

PUBLIC PROCUREMENT & THE EU INTERNAL MARKET

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BACKGROUND – PUBLIC WORKS AFTER THE INTRODUCTION OF THE INTERNAL MARKET

The market strategy of most top contractors changed; aim was to become a European leader and to compete at European scale.

Traditional subcontracting in construction, through a stable and cooperative division of labour, changed to forms of outsourcing and labour recruitment that are much more cost driven.

Less direct employment on the part of the main contractor or leading company.

Labour has been 'externalised' by the use of subcontractors and agencies.

Replacement of direct employees with all kind of 'new' employment relations in a chain of dependency.

Freedom of establishment has made it possible to circumvent national standards with artificial legal entities from another constituency (letterbox)

Relatively small and specialised staff responsible for development, procurement and tendering, supervision and project management.

LEGAL FRAME

The legislator came with an internal market frame for procurement in the late 1980s

- Presented as a technical matter, there was no space for social/environmental concerns.**
- Cheapest price was the one and only criterion.**
- Aim was to open up the market of procured goods and services in the member states.**
- Trade union movement failed to have guaranteed labour standards inserted; Council watered down EP-proposals.**

The ECJ rulings underlined the economic freedoms (free provision of services).

WHAT CAME AFTER?

-  **A. Trade unions started a campaign for another legal instrument in the country where the work is pursued based on the 'lex loci laboris' philosophy (posting of workers, regulation of subcontracting, liability in the chain).**

-  **B. Together with several NGO's (and a disappointed European Parliament) a long-term strategy was developed by the most concerned ETUC affiliates (construction, public services) for the insertion of social and environmental clauses in the procurement rules.**

THE EUROPEAN COURT OF JUSTICE

Until 2004 – primacy of lowest price.

However, some member states simply took up the space for an more societal use of the procurement rules.

- **Examples**
- **Position of the European Commission**
- **Important ECJ-statements**

THE 2004 REVISION

The European Parliament took a much stronger stand. The result was more societal vision on the procurement rules.

However, member states still tended to stick to the 'old' regime, because the false argument used was that 'it was not allowed by Brussels'.

The ECJ came with more sophisticated positions.

Still, the notion that public means could be used from a societal perspective was not widely taken up (with some exceptions - see best practices).

THE 2014 LEGAL FRAME

The revision started promising; DG internal market was willing to discuss the societal concerns.

This created 'a window of opportunities'.

But, several legal issues are still open.

The challenges lie in the national transposition and the practical application.

It is still necessary to discuss the questions/aspects that are unclear or susceptible to multiple interpretations.