



Applicable Law to the Procurement of International Organisations in Europe

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1. Introduction

Academic literature on international organisations attached up to now very little attention to the issue of the laws applicable to their relations with third parties,¹ including their procurement activities. This could be because it is assumed that most international organisations are managerial bodies and that their administrative expenses (e.g.: emolument of staff, rental of office buildings, procurement of office furniture), are much higher than their operational expenditures.²

However, the United Nations (UN) administrative procurement activities for 2007 amounted to about \$1.90 billion, whilst its operational procurement to support peacekeeping operations amounted to about \$1.65 billion.³ For the Joint Organisation for Armaments Cooperation (OCCAR), which is an organisation dedicated to collaborative defence procurement, the administrative budget for 2006 was only about €32 million (including staff emoluments and administrative procurement), whilst the operational procurement budget was about €2.8 billion.⁴ The procurement activities of international organisations therefore have a significant economic impact, and the law applying to these activities deserves due attention.

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¹ For instance, the seminal reference work on international organisations by H.G. Schermer and N.M. Blokker, *International Institutional Law*, 4th Ed. (2003), touches this subject in only 13 of its 1213 pages

² Schermer and Blokker, *supra* note 1, §938-941: Administrative procurement is performed to run the organisation and includes for instance the renting of buildings and the purchase of office equipment. Operational procurement covers projects performed by the organisation to realise its mission, such as peacekeeping or collaborative defence procurement.

³ UN Procurement Division, <http://www.un.org/Depts/ptd/statistics.htm> accessed on 6 October 2008

⁴ N. Cardinali, 'The Place of OCCAR in the European Defence Procurement Debate', presentation to the European Defence Agency seminar of National Armaments Directors, 19 September 2006, on file with the author

We will analyse in turn the applicability of national law to the procurement activities of international organisations and the applicability of European Union (EU) law to such organisations (making a distinction when required between operational and administrative procurement), before focussing on the special case of European Community (EC) directives, and in particular the EC public procurement directives.

2. Applicability of National Law

As a general principle of international law, most rules of national law, especially the law of the state in which organisations have their headquarters or conduct other activities, are applicable to international organisations in the same way as it does to other subjects within the national jurisdiction as long as they are not excluded.⁵

It is generally recognised, however, that it should not be possible to use such laws as a lever to affect the proper functioning and independence of the organisation.⁶ Therefore, international organisations are granted ‘privileges’ that release the organisation from the obligations imposed by some provisions of national law, usually exempting the organisation from direct taxation, customs duties, search and seizure, censorship, and currency transfer regulations.⁷ Because of the reason for their existence, the privileges of an organisation only apply to their ‘functional acts’, meaning those that are related to the organisation’s function or mission, and probably have to be interpreted restrictively.⁸ Those privileges are usually found in the constituting instrument of each organisation, but they are also occasionally granted by specific national legislation⁹ (in these two cases, we will call them *express privileges*), or by customary international law (in which case we will speak about *customary privileges*).¹⁰

⁵ J. Combacau and S. Sur, *Droit International Public*, 7th Edition (2006), at 715; Schermer and Blokker, *supra* note 1, §1602

⁶ Combacau and Sur, *supra* note 5, at 715; Schermer and Blokker, *supra* note 1, §1602 and 1608; A. Reinisch, *International Organisations before National Courts* (2006), at 14-15 argues that, whilst this principle is true, it should not be read as providing a broad range of customary privilege to international organisations

⁷ J. Klabbers, *An Introduction to International Institutional Law* (2006), at 146 et.seq.; Schermer and Blokker, *supra* note 1, §1610-1612; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd Edition (2003), Chapter 10

⁸ Reinisch, *supra* note 6, at 342; Schermer and Blokker, *supra* note 1, §1608

⁹ Such as by the United States Code Title 22, Chapter 7, Subchapter XVIII, accessed on 12 May 2009 at http://www.law.cornell.edu/uscode/html/uscode22/usc_sup_01_22_10_7_20_XVIII.html

¹⁰ Schermer and Blokker, *supra* note 1, §1601-1609; American Law Institute, *Restatement of the Law – The Foreign Relation Law of the United States*, 3rd Edition (1987), §467, Reporter’s Note 4; Klabbers, *supra* note 7, at 155

Specifically, most observers agree that mandating compliance with national administrative law could affect the policy and functional independence of international organisations.¹¹ For instance, one state might want to affect an organisation's procurement decisions to the benefit of its own industry or to further its own policy aims. It could be argued that procurement decisions should be left solely to the decision-making bodies of the organisation, where all its member states are represented and their potentially competing interests can be balanced in line with the organisation's internal procedures.¹²

For this reason, international organisations usually do not apply the body of national rules that regulate the relationship between the state where the international organization is located and its citizens, and apply their own rules for their internal legislative and administrative acts, which form the 'internal law' of the organisation.¹³ The latter is usually assumed to include the rulemaking procedures of the organisation, the employment rules of its staff and, especially important for the purpose of this paper, its public procurement rules.¹⁴ The latter are therefore almost universally made of internal rules that do not follow national legislation, even though there is usually no provision to that effect in the express privileges of the organisations. However, widespread and widely accepted practice does at some point create customary rules of international law, even without a court ruling to that effect,¹⁵ and the fact that procurement rules is recognised as part of the 'internal law' of the organisation can therefore likely be classified as a customary privilege even though this has not yet been confirmed by an international court.

Unfortunately, it is generally quite difficult to distinguish between the internal and external activities of international organisations, as most of their internal administrative decisions have

¹¹ Combacau and Sur, *supra* note 5, at 715; Schermer and Blokker, *supra* note 1, §1601-1602

¹² Reinisch, *supra* note 6, at 379: this author build his reasoning on a parallel between international organisations and the fact that administrative law of State cannot be adjudicated in the courts of another State; even though he was referring to the administrative law of international organisations in general, and not specifically to procurement, his reasoning applies entirely

¹³ Amerasinghe, *supra* note 7, at 271-274; Reinisch, *supra* note 6, at 378; Schermer and Blokker, *supra* note 1, §1196

¹⁴ *Waite and Kennedy v Germany*, Application no. 26083/94, ECHR (1999) Vol I, para 72; *Beer and Regan v Germany*, Application no. 28934/95, ECHR (1999) Vol I, para 62; See e.g. for the UN procurement rules <http://www.un.org/Depts/ptd/manual.htm>, and of course the procurement rules of the three international organisations under analysis, which we will analyse in details

¹⁵ Combacau and Sur, *supra* note 5, at 60-65: a court that rules that a practice has become a custom is only confirming the existence of such custom. The court ruling itself does not create the custom, which existed prior to it

effects that reach beyond the organisation itself,¹⁶ and this is especially true of procurement. Some have argued for a restrictive approach to the recognition of customary privileges, whereby only matters of a nature purely internal to the organisation are exempted from compliance with domestic law without being expressly mentioned as a privilege in a legal instrument.¹⁷ However, this restrictive interpretation is difficult to reconcile with the almost universal practice to have the procurement of international organisations performed through internal rules.

Specifically for organisations headquartered within the EU, the EC Court of First Instance (CFI) has confirmed that public contracts awarded by organisations set-up by the Council of the EU were not subject to the legislation of EU member states.¹⁸ The CFI, in the reasoning leading to this conclusion, seemed to consider this principle to be broadly valid for any international organisation in the EU. This would confirm that, within the EU, the public procurement of international organisations is not ruled by national law.

In addition to their privileges, international organisations are usually granted immunity from jurisdiction and execution of judgement.¹⁹ Even though some still seem to confuse immunity with privileges,²⁰ it is now widely accepted that, even though international organisations may enjoy immunity from jurisdiction, the latter is not an exemption from compliance with applicable law.²¹

This section led us to an important conclusion: national public procurement law is not applied by international organisations. Probably through some form of customary privilege, international organisations have been implicitly allowed by their member states to apply their

¹⁶ J.E. Alvarez, *International Organizations as Law-makers* (2006), p.143; Schermer and Blokker, *supra* note 1, §1206

¹⁷ Reinisch, *supra* note 6, at 15

¹⁸ Case T-411/06 *Società generale lavori manutenzioni appalti Srl. (Sogelma) v European Agency for Reconstruction (EAR)*, judgement of 8 October 2008, not yet reported, para 115

¹⁹ Schermer and Blokker, *supra* note 1, §§1610-1612; Amerasinghe, *supra* note 7, Chapter 10; American Law Institute, *supra* note 10, §223, Comment b

²⁰ It seems to be the case of Eurocontrol: Case T-155/04, *SELEX Sistemi Integrati SpA v Commission*, judgement of 12 December 2006, not yet reported, para 41; Case C-113/07 P, *SELEX Sistemi Integrati SpA v Commission and European Organisation for the Safety of Air Navigation (Eurocontrol)*, judgement of 26 March 2009, not yet reported, para 58

²¹ See for instance the analysis of State immunity made in Foakes and Wilmschurst, 'U.N. Convention on Jurisdictional Immunities of States and Their Property', 7 *BLI* (2006), at 105 et.seq.; Schermer and Blokker, *supra* note 1, §1612; Reinisch, *supra* note 6, at 14; American Law Institute, *supra* note 10, §467, Comment c

own procurement rules, approved through their internal decision-making process, to both to their operational and administrative procurement.

3. Applicability of EC Substantive Law – General Principles

We have seen in the previous section that most rules of national law apply to international organisations, but that this is not the case for national public procurement law. However, public procurement in Europe is generally regulated by EU law, including principles that the ECJ held were flowing from the Treaty establishing the EC (EC Treaty),²² and the EC Public Procurement Directives.²³ It is therefore necessary to ascertain if and how EU law applies to international organisations in Europe, and especially how far the procurement rules of the organisations would have to comply with EU public procurement law.

It has often been assumed that international organisations created outside the EU framework were not subjected to EU law at all.²⁴ Under that line of reasoning, as international organisations are, under international law, legal subjects different from the EU and not party to the EU or EC Treaties, they cannot be bound by decisions made by the EU, including EU legislation.²⁵ This is an application of the generic international law principle that treaties are only binding on their parties.²⁶ Even if EU member states could incur international responsibility individually for breaching their EU law obligations by delegating powers to an international organisation in such a way that prevents them from fulfilling these obligations, this would not imply that the organisation itself should be subject to these obligations.²⁷

²² Consolidated Version of the Treaty Establishing the European Community (EC Treaty), OJ 2006 C 321/37

²³ Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L134/114, as amended, (the *Public Sector Directive*), and Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ 1989 L 395/33, as amended (the *Remedies Directive*)

²⁴ This seems to be the position of Eurocontrol: Case T-155/04, *SELEX*, *supra* note 20, para 41; Case C-113/07 P, *SELEX 2*, *supra* note 20, para 58; and of France: Représentation Permanente de la France Auprès de l'Union Européenne, 'Livre Vert sur les Marchés Publics de Défense', No JMD / jf / 544, MICA / 182 / 2005, 25 February 2005, pages 4-5

²⁵ This position was explained to the author by the former OCCAR-EA Legal Advisor in Spring 2006

²⁶ Vienna Convention on the Law of Treaties of 1969, United Nations, *Treaty Series*, vol.1155, p.331, Art.26 and 34; A. Aust, *Modern Treaty Law and Practice* (2000), Chapter 14; C. Vincenzi and J. Fairhurst, *Law of the European Community*, 3rd Ed. (2002), at 180 et.seq.; A. Kaczorowska, *EU Law for Today's Lawyers* (2000), Chapter 6; Alvarez, *supra* note 16, at 120

²⁷ Ahmed and Butler, 'The European Union and Human Rights: An International Law Perspective', 17 *EJIL* (2006) 771, at 788

Even though this point of view is correct when reference is made to ordinary treaties, in contrast with ordinary international treaties, the EC Treaty created its own legal system that penetrates the national legal order of its member states, as evidenced by the doctrines of supremacy, direct applicability and direct effect of EC law.²⁸ EU law can confer rights and obligations to individuals, and not only to EU member states,²⁹ and it seems widely accepted that the term ‘individuals’ in those rulings refers to both natural and legal persons.³⁰ An international organisation, in addition to an international legal personality can, and often has, legal personality in the legal system of its member states,³¹ and would therefore theoretically have to comply with the applicable domestic law, including EU law, within the limits set by its privileges.

Unfortunately, the number of cases in which the ECJ has been confronted with the status of international organisations is very small.³² However, despite the fact that the Court has never explicitly stated that EU law, in principle, applied to international organisations,³³ it held that the question whether specific rules of EU law may be relied upon against an international organisation has to be answered based on the substance of each case,³⁴ which leads to the same result. The ECJ has in fact a few times applied EU law to international organisations (especially in competition cases) or to their staff members.

²⁸ As articulated in Case 6/64, *Flaminio Costa v ENEL*, [1964] ECR 585; Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR I; P. Craig and G. De Búrca, *EU Law, Text, Cases and Materials*, 3rd Ed. (2003), at 178-179

²⁹ See e.g. Case 26/62 *van Gend en Loos*, *supra* note 27; Joined Cases C-6/90 and C-9/90, *Francovich v Republic of Italy*, [1991] ECR I-5357; Kunoy and Dawes, ‘Plate Tectonics in Luxembourg: The *Ménage à Trois* between EC Law, international law, and the European Convention of Human Rights following the UN Sanctions Cases’, 46 *CMLRev* (2009) 73, at 80

³⁰ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland*, Application no. 45036/98, ECHR (2005) Vol VI, para 159

³¹ Klabbers, *supra* note 7, at 49-52; Combacau and Sur, *supra* note 5, at 713-714; Amerasinghe, *supra* note 7, at 69-77; Schermer and Blokker, *supra* note 1, §§1591-1598; Reinisch, *supra* note 6, at 12-13

³² The ECJ held, for instance, that employees of international organisations retain their status of workers as defined in the EC Treaty, and that EU law on the free movement of workers would therefore apply: Joined Cases 389/87 and 390/87, *GBC Echternach and A. Moritz v Minister van Onderwijs en Wetenschappen*, [1989] ECR. 723, para 11; Case C-310/91, *Hugo Schmid v Belgian State, represented by the Minister van Sociale Voorzorg*, [1993] ECR. I-3011, para 20; Case C-411/98, *Angelo Ferlini v Centre hospitalier de Luxembourg*, [2000] ECR. I-8081, para 42; Applicability of EC Competition Law to an international organisation in Case C-364/92, *SAT Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation (Eurocontrol)*, [1994] ECR I-43; Case T-155/04, *SELEX*, *supra* note 20; Case C-113/07 P, *SELEX 2*, *supra* note 20

³³ This is clearly the position of the Commission: Case C-113/07 P, *SELEX 2*, *supra* note 20, para 55

³⁴ Case C-364/92, *SAT v Eurocontrol*, *supra* note 32, para 11; Case C-113/07 P, *SELEX 2*, *supra* note 20, para 62, as well as paras 65 et seq where the ECJ in fact reviewed the use of EC competition law against Eurocontrol

However, the ECJ also stated that EU law must be interpreted, and its scope limited, in the light of the relevant rules of international law, including customary international law.³⁵ Rules of international law form part of the EU legal order, and the EU must comply with those rules when adopting EU law.³⁶ Therefore, even though applicability of EU law to an international organisation cannot be excluded *a priori* and must be analysed case-by-case based on the contents of the EU substantive law itself, this analysis also has to consider any ‘relevant rules of international law’.³⁷

In order to further clarify what those ‘relevant rules of international law’ would be, we should refer to Art.307 EC. This article states among other things that previous international agreements with third countries concluded before the entry into force of the original EC Treaty (1958) shall not be affected by the provisions of the EC Treaty.³⁸ As international organisations are normally set-up by international agreements³⁹ and their procurement rules adopted by formal decisions of the organisation pursuant to its founding agreement, which are usually recognised as being part of international law and subject to the rules of treaty interpretation,⁴⁰ the ECJ jurisprudence on Art.307 EC is of fundamental importance to our study, as it determines the precedence between international agreements and EU law.

In line with that case law, in matters that are within the exclusive competence of the EU, its member states may not conclude new international agreements,⁴¹ nor may they, within an international organisation, unilaterally assume any obligation or make any proposal that might

³⁵ Case C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, [1992] ECR I-06019, paras 9-10; Case C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz*, [1998] ECR I-03655, para 45; Ahmed and Butler, *supra* note 26, at 777; Kunoy and Dawes, *supra* note 28, at 84

³⁶ Case C-162/96, *Racke*, *supra* note 33, paras 45-46; Case C-113/07 P, *SELEX 2*, *supra* note 20, para 59; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, judgement of 3 September 2008, not yet reported, paras 291-326; Gattini, ‘Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*’, 46 *CMLRev* (2009) 213, at 221-228

³⁷ Kunoy and Dawes, *supra* note 28, at 99 and 103

³⁸ EC Treaty, *supra* note 22, Art.307

³⁹ Reinisch, *supra* note 6, at 7; Amerasinghe, *supra* note 7, at 20; Schermer and Blokker, *supra* note 1, §§34-43; but see the discussion of ‘contractual’ and ‘constitutional’ treaties in N.D. White, *The Law of International Organisations*, 2nd Edition (2005), at 14-23

⁴⁰ Amerasinghe, *supra* note 7, at 271-274; Reinisch, *supra* note 6, at 378; Schermer and Blokker, *supra* note 1, §§706-709, 1196-1200, 1335-1339 and 1523; White, *supra* note 37, at 159; Alvarez, *supra* note 16, at 119-120

⁴¹ Case C-468/98, *Commission v Sweden*, [2002] ECR 9575; As explained in K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell: 1999), p.558

affect EC rules promulgated for the attainment of the objectives of the Treaty.⁴² An exclusive competence of the EU has been defined as powers that have been definitely and irreversibly transferred by the EU member states to the EU based on the wording or context of the EC Treaty.⁴³ Unfortunately, the scope of the EU exclusive competences is not necessarily clear.⁴⁴ The type of competence of the EU can only be determined by the ECJ,⁴⁵ and the latter has only recognised a very limited number of areas as being exclusive competences of the EU.⁴⁶

Specifically for public procurement, the regulation of which is part of the internal market, the EU only has the competence to improve the conditions for the establishment and functioning of the internal market, and does not have a general competence to regulate it.⁴⁷ Considering the fact that the EC Treaty does not even refer to public procurement and the ‘framework’ nature of the Public Sector Directive, it would seem that this still leaves sufficient freedom to EU member states,⁴⁸ and that public procurement would currently not be an exclusive competence of the EU, but a shared competence between the EU and its member states. The latter would therefore not be prevented from concluding international agreements related to public procurement outside the framework of the EU.

Conversely, in respect to matters that do not fall within the exclusive competence of the EU, EU member states may conclude new international agreements with third countries. However, such agreements, even when they amend or replace a prior agreement, have to be drafted in line with EU law.⁴⁹ Likewise, if EU rules have been promulgated for the attainment of the objectives of the treaty, EU Member States may not assume, outside the EU framework,

⁴² Case C-45/07, *Commission v Greece*, judgement of 12 February 2009, not yet reported

⁴³ Lenaerts and Van Nuffel, *supra* note 40, §§4.036-4.038; ECJ Opinion 1/76, subsequently clarified by Opinion 1/94 of 15 November 1994, [1994] ECR I-5267, and Opinion 2/92 of 24 March 1995, [1995] ECR I-521

⁴⁴ See the diverging views expressed in: European Commission, ‘First Report on Subsidiarity’, COM(94)533; Craig and De Búrca, *supra* note 27, at 133-135; Kaczorowska, *supra* note 25, at 68-69

⁴⁵ Craig and De Búrca, *supra* note 27, at 122

⁴⁶ Lenaerts and Van Nuffel, *supra* note 39, §4-040

⁴⁷ Case C-376/98, *Germany v Parliament and Council*, [2000] ECR I-8419, paras 83-84; see further Aalto, ‘Interpretations of Article 296’, in D. Keohane, Ed., *Toward a European Defence Market*, Chaillot Paper n° 113, EU Institute for Security Studies (2008), pp.13-49, at 16

⁴⁸ Despite the fact that she does not refer to the terms of ‘exclusive’ or ‘shared’ competences, this seems to be the view of S. Arrowsmith, *The Law of Public and Utilities Procurement*, Second Edition (2005), §§3.8-3.14

⁴⁹ See e.g. Case C-466/98, *Commission v United Kingdom*, [2002] ECR I-9427; Joined Cases C-176/97 and C-177/97, *Commission v Belgium and Luxemburg*, [1998] ECR I-3557; see also EC Treaty, *supra* note 22, Article 10(2)

obligations which might affect or are contrary to EU law.⁵⁰ This means that international agreements related to procurement concluded by EU member states after the entry into force of the EC Treaty, have generally to be drafted in line with EU law.

Even for international agreements concluded before the entry into force of the EC Treaty, the obligations arising from which would in general take precedence over EU law, EU member states participating in such agreement are under a duty – as soon as the subject matter of the agreement comes within the competences of the EU – not to enter into any commitment within the framework of these agreements that could hinder the community in carrying out its tasks, but also to proceed by common action within the framework of these agreements.⁵¹ Moreover, the EU member state participating in the agreement must take all appropriate steps to eliminate incompatibilities between such international agreements and EU law.⁵² Even though EU member states may choose the appropriate means to do so, an obligation to denounce the agreement cannot be excluded if EU member states encounter difficulties which make adjustment of the agreement impossible.⁵³ However, it is not entirely clear what ‘appropriate steps’ EU member states have the obligation to take to bring the international agreement in line with EU law.⁵⁴

Lastly, even though Art.307 EC does not apply to international agreements concluded solely between EU member states, such agreements must also be drafted in line with EU law or,

⁵⁰ Case 22/70, *Commission v Council (AETR)*, [1971] ECR 263, paras 21-22; Joined Cases C-176/97 and C-177/97, *Commission v Belgium and Luxembourg*, *supra* note 48; Case C-122/95, *Germany v Council*, [1998] ECR I-973; similarly, in Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, *supra* note 35, paras 285-289, the ECJ held that, although it did not in general have jurisdiction to review the legality of international agreements, EC law provisions adopted to implement such agreements had to be in line with the fundamental principles of EC law

⁵¹ Joined Cases 3, 4 and 6/76, *Cornelis Kramer and others*, [1976] ECR 1279, paras 44-45; Manzini, ‘The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law’, 12 *EJIL* (2001) 781, at 786

⁵² EC Treaty, *supra* note 22, Art.307(2); Case 22/70 *AETR*, *supra* note 46, paras 21-22; Case C-468/98 *Commission v Sweden*, *supra* note 46; Case C-466/98, *Commission v UK*, *supra* note 45; Joined Cases C-176/97 and C-177/97, *Commission v Belgium and Luxembourg*, *supra* note 45; Case C-62/98, *Commission v Portugal*, [2000] ECR I-5171, paras 49-50; Case C-84/98, *Commission v Portugal*, [2000] ECR I-5215, paras 58-59

⁵³ Case C-62/98 *Commission v Portugal*, *supra* note 48, paras 49-50; Case C-84/98, *Commission v Portugal*, *supra* note 48, paras 58-59; see Klabbbers, *supra* note 7; See also Case C-170/98, *Commission v Belgium*, [1999] ECR I-5493, para 42; Manzini, *supra* note 47, at 788 et seq.

⁵⁴ Gattini, *supra* note 34, at 235

when they entered into force before the EC Treaty entered into force, be amended to comply with EU law.⁵⁵

Moreover, we saw above that, out of functional necessity, international organisations are granted privileges that release them from the obligations imposed by some provisions of domestic law.⁵⁶ International law, both treaties law and customary international law, widely recognise the privileges of international organisations,⁵⁷ and EU law, just as national law, will have to be applied in light of the privileges granted to international organisations (either in their founding agreement or by custom), which are therefore also part of the ‘relevant rules of international law’.

We can therefore refine our conclusion by stating that EU law will in general terms apply to the procurement activities of an international organisation in the EU, but that this must be analysed case-by-case based on:

- The contents and scope of the EU substantive law related to the case at hand;
- The privileges of the international organisation, whether explicit or customary, and relevant customary international law, which takes precedence over EU law;
- Relevant international agreements concluded with third states before 1958, which take precedence over EU law;
- Relevant international agreements concluded among EU member states, and those concluded with third states after 1957, insofar as they are not inconsistent with EU law.

Of course, EU member states that are also members of an international organisation may choose to invoke an exemption from compliance with EU law, in line with the ECJ case law, such as Art.296 EC if the protection of the essential interests of their security requires the non-applicability of EU law to an international organisation.⁵⁸ It is likely that this cannot be

⁵⁵ Case 10/61, *Commission v Italy*, [1962] ECR 1, para II.B; Case 475/93, *Jean-Louis Thévenon and Stadt Speyer-Sozialamt v Landesversicherungsanstalt Rheinland-Pfalz*, [1995] ECR I-3813

⁵⁶ Klabbers, *supra* note 7, at 146 et.seq.; Schermer and Blokker, *supra* note 1, §1610-1612

⁵⁷ American Law Institute, *supra* note 10, §467, comments a and d, and reporter’s notes 1 and 2

⁵⁸ In which case, the applicable case law would include Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; Case C-273/97, *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-7403; Case C-414/97, *Commission v Spain* [1999] ECR I-5585; Case C-285/98, *Tanja Kreil v Germany* [2000] ECR I-69; Case C-186/01, *Alexander Dory v Germany* [2003]

done by the organisation itself. However, exemptions from compliance with the EC Treaty are not general or automatic and have to be invoked case-by-case,⁵⁹ which means that, even though they could be invoked for an individual procurement decision, they could probably not be relied on for the approval of the generic procurement rules of the organisation.

4. The Case of EC Treaty Provisions

The primary source of EU law is the EC Treaty. For public procurement within the EU, the ECJ identified a number of principles that the EC Treaty requires public authorities to comply with in their procurement activities, even when the EC public procurement directives do not – or do not fully – apply, such as non-discrimination on the grounds of nationality, transparency, mutual recognition, proportionality, effective judicial protection and equal treatment.⁶⁰ Unfortunately, some of these principles are controversial, especially the use that the ECJ and the Commission currently make of equal treatment,⁶¹ and it is not entirely clear which processes would have to be followed by public authorities in order to comply with these Treaty principles.⁶²

In line with our previous conclusions, international organisations based in the EU would have to comply with these principles in their procurement activities, unless exempted by a privilege

ECR I-2479; Case C-337/05, *Commission v Italy*, judgement of 8 April 2008, not yet reported; see further M. Trybus, *European Defence Procurement Law – International and National Procurement Systems as Models for a Liberalised Defence Procurement Market in Europe* (1999); Heuninckx, 'Defence Procurement in the EU: Time to Listen to the Wake-up Calls' 7 *BLI* (2006) 208; Georgopoulos, 'Defence Procurement and EU Law' 30 *EL Rev* (2005) 559; B. Schmitt (rapporteur), *Defence Procurement in the European Union – The Current Debate*, EU Institute for Security Studies (2005); Trybus, 'Defence Procurement: The New Public Sector Directive and Beyond' 13 *PPLR* (2004) 198

⁵⁹ Case 222/84, *Johnston*, *supra* note 54, para 26; Case C-273/97, *Sirdar*, *supra* note 54, para 16; Case C-285/98, *Kreil*, *supra* note 54, para 16; see also B. Rapp, *Defence Procurement and Internal Market*, Institut für Strategie-Politik- Sicherheits- und Wirtschaftberatung, Berlin, no date

⁶⁰ See further Arrowsmith, *supra* note 44, §§4.1-4.35; Brown, 'Seeing through Transparency: The Requirement to Advertise Public Contracts and Concessions under the EC Treaty', 16 *PPLR* (2007) 1; P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (2004), at 176; Treumer, 'Recent Trends in the Case Law of the European Court of Justice', in R. Nielsen and S. Treumer (Eds.), *The New EU Public Procurement Directives* (2005), at 25

⁶¹ Pijnacker Hordijk and Meulenbelt, 'A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be dismissed', 14 *PPLR* (2005) 123

⁶² In an attempt to clarify that issue, the European Commission published a much criticised communication on the subject: Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, O.J. 2006 C 179/2; Williams, 'Contracts Awarded Outside the Scope of the Public Procurement Directives', 16 *PPLR* (2007) NA1; Brown, 'Case Comment: Case T-258/06: The German Challenge to the Commission's Interpretative Communication on Contracts not Subject to the Procurement Directives', 16 *PPLR* (2007) NA84

or a relevant rule of international law, or unless an exemption from compliance with the EC Treaty (such as Art.296 EC, as mentioned above) is invoked. This conclusion is almost certain for international organisations where a controlling majority of the member states are also EU member states, as the latter have to abstain from any measure which could jeopardise the attainment of the objectives of the EC Treaty.⁶³ Allowing an international organisation under their control to act against provisions of the EC Treaty would certainly be in breach of such negative obligation, unless justified by a relevant rule of international law. For the same reason, the EU member states that are members of the organisation would have the obligation to ensure that the rules and practices of the organisation, such as those related to procurement, comply with EC primary law. Moreover, it seems that the ECJ does not consider the issue of control over the organisation's decision-making to be relevant to the applicability of EU law to an international organisation,⁶⁴ so that EU law would apply to the organisation whether or not a controlling majority of its member states have an obligation not to jeopardise the objectives of the EC Treaty.

In addition, provisions of the EC Treaty can have direct effect in the national legal system of the EU member states.⁶⁵ This means that they may be relied upon by individuals before national courts if they create rights for such individuals and are sufficiently clear, precise and unconditional.⁶⁶ The direct effect of EC Treaty provisions is both vertical (they can be relied on in suits between individuals and the state) and horizontal (they can be relied on in suits between individuals). Therefore, it seems that individuals could rely upon the EC Treaty in suits against an international organisation, as long as these provisions apply to the organisation, based on the circumstances of the case. This has indeed already been the case,⁶⁷ and therefore reinforces the generic conclusion of the previous section.

⁶³ EC Treaty, *supra* note 22, Art.10(2)

⁶⁴ Case C-364/92, *SAT v Eurocontrol*, *supra* note 32; Case T-155/04, *SELEX*, *supra* note 20; Case C-113/07 P, *SELEX 2*, *supra* note 20; even though the ECJ does not have jurisdiction to review the compatibility with EC law of the instruments adopted by the international organisation, it will have jurisdiction to review the legality of EC law provisions adopted to implement these instruments (see Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, *supra* note 35, para 285) and to review if an EU member state failed to abide by its EU law obligations (Case C-466/98, *Commission v UK*, *supra* note 49)

⁶⁵ Case 26/62, *van Gend en Loos*, *supra* note 27 (vertical direct effect); Case 43/75, *Defrenne v SABENA*, [1976] ECR 455 (horizontal direct effect)

⁶⁶ Case 26/62, *van Gend en Loos*, *supra* note 27

⁶⁷ Case C-364/92, *SAT v Eurocontrol*, *supra* note 32

5. The Case of EC Directives

In addition to the EC Treaty, we have explained that the secondary legislation on public procurement within the EU consists of directives. As we saw that international organisations apply their own rules to their public procurement activities (and not the law of an EU member state), we need to assess if the EC public procurement directives would have to be implemented in those rules. We will first of all consider the issue of directives in general, before turning specifically to the public procurement directives.

An EC directive is binding on the EU member states as to the result to be achieved, but leaves to the national authorities the choice of form and methods.⁶⁸ This means that the EU member states have the obligation to transpose the directives into their national legal system within a specified timeframe.⁶⁹ However, a directive is only binding on EU member states,⁷⁰ and an international organisation with a separate legal personality from its member states would therefore not have the obligation to implement it in its internal procedures, such as its public procurement rules.⁷¹

Nevertheless, EU member states have the obligation to take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions of the EC, and have to abstain from any measure which could jeopardise the attainment of the objectives of the EC Treaty.⁷² Therefore, where a controlling majority of the member states of an international organisation are also EU member states, which all have the same obligation to implement directives, they could be found to have failed to fulfil their obligation of implementing an applicable directive if, despite having the necessary majority in the decision-making organs of the organisation, they did not amend the organisation's rules to comply with it. Such obligation would be coherent with the reasoning of the ECJ in its case law on international agreements and Art.307 EC that we discussed above, which held that EC

⁶⁸ EC Treaty, *supra* note 22, Article 249(3)

⁶⁹ Case 29/84, *Commission v Germany (Re Nursing Directives)*, [1985] ECR 1661, para 23

⁷⁰ Case 152/84, *Helen Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, [1986] ECR 723, para 48

⁷¹ See the reasoning of the CFI in Case T-411/06, *Sogelma v EAR*, *supra* note 18, paras 115-116; Ahmed and Butler, *supra* note 26, at 788

⁷² EC Treaty, *supra* note 22, Art.10(2)

member states had an obligation to draft new international agreements in line with EU law, but also to attempt to bring previous international agreement in line with EU law.

Therefore, as a matter of principles and without considering any exception contained in the directives or in relevant international law, there is a strong possibility that EU member states would have an obligation to implement applicable EC directives in the internal procurement rules and practices of international organisations of which they are members when they cannot be prevented to do so by non-EU member states. However, the international organisations themselves, being distinct legal persons under international law, would most likely not have such obligation. Moreover, this conclusion would not be valid if the directive itself is said not to apply to international organisation, or if a privilege exempts the organisation from complying with that specific area of the law.

In addition, the ECJ held early on that a directive could have direct effect if it was not adequately implemented in time by the EU member states after the end of its implementation period.⁷³ This means that provisions of a non-implemented or incorrectly implemented directive may be relied upon by individuals before national courts, but only if they create rights for such individuals and are sufficiently clear, precise and unconditional.⁷⁴ However, the direct effect of directives can only be pleaded in suits between individuals and the state (vertical direct effect) and not in suits between individuals (horizontal direct effect),⁷⁵ because directives are only binding on EU member states, and therefore cannot impose obligations upon individuals if not adequately implemented.⁷⁶

As we saw above, international organisations usually have a legal personality separate from that of their member states. Therefore, one could argue that, if a directive is not implemented or incorrectly implemented by an EU member state into a law or legal rule with which an

⁷³ For a more detailed discussion, refer to the following cases: Case 41/74, *Van Duyn v Home Office*, [1974] ECR. 1337; Case 2/74, *Reyners*, [1974] ECR 631; Case 36/75, *Rutili v Minister for the Interior*, [1975] ECR. 1219; Case 38/77, *Enka*, [1977] ECR. 2203; Case 8/81, *Becker v Finanzamt Münster-Innenstadt*, [1982] ECR. 53; Case 270/81, *Verbond van Nederlandse Ondernemingen*, [1977] ECR. 113; Case 103/88, *Fratelli Costanzo SpA v Comune di Milano*, [1989] ECR. 1839; see further Craig and De Búrca, *supra* note 27, at 202-227

⁷⁴ Case 26/62 *van Gend en Loos*, *supra* note 27; Joined Cases C-6/90 and C-9/90 *Francovich*, *supra* note 28

⁷⁵ Case 152/84, *Marshall*, *supra* note 64, for national law inconsistent with a directive; confirmed in Case C-91/92, *Paola Faccini Dori v Recreb Srl*, [1994] ECR. I-3325, for an unimplemented directive

⁷⁶ Case 152/84, *Marshall*, *supra* note 64, para 48; Case T-411/06, *Sogelma v EAR*, *supra* note 18, para 115

international organisation has to comply, this directive cannot have direct effect in a suit against that organisation, as that organisation would not be an addressee of the directive.⁷⁷

However, the ECJ has interpreted widely the concept of the state, and directives were held to have vertical direct effect against a wide variety or ‘emanations of the state’.⁷⁸ Considering that case law, and even though the ECJ did not yet hold that an international organisation was an ‘emanation’ of EU member states, it is quite possible that an international organisation could be considered as such. Therefore, one should not discount the possibility that unimplemented or incorrectly implemented directives could have direct effect against an international organisation in suits between individuals and that organisation.

6. The EC Public Procurement Directives

The conclusions of the previous section are quite significant for the public procurement activities of international organisations in Europe, as we have seen that there is a strong possibility that EU member states have, in general term, an obligation to implement applicable EC directives into the internal rules and procedures of international organisations, and that if they do not do so despite being able to, it is not unthinkable that the unimplemented directive could have direct effect against the organisation.

However, we have seen that this obligation would be subject to exceptions contained in relevant rules of international law (which we discussed above), but also that the application of EU law to an international organisation would be subject to the substantive law of the case. We must therefore now investigate the substance of the EC public procurement directives themselves to ascertain if they could apply to international organisations. The Remedies Directive will apply as soon as the Public Sector Directive applies, so only the applicability of the latter will be investigated here.⁷⁹

⁷⁷ The CFI unfortunately did not develop this line of argument in Case T-411/06, *Sogelma v EAR*, *supra* note 18

⁷⁸ Vincenzi and Fairhurst, *supra* note 25, at 190; Joined Cases C-253/96 to C-258/96, *Kampelman v Landschaftsverband Westfalen-Lippe and others*, [1997] ECR I-6907, para 46; Case 8/81, *Becker*, *supra* note 67, and Case 221/88, *ECSC v Busseni*, [1990] ECR I-429; Case 152/84, *Marshall*, *supra* note 64, para 51; Case 222/84 *Johnston*, *supra* note 54; Case 103/88, *Costanzo*, *supra* note 67, para 31; Case C-188/89 *A. Foster and Others v British Gas plc*, [1990] ECR I-3313, para 20

⁷⁹ Directive 89/665/EEC, *supra* note 22, Article 1(1)

The Public Sector Directive states explicitly that it will not apply to contracts awarded pursuant to the particular procedure of an international organisation.⁸⁰ Unfortunately, the meaning and scope of the terms ‘international organisation’ are not defined in the Directive.

In the absence of any definition of a term in EU law, the meaning and scope of that term must be determined by considering the general context in which it is used and its usual meaning in everyday language.⁸¹ There is not one single agreed definition of international organisations, but in the case of the directive exemption, it seems widely accepted that this concept only covers organisation of which only states (and maybe also other international organisations) are members.⁸²

According to a fairly outdated view of the Commission, this exclusion covers only contracts awarded by a contracting authority under the Directive, as international organisations are not ‘contracting authorities’ to which the Directives apply.⁸³ This is probably too simplistic, as international organisations of which EU member states are members and control the decision-making, would fit nicely within the definition of bodies governed by public law, which is a type of contracting authority.⁸⁴ Would the Commission’s view be correct, the Public Sector Directive would not apply to the procurement activities of international organisations, but

⁸⁰ Directive 2004/18/EC, *supra* note 22, Article 15(c)

⁸¹ See e.g. Case C-164/98P, *DIR International Film Srl and others v Commission*, [2000] ECR I-447, para 26; Case 349/85, *Denmark v Commission*, [1988] ECR 169, para 9; This is inspired by the Vienna Convention on the Law of Treaties, *supra* note 26, Art.31(1), but the ECJ seems to give priority to interpretation of terms in the general context (systematic method) and in the light of the object and purpose of the provisions (teleological method) over literal interpretation: see Kaczorowska, *supra* note 25, at 182; Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Italian Ministry of Health*, [1982] ECR 3415; Case 6/60, *Humblet v Belgium*, [1960] ECR 559

⁸² Trybus, ‘Procurement for the Armed Forces: Balancing Security and the Internal Market’, 27 *EL Rev* (2002) 692, at 701; UK Public Contracts Regulations 2006 (S.I. 2006/5), Regulation 6(2)(d)(iii); The Vienna Convention on the Law of Treaties, *supra* note 26, Article 2(i) defines ‘international organisations’ as intergovernmental organisations

⁸³ European Commission, *Public Procurement in the European Union – Guide to the Community Rules on Public Supply Contracts other than in the Water, Energy, Transport and Telecommunications Sectors (Directive 93/36/EEC)* (1995), Chapter II, § 2.3, page 25; Directive 2004/18/EC, *supra* note 22, Article 1(2)(a): a public contract, to which the Directive applies, is a contract concluded by a contracting authority

⁸⁴ Directive 2004/18/EC, *supra* note 22, Article 1(9), para 1: a contracting authority is the State, regional or local authorities, bodies governed by public law, and associations formed by one or several of such authorities or one or several of such bodies governed by public law; Case 31/87, *Gebroeders Beentjes B.V. v State of the Netherlands*, [1988] ECR 4635; Case C-44/96, *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH*, [1998] ECR I-73, para 20-21; Case C-353/96, *Commission v Ireland*, [1998] ECR I-8565, para 36; Case C-360/96, *Gemeente Arnhem and Gemeente Rheden v BFI Holding*, [1998] ECR I-6821; Case C-306/97, *Connemara Machine Turf Co Ltd v Coillte Teoranta*, [1998] ECR I-8761, paras 27-28 and 31; Case C-380/98, *The Queen v H.M. Treasury, ex parte The University of Cambridge*, [2000] ECR I-8035, para 20; see discussion of that point in Arrowsmith, *supra* note 44, §5.3

even if it is not, the international organisations exemption mentioned above warrants further discussion.

Some commentators consider that the text of the exemption should be interpreted as covering all international organisations, including those of which only EU member states are members.⁸⁵ Support for this argument is provided by the usual meaning of the terms ‘international organisation’ in everyday language and by the fact that the Commission, European Parliament and EU member states would probably have been more specific in drafting the exemption if their purpose had not been to provide a blanket exemption applicable to all international organisations. This view could also be supported by the wording of Art.307 EC, which does not affect rights and obligations of the EU member states contracted in prior international agreements with third countries.⁸⁶ An exemption similar to the international organisation exemption of the Directive could therefore already be found in the EC Treaty for procurement activities performed through organisations created by such agreements, such as NATO. The international organisations exemption of the Directive would then aim at extending it to all international organisations for the specific area of public procurement.

However, as this exemption could provide the EU member states with an easy way to avoid their obligations under EU law, there is a contrary view that the exemption can only apply to international organisations of which at least one non-EU member state is member, and that international organisations of which only EU member states are members should be considered as contracting authorities within the meaning of the Directives.⁸⁷ The proponents of this interpretation argue that another reading would be contrary to the obligation of the EU member states to take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty and to abstain from any measure that could jeopardise the attainment of

⁸⁵ EU Institute for Security Studies, ‘Contribution to the Consultation *Green Paper on Defence Procurement*, Answers and Comments made by the EU ISS Task Force on the establishment of a European Defence Equipment Market’, 15 February 2005, page 9; United Kingdom Permanent Representation to the European Union, ‘UK Government Response to the Commission Green Paper on Defence Procurement’, 15 February 2005, page 7; COM (2004)608 DEF., Groenboek Overheidsopdrachten op Defensiegebied (Reactie Nederland), 2005, page 7; Heuninckx, *supra* note 54

⁸⁶ EC Treaty, *supra* note 22, Article 307

⁸⁷ Trybus, *supra* note 76, at 709-711; A. Georgopoulos, ‘European Defence Procurement Integration: Proposals for Action within the European Union’ (PhD thesis on file at the University of Nottingham), page 92

the objectives of the EC Treaty.⁸⁸ This interpretation is also supposed to find support in the fact that Art.307 EC applies only to organisations created with third countries before the entry into force of the Treaty: The exemption of the Directive is assumed to have the same application.⁸⁹

However, even though creating international organisations specifically to avoid the application of the Public Sector Directive would certainly fall foul of the EU member states' obligation mentioned above under the Treaty, most international organisations are created for a genuine purpose. Moreover, no provision of the EC Treaty actually prevents the EU member states from exempting all international organisations (or any other entity, for that matter) from complying with a specific directive. In that sense, it would be akin to a privilege granted to international organisations by the EU. We saw above that, even though privileges are usually granted by the founding international instrument of an organisation, they may also be granted through legislation.

This issue has never been ruled on by the ECJ. The only possible indication is that the ECJ used the term 'international organisation' broadly in cases related to the free movement of workers⁹⁰ or competition law,⁹¹ without distinction between those of which only EU member states are members and those including other states.

Moreover, even though it did not seem to take into account the international organisation exemption in its reasoning, the CFI held that the purpose of the Public Sector Directive was to coordinate national procurement laws, and that it was therefore not applicable to international bodies set-up by the Community institutions, which were not, like other international organisation as we explained above, subject to the public procurement law of the EU member

⁸⁸ EC Treaty, *supra* note 22, Article 10(2)

⁸⁹ M. Trybus, *European Union Law and Defence Integration* (2005), at 225; It is interesting to note that the same author argued that the previous Public Supplies Directive included an automatic exemption of the products covered by Article 296(1)(b), even though the EC Treaty exemption itself was not automatic (see Trybus, *supra* note 76), but for the international organisation exemption argues that the purpose of Art.307 EC should be carried over to the Public Sector Directive

⁹⁰ Joined Cases 389/87 and 390/87, *Echternach and Moritz*, *supra* note 31; Case C-310/91, *Schmid*, *supra* note 31; Case C-411/98, *Ferlini*, *supra* note 31, especially para 17

⁹¹ Case C-364/92, *SAT v Eurocontrol*, *supra* note 32

states.⁹² In this ruling, the CFI seems to have identified another ground on which international organisations would not have to be subject to the Public Sector Directive.

In addition, it is certainly significant that the procurement activities of the EU institutions are regulated by specific rules that do not have to comply with the Public Sector Directive, because the purpose of that Directive is the harmonisation of national law, with which the procurement rules of the EU institutions do not have to comply,⁹³ even though those rules are in fact often based on the Public Sector Directive.⁹⁴ If the EU institutions do not have to comply with the EC public procurement directives, it is questionable why other international organisations would have to.

It seems to us that interpreting the exemption as applying to all international organisations, even those of which only EU member states are members, is on the one hand more logical and on the other hand more supported by the little case law somewhat related to the topic. In any case, commentators seem unanimous that the exemption would apply to international organisations of which non-EU member states are members (or alternatively, to organisations in which non-EU member states hold at least a blocking minority). The scope of this exemption is nevertheless a point of EC public procurement law that still requires clarification.

7. Conclusions on Applicable Law

This paper has shown that, as far as EU law applicability to international organisations is concerned, a distinction has to be made between what we could call international organisations ‘controlled’ by EU member states, which are those where the member states that are also EU member states hold a controlling majority in the decision-making process of the organisation, and international organisation ‘not controlled’ by EU member states, which

⁹² Case T-411/06, *Sogelma v EAR*, *supra* note 18, para 115

⁹³ Case T-411/06, *Sogelma v EAR*, *supra* note 18, paras 115-116; for the EC institutions: Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 248/1; Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 Laying down detailed rules for the implementation of the Financial Regulation, OJ 2002 L 357/1; For the European Defence Agency: Decision 2007/643/CFSP of 18 September 2007 on the financial rules of the European Defence Agency and on the procurement rules and rules on financial contributions from the operational budget of the European Defence Agency, OJ 2007 L 269/1

⁹⁴ See e.g. EDA Steering Board Decision No. 2006/29 (COR.) of 23 November 2006 on the Revision of the EDA Financial Rules, p.1

are those where non-EU member states hold at least a blocking minority in the decision-making process of the organisation (such as when decisions require unanimity).

We saw first that most rules of national law, especially the law of the state in which organisations have their headquarters or conduct other activities, are applicable to international organisations, even if international organisations have immunity from jurisdiction to enforce such law. However, such laws may not affect the proper functioning and independence of the organisation, and for this reason, national public procurement law is in fact not applied by international organisations, which apply their own procurement rules.

EU substantive law, both the EC Treaty and secondary legislation, may apply to international organisations in Europe. Actual applicability of an EU law provision has to be analysed depending on the circumstances of the case, taking into account the substantive provisions of EU law and relevant international law, such as the privileges of the organisation and customary international law.

In addition, it EU member states probably have an obligation to bring in line with EU law the rules and practices of international organisations that they 'control'. An international organisation itself, being legally distinct from its member states, would most likely not have such obligation, but it is possible that international organisations could be found to be 'emanations' of EU member states and that therefore unimplemented or inadequately implemented EC directives could have direct effect in suits between individuals and international organisations.

Looking at the EC public procurement directives, which constitute the backbone of public procurement law in the EU, even though there is a debate as to whether or not the international organisation exemption of the EC Public Sector Directive could apply to international organisations of which only EU member states are members, the more likely position is that the exemption would apply to all international organisations, and the latter would therefore not have to comply with the EC public procurement directives. Nevertheless, this issue would require formal clarification.

However, even though it would therefore seem that the EC public procurement directives would not apply to international organisations, the principles of EU law flowing from the EC Treaty that are applicable to public procurement would still apply to the procurement activities of international organisations 'controlled' by EU member states, and probably also

to other international organisations in the EU, subject to any relevant rule of international law such as the privileges granted to the organisations and customary international law.

In order to avoid having to comply with these EU law principles in the public procurement activities of international organisations, EU member states could invoke an exemption from compliance with the EC Treaty, such as Art.296 EC. However, exemptions from compliance with the EC Treaty are not general or automatic and have to be invoked case-by-case. Therefore, it would seem inappropriate for EU member states to invoke an EC Treaty exemption as a blanket exemption to enact generally applicable procurement rules that include provisions that breach the EC Treaty, even though an EC Treaty exemption could still be invoked for individual procurement processes.

Nevertheless, our conclusions mean that anyone wanting to study the procurement rules of international organisations in Europe will have to study each of these rules individually, as they will not be based on a uniform legal framework.