

# The Digital Solidarity Clause – An Analysis in the Light of Contract, Public Procurement, and Competition Law

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## I. The Digital Solidarity Fund and its Financing Mechanism

PIERRE TERCIER has shown throughout his professional carrier how fruitful the combination of the principles of different legal segments can become in the law society. His outstanding expertise in contract law<sup>1</sup> and his far-reaching involvement in the development of competition law<sup>2</sup> clearly show his influence on the Swiss legal environment.

### A. The Inception of the Digital Solidarity Fund

In order to face the challenges posed by the ever evolving Information Society, the international community decided to gather: In December 2001, upon proposition of the International Telecommunications Union (ITU) and in order to provide for effective means to achieve the goals set at the Millennium Summit, the UN resolved that a high-level summit should be convened to discuss global issues relating to the Information Society at the level of the heads of states and government and with active participation of non-governmental organisations, the civil society and the private sector<sup>3</sup>. The World Summit on the Information Society (WSIS) was held in two phases, in Geneva from December 10 to 12, 2003 and in Tunis from November 16 to 18, 2005.

The main purpose of the WSIS was to set out a “common vision and understanding of the Information Society”, to comprehensively discuss the “whole range of relevant issues related to the Information Society”<sup>4</sup>, and particularly to find concrete means towards the bridging of the worrying digital divide<sup>5</sup>. However, already in the preparatory process, it became clear that the questions on how the digital divide should be closed and especially how the investments needed should be financed were far away from an international consensus<sup>6</sup>.

Nevertheless, during the discussions at the WSIS, the idea of creating a Global Fund gathering financial means to address the digital divide emerged, supported by the African Union and its Member countries<sup>7</sup>. Although the proposal did not immediately

<sup>1</sup> TERCIER, *Les contrats spéciaux*; TERCIER, *Le point sur la partie spéciale du droit des obligations*, RSJ 1995 onwards.

<sup>2</sup> PIERRE TERCIER has been member and chairman of the Swiss Competition Authority and is highly appreciated commentator of the Act on Cartels (TERCIER et al. (eds.), *Droit de la concurrence*).

<sup>3</sup> ITU Resolution 73 (Minneapolis 1998); UN, Resolution A/RES/56/183 adopted by the General Assembly on January 31, 2002; UN Resolution A/RES/57/238 adopted by the General Assembly on January 31, 2003; WEBER, *Legal Framework*, 27.

<sup>4</sup> UN, Resolution A/RES/56/183, recital clause 3; WEBER, *Legal Framework*, 27.

<sup>5</sup> The digital divide can be defined as “a gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard both to their opportunities to access information and communication technologies (ICT) and to their use of the Internet for a wide variety of activities” (OECD [2001], 5).

<sup>6</sup> On another front, the question of Internet governance also raised disagreements; nevertheless, the Geneva Declaration of Principles, WSIS-03/GENEVA/DOC/0004, the Geneva Plan of Action, WSIS-03/GENEVA/DOC/0005, and the Tunis Commitment, WSIS-05/TUNIS/DOC/7, and Tunis Agenda for the Information Society, WSIS-05/TUNIS/DOC/6 (rev. 1), were adopted as outcome documents.

<sup>7</sup> See notably WSIS, Report of the African Regional Conference for WSIS, Bamako May 28-30, 2002, WSIS/PC-21/DOC/0004, 6; WSIS, African Group, Proposed Comments and Amendments from the

raise general enthusiasm at the WSIS<sup>8</sup>, the inception of the Digital Solidarity Fund (DSF) took a positive turn with the active support of the local authorities at the Cities and Local Authorities Summit held in the aftermath of the WSIS preparatory phases in Lyon on December 4 and 5, 2003<sup>9</sup>.

The DSF was officially inaugurated on March 14, 2005 as the “Digital Solidarity Fund Foundation”<sup>10</sup>, a foundation constituted under Swiss Law with legal domicile in Geneva.

## B. An Innovative Financing Mechanism

Besides providing for the traditional possibility to grant financial support through a donation to the foundation, the promoters of the Digital Solidarity Fund came up with an innovative financing mechanism to collect resources, namely the 1% digital solidarity principle. This 1% digital solidarity principle – also known as Geneva principle – consists in a clause that can be inserted in a contract on ICT goods or services, providing that a seller or service provider must transfer 1% of the total transaction value to the Digital Solidarity Fund Foundation.

Recalling the fact that the DSF has been created under the impetus of local authorities and cities, the instrument is primarily meant for public institutions to adopt: Basically, a public entity subscribing to the Geneva principle then requests, in its contracts, from private companies supplying ICT (equipment, software, services, etc.) to transfer 1% of the total value of the transaction directly to the DSF. “The clause states that suppliers responding these calls for bids undertake to donate 1% of the contract value, deducted from their profit margin, to the Global Digital Solidarity Fund”<sup>11</sup>: The 1% consists in a contribution that is paid by companies winning public bids out of their profit margin. Therefore, the mechanism relies on a public entity including a so-called digital solidarity clause in all its invitations to tender for goods or services related to ICT.

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Bureau of the African Group to the WSIS, Tunis September 1–3, 2003, WSIS/PC-3/CONTR/0163, 2 and 4; WSIS, Contribution from Senegal to PrepCom-3, WSIS/PC/CONTR/157-F, 2 s.

<sup>8</sup> The initiative received support from many other developing countries, among which Brazil, India, China and South Africa; the Organisation of the Islamic Conference (OIC) also expressed its support. In contrast, many developed countries, like the United States, the European Union, and Japan were opposed to the insertion of the proposal in the WSIS documents, so as the majority of the private sector (for more details, see WEBER/MENOUD, Chap. 3 § 3.I.).

<sup>9</sup> World Summit of Cities and Local Authorities on the Information Society, Declaration of December 5, 2003; the inception of the Digital Solidarity Fund was announced shortly afterwards at the occasion of the last plenary session of the WSIS by the mayors of Geneva and Lyon with initial contributions from the cities of Geneva and Lyon and the Republic of Senegal (WSIS, Report from the Cities and Local Authorities in the IS, Statement of Mr. G. Collomb, Mayor of Lyon, and Mr. Ch. Ferrazino, Mayor of Geneva, December 12, 2003).

<sup>10</sup> In French “Fondation Fonds de Solidarité Numérique” (Art. 1 Statutes of the Digital Solidarity Fund Foundation, available at [www.dsf-fsn.org/cms/content/view/27/61/lang,en](http://www.dsf-fsn.org/cms/content/view/27/61/lang,en)).

<sup>11</sup> DSF, The 1% Principle, [www.dsf-fsn.org/cms/content/view/39/73/lang,en](http://www.dsf-fsn.org/cms/content/view/39/73/lang,en).

From the perspective of the public institution, this financing system has also the advantage of being quite simple to implement: It can be easily applied following three steps<sup>12</sup>: First, the public entity has to adopt the Geneva principle pursuant to its administrative regulations and competences; once the decision is formally taken, the institution has to inform the DSF Foundation by sending its decision to introduce a 1% digital solidarity clause in its calls for bids by mail or by post. Second, the digital solidarity clause can then be included in the calls for bids for the supply of ICT related goods or services. Third, when the contract has been awarded, the institution solely has to inform the DSF Foundation on the name of the successful bidder and the value of the contract using a DSF “information about the contract” form, which is available online<sup>13</sup>; this information is treated with complete confidentiality by the DSF.

This funding instrument, which presents the advantages of being permanent and voluntary-based, is undoubtedly an opportunity to reconcile the need for an innovative financing mechanism with Nation States’ apparent reluctance for a compulsory scheme, hence the obtained wide international recognition and political support<sup>14</sup>. Although, the Digital Solidarity Fund is still in a launching phase<sup>15</sup>, the digital solidarity clause has already been adopted and implemented in Switzerland by the municipalities of Geneva and Lausanne, as well as the *Hôpitaux Universitaire de Genève* (HUG) and the *Centre hospitalier universitaire de Lausanne* (CHUV), i.e. the university hospitals of Geneva and Lausanne. The Geneva principle is also applied by the Republic of Senegal.

## II. Aspects of Contract Law

### A. Qualifying the Digital Solidarity Clause

The 1% digital solidarity clause is a provision entailed in a contract between a public entity and a private company hired to supply ICT goods or services after a public procurement process; the clause is a contractual provision stating that the private company party to the contract undertakes to donate 1% of the total transaction value to the Digital Solidarity Fund Foundation. Contract law is still predominantly national law; since this contribution cannot address a large number of different legal systems and since according to the rules of international private law (conflict rules of law) the legal provisions of the domicile of the goods’ or services’ provider (not the domicile of the delivery’s recipient) would apply, the subsequent comments to the aspects of contract law are given by applying Swiss law due to the involvement of Swiss entities.

<sup>12</sup> DSF, Applying the “1% digital solidarity” principle, [www.dsf-fsn.org/cms/content/view/40/74/lang,en/](http://www.dsf-fsn.org/cms/content/view/40/74/lang,en/).

<sup>13</sup> Available at [www.dsf-fsn.org/cms/documents/en/pdf/information\\_contract\\_en.pdf](http://www.dsf-fsn.org/cms/documents/en/pdf/information_contract_en.pdf).

<sup>14</sup> For a comprehensive list of international declarations regarding the DSF, see [www.dsf-fsn.org/cms/content/view/26/60/lang,en/](http://www.dsf-fsn.org/cms/content/view/26/60/lang,en/).

<sup>15</sup> See WEBER/MENOUD, Chap. 3 § 3.II.

## 1. *Donation*

### a. *Definition*

Looking at the fact that the 1% contribution to the DSF is paid without corresponding consideration, the donation element of this money transfer needs further elaboration. Under Swiss law, a donation constitutes “a contract through which a person undertakes to transfer property between living persons without corresponding consideration”<sup>16</sup>. The unclear terms of Art. 239 CO – which put the emphasis on the “transfer” – should not lure, as the donation constitutes a contract under Swiss law<sup>17</sup>; the donation must be qualified as an **unilateral contract**, because only one party undertakes a performance<sup>18</sup>.

Two kinds of legal acts that are covered by the notion of donation can be distinguished, referring to the moment at which the execution of the commitment to donate is completed: (1) The case in which the commitment and the execution happen concurrently is qualified as a **donation from hand to hand** (CO 242)<sup>19</sup>; (2) if the parties commit to donate, but provide for a later execution, the law speaks of a **promise to make a donation** (CO 243)<sup>20</sup>.

### b. *Elements of a Donation*

A contract of donation presents two essential elements: (1) A transfer of goods from the donor’s property to the donee’s assets<sup>21</sup>, on the one hand, and (2) the absence of corresponding consideration, on the other.

(1) **Transfer of property**: This aspect of a donation mainly implies that the goods intended to be transferred must be in the assets of the donor at the time of the contract’s conclusion<sup>22</sup>. Consequently, the impoverishment of the donor must necessarily be mirrored by an enrichment of the beneficiary, through either an increase in his assets or a

<sup>16</sup> TERCIER, *Les contrats spéciaux*, N 1554; this definition proposal goes beyond the text of Art. 239 CO, which puts the emphasis on the “transfer” between living persons and is thus slightly unclear.

<sup>17</sup> Swiss law distinguishes itself from other legal systems, for example in France, in which the donation constitutes a unilateral act of disposal (see TERCIER, *Les contrats spéciaux*, N 1557).

<sup>18</sup> TERCIER, *Les contrats spéciaux*, N 1556; CR-CO I – BADDELEY, N 5 ss ad Art. 239; BaK-OR I – VOGT, N 3 ad Art. 239.

<sup>19</sup> The donation from hand to hand is not an abstract act of disposal in which the transfer *in se* would constitute the donation, rather it is comprised of an agreement generating obligations and of an execution, both happening instantly (same opinion, TERCIER, *Les contrats spéciaux*, N 1613; CR-CO I – BADDELEY, N 5 s ad Art. 242; BaK-OR I – VOGT, N 1 ad Art. 242; ZK-OSER/SCHÖNENBERGER, N 22 ad Art. 239; VAN DE SANDT, N 679; BUCHER, 147 s; ENGEL, 116; CAVIN, 187; BGE 105 II 104/107 = JT 1979 I 489/492); dissenting and qualifying the donation from hand to hand as an abstract act of disposal, MAISSEN, N 25 ss, who for this reason favours the German designation “Realschenkung” instead of the more narrow term “Handschenkung” or “Schenkung von Hand zu Hand” (MAISSEN, N 34).

<sup>20</sup> See notably TERCIER, *Les contrats spéciaux*, N 1558 ss; CR-CO I – BADDELEY, N 12 ad Art. 239.

<sup>21</sup> In other words, the donor must transfer one of his assets to the donee (TERCIER, *Les contrats spéciaux*, N 1571).

<sup>22</sup> See for instance CR-CO I – BADDELEY, N 31 ss ad Art. 239; on the type of properties that can be the object of a donation, see BaK-OR I – VOGT, N 6 ss ad Art. 239.

decrease in his liabilities<sup>23</sup>. In the case of a promise to donate, the beneficiary is “enriched” of a claim towards the promising donor<sup>24</sup>.

(2) **Free nature of the attribution:** This legal criterion characterises the intention of the donor that underlies the contract of donation. The donation must be made with the sole intention to enrich the beneficiary, i.e. *animus donandi* or *causa donandi*<sup>25</sup>. The absence of a corresponding consideration is therefore the visible manifestation of this intention. In this respect it is important to precise that the concept of donative intent does not refer to the motives of the donation, which can be varied (generosity, gratitude, vanity, publicity needs, etc.) and are irrelevant, but rather to a more objective intent of the donor supposing his consciousness and will to become impoverished to the donee’s advantage<sup>26</sup>.

### c. *Qualification of the Digital Solidarity Clause*

As mentioned above, the digital solidarity clause is a contractual provision usually entailed in a public contract between a public entity and a private business (main contract).

An outline of the main characteristics of the digital solidarity clause permits to characterise the provision as a **promise to donate** according to Art. 243 section 1 CO: The private business (the donor) commits to transfer a part (1% at least) of the main contract’s price to the Digital Solidarity Fund (the donee) without immediate corresponding consideration; the execution is not carried out concurrently with the commitments, but happens at a later point<sup>27</sup>.

It is paramount to clarify the role of the different parties to the digital solidarity principle: In this particular and unusual constellation, the public authority adopting the mechanism in its public bids does not have the position of the donor: Indeed, the 1% digital solidarity is meant to be taken out of the private business’s margin issuing from the main contract. Therefore, it is the private company that is impoverished through this supplementary commitment undertaken in the main contract<sup>28</sup>.

<sup>23</sup> TERCIER, *Les contrats spéciaux*, N 1571; for more details, see CR-CO I – BADDELEY, N 38 ss ad Art. 239.

<sup>24</sup> See hereinafter at II.A.1.c (1).

<sup>25</sup> CAVIN, 185 s.

<sup>26</sup> TERCIER, *Les contrats spéciaux*, N 1573; MAISSEN N 120; CR-CO I – BADDELEY, N 26 ad Art. 239.

<sup>27</sup> It is important not to confuse a promise to give with a preliminary contract (Art. 22 CO): The promise to give is a contract in which the parties commit to an act of disposal whereas the preliminary contract is a contract in which the parties agree to enter into a subsequent contract in the future (see CR-CO I – DESSEMONTET, N 2 and 8 ad Art. 151).

<sup>28</sup> This is also mirrored by the fact that private ICT companies also have the possibility to apply the digital solidarity principle of their own initiative in all their contracts.

However, some points ensuing from this special constellation in which this promise to donate is made that raise questions which need to be looked into in more details<sup>29</sup>: These pertain to (1) the object of the donation and (2) the donative intent.

(1) **Object of the donation:** In the case of the digital solidarity clause, the donor promises to attribute a percentage of the main contract's total value, i.e. of the price paid by the public authority for the ICT goods or services delivered. The object of the donation is not in the patrimony of the donor at the moment at which the promise to give is made: Indeed, the public authority hasn't paid the agreed price yet. However, despite the narrow letter of Art. 239 CO, the doctrine admits that in the special case of the promise to give, the good itself does not have to be in the patrimony of the donor at the time of the commitment to donate: The promise gives then rise to a claim in favour of the donee and to a corresponding debt in the donor's liabilities<sup>30</sup>. The problems linked to a possible lack of donor's authority to dispose on the good are thus to be examined only at the time of the contract's execution<sup>31</sup>.

(2) **Donative intent:** In such a tripartite configuration – where the private company is in some way “obliged” to donate on the grounds of a contractual provision formulated by the public authority within a public procurement contract and mainly agrees for publicity and social communication reasons – the *animus donandi* appears difficult to perceive. Furthermore, the private enterprise may mainly accept to commit to a digital solidarity clause for publicity and social communication reasons. However, as mentioned above, the motives of the donation may be manifold and are irrelevant to the donative intent; what matters is that the donor is conscious and willing to be impoverished to the donee's advantage and that he therefore does not receive a direct corresponding consideration. The will and consciousness of the private company can be assumed, as the digital solidarity clause is a contractual provision entailed in an (supposedly valid) agreement reflecting the parties' mutual assent (CO 1). Moreover, the donor neither receives a direct corresponding consideration nor hopes to receive one. By transferring a part of its profit to the DSF, a business does therefore act with donative intent.

If the promise itself is made *donandi causa*, the subsequent act of attribution executing the promise is, for its part, made *solvendi causa*: In fact, the donor executes its obligation towards the Digital Solidarity Fund as well as its contractual obligation towards the public authority. This fact does not, however, impact on the free nature of the promise to donate, which should be, for the purpose of asserting the *animus donandi*, considered as a **whole process** made of different steps<sup>32</sup>.

<sup>29</sup> The aspects particularly ensuing from the three-sided relationship in which the clause is situated will be examined hereinafter at II.2; however, the aspects pertaining to particular points of the law of donations must be dealt with here.

<sup>30</sup> CR-CO I – BADDELEY, N 16 ad Art. 239; MAISSEN, N 218; CAVIN 183 N 1; BaK-OR I – VOGT, N 7 ad Art. 239.

<sup>31</sup> CAVIN 183 N 1.

<sup>32</sup> See also VAN DE SANDT, N 360 and 367; EITEL, 17.

d. *Consequences of the Qualification*

Qualifying the digital solidarity clause as a promise to donate has several implications with respect to the conclusion of the contract; these pertain to (1) the form of the contract and (2) the manifestation of the parties' mutual assent.

(1) A promise to donate requires the **written form** in order to be valid (CO 243)<sup>33</sup>. This prerequisite mainly serves to protect the donor against any impulsive commitment<sup>34</sup>. Consequently, all essential elements of a promise to give must take the form of a written agreement<sup>35</sup>, otherwise the contract is void<sup>36</sup>. The digital solidarity clause is entailed in the contract between the purchasing authority and the winning business following a public procurement procedure; such contracts are also submitted to the written form by public procurement law<sup>37</sup>, answering thereby the requirement of Art. 243 section 1 CO.

(2) As a bilateral legal act, the promise to donate requires a manifestation of parties' mutual assent to be binding, meaning that an **acceptance** from the beneficiary is required as an answer to the donor's offer. It is a prerequisite that the beneficiary is notified the offer to donate<sup>38</sup>. In cases of three-party relationships, in which a third person benefits from an arrangement between two other parties, like in the case of the digital solidarity clause, it is necessary that the third – beneficiary – takes note of the donor's offer which has been formulated in the main contract<sup>39</sup>. The DSF provides for a notification mechanism that fulfils this requirement: Once the public contract has been awarded, the purchasing public institution has to inform the DSF Foundation of the name of the successful bidder and the value of the contract using a DSF "information about the contract" form, which is available online<sup>40</sup>. It can therefore be assumed that the DSF takes notice of the donative transaction upon receipt of the form; it is not necessary that the DSF expressly reacts to the donor's declaration, as the acceptance can be deduced from the circumstances<sup>41</sup>.

<sup>33</sup> In the case of real property or rights *in rem*, a promise to give even requires a notarised deed (CO 243 II).

<sup>34</sup> TERCIER, *Les contrats spéciaux*, N 1616; CR-CO I – BADDELEY, N 2 ad Art. 243.

<sup>35</sup> *Essentialia negotii* of a promise to give are the identity of the parties, the object of the donation, the will to give and possibly other elements such as the conditions and obligations imposed on the beneficiary (for more details, see VAN DE SANDT, N 719 ss).

<sup>36</sup> However, if the promise to donate is subjected to the written form and not to a notary deed, its execution cures formal defects and is assimilated to a donation from hand to hand (TERCIER, *Les contrats spéciaux*, N 1622 ss; CR-CO I – BADDELEY, N 21 ss ad Art. 243).

<sup>37</sup> Art. 29 of the Federal Ordinance of December 1, 1994 on Public Procurement, RS 172.056.11 (Public Procurement Ordinance).

<sup>38</sup> TERCIER, *Les contrats spéciaux*, N 1609.

<sup>39</sup> BaK-OR I – VOGT, N 3 ad Art. 239; BaK-OR I – GONZENBACH, N 4 ad Art. 112; BGE 69 II 309.

<sup>40</sup> The form is available at [www.dsf-fsn.org/cms/documents/en/pdf/information\\_contract\\_en.pdf](http://www.dsf-fsn.org/cms/documents/en/pdf/information_contract_en.pdf).

<sup>41</sup> Given that the DSF has itself formulated the digital solidarity principle, already knows which municipalities or public institutions are applying it and provides for an online form, its tacit acceptance can be assumed upon receipt of the form (see TERCIER, N 1611 with further references); Furthermore, the acceptance of the donation is not subjected to the written form: Solely the declaration of the donor has to be entailed in a written act (Ibid., N 1619).

## 2. *Contract in Favour of a Third Person*

### a. *System*

The DSF funding mechanism relates three parties: (1) A public institution, (2) a private company (supplier), and (3) the DSF Foundation. Thereby the mechanism gives rise to a special **three-party relationship**<sup>42</sup> in which the DSF (the third party) benefits from an agreement reached between the two other parties. This constellation presents elements of a contract in favour of a third person within the meaning of Art. 112 CO that deserve to be looked into.

The provision in favour of a third party is an **agreement** through which the creditor (promisee) is promised by the debtor (promisor) the execution of a consideration in favour of a third party (beneficiary)<sup>43</sup>. It is important to precise that the promisee is acting in person (and not as a representative of the third party) and that the beneficiary is not party to the contract<sup>44</sup>.

It follows from the wording and the position of Art. 112 in the Code of Obligations that the provision in favour of a third person is not an independent nominate or in-nominate contract defined by its content elements; rather it is an agreement that can be appended to any other contract and modifies it in the sense that all or part of the consideration is then executed towards a determined third party<sup>45</sup>. As legal act generating obligations for the debtor, the provision requires the agreement of the parties on this specific method of execution of the contract<sup>46</sup>; further, its consequences in law are determined according to the different contracts at the base of the three-party relationship<sup>47</sup>.



<sup>42</sup> On the concept and the different manifestations of three-party relationships in Swiss law, see WEBER, *Dreipersonen-Verhältnisse*, 169 ss.

<sup>43</sup> GAUCH/SCHLUEP/SCHMID/REY, volume II, N 4094; BGE 117 II 315/320.

<sup>44</sup> BK-WEBER, N 35 ad Art. 112; GAUCH/SCHLUEP/SCHMID/REY, volume II, N 4094.

<sup>45</sup> There is a conflict of doctrine with regard to the dogmatic nature of the provision in favour of a third party: One part of the doctrine expresses the opinion that it does not constitute a proper contract comprising of essential elements, but that it is solely a specially arranged method of executing an obligation (BK-WEBER, N 15 ad Art. 112; CR-CO I – TEVINI DU PASQUIER, N 2 ad Art. 112; BUCHER, AT, 475; BK-GONZENBACH, N 1 ad Art. 112), while the other part sees it as a contract (KRAUSKOPF, N 167; ENGEL, *Traité*, 417).

<sup>46</sup> CR-CO I – TEVINI DU PASQUIER, N 2 ad Art. 112.

<sup>47</sup> BK-WEBER, N 16 ad Art. 112.

(1) Relationship between the promisee (public entity) and the third party beneficiary (DSF): As the Digital Solidarity Fund relies on a voluntary commitment basis, the public entity taking up the 1% principle is not directly bound to the DSF. The local authority solely takes an internal formal decision, stating its resolution to insert the 1% digital solidarity clause in its call for bids. For example, the City of Geneva has adopted the digital solidarity principle in a decision of the Municipal Administrative Board of December 15, 2004 that states its intention to apply the 1% digital solidarity. Later, this decision was communicated to the Digital Solidarity Fund Foundations.

(2) Relationship between the promisee (public entity) and the promisor (private company): The public authority and the private company reach a contractual agreement for the supply of ICT goods within the context of a public bid; the 1% digital solidarity clause is entailed in the contract, constituting a secondary obligation to the principal of providing ICT goods or services in the form of a promise to donate (*donandi causa*)<sup>48</sup>: The promisor commits to transfer at least 1% of the payment price to the third beneficiary.

(3) Relationship between the promisor (private company) and the third party beneficiary (DSF): The promisor is obliged to perform its obligation towards the third party beneficiary, because he has committed to it towards the promisee (*solvendi causa*).

#### *b. Perfect or Imperfect Contract in Favour of a Third Person*

Under Art. 112 section 2 CO a distinction is drawn between **two different kinds of contracts in favour of a third party** depending on whether the third party beneficiary is vested with the right to enforce its execution or not: The doctrine speaks of “perfect” or “imperfect” contract in favour of a third person. In an imperfect contract in favour of a third party, the beneficiary solely has the right of receiving the performance and not the one of requiring it. By contrast, in a perfect contract in favour of a third party, the beneficiary is entitled in his own right to require the performance in his favour.

As the perfect contract in favour of a third party is an exception to the principle of the relativity of contracts<sup>49</sup>, Art. 112 section 2 CO states two criteria to ascertain if the third party is exceptionally entitled to claim the performance of an obligation: (1) The **intention** of the parties and (2) the **custom**, to which the Swiss doctrine has added a third criteria, (3) the **purpose** of the contract<sup>50</sup>. Obviously, the right of the beneficiary

<sup>48</sup> See *supra* at II.A.1; being part of a public bid procedure, this legal relationship must also be analysed in the light of public procurement law (see hereinafter at III.).

<sup>49</sup> CR-CO I – TEVINI DU PASQUIER, N 9 ad Art. 112; the relativity of contract is also known as the doctrine of privity of contract under Common law (see for instance, KOFFMAN/MACDONALD, N 18.1 ss).

<sup>50</sup> These criteria are to be applied subsidiarily, i.e. when the intent of the parties is not clear it can be resorted to the custom, and – if neither the parties’ intent nor the custom provide for a clear answer – to the purpose of the contract (BK-WEBER, N 43 ad Art. 112).

to claim the execution of the obligation can also be stated by a provision of the law<sup>51</sup>.

In the case of the digital solidarity clause, the **intent of the parties** appears decisive. If the clause does not expressly state that the third party is entitled to enforce the benefit conferred on him, the contract has to be interpreted. The wording of the contract, parties' declarations and behaviour can shed light on the parties' intent. Particularly relevant with this respect are the interests of the promisor, which should be considered in the light of the circumstances of the concrete case<sup>52</sup>: Notably, the evident interest of the promisee to see the beneficiary in such a position as to have the right to claim execution is to take into account<sup>53</sup>. The transfer of the 1% of the contract's value to the DSF occurs subsequently to the overall execution of the main public procurement contract, during what appears like a second phase of the contract's execution, starting after the price for the goods or services has been paid to the provider. The purpose and objectives of such a mechanism show an obvious interest of the public authority (promisee) to intend an enforceable right to be bestowed on the DSF (beneficiary), so that it is in a position to claim the execution of the 1% digital solidarity clause independently in this second phase of the contract's execution.

## B. Practical Implications

### 1. *Obligations of the Promisor*

The private business (promisor) can solely fulfil his obligation in a valid way by **performing towards the beneficiary**<sup>54</sup>.

Nevertheless, before the DSF makes a declaration of adhesion<sup>55</sup>, there are two theoretical possibilities to **release the private entity** (promisor) from executing its obligations towards the beneficiary<sup>56</sup>: (1) The private business can either together with the public authority (promisee) or with the DSF (third party) itself arrange to be released from performing to the third party; (2) the public authority (promisee) alone can release the promisor; in such case, however, the promisor's obligation still exists and is to fulfil towards the promisee.

<sup>51</sup> So as is the case for instance in Art. 113 CO (for other examples, see BK-WEBER, N 59 ss ad Art. 112).

<sup>52</sup> BK-WEBER, N 44 s ad Art. 112 with further references.

<sup>53</sup> Id.; KRAUSKOPF, N 917.

<sup>54</sup> BK-WEBER, N 104 ad Art. 112.

<sup>55</sup> See hereinafter at II.B.2.

<sup>56</sup> In principle, there is also a third possibility to free the promisor to perform towards the beneficiary: Instead of making a declaration of adhesion, the third party could decline the benefit conferred on him (BK-WEBER, N 116 s ad Art. 112; KRAUSKOPF, N 1157 ss); a possibility which however does not seem realistic in the case of the Digital Solidarity Fund.

## 2. *Entitlement of the Beneficiary*

The most relevant practical consequence of qualifying the three-party relationship created by the digital solidarity clause mechanism as perfect contract in favour of a third party regards the entitlement of the beneficiary, i.e. of the Digital Solidarity Fund Foundation. In this constellation, the third party beneficiary is independently and originally entitled in his own right to require the performance in his favour<sup>57</sup>; unless otherwise agreed, this right of the beneficiary arises directly and without further involvement of the parties as soon as the main contract between the promisee and the promisor is concluded<sup>58</sup>. However, the construction of a promise to give within a contract in favour of a third party may not be used to circumvent the validity requirement according to which a promise to donate is validly concluded upon acceptance of the promise by the beneficiary (as part of the necessary manifestation of the parties mutual assent)<sup>59</sup>. Consequently, the right of the DSF to claim for its benefit only arises as soon as the DSF has taken note of the promise. Worth mentioning is that, in principle, the DSF (beneficiary) and the public authority (promisee) are individually entitled to enforce the contractual term in favour of a third party<sup>60</sup>.

The fact that the right of the third party arises at conclusion of the contract between the promisee and the promisor does not mean that the third party is already in the position to enforce his right at that time: Indeed, the content, extent, and particularly the **enforceability** of the beneficiary's claim can be determined by the parties<sup>61</sup>. In the case of the digital solidarity clause, if the parties didn't expressly provide for a fixed term for performance, the enforceability of the beneficiary's claim results from the nature of the business (CO 75): The execution of the private business's obligation to transfer 1% of the contract value to the DSF presupposes the perfection of the contract between the promisee and the promisor, particularly the payment of the price for the delivery of goods and services agreed in the main contract, representing the contract's value from which the 1% contribution is calculated. Therefore, if the parties haven't provided for an express term, the debtor's performance is due and enforceable only once the main contract has been carried out.

Furthermore, the right of the DSF to enforce the benefice conferred on him becomes irrevocable as from the moment the beneficiary makes a **declaration of adhesion** to the contract in favour of a third person by stating that he intends to invoke its right, according to Art. 112 section 3 CO<sup>62</sup>. The DSF can declare its intention to make use of

<sup>57</sup> The DSF does not take the position of a party to the contract but steps in as a creditor of the performance relating to the formulated promise to donate, alongside the public authority (BaK-OR I – GONZENBACH, N 15 ad Art. 112; BK-WEBER, N 112 ad Art. 112).

<sup>58</sup> BK-WEBER, N 109 ad Art. 112; BaK-OR I – GONZENBACH, N 15; KRAUSKOPF, N 1069 ss.

<sup>59</sup> BaK-OR I – GONZENBACH, N 4 ad Art. 112; see also *supra* at II.A.1.d.

<sup>60</sup> See BK-WEBER, N 127 ad Art. 112; for more details, KRAUSKOPF, N 1421 ss.

<sup>61</sup> CR-CO I – TEVINI DU PASQUIER, N 16 ad Art. 112.

<sup>62</sup> The parties can, however, agree otherwise and provide for the possibility to revoke the third party's right at any time (CR-CO I – TEVINI DU PASQUIER, N 22 ad Art. 112); Obviously, instead of making a declaration of adhesion, the third party could decline the benefit conferred on him, which would free the promisor to perform towards him (BK-WEBER, N 116 s ad Art. 112; KRAUSKOPF, N 1157 ss), a possibility which however does not seem realistic in the case of the Digital Solidarity Fund.

his claim to the promisee at any time, even before its enforceability, either expressly (written or orally) or in an implied way<sup>63</sup>. For the sake of the system's efficiency it would, of course, be desirable that the DSF declaration of adhesion happens as soon as possible, so that it irrevocably ensures its third-party right to enforce and puts itself in the position of claiming the due 1% transfer for the case that the private entity does not perform.

### III. Aspects of Public Procurement Law

#### A. Inclusion of the Digital Solidarity Clause in Public Contracts

There are two possibilities for a public institution to implement the 1% principle: If the public entity follows a “formal” approach, it includes the 1% digital solidarity clause in its invitation to tender, meaning that this clause becomes applicable in case of significant public procurement contracts that have to be subjected to a call for bids, i.e. to an open, restricted or single tendering procedure regulated by law. However, if the public entity adopts a broader approach, it can expressly decide to include a digital solidarity clause in all its public contracts, even in those of lesser value that don't require public bids. Obviously, from a solidarity perspective, it seems desirable and coherent that a broader approach is implemented.

The inclusion of a clause in an invitation to tender is not straightforward and can raise admissibility questions that are to be answered according to public procurement law. It is therefore necessary to first check under which circumstances public procurement law is applicable, then to outline the driving principles of procurement, and finally to look into their implication for the inclusion of the digital solidarity clause in public bids. Public procurement law encompasses many layers of regulation at international, European and national level that mainly endeavour to open public procurement to competition by ensuring transparency and equal treatment: Switzerland, being party to the WTO Agreement on Government Procurement<sup>64</sup> and having reached a bilateral agreement with the EU on certain aspects of public procurement, has harmonised and adapted its regulation to international standards. Therefore, since public procurement considerations in Swiss law are particularly matching European concerns, the following comments are predominantly based on national law<sup>65</sup>.

<sup>63</sup> For more details KRAUSKOPF, N 1111 ss; if such a declaration is not made, the promisee is free to revoke the beneficiary's claim and thereby to “transform” the perfect contract in favour of a third party in a unperfected contract in favour of a third party (see BK-WEBER, N 123 ad Art. 112).

<sup>64</sup> WTO, Agreement on Government Procurement, April 15, 1994 RO 0.632.231.42 (hereinafter WTO Government Procurement Agreement).

<sup>65</sup> This approach also seems sensible, as for the time being in the geographical Europe solely the municipalities of Geneva and Lausanne, and their university hospitals are applying the digital solidarity clause in public bids.

## B. Applicability of Public Procurement Law

In Switzerland, public procurement at the Confederation's level is regulated by the Federal Public Procurement Act (PPA) and by its implementing Ordinance<sup>66</sup>. Public procurement at the Cantons' and municipalities' level is regulated by the different cantonal regulations in force and framed by the Intercantonal Public Procurement Agreement (IPP) setting the necessary harmonising framework<sup>67</sup>. Consequently, there are two layers of **public procurement legislation** distinguishing between the purchasing public entity, at Federal and at Cantonal level.

Not all Federal and Cantonal public markets are subjected to public procurement procedure; indeed, public procurement regulation only applies if the estimated value of the market at hand reaches certain **significant thresholds** specified by law. For instance, a public institution of the Federal Administration has to issue an invitation to tender for public contracts, whose value reaches (i) CHF 263 000.– for supply and service contracts, (ii) CHF 10.07 millions for buildings and (iii) CHF 806 000.– if the purchasing body is established under public law or under private law but carrying out a public service activity<sup>68</sup>. At Cantonal and Communal level, the thresholds set by cantonal legislation usually take on the values laid down by the Intercantonal Public Procurement Agreement<sup>69</sup>; those are CHF 383 000.– for supply and service contracts, CHF 766 000.– for contracts in the field of water, energy, transport and telecommunications, and CHF 9.575 millions for buildings<sup>70</sup>.

## C. Principles of Public Procurement

Harmonising rules in the field of public procurement in Switzerland have been adopted following to international regulation efforts and are strongly influenced by them<sup>71</sup>. **International legal sources** mainly comprise the WTO Government Procurement Agreement<sup>72</sup>, to which Switzerland is party, and the EU Directives addressing public procurement<sup>73</sup>, whose ensuing case law is increasingly taken into account by Swiss

<sup>66</sup> Federal Act of December 16, 1994 on Public Procurement, RS 172.056.1 (Public Procurement Act); Federal Ordinance of December 1, 1994 on Public Procurement, RS 172.056.11 (Public Procurement Ordinance).

<sup>67</sup> Intercantonal Agreement on Public Procurement of November 25, 1994 RS 172.056.5 (Intercantonal Public Procurement Agreement).

<sup>68</sup> Art. 6 PPA in connection with Art. 2a PPO.

<sup>69</sup> See for instance, for the Canton of Geneva, Art. 3 section 2 of the Regulation on Public Procurement in the matter of supplies and services (Règlement sur la passation des marchés publics en matière de fournitures et de services), L 6 05.03.

<sup>70</sup> Art. 7 IPP.

<sup>71</sup> See ZUFFEREY/MAILLARD/MICHEL, 3; the Federal Act on Public Procurement, the implementing Ordinance on Public Procurement and the Intercantonal Agreement on Public Procurement were issued in 1994.

<sup>72</sup> WTO Government Procurement Agreement (*supra* n. 64); for more details, see BIAGGINI, 676–698; COTTIER/OESCH, 1063 ss.

<sup>73</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, 114 ss; Directive 2004/17/EC of the European Parliament and of the

authorities<sup>74</sup>. Furthermore, Switzerland has reached an agreement with the EU within the bilateral agreements' package of 1999 addressing certain aspects of government procurement<sup>75</sup>.

Both international and national law mainly aims at opening up public procurement to **competition**<sup>76</sup>. Particularly, the CH-EU Bilateral Agreement goes beyond the WTO Agreement and had the effect of further liberalising public procurement with the EU at the level of districts and municipalities<sup>77</sup>, in the telecommunication, railway and energy (other than electricity) sectors<sup>78</sup>.

The large part of the public procurement law therefore deals with tender procedure striving to ensure **sound competition** between tenderers. From this perspective, the principle of transparency (1), the principle of non-discrimination on nationality grounds (2) and the principle of economic utilisation of public resources (3) constitute the pillars of international public procurement rules<sup>79</sup>:

(1) The **principle of transparency** guarantees the regularity and loyalty in the contract award procedure; furthermore, it should also help tenderers press their rights if needed<sup>80</sup>. It is first and foremost implemented by public procurement procedure's publication requirements.

(2) The WTO Government Procurement Agreement distinguishes between the **principle of non-discrimination** in its narrow meaning and the principle of national treatment<sup>81</sup>: Non-discrimination implies to treat all foreign tenderers in a comparable way<sup>82</sup>, whereas national treatment imposes to apply an equal treatment to national and foreign tenderers.

(3) Obviously, public procurement is also about utilising **efficiently and economically** available public resources. The realisation of this principle primarily rests upon achieving sound competition even when the state intervenes as contracting party<sup>83</sup>, an objective which mainly means controlling and framing state's leeway and decision-making

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Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, 1 ss.

<sup>74</sup> See BIAGGINI, 719; for a schema of the whole public procurement legal system see ZUFFEREY/MAILLARD/MICHEL, 33 and CLERC, 401.

<sup>75</sup> Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement of June 21, 1999, RS 0.172.052.68 (OJ L 114, 30.04.2002, 430 ss), entry into force on June 1, 2002 (CH-EU Bilateral Agreement on Public Procurement).

<sup>76</sup> See for instance Art. 1 of the Intercantonal Public Procurement Agreement.

<sup>77</sup> Art. 2 Bilateral Agreement on Public Procurement.

<sup>78</sup> See BIAGGINI, 652.

<sup>79</sup> For the whole, see ZUFFEREY/MAILLARD/MICHEL, 17–18; The WTO Government Procurement Agreement, the EU directives as well as the CH-EU Bilateral Agreement on Public Procurement are considered for the following paragraphs.

<sup>80</sup> ZUFFEREY/MAILLARD/MICHEL, 18.

<sup>81</sup> Art. 3 WTO Government Procurement Agreement; the distinction is taken up in the CH-EU Bilateral Agreement on Public Procurement (see at Art. 6).

<sup>82</sup> Exemptions to these principles are listed in Appendix I, which is different for all contracting states.

<sup>83</sup> For some case law, see ZUFFEREY/MAILLARD/MICHEL, 165 s.

in the public procurement process. A paramount tool for these purposes resides in the setting of selection and awarding criteria: The WTO Government Procurement Agreement, the EU directives as well as the CH-EU Bilateral Agreement all leave the choice to the contracting parties to opt either for the “lowest price” criteria or for the “most economically advantageous” one<sup>84</sup>.

As mentioned, public procurement at the Confederation’s level is regulated by the Public Procurement Act (PPA) and by its implementing Ordinance<sup>85</sup>. Art. 1 PPA states the principles that underlie the whole public contracts regulation: In consistency with international regulations, the Federal Act aims at ensuring transparency, strengthening concurrence, favouring an economic utilisation of public resources, and guaranteeing equal treatment of all tenderers<sup>86</sup>.

Public procurement at the Cantons’ and municipalities’ level is regulated by the different local regulations in force. Furthermore, the Intercantonal Public Procurement Agreement sets a harmonising framework, on the one hand, implementing the WTO Government Procurement Agreement into cantonal law and, on the other hand, enabling an intercantonal opening of public markets. Therefore, at cantonal level too, public procurement is driven by transparency, equal treatment, impartiality and efficient utilisation of public funds considerations<sup>87</sup>.

#### D. Practical Implications

The pillars of public procurement, the principles of transparency, non-discrimination and economic utilisation of public resources impose certain requirements that have to be obeyed in order for a clause or special criteria to be validly taken into consideration in the conclusion of a public contract.

- The principle of transparency requires a call for tender to be complete and detailed<sup>88</sup>. Consequently, the invitation to tender notably has to entail the necessary technical information (such as name, address, etc. of the awarding authority)<sup>89</sup>, a complete and detailed description of the goods, services or performance whose provision is asked<sup>90</sup>, the qualification criteria that should be met by the tenderer

<sup>84</sup> See Art. XII (h) WTO Government Procurement Agreement; Art. 4 (e) CH-EU Bilateral Agreement on Public Procurement; see also Art. 53 section 1 Directive 2004/18/EC and Art. 55 section 1 Directive 2004/17/EC.

<sup>85</sup> Federal Act of December 16, 1994 on Public Procurement, RS 172.056.1 (Public Procurement Act); Federal Ordinance of December 1, 1994 on Public Procurement, RS 172.056.11 (Public Procurement Ordinance).

<sup>86</sup> Art. 1 PPA.

<sup>87</sup> ZUFFEREY/MAILLARD/MICHEL, 37.

<sup>88</sup> The necessary contents of a published invitation to tender are not subject to controversy, contrary to the degree of transparency required, which is not always straightforward, see ZUFFEREY/MAILLARD/MICHEL, 99 and 241–252 for some case law.

<sup>89</sup> Art. 18 lit. a PPO.

<sup>90</sup> Art. 18 lit. b PPO.

attesting their financial, economic and technical capacities<sup>91</sup>, technical specifications<sup>92</sup>, as well as the awarding criteria in order of importance<sup>93</sup>.

As mentioned above, the 1% digital solidarity clause states a promise to donate<sup>94</sup>. The clause consists in an obligation that the tenderer has to carry out if awarded the bid. As such, the 1% digital solidarity clause constitutes neither a qualification criterion, nor a technical specification, nor an awarding criterion; rather, as a subsidiary obligation added to the principal performance, it is integral part of the terms of the agreement. Therefore, pursuant to the principle of transparency and to Art. 18 section 1 lit. b PPO, the digital solidarity clause is to be entailed in the documents accompanying the call for tender published in the Official Gazette, which can, upon demand, be sent to interested businesses<sup>95</sup>.

- The digital solidarity clause does not seem to pose any problems with respect to the principle of non-discrimination: First, the obligation stated by the clause is imposed to all tenderers and, second, it does not, even indirectly, favour national or local tenderers<sup>96</sup>.
- The inclusion of a digital solidarity clause touches upon broader discussions around the insertion of environmental and social considerations in public procurement that have been extremely topical in the last decade. The awareness that sustainable development is indeed in the public interest<sup>97</sup> has constrained to move slightly away from a strict utilisation of public resources according to the sole criteria of the “lowest price” and to take other broader “economic” considerations into account, such as environment protection, social aims or development concerns. The implementation of such policies, however, is still at an early stage<sup>98</sup>. Indeed, there are aspects of public procurement law that might be hard to reconcile with the promotion of sustainable development in a call for tender: Particularly, if such concerns are expressed as awarding criteria and if they are taken into account in choosing

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<sup>91</sup> The public entity should also publish the proofs it requests to attest the capacities (Art. 9 PPA).

<sup>92</sup> Art. 12 PPA.

<sup>93</sup> Art. 21 PPA; see also MICHEL/CLERC, pp. 10–11; for complete list of what the invitation and its documents should entail, see Annexe 4 and 5 of the PPO.

<sup>94</sup> Art. 243 CO.

<sup>95</sup> Art. 17 section 2 OPP.

<sup>96</sup> Discrimination concerns particularly arise with awarding criteria, if these indirectly favour local suppliers: This can be the case if the purchasing authority takes transfer distances in consideration for environmental reasons, see ZUFFEREY/MAILLARD/MICHEL, 247–248.

<sup>97</sup> Environmental considerations have first and foremost been the object of international attention in the field of public procurement; see for instance, the First Principle of the “Business Charter for Sustainable Development” of the International Chamber of Commerce issued in 1991, available at [www.iccwbo.org/policy/environment/id1309/index.html](http://www.iccwbo.org/policy/environment/id1309/index.html), recalling that “environmental management [is] among the highest corporate priorities”; the World Bank for its part has even developed a kind of “environmental conditionality”, favouring States engaging in sustainable environment management (see PINAUD, 83); further, the OECD has been as early as earnest in promoting environment concerns (see *ibid.*, 83 ss).

<sup>98</sup> See also hereinafter at IV B.

the “most economically advantageous” offer; further, the principle of non-discrimination can be infringed<sup>99</sup>.

## IV. Aspects of Competition Law

### A. Competition Law in the Public Sector

Competition law sets rules that mainly regulate private markets. If governments intervene, legal provisions on illegal state aid – as for example contained in Art. 87 of the European Community Treaty (EC Treaty)<sup>100</sup> – might apply. Since governmental bodies are not market players, however, general antitrust provisions are not easily directly applicable. An exception is usually only foreseen for public enterprises to the extent that such enterprises are acting as competitors of private firms in a specific market segment; in this sense, Art. 2 section 1<sup>bis</sup> of the Swiss Act on Cartels and other Restraints of Competition<sup>101</sup> includes the public enterprises in its scope of application.

In Switzerland respective rules of general nature on illegal state aid are not available. The fact that European law provides for such a strict regulation strongly influences competition considerations in the public procurement sector and could have a paramount impact on the implementation of the digital solidarity clause. Furthermore, the challenging discussions which are taking place in Europe with regard to the integration of secondary policies in public procurement are the most “advanced” at an international level<sup>102</sup>; as their impact on the inclusion of a digital solidarity clause in public bids could be considerable, the following comments are predominantly based on European law.

As TERCIER correctly states<sup>103</sup>, the law of public procurement has the objective to improve the competitive environment; on the one hand, such law facilitates the proper use of public resources and, on the other, competitive distortions are limited by the provisions guarantying transparency and by a specifically foreseen procedural framework. Insofar, public procurement law has a **complementary function** in serving a competitive environment<sup>104</sup>. From a procedural point of view, antitrust law and public procurement law can be applied in parallel<sup>105</sup>.

<sup>99</sup> The insertion of a selection criteria stating that only an enterprise applying the 1% digital solidarity can be taken into consideration by the awarding authority would, for instance, raise delicate legal question, which are, however, beyond the scope of this study.

<sup>100</sup> Treaty Establishing the European Community (consolidated version), OJ C 325, 24.12.2002, 1 ss; as far as legal provisions on illegal state aid are concerned, Switzerland is still “under-developed” since respective rules of general nature are not available.

<sup>101</sup> Swiss Federal Act on Cartels and other Restraints of Competition of October 6, 1995, RS 251 (Cartels Act).

<sup>102</sup> See PINAUD, 86 ss.

<sup>103</sup> CR-LCart – TERCIER, Introduction, N 174; similarly ZUFFEREY/MAILLARD/MICHEL, 52.

<sup>104</sup> For a general overview see CLERC, 378 ss.

<sup>105</sup> See ZUFFEREY/MAILLARD/MICHEL, 53.

In the European Community it is widely discussed that public procurement rules should establish an effectively **competitive regime**, similar to the regime envisaged for the operation of private markets<sup>106</sup>. Obviously, private and public markets cannot be regulated in the same way: Antitrust law and policy encompass a set of rules of negative character, i.e. the antitrust provisions must restrain the activities of private firms to an acceptable range pre-determined by the competent authorities; in contrast, public markets require a set of rules that have a positive character<sup>107</sup>. Indeed, the main objective of public procurement lies in the enhancement of market efficiency and the improvement of market information (i.e. transparency) by ensuring that the conditions of competition are not distorted and that contracts are allocated to suppliers and contractors under the conditions which are most favourable<sup>108</sup>.

The Commission of the European Community has repeatedly tried to design adjusted rules of public procurement which reflect the spirit of competition<sup>109</sup>; the respective Directives<sup>110</sup> are governed by the principles of openness, transparency and non-discrimination, with the objective that an industrial restructuring would follow as a result of such stimulation and that desirable effects on efficiency gains would eventually occur<sup>111</sup>. A competitive regime of this kind may not even be jeopardised by the concept of “special or exclusive rights”, since a public entity does not enjoy the benefits of such rights merely because it holds a specific licence<sup>112</sup>. In a nutshell, antitrust law and public procurement law drive into the same direction of improving a competitive environment.

## B. Acknowledgement of Secondary Policies

The establishment of a competitive regulatory framework does not mean that exclusively economic aspects may be taken into account in the evaluation of the market parameters. In private markets **public interest considerations** can play a role (as stated for example in Art. 8 and Art. 11 of the Swiss Act on Cartels); this approach is even more justified in public markets. Therefore, public authorities and entities may consider general interest aspects in their public procurement policies, for example by defining environmental and social policies intending to put the public procurement at the service of an environmental or social aim<sup>113</sup>.

Apart from the priority objective of procurement law being the acquisition of goods or services on the best possible terms<sup>114</sup>, it is generally acknowledged that so-called sec-

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<sup>106</sup> In this sense the respective leading case of the European Court of Justice, *Coöperatieve Vereniging „Suiker Unie“ UA and others v Commission of the European Communities*, ECR 1975 1663.

<sup>107</sup> *BOVIS*, 227.

<sup>108</sup> *BOVIS*, 228.

<sup>109</sup> For an overview see *ARROWSMITH*, 2004, 1277 ss.

<sup>110</sup> See *supra* N. 60.

<sup>111</sup> *BOVIS*, 223.

<sup>112</sup> In this sense the leading case „Leased Lines” of the European Court of Justice, *R. v Secretary of State for Trade and Industry ex parte British Telecommunications plc*, ECR 1996 I 6417.

<sup>113</sup> *ARNOULD*, 190.

<sup>114</sup> To the concept of the competitive dialogue see *ARROWSMITH* (2004), 1280 ss.

ondary policies may also be considered, for instance the protection of the environment, the development of less favoured regions<sup>115</sup>, the struggle against unemployment in France<sup>116</sup>, the isolation of foreign States on the international scene (United Kingdom/South Africa)<sup>117</sup>.

The court practice of the European Court of Justice shows that the social policy dimension of public procurement rules mainly focuses on social cohesion, on employment concerns and on the achievement of expectable standards of living<sup>118</sup>. Nevertheless, the interpretation of the public procurement rules cannot be done in an “over-flexible way” meaning that not all positive actions of a social policy dimension may be taken into consideration, but only basic objectives such as the promotion of equality of opportunities and the elimination of sex or race discrimination<sup>119</sup>. The practice of the European Court of Justice, however, has not always been very coherent: In the *Beentjes* case, the Court held – contrary to the opinion of its Advocate General – that, to a certain extent, the possibility of taking into account objectives of general interest in public procurement would be justified<sup>120</sup>. A few years later, however, the Court refused to endorse the interpretation of the public procurement laws that the European Commission had developed on the basis of its understanding of the *Beentjes* case<sup>121</sup>. Subsequently, the European Directives have been redrafted in a way that the new provisions recognised the possibility for the contracting authority or entity to lay down special conditions relating to the performance of contracts<sup>122</sup>. The further Court practice in *Concordia Bus* relied on the aspect of economically and technically equivalent bids<sup>123</sup>, but the acknowledgement of social policy (combating unemployment) has not been excluded in *Nord Pas de Calais*<sup>124</sup>.

Consequently, environmental or social considerations as award criteria are permissible, but they should at least relate to the goods or services delivered<sup>125</sup>. If the 1% digital solidarity clause is included in IT-related contracts, making the delivery of goods or services thereby “more expensive”, however, enabling the recipient of such 1% to support less developed countries by transferring the respective amount into the Digital Solidarity Fund, the inherent relation between the special charge and the goods or services delivered can be considered as being fulfilled. In particular, such financing mechanism may be seen as tool for promoting the accepted objective of equality of opportunities.

<sup>115</sup> Commission of the European Communities v Italian Republic, ECR 1992 I 3401.

<sup>116</sup> Commission of the European Communities v French Republic, ECR 2000 I 7445.

<sup>117</sup> ARNOULD, 187.

<sup>118</sup> BOVIS, 237 s.

<sup>119</sup> *Ibid.*, 238 s.

<sup>120</sup> *Gebroeders Beentjes BV v State of the Netherlands*, ECR 1988, 4635.

<sup>121</sup> Commission of the European Communities v French Republic, ECR 2000 I 7445.

<sup>122</sup> ARNOULD, 191.

<sup>123</sup> *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, ECR 2002 I 7213.

<sup>124</sup> Commission of the European Communities v French Republic, ECR 2000 I 7445.

<sup>125</sup> ARROWSMITH (1999), 44; ARROWSMITH (2004), 1317.

### C. Abuse of a Dominant Position

Competition laws generally prohibit the abusive exploitation by one or more entities of a dominant position (as stated for example in Art. 82 of the EC Treaty and in Art. 7 of the Swiss Act on Cartels). Public undertakings have not only a dominant position, but regularly a monopolistic position in a given market<sup>126</sup>. In case of municipalities, an alternative buyer of goods or services could only consist in an adjacent municipality; in case of hospitals, the number of such entities is limited.

Most antitrust laws contain lists of examples of abusive exploitation, including imposing unfair purchase or selling prices or other unfair trading conditions, limiting production, markets or technical developments to the prejudice of consumers, applying dissimilar conditions to equivalent transactions leading to competitive disadvantages for certain consumers and making the conclusion of contracts subject to supplementary, not related obligations (tying)<sup>127</sup>.

To be void, the digital solidarity clause would have to be considered as an “other unfair trading condition”. Only limited case law exists in this respect<sup>128</sup>; at any rate, it could hardly be argued that such a condition would be unfair or harm consumers in a direct or indirect way<sup>129</sup>. In particular, such financing mechanism does not set obstacles for residual competition<sup>130</sup>. Consequently, the inclusion of the 1 % clause into IT contracts may not be qualified as an abusive behaviour.

### D. Practical Implications

The advances of the European Court of Justice’s and of the Commission’s case law are undoubtedly opening the way for further inclusion of social and environmental considerations in public procurement law. The recent acknowledgement of social and environmental needs within the criteria of the “most economically advantageous tender” is also mirrored in the respective Directives<sup>131</sup>.

The digital solidarity clause is an important instrument of development promotion and answers crucial international social concerns, which undoubtedly lie in the general interest. After a look at the evolution in the field, it appears that such a clause would even be compatible with the demanding requisites of European law and is in line within the current evolution in the field: Indeed, the mechanism is coherent from a

<sup>126</sup> Obviously, the covered market share depends on the delineation of the relevant market; however, public undertakings are exactly established since the government assumes that market forces would not lead to satisfactory results.

<sup>127</sup> See for example Art. 82 section 2 of the EC Treaty and Art. 7 section 2 of the Swiss Act on Cartels.

<sup>128</sup> In a single case the European Court of Justice did not accept restrictions imposed on authors and composers insofar as these were not justified by the need for the performance rights society to strengthen its power: *Belgische Radio en Televisie v SV SABAM and NV Fonior*, ECR 1974 51 and 313.

<sup>129</sup> See Discussion Paper on the Application of Art. 82 of the Treaty to Exclusionary Abuses of 2005, <http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf>.

<sup>130</sup> See WEBER, *Marktmissbrauch*, 105.

<sup>131</sup> See, for instance, in Directive 2004/17/EC at recital clause (1), (55) and Art. 38 and in Directive 2004/18/EC at recital clauses (1) and (46) and Art. 26.

resource allocation perspective, as it finds its source in the public bids for the delivery of ICT goods or services in order to finance ICT development projects in disadvantaged and backward areas. Therefore, the concept of the link to the subject-matter expressed by the European Court of Justice is being adhered to.

Furthermore, the inclusion of a digital solidarity clause by a public entity in its public contracts could not be considered as an abusive behaviour. The instrument is purely social; it is not unfair, does not harm consumers and does not represent an obstacle to competition.

## V. Outlook

The digital solidarity clause is an innovative financing instrument that holds many promises to bridge the digital divide between developed nations and developing countries. As the DSF is starting to reach increasing international acknowledgement, it is important to know whether its financing mechanism can be adopted right away or if there are too many legal barriers to its implementation.

With respect to contract law requirements, the protagonists of the digital solidarity clause should primarily make sure to respect formal and validity prerequisites entailed by the provisions on the promise to donate and by the law of the contract in favour of a third party. Particularly, for the sake of the efficiency of the enforcement of the digital solidarity clause, the right of the DSF to claim for execution should be expressly stated in the contract between the public authority and the private business.

The digital solidarity clause also touches upon public procurement law which is closely linked with competition law. Both frame state's leeway by posing strict requirements, endeavouring to achieve sound and transparent public markets opened to competition. In the light of recent regulatory provisions and still developing case law, increasing space is, however, given to considerations of so-called secondary policies, such as environmental protection and social policies, or even objectives of general interest.

The above considerations show that there are no totally incompatible legal provisions impeding the implementation of the digital solidarity clause; the few problematic points which could hinder it may be easily resolved. Therefore, the adoption of the digital solidarity principle at present mainly depends from political will: The biggest obstacle that remains to be cleared might be political disinclination.

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