

PUBLIC PROCUREMENT

– procurement outside the EC-directives

1 Short summery -----	3
2 The regulation of public procurement -----	4
2.1 Public procurement in the EU -----	4
2.2 The Treaty provisions and principles -----	4
2.3 EC Directives on public procurement -----	5
2.4 National regulations of public procurement -----	6
2.4.1 National regulations of EC law -----	6
2.4.2 National regulation of contracts outside the EC law -----	7
3 Public procurement wholly or partly outside the EC law -----	7
3.1 Procurement below the threshold values -----	8
3.2 Procurement of B-services -----	8
3.3 Concessions -----	9
4 A specific cross-border interest -----	9
5 Other exemptions from the Directives -----	10
6 The application of the Treaty and the principles -----	10
7 The situation in Sweden -----	10
7.1 The Swedish regulation of public procurement -----	10
7.2 Implications for the Swedish law -----	12
8 Concluding remarks -----	12

1 Short summery

The purpose of this paper is to present the work I am currently carrying out on my PhD thesis on public procurement. I have chosen to examine contracts that wholly or partly fall outside the EC Directives on public procurement. I have defined the thesis to only cover procurement of B-services contracts, contracts below the thresholds and the allotment of concessions, both works and service concessions. These types of contracts may be subject to different procurement legal regulation, depending on the value, etc. My thesis is that all the exceptions from the EC Directives regulatory ports within the same regulatory framework as these types of procurements, which constitute four main categories. In my thesis, these procurements either fall

1. outside the provisions of the EC Directives and the EU Treaty (Treaty) (procurement below the thresholds with no specific cross-border interest),
2. outside the provisions of the EC directives, but within the Treaty (service concessions, works concessions in the utilities sectors and contracts below the thresholds of a specific cross-border interest),
3. partly within the provisions of the EC directives, partly outside the provisions of the EC Directives and the Treaty (B-services above the thresholds), or
4. partly within the provisions of the EC Directives, partly within the provisions of the Treaty (B-services above the thresholds if they have a specific cross-border interest).

I therefore examine the characteristics of the different types of contracts and where they end up in the regulatory framework of either the EC or the different Member States. I am also examining what provisions the contracting authorities and entities are obliged to use when they procure these contracts, depending on where in the framework the different procurements belong.

I have just passed half of my time as a PhD-student, which in Sweden means that I have still two years before I have to deliver a dissertation. This paper therefore does not give any solutions or findings, just briefly outlines the work I have done so far.

2 The regulation of public procurement

2.1 Public procurement in the EU

Public procurement is purchases made by the public in the form of government, municipality, county council, publicly owned companies and associations and foundations in order to be able to carry out their various activities. In Sweden the sum of SEK 500 billion per year or about 20 percent of gross domestic product (GDP) is often mentioned while the corresponding figure for the EU area is estimated to around 1,500 billion euro, representing 16 percent of its GDP. It can mean major benefits for the public and the residents if the public procurement is conducted in a cost effective manner and with conditions and criteria that are relevant and proportionate.

The interest of the EC to regulate public procurement has however resulted in laws and regulations which many perceive as extensive and difficult to interpret. One of the reasons is that the regulations for contracts of larger value have been negotiated by the then twelve Member States of the EU. Many of the regulations are therefore compromises, which unfortunately mean that they sometimes are difficult to interpret. In addition, the framework is not comprehensive, but contains different kinds of exceptions and exclusions of certain types of contracts. Some of the exempted contracts are covered only to a minor aspect of the EU procurement directive, while others are only subject to the provisions of the Treaty and others again are completely outside the acquis.

In my thesis I examine the contracts that fall outside the EC Directives, with special emphasis on contracts below the thresholds, procurement of B-services and the award of concessions. I also examine other types of exemptions from the EC directives on public procurement, in order to see if they are covered by the same regulations as any of the now mentioned types of contracts.

2.2 The Treaty provisions and principles

The Treaty governs the rights and obligations in the areas the Member States has submitted to the Community. As a rule, the Treaty only covers areas that have a cross-border interest. This means that Member States' actions can affect individuals in other Member States. Strictly national procedures with no cross-border interest are left for the Member States to regulate themselves, so the Member States can choose themselves whether and how they want to regulate these areas not covered by Community law.

The provisions of the Treaty and the general principles which are considered to originate there from govern the rights and obligations of the Member States and establish the fundamental rights and freedoms of movement for the individuals. The Treaty's regulations in Articles 43 EC, concerning the freedom of establishment, and 49 EC, concerning the freedom to provide services, and the general principles of equality, the prohibition of discrimination on grounds of nationality, transparency, proportionality and mutual recognition, is considered applicable to public contracts covered by Treaty. The European Court of Justice (ECJ) has in a number of rulings interpreted principles applicable to public procurement. Most issues relating to the Treaty and principles applicable to public procurement however remain unsolved.

2.3 EC Directives on public procurement

For some subject areas the provisions of the Treaty is not sufficient. The Commission may then propose that the Member States should adopt directives and regulations to allow a more detailed regulation of the area in question. The purpose of a more detailed regulation is therefore to develop and clarify the existing Treaty provisions and principles. The detailed regulation of directives or regulations, however, rarely cover the whole area, why some parts remain unregulated by other than the Treaty itself. As a result, a procedure that is excluded from, for example, an EC Directive, may nevertheless be subject to the regulations and principles of the Treaty. It is only when the procedure also falls outside the Treaty provisions that the Member States have the opportunity to choose themselves whether the area should be regulated and how.

A directive is under Article 249 of Treaty binding on Member States to the result to be achieved with the directive, but EC law leaves it to Member States to determine the form and means of implementation. Member States are thus not bound by the directive's terminology or structure, if the intended results can be achieved by other means. According to the ECJ, the transposition of a directive into national law does not necessarily require that the provisions of a directive are reproduced verbatim in express and specific constitutional provisions. It is in enough in domestic law, therefore, to establish a legal framework for the legal position which ensures that the directive can be applied in a clear and precise manner. Individuals will thus be able to identify their rights under the directive and make these claims by judicial process. The ECJ has accepted national court precedents as a method for proper implementation¹.

As regards public procurement, the Member States have chosen to adopt rather detailed directives. The purpose of the directives is to remove obstacles to the free movement of goods and services and to protect the interests of traders in a Member State wishing to offer goods or services to contracting authorities and entities in another.

The first directive in the area was adopted already in 1971 and regulated public works contracts. That directive was followed by directives for goods, services and remedies. Today, there are a total of five directives that regulates public procurement, two procedural directives and three remedies directive.

The two procedural directives cover various aspects of public procurement and public contracts in the so-called classical sector and in the so-called utilities sectors. With the classical sector is meant the state, municipal and county councils and societies, associations, especially formed community associations and foundations that meet the needs of the public interest. A precondition for a body to be covered by the provisions of the classical sector is that the need to be fulfilled is not of an industrial or commercial character and that the body is publicly funded, under public control or that a public authority appoints more than half of its members. Within the utilities sectors the contracting entities that are covered by the provisions are operating in the sectors of gas, heat, electricity, drinking water, transport and/or postal services. Unlike the classical sector, even private bodies can be covered by the utilities provisions, provided they are engaged in an activity covered and are doing so on the basis of a special or exclusive right.

¹ C-363/85, Commission vs Italy.

The directives on public procurement and procurement in the utilities sectors provides for the procurement of goods, services and works. The directives include detailed provisions on how the various procurement processes are to be implemented and how the contracting authority (within the classical sector) and contracting entities (in the utilities sectors) can formulate requirements and criteria for their public procurement.

2.4 National regulations of public procurement

2.4.1 National regulations of EC law

Community law sources consist of the founding Treaties (primary legislation), acts adopted by the EC institutions (secondary legislation) and its preparatory documents, international agreements concluded by the Community, ECJ case law and the general principles.

When Member States implement EC legislation and applies the above sources of law there are certain fundamental principles that are applicable, which are mainly developed by the ECJ. These fundamental principles are a direct effect, directly applicability, duty of loyalty and conformal interpretation.

Direct effect

Direct effect means that individuals may refer to EC law before national authorities and courts. The concept of direct effect has been developed by the ECJ rulings and is important in Community law². The principle of direct effect is based, inter alia, on the legal rights of individuals, because individuals have limited opportunities to appeal to the ECJ. For a provision to have direct effect it must include a clearly defined right for individuals³. A national legal provision which proves to be contrary to a provision which has direct effect must be overridden by the national courts.

Direct applicability

Direct effect should not be confused with the concept of direct applicability. Direct applicability means that a regulation applies at the same time and in the same way throughout the EU, without the Member States need to ensure receipt or transposition into national law. A requirement for a provision to have direct effect, however, is that it is directly applicable. EC regulations are directly applicable in all Member States.

Duty of loyalty

The Treaty contains no provision with a content saying that Community law should prevail over national law. The ECJ has in its rulings created the principle of Community law from the obligations of the Member States defined in the Treaty. One of the main starting points for the court has been the so-called duty of loyalty (also known as the solidarity obligation) as regulated in Article 10 of the Treaty.

² See C-31/87, Beentjes, C-103/88, Fratelli Constanzo, C-433/93, Commission vs Germany, C-54/96, Dorsch Consult, C-76/97, Tögel, C-111/97, EvoBus Austria, C-258/97, HI, C-27/98, Fracasso and Leitschutz, C-81/98, Alcatel and C-15/04, Koppenstein.

³ See 6/64 Costa vs ENEL, 106/77, Simmenthal I and C-213/89, Factortame I.

The ECJ created already back in 1964 the principle that Community law prevails over national law through a precedent. It justified the principle by saying that when the Treaty came into force in the Member States, it created a new independent judicial system that was part of the national legal systems. The new common legal system was an obligation on Member States, and ultimately for its courts, to follow and to use the new common framework.

Conformal interpretation

Another expression of the loyalty obligation is the requirement for conformal interpretation, namely that a national provision always has been interpreted in such manner that, if possible, it is in conformity with the Community regulations which, although not directly applicable, govern the same issue.

Although a regulation of Community law in a given case can not be given direct effect, there is the so-called "von-Colson principle", that national courts and authorities are obliged to interpret national law taking into account the contents of the current Community legislation. It means in practice that the national authorities and courts arrive at the same conclusion, as if the EC provision had had direct effect.

2.4.2 National regulation of contracts outside the EC law

In cases where the regulation of a public procurement falls wholly outside the Community acquis, Member States are free to regulate these acquisitions themselves. However, there is a possibility that a Member State incorporates provisions for contracts that are not covered by the EC's regulatory framework which are identical or very similar to those applicable to contracts covered. The reason for the Member States actions are probably that the EC legal provisions governing all aspects of public procurement and whatever measures a Member State chooses to introduce, it will look at the provisions of the EC legislation, consciously or unconsciously.

The risk is that national provisions that only govern contracts which fall outside EC law will be interpreted in light of this right. There is case law from the ECJ, under which an EC provision, which is binding in a particular area, but as a Member State voluntarily has adopted in another area, will be interpreted in the same way. In the mentioned case, the ECJ noted that it has jurisdiction to interpret Community law where the situation in question is not directly regulated by this law, but the national legislature in the transposition of the Directive's provisions into national law has decided that also purely internal situations should be treated in the same way as the situations governed by the Directive.

3 Public procurement wholly or partly outside the EC law

The EC Directives on public procurement include limits on public contracts not covered by the provisions. There are several specified exceptions, for example, employment and property, and general, as the exception of B-services, concessions and contracts below the threshold values, see below. The latter three exceptions are regulated in different ways and the EU Treaty rules and principles are to varying degrees applicable to them.

3.1 Procurement below the threshold values

Already the first directive on public contracts contained so-called threshold values⁴. Threshold is the amount that a public procurement must exceed in order to be covered by the EC procurement directives. The directives are only applicable to contracts exceeding the thresholds, while smaller contracts fall outside the scope of the directives. The thresholds for goods and services amounts to approximately SEK 1.2 million for the government, approximately SEK 1.9 million for other contracting authorities within the classical sector and around SEK 3.8 million for contracting entities in the utilities sectors. The threshold for work contracts amounts to approximately SEK 49 million for all sectors alike⁵.

The ECJ has previously stated in several rulings that contracts that fall outside the public procurement directives because of low value, still are covered by the Treaty and the general principles⁶. The application of basic rules and general principles on the award of public contracts with a value below the threshold for the application of the EC directives, however, must be of a certain cross-border interest⁷, see below.

3.2 Procurement of B-services

In the EC's regulation of public procurement, all services have been divided into so-called A- and B-services, in order to apply different rules to different services. B-services are those services for which it is not considered possible to exploit all the opportunities of increase cross-border trade⁸. Examples are medical services, legal services and education services. B-services are only regulated in part by the public procurement directives. The Community legislature has assumed that contracts for B-services, taking into account their special nature, a priori, have no such cross-border interest which can justify that they are after a call for competition will be of interest to companies from other Member States⁹. In the procurement of B-services, contracting authorities or entities, therefore, only have to consider the provisions in the directives regarding technical specifications of the tender documentation and those regarding a notice of the outcome of the procurement procedure, which is to be sent to the Publication Office in Luxemburg¹⁰. The other procedural requirements of the procurement directives, in particular those concerning the obligations of advertising, is not applicable to contracts for B-services¹¹. Thus the contracting authorities and entities may award contracts directly to a supplier without first publishing a notice.

The ECJ has however ruled that the restrictions in the application of the procurement Directives for B-services can not be interpreted as precluding the application of the principles set out in Articles 43 and 49 EC, if a contract for B-services is of a particular

⁴ See Article 7 in Directive 71/305/EEC.

⁵ Sweden is not a Member of the EMU, so the threshold values are determined every second year by the Commission.

⁶ See C-275/98, Unitron Scandinavia, C-324/98, Telaustria and C-59/00, Vestergaard.

⁷ See C-147/06 and 148/06 SECAP, p. 21.

⁸ P. 19 in the preamble to Directive 2004/18/EG and p. 18 in directive 2004/17/EG.

⁹ See C-507/03, Commission vs Ireland, p. 25.

¹⁰ See Article 21 in Directive 2004/18 and Article 32 in Directive 2004/17/EC.

¹¹ Se C-507/03, kommissionen mot Irland, p. 24.

cross-border interest¹², see below. The award of a contract for a B-service of a specific cross-border interest without the contract being put out to competition in some kind of publication, means according to the ECJ that there is an indirect discrimination on grounds of nationality, which is prohibited under Articles 43 and 49 EC¹³. It is therefore necessary to examine whether a contract for B-services may have a specific cross-border interest, to know what procedural rules are applicable to the procurement procedure.

3.3 Concessions

Services and works concessions are defined as contracts of the same type as a service and works contracts, with the difference that the compensation for the work consists solely of the right to use the service or facility, or in this right together with payment¹⁴. Work concessions are covered by a few provisions in the classical sector, but falls completely outside the utilities sectors. Service concessions are not covered either by the classical sector or the utilities sectors¹⁵. Both types of concessions are covered by the Treaty and the principles, provided that the value of the concession exceeds the applicable thresholds. Examples of concessions may be the construction and operation of a railway, or the construction and operation of a road or bridge financed by road or bridge toll. Examples of service concessions are the managing of parking lots or the provision of telephone directories.

In 2000 The Commission published an interpretative Communication on concessions¹⁶. The statement clarifies the views of the Commission on how the concessions are to be procured and what obligations and rights which it considers follow from the Treaty provisions and principles.

4 A specific cross-border interest

The ECJ has in a number of rulings developed the concept of a specific cross-border interest¹⁷. Among other things, the ECJ states that a contract can be cross-border interest if the value is high and if the service or goods to be delivered are located near a geographical border. The detailed definition of the concept is still unclear and the contracting authorities and entities must themselves interpret the concept of a specific cross-border interest until the ECJ further fill the concept with contents. I will investigate and try to identify the deeper meaning of the term in my thesis.

¹² a.a. p. 29.

¹³ See C-231/03, Coname, p. 19.

¹⁴ See Article 3 and 4 in Directive 2004/18/EC and Article 1 p. 3 in Directive 2004/17/EC.

¹⁵ C-324/98, Telaustria and Telefonadress.

¹⁶ Commission interpretative communication on concessions under Community law (2000/C 121/02).

¹⁷ See C-507/03, Commission vs Ireland, C-119/06, Commission vs Italy, C-532/03, Commission vs Ireland, C-380/05, Centro Europa 7 Srl, C-147/06, SECAP and C-454/06, Pressetext.

5 Other exemptions from the Directives

The two procurement directives also includes a variety of other exemptions, ranging from employment agreements to contracts for central bank services, acquisition of uranium, artistic decoration and purchase of real estate, which means that these goods, services and works can be procured without competition. These contracts are not subject to the public procurement directives, nor subject to the Treaty or principles. They could however be covered by the Treaty and the general principles, if it could be shown that they have a specific cross-border interest.

My theory is that all exemptions from the EC Directives on public procurement falls within the same categories as the three exemptions I have choose to examine more thoroughly. This is of course something that I am going to examine, with the open mind that I of course could be mistaken.

6 The application of the Treaty and the principles

As described above public procurement below the thresholds as a general rule, fall outside the Procurement Directives and outside the Treaty and its principles. Also the procurement of B-services falls mainly outside the Directives, the Treaty and the principles, although some provisions of the Procurement Directives apply. Contracts below the threshold values and B-services can be covered by the Treaty and the principles, if they have a specific cross-border interest. Concessions above the thresholds fall mainly outside the Procurement Directives (works concessions are subject to a lesser extent), but covered by the Treaty and the principles.

In a number of rulings the ECJ has stated what the obligations of contracting authorities and entities have been in cases where a contract falls outside the directives, but inside of the scope of the Treaty and the principles. Among other things, the principle of non-discrimination obligates the contracting authorities and entities to publish some kind of notice, so that suppliers in other Member States will get an opportunity to participate in the procurement¹⁸. What other obligations contracting authorities and entities have, however, is not clear. What obligations regarding selection and award criteria, procurement process and the award of a contract does apply and what remedies which can be used regarding contracts covered by the Treaty and principles, but not the Directives, still remains to explore.

7 The situation in Sweden

7.1 The Swedish regulation of public procurement

The public procurement in Sweden has been regulated since the 1800s, although the earlier provisions only covered the procurement of governmental authorities. In the 1920s, the Swedish Parliament adopted the first procurement regulation (UF), which in modified forms lived on until 1994. The regulation was mandatory for the government authorities, but lacked sanctions. There was also a municipal procurement regulation

¹⁸ See C-324/98, Telaustria.

(UR), which addressed the municipal public contracts, but it was a voluntary document. It was adopted by most municipalities and county counties, but, like the UF, the UR lacked sanctions. Both the UR and the UF was made more or less obsolete on January 1, 1994 when the Act (1992:1528) on Public Procurement (the old LOU) came into force. The law was adopted due to Sweden's ratification of the Agreement on the European Economic Area (EEA), whereby Sweden committed itself to introduce provisions which meet the public procurement regulations of the Internal Market of the European Community (EC). The incorporation of the provisions of the old LOU has meant that all major Swedish public contracts after January 1, 2004 are regulated by the EC rules on public procurement.

The old LOU expired by December 31, 2007. Instead, two new laws on public contracts came in force, the Act (2007:1091) on Public Procurement (LOU) and the Act (2007:1091) on procurement in the water, energy, transport and postal services (LUF). The provisions for the larger value contracts in the two new laws are based mainly on the new procedural directives, negotiated between the Member States in the years 1996 to 2004. Procurement of lower economic value falls outside the scope of the EC Directives on public procurement. This means that Sweden has the ability to provide for these contracts, as has happened with the adoption of the provisions of chapter 15 of the respective law. In addition, sanctions are regulated in the three remedies directives, of which the one of a later date is still to be implemented into Swedish law.

The provisions of LOU and LUF regulate the procedure for awarding contracts for goods, services and works conducted by contracting authorities and entities. With contract is meant a written, self-signed contract for pecuniary interest concluded between the contracting authorities/entities and a supplier. The provisions are quite detailed and described in detail the various procedures that can be used. As an example describing how the advertising of contracts should be done and where, the application and tender limits that are minimums, the qualification of suppliers, how the evaluation of tenders are to be made and how the award notices must be designed.

The provisions of LOU and LUF applied to the beginning of a procurement, which has taken place when a contracting authority/entity has selected the award procedure that will be used in procurement¹⁹. The provisions will then apply until the contract has been concluded, or if a procurement process has been cancelled. Procedures and actions that contracting authorities/entities undertake before they select an award procedure and after a contract has been duly signed, falls as a general rule outside the scope of the laws. Such procedures are governed by other applicable Swedish law. Where a contracting authority or entity carries out significant changes in a procured contract, the changes can be considered as an unauthorized use of the negotiated procurement without advertising, and the provisions on legal remedies might be appropriate²⁰.

Both Swedish laws have provisions to regulate the procurement of contracts below the thresholds and the procurement of B-services. Sweden has chosen to introduce rather a strict regulation for procurements of these contracts, although it is not a requirement of the EC.

¹⁹ C-337/98, *Commission vs France*.

²⁰ C-454/06, *Pressetext*.

7.2 Implications for the Swedish law

The Swedish legislator has chosen to introduce a rather detailed regulation of public procurement of contracts below the thresholds and for procurement of B-services. The regulation for these procurements was originally based on the provisions of the UF and UR, but has in recent years more and more been adapted to the provisions of procurements of contracts above the thresholds. As a consequence, EC legislation is starting to have a significant impact in Sweden even for procurement of contracts of lesser value and for procurement of B-services. In accordance with precedence from the ECJ as mentioned before, mandatory EC provisions that a national legislator voluntarily impose on an area, are to be interpreted the same way as the mandatory EC provisions. Sweden has also entered the five basic principles that the ECJ deemed to be most applicable to public procurement above the thresholds to the wording of LOU and LUF, without limiting their scope to procurements above the thresholds. The five principals are: the principles of equal treatment, non-discrimination, proportionality, transparency and mutual recognition. The consequence is that ECJ's present and future interpretation of these principles that apply to public procurement above the threshold also applies directly to contracts below the thresholds and B-services.

The legislature in Sweden has transposed the provisions on works concessions contained in the procurement directive for the classical sector. Sweden has chosen not to impose national provisions for the award of works concessions in LUF or provisions for the award of service concessions in either of the two laws. It does not mean that the Treaty and the principles are not applicable to these concessions, only that it is not expressed in the Swedish law. Since Sweden does not have provisions on concessions beyond those indicated in the classical directive, there are no provisions for remedies for these other concessions in the Swedish legislation. Even if a contracting authority or entity chooses to assign an unregulated license without regard to the Treaty or the principles, it is not possible to have such an award proceeding tried by a Swedish court under the provisions of LOU or LUF.

8 Concluding remarks

In my thesis, I will start by defining what exactly constitutes a procurement below the thresholds (i.e. examine the provisions concerning thresholds), what constitutes a B-service and exactly how a concession is constructed. I will there after try to see in what area of the law that these three categories of procurements are located. The interesting questions to examine after this categorizing is finished are to define what rules, provisions, regulations and principals that is applicable to each type of procurement respectively.

The next challenge is to see if the Swedish legislation is providing the right provisions for the procurement of these three categories, which I very much doubt. There are also difficulties regarding applicable remedies, a question relevant for all of the Member States duties according to the Treaty.

One of my greatest fears is that it will turn out to be irrelevant if a procurement is covered by the EC Directives on public procurement or if they are only covered by the Treaty. Somehow there must be a difference, and I am determined to find it.