The rules on the free movement of services apply to all central, federal, regional, and local authorities of the Member States and their emanations and all bodies governed by public law for which the Member States can be held responsible, to the executive, legislative, and judicial branches of government. As services share many similarities with goods, most importantly the location of the tenderer in another Member State than the contracting entity, these two regimes are the most relevant for the public procurement of goods, services, and works. The freedom of establishment is less likely to be affected by procurement decisions since violations of these rules normally happen independently from procurement procedures. However, as outlined above the regime is closely connected and partly overlaps with that on services.

## *2.3 The Prohibition of discrimination on grounds of nationality*

A general principle of prohibition of any discrimination on grounds of nationality is stipulated in Article 18 TFEU. The principle is generally not applied independently[33] since it is also contained in the more specific free movement of regimes of the Treaty. The principle "requires that persons in a

[27] Case 33/74, *Van Binsbergen* v. *Bestuur van de Bedrijfsvereiniging Metaalnijverheid* [1979] ECR 1299.

[28] Case C-180/89, *Commission* v. *Italy* ('Italian Tourist Guides') [1991] ECR I-709, other imperative requirements are: the functioning of the justice system (Case C-33/74, *Van Binsbergen*, ibid.), interests of the workforce in good relations in the labour market (Case 279/80, *Webb* [1981] ECR 3305); interests of the holder of an insurance policy (Case C-205/84 *Commission* v. *Germany* [1986] ECR 3755), conservation of the national historical and artistic heritage (Case C-180/89), social policy interests and the fight against fraud in the context of lotteries and gambling, protection of intellectual property rights, quality and pluralism of broadcasting (Case C-352/85, *Bond van de Adverteerders* v. *Nederland* [1988] ECR 2085), coherence of domestic taxation systems, or the preservation of the good reputation of the national financial sector.

[29] See: Case C-243/89, *Commission* v. *Denmark* ('Storebaelt'), *supra* note 17, where the contracting entity's requirement in the specifications to include national products and labour was held to be incompatible with Article 34 TFEU; Case C-359/93, *Commission* v. *The Netherlands* ('UNIX'), *supra* note 17; Case C-59/00, *Bent Mousten Vestergaard* v. *Spøttrup Boligselskab*, *supra* note 17. See also Arrowsmith, *supra* note 5, at 185; Trepte, *supra* note 17, at 8.

[30] Case C-3/88, *Commission* v. *Italy* ('Re Data Processing') [1989] ECR 4035.

[31] Case C-243/89, *Commission* v. *Denmark* ('Storebaelt'), *supra* note 17.

[32] Case C-113/89, *Rush Portuguesa* v. *Office national d'immigration* [1990] ECR I-1417.

[33] Case C-307/87, *Commission* v. *Greece* [1989] ECR I-461.

situation governed by [Union] law be placed on a completely equal footing with nationals of the Member State."[34] The principle only applies to nationals of the Member States of the EU and individuals and legal persons who are resident in them, not to nationals from third countries.

Since most public procurement decisions, regarding for example, qualification, short-listing, or contract award are already covered by the regimes particularly on the free movement of goods and services outlined above, these more specific regimes will in most cases derogate the more general prohibition of the discrimination on grounds of nationality in Article 18 TFEU. Thus there is no need of Article 18 TFEU in the procurement context.[35]

# 3 Secondary EU Law: the procurement Directives (and some Regulations)[36]

As there is a traditional protectionist tendency in many Member States to award public procurement contracts to domestic national industries and service providers, further detailed regulation beyond the TFEU was necessary. Moreover, more generally not every little detail of economic law can be determined in the TFEU itself.

Therefore, legal bases for the EU institutions to introduce more specialised 'secondary' EU legislation are stipulated in the Treaty: Articles 53 (2), 62, and 114 TFEU are the most relevant for procurement legislation.[37] This legislation is called secondary because it depends on the primary legal bases in the TFEU. The type of legal instrument chosen for public procurement was the Directive. An EU Directive can be described as a model law agreed at EU level which sets out the basic parameters and objectives of legislation which then has to be transposed into the national laws of the 28 Member States by a specified deadline. Within certain limits, the Member States are free to choose the method of transposition, as long as the resulting national instrument is fully compliant with the original EU Directive. For public procurement, EU legislation involved the enactment of six Directives: the Public Sector Procurement Directive 2014/24/EU,[38] the Public Sector Remedies Directive 89/665/EEC,[39] the Utilities Procurement Directive 2014/25/EC,[40] the Utilities Remedies

[34] Case C-187/87, *Cowan* v. *Trésor Public* [1989] ECR 195, at 219.

[35] Arrowsmith, supra note 5, at 301-302, also arguing against J. Winter, "Public Procurement in the E.C." (1991) *Common Market Law Review* 741, at 762 that Article 18 TFEU (then 12 and 6 EC respectively) does not apply to entities not covered by the free movement regimes.

[36] The first part of this section is based on: Trybus, Caranta and Edelstam, *supra* note 1, at 3-5.

[37] See the Preambles to all EU procurement Directives.

[38] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65. For overviews of this Directive see: Lichère, Caranta and Treumer (eds.) *Modernising Public Procurement: The New Directive* (Djøf: Copenhagen, 2014); Caranta, "The changes to the public contract directives and the story they tell about how EU law works" (2015) 52 *Common Market Law Review* 391–459; Issues 3 and 4 of the (2014) 23 *Public Procurement Law Review*; and Skovgaard Ølykke and Sánchez Graells (eds.), *Reformation or Deformation of the EU Public Procurement Rules in 2014* (Edward Elgar: Cheltenham, 2016).

[39] 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, OJ [1989] L 395/33–35 as amended especially by Directive 2007/66/EC [2007] OJ L335/31.

[40] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

Directive 92/13/EEC,[41] the Concessions Directive 2014/23/EU[42] and the Defence and Security Procurement Directive 2009/81/EC..

The Directives are very detailed and share common features. They require, in short, the publication of all contracts awarded by government and other public entities above certain thresholds in the Official Journal of the EU (OJEU), rules on technical specifications,[43] the award of these contracts on the basis of prescribed detailed procedures, rules on the qualification of bidders,[44] and award criteria.[45] It also involves the operation of efficient enforcement and remedies systems for aggrieved bidders, which is the subject of separate Remedies Directives for the public sector (665/89/EEC) and utilities (92/13/EEC). Again, the main objective of this legal framework is to open the public procurement markets of the Member States in addition and amplifying the Treaty regimes on the free movement of goods and free movement of services. Therefore, non-discrimination on grounds of nationality is the crucial objective of this secondary legislation, but the achievement of value for money, transparency, competition, non-discrimination and equal treatment of bidders are all linked to that main objective. More recently the Union has been moving towards also aiming to promote social and environmental objectives,[46] promote innovation, or to fight corruption, but these are not the main objectives. The following pages will provide a brief overview over the main issues addressed in the Directives, notably their coverage (3.1), procedures (3.2), publication (3.3), technical publications (3.4), contract conditions (3.5), qualification and selection (3.6), award criteria (3.7), and review and remedies (3.8).

## 3.1 Coverage

All Directives dedicate a substantial part of their provisions to their personal and material coverage, in other words the types of entities that have to follow the rules of the respective Directive (personal) and the types of contracts the respective Directive applies to (material).[47] There is common ground but also certain differences between the various Directives regarding this crucial issue.

With regards to personal coverage, Public Sector Directive 2014/24/EU applies to all public bodies and institutions at the central government levels of the Member States, their federal State governments (Germany, Austria), regions (France, Belgium), autonomous communities (Spain), provinces (Italy, Netherlands), departments, counties (UK, Ireland), districts, municipalities, to the smallest village. Moreover, the Directive covers "bodies governed by public law, associations

[41] 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, OJ [1992] L-76/14 as amended especially by Directive 2007/66/EC [2007] OJ L335/31.

[42] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1.

[43] Burgi, "Specifications", in Trybus, Caranta, Edelstam, *supra* note 1, 37.

[44] Steinicke, "Qualification and Shortlisting" in Trybus, Caranta, Edelstam, ibid., 105.

[45] Franch, and Grau, "Award Criteria" in Trybus, Caranta, Edelstam, *supra* note 1, 125.

[46] See: Caranta and Trybus (eds.), *The Law of Green and Social Procurement* (Djøf: Copenhagen, 2010); Arrowsmith and Kunzlik (eds.) *Social and Environmental Policies in EC Procurement Law* (Cambridge: CUP, 2009); McCrudden, *Buying Social Justice. Equality, Government Procurement and Legal Change* (OUP: Oxford, 2007); Arrowsmith, "Horizontal Policies in Public Procurement: A Taxonomy" (2010) 10 *Journal of Public Procurement* 149; Kunzlik, 'Green Public Procurement—European Law, Environmental Standards and 'What to Buy' Decisions' (2013) 25 *Journal of Environmental Law* 173; Semple, *A Practical Guide to Public Procurement* (Oxford, OUP, 2015), chaper 7.

[47] See: Noguellou, "Scope and Coverage of the EU Procurement Directives", in Trybus, Caranta, Edelstam, *supra* note 1, 15.

formed by one or several of such authorities or one or several of such bodies governed by public law." This means that any entity controlled and financed by the government of a Member State is covered by the Directive. This goes deeper than the requirements of the World Trade Organisation's Government Procurement Agreement. Interestingly, the Directive does not apply to the EU institutions who created the Directive.[48] The Utilities Directive 2014/25/EU applies to companies operating in the water supply, energy, transport and other sectors. While these companies are now mostly not in public ownership but are large privatised, they used to be government owned and still operate within a monopolised market. If real competition is established in a particular market, the relevant sector is taken out of the field of application of the Utilities, as happened to the telecommunications sector. This history and special status of utilities in the European market motivated the legislator to regulate their procurement in a separate but more flexible Directive, a special feature of EU procurement law.[49] Consequently, Arrowsmith calls her leading English language book *The Law of Public* and Utilities *Procurement*.[50] The Defence and Security Procurement Directive 2009/81/EC, which also contains more flexible rules than Directive 2014/24/EU, and the Concessions Directive 2014/23/EU have the same coverage as the Public Sector and Utilities Directive combined; the difference to the other instruments lies in their material coverage.

An important part of material coverage are the thresholds of minimum contract values below which the Directives do not apply. However, this does not limit the application of the TFEU regimes outlined above, which led to a Treaty-based regime of minimum standards for contracts below these thresholds[51] which have been amplified by the Court of Justice and shall briefly be discussed under section 6 below. The thresholds differ slightly between the Directives and are fixed in Euros and updated in Regulations on a biannual basis.[52] For central government contracts they currently stand at €135,000 for supplies and services (€209,000 for authorities below the central level) and at €5,225,000 for works procured by any contracting entity. Moreover, there is a list of exceptions excluding contract types and certain situations from the field of application of the Directives. These include the acquisition or rental of property, conciliation and legal services, employment contracts, political campaign services and loans. The list of exclusions is particularly long in the Defence and Security Procurement Directive 2009/81/EU where it notably also features the large European collaborative projects for major new equipment and contracts between governments.[53] Overall, it can be said the thresholds and exceptions exclude about 85 per cent of all public and utilities procurement in the EU from their field of application.

## 3.2 Procedures

The Public Sector Directive provides for a maximum of six main types of procurement procedure: open, restricted, negotiated with competition, competitive dialogue, innovation partnership, negotiated without competition. Moreover, there are 'accelerated versions' of the restricted procedure and competitive negotiations for urgency situations with shorter time limits.

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[48] See: Stelkens and Schröder, "Substantive Law applicable to EU Public Contracts", in Trybus, Caranta, Edelstam, ibid., 395.

[49] See: Torricelli, "Utilities Procurement", in Trybus, Caranta, Edelstam, *supra* note 1, 223.

[50] Arrowsmith, (Sweet & Maxwell: London, 1st ed. 1996, 2nd ed. 2005, 3rd ed. 2014).

[51] Risvig Hamer, "Requirements for Contracts 'Outside' the Directives" in Trybus, Caranta and Edelstam, *supra* note 1, 191.

[52] See for example: Commission Delegated Regulation 2015/2170/EU of 24 November 2015 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts (Text with EEA relevance) OJ 2015 L307/5.

[53] See: Trybus, "Defence Procurement" in Trybus, Caranta, Edelstam, *supra* note 1, 249.

Finally, there are the 'special procedures', namely framework agreements, dynamic purchasing systems, and electronic auctions. The open procedure allows for a maximum of competition and transparency. Based on a detailed (technical) description or specifications of the good, service or work to be procured, and in response to a contract notice to be published in the OJEU, all interested economic operators, subject to qualification, can bid for the contract.

The restricted procedure shares many features with the open procedure but there is an additional stage. Under both the Public Sector and the Defence Directives, detailed specifications have to be finalised and a contract notice is published in the OJEU. Economic operators interested in the contract first have to send a request to participate. This request to participate is not a full tender but simply a short document which expresses the wish to participate and information about the economic operator. This will be followed by a shortlisting or selection process based on objective and regulated criteria and only the selected operators, a minimum of five in the Public Sector Directive and three in the Defence Directive, will be invited to bid. Then the selected operators have to send their full tenders. The contract will be awarded to one of the qualified bidders who submitted a compliant bid on the basis of the established award criteria. Similar to the open procedure, the restricted procedure requires finalised technical specifications when the contract is advertised and negotiations between contracting entity and bidders are prohibited.

For competitive negotiations, as in the restricted procedure, a contract notice is published in the OJEU and interested economic operators have to send a request to participate to the contracting authority. There is also a shortlisting process as in the restricted procedure which is based on objective and regulated criteria and only the shortlisted operators, a minimum of three, will be invited to bid. However, this is where the similarities with the restricted procedure end. First, there are no finalised and detailed specifications at the beginning of the procurement process, only requirements. Moreover, the selection of three operators in the first stage will be followed not by bids but by negotiations with the shortlisted operators, followed by a best and final offer.

The competitive dialogue shares many features with competitive negotiations but negotiations are more strictly regulated. As the other procedures, the competitive dialogue requires the publication of a contract notice in the OJEU which shall set out their needs and requirements, detailed technical specifications are not required from the beginning of the process. As in the restricted procedure and the negotiated procedure with prior publication of a contract notice, interested bidders can send a request to participate.[54] There is also a shortlisting process which is based on objective and regulated criteria and only the shortlisted operators, a minimum of three, will be invited to bid. Then, "[c]ontracting authorities/entities shall open with the candidates selected […] 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 new innovation partnership procedure shares many features with the competitive dialogue but is intended to foster innovation in the process.

For the negotiated procedure without publication of a contract notice there is no obligation to publish a contract notice and there are generally only very few procedural requirements. The contracting authority or entity may simply start unstructured negotiations with only one provider, although it may also do so with more than one provider or follow a more structured approach. The Directives require the publication of a contract award notice which must include a justification for the use of the procedure based on one of the limited situations expressly provided in the Directives.

In the context of the Public Sector Directive, contracting authorities can choose freely between the open and restricted procedures but the use of all other procedures is limited to specific situations expressly addressed in the instrument. In the context of the more flexible Utilities Directive contracting entities can additionally freely chose competitive negotiations. This is also the

[54] For example: Article 33(2) Defence Directive.

case in the context of the Defence Directive, which does not provide for the open procedure. The use of all other procedures – competitive dialogue, innovation partnerships, and especially the negotiated procedure without competition is strictly limited to prescribed situations. These situations are particularly exceptional for the latter, essentially single-source procurement, as the use of this procedure is close to procuring outside the framework of the Directives. Overall, the procedures are tightly regulated to ensure transparency, competition, and non-discrimination but also accommodate flexibility, especially in the context of the Utilities and Defence Directives. Moreover, innovative procurement procedures and modern purchasing techniques, most notably electronic procurement can be accommodated within these procedures.

### *3.3 Publication*

With the exception of the negotiated procedure without competition, the public procurement procedures begin with the publication of a contract notice in Tenders Electronic Daily (TED), the electronic version of the Supplement to the OJEU.[55] This means that all contracts above the thresholds are published in one electronic portal using the same format. This is obviously crucial for the transparency objectives of EU procurement law. However, it is also crucial to create competition and to ensure market access: economic operators cannot bid for contracts in other Member States when they do not know about them. Only after publication on TED can contracts be advertised in other and also national media. There are additional publication requirements, most notably regarding award notices once a procedure has concluded.

### *3.4 Technical specifications*

For the open and restricted procedures, the procurement rules on technical specifications defining the good, work, or service to be procured are mainly intended to prevent 'product definitions' to be abused to reduce the pool of possible bidders and to lead to discrimination of tenderers because of their nationality.[56] After all, it is easy to tailor technical specifications for a particular domestic provider. Discriminatory product specifications would also be measures having equivalent effect to quantitative restrictions in violation of Article 34 TFEU as outlined under section 2.1.1 above, unless justified by Article 36 TFEU or the *Cassis* jurisprudence. This made it particularly important to address this issue in sufficient detail in the secondary law Directives to ensure a harmonised approach across the 28 Member States. Technical specifications are frequently the subject of judgments of the CJEU[57] and review proceedings at the national level.[58]

### *3.5 Performance conditions*

Closely connected to specifications are performance conditions. The substantive Directives 2014/24/EU, 2014/25/EU and 2009/81/EC allow contract performance conditions, as long as these comply with EU law and are indicated in the contract documentation.[59] The requirement of compatibility with EU law means mainly that contract conditions must not be directly or indirectly

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[55] http://ted.europa.eu/TED/misc/chooseLanguage.do [accessed 17 March 2017].

[56] On the rules of Utilities Directive and Public Sector Directive see: Bovis, *EC Public Procurement: Case Law and Regulation* (OUP, 2007), at 220-223 and 397-399 and Burgi, "Specifications" in Trybus, Caranta, and Edelstam, *supra* note 1, 37.

[57] See: Case C-45/87, *Commission* v. *Ireland* ('Dundalk') [1988] ECR 4929 and Case C-359/93, *Commission* v. *the Netherlands* ('UNIX'), *supra* note 17.

[58] See the country chapters in Treumer and Lichère (eds.), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing: Copenhagen, 2011).

[59] Contract notices, contract documents, descriptive documents or supporting documents, see for example Articles 20, 22, and 23 Defence Directive.

discriminatory.[60] The requirement of the contract conditions to be communicated at the beginning of the procurement procedure partly explains their close connection to the specifications regulating the very beginning of the procurement procedure.

### *3.6 Qualification and selection*

Procurement qualification rules address the need to procure from reliable, appropriately trained, capable, experienced and trustworthy economic operators.[61] According to the case law of the CJEU, qualitative selection criteria have to be clearly distinguished from the award criteria discussed in the next section below: the earlier concern the quality of the bidder not the product or service subject to the tender.[62] The objective is to protect contracting authorities and entities from unreliable suppliers and providers who will not deliver in the end. Therefore, the objective is ultimately to ensure the fulfilment of the primary objective of procurement: to provide the contracting entity with what it needs to operate. This objective is compromised or undermined if the company in question or companies in its supply chain go bankrupt or run into difficulties with the authorities of the country in which they are situated for criminal, tax, or other reasons. Not having the technical capacity, the organisation, or the skilled manpower to fulfil the eventual contract is at least equally problematic. The financial and technical capacity of possible contract partners has to be ensured. On the other hand, qualification – or rather disqualification – offers opportunities for discrimination against bidders from other Member States. Therefore, it needed to be addressed in the Directives. Qualification is generally a delicate stage leading to judgments of the CJEU[63] many complaints and review proceedings at the national level.[64] Nothing motivates an economic operator more to initiate review proceedings than being disqualified since the reasons will also be connected to their reputation.

### *3.7 Award Criteria*

Traditionally the substantive Directives provided for the lowest price and the economically most advantageous tender as award criteria to determine the winner of competitive procurement procedures.[65] The criterion of the economically most advantageous tender allows taking account of a multitude of economic (sub-) criteria which are connected to the subject matter of the contract, such as quality, delivery date, after-sales service, etc. The 2014 reforms removed the lowest price award criterion from the Public Sector and Utilities Directives and never included it in the Concessions Directive. It is now only contained in the Defence Directive and will probably be removed from it in the next revision of the instrument. Award criteria other than lowest price are the final stage where discrimination on grounds of nationality can take place and discriminatory award criteria would already qualify as violations of the TFEU regimes on the free movement of goods and services, unless justified. Therefore, it was necessary to also address this issue in more detailed rules in the procurement Directives to ensure a harmonised approach to this issue across the 28

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60 See: Comba, "Effects of EU Law on Contract Management" in Trybus, Caranta, and Edelstam, *supra* note 1, 317.

61 On the rules of the Utilities Directive and Public Sector Directive see: Trepte, *supra* note 17, at 335-353 Bovis, *supra* note 57, at 224-233 and 399-416; Steinicke, "Qualification and Shortlisting" in Trybus, Caranta, and Edelstam, *supra* note 1, 105.

62 Especially Case C-532/06, *Lianakis* [2008] ECR I-251, at paragraphs 25 to 32.

63 See: Case C-76/81, *Transporoute et Travaux SA* v. *Minister of Public Works* [1982] ECR 417; Case C-389/92, *Ballast Nedam Group NV* v. *Belgian State* [1994] ECR I-1289; Case C-225/98, *Commission* v. *France* ('Nord-Pas-de-Calais') [2000] ECR I-7445; Joined Cases C-27-29/86, *CEI and Bellini* [1987] ECR 3347.

64 See the country chapters in Treumer and Lichère, *supra* note 59.

65 On the rules of the Utilities Directive and Public Sector Directive see: Trepte, *supra* note 17, at 462-480; Bovis, *supra* note 57, at 263-264 and 429-442; Franch and Grau, "Contract Award Criteria" in Trybus, Caranta, and Edelstam, *supra* note 1, 125.

Member States. Award criteria are also frequently the subject of court decisions of the CJEU[66] and in national review proceeding.[67]

## *3.8 Remedies system*

Specific Remedies Directives for the public sector (665/89/EEC) and utilities (92/13/EEC) require a national remedies system allowing aggrieved bidders to initiate review proceedings against procurement decisions. For defence and concessions such requirements are an integral part of the substantive Directives 2009/81/EC[68] and 2014/23/EU. The Member States have to establish review bodies with the additional possibility to appeal the decisions of these bodies in an independent court of law.[69] Member States may establish specific procurement review bodies or use existing courts - or both. They use ordinary, commercial, or administrative courts.[70] For example, in France procurement cases are brought in the administrative courts (up to the *Conseil d'État*), in England and Wales in the High Court, and in Germany in specialised procurement review chambers in the first instance and the ordinary high courts (*Oberlandesgerichte*) in the second instance. The Directives also prescribe certain minimum procedural requirements and the remedies these review bodies can award.[71] Before the conclusion or making of the contract, the review bodies can set aside any relevant procurement decision: discriminatory technical specifications, the rejection of a tender, a disqualification, or even the award of the contract. The national review systems have to provide for final decisions and interlocutory procedures. After the conclusion or making of the contract, the review body can traditionally only award damages, a frequently unsatisfactory remedy. Thus, many contracting entities 'rush to signature' to limit the available remedies. The CJEU has developed a doctrine which addresses this situation. In *Alcatel*[72] it ruled that a certain period of time has to elapse between the award decision and the conclusion or making of the contract, a period which the 2007 reform of the Remedies Directives[73] set at normally 10 days. This facilitated and thus increased review proceedings in many Member States. With the 2007 reform the EU legislator also introduced the new remedy of 'ineffectiveness' which allows review bodies to annul an already concluded public contract within strict time limits if grave violations of procurement law have occurred, including the violation of the 10 day *Alcatel* standstill period and the direct illegal award without any respect for procurement law. As a consequence of the Directives, the national review and remedies systems of the Member States share a number of common features. However, there are also considerable differences. France and Germany, for example, see over 1,000 review proceedings each, with about half of them successful in the first instance.[74] In England and Wales there are only very few cases each year, although there is

66 See: Case C-324/93, *Evans Medical* [1995] ECR I-563; Case C-513/99, *Concordia Bus Finland* [2002] ECR I-7213; C-324/03, *Contse* [2005] ECR I-9315.

67 See the country chapters in Treumer and Lichère, *supra* note 59.

68 See: Trybus, "The hidden Remedies Directive: review and remedies under the EU Defence and Security Remedies Directive" (2013) 22 *Public Procurement Law Review* 135-155

69 See: Wauters, "Review Bodies" in Trybus, Caranta, Edelstam, *supra* note 1, 341.

70 See: Trybus, Blomberg, Gorecki, *Public Procurement Review and Remedies Systems in the European Union* (SIGMA Paper 41, Paris, 2007) with overviews of the remedies systems of 23 the then 25 Member States and Romania and Bulgaria.

71 See: C. Bovis, "Remedies", in Trybus, Caranta, Edelstam, *supra* note 1, 363.

72 Case C-81/98, *Alcatel Austria AG and Others, Siemens AG Österreich, Sag-Schrack Anlagentechnik AG* v. *Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-1477.

73 This refers to amendments of the Remedies Directives through Directive 2007/66/EC [2007] OJ L335/31.

74 For France see: Lichère and Gabayet, "Enforcement of the Public Procurement Rules in France" in Treumer and Lichère, *supra* note 59, at 299-328 and Trybus, Blomberg, and Gorecki, *supra* note 71, at 62. For Germany see: Burgi, "EU Procurement Rules – A Report about the German Remedies System, in Treumer and Lichère, ibid., at 105-154 and

anecdotal evidence for many out of court settlements.[75] This can partly be explained by the high costs of proceedings in England and a generally less litigious society.

# 4 Case law

While the TFEU but especially the Directives discussed under the previous headings address the procurement process in great detail, there are still considerable gaps and uncertainties. Many of these are addressed by national procurement review bodies and courts. However, there is a clear need for a common interpretation of EU law in general and EU public procurement law in particular. This is provided by the CJEU in Luxembourg. Some judgements relevant for public procurement are the result of enforcement actions brought by the European Commission against Member States for violations of EU law under Article 258 TFEU.[76] However, most of the relevant judgements were issued as a result of the procedure under Article 267 TFEU. In this procedure a case arising in a national court of one of the Member States leads to a preliminary reference to the CJEU asking for an interpretation of EU law to decide the national case. The resulting case law can concern an interpretation of the rules of the Treaty applying to public and utilities procurement[77] or the interpretation of the procurement Directives. It would go beyond the aims of this paper to discuss this case law in detail. However, it is important to highlight the importance of the public procurement case law of the CJEU as a distinct and crucial source of EU public procurement law, especially when particular details and problems are not addressed in the legislation.

An important feature of EU procurement law is that important concepts and principles are often first established by the CJEU and only later codified by the EU legislator through amendments of the Directives. Prominent examples are the standstill period between the award and the conclusion or making of the contract in the *Alcatel* judgment[78] discussed under section 3.8 above and the regulation of modifications to already concluded contracts in the *Pressetext* judgment.[79] These are not examples of judicial overreach. The judgments of the CJEU arise out of real life cases detecting gaps and problems that the legislator, who has to draft provisions in the abstract, cannot always anticipate. Thus, in addition to the Treaty principles and procurement Directives, the procurement practitioner and layer needs to be aware of the case law of the CJEU on public procurement.

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Trybus, Blomberg, and Gorecki, ibid., at 67.

75 See: Trybus, "An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales" in Lichère and Treumer, *supra* note 59, 201-234 and Trybus, Blomberg, and Gorecki, ibid., at 107.

76 Examples include: Case C-263/85, *Commission* v. *Italy* [1991] ECR I-2457; Case C-45/87, *Commission* v. *Ireland* ('Dundalk'), *supra* note 58; Case C-3/88, *Commission* v. *Italy* ('Re Data Processing'), *supra* note 30; Case C-243/89, *Commission* v. *Denmark* ('Storebaelt'), *supra* note 17; C-360/89, *Commission* v. *Italy* [1992] ECR I-3401; Case C-272/91, *Commission* v. *Italy* ('Lottomatica') [1994] ECR I-1409; Case C-87/94, *Commission* v. *Belgium* ('Walloon Buses') [1996] ECR I-2043; Case C-359/93, *Commission* v. *The Netherlands* ('UNIX'), *supra* note 17.

77 Examples include: Case 76/81, *Transporoute et Travaux SA* v. *Ministère des travaux publics* [1982] ECR 417; Case 21/88, *Du Pont de Nemours Italiana* v. *Unita Sanitara Locale di Carara* [1990] ECR 889; Case C-113/89, *Rush Portuguesa* v. *Office national d'immigration*, *supra* note 32; *Unitron Scandinavia* [1999] ECR I-8291; Case C-324/98, *Telaustria* [2000] ECR I-10745; Case C-470/99, *Universale Bau AG* [2002] ECR I-11617; Case C-59/00, *Bent Mousten Vestergaard* v. *Spøttrup Boligselskab*, *supra* note 17; Case C-358/00, *Buchhändler Vereinigung*, [2002] ECR I-4685; Case C-231/03, *Coname*, [2005] ECR I-7287; Case C-234/03, *Contse and others*, [2005] ECR I-9315.

78 Case C-81/98, *Alcatel*, *supra* note 73, now codified in Article 2a of the Public Sector Remedies Directive 89/665/EEC as amended in 2007.

79 C-454/06, *Pressetext Nachrichtenagentur* v. *Austria* [2008] ECR I-4401 now codified in Article 72 Public Sector Directive 2014/24/EU.

# 5 The second life of secondary EU law: after transposition

The EU Member States had to transpose the Directives into their national laws by a deadline specified in each procurement Directive. If a timely transposition into national law occurred and resulted in national legislation which is fully compliant with the requirements of the Directive, the original Directive will only be used as a comparator and for interpretation in the national case law. The binding procurement law in that jurisdiction, however, will be the national law that transposed the Directive.

Member States who did not have a binding national public procurement law before the EU public procurement Directives, for example the United Kingdom[80] or Ireland,[81] implemented the Directives by introducing national legislation that followed them very closely, at times almost word for word. The traditional approach to implementation of the Directives in Denmark is interesting in this respect. Rather than drafting national regulations, the Danish legislation simply made the Directives directly applicable in Denmark. Consequently, Danish contracting entities used to follow the Directives directly.[82] However, Member States that did have a long tradition of public procurement legislation, such as for instance France with its *Code de marchés publics*[83] and Germany with its *Verdingungsordnungen*,[84] had to amend their pre-existing national laws to comply with the Directives. In these Member States, a difficult and onerous process had carefully transposed every single requirement of the Directives into the pre-exiting national laws. This legislative method of Directives which then have to be transposed in the Member States causes many problems because at times Member States did not implement the Directives fully or before the deadline.[85] However, the Directives ultimately led to 28 national Member State procurement laws which are more or less harmonised as far as contracts covered by the Directives are concerned.

For example, the Defence and Security Procurement Directive 2009/81/EC was transposed in Austria with the Federal Procurement Defence and Security Act 2011,[86] in Germany with the

[80] In the United Kingdom Directive, for example 2014/24/EU was transposed with the UK Public Contracts Regulations 2015 S.I. 2015 No. 102 which entered in force on 26 February 2015.

[81] In the Republic of Ireland, for example Directive 2014/24/EU was transposed with the European Union (Award of Public Authority Contracts) Regulations 2016, S.I. No. 284/2016 which entered into force on 5 May 2016.

[82] This is described by Treumer, "Green Public Procurement and Socially Responsible Public Procurement: An analysis of Danish Regulation and Practice" in Caranta and Trybus (eds.), *The Law of Green and Social Procurement in Europe* (Djøf Publishing: Copenhagen, 2010), 53 at 55.

[83] This traditional approach of a relatively comprehensive CMP has changed with the recent transpositions. For example, Directive 2014/24/EU was transposed by the Ordonnance n° 2015-899 du 23 juillet 2015 consolidée par le décret n°2016-360 du 25 mars 2016 (Journal officiel du 27 mars 2016).

[84] The German approach to the transposition of the Directives is rather complex. For example, Directive 2014/24/EU was transposed in §§[sections]97–184 Gesetz gegen Wettbewerbsbeschränkungen (GWB) [English: Act against Restrictions of Competition] BGBl. Teil I Nr. 8 vom 23.02.2016, S. 203 bis 232, the Vergabeverordnung (VgV) [English: Public Tender Regulation], see Verordung zur Modernisierung des Vergaberechts (VergRModVO) vom 12.04.2016 BGBl. Teil I Nr. 16 S. 624 ff., and the Verdingungsordung für Bauleistungen-EU (VOB/A-EU) [English: Contracting Rules for the Award of Public Works] BAnz AT 01.07.2016 B4 and BAnz AT 19.01.2016 B3.

[85] See with respect to the old Utilities Procurement Directive 2004/17/EC and the old Public Sector Procurement Directive: Trybus, "The morning after the deadline: the state of implementation of the new EC Public Procurement Directives in the Member States on February 1, 2006" (2006) 15 *Public Procurement Law Review* NA 82-90; Trybus and Medina, "La transposición de las Directivas comunitarias sobre contratación pública en los Estados miembros", in Rodríguez-Arana Muñoz, Sanz Rubiales, and Sendín García, *La Contración Administrativa en España e Iberoamérica* (Cameron May y La Junta de Castilla y León: London, 2008) 577-599 and Trybus and Medina, "La transposición de las Directivas comunitarias sobre contratación pública en los Estados miembros" 298/2009 *Noticias de la Unión Europea* 83-94.

[86] Bundesgesetz über die Vergabe von Aufträgen im Verteidigungs- und Sicherheitsbereich (Bundesvergabegesetz Verteidigung und Sicherheit 2012 – BVergGVS 2012, BGBl. I Nr. 10/2012.

Competition Act as amended in December 2011[87] and the Defence and Security Procurement Regulation,[88] in the Republic of Ireland with the European Union (Award of The national Contracts Relating to Defence and Security) Regulations 2012,[89] and in the United Kingdom with the Defence and Security Contracts Regulations 2011..

Therefore, the Directives, which before the deadline for their transposition has passed are not legally binding, have a 'second life' as 28 transposed national procurement laws. Such a Directive can only be enforced by individuals in national review bodies and courts after the deadline of their transposition has passed and the Member State in question has not transposed that Directive[90] through the principle of direct effect.[91] A Member State 'running late' with transposition will sometimes clarify this effect in a circular or decree,[92] although such a communication is not really necessary as direct effect is a technique of EU law which arises irrespective of whether the Member State wills it or not.

# 6 The second life of primary EU Law and EU case law: below the threshold.

The regimes of the TFEU on the free movement of goods and services discussed in section 2 above do not only serve as the foundation of the secondary public procurement Directives discussed in section 3 but directly apply to public contracts in two ways.

First, the TFEU applies on a supplementary basis to public and utilities procurement to which the Directives (also) apply.[93] Therefore public entities and utilities within the scope of the Directives have to follow the provisions of the TFEU in addition to having to follow the provisions of the Directives. Since the Directives aim at providing detailed requirements on how to conduct procurement procedures according to the Internal Market requirements of the TFEU, in theory there should be no discrepancy. However, since the Directives may leave gaps and require interpretation, there remains an at times important function of the TFEU even with respect to contracts to which the Directives fully apply. Second, the TFEU is applicable to the considerable procurement activities falling outside the scope of the Directives. This concerns contracts to which the Directives do not apply as their contract values are below the thresholds for application of the Directives and to contracts subject to the numerous exceptions from the scope of the Directives discussed in section 3.1 above.

According to the Commission, the latter category and the low value contracts account "for the vast majority of public contracts in the EU – over 90% in some Member States." As the provisions of the TFEU therefore apply to varying degrees to most public and utilities procurement activities, it could even be argued that the substance of the procurement rules directly emanating

87 Gesetz gegen Wettbewerbsbeschränkungen, of 15 July 2005, BGBl. I S. 2114; 2009 I S. 3850, as last amended by Article 1 and Article 4 (2) of the Law of 5 December 2012, BGBl. I S. 2403.

88 Vergabeverordung für die Bereiche Verteidigung und Sicherheit – VSVgV, BGBl. I S.1509/2012.

89 European Union (Award of Contracts Relating to Defence and Security) Regulations 2012, SI No. 62 of 2012.

90 Case 148/78, *Pubblico Ministero v Ratti* [1979] ECR 1629, [1980] 1 CMLR 96.

91 Case 26/62, *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMLR 105.

92 In countries such as Germany or Belgium were transposition of the now old Public Sector Directive 2004/18/EC was late, this approach is adopted as an interim solution pending final transposition of the respective directive into national law.

93 Braun, "A Matter of Principles(s) – The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives" (2000) 9 *Public Procurement Law Review* 39-48, at 41 citing Prieß, *Das Öffentliche Auftragswesen in der Europäischen Union* (Heyermanns: Heidelberg: 1st ed. 1994), at 64.

from the TFEU is more important than those of the detailed Directives.

The relevant requirements for all public procurement contracts directly emanating from the TFEU have been formulated by the CJEU,[94] clarified by the European Commission in an Interpretative Communication on contracts falling outside the scope of the Directives of 2006[95] and an Interpretative Communication on concessions of 2000,[96] and discussed in the academic literature.[97] The relevant principles according to these sources are non-discrimination and equal treatment, transparency, proportionality, mutual recognition, and equivalence and effectiveness of procurement review proceedings. It would go beyond the aims of this chapter to discuss these requirements in detail.[98] The Member States have reacted differently to these requirements directly emanating from the TFEU. Germany, for example, after even challenging the relevant Commission Communication in the Court of Justice, only very recently introduced an instrument addressing requirements for contracts outside the scope of the Directives..

# 7 Conclusions

EU law and public procurement have a fundamental Internal Market dimension through the regimes on the free movement of goods and services. Therefore, they started already 60 years ago, with the (EEC) Treaty of Rome, the predecessor of the current TFEU. The free movement of goods and services regimes described in section 2 of this paper were not sufficient to open the public procurement markets of the Member States. Neither was the first set of rather basic Directives introduced in the 1970s, which had little effect. Is was only the second generation of procurement Directives in the 1990s that had a significant impact on procurement law in the Member States, an effect enhanced by the reforms of 2004 and 2014, the 2007 reform of the review system, and the introduction of a Directive for defence procurement in 2009. The latest reforms appear to put a stronger emphasis on public procurement as an instrument to promote environmental objectives, social policies, Small and Medium Sized Enterprises, and innovation. However, whatever measure to further such secondary objectives was introduced, the opening of the procurement markets of the Member States remains at the principal objective of the Treaty, Directives, and case law dimensions of EU public procurement law. This Internal Market focus is not surprising as the legal bases for the

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94 Case C-76/81, *Transporoute et Travaux SA* v. *Ministère des travaux publics*, *supra* note 79; Case C-263/85, *Commission* v. *Italy*, *supra* note 79; Case C-45/87, *Commission* v. *Ireland* ('Dundalk'), *supra* note 58; Case C-3/88, *Commission* v. *Italy* ('Re Data Processing'), *supra* note 30; Case C-21/88, *Du Pont de Nemours Italiana* v. *Unita Sanitara Locale di Carara*, *supra* note 79; Case C-113/89, *Rush Portuguesa* v. *Office national d'immigration*, *supra* note 32; Case C-243/89, *Commission* v. *Denmark* ('Storebaelt'), *supra* note 17; C-360/89, *Commission* v. *Italy* [1992] ECR I-3401; Case C-272/91, *Commission* v. *Italy* ('Lottomatica') [1994] ECR I-1409; Case C-87/94, *Commission* v. *Belgium* ('Walloon Buses') [1994] ECR I-2043; Case C-359/93, *Commission* v. *The Netherlands* ('UNIX'), *supra* note 17; Case C-275/98, *Unitron Scandinavia*, *supra* note 17; Case C-324/98, *Telaustria*, *supra* note 79, Case C-470/99, *Universale Bau AG*, *supra* note 79; Case C-59/00, *Bent Mousten Vestergaard* v. *Spøttrup Boligselskab*, *supra* note 17; Case C-358/00, *Buchhändler Vereinigung*, *supra* note 79; Case C-231/03, *Coname*, *supra* note 79; Case C-234/03, *Contse and others*, *supra* note 79; Case C-458/03, *Parking Brixen*, [2004] ECR I-8585.

95 *Commission Interpretative Communication on the Community law applicable to contracts not or not fully subject to the provisions of the Public Procurement Directives*, 1 August 2006, OJ [2006] C-179/02.

96 *Commission Interpretative Communication of Concessions under Community Law*, 29 April 2000, OJ [2000] C-121/2, hereinafter '2000 Concessions Communication'.

97 For example: Dragos and Caranta (eds.), *Outside the EU Procurement Directives – Inside the Treaty?* (Djøf: Copenhagen, 2012); Braun, *supra* note 96; Pijnacker Hordijk and Meulenbelt, "A Bridge Too Far: Why the European Commission's Attempt to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be dismissed" (2005) 14 *Public Procurement Law Review* 123-130; Arrowsmith, supra note 5, at 264-276.

98 The author did so: Trybus, "Public procurement in European Union internal market law", *supra* note 1.

Directives only authorise the EU legislator to introduce public procurement legislation on that basis. However, it could be argued that the most significant impact of EU public procurement law was not on an economic operator venturing out and bidding for contracts in another Member State but on economic operators bidding for contracts in their own Member States. This is because while cross-border procurement is only between 2 and 4 per cent of the overall procurement market, the TFEU, Directives and CJEU case law had an impact on all contracts and over 95 per cent of these contracts are awarded to domestic providers. However, the cross-border percentage might well increase over time and it can only do that when all contracts are awarded on the basis of the common regime.

Distinctive features of EU procurement law beyond the fundamental objective to further cross-border procurement are that, in contrast to other international regimes or US federal procurement law, it affects all levels of government down to the smallest village and that it includes utilities. The still limited importance of most secondary objectives is another distinctive feature.

While in the early 1990s EU public procurement law was a rather unknown subject, with only very few obscure court cases, few specialist lawyers, and little academic interest, it is today an important subject area with – EU wide – hundreds of review bodies reviewing thousands of cases every year, boutique law firms dealing with procurement as well as procurement department in most major law firms, academic courses, journals and textbooks, and a lot of related consultancy and for example software industries.

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