

Private Contribution to the Commission Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market

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1. Aim and Scope of the Contribution

This document provides a private contribution to the Commission's consultation on modernising the EU public procurement rules.¹ The author is a researcher in the law of public procurement within the Public Procurement Research Group of the University of Nottingham, UK, and this contribution is based on the research performed within the scope of his Ph.D., on his academic articles, and on his practitioner's experience in defence procurement. This document only discusses a few of the questions included in the consultation, some of them in details and some others in more generic terms.

2. Public Contracts – Exemptions

2.1. Questions Concerned

7. Do you consider the current provisions on excluded contracts to be appropriate? Do you think that the relevant section should be restructured or that individual exclusions are in need of clarification?

8. Do you think that certain exclusions should be abolished, reconsidered or updated? If yes, which ones? What would you propose?

2.2. Integration of Directives

The EU public procurement regime (without considering the specific regime applicable to utilities operating in the water, energy, transport or postal services sectors) consist of three

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¹ Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market, COM(2011) 15/4, 27 January 2011

principal directives: Directive 2004/18/EC (Public Sector Directive),² containing the substantive and procedural measures for the harmonisation of public procurement in general, Directive 89/665/EEC (Remedies Directive),³ containing the measures for the harmonisation of the procedures for appealing decisions of contracting authorities, and of the available remedies, which complements Directive 2004/18/EC, and Directive 2009/81/EC (Defence and Security Directive),⁴ containing the substantive and procedural measures for the harmonisation of public procurement and remedies for military equipment.

Even though there were at the time good reasons for adopting separate directives, we have explained in an earlier article that this led to potential incoherence, especially between the Public Sector Directive and the Defence and Security Directive.⁵ We would therefore recommend, if at all possible, integrating the three main public procurement directives into a single directive in order to ensure consistency.

2.3. Definition of ‘International Organisation’

Concerning the exemptions of the Directives, the first clarification should cover the definition of the term ‘international organisation’.

The Public Sector Directive does not apply to contracts awarded pursuant to the particular procedure of an international organisation.⁶ Likewise, the Defence and Security Directive does not apply to contracts governed by specific procedural rules of an international organisation purchasing for its purposes.⁷ However, the term ‘international organisation’ is not defined in the Directives.

² 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

³ 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 L395/33, as amended

⁴ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ 2009 L216/76, as amended

⁵ Heuinckx B., “Lurking at the Boundaries: Applicability of EU Law to Defence and Security Procurement” (2010) 19(3) PPLR 91-118

⁶ Directive 2004/18/EC, above, Art.15(c)

⁷ Directive 2009/81/EC, above, Art.12(c)

In the absence of any definition of a term in EU law, the meaning and scope of a term must be determined by considering the general context in which it is used and its usual meaning in everyday language.⁸ There is not one single generally agreed definition of the term international organisation at international law,⁹ 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.¹⁰

According to a fairly old view of the Commission, this exclusion covers only contracts awarded by a contracting authority under these procedures, as international organisations are not contracting authorities within the meaning of the Directives.¹¹ This is probably too simplistic, as international organisations of which EU Member States control the decision-making process would fit within the definition of bodies governed by public law (see Section 3). However, this view could be correct when applied to international organisations in which non-EU Member States may block the organisation's decisions.¹²

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.¹³ Support for this argument is provided by the usual meaning of the term

⁸ See e.g. *CILFIT* (Case 283/81) [1982] E.C.R. 3415; *Humblet* (Case 6/60) [1960] E.C.R. 559; *DIR v Commission* (Case C-164/98 P) [2000] E.C.R. I-447, [26]; *Denmark v Commission* (Case 349/85) [1988] E.C.R. 169, [9]; This is inspired by the Vienna Convention on the Law of Treaties of 1969, United Nations, *Treaty Series*, vol.1155, Art.31(1), but the CJEU 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 A., *EU Law for Today's Lawyers* (Old Bailey Press, 2000), p.182

⁹ See further White N.D., *The Law of International Organisations*, 2nd Ed. (Manchester University Press, 2005), Ch.1; Reinisch A., *International Organisations before National Courts* (Cambridge University Press, 2006), p.5; Schermer H.G. and Blokker N.M., *International Institutional Law*, 4th Ed. (Nijhoff, 2003), §§29-32; Klabbers J., *An Introduction to International Institutional Law* (Cambridge University Press, 2006), p.7

¹⁰ Trybus M., "Procurement for the Armed Forces: Balancing Security and the Internal Market" (2002) 27 *E.L.Rev* 692, p.701; UK Public Contracts Regulations 2006 (S.I. 2006/5), Regulation 6(2)(d)(iii); Vienna Convention on the Law of Treaties, above, Art.2(i) defines 'international organisations' as intergovernmental organisations

¹¹ *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)* (European Commission: 1995), Ch.II, §2.3, p.25

¹² Trybus, "Procurement for the Armed Forces", above, p.701

¹³ *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* (EU Institute for Security Studies, 2005), p.9; *UK Government Response to the Commission Green Paper on Defence Procurement*, above, p.7; *Groenboek Overheidsopdrachten op Defensiegebied (Reactie Nederland)*, above, p.7; Heuninckx B., "Defence Procurement in the EU: Time to listen to the Wake-up Calls" (2006) 7(2) *B.L.I.* 208, pp.221-223

‘international organisation’ in everyday language. Moreover, the Commission, European Parliament and EU Member States could have been more specific in drafting the exemption if their purpose had not been to provide a blanket exemption applicable to all international organisations.

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 non-EU Member States are members, and that other international organisations should be considered as contracting authorities within the meaning of the Directives.¹⁴ 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 EU Treaties and to abstain from any measure that could jeopardise the attainment of the objectives of the EU Treaties.¹⁵ Taking this restrictive interpretation one further step, one could argue that the exemption should only apply to international organisations where non-EU Member States have the power to block decisions supported by the Members of the organisation that are also EU Member States.

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 Treaties, most international organisations are created for a genuine purpose. Furthermore, no provision of the EU Treaties actually prevents the EU legislator 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. Even though privileges are usually granted by the founding international agreement of an organisation, they may also be granted through legislation.¹⁶

¹⁴ Trybus, “Procurement for the Armed Forces”, above, pp.709-711; Georgopoulos A., *European Defence Procurement Integration: Proposals for Action within the European Union*, PhD thesis (University of Nottingham, 2004), p.92

¹⁵ Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), [2008] OJ C115/47, Art.4(3) (formerly Art.10(2) EC)

¹⁶ Schermer and Blokker, *International Institutional Law*, above, §§325 and 1601-1609; American Law Institute, *Restatement of the Law – The Foreign Relation Law of the United States*, 3rd Ed. (American Law Institute Publishers, 1987), §467, Reporter’s Note 4 and Comments a and b; Klabbers, *An Introduction to International Institutional Law*, above, pp.147 155; Amerasinghe C.F., *Principles of the Institutional Law of International Organizations*, 2nd Ed. (Cambridge University Press: 2003), p.315

This issue has never been ruled on by the CJEU. The only possible indication is that the CJEU used the term ‘international organisation’ broadly in cases related to the free movement of workers¹⁷ or competition law,¹⁸ without distinction between those of which only EU Member States are members and those including other States.

The two directives should therefore be amended to include a definition of ‘international organisation’. Such definition could read, for instance, as:¹⁹

‘International organisation’ means an organisation established by an international agreement, having international legal personality, whose membership consists only or principally of [EU] Member States, of third countries, or both, and having a permanent institutional element with a will independent of its individual members; or an organisation, agency or institution created within such organisation in order to further its purpose.

In order to avoid entering into the international law debate of whether or not international organisations can have a will independent from their Member States,²⁰ the words ‘with a will independent of its individual Member States’ could even be omitted. This definition should not extend to bodies created ‘by’ an international organisation, as this could very well include undertakings, which should not be able to rely on the international organisation exemptions when they fall within the definition of contracting authorities.

2.4. Clarification of the International Rules Exemptions

The second clarification of the Directives should cover the ‘international rules’ exemptions.

The Public Sector Directive does not apply to contracts awarded pursuant to the particular procedure of an international organisation,²¹ and the Defence and Security Directive does not apply to contracts governed by specific procedural rules of an international organisation

¹⁷ *Echternach and Moritz* (Joined Cases 389/87 and 390/87) [1989] E.C.R. 723; *Schmid* (Case C-310/91) [1993] E.C.R. I-3011; *Ferlini* (Case C-411/98) [2000] E.C.R. I-8081, especially [17]

¹⁸ *SAT v Eurocontrol* (Case C-364/92) [1994] E.C.R. I-43; *SELEX* (Case T-155/04) [2006] E.C.R. II-4797; *SELEX II* (Case C-113/07 P) [2009] E.C.R. I-2207

¹⁹ This definition is inspired by the Report of the ILC, 55th Session (2003), UN Doc. A/58/10, at 38; American Law Institute, *Restatement of the Law – The Foreign Relation Law of the United States*, above, §221; Schermer and Blokker, *International Institutional Law*, above, §33-45; White, *The Law of International Organisations*, above, pp.1-2; Klabbers, *An Introduction to International Institutional Law*, above, pp.7-13

²⁰ See e.g. White, *The Law of International Organisations*, above, pp.30-32

²¹ Directive 2004/18/EC, above, Art.15(c)

purchasing for its purposes.²² In addition, the Defence and Security Directive does not apply to contracts governed by specific procedural rules pursuant to an international agreement or arrangement concluded between EU Member States and third countries,²³ and to contracts awarded in the framework of a cooperative programme based on research and development.²⁴

In such context, contracting authorities (often EU Member States) request or allow a third party (international organisation, other EU Member State, third country, etc.) to procure from economic operators on the basis of specific rules (procurement rules of the organisation, of the international agreement, etc.). This leads to a complex relationship, shown, on the figure below, and it is not entirely clear to which contracts these exemptions apply. It could refer to:

- The contracts awarded by the entity managing the procurement (international organisation, third country, etc.) to economic operators on the basis of specific public procurement rules (the case N° 1 in the figure below);
- The contracts awarded by an EU Member State or other contracting authority to economic operators on the basis of those specific rules (the case N° 2 in the figure below); and/or
- The contracts awarded by one or more EU Member State or other contracting authority to the entity managing the procurement (international organisation, third country, etc.) on the basis of specific rules, and entrusting it with a mission, such as the procurement of a piece of equipment or the management of a collaborative programme (the case N° 3 in the figure below).

The term ‘contract’ has to be read in accordance with the definition of ‘public contracts’ within the Public Sector Directive, which are contracts for pecuniary interest between contracting authorities and economic operators.²⁵ Therefore, the third possibility above would only be possible if the entity managing the procurement qualifies as an ‘economic operator’,

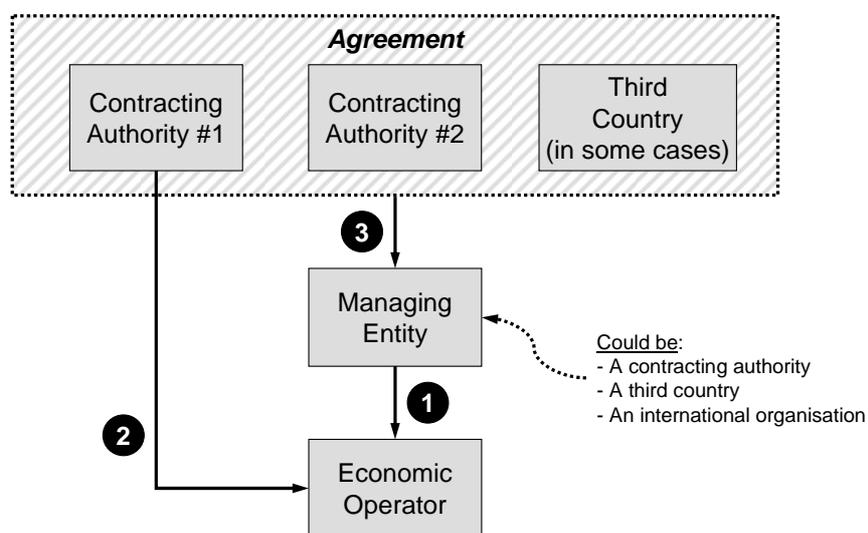
²² Directive 2009/81/EC, above, Art.12(c)

²³ Directive 2009/81/EC, above, Art.12(a)

²⁴ Directive 2009/81/EC, above, Art.13(c)

²⁵ Directive 2004/18/EC, above, Art.1(2), referring to Directive 2004/18/EC, above, Art.1(2)(a); see Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.6

which is any natural or legal person or public entity or group of such persons and/or bodies which offers works, products and/or services on the market.²⁶



Relationships in International Rules Exemptions

It is submitted that the first two possibilities (cases N° 1 and 2 in the figure) should always be covered by the exemptions mentioned. This is specifically provided for in the international organisation exemption of the Defence and Security Directive,²⁷ and had been acknowledged by the Commission for the international organisation exemption of the Public Sector Directive.²⁸ This reading should become generally accepted for all the exemptions mentioned in this Section, and this should be done by a clarification inserted in the Directives through an amendment.

It is more questionable if the third possibility (case N° 3 in the figure) should be included in the interpretation of the Directives. It would amount to say that, when purchasing from the entity managing the procurement with which they are not in a quasi-in house relationship and that operates on the market, EU Member States (or other contracting authorities) would not have to comply with the Directives, but only with the EU Treaties procurement principles. It is submitted that this should not be the case.

²⁶ Directive 2004/18/EC, above, Art.1(8)

²⁷ Directive 2009/81/EC, above, Art.12(c), which reads in full "This Directive shall not apply to contracts governed by [...] specific procedural rules of an international organisation purchasing for its purposes, or to contracts which must be awarded by a Member State in accordance with those rules."

²⁸ *Guide to the Community Rules on Public Supply Contracts*, above, Ch.II, §2.3, p.25

3. Public Purchasers – The State

3.1. Questions Concerned

9. Do you consider that the current approach in defining public procurers is appropriate? In particular, do you think that the concept of “body governed by public law” should be clarified and updated in the light of the ECJ case-law? If so, what kind of updating would you consider appropriate?

3.2. Definition of ‘Contracting Authority’

3.2.1. State of the law

The EU public procurement directives apply only to procurement activities performed by *contracting authorities*.²⁹ These are defined as 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 bodies governed by public law.³⁰

The definition of the *State* includes all the bodies exercising legislative, executive and judicial powers at national, federal or local level,³¹ but has to be applied in functional terms to include bodies which are formally separate from the State administration.³² Bodies with no distinct legal personality³³ whose composition and functions are laid down by legislation and which depend on the authorities for the appointment of their members, the observance of the obligations arising out of their measures, and the financing of the public contracts they awards are to be regarded as the State.³⁴

²⁹ Directive 2004/18/EC, above, Art.1(2)(a): a public contract, to which the Directive applies, is a contract concluded by a contracting authority; Directive 2009/81/EC, above, Art.1(2), 1(17), and 2

³⁰ Directive 2004/18/EC, above, Art.1(9), para 1

³¹ *Commission v Belgium* (Case C-323/96) [1998] E.C.R. I-5063, [25]-[29]; *Commission v Germany* (Case C-126/03) [2004] E.C.R. I-11197, [18]

³² *Gemeente Arnhem v BFI* (Case C-360/96) [1998] E.C.R. I-6821, [62]; *Beentjes v Netherlands* (Case 31/87) [1988] E.C.R. 4635, [7]-[13]; see also S. Arrowsmith, *Public Procurement in the European Community: Volume II – A Guide to the Procurement Cases of the Court of Justice* (Earlsgate, 1992), pp.74-76

³³ *Connemara Machine Turf* (Case C-306/97) [1998] E.C.R. I-8761, [27]-[28]; see discussion of that point in Arrowsmith S., *The Law of Public and Utilities Procurement*, 2nd Ed. (Sweet and Maxwell, 2005), §5.3

³⁴ *Beentjes*, above, [12]

*Body governed by public law*³⁵ is further defined as any body established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character, having legal personality, and closely dependent on the State, regional or local authorities or other bodies governed by public law.³⁶ These conditions are cumulative.³⁷ The definition of body governed by public law also has to be interpreted in functional terms.³⁸

The existence or absence of needs in the general interest not having an industrial or commercial character must be appraised objectively, the legal form of the provisions in which those needs are mentioned being immaterial in that respect.³⁹ The Court of Justice of the EU (CJEU) has held that a vast number of activities could constitute needs in the general interest.⁴⁰ It has been argued that the requirement of meeting needs in the general interest would probably always be satisfied, except when the market already meets those needs.⁴¹ The activities will be considered to be commercial when the body is competing with others and is bearing itself the financial risks of its activities.⁴² Activities performed in support of the State and necessary for the exercise of the State's powers are closely linked to public order and are therefore needs of the general interest not having an industrial or commercial character.⁴³

The condition of close dependence can be met either if the body:

- Is financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law⁴⁴;

³⁵ Directive 2004/18/EC, above, Art.1(9), para 2

³⁶ *Mannesmann Anlagenbau v Strohal Rotationsdruck* (Case C-44/96) [1998] E.C.R. I-73, [20]; *University of Cambridge* (Case C-380/98) [2000] E.C.R. I-8035, [20]

³⁷ *Mannesmann Anlagenbau*, above, [21]; *Adolf Truley v Bestattung Wien* (Case C-373/00) [2003] E.C.R. I-1931, [34]; *Korhonen v Varkauden Taitotalo* (Case C-18/01) [2003] E.C.R. I-5321, [32]

³⁸ *Connemara Machine Turf*, above, [31]; *Commission v Ireland* (Case C-353/96) [1998] E.C.R. I-8565, [36]; *Commission v France* (Case C-237/99) [2001] E.C.R. I-939, [43]; *Commission v Spain (SIEPSA)* (Case C-283/00) [2003] E.C.R. I-11697, [73]

³⁹ *BFI*, above, [63]

⁴⁰ Waste collection: *BFI*, above; funeral services: *Adolf Truley*, above; running universities: *University of Cambridge*, above; Providing leisure facilities: *Connemara Machine Turf*, above; Organising exhibitions to promote commerce: *Agorà and Excelsior* (Joined cases C-223/99 and C-260/99) [2001] E.C.R. I-3605; building property to stimulate economic activity: *Korhonen*, above

⁴¹ Arrowsmith, *The Law of Public and Utilities Procurement*, above, §5.13

⁴² *BFI*, above, [48]-[49]; *Agorà*, above, [38]; *Korhonen*, above

⁴³ *SIEPSA*, above, [85]; *Mannesmann Anlagenbau*, above, [24]

⁴⁴ See further *University of Cambridge*, above, [26], [33], [36]

- Is subject to management supervision by public authorities, which renders the body dependent on them in such a way that they are able to influence its decisions in relation to public contracts⁴⁵; or
- Is having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.⁴⁶

Within these conditions, the term ‘public authority’ is used by the CJEU to cover a wider and more generic concept than ‘contracting authority’ within the meaning of the Public Sector Directive.⁴⁷ We discuss in more details the definition of ‘public authority’ in Section 4.2.

A list of the bodies meeting these criteria can be found in annex of the Public Sector Directive.⁴⁸ This list is non-exhaustive, but has to be amended on a regular basis.⁴⁹ It is not dispositive, and also merely illustrative in the sense that entities listed are not in fact covered if they do not properly fall within the definition and that entities not listed but falling within the definition are covered, and determining if a body meets the definition of body governed by public law must be done case-by-case.⁵⁰

3.2.2. *The case of international organisations*

Within the scope of our research, we applied this definition to the specific case of international organisations and found that a number of clarifications would be useful.

Indeed, international organisations could be found to be bodies governed by public law. The fact that no international organisation is listed in the annex of the Directive is not dispositive, as the annex is merely illustrative, even though we should note that the list only includes entities that created on the basis of the national law of EU Member States, and no subjects of

⁴⁵ See further *Commission v France* (Case C-237/99), above, [48] et.seq.; *Adolf Truley*, above, [72]: whole ownership by a contracting authority is sufficient to demonstrate management supervision

⁴⁶ Directive 2004/18/EC, above, Art.1(9), para 2(c)

⁴⁷ *Wall v Stadt Frankfurt* (Case C-91/08), judgment of 13 April 2010, not yet reported, [47]-[52] and [60]; *Stadt Halle* (Case C-26/03) [2005] E.C.R. I-1, [48]-[50] implies that it is possible that some public authorities are not contracting authorities

⁴⁸ Directive 2004/18/EC, above, Annex III

⁴⁹ Directive 2004/18/EC, above, Art.1(9), para 3

⁵⁰ *SIEPSA*, above, [77]; *Adolf Truley*, above, [44]

international law.⁵¹ A first issue that should be clarified is therefore whether or not entities created under international law could be contracting authorities. It is submitted that there is no reason why this should not be the case in principle.

Most international organisations are set-up to meet needs in the general interest not having an industrial or commercial character and operate as agents of their Member States as not-for-profit organisations. Not only do these organisations usually not compete against each other in any commercial sense, but their Member States also provide most, if not all of their financing.⁵² In addition, most international organisations, though not all, have legal personality in the legal system of their Member States, as well as international legal personality.⁵³ It is not entirely clear which of the two legal personalities was meant by the provisions of the Directive, even though it is highly likely to refer only to domestic legal personality.

Lastly, most international organisations are closely dependent on the State: they are often financed solely by their Member States, as we explained above, the latter supervise their management, and the governing and supervisory bodies of those organisations are usually solely constituted by members appointed by their Member States.⁵⁴ So, if the Member States of an international organisation are all EU Member States, it seems that each of these conditions would often be met.

On its face, it would even seem that the condition that more than half of the members of the organisation's management or supervisory board must be appointed by EU Member States would also cover organisations of which some (but less than half) Member States are not EU Member States. However, it is likely that this condition is based on the premise that the decisions of most of such boards are made by majority voting. If decisions have to be made

⁵¹ Even though these were not procurement cases, it is interesting to note that the CJEU seems to consider that there can be “national” and “international” bodies governed by public law, international organisations falling within the latter category: *LTU v Eurocontrol* (Case 29/76) [1976] E.C.R. 1541, [4]; *Verein für Konsumenteninformation v Henkel* (Case C-167/00) [2002] E.C.R. I-8111, [27]

⁵² Schermer and Blokker, *International Institutional Law*, above, §§966 et.seq.; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.359 et.seq.

⁵³ International Court of Justice, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p.178; Klabbers, *An Introduction to International Institutional Law*, above, pp.49-52; Combacau J. and Sur S., *Droit International Public*, 7th Ed. (Montchrestien: 2006), p.714; Amerasinghe, *Principles of the Institutional Law of International Organizations*, above, pp.69-77; Schermer and Blokker, *International Institutional Law*, above, §§1591-1598

⁵⁴ Schermer and Blokker, *International Institutional Law*, above, §§771-887

unanimously, which is often the case for international organisations,⁵⁵ or if non-EU Member States constitute a blocking minority, it is submitted that this condition would not be met. Non-EU Member States would in this case have a veto power on the organisation's decisions, making EU Member States Member of the organisation unable to influence the organisation's decisions related to public contracts.⁵⁶ This could sever the close dependency link with EU Member States required by the definition of body governed by public law. However, the other alternative conditions for such close dependency (financing or management supervision) could still be met, depending on the case. It is nevertheless submitted that the condition on the majority of the membership of the organisation's management or supervisory board should be amended to rather reflect control by EU Member States or other contracting authorities.

Therefore, a number of uncertainties remain, as it is not certain if the EU legislator intended the concept of bodies governed by public law to cover entities created under international law, and if the requirement of having legal personality requires international legal personality and/or personality in the legal system of the EU Member States concerned. Also, a clarification of the definition of bodies governed by public law would allow clarifying the meaning of 'the State' within the definition of contracting authorities: as the aim of the Public Sector Directive is the harmonisation of the laws of the EU Member States,⁵⁷ the term 'the State' can only refer to the latter. Moreover, we have seen that the third alternative condition to be a body governed by public law (an administrative, managerial or supervisory board, more than half of whose members are appointed by the State) was most likely drafted to cover cases where voting within that board was by simple majority. This should be amended to cover cases where the decision-making process requires more than a simple majority (such as qualified majority or unanimity).⁵⁸

Clarifying this definition would only require amending the Public Sector Directive, as the Defence and Security Directive refers to it for the definition of contracting authority.⁵⁹ The following definition of contracting authority, which in addition includes clarifications flowing

⁵⁵ Schermer and Blokker, *International Institutional Law*, above, §§787-790

⁵⁶ See *Commission v France* (Case C-237/99), above, [48]-[49]

⁵⁷ *Sogelma v EAR* (Case T-411/06) [2008] E.C.R. II-2771, [115]

⁵⁸ As the CJEU has done for public authorities in *Wall*, above

⁵⁹ Directive 2009/81/EC, above, Art.1(17)

from the case law of the CJEU, could be used, with changes from the current definition highlighted in italic:

A ‘contracting authority’ means *a [EU] Member State (including all bodies exercising legislative, executive and judicial powers at national, federal or local level), a regional or local authority of a [EU] Member State, a body governed by public law, or an association formed by one or several of such authorities or one or several of such bodies governed by public law.*

A ‘body governed by public law’ means any body *created in the national legal system of one or more [EU] Member State or in international law:*

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality *in the legal system of one or more [EU] Member State;* and

(c) *Meeting at least one of the following conditions:*

– financed, for the most part, by *one or more [EU] Member State, regional or local authorities of one or more [EU] Member State, or other bodies governed by public law;* or

– subject to management supervision by those bodies *that renders the body dependent on those bodies in such a way that the latter are able to influence its decisions in relation to public contracts;* or

– having an administrative, managerial or supervisory board, *of which the members appointed by one or more [EU] Member States, by regional or local authorities of one or more [EU] Member State, or by other bodies governed by public law have sufficient voting power to make decisions against which all the other board members would vote.*

Such definition would make clear that international organisations ‘controlled’ by EU Member States could be contracting authorities, but that international organisations ‘not controlled’ by EU Member States would probably not. In addition, it makes clear that third countries and their regional or local authorities are not contracting authorities (something that should have been evident), and that the legal personality referred to is domestic legal personality.

3.3. Definition of ‘European Public Body’

The definition of ‘central purchasing body’ in the Defence and Security Directive, states that such a body may be either a contracting authority to which the Directive applies, or a body to which it does not apply if such body is a ‘European public body’.⁶⁰ This is confusing, on the one hand because the term ‘European public body’ is not defined, and on the other hand because it does not make clear if it assumes that such bodies would never be contracting authorities, even though it implies that European public bodies could at least in some cases not be contracting authorities.

The definition of ‘European public body’ would almost certainly cover bodies set-up by the EU institutions,⁶¹ but could also include independent international organisations of which only EU Member States are Members. It is not certain, on the other hand, that it should cover international organisations of which non-EU Member States are Members.

The most appropriate measure to resolve this issue would be to amend the Defence and Security Directive to add a definition of European public body. The following amendments to Art.1 of the Defence and Security Directive could achieve that aim (proposed changes in italic), bearing in mind that a definition of international organisation would have been inserted in the Directives (see Section 6):

‘Central purchasing body’ means a contracting authority/entity as referred to in Article 1(9) of Directive 2004/18/EC and Article 2(1)(a) of Directive 2004/17/EC *to which this Directive applies, or a body to which this Directive does not apply, if such body is a European public body, which: [...]*

‘European public body’ means an international organisation whose membership consists solely of [EU] Member States; or an organisation, agency or institution created within such organisation.

Such definitions, even though they would leave open the question of whether or not European public bodies can qualify as contracting authorities, which is a decision that has to be made case-by-case anyway,⁶² would provide a definition of European public body that would

⁶⁰ Directive 2009/81/EC, above, Art.1(18)

⁶¹ Directive 2009/81/EC, above, Recital 23

⁶² *SIEPSA*, above, [77]; *Adolf Truley*, above, [44]

include agencies created within the scope of the EU,⁶³ but also international organisations of which only EU Member States are Members.

In the case of such international organisations, this would clarify that, if its procurement rules comply with the Directive, EU Member States would not have to follow the Directive in order to procure from it.⁶⁴ This would also avoid discussions of whether or not such organisation is a contracting authority: for EU Member States to be able to procure directly from such organisation without complying with EU public procurement law, the organisation would have to comply with the Defence and Security Directive, whether or not it qualifies as a contracting authority. In addition, it would require international organisations acting as central purchasing bodies to provide remedies comparables to those of the Directive. Therefore, it would be a simple measure resolving many issues together.

The concept of European public body could also be introduced in the Public Sector Directive, in order to promote European collaboration in the procurement of civil goods or services. As the proposed definition of European public body fits within the definition of international organisation proposed in Section 6, this would mean that contracting authorities would not have to comply with the Public Sector Directive when they procure from a European public body of which the procedures comply with the Directive, but that, if they rely on the international organisations exemption (discussed in Section 6) because the European public body applies procurement procedures differing from those of the Directive, they would have to comply with the Directive when they assign to it the task of procuring in their name, unless the quasi in-house exemption discussed in Section 4.4 applies.

3.4. Direct Effect, Contracting Authority and Quasi In-house

3.4.1. Potential Incoherence of the Jurisprudence

Another issue identified in our research is a potential incoherence between the CJEU rulings related to the definition of contracting authorities and public authorities, the direct effect of directives, and the quasi in-house exemption of EU public procurement.

⁶³ Directive 2009/81/EC, above, Recital 23 mentions the European Defence Agency (EDA), which is created within the scope of the EU, as an example of European public body

⁶⁴ Directive 2009/81/EC, above, Art.10

3.4.2. Contracting Authorities and Public Authorities

The public procurement directives apply to contracting authorities, which include bodies governed by public law that are subject to management supervision by EU Member States or that have an administrative, managerial or supervisory board controlled by EU Member States.⁶⁵ However, even when the public procurement directives do not apply, procurement principles flowing from the EU Treaties, such as non-discrimination on the ground of nationality and the equal treatment of economic operators, could still have to be complied with.⁶⁶

However, only some entities have to abide by those principles when they perform purchasing.⁶⁷ It seems clear that contracting authorities that generally have to comply with the EU public procurement directives also have to comply with the procurement principles flowing from the EU Treaties, even when the Directives do not apply.⁶⁸ In addition, entities that are not contracting authorities, referred to by the CJEU as ‘public authorities’, also have to comply with the principles. In the relevant case law, the term ‘public authority’ covers a wider concept than ‘contracting authority’ within the meaning of the Public Sector Directive.⁶⁹

To establish whether an entity is a public authority, some aspects of the definition of ‘contracting authority’ should be taken as guidance: the entity in question must be effectively controlled by the State or another public authority, and may not compete in the market.

⁶⁵ Directive 2004/18/EC, above, Art.1(9)

⁶⁶ Arrowsmith, *The Law of Public and Utilities Procurement*, above, Ch.4; Sundstrand A., “Procurement Outside the EC Directives”, conference paper, 4th Public Procurement PhD Conference, Nottingham, 7-8 September 2009

⁶⁷ See *Parking Brixen v Gemeinde Brixen* (Case C-458/03) [2005] E.C.R. I-8585, [49]-[50]; *Telaustria v Telekom Austria* (Case C-324/98) [2000] E.C.R. I-10745, [60]; *Commission v Italy* (Case C-412/04) [2008] E.C.R. I-619, [66]; *Commission v Ireland* (Case C-507/03) [2007] E.C.R. I-9777, [30]; *Commission v France* (Case C-264/03) [2005] E.C.R. I-8831, [32]; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* (Case C-220/06) [2007] E.C.R. I-12175, [71] and [75]; *Wall*, above, [47]

⁶⁸ *Commission v Ireland* (Case C-507/03), above, [30]; *Commission v France* (Case C-264/03), above, [32]; *Commission v Italy* (Case C-412/04), above, [66]; *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*, above, [71]; See Szydło, “Contracts beyond the scope of the EC procurement directives”, above, pp.724-726; Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§4.23-4.24 and 4.33; Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, [2006] OJ C179/2, §1.1

⁶⁹ *Wall*, above, [47]-[52] and [60]; *Stadt Halle*, above, [48]-[50] implies that it is possible that some public authorities are not contracting authorities; Wauters K., “In-house Provision and the Case Law of the European Court of Justice”, conference paper, 4th Public Procurement PhD Conference, Nottingham, 7-8 September 2009

Control can be found if the State or another public authority owns a controlling majority in the entity. On the other hand, the entity will be found to compete on the market if it provides goods or services through normal commercial relations formed by bilateral contracts freely negotiated (even if the entity was initially created for public purposes), and obtains more than half its turnover from those bilateral contracts, but the elements of that definition are only to be considered as guidance.⁷⁰

As this definition uses terms similar but not the same as those used for the definition of bodies governed by public law, it is unclear if they cover the same or similar concepts. Moreover, in order to be coherent, the concept of public authorities must cover in any case the concepts of contracting authorities and of European public bodies as defined above.

3.4.3. Direct Effect of Directives

Provisions of a non-implemented or incorrectly implemented directive may, after the end of its transposition period, have direct effect, which means that it can be relied upon by individuals before national courts, but only if they create rights for individuals and are sufficiently clear, precise and unconditional.⁷¹ However, the direct effect of directives can only be pleaded in suits between individuals and the State and not in suits between individuals,⁷² because directives are only binding on EU Member States, and therefore cannot impose obligations upon individuals if they are not adequately implemented.⁷³

However, the CJEU has interpreted widely the concept of the State, and directives were held to have vertical direct effect against a wide variety of ‘emanations of the State’,⁷⁴ in particular

⁷⁰ *Wall*, above, [47]-[52] and [60]

⁷¹ For a more detailed discussion, refer to the following cases: *Van Duyn v Home Office* (Case 41/74) [1974] E.C.R. 1337; *Reyners v Belgium* (Case 2/74) [1974] E.C.R. 631; *Rutili v Minister for the Interior* (Case 36/75) [1975] E.C.R. 1219; *Enka v Inspecteur der Invoerrechten* (Case 38/77) [1977] E.C.R. 2203; *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] E.C.R. 53; *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* (Case 51/76) [1977] E.C.R. 113; *Fratelli Costanzo v Milano* (Case 103/88) [1989] E.C.R. 1839; *van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] E.C.R. 1; *Francovich v Italy* (Joined Cases C-6/90 and C-9/90), [1991] E.C.R. I-5357; see further Craig P. and De Búrca G., *EU Law, Text, Cases and Materials*, 3rd Ed. (Oxford University Press, 2003), pp.202-227

⁷² *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* (Case 152/84) [1986] E.C.R. 723, for national law inconsistent with a directive; confirmed in *Faccini Dori v RE.C.R.eb* (Case C-91/92), [1994] E.C.R. I-3325, for an unimplemented directive

⁷³ *Marshall*, above, [48]; *Sogelma*, above, [115]

⁷⁴ Vincenzi C. and Fairhurst J., *Law of the European Community*, 3rd Ed. (Pearson: 2002), p.190; *Kampelmann v Westfalen-Lippe* (Joined Cases C-253/96 to C-258/96) [1997] E.C.R. I-6907, [46]; *Becker*, above; *ECSC v*

bodies, whatever their legal form, subject to the authority or control of the State, or with special powers beyond those which result from the normal rules applicable to relations between individuals, such as to provide public services under State control.⁷⁵ In this test, we can see that State control is again a key element.

3.4.4. *The Quasi In-house Exemption*

The public procurement directives and the procurement principles flowing from the EU Treaties will not apply to contracts between a contracting authority and an entity legally distinct from it when the contracting authority exercises over the entity concerned a control which is similar to that which it exercises over its own departments and, at the same time, that entity carries out the essential part of its activities with the controlling contracting authority ('quasi in-house' contracts).⁷⁶ These two conditions must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying derogation from the rules of the Directive lies on the person seeking to rely on those circumstances.⁷⁷

The assessment of the first of those two conditions must take into account all the legislative provisions and relevant circumstances, and must show that the entity concerned is subject to a control enabling the contracting authority to exert a power of decisive influence over strategic objectives and significant decisions.⁷⁸ This will be the case if all members or shareholders of the entity in question are contracting authorities⁷⁹ and decisions regarding the activities of the entity in question are taken by bodies, created under the statutes of that entity, which are

Busseni (Case 221/88), [1990] E.C.R. I-429; *Marshall*, above, [51]; *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1986] E.C.R. 1651; *Fratelli Costanzo*, above, [31]

⁷⁵ *A. Foster and Others v British Gas plc* (Case C-188/89) [1990] E.C.R. I-3313, [20]

⁷⁶ *Teckal v AGAC* (Case C-107/98) [1999] E.C.R. I-8121, [50]-[51]; *Stadt Halle*, above, [49] and [52] (in that case, the contracting authority owned more than 75% of the shares of the company): for further discussion, see Brown A., "Application of the Procurement Directives to Contracts Awarded by Public Bodies to Subsidiaries and the Scope of the Remedies Directive: A Note on Case C-26/03 *Stadt Halle*" (2005) 14(3) P.P.L.R. NA72; *Commission v Spain* (Case C-84/03) [2005] E.C.R. I-139, [39]; *Commission v Italy (Agusta Helicopters)* (Case C-337/05) [2008] E.C.R. I-2173, [39]-[41]: see B. Heuninckx, "A Note on Case *Commission v Italy* (Case C-337/05) (Agusta Helicopters Case)" (2008) 17(5) P.P.L.R. NA187 p.NA188 and Trybus M., "Case C-337/05, *Commission v Italy* (Agusta and Agusta Bell Helicopters)" (2009) 46(3) C.M.L.Rev. 973; *Parking Brixen*, above, [62]; *Sea v Ponte Nossa* (Case C-573/07) [2009] E.C.R. I-8127, [38]; Arrowsmith, *The Law of Public and Utilities Procurement*, above, §§6.166-6.172; Wauters, "In-house Provision and the Case Law of the European Court of Justice", above

⁷⁷ *Stadt Halle*, above, [46]; *Parking Brixen*, above, [63]

⁷⁸ *Parking Brixen*, above, [65]

⁷⁹ *Stadt Halle*, above, [49]; *Coditel Brabant v Commune d'Uccle* (Case C-324/07) [2008] E.C.R. I- 8457, [30]

composed of representatives of those contracting authorities. This control may be exercised jointly by those contracting authorities.⁸⁰

The necessary level of control might be found not to exist when the entity in question has become market-oriented and has gained a degree of independence that would render tenuous the control exercised by the contracting authorities. However, this would not be the case if the entity is not of a commercial character and has been set-up to act in the public interest.⁸¹

3.4.5. Ensuring Coherence

The CJEU rulings on bodies governed by public law, public authorities, direct effect and on the quasi in-house exemption are based on the level of control exercised by EU Member States (or other authorities) over the entity concerned. Coherence between these rulings must be ensured. The only consistent way to read these rulings would be that:

- The level of control required to find an entity to be in a quasi in-house relationship with public authorities ('a control similar to that which the public authorities exercise over their own departments'), must be sufficient to also find that entity to be a public authority ('effective control by public authorities');
- The level of control required to find an entity to be a body governed by public law ('subject to the management supervision of, or having an supervisory board controlled by, contracting authorities'), must be sufficient to also find that provisions of directives can be invoked in suits against that entity ('subject to the authority or control of the State'); and
- The concept of public authority must include, without being limited to, contracting authorities and European public bodies.

Any other reading would be entirely incoherent, for instance finding an entity to be in a quasi in-house relationship with a contracting authority (in which case the contracting authority would not have to comply with EU procurement law to award a contract to it), but finding the entity not to be a public authority (in which case the entity would not have to comply with EU public procurement law when awarding subcontracts), or finding that an entity qualifies as a

⁸⁰ *Coditel Brabant*, above, [42] and [54]; *Sea*, above, [54]-[63]; this conclusion had been foreshadowed in *Arrowsmith, The Law of Public and Utilities Procurement*, above, §§6.178

⁸¹ *Parking Brixen*, above, [67]-[70]; *Coditel Brabant*, above, [36]-[38]

contracting authority having to apply the public procurement directives, but that it is not an emanation of the State against which those directives could have direct effect.

As this issue concerns a clarification of EU law, a measure that would definitely clarify the issue is a judgment by the CJEU. However, such ruling could only be made if the three issues mentioned would be raised to the Court, which has not yet been the case, and the Court would have to be willing to tackle these three issues clearly. In addition, the Commission should also amend its interpretative communication on the law applicable to contract awards not or not fully subject to the provisions of the public procurement directives.⁸²

Another alternative and complementary measure, but one that would only clarify the applicability of the EU Directives, would be to amend the latter to include the quasi in-house exemption, which has been judicially created. This could be done through amending the definition of body governed by public law in the following manner (bold italic indicates the new change):

- subject to management supervision by those bodies *that renders the body dependent on those bodies in such a way that the latter are able to influence its decisions in relation to public contracts, **such as, for instance, when those bodies exercise over the body a control similar to that which they exercise over their own departments;***

In addition, a new exemption could be introduced in both the Public Sector and the Defence and Security Directive, worded for instance:

This Directive shall not apply to contracts awarded by a contracting authority to a body governed by public law over which the contracting authority exercises, possibly jointly with other contracting authorities, a control similar to that which it exercises over its own departments and if, at the same time, that body carries out the essential part of its activities with the controlling contracting authority.

This would clarify that when the directive would not apply to the relationship between the controlling contracting authorities and the body concerned because of the quasi in-house exemption (assuming the condition of the second part of the exemption is met), the body concerned would automatically qualify as a contracting authority that has to comply with the Directives (assuming the other parts of the definition are met). One should note that these

⁸² Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, above

amendments would imply that, when the controlling public authorities are contracting authorities, the controlled entity would be found, not only a public authority that has to comply with the EU Treaty principles, but also a contracting authority that has to comply with the Directives.

4. Modernise Procedures

4.1. Questions Concerned

15. Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes? If not: How should the procedures be improved in order to alleviate administrative burdens/reduce transaction costs and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money?

16. Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?

17. Do you think that the procedures and tools provided by the Directive to address specific needs and to facilitate private participation in public investment through public-private partnerships (e.g. dynamic purchasing system, competitive dialogue, electronic auctions, design contests) should be maintained in their current form, modified (if so, how) or abolished?

18. On the basis of your experience with the use of the accelerated procedure in 2009 and 2010, would you advocate a generalisation of this possibility of shortening the deadlines under certain circumstances? Would this be possible in your view without jeopardizing the quality of offers?

19. Would you be in favour of allowing more negotiation in public procurement procedures and/or generalizing the use of the negotiated procedure with prior publication?

20. In the latter case, do you think that this possibility should be allowed for all types of contracts/all types of contracting authorities, or only under certain conditions?

21. Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/ discrimination? In addition to the safeguards already provided for in the

Directives for the negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion? If so, what could such additional safeguards be?

4.2. More Flexibility of the Use of Negotiated Procedure

Another issue that we identified in our research concerns the procurement procedures to be used by contracting authorities under the public procurement directives. Under the Public Sector Directive, the default procedures are the open and the restricted procedures.⁸³ However, under the Defence and Security Directive, because the contracts covered are characterised by specific requirements in terms of complexity, security of information or security of supply, the default procedures are the restricted procedure or the negotiated procedure with publication of a contract notice.⁸⁴ For utilities operating in the water, energy, transport and postal services sectors, the open procedure, the restricted procedure and the negotiated procedure with publication are the default procedures.⁸⁵ Nevertheless, the common aim of each of those Directives is to harmonise the procurement law of the EU Member States to ensure the effects of the principles flowing from the EU Treaties and to guarantee the opening-up of public procurement to competition.⁸⁶

First, one could question if the specificities of the defence market and of the utilities market are not shared with other markets in the EU, for instance major construction projects. It does not seem that this possibility has been analysed by the Commission or the EU legislator.

Second, it is entirely possible to open-up procurement and to comply with the procurement principles flowing from the EU Treaties without applying the open or restricted procedure in every case, especially since the CJEU held that sufficient advertising and some form of competition were required for any procurement to which the principles apply.⁸⁷

⁸³ Directive 2004/18/EC, above, Art.28

⁸⁴ Directive 2009/81/EC, above, Art.25 and Recital 47

⁸⁵ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134/1, as amended, Art.40 and 1(9)

⁸⁶ Directive 2004/18/EC, above, Recital 2; Directive 2009/81/EC, above, Recital 4; Directive 2004/17/EC, above, Recital 9

⁸⁷ *Commission v Ireland (Dundalk Water Pipes)* (Case 45/87) [1988] E.C.R. 4929, [16]; *Unitron Scandinavia v Ministeriet for Fødevarer, Landbrug og Fiskeri* (Case C-275/98) [1999] E.C.R. I-8291, [31]; *Telaustria*, above,

Therefore, one could question if the Public Sector Directive should not be amended to include more flexible provisions on the use of the negotiated procedure with publication.

5. Specific instruments – Below Threshold Awards

5.1. Questions Concerned

29. Do you think that the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directives? Or would you consider that additional guidance, for instance on the indications of a possible cross-border interest, or any other EU initiative, might be needed? On which points would you deem this relevant or necessary?

5.2. Updating the Interpretative Communication

By definition, the case-law of the ECJ is evolving. Therefore, the Commission should consider a regular update of its interpretative communication to take into account new case law. Moreover, the current interpretative communication is currently supposed to apply only to below threshold contracts and to “Part B” services.⁸⁸ However, in our view the case law of the CJEU covers all contracts to which the Directives do not apply⁸⁹ and this should be made clear in an emended version of the interpretative communication.

[60]-[62]; *Coname v Comune di Cingia de' Botti* (Case C-231/03) [2005] E.C.R. I-7287, [16]; *Commission v Italy* (C-260/04) [2007] E.C.R. I-7083, [22]-[24]; *Wall*, above, [36]; *Commission v Italy (Data Processing)* (Case C-3/88) [1989] E.C.R. 4035, [8]; *Parking Brixen*, above, [46]-[49]; *ANAV v Bari* (Case C-410/04) [2006] E.C.R. I-3303, [18]-[23]; Szydło, “Contracts beyond the scope of the EC procurement directives”, above, pp.723-724; Treumer S. and Werlauff E., “The leverage principle: secondary Community law as a lever for the development of primary Community law” (2003) 28(1) E.L.Rev. 124, p.126

⁸⁸ Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006 C179/2, Introduction; for a detailed analysis of the document, see R. Williams, ‘Contracts Awarded Outside the Scope of the Public Procurement Directives’ (2007) 16(1) PPLR NA1

⁸⁹ See also Sundstrand A., “Procurement Outside the EC Directives”, conference paper, 4th Public Procurement PhD Conference, Nottingham, 7-8 September 2009, §5; Szydło M., “Contracts beyond the scope of the EC procurement directives - who is bound by the requirement for transparency?” (2009) 34(5) E.L.Rev. 720, p.722

6. Public-Public Cooperation

6.1. Questions Concerned

30. In the light of the above, do you consider it useful to establish legislative rules at EU level regarding the scope and criteria for public-public cooperation?

31. Would you agree that a concept with certain common criteria for exempted forms of public-public cooperation should be developed? What would in your view be the important elements of such a concept?

32. Or would you prefer specific rules for different forms of cooperation, following the case-law of the ECJ (e.g. in-house and horizontal cooperation)? If so, please explain why and which rules they should be.

33. Should EU rules also cover transfers of competences? Please explain the reasons why.

6.2. Clarification of these issues

Concerning the quasi-in house exemption, as discussed in Section 3.4, the quasi in-house exemption could be clarified in the Public Sector and Defence and Security Directives. However, this would not cover the cases when the quasi-in house exemption applies to contracts not covered by the Directives. An interpretative communication from the Commission, summarizing the CJEU case law on the subject like the communication on contracts not covered by the Directive, and updated regularly, would be an appropriate mean of presenting the applicable law.

Public-public should always be exempted when it concerns joint procurement, an issue discussed below.

7. Aggregation of Demand – Joint Procurement

7.1. Questions Concerned

34. In general, are you in favour of a stronger aggregation of demand/more joint procurement? What are the benefits and/or drawbacks in your view?

35. Are there in your view obstacles to an efficient aggregation of demand/joint procurement? Do you think that the instruments that these Directives provide for aggregating demand

(central purchasing bodies, framework contracts) work well and are sufficient? If not, how should these instruments be modified? What other instruments or provision would be necessary in your view?

36. Do you think that a stronger aggregation of demand/ joint procurement might involve certain risks in terms of restricting competition and hampering access to public contracts by SMEs? If so, how could possible risks be mitigated?

37. Do you think that joint public procurement would suit some specific product areas more than others? If yes, please specify some of these areas and the reasons.

38. Do you see specific problems for cross border joint procurement (e.g. in terms of applicable legislation and review procedures)? Specifically, do you think that your national law would allow a contracting authority to be subjected to a review procedure in another Member State?

7.2. Collaborative Procurement

In earlier articles published in 2008 and 2009, we have discussed the specific issues raised by collaborative defence procurement.⁹⁰ The benefits and drawbacks of collaborative procurement are documented in these articles,⁹¹ and collaboration has in many fields (for instance in defence procurement) become a necessity. The potential gains for the taxpayer of effective collaborative procurement are high, if the issues that can plague collaboration are adequately tackled.⁹² Collaborative procurement has a wider scope than central purchasing bodies, framework contracts, and the Public Sector Directive does not explicitly deal with the

⁹⁰ Heuninckx B., “A Primer to Collaborative Defence Procurement in Europe: Troubles, Achievements and Prospects” (2008) 17(3) PPLR 123-145; Heuninckx B., “The European Defence Agency Capability Development Plan and the European Armaments Cooperation Strategy: Two Steps in the Right Direction” (2009) 18(4) PPLR NA136-NA143

⁹¹ See also: Maulny J-P. et.al., ‘Cooperative Lessons Learned: How to Launch a Successful Co-Operative Programme’, Final Report for Study 06-EDA-008, IRIS/CER/DGAP/IAI, 30 November 2006, p.8; Flournoy M., Smith J. et.al., ‘European Defense Integration: Bridging the Gap between Strategy and Capabilities’, Center for Strategic and International Studies (CSIS), Washington D.C. (USA), October 2005, p.27; Fraser S., ‘European Defence Equipment Collaboration: A View from the UK Ministry of Defence’ (2004) 7(1) RUSI Defence Systems, p.16; Hayward K., ‘Towards a European Weapons Procurement Process – The shaping of common European requirements for new arms programmes’, Chaillot Paper No 27, WEU Institute for Security Study, June 1997; Lorell M. and Lowell J., ‘Pros and Cons of International Weapons Procurement Collaboration’, RAND, Santa Monica (USA), 1995, pp.7 et.seq.; Bourn J., ‘Ministry of Defence: Collaborative Projects’, UK National Audit Office, House of Commons document 1990/91 HC 247, 22 February 1991, §1.1

⁹² Explained in Heuninckx B., “The Front Line of Procurement” Supply Management, 22 July 2010, pp.32-33 (<http://www.supplymanagement.com/analysis/features/2010/the-front-line-of-procurement/>)

issue. On the other hand, even though the Defence and Security Directive contains an exemption related to collaborative programmes, the exemption concerned only covers collaborative programmes based on research and development, and not joint procurement of off-the-shelf supplies.⁹³

The collaboration between contracting authorities in order to define the collaborative procurement framework should always be exempted from compliance with EU public procurement law, in line with the case law of the CJEU, which held that of the award of a contract of a non-commercial nature by public authorities to another public authority would not have to comply with EU public procurement law if such contract is the culmination of a process of cooperation between the parties that aims to ensure the efficient completion of a public task that they all have to perform, even if the public authorities awarding the contract do not exercise any control over the other public authority.⁹⁴ However, when the ‘leading’ contracting authority, or the entity managing the joint procurement, awards a contract to an economic operator to meet the aggregated demand, such contracts should comply with EU law as required.

8. Contract Execution – Subcontracting

8.1. Questions Concerned

44. Do you think that contracting authorities should have more possibilities to exert influence on subcontracting by the successful tenderer? If yes, which instruments would you propose?

8.2. Subcontracting Provisions

In a previous article published this year, we discussed the Defence and Security Directive, including its provisions on subcontracting,⁹⁵ which allow the contracting authority to impose

⁹³ Directive 2009/81/EC, above, Art.13(c) and Recital 28; see Heuinckx B., “Lurking at the Boundaries: Applicability of EU Law to Defence and Security Procurement” (2010) 19(3) PPLR 91-118, pp.110-111

⁹⁴ *Commission v Germany* (Case C-480/06) [2009], [2009] E.C.R. I-4747, [36]-[45]; for an analysis of the case, see Pedersen K. and Olsson E., “*Commission v Germany* – a new approach to in-house providing?” (2010) 19(1) P.P.L.R. 33

⁹⁵ Heuinckx B., “The EU Defence and Security Procurement Directive: Trick or Treat?” (2011) 20(1) PPLR 9-28; Directive 2009/81/EC, above, Art.50-53

subcontracting obligations to the prime contractor. These provisions should also be available to procurement not related to defence and security equipment.

9. Ensuring fair and effective competition

9.1. Questions Concerned

57. How would you propose to tackle the issue of language barriers? Do you take the view that contracting authorities should be obliged to draw up tender specifications for high-value contracts in a second language or to accept tenders in foreign languages?

9.2. Use of Language and Cross-border Tenders

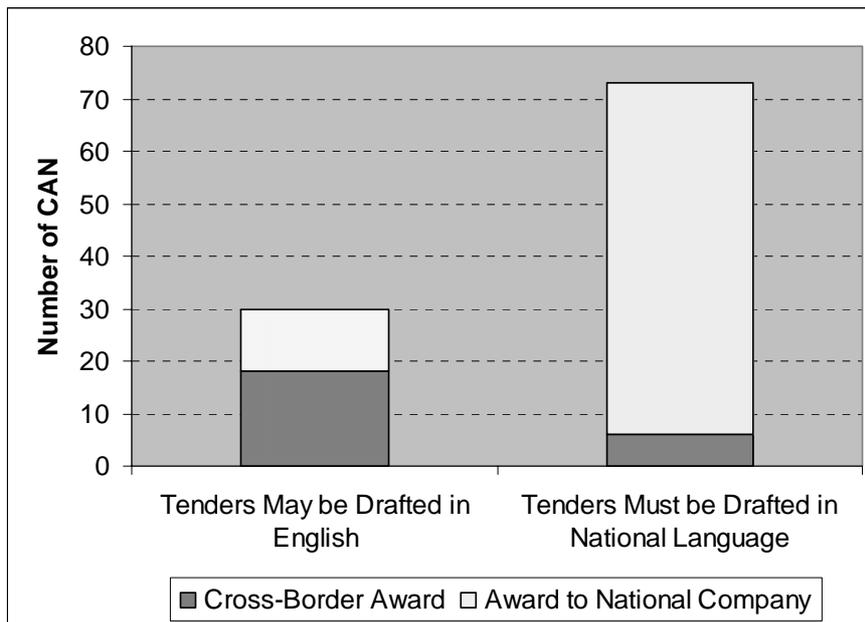
In a former article published in 2009, we analysed the data available in the Electronic Bulletin Board (EBB) of the European Defence Agency (EDA) advertising defence contracts for which the Art.346 TFUE exemption was invoked by an EU Member State.⁹⁶ For the procurement processes resulting in a published Contract Award Notice, the related Contract Notice required the tenders to be drafted in the national language of the contracting authority in 70.9% of the cases, whilst they allowed the tenderers to draft these documents in English in 29.1% of the cases. The use of other alternative languages was minimal.

Analysing the correlation of the language allowed for the tenders and the direct cross-border awards of contracts showed that, when the use of English was allowed in the tenders, the resulting contracts were awarded to a foreign company in 60.0% of the cases. Conversely, when the Contract Notice required the tenders to be submitted solely in the national language of the contracting authority (different from English), the resulting contracts were awarded to a foreign company in only 8.2% of the cases. This difference is significant.

The subscribing Member States allowing the use of English in tenders were the Netherlands, Lithuania and the UK, which allowed English in each case, and Finland, Germany, Slovenia and Sweden, which allowed the use of English in about one time out of two. The data shows a higher percentage of contract award to foreign companies when the use of English was allowed for all the latter countries (except Germany).

⁹⁶ Heuninckx B., “The European Defence Agency Electronic Bulletin Board: A Survey after Two Years” (2009) 18(2) PPLR 43-66; see <http://www.eda.europa.eu/ebbweb/>

This could be evidence that Member States allowing tenders to be submitted in English are already less protectionist than others, and therefore more likely to award contracts to a foreign company, that the use of English is related to technologically complex contracts that attract more cross-border bidding, or that the use of English simply facilitates the bids of foreign companies. The success rate of foreign companies bidding cross-border was in fact quite high (in about 70% of the cases when there was cross-border bidding, the contract was awarded to a foreign company),⁹⁷ but it seems that foreign companies are somewhat reluctant to bid cross-border. Language could be one of the barriers in this area.



Direct Cross-Border Awards and Tender Language in the EDA EBB (end 2008)

One could conclude from this analysis that the EDA and subscribing Member States should possibly consider requesting contracting authorities in the field of defence to allow the use of English in submitted tenders, as this could be a factor to facilitate cross-border bidding for defence contracts. However, more detailed statistical analysis based on a higher number of data would be required to confirm this hypothesis.

To the knowledge of the author, such analysis has not been performed for public contracts advertised in the TED database. It would be interesting to see if similar results are reached in the EC internal market.

⁹⁷ EDA press release, “EU governments agree on an Armaments Cooperation Strategy”, Brussels, 16 October 2008, p.3