

# EUROPA-INSTITUT

DER UNIVERSITÄT DES SAARLANDES

INTERNATIONAL LAW SCHOOL

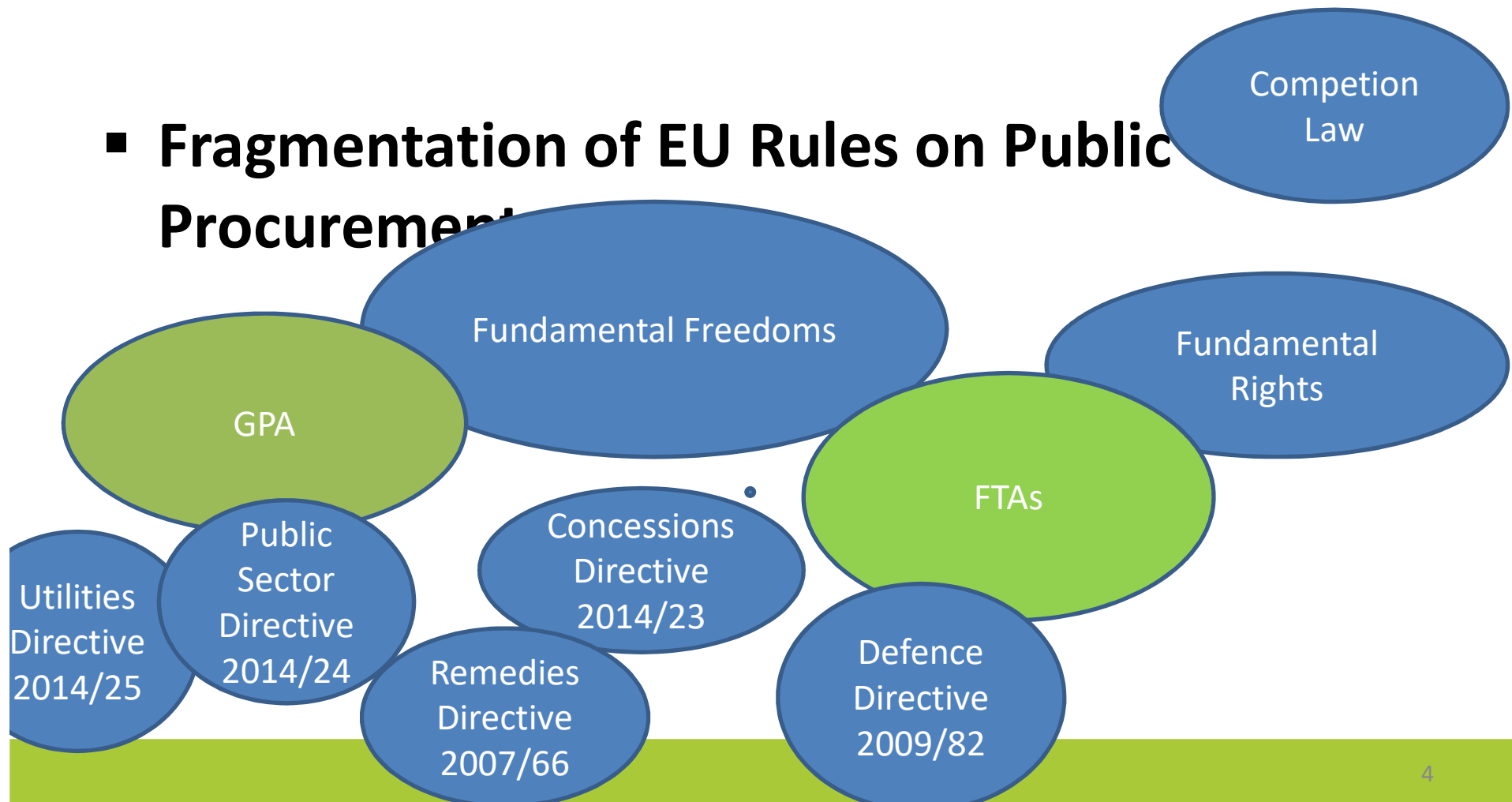


# Public Procurement and Foreign Subsidies

**Public procurement refers to the process by which public authorities, such as government departments or local authorities, purchase work, goods or services from companies**

# Openness of the EU Procurement Market - An Introduction -

## ■ Fragmentation of EU Rules on Public Procurement



## Obligation to keep being open?

- In which way is EU bound by international law to keep its procurement market open?
  - No customary international law in this regard
  - International treaties?
    - GPA
    - FTAs
    - Specific bilateral treaties on PP

# Multilateral Obligations

## GATT and GATS do not apply to Government Procurement

### Agreement on Government Procurement (GPA)

- 20 Members (EU + 19 States)
- concluded in the World Trade Organisation (WTO) framework
- allows operators from the 19 other participating WTO partners to bid for certain public contracts in the EU, and EU companies to bid for contracts of 19 other WTO partners.
- Transparency, non-discrimination (nt + mfn)

# Bilateral Obligations

## Bilateral Free Trade Agreements

- EU has concluded free-trade agreements (FTAs)
- always chapters on public procurement
  - With non-GPA members: very elaborated chapters
  - With GPA members: GPA principles apply, extended scope of application
- give companies of the parties better access to each others' public procurement markets.
- examples: recent trade agreements with Canada and Japan.

# Starting Point: The Openness of the EU Procurement Market

Why does it matter????

Size of the EU Procurement Market:

- Government/Public Procurement accounts for 10 to 20 % of GDP
- 2016 the EU average PP expenditure was 13.4 %
- 2018 total PP market of 2 trillion €



# Starting Point: The Openness of the EU Procurement Market

80-90 % off all EU MS Procurement is “open to the world”

Long tradition:

- Germany: Public procurement market is open since 1960ies (but no full legal remedies)
- EU: Procurement Market is generally open
  - Market access, non-discrimination of foreign bidders
  - Thresholds: Services, goods: 200.000 €; construction 5 Mio. €

# Starting Point: The Openness of the EU Procurement Market

Comparison:

USA: appr. 35% is open to foreign bidders

Japan: appr. 28 % is open to foreign bidders

China:

- Procurement market more or less closed
- no market access
- multiple years of negotiations regarding China`s accession to the GPA

- Open to the world as a general principle of EU Procurement Law --- no international obligation!!
  
- Laid down in directives
- But: exceptions possible
  - Art. 85 Utilities Directive
  - Recital 18 Defence Directive
  - Abnormal Low Prices
  - Violation of Labor Standards
  - Upcoming: International Procurement Instrument Regulation

# Exceptions to global openness



- Art. 85 Utilities Directive
  - Allows to reject tenders if more than 50% of the products come from third countries
  - That are not covered by multilateral or bilateral agreements with EU
  - If third countries are not covered by the GPA or a bilateral agreement, the tender may be rejected.

# Exceptions to global openness



- Recital 18 Defence Directive
  - Up to Member States to accept bids from third countries or not
  
  - These procurements are not included in the GPA or in existing bilateral agreements.
  - Public buyers do not have to give access to third country operators.

# Exceptions to global openness



- Art. 69 2014/24
- Abnormally Low prices/tender
  - Refers to situation where the price offered by the bidder raises doubts as to whether the offer is economically sustainable
  - Will it deliver the contracts requirements?
  - Abnormally low tenders should be excluded

# Exceptions to global openness



- Decision to exclude foreign bidders usually taken by procuring entities on sub governmental level
- Here objectif: „value for money“ and creation of competition
- Not: national security; distorsion of competition within the internal market

# International Procurement Instrument

The Commission has proposed the International Procurement Instrument (IPI)

- to foster reciprocity and
- provide leverage in order to negotiate with third countries the opening of their procurement markets for EU business.
- need to have such leverage to counter discriminatory measures and outright market closures.
- aimed at encouraging trade partners to negotiate with EU on opening p



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