

Contribution to Growth: European Public Procurement

Delivering improved rights for
European citizens and businesses

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 Rotationsdurck 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 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.

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 Anlagenbau Austria AG et al. v. Strohal Rotationsdruck 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, *Arkkitehtuuritoimisto 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 Rotationsdruck 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.

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 HM. 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.

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 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.

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 coordination of procedures for the award of concessions.

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 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.

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.

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 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 have set the relation of market integration for the public and utilities and concession sectors in the EU with the need for market access from third countries and for better market access for SMEs.

The main reforms in the public sector procurement evolve around the following thematic areas: public sector procurement reforms, utilities procurement reforms, concessions procurement and redress reforms.

2.2. Public Sector Directive reforms

Group structures

The Directive exempts from tendering contracts between contracting authorities and their subsidiaries where the parent exercises control over the subsidiary that is similar to the control that it can exercise over its own departments; the subsidiary carries out 90% or more of its activities for the parent; and there is no private participation in the subsidiary.

There is also specific authorization of "shared services" arrangements, where two or more contracting authorities jointly control the "subsidiary".

Contract variations and contractor insolvency

The following changes are categorized as "substantial changes" in a public contract, requiring a tender process for a new contract: a change of contractor, other than following insolvency and corporate restructuring of the original contractor; any change that, had it applied during the tender process, would have led to different contractors being selected to be invited to tender or a different contractor winning the tender; a "considerable" extension of the scope of the contract to cover new supplies, services or works it does not currently cover; or any change to the economic balance of the contract in favour of the contractor.

The following changes will not be regarded as "substantial": the transfer of the contract to a successor contractor following the insolvency or corporate restructuring of the original contractor; a price variation with a monetary value that is both below 5% of the initial contract price and below the EU tendering threshold; a price increase of up to 50%, where the need for the change is due to circumstances that were unforeseeable when the contract was tendered originally and the change does not alter the overall nature of the contract.

Compulsory e-procurement

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

Fully electronic procurement, including the online submission of tenders, is required since 30th June 2016. The technical electronic capability required is likely to include encryption and time stamping of tenders, electronic signatures and enhanced security measures to prevent them being tampered with.

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

When procuring a works contract with a value above the tendering threshold or a supplies or services contract with a value of over EUR 500,000, a contracting authority needs to give reasons if the contract is split into lots. There is also a specific power to limit the number of lots any tenderer can win. This must be stated in the OJEU notice/invitation.

Prequalification rules

Significant changes were introduced to prequalification:

Suppliers are able now to apply for an "European Procurement Passport" (renewable 6 monthly) which certifies that they have not been convicted of any offences that would make them ineligible to bid and that they are not insolvent;

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.

Any minimum turnover requirement cannot be greater than three times the annual contract value unless "special risks" (which must be stated) justify a higher figure;

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 dealing with conflicts of interest between staff of the authority and contractors. Conflict of interest provisions also apply to a contractor that has advised on or being involved in preparing for the procurement.

Competitive procedure with negotiation

The competitive procedure with negotiation is similar to the competitive dialogue procedure and is available in similar circumstances. It requires tenders to be invited from at least 3 bidders. The contracting authority will be able to negotiate with bidders post tender, to improve the content of their offers.

Timescales

The new minimum tender period under the restricted procedure is reduced to 35 days, or 30 days under full e-tendering. For contracting authorities other than central government this period can be reduced if all bidders agree. If they do not agree, the contracting authority can set the tender period which must be at least 10 days. The minimum tender period under the open procedure is 40 days.

Enforcement body

Each EU Member State needs to set up a body responsible for oversight of the EU procurement rules and with the power to review procurement decisions. Procuring authorities must send to this body copies of works contracts valued over EUR 10 million and supplies and services contracts valued over EUR1 million. All public contracts have to include clauses allowing them to be terminated if the European Court declares that they were procured in breach of the Directive or EU Treaty.

Sustainable procurement

The new rules 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.

2.3. The Utilities Procurement Reforms

There are **new definitions** for the regional authorities, local authorities, ancillary purchasing activities, procurement service provider, life cycle and innovation and amended definitions for service contracts, candidate, procurement documents, centralised purchasing activities, central purchasing body. (Art. 2).

There is a detailed provision of **mixed procurement contracts** covering the same activity (Art. 3) and procurement covering several activities (Art 3a).

A detailed definition of **special or exclusive rights** is created in Art. 4. Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute special or exclusive rights. Such procedures include procedures pursuant to other legislative acts listed in Annex II, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria (reference to Article 19a is not appropriate).

The 2014 Utilities Procurement Directive made provisions for its application to activities relating to the exploitation of a geographical area for the purpose of extracting oil or gas; exploring for or extracting coal or other solid fuels. However, procurement made for the purpose of exploring oil and gas has been withdrawn from the scope as that sector has been found to be subject to such competitive pressure that the procurement discipline brought about by the Directive is no longer needed (Art. 11).

There is a **new threshold** - EUR 1 000 000 – for contracts for social and other specific services listed in Annex XVII (Art. 12).

The method for calculation the estimated value of procurement was amended especially concerning the separate operational units of a contracting entity and the new type of procedure innovative partnerships (Art. 13).

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 institution, where the contracts or design contests concerned are fully financed by this organisation or institution; in the case of contracts or design contests co-financed the most part by an international organisation

or international financing institution the parties shall agree on applicable procurement procedures (Art. 18).

The exclusion for public passenger transport services by rail or metro is repeated in the 2014 Utilities Procurement Directive (Art. 19), and a detailed definition for contracts between contracting authorities through in-house arrangements is created (Art 21).

There is **mandatory use of e-procurement**. The 2014 Directive provides for the mandatory transmission of notices in electronic form, the mandatory electronic availability of the procurement documents and imposes the switch to fully electronic communication, in particular e-submission, in all procurement procedures within a transition period of two years (Art. 33 and Art. 101).

A new definition on **conflicts of interest** was created concerning the conflicts of interest and categories of affected persons but only in respect of contracting authorities (Art. 36).

There is a **toolbox approach** created for the Utilities procurement in relation to the procurement procedures. Member State systems will provide the three basic forms of procedure which already exist under current Directives: open and restricted procedures as well as negotiated procedures with prior call for competition. They shall further provide competitive dialogue and the innovation partnership, a new form of procedure for innovative procurement (Art. 39).

Contracting entities will furthermore have at their disposal a set of six specific procurement techniques and tools intended for aggregated and electronic procurement: **framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement**. Compared to the previous Directive, those tools have been improved and clarified with a view to facilitating e-procurement.⁴²

There are shorter time-limits for the open procedure and an option for the urgent open procedure (Art. 40). There are also shorter time-limits for the restricted and negotiated procedure (Art. 41-42), with no accumulation of shortening time-limits (Art. 65).

As in the Public Sector Procurement Directive, the Utilities Procurement Directive makes reference to **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 (Art. 53, 53a).

Contracting entities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots (Art. 59).

In open procedures, contracting entities may decide to examine tenders before verifying the fulfilment of the selection criteria (Art. 70).

There is a definition of **life-cycle costing** (Art. 77).

⁴² Framework agreements should not exceed 8 years (Art 45). In order to award contracts under a dynamic purchasing system, contracting entities shall follow the rules of the restricted procedure instead of open procedure (Art 46). There are new rules regulating the formatting of electronic catalogues (Art 48).

Where tenders appear to be **abnormally low** in relation to the works, supplies or services, the contracting entity shall require economic operators to explain the price or costs proposed in the tender (Art. 79).

The 2014 Utilities Directive keeps the detailed regulation of tenders comprising products originating in third countries and relations with those countries (Art. 79a, 79b).

There is the option for Member States for establishing a system for direct payment for subcontractors (Art. 81).

A **modification of a contract of framework agreement** during its term shall be considered substantial where it renders the contract or the framework agreement materially different in character from the one initially concluded (Art. 82). A modification shall not be considered to be substantial where the following cumulative conditions are fulfilled:

- (a) the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee;
- (b) the modification does not alter the overall nature of the contract.

There is the threat of termination of contracts when a modification of the contract constitutes a new award (Art. 83).

For the award of contracts for social and other specific services, public contracts for social and other specific services listed in Annex XVII shall be awarded in accordance with more flexible regulation as in the proposed Public Sector Procurement Directive (Art. 84-86). The Directive includes specific rules especially for social, healthcare and training services.

2.4. Concessions Procurement

European institutions have introduced a new Directive 2014/23/EU on concessions to regulate the award of concessions.

Concessions regulation represents the most significant development of the reform agenda of the EU in public procurement regulation. The main principles envisaged in the 2014 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 Commission believed that 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 rules of the legislative framework applicable to the award of concessions are clear and simple. Member States or public authorities should remain free to define and specify the characteristics of the services to be provided, including any conditions regarding the quality or price of the services. They should duly reflect the specificity of concessions as compared to public contracts and should not create an excessive amount of bureaucracy.

The scope of the concessions Directive indicates that it fully applies only to concessions with a cross-border interest with a value of at least EUR 5 million.

The concessions Directive does not apply to concessions awarded between contracting authorities or to concessions awarded by contracting authorities to affiliated undertakings or joint ventures. The Directive also sets out various other specific exemptions such as concessions contracts for the provision or exploitation of electronic communications, as well as water and waste sectors.

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.

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 five per cent of the initial contract value shall not be considered to be substantial. 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. 42). 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.

Non-economic services of general interest should not fall within the scope of the Concession Directive. It is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, such as certain social, health, or educational services. (Articles 8, 10, 11, 12, 14, 15 and 21). These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. In the case of mixed contracts, the applicable rules should be determined in function of the main subject of the contract where the different parts which constitute the contract are objectively not separable.

In the concession award 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, even where such factors do not form part of their material substance etc. Contracting authorities and entities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of serious or repeated violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

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). Potential tenderers must be given at least 52 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 send a concession award notice giving the results of the concession award procedure.

The concessions Directive also introduced a standstill period for concession awards to be appealed by extending the scope of the Remedies Directive so that it applies to all concession contracts above the

relevant threshold. Not later than 48 days after the award of a concession, the contracting authorities and contracting entities shall send a concession award notice on the results of the concession award procedure. In view of the detrimental effects on competition, awarding concessions without prior publication should only be permitted in very exceptional circumstances.

The concessions Directive did not outline any specific procurement procedure for the award of concessions and, in order to promote flexibility, instead set out procedural guarantees of transparency, consistency and objective criteria which contracting authorities must fulfil when awarding a concession. In order to comply with these requirements, the contracting authority must give a description of the concession, the technical specifications, the award criteria and the minimum requirements to be met in the contract notice, the invitation to submit tenders or the concession documents. The award criteria must relate to the economic, financial and technical capacity of the party and be listed in descending order of importance. The contracting authority should also establish in advance and communicate to all participants the rules on the organisation of the concession award procedure, including the rules on communication, the stages of the procedure and timing. Throughout the procurement process, a contracting authority must ensure that the parties are treated fairly and equally. Contracting authorities should take care to ensure that the information provided to tenderers throughout the tender process does not give some tenderers an advantage over others, and retain records relevant to the procedure.

Before awarding the concession a contracting authority needs to ensure that the tender complies with the requirements, conditions and criteria set out in the concession notice, the invitation to tender and the concession documents, and that the tenderer is not excluded from participating in the award. Assuming that the tenderer is compliant, the contracting authority must, as soon as possible, inform each tenderer of decisions reached concerning the award of a concession. Upon request from the party concerned, the contracting authority must, as quickly as possible (and within 15 days from receipt of a written request) inform any unsuccessful candidates of the reasons for the rejection of their application.

The concessions Directive limits 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.

The regulation for concessions recognises their special nature and characteristics which are different than those of public contracts, and applies a **light regulation** which balances the freedom of Member States to organise delivery of their public services through exclusive rights granted to public undertakings with the imperative of the principle of transparency in the award of public contracts which ensures market access and competition in the delivery of public services.

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. 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 89/665⁴³ 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 92/13⁴⁴ coordinating the laws, regulations and administrative

⁴³ See OJ 1989, L 395/33.

⁴⁴ See OJ 1992, L 76/14.

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 enforced⁴⁵ 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.⁴⁶ 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.⁴⁷

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*. 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 Directive⁴⁸ 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**

⁴⁵ See Article 2(7) of Directive 89/665 and Article 2(8) of Directive 92/13.

⁴⁶ See Article 1(2) of Directive 89/665 and Article 1(2) of Directive 92/13.

⁴⁷ See Article 2(2) of Directive 89/665 and Article 2(2) of Directive 92/13.

⁴⁸ See Directive 2007/66/EC of 11 December 2007, OJ L335/31.

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.⁴⁹ 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.

⁴⁹ 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.

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 reveals 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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