

# Recent developments in the ECJ's jurisprudence on Public Procurement

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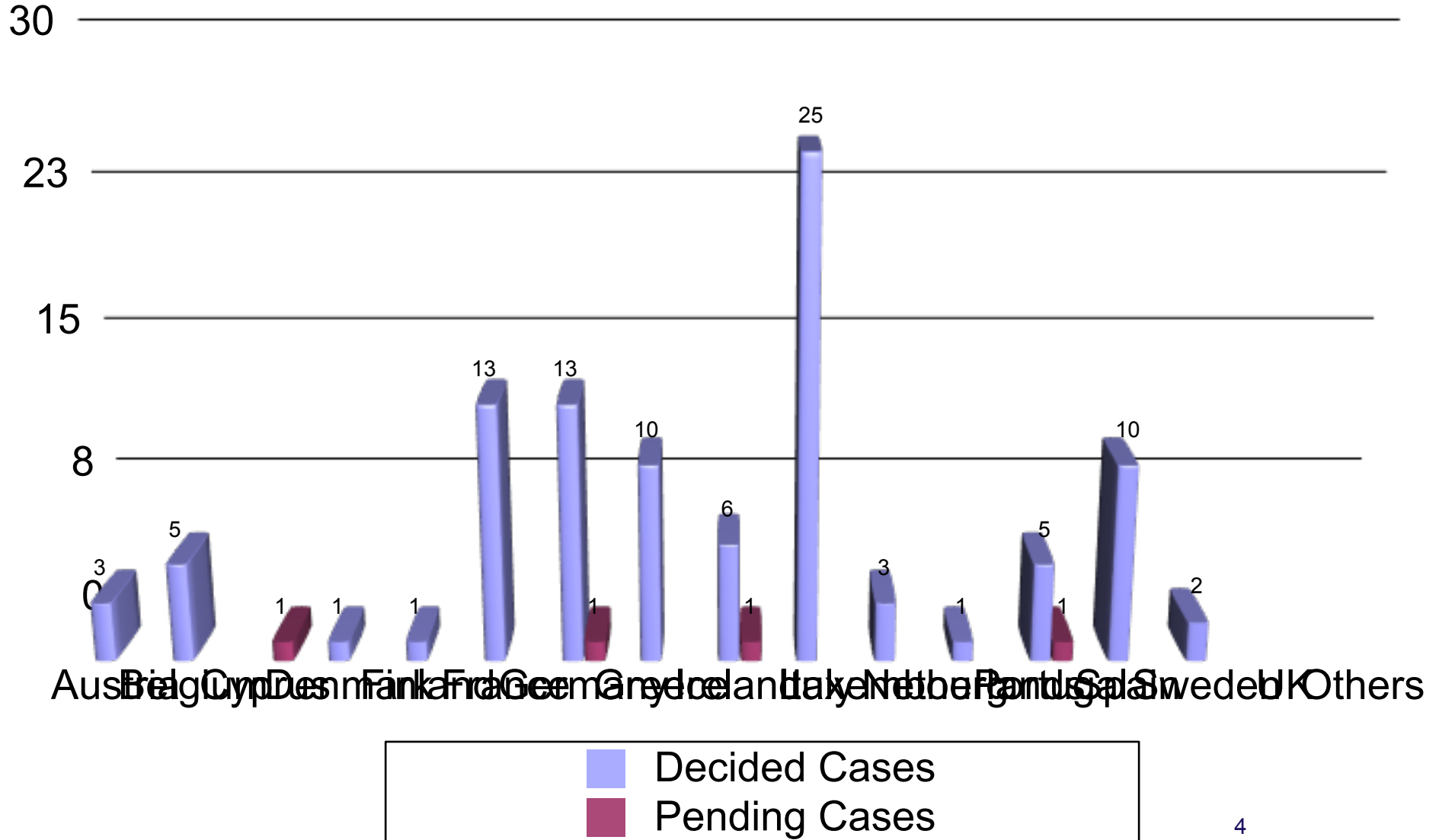
# ECJ case law on public procurement

## 1. Overview

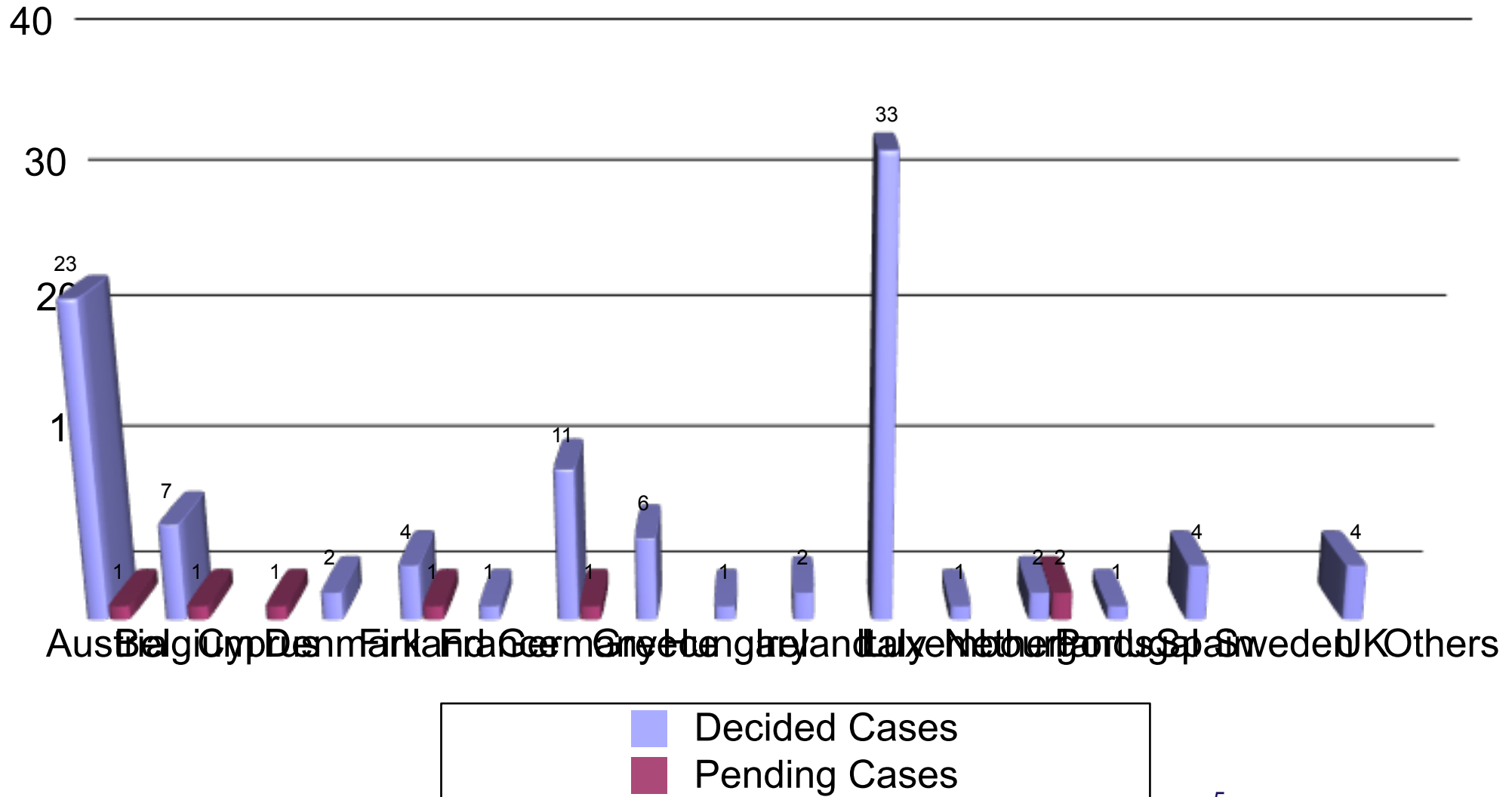
# Different types of procurement case

- Commission actions v. Member States under Art. 258 TFEU (over 100 such rulings)
- “preliminary rulings” by ECJ on references from national courts under Art. 267 TFEU (> 100 rulings)
- cases in national courts: thousands, but numbers vary greatly per Member State
- actions in General Court against EU institutions (> 50 rulings)
- all ECJ + GC rulings available online at ***<http://curia.eu.int>***

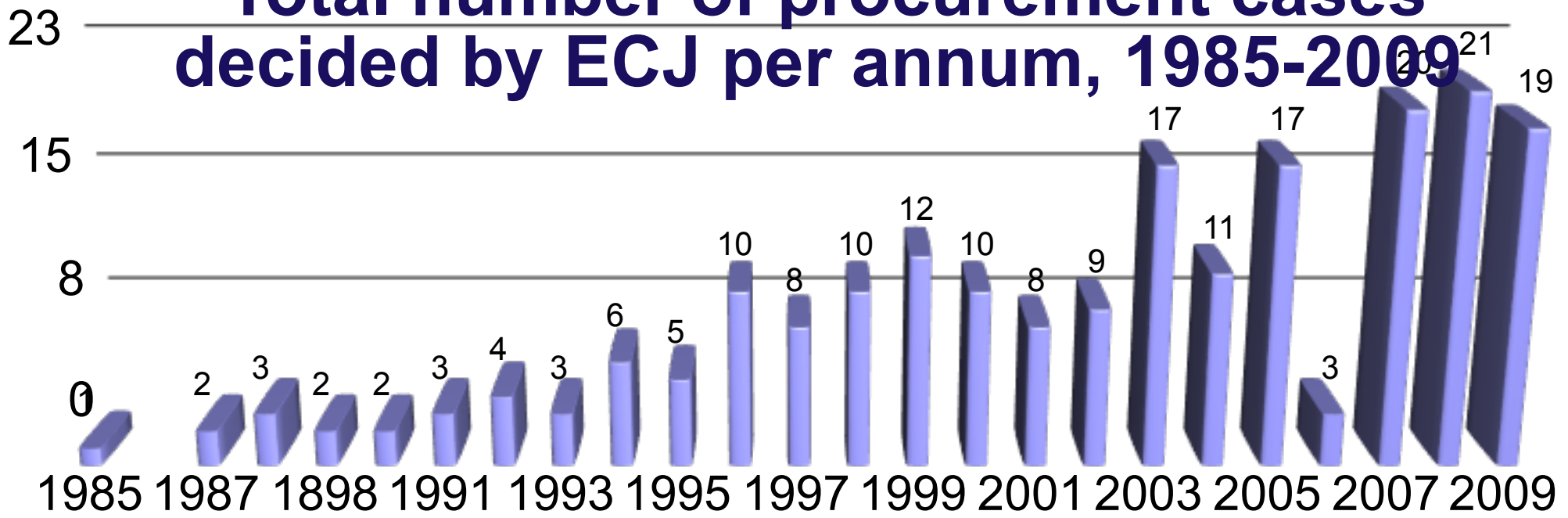
# Commission procurement cases against Member States, to 1<sup>st</sup> June 2010



# Procurement-related references to ECJ from national courts, to 1<sup>st</sup> June 2010



# Total number of procurement cases decided by ECJ per annum, 1985-2009



Decided Cases

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## **2. Which authorities and contracts are caught by the procurement Directives?**

# Which authorities are caught by the procurement Directives?

- Directive 2004/18 applies to the State, regional and local authorities, plus other “contracting authorities”
- include “bodies governed by public law”, i.e. a body
  - (i) established to meet “needs in the general interest, not having an industrial or commercial character”; and
  - (ii) financed, supervised or appointed, for the most part, by the State or other public authorities



# German sickness funds

**C-300/07 Hans Oymanns** 11.06.09

- German statutory sickness insurance funds are "bodies governed by public law"
- meet general interest needs relating to public health
- financed mostly by members' compulsory contributions, plus some direct funding from federal authorities
- members' contributions are fixed by German law and approved by a supervisory public body
- the funds are non-profit making: contributions must match expenditure

# What constitutes a relevant contract?

## **C-220/05 *Auroux v Roanne* 18.01.07**

- Roanne Council signed a development agreement with another public entity for construction of a new leisure centre
- second entity would acquire land, procure funding and commission works, but would not itself execute the works
- authority specified requirements and partly funded the works
- ECJ held: this was a public works contract which should have been put out to tender under the Works Directive
- it made no difference that the developer itself would apply the Directive's procedures when appointing sub-contractors

# Contract versus a land deal

## **C-536/07 *Commission v Germany*** 29.10.10

- City of Cologne awarded contract to a private developer to construct 4 new exhibition halls, which City would then rent
- a public works contract, despite being classified as a lease under German law
- main purpose was construction of the halls according to detailed specifications laid down by the City
- irrelevant whether City would own or use the buildings itself or make them available to the public or third parties

## C-351/08 *Helmut Muller* 25.03.10

- German federal agency invited bids to purchase site of an ex army barracks
- private developers presented their plans for use of site to the local authority
- agency sold land to bidder whose plans the local authority preferred
- rejected bidder (Muller) complained to German court, which referred questions to ECJ
- was this a public works contract or simply a land sale?

# C-351/08 *Helmut Muller*: key ECJ findings

To be a public works contract:

- the works must be of "direct economic benefit" to authority, e.g. the authority:
  - will become owner of the works
  - has legal right to control their use
  - contributes financially to the works, or
  - assumes risks if the works are an economic failure
- the authority must specify requirements, i.e. either
  - take measures to define the type of work or
  - have a “decisive influence” on the work's design
- mere exercise of urban-planning powers is not sufficient

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## 3. The exemption for “in-house” contracts

# C-107/98 *Teckal*: the established test

- the Directives apply to contracts awarded to a “legally distinct” person, even if connected to the authority
- except if:
  - (i) the authority exercises over that person a control similar to that which it exercises over its own departments; and
  - (ii) that person “carries out the essential part of its activities with the controlling authority”
- i.e. the contract does not need to be tendered if the two *Teckal* conditions are met

# Meaning of “control similar to that over own departments”

- prima facie met if supplier is 100% owned by the authority
- can be met collectively by joint public owners; individual control is not required (**C-324/07 *Coditel Brabant***)
- but such control is excluded if
  - any of supplier’s capital is owned by private entities (**C-26/03 *Stadt Halle***)
  - some or all of its capital will be sold to private entities in short term (**C-29/04 *Com v Austria***)
  - supplier enjoys management independence or is active in other territories (**C-458/03 *Parking Brixen***)



## C-573/03 *Sea Srl* 10.09.09

- Italian local authorities awarded waste disposal contracts to Setco, which they jointly owned
- the public shareholders *collectively* exercised decisive influence over Setco's strategic objectives and decisions
- Setco's activity was limited to the authorities' territory and carried on essentially for their benefit
- mere possibility of future private investment in Setco did not exclude control; only relevant if there is a “real prospect” of this happening in the short-term

## C-480/09 *Com. v Germany* 09.06.09

- four Hamburg districts granted 20-year contracts to the City for refuse disposal services, in return for an annual fee
- the districts did not exercise control over the City authority, even collectively (so 1<sup>st</sup> *Teckal* condition not strictly met)
- ECJ ruled that this cooperation between public bodies was permitted:
  - contracts helped City to fund construction of new incineration plant
  - governed solely by public interest considerations
  - no private sector involvement
  - no intention to circumvent the procurement rules

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## 4. Changes to an existing contract

# Contract changes: the issue

- parties often wish to change the provisions of a public contract during its term
- e.g. changes to the price, scope, quantities, duration or named sub-contractors
- increasingly common in an economic downturn
- does the authority have to start a new tender procedure?
- *Pressetext* and other ECJ rulings provide guidance

## C-454/06 *Pressetext* 19.06.08

- long-running contract for press agency services between Austrian Government and APA
- various changes were introduced:
  - contract transferred to APA's subsidiary (an “internal re-organisation”)
  - prices were converted to Euro and rounded down
  - price index updated under price review clause
  - a rebate increased from 15% to 25%
  - right to terminate contract was waived for 3 years

## C-454/06 *Pressetext*: key ECJ test

- “amendments... during currency of the contract constitute a new award within the meaning of [the Directive] when:
  - they are **materially different** in character from the original contract and therefore...
  - **demonstrate the intention of the parties to re-negotiate the essential terms**”
- AG Kokott: not easy in practice to distinguish between material and non-material amendments; this has to be decided on a case-by-case basis

## *Pressetext*: factors pointing to a new contract

An amendment “may be regarded as material” when:

- it would have allowed for admission of different bidders or selection of a different bid in the original tender
- it extends the contract’s scope considerably to encompass services not initially covered
- it changes the economic balance of the contract in favour of the contractor

But not if change is foreseen in terms of initial contract

# What constitutes a material change?

- change is material if contract extended “considerably”
- where to draw the line: e.g. what if 200 km of motorway works are extended to 250 km, or a 10-year agreement is extended by 12 months?
- **C-160/08 Com v Germany**, 29.04.10: extension of ambulance services contract to a new area increased its value by **15%**: ECJ ruled this was a “material change”
- price rises much harder to justify than price decreases
- reasons for change: driven by external, objective factors?



## C-91/08 *Wall v Frankfurt*: 13.04.2010: change of sub-contractor

- bidder for concession named Wall as key sub-contractor
- after winning the concession, that bidder appointed a different sub-contractor, with the authority's consent
- Wall complained; German court referred questions to ECJ
- ECJ held: changing a sub-contractor amounts to a material change, requiring a re-tender, if the use of that sub-contractor was a "decisive factor" in award decision
- exceptionally, the change was material even though the possibility of such a change was provided for in contract

## **C-423/07 *Commission v Spain*, 22.04.10:** Changes between OJEU notice and award

- Spain issued OJEU notice for motorway construction
- winning bid included additional works not mentioned in OJEU notice or tender specifications
- these added 87% to total value per Commission, or 27% per Spain
- held: Spain in breach for failing to give complete description of all works
- additional works only permitted if envisaged in OJEU notice

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## **5. Selection and award criteria**

# Disclosure of award criteria

## C-532/06 *Lianakis* 24.01.08

- tenderers must be aware of “all the elements” to be taken into account by the authority for identifying the most advantageous offer, including their relative importance
- the authority cannot apply weightings or sub-criteria that it has not previously brought to tenderers’ attention
- weightings and sub-criteria cannot be established or changed after tenders submitted

# Selection criteria versus award criteria

## C-532/06 *Lianakis* 24.01.08

- Greek authority specified the following as award criteria:
  - bidder's experience on projects in last 3 years
  - bidder's manpower and equipment
  - bidder's ability to complete project by deadline
- ECJ: the directive *prohibits* these criteria from being used as award criteria (rather than selection criteria)
- selection criteria (for checking bidder's suitability) must relate to financial standing and technical capability
- award criteria cannot be “essentially linked to the tenderer's ability to perform the contract in question”

## C-199/07 *Commission v Greece* 12.11.09

- Greek railway utility contract for engineering services
- non-Greek engineers excluded if they had previously put forward qualifications falling under a different category from those required for this contract
- ECJ ruled that the utility had confused selection and award criteria in its OJEU notice
- ECJ applied *Lianakis* ruling word-for-word

# Any exclusion grounds must be proportionate

- ECJ has ruled the following to be unlawful:
  - Greek law prohibiting all media companies from bidding for public contracts (**C-213/07 *Michaniki*** 16.12.08)
  - Italian law prohibiting affiliates from same group from submitting separate bids in a tender procedure (**C-538/07 *Assitur*** 19.05.09)
  - Italian ban on a consortium participating in same tender as members of that consortium (**C-376/08 *Serrantoni*** 23.12.09)
- States may apply exclusions aimed at ensuring equal treatment and transparency, but only if proportionate

## **C-299/08 *Commission v France* 10.12.09:** Directive's award procedures are exhaustive

- French Public Procurement Code laid down special procedure for "definition contracts"
- holder of initial definition contract was given preference for subsequent contracts
- ECJ held: Directive 2004/18 exhaustively lists the award procedures permitted (open, restricted, competitive dialogue and negotiated)
- definition contract procedure was not a form of competitive dialogue: it covered several different contracts, not just one



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## **6. EC Treaty requirements to advertise public contracts falling outside the Directives**

# Treaty principles and *Telaustria*

- TFEU principles of non-discrimination, equal treatment and transparency apply even if a public contract falls outside the procurement Directives
- **C-324/98 *Telaustria***: EU transparency obligation requires “a degree of advertising sufficient to enable the services concession to be opened up to competition”
- applied in subsequent ECJ rulings to:
  - public services concessions
  - licences for games of chance (**C-203/08 *Betfair***)
  - Part B services (e.g. ambulance services)
  - below-threshold contracts

# The need for cross-border interest

- Treaty principles apply only if the contract is of “certain cross-border interest” to suppliers in other EU States (e.g. **C-507/03 *Com v Ireland*** + **C-119/06 *Com v Italy***)
- test softened to “may be of interest” in C-91/08 *Wall*
- **C-147/06 *SECAP***: relevant factors include:
  - value: no cross-border interest if value is “very modest” (the Directives’ thresholds “serve only as a guideline”)
  - place of performance: near borders, even low-value contracts may attract foreign interest

# Commission Communication 23.06.06

(OJ C179/2, 01.08.06)

- non-binding guidance on Treaty requirements for public contracts outside the EU Directives
- whether advertising required depends on circumstances, including subject-matter, value and place of performance
- various options suggested for advertising, e.g. via press, authority's own website or national portals
- whole procedure must be fair, non-discriminatory and open to judicial review

# T-258/06 *Germany v Commission*

20.05.10

- Germany claimed Communication unlawful, as it set out new rules and amounted to *de facto* legislation
- supported by six Member States + European Parliament
- General Court dismissed challenge as inadmissible
- Communication merely confirms ECJ case law; it does not create new obligations or binding legal effects
- Court confirms that derogations under the Directives (urgency, exclusive rights, etc) also apply under Treaty

# Other requirements “transposed” by ECJ from the Directives to the Treaty

- *Teckal* test defining the exemption for “in-house” contracts: C-458/03 *Parking Brixen* (services concession)
- duty to re-advertise if there are “material changes” to an existing contract or concession: C-91/08 *Wall v Frankfurt*
- ban on automatic exclusion of abnormally low tenders: C-147/06 *SECAP* (sub-threshold contracts)
- C-532/06 *Lianakis??*
  - advance disclosure of all sub-criteria + weightings
  - distinction between selection and award criteria?

# 7. Overall conclusions

- Ever-growing body of ECJ case law on procurement issues
- Important recent rulings on numerous issues such as:
  - distinction between works contracts and land deals
  - exemption for “in-house” awards
  - whether contract changes give rise to a new award
  - content and disclosure of award criteria
  - duty to advertise under EC Treaty
- Some issues not yet clarified, e.g. availability and conduct of the competitive dialogue procedure