

Presentation subject - III. Panel

Panel 3
Public procurement -
Compliance audit of the European and national
competition / award principles

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Outline

1. Importance of public procurement
2. Legal foundations
3. Public procurement law principles
4. Services of general economic interest (SGEI)
5. Audit examples
 - Trier State Garden Show
 - Schlosshotel Bad Bergzabern
 - Landau residential development

1. Significance of public procurement (1): Economic dimension



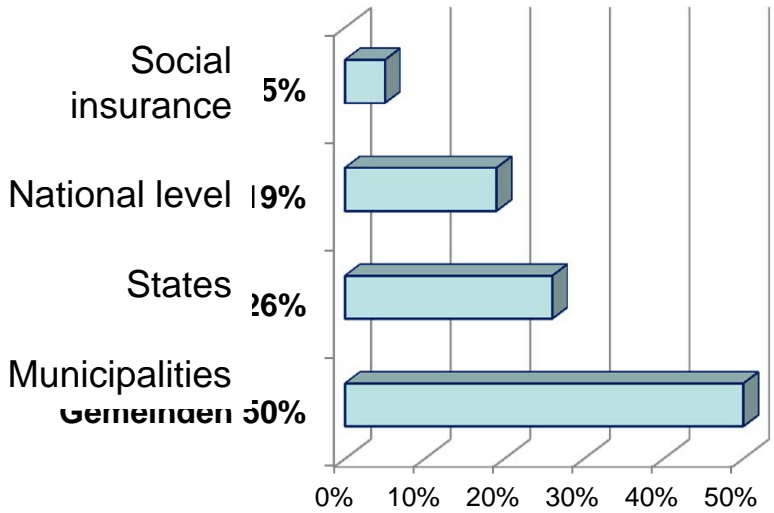
- Public contracts in the EU are awarded to the value of about €2,400 billion each year.
- This is equivalent to about 19.0% of the EU's gross domestic product.



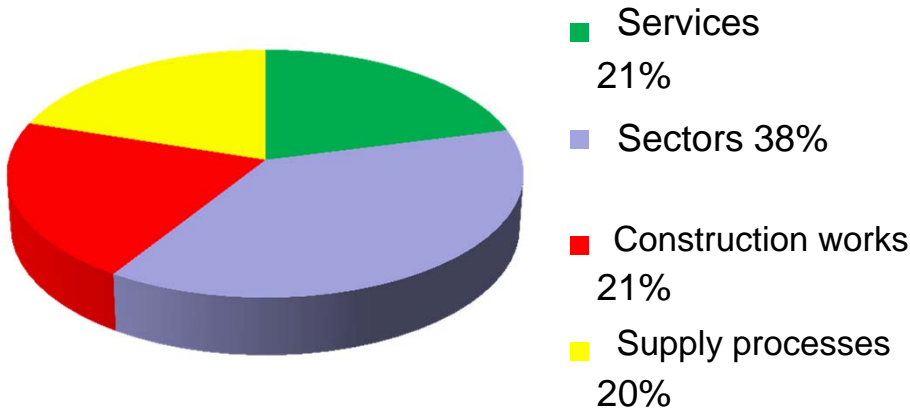
- In Germany, the market volume of public contracts is about €500 billion each year.
- This is equivalent to about 19.1% of Germany's gross domestic product.

1. Significance of public procurement (2): Distribution of contracts

Contracting authority



Areas

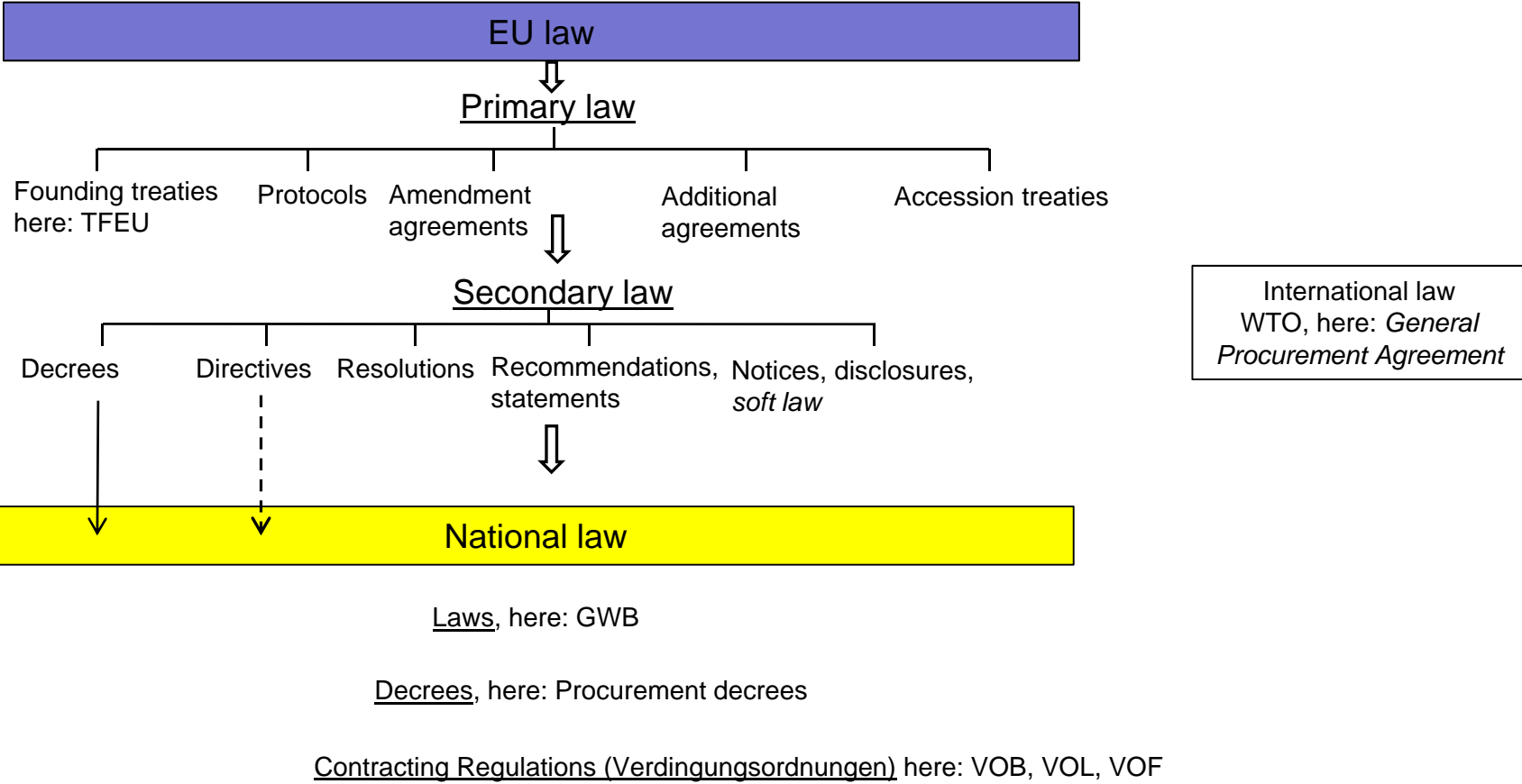


1. Significance of public procurement (3): Legal objectives

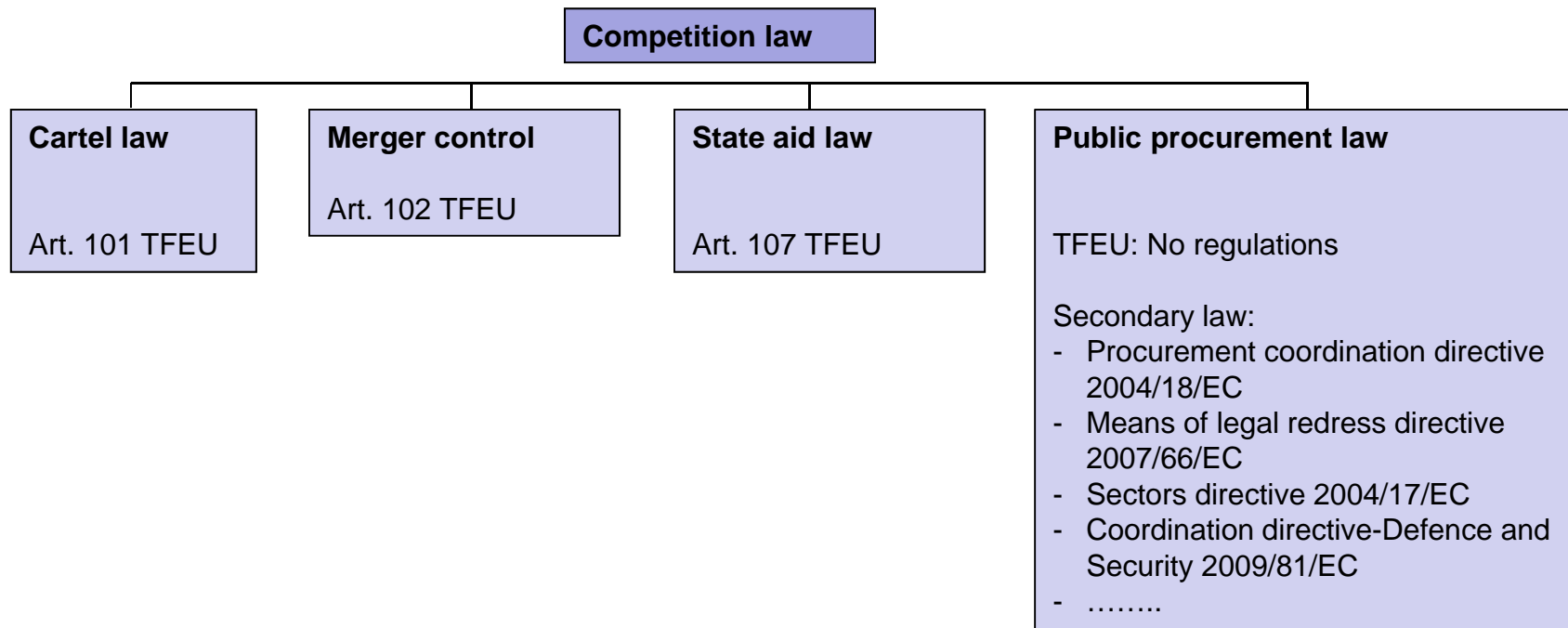
Applicable objectives of the public procurement law:

- Ensuring economic use of state resources
- Monitoring of the use of state resources
- Market overview
- Economic governance
- Ligation of influence exertion with non-allocation in public tenders by third parties
- Prevention and control of corruption

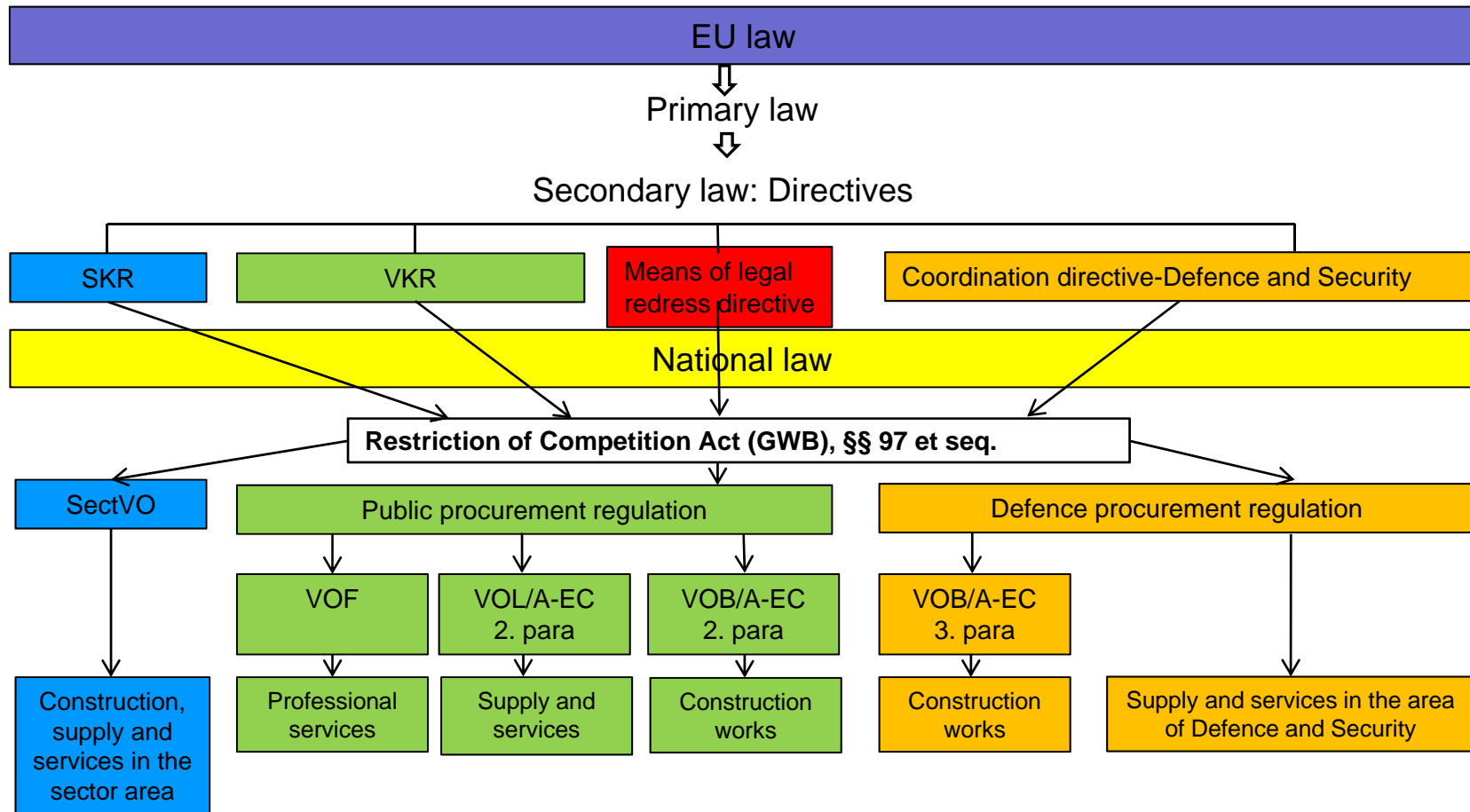
2. Legal foundations (1): Hierarchy of norms



2. Legal foundations (2): EU rules on competition

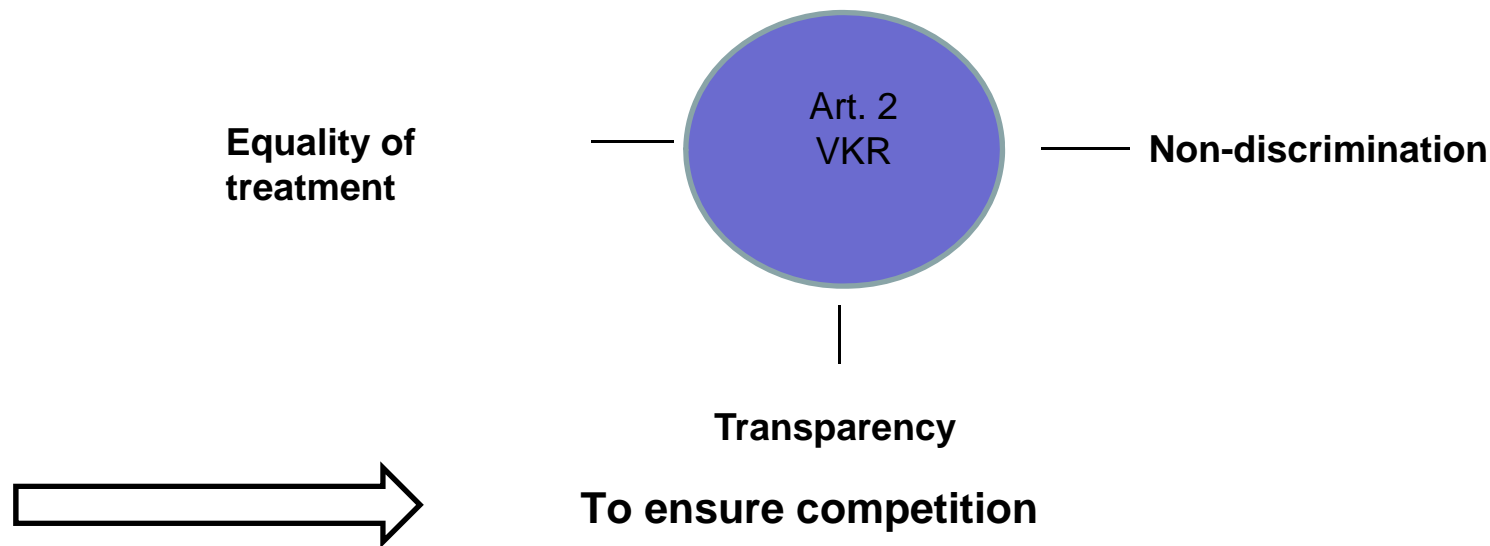


2. Legal foundations (3): *National* implementation



3. Public procurement law principles (1): EU law

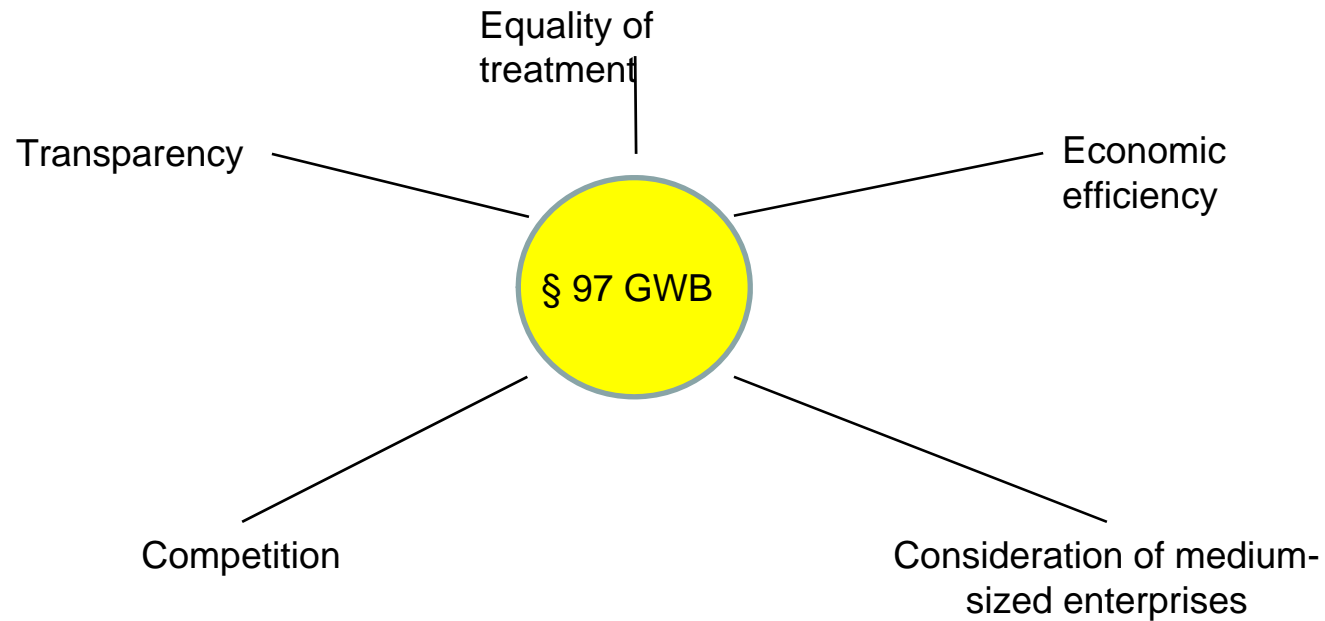
The complete public procurement law based on a few distinctive *principles*:



Derivation from the normalized fundamental freedoms in the TFEU of free movement of goods, freedom of establishment and freedom to provide services as well as of undistorted competition, which is likewise essential for the completion of the internal market.

These principles shape - in one form or another - also the other competition regulations as well as the other relevant legislation for the EU internal market on the whole.

3. Public procurement law principles (2): National public procurement law



3. Public procurement law principles (3): Transparency

Notice of intentional procurement plan

Prior information and notice of the procurement in the Supplement to the Official Journal of the EU which ensures bidders the same information (Art. 35, Art. 36 VKR).

Prior information of the public contracting authority before procurement procedures

Unsuccessful bidders are informed of the name of the intentional successful bidder and the reason for the rejection of their tender before the contract award– legal protection of the bidders (Art. 41 VKR).

Information obligations of the public contracting authority after procurement procedures

Public contracting authorities have to arrange an announcement regarding the contract award in the Official Journal of the EU. The same applies in the event of cancellation of the procurement procedure (Art. 35 VKR).

Documentation of the procurement action (contract award notice)

The report must include the individual stages of the process, the measures, the findings as well as the reasons for each decision (legal protection) (Art. 43 VKR).



3. Public procurement law principles (4): Equality of treatment and non-discrimination

Verification of the suitability of the bidder (as a rule, determined by the public contracting authority)

- Reasons for exclusion: Criminal proceedings in respect of bribery, fraud, money laundering, etc., opening of insolvency proceedings, grave professional misconduct among others (Art. 45 VKR).
- Suitability to pursue the professional activity: Certificate of registration in the professional or trade register of the country of origin (Art. 46 VKR).
- Economic and financial capacity: professional risk indemnity insurance, total turnover and turnover for the area put out to tender, bank statements etc. (Art. 47 VKR).
- Technical and / or professional capacity: List of services provided over the past five years, information regarding the number and qualification of personnel, type of technical equipment etc. (Art. 48 VKR).
- Additionally possible: quality assurance standards and standards for environmental management (Art. 49 and Art. 50 VKR).
- The suitability can also be established through prequalification in the official lists or by means of certification through public or private bodies (Art. 52 VKR).

3. Public procurement law principles (5): Equality of treatment and non-discrimination

Standards / Technical specifications

- European norms, technical specifications and approvals have precedence over their national equivalents (Art. 23 para. 3 VKR).
- The specifications of national standards possibly constitute a discrimination if there are European standards present:

The Irish town of *Dundalk* had included a clause in the invitation to tender for the expansion of its drinking water supply, after the bidders for the pressure pipelines were required to submit a certificate issued in accordance with the Irish standard mark licensing scheme of the National Institute for Industrial Research and Standards on compliance of the tubes with the Irish standard 188-175. However, there was already an ISO standard. The ECJ interpreted this as an infringement of the free movement of goods in its judgment of 22 September 1988.

- It is expressly forbidden to refer to technical specifications, products of a specific make or source or a particular process, which have the effect of giving preference to or excluding certain companies. Such prohibition shall also cover the indication of trade marks, patents or types, or a specific origin or production. (Art. 23 para. 8 VKR).

3. Public procurement law principles (6): To ensure competition



EU law



National law

Competitive procurement processes

(Art. 28 – 31 VKR)

- Open procedure
- Closed procedure

- Negotiated procedure
- Competitive dialogue (with particularly complex contracts)

Competitive procurement processes

(§ 3 VOB)

- Public invitation to tender
- Restricted invitation to tender after public participation competition
- Restricted invitation to tender
- Direct award

Threshold value (Art. 7 VKR)

- Construction contracts: €5,000,000
- Supply and service contracts: €200,000
- Sector contracts in terms of supply and service contracts: €400,000
- Highest or upper governmental authorities in terms of supply and service contracts: €130,000

Threshold value (§ 3 VOB)

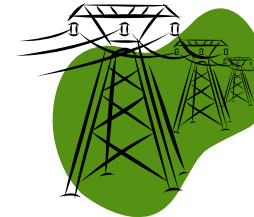
- Restricted invitation to tender: Depending on the nature of the trade €50,000, €100,000 or €150,000.
- Direct award : €10,000.

4. Services of general economic interest (SGEI)

The EU is \Rightarrow *market orientated*.

However the EU also recognises, that there can be certain service(s), which serve the
 \Rightarrow *general public interest*

and therefore (may) require special arrangements. With these so-called services of general economic interest (SGEI), the provision of facilities for the general public is necessary, e.g.:



What shall apply in the public procurement law?

In terms of the areas of the public procurement law, these are reflected in certain privileges - only - for the benefit of the sectoral contracting authorities, including :

- higher threshold values for supplies and services (€400,000 instead of €200,000),
- free choice of the tender procedure.

5. Infringements of public procurement law: Audit examples



Trier State Garden Show



Schlosshotel
Bad Bergzabern



Landau residential
development

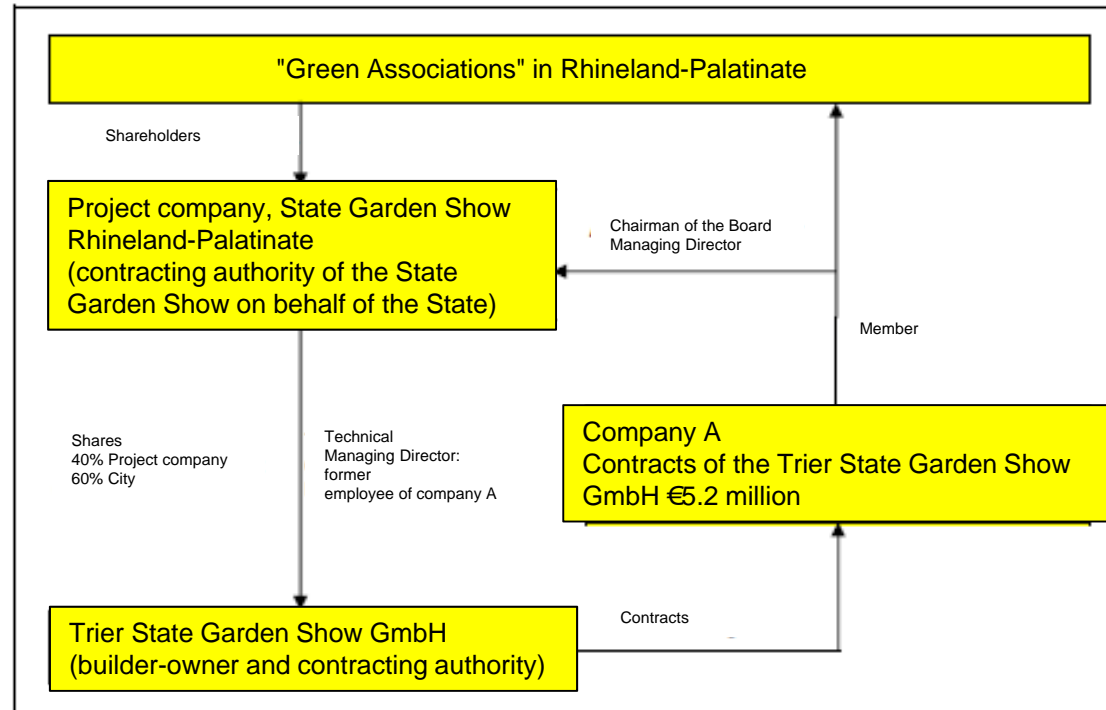
5. Trier State Garden Show (1): History



History

- The Trier State Garden Show took place from April to October 2004 on a former military barracks site. It was attended by 720,000 people.
- State Garden Shows serve to present innovative garden and landscape designs to the general public. In addition, they often pave the way for the development and redevelopment of urban problematic areas.
- Parts of the compound, such as gardens, playgrounds, paths or water basins were commissioned for reuse - in the present case for the facilities of a new neighbourhood.
- The construction costs amounted to €13.2 million.

5 Trier State Garden Show (2): Integration of personnel



Due to the personnel interrelation between contracting authority and contractor, almost all the contracts were awarded to member enterprises of the so-called "Green Associations" in Rhineland-Palatinate and Saarland. In particular, Company A received a particularly high proportion of contracts with €5.2 million. Their business owner was chairman of the board of the joint venture company (contracting authority of the State Garden Show), a former senior employee holding the position of Technical Director of the Trier State Garden Show GmbH (contracting authority).

5. Trier State Garden Show (3): Infringements of public procurement law



Errors with the publication

- It was only published, that landscaping, earthworks and path construction works were to be carried out.
- The construction contracts were not described with sufficient accuracy (Art. 35 para. 1c VKR).
- In the national publications, the project was referred to as the State Garden Show. In the Supplement to the Official Journal of the EU, there was only talk of a "parkland".
- National publications shall not contain more information than EU-wide notices (Art. 36 para. 5 VKR).
- The eligibility criteria was formulated so that only landscape park construction companies could meet it. Large parts of the services could have been provided by other business groups, e.g. civil engineering workers.
- The requirements of the eligibility criteria were unreasonably high and restricted competition in an inadmissible manner (Art. 2 VKR).
- No award criteria was specified.
- The award criteria shall be designated with their weighting (Art. 40 para. 5 e VKR).

5. Trier State Garden Show (4): Infringements of public procurement law



Errors with tender specifications

- Certain products were determined in the case of numerous positions of tender specifications.
- Infringement against the requirement of product-neutral tendering (Art. 23 para. 8 VKR).
- Often, the tender specifications contained numerous positional requirements. Positional requirements may only be used in exceptional circumstances, when the necessity of service is not pre-determined.
- The use of positional requirements infringes the requirement of explicit and exhaustive tender specifications and carries the risk of procurement manipulations and competition distortions (Art. 2 VKR).

5. Trier State Garden Show (5): Infringements of public procurement law



Errors in the evaluation of tenders

- During the evaluation of tenders for the playground, Company A rebuked three points on the offer of the minimum bidder, although it could have no knowledge of the content. Only the contracting authority has the appropriate information at their disposal.
- The contracting authority may not disclose confidential information of an offer to any other bidder (Art. 6 VKR).
- In the case of earthworks, with a contract value of €3 million, company A did not offer adequate prices for individual positions to a certain extent (1 cent positions). Neither the engineering office nor the contracting authority cleared up the prices. The 1-cent positions were never implemented. Thus, company A had a significant competitive advantage, which eventually helped it to the contract.
- This infringed the principle of equal treatment and competitiveness (Art. 2 VKR).

5. Schlosshotel Bergzaberner Hof (1): History

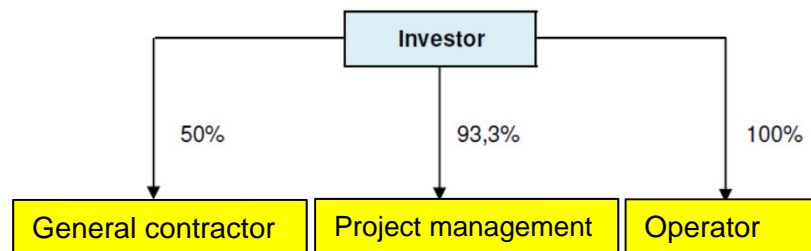


History

- A private investor acquired a listed building in the centre of the town Bad Bergzabern in order to build a four-star hotel there.
- After the costs got out of hand, he sold the hotel during construction work at an inflated price to the town. He still further remained the hotel operator, however, and has paid a lease of €3 /m² since then.
- The town granted him the hotel after the expiration period of ten years for a purchase price of €1.4 million, although the production costs amounted to more than €7.4 million.

5. Schlosshotel Bergzaberner Hof (2): Planning services

Holdings of the investor



In the implementation of construction measures, the investor commissioned a general contractor and a project controller, at whose offices he himself was significantly involved.

General contractor services

- The investor agreed a flat rate fee of €210,000 with his general contractor. The fee was set too low in order to run under the threshold for Europe-wide invitations of tenders.
- The calculation of the threshold value for a public procurement contract may not be made with the intention of avoiding the application of the VKR (Art. 9 VKR).
- A month before the contract conclusion, the threshold value was lowered from €211,000 to €206,000. This was overlooked by the investor.
- The agreed fee laid above the threshold value at the time of the contract conclusion. The direct award violated the order of the European tender (Art. 8 VKR).

Project management services

Also in the allocation of project management services, the threshold value was incorrectly calculated to avoid a Europe-wide tender (Art. 9 VKR).

5. Schlosshotel Bergzaberner Hof (3): Kitchen equipment



Kitchen equipment

- Specialist planners, kitchen appliance manufacturer P and bidder S operating under the same address.
- Project engineer problems - The commissioning of a specialist planner who was working for a company involved in the competition at the same time, distorting the competition (ECJ judgment of 3 March 2005 - Fabricom SA against Belgium).
- The specialist planner provided exclusive products of the kitchen equipment manufacturer P in the tender specifications.
- Infringement of the requirement of product-neutral tendering (Art. 23 para. 8 VKR).
- In the evaluation of tenders, the minimum bidder was excluded because he had not offered the indicated kitchen appliances of the manufacturer P. As a result, bidder S was awarded the contract.
- This infringed the principle of equal treatment and competitiveness (Art. 2 VKR).

5. Former military barracks in Landau (1): History / value determination



History

- The city intends to convert a former military barracks site into a new residential area.
- It commissioned an architectural firm with an expertise in the renovation costs of existing buildings. They came to the expert opinion that renovation was in fact more favourable than the construction of new buildings.

Line of sight



Assesment of value

- The local advisory committee disregarded the findings of the architectural expert report. They identified :

Land value:	€8.2 Mill.
<u>Negative value of the building :</u>	<u>- €5.5 Mill.</u>
Market value:	€2.7 Mio.
- The market value determined by the advisory committee was €5.5 million to low.

5. Former military barracks in Landau (2): Flaws in the invitation to tender



Flaws in the invitation to tender

- The city called for a disproportionately high processing expenditure :
 - o Elevations, floor plans, sections in a 1:100 scale for a building area of approximately 20.000 m².
 - o Constructive details in a 1:50 scale.
 - o Dimensional representations.
 - o Energy concepts with mathematically verifiable energy consumption characteristics.
 - o Concepts to the sustainability of buildings etc.
- The deadlines for the application and for delivering of planning services were too short.
- This meant that only the local investor delivered a tender wherein it can be assumed that he already had "preliminaries".
- Infringement of the principle of equal treatment and transparent competition (Art. 2 VKR).

5. Former military barracks in Landau (3): Valuation criteria / summary

Evaluation criteria

- Architectural quality - 40%
- Energy efficiency / ecology - 30%
- Purchase price – 30 %

- Too low of an exposure to the purchase price.
- The criteria of architectural quality and energy efficiency / ecology were not further differentiated. This opened up the city to more or less arbitrary evaluation options.
- Infringement of the principle of equal treatment and transparent competition (Art. 2 VKR).

Summary:

- The invitation to tender was tailored exclusively to the local investor.
- Other applicants realised this and / or shied away from disproportionately high expenditure.
- The competition was restricted in an improper way (Art. 2 VKR) .

5. Former military barracks in Landau (4): The End

CAUGHT COLD

The State auditors-vote for the sale of land on Cornichonstrasse has hit Landau hard like a bomb. Many citizens were gobsmacked as they heard the words from Speyer. The many millions was the talk of the town.

