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The Procurement of Services of General Interest

Introduction

The jurisprudence of the European Court of Justice has indicated on numerous occasions that public procurement has a multi-faceted dimension in assisting the process of the common market. In particular, the Court has demonstrated the pivotal position of public procurement in the process of determining the parameters under which public subsidies and state financing of public services constitute state aids. In the centre of the debate regarding the relation between state aids and the financing of services of general interest, within the broader remit of the interplay of subsidies and public services, public procurement has emerged as an essential component of state aids regulation. The European Court of Justice has inferred that the existence of public procurement, as a legal system and a procedural framework, verifies conceptual links, creates compatibility safeguards and authenticates established principles applicable in state aids regulation. Public procurement in the common market not only does represent the procedural framework for the contractual interface between public and private sectors, it also reflects on the character and nature of activities of the state and its organs in pursuit of public interest. Public procurement regulation has acquired legal, economic and policy dimensions, as market integration and the fulfilment of treaty principles are balanced with policy choices.

The implications of the debate are important, not only because of the necessity for a coherent application of state aids regulation in the common market but also because of the need for a legal and policy framework regarding the financing of services of general interest and public service obligations by Member States. The significance of the
topic is reflected in the attempts of the European Council to provide for a policy framework of greater predictability and increased legal certainty in the application of the State aid rules to the funding of services of general interest. The present article intends to define the connection between public procurement and services of general interest and to ascertain the parameters of interplay between public procurement and state financing of public services within the regulatory regime of state aids.

Part 1 The services of general interest under EU law

The EU Treaty does not include as a Community objective the provision or the organisation or the financing of services of general interest and therefore does not assign specific and explicit powers to the Community in the area of services of general interest. Except for a sector-specific reference in the area of transport, services of general economic interest are referred to in Articles 16 and Article 86(2) of the EC Treaty. Furthermore, according to the Charter of Fundamental Rights of the European Union, the Union recognises and respects access to services of general economic interest, in order to promote the social and territorial cohesion of the Union.

Although Article 16 EC confers responsibility upon the Community and the Member States to ensure, each within their respective sphere of competencies, that their policies enable services of general economic interest to fulfil their missions, it does not provide the Community with specific means of action. On the other hand, Article 86(2) EC implicitly recognises the right of the Member States to assign specific public service obligations to economic operators. It manifests a fundamental principle ensuring that services of general economic interest can continue to be provided and developed in the common market. Providers of services of general interest are exempted from application of the Treaty rules only to the extent that any exemption is strictly necessary to allow them to fulfil their mission to pursue activities of general interest. Thus, such deviation from the Treaty rules is subject to the principles of neutrality, freedom to define and proportionality.

Therefore, in the event of conflict, the fulfilment of a public service mission can effectively prevail over the application of Community rules, including internal market and competition rules, subject to the conditions foreseen in Article 86(2) EC. Consequently, the Treaty protects the effective performance of a general interest task but not necessarily the provider as such.