

Final Report and Summary of the Project– KKV - 2019

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Social and Green Clauses in EU Public Procurement Law: The Scope of Discretion

Final Report:

The main aim of this project was to assess the scope of discretion of the Member States in EU public procurement law. Two key aspects have constituted the focus of our examination examined. First, the scope of discretion in relation to the application of the principle of proportionality by the national courts and the European Court of Justice (CJEU) has been studied. Second, the scope of discretion of the Member States in relation to their obligation of transparency has been scrutinised. The obligation of transparency (which is intricately connected to the principle of non-discrimination) and the principle of proportionality have also been analysed as constituting the very essence of EU public procurement law. Discretion has been assessed both in relation to EU secondary legislation and primary law, i.e EU free movement law.

At the start of our project we wanted to answer the following research questions. How far may Member States derogate from EU free movement provisions in the context of EU public procurement law? What is the extent of their discretion? Is the discretion the same as derogation available to the Member States under the free movement provisions? Is there a difference of approach between social and green clauses? These are the core questions, which have been in fact investigated and answered by this research project. Also, at the start of this project we

wanted to use a novel constitutional approach to EU public procurement law. We have applied this approach to our research and it has led to publications bringing a fresh look at EU public procurement law. We are pleased with the results of our research, most of it have been internationally published by top academic publishers.

We have also organised an internal conference in Oxford which has resulted in the publication of book by Hart Publishing in 2019 in the special edition of the Oxford Institute of European and Comparative Law. The book can be summarised as follow: “The EU public procurement regime has recently undergone an overhaul and now allows Member States and their contracting authorities to pursue strategic goals via public procurement, including environmental and social objectives. The extent to which such interests may be accommodated in the procurement process is ultimately determined by the broader legal context in which the EU public procurement regime exists, which raises pressing questions regarding the scope and limits of Member States' discretion. This volume scrutinises these new legal acts – particularly Directive 2014/24/EU – focusing on discretion and engaging with questions central to the public procurement regime against the EU legal backdrop, including internal market law, environment law, as well as law beyond the EU”.

During the time of our research the three authors have published ten articles related to the research. In the book of Hart (edited by the three of us), we have also ten publication written by external academic/practitioners which relate to the topic of discretion in EU public Procurement Law.

Summary of the List of Publications:

Here comes a summary of our list of publication (not including the 10 external writers) during the time of our project:

Edited collection – book

S Bogojević, X Groussot and J Hettne (eds.) *Discretion in EU Public Procurement Law* (Hart Publishing, 2019).] with 13 publications on the topic of discretion on EU Public Procurement.

Chapters and articles

J Hettne, *Aksamhet och omsorg i upphandlingsprocessen: om frånvaron av preklusionsregler i LOU*, *Upphandlingsrättslig tidskrift* 2016:3, s. 201-214

X Groussot, *Social Clauses after Regio Post: A Constitutional Perspective* in *Festschrift till Ann Henning*, Lund, 2016.

X Groussot, J Hettne and G Pétursson, ‘General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union’ in S Vogenauer & S Weatherill (eds) *Vogenauer, S. & Weatherill, General Principles of Law: European and Comparative Perspective* (Hart Publishing 2017).

J Hettne & S Montin, *Politik och juridik inom offentlig upphandling*, *Statsvetenskaplig tidskrift* 2018, s. 115-133.

J Hettne, *Public Procurement and European Standards: Fair Competition or Limits to Discretion?* in S Bogojević, X Groussot and J Hettne (eds.) *Discretion in EU Public Procurement Law* (Hart Publishing, 2019).

X Groussot and Angelica Ericsson, *The Obligation of Transparency* in S Bogojević, X Groussot and J Hettne (eds.) *Discretion in EU Public Procurement Law* (Hart Publishing, 2019).]

S Bogojević, X Groussot and J Hettne, 'The Age of Discretion: Understanding the Scope and Limits of Discretion in EU Public Procurement Law' in S Bogojević, X Groussot and J Hettne (eds.) *Discretion in EU Public Procurement Law* (Hart Publishing, 2019).]

S Bogojević, X Groussot and J Hettne, 'Where the Future Lies: A New Age of Proportionality?' in S Bogojević, X Groussot and J Hettne (eds.) *Discretion in EU Public Procurement Law* (Hart Publishing, 2019).]

S Bogojević, Mapping Discretionary Space in EU Public Procurement Law: The Case of Environmental Protection as Discretion' in S Bogojević, X Groussot and J Hettne (eds.) *Discretion in EU Public Procurement Law* (Hart Publishing, 2019).

S Bogojević, 'Miljörätt och offentlig upphandling: vikten av *intra*-disciplinär miljörettsforskning' i J Därpö, M Forsberg, M Pettersson och C Zetterberg (red) *Miljörätten och den förhandlingsovilliga naturen – Vänbok till Gabriel Michanek* (Iustus, 2019)