Introduction to European Business Law

Lund University MOOC, Jan 5 to Mar 15, 2015

Module 5 (state aid & public procurement)

A glossary of key terms and a summary of case notes from week 5

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These notes were prepared by Penny Parker for others who are taking this MOOC course, for personal private use only. Please feel free to comment or submit corrections to pennyparker@me.com.

Agricultural aid – this is one of the block exemptions available relating to state aid. State subsidies will be allowed as long as complying with the conditions of the particular exemption.

Altmark case – this is an important case under the state aid doctrine, setting out conditions when state aid will be permissible for services of general economic interest, such as bus transport. From the lecture notes: This is one very important case. Germany wanted to continue running a bus line that was not economically viable. It gave the company additional financing in order to continue running the line. Was the financing state aid? If so, was it permissible under article 106, 2nd paragraph? The court found that the financing was compensation for a service of general economic interest and was not state aid. Therefore article 106 did not apply. However, the court established several conditions in this case, to make sure it is fair compensation for the extra costs involved. If it overcompensates, it becomes state aid not just compensation. Accordingly, the court said that public subsidies are not state aid where such subsidies are to be regarded as compensation for the services provided by an undertaking in order to discharge public service obligations. See also the case summary in the case notes section below.

Article 107 TFEU – state aid or state subsidies are prohibited by this article, unless it falls within an exemption. From the lecture notes: State aid law is generally speaking, the common term to denote the prohibition in the treaty of member states providing subsidies to companies, which threaten to distort competition in the EU. As we will see, the prohibition is shaped, so that it allows a wide margin of discretion for the administration. Both on the European and on the member state level, the law leaves space for politics. One such example is the decision of European government and the Commission to allow state aid to banks during the financial crisis. But there is another side too, that is the economic side of state aid. State intervention in the economy is a common feature in developed countries. Since the state is so powerful, an intervention can have an impact on the economy. While some argue that this is a positive force, others argue that this is a negative force. In any case, the application of state aid law will always have an economic dimension. See also the topic of "state aid" in this glossary which deals more specifically with the items in article 107(1).

Article 108 TFEU – this article addresses the procedural aspects of state aid law in what is commonly called state aid control. From the lecture notes: Before we go into the details, let me give you a brief outline on how the state aid control system is set up. The purpose of state aid control, as we noted in the earlier lectures, is to control state interventions in the market. This system is supervised by the European Commission. Only the Commission can declare a state aid measure compatible with the internal market. The Commission cooperates with the member states. The member states must notify state aid measures to the Commission so that the Commission can make its assessment whether the aid

is compatible with the internal market, or whether the measure is an aid at all. Pending this assessment, the member state may not put the aid into effect. This is the so-called stand-still obligation.

The relationship between the Commission and the member states is an exclusive one. Beneficiaries and their competitors do not play a direct role in that procedure. However, beneficiaries and competitors play an important indirect role as sources of information. Individuals in undertakings can also submit complaints to the Commission if they know or suspect that somebody received state aid. Moreover they can also use national courts to stop a member state from paying state aid until the Commission has made its assessment of the measure.

Bid criteria -- bid criteria for public procurement contracts is addressed in article 53 TFEU. Several of the cases this week involve the big criteria, including SIAC, Concordia bus, Walloon busses, and Storebaelt. From the lecture notes: Once tenders have been received, in both an open or restricted procedure, the contract must be awarded on the basis of one of the two criteria in article 53, the lowest price or the economically advantageous tenderer. Under the lowest price basis, the award goes to the lowest tenderer. Many authorities use this only for simple purchases where the nature and quality of items offered does not vary much between different suppliers.

Under the most economically advantageous tender principle, the authority may award the contract to the firm whose tenderer is the most advantageous, take into account all relevant factors. In the public sector right of an article 53.1 a, we have a list with various factors which could be used such as price, quality, running costs, after sales service, and delivery date as well as price.

Block exemptions – there are block exemptions available under the state aid program. If you satisfy the conditions, the exemption permits the state aid intended. Current block exemptions exist for:

- Small & medium sized enterprises
- Training
- Employment
- Environment
- Agricultural aid,
- and soon possibly infrastructure aid
- A special category of aid is any support of services of a general economic interest. There is both a de minimis exemption for this kind of aid, and also a block exemption.

Compensation (as opposed to financing) – if state aid to a private company can be properly characterized as fair compensation for the services performed it will not be considered state aid and will instead qualify for the exemption of "services of a general economic interest." This was the key issue underlying the **Altmark** case, summarized below in my case notes.

Contract award procedures – contract award procedures are addressed in each of the major directives on public procurement. The key principles are transparency and equal treatment. The objective of the EU public procurement rules is a free market in public procurement. The rules on procurement that the EU has created to implement this internal market policy in public procurement derive mainly from two sources, the treaty and the procurement directives. As to the former, the treaty contains general rules that, inter alia, prohibit member states from discriminating against other member states, for example, by reserving contracts for domestic firms. As we will see, these rules apply in principle, but with limited exceptions to all public procurement measures and all types of government contracts. We can refer to these as the negative obligations of the treaty. These rules are applicable and they are enforceable in member states without the need for any implementing measures.

Contracting authority – The contracting authority can be any entity controlled by the state. States can not avoid the requirements on public procurement in the directives by setting up a separate company to

manage the bidding process. This was the key conclusion from the see SIEPSA case, where Spain had claimed that its contracting entity SIEPSA did not have to comply with public procurement law because they weren't a public authority. The court said, doesn't matter, as long as they are acting in your behalf for a public works contract the public procurement rules apply.

Culture state aid – this is one of the areas where state aid is permitted under the terms of both a block exemption, and by using the exemptions in paragraph 107(3). There was a tricky question however in the ungraded quiz for this week, that required you to pick up on the nuance between these two different approaches. If the block exemption is involved, no pre-aid notice is required. The question reads, which of the following kinds of aid must be notified by the Commission, please select all that apply? You must select 2 of the 3 possible answers – aid that promotes culture in accordance with article 107.3 and culture state aid in accordance with Commission guidelines regarding culture aid. What guidelines? I didn't know there were any guidelines on culture in addition to the exemption in 107.3, but apparently there is. The only box that should not be ticked in this question is the group exemption option – because no notice is required if you are using that option for a culture project.

De minimis exemptions – state aid notices are not required for smaller contracts that do not exceed certain thresholds. The main de minimis rule stipulates contracts of 200,000 Euros or less. But there is a second de minimis exemption in the state aid package. From the lecture nots: Second, there exists a regulation on de minimis aid, granted to undertakings providing services of general economic interest. In this regulation, the de minimis amount is 500,000 Euros over a period of three years. It is thus higher than the ordinary de minimis rule stipulating 200,000 Euros.

Distortion of competition -- this is one of four main criteria for establishing whether a state subsidy or other financial benefit can be characterized as "state aid" within the meaning of article 107 TFEU. The other three criteria are imputability, favourable undertakings, and selective. From the lecture notes: Here we have a presumption that if the first three criteria are fulfilled, the last one is fulfilled too. However, this does not free the authorities from making an assessment on this point. But the burden of proof goes over to the state or beneficiary to show that the measure in question does not distort or threaten to distort competition. There has been discussions about how to make this assessment more scientific based on competition economics, but that discussion effectively ended with the financial crisis.

Economically advantageous criteria – this is the term most often used when describing the award criteria that contracting authorities must use when selecting a winning bidder in public procurement activities. It comes from article 53 TFEU. From the lecture notes: Once tenders have been received, in both an open or restricted procedure, the contract must be awarded on the basis of one of the two criteria in article 53, the lowest price or the economically advantageous tenderer. Under the most economically advantageous tender principle, the authority may award the contract to the firm whose tenderer is the most advantageous, take into account all relevant factors. In the public sector right of an article 53.1 a, we have a list with various factors which could be used such as price, quality, running costs, after sales service, and delivery date as well as price. The list of the directives is not exhaustive. However authorities may use other factors such as those mentioned in the SIAC construction case (C-19/00), or the Concordia bus case (C-513/99). In the SIAC case in particular the court construed the requirement very broadly to permit a bid selection process that seemed a little screwy (not transparent). See my case summary of SIAC below.

Employment -- this is one of the block exemptions available relating to state aid. State subsidies will be allowed as long as complying with the conditions of the particular exemption.

Environmental aid – this is one of the block exemptions available relating to state aid. State subsidies will be allowed as long as complying with the conditions of the particular exemption.

Equal treatment principle – several of the cases in this week's materials showcased the equal treatment principle as being important. Many of the public procurement cases involved the principle. The court said in **Fabricom** (C-21/03 and C-34/03 combined), for example, said that equal treatment "lies at the very heart of the public procurement directives". In **Storebaelt** (C-243/89), another public procurement case, the court held that the equal treatment principle was important even though not expressly mentioned in the Directive.

Exemptions – exemptions to the prohibition on state aid include

- de minimis exception,
- block exemptions,
- article 107 based exemptions (promotes economic development in underdeveloped area, important common European project, facilitates development in certain activities or areas, and promotes culture)
- services of general economic interest (e.g. postal services, broadcasting, education, healthcare)
- state aid package (a combination of measures that have been combined in a rather complex package)

Favourable undertakings -- this is one of four main criteria for establishing whether a state subsidy or other financial benefit can be characterized as "state aid" within the meaning of article 107 TFEU. The other three criteria are imputability, selective, and distortion of competition. Favourable undertakings means that the aid must bring an advantage. Article 171 TFEU speaks of **favouring undertakings**. In short, the beneficiary of the aid must be better off after the aid has been granted than he was before. But it doesn't have to be a transfer of money. The provision also covers a situation where the state does not take out a levy or a tax or otherwise, must be paid by everybody else.

General economic interest – see "services of a general economic interest" in this glossary.

General principles – the key general principles when discussing public procurement law are equal treatment/non-discrimination and transparency. However, some of the cases also mention proportionality, legal certainty, equivalence, effectiveness, mutual recognition,

GPA – see WTO GPA.

Imputability – this is one of four main criteria for establishing whether a state subsidy or other financial benefit can be characterized as "state aid" within the meaning of article 107 TFEU. The other three criteria are favourable undertakings, selective, and distortion of competition. Imputability means the aid has been granted by a state or through state resources. That is the aid must come from the purse of the state. The notion of state carries a wide definition. It does not only cover the state per se, but also the administration and companies, which have very close links to the state and fulfill administrative functions. The decisive question is whether the state has a determining influence in the company. However there is an exception for state acts which can be classified as a **private investment**. See that topic in this glossary for more details.

Ineffectiveness, remedy of -- The remedy of ineffectiveness is a very important remedy introduced by the Remedies Directive. It is in particular a remedy against direct illegal award of contracts. It follows from Article 2d(2) that the consequences of a contract being considered ineffective shall be provided for by national law. Nevertheless, according to the same provision national law may provide for the retroactive cancellation of all contractual obligations, or to limited obligations which still have to be performed. Furthermore, Recital 13 makes clear that ineffectiveness essentially implies that the rights and obligations of the parties under the contracts should cease to be enforced and performed.

Infrastructure aid – this is an area that is identified as potentially qualifying for a block exemption in the future, meaning that state subsidies will be allowed as long as complying with the conditions of the particular exemption.

Lowest bid – this is one of two approaches that a public procurement body may use to select the winning bidder in a tender, under article 53 TFEU. Once tenders have been received, in both an open or restricted procedure, the contract must be awarded on the basis of one of the two criteria in article 53, the lowest price or the economically advantageous tenderer. Under the lowest price basis, the award goes to the lowest tenderer. Many authorities use this only for simple purchases where the nature and quality of items offered does not vary much between different suppliers.

Notification of new aid – unless a state aid qualifies under a block exemption, it must notify the Commission before going forward with any type of state aid that is being granted on one of the permitted exemptions to article 107 TFEU. From the lecture notes: As I said in the introduction the member state must notify new state aid to the Commission. This means first and foremost that aid must be new. If it concerns an existing aid measure which has already been cleared by the Commission the measure does not have to be notified. More importantly if it concerns existing aid the standstill clause in article 108(3) TFEU may not apply. The control of existing aid is regulated through article 108(1) TFEU and specified in the procedural regulation. According to the treaty the Commission shall in cooperation with member states keep under constant review all systems of aid existing there. It's only if such an existing aid is changed in its substance that the stand-still obligation in article 108(3) TFEU applies. And the aid must then be notified to the Commission as new aid. This means that an aid measure which the member state wishes to introduce or any substantive change that the member state wishes to make to an existing aid scheme must be notified to the Commission. You'll find this principle in the first sentence of article 108(3) TFEU.

Private investment – this is an exception to the rule that any funds or benefits granted by a state satisfies the "imputability" criteria of article 107. From the lecture notes: If the state acts like a private investor in the market economy, the intervention is considered to be a normal investment, such an intervention is not considered to fall under the prohibition of state aid in Article 171 TFEU. Therefore, if state controlled companies follow market oriented transactions, there is no state aid. If the state acts like a creditor, owner and investor on market terms, there is no state aid.

Public procurement – public procurement is the activity entering into contracts for goods and services for a government entity. These activities are strictly governed by a series of Directives and Regulations addressing various industry sectors. There are three main types of contracts addressed – works, supply and service. See those topics in this glossary for more details. The Directives also strictly regulate award selection criteria, the qualification and eligibility of bidders, and remedies, penalties, procedures. Key treaty provisions include article 34 free movement of goods, article 56 freedom to provide services and article 49 freedom of establishment.

Public sector directive – this refers to Directive 2004/18. It is the main directive pertaining to public procurement but there are others as well. From the lecture notes: The different EU member states traditionally have had different approaches to distinguishing between private and public law. Some states have never made a general distinction, although they may have various different rules that apply only to public bodies or activities. Other member states have separate systems of administrative public law and have traditionally adopted general classifications of particular bodies or activities in their economies as public or private, for the purpose of deciding which system will apply to them, including for the purpose of determining the scope of their domestic public procurement rules. However, in terms of the entities covered, as well as the type of contracts covered, the procurement directives have a common scope for all member states. Also, the Walloon Buses, Fabricom and Storebaelt cases deal with core values and principles that form a part of 2004/18.

Public subsidies – another name for state aid. Permitted under some conditions. See exemptions topic in this glossary for more detail.

Qualification and eligibility of bidders -- In all award procedures under the directive, the process of deciding which suppliers are to be excluded for these kinds of reasons is regulated by the directive. The directive significantly limits an authority's discretion in this area in two ways. 1. They permit firms to be excluded only on certain limited grounds listed in the directives, including financial position and technical capacity. 2. They also control the process of exclusion, including the evidence that may be used. These rules seeks to ensure that authorities provide fair opportunities of participation and that procedures for assessing qualification are not unduly burdensome and do not provide opportunities for authorities to conceal discrimination.

Remedies directives – these address remedies in public procurement law. Directive 89/665 addresses the classic industry sector. Directive 92/13 addresses the utility sector. Directive 66/2007 is a recently amended and further developed version. The European Commission showed early awareness of the need of fast and efficient enforcement of the public procurement rules, and this led to the early adoption of the so called remedies directives. The remedies directives allow a wide degree of discretion for the member states and there are substantial differences between the enforcement regimes at a national level in the EU. Enforcement of the public procurement rules also takes place at a supranational level as the European Commission supervises the compliance of the member states with obligations under EU law. That follows from article 258 in the treaty (TFEU). That Commission has used in that procedure in several cases in the field of public procurement.

Remedy of ineffectiveness – see ineffectiveness.

Selective -- this is one of four main criteria for establishing whether a state subsidy or other financial benefit can be characterized as "state aid" within the meaning of article 107 TFEU. The other three criteria are imputability, favourable undertakings, and distortion of competition. From the lecture notes: The third criteria is that the aid **must be selective**. Article 171 TFEU prohibits state aid only if it favors certain undertakings or the production of certain goods. This means that the targeted measure to a specific undertaking or groups of undertakings is prohibited. However, if a measure is general in character, it's not covered by this criterion. You can imagine that this leads to big difficulties when it comes to tax measures, because how do you determine that a certain tax measure is selective? There is a lot of discussion on this particular topic and a lot of case law from the court of justice.

Service contract – this is one of three types of contracts that can be the subject of a public procurement tender. The other two are works and supply contracts. A service contract is sort of a catch all category – anything that doesn't fit in the works or supply categories is a service contract. Each type of contract is subject to a different Directive. However, the main rules that apply to the three different types are virtually identical. Unlike some procurement regimes, the directives apply the same framework of rules to all three types of contracts. Leaving member states to draw any appropriate distinctions between them, for example, over the types of award procedures suitable for different contracts. And member states may also leave this to the procuring entities.

But there are, however, some differences between the different types.

- In particular, there are much higher thresholds that apply to works contracts than to supply and services.
- There are some differences in the availability of the negotiated procedure with a notice for the different types of contracts.
- And some services contracts are not fully regulated, but subject only to very limited obligations.

Services of general economic interest – this is a special category of aid is that is in support of services of a general economic interest. There is both a de minimis exemption for this kind of aid, and also a block exemption. It has a special relevance as regards state law. The concept is mentioned in Article 14. In the treaty, this article stresses the important place occupied by services of general economic interest in the shared values of the Union. They are also important in promoting social and territorial cohesion. The union and the member states, each within their respective powers, shall therefore take care that such services operate on the basis of principles and conditions which enable them to fulfill their mission. It is a dynamic concept which can vary from state to state. Member states have discretion to decide which services they wish to promote. Typical services include: Postal services; Broadcasting; Education; and Healthcare.

Small & medium sized enterprises -- this is one of the block exemptions available relating to state aid. State subsidies will be allowed as long as complying with the conditions of the particular exemption.

Standstill obligation – this is the obligation of a state to wait once it has notified the Commission of a proposed state aid program, until the Commission has approved it. From the lecture notes: The stand-still obligation is a very specific feature of state aid control. Before the Commission has declared an aid compatible with the internal market, the aid must not be put into force. This is regulated by the last sentence of Article 108(3) TFEU, according to which a member state may not put the proposed measure into effect until the con, control procedure has resulted in a final decision. The types of decision which are considered final is regulated in the procedural regulation.

Article 108(3) TFEU has direct effect. This means that the provision can be invoked before national courts. The court of justice has emphasized that national courts must be able to prevent the member state from putting a measure into effect if the Commission has not cleared the measure. If they have questions they can always refer the case to the court of justice for a preliminary ruling under article 267 TFEU.

This is also the case if the measure has not been notified. Many member states failed to report all their new aid measures and changes to existing aid measures to the Commission. The procedure in article 108(3) TFEU is also meant to apply to these categories of aid.

So, in short, if a measure constitutes state aid in the meaning of article 107(1) TFEU, it must not be put into effect until the Commission has made its assessment. National courts may decide to enforce this prohibition.

State aid -- The definition of State Aid is found in Article 107(1) TFEU. According to this provision, save as otherwise provided in the Treaties, any aid granted by a member state or through state resources in any form whatsoever, which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall be insofar as it affects trade between member states incompatible with the internal market.

In the ungraded quiz on this issue, the question was looking for 4 elements that define state aid:

- The aid leads to or threatens to lead to a distortion of competition
- The aid is selective in terms of what undertakings benefit from the aid
- The aid is granted by a member state
- The aid leads to an advantage for the beneficiary

The one response that was not a correct selection was "money is transferred to the beneficiary" – with the explanation being that state aid need not take the form of monetary aid and could be in the form of tax relief for example.

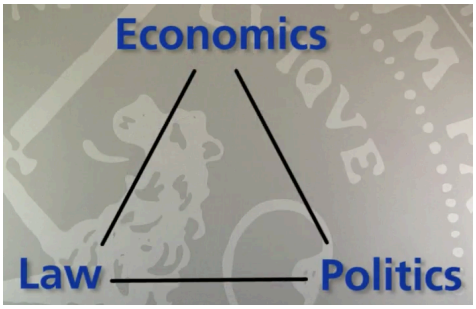
State aid control – this is the system whereby the Commission is kept informed of new initiatives by the Member States that seem to qualify for an exemption. The Commission must normally approve any such program before the state can go forward with the program. From the lecture notes: Before we go into the details, let me give you a brief outline on how the state aid control system is set up. The purpose of state aid control, as we noted in the earlier lectures, is to control state interventions in the market. This system is supervised by the European Commission. Only the Commission can declare a state aid measure compatible with the internal market. The Commission cooperates with the member states. The member states must notify state aid measures to the Commission so that the Commission can make its assessment whether the aid is compatible with the internal market, or whether the measure is an aid at all. Pending this assessment, the member state may not put the aid into effect. This is the so-called stand-still obligation. The relationship between the Commission and the member states is an exclusive one. Beneficiaries and their competitors do not play a direct role in that procedure. However, beneficiaries and competitors play an important indirect role as sources of information. Individuals in undertakings can also submit complaints to the Commission if they know or suspect that somebody received state aid. Moreover they can also use national courts to stop a member state from paying state aid until the Commission has made its assessment of the measure.

State aid package -- this is the combination of measures that set out the terms under which states may grant state aid even though it may otherwise be prohibited under articles 107 and 108 TFEU. From the lecture notes: The Commission has therefore complimented the case from the court with a rather complex package composed of four different acts.

- First, there exists a non-binding communication on the application of the state errors as regards services of general economic interest. This communication clarifies the view of the commission on the **Altmark** case, and other important developments in the case.
- Second, there exists a regulation on de minimis aid, granted to undertakings providing services of general economic interest. In this regulation, the de minimis amount is 500,000 Euros over a period of three years. It is thus higher than the ordinary de minimis rule stipulating 200,000 Euros.
- Third, a decision exists on the application of article 106 2nd paragraph regarding services of general economic interest. This is a group exemption decision. If the conditions in this decision are met, no notification to the commission is required.
- Finally, the framework exists for state aid in the form of public service compensation, is complement the decision, but state aid covered by this framework must be notified to the Commission before it can be granted to an undertaking.

All this gives the member states more possibilities to finance services of general economic interest. But they're also complex and require a lot of work and analysis at the national level. That brings us to the end of this lecture.

State aid triangle -- the term used in the lecture to three different drivers affecting the state aid doctrine. From the lecture notes: The nature of state aid is therefore, best described by the state aid triangle. In this course, we will deal mainly with the law part of the triangle. But keep in mind, that the other aspects are just as important.



Subsidies – another term that can be used to describe state aid.

Suitability – see qualification and eligibility

Supply contract -- this is one of three types of contracts that can be the subject of a public procurement tender. The other two are supply contracts and service contracts. A supply contract is the one for the acquisition, purchase, lease, et cetera of products. Each type of contract is subject to a

different Directive. However, the main rules that apply to the three different types are virtually identical. Unlike some procurement regimes, the directives apply the same framework of rules to all three types of contracts, leaving member states to draw any appropriate distinctions between them, for example, over the types of award procedures suitable for different contracts. And member states may also leave this to the procuring entities.

But there are, however, some differences between the different types.

- In particular, there are much higher thresholds that apply to works contracts than to supply and services.
- There are some differences in the availability of the negotiated procedure with a notice for the different types of contracts.
- And some services contracts are not fully regulated, but subject only to very limited obligations.

Training -- this is one of the block exemptions available relating to state aid. State subsidies will be allowed as long as complying with the conditions of the particular exemption.

Transparency – this is a very important principle in public procurement. For example in the **SIAC** case the court said "The principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified. More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. The obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure."

Weighting – weighting of factors in bid selection is permitted in public procurement processes, as long as open, transparent and observing the general principle of equal treatment. Where the authority proposes to use the most economically advantageous criteria for award, public sector directive Article 53.2 expressly requires that it must disclose in the contract notice or in the documents the criteria to be used and the relative weighting of these award criteria. This weighting may be expressed as a range with a minimum and maximum weighting where the authority considers this appropriate. For example, an authority could perhaps assign in the documents a weighting of 80% to price and 20% to quality. Or state in the documents that the weighting will be 80 to 85% for the price and 15 to 20% for quality and later decide on the more precise weighting in that sense.

Works contract -- this is one of three types of contracts that can be the subject of a public procurement tender. The other two are supply contracts and service contracts. Works contracts are contracts for carrying out works or a major project. For example, in the SIAC case the Mayo County Council advertised for tenders for a public works contract to be awarded by open procedure and involving, inter alia, the laying of sewers, storm overflows, ventilating columns, storm water drains, rising mains and water supply pipes. Each type of contract is subject to a different Directive. However, the main rules that apply to the three different types are virtually identical. Unlike some procurement regimes, the directives apply the same framework of rules to all three types of contracts, leaving member states to draw any appropriate distinctions between them, for example, over the types of award procedures suitable for different contracts. And member states may also leave this to the procuring entities.

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WTO GPA – this refers to the World Trade Organization Agreement on Government Procurement, or GPA. In a third run of legislation, the directives on award procedures were amended in light of the fact that the EU and its member states had become party to the new WTO Agreement on Government Procurement, the GPA. Under the GPA, the EU and member states provide access to EU procurement markets to certain third countries, the US and Japan, whilst those countries in turn undertake similar obligations towards the member states and to each other. The GPA does not, however, govern the relationship of the EU member states inter se, as in between the member states. Once the GPA came into effect it triggered a new run of legislation, to harmonize existing public procurement directives with the requirements of the GPA.

CASE SUMMARIES FROM THIS MODULE

Case law – state aid, services of economic interest

- C-280/00 – **Altmark Trans GmbH** v. Nahverkehrsgesellschaft Altmark GmbH (2003). 14 pages. The court found that compensation for a service of general economic interest is not state aid and that it was therefore not necessary to use article 106.2 TFEU. The case involved the operation of urban, suburban and regional scheduled transport services. Public subsidies were paid to support the transport service. The court held these subsidies were not state aid but were in fact appropriate compensation for the discharging of the public service obligations. The grant of licenses for bus service in Stendal, Germany and public subsidies for operating those services was challenged by a competitor as improper state aid.

  The Court concludes that public subsidies can be treated as compensation in this case, but they must meet certain strict requirements. "[P]ublic subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by [the Treaty provision prohibiting state aid] where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

  - first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
  - second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
  - third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
  - fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations."

Case law – public procurement

- C-283/00 – **Commission v Spain "SIEPSA"** (2003). 13 pages. Procedure for the award of public works contracts. The concept of a "body governed by public law" has a common

meaning for all Member States. The definition does not necessarily correspond with the national definition in a member state. SIEPSA was the contracting authority for the government of Spain who had issued a tender for the construction of an experimental educational prison in Segovia. The Commission intervened claiming that SIEPSA was failing to follow the procedures for the award of public works contracts set out in Directive 93/37/EEC. Spain argued that the Directive did not apply to SIEPSA since it was a private company governed by private law; it was not technically a contracting authority within the meaning of the Directive. The Court did not agree.

"[T]he Court notes that SIEPSA was established for the specific purpose of putting into effect, the programmes and actions provided for in the plan for paying off the costs and establishing prisons for the purpose of implementing the Spanish State's prison policy. To that end, as its statutes show, it carries on all activities which prove necessary in order to construct, manage or sell that State's prison assets. The needs in the general interest which SIEPSA is responsible for meeting being, therefore, a necessary condition of the exercise of the State's penal powers they are intrinsically linked to public order."

"… As the Commission has rightly argued, activities such as paying off the costs of and establishment of prisons, which are among SIEPSA's primary objectives, are not subject to market competition. That company cannot, therefore be regarded as a body which offers goods or service on a free market in competition with other economic agents. … [E]ven if SIEPSA's activities do generate profits, it would appear inconceivable that the pursuit of such profit should be in itself the company's chief aim."

"It follows that a body such as SIEPSA must be treated as a body governed by public law for the purposes of [public procurement] and, therefore, as a contracting authority" [and is therefore subject to the public procurement procedural requirements of the Directive].

- C-87/94 – **Commission v Belgium "Walloon Buses"** (1996). 11 pages. Underlying fundamental principles in the public sector directive 2004/18, such as the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality. Belgium issued a tender for busses which failed to comply with Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. They also failed to comply with the principle of equal treatment. After they had opened the tender process, they made some amendments, admitted a bidder who did not meet the selection criteria, and accepted a tender which did not meet the criteria for the award of the contract.

  The invitation for bids was published in the Official Journal of the EC in April 1993, for an open procedure to supply 307 standard vehicles, divided into 8 lots, to be performed over a period of 3 years. The contract documents included both general and special conditions. Point 20.2 of the special conditions said the contract would be awarded to the most economically advantageous tender. The tender would be selected on the basis of the award criteria set out. Three technical amendments were issued, including on the number of seats, one on the height of the flooring, and a third on a penalty calculation issue. Five companies submitted bids. The bids were reviewed and an internal meeting decided to award Lot 1 to Jokheere and Lots 2-6 to Van Hool. In the meantime additional information was submitted by one of the other bidders (EMI), including new fuel consumption figures. The contracting authority undertook a fresh review of the tenders and this time decided to award Lot 1 to Jokheere (same as before) but Lots 2-6 to EMI instead of Van Hool. They briefly considered whether they could take the new information into account, but eventually decided they could. Van Hool lodged a complaint with the Commission, which issued a letter to the Belgian Government indicating that the procedures required in the Directive were not followed and that the principle of equal

treatment was also not complied with. Specifically it took into account amendments made to one of the tenders after the opening of tenders, and it accepted a tender which did not meet the criteria for the award of the contract laid down in the contract documents.

Belgium claimed the Directive didn't apply, that this was a purely internal Belgium situation in which Community law did not apply. The court disagreed. The obligation imposed on contracting entities by Article 4(1) of the Directive is not subject to any condition concerning the nationality or seat of tenderers. Moreover it is always possible that undertakings established in other Member States may be concerned directly or indirectly by the award of a contract.

Belgium next argued that it could have elected a negotiated contract route instead of an open tender procedure, and in such case the Directive would not apply. The court said once they have issued an invitation to tender under one particular procedure, they are required to observe the rules applicable to it, until the contract has been finally awarded.

The Commission argued that by taking into account the supplemental information submitted by EMI on fuel consumption, frequency of engine & gear box replacements, and certain aspects of the technical quality of the material offered, the principle of equal treatment of the other tenderers was breached. EMI had apparently submitted incorrect information on fuel consumption and these other factors in its original tender. Belgium argued it was actually consistent with equal treatment to consider EMI's corrected figures since EMI's tender could then be compared on an equal footing to the other bids. The Court disagreed with Belgium and agreed with the Commission. "When a contracting entity takes into account an amendment to the initial tenders of only one tenderer it is clear that that tenderer enjoys an advantage over his competitors, which breaches the principle of the equal treatment of tenderers and impairs the transparency of the procedure."

With respect to engine and gear box replacements, the court added that "by awarding the contract to EMI on the basis of figures which did not correspond to the prescriptive requirements of Annex 23 of the special conditions for calculating its notional penalty for maintenance costs for engine and gear box replacement, the SRWT infringed the award criteria laid down in the special conditions and also the principle of equal treatment of tenderers."

Finally, the contracting authority also violated the Directive "by taking into account, when comparing the tenders for Lots Nos. 4, 5 and 6, the cost-saving features suggested by EMI without having referred to them in the contract documents or in the tender notice, by using them to offset the financial differences between tenders in the first place and those of EMI placed second, and by accepting some of EMI's tenders as a result of taking those features into account."

- C-21/03 and C-34/03, joined cases – **Fabricom v Belgium "Fabricom"** (2005). 9 pages. Underlying fundamental principles in the public sector directive 2004/18. The definition of the equal treatment principle under the procurement directives. Prohibition on participation in a procedure of submission of a tender by a person who has contributed to the development of the works, supplies or services concerned. Belgium law precludes a person who has carried out preparatory work for a public contract from participating in that contract. The question was whether this requirement was valid in light of the general principle of non-discrimination in EU law.

  Fabricom is a contractor who regularly submits tenders for public contracts, particularly in the water, energy, transport and telecommunications sectors. It claims the Belgian Decree disqualifying it from bidding on the next contract violates the principles of equal treatment, effectiveness of judicial review, proportionality, and the freedoms of trade and industry, and the

right to property laid down in Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950. Belgium claims its rule in this regard is designed to prevent a person desiring to be awarded a public contract from deriving an advantage, contrary to free competition, from research, experiments, studies or development carried out in connection with works, supplies or services relating to such a contract.

The court notes that the principle of equal treatment "lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition." However, it is settled case law that this principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

While the court notes that a person who has participated in certain preparatory works may be at an advantage in a later tender, the Belgium rule does not afford a person in such a situation to demonstrate that in his particular case there is no advantage gained, no distortion of the competition. Accordingly, the Belgium rule goes beyond what is necessary to attain the objective of equal treatment for all tenderers. The court also rejected Belgium's other arguments, first that the rules should only apply to private undertakings not public contracting, and second, requiring a person who has participated in preparatory works for a bid to be excluded from the bidding process until the very end.

- C-243/89 – **Commission vs. Denmark "Storebaelt"** (1993). 13 pages. Underlying fundamental principles in the public sector directive 2004/18, breach of the equal treatment principle. The invitation to tender required the use of Danish materials, consumer goods, labour and equipment to the greatest extent possible, but the final selected tender did not comply with the tender conditions. Storebaelt was the contracting authority, wholly owned by the Danish State, responsible for drawing up a project for a road and rail link across the Great Belt, including a bridge across the Western Channel. It published a restricted invitation to tender for the construction of the bridge, inviting 5 groups of companies (consortia) to submit tenders.

  The Danish goods preference clause was not compatible with the Treaty. This was apparently brought to the attention of the Danish Government by the Commission. The Danish Government admitted this in the proceedings. However, it claims to have deleted this clause from the final contract before it was signed by the winning bidder and in that way complied with the Commission's decision (even though the Commission had asked the government to postpone signing). The court did not agree saying that "even though the clause in question was deleted shortly before signature of the contract with ESG and consequently before notification of the reasoned opinion, the fact remains that the tendering procedure was conducted on the basis of a clause which was not in conformity with Community law and which, by its nature, was likely to affect both the composition of the various consortia and terms of the tenders submitted by the five selected consortia. It follows that the mere deletion of the clause at the final stage of the procedure cannot be regarded as sufficient to make good the breach of obligations alleged by the Commission."

  Next the Danish government argued that it was not bound by the principle of equal treatment since it was not expressly mentioned in the Directives under which it was issuing its public tender. The court also rejected this argument, saying "although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the directive whose purpose is, according to the ninth recital in its preamble,

to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, b means of which such competition is to be ensured."

The Commission argued that Denmark had violated the principle of equal treatment by selecting ESG and then negotiating a final contract with them that led to amendments to certain price related factors which favoured the tenderer alone. Denmark claimed this complied with its local laws which permitted bidders to make reservations to some conditions and have them negotiated in the final selection process. The court said that local rule violated the principle of equal treatment, which would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions by means of reservations, except where those terms expressly allow them to do so.

"In those circumstances, and since the condition in question did not give tenderers the option of incorporating reservations into their tenders, the principle of equal treatment precluded Storebaelt from taking into consideration the tender submitted by ESG."

- C-6/90 and C-9/90, joined cases – **Francovich, Bonifaci and others v. Italian Republic** (1991). 16 pages. Enforcement at national level - It follows from the principle of effectiveness that the conditions for a remedy must not make it virtually impossible or excessively difficult to obtain reparation. The case involved the protection of employees in the event of the insolvency of their employer. Directive 80/987 is intended to guarantee employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in Member States. In particular it provides for specific guarantees of payment of unpaid wage claims. Italy was supposed to implement the terms of Directive 80/987 into its domestic laws no later than October 23, 1983.

  Mr. Francovich had worked for CDN Elettronica in Vicenza but had received only sporadic payments on account of his wages. He obtained a court order, but was unable to collect on it. He then turned to the Italian State for alternative compensation under the terms of Directive 80/987. Similarly in the case of Mr./Ms. Bonifaci and 33 other employees, they had worked for Gaia Confezioni Srl until it was declared insolvent in April 1985. More than 5 years after the company's insolvency they had been paid nothing. Both sets of litigants had been granted a right to bring an action against the Italian government on a "direct effects" basis since Italy had failed so far to implement the Directive.

  The Court first ruled that each of these employees were entitled to enforce their rights against Italy on a direct effects basis. "As the Court has consistently held, a Member State which has not adopted the implementing measures required by a directive within the prescribed period may not, against individuals, plead its own failure to perform the obligations which the directive entails. Thus wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State." The court determines in this case that the relevant provisions in the Directive are sufficiently precise and unconditional to be directly enforced.

  The second question is whether Italy's delay in implementing the Directive can itself lead to additional liability and damages for which the individuals in this case can be compensated. The court concludes, yes, damages can be sought against the state. "The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a

breach of Community law for which a Member State can be held responsible." However, there are 3 conditions: 1. The directive must grant rights to individuals. 2. It must be possible to identify the content of those rights. 3. There must be a causal link between the breach by the state and the loss and damage suffered by the injured parties.

- C-513/99 – **Concordia Bus Finland Oy Ab vs. Helsinki Kaupunki and HKL-Bussiliikenne "Concordia Buses"** (2002). 12 pages. The list in Article 53(1)(a) Public Sector Directive of factors which could be used to decide whose tender is the most advantageous is not exhaustive. Authorities may use other factors, such as environmental factors. A public tender was issued for operating the urban bus network within the city of Helsinki, in accordance with routes and timetables described in a document in seven lots. The main proceedings concern lot 6 of the tender notice, relating to route 62. The contract would be awarded to the undertaking whose tender was most economically advantageous overall to the city. That was to be assessed with reference to three categories of criteria: the overall price of operation, the quality of the bus fleet, and the operator's quality and environment management. Eight tenders were received for lot 6, including those from HKL (the winning bidder) and Swebus Finland (the challenger bidder, now called Concordia). Concordia submitted two offers, A and B.

  "The commercial service committee decided on 12 February 1998 to choose HKL as the operator for the route in lot 6, as its tender was regarded as the most economically advantageous overall. According to the order for reference, Concordia (then Swebus) had submitted the lowest-priced tender, obtaining 81.44 points for its A offer and 86 points for its B offer. HKL obtained 85.75 points. As regards the bus fleet, HKL obtained the most points, 2.94 points, Concordia (then Swebus) obtaining 0.77 points for its A tender and -1.44 points for its B tender. The 2.94 points obtained for vehicle fleet by HKL included the maximum points for nitrogen oxide emissions below 2 g/kWh and a noise level below 77 dB. Concordia (then Swebus) did not receive any extra points for the criteria relating to the buses' nitrogen oxide emissions and noise level. HKL and Concordia obtained maximum points for their quality and environment certification. In those circumstances, HKL received the greatest number of points overall, 92.69. Concordia (then Swebus) took second place with 86.21 points for its A offer and 88.56 points for its B offer."

  The questions for the court included whether it was permissible to specify environmental criteria for the award selection, especially when it is known that the city's own bus department has an inherent advantage in being able to produce cleaner emissions than the private companies that were bidding.

  First the court concludes that the list of criteria in the Directive is not exhaustive. It is only a "for example" list. Nothing requires the contracting authority to only select economic criteria for its tender process. However, this isn't a blank check to use any criterion it chooses. It must be relevant to an overall assessment of which offer is the economically most advantageous, including qualitative and quantitative criteria. Finally the criteria must also satisfy the fundamental principles of Community law, in particular the principle of non-discrimination, the right of establishment, and the freedom to provide services.

  "It follows from the above considerations that, where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply

with all the fundamental principles of Community law, in particular the principle of non-discrimination."

On the second issue, whether environmental criteria could be used when the contracting entity's own transport undertaking is one of the few able to offer a bus fleet satisfying those criteria –

"In the present case, it should be noted, first, that, as is apparent from the order for reference, the award criteria at issue in the main proceedings were objective and applied without distinction to all tenders. Next, the criteria were directly linked to the fleet offered and were an integral part of a system of awarding points. Finally, under that system, additional points could be awarded on the basis of other criteria linked to the fleet, such as the use of low-floor buses, the number of seats and tip-up seats and the age of the buses. … It must therefore be held that, in such a factual context, the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a breach of the principle of equal treatment."

- C-19/00 – **SIAC Construction Ltd v County Council of the County of Mayo "SIAC"** (2001). 6 pages. The criteria to be applied by the contracting authority shall be applied consistently throughout the procurement process. The Mayo County Council advertised for tenders for a public works contract to be awarded by open procedure and involving, inter alia, the laying of sewers, storm overflows, ventilating columns, storm water drains, rising mains and water supply pipes. This contract was to be a measure-and-value contract, under which the quantities estimated for each item are set out in the bill of quantities. The tenderer fills in a rate for each item and a total price for the estimated quantity. The price payable is determine by measuring the actual quantities on completion of the work and valuing them at the rates quoted in the tender.

  Twenty-four contractors submitted proposals. The three lowest were from SIAC, Mulcair and Pierce Contracting. In his report the consulting engineer stated that all three were equal in technical merit. On the other hand, he said he had serious reservations regarding the tender submitted by SIAC because the pricing system it had used greatly reduced the freedom of the consulting engineer to properly and fully administer the contract in a way that, in his view, is the most economically advantageous to the Mayo County Council. He also had other concerns about how the pricing was structured. He favored the Mulcair proposal over SIAC for these reasons. The Pierce proposal was the high bid, so was rejected on price. On this basis Mulcair was selected, and a contract was signed with them. The project was completed.

  In the meantime SIAC requested an explanation for why its bid had not been accepted. The County Council responded with its reasons. SIAC then brought a claim to the Irish High Court challenging the decision. Its claim was dismissed, the Irish court concluding that the County Council had exercised a discretionary power of selection which was largely predicated on the exercise of professional judgment. The court said its standard of review was whether the Council's decision was unreasonable and it concluded this was not the case. SIAC appealed to the Irish Supreme Court which in turn stayed its proceedings to submit the Community Law issue to the ECJ, namely is the Council obliged to award the contract on the lowest price or can it award it to the second lowest price on the basis of the professional report of its consulting engineer that the ultimate cost is likely to be less if awarded to the contractor who tendered the second lowest price?

  "The principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified. More specifically, this means that the award criteria must be

formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way. The obligation of transparency also means that the adjudicating authority must interpret the award criteria in the same way throughout the entire procedure."

The court concludes that it was acceptable to award the tender in the manner done by the Council since the ultimate cost of which, in the professional opinion of an expert, is likely to be the lowest, "provided that the equal treatment of tenderers has been ensured, which presupposes that the transparency and objectivity of the procedure have been guaranteed and in particular that: the award criterion was clearly stated in the contract notice or contract documents; and the professional opinion is based in all essential points on objective factors regarded in good professional practice as relevant and appropriate to the assessment made."