KONKURRENSVERKET
Swedish Competition Authority

Ansökan om forskningsmedel

Datum: 2015-01-31

Observera att ansökan med bilagor endast ska skickas elektroniskt till konkurrensverket@kkv.se

1 Sökande (huvudansvarig för projektet)

Namn
Xavier Groussot

Universitet/högskola eller motsvarande
Lunds Universitet

Institution eller motsvarande
Juridicum

Postadress
Box 207

Postnr och ortsnamn
22 350 Lund

Telefonnr (direkttel inkl. riktnr)
[redacted]

E-post
[redacted]

2 Anslagsförvaltare

Universitet/högskola eller motsvarande
Åsa Månasson

Institution
Juridicum

Postadress
Box 207

Postnr och ortsnamn
22350.Lund

Telefonnr (direkttel inkl. riktnr)

Bankgiro/Plusgiro

3 Projektbeskrivning

Projekttitel *För att radbryta texten, använd Alt + Enter*
Social and Green Clauses in EU Public Procurement Law: The Scope of Discretion

Projektet avses starta, datum
2016-01-01

Projektet beräknas vara slutfört, datum
2017-12-31

Sammanfattning av projektets syfte, betydelse och genomförande (högst 1400 tecken).
För att radbryta texten, använd Alt + Enter

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 are proposed to be investigated by this research project. We propose to so by using a novel constitutional approach to EU public procurement law, which stands in contrast with the present doctrine, which, in our view, offers only a narrow understanding of this complex field of EU law.

The main aim of this project is to assess the scope of discretion of the Member States in EU public procurement law. Here, two key aspects will be 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) will be studied. Second, the scope of discretion of the Member States in relation to their obligation of transparency will be scrutinised. The obligation of transparency (which is intricately connected to the principle of non-discrimination) and the principle of proportionality constitute the very essence of EU public procurement law.

Bifoga en utförligare projektbeskrivning (max 10 A4–sidor).

4 Kostnadsredovisning

Fyll i de ofärgade cellerna med för projektet gällande information, så uppdateras de färgade automatiskt. Ge akt på de felmeddelanden i rött som visas vid överträdelse av Konkurrensverkets riktlinjer för anslag till forskningsprojekt.

Projektår 1 Personalnamn, akademisk titel **(bifoga CV)**	Månadslön enligt KKV:s riktlinjer	Anställningstid i projektet, månader	Arbetstid i procent av heltid	Lönekostnad inkl. sociala avg.
Professor Xavier Groussot	55000	12	30%	293 040
Docent Jörgen Hettne	42000	12	30%	223 776
Docent Sanja Bogojevic	42000	12	30%	223 776
	Summa övriga kostnader (hämtas från tabell 4a)			0
	Total kostnad inklusive sociala-, och förvaltningsavgifter			999 799

Projektår 2 Personalnamn, akademisk titel **(bifoga CV)**	Månadslön enligt KKV:s riktlinjer	Anställningstid i projektet, månader	Arbetstid i procent av heltid	Lönekostnad inkl. sociala avg.
Professor Xavier Groussot	55000	12	30%	293 040
Docent Jörgen Hettne	42000	12	30%	223 776
Docent Sanja Bogojevic	42000	12	30%	223 776
	Summa övriga kostnader (hämtas från tabell 4a)			65 000
	Total kostnad inklusive sociala-, och förvaltningsavgifter			1 087 549

Projektår 3 Personalnamn, akademisk titel **(bifoga CV)**	Månadslön enligt KKV:s riktlinjer	Anställningstid i projektet, månader	Arbetstid i procent av heltid	Lönekostnad inkl. sociala avg.
	Summa övriga kostnader (hämtas från tabell 4a)			0
	Total kostnad inklusive sociala-, och förvaltningsavgifter			0

4a Redovisning övriga kostnader

	År 1	År 2	År 3
Material och utrustning			
Resor		15 000	
Övriga kostnader		50 000	
Summa	0	65 000	0

5 Kostnadssammanfattning (anges i kronor) för nu sökt anslag

Total projektkostnad

2 087 348

Därav söks från		Tidigare erhållna anslag från	
Konkurrensverket	Annan anslagsgivare *	Konkurrensverket	Annan anslagsgivare **

*Anslagsgivarens namn	Ansökan inlämnad, datum	Sökt belopp

**Anslagsgivarens namn	Ansökan bevi jad, datum	Beviljat belopp

6 Övriga projekt som samtidigt kommer att ledas av huvudansvarig

Projekttitel *För att radbryta texten, använd Alt + Enter*

Namn och institution på personer som beviljas forskningsbidrag kommer att publiceras på Konkurrensverkets webbplats.

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

Synopsis of the Research Proposal

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 are proposed to be investigated by this research project. We propose to do so by using a novel constitutional approach to EU public procurement law, which stands in contrast with the present doctrine, which, in our view, offers only a narrow understanding of this complex field of EU law.

Structure of the Research Proposal

- Background, Aims and Significance
- Green Clauses in EU Public Procurement Law: Reflection on Discretion (I)
- Social Clauses in EU Public Procurement Law: Reflection on Discretion (II)
- Methodology
- Implementation

Background, Aims and Significance

The main aim of this project is to assess the scope of discretion of the Member States in EU public procurement law. Here, two key aspects will be 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) will be studied. Second, the scope of discretion of the Member States in relation to their obligation of transparency will be scrutinised. The obligation of transparency (which is intricately connected to the principle of non-discrimination) and the principle of proportionality constitute the very essence of EU public procurement law. They apply both in relation to EU secondary legislation (see e.g. Recital 1 of Directive 2014/24/EU) and primary law, e.g EU free movement law.

At first glance, the principal objective of the Union in coordinating public procurement law is mainly to secure the proper functioning of the internal market.[1] EU public procurement law ensures that suppliers and service providers from other EU Member States are not excluded from the market, thus guaranteeing non-discriminatory access to public tenders. The performance of public procurement is subject to a bipolar set of provisions. First, the provisions of free movement apply, or more specifically, the provisions on the free movement of goods, establishment and services. Second, the larger public contracts are covered by secondary legislation formalised by directives requiring the public authorities to award contracts using transparent procedures set therein. This ensures that awarding authorities do not abuse their power of contracting to favour national tenderers and thereby directly or indirectly discriminate foreign tenders.

In the Treaty of the Functioning of the European Union (TFEU), as amended by the Lisbon Treaty, the Union is encouraged to take action within both the social and environmental fields. According to Article 8, the Union shall, in all its activities, aim to eliminate inequalities, and to promote equality, between men and women. Article 9 provides that the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. It follows from Article 10 that the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Finally, Article 11 states that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. These Articles are concrete expressions of the general principle of consistency, listed in Article 7 TFEU, which declares that the Union shall ensure consistency between its policies and activities. This means that the present EU legal framework is the result of a comprehensive reconciliation of different interests, not only an expression of free trade and competition.

These new Treaty provisions raise several crucial questions. For instance, how do they impact the discretion given to the Member States in relation to green and social clauses under EU procurement law? And what is the level of ambition for policy coordination that these articles

[1] Public procurement accounts for some 19% of GDP in the EU. See Commission Staff Document – Annual Public Procurement Implementation Review 2013, Brussels, 1.8.2014SWD(2014) 262 final.

express? These issues have been significant in the current revision of the EU public procurement directives, in which the Commission outlined two complementary objectives:[2]

1) Increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification of the existing public procurement rules, including streamlining, and providing more efficient procedures that will benefit all economic operators, as well as facilitate the participation of SMEs and cross-border bidders.

2) Allow procurers to make better use of public procurement in support of common societal goals, such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.

The proposal from the Commission has its roots in the Green Paper on the modernisation of EU public procurement policy published in 2011.[3] On this basis, the Commission launched a broad public consultation on options for legislative changes to make the award of contracts easier and more flexible, and to enable public contracts to be put to better use in support of other policies. Against this background, the new directive clarifies that 'strategic use of public procurement' [4] is permissible. The Member States are therefore allowed to use their purchasing powers to procure goods and services that foster innovation, seek to safeguard the environment, and combat climate change while improving employment, public health and social conditions.

This fits the newer picture of EU internal market rules, which no longer are aimed at only promoting free trade. For instance, Article 114.3 TFEU – the most important legal basis for the internal market – provides that the Commission, in its proposals regarding new internal market legislation concerning health, safety, environmental protection and consumer protection, shall take as a base a high level of protection. Within their respective powers, the European Parliament and the Council shall also seek to achieve this objective. Similarly, the

[2] See proposed amendments to Directive 2004/18 (COM/2011/896 final).
[3] COM/2011/15.
[4] See J Hettne, *Strategisk upphandling – stärkt miljöskydd och socialt ansvar på en konkurrenskraftig inre marknad?* in Bakardjieva, A., Oxelheim, L. and Persson, T. (eds.), Ett konkurrenskraftigt EU till rätt pris (Europaperspektiv 2013), Santérus 2013 and J Hettne, *Sustainable Public Procurement and the Single Market – is there a conflict of interest?*, EPPPL nr 1 2013, p. 31.

CJEU has for more than fifty years reconciled the interests of free trade with other essential interests in its case-law. The famous *Cassis*-principle means, in this respect, that a balance must be struck between trade and all other interests that come into play. This doctrine reflects the width of discretion granted to the Member States in derogating from the free movement provisions. The question that this gives rise to and that this research project seeks to address is the scope of that discretion under EU public procurement law.

Green Clauses in EU Public Procurement Law: Some Reflections on Discretion (I)

According to the Commission Communication on Public Procurement for a Better Environment, at least 50% of tendering procedures in the EU should be "green".[5] Similarly, in a recent report – the so-called 'Monti Report' – one of the key recommendations to make public procurement work for innovation, green growth and social inclusion is to impose specific, "green" mandatory requirements.[6] There are several reasons why the EU is pushing procurement law into this direction. One obvious reason is to ensure environmental protection, as codified in the EU treaties. Legitimacy is yet another important purpose in "greening" the rules on the internal market. The rejection of the Treaty establishing a constitution for Europe in 2005 led European leaders to 'desperately cast around for issues that they hoped would be better received by citizens'[7] and thus legitimise the EU as a legal authority. Environmental protection is understood to be such an issue. An underlying, key motive, however, is the economic benefits that derive from creating a "green economy". According to Connie Hedegaard, the EU Commissioner for Climate Action, environmental measures in the EU form part of key strategy for the EU in 'a global race for green growth and jobs'.[8]

[5] COM(2008) 400 final.

[6] M. Monti ,'A new strategy for the Single Market at the Service of Europe´s Economy and Society' (Report to the President of the European Commission José Manuel Barroso 9 May 2010) available at: http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf.

[7] K. Kulovesi, 'Climate Change in EU External Relations: please follow my example (or I might force you)' in Elisa Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge University Press 2012) 115, 116.

[8] C. Hedegaard, EU Commissioner for Climate Action, 'Europe's View on International Climate Policy' (Speech at Harvard Kennedy School, Cambridge 20 September 2010) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/468>.

These considerations have been transposed into law. The Public Sector Directive allows the possibility for contracting entities to define environmental requirements for the technical specifications of a given contract.[9] These may include laying down a given production method, and/or specific environmental effects of product groups or services. The important points here include that any green requirements must be drawn and adopted on the basis of scientific information, and that any technical specifications need to be clearly indicated so that all tenderers know what the requirements established by the contracting authority cover.[10] The latter point is reinforced in recital 46 that deals with equal treatment, stating that the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, a contracting authority may use criteria aiming to meet social or/and environmental requirements.

The CJEU has developed the meaning of these provisions is several recent cases. In *Concordia Bus Finland*[11] the Court concluded that although the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, also taking into consideration ecological criteria (here, the level of nitrogen oxide emissions, and the noise level of the buses), this does not confer an unrestricted freedom of choice on the authority. Instead any "green" requirements must be expressly mentioned in the tender notice, and comply with all the fundamental principles of Union law, especially the principle of non-discrimination.

Similarly, in *EVN,* the CJEU made it clear that a connection between the "green" part of a tender and the contract is vital and cannot be satisfied just by looking at the preferable "green" elements without linking them to the contract (or the ability of the applicant to generally act "green").[12] The CJEU clarified that although each of the award criteria need not be of a purely economic nature, and that the contracting authority may take ecological criteria into consideration when it decides to award a contract, these criteria need to be linked to the subject matter of the contract. Mimicking *Concordia Bus Finland,* the Court concluded that this does not confer an unrestricted discretion to the awarding body, as it needs to comply

[9] Directive 2004/18/EC (now repealed by Directive 2014/24).
[10] See recital 29, as well as S. Arrowsmith (Ed.) *EU Public Procurement Law: An Introduction* (University of Nottingham 2010) Chapter 11.
[11] Case C-513/99 *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* [2002] ECR I-7213.
[12] Case C-448/01 *EVN v Republic of Austria, European Court of Justice* [2003] ECR I-14527.

with the fundamental principles of Union law, in particular the principle of non-discrimination.

The Court has maintained this doctrine in more recent case law. In *Commission v Netherlands,*[13] the CJEU recalled that under Article 2 of Directive 2004/18, which lays down the principles of awarding contracts, contracting authorities are to "treat economic operators equally and non-discriminatorily and are to act in a transparent way." Moreover, it explained that those principles are of crucial importance in listing technical specifications, which must afford equal access for tenderers. This means, they must be sufficiently precise to allow tenderers to determine the subject-matter of the contract so that all tenderers know what the requirements established by the contracting authority demand.

To summarise, the CJEU has found that where contracting authorities lay down environmental characteristics in terms of performance or functional conditions, they may use detailed specifications, provided that: a) those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract, b) the conditions for the label are drawn up on the basis of scientific information, c) the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate and, d) they are accessible to all interested parties. Despite this typology, the scope of the discretion granted to Member States in determining the "appropriate" requirements in line with the set contract, gathering "scientific" information and deciding between possibly conflicting scientific views, as well as setting rules for participation is unclear, and assumingly extensively wide.

Social Conditions in Public Procurement Law – Reflection on Discretion (II)

Over the last 20 years, there has been an intense debate as to what extent EU law prevents Member States from taking social considerations into account in public procurement. The first case where the CJEU had an opportunity to deal with this issue was in *Beentjes.*[14] In this case the Court ruled that social policy considerations and in particular measures aimed at combating long-term unemployment could be part of the award criteria for public contracts, especially in cases where the most economically advantageous offer is selected. The Court accepted that the latter award criterion contains features that are not exhaustively defined in

[13] Case C-368/10 *Commission v Netherland (Dutch Coffee)*, ECLI: EU:C:2012:284
[14] Case 31/87 *Gebroeders Beentjes BV* v *State of the Netherlands*, EU:C:1988:422.

the Directives, therefore discretion is conferred on contracting authorities to specify what would be the most economically advantageous offer to them.

The Court held that a condition of performance relating to the employment of long-termed unemployed persons is compatible with the public procurement directives, if it has no direct or indirect discriminatory effect on tenders from other Member States. Furthermore, such a condition must be mentioned in the tender notice. Rejection of a contract on the grounds of a contractor's inability to employ long-term unemployed people has no relation to evaluation of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability. The Court maintained that measures relating to employment could be utilised as a feature of the award criteria only and on condition that they do not run contrary to the fundamental principles of the Treaty: that is, they must comply with all the relevant provisions of Union law, in particular the right of establishment and the freedom to provide services.[15]

In *Nord-Pas-de-Calais*[16], the Court also considered whether a condition linked to a local project to combat unemployment could be considered as an award criterion for the relevant contract. The Commission alleged that the French Republic had infringed Directive 93/37 concerning the coordination of procedures for the award of public works contracts by referring to a campaign against unemployment as an award criterion in some of the disputed contract notices. Under Article 30 (1) of the Directive, the criteria on which contracting authorities could base the award of contracts are the lowest price only or, when the award is made, to the most economically advantageous tender based on considerations, such as price, period for completion, running costs, profitability and technical merit. The Court held, as in *Beentjes*, that the most economically advantageous offer does not preclude all possibility for the contracting authorities to use a criterion linked to the campaign against unemployment provided that that condition is consistent with fundamental principles of EU law, in particular the principle of non-discrimination deriving from the provisions on the right of establishment and the freedom to provide services.

Moreover, when social considerations are subject of harmonisation, Union legislation must be respected in public procurement proceedings. In *Rüffert*[17], for instance, the Court made clear that the Posted Workers Directive and the freedom to provide services preclude requirements

[15] Supra, para. 29.
[16] Case C-225/98 *Commission* v *French Republic*, EU:C:2000:494.
[17] Case C-346/06 *Dirk Rüffert* v *Land Niedersachsen*, EU:C:2008:189.

in public contracts that go beyond those compatible with their provisions.[18] The fact that the contracting authorities, where relevant, must respect all the relevant provisions of Union law, as was confirmed in *Beentjes*, has further been clarified in *Bundesdruckerei*.[19] This recent case concerned a EU wide tender in the Federal German State of North Rhine-Westphalia regarding a public contract to digitise documents and convert data for the City of Dortmund's urban planning service. Bundesdruckerei challenged the city's requirement that bidders for the €300,000 contract also should force the subcontractors to comply with the minimum hourly wage of €8.62, as provided for under the federal law even to subcontractors established in another Member State where the work was planned to be exclusively performed.

The CJEU stated that Article 56 TFEU precludes the legislation of the Member State, to which the contracting authority belongs, that requires also the subcontractor to pay their workers a minimum wage as stated by the German legislation. The Court declared first of all that such legislation is capable of constituting a restriction of the freedom to provide services. This because the imposition of a minimum wage on a subcontractor established in another Member State, in which minimum rates of pay are lower, constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of services in that other Member State. According to the CJEU, such a national measure may in principle be justified by the objective of protecting workers under the German law, to ensure the workers are paid a reasonable wage in order to avoid both social dumping and the competitive advantage in the procedure that lower labour costs in certain Member States would use to offer a better bid. However, in so far as it applies solely to public contracts, the Court found the national law not to be appropriate for achieving that objective as long as there is no information that the workers in private sector are in need of the same wage protection. Following from this, the Court concluded:

"By imposing, in such a situation, a fixed minimum wage corresponding to that required in order to ensure reasonable remuneration for employees in the Member State of the contracting authority in the light of the cost of living in that Member State, but which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed and for that reason prevents subcontractors established in that Member State from deriving a competitive advantage from the differences between the respective rates

[18] See Arrowsmith, S. and Kunzlik, P., Editors' Note – the decision in Rüffert v. Land Niedersachsen in Arrowsmith/Kunzlik (eds.) *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press 2009) p. 1 ff, and Ahlberg, K. And Bruun, N. *Upphandling och arbete i EU* (SIEPS 2010) p.125.
[19] Case C-549/13 *Bundesdruckerei GmbH* v *Stadt DortmundBundesdruckerei* (18 September 2014).

of pay, that national legislation goes beyond what is necessary to ensure that the objective of employee protection is attained".

According to Directive 2004/18, social requirements may be expressed as special conditions relating to the performance of a contract, provided that these are compatible with Union law and are indicated in the contract notice or the specifications. In the preamble (recital 33), contract performance conditions are defined as compatible with this directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. Similarly, the new directive on public procurement, 2014/24/EU, does not change the situation. The questions raised here, and which this project aims to investigate, include how does the contracting authority balance specific national social policies with the principles of transparency and non-discrimination, and more importantly social policies stemming from EU law.

METHODOLOGY

Our project is founded on legal dogmatic. *De lege lata*, it will analyse and systematise the case law of the CJEU on social and green clauses in EU public procurement law. *De lege ferenda*, it will provide recommendations as to the level of discretion that should be afforded to the Member States in applying EU procurement law. This is not an easy task and the differences (if any) in discretion between social and green clauses will constitute an important tool of measurement. The use of both social and green clauses reflects a comparative approach, which is necessary for the achievement of this project. The study will also focus on Sweden and, therefore, look particularly at the impact of discretion on Swedish national authorities and courts in this regard. This is important since Union law does not require Member States to guarantee that the most economic efficient tender is chosen. In that sense, Arrowsmith and Kunzlik [20] have stressed that the Union does not have competence to evaluate the disbursement of public funds, as this assessment shall be left to the national state.

Our project sets out a new EU constitutional approach. More precisely, we will look at public procurement through the prism of EU constitutional law. This approach is all the more important and of high relevance since our project concerns the issue of discretion, which is a constitutional issue in itself. This approach is novel in relation to public procurement law and

[20] Supra.

is inspired from the recent writings of Nic Shuihbne[21] and Vasiliki Brisimi.[22] Here, public procurement is seen as an expression of the free movement provisions, which in its turn, is viewed in light of a constitutional perspective. This constitutional perspective requires particular emphasis to be put not only on key provisions of the Treaty, such as Articles 3(3) TEU, 4(2) TEU and 267 TFEU, but also examining the crucial role of the EU Charter of Fundamental Rights (Charter). The latter is particularly relevant in relation to the issues of access to justice, proportionality and transparency, as well as both social and environmental provisions of the Charter. Our project team is composed of Sanja Bogojevic, Xavier Groussot and Jörgen Hettne, who have extensive expertise in a range of legal areas, including EU constitutional law, environmental law, procurement law and competition law, and thus are academically fitted to realise this ambitious project based on a new methodology.

IMPLEMENTATION

This research project will be implemented in three ways. First, through publication of articles in high-profile Swedish and international journals. Second, an expert-conference will be organised in 2017 in Lund to which leading academics in the relevant field will be invited to discuss the scope of discretion of Member States in EU procurement law. Based on this, we intend to publish an anthology with a leading publication house, such as Oxford University Press.

[21] N. Shuibhne, *The Coherence of EU Free Movement Law – Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013).
[22] V. Brisimi, *The Interface between Competition and the Internal Market – Market Separation under Article 102 TFEU* (Hart Publishing 2014).