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Questionnaire general topic 3
Public procurement law: limitations, opportunities and paradoxes

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All three questionnaires have originally been elaborated in English, and subsequently translated into French and German. Therefore, in case of any discrepancies, it is the English versions which best represent the thinking of the General Rapporteurs.

Introduction

This questionnaire is intended to provide the framework for national and institutional reports on the present state, future and systematic relevance of Public Procurement Law. Public procurement is taken here in the rather broad meaning of public contract, including concessions, to cover all aspects of contractual activities of national and EU public institutions. Rapporteurs are asked to answer the questions from the perspective of how EU rules/judgments are applied in their jurisdictions.

The theme is obviously relevant considering the outsourcing trend having taken place in Europe during the past decades. This evolution has many implications for EU law. To begin with, contracting out involves interactions with market operators. The Four Freedoms have a role to play. Competition law is relevant too, including reference to the rules on the provision of services of general economic interest (SGEIs).

Public procurement law is riddled with challenging technicalities which cannot all be discussed in the reports. The questionnaire therefore focuses on those aspects believed to be more problematic for a systematic approach to public procurement law and to internal market law generally. Inconsistencies – or, at least unsolved questions – are still to be found in the present regime of EU public procurement law. Dissonances between this regime and other areas of EU law may lead to legal paradoxes. Those aspects are the ones calling louder for investigation and development in the law. At the same time, it is believed that the level of refinement of public procurement law presents con-

siderable opportunities to contribute in the development of the wider European administrative law which took its first tentative steps only some years ago.[1]

The context

Question 1

Which main systemic challenges were/are Member States confronted with when adopting EU style public procurement rules?

- In theory, different approaches are possible to public procurement; 1) trust the public servants and leave them wide discretion on how to choose contractors (minimal regulation: this used to be the case in the UK); 2) do not trust public servants too much, after all, this is the taxpayers' money (or, and there are ideological implications in the alternative, this is the public budget); public accountancy and auditing rules do therefore apply, but they are not enforceable in courts on the behalf of competitors (internal rules: this used to be the case in Germany); 3) again do not trust public servants too much, however this is administrative law after all and the Rule of law must prevail; conferring on competitors' enforceable rights is a means to this end (this is the French approach).

- Consistently with its van Gend en Loos DNA, EU law has inevitably opted for the third option as it was made clear when the first remedies directive 89/665/EC was enacted in 1989. This is expected to have led to adaptation challenges which were more or less intense in different jurisdictions.

- Rapporteurs are asked to give some information on both the challenges faced, the ways they were overcome, and possibly on how the original legal (including theoretical) framework is still creating frictions in the full implementation of EU law. Additionally, the rapporteurs are asked how public procurement law fits in the overall system of their administrative law.

The boundaries of EU public procurement law

This set of questions endeavours to map the province of public contracts, distinguishing them from legislative measures, administrative decisions, and other measures, while at the same time finding out which public contracts fall outside the scope of application of EU public procurement law.

Question 2

How are public contracts defined, and what are the criteria that set them apart from legislative measures, administrative decisions, or other arrangements which are not considered public contracts?

[1] Public contracts are one of the four areas of concern for European administrative law; please refer to http://www.reneual.eu/.

- The distinction between contracts and other measures, such as legislative or regulatory acts and administrative decisions, is obviously quite topical in defining the scope of application of EU public procurement law.

- In Commission/Ireland (C-532/03, Ambulances) the Court of Justice indicated that the provision of services to the general public by a public authority in the exercise of its own powers derived directly from statute and applying its own funds was not regulated by the EU public procurement directives, although a contribution is paid for that purpose from another authority, covering part of the costs of those services. Although in a different context (the in house exception), in Asemfo (C-295/05) the Court considered both the fact that the building service provider was required by law to carry out the orders given to it by the public authorities, and the fact that the service provider was not free to set the tariff for its services as relevant for excluding the application of EU public procurement law.

- A number of aspects may potentially come into play here, like the fact that all the entities involved in providing the service were entities of public law (please link with the next question if necessary), or the fact that costs only were covered, and no profit was made by the service provider (on this contrast Commission/Italy C-119/06; Ordine degli Architetti delle Province di Milano e Lodi C-399/98 also addressed the relevance of the public law aspect in an agreement between a contracting authority and a private party).

- Situations like the one relevant in Helmut Müller **(**C-451/08) (urban planning) deserve consideration too. Helmut Müller needs to be distinguished from the Auroux case (C-220/05), a possible reason being that Auroux did not only involve planning decisions and building licences, but also the building of some public works to the benefit of the licencing authority (and the same can be said in Ordine degli Architetti delle Province di Milano e Lodi (C-399/98)).

- Licences to operate games of chance present classification problems too. They were qualified as service concession in an infringement procedure against Italy (C-260/04), but in the more recent Sporting Exchange (C-203/08) the Court of Justice held otherwise.

- Finally, in many jurisdictions, ‘concession’ is a unilateral administrative decision, at times similar to a ‘licence’. Under EU Law, works and services concessions are contracts. A number of legal acts named ‘concessions’ under national law may be considered not to be public contracts under national and EU public contracts law, such as for instance concessions for the exploitation of natural resources.

Question 3

How are in house arrangements and instances of public-public partnerships or other public-public cooperation forms regulated?

- According to a line of cases starting with Teckal (C-107/98) expanding in Coditel Brabant (C-324/06), Sea (C-573/07), and Commission v Germany (C-480/06), ‘genuine’ forms of in house and public-public cooperation are excluded under given conditions (please see question 4) from the application of EU public procurement rules and principles. The first aspect to be considered, linked to the previous question, is how are these forms regulated (e.g., by a contract under private law, a public law contract, administrative decisions, laws or bylaws)?

- Additional aspects to be considered are whether public-public partnerships are limiting the amount of business contended on the market and under competitive market rules in a significant way?, whether and if yes under which conditions the partnerships may also provide services on commercial basis on the market and in competition with economic operators?, and whether and how the conditions for public-public partnership laid down in the case law (now including Ordine degli Ingegneri della Provincia di Lecce and Others C-159/11) are understood and complied with?

Question 4

Which (if any) consensual arrangement between the public and private sectors is considered to fall outside the scope of application of EU rules?

- The Stadt Halle (C-26/03) judgment made clear that any involvement of the private sector rules out the in house exception considered in the previous question and leads to the application of EU rules. However, Articles 12 ff of Directive 2004/18/EC list a number of service contracts which are excluded from the scope of application of the same directive. Additionally, even contracts not listed in those provisions may be excluded, depending on the interpretation given to the definition of works, supply, and services contracts given in Article 1 of the same Directive. For instance, in Helmut Müller **(**C-451/08) the Court held that the sale to an undertaking, by a public authority, of undeveloped land or land which has already been built upon does not constitute a public works contract; according to Loutraki (C-145/08 and C-149/08), the same is true with reference to privatisation agreements.

- Licences for the organisation of games of chances as those relevant in Sporting Exchange (C-203/08) could also be considered under this point if their consensual nature is accepted.

- On the contrary, EU rules – if not yet EU directives provisions – do apply to services concessions, which are to be regulated in the new directive on the award of concession contracts.

Question 5

What kind of mixed arrangements are to be found in your jurisdiction and how are they regulated?

- In Loutraki (C-145/08 and C-149/08) and in Mehiläinen Oy (C-215/09) the Court of Justice was confronted with mixed (part procurement, part non-procurement) arrangements. In considering whether public procurement rules were applicable, the Court first considered whether the procurement component is severable from the rest of the agreement; if so, public procurement rules will apply to that component. If not, the prevalent object of the arrangement is the one determining which rules are applicable. On this basis, is the case of mixed agreement relevant in your jurisdiction, and if so, under which specific circumstances? Has the question of severability been addressed, and if so, how?

The general principles of EU law: public procurement law and beyond

The Public procurement directives obviously apply to public procurement contracts. However, as already recalled, a number of contracts are expressly or impliedly excluded from the scope of application of the directives. Moreover, those directives do not apply to contracts below given thresholds and (but legislation is pending on this) to service concessions, and apply only partly to a number of service procurements (priority services).

Since Telaustria (C-324/98), however, the general principles of non-discrimination/equal treatment and transparency are supposed to be applicable to the award of contracts not covered, or not fully covered by the EU procurement directives. Recent cases seem to indicate that the same principles are also applicable to non-contractual arrangements, therefore possibly constituting the foundations for the overall EU administrative law.

Question 6

Which rules or principles are applicable to the award of contracts (or consensual arrangements) excluded, not covered, or not fully covered by the EU procurement directives?

- Do the general principles of non-discrimination/equal treatment and transparency apply for the award of contracts expressly excluded (e.g. contracts listed in Article 16 of Directive 2004/18/EC)? If not what are the principles or rules applied to those contracts? More generally, how have the above mentioned principles in practice been translated in specific operative rules which also apply to below the threshold contracts, non-priority services and, for the moment being, service concessions?

- The same questions are also referred to Helmut Müller **(**C-451/08) like situations (contracts excluded from the area of application of the directives because they fall outside the definition of public procurement contracts given for instance by Article 1 of Directive 2004/18/EC).

- Utilities and defence procurements too are excluded from the coverage of Directive 2004/18/EC; however, they are under specific EU rules, and therefore do not necessarily concern us here (but the somewhat lighter regime provided for instance under Directive 2004/17/EC could well be a source of inspiration for the concretisation of the above recalled principles).

Question 7

Do the principles of non-discrimination/equal treatment and transparency (or rules derived therefrom) also apply to the selection of the beneficiary of unilateral administrative measures?

- The recent cases referring to licences to operate games of chance Sporting Exchange (C-203/08) and Garkalns (C-470/11), while ruling out the nature of service concessions of those arrangements, have affirmed the applicability of the principles of non-discrimination/equal treatment and transparency to those arrangements.

- The same principles (or rules derived from them) may be relevant for the attribution of other benefits (e.g. concessions for the exploitation of natural resources or public domain land, provided these concessions are not considered to be contractual in nature).

- It is to be noted that Articles 9 ff of Directive 2006/123/EC on services in the internal market lay down authorisation procedures which are supposed to comply with those principle. Again, in many jurisdictions authorisations will be classed as unilateral administrative decisions.

- This question, in connection with question 2, aims at finding the general principle applicable potentially to all instances where the State or any other public law entity disburses money or grant benefits or privileges (including the right to carry out an economic activity), on a selective basis, choosing among a number of market participants potentially exceeding the resources being distributed.

- To a certain extent this situation is similar to the one where exclusive rights are granted to a specific economic operator in connection with the provision of SGEIs which is discussed below (see question 11).

Public procurements and general EU law, including competition and State aids law

EU procurement law is based on the Treaty provisions on the Four Freedom. A basic question is whether contracting authorities deciding what to buy are considered as private market participants or rather as taking public law measures potentially restricting the competition?

Provided that in principle public procurement rules foster competition among economic operators, it is to be considered whether some specific rules might instead be abused to stifle competition. Moreover, rules on State aids allow for derogations to the prohibitions they edict in the case of SGEIs, and it is to be assessed whether and to what extent the doctrines devised with reference to SGEIs are in line with those concerning public procurements.

Question 8

Can decisions taken by contracting authorities be treated as measures imposing restrictions on the internal market? If so, shall they comply with the non-discrimination and proportionality principles and be additionally justified by imperative requirements in the general interest?

- Choices by contracting authorities as to what to buy should reflect their preferences (provided they do not entail discriminations on the basis of nationality in line with the principles recalled above under questions 6 and 7).

- In a few cases, the most recent being Contse (C-234/03), the Court of Justice has however couched its reasoning in pure internal market terms (including reference to imperative requirements in the general interest), and this even if the relevant restrictions could have easily been considered in breach of the non-discrimination principle according to the well-established public procurement case law.

- The question intends to elicit information on how the contracting authorities in different jurisdictions see themselves and the room of choice allowed to them concerning what to buy (this also being related to the issues discussed below under questions 12 and 13).

Question 9

Which if any public procurement rules may lend themselves to abuse thus potentially limiting competition?

- In principle collusion and bid rigging should be taken care of by the Treaty rules on competition; however, transparency itself, the basis of many public procurement rules, may end making it easier for economic operators to collude.

- Other rules and practices, concerning for instance long term concessions, framework agreements, and central purchasing bodies may be abused by either shutting down markets for a certain time and/or giving a very relevant market power to contracting authorities. Unduly demanding qualification requirements may also restrict competition to the detriment of SMEs. The role of the contracting authority as economic operators may also lead to distortions of the competition (again Ordine degli Ingegneri della Provincia di Lecce and Others C-159/11).

Question 10

Can SGEIs be outsourced to market participants without following public procurement-like procedures, including through direct award? Do EU State aid rules apply if the latter is the case?

- In the well-known Altmark case (C-280/00) the Court of Justice held that in principle and under given conditions exclusive rights for the provision of SGEIs may be granted through non-competitive procedures. The 2012 Communication of the Commission on the application of the EU State aids rules to compensation granted for the provision of SGEI is in line with the Altmark judgement (2012/C 8/02, see points 63 ff). The Communication is without prejudice to the application of EU public procurement law but does not by itself advance coherence between public procurement law and State aids law. The Communication 'EU Framework for State aid in the form of public service compensation' refers instead to the general principles of EU public procurement law in a much more directive way (2012/C 8/03, point 19). The proposed directive on concessions might help bring in line public procurement and State aid law and developments under this respect will have to be considered.

- Specific rules applicable to this or that SGEI (e.g. Regulation 2007/1370/EC on public passenger transport services by rail and by road) might also be relevant.

Strategic use of public procurement

The Commission Green Paper 'on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market' (COM(2011) 15 final) has introduced a novel emphasis on the 'complementary objectives' of public procurement regulation, in a way putting

sustainability on the same footing as other objectives. A specific part of the Green paper is dedicated to what is referred to as 'strategic use of public procurement'. The overall idea is that these complementary objectives may reinforce one another, for instance 'by moving focus from lowest initial price to lowest life-cycle cost'.

This set of questions dwelves on the most relevant aspects of the strategice use of public procurement, including how public procurement may contribute to meet the development goals of Agenda 2020.

Question 11

Are public procurements used as a tool to achieve environmental and social policy goals and if so what are the challenges?

- Traditionally, the basic idea in public procurement legislation has been to achieve better value for money; however, according to the 2011 Green Paper, this must be coordinated with environmental and social concerns. The economic crisis may sharpen the focus on costs or, given resource scarcity, encourage contracting authorities to strike twice with one stone. If the latter is the case, how is this achieved in different jurisdictions? Life-cycle costing methods may help in this endeavour, but how far are they developed? On this background, the question is whether strategic concerns could be abused by contracting authorities to favour local product/producers (and linked with question 9)?

- Overall, Member States, or regions within Member States, may be seen to be either embracing strategic procurement or being lukewarm at best. The reasons for these attitudes should be briefly elaborated upon.

- Additionally, a number of secondary law instruments (e.g. Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, and Regulation 2008/106/EC on a Community energy-efficiency labelling programme for office equipment) actually impose instances of what to buy, and this opens to the more traditional questions of whether these measures have been correctly implemented into national legislation and whether the contracting authorities comply with them?

Question 12

Are public procurements used as a tool to foster innovation?

- Innovation, already a concern when the 2004 directives were being drafted, is now more central than ever (cf Agenda 2020). The EU framework, including its suspicion of dialogue (see below question 14), is however often considered as a straightjacket hindering innovation.

- The 2004 directives allowed on performance based technical specifications, and a first aspect could be how far are contracting authorities as to having recourse to this kind of specifications and with which problems and results? The competitive dialogue too was expected to help innovation. The question is how often and for which kinds of projects has the competitive dialogue been used in different jurisdictions?

- Moreover, Article 16(f) of Directive 2004/18/EC excludes from the scope of application of the directive contracts having research as their sole reason (with potential State aids problems). The proposal for a new directive rather aims at introducing a new and more far ranging procedure to foster innovation. The question is how this should be designed to be both effective and in line with other Treaty provisions, such as those on State aids?

- The topic also links with the rules protecting intellectual property rights.

Remedies

Question 13

To what extent (if any) and how has Directive 2007/66/EC strengthened the remedies against breaches of EU public procurement rules?

- In 2007 the Remedies Directive was strengthened with quite vigorous remedies unheard of before in many Member States. The question is how effective is the remedy system in practice? More specifically, is interim relief granted before the conclusion of the contract? In which cases have contracts been declared ineffective? Is the use of voluntary ex ante transparency notices widespread? Are damages frequently awarded in procurement cases and which heads of damages are recoverable? The question of the remedies available in case of contracts not covered by the directives should also be considered.

- Moreover, and from a systematic point of view, how have the new remedies impacted the domestic system? More specifically, is there a preference for remedies which affect the award decision and possibly the contract (interim relief, ineffectiveness) or are rather damages the preferred remedy (this in Germany translates in the difference between primary and secondary legal protection – Rechtsschutz)?

Conclusion and reform

The legislative work in progress has already been referred to in a number of questions, and especially so in those concerning the strategic use of public procurement. The final question addresses different aspects of the reform process which are expected to impact how public contracts are regulated in the EU Member States with a specific focus on the modernisation of EU law.

Question 14

How are the new directives to contribute to the modernisation of EU public contracts law?

- Different aspects are possibly relevant here and rapporteurs are asked to refer to any additional one which might be particularly relevant to their jurisdiction.

- Among those aspects which surely deserve consideration, the first one is obviously the new directive on concession contracts, providing a new legislative framework for all concession contracts, including service concessions. The definition of concession still focuses on the right to

exploit the works or services and the new directive provides a definition of the risk of exploitation. The question is how this reflects the way concessions are understood in different jurisdictions (see also question 2) and how the requirement concerning the transfer of the risk of exploitation has been applied in different member States? A further problem is if and if so to what extent the new regime is applicable to institutional public-private partnerships.

- At policy level, the economic crisis might have either provided an additional impetus to public-private partnerships or dried up private capital; the questions therefore are whether private funding and long-term contracts have been used strategically by the Member States? At the same time, the preference for long-term contracts may end up in restricting competition and effectively shutting up some markets over a long period (please refer to question 9).

- Another facet of the modernisation attempt focuses on the award procedures. According to some critics, the procedures laid down in the 2004 directives are too cumbersome, leading to high costs and inefficiency.

- The competitive dialogue introduced in 2004 was already expected to allow a measure of procedural flexibility, albeit under restrictive if somewhat vague conditions ('complex contracts') (see also question 12). The question is whether the new rules on the competitive dialogue are liable or not to widen the recourse to this procedure?

- The more general question is what is the place for negotiations in EU public procurement rules? Contrary to the US approach and fearing very much nationality-based discrimination, EU public procurement law is generally hostile to negotiation and dialogue between contracting authorities and tenderers. This could be about to change if the new Public sector directive introduces the kind of flexibility found in the utilities sector, thus allowing on a general basis contracting authorities to have recourse to negotiated procedures with prior advertisement. The question about the minimal procedural safeguards is, however, relevant here, and links with the discussion on the general principles of non-discrimination and transparency (above, question 6).

- Electronic procedures and more generally the use of technology are also relevant. The doubt is to what extent contracting authorities and the market in different jurisdictions are ready for a paperless world?
- Finally, and more generally, in line with the systematic ambition of the present questionnaire, do the new rules (and the new definitions in the directives) portend a systemic change in the EU public procurement law (and if so in which direction), liable to impact national administrative law? Or must they be simply read as maintenance works on a building whose main structures remain unaltered?