



Formidable but

Friendly



Anderson Strathern

**PROCUREMENT OBLIGATIONS WHERE NONE
EXISTED BEFORE – THE CREEPING REGULATION OF
UNREGULATED PROCUREMENT**

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PARTNER, CONSTRUCTION & PROJECTS

- Regulation 8(1) “these regulations do not apply where the estimated value is less than the relevant threshold.”
- Regulation 5(1), (2) – limited application to Part B services
- Concessions
- No written contract, defence contracts, financial services

but generally treaty principles may still apply:

- Article 43EC (freedom of establishment);
- Article 49EC (freedom to provide services);
- Article 12EC (non-discrimination);



Treaty Principles and Telaustria

What are the principles?

- Transparency;
- Equal treatment;
- Non-discrimination;
- Equal treatment and transparency apply even if a public contract falls outside the directives;
- Teleaustria: EC transparency obligations requires “a degree of advertising sufficient to enable the services contract to be opened up to competition”;

There has been a gradual extension by the ECJ

- Concession contracts- Telaustria; CoNaMe; Parking Brixen;

- How Wide Is The Concept Of Concession?
- Defined as a contract where the consideration is the right to exploit the service by charging end users, ie., the private sector party takes the economic risk;
- For example, concessions to supply telephone directories (Telaustria) or operate car parks (Parking Brixen) or public transport
- C-260/04 Com V Italy; ECJ condemned Italy for failure to advertise renewal of 330 licences for horse race betting shops;
- If betting shop licences are caught, then why not licences for pubs, hotels or sports clubs? How far will ECJ go?

- Below threshold – Bent Mousten; SECAP;

- Part B services – Finland; An Post

When do the Principles Apply?

- When relevant to internal market;
- Contract of certain cross-border interest ; C-147/06 SECAP

Relevant factors include:-

- Value: cross-border interest may be excluded if contracts value is very modest, but not if it is for a significant amount;
- The directive's thresholds "serve only as a guideline";
- Price performance: where "borders straddle conurbations" even low value contracts may attract foreign interest; Northern Ireland contracts more appealing to providers in Republic Of Ireland than those in South of England.
- Value and nature of services;

Is There Now Always an Obligation to Award Contracts Competitively Under the EC Treaty Principles?

- Contracts which would have benefited from an exemption;
- Contracts of a very modest value;
- Contracts with insufficient internal market relevance.
- Proportionality

Commissions Interpretive Communication 2006: lays down the non-binding guidelines;

- How to determine whether a contract is subject to EC treaty principles;
- How to avoid contracts which are subject to EC treaty principles;
- How to award:
- Means of advertising;
- Content of advertising.

How Can The Transparency Requirement Be Met?

- ECJ case law very vague on what is required.
- “A degree of advertising” sufficient to open the contract competition (Teleaustria);
- Foreign suppliers must have “access to appropriate information” before the contract is awarded (Coname);
- Precise requirements are “currently unclear”; the authority has to assess the requirement to waive advertising in each individual case (eg., Kokott in Pressetext);

Transparency/Advertising: The Options

- National/local newspapers: never enough if contractors have cross-border interests?;
- International newspaper/journals (for example, Financial Times European Edition?). Is one language sufficient?;
- Authority's own website: described as flexible, cost effective and adequate in Commission's 2006 communication – but will it always be sufficient?
- on-line portals;
- “Voluntary” notice in the OJEU itself.

The Domestic Courts

- Uncertainty as to approach the domestic courts would use.
Need for legal certainty
- The Public Contracts (Scotland) Regulations 2006
 - “the contracting authority shall, if required by its general Community obligations, for the benefit of any potential economic operator, ensure a degree of advertising which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non discrimination and transparency.”

- Does this take us any further?
- Has a secondary regime been created?
- Managing risk of challenge in this uncertainty

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