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procurement

2015 no 2

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REPRINT FROM PROCUREMENT LAW JOURNAL

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On 28 March 2014, the new procurement directives were published in the *Official Journal of the European Union*. The EU Member States are obliged to implement them into their national legal systems before 18 April 2016. The present article aims at providing an overview of the main elements of this reform. Where appropriate, certain aspects will be discussed in greater detail, including those which might be relevant for those EFTA States that are part of the European Economic Area (“EEA”).

I. The “Europe 2020” strategy

Research and innovation, including ecological and social innovation, are regarded as the main drivers of future growth and have therefore been put at the center of the “Europe 2020” strategy for smart, sustainable and inclusive growth launched in 2010 by the European Commission.¹ In the context of this strategy, public authorities have been called upon to make the best strategic use of public procurement to spur innovation by relying on its key advantages. With the new rules on public procurement, the European legislator intends to provide public authorities a useful tool with a view to boost innovation.

The importance of public procurement law for the functioning of the EEA cannot be overemphasized. It provides a uniform set of rules binding on all public authorities. Consequently, economic operators can expect that public authorities in all EEA States will abide by the same rules. It must be recalled that the aim of this set of rules is to guarantee to potential tenderers established in the EEA access to public contracts of interest to them.² It ensures cross-border competition and guarantees equal and non-discriminatory treatment between economic operators

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(Responsibility for the information and views set out in this article lies entirely with the author)

¹ Commission Communication, *EUROPE 2020 – A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020final.

² See Case C-220/05 *Auroux* [2007] ECR I-385, par. 53; Case C-368/10 *Commission v Netherlands*, ECLI:EU:C:2012:284, par. 52.

from all EEA States.³ As a consequence hereof, public authorities benefit from a large variety of goods and services from the entire European single market. From an economic perspective, public procurement law ensures the optimal allocation of resources, meaning that public authorities will get the best and most innovative offer for the best price. In times where the national treasuries across Europe struggle with their budgets, investing in the economically most advantageous offer on the market is of utmost importance. Public procurement constitutes a considerable economic investment, with an estimated value of EUR 425 billion, or 3.4% of the EU GDP⁴, worth being protected. Public procurement law comes here into play, as it prevents irregularities in public administration to the detriment of public interests (the respect of budgetary, ethical and legal rules) by laying down transparency requirements. Moreover, it reinforces the rule of law by creating legal certainty through foreseeable tender procedures and by granting the possibility of legal review through the creation of a harmonized set of legal remedies economic operators can rely on in order to enforce their rights in case of a breach of the rules.

With the simultaneous adoption on 26 February 2014 of *Directive 2014/24/EU on public procurement*⁵ and of *Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors*⁶, the European legislator has replaced the rules in force, introducing a number of reforms. These reforms essentially pursue the following objectives: to give more flexibility when applying the rules⁷, to facilitate access to contracts for small and medium sized enterprises (SMEs)⁸, to support the strategic use of public procurement for environmental and social policy goals⁹, to provide more legal clarity on the application of the rules and to encourage innovation. In addition to this, the adoption of *Directive 2014/23/EU on the award of concession contracts*¹⁰ aims at filling a legal gap left by the legislature, providing for more legal certainty in a

³ See Case C-213/07 *Michaniki* [2008] ECR I-9999, par. 53.

⁴ See *European Commission – EU public procurement legislation: Delivering results / Summary of evaluation report*, p. 9 and *European Commission – Public procurement reform, Fact sheet No 1: General overview*.

⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJEU L 094, 28.3.2014, p. 65).

⁶ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJEU L 094, 28.3.2014, p. 243).

⁷ See Recital 42 in the Preamble to Directive 2014/24/EU.

⁸ See Recitals 2 and 124 in the Preamble to Directive 2014/24/EU.

⁹ See Recitals 37, 40, 45, 47, 75, 101, 103, 105, 123, 128 in the Preamble to Directive 2014/24/EU and Article 18 (“Principles of procurement”) thereof.

¹⁰ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJEU L 094, 28.3.2014, p. 1).

sensitive field which has so far been predominantly shaped by the case-law of the *Court of Justice of the European Union* (hereafter “CJEU”)¹¹.

II. The legislative reform in detail

1. The legislative procedure

The new procurement directives, adopted on 26 February 2014, went through a legislative procedure lasting two and a half years which began with the proposals submitted by the European Commission on 21 December 2011. Subsequently, the compromise texts were adopted by the Council between October and December 2012, a report by the Internal Market Committee of the European Parliament was issued and a decision to negotiate from March 2013 on by means of the tri-*logue* procedure was taken. After a consensus was reached, both the European Parliament and the Council approved the legislative texts on 15 January 2014 and on 12 February 2014 respectively. The publication in the *Official Journal* took place on 28 March 2014. After their entry into force in the EU on 17 April 2014, the new procurement directives will have to be implemented into national law within 24 months, until 18 April 2016 at latest. Longer implementation periods will apply only to the requirements foreseen for procurement using electronic means of communication.

2. General overview

Directives 2014/24 and 2014/25 replace the previous directives containing substantive provisions for “classic” and for “sector” specific public contract awards. They are repealed with effect from 18 April 2016. *Directive 2009/81/EC on procurement in the fields of defense and security* (hereafter: defense directive)¹² and *Directives 89/665/EEC and 92/13/EEC on remedies in classic and sector specific contracts awards*, as amended by Directive 2007/66/EC (hereafter: remedies directives), remain unchanged. The only exception hereto is an amendment to the remedies directives with a view to extend their scope of application to those concessions regulated by Directive 2014/23. Consequently, certain concessions not covered by Directive 2014/23 will not be affected by the reform.

The three new procurement directives are structured in a similar way: A first title regarding the subject matter (definitions) and the scope of application is followed by a second title containing provisions on the award of public contracts

¹¹ See Case C-458/03 *Parking Brixen* [2005] ECR I-8585, par. 46, and Case C-91/08 *Wall* [2008] ECR C-91/08, par. 33.

¹² Directive 2009/81/EC on the coordination of procedures for the award of certain contracts in the fields of defense and security (OJEU L 216, 20.8.2009, p. 76).

and concessions. Directives 2014/24 and 2014/25 have a third title with arrangements for service contracts (for example: social and other specific services), while in Directive 2014/23 this third title deals with the rules on the performance of concessions. Title IV of Directives 2014/24 and 2014/25 deals with the new governance requirements. The last titles of all the three directives contain final provisions, which include transfers of competence to the Commission, as well as rules concerning the entry into force and periods of implementation.

The following overview shall focus on Directive 2014/24 on public procurement (II.) and provide additional information about the specificities in the other two directives (III./IV.).

II. The directive on public procurement

1. Subject matter and scope of application

The reform entails only few changes pertaining to the main definitions in the area of EU public procurement law, in particular as regards the concepts of “procurement” and “contractor”, which are relevant for determining the scope of application of the rules. The same applies to the general principles of EU public procurement law (transparency and non-discrimination among others), which remain relevant also for the areas not covered by the directives (for example, below the thresholds), as they are derived from primary EU law.¹³

a) *The notion of “procurement”*

The provision in Article 1(2) of Directive 2014/24, according to which EU public procurement rules are applicable where contracting authorities may have a choice, might have as a consequence that so-called “open house-models”, in which all tenderers fulfilling the award criteria are awarded a contract from the start, could be exempted from the scope of application of the directive.

Furthermore, Directive 2014/24 underlines the procurement element which must be inherent to every administrative action for it to fall within the scope of application by specifying in Recital 4 that “[t]he increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself. [...] The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract”, irrespective of

¹³ See Case C-324/98 *Telaustria* [2000] ECR I-10745, par. 60; Case C-92/00 *HI* [2002] ECR I-5553, par. 47; Case C-59/00 *Vestergaard* [2001] ECR I-9505, par. 20; C-264/03 *Commission v France* [2005] ECR I-8831, par. 32-33. See also the Commission Interpretative Communication, *Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives* (2006/C 179/02), OJEU C 179/2.

the fact that the notion of “acquisition” referred to in Article 1(2) must certainly be construed widely. Nothing changes as regards the functional understanding of procurement. However, the process must have the characteristics of procurement, in other words, of an acquisition of works, supplies or services. Not every process involving a contract authority which pays remuneration to another legal person (a pecuniary benefit) is *qua definitionem* a public contract or a concession.

b) *Mixed procurement*

The rule of thumb for the award of mixed contracts is that they are to be awarded in accordance with the provisions applicable to the type of procurement that characterizes the main subject of the contract in question.¹⁴ Article 3(2) (1) of Directive 2014/24 regulates this explicitly for awards which have as their subject two or more types of procurement (works, services or supplies), although the second subparagraph clarifies that in the case of mixed contracts consisting partly of services and partly of supplies, the main subject is to be determined in accordance with the respective services or supplies whose values are estimated to be the highest. This provision codifies the case-law of the CJEU, according to which the relative value of the various matters covered by the contract can also be one factor in determining the contract’s main purpose.¹⁵

c) *Thresholds*

Directive 2014/24 applies to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the threshold specified in Article 4(a-c) (EUR 5.186.000 for public works contracts; EUR 134.000 for public supply and service contracts awarded by central government authorities, and EUR 207.000 for public supply and service contracts awarded by sub-central contracting authorities). Article 4(d) introduces a new threshold of EUR 750.000 for public service contracts for social, health, cultural and other specific services¹⁶. There have been no major changes in the provisions regarding the calculation of the estimated value of procurement. According to Article 6(1), the Commission is to verify every two years from 30 June 2013 that the thresholds correspond to the thresholds established in the *Agreement on Government Procurement (GPA)*, concluded under the auspices of the *World Trade Organization (WTO)*, and,

¹⁴ See Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329, par. 29; Case C-412/04 *Commission v Italy* [2008] ECR I-619, par. 47-48; Case C-220/05 *Auroux* [2007] ECR I-385, par. 37; Case C-536/07 *Commission v Germany* ECLI:EU:C:2009:664, par. 57; Case C-213/13 *Pizzarotti* ECLI:EU:C:2014:2067, par. 40.

¹⁵ See Case C-412/04 *Commission v Italy* [2008] ECR I-619, par. 49.

¹⁶ Article 74 of Directive 2014/24.

where necessary, to revise them. The thresholds have recently been revised with effect to both the EU¹⁷ and the EFTA¹⁸ pillar.

d) *Geographical scope of application*

In addition to the 28 EU Member States and the 3 EFTA States that are part of the EEA, the benefits of the EU rules on public procurement also apply to suppliers from a number of other States the EU has entered into an agreement with. The abovementioned GPA is the main agreement concluded by the EU in the area of public procurement. It is designed to open up the public procurement markets of each of the Contracting Parties to international competition. Compliance with the EU rules ensures compliance with the GPA, where it applies, and suppliers from States that are signatories of the GPA have the same rights as EU suppliers. The non-EEA States that are signatories to the GPA are Armenia, Aruba, Canada, Hong Kong (China), Chinese Taipei, Israel, Japan, Republic of Korea, Singapore, Switzerland and the United States of America. Ten other WTO Members, including China, Moldova, Montenegro, New Zealand and Ukraine, are negotiating accession to the GPA. On 30 March 2012, the GPA Parties reached an agreement and adopted a Protocol amending the GPA which originally dates back to 1994. The revised GPA entered into force on 6 April 2014.¹⁹ The EU has similar free trade agreements with some other countries, and contracting authorities should check to see if any of these apply if they receive expressions of interest or bids from suppliers in other non-GPA States.²⁰

2. Exemptions

Article 7 *et seq.* of Directive 2014/24 deal with public contracts that are excluded from the scope of application of the European rules on public procurement. In some cases, these legal provisions are merely declaratory or contain clarifications. Some other provisions concern highly controversial issues and are therefore constitutive.

First, Article 7 excludes from the scope of application of the “classic” directive those public contracts in the water, energy, transport and postal services

¹⁷ *Commission Regulation (EU) No 1336/2013 of 13 December 2013 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of the application thresholds for the procedures for the awards of contract*, OJEU L 335 of 14.12.2013, p. 17.

¹⁸ See the *thresholds referred to in Directive 2004/17/EC and Directive 2004/18/EC, as amended by Regulation (EU) No 1336/2013, expressed in the national currencies of the EFTA States* (2014/C 227/06), EEA Supplement to the OJEU C 227 of 17.7.2014, p. 9.

¹⁹ The text of the revised GPA is available at: https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf

²⁰ A Commission list of such agreements can be found at: http://ec.europa.eu/growth/single-market/public-procurement/rules/free-trade-agreements/index_en.htm

sectors. Article 8 excludes contracts for the principal purpose of permitting the contracting authorities to provide or exploit public communication networks or to provide to the public electronic communications services. Article 9 excludes those public contracts that are awarded pursuant to international rules. Article 10 foresees special exclusions for service contracts. An important clarification is stated in Article 10(f), according to which loans, whether or not in connection with the issue, sale, purchase or transfer of securities or other financial instruments, are excluded from the scope of the directive.

The decision by the European legislator to give up the previous differentiation between priority and non-priority services (Annex II A and II B of the previous Directive 2004/18/EG)²¹ made it necessary to exclude from the scope of application of the procurement directives those public contracts that, by the very nature of the matter, are not deemed relevant to be submitted to a European tender procedure. An example are legal services, albeit, not all of them, but merely those provided for in connection with judicial proceedings or in the exercise of sovereign functions.²² Also excluded are contracts related to public passenger transport services by rail or metro, that are awarded on the basis of *Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road*.²³ Therefore, from a perspective of EU law, nothing appears to preclude the option of a direct award of public service contracts where they concern transport by rail pursuant to Article 5(6) of this regulation.

The national legislator is, however, not exempt from verifying whether EU primary law requires that a public contract on services excluded from the scope of the procurement directives be exceptionally submitted to a tender procedure which meets the publicity obligation. EU primary law may impose a duty to observe minimum procedural standards even for those contracts involving services that are excluded from the scope of the procurement directives. The national legislator could either specify these minimum requirements or even prescribe the applicability of public procurement law. Such an approach would, however, raise the question as to why the national legislator would see the need for regulation in certain areas, in which European legislature has expressly refrained therefrom.

²¹ The classification of a contract as concerning “A services” or “B services” is of great importance for determining which rules apply to the contracting authority under Directive 2004/18. Contracts falling under the first category are subject to all the rules, the publication requirements, etc. Contracts belonging to the second category are only subject to Article 23 (“technical specification”) and Article 35(4) (“publication of the award of a contract”). Under Directive 2004/17, contracts for “B services” are subject to the corresponding provisions in Articles 34 and 43. See Case-226/09 *Commission v Ireland* [2010] ECR I-11807; Case C-113/13 *Croce Verde*, ECLI:EU:C:2014:2440, par. 41.

²² Article 10(d) of Directive 2014/24.

²³ *Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70*, OJEU L 315 of 3.12.2007.

3. Public-public cooperation

The codification of the current case-law of the CJEU on contracts between public entities in the public sector was one of the most controversial aspects during the legislative procedure. It is regulated in Article 12 for the “in-house” exemption as well as for the “horizontal public-public cooperation”. Recital 31 makes clear that the legislative purpose of this provision was to codify the existing case-law and not so much to create new law.

From a methodological standpoint, the case-law of the CJEU in this respect relies on a teleological interpretation of the notion of “procurement”²⁴, which excludes certain public contracts from the scope of application of public procurement rules. Article 12 adopts this legal construction by stating that a public contract shall fall outside of the scope of Directive 2014/24 by express decision of the European legislator. In addition to this, the directive provides for some useful clarifications. For example, it stipulates that a joint control by several contracting authorities over a legal person is possible, as established by the CJEU in Case C-324, *Coditel Brabant*²⁵, as well as the award of a public contract to undertakings that are connected with each other (sister companies) or the award by the controlled undertaking to the controlling undertaking (so-called “bottom-up award”)²⁶. Then as now, it remains unchanged that the fact that the contracted entity can at the same time be a contracting entity does not preclude the applicability of EU public procurement rules.²⁷ The two essential conditions developed by the case-law of the CJEU on the basis of the judgment delivered in Case C-107/98, *Teckal*²⁸, – (1) control by the contracting authority (“control criterion”) and (2) activity carried out by the controlled entity predominantly in the performance of tasks entrusted (“activity criterion”) – must be fulfilled in order to benefit from the in-house exemption.

The legal requirements established in the case-law of the CJEU have been specified in greater detail, with some requirements now being more flexible. For example, it will henceforth suffice to fulfil the criterion of “predominance” that more than 80% of the activities of the controlled legal person be carried out in the performance of tasks entrusted to it by the controlling contracting authority.

²⁴ This interpretation is based on the premise that a public authority should have, as a matter of principle, the right to perform public interest tasks conferred on it by using its own administrative, technical and other resources, or in cooperation with other public authorities, without being obliged to call on outside entities not forming part of its own departments (see Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, par. 48-49).

²⁵ See Case C-324/07 *Coditel Brabant* [2008] ECR I-8457.

²⁶ See *Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities (“public-public cooperation”)*, SEC(2011) 1169 final.

²⁷ See Case C-305/08 *CoNISMa* [2009] ECR I-12129; Case C-159/11 *ASL Lecce*, ECLI:EU:C:2012:817, par. 26; Case C-386/11 *Piepenbrock*, ECLI:EU:C:2013:385, par. 29.

²⁸ Case C-107/98 *Teckal* [1999] I-8121.

This provision adds legal uncertainty as regards exactly how large a portion of its activities the controlled entity must carry out for its controlling authority in order for the exemption to apply. The CJEU's judgments in Cases C-340, *Carbotermo*²⁹, and C-295, *Asemfo*³⁰, left a grey area where the application of the exemption was uncertain, but the threshold is now fixed at 80%, a decrease from the original Commission proposal where it was set at 90%.

The provision in Article 12(1)(c) of Directive 2014/24 is likely to lead to misunderstandings, as it is – contrary to what it might suggest at first sight – not meant to deviate from the case-law of the CJEU as regards the admissibility of private capital participation.³¹ According to the case-law developed in Case C-26/03, *Stadt Halle*³², the control criterion cannot be deemed to be met where private capital participation exists. This is only allowed in very few exceptions, where prescribed by national law and provided that this is in compliance with EU law. In the course of the legislative process, due consideration was given to the requirements of the legal systems of some EU Member States, in which associations foreseeing compulsory private membership exist. Recital 32 specifies that Article 12(1)(c) merely refers to cases where the participation of specific private economic operators in the capital of the controlled legal person is made compulsory by a national legislative provision in conformity with EU law.

Rules have been created in Article 12(4) of Directive 2014/24 regulating the horizontal cooperation between contracting authorities. This provision codifies an exemption from public procurement rules which is clearly inspired by the judgment of the CJEU in Case C-480/06, *Commission v Germany*³³. That case was characterized by the fact that none of the cooperating public authorities had any control over the other, which rendered the classic in-house exemption inapplicable. In its judgment, the CJEU however expressly stated that EU law does not require contracting authorities to use any particular legal form in order to jointly carry out their public service tasks, and found the cooperation consistent with EU law. The CJEU upheld its line of reasoning and clarified its view in its subsequent ruling in Case C-159/11, *ASL Lecce*³⁴, although the CJEU implied that the cooperation at hand in that case did not fall outside of the scope of the current directive. The judgment delivered shortly thereafter in Case C-386, *Piepenbrock*³⁵, became an opportunity for the CJEU to confirm this case-law and to elaborate further on the precise criteria allowing for an exemption even

²⁹ Case C-340/04 *Carbotermo* [2006] ECR I-4137.

³⁰ Case C-295/05 *Asemfo* [2007] ECR I-2999.

³¹ See Case C-574/12 *Centro Hospitalar de Setúbal*, ECLI:EU:C:2014:2004.

³² Case C-243/09 *Stadt Halle* [2010] ECR I-9849.

³³ Case C-480/06 *Commission v Germany* [2009] ECR I-4747.

³⁴ Case C-159/11 *ASL Lecce*, ECLI:EU:C:2012:817.

³⁵ Case C-386/11 *Piepenbrock*, ECLI:EU:C:2013:385.

if – again – it did not apply to the case at issue. As the exact implications of these judgments have been subject to much debate, the legal certainty following the codification is to be welcomed. Some clarifications are certainly provided as well.

The critical criterion when assessing the applicability of the exemption in Article 12(4) of Directive 2014/24 is the one related to “*cooperation*”. It is obvious that the legal definition in Article 12(4)(a) is similar to, but does not constitute an exact reiteration of the CJEU’s reasoning in the *aforecited cases*. Consequently, the question arises as to how to interpret this criterion. Recital 33 in the Preamble provides some enlightenment on the provision in this regard. According to this recital, such cooperation might cover all types of activities related to the performance of services and responsibilities assigned to or assumed by the participating authorities, such as mandatory or voluntary tasks of local or regional authorities or services conferred upon specific bodies by public law. The services provided by the various participating authorities need not necessarily be identical; they might also be complementary. The clarifications in the Preamble appear to be in accordance with the existing case-law, which for the time being has not been very precise either. Nonetheless, what can be deduced from the CJEU’s reasoning in the *aforecited cases* is that there must be some form of “*genuine cooperation*” between the parties, as opposed to a situation where one contracting entity simply procures a service from another. Rather than what tasks the cooperation foresees, it is the form of cooperation in itself that is important. This notion is probably what the Commission tried to incorporate in its proposal, according to which only activities were exempted from the rules on public procurement that implied “*genuine cooperation [...] involving mutual rights and obligations*”.

In addition to the emphasis on the form of the cooperation, the CJEU in the *aforecited cases* put an emphasis on the purpose of the cooperation at hand. This aspect of the case-law is reflected in Article 12(4)(b), which states that the implementation of the cooperation must be governed solely by considerations to the public interest. This constitutes an almost exact reiteration of the CJEU statements. According to Recital 33, this includes any financial transfers between the participating contracting authorities. Consequently, even if the requirement initially proposed by the Commission, that the cooperation should not entail any financial considerations other than reimbursement for actual costs, has been removed from the final text, it will still constitute an element in the assessment of whether or not the cooperation solely pursues public interests.

A draft provision setting limits to the remuneration agreed was discarded during the legislative process. Likewise discarded was a provision prohibiting private capital participation in both cooperation partners. Recital 32 clarifies that contracting authorities such as bodies governed by public law, that may have private capital participation, should be in a position to avail themselves of the exemption for horizontal cooperation.

Article 12(5) of Directive 2014/24 contains a provision for the determination of the average total turnover, which might have left some questions unanswered. Section 4 (Article 13 *et seq.*) foresees exemptions for specific situations, like defense and safety, that are regulated in specific directives.

4. General procedural provisions

Articles 18 *et seq.* of Directive 2014/24 contain some “*general rules*” on procurement:

- As stated at the outset, Article 18 specifies the “*principles of procurement*”. According to the provision in Article 18(1), contracting authorities are to treat economic operators equally and without discrimination and are to act in a transparent and proportionate manner. Furthermore, it prohibits practices aimed at bypassing the rules on public procurement or frustrating the attainment of its objectives, for example by artificially narrowing competition. Competition is to be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.
- Article 18(2) contains a “*horizontal clause*” obliging the EU Member States to take appropriate measures to ensure that, in the performance of public contracts, economic operators comply with applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements and/or by a number of conventions listed in Annex X.
- Article 20 allows EU Member States to reserve the right to participate in public procurement procedures to “*sheltered workshops*” and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programs. Conversely, this means that a “normal” competition between business undertakings and the aforementioned entities will not take place.
- Article 21 protects the confidentiality of tenders. However, it seems to subject this protection to national law, as it applies “*unless otherwise provided in the national law to which the contracting authority is subject, in particular legislation concerning access to information*”. Irrespective of this, it is important noting – as regards the protection of confidential information in the context of a procurement procedure –, that contracting authorities will certainly remain bound by the findings of the CJEU in Case C-450/06, *Varec*³⁶, due to their relevance of constitutional character. According to this case-law, the right of

³⁶ Case C-450/06 *Varec* [2008] ECR I-581.

other economic operators to the protection of their confidential information and their business secrets will always have to be balanced against the requirement of transparency, manifested in the right of tenderers to have access to information relating to the award procedure.³⁷ As the CJEU has explained, the principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection (which the requirement of transparency is meant to safeguard).³⁸ Contracting authorities will therefore have to carry out a case-by-case assessment of the information in question when stating the reasons for the award of a contract (and for the rejection of the other tenders respectively) to the participants³⁹ in a procurement procedure and when confronted with possible subsequent requests for access to documents by them.

- Article 22 should not be underestimated in terms of importance, as it contains rules applicable to communication in tender procedures. Pursuant to these rules, all tender procedures must be carried out using electronic means of communication. However, according to Article 90(2), the EU Member States may postpone the application of this provision until 18 October 2017. For central purchasing bodies, this “*analogical grace period*” already ends 18 months earlier, on 18 April 2017.
- The reform introduces amendments aimed at fighting corruption. It takes into account that conflicts of interest and unlawful conduct are detrimental to the proper conduct of award procedures and the correct application of the rules.⁴⁰ The European Commission estimates that corruption in public procurement costs society about EUR 2 billion a year.⁴¹ As the CJEU has explained in its recent judgment in Case C-538/12, *eVigilo*⁴², a conflict of interest entails the risk that the contracting authority may choose to be guided by considerations unrelated to the contract in question and that on account of that fact alone preference may be given to a tenderer. Such a conflict of interests is thus liable to constitute an infringement of Article 2 of Directive 2004/18. Article 24 of Directive 2014/24 provides henceforth for greater clarity and legal certainty, as it contains the first provision in EU law specifying the meaning of “conflict of

³⁷ Par. 51.

³⁸ Par. 52.

³⁹ Article 55(3) of Directive 2014/24 will have to be interpreted accordingly.

⁴⁰ The CJEU has ruled that the obligation of transparency, which is corollary to the principle of equal treatment as between tenderers, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority with respect to certain tenderers or certain tenders (see Case C-496/99 P *Commission v CAS Succhi di Frutta*, ECLI:EU:C:2004:236, par. 110, and Case C-42/13 *Cartiera dell’Adda*, ECLI:EU:C:2014:2345, par. 44).

⁴¹ See *European Commission – Public procurement reform, Fact sheet No 10: Transparency and anti-corruption*.

⁴² Case C-538/12, *eVigilo*, ECLI:EU:C:2013:286.

interest”. This concept is now defined as “*a situation in which persons involved in, or able to influence, the procedure by which a purchaser awards a contract have a direct or indirect financial, economic or other personal interest that could jeopardise their impartiality and independence in that procedure*”.⁴³ EU Member States are called upon to take steps to prevent, identify and address conflicts of interest.

5. Award procedures

As regards the award procedures (Articles 26 *et seq.*), the terms used in the paragraphs 2-4 of Article 26 (“Member States shall provide”) clarify that all types of procedure prescribed in Directive 2014/24 are to be implemented into national law. The so-called “tool box approach” that would have left at the discretion of the EU Member States the choice of the procedural instruments to be incorporated into national law on public procurement was no longer pursued in the legislative process.

a) *Open and restricted procedures*

The reform of EEA rules on public procurement does not introduce any changes to the open and restricted procedures, except in respect of time-limits:

- Open procedure: A time-limit of minimum 35 days for the receipt of tenders is foreseen (30 days if electronic tenders are permitted). If the procedure is preceded by a suitable prior information notice, the time-limit is a minimum of 15 days. In case of urgency, the time-limit is a minimum of 15 days.
- Restricted procedure: The procedure prescribes a minimum of 30 days for requests to participate. It also foresees a minimum of 30 days to submit tenders (25 days if electronic tendering permitted). If the procedure is preceded by a suitable prior information notice, the time-limit is a minimum of 10 days. In case of urgency, the minimum time to submit requests is 15 days and to submit tenders is 10 days.

b) *Competitive procedure with negotiation and competitive dialogue*

The reform has led to a revision of the competitive dialogue and negotiated procedures. It can be observed that Directive 2014/24 acknowledges the need for broader access to flexible procedures. For that reason, the grounds for using the competitive procedure with negotiation have been significantly extended. Basically, this procedure will be available for all purchasing that is not “off the shelf”, such as purchasing designs or innovative solutions. However, the “price”

⁴³ Par. 34-35.

to be paid for the wider availability of the competitive negotiated procedure is the determination of narrower and more express procedural rules reducing the procurer's flexibility when conducting the procedure. In particular, the Directives contain a clear requirement that there may not be any negotiation of final tenders.

In addition to that, the same requirements are to apply to the choice of the competitive dialogue as of the negotiated procedure with prior publication. The contracting authority can therefore choose between both types of procedure provided that the requirements are met.

The most relevant amendment in practical terms introduced by Directive 2014/24 with respect to the procedures concerns the competitive procedure with negotiation. It consists in the fact that, according to Article 26(4)(a)(iii) of Directive 2014/24, the choice of the competitive procedure with negotiation is possible if *“the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them”*. This is a useful clarification, as tenderers – when selecting the adequate type of procedure – often faced the question as to whether it was realistic (or sensitive from an economic perspective), in view of the object to be procured, to refrain from any possibility of negotiation. Nonetheless, it can be expected that the practical implementation of this provision will raise questions as regards the choice of the right type of procedure by contracting authorities, which will have to be clarified by the national review bodies (as well as by the CJEU and the EFTA Court respectively).

For these types of procedure (and for not open procedures), Article 26(5) subparagraphs 2 and 3 of Directive 2014/24 introduces an innovation in that – if the EU Member States provide for this –, where contracts are awarded by sub-central contracting authorities, the call for competition (in other terms, the publication) does not necessarily have to be made according to Article 49 but rather by means of a prior information notice pursuant to Article 48(2). Where a prior information notice, which is to cover a maximum period of 12 months, is used as a call for competition, contracting authorities are to simultaneously and in writing invite the economic operators that have expressed their interest to confirm their continuing interest⁴⁴. It remains to be seen whether this will have an effect with regard to simplification of the procedure, as intended by the European legislature. A contrary indication is that also the prior notification must refer to the supply, works or services that will be the subject of the contract to be awarded, in accordance with Article 48(2)(a). Against this background, the advantages of the contract notice as an established instrument should outweigh those of the prior information notice.

Nothing changes as regards the applicability of the negotiated procedure

⁴⁴ Article 54(1)(2) of Directive 2001/24.

without prior publication⁴⁵. Some of the known exceptions, for instance concerning the necessity to limit subsequent awards to the same contract partner, have been transferred to the chapter related to the contract performance⁴⁶.

c) *Innovation partnership*

The reform of EU rules on public procurement introduces an entirely new procedure, the so-called “innovation partnership”⁴⁷. The similarities with the negotiating procedure and the competitive dialogue are unmistakable. This applies both to the legal requirements for the choice of this type of procedure as well as to the procedure’s structure.

The objective of a long-term innovation partnership must be the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works. The contracting authority’s needs may not be met by solutions already available on the market. This specific procedure is meant to avoid that a separate tender procedure for the purchase be necessary subsequent to a research and development project⁴⁸. The innovation partnership is to be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership is to set intermediate targets to be attained by the partners and to provide for payment of the remuneration in appropriate instalments. Based on those targets, the contracting authority may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting authority has indicated in the procurement documents those possibilities and the conditions for their use.

In order to ensure compliance with the EEA rules on competition (and state aid rules), contracting authorities are urged by the European legislature to avoid using innovation partnerships in such a way as to prevent, restrict or distort competition. Setting up innovation partnerships with several partners is considered to be a suitable means to avoid such effects. Furthermore, it is worth noting that by stating that the contracting entity is to define the arrangements applicable to intellectual property rights in the procurement documents, the European legislature identifies a number of legal issues that the contracting entity will necessarily have to deal with. These issues arise from the nature of the fact that several partners will be involved in the development process. They concern the

⁴⁵ Article 26(6) in conjunction with Article 32 of Directive 2014/24.

⁴⁶ See, in particular, Article 72(1)(b) of Directive 2014/24.

⁴⁷ Article 26(3) in conjunction with Article 31 of Directive 2014/24.

⁴⁸ See Recital 49 in the Preamble to Directive 2014/24.

ownership of the product, which only the contracting entity can reasonably be entitled to. In addition to this, the European legislature states that the legitimate interest in the protection of “technical knowhow” will have to be safeguarded. Therefore, Article 49(6) subparagraph 3 of Directive 2014/24 states that solutions proposed or other confidential information communicated by a partner within the framework of the partnership shall not be revealed to the other partners without that partner’s consent.

Ultimately, the introduction of the innovation partnership should be regarded as an experiment with a view to provide for adequate procedural solutions in promotion of innovation by means of public procurement rules, notwithstanding the exemption of a number of research and development services from their scope of application, as laid down in Article 14 of Directive 2014/24.

6. Framework agreements and instruments for centralized / joint purchasing activities

Articles 33 *et seq.* of Directive 2014/24 regulate framework agreements and instruments for centralised and joint purchasing activities.

The previous regulation, according to which framework agreements with several economic operators – provided that a sufficient number of bids eligible for an award – must be concluded with at least three contracting partners, was scrapped. It has always been difficult to understand why framework agreements related to a specific contract object could be concluded with one or three undertakings but not with two undertakings.

Member States may establish central purchasing bodies pursuant to Article 37 of Directive 2014/24 which can also – like a trade intermediary – acquire goods and services in their own name and subsequently sell them to other contracting authorities without requiring a new tender procedure⁴⁹. Another option consists in concentrating the procurement need of several contracting authorities by means of a central purchasing body that launches common tender procedures, a common administrative practice nowadays, according to which the central purchasing body acts on behalf of the other contracting authorities as their representative⁵⁰.

7. Conduct of the award procedure

The conduct of the award procedure is regulated in Chapter III of Title II of Directive 2014/24:

The admissibility of preliminary market consultations has finally been codified

⁴⁹ See Article 2(14)(a) of Directive 2014/24.

⁵⁰ See Article 2(14)(b) of Directive 2014/24.

in Article 40. Such consultations usually allow contracting entities to “explore the market”, in preparation for a call for tenders. This can imply seeking or accepting advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure. Article 40(2) of Directive 2014/24 specifies, however, that such advice may not have the effect of distorting competition and result in a violation of the principles of non-discrimination and transparency.

Article 41 deals with an issue that arises whenever a project designer is invited to participate. As already established by the case-law of the CJEU, the contracting authority is to take appropriate measures to ensure that competition is not distorted by the prior involvement of candidates or tenderers.⁵¹ Such measures are to include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from this prior involvement in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. These provisions codify the aforementioned case-law in so far as they allow the exclusion of a candidate or tenderer only as *ultima ratio* to guarantee equal treatment and undistorted competition. Before this occurs, the candidate or tenderer concerned is to be given the opportunity to prove the absence of negative effects on competition.

Articles 42-44 contain provisions on technical specifications and labels of quality. These provisions deviate from the principle, according to which EEA rules on public procurement are neutral with regard to the object procured by the contracting authority (so-called “autonomy of procurement”). This neutrality intends to ensure a non-discriminatory procurement. The purpose of the procurement must be specified by the contracting authority in the contract notice. Pursuant to Article 42(1)(4) of Directive 2014/24, for all procurement that is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications are to, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.

Alternative tenders are denominated “variants” in the EU procurement directives. The reform introduces another innovation as, pursuant to Article 45(1) of Directive 2014/24, variants are not allowed if this is not explicitly indicated in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest. Contracting authorities may authorize or even require tenderers to submit variants. Variants are to be linked to the subject-matter of the contract. The minimum requirements to be met by the variants are to be stated in the procurement documents. The procurement

⁵¹ See Case C-21/03 *Fabricom* [2005] ECR I-1559.

directives do not provide an answer to the question as to whether variants are allowed when other award criteria have been stated apart from the price.

As part of the effort to encourage greater participation of SMEs, Article 46 of Directive 2014/24 regulates the division of contracts into lots.⁵² Article 46(4) leaves it to the EU Member States to decide whether award contracts may or even must be divided. Article 46(3) further allows the EU Member States to combine several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined. The difficulties associated with this exercise were obvious to those who have ever been involved in the field of public procurement. Perhaps for this reason the adopted text only requires an explanation to be given where contracts are not divided into lots (public sector only), while allowing contracting authorities to limit the number of lots that can be awarded to any one operator based on objective criteria (public sector and utilities).

Article 47 of Directive 2014/24 regulates the setting of time limits for the receipt of tenders and requests to participate. The relevant time limits are regulated in connection with the respective types of procedure. They have been shortened in comparison to the rules currently in force. Nonetheless, the procurement directives retain the principle according to which time limits must be adequate so as to take account of the complexity of the contract and the time required for drawing up tenders.⁵³ Article 47 determines the instances in which the contracting authority may extend the time limits, for instance where signi-

⁵² The idea of mandatory division of contracts into lots was mooted in the Commission's *Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market*, COM(2011) 15 final.

⁵³ The rationale behind these provisions is to make sure that the conditions for free and fair competition are given. Time limits that are too short restrict competition and increase prices. They discourage potential tenderers and increase price calculations, due to the fact that bidders are prevented from carrying out detailed calculations, with the consequence that they must add risk premia. Besides, they might be hindered from gathering all the necessary references and documents. Furthermore, decision-making procedures within larger companies usually take time. An adequately long time limit might be of particular importance in cross-border situations. It might be necessary in order for tenderers from other EU Member States to adjust to the circumstances of competition in the State where the contract is meant to be performed, for instance, when assessing the value of the contract and setting the price. Furthermore, tenderers from other EU Member States might have to take into account particular requirements and national standards before submitting tenders. Consequently, a contracting authority wishing to launch a procurement procedure may not rely on the minimum time limits. Instead, it must take into account the complexity of the contract and other know framework circumstances such as bank holidays, additional time to obtain the necessary certificates, etc, and fix an adequate time limit. The importance of setting adequate time limits must be seen in light of the need to ensure equality of opportunity (see Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, par. 55), effective competition (see C-138/08 *Hochtief* [2009] ECR I-9889) and the highest possible number of tenderers (see Case C-538/07 *Assitur* [2009] I-4219, par. 26) in the area of public procurement.

ficant changes have been made to the procurement documents before the time limit fixed for the receipt of tenders or significant changes have been made to the procurement documents at short notice.

Section 2 of Chapter III (Article 48 of Directive 2014/24 *et seq.*) contains provisions concerning the publication and transparency. Contracting authorities are required to use the standard forms established by the Commission in implementing acts for the publication of prior information notices, contract notices and contract award notices. In addition to this, extended requirements apply to contracting authorities and tenderers as regards electronic communication and publication. Pursuant to Article 53 of Directive 2014/24, contracting authorities are to offer by electronic means unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice or the date on which an invitation to confirm interest was sent. It is important to stress that this requirement must be fulfilled immediately at the expiry of the deadline of implementation. As Article 90(2) clearly states, the postponed deadline for implementation does not cover the requirements laid down in Article 53.

8. Selection criteria and means of proof / grounds for exclusion

There are a few innovations with regard to existing law that concern the aptitude-related rules in Directive 2014/24:

- The minimum yearly turnover that economic operators are required to have is not to exceed two times the estimated contract value. Exceptions are only allowed in duly justified cases.⁵⁴
- Public procurement rules regulate that an economic operator may be excluded from participation in a procurement procedure where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave “professional misconduct”, which renders its integrity questionable.⁵⁵ This last new requirement is probably based on the case-law of the CJUE, which defines the concept of “professional misconduct” as covering “*all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the infringements of ethical standards in the strict sense of the profession to which that operator belongs*”.⁵⁶
- The EU expects an administrative simplification from the introduction of the *European Single Procurement Document (ESPD)*, a standard form which still has to be designed by the Commission. Details are regulated in Article 59 of Directive 2014/24. Contracting authorities are to accept self-declarations

⁵⁴ Article 58(3)(2) of Directive 2014/24.

⁵⁵ Article 57(4)(c) of Directive 2014/24.

⁵⁶ See Case C-465/11, *Forposta and ABC Direct Contact*, ECLI:EU:C:2012:801, par. 27; Case C-470/13, *Generali-Providencia Biztosító*, ECLI:EU:C:2014:2469, par. 35.

submitted by tenderers using the ESPD as preliminary evidence of the fulfilment of the legal requirements set out by the procurement directives as regards *inter alia* (the non-existence of) exclusion grounds⁵⁷ and selection criteria⁵⁸. This means that ultimately only the winning bidder will have to provide full documentary evidence. The ESPD will be made available in all official languages in the *e-Certis* online database⁵⁹. Contracting entities will have to consult *e-Certis* where the requested information is covered by the ESPD. Alternatively, the tenderer can indicate any other national database, in which the information certifying the fulfilment of the legal requirements is stored.

- The possibility of rehabilitating a tenderer excluded after major deficiencies and serious misbehaviour from his side has always been a controversial issue in public procurement practice. The new procurement directives provide an answer by introducing a “self-cleaning” mechanism, without solving the issue exhaustively. In order to be able to participate again in a procurement procedure where he can provide evidence that he has complied with measures aimed at restoring reliability. This includes paying or undertaking to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarifying the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taking concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.⁶⁰ What this exactly means in practice, will require further clarification. When interpreting these provisions, it will have to be made sure that the guarantee of judicial protection as well as some procedural rights is not undermined. Once an economic operator has undergone a “self-cleaning” process and the compliance measures offer sufficient guarantees, he should no longer be excluded from any public call for tenders, as the recitals to the procurement directives state.⁶¹
- Article 63 concerns the possibility for economic operators to rely on the capacities of other entities for the purpose of the performance of the public contract. When it comes to proving their suitability to perform the public contract with regard to criteria relating to economic and financial standing, and to criteria relating to technical and professional ability, an economic operator may rely on these capacities, regardless of the legal nature of the links which it has with other economic operators.⁶²

⁵⁷ Article 57 of Directive 2014/24.

⁵⁸ Article 58 of Directive 2014/24.

⁵⁹ The *e-Certis* database is hosted by the European Commission (http://ec.europa.eu/growth/single-market/public-procurement/e-procurement/e-certis/index_en.htm).

⁶⁰ Article 57(6) of Directive 2014/24.

⁶¹ See Recital 102 in the Preamble to Directive 2014/24.

⁶² See Case C-176/98 *Holst Italia* [1999] ECR I-8607; Case C-94/12 *Swm Costruzioni*, ECLI:EU:C:2013:646.

9. Award criteria

Innovations are contained in Articles 67 *et seq.* of Directive 2014/24 regarding the award of the contract. Contrary to the current legal situation, the contracting entities will not have to decide between the award criterion of the “price” and that of the “economical advantage”. The generic term will be that of the “most economically advantageous tender”, and Article 67(2) clarifies that this criterion is to be identified on the basis of the price or the price/performance ratio, which is to be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

It is worth noting, that the phrase in Article 67(2)(a), stating that the award criteria may include “*social, environmental and innovative characteristics and trading in its conditions*” goes back to the judgment in Case C-368/10, *Commission v Netherlands*⁶³, in which the CJEU clarified that contracting authorities were also authorised under Directive 2004/18 to choose the award criteria based on considerations of a social and/or environmental nature. However, the CJEU had already pointed out in previous judgments that ecological criteria may be taken into consideration by a contracting authority when assessing the most economically advantageous tender, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of EU law, in particular the principle of non-discrimination.⁶⁴

Directive 2014/24 also makes clear in Article 43 that publicly available labels are an effective method of demonstrating compliance with such specifications. However, suppliers must be allowed to offer compliance with equivalent labels or offer other proofs (e.g. technical dossiers) in circumstances where the label cannot be obtained within the relevant time limits. Labels must also, as now, meet certain conditions such as being based on transparent and non-discriminatory criteria and awarded by a body independent of the supplier applying for the label.

The common view, according to which the phrase “*on the basis of the price*” must be construed as meaning that in future an award based exclusively on the price is no longer to be admissible, with the consequence that only qualitative aspects must be taken into account, appears to be at least questionable. In fact, the wording of Article 67(2) seems to point to the contrary, as well as Recital 92, which rules out choosing exclusively on the basis of non-cost criteria but does not forbid the opposite case.

⁶³ Case C-368/10 *Commission v Netherlands*, ECLI:EU:C:2012:284, par. 85 (social aspects) and 89 (environmental aspects).

⁶⁴ See Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, par. 69; Case C-448/01 *Wienstrom* [2003] ECR I-14527, par. 33.

A new interesting award criterion is introduced by Article 67(2) subparagraph 2. Pursuant to this provision, the cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only. This award technique could be used in circumstances where the contracting entity has only been assigned a fixed budget for which it wishes to acquire the best possible good/service.

For the first time, the tenderer's qualification and experience may be taken into account as award criteria. Pursuant to Article 67(2)(b), this is the case where the quality of the staff assigned can have a significant impact on the level of performance of the contract. This new provision eliminates the basis for the case-law of the CJEU regarding the strict separation of the suitability criteria and the criteria on the economic advantage of tenders. In its judgment delivered in Case C-532/06, *Lianakis*, the CJEU deduced from the systematic structure of the procurement directives that any examination of the tenderers' suitability at the level of the assessment of the tender is not permissible because the two procedures are distinct and governed by different rules.⁶⁵ The suitability of tenderers is to be checked by the authorities awarding contracts in accordance with the criteria of economic and financial standing and of technical capability. By contrast, the award of contracts is based on the criteria of the lowest price or the economically most advantageous tender. This led to legal uncertainties almost impossible to solve in practice, in particular, in areas in which the price of the tenders barely showed any difference. Given the fact that the CJEU did not base his reasoning on primary EU law, the European legislator was free to regulate this matter in derogation from the regulation currently in force.

Article 68 of Directive 2014/24 contains provisions concerning the life-cycle costing. The new regulation focuses more than before on the possibility to include other economic aspects than the sole price which shall determine the award decision.

The Commission's original proposal contained a formula for determining when a tender was abnormally low and thus had to be subject to scrutiny. If at least five tenders had been received, a tender would be considered abnormally low if it was 50% lower than the average price or cost and 20% lower than the price or cost of the second lowest tender. It would also have been possible to identify abnormally low tenders on other grounds. This formula has been removed in the final text of the public sector and utilities directives. However the obligation to seek an explanation in respect of abnormally low tenders still exists in Article 69 of Directive 2014/24. The obligation to investigate follows from Case C-599/10,

⁶⁵ Case C-532/06 *Lianakis* [2008] ECR I-251, par. 26; Case C-199/07 *Commission v Greece*, ECLI:EU:C:2009:693, par. 55-56; Case C-641/13 P *Spain v Commission*, ECLI:EU:C:2014:2264, par. 36-39.

*Slovensko*⁶⁶, but in the absence of any definition or formula for identifying abnormally low tenders uncertainty remains about when this obligation will arise.

10. Performance of contracts

A chapter of its own in Directive 2014/24 is devoted to the performance of contracts although this aspect is, strictly speaking, not related to the procurement process. Especially the question as to when modifications to the contract are equal to a new award from a functional point of view and therefore cannot be performed without being opened again to competition has been regarded as requiring regulation. The new regulation takes account of the case-law of the CJEU concerning the modification of public contracts⁶⁷ by codifying a number of constellations which would usually qualify as “substantial modifications” and therefore require a new tendering procedure. At the same time, the new regulation provides for more legal certainty, as fixed percentage values have been established⁶⁸. According to the new rules, contracts may be modified without a new procurement procedure being necessary where the value of the modification is below the thresholds set out in Article 4, and 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts. Where several successive modifications are made, the value is to be assessed on the basis of the net cumulative value of the successive modification.

11. Social and other specific regimes

The new Directives 2014/24 and 2014/25 introduce dramatic amendments to the provisions related to the former non-priority services (Annex II B of Directive 2004/18 and Annex VXII of Directive 2004/17). These annexes will cease to exist in their current form. Nonetheless, specific rules will be maintained for a number of services, beyond the field of social services, for example, for legal services, according to Article 74 *et seq.* of Directive 2014/24. Public contracts for social, health, cultural and other specific services listed in Annex XIV is to be awarded in accordance with public procurement rules, where the value of the contracts is equal to or greater than EUR 750.000. Contracting authorities

⁶⁶ Case C-599/10 *Slovensko* ECLI:EU:C:2012:191

⁶⁷ According to the case-law of the CJEU, an amendment to a contract during its period of validity may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted (see Case C-91/08 *Wall* [2008] ECR C-91/08, par. 37-38; Case C-337/98 *Commission v France* [2000] ECR I-8377, par. 44 and 46; Case C-454/06 *presstext Nachrichtenagentur* [2008] ECR I-4401, par. 34-35).

⁶⁸ Article 72(2) of Directive 2014/24.

intending to award a public contract for these specific services are to make their intention known either by means of a contract notice or of a prior information notice, in accordance with Article 75 of Directive 2014/24. However, the procurement procedure itself can be conducted in a more flexible manner.

Pursuant to Article 76 of Directive 2014/24, the EU Member States are to put in place national rules for the award of contracts concerning these specific services. These national rules must ensure that contracting authorities comply with the principles of transparency and equal treatment of economic operators. EU Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question. Because of the latter requirement (and the other requirements laid down in Article 76(2) of Directive 2014/24), it may well be advisable if the EU Member States exercise caution when adopting rules, in particular as regards their level of detail and their restrictive effect, although EU Member States are entitled to go beyond the minimum requirements laid down by EU law.

Article 77(1) of Directive 2014/24 contains a new provision, according to which EU Member States may provide that contracting authorities may reserve the right for certain organisations to participate in procedures for the award of public contracts exclusively for health, social and cultural services. The requirements which those organisations will have to fulfil are laid down in Article 77(2). According to this provision, the organisations in question redistribute or reinvest the profits they make and are run based on employee ownership or other participatory principles. The possibility to reserve contracts is limited to contracts with a maximum, non-renewable duration of 3 years.

12. Governance

The rules under Title IV regarding governance are new. They have been considerably reduced by comparison with the original Commission proposal. In particular, there is no longer to be an administrative structure, which – in parallel with the usual system of legal review in procurement matters – exercises an *ex officio* surveillance of compliance with procurement rules and acts as an ombudsperson for citizens.⁶⁹

⁶⁹ See *Commission proposals to modernise the European public procurement market - Frequently Asked Questions* (Memo/11/931 of 20 December 2011), point 4.

III. The directive on the award of concession contracts

Public authorities use concession contracts to engage private firms to supply services or to perform works. Examples include building roads, bridges, sports arenas or supplying energy or waste disposal services. The key feature of concession contracts is that the private firm must bear a substantial part of the economic risk stemming from executing the contracted works or services. The firm does not usually acquire property rights to the infrastructure object that it builds or operates, but it may receive revenue from it and even an additional annual payment from the public authority.

Concessions are important as they usually concern high-value projects. In addition, they can have lock-out effects and, consequently, harm competition due to their long duration.⁷⁰ Unless justified by overriding reasons in the public interest, non-discriminatory in nature, suitable for securing the attainment of the objective it pursues and proportionate, long-term concessions can amount to a breach of Articles 49 and 56 TFEU.⁷¹ At the same time, they have positive effects on efficiency and innovation, by helping to harness private sector expertise and encouraging the long-term development of infrastructure and strategic services. It was therefore all the more important to regulate the regime of concessions at EU level.

Directive 2014/23 on the award of concession contracts is part of the legislative package adopted. According to previously applicable law, the award of concession contracts was excluded (services concessions) or only lightly regulated (works concessions) by secondary legislation.⁷² Nonetheless, according to the case-law of the CJEU⁷³ and the EFTA Court⁷⁴, minimum requirements regarding transparency of, and non-discrimination on grounds of nationality and equal treatment during the procurement procedure were to be observed. The award

⁷⁰ See Case C-454/06 *presstext Nachrichtenagentur* [2008] ECR I-4401, par. 73; Case C-451/08 *Helmut Müller* [2010] ECR I-2673, par. 79. The CJEU has ruled with regard to the duration of concessions, that there are serious grounds, including the need to guarantee competition, for holding the grant of concessions of unlimited duration to be contrary to the EU legal order.

⁷¹ The CJEU has further held the grant of concessions for a duration of up to 15 years to be liable to impede or even prohibit the exercise of the freedoms guaranteed by Articles 49 and 56 TFEU by operators in other EU Member States, thus constituting a restriction on the exercise of those freedoms (see Case-C-323/03 *Commission v Spain* [2006] ECR I-2161, par. 44; Case C-64/08 *Engelmann* [2010] I-8219, par. 46-48).

⁷² See Title III (Articles 56-65) of Directive 2004/18.

⁷³ The CJEU has ruled that “public authorities which grant such a concession are required to comply with the fundamental rules of the TFEU, the principles of non-discrimination on grounds of nationality and equal treatment, and also the obligation of transparency thereunder” (see Case C-347/06 *ASM Brescia* [2008] ECR I-5641, par. 58-59; Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, par. 25; Case C-221/12 *Belgacom* ECLI:EU:C:2013:736, par. 28).

⁷⁴ See Case E-24/13 *Casino Admiral* [not yet reported], par. 51.

of concession contracts is henceforth regulated in a directive of its own that introduces a number of innovations:

- As regards the scope of application of the new regime on concessions, it is worth mentioning that the controversial concept of “concession” – meanwhile clearly outlined by the case-law of the CJEU⁷⁵ – has been codified in the directive⁷⁶, thus providing for more legal certainty. More concretely, the requirement developed by the case-law regarding the necessary transfer to the concessionaire of an “operating risk” in exploiting works/services encompassing demand or supply risk, or both⁷⁷, has now found a firm legal basis in secondary EU law.
- The directive also only applies to concessions with cross-border interest, having an estimated value equal to or above a specific threshold.⁷⁸ The threshold value has been set at EUR 5.186.000 (the same as for works contracts and lower than the thresholds for most service contracts under the other directives). It is worth recalling in this context, that, while according to the case-law of the CJEU, the existence of (at least potential) “cross-border interest” was essential for the applicability of the fundamental rules of the TFEU and all the general principles referred to above⁷⁹, it was not always clear in practice under which exact circumstances such an interest could be deduced. This had to be subject of a thorough assessment on the basis of various criteria developed by the CJEU, among others the estimate value and the place of performance of the contract.⁸⁰ Although it is not completely clear whether these criteria might

⁷⁵ See Case C-206/08 *Eurawasser* [2009] ECR I-8377, par. 59 and 77; Case C-451/08 *Helmut Müller* [2010] I-2673, par. 75.

⁷⁶ Article 5(1) of Directive 2014/23 contains definitions for (a) “works concession” and (b) “services concession”.

⁷⁷ See Case C-234/03 *Contse and Others* [2005] ECR I-9315, par. 22; Case C-300/07 *Hans & Christophorus Oymanns* [2009] ECR I-4779, par. 74; Case C-206/08 *Eurawasser* [2009] ECR I-8377, par. 66-67; Case C-274/09 *Commission v Germany* [2011] ECR I-1335, par. 37.

⁷⁸ See Articles 1(1) and 8(1) of Directive 2014/23.

⁷⁹ See Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, par. 33; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, par. 55; Case C-507/03 *Commission v Ireland* [2007] ECR I-9777, par. 29. The test was later softened to a requirement of “potential interest” (see Case C-91/08 *Wall* [2010] ECR I-2815, par. 34).

⁸⁰ The CJEU has ruled that the cross-border interest in a public contract must be assessed in the light, *inter alia*, of its value and the place where it is carried out (see Case C-470/13, *Generali-Providencia Biztosító*, ECLI:EU:C:2014:2469, par. 27; Case C-159/11, *ASL Lecce*, ECLI:EU:C:2012:817, par. 23; Case C-358/12, *Consorzio Stabile Libor Lavori Pubblici*, ECLI:EU:C:2014:2063, par. 24). Other criteria can be the technical characteristics of the market or the existence of complaints brought by operators situated in other EU Member States (see Case C-113/13 *Croce Verde*, ECLI:EU:C:2014:2440, par. 49).

- still be relevant under the new legal framework (or utterly redundant)⁸¹, the establishment of a clear threshold triggering the applicability of the rules on concessions must certainly be seen as a major clarification of the legal situation.
- As regards procedural requirements, the directive introduces an obligation to publish a notice advertising the concession in the *Official Journal* and to publish award notices⁸², however providing for some exceptions applicable to social and other specific areas. Similar to the current legal situation, the directive does not outline any specific procedure for the award of concessions. It rather sets out some procedural guarantees which must be fulfilled (transparency, consistency, equal treatment and use of objective awards criteria). It is worth noting that the statement in Article 30(1) of Directive 2014/23, whereby the procuring entity “*shall have the freedom to organise the procedure*” is correct in so far as there is formally no obligation to apply a certain procedure. In substance, however, the detailed obligations that apply to the award of concessions are very similar to those that apply in awarding contracts under the negotiated procedure under Directive 2014/24 (with some features of Directive 2004/25), with slightly more flexibility in a few matters. Accordingly, Directive 2014/23 contains provisions on permitted and mandatory grounds for selection and exclusion similar to those of the other directives⁸³; minimum time-limits for submitting offers⁸⁴ as under the other directives, although different in detail; similar requirements for debriefing,⁸⁵ standstill,⁸⁶ and award notices⁸⁷; and controls over communications⁸⁸ (although no general obligation to use electronic means in due course, as applies under the other directives). The limitations on

⁸¹ Recital 23 in the Preamble to Directive 2014/23 states that “[the] Directive should apply only to concession contracts whose value is equal to or greater than a certain threshold, *which should reflect the clear cross-border interest* of concessions to economic operators located in Member States other than that of the contracting authority or contracting entity.” This suggests that the threshold is meant to be indicative of a (potential) cross-border interest, ultimately rendering the criteria developed by the CJUE redundant.

⁸² Articles 31-32 of Directive 2014/23.

⁸³ Article 38 of Directive 2014/23.

⁸⁴ Article 39 of Directive 2014/23.

⁸⁵ Article 40 of Directive 2014/23.

⁸⁶ See Articles 46 and 47 amending the Remedies Directives to apply their rules to concessions, including on notification and standstill. Recitals 4 to 7 in the Preamble to Directive 2007/66 refer to the “standstill period” as a minimum period during which the conclusion of the contract in question is suspended, irrespective of whether or not conclusion occurs at the time of signature of the contract. The standstill period is meant to give tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure. The “standstill period” was incorporated into Article 2(3) of Directive 89/665 and of Directive 92/13 by Articles 1 and 2 of Directive 2007/66 in order to reflect the case-law of the CJEU (see Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, para. 79; Case C-327/00 *Santex* [2003] ECR I-1877, para. 50; Case C-327/08 *Commission v France* [2009] ECR I-102, para. 41).

⁸⁷ Article 32 of Directive 2014/23.

⁸⁸ Article 29 of Directive 2014/23.

the allowed award criteria are similar to, although not identical with, those of the other directives, with similar controls and a similar requirement for award criteria to be linked to the subject matter of the arrangement, although more flexibility on some matters is given, including an advance formulation and disclosure of the criteria and methodology for award. Against this background, the “openness” as regards the applicable award procedure must be construed as meaning that the structure of the process for awarding concessions remains at the discretion of the procuring entity. It should be borne in mind, however, that this is already the case to a very large extent for contracts that can be awarded by negotiated procedures with a notice and competition.

- In order to avoid the typical lock-out effects detrimental to competition, usually derived from an extensive use of concessions (continuous prolongation or contracts of long duration), the directive sets limits to the duration of concession contracts to the time estimated to be necessary for the economic operator to recover its investment in operating the works/services together with a return on the invested capital.⁸⁹ This requirement appears to be inspired by the case-law established in Case C-64/08, *Engelmann*.⁹⁰ Even though the directive is not meant to apply retrospectively, the extension of current concessions might fall within its scope of application.
- Furthermore, the legal protection guaranteed by the Directives on Remedies is extended to the award of concession contracts, as they are amended accordingly. As a result, in the future the legal remedies foreseen in national legislation to safeguard the rights conferred on individuals by the procurement directives will have to comply to with the detailed requirements of the Directives on Remedies (including the rules on notification and standstill) rather than merely with the principles of transparency and effectiveness in EU law, as is currently the case.⁹¹
- To conclude, the “services of general economic interest”, entrusted to an economic operator pursuant to the relevant provisions on state aid can be put out to tender in form of concessions.

The political price for the addition of the Directive on the award of concession contracts was the exclusion of concession contracts in connection with the production, transport or distribution of drinking water from its scope of application, as stated in Recital 40 in the Preamble to Directive 2014/23 and Article 12 thereof (“specific exclusions in the field of water”).

⁸⁹ See Recital 52 in the Preamble to Directive 2014/23 and Article 18(2) thereof.

⁹⁰ See Case C-64/08 *Engelmann* [2010] I-8219, par. 48, according to this case-law, in the individual assessment of whether a long-term concession is justified, due account must be taken of the concessionaire’s need to have sufficient length of time to recoup his investments.

⁹¹ See Case C-91/08 *Wall* [2010] ECR I-2815, par. 61-71.

IV. The Directive on procurement in sectors

The provisions of Directive 2014/25 (“Sector Directive”) closely follow the “Classic Directive” in content (*mutatis mutandis*) and structure. In order to avoid repetitions, it does not appear necessary to provide a detailed description.

V. Outlook

The reform of EEA rules on public procurement must be welcomed, as it addresses a number of important issues identified by both administrative and legal practice, *inter alia*, the need to close loopholes in legislation. The codification of the case-law of the CJEU was necessary due to its considerable evolution over the past decade. This includes the various legal forms of cooperation between public entities, considered essential for the fulfilment of tasks of public interest. The result of the reform is a major increase in legal certainty, to the advantage of contracting authorities that depend on procurement in their daily practice and of economic operators that wish to benefit from the internal market, free of administrative/legislative barriers. The most important amendment constitutes without any doubt the regulation of service concessions, which had been long postponed by the European legislature.⁹² Another reason for welcoming the reform is the increased flexibility in the handling of procedures, following the revision of the competitive dialogue and negotiated procedures, as well as the introduction of the new innovation partnership procedure. Currently limited in their margin of maneuver by procedures deemed too strict, contracting authorities were hoping for more room for negotiation, in order to obtain the works, goods and services they look for. The increased room for negotiation will henceforth enable them to tailor procurement more in conformity with their needs and expectations.

As regards the question whether the objectives of the “Europe 2020” strategy will be ultimately achieved, it is important recalling the experimental character of the reform. Both the increased flexibility in the application of the rules as well as the introduction of the innovation partnership procedure aim at encouraging innovation. The next months will be marked by an intensive debate in the entire EEA regarding the state of implementation of the procurement directives into national law. Only once the EU Member States and the EFTA States that are part of the EEA will have adopted the national implementing legislation, it will be possible to assess where the pitfalls are and what kind of measures might be necessary to overcome them. Given the fact that according to Article 288(3) TFEU (and Article 7(c) EEA), directives are binding as to the result to be

⁹² See an explanation of the historical reasons for the European legislature to postpone the regulation of service concessions, Case C-324/98 *Telaustria* [2000] ECR I-10745, par. 48, C-358/00 *Die Deutsche Bibliothek* [2002] ECR I-4685, par. 25.

achieved, but leave to the national authorities the choice of form and methods of implementation, and that the procurement directives do indeed still leave a considerable margin of transposition in many aspects, a great deal of legislative creativity will be needed. Competition between the national legal systems as regards the development of solutions to different issues (the so-called “regulatory competition”⁹³) might prove extremely helpful. In any case, irrespective of the implementation aspect, it is important pointing out that much of the responsibility still rests on the shoulders of developers, who will have to bring up the necessary creativity, innovation and entrepreneurial skills Europe needs in order to keep its central position in world economy.

⁹³ “Regulatory competition” can be defined as a process whereby legal rules are selected and de-selected through competition between decentralised, rule-making entities, which could be nation states, or other political units, such as regions or localities. A number of beneficial effects are expected to flow from this process. Insofar as it avoids the imposition of rules by a centralised, “monopoly” regulator, it promotes diversity and experimentation in the search of effective laws. In addition, by providing mechanisms for the preferences of the different users of laws to be expressed and for alternative solutions to common problems to be compared, it enhances the flow of information on what works in practice (see Kühn, W. M., “The principle of mutual recognition of judicial decisions in EU law in the light of the ‘Full Faith and Credit’ clause of the US Constitution, *Boletín Mexicano de Derecho Comparado*, Year XLVII, No. 140, May-August 2014, p. 460).