

Administration in International Organizations

**LAW OF PUBLIC CONTRACTS**

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# **Procurement under the Treaty on the Functioning of the European Union**

## **The key provisions on free movement relevant to public procurement:**

- Article 34 TFEU (ex Article 28 TEC) on free movement of goods;
- Article 56 TFEU (ex Article 49 TEC) on freedom to provide services;
- Article 49 (ex Article 43 TEC) on freedom of establishment

## **Other relevant provisions:**

- Article 107 TFEU on State aid

# **Procurement under the Treaty on the Functioning of the European Union**

## **Article 34 (ex Article 28) on free movement of goods**

„Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”

### **1. Measures that discriminate directly between domestic and imported products (e.g. decision to buy products only from domestic market; policy which gives preference to domestic products)**

- Du Pont de Nemours, C-21/88 (national rules reserving to undertakings established in certain regions of the national territory a proportion of public supply contracts are contrary to Article 34);
- Storebaelt, C-243/89 (a clause requiring the use of Danish materials as far as possible contrary to Article 34)

# **Procurement under the Treaty on the Functioning of the European Union**

## **Article 34 (ex Article 28) on free movement of goods**

„Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”

**2. Measures which apply equally to domestic and imported products but which *have the effect of favouring* domestic products as against imports**

- **Dundalk, C-45/87** (contract specification requiring conformity with Irish standard which was applicable to both domestic and imported products held contrary to Article 34 as in practice only one Irish firm produced goods that complied with the standard)

# **Procurement under the Treaty on the Functioning of the European Union**

## **Article 34 (ex Article 28) on free movement of goods**

„Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”

### **3. Measures that have an equal impact on domestic and imported products**

- **Measures that relate to the characteristics of a product;**
- **Selling arrangement are caught by Article 34 only if they are directly or indirectly discriminatory**

**See UNIX, C-359/93**

# **Procurement under the Treaty on the Functioning of the European Union**

## **Article 56 TFEU (ex Article 49 TEC) on freedom to provide services**

„Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.”

# **Procurement under the Treaty on the Functioning of the European Union**

## **Article 56 TFEU (ex Article 49 TEC) on freedom to provide services**

- 1. Measures that discriminate directly on grounds of nationality of the service provider (e.g. rules prohibiting foreign service providers from providing a particular type of service)**
  - See, C-360/89 – Commission vs Italy**

# **Procurement under the Treaty on the Functioning of the European Union**

**Article 56 TFEU (ex Article 49 TEC) on freedom to provide services**

**2. Measures which apply equally to domestic firms and those from other Member States but which *have the effect of favouring* domestic firms**

- **See**

- C-3/88, *Commission v Italy* (“Re Data Processing”);
- C-234/03, *Contse*
- C-113/89, *Rush Portuguesa*



# **Procurement under the Treaty on the Functioning of the European Union**

**Article 56 TFEU (ex Article 49 TEC) on freedom to provide services**

**3. Measures that have an equal impact on domestic and non-domestic firms**

# **Procurement under the Treaty on the Functioning of the European Union**

## **Article 49 TFEU (ex Article 43 TEC) on freedom of establishment**

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

# **Procurement under the TFEU – Derogations and limitations**

## **Explicit derogations based on TFEU provisions**

### **Free movement of goods:**

- MS may derogate from the freedom 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 (Article 36 TFEU);
- Restrictions must be justifiable on objective grounds and cannot be disguised restriction on trade;
- Restrictions must satisfy the proportionality test:
  - They must be suitable to promote the objective sought;
  - They must be necessary to achieve the objective sought (there is no less restrictive measure)

# **Procurement under the TFEU – Derogations and limitations**

## **Explicit derogations based on TFEU provisions**

### **Freedom of establishment and freedom to provide services**

- MS may derogate from the freedoms on grounds of public policy, public health or public morality (Articles 52, 62 TFEU)
  - Freedoms do not apply to do not apply to activities that “are connected, even occasionally, with the exercise of official authority” (Articles 51, 62 TFEU)

# **Procurement under the TFEU – Derogations and limitations**

## **Implicit limitations**

### **Free movement of goods:**

- Mandatory requirements - protection of consumers, environmental protection, the effectiveness of fiscal supervision and improvement of working conditions (subject to proportionality requirements)

### **Freedom of establishment, freedom to provide services:**

- Imperative requirements/objective justifications

# **Procurement under the TFEU – Derogations and limitations**

## **How do all the derogations and limitations apply in public procurement cases?**

- Re Data Processing (it is not enough that the subject matter of the contract is concerned with public security or health; protection of confidential information could be achieved by less restrictive means);
- C-379/98 - PreussenElektra (measures that were caught by Article 34 TFEU exempt on the grounds of environmental and health considerations)

# **Procurement under the TFEU**

## **Application of the free movement provisions**

- They may even apply to individual contracts as opposed to measures of a general nature
- TFEU obligations apply only to contracts that are considered of cross-border interest

# Procurement under the TFEU

## Transparency and competition

1. The TFEU non-discrimination principle implies an obligation of transparency entailing “a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed” (the CJ in Teleaustria C-324/98);
2. Content of the obligation (not clear, lack of precise rules, leverage principle):
  - a) Requirement to draw up the rules of the procedure in a clear, precise and unequivocal manner;
  - b) Publicity for the procurement that is accessible to any interested party
    - Is a separate notice for each contract needed or not?
    - A notice in a source in which suppliers can be expected to look for contract opportunities (Official Journal; the procuring entity’s own website, national journals, specialist publications);
    - According to the Commission, it is for the contracting entities themselves to determine what is appropriate medium for publication
  - c) Other requirements? (the CJ did not provide specific rules; According to the Commission there is an obligation to hold a competition)



# **Procurement under the TFEU**

## **Transparency and competition**

### **To which contracts do those obligations apply?**

- Non-priority services contract;
- Below-thresholds contracts;
- Contracts excluded from the directive's obligations of advertising and competition;
  - In-house arrangements are excluded from the TFEU rules