

The Historical Development of the EU Procurement Directives

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The Treaty of Rome

- None of the founding treaties mentioned procurement – resulted from failure to reach agreement – preference policies highly sensitive
- But several provisions were relevant
 - Non-discrimination on grounds of nationality
 - Art 48 (free movement workers), 52-66 (freedom of establishment and to provide services)
 - Art 30 prohibited quantitative restrictions on imports and measures having equivalent effect.

The Treaty of Rome

- Arts 52 – 66 required Member States progressively to abolish restrictions on freedom of establishment of nationals of other member States
- These provisions provided a Treaty basis for subsequent legislation on procurement

General Programmes

- Council adopted two General programmes showing how restrictions on access to government contracts would be reduced over time (1962)

Directives

- Liberalisation (public contracts)
- Co-ordination (works & supplies *only*)

Co-ordination - approach

- Limit the extent to which technical specifications could be used to restrict participation
- Enhance transparency by rules requiring advertising
- Rules for selection of tenderers
- Restriction of award criteria to lowest price of most economically advantageous ('M.E.A.T.')

Subsequent Events

- Cecchini Report – The Cost of Non-Europe - 1985 White Paper ‘Completing the Internal market’)- The ‘1992 Programme’
- Subsequent broadening of the scope of explicit European competence

1985 White Paper, 'Completing the Internal Market' COM (85) 310 Final

- The compliance problem
- Restricted coverage (utilities, services not covered)

The Single Market Onwards – A Burst of Legislative Activity

- Improvements / amendments to existing texts
- Consolidation of existing texts
- Extension of scope – public services contracts
- Extension of scope – utilities works, supply, then services contracts
- Addressing the compliance problem – remedies re public, and later utilities contracts
- Alignment with GPA 1994

The 2004 Legislation

- 2004/17 – public works, supply, services
- 2004/18 utilities works supply services

Changing Context

- Recognition of urgency of environmental imperatives – acid rain, ozone depletion, climate change
- Evolution of the European Entity – not just an internal market – a wide range of policy areas
- Geographical expansion

Changing Context

- Trend to privatisation and outsourcing
- C- 324/98 Telaustria – applying Treaty principles to procurements not covered by the Directives

Extension of the Scope of European Law – Environmental Competence – The Single European Act

- Art 130s EC objectives of environmental policy & ‘Principles’ (precautionary, polluter should pay, remedy at source)
- A Legislative basis for environmental measures – Art 130r EC
- The ‘integration principle’ environmental protection requirements shall be a component of the Community’s other policies: Art 130r(2) EC

The 'Integration Principle'

- Treaty of Amsterdam:

Environmental protection to be integrated into the *definition* and *implementation* of other Community policies: Art 6 EC as amended

Prior to 2004...

- Silence of the Directives as regards environmental and social policies in procurement
- Commission 'Guardian of the Treaty'- concern to limit purchasers discretion so as to avoid national preferences

Stages at which horizontal policies might be pursued

- Decision as to what to purchase
- Specifications
- Contract Performance Conditions
- Selection/Qualification
- Award Criteria

The Commission's restrictive interpretations

- Specifications – can only specify production processes and methods as regards supplies if the PPMs affect the consumption characteristics of the products.
- Award Criteria – where M.E.A.T. criteria are used, each criterion must confer a 'direct economic benefit' on the contracting authority

Key cases prior to 2004

- Contract performance conditions:
 - 31/87 Beentjes 1988
- Contract award criteria:
 - C-225/98 Nord-Pas-de-Calais 2000

Key cases prior to 2004

- The Integration Principle as regards environmental protection:
 - C-379/98 PreussenElektra 2001
- Contract award criteria:
 - C-513/99 Concordia Bus Finland 2002
 - C- 48/01 EVN 2003

Technical Specifications

- Impact of the case -law as regards technical specifications: PPMs, the invisibility fallacy, the revised invisibility fallacy, a new approach?

The impact of events & new approaches

- Climate Change - Energy Security – Energy Policy
- Procurement for a better environment, Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, GPP.
- EU standards, labels and obligations – Community horizontal policy?

Key cases since 2004

- Interaction with directives
 - C-6/05 Medipac- Kazantzidis AE v Venizelio-Pananio (2007)
 - C- 346/06 Ruffert v Land Neidersachsen (2008)
- T- 331/06 Evropaiki Dynamiki etc v European Environment Agency (2010)