



Joint Eurodiaconia-SSE Seminar Sustainable and Socially Responsible Public Procurement in the Field of Social Services

8 November 2023, 10:00-12:00

ECJ Ruling in the [Case C-598/19](#) CONACEE (6 October 2021): Summary Information

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ECJ Rulings & EFTA Court Advisory Opinion (1): Summary Information

- Spain: ECJ rulings on reserved contracts for sheltered workshops and personal assistance services
 - ECJ Ruling (6 October 2021) in [Case C-598/19](#) CONACEE on the use of public procurement and national legislation reserving the right to participate in certain public procurement procedures for social initiatives special employment centres => 1) It is apparent from the **national legislation** that the **purpose of a special employment centre**, whether a social or business initiative, is to provide paid employment for disabled persons and is regarded **as a means of including as many of those people as possible in regular employment**, and, second, that **at least 70% of the employees of special employment centres are disabled**. 2) If social initiative special employment centres, on account of their particular characteristics, are in a position to **implement more effectively the social integration objective pursued by Article 20(1) of Directive 2014/24/EU**, this could **objectively justify a difference in treatment with respect to business initiative special employment centres**.
 - ECJ Ruling (14 July 2022) in [Case C-436/20](#) ASADE on the **provision of services in the form of personal assistance**, exclusion of profit-making operators and location of the entity as selection criteria
- Norway: **Provisions in Norwegian procurement legislation on (not-for-profit) providers of elderly care services** => EFTA Court Advisory Opinion in [Case E4-22](#) (28 March 2023) => **Presentation Ingunn Moser**

ECJ Rulings & EFTA Court Advisory Opinion (2): Common requirements allowing for a differentiated treatment of different types of providers

- **National legal basis: Existence of national** [*MM: Open question: Would regional legislation be sufficient? => ECJ Ruling Sodemare: State Aid for Third Sector Organisations in Italy, 1997 – Not clear!*] **legislation explicitly stipulating the conditions/requirements in line with objectives of (national) social, health, employment and/or housing policy** [... and indirectly in line with objectives of the European Treaties and appropriate to support the realisation of the principles of the EPSR]
- **Social impact measurement and assessment:** Need to prove of **more effective outcomes** (as to effects on the social inclusion, labour market integration, etc.; potentially also lower costs for the society due to social investment for vulnerable groups / persons needing specific support) **actually achieved by the preferential treatment of not-for-profit providers / social economy organisations** (combining an economic activity with a “social mission”): E.g., minimum employment share of PwD of 50% or 70% compared to the 30% set in EU State Aid (GBER, Art. 33 & 34) and EU Public Procurement Legislation (Art. 20 Dir 2014/24/EU) in relation to sheltered workshops/work integration social enterprises (WISE).
- **Political decision of competent public authority:** Opting for socially-responsible public procurement
=> **Assessment SSE:** Strengthening of possibility to pursue (explicitly defined and legally backed) policy objectives of national policy and first steps for strengthening their weight compared to logics and conditions of EU competition law (e.g., aiming to avoid distortions of the trade and or of the competition conditions in the internal market or aiming to achieve “level playing fields”).



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Recommendations / Reflections / Conclusions from Eurodiaconia and Social Services Europe

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EU Public Procurement Legislation: Priority areas for social service providers

- **Horizontal Social Clause / Impact on Labour Law (Art. 18.2)**
 - Compliance with labour, environmental and social law (“shall”)
 - Public procurement procedures could promote the realisation of decent/good working and pay conditions <=> Reality/costs!
 - Reference to collective agreements stays contested
- **Impact on Employment of Persons with Disabilities or Disadvantaged Workers (Art. 20)**
 - EU law allows for reserved contracts for sheltered workshops
- **Other key issues: MEAT/BPQR, Special Regime for Social Services**
 - National regulations for contracts below a threshold of 750.000€
 - EC Guidance (2021) recommends awarding contracts based on the principle of the “Most Economically Advantageous Tender” (MEAT), Art. 67, i.e., recognising social/quality criteria and social clauses
 - Contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation, Art. 76
 - Subject matter of contract decisive for possibility to use a special regime for social, education, etc. services, Art. 77 & Common Procurement Vocabulary (CPV)

Network on Sustainable Development in Public Procurement (21.04.23) – Main common demands for a revision of EU Public Procurement Legislation

- *Participants: EPSU, UNI Europa, [ETUC]; CECOP, ENSIE, RREUSE, SSE; Fair Trade Europe; Electronics Watch*
- **Expectations for reforms and demands/proposals for a reform of the EU Public Procurement Legislation**
 - **Removal of lowest price criteria**/making the use of the MEAT criteria the standard/default logic
 - **Better enforcement of rules on reserved markets** (Art. 20 Dir. 2014/24/EU)
 - **Better enforcement of social clauses** prescribing the respect of collective agreements, including by criteria allowing for an exclusion of bidders not respecting them, labour law and/or the ILO Core Labour Standards and by referring to the ILO Convention 94 (1949) on Labour Clauses in Public Contracts => UNI Europa & ETUC Campaign to get pledges signed in view of EP Elections 2024
 - **Improve the organisational setup to realise SRPP** given risk-adverse public buyers/tenderers
- **What to expect from/on which issues to approach the EC, in particular DG GROW?**
 - Promotion of Guide “Buying Social” (2021)
 - Training Seminars on Sustainable Public Procurement for Staff of Public Authorities in the EU MS
 - **Legal obligation to assess effect of thresholds** (e.g., 750,000€) as to their impact on (the distortion) of the internal trade => Share of successful cross-border tenders, e.g., in social service sub-sectors
 - **Appetite for more far-reaching reforms?** (e.g., given the non-support for an initiative of the Dutch government, together with other EU MS, to reduce the relevance for the social services sector)

Some reflections by SSE on the relationship between (EU-level and/or national) social policy objectives, social service delivery and the use of public procurement

- Reflections on the **relationship between EU social policy objectives and the use of public procurement**
 - => Is **public procurement the right instrument to implement quality assurance frameworks**, such as, e.g., the European Voluntary Quality Framework for Social Services of General Interest (2010)? Primarily NO!
 - **Freedom of choice of provider by user**: 1) selection and award criteria (and thus indirectly also quality criteria) set by public authorities and 2) if selection by public authority if only one provider
 - **Person-centred services**: public procurement not allowing for 1) co-production of services and 2) for negotiations between public authority and provider on new/changing demands/needs
 - **Respect for user rights**: 1) rigidity and complexity of public procurement procedures and 2) non-representation of users at the stage of the selection and/or award of contracts
 - **Participation and empowerment**: emphasis on 1) costs and 2) standardisable services
 - **Partnership**: buyer-supplier-type relationship => [financial & political] dependency structures
 - => **SSE Statement on the EC Guide/Commission Notice “Buying Social – a guide to taking account of social considerations in public procurement (2nd edition)”**, Brussels, 26.05.21, C(2021)3573 final (6 December 2021) => [article](#) & [document](#)

EASPD Discussion Note (2022) “Alternative Models to PP”: Germany

- **Germany: “social law triangular relationship”** (*sozialrechtliches Dreiecksverhältnis*) = specific contractual relationships in a triangle of government/public authority, private (commercial or not-for-profit) services provider and user entitled to support; direct contractual relationship between service provider and user
 - National/regional legislators not obliged to organise social services via public contracts, with exceptions
 - **Authorisation/licencing systems** (*Zulassungssysteme*)
 - All service providers meeting certain requirements have an entitlement to authorisation/accreditation in which only the service users – having an individual legal entitlement – selects the service provider (= *Wunsch- und Wahlrecht*) which, in turn has certain leeway in offering services/service packages
 - No selection decision by public authority of a provider/no attribution of users by them to a specific provider and no remunerated exchange contract of public authority directly with provider (they are concluding a service agreement with the beneficiary directly)
 - **Funding/financing model: Grants** (*Förderungsfinanzierungsmodell*) => **No contractual relationship between public contracting entity and social service provider subject to [Directive 2014/24/EU](#)**

=> **Presentation Friederike Mussnug**

EASPD Discussion Note (2022) “Alternative Models to PP”: Italy

- **Italy: Code of Third Sector (*Codice del Terzo Settore*) (2017)**, structuring legislation relevant for not-for-profit entities, introduces
 - **co-programming (*co-programmazione*) => participative and shared administrative procedure mapping needs and related necessary actions, implementation procedures and available resources, based on contracts** – “*provided that this proves to be more favourable than resorting to the market*”
 - **project co-development (*co-progettazione*) => implementation of pre-defined projects through shared human and capital resources based on a contract & accreditation (*accreditamento*) => identification of third sector organisations with whom the project development partnership will be activated**
- Rationale behind partnership models
 - Pivotal role played by third sector organisations in society
 - **Synergies from partnership for better outcomes for people in need** => Recognition by Italian Constitutional Court (2020) <=> Opinions of Italian Council of State (2018)
- Directly awarded contracts for emergency ambulance transport services (only) with accredited voluntary organisations **if ensuring criteria of solidarity, social utility and economic efficiency**

=> **Presentation Liugi Martignetti, Secretary General, REVES**

EASPD Discussion Note (2022) “Alternative Models to PP”: Netherlands

- **Netherlands: Ongoing political discussions**

- 2018: Legislative proposal 1 amending Public Procurement Act to **exempt social services from any procurement obligation** currently pending in Dutch Parliament (since 01.04.19)
- 11/2019: Legislative proposal 2 by Dutch Minister of Health to simplify public procurement in the field of social services (preferred option: exemption; not seen possible, as Dutch Public Procurement Act based on PPD) => **Amendment of Youth Care Act and Social Support Act (requiring the use of MEAT) allowing contracting authorities to focus more on content than on procedures**; 19.04.22: DRAFT proposal passing Parliament
- Evidence: **Monitor Deloitte “Study on regulatory burden and level of cross-border dimension of public procurement of social health services”** (04/20)
 - [Directive 2014/24/EU](#) implying time-consuming and costly procedures => ineffectiveness & inefficiency + regulatory burden disproportionate (for public authorities & service providers)
 - Cross-border dimension in EU (2016-2018) for home care and youth care/welfare: 0,5% (foreign provider winning at least 1 lot) / 0% (winning the majority of lots)