EXPOSÉ FOR A DOCTORAL THESIS

Preliminary Title

EU Internal Market – and Public Procurement Law:

Social and Environmental Dimensions of Economic Integration

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1. Liberalisation of Public Procurement

Public Procurement is the process by which governments and other public law entities purchase products, services and works. Governments are the largest, single most important customer of industry. As they spend a substantial portion of taxpayers' money, they are obliged to carry out their spending efficiently with high standards and integrity to safeguard public budget from wasting. Public procurement plays a key role as an important market amounting between 10% and 25% of GDP on average world-wide according to the World Bank Group (2019).[1]

For a very long time, there weren't even national rules on public procurement, not to mention international rules. Public procurement has been conducted since the existence of governments. Evidence is found from 800 BC in the development of the silk trade between China and a Greek colony, or a clay tablet found in Syria with the earliest procurement order dating from between 2400 and 2800 BC.[2] It is only since the increase of economic activity of states that public procurement has been identified of economic importance.

1.1. International Origins

There are several international frameworks or instruments, both binding and non-binding, that serve as guidance to conducting public procurement. Most notably, those are multilateral instruments such as the World Bank [3] Guidelines for Procurement ("Guidelines"), the United Nations Convention against Corruption (“UNCAC”), the

[1] World Bank Group. 'Doing Business 2019: Training for Reform.' <http://www.worldbank.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf> (2019). Accessed on 13 May 2020.

[2] Khi V. Thai, 'Public procurement re-examined' (2001) 1(1) Journal of Public Procurement 9, 11. Citing Charles K. Coe, *Public Financial Management* (Prentice Hall, 1989) 87.

[3] World Bank (as opposed to the World Bank Group) refers to two institutions, namely the International Bank for Reconstruction for Development (IBRD) and the International Development Association (IDA). Procurement requirements of IBRD and IDA are identical.

Government Procurement Agreement ("GPA") and the EU Procurement Directives ("EU Directives"). The UNCITRAL Model Law on Public Procurement - though not an agreement and thus without the same legal effect as Guidelines, UNCAC, GPA or EU Directives - shall serve as a model for states in both the development and harmonisation of public procurement regimes. Furthermore, there are numerous frameworks in regional, bilateral or investment agreements.

As mentioned, despite considerable economic importance, initially public procurement rules did not find a way into multilateral agreements. Today, public procurement is generally exempted from market access and non-discrimination obligations for goods (Articles III:8(a), XVII:2 GATT) and services (Article XIII:1 GATS). “Government procurement practices have traditionally been considered unreached by the language of GATT Article I, and the language of GATT Article III and the preparatory work of GATT seems to support this approach.”[4] The scope of the derogation, however, might not be as broad as has generally been thought.[5] There are paradigm situations, perhaps even with the risk of a legal vacuum - in which Article III:8(a) GATT has been subject to sensitive interpretation in the WTO's dispute settlement system.[6] This issue appears to be far from resolved. Davies, for instance, advocates for the preservation of operation of the derogation even in such paradigm situations.[7]

Although public procurement generally aims to deliver value for money, governments were free to procure in a protectionist manner thereby harming the economy as well as

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[4] John H. Jackson, *The Jurisprudence of GATT&WTO* (Cambridge University Press 2000) p. 63.

[5] Arwel Davies, 'The Evolving GPA- Lessons of Experience and Prospects for the Future.' in Aris Georgopulos, Bernard Hoekman & Petros C. Mavroidis (Eds.) *The Internationalization of Government Procurement Regulation*. (Oxford University Press 2017).

[6] See e.g. WTO, *Canada: Certain Measures Affecting the Renewable Energy Generation Sector – Report of the Appellate Body* (6 May 2013) WT/DS412/AB/R; WTO, *Canada – Measures Relating to the Feed-In Tariff Programme – Report of the Appellate Bopdy* (6 May 2013) WT/DS426/ AB/R.

[7] Arwel Davies, 'The GATT Article III:8(a) Procurement Derogation and Canada - Renewable Energy.' (2015) 18(3) Journal of International Economic Law 543.

public budgets. Discriminatory procurement became the "norm". The fragmentation of markets into several national carve-outs diminished welfare and prevented market integration. GATT and WTO Members have been addressing issues of public procurement in the multilateral trading system. Overall, three main developments to be highlighted are the first plurilateral Agreement on Government Procurement ("GPA"), negotiations on government procurement in services according to Article XIII:2 GATS and the setting up of a multilateral Working Group on Transparency in Government Procurement established by the Singapore Ministerial Conference in 1996.

The GPA was negotiated parallel to the Uruguay Round of multilateral trade negotiations in the 1980s and 1990s. It was signed in Marrakesh on 15 April 1994 at the same time as the Agreement Establishing the WTO[8] and entered into force on 01 January 1996. The GPA covers the purchasing of goods, services and construction services by governments and intends to open public markets among its parties and foster good governance as well as fair and transparent competition. Renegotiations were initiated only two years later and lasted until the end of 2011. The revised GPA was formally adopted in 2012 and came into force in 2014 updating the text and elevating members' commitments on market access. Both versions of the GPA are based on the same underlying principles of non-discrimination, transparency and fairness. The GPA grants rights exclusively to its parties, who need not be WTO members.[9] Hence, WTO members who are parties to the GPA may still discriminate against other states, even WTO members that are not a party of the GPA. Furthermore, contrary to the GATT and GATS, the GPA is an agreement based on mutual reciprocity. Thus, even amongst GPA parties, liberalisation seems limited and is subject to constant negotiations.

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[8] Although negotiated completely independently, see e.g. Marc Bungenberg, 'Die Ausweitung des Geltungsbereichs des Government Procurement Agreement' (2000) Wirtschaft und Wettbewerb 872 (German).

[9] There are currently 48 parties including the European Union and its Member States. The newest party is Australia having joined in 2019.

1.2. European Origins

None of the founding treaties included provisions on public procurement explicitly. Reich finds that "this was not as a result of a simple omission by the drafters of the Treaty, but of a failure to reach agreement on a set of principles, because the complexity of the subject matter and the highly sensitive nature of preference policies".[10]

Besides the adoption of some Directives in the 1970s, public procurement law became a main subject in the Commission's 1985 White Paper on Completing the Internal Market[11] and has been a priority since the 1986 Single European Act. The White Paper stated

> 81. Public procurement covers a sizeable part of GDP and is still marked by the tendency of the authorities concerned to keep their purchases and contracts within their own country. This continued partitioning of individual national markets is one of the most evident barriers to the achievement of a real internal market.
>
> 82. The basic rule, contained in Article 30 et seq. of the EEC Treaty, that goods should move freely in the common market, without being subject to quantitative restrictions between Member States and of all measures having equivalent effect, fully applies to the supply of goods to public purchasing bodies, as do the basic provisions of Article 59 et seq. in order to ensure the freedom to provide services.

1.3. Ways of Perceiving EU Public Procurement Law

Since public procurement has been identified of economic importance and as a non-tariff barrier,[12] the public procurement rules shall aim at non-discriminatory, transparent and fair procedures.[13] Therewith, they aim at fostering economic integration and sustainable,

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[10] Arie Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (Kluwer 1999) 71-72.

[11] Commission, 'Completing the Internal Market: White Paper from the Commission to the European Council' COM(85) 310 final 23.

[12] See Commission of the European Communities, *The Cost of Non-Europe, Basic Findings, Vol.5, Part.A: The Cost of Non-Europe in Public Sector Procurement* (Official Publications of the European Communities 1988). Cechinni Report 1992, *The European Challenge* (Wildwood House 1988).

[13] See e.g. Christopher Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016); Friedl Weiss, 'Internationales öffentliches Beschaffungswesen' in Tietje C

inclusive economic growth[14] through the principle of an open market economy with free competition[15] as enshrined in Article 119 TFEU. Equality in the sense of equal opportunity as a prerequisite for contending on the sole criterion of economic performance is typical of free competition.[16] This is one of the arguments why the liberalisation processes in the WTO and the EU are often interpreted with an economic theory depending on price competition.[17]

Concerning the public procurement rules, settled case-law emphasises that "the purpose [of the public procurement rules] is to *avert* both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the *possibility that a [contracting authority] may choose to be guided by other than economic considerations*."[18]

It makes sense to take into account the notion of value for money as part of efficiency. Highlighted with the latest set of procurement rules, economic performance might not be, however, the sole objective pursued.

Still, there have been quite convincing arguments for a purely economic approach. For instance, by arguing for the application of EU competition rules to *all* contracting

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(ed) *Internationales Wirtschaftsrecht* (De Gruyter 2015, German).

[14] Commission, 'Europe 2020 strategy for smart, sustainable and inclusive growth' (Communication) COM(2010) 2020 final.

[15] See e.g. case C-399/98 *Ordine degli Architetti and Others* [2001] EU:C:2001:401, paras 52, 75; joined cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] EU:C:2001:640, para 35; case C-513/99 *Concordia Bus Finland* [2002] EU:C:2002:495, para 81; case C-243/89 *Commission v Denmark* [1993] EU:C:1993:257, para 33.

[16] See Walter Frenz, *Vergaberecht EU und national* (Springer 2018, German), margin no 8. Water Frenz, *Handbuch Europarecht, Band 2: Europäisches Kartellrecht* (2nd ed, Springer 2015, German), margin no 31.

[17] For a detailed analysis in respect to EU public procurement law, see e.g. Peter Kunzlik, 'Neoliberalism and the European Public Procurement Regime.' (2013) 15 Cambridge Yearbook of European Legal Studies 283.

[18] See e.g. case C-380/98 *University of Cambridge* [2000] EU:C:2000:529, para 17; case C-470/99 *Universale-Bau and Others* [2002] EU:C:2002:746, para 52; case C-373/00 *Adolf Truly* [2003] EU:C:2003:110, para 42; case C-18/01 *Korhonen and Others* [2003] EU:C:2003:300, para 52; (emphasis added).

authorities' purchasing activities due to their vast purchasing power, irrelevant of the subsequently intended activity.[19] Another approach has also manifested in literature by considering the public procurement market being a *sui generis* one where a positive regulatory approach enhancing and safeguarding market access is required and "where the mere existence and functioning of antitrust is not sufficient to achieve the envisaged objectives".[20] Perhaps an even more nuanced approach may be to advocate and search for regulatory space, i.e. seeking opportunities to pursue national interests in public procurement specifically.[21] Essentially, EU public procurement rules can be described as supranational administrative law.[22] They are intertwined with global administrative law[23] such as the WTO GPA. Both types of administrative law feature liberalisation, but many countries want to continue using public procurement to promote other policies. While global administrative law is not very precise in implementation and rather lenient with discretion, the EU supranational administrative law is very detailed in how the Member States have to implement the rules and strict in protecting free trade.[24]

1.4. Strategic Public Procurement

Inherently, the EU public procurement rules stem from free movement law. The internal market is not only concerned with economic integration in the sense of open competition but also "sustainable development of Europe based on balanced economic growth and

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[19] See e.g. Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* (2nd edn, Hart Publishing 2015).

[20] Bovis (n 13) xiii.

[21] See e.g. Sue Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2012) 14 Cambridge Yearbook of European Legal Studies 1.

[22] Bovis (n 13) xiv.

[23] For the established and still growing public international law branch of global administrative law, see e.g. Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The emergence of global administrative law.' (2005) 68 Law and Contemporary Problems 15.

[24] See e.g. Simona Morettini, 'Public Procurement and Secondary Policies in EU and Global Administrative Law' in Edoardo Chiti and Bernardo Giorgio Mattarella (eds) *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (Springer 2011).

price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance" according to Article 3(3) TEU. Highlighted in case *Brüstle*, Advocate General Bot observed that "the Union is not only a market to be regulated, but also has values to be expressed".[25]

Public procurement, with its large market influence, is capable of being used as a policy strategy instrument. Already in 2008, the European Commission proclaimed that it "can shape production and consumption trends and significant demand from public authorities for 'greener' goods will create or enlarge markets for environmentally friendly products and services. By doing so, it will also provide incentives for companies to develop environmental technologies."[26] Formally, it has been recognised as a policy instrument with the 2011 Single Market Act[27] which eventually prompted reforms to the EU public procurement rules[28]. Value shall no longer be about the lowest price only. "Some Member States made MEAT[29], which may include green criteria, mandatory for their procurement processes. […] In any event, to achieve optimum outcomes in public procurement, strategic criteria need to be applied systematically."[30] However, a prerequisite for the systematic application of strategic criteria is a comprehensive understanding of the nature of public procurement law and its potential for discretion within the internal market.

While the European legal framework shall minimise the level of protectionism and

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[25] Case C-34/10 *Brüstle* [2011] EU:C:2011:138, Opinion of AG Bot, para 46.

[26] Commission, 'Public procurement for a better environment' (Communication) COM(2008) 400 final; See also a recent empirical study observing the positive effects of strategic public procurement: Stojčić Nebojsa, Srhoj Stjepan and Coad Alex, 'Innovation procurement as capability-building: Evaluating innovation policies in eight Central and Eastern European countries' (2020) 121 European Economic Review 103330.

[27] Commission, 'Single Market Act.' (Communication) COM(2011) 206 final.

[28] Commission, 'Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market.' (Communication) COM(2011) 15 final.

[29] Most economically advantageous tender allows for giving more prominence to quality.

[30] Commission, 'Making Public Procurement work in and for Europe' (Communication) COM(2017) 572 final 8.

strengthen competitiveness, it still enables a leeway of discretion. Practices must be reconciled with the underlying legal principles. After all, the EU single market's rationale is the theory of comparative advantage by David Ricardo. His legacy, though based on a rather simple example of two states trading wine for cloth, shows that opportunity cost prevails absolute advantage even if one state had a productivity advantage over the other. His model belongs to liberal economic paraphernalia and has never been falsified in economic sciences. Thus, unilaterally opening European markets without reciprocal access (unlike the arguably reciprocal access in the international public procurement regime) increases wealth and economic well-being by increasing the range of competitors.[31] Although free trade is capable of yielding many benefits, numerous issues might arise such as adverse effects on environmental or socio-economic standards.

2. Outline of Problem

2.1. Overview

It is evident from the origins of the international liberalisation process that public procurement is not a replication of a "regular private market" and thus generally exempted from the GATT and GATS. It would appear that international public procurement is an indefinite public market made up of reciprocal commitments to the greatest possible mutual benefit. International liberalisation, however, is limited by vast discretion whereby national interests are preserved. A differentiated approach could potentially be argued also, at least to some extent, within the framework of the EU – given the special (public) nature of public procurement. Admittedly, even if there were a differentiated liberalisation approach, it must not necessarily be a less favourable one if the approach in public procurement markets took the route of extensive positive obligations.

[31] David Ricardo, *On the Principles of Political Policy and Taxation* (3rd edn, John Murray 1821).

In light of strategic public procurement objectives, the legal classification of public procurement decisions as well as the social and environmental dimension of economic integration (i.e. in the Public Sector Procurement Directive and in EU free movement, EU competition and EU state aid law) must be scrutinised. Among others, one of the main problems is going to be to attempt to overcome legal uncertainties concerning process and production methods (PPMs) as a link between trade and other policy areas.

2.2. EU Free Movement Law

In public procurement, the TFEU guarantees the free movement of goods, freedom of establishment, freedom to provide services and their derived general principles for public procurement. The application of fundamental freedoms and general principles in the context of public procurement still presents difficulties, significantly so in respect to strategic public procurement.

According to Article 34 TFEU, "all quantitative restrictions on imports and all measures having equivalent effect" are prohibited between Member States. The latter includes all trade rules "which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[32] Measures having equivalent effect may be prohibited if they discriminate directly against imports versus domestic goods,[33] if they discriminate indirectly against imports (neutral criteria that favour domestic goods)[34] or if they hinder or restrict imports although in a non-discriminatory manner[35]. It is well known that the ECJ distinguishes between measures that relate to the characteristics of the goods and those which merely relate to "selling arrangements" which will not, when non-

[32] Case 8/74 *Procureur du Roi v Dassonville ('Dassonville')* [1974] ECLI:EU:C:1974:82.

[33] See e.g. case C-263/85 *Commission v. Italy* [1991] EU:C:1991:212; case C-21/88 *Du Pont de Nemours Italiana SpA v. Unita Sanitaria Locale No 2 Di Carrara ('Du Pont de Nemours')* [1990] EU:C:1990:121.

[34] Case 45/87 *Commission v Ireland ('Dundalk')* [1988] EU:C:1988:435.

[35] Case 120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] EU:C:1979:42.

discriminatory, infringe Article 34 TFEU.[36] Measures are not automatically prohibited as they may be justified under explicit derogations from Article 34 in Article 36 TFEU or as mandatory requirement under the rule of reason in *Cassis de Dijon*[37]. The concept of measures encompasses general laws and practices only[38] and Arrowsmith, for instance, found that the ECJ consistently *assumes* that Article 34 TFEU applies to individual procurement decisions (individual contract awards).[39] Furthermore, she questions for instance the difference between procurement and other governmental activity and presumes that the ECJ's approach "may have been adopted to allow the ECJ to deal with states that do not regulate procurement through formal rules but restrict access to the market through persistent practices that may be hard to prove"[40].

Article 49 TFEU, freedom of establishment, concerns the right of individuals and companies or firms of a Member State to set up their business in another Member State. This right includes both forming a company in another Member State ("primary establishment") and setting up agencies, branches or subsidiaries of an existing company ("secondary establishment"). The concept of establishment is a very broad one, it allows to participate on a stable and continuous basis in the economic life of another Member State to profit therefrom.[41] With public procurement, it means government measures are prohibited were they restrict enterprise's public market access, e.g. by

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[36] Cases C-267/91 and C-268/91 *Keck & Methouard* [1993] EU:C:1993:905.

[37] Case 120/78 *Cassis de Dijon* (n 35).

[38] Case 21/84 *Commission v France* [1985] EU:C:1985:18.

[39] Sue Arrowsmith and Peter Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press 2009) 57. See also e.g. case C-3/88 *Commission v Italy ('Re Data Processing')* [1989] EU:C:1989:606; case C-243/89 *Commission v Denmark ('Storebaelt')* [1993] EU:C:1993:257; case C-359/93 *Commission v Netherlands ('UNIX')* [1995] EU:C:1995:14; case 59/00 *Bent Mousten Vestergaard v Spottrup Boligselskab ('Bent Mousten')* [2001] EU:C:2001:654; case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG ('Telaustria')* [2000] EU:C:2000:669.

[40] Arrowsmith and Kunzlik (n 39) 57.

[41] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano ('Gebhard')* [1995] EU:C:1995:411.

preventing them to bid.

Article 56 TFEU provides for the right of nationals of a Member State who are established in a Member State to provide services for a national of another Member State, e.g. by posting workers there. The provisions on services are subordinate to provisions relating to freedom of movement of goods, capital and persons. Services, compared to establishments, are carried out by self-employed persons too but they act temporarily instead. The temporary nature is to be determined in the light of its duration, regularity, periodicity and continuity.[42] In the context of public procurement, these provisions guarantee unrestricted access to participation in public contracts.

In addition to these fundamental freedoms, general principles of law have emerged from ECJ case-law. Most notably, the general principles in the context of public procurement are equal treatment, mutual recognition and proportionality.

The TFEU and its principles generally impose prohibitions, i.e. negative obligations. However, it was soon recognised that, in the field of public procurement, the Treaty was insufficient and certain positive obligations were necessary. For instance, the principle of transparency in secondary law requires EU-wide advertising to monitor and enforce the negative obligations as contracting authorities cannot disguise discriminatory actions and hide behind discretion. This shall facilitate the removal of barriers to market access.

Summing up, the rules on public procurement derive mainly from the TFEU (provisions on the free movement of goods, freedom of establishment and freedom to receive and provide services) and from the EU Public Procurement Directives (Public Sector and Utilities Sector).[43]

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[42] Ibid.

[43] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive

The two amended EU Public Procurement Directives cover only those parts of public procurement that are beyond the value threshold set out therein (in total, approximately 80 per cent of public procurement falls outside the scope of the Directives).[44] Also, in this context, a newly adopted EU Concessions Directive creates a regulation for the award of concession contracts.[45] The EU legislator decided to regulate in the Directives only those public contracts that are capable of having a major effect on trade between the Member States, i.e. contracts of high value. Essentially, the Directives' fundament rests on the basic principles non-discrimination, equal treatment and transparency. These principles emanate in the publication of proposed procurement contracts, the design of technical specifications, choice of the procurement procedure, qualification and selection of tenderers and eventually the award of contracts.

Contracting authorities are generally free to decide on what to buy via technical specifications and encourage competition with award criteria conditions provided they are relating to the performance of public contracts, are not directly or indirectly discriminatory and are included in the contract advertisement or the contract documents. For instance, the award based on the "most economically advantageous offer" provides for a flexible and wide interpretation[46] to balance internal market objectives with environmental or social ones. As there is no explicit mentioning in the Directives of environmental or social criteria as part of the award criteria, the ECJ must fill the gaps in its case-law on the extent of discretion of contracting authorities. It is clear, as the ECJ clarified early on in its case-law, that

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2004/17/EC [2014] OJ L94/243.

[44] Commission, 'Internal Market and Services, EU public procurement legislation: delivering results. Summary of evaluation report' (2016) 9. Available at <https://ec.europa.eu/docsroom/documents/15552>.

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

[46] Case 31/87 *Gebroeders Beentjes v The Netherlands ("Beentjes")* [1989] EU:C:1988:422.

> [the Directive] **does not lay down a uniform and exhaustive body of [Union] rules**; within the framework of the common rules which it contains, the **Member States remain free to maintain or adopt substantive and procedural rules** in regard to public works contracts **on condition that they comply with all the relevant provisions of [Union] law**, in particular the prohibitions flowing from the principles laid down in the Treaty in regard to the right of establishment and the freedom to provide services.[47]

Thus, it is inevitable to examine the approach of the ECJ on those primary law provisions with respect to public procurement – particularly the balance of internal market vis-à-vis other objectives.

Arrowsmith and Kunzlik held that "the directives now embrace norms relating to equal treatment that go beyond non-discrimination on grounds of nationality and provide a positive organising principle for opening up public contracts, as well as a general principle of transparency" and that the "ECJ has used these principles both to interpret the explicit rules of the directives and to imply additional obligations."[48] Apparently, the ECJ significantly favours internal market objectives as manifested in *Beentjes*[49] and subsequent jurisprudence, though the ECJ shows contrary indications in decisions such as *Concordia Bus Finland*[50] and *EVN-Wienstrom*[51]. While in *Beentjes* measures relating to the contract workforce are hindrances to trade that must be justified, in *Concordia Bus Finland* the ECJ allowed for an environmental award criterion although it could only be met by very few firms (especially by one firm associated with the contracting authority). Arrowsmith and Kunzlik argue for a doctrine not yet articulated by the ECJ that such criteria as in *Concordia Bus Finland* are not generally hindrances to trade where they are "excluded buying decisions" - they relate to contract performance only, rather than

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[47] Ibid, para 20 (emphasis added); See also joined cases 27-29/86 *S.A. Construction et Entreprises Industrielles and others v Société Co-operative 'Association Intercommunales pour les Autoroutes des Ardennes' and others ("CEI and Bellini")* [1987] EU:C:1987:355.

[48] Arrowsmith and Kunzlik (n 39) 91.

[49] Case 31/87 *Beentjes* (n 46).

[50] Case 513/99 *Concordia Bus Finland* (n 15).

[51] Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich („EVN-Wienstrom")* [2003] EU:C:2003:651.

measures of regulatory nature not confined to the contract.[52] Such an "excluded buying decision" - doctrine would not treat government requirements as hindrances to trade, but as defining what the government wants to buy, i.e. what the market is.

Another approach is that of the European Commission[53] and appears to be supported by the ECJ also, for example, in the case *Contse*[54] concerning the procurement of services where it can be deduced that *all* procurement measures require justification since procurement authorities are viewed as regulators. In this case, the ECJ applied the *Gebhard*[55] formula to public procurement. Under this doctrine, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty require the state to show that the measures are necessary and proportionate to securing legitimate policy objectives. It must be noted that all measures in the case *Contse* impacted foreign firms more than it did domestic firms. When tailoring this approach to the procurement of goods rather than services, one would have to also apply the *Keck*[56] principles. In *Keck* and its following jurisprudence, the Court distinguishes between national measures hindering trade relating to the product that infringe Article 34 TFEU and those relating to the 'selling arrangements' that do not infringe the provision. If measures were to be non-discriminatory, the ECJ might reject an approach such as in *Contse*.[57] Needless to say, certain selling arrangements might restrict market access much more than some product rules. Since the Directives only cover those public contracts that are capable of having a major effect on trade between the Member States,

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[52] Arrowsmith and Kunzlik (n 39) 78.

[53] Commission, 'Commission interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement.' (Communication) COM (2001) 566 final. Joined cases C-369/96 and C-376/96, *Criminal Proceedings against Jean-Claude Arblade ('Arblade')* [1999] EU:C:1999:575.

[54] Case C-234/03 *Contse SA, Vivisol Srl & Oxigen Salud SA v Institutio Nacional de Gestión Sanitaria (Ingesa) ('Contse')* EU:C:2005:644.

[55] C-55/94 *Gebhard* (n 41).

[56] Cases C-267/91 and C-268/91 *Keck* (n 36).

[57] See Arrowsmith and Kunzlik (n 39) 66-67, 79-80.

it is worth questioning whether below-threshold contracts are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade, as the approach in *Contse* would also include measures that have little effect, actual or potential, on imports - provided they are even measures.[58] According to Arrowsmith and Kunzlik, it is within the nature of public procurement that each award involves criteria that may exclude certain tenderers. It is this very reason why they argued for an "excluded buying decisions" doctrine. If their view were to be accepted, one would probably have to advocate for the application of the *Keck* principles to qualify measures of regulatory nature beyond the extent of the contract as hindrances to trade – provided procurement decisions are even "measures".

2.3. EU Competition Law and Public Procurement

Article 18(1) Public Sector Procurement Directive reads:

> Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.
>
> The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

The Provisions explicitly refers to the “design of the procurement”, i.e. the tendering procedure. Some scholars argue that there is a significant overlap between EU competition law and EU public procurement law and that EU public procurement law is to be interpreted in a pro-competitive way. A debate has emerged whether core competition ("antitrust") law applies to contracting authorities and whether such a competition regulation is to be interpreted within the Directive and public procurement in general. On one side lies the pro-competitive approach arguing for the necessity of the

[58] Ibid, 68-69.

applicability or implementation of core competition regulation[59] and on the other side the criticism[60] thereof.

It is necessary to identify to what extent EU competition law is applicable to public entities operating as contracting authorities in the field of public procurement. It is undisputed that EU competition law applies to tenderers as suppliers. However, the applicability to contracting authorities remains to be legally uncertain, not least because of ECJ case-law *FENIN*[61] and *Selex*[62]. In *FENIN*, the Court of Justice upheld the General Court's decision[63] stating that sole purchasing activities cannot be qualified as economic activities and thus do not qualify the purchaser as undertaking in EU competition law. It must be stressed that the FENIN/Selex-doctrine is very controversial.[64]

It will be argued that the EU public procurement regime does not intend to constrain public entities' purchasing activities to both EU public procurement law and EU competition law where the contracting authority subsequently intends to act in general interest, not having industrial or commercial character (i.e. a non-economic activity). EU public procurement rules have established a sui generis market with a levelled playing field through internal market principles and competition through positive obligations such as transparency.

Therefore, within the thesis, Article 18(1) of the 2014 Public Sector Procurement Directive will be interpreted as an emanation of the consequence of economic integration into the internal market and as a representation of the legal interaction between derived general principles and positive obligations for contracting authorities in the public

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[59] See Sanchez-Graells (n 19).

[60] See Arrowsmith (n 21); Kunzlik (n 17).

[61] Case C-205/03 P *FENIN v Commission ('FENIN')* [2006] EU:C:2006:453.

[62] Case C-113/07 P *Selex Sistemi Integrati v Commission ('Selex')* [2009] EU:C:2009:191.

[63] Case T-319/99 *FENIN v Commission* [2003] EU:T:2003:50, paras 36-37.

[64] See Sanchez-Graells (n 19) 158-172 and literature cited therein.

procurement procedures, which result in competition in the meaning of market access. Following the ECJ's approach of applying EU competition law to contracting authorities, it shall only be applied where they pursue a subsequent economic activity. It makes little sense to interpret public markets replicating the private market. The public procurement market is inherently different, it includes a non-economic nature also.

The application of EU competition law must of course be analysed before examining the social and environmental dimensions.

2.4. EU State Aid Law

Although it is part of EU competition law in general, EU State aid law takes a specific role in the internal market. While both, the Public Procurement Directives and EU State aid law, aim at creating a level playing field, the Directives rather aim for increasing efficiency of public expenditure through broad competition, i.e. liberalisation in the meaning of transparency, mutual recognition, non-discrimination and generally access to public contracts, and EU State aid law aims for increasing efficiency in an already liberalised market by prohibiting incompatible infusions of money.

Perhaps it could be argued that the award of public contracts under the rigorous secondary law framework need not be subject to State aid control. However, automatically exempting State aid control may not be warranted for, since favouring specific economic operators in a market can be done by both, directly, by granting subsidies, or indirectly, by awarding them public contracts. The links are highly debated in literature,[65] especially in respect to Services of General Economic Interest.

Of course, the issues concerning the interaction and application of EU State aid law and

[65] See e.g. Pernille Edh Hasselgård, 'The Use of Tender Procedures to Exclude State Aid' (2017) European Procurement & Public Private Partnership Law Review 12(1) 16-28; Grith Skovgaard Ølykke, "The Notice on the Notion of State Aid and Public Procurement Law" (2016) European State Aid Law Quarterly 15(4) 508-526, and literature cited therein.

public procurement law must be highlighted in the thesis before assessing the social and environmental dimensions.

3. Aim of the Thesis

The thesis shall re-evaluate areas of potential conflict in EU public procurement law as well as between EU internal market law safeguarding/enhancing market access/efficiency and substantive policy objectives, in particular social and environmental matters, as adumbrated in ECJ case-law and discussed by legal scholars.

Naturally, renowned scholars have researched discretion in EU public procurement law and have examined a selection of ECJ case law concerning various criteria for awarding contracts in public procurement procedures. The aim of the thesis is not only to critically review existing research but to make an original contribution to legal scholarship. This shall be accomplished by attempting to take another step towards, on one hand, re-assessing the legal characterisation of national administrative actions and decisions in the process of public procurement in light of EU internal market law and, on the other hand, reviewing the notion of value for money in EU public procurement law. This will also involve a discussion of the historical development of EU public procurement law, as well as the highly debated interrelationship of EU competition law and EU state aid law with public procurement law.

Consequently, the integration potential of social and environmental objectives in EU internal market law can be elucidated, and these findings shall be applied to the field of public procurement specifically, taking into account its special nature.

Ample jurisprudence and scholarly writing allows for revisiting this timely subject.

4. Research Questions

4.1. Main Research Questions

1. What is the potential conflict between EU internal market law safeguarding/enhancing market access/efficiency and substantive policy objectives, in particular social and environmental matters?

2. To what extent may contracting authorities use public procurement to shape social, environmental or economic policy that is not necessarily connected with the acquisition of goods, services and works through competitive tendering procedures?

4.2. Supporting Research Questions:

a) To what extent are contracting authorities subject to EU competition law? What is the relationship between public procurement and EU state aid law?

b) What is or should be the legal characterisation of public procurement decisions in the light of relevant EU internal market law?

c) What is the scope of the social and environmental dimensions of EU public procurement law? Does the notion of value for money in public procurement necessarily contain a social or environmental aspect? If not, should it? To what extent may contracting authorities pursue social, environmental or economic objectives that go beyond those explicitly permitted and laid down in EU public procurement law?

d) How can these objectives be weighed against the objectives of the internal market and among themselves?

5. Method and Approach

Emphasis will clearly lie on analysis of legal doctrine, i.e. traditional legal scholarship. Additionally, elements of comparative perspectives as well as an economic analysis of

law shall complement it. The research questions shall be analysed on the basis of relevant legal sources. Since the thesis will deal with EU law at Union level, the relevant legal sources are therefore EU primary law, EU secondary law, ECJ case-law and other sources such as Communications of the European Commission.

In particular, much like the ECJ, a teleological approach will be used to interpret relevant EU provisions applicable to public procurement in order to achieve the Union goals set out in Article 3 TEU. Selected comparative - as well as economic theory perspectives shall complement the teleological approach by suggesting how to consolidate social and environmental benefits with the concepts of free trade, competition and thus economic welfare. Relevant sources of law will be examined in order to determine when and how social, environmental and also economic policy has played a pivotal role therein in the past. In order to apply these findings to public procurement, though, the potentially special nature of public procurement law needs to be re-assessed by investigating the supporting research questions. These will generally be examined, again, using a teleological approach, case-law analysis and literature review. Additionally, a historical approach analysing the political sphere and evolution of the public procurement regime shall contribute to the understanding of the developments in EU public procurement law and consequently the notion of value for money. With such critical historical perspective, the thesis shall not only look at the nature of public procurement law but also take into account that the law is man-made and might have preserved interests beyond market integration that have may have evolved over time also.

6. Delimitation

It is not the object of the thesis to cover all aspects of internal market law, or of public procurement law. Neither will the WTO GPA as part of global administrative law and its compatibility with EU administrative law be subject of analysis given that the EU Public

Procurement Directives are presumed to be compatible.[66] Likewise and for similar reasons, national public procurement rules will not be examined.

7. Preliminary Table of Contents

[66] See Directive 2014/24 (n 43), recitals 17-18.

8. Schedule

	SS 2019	WS 2019/20	SS 2020	WS 2020/21	SS 2021	WS 2021/22
Legal Methodology Course						
Preparatory works and extensive research						
Seminar for the presentation and discussion of the research proposal, publish for the faculty						
Further research and write thesis						
Presentation and discussion of findings in seminars and/or conferences						
Submit draft of thesis						
Revise and submit thesis						
Thesis defense						

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