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Public Procurement in the Internal Market: Free Movement of Goods and Freedom to Provide Services

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Public Procurement in the Internal Market: Free Movement of Goods and Freedom to Provide Services

Visiola Pula*

Abstract

Public Procurement (PP) has proven to be a powerful driver of growth, both for the global economy and the EU. It occupies a significant percentage of the public demand in goods and services. In addition to its commercial importance, PP has recently come into use as a policy instrument to promote social and sustainable considerations in public spending. Commercial interests are directly related to the establishment of the European Single Market, while social and environmental factors reflect what in practice has been developed as a "Socially Responsible Public Procurement".

This thesis compares the regulatory framework applied to the free movement of goods and services and the PP regime. Differing PP practice has historically been considered an important non-tariff barrier to the free movement of goods and the freedom to provide services within the EU's Single Market. Therefore, the question of how the Court of Justice of the European Union (CJEU) has dealt with cross-border PP is analysed by consulting settled case law.

Keywords: public procurement, free movement of goods, freedom to provide services, Court of Justice of the European Union, distinctly applicable measures, indistinctly applicable measures.

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LIST OF ABBREVIATIONS

TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
EU	European Union
PP	Public Procurement
EC	European Community

INTRODUCTION

"The size and nature of government markets means that public procurement has always had a great economic and political importance".[1] In the light of the EU, apart from a profounder economic impact directly relevant to the single market, the significance of PP, additionally, encompasses a social and legal depth as a policy instrument in the hands of the EU and the Member States. PP in the EU amounts approximately to 16% of the GDP representing a pivotal mechanism in triggering growth and competitiveness among the Members States.

Barriers to cross border trade, have constantly been a priority for EU institutions. PP has been identified as a considerable non-tariff barrier and a hindering factor for the functioning of a genuinely competitive single market. "Economic justification for its regulation are based on an assumption that by introducing competitiveness into the relevant markets of the Member States, their liberalization and integration will follow".[2] By ensuring a harmonized adjustment of the sector, the EU aimed initially to increase trade by opening the national markets of the Member States to cross border supply of goods and services by other Members States, subsequently assure value for money, efficient use of resources and purchasing power. The EU objective to establish a Single Market is being carried on further by regulating the award of public contracts.

The aim of this contribution is to introduce a comparative approach of the regulatory framework applied in the context of the free movement of goods and services and the PP regime. The objective of Chapter 1 is to give the reader a first hand knowledge about PP, what is PP and

[1] *Arrowsmith/Linarelli/Vallance*, Regulating Public Procurement: National and International Perspectives, p.xxxix.
[2] *Bovis*, EU Public Procurement Law, p.3.

why does it matter, the EU legal instruments governing the procurement sector and PP principles developed via the assessment of the CJEU, so as to make him/her familiar with the key concepts in the field. Chapter 2 will elaborate upon PP from the perspective of the free movement of goods, at first giving a brief overview of the traditional understanding of the freedom, following than its concrete application in PP by making use of the jurisprudence of the CJEU. The same structure will be used also for the 3rd Chapter tackling the freedom to provide services. The last section will draw the conclusions of the carried work.

CHAPTER 1

Introduction to PP

1. The importance of PP

"Procurement refers to a situation where a public body obtains the goods and services that it needs by making a contract with another entity".[3]

As a process, "PP implies three simple questions: what? who? and how? It is the second phase, from the publication of the contract notice until the award of the contract, the public procurement *stricto 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 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, arguably core regime of the EU".[4]

Worldwide, PP affects a substantial share of world trade flow and amounts to € 1000 billion per year.[5] "The European Commission has been always keen to stress the significance of public procurement as an essential component of the Single Market".[6] In the EU, the public purchase of goods and services has been estimated to account for 16%

[3] *Arrowsmith/Linarelli/Vallance* (fn.1), p.6.
[4] *Trybus/Caranta/Edelstam*, European Union Law of Public Contracts: Public Procurement and Beyond, p.25.
[5] EU Commission, Trade - Public Procurement, 31.10.2014, available at: http://ec.europa.eu/trade/policy/accessing-markets/public-procurement/, (10.05.2015).
[6] *Bovis*, (fn.2), p.3.

of the GDP,[7] influencing on a large scale national economies of the Member States and the EU as a whole.

"In recent years the economic importance of public procurement has even been growing as many European states have followed a policy of liberalisation and privatisation of public services, so that the state no longer provides such services itself directly, but purchases them from private companies and other organizations".[8]

PP contracts are considered enormous cross border business opportunities, fostering development, growth, a sustainable market economy and competitiveness. They are deemed to open markets to competition, eliminate distortion of free trade which can be detrimental to economic welfare and recently to support social and environmental objectives.

PP procedure must guarantee the optimal conditions for the supply of goods and services, in terms of both price and quality, so as to benefit taxpayers and the public in general. Due to the critical importance for the public welfare, the government must apply high and fair professional standards when it spends the money on behalf of taxpayers. "Prudent commercial contracting involves thorough planning and visionary negotiations".[9] It must ensure integrity and transparency, from the advertisement notice to the final award of the contract, and stem from the endorsement of national suppliers, or the promotion of particular private entities. In case of the EU, public spending widens in scope since the financial resources used represent the contribution of the European citizens, at the same time those of the Member States' governments. "The EU and the Member States, thus

[7] EU Commission, (fn.5).
[8] *Schulten/Alsos/Burgess/Pedersen*, Pay and other Social Clauses in European Public Procurement, 2012, p.4.
[9] *Krueger*, Journal of Public Procurement, Vol.4, 2004, p.397.

have shared regulatory powers in relation to public procurement law".[10]

The EU PP Directives regulate the publication and organization of tender procedures applying sound management of public purchase. The need to further regulate and harmonize PP on an Union level is directly concerned with the weight of PP in achieving the completion of the Single Market, where the free movements of goods, services and the freedom of establishment are guaranteed by opening the national markets to bidders from other Member States. Free movement of goods and services are the most relevant ones when dealing with PP, thus discriminatory treatment, lack of publicity, or the use of corruption and non-competitive methods have been considered as direct discrimination or measures having equivalent effect to quantitative restrictions by the CJEU. EU PP rules exist to bring some common discipline to the regulation of this critical government function. In particular, EU Directives seek to ensure that undertakings from across the single market have a fair and equal opportunity to compete for public contracts. "As far as possible, they also seek to remove legal and administrative barriers to participation in cross border tenders, to ensure equal treatment and to eliminate discriminatory purchasing by ensuring transparency".[11]

2. The PP legal framework[12]

The PP rules in the EU derive mainly from two sources: the TFEU and the PP Directives. The TFEU contains general rules that prohibit Member States from discriminating against other Member States, for instance, by reserving particular contracts for domestic economic

[10] *Janssen*, Utrecht Law Review, Vol.10, 2014, p.180.
[11] European Commission, EU Public Procurement Legislation: Delivering Results Summary of Evaluation Report, 2011, p.5.
[12] For the purpose of this work the Remedies Directive will not be considered. See Remedies Directive 89/665/EEC17, as amended by: Directive 92/50/EC18, Directive 2007/66/EC19 and Utilities Remedies Directive 92/13/EEC20, as amended by: Directive 2006/97/EC21, Directive 2007/66/EC22.

operators. TFEU provisions apply in principle to all PP contracts, yet with limited exceptions. This includes those contracts which fall outside the scope of the EU Procurement Directives (for instance, because their value is below the approved financial thresholds for the EU PP Directives to apply).[13] The most important provisions are:[14]

- Article 34 TFEU on free movement of goods
- Article 56 TFEU on free movement of services

However, the regulation of a pivotal sector, in terms of both financial and political repercussions, could not be simply addressed by the TFEU only. The legal uncertainty that the diversity in the Member States national laws creates, should be taken into account as another major reason to regulate in more details a critical area such as PP, with particular regard to the consequences it implies, respectively, hindrance of cross border trade. To eliminate market access restrictions, to promote cross border trade flow, to ensure "value for money", to prohibit discrimination and to award contracts through transparent and fair procedures, further special legal instruments were considered necessary and desirable. This would, in turn, intensify and strengthen the penetration of goods and services destined for the public sector, would enhance the tradability of public contracts across the common market and would bring considerable savings and price convergence.[15]

The current legal framework comprises a set of Directives, recently amended by the Public Sector Directive 2014/24/EU replacing Directive 2004/18/EC, the Utilities Directive 2014/25/EU replacing Directive 2004/17/EC and a new Directive 2014/23 on Concession

[13] *Arrowsmith* in: *Arrowsmith*, EU Public Procurement Law: An Introduction, pp.14-257.
[14] Article 49 TFEU on the freedom of establishment is also included in the set of freedoms relevant to PP, nevertheless, free movement of goods and services have the greatest economic impact in the PP Single Market. For the purpose of this work, focus will be given only to Article 34 and 56 TFEU.
[15] *Bovis*, EPPL, Vol.2, 2010, p.85.

Contracts. The reasons to treat separately the Public Sector and the Utilities Sector are mainly two.

"Firstly, as a result of the positive effects of liberalization of network industries which has stimulated sectoral competitiveness, a more relaxed regime for utilities procurement, irrespective of their public or privatized ownership has been justified and accepted. Secondly, to achieve the opening up of the relatively closed and segmented public sector procurement markets, the separate regulation between public and utilities procurement resulted in a codified set of rules for the public sector which aims at producing legal efficiency, simplification and compliance by covering governing supplies, works and services procurement in a single legal instrument".[16]

It must be noted that the Directives only affect the award of public contracts. "Once contracts have been awarded, conflict issues between the parties must be decided by the national courts of the Member States".[17] "Furthermore, public authorities remain free to determine whether they wish to outsource the public service concerned or to provide it directly (including through an in-house service provider)".[18]

On the contrary, if the public authority decides to enact a PP proceeding, "the Directives will ensure that the award of a public contract takes place, in the context of a tendering procedure, in accordance with principles safeguarding the non-discriminatory, objective and transparent character of that procedure, so as to ensure that all economic operators get the same equal opportunities to acquire the contract".[19]

"It is clear from the content of the provisions of the Directives - particularly the ones that instruct contracting authorities as how to design and execute

[16] *Bovis*, EPPL, Vol. 4, 2012, p.221.
[17] *Jansen/Mutluer/van den Borne/Prent/Elian*, Towards (further) EU Harmonization of Public Contract Law, p.759.
[18] *Sauter*, Public Services in EU Law, p.166.
[19] Ibid., p.765.

compulsory tendering procedures - that they reflect the necessary means to achieve the central objective of EU public procurement regulation".[20]

In the PP sector, it is of relevance to stress out the role that the CJEU has taken with regard to "policy formulation at national and European levels".[21] The role exercised by the Court has been of a central importance to ensure the adequate application and interpretation of the TFEU provisions and the Directives' rules.

"Preliminary rulings establishing the effect of the relevant Community rules, by infringement actions establishing the failure of a Member State to fulfill its Union obligations or even by interim orders suspending the award of a public procurement contract, the jurisdiction of the Court of Justice of the European Union is a factor to be borne in mind by all those working in the field of public procurement".[22]

The Court's caselaw has influenced the interpretation of the Directive's provisions as well as defined fundamental concepts such as contracting authority, general interest, technical specifications, selection criteria, etc. The legal practice, the intertwining with national law and the increased number of cases brought before the CJEU have contributed to develop PP rules into a distinct and separate sphere of law.

The Court's approaches has made the regime concrete and flexible and it has provided assistance in order to strengthen the Union's founding principles such as free movement of goods, freedom of establishment, freedom to provide services, the equal treatment principle, transparency and not only. The Court draws a primary focus on the aim of the concerned freedom and the purpose of the Directives, opening Member States' market to competition, while

[20] Jansen/Mutluer/van den Borne/Prent/Elian, (fn.17), p.764.
[21] *Bovis* (fn.2), p.759.
[22] *Venckute*, Leading cases on technical specifications and standards in EC Public Procurement, (IPPA), p.1, availbale at: http://www.ippa.org/IPPC4/Proceedings/01ComparativeProcurement/Paper1-17.pdf, (07.06.2015).

combining the latter with political, economic and social considerations.[23] The CJEU influence has definitely a great contribution in asserting the strategic goals of the European institutions and laying down the necessary guidelines to achieve integrated markets in the EU.

[23] For instance, giving a margin of discretion to domestic authorities in including environment criteria in the technical specifications.

3. Fundamental principles of PP

In order to give full effect to the PP Directives the general principles of law have been used extensively by the CJEU to guide their interpretation and practical purpose. Recital 2 of the Preamble to the Public Sector Procurement Directive explicitly states:

"The award of contracts concluded in the member states on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition,[24] the principle of proportionality[25] and the principle of transparency".[26]

It is important to note that the principles have been deployed often to solve complex situation as well as to fill in legislative gaps, which nevertheless have created substantial uncertainty in their applicability.

For the purpose of this work only the equal treatment and the transparency principles will be considered. Without prejudice to the role and importance of the other principles, equal treatment has a tendency to balance bidders position vis-à-vis each other, which the Court made clear in the *Fabricom* ruling. Furthermore, it deploys to a

[24] In the Research Handbook on the Economics of Law, Pelkmans elaborates on the principle of mutual recognition: the idea is that one can pursue market integration, indeed "deep" market integration, while respecting "diversity" amongst the participating countries. In practice, this means that the Member State in which the service is provided must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognized as equivalent to those required by the Member State in which the service is provided.

[25] In the judgment *British American Tobacco* (para.122), the Court argued that "proportionality requires that measures implemented through [EU] provisions should be appropriate for attaining the objectives pursued and must not go beyond what is necessary to achieve ". The same logic applies also in PP proceedings.

[26] See Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts, OJ 2004 L134.

certain extent some features of transparency and non-discrimination, even though is not always limited to it. Equality could be also based on the nationality of undertakers or on the origin of the good, however if considered by the contracting authority in awarding a contract, it could give rise to unequal treatment. Transparency on the other hand has a direct impact in market access, it has been considered one of the most important principles in PP, and enshrines also a double dimension, publicity through advertisement, which has yet to be clearly defined by the Court.

3.1 The equal treatment principle

One of the main drivers of the PP Directives is to ensure the access of foreign economic operators to the market of the Member States. Such a purpose could not be attained in the absence of equality, which in the EU context[27] apart from its general implications, is closely related to the principle of non-discrimination and transparency. Participants in the awarding process of a public contract must have access to all the information and criteria which will be considered by the contracting authority. This does not compel the disclosure of details which have no weight in the evaluation of the offers, however, accurate information consent operators to be aware of the award criteria, their scope, hence to have an equal opportunity while preparing and submitting their bids. In order to achieve opportunity of participation on a par footing, public contracts are to be awarded in the Member States by "due observance of principles which can be derived from the aforesaid principles: regardless their nationality, all economic operators in the EU must get the same equal opportunities to acquire public contracts"[28] providing for a transparent and fair process.

[27] For instance Article 2 TEU and Article 18 TFEU, although considering the economic freedoms, the principle is guaranteed explicitly or implicitly within them.
[28] *Jansen/Mutluer/van den Borne/Prent/Elian* (fn.17), p.763.

"The competition principle presents a close link with the principle of equal treatment and could even be considered a specific manifestation of the latter".[29] As we will see in the *Fabricom* case, in the PP context, the equal treatment principle requires either similar situation to be treated differently or different situations to be treated likewise, exception made in case of objective justification. On the other hand the competition principle regulates the attitude of undertakings so as no distortion of the PP market is found. The principle of competition comprises other distinct features, nevertheless, caselaw has demonstrated that many discriminatory (unequal) procurement measures or decisions infer also infringement of competitive behavior among economic operators, thus confirming their dependency.[30]

"It is submitted that this is the main reason why the principle of competition has not yet been explicitly formulated in full, nor fully endorsed by the EU judicature: as some of the issues that directly concern the competition principle have been addressed by the ECJ in light of more general principles of equal treatment".[31]

While we can affirm that equal treatment underlines values enshrined in the principle of competition, we can not ascertain that the equal treatment principle assimilates completely competition since "public procurement rules and practices, from a strict equality of treatment perspective, may fall short of guaranteeing the pro-active system envisioned in the EU Directives".[32]

The principle of equal treatment was addressed by the CJEU in the famous case *Fabricom*. The case involved Fabricom SA, a Belgian contractor regularly submitting tenders for public contracts in the

[29] *Graells*, Public Procurement and the EU Competition Rules, p.212.
[30] In the Joined Judgments *Lombardini and Mantovani*, C-285/99 and 286/99 (para.75 and 76), the Court refers to both principles and does not make a clear distinction between them, rather it indicates that the principles seem to assimilate each other.
[31] *Graells* (fn.29), p.213.
[32] Ibid., 217.

water, energy, transport and telecoms sectors. The Court was asked whether it was in accordance with the procurement Directives to prohibit entities who have carried out preparatory or research works from subsequently submitting a tender for that same work. The Court agreed that involvement to carry out preparatory research or works relating to a public contract can entail a margin of advantage in preparing a tender given that the respective entity might have additional information or experience from having executed such preparatory works. However, the Court noted that an absolute prohibition of participation, such as the one found in the Belgian law, was a disproportionate method of attaining the objectives under the equal treatment principle. The Court ruled that "Comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified".[33] The Court held that compliance with the principle of equal treatment requires an absence of discrimination on grounds of nationality and a duty of transparency which enables contracting authorities to ensure that the principle is complied with.[34]

In the case *Commission v. France*, the Court had to deal with the award of contracts for electrification and street lighting works. The calls to participate in the tender proceeding were all made public on a national level, while only some of them at an EU level. The CJEU delivered that the principle of equal treatment is not limited to the time when a contractor submits a tender, on the contrary it encompasses all the stages of a tendering proceeding. Furthermore, the Court stressed that principle has a wide scope capable of protecting actual and potential bidders and if not properly applied it can discourage from participating in the award of a public contract "because they [the

[33] Judgment in *Fabricom SA v. État Belge*, Joined Cases C-21/03 and C-34/03, EU:C:2005:127, para.27.
[34] *Bovi,* (fn.16), p.225.

potential bidders] have been placed at a disadvantage by the procedure followed by a contracting entity".[35]

3.2 Transparency

Transparency is a founding principle of the EU, specified in both the Treaties[36] and the Public Sector Directive. "The rules of the game must be known to all participants".[37] It has been widely used by the CJEU to achieve objectives such as: publicity, accessibility, clarity and certainty.

"The principle of transparency serves two main objectives: first is to introduce a system of openness in the public purchasing of the Member States, so potential discrimination on grounds of nationality should be eliminated; secondly, transparency in public procurement represents a substantial component for a system of best practice for both the public and private sectors, a system which could introduce operational efficiencies within the relevant markets".[38]

It entails a regime of available information enabling stakeholders to take decisions accordingly and it can be closely associated with the opportunity of participation and entrance in the market of the Member States.

The EU PP Directives endorse a prominent role to transparency, considering it a fundamental principle in eliminating distortion and discrimination in the pertinent markets.[39] "As economic decision making is dependent on the availability of information, transparency

[35] See Judgment *Commission v. France*, C-16/98, EU:C:2000:54, para.109.
[36] Article 1 TEU and Article 15 TFEU, however, here transparency is used in an economic context, meaning that transparency facilitates access to financial information for the actors operating in the market, subsequently increasing the single market performance.
[37] *Arrowsmith*, in: *Arrowsmith*/ *Kunzlik* (eds.), Social and Environmental Policies in EC Procurement Law: New Directive and New Directions, p.55-107.
[38] *Bovis*, EPPL, 2008, Vol.1, p.18.
[39] *Bovis* (fn.2), p.33.

facilitates good decisions".[40] "Access to government-held information is of particular importance, because 'for much of the information relevant to decision-makers in political and economic markets, government is in fact the sole repository (and producer)".[41] In PP, transparency is achieved through extensive publicity and advertisement of PP contracts over certain thresholds by means of publication in the Official Journal of the European Communities.[42]

The first case involving the transparency principle was the *Walloon Busses* case. SRWT, the Walloon regional transport company in Belgium favored an offer by a Flemish company, even though the respective company, submitted tender amendments after the imposed deadline of receipt of offers. Here, the Court argued that the principle of transparency applies at all stages of the procurement process and that information should be equally and timely available.[43] The principle was further clarified in the *Succhi di Frutta* case, where the CJEU explicitly stated:

"It implies [transparency] that all conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way (emphasis added) and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract".[44]

The landmark decision with regard to transparency came only in *Telaustria*. "Telaustria was the first case to confirm that public bodies have a positive obligation to pro-actively publicise contracts and

[40] *Buijze*, Utrecht Law Review, 2013, Vol. 9, p.7.
[41] *Islam*, Do more transparent governments govern better?, Policy Research Working Paper 307, 2003, p.3.
[42] *Bovis* (fn.2), p.250.
[43] Judgment in Commission v. Belgium "Walloon Buses", C-87/94 R, EU:C:1994:166, para.54-55.
[44] Judgment in *Commission v. CAS Succhi di Frutta SpA*, C-496/99 P, EU:C:2004:236, para.111.

concessions, even when they fall outside the procurement directive".[45] The CJEU ruled first that, even though services concessions fall outside the scope of the procurement directives, contracting authorities awarding them must nonetheless observe fundamental principles of non-discrimination which derive from the EU primary law, and in particular the freedom of establishment and freedom to provide services.[46]

What is relevant for the transparency principle is what the Court has identified in the judgment as "a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed". An accompanying dimension of the transparency principle surfaces, indispensable to foster cross border PP, namely the advertisement of a public contract. Advertising secures publicity and free competition enabling economic operators from all over the Union to take part in the awarding proceeding, hence guaranteeing a wide margin of choice. Fair competition, another key element of the formula is introduced to achieve efficient and economic procurement results. However, the case was heavily criticized, in particular for a non-clear conclusion on the wording "advertising". In her opinion on the case *Commission v. Finland*, Advocate General Sharpston states:

"On the one hand advertising implies an obligation to publish. On the other hand the words used in other language versions [...] are more akin to publicity in English. In my view "publicity" does not necessarily imply an obligation to publish. It does however, imply an obligation to do more than simply contacting a single potential tenderer and awarding the contract to that undertaking".

In its further caselaw *Coname*, the Court emphasized that the entity granting a concession must ensure that tenderers located in other

[45] *Brown*, EU Primary Law in Practice, p.169.
[46] *Brown* (fn.45), p.169.

Member States "can have access to appropriate[47] information" so as the create an opportunity to take part in the awarding proceeding before final decision is made, not requiring "necessarily an obligation to hold an invitation to tender". It should be noted that even in the *Parking Brixen* decision "the appropriateness of the detailed arrangements of the call for tenders" was left to the entity granting the concession. Yet an absolute absence of any call for participation would clearly not be in line with the requirements enshrined in the principle of equal treatment.[48] In its subsequent case *Commission v. Italy* the Court investigated once again the transparency requirement noting that: "the complete failure to invite competing bids [...] infringes the general principal of transparency and the obligation to ensure a sufficient degree of advertisement".[49]

When it comes to the substantial application of transparency, the *An Post* case draws down the necessary criteria. The transparency principle applies to all services that "may be of [cross border] interest".[50] Consolidated caselaw has remarked that where the Directives do not apply either because the contract falls outside the scope of the Directives or is below the established thresholds, the principle of transparency will nevertheless apply, upon condition of some form of advertising. That will be the case whenever the contract in question may be of interest to undertakings located in another Member State. Though, it is important to notice that the lack of advertising can be justified by what the Court has considered in its caselaw as "objective" or "special" circumstances, for instance modest

[47] How to define appropriate? Also in the *Sporting Exchange (Betfair)* and *Engelmann* cases "compliance with the principle of equal treatment and with the consequent obligation of transparency necessarily means that the objective criteria enabling the Member States' competent authorities' discretion to be circumscribed must be sufficiently advertised". How to determine sufficiently? These are considered unclear aspects in the CJEU caselaw.

[48] See Judgment in *Parking Brixen,* C-458/03, EU:C:2005:605.

[49] Judgment in Commission v. Italy, C-260/04, EU:C:2007:508, para.24.

[50] Judgment in *Commission v. Ireland*, C-506/03, EU:C:2010:182, para.17.

economic interest at stake".[51] The line of reasoning was carried on also in the *Commission v. Italy* case in regard to the procurement of services that fell below the minimum threshold. Though the ECJ stated that, while these below-threshold contracts were excluded from the PP procedure, as stated in the Council Directives, they would still have to comply with the principle of transparency always if the service was of cross border interest.[52]

4. Thresholds and cross border interest

A precondition for the Directives to find tangible applicability is the monetary amount that a PP contract must exceed in order to be covered by the EU PP Directives. However, there are different thresholds, "and determining which particular one applies depends on three factors: the sector (general or utilities), the contract nature (works, goods, or services), and the contracting authority (central government or others)".[53] "A *de minimis* rule applies to contracts below the thresholds, which exempts them from the provisions of the Directives",[54] they will bring consequences to the involved parties only for contracts above a certain financial value, which amounts to "cross border" competition. Since the Directives are concerned only with opening trade among Member States, in leaving outside their scope "modest" contracts, a certain legitimacy is granted. "The exceptions to this rule are contracts that fall below the financial threshold but that have a "cross border" interest".[55]

In several judgments, the CJEU has ruled that below-thresholds contracts, falling outside the scope of the Directives are still covered

[51] See Judgment in *Coname,* C-231/03, EU:C:2005:487.
[52] See Judgment in *Commission v. Italy*, C-412/04, EU:C:2008:102, para.66.
[53] *Schoner*, PCLJ, 2013, Vol.43, p.5
[54] *Bovis* (fn.2), p.255.
[55] *Schonner* (fn.53), p.5.

by the Treaties and the general principles deriving therefrom,[56] nevertheless the presence of a certain cross border interest is of a mandatory nature.[57] "The Treaty principles are applicable to these contracts and function, ultimately, as a constraint on national rules".[58] "The Court of Justice proposes an evolving concept of cross border interest, but rather than fully define cross border interest, the Court only provides examples".[59] There are no precise guidelines in giving a definition what can be of a "cross border" interest in PP. In the *SECAP* case the Court drew the distinction between "significant amount" and "very modest"[60] in order to assert whereas contracts may be of a cross border interest. In general, the concept has been developed to infer that a contract can be deemed of cross border interest if the value is high enough to attract the interest of foreign bidders, the respective contract is of particular economic relevance to undertakings located in other Member States and the goods or services to be delivered are located near a geographical border.[61] Although national differences are present, the caselaw of the Court has long-established that contracts between contracting authorities and undertakings, do not automatically fall outside the scope of European PP Law.[62]

[56] See Judgment in *Unitron Scandinavia and 3-S*, C-275/98, EU:C:1999:567, and Judgment in *Telaustria*, C-324/98, EU:C:2000:669, and Judgment in *Vestergaard*, C-59/00, EU:C:2001:654.
[57] See Judgment in *SECAP*, Joined Cases C-147/06 and 148/06, EU:C:2008:277, para.21.
[58] *Schonner* (fn.53), p.5.
[59] Ibid., p.12.
[60] Judgment in *SECAP*, EU:C:2008:277, para.31.
[61] See Judgment in *Commission v. Ireland, "AnPost",* C-507/03, EU:C:2007:676, and Judgment in *Commission v. Italian Republic*, C-119/06, EU:C:2007:729, and Judgment in *Commission v. Ireland*, C-532/03, EU:C:2007:801, and Judgment in *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità*, C-380/05, EU:C:2008:59, and Judgment in *Pressetext*, C-454/06, EU:C:2008:351.
[62] J*anssen* (fn.10), p.171.

CHAPTER 2

Free movement of goods

PP rules can be fairly addressed as a concrete expression of the fundamental freedoms enshrined in the TFEU, in particular, the free movement of goods and services.

"The purpose of coordinating at the Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wishes to offer goods or services to contracting authorities established in another Member State".[63]

The rules to the free movement of goods pursue a model where all goods can move without restrictions within the Community and at the same time guarantee a free and competitive European public market for all bidders. By obtaining liberalization of the public market in goods, the EU lawmaker aims to eliminate the distortion of the economic freedoms enshrined in the Treaties and introduce a non-preferential and non-discriminatory purchasing pattern.

1. Article 34 TFEU

The most relevant provision regarding free movement of goods in the context of PP is certainly Article 34 TFEU: "All quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States". It can be further estimated that

[63] Judgment in *University of Cambridge*, C-380/98, EU:C:2000:529, para.16.

the application of Article 34 has been gradually extended and adapted in order to respond to the changing landscapes of global economy and the developments of the EU. "This provision has been interpreted broadly, and the prohibition of measures having equivalent effect to quantitative restrictions, therefore has a considerable scope".[64] "The root of this wide scope was the Court's ruling in *Dassonville* that a measure having equivalent effect could be "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[65] It followed another central ruling, *Cassis de Dijon*, which introduced the principle of "mutual recognition" to overcome barriers that can significantly hamper international trade. According to the ruling, the import and trade of a product, already recognized and approved in one of the EU countries, does not require any additional approval by the national authorities of the host country.

"It is constructed upon a presumption that goods which have been lawfully produced or marketed in one Member State can be sold without restrictions in any other Member State, even if they are produced to technical or quality specifications different from those applied in the Member State of importation".[66]

"Using the ideas in *Cassis* it is possible to implement trade between states while still allowing Member States to maintain their own laws and avoiding the need for harmonization".[67] Measures to prohibit or ban a product are permitted only on grounds of major interests such as environment, consumers' protection, the protection of public health or public interest and as long as they are considered proportionate and non-discriminatory.

[64] *Hettne*, Sieps, 2013, p.3.
[65] *Hettne* (fn.64), p.3.
[66] *Kaczorowska*, European Union Law, p.531.
[67] *Chalmers/Davies/Monti*, European Union Law, p.777.

Article 34 TFEU has also been applied directly in relation to PP in that one of the primary purposes of the PP Directives is to create an open and transparent market where the free movement of goods takes place without restrictions. When elaborating upon the Article, it is important to follow settled caselaw already established by the Court in regard to the general application of the concerned freedom.

1.1 Distinctly applicable measures

The first type of measures covered by the Article are triggered by the application of distinct rules to domestic and imported goods, also known as direct discrimination or distinctly applicable measures. "Direct discrimination means that the imported good has received different and usually less favorable treatment by comparison with the treatment which the domestic good has received".[68] Examples of direct discrimination in placing a product in the market stem from the nationality or origin of the good.

When transposed in the PP context, direct discrimination would involve requirements to buy a certain product only from national suppliers or other forms of preferences which are able to favor national goods. The principle found application in the CJEU case "*Du Pont de Nemours*". The facts of the case were essentially concerned with the Italian applicable law under which a percentage of public supply contracts was reserved to undertakings located in the regions of the Mezzogiorno (Southern Italy). It was mandatory that up to one-sixth of state authorities supplies should come from undertakings located in certain regions of Southern Italy which offered products processed at least partly in the region.

The Court of Justice looked again at the effects and did not constrain itself, nor Article 34 to any particular measure. It found the Italian provision as constituting direct discrimination in favor of the Italian

[68] *Connor*, German Law Journal, 2010, p.161.

products vis-à-vis the products originating from other Member States, since only the Italian products could benefit from such a regime.

"It must be pointed out in that regard that such a system, which favors goods processed in a particular region of a Member State, prevents the authorities and public bodies concerned from procuring some of the supplies they need from undertakings situated in other Member States. Accordingly, it must be held that products originating in other Member States suffer discrimination in comparison with products manufactured in the Member State in question, with the result that the normal course of intra-Community trade is hindered".[69]

In conclusion, the Court indicated that all the products benefiting from the preferential system were domestic products[70] and that the respective measure could be assessed as having an equivalent effect to quantitative restrictions since it could not be justified accordingly to any of the exceptions of Article 34.

In the Judgment *Commission v. Italy*, the Court drew parallel considerations with the findings in "*Du Pont de Nemours"*. Under the Italian Law, public bodies were required to purchase vehicles only of domestic manufacture in order to qualify for the aid provided for by the national law. The Court found that the Italian Republic had failed to fulfill its obligations under Article 30 of the EEC Treaty since the proposed measure favored only part of the national production. " Since only national producers, albeit not all of them, may benefit from the advantage granted, it is of little consequence that such a preferential system also has a restrictive effect as regards national producers". [71]

[69] Judgment in *Du Pont de Nemours Italiana SpA v. Unita Sanitaria Locale No.2 Di Carrara "Du Pont de Nemours",* C-21/88, EU:C:1990:121, para.11.

[70] The preferential system was discriminatory also to local undertakers which did not have a registered office in the region.

[71] Judgment in *Commission v. Italy*, C-263/85, EU:C:1991:212.

In *Storebaelt*,[72] a company wholly owned by the Danish State, had invited tenderers in a procedure for the award of public works contracts, on the basis of a condition requiring the use to the greatest possible extent of national materials, consumer goods, labor and equipment. Although the criteria used by the Danish government was removed after the Commission issued a reasoned opinion on the matter, it still remained that the procedure as a whole and the formation of consortia, were influenced by it. The obligation under the "*Danish content clause*", evidently restricted the import of materials of non-Danish origin, favoring only domestic-processed products, thus resulting in a severe obstacle to Community trade in goods.

1.2 Indistinctly applicable measures

A national measure will be held to be indirectly discriminatory where trade rules, not themselves discriminatory as to the product origin, impose a greater impact on the imported good. The measures do not explicitly distinguish between domestic or imported goods, thus they are referred to as "indistinctly applicable measures". At first glance rules apply equally to both domestic and imported goods, nevertheless, an indirect disadvantage is created for the goods coming outside the home country. The landmark decision in this regard is the *"Dundalk"* case.[73]

The case concerned the utilization of pipes for construction works to conform to a specific and technical Irish standard. Notwithstanding the fact that the requirement applied to both domestic and imported products alike, in reality, it affected mostly imported products, hence not complying with Article 10 of the Public Works Directive 71/305

[72] Judgment in *Commission v. Denmark "Storebaelt",* C-243/89, EU:C:1993:257.

[73] In the *VESTERGAARD* judgment, the Danish national Court referred the case for a preliminary ruling, questioning if requiring the utilization of windows of a particular make in the contract, was compatible with Community law. The Court recalled the findings in *Dundalk* and *UNIX,* confirming that Article 34 TFEU (30 EEC Treaty), prevents Member States from introducing a specific make in carrying out a contract, without expressively adding the words "or equivalent".

which prohibited Member States from introducing into a public contract technical specifications unless justified by the subject matter of the contract. Only one Irish firm had the capacity to actually produce the pipes complying with the standard, thus resulting in discriminatory use of technical requirements. Due to the special features of PP contracts, it is reasonable and acceptable to impose compliance with technical standards regarding the necessary materials to complete a given work. While the latter can be validated as aiming to deploy high standards of construction materials, the Irish government clearly failed to follow this objective, since the contract excluded the use of other pipes provided in the other Member States, capable of presenting the same level of performance.

The CJEU concluded that such a hindrance to trade could not be justified under any of the derogations in accordance with settled caselaw and subsequently it was regarded as constituting indirect discrimination. Furthermore, it established the "equivalent standard" doctrine, where unless justified by the subject matter[74] of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favoring or eliminating certain undertakings or certain products. "Such reference shall be permitted on an exceptional basis and shall be accompanied by the words "or equivalent".[75]

The basic rules established by the Directives set up a framework where public authorities have a broad discretion and flexibility as regards the way in which they draft the applicable technical specifications of a given contract.[76] In this sense, the need to go further and to offer a pattern which can accommodate different

[74] In the *Concordia Buses* case, the Court has addressed the criteria in connection to the performance of the contract being awarded, and/or likewise related only to the performance of that contract (now, Article 53 of the Public Sector Directive).
[75] *Hettne* (fn.64), p.4.
[76] Graellz (fn.29), p.272.

situations, advances a possibility to make use of equivalent technical specifications which should not be discriminatory in purpose and practice. The impossibility to give a precise and sufficient description of the necessary technical specifications, authorizes the contracting authority to accompany the standards by the words "or equivalent". Until now, there are no limitations or further criteria other than those already found in the Court's caselaw, which could be referred as a neutral system delineating potential technical equivalent solutions. It must be noted however, that in creating the doctrine, the Court continues to maintain the approach of opening the doors of the PP market to foreign bidders, while attempting to find a less intrusive tool in balancing Member States autonomy.

1.3 Other forms of indistinctly applicable measures

Referring to the caselaw development outside the scope of PP, the CJEU has constantly been criticized for the lack of clarity in developing a principle that Article 34 TFEU can capture all national measures capable of hindering cross border trade among Member States, if such a measure could amount to an equal impact on national and foreign products, thus exempting only those specifically justified under Article 36 TFEU or under the "mandatory requirements". In practical terms it would mean that such a broad scope would not only restrict part of the Member States autonomy, at the same time it would represent increased workload for the Court, including cases not necessarily of relevant impact for intra-Community trade. In the joined cases *Keck & Mithouard "Keck"*, the CJEU laid down a new test, drawing a distinction between:

a. "product-related" measures, mainly linked to the features of the good or the physical composition, respectively the form,

size, weight, composition, designation, presentation and labeling.[77]

and

b. "selling arrangements" covering restrictions on when goods may be sold, restriction on where or by whom goods may be sold, advertising restrictions, and price control.[78]

"It is understandable that the Court wished to create clarity on the ambit of Article 30 EEC, but the Court manifestly failed to do that in Keck".[79]

In the 2009 Trailer case it seemed that the Court took adequate steps to reverse its prior conclusions, however, the distinction between "selling arrangements" and "product-bound measures" gradually mutated into a distinction between "selling arrangements" and all other measures.[80] Advocate General Van Gerven observed that "all other national measures applicable without distinction" also fall in principle within the new Keck and Mithouard caselaw.[81] "Opinions vary as to the meaning and importance of this pronouncement, but the fact is that five years later, it does not seem possible to identify a single case in which the Court has reached a different result from that which it would have reached before Trailers". [82]

Transferred in the PP context, an example stems from "product-related" measures. The Court first explored its significance for the single market in the *UNIX* case. In 1991, the Dutch contracting authority, published a notice in the Official Journal for the supply and

[77] Judgment in *Keck & Mithouard "Keck"*, Joined Cases C–267/91 and C–268/91, EU:C:1993:905, para.15.
[78] *Navarro/Oliver*, in: *Barnard/Peers* (eds), EU Law, p.337.
[79] *Gormley*, FILJ, 1995, Vol.19, p.877.
[80] Judgement in *Commission v. Italy* "Towing Trailers", C-110/05, ECR, EU:C:2009:66, para.37.
[81] *Gormley* (fn.79), p.880.
[82] *Navarro/Oliver* (fn.78), p.338.

maintenance of a meteorological station. The Commission concluded that the respective notice did not fulfill the EU law requirements on two main grounds. The second one, the use of a specified operating system called UNIX without adding the phrase "or equivalent" concerns our present work.

"The Netherlands Government contends that the UNIX system must, in the field of information technology, be regarded as a technical specification generally recognized by traders and that, accordingly, it is unnecessary to add the words "or equivalent".[83]

In fact, the contract was awarded to a supplier that used a similar system, but not UNIX itself.

The Court rejected the arguments of the defendant and held that the requirement to use the "UNIX" operating system infringed Article 34 TFEU since it either directly or indirectly excluded firms using systems other than "UNIX".

*"*The parties agree, however, that the UNIX system is not standardized and that it is the name of a specific make of product*"*.[84] *"*Hence the fact that the term UNIX was not followed by the words 'or equivalent' may not only deter economic operators using systems similar to UNIX from taking part in the tendering procedure, but may also impede the flow of imports in intra-Community trade, contrary to Article 30 of the Treaty, by reserving the contract exclusively to suppliers intending to use the system specifically indicated *"*.[85]

What it is important to remember in the UNIX case is that the defendant fully excluded all the systems that could have been likewise suitable for its technical requirements and able to perform in an equivalent way, amounting to a clear hindrance to market access. The

[83] Judgment in *Commission v. Kingdom of the Netherlands "UNIX"*, C-359/93, EU:C:1995:14, para.24.
[84] Judgment in *Commission v. Kingdom of the Netherlands "UNIX"*, EU:C:1995:14, para.26.
[85] Ibid., para.27.

situation would differ if the rationale behind certain policies does not significantly affect cross borde trade and does not interfere with the single market, or the required specifications follow major causes, for instance the level of environment protection.

Technical specifications have a real potential to be considered by the CJEU as hindering factors of a competitive and free public market, since they are able to identify in a sufficient precise manner a product or service and differentiate it from similar products or services originating from other Member States. The Court does not distinguish between binding or non-binding technical specification requirements, hence even optional specific indicators can constitute a barrier to trade in case they are capable of influencing bidders' behavior to the extent of affecting their decision in participating in the award of a public contract.

It is settled caselaw that PP rules prohibit the use of technical specifications, selection or award criteria that unfairly restrict the market access or discriminate against potential bidders on grounds of nationality. Nevertheless, as long as it is compatible with EU law and it is linked with the subject-matter of the contract, technical specifications[86] may be used to pursue sustainable objectives. The latter was confirmed in the *Concordia Buses* judgment.

"in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer

[86] Annex VI, 1a of Directive 2004/18 defines "technical specification" as the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority. In the case of public supply or service contracts, "technical specifications" are seen as specifications in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements and conformity assessment, performance, use of the product, safety or dimensions, the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labeling, user instructions, production processes and methods and conformity assessment procedures. (Annex VI, 1b).

who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination".[87]

"In order to empower public purchasers to integrate ethical considerations in their procurement while simultaneously limiting how far they could do so, EU courts have developed a requirement that, when included in award criteria, such considerations must be linked to the subject-matter of the contract".[88]

The CJEU has thus integrated a new test which open the doors to the public authorities of the Member States, an opportunity to promote social and environmental policies by means of sound PP practices.

The Court has not been entirely uniform with its judgments.

"It may have made life more difficult for itself by its increasing tendency to decide everything in fine detail, rather than to leave to the national courts the task clearly allocated to them by indicating, even clearly, what the requirements of Community law are and letting national judges decide on the basis of the criteria so established".[89]

Nevertheless, the Court places particular emphasis in opening domestic markets to foreign competition in the context of safeguarding the integrity of the Single Market, true for PP and the free movement of goods as well. Is the measure a disguised restriction on trade? Is it disproportionate to the aim sought? Has market access been completely blocked or cross border trade still takes place? Regardless of not having a precise formulation which would make easier to understand the Court's decision and predict its future

[87] Judgment in *Concordia Bus Finland*, C-513/99, EU:C:2009:495, para. 69.
[88] *Martens/de Margerie*, EPPL, Vol.1, 2013, p.8.
[89] *Gormley* (fn.79), p.886.

direction, the decisive momentum remains the possibility of access of foreign bidders to the domestic markets of the Member States.

2. Derogation from Article 34

Provisions on free movement of goods are not without exceptions. There are many legitimate reasons under which Member States may prohibit the entrance of a product in their domestic market. Examples range from environmental causes to security reasons. "These derogations exist to protect important national interests, but they can also be used to disguise protectionism, which is why they are usually quite strictly reviewed".[90] Article 36 TFEU and settled caselaw lay down the criteria which can be used to uphold restriction on intra-Community trade. Articles 34 and 36 attempt to attain a balance between pursuing a genuine free and competitive market in goods and services on the one hand, and the recognition of the need, in some circumstances, to safeguard essential public interests on the other.[91] However, it must be borne in mind that the acknowledged prohibitions shall not be based on arbitrary discrimination or restrictions, be them of a direct or disguised effect.

2.1 Explicit justifications

Article 36 TFEU constitutes an exhaustive list of derogations, asserting that national measures can be 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 policy".

The party seeking to invoke Article 36 (Member States), bears the burden to prove that the measure falling under the scope of Article 34

[90] *Chalmers/Davies/Monti* (fn.67), p.892.
[91] *Fairhurst*, Law of the European Union, p.589.

TFEU, is justified. The specific measure must than comply with what is recognized as the "proportionality test". Deriving from the original content, as a general principle of the EU, the principle of proportionality requires that a taken measure should not exceed what is necessary so as to achieve the legitimate objectives pursued by the measure itself. "In simple words, the measure must be proportionate to the aim sought".[92] The test of proportionality compels an accurate view of suitability, necessity and proportionality in the narrow sense, as crucial components of obtaining the right comprehension of the measure's intents vis-à-vis the concrete appliance. However, the CJEU has ruled that Article 36 TFEU must be narrowly interpreted. "Objectives that are not apparent from the Article cannot be invoked. In addition, a national measure must be proportionate to its aim, and there should be no alternatives available that are less restrictive to trade".[93]

In the judgment *Campus Oil Limited and others v. Minister for Industry and Energy and others* the Court made out clear that the purpose of Article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States. It merely allows national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in the Article.[94] When a Member State relies on Article 36 for the purpose of including under the exemptions provided within, certain national measures capable of restricting intra-Community trade, each case should be observed with due consideration. In a number of occasions the Court has held that Article 36 does not refer to matters of economic nature.[95] "A Member State cannot be allowed to avoid the effects of measures provided for

[92] *Lenaerts/Van Nuffel*, in: *Bray and Cambien* (eds), EU Law, p.220.
[93] *Hettne* (fn.64), p.4.
[94] Judgment in *Campus Oil Limited and others v. Minister for Industry and Energy and others,* C-72/83, EU:C:1984:256, para.32.
[95] See Judgment in *Commission v. Italy*, C-95/81, EU:C:1982:216.

in the Treaty by pleading the economic difficulties caused by the elimination of barriers to intra-Community trade".[96] In the present judgment, Ireland was totally dependent on the supply of petroleum goods, thus the seriousness of the repercussions that an interruption of supplies in petroleum products entailed for the country's existence was considered by the CJEU as sufficient ground to bring economic considerations within the scope of Article 36, respectively under public security. "An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows States to protect".[97]

In the case *The Queen v. Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith "Evans Medical"* the Dutch Secretary of State rejected an application for a license to import a consignment of diamorphine from the Netherlands. The claimant brought an action for judicial review of the decision seeking a declaration that the decision was contrary to Article 34 of the TFEU and could not be justified under Article 36. The Court explicitly stated "It must, however, be borne in mind that the derogation provided for in Article 36 cannot apply to national rules or practices if the health and life of humans can be as effectively protected by measures less restrictive of intra-Community trade".[98]

The CJEU concluded that despite the nature of the purchased good and its essential role concerning public health, the protected interest could be safeguarded adequately by a same less restrictive measure.[99]

[96] Judgment in *Campus Oil Limited and others v Minister for Industry and Energy and others,* EU:C:1984:256, para.35.
[97] Judgment in *Campus Oil Limited and others v Minister for Industry and Energy and others,* EU:C:1984:256, para.34.
[98] Judgment in *The Queen v. Secretary of State for the Home Department, ex parte Evans Medical and MacFarlan Smith "Evans Medical",* C-324/93, EU:C:1995:84, para.38.
[99] The Court reached a similar conclusion also in the Judgment C-104/75 *De Peijper*, where the CJEU despite confirming that it is a prerogative of the Member States to

2.2 The mandatory requirements

The "mandatory requirements", or "overriding reasons in the public interest", or "legitimate public interests objectives" are grounds of justification not explicitly mentioned in Article 36 TFEU. The CJEU has widely extended the grounds on which Member States can rely to justify restriction on trade, the latter a merit of evolving social and economic relations. "They were first introduced in the *Casiss de Dijon* case where the CJEU held that it was possible to justify indistinctly applicable national measures which were based upon certain additional mandatory requirements".[100] In more recent judgments, the Court has expanded this list to include the protection of environment, the improvement of working conditions, the promotion of culture, the prevention of the risk of seriously undermining the financial balance of the social security system, the maintenance of press diversity, the protection of road safety, the fight against crime, the protection of animal welfare and the protection of national or regional socio-cultural characteristics.[101] "Yet when the Court of Justice referred to the mandatory in *Cassis*, it was not offering a broad interpretation of Article 36. On the contrary, it was creating a new class of exception to free movement, existing alongside and in addition to the exceptions in the Treaty".[102]

In the case *Commission v. Italy*, the Court rejected the possibility of justification under the mandatory requirements. The CJEU concluded that regional development is not to be considered a ground of justification under the general interest.

*"*It need merely be observed, in that connection, that such considerations are matters neither of public policy, public security or public health referred to

decide, within the limits imposed by the Treaty, what extent of protection they want to uptake, however, their power is limited by the necessity and proportionality of an effective protection of health and life of humans.

[100] *Hettne* (fn.64), p.4.

[101] *Hettne* (fn.64), p.4.

[102] *Craig/De Burca*, EU Law, p.707.

in Articles 66 and 56 of the Treaty, taken together, nor reasons of overriding public interest which might justify the obstacles in question".[103]

The ECJ has, on rare occasions, accepted justifications for distinctly applicable measures based on safety requirements and the protection of the environment, i.e. mandatory requirements. "This has fuelled a debate on whether there should be a distinction between derogations based on Article 36 TFEU (Treaty based justifications) and those based on mandatory requirements (caselaw justifications)".[104] "The principle that mandatory requirements do not justify distinctly applicable measures may no longer apply since *Preussen Elektra* (although this is not entirely clear)".[105] It concerned a German statutory provisions which, first, required private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value. *Prima facie*, the CJEU indicated that there was a violation of Article 34, however it ruled that such provisions are compatible with the Community law, if they pursue an useful aim such as environment protecting in so far as the use of renewable energy sources which they are intended to promote contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.[106]

Despite the traditional view that general requirements can justify only indistinctly applicable measures, those that do not draw a direct distinction between domestic and imported products, further caselaw has proved the contrary. "This can be considered illogical, as some of them are as important as the justification grounds in Article 36".[107] In

[103] Judgment in *Commission v. Italy*, C-360/89, EU:C:1992:235, para.14.
[104] *Kaczorowska* (fn.66), p.567.
[105] *Arrowsmith* (fn.13), pp.14-205.
[106] Judgment in *PreussenElektra AG v. Schleswag AG "PreussenElektra",* C-379/98**,** EU:C:2001:160, para.4.
[107] *Hettne* (fn.64), p.21.

Preussen Elektra judgment, the CJEU accepted the need to protect and consider environmental allegations could justify even distinctly applicable measures as long as they meet the proportionality test,[108] are suitable in attaining the pursued objective and not go beyond what is necessary in order to achieve it.

CHAPTER 3

The freedom to provide services

In the global economy distribution, trade in services constitutes the largest fraction nevertheless, costumes, tariffs or in some cases the over regulation of the sector, represent an obstacle to interstate trade. "In the EU context, service providers often experience obstacles when they want to export their services to other EU Member States, or when they want to start a subsidiary company in other EU Member States",[109] thus resulting in a direct hindrance to the single market in services. In breaking down theses barriers, Article 56 TFEU and Directive 2006/123/EC are the applicable legal framework in compliance with other sector specific directives. For the purpose of this work only Article 56 TFEU will be considered. Under the Treaty, as well as according to settled caselaw, the freedom to provide services is enjoyed by both providers and recipients of services.[110]

Article 56 TFEU provides access to all European bidders in tendering proceedings in other Member States. It prohibits the restriction of the freedom to provide services within the EU, aiming to open domestic markets to nationals of Members State wishing to offer a service in another Member State. "This means that for a provider of services in a

[108] *Arrowsmith* (fn.13), pp.14-205.
[109] *Kox/Lejour/Montizaan*, CPB, 2004, p.9.
[110] See Judgment in *Raymond Vander Elst v. Office des Migrations Internationales (OMI),* C-43/93, EU:C:1994:310.

host Member State it should not be more difficult to reach potential costumers than for a person established in that Member State and providing similar services".[111] "For the purpose of Article 56 TFEU it is necessary to establish that the activity in question is of an economic nature, the service is offered for remuneration, there is a cross border element, and the service provider is of a temporary duration".[112] The broad concept of the Article encompasses both, those who wish to offer their services while remaining in their home country, as well as those who wish to temporarily transfer in another Member State to provide the respective service. As with Article 34 TFEU, Article 56 TFEU can be also applied in the PP context.

1. Distinctly applicable measures

Direct preferential treatment for national bidders on contract services is an example stemming from the prohibition that Article 56 implies. Any measure reserving certain contracts only to domestic service providers, or which apply conditions differentiating between national firms and firms from other Member States have been considered an infringement to the freedom to provide services by the CJEU. In the case *Commission v. Italy*, the Italian government reserved a fraction of the works for certain public contracts only to subcontractors who had their registered office in the region of the works, and second, where more than 15 contractors were interested to participate in the tender, in the selection process preference was to be given to contractors representing consortia and joint ventures which included undertakings carrying out their main activity in the area where the works were to be executed. According to the Italian authorities, the sole purpose of such a measure was to offset the disadvantages encountered by small and medium-sized undertakings as a result of the system of overall awards of contracts.

[111] *Kaczorowska* (fn.66), p.713.
[112] *Kaczorowska* (fn.66), p.707.

The CJEU held that the Italian government had failed to comply with its obligations under Community law since the respective measure was likely to desist foreign undertakings to participate in the tender. It thus reaffirmed its discriminating impact toward potential sub-contractors established in other Member States amounting to an infringement of Article 56 TFEU.

"The fact that Article 2(1) of Law No 80/87 reserves part of the works to sub-contractors having their registered offices in the region where the works are to be carried out constitutes discrimination against undertakings established in other Member States".[113]

The mere fact that the national provision excluded also other domestic economic operators, which did not have a registered office in the concerned region, it still remained that all the sub-contractors which the system favored were Italian.

2. Indistinctly applicable measures

As previously explained in Chapter 2, indistinctly applicable measures, or also referred to as indirectly discriminatory measures, apply equally to domestic firms and those form other Member States, however their final outcome has a favoring effect only on domestic providers. The case *Contse and others v. Ingesa*, "*Contse*" concerned the procurement of home respiratory treatments and assisted breathing techniques from two provinces in Spain. The tenderers were required to have at least one office open to the public in the capital of the province at the time the tenders were submitted, and by the award of extra points, preference was given to providers which at the time the tenders were submitted, had already oxygen production, conditioning and bottling plants situated within 1000 kilometers of that province, or offices open to the public in other specified towns in that province. In the event of a tie on points under the other award criteria, the contract was to be awarded to the firm previously supplying the service.

[113] Judgment in *Commission v. Italy*, EU:C:1992:235, para.8.

The CJEU ruled that the various conditions to be fulfilled were unnecessary and disproportionate to the proposed aim (public health), and favored those providers already established in the province, although there was no explicit distinction between domestic and foreign bidders. "It further reconfirmed the general EU law test that contracting authorities must apply, and which national courts must therefore verify, consisting of the four general conditions developed in the caselaw concerning the four freedoms".[114]

"It must be recalled, as all the parties which lodged observations before the Court have done, that, disregarding Article 46 EC, the national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must, according to settled case-law, fulfill four conditions in order to comply with Article 43 EC and Article 49 EC: they must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it".[115]

While evaluating each of the required conditions by the Spanish government, the CJEU stressed that "it must be held that those elements do not appear, in this case, to be adapted to the objective pursued in several respects".[116]

Following the in judgment *SA Transporoute et travaux v. Minister of Public Works*, the public authority of Luxembourg required from tenderers of other Member States, as a proof of good standing, possession of an establishment permit issued by the Government of the Member State in which the contract was to be awarded. Enrollment in the professional or trade register of the country in which the tenderer was already established was not deemed as a sufficient proof by the local authorities. The Luxembourg Government justified

[114] *Hettne* (fn.64), p.6.
[115] Judgment Contse and others, C-234/03, EU:C:2005:644, para.25.
[116] Judgment in *Commission v. Denmark "Storebaelt"*, EU:C:1993:257, para.61.

the requirement as "a registration of the contractor in question in a list of recognized contractors", even though in practice, the measure amounted to a double standard, which the most impact had to be faced by professionals coming from other Member States. It is now clear that the purpose of the Directives precludes the abolishment of real and potential restrictions on the freedom to provide services with regard to professionals providing services outside their country of establishment, hence imposing a direct duty on the Member States to guarantee such an access. In the Commission's view the standard to be complied with stood as

"precisely the kind of restriction envisaged by that definition [restrictive measures]. It contends that contractors established in Luxembourg pursue their professional and trade activities covered by such a permit whereas those not established in the country, and that means principally foreign contractors, must apply for the permit even if they wish to participate only once in a public works contract in that State".[117]

In *Commission v. France*, the Commission brought an action against France claiming that during the different procedures for the award of public works contracts for the construction and maintenance of school buildings in the region of Nord-Pas de Calais and the Département du Nord, the French Republic had failed to comply with Community Law, breaching Article 56 TFEU likewise the Works Directives 71/305 and 93/37. The Commission alleged various infringements in awarding the contracts, however what concerns this work is the imposition of technical criterias favoring French undertakings, thus restricting the Community freedom to provide services.

The French government had laid down certain technical specifications making direct reference to the classifications of French professional organizations, in particular the OPQCB and Qualibat - Qualifélec. The

[117] See Judegment in *SA Transporoute et travaux v. Minister of Public Works*, C-76/81, ECLI:EU:C:1982:49.

latter, made it more difficult for tenderers from other Member States to submit an offer within the brief time-limit set, since foreign participants were not familiar with the classification system used by the French authorities.“it remains the case that the technical specifications selected are so specific and abstruse that, as a rule, only French candidates are able immediately to discern their relevance ”.[118] The Court considered that it was not possible for foreign tenderers to participate on a same level with their local counterparts and reference to the classification of French professionals was likely to have a dissuasive effect on foreign providers. A second violation of the French authorities required proof that the designers of the construction work had to be registered with the *Ordre des Architectes* in France, a professional order containing a list of approved national architects in the country. The Court again found a breach of Article 56 TFEU arguing that registration in the *Ordre des Architectes* gave a considerable advantage to French architects, namely, “constitutes discrimination against Community architects and, accordingly, a restriction on their freedom to provide services”. Consequently, the Court concluded that the alleged violations was indirect discrimination, within the meaning of Article 56 TFEU.

Article 56 TFEU is likewise capable of covering any limitation to bring the provider’s own labor force to the Member State were the public contract will be performed. The following is of a general nature since it is not constrained only to public contracts, however the consequence of creating a disadvantage against domestic firms due to the non-possibility to use domestic workers is equally important also for PP.[119] The *Storebaelt* case provides a further example where the invitation of the tenderers in a procedure for the award of public works contracts, took place on the basis of a condition requiring the use to the greatest possible extent of national materials, consumer

[118] Judgment in Commission v. France, C-225/98, EU:C:2000:494, para.81.
[119] See Judgment in *Rush Portuguesa v. Office National D'immigration*, C-113/89, EU:C:1990:142.

goods, labor and equipment. The CJEU concluded that the "*Danish content clause*" condition did not comply with the Community law.

3. Other forms of indistinctly applicable measures

"One of the central issues of the freedom to provide services is, as with other freedoms, how to define its limits in a way reflecting the right balance between purposive market-creation, and practical attribution-respecting limits to EU law".[120] The challenges that the Court of Justice and the legislator face, are moreover increased by the fact that services can be both economically and socially extremely sensitive.[121] Services entail a complex dimension, from demanding industries such as telecommunication or transport, to fundamental services for the public welfare (healthcare and education) to conclude with small and medium sized ones, often very traditional and local orientated. Furthermore, services include people, facing the CJEU with moral and social interests which differ from one Member State to the other posing demanding challenges in the decision making process.

The general approach in regard to Article 56 was delivered by the Court in its case *Alpine Investments B.V. v. Minister van Financien.* Alpine Investment was a Dutch company incorporated and established in the Netherlands, which made use of a selling technique for commodities futures contracts involving the contact of individuals by telephone without their prior consent. The Dutch authorities had imposed a prohibition on the use of such a practice due to several complaints by investors. Although the case concerned measures applying equally to the domestic and foreign market, contrary to many expectations, the Court did not transpose the Keck formula. It argued that other techniques are still available for the company and that

[120] *Chalmers/Davies/Monti* (fn.67), p.800.
[121] *Chalmers/Davies/Monti* (fn.67), p.801.

existing clients could give their written consent to the use of "cold calling", hence there was no exclusion from the Belgian market.

While there is no doubt regarding the aim pursued by the freedom to provide services, the most complex and controversial aspect of the freedom is certainly the question where to draw the line between a justified and prohibited restriction. The CJEU has taken a general approach that all measures capable of hindering trade in services fall *prima facie* within the scope of Article 56 TFEU. The Court has constantly stated that all restrictions, even minor ones are caught by the prohibition. In the *Arblade* and *Gebhard* [122] cases, the Court ruled that the Treaty requires

"the abolition of any restriction even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede, or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services".[123]

Transferred in the PP context, while drawing attention to the criteria to be considered when addressing a national measure, the CJEU follows a similar view as in its settled caselaw, thus any kind of access restrictions to PP contracts are caught by Article 56 TFEU. Conditions and criteria to qualify those wishing to enter a tender competition must be justified as necessary and proportionate, otherwise they may hinder the freedom to provide services. Even though the specified conditions in the call can affect in the same way both domestic and foreign firms, if no grounds for exemption are found, the respective conditions will amount to breach of Community law. Likewise as in the free movement of goods, in particular after the Keck formula, also in the service sector there is not a closed list of restrictions or

[122] The same view was taken in the *Gebhard* even though it dealt with the freedom of establishment. The case is often referred to also in cases involving the service sector.

[123] Judgment in *Arblade*, Joined Cases C-369/96 and C-376/96, EU:C:1999:575, para.33.

derogations, as well as an entirely consistent caselaw. "The Court has not yet created a *Keck* for services, a case which is accepted to draw such lines, perhaps partly because the types of restrictions which impact on services are less easy to categorize than in the case of goods."[124] It remains to be seen if the Court will change direction on a case by case basis.

The Judgment *Ballast Nedam Groep NV (*a company governed by Netherlands law) *v. Belgian State,* affected the non-renewal of BNG's registration as a contractor in Belgium. The question that was raised before the CJEU concerned whether a holding company which does not itself execute works may not, because its subsidiaries which do carry out works are separate legal persons, be precluded on that ground from participation in public work contracts procedures. The Court rightly argued that "Accordingly, a holding company which does not itself execute works may not, because its subsidiaries which do carry out works are separate legal persons, be precluded on that ground from participation in public works contract procedures". [125]

As long as there is sufficient proof of the available economic, financial and technical standing of the holding company resources in order to carry out the contract, there is no need to constrain the freedom to provide services and impede the opportunity of a foreign provider to offer its services in the Member State in question.

4. Derogations from Article 56

Once a measure, rule, or requirement has been established as a restriction, or an obstacle to free movement, the question is whether Member States can justify those acts.[126] Justifying restriction on services compels the use of the EU law test, which the Court established in the *Gebhard* judgment, criteria of which the Court made

[124] *Chalmers/Davies/Monti* (fn.67), p.800.
[125] Judgment in *Ballast Nedam Groep NV v. Belgian State,* C-389/92*,* EU:C:1994:133, para.15.
[126] *Barnard/Schnell*, in: *Barnard/Peers* (eds.), EU Law, pp.403-442.

use also in the *Contse* case. For a measure to not hinder or make less attractive the exercise of the freedom enshrined in Article 56, four are the conditions to be fulfilled:

a. application in a non discriminatory manner;

b. justified by imperative requirements in the general interest;

c. suitable for securing the attainment of the objective pursued;

d. must not go beyond what is necessary in order to attain it.

4.1 Explicit justifications

Similar to the public interest grounds found in Article 36 TFEU, Article 52 combined with Article 62 TFEU provide a number of public interests, even though limited if compared with Article 36 TFEU, that can justify Member State measures restricting the freedom to provide services. It must be noted that the margin of discretion that the CJEU has given to Member States regarding the grounds of justification to secure public interest vary according to the nature of the facts concerned. Security derogations provide an example of how explicit justifications are applied in the PP context. Member States can invoke security in cases involving confidential information or defense purchases, however, "the scope of such arguments is limited by the proportionality test, as indicated by some cases that have come before the CJEU".[127]

In the *Re Data Processing* case, the Italian government had restricted public contracts involving the purchase of equipment and supplies required for the establishment of data-processing systems, and the design, and in some cases, the technical management of such systems only to firms of Italian public ownership or with a majority of them. According to the domestic authorities, the need derived from the sensitive information with which the firm would have to deal and the

[127] *Arrowsmith* in: *Arrowsmith*, (fn.13), pp.14-257

strategic nature of the sectors in question such as organized crime, public health, public security etc., at the same time, invoking also a need of confidentiality. The CJEU rejected such arguments by the Italian government, specifying furthermore that confidentiality in no way prevents the use of a competitive tendering procedure for the award of a contract.[128] It focused again on the effect that such measures are capable to produce be it that only Italian undertakings had the real possibility to be considered for the work. The Court ruled that the same result could be achieved by less restrictive measures, in particular by imposing a duty of secrecy on the provider's staff with possible criminal sanctions. The CJEU considered that the effectiveness of the measures in question, would not be affected by whether or not, the company was under Italian public ownership. In so far as the development and data processing may involve a degree of access to public and confidential information, there are unequivocally other sufficient and less restrictive measures to obtain the same results.

"Public security is a wide concept covering all aspects of security, internal and external, as decided by the ECJ, inter alia, in *Richardt*, *Werner* and *Leifer*, including the concept of national security".[129] Security as a ground of justification is of particular relevance for PP, mostly in the case of Defense Procurement. The need to safeguard matters related to national security, including here also, the purchase of defense supplies, or confidential information as in the above case, is directly related to the well-being of Member States and their citizens. Exclusion of foreign firms under public security derogations lies in the protection of the nature of the data concerned. The public implication, the risk of misuse by unauthorized personnel, or improper utilization contrary to the State interests, have an undeniable relevance, nevertheless, the Court has argued that the possibility to

[128] See Judgment in *Commission v. Italy*, C-157/06, EU:C:2008:530.
[129] *Trybus,* Buying Defense and Security in Europe: The EU Defense and Security Procurement Directive in Context, p.72.

depend on the security[130] derogation is ultimately constrained by a compelling proportionality test.

4.2 Objective justification

The freedom to provide services may also be restricted by rules which are justified by overriding reasons in the general interest, given that the rules apply to all service providers and undertakings operating in the territory of the Member State where the service is provided, [131] as long as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established, and in so far as it is appropriate for securing the accomplishment of the objective pursued and does not go beyond what is necessary in order to attain it.[132] "More generally, we can observe an increasing trend by the EU and the other global regulatory regimes to integrate secondary policies in their public procurement regulations".[133] The legitimate public interest objectives capable of justifying a restriction on the freedom to provide services include:

- the protection of workers;[134]
- the prevention of unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay;[135]
- combating fraud, in particular social security fraud, undeclared work, and preventing abuse, in so far as that objective can

[130] In the Judgment *Insinööritoimisto InsTiimi* C-615/10, the CJEU had to deal with a similar reliance on public security derogation. It furhter made clear that "*it is not merely sufficient for a Member State to rely on a general statement related to its security interests. Reliance on security is subject to scrutiny, the purpose of which is to assess whether those security interests can be properly relied on*".
[131] *Fairhurst* (fn.91), p.423.
[132] Judgment in *Arblade*, EU:C:1999:575, para.34 and 35.
[133] *Morettini* in: *Chiti/Mattarella* (eds.), Public procurement and Secondary Policies in the EU and Global administrative Law, pp.187-210.
[134] See Judgment in *dos Santos Palhota and Others*, C-515/08, EU:C:2010:589.
[135] See Judgment in *Wolff & Müller GmbH & Co. KG*, C-60/03, EU:C:2004:610.

> form part of the objective of protecting the financial balance of social security systems.[136]

In the case *Bundesdruckerei GmbH v. Stadt Dortmund*, the German local authorities issued at an EU level a call for tenders for a public contract relating to the digitalization of documents and the conversion of data for the urban-planning service of the city of Dortmund. A special condition of the tendering documents, referred to as a compliance with a standard form by which the contractor agreed to pay his employees a minimum hourly wage of EUR 8.62 and to require his subcontractors also to comply with that minimum wage, was imposed in the national legislation. Nevertheless, if the contractor was awarded the contract, the services under that contract would be performed exclusively in another Member State, in this case Poland, by a subcontractor established in that State. In the latter scenario, the subcontractor would not be able to provide an undertaking to comply with the minimum wage imposed since, such a minimum wage was not provided for by collective agreements or by the law of that Member State and payment of such a minimum wage was also not usual in that State in the light of the general standard of living there.

The objective of the special condition relating to the performance of the contract and in particular the social considerations, was certainly the protection of employees in ensuring an adequate and reasonable wage in order to avoid social dumping. "The most widespread social topics in public procurement are the "promotion of employment opportunities" and "the promotion of decent work". [137] As the European Commission has noticed in its recent evaluation report on the "Impact and Effectiveness of EU Public Procurement Legislation", there has even been "growing policy interest in re-orienting public expenditure towards solutions that are more compatible with

[136] See Judgment in *De Clercq and Others*, C-315/13, EU:C:2014:2408.
[137] *Schulten/Alsos/Burgess/Pedersen* (fn.8), p.8.

environmental sustainability, promote social policy considerations, or support innovation".[138] Among others, the consideration of social criteria in public contracts, becomes more and more acknowledged as a core principle of a modern procurement policy. "In practice the development of "socially responsible public procurement" (SRPP) may include a wide range of policy issues such as employment opportunities, decent work, compliance with social and labor rights, social inclusion, and equal opportunities etc".[139]

However, the Court stated that"In this regard, under national legislation, of a minimum wage on subcontractors of a tenderer which are established in a Member State other than that to which the contracting authority belongs and in which minimum rates of pay are lower, constitutes an additional economic burden that may prohibit, impede, or render less attractive the provision of their services in the host Member State. Consequently, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 56 TFEU".[140]

The Court made use again of the proportionality test underlying that the measure in question appears disproportionate and the national legislation goes beyond what is necessary to ensure, in this case, employees protection. It must also be recalled that a measure may be imposed only to the extent to which it is compatible with Community law. Furthermore, the Court concluded that the wage protection measure at issue cannot be justified neither in the light of the social security stability systems since, there is no real, or potential risk that could seriously undermine the balance of the German social security system.

[138] *European Commission*, Impact and Effectiveness of EU Public Procurement Legislation - Evaluation Report, Commission Staff Working Paper, SEC (2011) 853 final, 27.6.2011, p. IX.
[139] Schulten/Alsos/Burgess/Pedersen, (fn.8), p.4.
[140] Judgment in *Bundesdruckerei GmbH v. Stadt Dortmund*, C-549/13, EU:C:2014:2235, para.30.

"If those employees did not receive a reasonable wage and were consequently forced to have recourse to social security in order to ensure a minimum level of purchasing power, it would be to Polish social assistance that they would have a right. Such a consequence would clearly not affect the German social security system".[141]

PP has been used as a strategic policy instrument to promote social and sustainable goals on both international and European level. While environment considerations can be integrated more easily in public contracts i.e. through technical specifications, social concerns do not possess the same versatility. Arguments vary as to the necessity and outcome of incorporating social and environment requirements into the PP framework since the primary purpose of PP remains to open the public markets of the Member States to foreign bidders and strengthen competitiveness within the Union. "The contracting authorities within the EU can therefore not be given full freedom to set social and environmental requirements for the award of a public contract".[142] Their significance has been acknowledged extensively by the CJEU and recently the EU lawmakers in developing a new set of Directives which recognize the scope of sustainable and social PP. However, PP should be considered and ultimately remain as a complementary tool in achieving the Union's policy goals, hence, to be integrated with other instruments in the hand of the EU institutions.

[141] Ibid., para.35.
[142] *Hettne*, EPPL, Vol.1, 2013, p.40.

CONCLUSION

PP is a powerful driver of growth, both for the global economy and the EU. It is a discipline that depicts how singular and distinctive objectives, that is economic freedoms, legal regulations and policy targets, can come together to optimize public spending and welfare. With particular emphasis on the European setting, PP can be addressed as a multiface tool in the hands of the EU institutions and the Member States, covering commercial interests as well as fostering critical and strategic issues such as, environment, social security, labor rights, employment opportunities etc. Commercial interests are directly related with establishing the European Single Market, a space where the free movement of goods, services, capital and people are not only guaranteed, but in a globalize social and economic system, improved to efficiency.

Regulating the PP sector, has proved to be a challenging task, since the intertwining of the EU legal order with the national one, has made it difficult to set the boundaries between the Member States autonomy and the EU intervention. However, further adjustment on an European level has deemed to be necessary, as PP has been considered a considerable non-tariff barrier, able to hinder intra-Community trade and competitiveness in the relevant markets. "At opposite, providing public goods and services privately without any public regulation would induce higher prices once the producer benefits from monopoly power".[143] "Significant legal reasons have emerged by positioning the regulation of public procurement as a necessary ingredient of the fundamental principles of the Treaties, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality".[144] Thus, a separate legal system, corresponds to an integrated and functional European

[143] *Brux/Marty*, EPPP, Vol.2, 2014, p.113.
[144] *Bovis* (fn.2), p.482.

common market, public spending accountability, transparency, fair competitive behavior, sound management practices and elimination of corruption or discrimination in public expenditure. It eliminates market access restrictions, promotes cross border trade flow, ensures "value for money" as well as the award of public contracts through a transparent and fair procedure.

The PP Directives, aim to bring the different legal systems of the Member States in one common direction, placed within the framework found in the EU Treaties. Due to the existing differences in the national systems, it has been often complex to set uniform definitions, rules, or standards, which are able to accommodate them. In doing so, the CJEU jurisprudence has played a major role, sometimes crucial, in rendering PP rules flexible, while reflecting on the founding principles of the Treaties. The CJEU influence has definitely contributed in constructing an ample regime which balances the requirements of a Single Market with social and sustainable considerations. The latter can be seen in the New PP Directives, which have incorporated many of the Court's findings in years of jurisprudence.

The most relevant freedoms concerning PP are certainly the free movement of goods and the freedom to provide services, respectively Article 34 and 56 TFEU. In reaching this conclusion, their economic and legal significance has been taken into account as determining factors. When elaborating upon the freedoms, it is important to follow settled caselaw already established by the CJEU, dealing with them as fundamental pillars of a single and competitive European market. Transposed in the PP context, both freedoms were considered under the structure that the Court has attained in the historical judgments of *Dassonville*, *Cassis* and *Keck*, drawing a distinction between distinctly and indistinctly applicable measures and further, also to measures which have an equal impact on domestic and imported products, however do not fit in the previous categories.

Distinctly applicable measures set a system where goods, or services coming from other Members States receive a different and usually less favorable treatment compared to the treatment which the domestic goods or services have received. Recognizing a measure with this characteristics is relatively simpler since there is a direct discrimination in placing the product or service in the market, stemming from the nationality or origin of the product or service. The measures are able to construct a domestic preferential regime applying conditions differentiating between national firms and firms from other Member States, or by reserving certain contract only to national providers.

Indistinctly applicable measures are a form of covered discrimination. *Prima facie*, rules apply equally to domestic and foreign, nevertheless, an indirect disadvantage is created for the goods or service providers coming from other Member States, thus favoring only domestic providers. Requirements to have a registered office in the region where the work will take place, double standards such as possession of an establishment permit issued by the government of the Member State in which the contract is to be awarded as a proof of good standing, the utilization of specific and technical standard, a specific make or source, a particular process, trade mark, patent, or types, or a specific origin or production with the effect of favoring, or eliminating certain undertakings or certain products, not accompanied by the words "or equivalent", are only some of the examples of preferential treatment used by the public authorities of the Member States in awarding a public contract.

The scenario results to be more complex where other forms of measures are at focus. Those measures, although have an equal impact on domestic and imported products, are still capable of posing obstacles to cross border trade within the Union. It is not entirely clear the approach that the Court takes in this regard, since there is not a

uniform caselaw to which one could refer to. A likely direction reflects the possibility that all measures hindering intra-Community trade are capable of falling within the scope of Article 34 and 56. Certainly, there is no precise structure, however the question to be answered in this regard is: Has market access been restricted? Market access, especially in the PP context, is crucial in deciding the nature of a taken measure. The aim of the Directives themselves is to enable a flow of goods and services and facilitate their access in the public market of the Member States, hence measures which pose obstacles to the penetration of a particular service or good in the public market of the other Member States, are detrimental to intra-states trade, subsequently to an integrated and functional Single Market.

Technical specifications have proved to be important factors which encompass a real potential in violating the economic freedoms. In creating the equivalent standard doctrine, the Court attempts to find a less intrusive tool in balancing Member States autonomy when deciding the standards that undertakings have to comply with for the award of a public contract. It generates the opportunity to make use of specific indicators while allowing an ample pool of choices, which can serve in a likewise manner the technical requirements of the state authorities. It can estimated that the doctrine opens the doors to a parallel set of criteria which can be used to uphold the abolishment of intra-Community trade restriction.

The provisions on free movement of goods and services are not without exceptions. There are many legitimate reasons under which Member States may prohibit the entrance of a product or a specific service in their domestic markets. Security, environment, social dumping, combating fraud, etc. are some examples used by national authorities in justifying their actions. The Court distinguishes among explicit causes of justification, which can be found in the Treaties, and mandatory (objective) requirements, developed as grounds of justification through the Court's jurisprudence. The traditional view

has been that the general requirements can justify only indistinctly applicable measures, however, since the *Preussen Elektra* judgment, where the CJEU accepted that environmental protection could justify even distinctly applicable measures as long as they meet the proportionality test, there is a possibility that this assumption may no longer apply, although this is not entirely clear. It must be noted that even in cases where the Court has accepted grounds of derogation from the fundamental freedoms, Member States are nevertheless constrained by the proportionality test. The measure in question should not be disproportionate, the national legislation must not go beyond what is necessary to achieve the aim sought and no less restrictive measure on trade should be available.

In brief, the CJEU has followed a similar logic as in its established caselaw, also when referred to PP since, even though the context is different, it affects one of the Union's core regimes, the Single Market. Through its jurisprudence, the Court has constantly worked on a paradigm which enables economic operators from across other Member States to have equal opportunities when competing for the award of a public contract. In doing so, the Court has established a rigorous and transparent system, nevertheless, flexible up to a point able to encompass societal considerations.

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