

STUDY

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Contribution to Growth: European Public Procurement

Delivering improved rights for European citizens and businesses



Policy Department for Economic, Scientific and Quality of Life Policies
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Abstract

This study evaluates the objectives of legislative actions in the area of public procurement during the 7th and 8th legislature and assesses the contribution of current initiatives to the achievement of EU objectives. This document provides for a critical analysis of the legal framework of the public procurement regime and identifies the future potential of European public procurement..

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List of Abbreviations

CJEU	Court of Justice of the European Union
E-Auctions	Electronic Auctions
E-Certis	Electronic Certification
EMAS	Eco-Management and Audit Scheme
E-Procurement	Electronic Procurement
ESPD	European Single Procurement Document
EU	European Union
ICT	Information and Communication Technologies
LCC	Life Cycle Costing
MEAT	Most Economically Advantageous Tender
OJEU	Official Journal of the European Union
PIN	Prior Information Notice
PPP	Public Private Partnership
R&D	Research and Development
SME	Small and Medium Enterprises
TFEU	Treaty on the Functioning of the European Union
VFM	Value for Money

EXECUTIVE SUMMARY

Background

The European institutions through the enactment of the Single Market Act¹ have identified public procurement as an **essential component of competitiveness and growth**² and as an indispensable instrument of delivering public services³.

Legislative actions during the 7th and 8th legislature have introduced a generation of legal instruments which aim at establishing gradually a **homogenous public procurement market in the European Union**.

During the 7th and 8th legislature the reforms on public procurement have sought to accomplish **unobstructed access to public markets** through **transparency of expenditure** relating to public and utilities procurement, **improved market information** through the introduction of technology to the application of the procurement rules, **elimination of technical standards capable of discriminating** against potential contractors, **uniform application of objective criteria** of participation in tendering and award procedures and **regulatory alignment** between public sector and utilities procurement.

The achieved reforms of public procurement have met three **principal objectives: simplification, modernization and flexibility**.

The objective of **simplification** has been met to a large extent by the introduction of the public sector Directive on supplies, works and services which represents a notable example of codification of supranational administrative law. The main influence for the codification of the public sector Directive can be traced in important developments in the application of the public procurement rules by **defining essential legal concepts** such as public contracts, contracting authorities, the remit of selection and qualification criteria, and the parameters for contracting authorities to use **environmental and social considerations** as award criteria and which have influenced public procurement law making.

The objective of **modernization** has been met mainly as a result of the newly introduced concepts. The ability of private undertakings, which pursue activities of general interest of non-commercial or industrial character to tender for public contracts alongside bodies governed by public law, the introduction of the **competitive dialogue** to facilitate the award of complex projects such as public private partnerships and trans-European networks, the introduction of **framework procurement** to the public sector, the use of **electronic procurement** concepts such as **e-auctions** and **dynamic purchasing systems**, the **digitization agenda** and the introduction of **concessions procurement regulation**.

The **flexibility** objective of the public procurement reforms reflects on the relaxation and the disengagement of the public procurement rules in **industries that operate under genuinely competitive conditions** in the utilities sectors, such as telecommunications.

¹ European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

² European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

³ European Commission, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, 7.12.2010, SEC(2010) 1545 final. European Commission, Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, SEC(2010) 1258, final.

Flexibility is also present at the **disengagement of the rules in contractual arrangements** such as public-public partnerships and in-house relations, as well as in certain sectors such as water for concessions procurement.

The public procurement rules have established an **effective judicial review system** and provided for **autonomous remedies** to Member States legal orders for disputes related to the award of public and utilities contracts.

The public procurement rules have created an environment of **convergence and alignment** between the public sector and utilities procurement.



Future reforms of the public procurement acquis should focus upon the **digital transformation** of public and utilities procurement. Through the adoption of technology systems such as **e-Certis** and **ESPD**, alongside the application of **electronic procurement** and **electronic invoicing**, the **digitization agenda** of public procurement will streamline the application of the rules, introduce efficiency in the process and make public procurement more attractive for businesses, especially SMEs resulting in increased competitiveness.

Another potential for reform should focus on the way service concessions and contracts are awarded by a contracting authority to another contracting authority on the basis of **exclusive rights**, in the light of the interface of the public procurement acquis with the Services Directive⁴.

Finally, public contracts which fall below the stipulated value thresholds (**sub-dimensional contracts**) represent a sensitive category for future reforms. On the one hand, they encapsulate a **significant amount** of Member States' public expenditure which escapes the clutches of the public procurement acquis.

⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006).

On the other hand, the European institutions are keen to subject these contracts to **some degree of competition** and have supplemented the public procurement Directives with EU law principles which ensure a parallel process of procurement with dimensional public contracts.

The procurement of sub-dimensional procurement contracts has created uncertainty in the market place and resulted in a dysfunctional application of the procurement acquis to those contracts.

The administrative and procedural burdens on the part of contracting authorities to subject sub-dimensional contracts to **transparency** and **competitive tendering requirements** often surpass any potential efficiency benefits resulting from competitively tendering them. In addition, adequately sufficient safeguards against intentional division of dimensional contracts into lots in order to avoid the applicability of the public procurement Directives do not exist in the current acquis.

Soft law will play a significant role in future reforms of the public procurement acquis. Legislative instruments focusing on guidance as well as policy initiatives have been earmarked for Member States to develop a strategic approach to procurement amidst a continuous effort to stimulate investment in the EU and its Member States through public and utilities procurement. A policy initiative has been launched to carry out procurement more efficiently through digital technologies and in a sustainable manner from socio-economic perspective.

Strategic procurement will be promoted by soft law in six priority areas set out by the European Commission at both Member State and EU levels. These priority areas include a greater uptake of innovation; the utilisation of green and social criteria in awarding public contracts; professionalization of public buyers and enhancing the governance of public procurement; improving access by SMEs to procurement markets in the EU and by EU companies in third countries; increasing transparency, integrity and quality of procurement data; digitisation of procurement processes, and more cooperation among public buyers across the EU.

The Single Market Act relies on a simplified public procurement regime in the European Union, which will result from **procedural efficiencies** and from streamlining the application of the substantive rules through digital technologies. The **professionalization** and **commercialisation of procurers** in the Member States will insert quality and consistency in the public procurement process and assure competitors of public contracts of legitimate expectations from the award of public contracts process in a sustainable manner and from a socio-economic perspective. Public procurement regulation will play a pivotal role for the delivery of the European 2020 Growth Strategy.

INTRODUCTION

The strategic importance of public procurement for the European integration process has been recognised by the 2011 Single Market Act⁵ which has prompted a series of reforms to the EU public procurement *acquis*⁶. These reforms aim at linking directly public procurement with the European 2020 Strategy which focuses on growth and competitiveness. The importance of a liberalised and integrated public procurement as an essential component of the Single Market has been clearly established⁷. The conceptual origins of public procurement regulation in the European Union can be traced in policy instruments which identified purchasing practices of Member States as considerable non-tariff barriers and as hindering factors for the functioning of a genuinely competitive internal market⁸. Economic justifications for regulating public procurement have pointed towards introducing competitiveness into the relevant markets in order to increase cross-border trade of products and services destined for the public sector and to achieve price transparency and price convergence across the European Union, thus achieving significant savings⁹. The need for competitiveness and transparency in public procurement markets is also considered as a safeguard to fundamental Treaty principles¹⁰, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality.

Public procurement regulation has an introvert focus on the internal market of the European Union. It envisages bringing the respective behaviour of the public sector in parallel to the operation of private markets. Public procurement regulation reveals distinctive *sui generis* markets which function within the EU internal market and have as main feature the pursuit of public interest. They are referred to as *public markets* where the pursuit of public interest is the main behavioural driver.

Further variances distinguish public markets from private markets apart from the substitution of profit maximisation. These focus on structural elements, competitiveness, demand and supply conditions, pricing and risk.

Public procurement regulation relies on harmonisation. Harmonisation has been entrusted to carry public procurement regulation through Directives, as legal instruments, which have been utilized to provide the framework of the *acquis communautaire*, but at the same time afford the necessary discretion to the Member States as to the forms and methods of their implementation. By allowing for discretion to Member States, an element of public policy is inserted in public procurement regulation, which reveals ordo-liberal policy inferences and decentralized features.

⁵ European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

⁶ Green Paper on the modernization of EU public procurement policy: Towards a more efficient European Procurement Market, COM(2011)15/47.

⁷ European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

⁸ European Commission, *White Paper for the Completion of the Internal Market*, COM (85) 310 fin, 1985; also Green Paper on Public Procurement in the European Union: *Exploring the way forward*, European Commission 1996; also European Commission, Communication on Public Procurement in the European Union, COM (98) 143.

⁹ Commission of the European Communities, *The Cost of Non-Europe, Basic Findings, Vol.5, Part.A; The Cost of Non-Europe in Public Sector Procurement*, Official Publications of the European Communities, Luxembourg, 1988. Also the Cechinni Report 1992 *The European Challenge*, Aldershot, Wildwood House, 1988.

¹⁰ Cases C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR 3605; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821; C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdruck GesmbH*, [1998] ECR 73.

The current public procurement *acquis*¹¹ has prescribed a different regulatory treatment to public sector procurement and utilities procurement, for two reasons. Firstly, a more relaxed regime for utilities procurement, irrespective of their public or privatised ownership has been justified and accepted as a result of the positive effects of liberalization of network industries which has stimulated sectoral competitiveness. Secondly, a codified set of rules, covering supplies, works and services procurement in a single legal instrument for the public sector aims at producing legal efficiency, simplification and compliance in order to achieve the opening up of the relatively closed and segmented public sector procurement markets.

A decentralized dimension of the public procurement rules has been introduced by the procurement Remedies Directives¹², which nevertheless, suffered from serious deficiencies, as they did not provide for effective review procedures between the stages of contract award and contract conclusion. Thus, the Remedies Directives have been inadvertently promoting direct awards and the so-called “race to sign” the relevant contract to ensure immunity from any redress, based on the *pacta servanta sunt* principle. In addition, during both pre-contractual and post-contractual stages there were no effective deterrents for breach of either procedural or substantive public procurement rules. These deficiencies were corrected by the amending Remedies Directive¹³ introducing new themes such as a clear divide between pre-contractual and post-contractual stages, a balance between effective review of public contracts and need of efficient public procurement, a strict standstill requirement for contract conclusion, including direct awards by contracting authorities and extensive communication and monitoring requirements.

The evolution of the public procurement *acquis* has been affected by conceptual and regulatory vagueness, limited interoperability with legal systems of Member States and continuous market-driven changes in modality options and in financing the delivery of public services.

These shortcomings have been addressed by the Court of Justice of the European Union (CJEU). Public procurement law has benefited from the instrumental role of the CJEU, which has provided intellectual support to the efforts of the European institutions to strengthen the fundamental principles which underpin public procurement regulation.

¹¹ Directive 2014/24/EU on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2014/25/EU coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2014/23/EU on the on the coordination of procedures for the award of concessions.

¹² Public Sector Remedies Directive 89/665 OJ 1989, L 395/33, and the Utilities Remedies Directive 92/13, OJ 1992, L 76/14.

¹³ Directive 2007/66, O.J. 2007, L335/31.

1. THE PRINCIPLES OF PUBLIC PROCUREMENT

KEY FINDINGS

- Public and utilities procurement represent **significant non-tariff barriers** to the genuine functioning of the internal market.
- Public procurement rules promote the **fundamental freedoms** of the EU Treaty.
- Public Procurement rules allow for economic and non-economic factors to influence the award of public and utilities contracts.
- The Court of Justice of the EU has been the **main influence** in the reforms of the public procurement acquis.
- Public procurement rules have **inherent flexibility** in their application.
- Public procurement rules provide for **discretion to Member States** in their transposition to national law.
- The EU Public Procurement acquis experiences regulatory porosity due to non-exhaustive harmonisation.

1.1 The doctrines of public procurement regulation

A liberalised and integrated public procurement is an essential component of the Single Market in the EU¹⁴. The origins of the regulation of public procurement in the European Union derive from soft law which identified purchasing practices of Member States as considerable non-tariff barriers and as hindering factors for the functioning of a genuinely competitive market¹⁵. The need for **competitiveness** and **transparency** in public procurement markets has been also considered as a safeguard to fundamental Treaty principles¹⁶, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality. Economic justifications for regulating public procurement have pointed towards introducing competitiveness into the relevant markets in order to increase cross-border trade of products and services destined for the public sector and to achieve price transparency and price convergence across the European Union, thus achieving significant savings¹⁷. The strategic importance of public procurement for the European integration process has been recognised by the 2011 Single Market Act¹⁸ which has prompted a series of reforms to the EU Public Procurement acquis¹⁹. These reforms aim at linking directly public procurement with the European 2020 Strategy on growth and competitiveness.

¹⁴ Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM (2010) 608 final.

¹⁵ *White Paper for the Completion of the Internal Market*, COM (85) 310 fin, 1985; also Green Paper on Public Procurement in the European Union: *Exploring the way forward*, European Commission 1996; also Commission, Communication on Public Procurement in the European Union, COM (98) 143.

¹⁶ Cases C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR 3605; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821; C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, [1998] ECR 73.

¹⁷ See Commission, *The Cost of Non-Europe, Basic Findings, Vol.5, Part. A; The Cost of Non-Europe in Public Sector Procurement* (Official Publications of the European Communities, 1988). Also the Cechinni Report 1992 *The European Challenge*, (Wildwood House, 1988).

¹⁸ Communication: Europe 2020, A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 final.

¹⁹ Green Paper on the modernization of EU public procurement policy: Towards a more efficient European Procurement Market, COM (2011) 15/47.

The drivers of public procurement regulation have been promoted by the following doctrines which have been utilised to construct the interpretation of concepts of the public procurement Directives.

1.1.1. The doctrine of objectivity

First, the doctrine of objectivity, intends to provide a restrictive interpretation of rules governing selection procedures (quantitative and qualitative suitability criteria) and award procedures, in particular negotiated procedures as well as with the support of the test of equivalence, eliminate non-tariff barriers in the fields of technical standards, product specification and standardization.

1.1.2. The doctrine of effectiveness

The doctrine of effectiveness results in the applicability of public procurement Directives and is verified by the test of functionality, interpreting the term contracting authority in broad and functional terms²⁰ and encompassing as contracting authorities private law entities²¹, private entities for industrial and commercial development²², entities meeting needs of general interest retrospectively²³, semi-public undertakings²⁴, state commercial companies²⁵ and statutory sickness funds²⁶. The doctrine of effectiveness is also verified by defining a body governed by public law as an effective concept of EU law which must receive an autonomous and uniform interpretation throughout the EU²⁷ based on the tests of dualism²⁸ and commercialism²⁹.

The test of dualism refers to the ability of contracting authorities to pursue market oriented activities without losing their classification as contracting authorities for the purposes of public procurement law. The test of commercialism indicates that profitability and commercially motivated decision-making on the part of an undertaking render the public procurement directives inapplicable. Contracting authorities are free to set up legally independent entities if they wish to offer services to third parties under normal market conditions. If such entities aim to make profit, bear the losses related to the exercise of their activities, and perform no public tasks, they are not to be classified as contracting authorities³⁰.

The doctrine of effectiveness applies also with a view to meeting the requirements of swift dispute resolution at national level and of enforceability of decisions of national courts or tribunals.

²⁰ Case C-44/96 *Mannesmann Anlagenbau Austria and Others*, [1998] ECR I-73, paragraphs 20 and 21; case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53; case C-214/00 *Commission v Spain* [2003] ECR I-4667, paragraphs 52 and 53; and case C-283/00 *Commission v Spain* [2003] ECR I-11697, paragraph 69.

²¹ Case C-214/00 *Commission v Spain* [2003] ECR I-4667, paragraphs 54, 55 and 60; and case C-283/00 *Commission v Spain* [2003] ECR I-11697, paragraph 75.

²² Case C-18/01, *Arkkitehtuutoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy, Rakennuttajatoimisto Vilho Tervomaa and Varkauden Taitotalo Oy*, [2003] ECR I-5321 paragraphs 48 and 59; also case C-373/00, *Adolf Truly*, [2003] ECR-193, paragraph 66.

²³ Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53;

²⁴ Case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-1;

²⁵ Case C-283/00, *Commission v Spain*, [2003] ECR I-11697. Cases *Adolf Truly*, paragraph 42, and *Korhonen*, paragraphs 51 and 52, *op.cit.*

²⁶ Case C-300/07, *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik, v. AOK Rheinland/Hamburg*, [2009] ECR I-4779.

²⁷ Case C-44/96 *Mannesmann Anlagenbau Austria and Others*, [1998] ECR I-73, paragraphs 20 and 21; case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53; case C-214/00 *Commission v Spain* [2003] ECR I-4667, paragraphs 52 and 53; and case C-283/00 *Commission v Spain* [2003] ECR I-11697, paragraph 69.

²⁸ Case C-44/96 *Mannesmann Anlagenbau Austria*, [1998] ECR I-73, paragraphs 17 to 35.

²⁹ Cases C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI^{Holding} BV*, *op.cit.*; C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, *op.cit.*

³⁰ Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 51.

The doctrine of effectiveness presumes that national remedies, which are left to the discretion of Member States, must be effective in adhering to and observing public procurement law and EU law by reference to enforcement mechanisms. Effectiveness is measured by the ability to enforce public procurement law.

1.1.3. The doctrine of flexibility

The doctrine of flexibility which is defined through the tests of dependency³¹ and competitiveness³² provides the parameters for the inapplicability of the public procurement Directives. The test of dependency reveals two distinctive features: the similarity of control of an undertaking to that exercised by contracting authorities over their own departments and the operational connection of the undertaking's activities to the objectives of the contracting authority. The test of competitiveness indicates that any element of competition from private undertakings in the activities of an undertaking, dilutes the assumption that for that undertaking to be considered as a body governed by public law, it must be established for the specific purpose of meeting needs in the general public interest not having an industrial or commercial character. The doctrine of flexibility is also reflected in legislative provisions of both the public sector and utilities procurement Directives respectively.

The flexibility doctrine is reflected on the award criteria of public contracts, through the test of compatibility of socio-economic and environmental policies with the economic approach to public procurement regulation.

1.1.4. The doctrine of procedural autonomy

The doctrine of procedural autonomy is depicted through the wide discretion afforded to Member States to create the appropriate fora to receive complaints against decisions of contracting authorities and utilities, as well as actions for damages.

1.1.5. The doctrine of procedural equality

The doctrine of procedural equality, expressed through the explicit obligation conferred to Member States to avoid introducing review procedures for public procurement disputes, as well as procedures for actions for damages which differ, in a discriminatory context, from other review procedures and procedures for actions for damages under national law. The doctrine of procedural equality is a boundary of Member States' discretion in their autonomy to establish remedies for enforcing public procurement rules. Procedural equality presumes that the procedural autonomy for public procurement remedies granted on Member States must not result in differentiated systems when compared with redress procedures for other disputes within their legal orders.

1.2. Discretion in the application of public procurement rules

Discretion has been inherent in public procurement *acquis*. Firstly, through harmonisation, discretion appears as the most influential factor in the evolution of public procurement regulation and its decentralised application. Directives have been entrusted to carry the principles and concepts of the regime. Secondly, discretion is evident in the procurement concepts, such as contracting authorities and public contracts and the process itself, such as the selection and qualification phase, the award procedures and the award criteria phases. Thirdly, discretion in the application of public procurement

³¹ Case C-107/98, *Teckal Srl v Comune di Viano*, [1999] ECR I-8121; case C-237/99, *Commission v. France*, case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, [2000] ECR I-8035;

³² Joined cases C-223/99 & C-260/99, *Agora Srl v. Ente Autonomo Fiera Internazionale di Milano and Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR I-3605; also case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 51.

regulation is verified by CJEU's jurisprudence, where judicial doctrines attempt to align it with the underlying EU legal principles.

Discretion in public procurement surfaces through two judicially developed doctrines, the doctrine of flexibility in the application of substantive public procurement rules and the doctrine of procedural autonomy in the application of remedies in the award of public contracts. The doctrine of *flexibility* has been applied in order to determine the remit and thrust of public procurement rules, particularly in relation to the concept of contracting authorities and the ability to use socio-economic and environmental policies as award criteria. The doctrine of *procedural autonomy* is depicted through the wide discretion afforded to Member States to create the appropriate *fora* to receive complaints against decisions of contracting authorities and utilities, as well as actions for damages.

1.3. The boundaries of discretion in public procurement regulation

At first sight, the main boundary of discretion of public procurement has been the *de lege ferenda* i.e. the spirit of the law interpretation of public procurement Directives³³ in order to provide a platform upon which Member States can effectively implement the *acquis* into domestic legal systems. A *de lege ferenda* interpretation of the public procurement Directives reflects on an optimal regulatory interface arising out of the Directives. Although the deficiencies and conceptual limitations of the public procurement Directives have been recognised, jurisprudence has pointed towards the strategic goal to arm the regime with direct effect, in order to enhance access to justice at national level, to improve compliance and to streamline public procurement regulation by introducing an element of uniformity in its application. The most pronounced deficiency of the public procurement Directives is their porosity which is caused by non-exhaustive harmonisation. Porosity is a condition of legal instruments that allows areas which otherwise would be subjected to their remit to fall through and escape the envisaged regulation. Non-exhaustive harmonisation excludes explicitly certain aspects of the matter envisaged thus limiting the regulatory intervention which should be harmonised by legal instrument such as Directives. The porosity of the public procurement Directives undermines their effectiveness by preventing their applicability to certain contractual situations and as a result restricting a *de lege ferenda* extension of their provisions.

Non-exhaustive harmonisation excludes from the scope of the public procurement Directives public contracts below certain thresholds and certain contractual relationships which reflect inter-administrative interfaces in the public sector or contractual relations based on dominant influence between utilities and affiliated undertakings and in particular public contracts based on exclusive rights, public contracts in pursuit of services of general economic interest and in-house contracts.

Non-exhaustive harmonisation reflects the mutual exclusivity of the public sector Directive and the Utilities Directive as well as their non applicability in cases of public contracts awarded pursuant to international rules, or secret contracts and contracts requiring special security measures or contracts related to the protection of Member States' essential interests.

In addition, the public sector Directive also does not cover public contracts of which their object is to provide or exploit public telecommunications networks; contracts for the acquisition or rental of land; contracts related to broadcasting services; contracts related with financial securities, capital raising

³³ Directive 2014/24 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2014/25 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2014/23 on the on the coordination of procedures for the award of concessions.

activities and central bank services; employment contracts; and research and development contracts which do not benefit the relevant contracting authority.

The Utilities Directive does not apply to contracts awarded in a third country; contracts awarded by contracting entities engaged in the provision or operation of fixed networks for the purchase of water and for the supply of energy or of fuels for the production of energy; contracts subject to special arrangements for the exploitation and exploration of oil, gas, coal or other solid fuels; contracts and framework agreements awarded by central purchasing bodies, contracts of which their object activity is directly exposed to competition on markets to which access is not restricted and contracts related to works and service concessions.

Non-exhaustive harmonisation in *lex specialis* legal instruments such as the public procurement Directives cannot impose limits on the application of primary EU law to supplement their legal thrust. The lacuna in the limited effectiveness of the procurement Directives and particularly in areas which cannot *de lege ferenda* be conducive to regulatory control and the need for conformity with EU law has been noted. Although the application of primary European law is not precluded in the presence of exhaustive provisions of secondary law³⁴, it has been explicitly recognised that the *lex specialis* character of the procurement Directives aims at complementing fundamental freedoms of EU law. The treatment of the porosity of the procurement Directives is administered through the necessity to supplement their remit with *acquis* deriving from fundamental principles of EU law. Thus, the supplementary applicability of primary EU law intends to close the gap that exists in contracts falling outside the procurement Directives, such as sub-dimensional contracts³⁵ and in contracts which fall within the remit of the Directives, but escape from the full thrust of the principles enshrined therein³⁶. The need to increase compliance of contracting authorities by promoting the objectivity of the procurement Directives and enhancing their justiciability, whilst in parallel limiting their inherent flexibility has been manifested.

The porosity of the public procurement Directives has been treated further by relying on the principle of transparency for their interpretation and application. The principle of transparency is surrogate to the principle of equal treatment and both principles encapsulate the fundamental EU law principles which underpin public procurement, such as the free movement of goods, the right of establishment and the freedom to provide services, as well as the principle of non-discrimination. The conceptual link between transparency and the principle of equal treatment is evident from jurisprudential

³⁴ Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9; Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32; and case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64.

³⁵ Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16, and case C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 32.

³⁶ See case 45/87 *Commission v Ireland* [1988] ECR I-4929, paragraph 27, where the Court held that the inclusion in the contract specification of a clause stipulating exclusively the use of national specifications infringe Article 30 EC; Case C-243/89 *Commission v Denmark (Storebælt)* [1993] ECR I-3353, where the Court found that contract clauses concerning preference to national specifications and nominated sub-contractors infringe Articles 30, 48 and 59 EC; Case C-158/03 *Commission v Spain*, and Case C-234/03 *Contse and Others* [2005] ECR I-9315, where the content of tendering specifications, and in particular sub-criteria for the award of contracts ran contrary to Article 49 EC; Case C-92/00 *HI* [2002] ECR I-5553, paragraph 42, where the Court ruled that contracting authorities' decisions are subject to fundamental rules of Community law, and in particular to the principles on the right of establishment and the freedom to provide services; Case C-244/02 *Kauppatalo Hansel Oy* [2003] ECR I-12139, paragraphs 31 and 33, where the Court confirmed the principle under which primary law is to be taken into account in a supplemental capacity for evaluating the effectiveness of the public procurement Directives; Case C-57/01 *Makedoniko Metro and Mihaniki* [2003] ECR I-1091, paragraph 69, where the Court held that even if the Community directives on public procurement do not contain specifically applicable provisions, the general principles of Community law ... govern procedures for the award of public contracts; Case C-275/98 *Unitron Scandinavia* [1999] ECR I-8291, paragraph 30 et seq, where the Court held that Community law principles such as the principles of transparency and the prohibition of discrimination on grounds of nationality must embrace the remit of the public procurement Directives.

developments. Transparency intends to ensure the effectiveness of equal treatment in public procurement by guaranteeing the conditions for genuine competition.

As the principle of equal treatment is a general principle of EU law, Member States are required to comply with the duty of transparency, which constitutes a concrete and specific expression of that principle.

The duty of transparency represents a concrete and specific expression of the principle of equal treatment³⁷, which assumes that similar situations should not be treated differently unless differentiation is objectively justified³⁸.

³⁷ Joined cases C-117/76 and C-16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7.

³⁸ Joined cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9, and case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 32.

2. ACHIEVEMENTS OF EUROPEAN PUBLIC PROCUREMENT ACQUIS

KEY FINDINGS

- The public procurement rules have provided for a **comprehensive framework of market access** to public sector and utilities contracts.
- Public procurement reforms have been based on **three principal objectives: simplification, modernization and flexibility**.
- The public procurement rules have introduced **transparency** of Member States expenditure for public and utilities contracts.
- The introduction of technology to the application of the procurement rules has **enhanced market information**.
- The public procurement rules have resulted in the **elimination of discriminatory technical standards**.
- The public procurement rules have introduced **objective and uniform criteria** for participation in tendering and award procedures.
- The public procurement rules have established an **effective judicial review system** and provided for **autonomous remedies** to Member States legal orders for disputes related to the award of public and utilities contracts.
- Public sector and utilities procurement rules **converge and align** in their application.

2.1. The reform agenda of public procurement

The strategic importance of public procurement for the European integration process has been recognised by the 2011 Single Market Act³⁹ which has prompted a series of reforms to the EU Public Procurement *acquis*⁴⁰. These reforms aim at linking directly public procurement with the European 2020 Strategy which focuses on **growth and competitiveness**. The importance of a liberalised and integrated public procurement as an essential component of the Single Market has been clearly established⁴¹. The conceptual origins of public procurement regulation in the European Union can be traced in policy instruments which identified purchasing practices of Member States as considerable **non-tariff barriers** and as **hindering factors** for the functioning of a genuinely competitive internal market. Economic justifications for regulating public procurement have pointed towards introducing competitiveness into the relevant markets in order to increase cross-border trade of products and services destined for the public sector and to achieve price transparency and price convergence across the European Union, thus achieving significant savings.

The need for competitiveness and transparency in public procurement markets is also considered as a safeguard to **fundamental Treaty principles**, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality.

³⁹ European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

⁴⁰ Green Paper on the modernization of EU public procurement policy: Towards a more efficient European Procurement Market, COM (2011)15/47.

⁴¹ European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

European institutions have introduced three new legal instruments which amend the public procurement Directives. In particular, Directive 2014/24/EU replaces Public Sector Directive 2004/18; Directive 2014/25/EU amends the Utilities Directive 2004/17; and a new Directive 2014/23/EU on concessions regulates the award of concessions. The 2014 EU legislative framework on public procurement and concessions has been enacted with expectations to enhance competitiveness and growth and to ensure the indispensable link of strategic procurement in the delivery of public services in the EU and its Member States.

The 2014 EU legislative framework benefits from **simplification, modernisation, procedural efficiencies** and from **streamlining** the application of the substantive rules.

The reforms brought by the amendments to the Public Sector Directive⁴² and the Utilities Directive⁴³ and the introduction of the Concessions Directive⁴⁴ have as their main aims the strategic use of simpler, flexible and sound procedures which can provide better market access and cross-border trade in public contracts and ensure robust governance through the professionalization of public procurement.

Remedies in public procurement have been the subject of reform in 2007 by the amending Remedies Directive⁴⁵ which improved access to justice and legal redress. Defence and security in public procurement are covered by the Defence Procurement Directive⁴⁶. The Remedies Directive and the Defence Procurement Directive were not part of the reform agenda of the 2014 EU legislative framework.

2.2. Public Sector Directive reforms

Group structures and contracts between entities within the public sector

The Directive exempts from tendering requirements contracts between contracting authorities and legal entities upon which the former exercise single⁴⁷ or joint control⁴⁸ that is similar to the control that they exercise over their own departments and the latter performs more than 80 % of the activities for the benefit of the former by other legal persons controlled by that contracting authority; and there is no direct private capital participation in the controlled legal entity with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions which do not exert a decisive influence on the controlled legal person.

The controlled entity by a single or multiple contracting authorities is exempt from applying the public Procurement Directive in awarding a contract to its controlling contracting authority, or to another legal entity controlled by the same contracting authority⁴⁹, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions which do not exert a decisive influence on the controlled legal person.

⁴² Directive 2014/24/EU, OJ L 94, 28.3.2014, p.65–242.

⁴³ Directive 2014/25/EU, OJ L 94, 28.3.2014, p. 243–374.

⁴⁴ Directive 2014/23/EU, OJ L 94, 28.3.2014, p. 1–64.

⁴⁵ Directive 2007/66/EU, O.J. 2007, L335/31.

⁴⁶ Directive 2009/81/EU, OJ L 216, 20/08/2009, p. 76–136.

⁴⁷ Article 12(1) of Directive 2014/24/EU.

⁴⁸ Article 12(3) of Directive 2014/24/EU.

⁴⁹ Article 12(2) of Directive 2014/24/EU.

Public-public co-operation

A contract concluded exclusively between two or more contracting authorities⁵⁰ is not deemed as a public procurement contract if it establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common; and the implementation of that cooperation is governed solely by considerations relating to the public interest; and finally the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.

Excluded services

The Public Sector Directive has introduced new exclusions for certain categories of services including legal services and legal advice given related to legal representation in arbitration or conciliation or judicial proceedings before national courts or international courts; notarial legal services related to document certification and authentication services⁵¹; financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments⁵²; central bank services and operations conducted with the European Financial Stability Facility and the European Stability Mechanism; loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments and civil defence, civil protection⁵³, and danger prevention services that are provided by non-profit organisations or associations.

Contract modifications and changes of economic operators

Contracts and framework agreements may be modified without a new procurement procedure where the modifications, irrespective of their individual monetary value and up-to 50 % of the value of the original contract, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options.

Contracts and framework agreements may be modified without a new procurement procedure and up-to 50 % of the value of the original contract for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and would cause significant inconvenience or substantial duplication of costs for the contracting authority.

Contracts and framework agreements may be modified without a new procurement and up-to 50 % of the value of the original contract where the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee and any modification does not alter the overall nature of the contract;

Contracts and framework agreements may be modified without a new procurement procedure and up-to 50 % of the value of the original contract where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of an unequivocal review clause or option in the original contract or a total or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established for the

⁵⁰ Article 12(4) of Directive 2014/24/EU.

⁵¹ Article 10(d) of Directive 2014/24/EU.

⁵² Directive 2004/39/EC on markets in financial instruments, OJ L 145, 30.4.2004, p. 1.

⁵³ Article 10(h) of Directive 2014/24/EU.

award of the contract or in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors.

Any contract modification without a new procurement procedure must be notified by the contracting authority by publishing a notice to that effect in the *Official Journal of the European Union*.

De minimis

Where the value of the modification is below the stipulated thresholds or 10 % of the initial contract value for service and supply contracts and below 15 % of the initial contract value for works contracts, there is no requirement for new procurement procedures.

New procurement procedure required for substantial changes

A modification of a contract or a framework agreement during its term shall be considered to be substantial, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In particular, any modification shall be regarded as substantial where it introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure; any modification shall be regarded as substantial where it changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement; extends the scope of the contract or framework agreement considerably; any modification shall be regarded as substantial where an unrelated contractor replaces the one to which the contracting authority had initially awarded the contract.

Compulsory e-procurement

The EU Public Sector Procurement Directive 2014/24/EU and Utilities Procurement Directive 2014/25/EU specify the mandatory use of electronic procurement⁵⁴ in the stages of e-notification which covers the dispatch of notices to the Official Journal Publications Office for publication⁵⁵, e-access which covers the obligation to make procurement document available electronically from the beginning of the procedure⁵⁶, e-submission which covers submission of the tenders and certain other documents by electronic means of communication and e-communication which covers the use of electronic means of communications for all communications in a procurement procedure⁵⁷.

Limited obligations for the use of electronic procurement apply for concessions under Directive 2014/23/EU.

The Directive currently requires all the "procurement documents" (including the contract terms) to be made available online from the date of publication of the OJEU notice.

⁵⁴ e-submission and e-communication stages of electronic procurement as postponed until 18 April 2017 for Central Purchasing Bodies, and until 18 October 2018 for other contracting authorities.

⁵⁵ Article 51(2) of the Public Sector Procurement Directive 2014/24/EU and Utilities Procurement Directive 2014/25/EU

⁵⁶ Article 53(1) of the Public Sector Procurement Directive 2014/24/EU and Utilities Procurement Directive 2014/25/EU

⁵⁷ Article 22(1) of the Public Sector Procurement Directive 2014/24/EU and Utilities Procurement Directive 2014/25/EU

Authentication

The Public procurement Directives do not require as mandatory for contracting authorities the use of electronic signatures, which are regulated by the eIDAS Regulation⁵⁸ which introduces new provisions regarding electronic Identity Documents and trust services, including e-signatures, e-seals and electronic time stamps. There is the possibility for contracting authorities to use electronic seals⁵⁹, electronic time stamps⁶⁰ and electronic registered delivery services⁶¹, provided Member States implements such instruments of authentication. The technical electronic capability required by Member States to include encryption and time stamping of tenders, electronic signatures and enhanced security measures are necessary to prevent procurement documents being tampered with.

Electronic signatures produce legally binding effect and in particular advanced electronic signatures, where they are required must be accepted if they originate from a trusted list of signatures, which must not impose additional requirements to economic operators and allow contracting authorities to be able to accept signatures in the required advanced electronic signature and qualified electronic signature formats⁶². Where an electronic signature is required, Member States must accept advanced electronic signatures based on a qualified certificate, with or without a secure signature device, issued by services providers from Trusted List of certification. Regulation 910/2014/EU on electronic identification and trust services for electronic transactions in the internal market provides for EU-wide definitions of 'electronic signature', 'advanced electronic signature' and 'qualified electronic signature' and for a requirement of mutual recognition on eligibility and assurance standards.

Electronic invoicing

Directive 2014/55/EU on Electronic Invoicing in Public Procurement, requires the Commission to adopt a European standard on the data and syntax for electronic invoices⁶³. There is a requirement that Member States accept and process electronic invoices⁶⁴. Decision 2017/1870/EU, sets out the European standards for e-invoicing.

PINs

Instead of publishing an OJEU contract notice for each procurement process, a contracting authority is able to publish a PIN (prior information notice). This gives details of all their proposed procurements over the next 12 months (with each procurement being treated as a separate "lot"). Suppliers respond to the PIN to "express an interest". When the contracting authority starts each actual procurement, they send an "invitation to confirm interest" to each of them.

Lots

Contracting authorities may award contracts in the form of separate lots and may determine the size and subject-matter of such lots. When procuring, contracting authorities must indicate in the procurement documents the main reasons for their decision not to subdivide a contract into lots, thus following the "explain or apply" principle in the division of contracts into lots.

⁵⁸ Regulation 910/2014/EU on electronic identification and trust services for electronic transactions in the internal market

⁵⁹ Article 35 of Regulation 910/2014/EU.

⁶⁰ Article 41 of Regulation 910/2014/EU Regulation 910/2014/EU.

⁶¹ Article 43 of Regulation 910/2014/EU.

⁶² Articles 26 and 28 of the Public Sector Procurement Directive 2014/24/EU.

⁶³ Article 3 of Directive 2014/55/EU.

⁶⁴ Article 7 of Directive 2014/55/EU.

There is also a possibility for contracting authorities to limit the number of lots any tenderer can win. This must be stated in the OJEU notice/invitation.

Selection and qualification

Significant changes were introduced to the selection and qualification stages of public procurement procedures:

There is a significant restriction on the questions that can be asked about bidders' financial strength. This limits the information that can be asked for to: a balance sheet, previous three year turnover figures, and a bank reference or evidence of "professional risk" insurance.

The minimum yearly turnover that contracting authorities may require for economic operators must not exceed two times the estimated contract value with the exception of justified cases related to special risks of the nature of the relevant contract.

Bidders "self-declare" that they meet the minimum prequalification requirements. Bidders can be excluded on the grounds of poor past performance of a contract for the procuring contracting authority where this is objectively "proportionate".

Conflicts of interest

There are specific provisions of the Public Sector Directive dealing with conflict of interest between staff of the authority and contractors as exclusion ground. In addition, conflict of interest may occur in cases of pre-procurement involvement of a contractor that has advised on or being involved in preparing for the procurement.

Exclusion grounds

Public Sector Directive stipulates the grounds⁶⁵ for exclusion and distinguishes between mandatory and discretionary grounds for exclusion with Member States expressly allowed to use discretionary grounds as mandatory exclusion grounds.

Mandatory grounds for exclusion of economic operators include conviction by final judgment for one of the following reasons: participation in a criminal organization; corruption; fraud; terrorist offences or offences linked to terrorist activities; money laundering or terrorist financing; child labour and other forms of human trafficking; non fulfilment of obligations relating to the payment of taxes or social security contributions.

Discretionary grounds for exclusion of economic operators include violations of applicable obligations referred to in Article 18(2); bankruptcy or subject of insolvency or winding-up proceedings; grave professional misconduct; distortion of competition; conflict of interest; distortion of competition from prior involvement with the contracting authority; significant or persistent deficiencies in the performance of public contracts; serious misrepresentation; undue influence of the decision making process of contracting authorities;

Re-Establishment of reliability

If a contracting authority has sufficient evidence by any economic operator falling under the mandatory or discretionary exclusion grounds in public procurement procedures that measures have been taken by that economic operator to demonstrate its reliability despite the existence of a relevant ground for exclusion, the economic operator concerned shall not be excluded from the procurement procedure.

⁶⁵ Article 57 of Directive 2014/24/EU.

Measures that have been taken by economic operators seeking re-establishment of reliability must be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct and must prove that the economic operator has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

Member States must determine by law, regulation or administrative provision the maximum period of exclusion of economic operators who fall under the mandatory or discretionary exclusion grounds, if no reliability measures have been taken or proven sufficient. Where the period of exclusion has not been set by final judgment of the relevant Member State, that period shall not exceed five years from the date of the conviction by final judgment in the mandatory exclusion grounds cases and three years from the date of the relevant event in the discretionary exclusion grounds cases.

Self-declaration

The Directive stipulates for the creation of the ESPD (European Single Procurement Document).

The ESPD is a self-declaration form replacing the various different forms used in the past for proving that a bidder fulfils the exclusion and selection criteria. The ESPD envisages eliminating major obstacles to participation in public procurement in the shape of the administrative burden resulting from the need to produce a considerable number of supporting documents related to exclusion and selection criteria.

The ESPD is available in all EU languages and used as a preliminary evidence of fulfillment of the conditions required in public procurement procedures across the EU.

Full evidence will have to be provided by the tender winners unless the contracting authority has the possibility of obtaining the supporting documentation directly by accessing a national database in any Member State that is available free-of-charge; or the contracting authority already possesses the supporting documentation. To ensure the integrity of the tendering procedure, a contracting authority may request tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents⁶⁶.

Attestation

Information concerning certificates and other forms of documentary evidence of eligibility of economic operators is introduced in e-Certis⁶⁷, an **online repository of certificates** which is obligatory for contracting authorities to have recourse to and constantly keep up-to-date.

Procurement procedures

Preliminary market consultation

Before launching a procurement procedure, contracting authorities may conduct market consultations⁶⁸ with a view to preparing the procurement and informing economic operators of their procurement plans and requirements, seeking or accepting advice from independent experts or authorities or from market participants which may be used in the planning and conduct of the

⁶⁶ Article 59(4) of Directive 2014/24/EU.

⁶⁷ Article 61 of the Public Sector Procurement Directive 2014/24/EU.

⁶⁸ Article 40 of Directive 2014/24/EU.

procurement procedure. Any market consultation must comply with the principles of non-discrimination and transparency and not have the effect of distorting competition.

Pre-procurement involvement

Contracting authorities which engage in market consultations with candidates to a procurement procedure are required⁶⁹ to reveal to all remaining candidates any relevant information exchanged in the context of or resulting from the involvement of the candidates who had been involved in market consultation or in the preparation of the procurement procedure. Contracting authorities must also adopt adequate time limits for the receipt of tenders to accommodate candidates which had not previously engaged through market consultations.

Exclusion from a procurement procedure of candidates engaged in market consultations with a contracting authority is allowed when there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

The already existing procedure of the Competitive Dialogue has received a broader scope for negotiations in the final stages. The competitive dialogue is an award procedure which is used exceptionally in cases of particularly complex contracts, where the use of the open or restricted procedures will not allow the award of the contract, and the use of negotiated procedures cannot be justified. A public contract is considered to be particularly complex where the contracting authorities are not able to define in an objective manner the technical specifications which are required to pursue the project, or they are not able to specify the legal or financial make-up of a project.

Sub-central contracting authorities may utilise PIN (prior information notice) as a means for calling for competition and the possibility to agree deadline with tenderers in restricted procedures and competitive procedures with negotiation.

Competitive procedures with negotiation

Competitive procedures with negotiation replace the negotiated procedure with prior publication which provided for the award of a public contract in two rounds. In the first round, all interested contractors submitted their tenders and the contracting authority selected, from the candidates, those who were invited to negotiate. In the second round, negotiations with various candidates took place and the successful tender was selected.

Competitive procedures with negotiation⁷⁰, are negotiations between a contracting authority and any economic operator in response to a call for competition containing information relevant to the subject-matter of the procurement, the minimum requirements to be met by all tenders, the needs and the characteristics required of the supplies, works or services to be procured and the contract award criteria. In principle, the minimum number of candidates to be selected is three, provided that there are a sufficient number of suitable candidates.

Innovation partnership

The Innovation Partnership⁷¹ is an award procedure designed to improve market interest by combining a contract which has the object of research with a purchase followed-up contract, provided that the research result fulfils pre-defined performance levels. Innovation partnerships are structured in successive phases similar to the procedure of *competitive negotiations* with intermediate targets and payments and cut-off options.

⁶⁹ Article 41 of Directive 2014/24/EU.

⁷⁰ Article 29 of Directive 2014/24/EU.

⁷¹ Article 31 of Directive 2014/24/EU.

Timescales

The minimum time limit for the receipt of tenders in open procedures shall be 35 days from the date on which the contract notice was sent. The minimum time limit for receipt of requests to participate in restricted procedures, in competitive procedures with negotiation, in competitive dialogues and in innovation partnerships shall be 30 days from the date on which the contract notice was sent or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent.

Sustainable and responsible procurement

Responsible procurement is established in addition to the stipulated principles of *equal treatment* and *non-discrimination* of economic operators, *transparency* and *proportionality* in the behaviour and actions of contracting authorities, *prohibition of avoidance* of the Public Sector Directive and *maintenance of competition*⁷² in the award of public contracts, a fundamental principle in the reform of the Public Sector Directive is the requirement⁷³ for Member States and contracting authorities for compliance of economic operators in the performance of public contracts with applicable obligations established by the EU or national legal orders or collective agreements in the fields of environmental, social and labour law and with applicable international environmental, social and labour law obligations⁷⁴, notwithstanding the rights of posted workers and economic operators from different Member States⁷⁵.

Responsible procurement affords contracting authorities the option

- not to award contracts⁷⁶ if they have established that the tender does not comply with the applicable obligations referred to in Article 18(2);
- to exclude⁷⁷ from participation in a procurement procedure any economic operator if they can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);
- to require⁷⁸ economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services and in particular with reference to compliance with obligations referred to in Article 18(2) and to reject a tender which it is abnormally low due to not compliance with Article 18(2).

⁷² Competition for the award of public contracts is considered to be artificially narrow if the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators, Article 18 of Directive 2014/24/EU.

⁷³ Article 18(2) of Directive 2014/24/EU.

⁷⁴ International environmental, social and labour law contained in Annex X of the Directive 2014/24/EU include ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise; ILO Convention 98 on the Right to Organise and Collective Bargaining; ILO Convention 29 on Forced Labour; ILO Convention 105 on the Abolition of Forced Labour; ILO Convention 138 on Minimum Age; ILO Convention 111 on Discrimination (Employment and Occupation); ILO Convention 100 on Equal Remuneration; ILO Convention 182 on Worst Forms of Child Labour; Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention); Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols.

⁷⁵ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1).

⁷⁶ Article 56 of Directive 2014/24/EU.

⁷⁷ Article 57(4)(a) of Directive 2014/24/EU.

⁷⁸ Article 69(2)(d) of Directive 2014/24/EU.

- to lay down⁷⁹ special conditions relating to the performance of a contract, including economic, innovation-related, environmental, social or employment-related considerations.
- to ensure⁸⁰ observance of obligations referred to in Article 18(2) by subcontractors to a public contract through a mechanism of joint liability⁸¹ between subcontractors and main contractor.
- to provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request such direct payment.

Sustainable procurement is provided by the introduction of new rules which offer greater opportunities for environmentally beneficial and “fair trade” purchasing. Compliance with environmental management systems (such as EMAS, the EU Eco Management and Audit Scheme) can also be required, where they are relevant to the contract. Any “standards” required need to be based on scientific evidence and objective criteria established through an “open and transparent process involving all stakeholders”. There is also emphasis on lifecycle costs in tender evaluation. Environmental costs can be taken into account if quantifiable in monetary terms.

Light regime procurement

For contracts related to social and other specific services listed in Annex XIV, the threshold is EUR 750.000. Such services include Health, social and related services, administrative social, educational, healthcare and cultural services, compulsory social security services; benefit services, community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services; religious services; hotel and restaurant services; legal and administrative government services; provision of services to the community; prison related services; public security and rescue services; investigation and security services; international services such as services provided by extra-territorial organisations and bodies and services specific to international organisations and bodies; postal services; miscellaneous services related to tyre-remoulding services and blacksmith services.

The light procurement regime for such services implies only ex-ante ex-post publicity requirements plus adherence to the principle of non-discrimination principle. Member States have the choice to apply only the best price-quality ratio (BPQR) which must to be assessed on the basis of award criteria linked to the subject-matter of the contract.

Contract award criteria

The Public Sector Directive specifies as sole award criterion the most economically advantageous tender, which must be assessed on the basis of price, or cost, using a cost-effectiveness approach such as life-cycle costing, or the best price-quality ratio (BPQR) which must to be assessed on the basis of award criteria linked to the subject-matter of the contract.

Where organisation, qualification and experience of the staff delivering the contract can significantly impact the level of performance of the contract, such attributes of economic operators may be used as award criteria.

⁷⁹ Article 70 of Directive 2014/24/EU. Special conditions are subject to being linked to the subject-matter of the contract within the meaning of Article 67(3) of Directive 2014/24/EU and indicated in the call for competition or in the procurement documents.

⁸⁰ Article 71(1) of Directive 2014/24/EU.

⁸¹ Article 71(6)(a) of Directive 2014/24/EU.

Member States can exclude or restrict the use of price or cost only as sole criterion.

Life-Cycle Costing

The new Public Procurement Directives significantly alter the process of tender awarding, through assigning a relevant importance to life cycle costing.

A new contract award criterion have been introduced⁸² as “.....*the most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing ...*”

Life cycle means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation.

Life-cycle costing is a tool to evaluate the costs of a good or service taking into account not just price (the upfront cost, usually incorporating production costs) but all costs which will accrue with operation and maintenance and finally disposal. When externalities are included, life-cycle costing becomes ‘an environmentally-relevant methodology’.

2.3. The Utilities Procurement Reforms

Utilities Procurement

Essentially the same changes have been effected by the **2014 EU legislative framework** for the Utilities Directive 2014/25/EU as for the Public Sector Directive 2014/24/EU. In order to take into account the flexibility required in the procurement of entities which operate in the Utilities sectors, there have been changes and amendments on issues specific to the Utilities Directive 2014/25/EU which provide for clarity and certainty.

Definitions

There are **new definitions** for a number of concepts in Utilities procurement:

regional authorities includes all authorities of the administrative units, listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003.

local authorities, includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in Regulation (EC) No 1059/2003.

ancillary purchasing activities cover activities consisting in the provision of support to purchasing activities, in particular in the following forms: technical infrastructure enabling contracting entities to award public contracts or to conclude framework agreements for works, supplies or services; advice on the conduct or design of procurement procedures; preparation and management of procurement procedures on behalf and for the account of the contracting entity concerned;

procurement service provider means a public or private body, which offers ancillary purchasing activities on the market;

life cycle indicates all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilisation

⁸² Article 67 of Directive 2014/24/EU.

innovation means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, inter alia, with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth;

A new definition on **conflicts of interest**⁸³ was established concerning the conflicts of interest and categories of affected persons but only in respect of contracting authorities which must appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

The Utilities Directive 2014/25/EU introduced **amended definitions** for *candidate* captures an economic operator that has sought an invitation or has been invited to take part in a restricted or negotiated procedure, in a competitive dialogue or in an innovation partnership;

procurement document is regarded as any document produced or referred to by the contracting entity to describe or determine elements of the procurement or the procedure, including the contract notice, the periodic indicative notice or the notices on the existence of a qualification system where they are used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

centralised purchasing activities cover activities conducted on a permanent basis, for the acquisition of supplies and/or services intended for contracting entities, or the award of contracts or the conclusion of framework agreements for works, supplies or services intended for contracting entities;

central purchasing body means a contracting entity or a contracting authority which provide centralised purchasing activities and, possibly, ancillary purchasing activities. Procurement carried out by a central purchasing body in order to perform centralised purchasing activities shall be deemed to be procurement for the pursuit of activities in the gas and heat sector, the electricity production and distribution sector, the water sector, in transport services, in ports and airports, in postal services and for extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels. The exclusion from Utilities Procurement Directive for contracts awarded for purposes of resale or lease to third parties⁸⁴ is not applicable to central purchasing bodies for performing centralised purchasing activities supply cover generation, wholesale and retail activities.

The method for calculation of the estimated value of procurement was amended specifically to cover cases related to the separate operational units⁸⁵ of a contracting entity, where account shall be taken of the total estimated value for all the individual operational units.

⁸³ Article 42 of Directive 2014/25/EU.

⁸⁴ Article 18 of Directive 2014/25/EU.

⁸⁵ Article 16 of Directive 2014/25/EU.

Where a separate operational unit is totally or partially independently responsible for its procurement, the values may be estimated at the level of the unit in question.

There is a detailed provision of **mixed procurement contracts** covering the same activity and procurement covering several activities.

A mixed contract covering the same activity is a contract which has as its subject-matter two or more types of procurement for works, services or supplies.

Mixed contracts must be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question. For mixed contracts consisting partly of services and partly of supplies, and for mixed contracts consisting partly of services covered by the light regime as in the Public Sector Directive 2014/24/EU Annex XIV and partly of other services, the main subject shall be determined in accordance with which of the estimated values of the respective services or supplies is the highest.

Contracts which have as their subject-matter procurement covered by the Utilities Procurement Directive 2014/25/EU as well as procurement not covered by that Directive may be separated. Contracting entities may choose to award separate contracts for the separate parts or instead to award a single contract. Where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the main subject-matter of that contract.

If contracting entities choose to award separate contracts, the decision as to which legal regime applies to any one of the separate contracts shall be taken on the basis of the characteristics of the separate contract concerned.

If contracting entities choose to award a single contract, such single contract is regarded as a mixed contract irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to. The consequence is that for the award of a single contract, the Utilities Procurement Directive 2014/25/EU is applicable. There is an exception⁸⁶ to that provision in cases of mixed contracts covering the same activity and involving defence or security aspects covered by Article 346 TFEU or Directive 2009/81/EC, in which cases the award of the relevant contract falls outside the Utilities Procurement Directive 2014/25/EU.

In the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the mixed contract shall be awarded in accordance with the Utilities Procurement Directive 2014/25/EU, provided that the estimated value of the part of activities for the contract is equal to or greater than the relevant threshold values stipulated by Utilities Procurement Directive 2014/25/EU.

Procurement covering several activities

For contracts intended to cover several activities, contracting entities may choose to award separate contracts for the purposes of each separate activity. The decision as to which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned and shall be subject to the rules applicable to the activity for which it is principally intended.

Contracting entities may choose to award a single contract for procurement covering several activities. The choice between awarding a single contract shall not be made with the objective of excluding the application of the Public Sector Procurement Directive 2014/24/EU or the Concessions Procurement Directive 2014/23/EU.

⁸⁶ Article 25 of Directive 2014/25/EU.

Contracts for which it is objectively impossible to determine the principal intention of one or all of their several activities, if one of the activities for which the contract is intended is subject to the Utilities Procurement Directive 2014/25/EU and the other to the Public Sector Procurement Directive 2014/24/EU, the contract shall be awarded in accordance with Public Sector Procurement Directive 2014/24/EU; if one of the activities for which the contract is intended is subject to the Utilities Procurement Directive 2014/25/EU and the other to Concessions Procurement Directive 2014/23/EU, the contract shall be awarded in accordance with Utilities Procurement Directive 2014/25/EU; if one of the activities for which the contract is intended is subject to this Directive and the other is not subject to any of the EU Procurement Directives, the contract shall be awarded in accordance with Utilities Procurement Directive 2014/25/EU.

Special and exclusive rights

There is explicit clarification of the concept of "**special and exclusive rights**". *Special or exclusive rights* means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to allow one or more entities to carry out activities in the gas and heat sector, the electricity production and distribution sector, the water sector, in transport services, in ports and airports, in postal services and for extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels and substantially affects the ability of other entities to enter the relevant markets.

Rights which have been granted by means of procedures such as public procurement procedures or procedures ensuring adequate transparency and publicity has been ensured and where the granting of those rights was based on objective criteria are not considered as special or exclusive rights.

Coverage of Utilities Procurement

Non-economic services of general interest are excluded from Utilities procurement.

Exploration for oil or natural gas has been excluded from the Utilities Procurement Directive 2014/25/EU as the relevant sector is deemed to be subject to a competitive environment thus rendering the Utilities Procurement Directive 2014/25/EU inapplicable. However activities related to the extraction of oil or gas are subject to the Utilities Procurement Directive 2014/25/EU.

Public passenger transport services by rail or metro are excluded⁸⁷ from the Utilities Procurement Directive 2014/25/EU.

The exclusion of passenger bus services under the Utilities Procurement Directive 2004/17/EU has been abolished. Entities providing bus transport services to the public, which were also excluded from the scope of the previous Utilities Directive 93/38 on the grounds that relevant activities were performed in a sufficiently competitive market and the need to preserve a multitude of specific arrangements applying to that sector cannot longer rely on that exemption.

Services ancillary⁸⁸ to postal services previously covered by the Utilities Procurement Directive 2004/17/EU, and in particular, mail service management services (services both preceding and subsequent to dispatch, such as mailroom management services), added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail), services concerning postal items such as direct mail bearing no address, financial services including in

⁸⁷ Article 21(g) of Directive 2014/25/EU.

⁸⁸ Article 6(2)(c) of the Utilities Procurement Directive 2004/17/EU, OJ 2004, L134/1. The ancillary to postal services were subject to the Utilities Procurement Directive on condition that such services are provided by an entity which also provides postal services and that the such logistics services are not directly exposed to competition on markets to which access is not restricted.

particular postal money orders and postal giro transfers, philatelic services, and finally logistics services (services combining physical delivery or warehousing with other non-postal functions), are excluded from the Utilities Procurement Directive 2014/25/EU.

Postal services such as poste restante, mail box rental, post counter services fall under the remit of the light procurement regime which is similar to the Public Sector Procurement Directive 2014/24/EU.

Contracts between contracting entities within controlling entities

The Utilities Procurement Directive 2014/25/EU exempts⁸⁹ from tendering requirements contracts between contracting authorities, but not contracting entities or public undertakings, and legal entities upon which the former exercise single or joint control that is similar to the control that they exercise over their own departments and the latter performs more than 80 % of the activities for the benefit of the former by other legal persons controlled by that contracting authority; and there is no direct private capital participation in the controlled legal entity with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions which do not exert a decisive influence on the controlled legal person.

The controlled entity by a single or multiple contracting authorities is exempt from applying the public Procurement Directive in awarding a contract to its controlling contracting authority, or to another legal entity controlled by the same contracting authority⁹⁰, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions which do not exert a decisive influence on the controlled legal person.

The exemption of *public-public co-operation* which has been established in the Public Sector Procurement Directive 2014/24/EU⁹¹ is also provided for under the Utilities Procurement Directive 2014/25/EU⁹², however it covers only contracting authorities and is not extended to contracting entities⁹³ nor public undertakings⁹⁴. The conditions of co-cooperation remain similar between the Public Sector Procurement Directive 2014/24/EU and the Utilities Procurement Directive 2014/25/EU. A contract concluded exclusively between two or more contracting authorities is not deemed as a public procurement contract if it establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common; and the implementation of that cooperation is governed solely by considerations relating to the public interest; and finally the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.

⁸⁹ Article 28 of Directive 2014/25/EU.

⁹⁰ Article 12(2) of Directive 2014/24/EU.

⁹¹ Article 12(4) of Directive 2014/24/EU.

⁹² Article 28(4) of Directive 2014/25/EU.

⁹³ Article 4(1) of Directive 2014/25/EU specifies as contracting entities are contracting authorities or public undertakings or entities which operate on the basis of special or exclusive rights granted by a competent authority of a Member State and which pursue one of the activities in the gas and heat sector, the electricity production and distribution sector, the water sector, in transport services, in ports and airports, in postal services and for extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels and substantially affects the ability of other entities to enter the relevant markets.

⁹⁴ Article 4(2) of Directive 2014/25/EU specifies Public undertakings are undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

There are **new exclusions** envisaged in the 2014 Utilities Procurement Directive.

Public contracts and design contests which the contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution⁹⁵ which finances these contracts or design contests, are excluded from the Utilities Procurement Directive 2014/25/EU. Contracts or design contests which are co-financed the most part by an international organisation or international financing institutions are subject to applicable procurement procedures agreed by the parties.

Exclusion criteria

The mandatory exclusion criteria include conviction by final judgment for one of the following reasons: participation in a criminal organization; corruption; fraud; terrorist offences or offences linked to terrorist activities; money laundering or terrorist financing; child labour and other forms of human trafficking; non fulfilment of obligations relating to the payment of taxes or social security contributions specified in the Public Sector Procurement Directive 2014/24/EU are obligatory under the Utilities Procurement Directive 2014/25/EU only in cases where the contracting entity is a contracting authority⁹⁶. Contracting entities or public undertakings may apply these exclusion criteria.

Contracting authorities, contracting entities and public undertakings may be required by Member States to apply exclusion criteria covering the discretionary grounds for exclusion of economic operators specified in the Public Sector Procurement Directive 2014/24/EU and include violations of applicable obligations referred to in Article 18(2); bankruptcy or subject of insolvency or winding-up proceedings; grave professional misconduct; distortion of competition; conflict of interest; distortion of competition from prior involvement with the contracting authority; significant or persistent deficiencies in the performance of public contracts; serious misrepresentation; undue influence of the decision making process of contracting authorities;

Re-Establishment of reliability follows common rules with the Public Sector Procurement Directive 2014/24/EU in all cases of contracting authorities, contracting entities and public undertakings under the Utilities Procurement Directive 2014/25/EU. If a contracting authority or a contracting entities or a public undertakings has sufficient evidence by any economic operator falling under the mandatory or discretionary exclusion grounds in public procurement procedures that measures have been taken by that economic operator to demonstrate its reliability despite the existence of a relevant ground for exclusion, the economic operator concerned shall not be excluded from the procurement procedure.

Measures that have been taken by economic operators seeking re-establishment of reliability must be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct and must prove that the economic operator has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

Member States must determine by law, regulation or administrative provision the maximum period of exclusion of economic operators who fall under the mandatory or discretionary exclusion grounds, if no reliability measures have been taken or proven sufficient. Where the period of exclusion has not been set by final judgment of the relevant Member State, that period shall not exceed five years from

⁹⁵ Article 20 of Directive 2014/25/EU.

⁹⁶ Article 80 of Directive 2014/25/EU.

the date of the conviction by final judgment in the mandatory exclusion grounds cases and three years from the date of the relevant event in the discretionary exclusion grounds cases.

Light regime procurement

For contracts related to social and other specific services listed in Annex XVII of the Utilities Procurement Directive 2014/25/EU, the threshold is EUR 1 000 000. Such services include health, social and related services, administrative social, educational, healthcare and cultural services, compulsory social security services; benefit services, community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services; religious services; hotel and restaurant services; legal and administrative government services; provision of services to the community; prison related services; public security and rescue services; investigation and security services; international services such as services provided by extra-territorial organisations and bodies and services specific to international organisations and bodies; postal services; miscellaneous services related to tyre-remoulding services and blacksmith services.

The light procurement regime for such services implies only ex-ante ex-post publicity requirements plus adherence to the principle of non-discrimination principle. Member States have the choice to apply only the best price-quality ratio (BPQR) which must to be assessed on the basis of award criteria linked to the subject-matter of the contract.

Innovation partnership

The Innovation Partnership⁹⁷ is an award procedure designed to improve market interest by combining a contract which has the object of research with a purchase followed-up contract, provided that the research result fulfils pre-defined performance levels. Innovation partnerships are structured in successive phases similar to the procedure of *competitive negotiations* with intermediate targets and payments and cut-off options.

Activities directly exposed to competition

The material conditions related to any utilities activities directly exposed to competition⁹⁸ remain unchanged by the Utilities Procurement Directive 2014/25/EU. If an activity in the gas and heat sector, the electricity production and distribution sector, the water sector, in transport services, in ports and airports, in postal services and for extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels is directly exposed to competition on markets to which access is not restricted, after a request by Member States or contracting entities⁹⁹ engaged in such activity and an assessment by the European Commission that the activity is directly exposed to competition on markets to which access is not restricted, contracts intended to enable an activity are not be subject to the Utilities Procurement Directive 2014/25/EU.

Access to a market is presumed not to be restricted if Member States have implemented and applied the EU law listed in Annex III¹⁰⁰ of the Utilities Procurement Directive 2014/25/EU.

⁹⁷ Article 49 of Directive 2014/25/EU.

⁹⁸ Article 34 of Directive 2014/25/EU.

⁹⁹ The procedural framework of Member States or contracting entities to request the non-applicability of the Utilities Procurement Directive 2014/25/EU to activities directly exposed to competition is regulated by Article 35 of the Utilities Procurement Directive 2014/25/EU which has been amended to provide Uniform and more flexible deadlines to Member States or contracting entities.

¹⁰⁰ For transport or distribution of gas or heat, Directive 2009/73/EC; for production, transmission or distribution of electricity, Directive 2009/72/EC; For contracting entities in the field of rail services, International rail passenger transport, Rail freight transport, Directive 2012/34/EU.

The Utilities Directive has updated the list of EU legislation giving legal presumption of free access by adding Directive 2012/34/EEC to cover the markets of rail freight transport and international passenger transport.

There is a **toolbox approach** created for the Utilities Procurement Directive 2014/25/EU in relation to the procurement procedures. Member State systems can provide the three basic forms of procedure which already exist under the Public Sector Procurement Directive 2014/24/EU: open procedures, restricted procedures as well as competitive negotiated procedures. They can further provide competitive dialogue and the innovation partnership.

As in the Public Sector Procurement Directive, the Utilities Procurement Directive 2014/25/EU establishes **preliminary market consultation**, where prior involvement of candidates or tenderers is allowed. Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting entity or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

Contracting authorities and contracting entities under the Utilities Procurement Directive 2014/25/EU have at their disposal a set of six specific procurement procedures intended for aggregated and electronic procurement: **framework agreements, central purchasing bodies, joint procurement, dynamic purchasing systems, electronic auctions, electronic catalogues**. There are shorter time-limits for the open procedure and an option for the urgent open procedure. There are also shorter time-limits for the restricted and negotiated procedure, with no accumulation of shortening time-limits. In open procedures, contracting entities may decide to examine tenders before verifying the fulfilment of the selection criteria. Compared to the previous Utilities Procurement Directive 2004/17/EC these procedures have been improved and clarified, particularly with a view to facilitating e-procurement. The **use of electronic procurement** in particular in relation to the transmission of notices and the availability of the all procurement documents is mandatory since October 2018.

Framework agreements should not exceed 8 years. The award of framework agreements is to be made with additional procedural safeguards on objective rules and criteria of their formation, however without any further alignment with the Public Sector Procurement Directive 2014/24/EU.

In order to award contracts under a **dynamic purchasing system**, contracting entities must now follow the rules of the restricted procedure instead of open procedure (Article 34 Public Sector Directive 2014/24/EU and Article 52 Utilities Procurement Directive 2014/25/EU). The dynamic purchasing system shall not contain a maximum duration period and candidates who satisfy the selection criteria shall be admitted to the dynamic purchasing system, and the number of candidates to be admitted to the system shall not be limited. The dynamic purchasing system must allow economic operators to seek entry at any point during its duration. Evaluation of tenders from economic operators must be accomplished with 10 working days, without any indicative tenders or simplified notices, features which made the previous regime under Directive 2014/17 /EU difficult to operate.

Electronic catalogues represent standardised formats for presentation of tenders. There are new rules regulating the formatting of electronic catalogues. Member States may require use of e-catalogues for specific procurements and have the power to make their format and standards mandatory. E-catalogues can be utilised in particular for framework agreements and dynamic purchasing systems. There is specific provision of e-catalogues when used within framework agreements, where resubmission of updated catalogues is allowed before the award of new contracts. For this purpose, adequate time must be given between notification of the need for update and collection of bid information.

Where tenders appear to be **abnormally low** in relation to the works, supplies or services, the contracting entity shall require economic operators to explain¹⁰¹ the price or costs proposed in the tender and in particular the economics of the manufacturing process, of the services provided or of the construction method or the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work; or the originality of the supplies, services or work proposed by the tenderer. Abnormally low tenders may be the result of non-compliance with responsible procurement requirements¹⁰², which must lead to exclusion of the tenderer from the procurement process or the result of non-compliance with subcontractor obligations¹⁰³ or reflect on the possibility of the tenderer having obtained State aid, which could lead to exclusion of the tenderer from the procurement process if the latter cannot prove the compatibility of state aid received.

The Utilities Procurement Directive 2014/25/EU maintains the detailed regulation of tenders comprising products **originating in third countries** which do not have either multilateral or bilateral relations with the European Union as the previous Directive 2014/17/EU in specifying market access conditions for undertakings¹⁰⁴ and relations with those countries¹⁰⁵.

There is the option for Member States for establishing a system for **direct payment** for subcontractors¹⁰⁶ in the same regulatory manner as in the Public Sector Procurement Directive 2014/24/EU.

A **modification of a contract or a framework agreement** during its term shall be considered as substantial where it renders the contract or the framework agreement materially different in character from the one initially concluded¹⁰⁷. A modification shall not be considered to be substantial where the following cumulative conditions are fulfilled and in particular, the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee; and that the modification does not alter the overall nature of the contract. The Utilities Procurement Directive 2014/25/EU specifies that there is the threat of termination of contracts when a modification to that contract constitutes a new award¹⁰⁸.

For the award of contracts for **social and other specific services**¹⁰⁹, public contracts for social and other specific services with a contract threshold value of EUR 1 000 000 listed in Annex XVII shall be awarded in accordance with more flexible regulation which covers ex ante and ex post publicity, as in the Public Sector Procurement Directive 2014/24/EU.

¹⁰¹ Article 84 of Directive 2014/25/EU.

¹⁰² Article 36(2) of Directive 2014/25/EU, referring to standards in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law standards.

¹⁰³ Article 88 of Directive 2014/25/EU.

¹⁰⁴ Article 85 of Directive 2014/25/EU.

¹⁰⁵ Article 86 of Directive 2014/25/EU.

¹⁰⁶ Article 88 of Directive 2014/25/EU.

¹⁰⁷ Article 89 of Directive 2014/25/EU.

¹⁰⁸ Article 90 of Directive 2014/25/EU.

¹⁰⁹ Article 91 of Directive 2014/25/EU.

2.4. Concessions Procurement

European institutions have introduced a new Directive 2014/23/EU on concessions to regulate the award of concession contracts for works and services.

Concessions regulation represents the most significant development of the reform agenda of the **2014 EU legislative framework** in public procurement regulation. The main principles envisaged in the 2014/23/EU Concessions Directive are: **legal certainty** and **better access to the concession markets**. The previous public procurement regime only partially applied to works concessions; service concessions were exempt. The lack of a consistent framework for concessions across the EU meant that concessions were often awarded without any transparent or competitive process and that, as a result, contracting authorities were often failing to achieve best value, and some economic operators, in particular SMEs, were denied access to the market.

Concessions are usually long term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and normally falling within their remit. Contracting authorities and entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire. The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. The concessions Directive 2014/23/EU confines the duration of concession contracts to the time estimated to be necessary for the party contracting with the contracting authority to recoup the investments made in operating the works or service together with a reasonable return on the invested capital.

With the Concessions Directive¹¹⁰, the European public procurement *acquis* distinguishes between public contracts, conceived as the procurement of works, goods or services against payment, and *concession contracts*, where works or services are provided to contracting authorities or to users in consideration for the right to exploit a facility. Concession contracts underpin an important share of economic activity in the EU. In practice, the distinction between works concessions and service concessions may prove to be difficult to determine. They are particularly significant in economic sectors that are of great importance to both citizens and economic operators, such as network industries and services of general economic interest. They are important vehicles in the long-term structural development of infrastructures and strategic services, as they help to harness private sector expertise, achieve efficiency and deliver innovation and their role is likely to become more prominent in the light of increasing constraints on public finances.

Exclusions from concessions procurement requirements

The Concessions Directive excludes concessions awarded to provide or operate fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; including the supply of drinking water to such networks.¹¹¹ Concessions are allowed for the disposal or treatment of sewage and for hydraulic engineering projects, irrigation or land drainage.¹¹² The latter services and works cannot be connected in any way with the supply of drinking water otherwise the concluded contract will fall in contravention of Union law.

¹¹⁰ Article 30 of Directive 2014/23/EU.

¹¹¹ Article 12(1) of Directive 2014/23/EU.

¹¹² Article 2(2) of Directive 2014/23/EU.

The Concessions Directive excludes concessions for the purpose of allowing contracting authorities and entities to provide or exploit public communications networks or supply to the public one or more electronic communications services and air transport services based on the granting of an operating licence.¹¹³ Explicitly, the awarding of concessions for specific TV broadcasting and radio services should be protected under the grounds of media plurality thereby excluding those services from the new rules. An exemption is granted for concessions awarded by media service providers for the supply of technical equipment necessary for the general production in performing their service.¹¹⁴ This prevents resorting to the *direct award* of contracting authorities with economic operators for services where competition is present¹¹⁵ and national interests are *not* violated.

The Concessions Directive does not cover concessions relating to purely national fields such as national security and lotteries awarded by Member States.¹¹⁶ Certain services like gambling, betting and national lotteries should be excluded from the scope of the Directive as they involve predominantly national considerations, including social and public concerns that should be confined to the competence of restricted procedures. Particular service concessions are awarded to economic operators through the granting of an 'exclusive right' (Annex II of the Directive) under which the chosen entity exploits the right for a given period under national law. The latter must be granted in accordance with the Treaty principles.¹¹⁷

Further elimination from the obligation to partake in a competitive procedure includes certain emergency services¹¹⁸ (ambulance services are not excluded), where they are executed by *non-profit* entities.

Non-economic services of general interest which have a limited cross-border dimension, such as certain social, health, or educational services and are delivered within a particular context that varies widely amongst Member States, due to different cultural traditions are excluded from the full application of the Concessions Directive. In the case of mixed contracts, the applicable rules should be determined in accordance with the main subject of the contract where the different parts which constitute the contract are objectively not separable.

The Concessions Directive clarifies the uncertainty that formerly arose, specifically whether active collaboration amongst contracting authorities or contracting entities should be incorporated within the public procurement rules, endorsing the rule of free administration in the delivery of public services. The latter was previously left to the national courts to decide, resulting in varying interpretations, generating inconsistencies and uncertainty. The new rules have clarified the position whereby contracts awarded 'in-house' are *not* bound to abide by the provisions of the Directive, so long as they qualify as contracts performed by publicly controlled entities.

¹¹³ Article 11 and Recital 38 of Directive 2014/23/EU

¹¹⁴ Article 10(8) and 11 and Recital 43 of Directive 2014/23/EU.

¹¹⁵ Article 16 of Directive 2014/23/EU.

¹¹⁶ Article 10(4),(5),(6), (7) of Directive 2014/23/EU.

¹¹⁷ Article 10(1) of Directive 2014/23/EU.

¹¹⁸ Recitals 36 and 54 of Directive 2014/23/EU.

The concessions Directive does not apply retrospectively. However, contracting authorities had to be mindful that an extension of the duration of a pre-existing concession might qualify as a new concession and would therefore have to comply with the rules of the concessions Directive.

Award procedures

The Concessions Directive affirms the *independence* of contracting authorities or contracting entities to undertake the most effective way to deliver public works and services under a *corresponding* set of rules, whilst preventing bias and ambiguity. The Concessions Directive delivers an accurate definition of when a concession occurs and how to clearly identify its core characteristics, while preventing disparities. Operational risk is outlined, making it clear as to the classifications of risk to be considered *active* and more importantly, how to identify *significant risk in combination with risk transfer*.

As a general principle¹¹⁹, contracting authorities or contracting entities are *not* obliged to strictly follow a *specific* award procedure ('*open*' or '*restricted*' procedures) as provided for public contracts.¹²⁰ Under the premises of the principles of equal treatment and non-discrimination and transparency, the design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of the Directive, or of unduly favoring or disadvantaging certain economic operators or certain works, supplier or services. The rules merely express that contracting authorities or contracting entities have regard to recognised conditions under a fair award procedure and exclude applications by tenderers who do fail to fulfill the award criteria. They must also eliminate candidates for the award procedure who have been evidently convicted for corporate crimes such as fraud, money laundering and evasion of tax. Candidates should be provided with a descriptive timetable concerning the award procedure and notify the relevant parties of selected changes in advance.¹²¹ Contracting authorities or contracting entities can flexibly and freely structure a transparent, proportionate and fair procedure according to their own national frameworks, provided that they follow the basic rules listed in the Directive.

Under the Concession Directive, contracting authorities and contracting entities shall have the freedom to organise the procedure leading to the choice of concessionaire. The Concessions Directive specifically aims at delivering a formalised framework to capture private operators and contracting authorities or contracting entities. Concessions are expected to stimulate investment infrastructure and services across the relevant markets in the EU. A formalised framework to capture the award of concessions will bring about competition and quality of service which benefit the public, without promoting privatisation. It is ultimately left to Member States and contracting authorities or contracting entities to ensure that the award of concessions follows a system which is applied in an appropriate and consistent manner, to ensure that the full benefits of competition, simplified procedures and efficiencies are achieved.

The Concessions Directive clarifies the duration of concessions and *integrates* the standing Treaty obligations in combination with the Court of Justice of the EU case-law.¹²²

¹¹⁹ Article 30 of Directive 2014/23/EU.

¹²⁰ Articles 3, 37(1) of Directive 2014/23/EU.

¹²¹ Article 37(4) of Directive 2014/23/EU.

¹²² Article 18 of Directive 2014/23/EU.

It additionally incorporates a *transparent* set of *specific* and more *clear-cut* requirements, which are appropriate at the various phases of the award process.¹²³

Further, the Concessions Directive fulfils the principles of equal treatment, non-discrimination, transparency and proportionality by expressing that the treatment of economic operators must conform to a process under which the design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of the Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

The principle of transparency is paramount for market access to concessions in Member States, but subject to a confidentiality regime¹²⁴ and in particular the obligation imposed upon contracting authorities and entities to respect information designated as confidential, including but not limited to, technical or trade secrets and the confidential aspects of tenders. Such an obligation shall not prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes, nor be affected by the national law to which the contracting authority is subject, in particular legislation concerning access to information. The contracting authority or entity may impose on economic operators requirements aimed at protecting the confidential nature of information which it makes available throughout the concession award procedure.

Selection and qualification

All of the Public Procurement Directives, including the Concessions Directive, provide for a horizontal obligation upon economic operators to respect and obey (during the performance of public contracts) the applicable rules in the fields of environmental, social and labour law established by European Union law, national law, collective agreements or by the international environmental, social and labour law provisions which are listed in Annex X of the Concessions Directive. This obligation aims at preventing unfair advantages attributed to certain economic operators during the procurement process, and in particular at maintaining a level playing field in all regulatory aspects of a public contract as applicable in domestic orders of Member States. Any failure by economic operators to meet such mandatory obligations in the fields of environmental, social and labour law shall lead to exclusion of the candidate from the procurement procedures by means of either a mandatory or voluntary exclusion during the selection and qualification stages of the procurement process.¹²⁵

The European Commission reserves competence to adopt measures which amend Annex X of the Concessions Directive and add new international agreements in the fields of environmental, social and labour law which are relevant in the performance of public contracts within the legal orders of the Member States.

The concessions Directive outlines rules for the publication and award of concession contracts and sets time limits for various stages of the procurement process. Contracting authorities wishing to award a concession will be required to publish a concession notice (using a standard form and containing prescribed information).

¹²³ Articles 36 to 41 of Directive 2014/23/EU.

¹²⁴ Article 28 of Directive 2014/23/EU.

¹²⁵ Article 18(2) of Directive 2014/24/EU.

Potential tenderers must be given at least 30 days from the date on which the concession notice was sent to apply, although this time limit may be reduced by five days if tenderers are able to apply electronically. Within 48 days of awarding a concession, a contracting authority must publish a concession award notice providing the results of the concession award procedure.

The new rules require mandatory publication of concession contracts with a value equal to or greater than Euro 5,350,000 million. Any contract that is valued below the latter threshold is *not* binding under the Directive to be published in the *Official Journal*;¹²⁶ however, other publication forms may be used by the contracting authority. With regard specifically to service concessions, the legislator established a *lighter* regime to social services, health or educational services¹²⁷, where *ex ante* and post notification requirements of the concession contract are necessary. In addition, contracting authorities or entities are free to deliver social services by themselves *via* other methods which are not involving concession contracts *i.e.*, such as through the granting licenses or public financing. Nevertheless, the Member States and contracting authorities are still expected to offer an *appropriate* level of advertisement and publicity that abides by the principles of the TFEU.¹²⁸

Contracting authorities or entities shall not be required to publish a concession notice where the works or services can be supplied only by a particular economic operator for any of the following reasons: (a) the aim of the concession is the creation or acquisition of a unique work of art or artistic performance; (b) the absence of competition for technical reasons; (c) the existence of an exclusive right; (d) the protection of intellectual property rights and exclusive rights. The derogation resembles Article 32(2) of the *Public Sector Directive* where negotiated procedures without prior publication may be used for public works contracts, public supply contracts and public service contracts. In particular, where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure; where the works, supplies or services can be supplied only by a particular economic operator for reasons related to the creation or acquisition of a unique work of art or artistic performance or where competition is absent for technical reasons or the protection of exclusive rights, including intellectual property rights precludes the submission of more than one tender.

Contracting authorities or entities shall not be required to publish a new concession notice where no applications, no tenders, no suitable tenders or no suitable applications have been submitted in response to a prior concession procedure. Suitable tenders or suitable applications are those where they are irrelevant to the concession, being manifestly incapable, without substantial changes, of meeting the contracting authority or contracting entity's needs and requirements as specified in the concession documents.

A similar provision exists in the *Public Sector Directive*; and, in particular, in Article 32(1) where a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents or not able to meet the selection and qualification criteria set out by the contracting authority or is subject to a ground of mandatory or voluntary exclusion from procurement procedures in accordance to Articles 57 and 58 of the *Public Sector Directive*.

¹²⁶ Articles 1 and 8 of Directive 2014/23/EU.

¹²⁷ Recitals 53 and 59 of Directive 2014/23/EU.

¹²⁸ Article 3 of Directive 2014/23/EU.

Contracting authorities or entities should provide *via* electronic methods, free, open and complete access to the relevant concession documents from the very beginning of the procurement process.¹²⁹ This enhances the principles of the Treaty and reflects the modernisation of the procurement award process.

The Concessions Directive offers a framework for electronic availability of concession documents¹³⁰. Contracting authorities and contracting entities shall offer by electronic means unrestricted and full direct access free of charge to the concession documents from the date of publication of a concession notice or, where the concession notice does not include the invitation to submit tenders, from the date on which an invitation to submit tenders was sent. Due to exceptional security of technical reasons, sensitive nature of information, the documents shall be transmitted by other means. The provision in Article 34 is similar to *Public Sector Directive* Article 53.

Probity and conflict of interest

The Concession Directive provides a framework for combating corruption and preventing conflicts of interest¹³¹. Member States shall require contracting authorities and entities to take appropriate measures to combat corruption, fraud, and favouritism. The concept of conflicts of interest shall cover any situation where staff members of the contracting authority or entity who are involved in the conduct of the concession award procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the concession award procedure. The provision for combating corruption and preventing conflicts of interest shares similar elements with Articles 24 and 57 of the *Public Sector Directive*.

Article 35 operates within the *probity* framework of the public procurement *acquis*. The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Where appropriate, the contracting authorities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority is aware of a judgment concerning such offences rendered in accordance with national law that has the force of *res judicata*. If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Non-observance of national provisions implementing the Council Directives 2000/78/EC¹³² and 76/207/EC¹³³ concerning equal treatment of workers which has been the subject of a final judgment or

¹²⁹ Articles 29 and 34(1)(2) of Directive 2014/23/EU.

¹³⁰ Article 34 of Directive 2014/23/EU.

¹³¹ Article 35 of Directive 2014/23/EU.

¹³² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16-22.

¹³³ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, pp. 40-42; and Directive

a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Article 57 of the *Public Sector Directive* deals with the personal situation of the candidate or tenderer. It provides that any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below must be excluded from participation in a public contract: (a) participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA;¹³⁴ (b) corruption, as defined in Article 3 of the Council Act of 26 May 1997¹³⁵ and Article 3(1) of Council Joint Action 98/742/JHA¹³⁶ respectively; (c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities;¹³⁷ and (d) money laundering, as defined in Article 1 of Council Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering.¹³⁸

The concept of 'conflict of interest' under the Concessions Directive contains a significant overlap with Article 24 of the *Public Sector Directive*. Nevertheless, there are some differences between Article 24 of the *Public Sector Directive* and Article 35 of the Concessions Directive.

The concept of conflicts of interest under Article 24 of the *Public Sector Directive* establishes minimum requirements in the sense that contracting authorities must take appropriate measures to effectively prevent, identify and remedy conflicts of interest in order to avoid any distortion of competition in the conduct of procurement procedures and to ensure equal treatment of all economic operators. The term conflict of interest covers at least any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

The Concessions Directive recognizes explicitly in Article 35 a proportionality test, where contracting authorities awarding concession contracts must not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified. Such requirement for a proportionality test is not found in the *Public Sector Directive*.

2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269, 5.10.2002, pp. 15-20.

¹³⁴ 98/733/JHA: Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351, 29.12.1998, pp. 1-3.

¹³⁵ Council Act of 26 May 1997 drawing up, on the basis of Article K.3 (2) (c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195, 25.6.1997, pp. 1-11.

¹³⁶ 98/742/JHA: Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, OJ L 358, 31.12.1998, pp. 2-4.

¹³⁷ Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, OJ C 316, 27.11.1995, pp. 48-57.

¹³⁸ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 28.6.1991, pp. 77-82, as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering – Commission Declaration, OJ L 344, 28.12.2001, pp. 76-82.

The Concessions Directive does specify the consequences of the existence of conflict of interest¹³⁹, where contracting authorities may exclude an economic operator from procurement procedures where a conflict of interest cannot be effectively remedied by any other less intrusive measure.

Time limits

A time framework¹⁴⁰ provides for the limit for receipt of application and tenders for concession which is set for minimum of 30 days from the date on which the concession notice was sent. Contracting authorities, entities shall take account, in particular, of the complexity of the concession and the time required for drawing up tenders or applications. Further, where the procedure is organized in 'successive stages', the minimum time limit for the receipt of initial tenders is a fixed at 22 days from the date on which the invitation to tender was sent.

Award criteria for concession contracts

In the concession procurement procedures, contracting authorities or contracting entities should be allowed to use award criteria or concession performance conditions relating to the works, or services to be provided under the concession contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or commercialisation of those works or services or a specific process during a later stage of their life cycle.

The award criteria for concession contracts must be linked to the subject-matter of the concession, and not confer any unrestricted freedom of choice on the contracting authority or the contracting entity¹⁴¹. The contracting authority or entity may, exceptionally, modify the ranking order of the award criteria to take into account the innovative solution which could not have been foreseen.

Conditions to be fulfilled by the criteria

The award criteria, as in the case of any other public contract, have to have been published and circulated for a reasonable period, and listed in falling order of significance. Concessions should be awarded to the tender which offers a solution that reflects the situation developed by previous public procurement *acquis* known as '*most economically advantageous tender*', in order to ensure effective competition and a fair procedure and efficiency throughout the award process (eliminating discrimination and corrupt activities).¹⁴²

The scope of the Concessions Directive provides for contracting authorities and entities with the ability to request, make available or employ a criterion which embraces the features of "*most economically advantageous tender*" to concessions; a framework that has been derived from the general Public Procurement Directives. The updated rules of '*most economically advantageous tender*' specify that the award criteria should effectively include requisite standards, fundamentally based on '*price or cost*', using a '*cost-effectiveness*' approach to attain the best value for money in order to guarantee efficiencies.

¹³⁹ Article 35(7)(d) of Directive 2014/23/EU.

¹⁴⁰ Article 39 of Directive 2014/23/EU.

¹⁴¹ Article 41 of Directive 2014/23/EU.

¹⁴² Recital 73 of Directive 2014/23/EU.

Listing of the criteria

Contracting authorities or entities are obliged to list the criteria in descending order of importance¹⁴³, though the Concessions Directive remains silent as far as the meaning of descending order of importance is concerned.

Modifications of concession contracts

The provisions of Article 43 relating to the modification of concessions are similar to those under Article 72 of the *Public Sector Directive*. If a pre-existing concession were to be substantially modified during its term it would be considered to be a new concession and the Directive would apply. Under the Directive, providing the overall nature of the contract is not altered, a modification of a value of less than ten per cent of the initial contract value shall not be considered to be substantial and on condition that the value of the modification is below the threshold stipulated in the Directive. Modifications of the concession resulting in a minor change of the contract below the threshold should always be possible without the need to carry out a new concession procedure (Art. 43). A new concession procedure is required in case of material changes to the initial concession, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that concession.

The main specific point in Article 43 which is different to Article 72 of the *Public Sector Directive* is that the threshold in Article 43(2) does not distinguish between services and construction contracts (respectively 10 per cent and 15 per cent in the *Public Sector Directive* Article 72(2)).

Article 43 offers a framework under which modifications of contracts during their term are allowed. Concessions may be modified without a new concession award procedure in accordance with this Directive if: (a) the modifications have been provided for in the initial concession documents in clear, precise, unequivocal review clauses; (b) for additional works or services by the original concessionaire that have become necessary and that were not included in the initial concession and no chance for changing concessionaire; (c) the need for modification has been brought about by circumstances which a diligent contracting authority or entity could not foresee, the modification does not alter the overall nature of the concession, increase in value is not higher than 50 per cent, (d) where a new concessionaire replaces the winner; and (e) where the modifications are not substantial.

Performance of the contracts

The Concessions Directive, just like the Public Procurement Directive, includes provisions about the performance of the contracts.

Extension of the Remedies Directive

The concessions Directive also introduced a standstill period for concession awards thus extending the scope of the Remedies Directive so that it applies to all concession contracts above the relevant threshold.

The high expectation of the public procurement reforms will be met by **enhancing the governance of public procurement** and raise the **professionalization and standards** in both public and private sectors. The reforms of public procurement have focused on **standardisation** of regulation for the award of public contracts, concessions and Public-Private Partnerships.

¹⁴³ Article 41(3) of Directive 2014/23/EU.

Regulatory standardisation faces a significant challenge. The desirability of regulating PPPs, concessions and public contracts alike is counterbalanced with the difficulty of the regulation of concessions and PPPs which emanates from the inability of such relations to fit into a procedural uniformity similar to that for the award of public contracts.

Public procurement regulation is a decision making process which is based on **objective, transparent and uniform procedures** for selecting contractual partners in order to deliver public services.

In concessions and PPPs, the award process is heavily influenced by **innovation**, which as a concept emerges in risk-based contractual relations and it is not likely to appear in traditional public contracts. The PPP relation is conducive to development processes and systems which create new ground and advanced delivery and finance methods. Partner motivation in concessions and PPPs creates an environment which is conducive for innovation.

Environmental conduciveness in concessions and PPPs for innovation exhibits a **balancing exercise of factors such as price, cost, risk, quality, performance and continuous improvement which underpins the value for money (VFM)** principle in public service delivery. The VFM is supported through incentivisation in concessions and PPPs, by mechanisms which create profit or revenue driven notions such as gain and profit sharing and through value engineering, for the determination of specifications and standards and the development of solutions utilising R&D functions of the private partner.

The concept of concessions and public-private partnerships represents a genuine attempt to revolutionise the delivery of public services by introducing the **private sector as strategic investor and financier of public services**. First, the private sector assumes a direct responsibility in serving the public interest, as part of its contractual obligations vis-à-vis the public sector. The motive and the intention behind such approach focus on the benefits which would follow as a result of the private sector's involvement in the delivery of public services. Efficiency gains, qualitative improvement, innovation, value-for-money and flexibility appear as the most important ones, whereas an overall better allocation of public capital resources sums up the advantages of engaging with the private sector in delivery of public services. Public-Private partnerships as a concept of public sector management have changed the methodology of assessing delivery of public services both in qualitative and quantitative terms.

The challenge of the European public procurement system is twofold: first, to **introduce innovation in traditional public contracts** and mimic the collective motivation relations between public and private sectors which are found in concessions and PPPs; secondly, to **capture innovation during the procurement process** and allow it to influence the selection process and be decisive factor in the award of public contracts. Public procurement regulation is channelled through three phases: **selection, tendering** and **award**. Innovation could possibly emerge in the award phase, as the selection phase is confined to objectively determined and standardised processes. Innovation could also emerge in the tendering phase when utilising negotiations between public and private sectors in competitive dialogue and innovation partnerships award procedures. The regulatory success of PPPs rests on the relative efficiency and innovation capacity of the private sector. This efficiency must demonstrate itself in a dynamic mode, reflecting the need for competition in the provision of the relevant services. Innovation can provide for such efficiency. In traditional public contracts, the inherently oligopolistic yet contestable market is ripe for innovation as a feature which will facilitate new entries or offerings.

2.5. Redress Reforms

The enactment of the Remedies Directives has brought a different dimension into the application of public procurement rules. Such dimension relies on the **decentralized compliance and enforcement of the substantive regime**. Directive 89/665¹⁴⁴ on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and Directive 92/13¹⁴⁵ coordinating the laws, regulations and administrative provisions relating to the application of community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors require Member States to introduce **effective remedies** and **means of enforcement** to suppliers, contractors and service providers who believe that they have been harmed by an infringement of the substantive procurement rules.

The Remedies Directives are based on three fundamental principles: the **principle of effectiveness**, the **principle of non-discrimination**, and the **principle of procedural autonomy**. In both Directives, effective review of decisions or acts of contracting authorities is the essential requirement of compliance with the substantive public procurement rules. The principle of effectiveness includes two individual features; firstly, the **swift resolution of disputes** and secondly, the **enforceability of decisions**. In particular, the Remedies Directives stipulate that Member States must take any measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible and can be effectively enforced¹⁴⁶ on the grounds that such decisions have infringed EU public procurement law.

There is an explicit obligation upon Member States to avoid introducing public procurement review procedures and procedures for actions for damages for unlawfully awarded contracts which are different, in a discriminatory context, from existing review procedures for other administrative acts and procedures for damages under national law.¹⁴⁷ Finally, the Remedies Directives leave Member States with **wide discretion** as to the creation of the appropriate forum to receive complaints and legal actions against decisions of contracting authorities and utilities, as well as action for damages in public procurement cases.¹⁴⁸

The initial Remedies Directives suffered from serious shortcomings, in the sense that their provisions did not provide for effective review procedures between the stages of contract award and contract conclusion respectively. This gave rise to **direct awards** and the so-called **race to sign** the relevant contract to assume immunity from any redress based on the ***pacta servanta sunt* principle**. In addition, at both pre-contractual and post-contractual stages, there were no effective deterrents for breach of either procedural or substantive public procurement laws.

The European institutions carefully examined two options: first, to entrust the enforcement of the *acquis* through compliance procedures to the European Commission; and second, to promote the establishment of national independent authorities to monitor compliance of public contracts awards with the *acquis*.

¹⁴⁴ See OJ 1989, L 395/33.

¹⁴⁵ See OJ 1992, L 76/14.

¹⁴⁶ See Article 2(7) of Directive 89/665 and Article 2(8) of Directive 92/13.

¹⁴⁷ See Article 1(2) of Directive 89/665 and Article 1(2) of Directive 92/13.

¹⁴⁸ See Article 2(2) of Directive 89/665 and Article 2(2) of Directive 92/13.

The preferred solution was to introduce a consolidated Directive as a single amending instrument, based on the principles of subsidiarity and proportionality, in an attempt to rectify the shortcomings of the Remedies Directives.

The amending Remedies Directive¹⁴⁹ is based on the previous instruments but it introduced new themes such as a **clear divide between pre-contractual and post-contractual stages, a balance between effective review of public contracts and the need for efficient public procurement, a strict standstill requirement for contract conclusion** including direct awards by contracting authorities, **extensive communication and monitoring requirements**, and **a substantial refocus of the corrective mechanism**. The amending Remedies Directive **repealed the attestation and conciliation procedures** which were laid down by its predecessors and extended its coverage to countries of the European Economic Area (EEA).

The weaknesses of the original Remedies Directives reflected in particular the absence of a period allowing an effective review between the decision to award a contract and the conclusion of the contract in question.

This has often resulted in contracting authorities and contracting entities making irreversible contract awards, by proceeding very quickly to the signature of the contract. In order to remedy this weakness, which is a serious obstacle to effective judicial protection for aggrieved tenderers and especially those who have not been definitively excluded from the procurement process, a **minimum standstill period** during which the conclusion of the contract in question is suspended, appears to be the best solution, irrespective of whether conclusion occurs at the time of signing the contract. The duration of the standstill period should take into account different means of communication. If rapid means of communication are used, a shorter period can be provided for than if other means of communication are used. The new Remedies Directive only provides for minimum standstill periods. Member States are free to introduce or to maintain periods which exceed those minimum periods. Member States are also free to decide which period should apply, if different means of communication are used cumulatively.

In order to eliminate the illegal direct contract awards the need for **effective, proportionate and dissuasive sanctions** is paramount. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective.

The **ineffectiveness** should not be automatic but should be ascertained by or should be the result of a decision of an independent review body. Ineffectiveness as a concept introduced by the amending Remedies Directive is the most appropriate way to restore competition and to create new business opportunities for those economic operators who have been deprived illegally of their opportunity to compete. Direct contract awards should include all contract awards made without prior publication of a contract notice or in accordance with a procedure without prior call for competition.¹⁵⁰

¹⁴⁹ See Directive 2007/66/EC of 11 December 2007, OJ L335/31.

¹⁵⁰ Possible justifications for a direct award within the meaning of the procurement Directives may include the exemptions explicitly provided in the Directives or a lawful 'in-house' contract award following the interpretation of the Court of Justice. The same applies to contracts which meet the conditions for exclusion or special arrangements. In exceptional cases the use of the negotiated procedure without publication of a contract notice is permitted immediately after the cancellation of the contract. If in those cases, for technical or other compelling reasons, the remaining contractual obligations can, at that stage, only be performed by the economic operator which has been awarded the contract, the application of overriding reasons might be justified.

Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with other infringements to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract. In the case of other infringements of formal procedural requirements, Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States should have the flexibility to provide for **alternative penalties** which should be limited to the imposition of fines to be paid to a body independent of the contracting authority or entity or to a shortening of the duration of the contract.

Economic interests in the effectiveness of a contract may only be considered as overriding reasons if, in exceptional circumstances, ineffectiveness would lead to disproportionate consequences. However, economic interests directly linked to the contract concerned should not constitute overriding reasons.

Furthermore, the need to ensure, over time, the legal certainty of decisions taken by contracting authorities and contracting entities requires the establishment of a **reasonable minimum period of limitation** on reviews seeking to establish that the contract is ineffective.

3. FUTURE POTENTIAL OF EUROPEAN PUBLIC PROCUREMENT REGULATION

KEY FINDINGS

- Public Procurement is an industrial policy component for the EU 2020 Growth Strategy reflecting on **strategy, innovation, socio-economic and environmental objectives**.
- Technologies, information and communication systems such as E-Certis and ESPD would enhance the **efficiency** and **effectiveness** of the regulatory system.
- The modernisation of public administrations in Member States will lead to **interoperable** procurement systems.
- The **digitization agenda** which will enhance SME participation and improve cross border procurement.
- The **professionalization** and **commercial awareness of procurers** in Member States will improve the quality of decisions leading to the award of public and utilities contracts.
- Contracts below the thresholds which trigger the application of the public procurement rules could pose **considerable barriers to market access** for cross-border procurement.

In order to strengthen the Single Market and as part of the continuous effort to stimulate investment in the EU and its Member States, a policy initiative has been launched to carry out procurement more efficiently through digital technologies and in a sustainable manner from socio-economic perspective.

The **policy package** was introduced by the EU Commission on the **3rd of October 2017** where six priority areas have been earmarked for Member States to develop a **strategic approach to procurement**. The policy initiative on public procurement recognises the importance of soft law to carry the reform agenda of the public procurement acquis. Although EU Member States have benefited from the reform agenda carried by the 2014 Public Procurement Directives, the need for **further simplification** and addressing successfully **barriers to market** is essential in influencing the strategic application of the new rules.

Public Procurement is regarded as an **essential lever** for the EU 2020 Growth Strategy. For such lever to impact upon Member States, **further modernisation of public administrations** is regarded as critical. The introduction of technologies to public procurement, especially **information and communication technologies (ICTs)** would allow for the efficiency and effectiveness of the regulatory system. Concepts such as **end-to end procurement** and **interoperable procurement** are the result of the digitization agenda which will enhance SME participation and improve cross border procurement.

The **soft law package of 2017** includes a number of action priorities such as greater uptake of innovative, green and social criteria in awarding public contracts; professionalization of public buyers; improving access by SMEs to procurement markets in the EU and by EU companies in third countries; increasing **transparency, integrity** and **quality** of procurement data; digitisation of procurement processes; and finally more cooperation among public buyers across the EU.

3.1. Strategic Procurement

Strategic procurement in the EU embraces the pivotal importance of the **SMEs** in achieving economic growth. Public procurement is of utmost economic significance for European SMEs. Although the Public Procurement regime deals effectively with sub-contracting issues, prompt payments and the promotion of SMEs in the selection and qualification procurement phase and the award of public contracts, SMEs across the EU Members States face barriers to accessing public procurement markets and winning public contracts.

Apart from inherent differences between countries, the **value of public contract** is one of the major factors that influence the extent to which SMEs can access public contracts. The larger a contract (i.e. single awards/lots), the less likely it will be awarded to SMEs. Other factors influencing SMEs' share in winning public contracts are the type of contract, the procurement sector, the award procedure and the award criteria.

SMEs' account for a considerably lower proportion of above-threshold supplies contracts than that of public works contracts; SMEs play only a marginal role in the supply of commodities, but they accounted to more than three quarters of the contract volume in other procurement sectors. The share of contract volume awarded to SMEs is sensitive to tenders awarded by central government, regional and local authorities and agencies and utilities; SMEs take a much smaller share of the total value of contracts awarded under the various negotiated procedures than under open procedure or restricted procedures. SMEs are not likely to win contracts when the competitive dialogue is utilised; and finally, SMEs are not likely to win contracts when the lowest offer is utilised as award criterion.

3.2. Innovative Procurement

Innovation in the delivery of public services is a priority for procurement regulation and will be achieved through the new **procedure of innovation partnerships** and the **new award criterion of life cycle costing**. Innovation partnerships is an award procedure designed to improve market pull by combining a research contract with a realistic chance to obtain a first purchase if the research result fulfils pre-defined performance levels. Innovation partnerships are structured in successive phases with intermediate targets and payments and cut-off options.

On the other hand, life-cycle costing is an award criterion which covers partly or totally costs over the life cycle of a product, service or works which are borne by the contracting authority or other users, such as costs relating to acquisition, costs of use, such as consumption of energy and other resources, maintenance costs, end of life costs, such as collection and recycling costs; or costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

3.3. Responsible Procurement

Responsible procurement takes into account **socio-economic nature of public service delivery through services of general economic interest** and incorporates **environmental protection** as a component of public procurement regulation.

3.4. Digital Procurement

Efficient procurement promotes systems such as **electronic procurement** and **electronic invoicing** which attempt to reduce bureaucracy and costs and allow for a more streamlined process in the delivery of public services.

The European Single Procurement Document (ESPD) has been adopted as a formal statement by an economic operator consisting of a self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and the relevant information as required by the contracting authority shall be provided upon request by the contracting authority or in the event of the economic operator being the winning bidder.

3.5. Cross-border Procurement

An indicator of the state of functioning of the public procurement acquis is the **cross-border procurement volumes** which reveal the import penetration of goods, works and services destined for the public sector but originating from a different Member State. Cross-border procurement covers both dimensional procurement (above thresholds) and sub-dimensional procurement (below threshold or low volume procurement). Cross-border procurement proves the level of integration in the relevant market, which indicates a transaction (public contract award) can take place with parties in different parts of the single market. This also reveal the effect of the quality of national public procurement legislation on selection and qualification, award procedures and the elimination of national bias systems such as language, culture, and preferences.

CONCLUSIONS

The European institutions, through the enactment of the Single Market Act, have identified public procurement reforms as **essential components of competitiveness and growth** and as indispensable instruments of delivering public services.

The results of public procurement reforms have been registered in a positive manner. The **flexibility** of the public procurement regulatory regime is reflected in important recent case-law developments, in particular case-law on the definition of contracting authorities, the use of award procedures and award criteria, and the possibility for contracting authorities to use environmental and social considerations as criteria for the award of public contracts. Further, flexibility underpins the relaxation of the competitive tendering regime and the disengagement of the public procurement rules in industries that operate under competitive conditions in the utilities sectors indicate the links between procurement regulation and anti-trust. The non-applicability of the regime to telecommunications entities is an important development indicative of the future legal and regulatory blueprints.

The recent reforms of the public procurement regime are felt in public-public partnerships and in-house contractual relations between contracting authorities or undertakings upon which the former exercise control similar to that exercised over their own departments and the controlled entities are operationally dependent on them link conceptually very well with public contracts awarded by utilities to their affiliated undertakings and public service contracts relating to services of general economic interest and contracts having the character of a revenue-producing monopoly, and as such reflect on the positive dimension of inherent flexibility in the 2014 public procurement Directives.

Public contracts, which fall below the stipulated value thresholds (**sub-dimensional contracts**), represent the most difficult category for reform and the **biggest opportunity** for discretionary exercises in public purchasing. On the one hand, they encapsulate a significant amount of Member States' public expenditure, which escapes the clutches of the public procurement acquis. On the other hand, there is an imperative to subject these contracts to some form of competition and has supplemented the public procurement Directives with EU law principles which ensure a parallel process of procurement with dimensional public contracts. This development has created uncertainty in the market place and resulted in a dysfunctional application of procurement rules to those contracts. The administrative and procedural burdens on the part of contracting authorities often surpass any **potential efficiency benefits** resulting from competitively tendering sub-dimensional contracts. In addition, adequately sufficient safeguards against intentional division of dimensional contracts into lots in order to avoid the applicability of the public procurement Directives exist in the current acquis.

All Public Procurement Directives benefit from the **principles of discretion and flexibility in their application** by Member States. Discretion of Member States in applying public procurement law is surrogate to the principle of proportionality.

The conceptual link is the principle of flexibility in public procurement law which has been developed and deployed by the jurisprudence of the CJEU. The discretion is reflected on the fact that the EU public procurement is enacted and implemented in domestic legal systems by reference to harmonisation, but procurement rules are inherently flexible to accommodate compliance and legal interoperability with EU principles and policies. The **doctrine of flexibility** allows the principle of proportionality to be employed in the application of public procurement rules by national legal systems.

Further legal reforms are needed. The public procurement rules and mainly the public sector Directive suffer from **legal porosity** as a result of **non-exhaustive harmonisation**.

Non-exhaustive harmonisation represents a de lege lata approach to public procurement regulation on the part of the European legislature. Such approach has developed certain deficiencies. The effectiveness of the procurement rules is compromised and the CJEU has applied, through a **rule of reason approach**, a hybrid transplant of EU legal principles to the public procurement Directives in order to control their porosity. However, this treatment is temporary and not conducive to legal certainty and legitimate expectation.

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ANNEX

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This study evaluates the objectives of legislative actions in the area of public procurement during the 7th and 8th legislature and assesses the contribution of current initiatives to the achievement of EU objectives. This document provides for a critical analysis of the legal framework of the public procurement regime and identifies the future potential of European public procurement. This document was prepared by Policy Department A: Economic and Scientific Policy, at the request of the Committee for the Internal Market and Consumer Protection.

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