



CENTRE FOR BUSINESS LAW

16 November 2017

Oslo, Norway

SUSTAINABLE PROCUREMENT

AND ITS LEGAL EFFECTS

Dagne Sabockis

PhD Candidate

Stockholm School of Economics

Public procurement amounts to ca
14 % of the total EU GDP*

or

**2 000 billion EUR
every year***

* Communication from the Commission 'Making Public Procurement work in and for Europe', 3.10.2017, COM(2017) 572 final

Table 1. Estimate of total general government expenditures on works, goods, and services (excluding utilities) in billion euros

	year				
	2012	2013	2014	2015	Mean
Belgium	56.8	57.1	58.7	59.5	58.0
Bulgaria	4.5	4.9	5.5	6.2	5.3
Czech Republic	22.2	21.4	21.5	24.2	22.3
Denmark	37.6	37.3	38.3	38.7	38.0
Germany	408.7	425.5	442.0	461.7	434.5
Estonia	2.6	2.6	2.7	2.9	2.7
Ireland	17.0	16.5	18.0	18.3	17.5
Greece	20.0	19.0	18.9	19.0	19.2
Spain	113.0	105.9	104.9	111.4	108.8
France	313.5	318.6	317.0	317.2	316.6
Croatia	5.7	6.0	6.0	5.7	5.9
Italy	171.7	171.6	169.2	170.3	170.7
Cyprus	1.3	1.1	1.0	1.0	1.1
Latvia	2.7	2.7	2.7	2.9	2.8
Lithuania	3.6	3.6	3.7	3.9	3.7
Luxembourg	5.6	5.7	5.9	6.3	5.9
Hungary	13.1	14.3	16.2	17.3	15.2
Malta	0.7	0.7	0.9	1.0	0.8
Netherlands	134.8	133.9	134.9	135.6	134.8
Austria	41.1	42.5	43.4	45.2	43.0
Poland	48.4	47.4	51.5	52.1	49.8
Portugal	17.2	16.6	17.0	17.7	17.1
Romania	15.6	16.2	16.4	18.7	16.7
Slovenia	4.7	4.8	5.1	5.2	5.0
Slovakia	9.9	10.1	10.9	13.4	11.1
Finland	35.8	37.4	37.7	38.0	37.2
Sweden	69.3	71.8	70.8	72.1	71.0
United Kingdom	290.3	285.4	312.6	349.7	309.5
EU total	1867.5	1880.5	1933.2	2015.3	1924.1

Table 2. Estimate of total general government expenditures on works, goods, and services (excluding utilities) as % of GDP

	year				
	2012	2013	2014	2015	Mean
Belgium	14.7	14.5	14.6	14.5	14.6
Bulgaria	10.6	11.7	12.9	13.7	12.2
Czech Republic	13.8	13.6	13.7	14.5	13.9
Denmark	14.9	14.6	14.7	14.5	14.7
Germany	14.8	15.1	15.1	15.2	15.1
Estonia	14.6	13.9	13.6	14.1	14.1
Ireland	9.7	9.2	9.3	7.2	8.8
Greece	10.5	10.5	10.6	10.8	10.6
Spain	10.9	10.3	10.1	10.4	10.4
France	15.0	15.1	14.8	14.5	14.9
Croatia	13.0	13.8	13.9	13.1	13.5
Italy	10.6	10.7	10.4	10.4	10.5
Cyprus	6.8	6.1	5.5	5.5	6.0
Latvia	12.1	11.8	11.6	12.0	11.9
Lithuania	10.7	10.2	10.0	10.6	10.4
Luxembourg	12.7	12.3	11.9	12.3	12.3
Hungary	13.3	14.1	15.4	15.8	14.7
Malta	10.4	9.5	10.7	11.9	10.6
Netherlands	20.9	20.5	20.3	20.0	20.4
Austria	13.0	13.2	13.1	13.3	13.2
Poland	12.4	12.0	12.5	12.2	12.3
Portugal	10.2	9.7	9.8	9.9	9.9
Romania	11.7	11.2	10.9	11.6	11.3
Slovenia	13.1	13.4	13.7	13.6	13.5
Slovakia	13.6	13.6	14.4	17.0	14.7
Finland	17.9	18.4	18.4	18.2	18.2
Sweden	16.4	16.5	16.4	16.1	16.3
United Kingdom	14.1	13.9	13.8	13.6	13.9
EU country average	12.9	12.8	12.9	13.1	13.0
EU total	13.9	13.9	13.8	13.7	13.8

Public Procurement Directives

Public procurement in the EU is regulated in several directives:

- Directive 2014/24/EU on public procurement
- Directive 2014/25/EU of public procurement by entities operating in the water, energy, transport and postal services sectors
- Directive 2014/23/EU on the award of concession contracts
- Directive 2009/81/EC on procurement in the defence sector
- Remedies directives
 - Directive 92/13/EEC utilities sector
 - Directive 89/665/EEC public sector

Public Procurement Directives

- Public contracts of certain types and above certain thresholds:

1. Works

(a) EUR 5 186 000 for public works;

2. Goods

(b) EUR 134 000 for public supply and service awarded by central government authorities

3. Services

(c) EUR 207 000 for public supply and service awarded by sub-central contracting authorities

(d) EUR 750 000 for public service contracts for social and other specific services

Public Procurement Directives

- Even procurement procedures under the thresholds must comply with the EU public procurement principles:

equal treatment

non-discrimination

mutual recognition

proportionality

transparency

An aerial photograph of a forested landscape. A road with a dashed white center line runs horizontally across the middle of the image. A river or stream flows through the lower right portion of the image. The terrain is hilly and covered in dense green trees, with some brownish patches indicating cleared areas or different vegetation types.

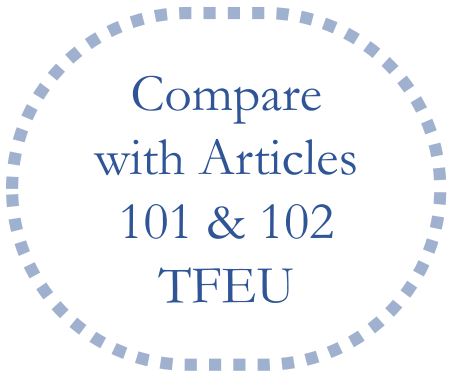
Why regulate public procurement?

Article 3 TEU

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Based on the fundamental freedoms

- Free movement of goods (Article 28 TFEU)
- Freedom of establishment (Article 49 TFEU)
- Freedom to provide services (Article 56 TFEU)



Compare
with Articles
101 & 102
TFEU

Brief history

1971: Creation of the EEC

- Abolitions of restrictions on freedom of establishment & freedom to provide services
 - Directive 71/305/EEC concerning the co-ordination of procedures for the award of public works contracts

1992: Completion of the single market

- “obstacles to the free movement of services need to be avoided”
 - Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts

1993: Abolition of restrictions + coordination of national public contract award procedures

- Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts

Brief history

2004: requests for simplification and modernisation

- Codification of the CJEU's case law allowing environmental & social considerations
 - Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts



2014: public procurement – an instrument for Europe 2020 Strategy

- Ensure compliance with the free movement of goods, freedom of establishment and the freedom to provide services, but also
- A “market-based instrument to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds”
 - Directive 2014/24/EU on public procurement

Public Procurement Directive, Recital 2:

“Public procurement plays a key role in the Europe 2020 strategy *[for smart, sustainable and inclusive growth]*, as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules [...] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.”

Public Procurement Directive, Recital 2:

“Public procurement plays a key role in the Europe 2020 strategy [*for smart, sustainable and inclusive growth*], as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. **For that purpose, the public procurement rules [...] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals.** There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.”

Public Procurement Directive, Recital 2:

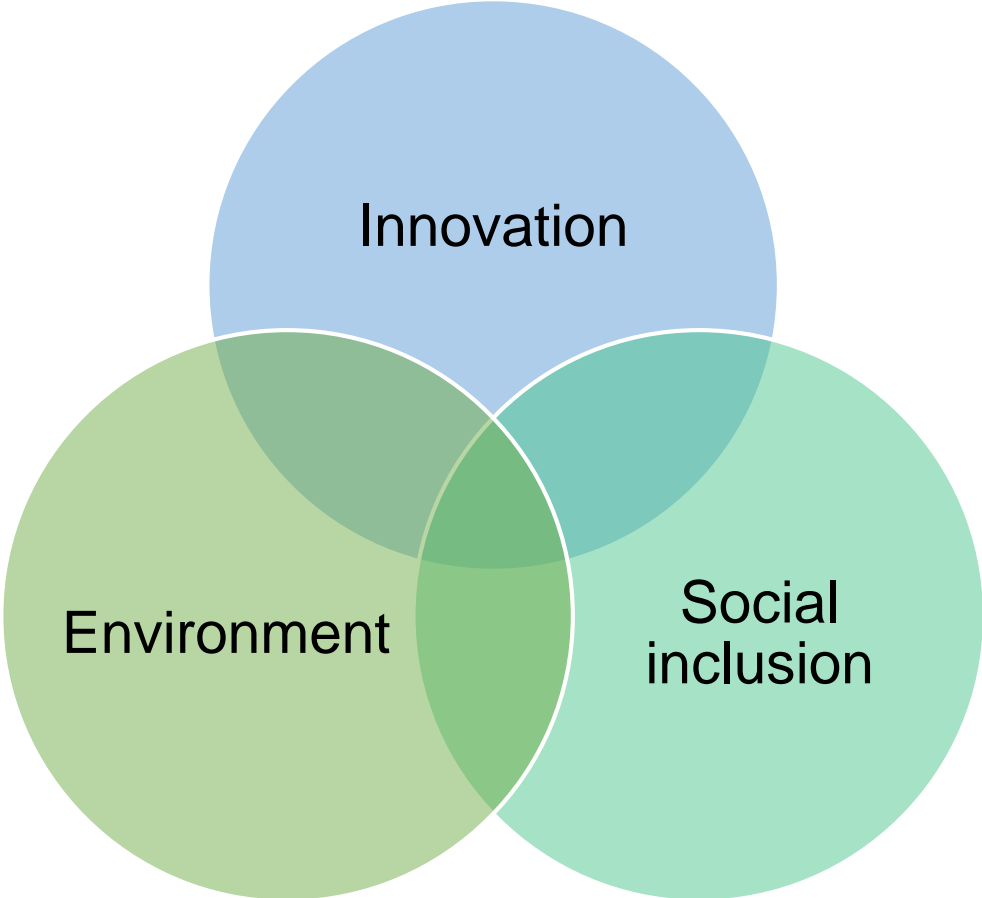
“Public procurement plays a key role in the Europe 2020 strategy [*for smart, sustainable and inclusive growth*], as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules [...] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals.

There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.”

Utilities Directive, Recital 4:

“Public procurement plays a key role in the Europe 2020 strategy [*for smart, sustainable and inclusive growth*], as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules [...] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.”

Sustainable procurement





EMPLOYMENT, SOCIAL AFFAIRS & INCLUSION

European Commission > Employment, Social Affairs & Inclusion



POLICIES AND ACTIVITIES

NEWS AND MULTIMEDIA

PUBLICATIONS AND DOCUMENTS

Search



Agencies and partners

- Social dialogue
- External Relations
- Stakeholder consultation and feedback
- Non-governmental organisations
- Corporate Social Responsibility (CSR) in the EU**
 - CSR Resources
 - Decentralised agencies

News

Study Contract: Procurement



ENVIRONMENT

European Commission > Environment > Green Public Procurement > About GPP >

Home

About us

Policies

Funding

Legal compliance

News & outreach

Green Public Procurement

News and Events

About GPP

Definition

Benefits

Barriers

Green and Sustainable Public Procurement

Dialogue with the market

Life-cycle costing (LCC)

Eco-labels

Glossary

GPP Criteria

GPP in Practice

Legal Framework

Policy Framework

GPP Advisory Group

National Action Plans

Green and Sustainable Public Procurement



Green Public Procurement

Green Public Procurement (GPP) is a procurement process that takes into account environmental impacts which would otherwise be ignored.

Sustainable Public Procurement

Sustainable Public Procurement (SPP) is a procurement process that takes into account the three pillars of sustainability: economic, environmental and social.

Many public authorities are already addressing these issues in their procurement processes, which also addresses the needs of citizens.

The current Procurement Directive covers the stages of the procurement process, from the identification of needs to the award of contracts. *Considerations in Practice* provides further information on how to implement SPP.

Further information on SPP is available in the *Employment, Social Affairs and Inclusion* section of the website.

The United Nations Sustainable Development Goals (SDGs) provide a framework for addressing the three aspects of sustainability.

Further useful information is available in the *Employment, Social Affairs and Inclusion* section of the website.



GROWTH

Internal Market, Industry, Entrepreneurship and SMEs

European Commission



Search



Home

About this DG

Contact us

Newsletter

Features



Single Market and Standards

Industry

Entrepreneurship and SMEs

Access to finance for SMEs

Supporting social responsibility in the economy through public procurement

Published on: 09/02/2016

By using their purchasing power to choose socially responsible goods, services and works, public authorities can set a positive example and encourage enterprises to...

New Commission Procurement Strategy

2017: “The overall objective is to obtain better value for public money, to deliver better outcomes for societal and other public policy objectives while increasing efficiency of public spending.”

-The European Commission’s public procurement strategy, October 2017

(Communication from the Commission ‘Making Public Procurement work in and for Europe’, COM[2017] 572 final)

New Commission Procurement Strategy

“Public procurement is a **strategic instrument** in each Member State’s economic policy toolbox. The 2015 single market strategy made the case for more transparent, efficient and accountable public procurement systems. This requires a shift from a purely administrative approach to **a strategically and needs-driven approach**, in full compliance with the rules.”

- The European Commission’s public procurement strategy, October 2017

(Communication from the Commission ‘Making Public Procurement work in and for Europe’, COM[2017] 572 final)

Award criteria 2.0

- **2004 Directives:**

1. Lowest price; or
2. The most economically advantageous tender

- **2014 Directives:**

“contracting authorities shall base the award of public contracts on the most economically advantageous tender”

1. Price;
2. Cost; or
3. The best price-quality ratio

Best price-quality ratio

- A model for the assessment of the bids in each procurement
- Typically through sub-criteria, by assigning each of them a value
- Criteria should be able to be weighed against each other **and** against the price

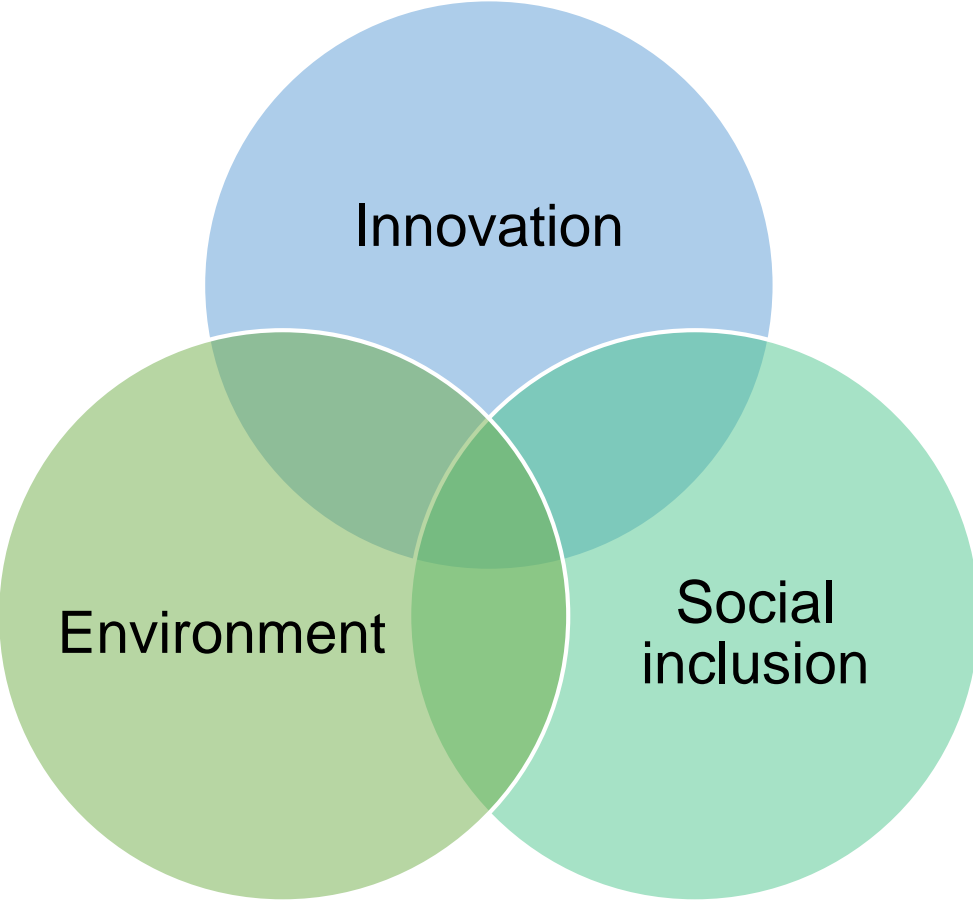
Best price-quality ratio

“Such criteria may comprise, for instance:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.”

Sustainable procurement



...at all stages of the project.

TEU, Preamble

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

TEU, Article 3

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

Social criteria in the CJEU's case law

Beentjes (Case 31/87)

- a public works contract for a part of a land consolidation operation
- Beentjes' tender was rejected because inter alia “it did not seem to be in a position to employ long-term unemployed persons”
- CJEU: The obligation could infringe the prohibition of discrimination on grounds of nationality if
 - it could only be satisfied by tenderers from the member state concerned, or
 - make it difficult for tenderers from other states to comply with it
- CJEU: whether such a condition is directly or indirectly discriminatory must be determined by the national courts, in the light of all the circumstances of the case

Social criteria in the CJEU's case law

Nord-pas-de Calais (C-225/98)

- public works contracts relating to a construction of a school
- an award criterion linked to a local project for combatting unemployment
- CJEU:
 - Award criteria linked to campaigns against unemployment are allowed if consistent with all fundamental principles
 - principle of non-discrimination flowing from the right of establishment and the freedom to provide services
 - must be applied in conformity with the procedural rules, esp. rules on advertising

Environmental criteria in the CJEU's case law

Concordia (C-513/99)

- Helsinki procurement of busses, limits on nitrogen emission
- CJEU: factors which are not purely economic can influence the value of a tender from the point of the contracting authority and must be allowed
- CJEU: it authorities may take criteria relating to the preservation of the environment into consideration under the MEAT-criterion
 - provided that they are linked to the subject-matter of the contract,
 - do not confer an unrestricted freedom of choice on the authority,
 - they are expressly mentioned in the contract notice

Environmental criteria in the CJEU's case law

- **EVN-Wienstrom (C-513/99)**
- Procurement of environmentally-friendly energy
- CJEU: Such criteria are lawful, but the criteria must be verifiable
 - The principle of equal treatment
 - The award criteria must be applied objectively and uniformly to all tenderers
 - Verification - an obligation rising from the principle of transparency

An aerial photograph of a landscape featuring a wide river or valley. A prominent bridge with a series of vertical supports spans across the river. The surrounding terrain is green and appears to be a mix of forest and open land. The text "So, where's the competition?" is overlaid in the center of the image.

So, where's the competition?

The definition of ‘undertaking’ in Articles 101 & 102 TFEU

- Public buyers are excluded from the application of Articles 101 and 102 TFEU by the case-law of CJEU
 - an organisation is *not* an undertaking pursuant to Arts. 101 & 102 when the activity it carries out is well connected with the exercise of public powers and is not in itself economic in nature (FENIN, C-205/03 P)
- The notion ‘state’ comprises bodies that are not part of the state administration in formal terms when
 - a body’s composition and functions are laid down by legislation,
 - it depends on the authorities for the appointment of its members & the observance of its obligations and its financing of the public works contracts (Beentjes, Case 31/87)

States can act as both

- "the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market. In order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the State and to determine the category to which those activities belong"

(Commission v Italy, Case 118/85)

Competition – an underlying aim of EU public procurement law

- Focus on market access
- Inherently connected to the principle of transparency
- 2004 Directive, *Recital 4*:
“Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any **distortion of competition** in relation to private tenderers.”
- Distortion of competition is not as such a breach under the procurement rules

Competition – an underlying aim of EU public procurement law

- Competition concerns are named in various places in the directive:

SME market access

Concentration of
buyer power

Negotiated
procedures with no
prior publication of
a contract notice

Innovation
partnerships

Framework
agreements

Starting point

- Hypothesis – the use of non-economic criteria in EU public procurement law is here to stay.
 - To what extent?
 - In what forms and shapes, under what names?
 - Under what conditions?
 - How does it affect competition between the tenderers?

Effects on competition

- Any legal effects on competition in markets related to public procurement contracts?
 - Specific markets:
 - Many times strongly steered by the governments and/or authorities
 - Energy, water, transport, postal services
 - The buyer = the regulator
 - Any TEU / TFEU considerations?
 - The SME cooperation & participation in general

What about the social market economy
with regard to competition law?

Non-economic values within Articles 101 & 102?

Mergers?

Market perspective: public vs private

- Any differences in private vs public markets with regard to non-economic values?
- If yes, can the two areas of market regulation benefit from one another?
- Ultimately, what is the effect on procuring authorities, tenderers and the companies' strategic decisions at large?

Why this, why now?

- ✓ Some research on non-economic values in public procurement exists, however most of it is connected to the old directives
- ✓ Timing
 - new directives → new cases and papers are expected
 - Commission's Public Procurement Strategy (03.10.2017)
- ✓ What will or should happen after Europe 2020?
- ✓ The new economy; big data → an opening up → room for new questions
- ✓ There's no 'legal vacuum'.

The idea and the intended result

- The idea:
 - A study based on the new procurement directives
- Intended result:
 - An assessment of the legal effects of the use of non-economic award criteria in public procurements
 - A contribution to the legal discussion on sustainable procurement, seen from the angle of 2014 Directives
 - A novel, sustainability-influenced approach to the area between competition law and public procurement law

Thank you.



CENTRE FOR BUSINESS LAW

Dagne Sabockis

PhD Candidate

Stockholm School of Economics

dagne.sabockis@phdstudent.hhs.se