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Coherence in the EU Public Procurement Directives

A Study into the Internal Coherence between the Objectives, the Principles and the Provisions in the EU Public Procurement and Concessions Directives

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This Study is commissioned by the European Commission and is conducted in support of the Evaluation of the Public Procurement Directives (2014/24/EU, 2014/23/EU and 2014/25/EU).

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Abbreviations

CJEU: Court of Justice of the European Union

EU: European Union

EXPP: ‘Commission Government Experts Group on Public Procurement’

GPP: Green Public Procurement

IPPP: Institutionalised Public-Private Partnership

PPP: Public-Private Partnership

SPP: Sustainable Public Procurement

SRPP: Socially Responsible Public Procurement

TEU: Treaty of the European Union

TFEU: Treaty on the Functioning of the European Union

Executive Summary

In the framework of the evaluation of the 2014 public procurement and concessions directives, this Study examines two aspects: (a) whether the provisions of the directives are coherent and consistent with the objectives set for the 2014 reform and (b) whether the three 2014 directives are complementary or conflicting.

Preliminary to the investigation was the definition of the objectives of the directives. The Study confirmed that the directives answer the need for market integration at EU level. Along this aim, the directives answer to the objective of contributing to different facets of sustainability (SMEs, social and environmental) and may be enlisted to foster further objectives. While not strictly speaking an objective of EU public procurement and concessions law, wider efficiency of public spending acts as a limit for the EU rules. To this end, public procurement rules must provide as much flexibility as possible. This will allow the Member States to achieve better value for money by adapting the rules and purchasing practices to their different market conditions. The proportionality requirement under Article 5(4) TEU must be complied with, and in this area too "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

The Study found that at this stage there is almost no major proven attrition between the different goals in the 2014 public procurement and concessions directives. The provisions in the 2014 directives have crafted an articulated balance between the two main objectives mentioned above. There is no evidence that pursuing both those objectives is undermining efficient public purchasing. Buying choices based on price only address a market that is different from the one addressed by choices preferring quality (e.g. non-biological vs biological food). No such choice is by itself restricting competition, each choice benefits from competition, but on a different market. Moreover, concerning breaches of EU and national law, fair competition requires the exclusion from the procurement and concession markets of dishonest economic operators. From this point of view, the choice not to mandate the exclusion of economic operators found in breach of the "applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions" creates an inconsistency in the application of the 2014 directives.

The parallel Study into the External Coherence between the Public Procurement Directives and other Legislative Instruments regulating Public Procurement in the European Union (henceforth the *External Coherence Study*) further addresses the interplay between these objectives seen from sectoral legislation.

The picture of rather limited inconsistencies in the 2014 legal framework becomes much less rosy when the general principles of EU public contract law as interpreted and applied by the Court of Justice are taken into consideration. The Study found that the Court is often having recourse to a specific understanding of proportionality in order to pursue the widest competition possible without any reference to the internal market. However, this is both overburdening the contracting authorities and entities and depriving the Member States of the power to adapt the EU rules to the specific needs and characteristics of their public procurement and concessions markets. The case law is thus inconsistent with the 'constitutional' reading of the principle of proportionality enshrined in Article 5 TEU.

Moreover, excessive demands on public buyers are expected to impact adversely on litigation and ultimately to undermine efficient public purchasing. The case law thus challenges the balance between the different objectives of the 2014 directives reflected in their provisions and creates an incoherent and difficult to apply in practice legal environment.

Finally on this point, a gap was identified in EU secondary law rules in so far as the 2014 directives do not cover Institutional Public Private Partnerships. In addition, their provisions covering contract executions seem to fall short from ensuring the proper working of the Internal Market and the pursuance of strategic objectives.

Concerning the interplay between the three 2014 directives, the Study found that, compared with the general procurement directive, the specificities in the objectives pursued by the utilities and concessions directives are rather limited and basically refer to an enhanced role for flexibility in the latter directives.

Unsurprisingly, this substantial convergence is reflected in the many rules that are the same across all the three 2014 directives while few rules - e.g. on qualification systems or on more flexible procedures - indeed correspond to that specific objective of the utilities and concessions directives.

Instead, many of the differences in the rules of the three 2014 directives such as those concerning selection and exclusion criteria do not actually correspond nor are they consistent with the specific rationales of the utilities and concessions directives. Moreover, one may find no differences in the rules with reference to some institutes - e.g. contract changes - when more flexible rules should have been expected based on the partially diverging objectives in the three directives. These misalignments between the objectives and the actual rules in the 2014 directives create inconsistencies among them that come atop some reported difficulties in distinguishing their scope of application.

0. Scope, Methodology and Structure of the Study

In line with current *Better Regulation Guidelines*, in this Study 'coherence' is understood as 'consistency'.[1] More specifically, according to the ToR:

"This Study analyses the main possible inconsistencies/conflicts, if any, in the objectives and provisions of each directive and between the directives that have an impact on the coherence of the overall public procurement framework, on the basis of existing analysis and examples.

More specifically, the following elements should be at least part of the analysis:

- Assess how the objectives of each directive may conflict with each other and reduce the effectiveness of the tools provided for in the directives.

- Assess whether differences of approach among the provisions in each directive undermine the achievements of the objectives.

- Assess whether and to what extent the three directives are complementary or conflict with each other when there are different approaches.

- Identify where the inconsistencies/conflicts within and between the directives create particular challenges for public buyers and economic operators in the practice.

The impact of the possible incoherence of the directives on the ground could be illustrated by concrete examples".

The keywords are 'inconsistency' and 'conflict' and they recall the jurisprudence notion of 'antinomy', i.e. the impossibility to apply two rules to the same facts because of the 'no contradiction principle'.[2]

The focus of this Study is on Directive 2014/23/EU on the award of concession contracts, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors. They will also collectively be referred to as the 2014 directives or the public contracts directives. Because of its higher relevance for the case law, Directive 2014/24/EU on public procurement will be referred to more often. Due to the short time available, this Study does not cover possible interferences and inconsistencies with other legislative measures in the field of public contracts such as Regulation (EC) No 1370/2007 on public passenger transport services

[1] SWD(2021) 305 final.

[2] For a more detailed discussion see D. Strauss, '*Transcending logic: the difference between contradiction and antinomy*' 26(1) Suid-Afrikaanse Tydskrif vir Natuurwetenskap en Tegnologie 2007, 123.

by rail and by road.[3] As the Court of Justice held in *Rudigier*, that regulation "contains special rules intended either to take the place of or to be added to the general rules of Directive 2014/24 or Directive 2014/25, depending on whether or not the applicable directive lays down rules in the fields governed by the regulation".[4] Nor does the Study extends to Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, whose reform is announced to proceed 'in coordination' with the revision of the 2014 directives covered here.[5] Nor does the Study cover the procurement rules applicable to EU institutions, agencies or bodies, such as those in Regulation (EU, Euratom) 2018/1046 on the financial rules applicable to the general budget of the Union. The latter rules, however, often refer back to the 2014 directives, or to the general principles contained in the Treaties and in those directives, and therefore some of the relevant case law will be used in this analysis. The many recent pieces of non-public procurement EU legislation which are impacting day-to-day operations of contracting authorities and entities will instead be analysed in the parallel *External Coherence Study*. Finally, the Remedies directives too are excluded from the scope of this Study.[6]

The study is based on the European Legal Method, i.e. doctrinal legal research in a European law context, with specific focus on the legislation, guidance documents and the case law. Further information was acquired through dialogue and conversation with experts, both academics and procurement leaders and practitioners. At the request of the concerned experts, neither their names nor their nationality will be disclosed. Continued interaction with the Commission's Service has allowed for both timely inputs and monitoring of the progress of the research that included:

1. Analysis of the text of the Public Procurement Directives to highlight most relevant convergences, differences and inconsistencies;

[3] See Case C-684/23, *'Latvijas Sabiedriskais Autobuss'*, ECLI:EU:C:2025:90; Joined Case C-266/17 and C-267/17, *Verkehrsbetrieb Hüttebräucker and Rhenus Veniro*, EU:C:2019:241; Case C-253/18, *Stadt Euskirchen* v *Rhenus Veniro GmbH & Co. KG*, ECLI:EU:C:2019:386; Joined Cases C-266/17 and C-267/17, *Rhein-Sieg-Kreis*, ECLI:EU:C:2019:241.

[4] Case C-518/17, *Rudigier*, ECLI:EU:C:2018:757, paragraph 49; Joined Cases C-266/17 and C-267/17, *Rhein-Sieg-Kreis*, ECLI:EU:C:2019:241, paragraph 72 refers to the provisions in Regulation EU No 1379/2007, as a 'specific body of award rules'.

[5] Commission Communication *The Single Market: our European home market in an uncertain world. A Strategy for making the Single Market simple, seamless and strong* COM(2025) 500 final, at p. 6.

[6] But see R. Caranta & V. Fričová, 'EU procurement and concession law', in M. Scholten (ed.), *Research Handbook on the Enforcement of EU Law* (Cheltenham, Elgar, 2023) 415-430.

2. Analysis of most cases decided by the CJEU concerning provisions of the 2014 directives; Directive 2014/24/EU was predictably the most referred to, since most of the case decided concerned that directive;

3. Reviewing the literature specifically focusing on or anyway dealing with the objectives of public procurement;

4. Reviewing grey literature (incl. ECA 2022 Report) and policy reports (incl. Letta's and Draghi's);

5. Dialogue with academics and other experts to gain insights on issues around the consistency between the objectives and provisions in the 2014 directives were held. These more specifically involved:

- the EXPP ('Commission Government Experts Group on Public Procurement'), whose experts voiced the concerns of both contracting authorities and entities and market participants; the EXPP members reacted in writing to the concept of the Study; this was followed by an *ad hoc* online meeting on the 5th of May which was based on a draft of this Study and by further inputs in writing;
- the Network of first instance public procurement review bodies, whose members highlighted the issues arising in legal practice both in writing and during a meeting in Warsaw on the 13th of May in which a draft of this Study was presented and discussed;
- academics, including relevant members of the European Public Procurement Group and of the SAPIENS network, a EU funded interdisciplinary project focusing on sustainable public procurement (SPP); opinions and insights were very widely sought from experts and stakeholders on many events during this Spring, including the Academy of European Law (ERA) Annual Conference on European Public Procurement Law held in Trier on 20-21 March and the EU Public Procurement anno 2025 organised by Prof. Carina Risvig Hamer at Copenhagen University on 23-24 April.
- some of the experts who have been commissioned for the other studies.

Because of the new formation of the Commission Stakeholder Expert Group on Public Procurement (SEGPP) that was just starting its activities, it was not possible for the Commission services to organise a meaningful meeting with that Group too, but opinions were exchanged through individual conversations with some of its members.

As most of the cases in the past decade refer to Directive 2014/24/EU, the classic sectors procurement directive, that instrument will be the main focus of this Study. Directives 2014/23/EU and 2014/25/EU, the concessions and utilities procurement directives, will however be referred to also in the first part of the Study when it will be necessary to support arguments based on Directive 2014/24/EU or to highlight differences in the rules applicable under the different directives.

As already originally foreseen, given the nature of the study and the very strict constraints imposed by the timelines for the Evaluation of the directives, no quantitative method was used and interviews were either unstructured or semi-structured. Recourse was had to expert interviews (i.e. a qualitative research method to help gather in-depth insights and knowledge from individuals with specialised expertise and authority in a specific field, sector or topic) and to expert dialogue (i.e. an organised collaborative process where participants with different but relevant backgrounds are put together to create the basis for recommendations). Meaningful information based on different methodologies, including quantitative data, may however be gauged from some of the other studies preparing the evaluation of the 2014 directives.

Again because of strict time constraints, this Study did not engage in any deep comparative analysis of the implementation of - and issues raised by - the 2014 directives in the 27 Member States. The limited references to the experience of some Member States contained in this Study are based on the existing literature and on inputs from the experts with whom views were exchanged.

Concerning its structure, the Study is divided in two main parts: I. Checking the consistency between the objectives and between them and the provisions in the 2014 Directives and II. Convergences and divergences among the three 2014 Directives.

The first part looks into consistency or otherwise within each of the concerned directives while the second part looks into how the three directives interrelate with each other in terms of complementarity, overlaps or contradiction. The first part opens with an analyses of the objectives of the 2014 directives, distinguishing between the main objectives (Market integration, SMEs and Sustainability) on the one hand (§ I.2.) and on the other hand considerations that may be treated as true objectives (clarity, simplify and flexibility) and considerations that look at the overall common sense of public contracts regulation. While the latter cannot be considered *stricto sensu* ‘objectives’ of the directives, they act as important limits to the discretion of the law makers and arguably of the Court of Justice as well (§ I.3.). As the analysis of the case law made it clear that the Court of Justice refers to the general principles of public contract law more often than to the objectives

of the 2014 directives, a specific section was written to introduce those general principles (§ I.4).

The in-depth presentation of the objectives and principles of the 2014 directives opened the way to consider whether the present objectives are conflicting; the analysis was then extended to emerging objectives - better investigated in the parallel *External Coherence Study* - to show that, while there might be trade-offs in the interplay of different objectives, we do not face intractable conflicts (§ I.5.). Where conflicts and inconsistency arise is between objectives, the interpretation of the principles and the actual provisions in the 2014 directive. Focusing first on specific issues and then on some emerging general patterns, the Study shows that the case law is giving priority to some general principles (and specifically to proportionality and to a wide understanding of competition) to the detriment of the smooth working of public purchasing activities that is required under a constitutional understanding of the proportionality principle (§ I.6.).

Finally, this first part closes with the identification of possible regulatory gaps with reference to Institutional Public Private Partnerships and to contract implementation (§ I.7).

The second part of the Study looks afresh to the objectives of the three directives. Now the analysis aims at spotting any difference which might justify diverging rules (§ II.1). The Study then highlights examples of substantial convergence in the rules across the three 2014 directives, including one case when, based on the objectives, divergence would have been expected among two or three of the 2014 Directives (§§ II.2. and II.3). The example of award procedures is then used to illustrate divergences among those directives that correspond to their partially different objectives (§ II.4). Finally, two examples of overdone divergence are analysed in detail, namely the treatment of conflict of interest and the selection and exclusion regime (§§ II.5. and II.6).

The Study is achieved with conclusions and with some reflections for future reform prodded by the finding of the research.

I. Checking the Consistency between the objectives and the provisions in the 2014 Directives

I.1. Defining the objective(s) of the procurement and concessions directives

As clearly indicated in the input from some EXPP experts, the definition of the objective(s) of the 2014 procurement and concessions directives is a necessary preliminary step to this Study. As is well known, the European Union (henceforth the EU) has not a general competence, rather it has the competencies vested on it by the Treaties. Under Article 4(1) TEU, "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States". As far as is relevant here, Article 5(1) TEU specifies that "The limits of Union competences are governed by the principle of conferral […]". Under Article 5(2) TEU, the link between competencies and objectives is established: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the *objectives* set out therein […]" (*emphasis added*).

In EU law jargon, the Treaty provision giving competence to the EU are called legal bases. According to a consistent case law, the legal basis must be attuned to the objectives pursued. For instance, in *Comune di Linosa*, the Court of Justice held that, "according to the Court's settled case-law, in the context of the organisation of the powers of the European Union, the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review, such as the *aim* and the content of the measure" (*emphasis added*).[7] In turn, the actual provisions of any measure must be attuned to the objectives or aims pursued by the lawmakers.[8]

The objective (or aim) of a legislative act is fundamental in the interpretation of any EU law measure and specifically of the legal notions employed in that measure - the EU law autonomous concepts.[9] For instance, in *Remondis*, the Court of Justice repeated that "it follows from the need for a uniform application of EU law and from the principle of equality that the terms of a provision of EU

[7] Case C-348/22, *Autorità Garante della Concorrenza e del Mercato v Comune di Ginosa*, ECLI:EU:C:2023:301, paragraph 52.

[8] Case C-264/18, *P. M. and Others*, ECLI:EU:C:2019:472, paragraph 27.

[9] Pls refer to R. Caranta, *Les exigences systémiques dans le droit administratif de l'Union européenne* in C. Blumann – F. Picod (dir.), *Annuaire de Droit de l'Union Européenne 2012* (Paris, Editions Panthéon Assas, 2014), 21-38.

law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account, not only its terms, but also its context and the *objective* pursued by the relevant legislation" (*emphasis added*).[10] At times, the 'objectives' are referred to as the 'general scheme' of the relevant legal texts.[11]

A good illustration is provided by the recent *INGSTEEL* case.[12] The problem was whether loss of opportunity was a recoverable head of damages under Directive 89/665/EEC (the first remedies directive). The Court of Justice started by recalling that, "In accordance with the Court's settled case-law, in interpreting a provision of EU law, it is necessary to consider not only the wording of that provision but also the context in which it occurs and the *objectives* pursued by the rules of which it is part" (*emphasis added*).[13] According to the Court, the positive answer based on a broader interpretation of the directive was "supported by the objective pursued by that directive, of not excluding any type of harm from the scope of that directive".[14] More specifically, while the directive was not aiming to 'complete harmonisation' of the procurement remedies, "the fact remains that, as stated in the sixth recital of that directive, the directive stems from the intention of the EU legislature to ensure that, in all Member States, adequate procedures permit not only the annulment of decisions taken unlawfully but also the compensation of persons harmed by an infringement of EU law".[15]

Another good example is *Obshtina Razgrad*.[16] The question was whether a written form is required for contract modifications in order to assess whether they are lawful or not. The answer is negative based on the objective of Article 72 of

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[10] Case C-429/19, *Remondis*, ECLI:EU:C:2020:436, paragraph 24; see also Case C-465/17, *Falck Rettungsdienste*, ECLI:EU:C:2019:234, paragraph 28; Case C-260/17, *Anodiki Services*, ECLI:EU:C:2018:864, paragraph 25; Case C-216/17, *Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2018:1034, paragraph 50.

[11] E.g. Case C-395/18, *Tim*, ECLI:EU:C:2020:58, paragraph 36.

[12] Case C-547/22, *INGSTEEL*, ECLI:EU:C:2024:478; for another example Case 416/21, *Landkreis Aichach-Friedberg*, ECLI:EU:C:2022:689, paragraphs 40 f.

[13] Case C-547/22, *INGSTEEL*, ECLI:EU:C:2024:478, paragraph 32; the Court refers to Case C-329/21, *DIGI Communications*, EU:C:2023:303, paragraph 41 and the case-law cited; among the precedents see also Case C-66/22, *Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias*, EU:C:2023:1016, paragraph 66, indicating that n interpreting provisions of EU law, it is necessary to consider "not only their wording but also the context in which they occur and the *objectives pursued* by the rules of which they are part" (emphasis added) and Case C-598/19, *Confederación Nacional de Centros Especiales de Empleo (Conacee)*, ECLI:EU:C:2021:810, paragraph 20, holding that "According to settled case-law, when interpreting a provision of EU law it is necessary to consider not only its wording but also the *objectives* of the legislation of which it forms part and the origin of that legislation" (emphasis added); see also Case C-726/21, *INTER Consulting*, EU:C:2023:764, paragraph 43 and the case-law cited.

[14] Paragraph 40.

[15] Paragraph 41.

[16] Joined C-441/22 and C-443/22, *Obshtina Razgrad*, ECLI:EU:C:2023:970.

Directive 2014/24/EU, i.e. ensuring the respect of the principles of transparency and equal treatment. In turn, the respect of those principles is part and parcel of the more general objective of the rules on public procurement, that is to ensure the free movement of goods and services and the opening to fair competition in all the Member States.[17] Limiting the applicability of Article 72 to written modification will provide contracting authorities with an easy way to escape the application of the general prohibition to modify contracts and to defeat the objective it is trying to achieve.[18]

Both the legal bases and the objectives pursued by any given piece of EU legislation are indicated in the very first recitals,[19] even if the objectives of more specific provisions might be gauged from later recitals.[20] The recitals indeed spell out the reasons for which a legal act was adopted. The second phrase in Article 296 TFEU indicates that: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties." The case-law consistently holds that, "while a recital in secondary EU legislation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule".[21]

In conclusion, **the objective/s of any EU law piece of legislation is/are linked to its legal basis; it/they can normally be gauged from the recitals to that measure and is/are fundamental in the interpretation of the same measure.**

I.2. The 'main' objectives in the 2014 Directives: Market integration, SMEs and Sustainability

Based on the above discussion, the recitals are the best starting point to investigate the objectives of the 2014 procurement and concessions directives. The analysis will move from the two classic and utilities procurement directives (Directives 2014/24/EU and 2014/25/EU*)* to then investigate the concessions directive (Directive 2014/23/EU). The choice is justified by the fact that, due to

[17] Paragraph 61; the Court refers to Case C-454/06, *pressetext Nachrichtenagentur*, EU:C:2008:351, Case C-91/08, *Wall*, EU:C:2010:182, Case C-719/20, *Comune di Lerici*, EU:C:2022:372.

[18] Paragraph 62.

[19] E.g. Case C-411/23, *D. S.A.*, ECLI:EU:C:2024:498, paragraphs 26 e 41.

[20] E.g. Case C-350/23, *Vorstand für den Geschäftsbereich II der Agrarmarkt Austria*, ECLI:EU:C:2024:771, paragraph 73; Case C-513/23, *Obshtina Pleven*, ECLI:EU:C:2024:917, paragraph 36; Case C-598/19, *Confederación Nacional de Centros Especiales de Empleo (Conacee)*, ECLI:EU:C:2021:810, paragraph 36.

[21] Case C-643/16, *The Queen,* on the application of *American Express Company* v *The Lords Commissioners of Her Majesty's Treasury*, ECLI:EU:C:2018:67, paragraph 51.

the resistance of a number of Member States, service concessions were not regulated by EU secondary law before the 2014 reform. Indeed, as Piotr Bogdanowicz remarked, "The road to the Concessions Directive was long and winding".[22] Opening a new area to EU legislation resulted in some specificities already in the objectives (§ I.2.2.).

I.2.1 Directives 2014/24/EU and 2014/25/EU

The two procurement directives, 'classic' or 'general' and 'utilities', are (so far) the last in a series pushing its roots deep in the past century. As such they clearly show their anchoring in the internal market legislation. However, additional non-market objectives have made their appearance in the recitals.

The Treaty on the Functioning of the European Union (TFEU), and in particular Article 53(1), Article 62 and Article 114 thereof, are mentioned right at the beginning of the preamble of Directive 2014/24/EU.[23] Recital 1 of Directive 2014/24/EU characterises the directive as a harmonisation instrument to achieve market integration:

> The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles *are given practical effect and public procurement is opened up to competition* (*emphasis added*).[24]

Therefore, the public contracts directives are rooted in what the case law considers to be the "fundamental rules of the TFEU, in particular those relating to the free movement of goods, the freedom of establishment and the freedom to provide services".[25] In *P.M. and Others*, the Court of Justice moved its reasoning from Recital 1 of Directive 2014/24/EU, which indicates that the award of public contracts must comply with the principles of the TFEU, including the provisions

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[22] P. Bogdanowicz 'Regulation of PPP and Concessions in European Union law - different but equal?', in P. Bogdanowicz, R. Caranta & P. Telles (eds), *Public-Private Partnerships and Concessions in the EU. An Unfinished Legislative Framework* (Cheltenham, Elgar, 2020), at p. 4.

[23] The Commission proposal already indicated that it was "based on Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union (TFEU)": COM/2011/0896 final.

[24] See I. Hasquenoth, *Contrats publics et concurrence* (Paris, Dalloz, Nouvelle Bibliothèque de Thèses, vol. 206, 2021) n° 274.

[25] Case C-598/19, *Confederación Nacional de Centros Especiales de Empleo (Conacee)*, ECLI:EU:C:2021:810, paragraph 33; see also B.J. Drijber & H.M. Stergiou, 'Public procurement law and internal market law, 46 *CML Rev.* 2009, 805–846.

concerning the freedom of establishment and the freedom to provide services.[26] The Court then referred to its settled case-law according to which

> the purpose of coordinating, at European Union level, the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State.[27]

As the Court of Justice recently repeated when deciding a case in which Directive 2004/18/EC was still applicable, "the main objective of the rules of EU law in the field of public contracts" is "the free movement of goods and services and the opening up of public contracts to competition in all the Member States".[28]

Like the previous directives, Directive 2014/24/EU is to make sure that the internal market freedoms are indeed given effects and national procurement markets are open to competition from economic operators from other Member States. Stéphane de la Rosa clearly indicates that "*Le droit de marchés publics est un branche sectorielle du marché intérieur qui fait l'objet d'une harmonisation* [...]".[29] Here competition is not a value in itself, but it is to serve market integration. Stéphane de la Rosa has also argued that public procurement rules, while based on internal market rules, are "*une matérialisation sectorielle*" of competition law, itself an application of XX century German ordo-liberal philosophy.[30] While it may indeed be true that EU internal market law developed in a framework of ordo-liberal theories, today Article 3(3) TEU characterises the EU as a "highly competitive social market economy". As it has been rightly remarked, "The European social market economy inherently and simultaneously pursues economic and social objectives".[31] Competition cannot be considered the only or even the main 'compass' for the EU and the internal market.[32]

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[26] Case C-264/18, *P. M. and Others*, ECLI:EU:C:2019:472, paragraph 23.

[27] Case C-264/18, *P. M. and Others*, ECLI:EU:C:2019:472, paragraph 24; the Court refers to Case C-507/03, *Commission* v *Ireland*, EU:C:2007:676, paragraph 27 and to the case-law therein cited.

[28] Case C-578/23, *Česká republika – Generální finanční ředitelství*, paragraph 29; the Court refers to Case C-553/15, *Undis Servizi*, EU:C:2016:935, paragraph 28, and to Case C-3/19, *Asmel*, EU:C:2020:423, paragraph 58.

[29] De la Rosa, S., *Droit européen de la commande publique*, 3me, Bruylant, Bruxelles, 2025, p. 174.

[30] See however De la Rosa, S., *Droit européen de la commande publique*, 3me, Bruylant, Bruxelles, 2025, p. 18, underlines 'competition' as the end objective of public contract rules - and of internal market rules more generally.

[31] A. Gerbrandy, W. Janssen & L. Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How 'Social' is Public Economic Law' *Utrecht Law Review* 2019(2) 32-46.

[32] See also M. Draghi, *The future of European competitiveness. Part A | A competitiveness strategy for Europe*, available at https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en (henceforth M. Draghi *Part. A.*), at pp. 18 ff, discussing the need to preserve the European social model.

The internal market rooting of the procurement directives was already clear in Recital 2 of Directive 2004/18/EC, indicating that "it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition".[33] The 'principles' referred to in this part of the recital included the market freedoms which are today mentioned again in Recital 1 to Directive 2014/24/EU.[34] In the case law, the internal market rooting of the procurement directives is at times couched as the objective to open up the "public procurement to undistorted competition in all the Member States".[35]

The main aim of achieving market integrations sets EU public contract law *au par* with instruments such as the WTO-GPA. EU law is framing national law which is allowed to pursue further objectives, such as for instance budget probity, in so far as the relevant national provisions are not inconsistent with EU law objectives and provisions (see also below §§ I.3. ff.).

The 'internal market' objective of the 2014 directives is confirmed in Recital 136 of Directive 2014/24/EU:

> Since the objective of this Directive, namely the coordination of laws, regulations and administrative provisions of the Member States applying to certain public procurement procedures, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.[36]

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[33] See the analysis also covering older directives performed by S. Arrowsmith, 'The purposes of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies' 14 *Cambridge Yearbook of European Legal Studies* 2012, 1-47; for a different reading see A. Sánchez Graells, *Public Procurement and the EU competition rules* 2nd ed. (Oxford, OUP, 2015) already at p. xv f.; for further discussion see §§ I.3.2. ff.

[34] The internal market rooting was even clearer in Directive 93/37/EEC, the third works procurement directive. Its first recital recalled the EEC Treaty legal bases on the freedom to provide service and of establishment and Article 100a, the provision allowing the adoption of harmonisation measures. The sixth recital linked expressly harmonisation and market freedom by indicating that, "Whereas the simultaneous attainment of freedom of establishment and freedom to provide services in respect of public works contracts awarded in Member States on behalf of the State, or regional or local authorities or other bodies governed by public law entails not only the abolition of restrictions but also the coordination of national procedures for the award of public works contract".

[35] E.g. Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, ECLI:EU:C:2021:700, paragraph 115.

[36] The subsidiarity consideration was already spelt out in the Proposal (COM/2011/0896 final).

The procurement directives may therefore be considered as 'concretised' internal market rules. This is confirmed by the case law of the Court of Justice refraining to address TFEU internal market rules when a question may be solved based on the directives.[37] In *Caruter* the Court remarked that (a) Directive 2014/24 is applicable, (b) the provisions of that directive must "be interpreted in accordance with the principles of freedom of establishment and freedom to provide services as well as with the principles deriving therefrom". Therefore, it held it not to be necessary to examine separately the question referred in the light of Articles 49 and 56 TFEU. Moreover, since the preliminary ruling request did not raise any new point of law with regard to the principles of freedom of establishment and freedom to provide services, the Court held it sufficient to refer to Directive 2014/24/EU.[38]

The Internal Market objective is specified with reference to SMEs, whose protection may however to some extent be considered as an objective on its own and part and parcel of strategic/sustainable procurement. The first phrase in Recital 78 of Directive 2014/24/EU indicates that "Public procurement should be adapted to the needs of SMEs". A number of provisions have been introduced in the 2014 directives to facilitate SMEs' access to procurement opportunities, including subdivision into lots, proportional selection criteria and the possibility for the Member States to provide for direct payment to subcontractors who are often SMEs.[39] However, the 2021 Commission *Final Report* on SMEs highlighted that SME participation in public procurement is still limited compared to their role in the general economy. Among the barriers posing difficulties to SMEs participating and winning tenders, the *Report* lists low trust in procurement processes and public procurers, including due to late payments, and high administrative burden. Concerning specifically cross-border procurements, SMEs do not just complain about linguistic barriers but also about tender documentation differences and non-user-friendly digital platforms both at EU (TED) and at national level. In general, public procurers and other institutions

[37] The Treaty provisions and principles are instead the only reference when the public contracts directives are inapplicable: Case C-699/17, *Allianz Vorsorgekasse*, ECLI:EU:C:2019:290, esp. paragraphs 48; the case concerned a below the threshold contract; the same applies when it is uncertain whether the directives are applicable as the application of the TFEU would be the default option: see Case C-517/20, *OL*, ECLI:EU:C:2023:219; as underlined by G. Gattinara, 'La jurisprudence de la Cour de justice en matière des marchés publics et des concessions (2 septembre 2022 – 1er septembre 2023)' *Rev. droit UE* 4/2024, 18 f, the approach was stricter in earlier cases.

[38] Case C-642/20, *Caruter*, ECLI:EU:C:2022:308, paragraph 35; the Court refers to Case C-199/15, *Ciclat*, EU:C:2016:853, paragraph 25); see also Case C-3/19, *Asmel*, ECLI:EU:C:2020:423, paragraphs 44 to 48. In Joined Cases C-728/22 to C-730/22, *Associazione Nazionale Italiana Bingo – Anib et al*, ECLI:EU:C:2025:200, paragraph 65, the Court held that "A national measure in a sphere which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure concerned and not those of primary law, such as Articles 49 and 56 TFEU"; the Court referred to Joined Cases C-721/19 and C-722/19, *Sisal and Others*, EU:C:2021:672, paragraph 32.

[39] See the analysis by M. Trybus & M. Andhov, 'Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?', 12(3) *European Procurement & Public Private Partnership Law Review* 2017, pp. 224-238

should be more proactive in helping SMEs involvement in and training for public procurement.[40] The interests of SMEs also feature prominently in the *Report on Public Procurement* recently approved by the European Parliament at the initiative of the IMCO Committee.[41]

In *Vitali*, the Court of Justice recalled that the Internal Market objective justifies the possibility both to rely on other entities under Article 63(1) of Directive 2014/24/EU and to have recourse to subcontractors under Article 71 of the same directive.[42] Concerning the latter, the Court held that the use of subcontractors "is likely to facilitate access of small and medium-sized undertakings to public contracts".[43] In *Casertana Costruzioni*, the Court again linked the two aspects holding that allowing recourse to relied upon entities is "consistent with the objective pursued by the directives in this area of attaining the widest possible opening up of public contracts to competition to the benefit not only of economic operators but also of contracting authorities. In addition, that interpretation also facilitates the involvement of small and medium-sized undertakings in the procurement market, an aim also pursued by Directive 2004/18, as stated in recital 32 thereof".[44]

Those considerations link the provisions in the directive aimed at facilitating SMEs' involvement in procurement procedures to the **second main objective of the 2014 directives** which goes beyond internal market considerations and focuses on the **strategic use of procurement budgets.**

> Recital 2 of Directive 2014/24/EU opens by claiming that
>
> Public procurement plays a key role in the Europe 2020 strategy [...], a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules [...] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to

[40] European Commission: Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, t33, Celotti, P., Alessandrini, M., Valenza, A. et al., *SME needs analysis in public procurement – Final report*, Publications Office, 2021.

[41] A10-0147/2025 esp. paragraphs 6, 16 and 19.

[42] Case C-63/18, *Vitali*, ECLI:EU:C:2019:787, paragraphs 24 f.

[43] Paragraph 27; the Court refers to Case C-298/15, *Borta*, EU:C:2017:266, paragraph 48; see also J. Stalzer, 'Comment to Article 71' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) at 759.

[44] Case C-223/16, *Casertana Costruzioni*, ECLI:EU:C:2017:685, paragraph 31; Case C-94/12, *Swm Costruzioni 2 and MannocchiLuigino*, EU:C:2013:646, paragraph 34, is referred to.

make better use of public procurement in support of common societal goals.

Moreover, Recital 91 indicates that "Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts".

Environmental and social considerations were simply allowed under the 2004 Directives, they did not represent one of their objectives. Recital 1 to Directive 2004/18/EC stated that "This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2". This was hardly a full heartedly endorsement for strategic or even for Sustainable Public Procurement (henceforth SPP).

The Commission proposal for what was to become Directive 2014/24/EU already indicated among its two objectives that of allowing procurers "to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services".[45]

Moreover, under Article 18(2) of Directive 2014/24/EU, "Member States shall 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 Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X".

According to the prevailing scholarly opinion, Article 18(2) stops short of creating a sustainability principle as it is worded as introducing a 'traditional' obligation of result addressed to the Member States rather than to contracting authorities.[46]

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[45] COM/2011/0896 final; concerning specifically the aspects related to climate change see M. Andhov & F. Muscaritoli, 'Climate Change and Public Procurement: Are We Shifting the Legal Discourse?' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law: Reflections on a Paradigm Shift* (Oxford, Hart, 2023) 35-37.

[46] W. Janssen, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology' in W. Janssen & R. Caranta (eds),

However, Recital 37 clarifies that "With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States *and contracting authorities* take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law [...]" (*emphasis added*). It is also true that Article 18(2) only refers to contract performance and not to the award, but the latter is involved by the cross references in Articles 56(1) and 57(4)(a), both referring directly to contracting authorities, even if not in terms of obligations.

The *Special Report* by the European Court of Auditors indicated that "the promotion of strategic procurements has had a limited impact at best".[47] Given the limitation of the dataset used by the Court, this conclusion is not very strong as it relied upon just one proxy indicator, i.e. the use of the lowest bid (*rectius*, the lowest price).[48] As is well known in the literature, contracting authorities and entities may take into account sustainability as selection criteria, technical specification, award criteria and contract performance conditions.[49] Using award criteria is also more complex-for public buyers and riskier for public servants in those Member States where auditors focus narrowly on costs and short-term budget savings and fail to assess quality.[50]

It is however true, as avowed by the 2020 Commission *Circular Economy Action Plan*, that instruments such as the EU GPP criteria 'have reduced impact due to the limitations of voluntary approaches.'[51] In the literature, Pouikli has highlighted the existing "misbalance between the discretion assigned to contracting authorities within the existing voluntary GPP regime and the role of the public procurement as a mechanism to increase compliance of MS with environmental

Mandatory Sustainability Requirements in EU Public Procurement Law. Reflections on a Paradigm Shift (Oxford, Hart, 2023); M. Andhov, 'Comment to Article 18(2)' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) at 200.

[47] European Court of Auditors, *Special Report 28/2023. Public Procurement in the EU* (Luxembourg, Publication Office of the EU, 2023), at p. 32.

[48] This is rightly lamented by the European Court of Auditors itself *Special Report 28/2023. Public Procurement in the EU* at pp. 33 ff. The same lamentation was already in the European Commission Communication *Making Public Procurement work in and for Europe*, COM/2017/0572 final, at p. 8. Concerning specifically data on SPP see N-A. Sava, 'The eForms Regulation and Sustainable Public Procurement Data Collection' 18(3) EPPPL 2023, 177-184.

[49] See the contributions collected by B. Sjåfjell & A. Wiesbrock (eds), *Sustainable Public Procurement Under EU Law* (Cambridge, Cambridge University Press, 2016).

[50] This is the case for instance in Portugal: P. Santos Azevedo, M. Assis Raimundo & A. Gouveia Martins, ' Public Contracts and Sustainable Development in Portugal' in F. Lichère (dir.), *Green Public Procurement: Lessons from the fields. Canada, France, Italy, Portugal, Netherlands and Switzerland* (Presses de l'Université Laval 2025) 269.

[51] A New Circular Economy Action Plan, COM(2020) 98 para 2.1; see also the Report from the Commission on *Implementation and best practices of national procurement policies in the Internal Market* COM/2021/245 final, at p. 8.

objectives".[52] Similar conclusions concerning social aspects were reached in the 2023 report on *The social impact of public procurement*.[53]

This has led in the past legislature to a high number of SPP rules in sectoral legislation which is the focus of the parallel *External Coherence Study*.

It is also true that sustainability has not generated much litigation. It is however worth recalling already at this stage that in *Tim* the Court of Justice indicated that sustainability aspects represent "a cardinal value with which the Member States must ensure compliance pursuant to the wording of Article 18(2) of that directive" (see also below §§ I.4.1. & I.6.1.f.).[54]

Arguably, when one considers the characterisation of the EU as a 'social market economy', sustainability must be a component of all policies and rules, public contracts included. This conclusion is reinforced with reference to the different facets of sustainability that find their constitutional basis in Articles 7 to 11 of the TFEU.[55]

Recital 2 also refers to the 'most efficient use of public funds'. This reference will be discussed below (§§ I.3.2.).

The recitals in Directive 2014/25/EU tell a more specific story, but the main objectives they identify are still market integration and allowing contracting authorities and entities to pursue wider 'societal goals'.

Recital 1 highlights the specificity of the utilities markets, i.e. the fact that national authorities continue to be able to influence the behaviour of the entities operating on those markets, including through "participation in their capital and representation in the entities' administrative, managerial or supervisory bodies", and this even more so given "the closed nature of the markets in which the entities in those sectors operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned". EU public procurement rules continue therefore to be necessary in these sectors. According to Recital 2, the directive was adopeted "In order to ensure the opening up to competition" of the relevant procurement contracts and "to ensure the effect of the principles of the Treaty on the Functioning of the European Union (TFEU) and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal

[52] K. Pouikli, 'Towards Mandatory Green Public Procurement (GPP) Requirements under the EU Green Deal: Reconsidering the Role of Public Procurement as an Environmental Policy Tool' (2021) 21 *ERA Forum* 699, 701.

[53] V. Caimi & S. Sansonetti, *The social impact of public procurement. Can the EU do more?* publication for the Committee on Employment and Social affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2023, at p. 154.

[55] Pls refer to R. Caranta, 'The changes to the public contract directives and the story they tell about how EU law works' 52 *CML Rev*. 2015, 391, at 396 ff.

treatment, non-discrimination, mutual recognition, proportionality and transparency". Basically, EU rules harmonising procurement procedures are needed to ensure the integration of the Internal Market. However, in view of "the nature of the sectors affected", the coordination of procurement procedures at EU level should, while safeguarding the application of the internal market principles, "establish a framework for sound commercial practice and should allow maximum flexibility" (below §§ I.3.1. & I.3.2.).

Concerning the use of public procurement to achieve societal goals, Recitals 4 and 96 and Article 36(2) of Directive 2014/25/EU are materially identical to Recitals 2 and 91 and to Article 18(2) of Directive 2014/24/EU.

Like Recital 136 of Directive 2014/24/EU, Recital 140 to Directive 2014/25/EU replicates the subsidiarity and proportionality assessments.

The main objectives of Directives 2014/24/EU and 2014/25/EU are market integration and to allow contracting authorities and entities to pursue wider 'societal goals' such as the involvement of SMEs in public procurement procedures and the inclusion of other social and environmental considerations in those procedures. Directive 2014/25/EU adds an emphasis on flexibility.

I.2.2 The concessions Directive 2014/23/EU

Service concessions were regulated for the first time under Directive 2014/23/EU along with works concessions. This explains some of the specificities in the relevant recitals. Recital 1 indicates that

> The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. As a result, economic operators, in particular small and medium-sized enterprises (SMEs), are being deprived of their rights within the internal market and miss out on important business opportunities, while public authorities may not find the best use of public money so that Union citizens benefit from quality services at best prices. An adequate, balanced and flexible legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen. Such a legal framework would also afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade. Particular importance should be given to improving the access opportunities of SMEs throughout the Union concession markets.

The traditional internal market logic of fighting discrimination could hardly be clearer, even if some wider benefits, from effective public spending to services quality to global trade are also touted. This approach is confirmed in Recital 4. It first recalls that, while public works concessions were regulated under Directive 2004/18/EC, the award of service concessions had simply to comply with the internal market principles. However, concerning the latter,

> There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of various Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects of the award of concession contracts. A uniform application of the principles of the TFEU across all Member States and the elimination of discrepancies in the understanding of those principles is necessary at Union level in order to eliminate persisting distortions of the internal market.

The first phrase of Recital 8 to Directive 2014/23/EU doubles down on the internal market rationale, indicating that “For concessions equal to or above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty” (see also Recital 68 and the discussion below § II.1.).

The achievement of ‘sustainable public policy objectives’ has instead a rather limited emphasis in the last phrase of Recital 4. Given the relevance of concession contracts, including most PPPs, this lukewarm approach would call for an explanation.

The last phrase of Recital 4 refers again to the efficiency of public spending, to the facilitation of equal access and fair participation of SMEs and to SPP. The latter is also shortly referred to in Recital 3 with the usual reference to the ‘Europe 2020 strategy’. However, Recital 3 fast reverts to the ‘most efficient use of public funds’, claiming that “concession contracts represent important instruments in the long-term structural development of infrastructure and strategic services, contributing to the progress of competition within the internal market, making it possible to benefit from private sector expertise and helping to achieve efficiency and innovation”. The recital moves here very far from referring to an objective that may be relevant in the interpretation of EU law provisions. It is rather a list of (vague) politically desirable results.

As Directive 2014/23/EU was widening the scope of application of EU secondary legislation, the emphasis on subsidiarity and proportionality is apparent already in Recital 8 before being spelt out with the usual formula in Recital 87. This emphasis translates itself in accrued flexibility. In *SHARENGO*, the Court of Justice refers to “the objective of flexibility and adaptability underlying that

directive, which is recalled in recitals 1 and 8 thereof" (see further below § I.3.1.).[56]

In line with the procurement directives, Directive 2014/23/EU aims at fostering the internal market in the area of concessions. Emphasis on sustainability is rather limited. Enhanced flexibility (and 'adaptability') are instead a specific characteristic of this directive.

I.3. Further objectives?

Enhancing the market freedoms and using the power of public contracts to achieve strategic objectives are the main objectives mentioned in the 2014 directives. **Further objectives are however mentioned in the recitals, often but not always with reference to specific aspects of the procurement process.** In principle, these further objectives should be subordinated to the directives' general - or lead - objectives.

I.3.1 Clear, simple and flexible rules

Besides public contract specific objectives, the 2014 Directives share with EU legislation at large some 'technical' objectives, namely to clarify, to simplify and - but this may also be considered as a political objective - to make the legislation more flexible. Simplification and clarification are 'technical' objectives - as opposed to 'political' - as they are both called for by better legislation/regulation models and required under the subsidiarity and proportionality principle. This is not contradicted by the sure fact that politicians - and philosophers long before them - like to call for simplification. The Letta *Report* "identifies the challenge of simplifying the regulatory framework as a principal hurdle for the future Single Market".[57]

While no one is for complication and against simplification, it is worth indicating upfront that 'clarity' and 'simplicity' may coincide only insofar as what is regulated is simple. It takes a major leap of faith to believe that procurements, concessions and PPPs are always - or even most of the time - simple or that complexity may

[56] Case C-486/21 *SHARENGO*, ECLI:EU:C:2022:868, paragraph 88.

[57] E. Letta, *Much More than a Market* (2024), at p. 10; see now the Commission Communication *The Single Market: our European home market in an uncertain world. A Strategy for making the Single Market simple, seamless and strong* COM(2025) 500 final, at p. 5, "Future legislative initiatives, both new and revisions of existing EU legislation, will strive to provide simpler rules. One example are the EU public procurement rules that are designed to promote transparency and cross-border sourcing of works, products and services. However, the complexity and fragmentation of some of these rules discourage public buyers from using the full toolbox and businesses from participating in tenders cross-border, and do not allow to capitalize on the strategic investment opportunity of public contracts.".

be regulated by simple rules. As some members of the Network of first instance public procurement review bodies have stressed, it is questionable whether simplification of the rules will lead to more or rather to less certainty. **Clarity is indeed what should be achieved, as legal certainty is a foundation of the rule of law.**

Starting with '**clarity**', the last phrase in Recital 2 of Directive 2014/24/EU refers to the "need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union". The last phrase in Recital 4 of Directive 2014/25/EU is literally the same. As already recalled, the need to introduce 'clear rules' about the award of concessions contracts is spelt out in Recital 1 to Directive 2014/23/EU to explain the reason for extending the scope of EU rules to public contracts - service concessions - which until then fell outside secondary law.[58] Recital 2 of Directive 2014/23/EU expressly indicates that "The rules of the legislative framework applicable to the award of concessions should be clear [...]".[59] 'Clarification' indeed constituted the same *raison d'être* of Directive 2014/23/EU. In *SHARENGO*, the Court of Justice acknowledged that "the referring court seeks clarification as to the distinction between the concepts of concession and public contract, since their respective scopes are likely to overlap. Moreover, that is one of the objectives pursued by Directive 2014/23, recital 18 of which states that it seeks to clarify the definition of concession".[60]

It would, however, be wrong to conclude that new iterations of the public contracts directives simply clarify the existing law. At times the directives are changed to introduce new objectives, such as those pertaining to SPP, to adapt the rules to technological development, or simply because amending some rules is perceived in the interest of achieving better procurement. As an instance of the latter, one may refer to reliance on other entities. Concerning the possibility for tenderers to rely upon other entities, in *Casertana Costruzioni* the Court of Justice held that, "Far from preserving the continuity of Article 48(3) of Directive 2004/18 and clarifying its scope, Article 63(1) of Directive 2014/24 introduces new conditions which were not provided for under the previous legislation".[61]

The objective of making the rules clearer is at times reiterated with reference to specific aspects of the law. For instance, this is the case with the need for clarifying the exception about public-public cooperation spelt out in Recital 31 of

[58] Case C-324/98, *Telaustria*, ECLI:EU:C:2000:669, paragraphs 48 ff.

[59] The Commission Report *on the functioning of Directive 2014/23/EU on the award of concession contracts and on the impact on the internal market of the exclusions set out in Article 12* COM(2023) 460 final at p. 5 goes as far as indicating 'providing certainty' as the first goal of Directive 2014/23/EU.

[60] Case C-486/21 *SHARENGO*, ECLI:EU:C:2022:868, paragraph 52

[61] Case C-223/16, *Casertana Costruzioni*, ECLI:EU:C:2017:685, paragraph 27; see also Case C-324/14, *Partner Apelski Dariusz*, ECLI:EU:C:2016:214, paragraph 91.

Directive 2014/24/EU.[62] In *Avania Sverige* the Court of Justice relied on the objective spelt out in Recitals 107 and 110 of Directive 2014/24/EU to hold that Article 72 thereof "seeks to clarify the conditions under which changes to a contract during their performance require a new contract award procedure, while taking into account the relevant case-law of the Court and the principles of transparency and equal treatment".

Unsurprisingly, some very relevant concepts in public contracts law are not yet fully clear to national courts. This is not very different from what happens in the application of domestic law, as new legal arrangements emerge - not least because some parties try evading the strictures of the law - whose legal classification needs clarification. EU law being applicable to 27 Member States with different legal traditions and speaking 23 official languages, what is a normal occurrence at national level is even more pronounced here.

For instance, such a central notion as the one of public contract is not yet fully clear[63] and it is still often enough the matter for preliminary references,[64] but this is also due to the emergence of new types of 'multi-stage' operations.[65] Moreover, in both *SHARENGO* and *Roma Multiservizi*, the Court of Justice was called (again) to clarify the notion of 'concession' but also that of 'mixed contract'.[66] Experts and members of review boards from different Member States have reported persistent difficulties in the application of the distinction between service procurement and concessions. The notion of concessions was also debated in *CNAE*, where the distinction from authorisation schemes was also relevant.[67] More generally, the notion of concession is not yet clear enough in itself and in its distinction from authorisations and licences and PPP, the latter being often regulated at national level with little reference to EU law.[68]

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[62] Case C-796/18, *Informatikgesellschaft für Software-Entwicklung*, ECLI:EU:C:2020:395, esp. paragraph 66.

[63] See the contributions by L. Folliot Lalliot, P. Huisman & S. de la Rosa in '*Evaluation of the 2014 public procurement directives. Answer to the call of evidence Ref. Ares(2024)8928678*' by the Public Contracts in Legal Globalization Network / Réseau Contrats publics dans la Globalisation juridique, at pp. 5 ff.

[64] E.g. Case C-436/20, *ASADE*, ECLI:EU:C:2022:559; Case C-367/19, *Tax-Fin-Lex*, ECLI:EU:C:2020:685.

[65] Case C-796/18, *Informatikgesellschaft für Software-Entwicklung*, ECLI:EU:C:2020:395, paragraph 38.

[66] Case C-486/21 *SHARENGO*, ECLI:EU:C:2022:868, paragraphs 58 ff; Case C-332/20, *Roma Multiservizi*, ECLI:EU:C:2022:610, paragraphs 53 ff.

[67] Case C-292/21, *CNAE*, ECLI:EU:C:2023:32; see also Case C-517/20, *OL*, ECLI:EU:C:2023:219.

[68] See P. Bogdanowicz 'Regulation of PPP and Concessions in European Union law - different but equal?', in P. Bogdanowicz, R. Caranta & P. Telles (eds), *Public-Private Partnerships and Concessions in the EU. An Unfinished Legislative Framework* (Cheltenham, Elgar, 2020), at pp. 1-16, and the contributions collected in the book.

It is not only concepts being at times unclear. The interrelation of concepts as regulated by the general principles too may give rise to uncertainties. The way the general principles are read may also lead to inconsistencies (for examples see below § I.6.1.).

As it is normally the case in domestic legal systems, concepts and their place in the overall EU public contract law - including in relation to the general principles - often get clarified with time. A good example is the concept of in house providing, which was at the center of many uncertainties at the start of the century, but is now rather rarely referred to the Court of Justice.[69] A few cases focus instead on the relatively new notion of public-public cooperation.[70] According to members of the Network of first instance public procurement review bodies, this notion indeed still requires clarification. The concept of 'body governed by public law' too is now rarely litigated about, which is quite a feat considering how innovative this EU law concept is compared to the legal traditions of many Member States. However, given that the concept heavily relies on factual requirements, it is only too natural that some national courts might still have doubts as to its application in specific sitautions.[71] The same is the case with reference to the complex delimitation of activities covered under Directive 2014/25/EU.[72]

New concepts and institutes too naturally create legal uncertainty requiring frequent clarifications from the case law. This is the case for instance with self-cleaning that was introduced in the 2014 directives and did not correspond to any provision in the previous directive.[73] In some Member States doubts surround the application of the concept of "member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein" in the last phrase of Article 57(1) of Directive 2014/24/EU. Also, the 2014 directives failed to explicitly address the place of PPPs in EU public contracts law[74] and omitted reference to IPPPs (below § I.7.1.).

However, clarity is of little avail when contracting authorities - often with the complicity of economic operators - are determined to create complex legal schemes in order to try and evade the application of EU law public procurement

[69] See Joined Cases C-383/21 and C-384/21, *Sambre & Biesme*, ECLI:EU:C:2022:1022; C-Case C-429/19, *Remondis*, ECLI:EU:C:2020:436; Case C-285/18, *Kauno miesto savivaldybė (Irgita)*, ECLI:EU:C:2019:829.

[70] E.g. Case C-796/18, *Informatikgesellschaft für Software-Entwicklung*, ECLI:EU:C:2020:395.

[71] Joined Cases C-155/19 and C-156/19, *Federazione Italiana Giuoco Calcio (FIGC)*, ECLI:EU:C:2021:88.

[72] See Case C-521/18, *Pegaso Srl Servizi Fiduciari,* ECLI:EU:C:2020:867.

[73] Case C-387/19, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, ECLI:EU:C:2021:13, paragraph 21; among the cases see Case C-472/19, *Vert Marine*, ECLI:EU:C:2020:468.

[74] See P. Bogdanowicz 'Regulation of PPP and Concessions in European Union law - different but equal?' and R. Caranta & P. Patrito 'An intellectual history of concessions and PPP law', in P. Bogdanowicz, R. Caranta & P. Telles (eds), *Public-Private Partnerships and Concessions in the EU. An Unfinished Legislative Framework* (Cheltenham, Elgar, 2020), at pp. 1 and 17 respectively.

law. It is submitted that the notion of 'public works contract' as today defined in Article 2014/24/EU and elaborated upon by the case law of the Court of Justice is reasonably straightforward. This, however, does not stop contracting authorities and their legal counsels to come up with ingenious contractual arrangements to try and bypass EU public procurement and concession law.[75] Moreover, clear rules have no power against those who do not want to listen. This is the case with national lawmakers trying to limit access to public procurement based on the legal form of the economic operator otherwise allowed to operate on the domestic market.[76]

Concerning '**simplification**', in *Taxi Horn Hours* the Court of Justice was reminded that Recital 1 of Commission Implementing Regulation (EU) 2016/7 establishing the standard form for the European Single Procurement Document indicated that "One of the major objectives of Directives [2014/24] and [2014/25] is [to reduce] the administrative burdens of contracting authorities, contracting entities and economic operators, not least small and medium-sized enterprises".[77] However, the Court ruled out that simplification might warrant a less strict approach on which economic operators part of a general partnership were to submit the ESPD. According to the Court, the "objective of reducing the administrative burden is, however, only one of the objectives of those directives. In that respect, it must in particular be reconciled with the *objective* of promoting the development of healthy and effective competition between economic operators taking part in a public procurement procedure, which lies at the very heart of the EU rules on public procurement procedures and is protected in particular by the principle of equal treatment of tenderers" (*emphasis added*).[78] Here the clash of 'objectives' sees the prevalence of the 'objective' of promoting the development of healthy and effective competition, whose qualification as an 'objective' of EU public contract law may well be revoked into doubt (for discussion see below § I.3.4.).

Simplification - or rather simplicity - is of specific relevance in certain areas of public contracts, such as social services. Recital 114 of Directive 2014/24/EU indicates that "When determining the procedures to be used for the award of contracts for services to the person, Member States should [...] also pursue the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operators".[79]

It is only too fair to say that EU law could hardly be held as the sole responsible for complexity in public procurement law. Today, less and less Member States

[75] Case C-28/23, *NFŠ*, ECLI:EU:C:2024:893 might be one of such cases, the last in a long list.

[76] E.g. Case C-219/19, *Parsec Fondazione Parco delle Scienze e della Cultura*, ECLI:EU:C:2020:470.

[77] Case C-631/21, *Taxi Horn Tours*, ECLI:EU:C:2022:869, paragraph 56.

[78] Paragraph 57.

[79] Case C-436/20, *ASADE*, ECLI:EU:C:2022:559; see also paragraph 121 of AG Medina's opinion ECLI:EU:C:2022:77.

follow a very basic cut & paste approach to the implementation of the directives. **Most of the Member States adopt - and in some cases then frequently amend - very detailed rules when transposing the EU public contracts directives. This practice - also known as gold-plating - very much contributes to the complexity of procurement and concessions rules, and also to their divergence among the Member States.**

'**Flexibility**' is linked to simplification but follows a different logic. Rather than reducing the number or complexity of the applicable rules, it allows the Member States and/or contracting authorities or entities to choose which rules or sets of rules to apply. Flexibility has traditionally been the hallmark of the EU procurement rules applicable in the utilities sectors. Recital 2 of Directive 2014/25/EU clarifies that, "In view of the nature of the sectors affected, the coordination of procurement procedures at the level of the Union should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility".

'Flexibility' is also central to Directive 2014/23/EU. A phrase in Recital 8 thereof indicates that the directive's provisions "should not go beyond what is necessary in order to achieve the aforementioned objectives and to ensure a certain degree of flexibility. Member States should be allowed to complete and develop further those provisions if they find it appropriate, in particular to better ensure compliance with the principles set out above".

However, some degree of flexibility already characterises Directive 2014/24/EU as well. Recital 42 thereof refers to "a great need for contracting authorities to have additional flexibility to choose a procurement procedure" which explains some loosening of the conditions that allow recourse to less rigid award procedures.

Prior market engagement too may be linked to flexibility in so far as it goes beyond the traditional rigid separation between buyers and sellers that sets apart public contracts from commercial buying. Preliminary market consultations were introduced in Article 40 of Directive 2014/24/EU and in Article 58 of Directive 2014/25/EU. Some experts rightly suggest extending the provision to cover other modalities of communication such as information sessions.

In some cases, however, the case law may be seen as reducing the flexibility allowed by the directives, such as for instance with reference to framework agreements (see below § I.6.1.h.).

Rules should always be clear and also as simple as it is possible considering the complexity of what is regulated. The real problem then is to draft rules that are as simple (and clear) as possible but still suited to achieve the substantive objectives of legislation. This is a technical problem requiring excellent drafting. How much flexibility the rules are to allow is instead a mostly political choice that depends on balancing possibly contrasting aims (see also § III.).

I.3.2 Efficient use of public money?

Trygve Harlem Losnedahl convincingly indicates that "The objective of the EU procurement rules was not to provide resource-efficient procurement, but to create an internal market by combating the protectionism that was still rife in the 1980s".[80] This sets EU public procurement rules aside from 'domestic' procurement regimes and even from the rules applicable to to the procurement of EU institutions referred to below in this paragraph. This should not come as a surprise, as the EU public procurement rules do not set up a self-contained and closed system. Being constrained by the principles of conferral, subsidiarity and proportionality they are to be grafted into national procurement systems.[81]

However, alongside strategic procurement, Recital 2 of Directive 2014/24/EU refers twice to the 'efficient use of public money', specifically indicating that "the public procurement rules [...] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement [...]".[82] The Recitals in Directive 2014/23/EU show some variations, referring to the "best use of public money" (Recital 1), to the "most efficient use of public funds" (Recital 3) and to the "efficiency of public spending" (Recital 4).

In listing the two complementary objectives - market integration and strategic objectives - for the reform of EU public contract law, the Commission had already proposed the aim to "Increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification and flexibilisation of the existing public procurement rules. Streamlined, more efficient procedures will benefit all economic operators and facilitate the participation of SMEs and cross-border bidders".[83] While there is some circularity in the reasoning, the end objective - fostering the internal market - is still very clear, and efficiency of 'public spending' and of 'procedures' was merely a tool.

As if contributing in achieving Internal Market Integration was not any more a good enough reason for regulating public contracts at EU level, soon after the

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[80] T. Harlem Losnedahl, 'Formål og virkemidler i regulering av offentlige anskaffelser – en rettshistorisk analyse' (English title: Ends and means in regulation of public procurement law – a legal historical analysis) 136(4) *Tidsskrift for Rettsvitenskap* 2023, pp. 359–442. An English translation of the article which was used here is available at https://www.jus.uio.no/nifs/english/people/aca/trygvehl/english-translation---trygve-harlem-losnedahl---ends-and-means-in-the-regulation-of-public-procurement-a-legal-historical-analysis---tidsskrift-for-rettsvitenskap-2023.pdf at p. 445.

[81] For a different opinion based on the central role assigned to competition see A. Sánchez Graells, *Public Procurement and the EU competition rules* 2nd ed. (Oxford, OUP, 2015) esp. 101 f; for a criticism of this position below § I.3.4.

[82] This is replicated in Recital 4 to Directive 2014/25/EU.

[83] COM/2011/0896 final.

entry into force of the 2014 directives, the Commission started touting the wider benefits of those rules and of public procurement more in general. This effort was particularly evident in the 2017 Commission Communication on *Making Public Procurement work in and for Europe*.[84] The Commission was arguing that public contracts should be used in "a more strategic manner, to obtain better value for each euro of public money spent and to contribute to a more innovative, sustainable, inclusive and competitive economy". Moreover, Europeans are said to "expect a fair return on their taxes in the form of high-quality public services" and this "strongly depends on modern and efficient public procurement processes".[85]

'Efficiency' is instead **among the leading objectives of 'sound financial management' as defined in Article 2(65) of Regulation (EU, Euratom) 2024/2509 on the financial rules applicable to the general budget of the Union (recast) (the Financial Regulation) applicable to the EU general budget.**

Under that article, "'sound financial management' means implementation of the budget in accordance with the principles of economy, efficiency and effectiveness". The principle of 'sound financial management and performance' is spelt out in Chapter 7 of the Financial Regulation. Under Article 33(1) (*Performance and principles of economy, efficiency and effectiveness*, "Appropriations shall be used in accordance with the principle of sound financial management, and thus be implemented respecting the following principles: [...] (b) the principle of efficiency which concerns the best relationship between the resources employed, the activities undertaken and the achievement of objectives".

Only occasionally, the Court of Justice has referred to 'the efficient use of public funds' as an argument to confirm its conclusions. In *Obshtina Razlog* the question was whether a contracting authority could have negotiated with just one economic operator following an open tendering procedure where no suitable tender had been submitted.[86] The Court found that neither the relevant provisions nor the general principles stood in the way of such possibility, provided *inter alia* that, as required in Article 26(4)(b) of Directive 2014/24/EU, the initial contract conditions had not been altered.[87] Proving this is for the contracting authority tantamount to demonstrate "that it has made the best possible use of public funds, as provided for in recital 2 of the same directive, and therefore that no irregularity within the meaning of the EU rules on the European structural and investment funds has

[84] European Commission Communication *Making Public Procurement work in and for Europe*, COM/2017/0572 final.

[85] *Ibidem*.

[86] Case C-376/21, *Obshtina Razlog*, ECLI:EU:C:2022:472, paragraph

[87] Paragraphs 64 ff.

been committed".[88] It is noteworthy that the procurement at issue in that case was financed by the EU.[89]

In its 2023 *Special Report*, the European Court of Auditors argued that "Obtaining the best value for money when procuring works, goods and services is a key objective of public procurement".[90] It is not specified in which legal context - the procurement of EU institutions or procurements by national contracting authorities and entities - this holds true. The Court, referring to "Article 26 of the Treaty of Rome", further and more correctly adds that "In the EU single market, public contracts should be awarded in respect of the best offer, irrespective of the country of origin of the company submitting the bid".[91]

While the non-discrimination principle is at the basis of the internal market, the existence of a legal basis justifying EU legislation aimed at increasing the efficiency of the EU Member States' public spending may well be doubted - and has been doubted - insofar as they and their contracting authorities and entities are not disbursing EU funds.[92] As Prof. Sue Arrowsmith contended already in 2012, "the directives are not concerned directly with value for money. Most significantly, the internal market provisions do not confer a power to regulate for this purpose. These may be invoked only for two purposes that relate to the internal market, namely to support the 'four freedoms' and to eliminate appreciable distortions of competition" in the internal market.[93]

It befalls to the competence of the Member States – and of their contracting authorities and entities – to pursue 'the efficient use of public funds' within the legal framework laid down in EU law. This framework, in turn, must not go beyond what is necessary to pursue market integration and strategic considerations.

Indeed, simplification and flexibilisation as specific efficiency measures listed in Recital 2 of Directive 2014/24/EU are instead fully justified objectives under the proportionality and subsidiarity principles generally applicable in EU law as provided in Article 5(1), (3) and (4) of the Treaty on European Union (TEU) and

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[88] Paragraph 70.

[89] The same is true of the precedents referred to by the Court (which however do not refer to the public procurement directives): Case C-743/18, *Elme Messer Metalurgs*, ECLI:EU:C:2020:767; Joined Cases C-260/14 and C-261/14, *Judeţul Neamţ*, ECLI:EU:C:2016:360.

[90] European Court of Auditors, *Special Report 28/2023. Public Procurement in the EU* (Luxembourg, Publication Office of the EU, 2023), at p. 6.

[91] *Ibid.*; see also at p. 14: "Our recommendations are intended to contribute to improvements that could help member states' contracting authorities to obtain the best value for public money in their procurements".

[92] *Amplius* and for further references see R. Caranta, 'The changes to the public contract directives and the story they tell about how EU law works' 52 *CML Rev*. 2015, 391, at 403 ff.

[93] S. Arrowsmith, 'The purposes of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies' 14 *Cambridge Yearbook of European Legal Studies* 2012, at pp. 37 f; *contra* A. Sánchez Graells, *Public Procurement and the EU competition rules* 2nd ed. (Oxford, OUP, 2015) esp. 101 ff.

in Protocol (No 2). Specifically based on Article 5(4) TEU under which "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties", it is argued here that the attainment of (internal) market integration and strategic objectives does not justify overregulation at EU level limiting the legislative competences of the Member States more than it is necessary to achieve the two mentioned objectives (above § I.3.1.).[94]

While the efficiency of public spending can not by itself be treated as an objective of the EU public contract rules, considerations pertaining to it such as simplicity and flexibility are very relevant in assessing whether measures taken to achieve the objectives of the relevant rules - pertaining to the internal market, SMEs and SPP - do not go beyond what is proportionate to achieve the aim. Proportionality is not limited to necessity and adequacy here. Proportionality requires a balance between different relevant EU – and Member States – general interests, including efficiency in a wider sense, in order to avoid that the rules intented to foster the internal market end up clashing against common procurement sense.

I.3.3 The EU framework of public procurement as a driver of economic growth?

The value for money approach has been further expanded by the European Court of Auditors. In its 2023 *Special Report*, the Court analyses public procurement as an engine of growth and market efficiency. The Court starts arguing that "Public procurement is thus one of the main drivers of economic growth and employment". The Court then moves to its already recalled assumption that "obtaining the best value for money" is "a key objective of public procurement". The Court further adds that the "selection of the best performing companies contributes to making markets competitive and safeguards the public interest", to conclude that "Regulation of public procurement in the EU therefore can be a driver of the economy, could enhance European integration, increases the competitiveness of European companies, and strengthens compliance with the principles of transparency, equal treatment, non-discrimination, mutual recognition, proportionality, and efficiency, thereby reducing the risk of fraud and corruption".[95] It is undeniable that the "The purpose of creating an internal market in the EU was to achieve overall economic growth for the member states in the internal market", but it was also to achieve 'peace'.[96]

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[94] See also Recital 136 to Directive 2014/24/EU.

[95] European Court of Auditors, *Special Report 28/2023. Public Procurement in the EU* (Luxembourg, Publication Office of the EU, 2023), at p. 6.

[96] T. Harlem Losnedahl, 'Formål og virkemidler i regulering av offentlige anskaffelser – en rettshistorisk analyse' (English title: Ends and means in regulation of public procurement law – a legal historical analysis) 136(4) *Tidsskrift for Rettsvitenskap* 2023, pp. 359–442. An English translation of the article which was used here is available at https://www.jus.uio.no/nifs/english/people/aca/trygvehl/english-translation---trygve-harlem-

It is not within the remit of this study to assess the place of public procurement in the wider economic and philosophical context of the internal market and of EU integration more generally as indicated in Article 3 TEU.[97] From a legal point of view, however, these potential wider benefits linked to the overall economic growth for the Member States are clearly very removed from what we can read in the recitals of the 2014 directives and from the EU Treaties legal bases supporting those directives. As already indicated, the "purpose of coordinating, at European Union level, the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State".[98]

Keeping this in mind, it seems reductive for the European Court of Auditors to have "examined how direct cross-border procurement has evolved over time" as simply "another relevant indicator".[99] That, and not driving economic growth etc, is the core goal of EU public contract law. And obstacles abound, not least the multiplicity of languages.[100]

This might of course change in the future, as for instance the Letta report makes public procurement a ground stone for a European industrial policy (below § I.5.2.).

Present EU public contract rules aim at achieving internal market integration. Wider economic benefits linked to the overall economic growth for the Member States, while possible and even politically desirable, are not an objective recalled in the recitals of the 2014 Directives nor may be directly deduced from the legal bases on which those directives are grounded.

losnedahl---ends-and-means-in-the-regulation-of-public-procurement-a-legal-historical-analysis---tidsskrift-for-rettsvitenskap-2023.pdf at p. 445.

[97] See the pages by A. Sánchez Graells, *Public Procurement and the EU competition rules* 2nd ed. (Oxford, OUP, 2015) at 101 ff, but also highlighting the specific issues of efficiency of public procurement systems at 110 ff.

[98] Paragraph 24; the Court refers to Case C-507/03, *Commission* v *Ireland*, EU:C:2007:676, paragraph 27 and to the case-law therein cited.

[99] European Court of Auditors, *Special Report 28/2023. Public Procurement in the EU* (Luxembourg, Publication Office of the EU, 2023), at p. 15; that aspect had already been analysed only a couple of years earlier by European Commission: BIP Business Integration Partners, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Economics for Policy a knowledge Center of Nova School of Business and Economics Lisboa and Prometeia, *Study on the measurement of cross-border penetration in the EU public procurement market – Final report*, Publications Office of the European Union, 2021, https://data.europa.eu/doi/10.2873/15626 .

[100] See S. Schoenmaeker, 'The Use of Languages in Public Procurement Procedures: A Hidden Non-Tariff Barrier to Free Movement?' 17 *EPPPL* 2022, 71-80.

I.3.4 Competition? What competition?

'Competition' shows many different, at times related, other times contradictory, meanings in the public procurement and concessions case law of the Court of Justice.[101] This creates a very slippery conceptual ground, where ambiguity may lead to solutions which are not consistent with the objectives of the law.

For instance, and as already recalled, the Court has often repeated that "the main objective of the rules of EU law in the field of public contracts" is "the free movement of goods and services and the opening up of public contracts to competition in all the Member States".[102] This statement may easily be read as a hendiadys: what is relevant is competition in the internal market, not competition in itself. In this context, competition is not an objective for the public procurement rules. Rather, competition is a tool, or a means, to achieve the objective of market integration. However, oblivious to the Internal Market dimension and focusing narrowly on best value for money, in its 2023 *Special Report*, the European Court of Auditors observed that "Competition, i.e. a sufficient amount of suppliers in the market and participating to the public procurement procedures, is a prerequisite to achieve" best value for money.[103] Here 'competition' is still a tool, but one serving best value for money whose role as an objective of the 2014 directives is however eminently contestable (above § I.3.2.). The imbrication of 'competition' and best value for money is so close here that distinguishing the two becomes difficult.[104]

Far from being of a purely theoretical interest, this ambiguity has led to judgments that contradict both the objectives of the 2014 directives and contrast with a constitutional reading of proportionality as clarified above (above §§ I.2. & I.3.1.). While more examples will be provided across this Study, in this section the aim is to further define and contrast two relevant meanings - and uses - of 'competition' which have a different grounding in the Treaties. The first is 'competition as the widest possible participation of economic operators to procurement procedures in the Internal Market'. The second is 'competition for its own sake'. With the former, competition is a tool. With the latter, competition becomes an objective - if not a value - upon itself.

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[101] See T. Harlem Losnedal, 'Five Meaning of 'Competition in EU Law' 11(2) *Oslo Law Review* 2024, esp. 8 ff; M. Steinicke, 'Comment to Article 18' in M. Steinicke & P.L. Vesterdorf (eds.), *Brussels Commentary on EU Public Procurement law* (München, Nomos, 2018) 330.

[102] Case C-578/23, *Česká republika – Generální finanční ředitelství*, paragraph 29; the Court refers to Case C-553/15, *Undis Servizi*, EU:C:2016:935, paragraph 28, and to Case C-3/19, *Asmel*, EU:C:2020:423, paragraph 58.

[103] European Court of Auditors, *Special Report 28/2023. Public Procurement in the EU* (Luxembourg, Publication Office of the EU, 2023), at p. 6.

[104] And indeed the two are not clearly distinguished by the European Court of Auditors: "Our audit assessed the level of competition for public procurements in the EU's single market over the period of 10 years and the actions taken by the Commission and the member states to identify and address obstacles to competitive tendering, in the interest of obtaining the best value for money". Moreover, the analysis focuses on "how the level of competition has evolved over time, and whether the 2014 reform has had an impact on competition levels and other objectives of the reform have been met" (*ibid.* at p. 4).

Competition as the widest possible participation. Still within an explicit Internal Market framework, and clearly linked with the legal basis in the TFEU for EU public procurement legislation, a consistent strand in the case law has identified the 'objective' - other times the 'concern' - to "ensure the widest possible participation by tenderers in a call for tenders" In the recent *AAS 'BTA Baltic Insurance Company'* case, the Court of Justice recalled its precedents to the effect "that the EU rules on public procurement were adopted in pursuance of the establishment of a single market, the purpose of which is to ensure freedom of movement and eliminate restrictions on competition". The Court then translated this objective in the concern for the 'widest possible participation'.[105] This was at times rendered with a passing reference to effective competition.[106]

Competition for its own sake (also referred to as 'healthy and effective competition'). The Internal Market framework – and the necessary link to a legal basis in the TFEU supporting the EU legislative competence - dissolves itself into thin air in other recent cases.[107] For instance, in *Taxi Horn Tours*, the Court of Justice recalled its precedents to the effect that "the objective of promoting the development of healthy and effective competition between economic operators taking part in a public procurement procedure [...] lies at the very heart of the EU rules on public procurement procedures and is protected in particular by the principle of equal treatment of tenderers".[108] In *Rad Service* the Court refers to the "obligation on the contracting authority to comply with the principle of equal treatment of tenderers, which seeks to encourage the development of healthy and effective competition between undertakings participating in a public procurement procedure, and which lies at the very heart of the EU rules on public procurement procedures".[109]

In these two cases, 'competition' is an objective, if not the objective, of public contracts rules. Equal treatment is treated as a tool to achieve competition. Still, in both *Taxi Horn Tours* and in *Rad Service* the reference to 'healthy competition' might still well have been an obiter. In the first case, it did not dispense with the need for an ESPD for all participants and in the latter case the substitution of the entity relied upon was conditionally allowed based on the facts of the case (below § I.6.1.c.).

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[105] Case C-769/21, *AAS 'BTA Baltic Insurance Company'*, ECLI:EU:C:2022:973, paragraphs 35 f.; the Court refers to Case C-144/17, *Lloyd's of London*, EU:C:2018:78, paragraphs 33 f and to the case-law therein cited.

[106] E.g. Case C-546/16, *Montte*, ECLI:EU:C:2018:752, paragraph 31.

[107] E.g. Joined Cases C-68/21 and C-84/21, *Iveco Orecchia*, ECLI:EU:C:2022:835, paragraph 86 (but this might still be read in an Internal Market framework); Case C-472/19, *Vert Marine*, ECLI:EU:C:2020:468, paragraph 22; the analysis by S. Arrowsmith, 'The purposes of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies' 14 *Cambridge Yearbook of European Legal Studies* 2012, at pp. 30 f. provides for some older precedents.

[108] Case C-631/21, *Taxi Horn Tours*, ECLI:EU:C:2022:869, paragraph 57.

[109] Case C-210/20, *Rad Service Srl Unipersonale*, ECLI:EU:C:2021:445, paragraph 43; see also Case C-697/17, *Telecom Italia*, ECLI:EU:C:2019:599, paragraph 33 and Case C-316/21, *Monument Vandekerckhove*, ECLI:EU:C:2021:837, paragraph 44.

In *Altea Polska*, however, the Court had to strike a balance between transparency (and effective judicial protection) on the one hand and confidentiality on the other hand.[110] Considering that the former two are public law values and are expressly mentioned or at least may be derived from the TFEU, one might have thought the conclusion foregone.[111] Enters competition *tout court*. According to the judgment,

> the Court has repeatedly held that the principal objective of the EU rules on public procurement is to ensure undistorted competition, and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in such a procedure, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators.[112]

There is a not so subtle shift here. In the referred precedent, the Court of Justice had not just referred to 'undistorted competition' but to "the opening-up of public procurement to undistorted competition in all the Member States", thus arguably staying closer to the internal market basis of EU public procurement legislation as manifested in the recitals (above § I.2.1.).[113]

Clearly, when the reasoning shifts from competition on the internal market to competition *tout court*, transparency may become less valuable. One should question what is the legal basis in EU primary law for such conceptual replacement?[114] As it will be remembered, 'competition' does not amount to a legal basis in the TFEU and therefore it is rightly not referred to in the recitals that are making explicit the legal bases on which the 2014 directives are grounded. 'Competition' is arguably a 'principle' of EU public contracts law (below § I.4.). Of course, competition, and even 'competition *tout court*', is an instrument for the

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[110] Case C-54/21, *Antea Polska*, ECLI:EU:C:2022:888; see also the different opinions of K-M. Halonen, 'Many faces of transparency in public procurement', A. Sanchez-Graells,'Transparency and competition in public procurement: a comparative view of their difficult balance' and R. Caranta, 'Procurement transparency as a gateway for procurement remedies', all in K-M. Halonen, A. Sanchez-Graells & R. Caranta (eds), *Transparency in EU Procurement* (Cheltenham, Elgar, 2019) pp. 8, 33 and 57 respectively.

[111] Article 3(2) of Directive 2014/23/EU, instead, while providing that contracting authorities and contracting entities "shall aim at ensuring the transparency of the award procedure and of the performance of the contract" also reminds them to comply with Article 28 about confidentiality.

[112] Paragraph 49.

[113] Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, ECLI:EU:C:2021:700, paragraph 115; see also Case C-223/16, *Casertana Costruzioni*, ECLI:EU:C:2017:685, paragraph 31; Case C-324/14, *Partner Apelski Dariusz*, ECLI:EU:C:2016:214, paragraph 34.

[114] This is, in our opinion, the shortcoming of the theory of A. Sánchez Graells, *Public Procurement and the EU competition rules* 2nd ed. (Oxford, OUP, 2015) who grounds EU public contracts directives on the need of competition as a tool of efficient market operation (esp. 105 ff).

'efficient use of public money', which is indeed referred to in those recitals, but, as already indicated, it is doubtful whether 'efficient use of public money' may be treated as an 'objective' on its own right of the public contract directives (above § I.3.2.). More problematic cases concerning competition are discussed in a specific paragraph of this Study (below § I.6.1.d.).

The shift in the meaning of 'competition' from competition in the internal market to competition *tout court* has shaky foundations in the directives and even weaker ones in the TFEU. Moreover, it is creating conflicts and inconsistencies with other objectives or principles whose roots in the Treaties are much stronger (below § I.6.1.d.).

I.3.5 Specific objectives for specific provisions

Looking for purpose, the case law has also identified the objective(s) of specific provisions requiring interpretation. These objectives may be more or less loosely related with the more general objectives of the 2014 directives, but in some cases they are seen as introducing exceptions to or tempering those general objectives.

Concerning situations in which specific objectives may be more or less loosely related with the more general objectives of the 2014 directives, in *Obshtina Pleven*, the Court of Justice held that "national legislation cannot be criticised for requiring contracting authorities to add the words 'or equivalent' in all cases where technical specifications are formulated by reference to standards". This allows tenderers to prove "that the solutions proposed satisfy in an equivalent manner the requirements defined by those technical specifications". This conclusion is upheld by the Court with reference to Recital 74 of Directive 2014/24/EU that spells out the objective "to ensure that technical specifications drawn up by public purchasers allow public procurement to be open to competition and to reflect, inter alia, the diversity of technical solutions in the marketplace".[115] It's worth noting that Recital 74 may be read as referring to 'competition in the internal market' and reference is made to 'sustainability' as well.

Some 'specific' objectives are only loosely related to the more general objectives of the 2014 directives. This is the case with the rules on exclusions. The specific objective of optional grounds of exclusion, as spelt out in Recital 101, is to exclude "from participation in public procurement procedures any economic operator in relation to which significant or persistent deficiencies have been recorded in the performance of a substantive requirement incumbent on it under a prior public contract, in particular where those deficiencies have given rise to the early termination of that contract".[116]

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[115] Case C-513/23, *Obshtina Pleven*, ECLI:EU:C:2024:917, paragraphs 34-36.

[116] Case C-682/21,*'HSC Baltic' UAB*, ECLI:EU:C:2023:48, paragraph 36; see also Case 416/21, *Landkreis Aichach-Friedberg*, ECLI:EU:C:2022:689, paragraph 41; Case C-395/18, *Tim*,

While the exclusion grounds aim at a sound - common sense - management of the procurement process, in the negative they outlaw groundless and therefore possibly arbitrary exclusion thus ensuring that competition on the internal market is not restricted. The underlying assumption is that rules pursuing market integration and/or strategic objectives must take into account the needs of sensible public purchasing. However, proportionality rules and tenderers must be given the possibility to show that they have reestablished their reliability through self-cleaning to ensure wider participation in award procedures. Proportionality here acts as a safeguard for a 'core' objective of public contract law - the wider opening of award procedures to economic operators from all the Member States - when it is necessary to consider common sense wider objectives of public acquisition processes (see above § I.3.2.). If a subcontractor cannot be relied upon, the tenderer must be given the opportunity to change it. The same applies to economic operators on whom a tenderer has relied.[117] In turn, the principle of equal treatment and the consequent interdiction to modify the tender may limit this option (see further below § I.4.1.i.).[118]

Some 'very specific' objectives related to specific provisions are actually introducing exceptions to the objective of the wider opening to intra-European competition. As a consequence, the relevant provisions are to be read narrowly. This is the case of the exclusion for emergency service under Article 10(h) of Directive 2014/24/EU. In *Italy Emergenza Cooperativa Sociale*, the Court of Justice held "the objective of the exception provided for in Article 10(h) of Directive 2014/24 is, as stated in recital 28 of that directive, to preserve the particular nature of non-profit organisations and associations by preventing them from being subject to the procedures set out in that directive. However, that recital states that that exclusion must not be extended beyond what is strictly necessary".[119] In *Italy Emergenza Cooperativa Sociale* the Court of Justice followed *Falck Rettingdienste*, in which the Court had explained that emergency transport services had to be included along transport in civil emergencies as "a result of the experience thus acquired by performing those day-to-day emergency services that those non-profit organisations or associations are in the position, according to the referring court, of being operational when they are required to provide 'civil protection' and 'civil defence' services".[120] As a derogation from the

ECLI:EU:C:2020:58, paragraph 35, extending the need for trust to subcontractors (see also paragraphs 41 f.). Concerning procurement by EU institutions, agencies or bodies, the objective is to protect the financial interests of the EU (e.g. Case T-126/23, *VC*, ECLI:EU:T:2024:666, paragraph 55). However, not all the optional ground of exclusion can be said to pursue that objective: see P. Friton & J. Zöll, 'Comment to Article 57' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) at p. 592.

[117] Case C-210/20, *Rad Service Srl Unipersonale*, ECLI:EU:C:2021:445, paragraph 38.

[118] Case C-210/20, *Rad Service Srl Unipersonale*, ECLI:EU:C:2021:445, paragraphs 42 ff.

[119] Joined Cases C-213/21 and C-214/21, *Italy Emergenza Cooperativa Sociale*, ECLI:EU:C:2022:532, paragraph 32; see also Case C-424/18, *Italy Emergenza Cooperativa Sociale*, ECLI:EU:C:2019:528.

[120] Case C-465/17, *Falck Rettungsdienste*, ECLI:EU:C:2019:234, paragraph 33.

scope of that directive, the derogation in Article 10(h) must be interpreted narrowly.[121] Therefore, the Court held that only no-profit organisations, i.e. those not redistributing any profit to their members, could qualify for direct award.[122]

In *Falck Rettungsdienste* the Court of Justice, following the opinion of Advocate General Campos Sanchéz-Bordona, also distinguished the exception in Article 10(h) from the exception in Articles 74-77 of Directive 2014/24/EU. According to the Court,

> non-profit organisations or associations referred to in recital 28 of Directive 2014/24 are not required also to satisfy the conditions laid down in Article 77(2) of that directive. There is no equivalence between, on the one hand, those organisations and associations referred to in recital 28 and, on the other hand, the 'organisations which are based on employee ownership or active employee participation in their governance' and 'existing organisations such as cooperatives', which are referred to in recital 118 of the same directive. Therefore, there also cannot be equivalence between Article 10(h) of Directive 2014/24, which excludes certain activities of non-profit organisations or associations from the scope of that directive, and Article 77 of the directive, which subjects certain activities of organisations based on employee ownership or employee participation in the organisation's governance and existing organisations, such as cooperatives, to the light regime laid down in Articles 74 to 77 of Directive 2014/24.[123]

The difference of regime - exclusion from the coverage of the directive in Article 10(h) vs reserved award procedure in Articles 74 to 77 - justifies the differences between emergency ambulance services (excluded) and other ambulance services (which might fall under the special regime).

Similarly, Article 20 of Directive 2014/24/EU gives to the Member States the power to limit participation in public procurement procedures to economic operators pursuing the aim to facilitate the employment of disabled and other disadvantaged people. In *Conacee* the Court of Justice held that the provision "pursues a social policy objective, relating to employment".[124] This in principle allows the Member States to lay down more restrictive conditions further limiting access to reserved contracts.[125]

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[121] Joined Cases C-213/21 and C-214/21, *Italy Emergenza Cooperativa Sociale*, ECLI:EU:C:2022:532, paragraph 32.

[122] Paragraphs 33 ff; see also Case C-11/19, *Azienda ULSS n. 6 Euganea*, ECLI:EU:C:2020:88, paragraph 52.

[123] Case C-465/17, *Falck Rettungsdienste*, ECLI:EU:C:2019:234, paragraph 60.

[124] Case C-598/19, *Confederación Nacional de Centros Especiales de Empleo (Conacee)*, ECLI:EU:C:2021:810, paragraphs 27.

[125] Paragraphs 28 ff.

The objectives of specific rules are either the application of the general objective of market integration, possibly also taking into account common sense procurement practices, or they refer to some higher order social consideration allowing for an exception to the general rules. Even the latter cannot be referred to as 'inconsistencies' in the legal regime laid down in the 2014 directives. They are well regulated exceptions that are inherent in any legal regime.

I.4. Objectives and principles

There should be a close relation between the objectives and the principles in the 2014 directives. 'Objectives' and 'principles' are in a relation of 'ends' to 'means'. Objectives are the ends that a given piece of legislation aims to achieve. Among the various legal rules enacted in order to help in achieving those objectives, the principles are those attaining a higher level of abstraction. However, the distinction is not always clear in the legislation (and even less so in some recent judgements).

I.4.1 The principles in the 2014 directives.

As already recalled, Recital 1 of Directive 2014/24/EU treats like principles both the constituent elements of the internal market (free movement of goods, freedom of establishment and the freedom to provide services) and the principles deriving from the fundamental market freedoms, "such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency".

More precisely, however, some judgements distinguish between "fundamental rules of the TFEU, in particular those relating to the free movement of goods, the freedom of establishment and the freedom to provide services" on the one hand, and on the other hand "principles deriving from them, such as the principles of equal treatment and proportionality".[126]

Article 18 of Directive 2014/24/EU and Article 36 of Directive 2014/25/EU list the 'Principles of procurement' in the same way.[127] Article 18(1) provides that "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner".

[126] E.g. Case C-598/19, *Confederación Nacional de Centros Especiales de Empleo (Conacee)*, ECLI:EU:C:2021:810, paragraph 33; the Court refers to Case C-285/18, *Kauno miesto savivaldybė (Irgita)*, EU:C:2019:829, paragraph 48 and to the case-law cited therein.

[127] C. Risvig Hamer, 'Comment to Article 18(1)' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) 187 ff.

Moreover, "The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall 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".[128] These principles are also echoed in Article 160 of the Financial Regulation.[129]

Non-discrimination is a core principle of EU law. Under the first phrase of Article 18 TFEU, "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited". This fundamental principle is also at the core of EU internal market law. **Equal treatment** extends non-discrimination beyond nationality aspects - actually it has been shown to include many different aspects - and **transparency** is instrumental in achieving both.[130] Together with subsidiarity, **proportionality** regulates the exercise of EU powers according to Protocol (No 2) *on the application of the principles of subsidiarity and proportionality attached to the TFEU*. However, what Article 18(1) of Directive 2014/24/EU refers to is proportionality as a general principle of EU law applicable to all and every measure, including decisions in procurement procedures rather than to the constitutional principle allocating competences between the Union and the Member States (see also above § I.3.2.).[131]

Principles such as equal treatment and transparency - in the older case law the latter was treated as an 'obligation'[132] - **are often instrumental in achieving the objectives laid down in the 2014 directives**. In *Lavorgna* the Court of Justice recalled that

> first, the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions. Secondly, the obligation of transparency, which is its corollary, is intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. That obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear,

[128] See T. Harlem Losnedal, 'Five Meaning of 'Competition in EU Law' 11(2) *Oslo Law Review* 2024, at p. 9.

[129] See Case C-376/21, *Obshtina Razlog*, ECLI:EU:C:2022:472, paragraph 53.

[130] See the analysis by E. Korem, 'Equality qualities in public procurement' *P.P.L.R.* 2025, 3, 200-2016 esp. at p. 206 f.

[131] See P. Bogdanowicz, 'The Application of the Principle of Proportionality to Modifications of Public Contracts', *European Procurement and Public Private Partnership Law Review* 2016, no. 3.

[132] E.g. Case C-699/17, *Allianz Vorsorgekasse*, ECLI:EU:C:2019:290, paragraphs 60 ff; Case C-697/17, *Telecom Italia*, ECLI:EU:C:2019:599, refers to transparency as an 'obligation', a 'duty' and a 'principle (paragraphs 31, 32 and 33 respectively).

> precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question.[133]

In *Conacee* the Court of Justice held that "the principle of equal treatment, which constitutes the basis of the EU rules on procedures for the award of public contracts, means, in particular, that tenderers must be in a position of equality when they formulate their tenders, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure".[134] In *Taxi Horn Tours* too, the Court recalled its precedents to the effect that "the objective of promoting the development of healthy and effective competition between economic operators taking part in a public procurement procedure [...] lies at the very heart of the EU rules on public procurement procedures and is *protected in particular by the principle of equal treatment of tenderers*" (*emphasis added*).[135] In *Pizzo* and in the following case law the Court of Justice repeated that tenderers could not be excluded from award procedure based on an interpretation of the law by the national administrative or judicial authorities when an obligation did expressly arise from the documents relating to that procedure or out of the national law in force.[136] *Roche Lietuva* stressed the importance of the respect of those principles in drafting the technical specifications.[137]

'**Competition**' too is arguably a principle in EU public contracts law under Article 18(1) of Directive 2014/24/EU and under Article 36 of Directive 2014/25/EU.[138] Some specific provisions replicate the interdiction of 'artificially' - or 'unjustifiedly' - limiting competition.[139] This is the case for instance with Article 42(2) of Directive 2014/24/EU and with the parallel provision in Article 60(2) of Directive 2014/25/EU. In *Iveco Orecchia*, the Court of Justice held that technical specifications must "afford economic operators equal access to the procurement

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[133] Case C-309/18, *Lavorgna*, ECLI:EU:C:2019:350, paragraph 19.

[134] Case C-598/19, *Confederación Nacional de Centros Especiales de Empleo (Conacee)*, ECLI:EU:C:2021:810, paragraph 37; the Court refers to Case *Telecom Italia*, C-697/17, EU:C:2019:599, paragraphs 32 and 33 and to the case-law cited therein.

[135] Case C-631/21, *Taxi Horn Tours*, ECLI:EU:C:2022:869, paragraph 57; see also e.g. Case C-210/20, *Rad Service Srl Unipersonale*, ECLI:EU:C:2021:445, paragraph 43; it is however doubted whether 'promoting the development of healthy and effective competition' might be counted as an objective of the 2014 directives (above § I.3.4.).

[136] Case C-27/15, *Pizzo*, EU:C:2016:404, paragraph 51, and C-162/16, *Spinosa Costruzioni Generali and Melfi*, EU:C:2016:870, paragraph 32.

[137] Case C-413/17, *'Roche Lietuva'*, ECLI:EU:C:2018:865, paragraph 33 ff.

[138] See C. Risvig Hamer, 'Comment to Article 18(2)' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) 196 ff; see however M. Steinicke, 'Comment to Article 18' in M. Steinicke & P.L. Vesterdorf (eds.), *Brussels Commentary on EU Public Procurement law* (München, Nomos, 2018) 330.

[139] See also e.g. Recital 74 of Directive 2014/24/EU.

procedure" and shall "not have the effect of creating unjustified obstacles to the opening up of public procurement to competition".[140]

As already recalled in the previous section, the recent case law often - wrongly - treats 'competition', without further precision, as an objective, and even a core objective of the 2014 directives (above § I.3.4.). Remarkably, 'competition' is not expressly mentioned in the second phrase of Article 3(1) of Directive 2014/23/EU which provides that "The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services". Arguably, the second phrase of Article 3(1) reaches the same regulatory effects of the above discussed provisions in the two other directives without the need to refer to a word which may be charged with too many potentially contradictory meanings.[141]

Proportionality is a principle often called to temper the application of rules aimed at achieving some objective of the EU public contracts rules. This may be illustrated by the rich case law on exclusions (see also below §§ I.6.1.a. to I.6.1.f.). The objective (or purpose) of the rules on exclusion is to avoid concluding contracts with unreliable economic operators (above § I.3.5.). In *HSC Baltic*, the Court of Justice reiterated both that the purpose of the optional ground of exclusion under Article 57(4)(g) "consists in excluding economic operators whose reliability is seriously compromised on account of wrongful or negligent conduct"[142] and that "the application of that optional ground for exclusion must comply with the principle of proportionality, which is a general principle of EU law, which Article 18(1) of Directive 2014/24 restates as far as concerns public procurement".[143] More generally, "Compliance with that principle warrants particular attention when applying the optional grounds for exclusion".[144]

Proportionality also makes it unlawful a selection criterion requiring a seat or office in the place where the service has to be rendered. According to the Court of Justice, such a criterion "is clearly disproportionate to the attainment of such an objective [...]. Even if the establishment of the economic operator in the territory of the place where it is called upon to provide the social services concerned is necessary in order to guarantee the proximity and accessibility of those services, such an objective could, in any event, be attained just as

[140] Joined Cases C-68/21 and C-84/21, *Iveco Orecchia*, ECLI:EU:C:2022:835, paragraph 86; see also Case C-413/17, *'Roche Lietuva'*, ECLI:EU:C:2018:865, paragraphs 35 f.

[141] See the analysis by T. Harlem Losnedal, 'Five Meaning of 'Competition in EU Law' 11(2) *Oslo Law Review* 2024, 1-15.

[142] Case C-682/21,*'HSC Baltic' UAB*, ECLI:EU:C:2023:48, paragraph 35.

[143] Paragraph 38.

[144] *Ibidem*.

effectively by requiring that that economic operator satisfies that condition only at the stage of performance of the public contract in question".[145]

It might very much depend on the specific subject matter of each contract but, from a practical point of view, awarding a contract to an economic operator lacking the facilities essential to perform the contract might lead to a situation whether contract implementation is delayed until a location is found - possibly leading to changes to the contract - or worse to the need to retender. While advanced procurement planning might mitigate some of these risks, a too early award will present its own challenges in terms of adequacy to the prevailing market conditions during execution (see more generally below § I.6.2.a.).

Concerning **sustainability**, as already recalled Article 18(2) of Directive 2014/24/EU, which is replicated in Article 30(3) of Directive 2014/23/EU and in Article 36(2) of Directive 2014/25/EU, contributes in achieving the strategic objectives of the public contracts rules, but by itself does not go beyond requiring compliance with existing rules in the performance of the contract (see also below § I.6.1.f.). According to the prevailing scholarly opinion, Article 18(2) stops short of creating a sustainability principle as it is worded as introducing a 'traditional' obligation of result addressed to the Member States rather than to contracting authorities.[146] Contracting authorities are however referred to along the Member States in Recital 37 (above § I.2.1.).

Still the provision has an important symbolic value. In *Tim*, the Court of Justice held that "Article 18 of Directive 2014/24, entitled 'Principles of procurement', is the first article of Chapter II of that directive devoted to 'general rules' on public procurement procedures. Accordingly, by providing in paragraph 2 of that article that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law, the Union legislature sought to establish that requirement as a principle, like the other principles referred to in paragraph 1 of that article, namely the principles of equal treatment, non-discrimination, transparency, proportionality and prohibiting the exclusion of a contract from the scope of Directive 2014/24 or artificially narrowing competition. It follows that such a requirement constitutes, in the general scheme of that directive, *a cardinal value with which the Member States must ensure compliance pursuant* to the wording of Article 18(2) of that directive" (*emphasis added*).[147]

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[145] Case C-436/20, *ASADE*, ECLI:EU:C:2022:559; the Court refers to Case C-234/03, *Contse and Others*, EU:C:2005:644, paragraph 43.

[146] W. Janssen, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology' in W. Janssen & R. Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law. Reflections on a Paradigm Shift* (Oxford, Hart, 2023); M. Andhov, 'Comment to Article 18(2)' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) pp. 199 ff.

[147] Case C-395/18, *Tim*, ECLI:EU:C:2020:58, paragraph 38.

Calling sustainability a 'cardinal value' seems indeed to confirm that sustainability is among the objectives of the 2014 directives, it is not just a means, it is an end the regulation and the practice of procurement must attain.

The general Internal Market principles should be used in the interpretation of EU public contracts law to facilitate the achievement of its objectives. It happens, however, that the focus on some of the general principles distracts the interpreter from the objectives and may lead to conclusions inconsistent with the goals of the 2014 directives and/or with public purchasing common sense (see also the examples analysed below § I.6.)**.**

I.4.2 Sound/good administration: a new general principle in public procurement law?

The principle of sound or good administration is spelt out in Article 41 of the Charter of Fundamental Rights of the European Union, which by itself is not binding on the Member States and their contracting authorities and entities.[148] Some parts of it, such as the duty to give reasons, are however an essential component of the right to effective judicial protection, and are as such binding in the award of public contracts.[149]

Recent judgments, however, treat the principle of sound or good administration as by itself applicable to contracting authorities and entities. In *Adusbef*, the Court of Justice held that, "according to settled case-law, the contracting authority must comply with the general principle of EU law relating to sound administration, which the Member States must observe when implementing EU law. Among the requirements flowing from that principle, the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressee in a position to defend its rights and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions".[150]

The principle of good administration includes the right to be heard which is occasionally defined in terms of the principle of the respect of the rights of defence. This is the case with self-cleaning. In *RTS infra* the Court of Justice held that "the principle of respect for the rights of the defence which, as a fundamental principle of EU law, of which the right to be heard in any procedure is an integral part, is applicable where the authorities are minded to adopt a measure which will adversely affect an individual, such as an exclusion decision adopted in the

[148] E.g. Case C-263/19, *T-Systems Magyarország*, ECLI:EU:C:2020:373, paragraph 42.

[149] See to this effect Case C-54/21, *Antea Polska*, ECLI:EU:C:2022:888, paragraph 50; Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, ECLI:EU:C:2021:700, paragraphs 120 ff.

[150] Case C-683/22, *Adusbef – Associazione difesa utenti servizi bancari e finanziari* ECLI:EU:C:2024:936, paragraph 79; the Court refers to Case C-66/22, *Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias*, EU:C:2023:1016, paragraph 87.

context of a public procurement procedure".[151] Combining this principle with those of transparency and equal treatment, the Court of Justice held that tenderers are to be informed in advance if they are expected to already provide evidence of self-cleaning when submitting their tenders.[152]

Through the principle of sound/good administration the case law imposes on contracting authorities and entities the compliance with basic standards for official decision making which are consistent with the main goals of the 2014 directives.

I.5. Conflicting objectives?

Writing in 1972, Colin Turpin remarked that:

> The volume of government procurement is such that the government's decisions on how, when and what to buy must inevitably have effects on the structure and health of industry, upon employment, and upon the economy as a whole. **It would be remarkable if any government were to carry out its procurements wholly without regard to these incidental effects; in this as in other fields the decisions of government can be expected to be political decisions, which take account of the ulterior social and economic consequences of alternative courses of action (emphasis added).**[153]

EU public contracts law is today serving a number of objectives, and new ones have been added to the list recently (below § I.5.2.). Given the limited fiscal power of the EU, it would be really remarkable if the policy lever represented by public contracts was to be left idle. The sheer value of public purchases in Europe are a major lever to achieve objectives going beyond internal market integration. This of course may lead to conflict or inconsistencies whose solution requires trade-offs. As indicated by Turpin, this is the realm of politics.

I.5.1 Fostering the Internal Market and pursuing strategic objectives

In its 2023 *Special Report*, the European Court of Auditors highlighted the 'delicate balance between competition and the 2014 reform objectives'.[154] While competition *tout court* does not seem to deserve consideration as an objective

[151] Case C-387/19, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, ECLI:EU:C:2021:13, paragraph 34.

[152] Paragraphs 35 ff.

[153] C. Turpin, *Government contracts* (London, Penguin, 1972), p. 244.

[154] European Court of Auditors, *Special Report 28/2023. Public Procurement in the EU* (Luxembourg, Publication Office of the EU, 2023), at p. 32.

either of the 2014 directive or of EU public contracts law generally (above § I.3.4.), for sure there may be some trade-offs between market integration and strategic objectives.

In its first recommendation, the *Special Report* further indicates that "The Commission should initiate a process in order to:

> (a) formulate and prioritise fewer, but clearer and more measurable objectives;
>
> (b) reflect whether EU strategic policy objectives should be achieved by means of:
>
> - strategic requirements for public procurement procedures, or rather
> - further regulation of the specifications for works, goods and services."[155]

This is a tall call for the Court of Auditors to make after having concluded that "the promotion of strategic procurements has had a limited impact at best" (see above § I.2.1.).[156] The Reports begs the question of why one should reduce the number of the objectives if there has been a limited uptake anyway and therefore arguably limited inconvenience - but any inconvenience should have been demonstrated in the Report, which unfortunately was not the case.

The European Court of Auditors even set a target implementation date: mid-2025. The recommendations of the European Court of Auditors aiming at reducing the room for sustainability considerations in public procurement are echoed in the Letta *Report*, who however, and contradictorily, claims that "the public procurement market should be leveraged as a key instrument for promoting social value, enhancing social capital, and aligning with the EU's ambitions for green and digital transformations".[157]

Contrary to what was recommended by the European Court of Auditors, as evidenced in the parallel *External Coherence Study*, in the past two years the EU

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[155] At p. 48.

[156] European Court of Auditors, *Special Report 28/2023. Public Procurement in the EU* (Luxembourg, Publication Office of the EU, 2023), at p. 32; serious scientific research, albeit limited to a small number of Member States, seems however to disprove this assessment: see F. Lichère (dir.), *Green Public Procurement: Lessons from the fields. Canada, France, Italy, Portugal, Netherlands and Switzerland* (Presses de l'Université Laval 2025).

[157] E. Letta, *Much More than a Market* (2024), at pp. 44 f; moreover, "public procurement must be harnessed to advocate for a "high road" to development. This involves focusing on policies and practices that aim for more than just the minimum requirements in terms of wages and working conditions. Such an approach aligns public spending with a broader agenda of social advancement and economic inclusivity" (*ibid.*); further objectives such as the creation of high-quality jobs, innovation, promoting SMEs and social economy and social enterprises are also mentioned.

lawmakers have fully embraced public procurement as a tool to achieve strategic objectives. It is true that the recent *Report on Public Procurement* of the European Parliament seems at times to toe the European Court of Auditors approach.[158] However, the objectives listed in the *Report* are superabundant as it calls "on the Commission to fully align the public procurement reform with its strategic objectives aimed at reducing bureaucracy and regulatory burdens, simplification, maintaining high social and environmental standards, guaranteeing ambitious local economic development, promoting access for SMEs and boosting the EU's competitiveness and security, preventing social dumping and preserving our economic and industrial sovereignty, in order to address harmful dependencies in respect of certain vital products and services; advises against measures that could compromise any of these principles".[159]

Moreover, the "further regulation of the specifications for works, goods and services" advocated by the European Court of Auditors does not in any way exclude higher standards for public purchases. For instance, Regulation (EU) 2024/1781 establishing a framework for the setting of ecodesign requirements for sustainable products provides for such 'further regulation' but also, for higher standards in public procurement. Recital 100 thereof states the obvious by indicating in its first part that

> Public procurement amounts to 14 % of the Union's GDP. To contribute to the objective of reaching climate neutrality, improving energy and resource efficiency and transitioning to a circular economy that protects public health and biodiversity, by ensuring that there is sufficient demand for more environmentally sustainable products, contracting authorities and contracting entities should, where appropriate, align their procurement with specific green public procurement requirements. Compared to a voluntary approach, mandatory green public procurement requirements will ensure that the leverage of public spending to boost demand for better performing products is maximised.

On this basis, Article 65 on Green Public Procurement binds contracting authorities and entities to purchase products compliant with minimum criteria set by the Commission and corresponding "two highest performance classes, the highest scores or, when not available, on the best possible performance levels". The approach is clear, 'further regulation' allows for different levels of sustainability in products and public procurement must aim at the highest levels. Contrary to what the European Court of Auditors suggests, 'further regulation' does not efface the possibility of a role for SPP.[160]

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[158] A10-0147/2025 esp. paragraphs J and 16 f.

[159] *Ibid.*, paragraph 4.

[160] See also e.g. Recitals 98 f and Article 83 of Regulation (EU) 2024/3110 laying down harmonised rules for the marketing of construction products.

Moreover, the little hard evidence we have from case studies on GPP mostly disprove general theoretical economic assumptions embraced by the European Court of Auditors which are strongly tilted against regulatory action. Carreras and Vannoni provide a very articulated analysis of the different degrees of effectiveness and efficiency expected from GPP and SRPP and, within the latter, from *hardcore* social objectives (e.g. respect for human and labour rights) and the goals of promoting inclusion and supplier diversity (e.g. SMEs, women or minority owned businesses) through *set asides* (i.e. the reservation of given contracts or of a percentage of the contracts passed by one contracting authority to the benefit of some firms, e.g. women or minority owned companies) and similar tools. Evidence from (limited) case studies seem to call into question the efficacy of the latter facet of SRPP only - which by the way is not really relevant in the EU context.[161]

According to Albert Sanchez Graells, however, any SPP clause having the effect to exclude any number of economic operators should be considered as 'artificially' restricting competition and as such presumed to be unlawful under Article 18(2).[162] However, as already shown (above § I.3.4.), 'competition' *tout court* by itself - and differently from the wider participation to public contracts markets across the EU - is a principle, not an objective on its own merits of the 2014 directives. As such, competition cannot be assumed to prevail over sustainability which, besides being a value, is an objective in its own right in the 2014 directives (with some uncertainty under Directive 2014/24/EU).

Moreover, no discussion on competition would be possible without referring to the relevant market. And sustainability may define a separate and discrete market. The recent *Commission Notice on the definition of the relevant market for the purposes of Union competition law*[163] indicates that "competition policy can contribute to preventing excessive dependency and increasing the resilience of the Union economy by enabling strong and diversified supply chains, and can complement the Union's regulatory framework on environmental sustainability *by taking into account sustainability factors to the extent relevant to the competition assessment, including as part of market definition*".[164] In this context the notice further indicates that, when defining the relevant market, various parameters of competition that customers consider relevant are to be considered, and they may include "the product's price, but also its degree of innovation and its quality in various aspects – such as its sustainability, resource efficiency, durability" etc.

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[161] E. Carreras & D. Vannoni, 'Mandatory Requirements in Sustainable Public Procurement: the Economic Perspective' in Janssen W. and Caranta R. (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Oxford, Hart, 2023) 57-74.

[162] A. Sanchez-Graells, 'Some Reflections on the 'Artificial Narrowing of Competition' as a Check on Executive Discretion in Public Procurement' in S. Bogojević, X. Groussot & J. Hettne (eds.), *Discretion in EU Public Procurement Law* (Oxford, Hart, 2020) 9 f.

[163] C/2024/1645.

[164] Paragraph 3, *emphasis* added.

The relative importance of these parameters may well change over time.[165] When sustainability defines a separate relevant market, sustainable and non-sustainable goods or services are not in competition. For instance, buying choices based on price only address a market that is different from the one addressed by choices preferring quality (e.g. non-biological vs biological food).[166] No such choice is by itself restricting competition, each choice benefits from competition, but on a different market.

In any case, it is not just SPP requirements having effects on competition. The choice to award a contract for whatever product or service to the lowest price is excluding all economic operators selling quality products. And the reverse is true if quality is preferred.[167] Moreover, the choice between buying catering service instead of buying food for an in house cantine is changing the relevant market excluding some economic operators. But the reverse is also true. And examples could be multiplied. **Requiring contracting authorities and entities to motivate each and every choice they make will create a heavy additional unproportionate burden on contracting authorities and entities conflicting with the requirements of simplification and flexibility and leading to substantially increased litigation.** Arguably, in the catering vs cantine example, the approach here criticised would also run counter to "freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others" that has been upheld by the Court of Justice.[168]

Anyway, as it will be shown in the next paragraph, the new geostrategic objectives of the EU to which public contracts are called to contribute to - resilience and industrial policy - simply can't be achieved through product regulation.

The multiplicity of the objectives of EU public contracts is here to stay, and potential conflicts are to be managed leading to politically sanctioned trade-offs. Public contracts are too important a lever to achieve strategic and geostrategic

[165] Paragraph 15; see also paragraphs 50 and 72 and the relevant Commission decisions referred therein. The topic is discussed by E. Lecchi, 'Sustainability and EU Merger Control' *Eur. Comp. L. Rev.* 2023, 44(2), 70-80.

[166] Autorité de la Concurrence, Décision n° 21-DCC-161 du 10 septembre 2021 relative à la prise de contrôle exclusif de certaines activités du groupe Bio c' Bon par la société Carrefour France (CarrefourFrance/ Bioc'Bon) (2021).

[167] So much so that the Commission communication *Guidance on the participation of third-country bidders and goods in the EU procurement market* encourages contracting authorities and entities to make use of non-price criteria to avoid buying cheap and low-quality products from outside the EU, which is clearly a choice to exclude some economic operators. As indicated in § I.5.2. an even stricter approach has been endorsed the the Court of Justice.

[168] Case C-285/18, *Kauno miesto savivaldybė (Irgita)*, ECLI:EU:C:2019:829; *Irgita* was affirmed by Joined Cases C-89/19 to C-91/19, *Rieco*, ECLI:EU:C:2020:87, and by Case C-11/19, *Azienda ULSS n. 6 Euganea*, ECLI:EU:C:2020:88.

objectives to be regulated having in mind market integration only - and even less 'competition *tout court*' only. While accepting the European Court of Auditors recommendations, in its replies the Commission was correct in pointing out that "Several recent sector-specific legal initiatives have given a new focus to the EU public procurement system, conferring to it the status of an economic tool to support the resilience and the sustainability of the EU economy".[169]

The 2014 public contracts directives themselves have not shied away from regulating the different moments in the procurement process by crafting a rather careful balance between (internal) market opening objectives (and principles) and sustainability objectives (and principle).[170] While any balancing act is eminently criticisable from a political point of view, and as such may be changed and hopefully be improved, it must be acknowledged that in doing this in 2014 the law makers have mostly towed with the case law of the Court of Justice, including the well-known *Max Havelaar* case.[171]

It is, however, arguable, that a recent judgment by the Court of Justice has upended the compromise reached in 2014 by a muscular reading of the 'competition *tout court*' principle (below § I.6.1.h.).

The balance between Internal Market and sustainability considerations has been crafted in a detailed manner in the 2014 directives and there is no proof of background inconsistencies between those two goals and among them and the provisions in the 2014 directives. The impact of sectoral legislation is considered in the External Coherence Study.

I.5.2 'New' geostrategic objectives: resilience/security and industrial policy (including European preference)

Reacting to the European Court of Auditors *Special Report*, the Commission rightly highlighted that "**public procurement, which represents 14% of the EU GDP, can play a major role in achieving key strategic objectives of the European Union, in particular the need to improve the resilience and sustainability of the EU economy and the security of supply"**.[172]

A significant number of communications, reports and studies in the past couple of years and especially in the past few months have shone the light on the (lack of) competitiveness of the EU. Most of these documents have referred to public contracts as a tool to remedy this sorry state of affairs. A thorough analysis of

[169] Available at https://www.eca.europa.eu/Lists/ECAReplies/COM-Replies-SR-2023-28/COM-Replies-SR-2023-28_EN.pdf , at p. 8.

[170] See the articulated analysis by D. Sabockis, *Competition and Green Public Procurement in EU Law – a study under Directive 2014/24/EU* (Stockholm, Jure Förlag, 2022).

[171] Case C-368/10, *Commission / the Netherlands*, ECLI:EU:C:2012:284.

[172] Available at https://www.eca.europa.eu/Lists/ECAReplies/COM-Replies-SR-2023-28/COM-Replies-SR-2023-28_EN.pdf , at p. 3.

these documents exceeds the remit of this Study and therefore references will be limited to a selection of communications and reports in order to highlight the role assigned to public procurement and concessions.

A turning point was marked by the Russian invasion of Ukraine and the consequent disruption of global supply chains which had barely recovered from a meltdown during the COVID 19 pandemics. The 2023 Commission Communication *Towards a more resilient, competitive and sustainable Europe* indicated that, "in the light of the rising geopolitical tensions and the technological transformation, the Union has embarked on a new approach to better protect its economic, security and strategic interests" and it is "taking steps to de-risk and address vulnerabilities in the EU economy across a number of key sectors", including by "promoting the resilience of its industry".[173] The overall aim is to "promote and build a more resilient, competitive and sustainable economy, protect EU citizens and guarantee their well-being".[174] Unsurprisingly, given the context, the focus is on defence procurement.[175] However, the Communication also highlights the role of public procurement among the measures aimed at reinforcing the EU's strategic autonomy in the then forthcoming NZIA (better analysed in the *External Coherence Study*).[176] It is worth recalling that already in *EVN* the reliability of the supply chain was considered as a legitimate award criterion. The Court of Justice expressly held that "the reliability of supplies can, in principle, number amongst the award criteria used to determine the most economically advantageous tender".[177]

Still the EXPP experts have lamented that the restrictive reading to the provisions allowing recourse to the negotiated procedure in case of emergency makes those rules ill-suited to address major crises such as the one following COVID. In this context, the creation of an *ad hoc* regime for emergency procurement was proposed.[178]

The role of public contracts is not limited to defensive resilience, but steers towards industrial policy in the Letta *Report*.[179] The *Report* adopts a resolutely Internal Market approach: "The Single Market has always been intrinsically linked to the EU's strategic objectives. Often perceived as a project of a technical nature, on the contrary it is inherently political. Its future is tied to the EU's strategic

[173] European Commission Communication *Towards a more resilient, competitive and sustainable Europe* COM/2023/558 final, at p. 1.

[174] At p. 2.

[175] At pp. 2 f.

[176] At p. 9.

[177] Case C-448/01, *EVN AG*, ECLI:EU:C:2003:651, paragraph 70.

[178] See also the Report by the Osservatorio Appalti Pubblici *Consultazione pubblica sulle direttive UE in tema di appalti pubblici e concessioni* at p. 39.

[179] E. Letta, *Much More than a Market* (2024).

objectives and thus to the context in which the EU acts".[180] According to the *Report*, "fostering greater integration within the public procurement market is crucial for realising the strategic goals of the European Union; innovation procurement, especially in green and digital technologies, could be one of the most important levers to support startups, scale-ups and SMEs in developing new products and services".[181]

The Draghi *Report* moves from the evolving global framework: "The previous global paradigm is fading. The era of rapid world trade growth looks to have passed, with EU companies facing both greater competition from abroad and lower access to overseas markets. Europe has abruptly lost its most important supplier of energy, Russia. All the while, geopolitical stability is waning, and our dependencies have turned out to be vulnerabilities".[182] One focus is on the drag that different domestic procurement regimes create for advanced technology procurement, such as is the case with cloud services.[183] Demand for green products should be stimulated "by promoting transparency and by introducing standardised low-carbon criteria for public procurement".[184] Innovative products should also be encouraged through procurement.[185] Another suggestion is to go for joint procurement in sectors such as LNG, critical raw materials and medicines.[186] And of course collaborative (joint) defence procurement are referred to.[187] Finally, some form of 'European preference' - expressed according to the US terminology of 'offsets' - is recommended. Indeed, "to ensure predictable demand for the EU clean tech industry and to offset trade distorting policies abroad, the report recommends introducing an explicit minimum quota

[180] At p. 3.

[181] At p. 12; see also at p. 42: "a better leveraging of public procurement practices is imperative. By adopting procurement strategies that are not only transparent and competitive but also sustainable, we can ensure that public spending aligns with and actively supports our broader goals. This strategic move can harness market power to encourage wider economic shifts towards innovation and sustainability.".

[182] M. Draghi, *Part. A*., at p. 1.

[183] M. Draghi *Part. A*. pp. 30 and 34; "A single EU-wide policy for public administrations' procurement of cloud service and data residency requirements, requiring as a minimum EU sovereign control of key elements for security and encryption Public procurement should be aligned across Member States, standardising tenders and facilitating/promoting collaboration between EU companies to scale up commercially and support consolidation in the EU, with exceptions allowed only in nationally sensitive areas (e g defence, home affairs and justice)". see also M. Draghi, *The future of European competitiveness Part B | In-depth analysis and recommendations*, available at https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf (henceforth M. Draghi *Part. B.*), at p. 84.

[184] M. Draghi *Part. B*., at pp. 105 and 111 f.

[185] M. Draghi *Part. B*., at . 255.

[186] M. Draghi *Part. A*., at pp. 50 and 57 respectively; see also M. Draghi *Part. B*., at pp. 27 ff and at p. 201 for medicines.

[187] M. Draghi *Part. A*., at pp. 8 and 60; see also M. Draghi *Part. B*., at pp. 160 ff.

for the local production of selected products and components in public procurement".[188]

The new place that the EU must secure for itself in a fast changing World is at the centre of the *Political Guidelines* presented to the European Parliament by Ursula von der Leyen in July 2024.[189] To increase competitiveness, the emphasis is on simplification, consolidation and codification.[190] Joint procurement is foreseen not just for defence products, but also for fuel and public health related supplies.[191] More generally, public contracts are seen as "one of the main levers available to develop innovative goods and services and create lead markets in clean and strategic technologies".[192] Therefore a revision of the Public Procurement Directive is announced. The first element in the future reform is "preference to be given to European products in public procurement for certain strategic sectors".[193] "[S]ecurity of supply for vital technologies, products and services" is also sought, and of course modernisation and simplification are to be achieved "in particular with EU start-ups and innovators in mind".[194]

The 2025 Communication on *A Competitiveness Compass for the EU* identifies a number of 'horizontal enablers' of competitiveness including in so far as they are relevant here, "simplifying the regulatory environment, reducing burden and favouring speed and flexibility" and "fully exploiting benefits of scale offered by the Single Market by removing barriers".[195] Unfair competition from third countries and the need to reduce dependencies in order to increase security and the resilience of the EU are once more highlighted.[196] In this context, the Communication anticipates the Clean Industrial Deal that will mobilise in a coordinated way different policy levers "to protect and promote clean tech and decarbonised manufacturing in the EU", including thanks to 'reformed public procurement rules'.[197] More specifically, public procurement is called

[188] At p. 51; a 'European preference' is referred to at p. 61 with reference to joint defence procurement; a European preference is advocated also with reference to the purchase of semiconductors: see also M. Draghi, *Part B.*, at pp. 89 f.

[189] Europe's Choice. Political Guidelines for the Next European Commission 2024-2029, available at https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en

[190] At p. 7.

[191] At pp. 14, 8 and 15 respectively.

[192] At p. 11.

[193] At pp. 11 f.

[194] At p. 12.

[195] European Commission Communication *A Competitiveness Compass for the EU* COM(2025) 30 final at p. 3.

[196] Pp. 10 ff.

[197] P. 11.

- to facilitate shifting the economy towards clean production and circularity by harnessing the power of the EU's domestic market, including through 'mandates or preference in public procurement';[198]
- to reinforce technological security and domestic supply chains, as well as simplifying and modernising rules, in particular for start-ups and innovative companies;[199]
- to increase the level of defence cooperation by "aggregating demand through increased recourse to joint defence procurement".[200]

The most 'innovative' idea is "the introduction of a European preference in public procurement for strategic sectors and technologies".[201] A very weak form of European preference is already included in Article 85 of Directive 2014/25/EU. This provision covers tenders offering products originating in third countries not bound by an agreement to guarantee reciprocal access to their markets by EU undertakings. Under Article 85(2), those tenders may be excluded when products from those countries exceed 50 % of the total value of the products constituting the tender. Under Article 85(3), in the same situation preference must be given to another tender possibly - but not necessarily - including made in Europe products, in case of equivalent tenders (i.e. when the price difference does not exceed 3 %). The application of the provision has not yet raised issues reaching the Court of Justice, which is not particularly surprising as an obligation kicks in only under strict conditions of 'equivalence'. The price advantage of third country products is normally huge, as illustrated by the *Kolin* case.[202]

The Commission Communication *The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation* indicates that

> Public procurement policies are a powerful instrument to help overcome barriers to market entry and to support sustainable and resilient industrial ecosystems, jobs and value creation in the EU. Targeted mandates and non-price criteria for sustainability, resilience as well as EU content requirements in line with the Union's international legal commitments can align national spending with the EU's broader decarbonisation and competitiveness agenda, ensuring that public spending benefits, innovation, sustainability, prosperity and creation of high-quality jobs. This

[198] At p. 9; see the analysis by A. Iurascu, *Advancing the Circular Economy through Public Procurement: Legal Framework and Implementing Pathways* (PHD thesis defended at Hasselt University on the 7th July 2025.

[199] At p. 15.

[200] *Ibidem*; see also the Joint Communication *A new European Defence Industrial Strategy: Achieving EU readiness through a responsive and resilient European Defence Industry*, JOIN (2024) 10 final, especially paragraph 2.1.1., and the Commission Communication *The Single Market: our European home market in an uncertain world. A Strategy for making the Single Market simple, seamless and strong* COM(2025) 500 final, at p. 6.

[201] At p. 14.

[202] Case C-652/22, *Kolin Inşaat Turizm Sanayi ve Ticaret AŞ*, ECLI:EU:C:2024:910.

> would also be a clear incentive for manufacturers to ramp up sustainable and resilient production.[203]

The need to widen the application of non-price criteria to procurement from energy intensive industries is highlighted.[204] More generally, the Commission proposal to revise the Public Procurement Framework in 2026 is anticipated to include "sustainability, resilience and European preference criteria in EU public procurement for strategic sectors".[205] Finally, "The Union will further support labour and social standards to ensure that the transition is fair and equitable for all, including in the context of the Commission's forthcoming evaluation of the legislative framework on public procurement".[206]

The recent *Report on Public Procurement of the European Parliament* too

> Notes that awarding public contracts based solely on the lowest price might encourage unfair competition and that this is at the expense of quality, sustainability and social standards; insists that more contracts, especially for intellectual services, should be awarded based on the best price-quality ratio, through use of MEAT criteria, meaning that tenders should be evaluated not only on price but also on factors such as quality, regional impact or continuity of supply of complex and essential services; adds that non-price considerations should be given a substantial weight in the overall rating and final decision on the award of contracts, especially for engineering services, which are essential to ensure high-quality, profitable projects in the long term, while protecting innovation and deterring the submission of abnormally low tenders.[207]

A preference for non-price criteria will more often than not turn into promoting some sustainability criteria. It is too early to say whether the quest for resilience and the preference for short supply chains will occasionally make place for even more 'localised' procurement.[208] This might be the case with the very recent Communication from the Commission *A Vision for Agriculture and Food. Shaping together an attractive farming and agri-food sector for future generations*. The Communication stresses the need to go "back to the 'roots' and re-establishing the link between food, territory, seasonality, cultures and local traditions is very important".[209] Therefore, "

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[203] COM(2025) 85 final, § 3.1.

[204] *Ibidem.*

[205] *Ibidem*.

[206] At. p. 21.

[207] A10-0147/2025 esp. paragraph 38.

[208] See the reflections by I. Hasquenoph, 'Sustainable public procurement and geography' *Public Procurement Law Review*, 2, 2021, 63-77.

[209] COM(2025) 75 final, p. 22.

> Public procurement should pursue a 'best value' approach to reward quality and sustainability efforts made by European farmers, food industry and services, and should provide opportunities for small and medium-sized enterprises (SMEs) to participate in such activities. This can provide the right incentives to promote the consumption of local, seasonal products, and food produced with high environmental and social standards, including organic products and food originating from shorter supply chains. Linked to this, the development of short food supply chains remains of strategic importance to ensure fairer prices for farmers, fishers and improved access to fresh and seasonal products for consumers.[210]

It is finally only fair to stress that emphasis on the potential role of public contracts in pursuing different societal goals is not an aberration - and was already anticipated in the 2014 directives. Historically, public procurement has been almost always used as a policy tool. Substantially following the already recalled argument by Colin Turpin, Trigve Harlem Losnedahl illustrates the historical fallacy of the belief that public procurement rules have always been concerned with efficiency and value for money.[211]

It is to be seen if the new objectives of resilience, short supply chains, 'buy European' etc will lead to changes into the provisions of the public contracts directives. If so, award criteria will be the most probable candidates for reform. Following *Kolin* and *Qingdao*, the provisions on the participation of economic operators from third countries to EU award procedures will have to be adapted to design the regime for the participation in award procedures in the EU of those third country economic operators not benefiting from reciprocal market opening agreement.[212] The members of the Network of first instance public procurement review bodies have stressed that unfortunately neither the case law nor the Commission are providing clear enough guidance as to the treatment of the concerned third country economic operators, including in the case of consortia.

The plurality of objectives to which public contracts are called to answer is not going to go away. The 14% of the GDP is too sizable a chunk of EU economics to be left to perfunctory buying.

While 'sustainability' - in both its environmental and social facets - and 'resilience' are already an objective and a permissible consideration

[210] At p. 23.

[211] T. Harlem Losnedahl, 'Formål og virkemidler i regulering av offentlige anskaffelser – en rettshistorisk analyse' (English title: Ends and means in regulation of public procurement law – a legal historical analysis) 136(4) *Tidsskrift for Rettsvitenskap* 2023, pp. 359–442. An English translation of the article which was used here is available at https://www.jus.uio.no/nifs/english/people/aca/trygvehl/english-translation---trygve-harlem-losnedahl---ends-and-means-in-the-regulation-of-public-procurement-a-legal-historical-analysis---tidsskrift-for-rettsvitenskap-2023.pdf

[212] Case C-652/22, *Kolin Inşaat Turizm Sanayi ve Ticaret AŞ*, ECLI:EU:C:2024:910; Case C-266/22, *CRRC Qingdao Sifang Co. Ltd*, ECLI:EU:C:2025:178.

respectively, any 'European preference' will be a very relevant innovation in the EU public procurement legal framework. Any such 'European preference' will have to be part and parcel of a new industrial policy suited to fast changing trade patterns.

Adequately balancing any new objective with the proper functioning of the procurement acquisition processes will be required.

I.6. Examples of inconsistency between objectives, principles and actual provisions in the directives emerging from the case law

As already recalled, this Study also aims at:

- Assessing whether differences of approach among the provisions in each directive undermine the achievements of the objectives, and to
- Identifying where the inconsistencies/conflicts within and between the directives create particular challenges for public buyers and economic operators in the practice.

This section intends to fulfil the tasks by analysing a number of specific issues which have been much litigated in the past ten years or so. Examining concrete and actual examples allows for a sharper analysis of conflicts among different components of the EU public contracts landscape (objectives, principles and specific provisions). Litigation is a sure pointer to inconsistencies among the provisions themselves and between them and the principles and/or objectives of the 2014 directives (§ I.6.1.). The microanalysis allows the identification of a few macrotrends in the case law that raise specific challenges for public buyers and also for economic operators (§ I.6.2.).

It is worth indicating upfront that those issues do not always arise from conflicts between objectives or between objectives and provisions. While this may sometimes be the case, it is argued here that often enough **it is the way the general principles are operationalised in pursuing the objectives and what interpretative preferences are developed in the case law that do lead to difficulties in the application of EU public contracts law.**

To provide a fuller picture, the Study also points to a couple of gaps in the EU public contract rules that undermine the achievement of some of the objectives of the 2014 directives (§ I.7.).

I.6.1 Microanalysis

A number of issues regularly surface in the case law of the Court of Justice that highlight clashes between the objective and/or principles and/or provisions in the 2014 directives.

A first issue revolves around the question of whether - and if so to which extent - tenderers are allowed to clarify or even change their tenders (§ I.6.1.a.)? A specific aspect of the question is whether tenderers are allowed to change their 'team' (subcontractors and relied upon entities) during the award procedure, including because the latter do not meet some participation requirement (§ I.6.1.b.). This naturally leads to consider the operation of optional exclusions at large, including with reference to self-cleaning (§ I.6.1.c.), and specifically the treatment of dubious competitive practices (§ I.6.1.d.). A horizontal question is whether and if so and how far can the Member States guide or constrain the discretion of contracting authorities and entities in enforcing compliance with mandatory requirements (§ I.6.1.e.). A connected issue is the treatment of "applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law" (§ I.6.1.f.). All the issues listed so far pertain to the selection and exclusion of tenderers or tenders. This is not surprising, as it is clear from both the literature and from the interaction with our colleagues and other experts that the qualification phase (exclusion and selection) is specifically problematic from the point of view of achieving the objectives of the 2014 directives. It is indeed in the qualification phase that the risks of discrimination against economic operators from other Member States is higher. The answer to this concern is the very detailed rules in Directive 2014/24/EU, while different approaches can be found in Directives 2014/23/EU and 2014/25/EU. Compliance with the very detailed rules in Articles 57 ff. of Directive 2014/24/EU creates a huge burden on economic operators, and this even more so on economic operators coming from other Member States, but also on contracting authorities. This in turn leads to frequent litigation as was confirmed by members of the Network of first instance public procurement review bodies. To try and alleviate this burden, the role of information and data will be briefly touched upon next (§ I.6.1.g.) Finally, the role of sustainability in technical specifications and the more niche but still very relevant issue of the maximum value or maximum quantity in framework agreements will be analysed to show how competition *tout court* has led the case law to stray away from the objectives of the directives. from precedents and even from quite clear provisions (§§ I.6.1.h. § I.6.1.i.).

The above list is not exhaustive of the issues raised in the application of the 2014 procurement and concession directives. Members of the Network of first instance public procurement review bodies have also mentioned abnormally low tenders, contract changes and early termination of contracts as problematic areas. Still, and while it is remarkable that those issues have mostly not reached the Court of

Justice, providing a full picture of litigation in the 27 Member States would have required a full-fledged and extensive comparative research. However, given the limitations, including the little time available, for this Study, the methodological choice was to focus here on the otherwise very rich case law of the Court of Justice without going into decisions of national review bodies and courts (above § 0).

I.6.1.a. Clarifications and changes to the tender

The distinction between clarification(s) and changes to the tender has been much debated in the case law in the past decade. The clash is between the wider participation to award procedures, which is served by allowing economic operators to explain away mistakes or unclarities in their tenders, and the principle of equal treatment and the ensuing concern that allowing economic operators and contracting authorities to tinker with duly and on time submitted tenders would give one competitor unfair advantages. Lastly, equal treatment is checked under the proportionality principle.[213]

Under Article 56(3) of Directive 2014/24/EU,

> Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

According to the settled case law, a tenderer may however be excluded when "it has failed to comply with an obligation that is expressly imposed — on pain of the operator's being excluded — by the documents relating to that procedure or provisions of national law in force".[214]

Besides the situation where an exclusion is lawfully provided in the contract documents, the proper delineation of the permissible area for clarification is far from clear. In *Klaipedos*, the Court of Justice repeated that a request for clarification cannot "make up for the lack of a document or information the submission of which was required by the contract documents, since the contracting authority is required to observe strictly the criteria which it has itself

[213] E.g. Case C-309/18, *Lavorgna*, ECLI:EU:C:2019:350, paragraph 24; the Court refers to Case C-144/17, *Lloyd's of London*, EU:C:2018:78, paragraph 32 and to the case-law cited.

[214] Case C-309/18, *Lavorgna*, ECLI:EU:C:2019:350, paragraphs 21 ff and case law referred therein; the hilarious aspect of the case was that the Italian lawmakers had finally managed to clarify the obligation set on pain of exclusion, but the contract documents apparently were still quite confusing.

laid down. In addition, such a request may not lead to the submission by a tenderer of what would appear in reality to be a new tender".[215] The question, therefore, is what makes a new tender? Unfortunately, there is no clear standard. It is believed that the case law inaugurated by *pressetext* and consolidated in Article 72 of Directive 2014/24/EU is applicable here.[216] Even limited changes in the tender may easily shift the result of the award procedure and therefore be considered 'substantial' and result in breaches of the equal treatment principle.

Members of the Network of first instance public procurement review bodies have also highlighted that Article 56 falls short of clarifying whether it is in some cases possible to provide evidence or other means of proof after the deadline for submitting the tender. The issue was raised by the Croat referring court in *Kolin*, but unfortunately the Court did not answer the question.[217] In line with commercial practice, some experts even suggest that means of proof should be required only after contract award. As novel as the idea might seem in the light of a traditional public procurement approach, it is to be recalled that in cases like *NV Construct* the Court allowed for evidence of capacity to perform the contract to be produced after contract award (below I.6.1.e.).[218] A more general tendency in the case law pushes for procrastinating the assessment of qualification requirements and this *a fortiori* should lead to a lower evidentiary threshold for clarifications. In turn, this trend raises some issues from the point of view of sound management of the acquisition processes (below § I.6.1.a.).

An interesting case, decided in the application of Directive 2004/18/EC, is *Partner Apelski Dariusz*.[219] An economic operator had participated in the award of all lots of a large contract for Summer and Winter street cleansing in Warsaw. As it did not meet the experience required for the whole contract, it relied on another entity that was however lawfully considered not to be suitable by the contracting authority. Therefore, the tenderer asked to be considered only for some lots it indicated to the contracting authority after the opening of the tenders. The Court of Justice held that a communication, by which an economic operator indicates "the order of priority of the lots of the contract concerned according to which its tender should be assessed, far from being merely a clarification made on a limited or specific basis or a correction of obvious material errors [...] constitutes, in reality, a substantive amendment which is more akin to the" - inadmissible - "submission of a new tender".[220]

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[215] Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, ECLI:EU:C:2021:700, paragraph 93.

[216] Case C-454/06, *pressetext Nachrichtenagentur*, EU:C:2008:351.

[217] Case C-652/22, *Kolin Inşaat Turizm Sanayi ve Ticaret AŞ*, ECLI:EU:C:2024:910.

[218] Case C-403/21, *NV Construct*, ECLI:EU:C:2023:47.

[219] Case C-324/14, *Partner Apelski Dariusz*, ECLI:EU:C:2016:214.

[220] Paragraph 68.

The scope of application of the rules on clarifications of tenderers is defined by the unresolved conflict between the concern for wider participation and the principle of equal treatment. The same conflict arises on whether it is possible to provide proof of the assertions in the tender after the contract award.

I.6.1.b. Changes to the tenderer's 'team'

Even direr conflicts among the 'objective' of wider participation on the one hand and the principles of equal treatment and transparency on the other hand arise concerning the limits to the possibility for tenderers to change their named subcontractors and/or relied upon entities.

Before going into this issue, some relevant differences between reliance and subcontracting need to be highlighted taking as point of reference the provisions in Directive 2014/24/EU. The identity of the entity relied upon is disclosed by the tenderer under Article 59(1), to allow the contracting authority to "verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion" (Article 63(1), second phrase).[221] In *Ambisig* the Court of Justice held that contracting authorities must have the power to check whether the relied upon entity meets the selection criteria before awarding the contract, and therefore national legislation cannot postpone the check to after the contract award.[222]

Concerning subcontracting instead, "the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors" (Article 71(2)). If this is not the case, for works contracts and for services to be provided at the contracting authority's facilities, the contracting authority shall be given the name and other details of the subcontractors "after the award of the contract and at the latest when the performance of the contract commences". It must also be informed of "any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services" (Article 71(5)).[223]

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[221] See R. Vornicu, 'Comment to Article 18(2)' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) at pp. 682 f.

[222] Case C-469/22, *Ambisig*, ECLI:EU:C:2023:25, paragraphs 26 f.

[223] See, also with reference to whether the obligation extends throughout the supply chain, J. Stalzer, 'Comment to Article 71' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) at 764.

Since, as just anticipated, the relied upon undertakings are always indicated already at tender stage and the contracting authorities are to check their compliance with selection criteria, "The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion" (Article 63(1) second phrase).[224]

The first relevant case is *Casertana Costruzioni*.[225] This case was decided based on Directive 2004/18/EU. That directive did not explicitly foresee the possibility of replacing a non-compliant auxiliary entity and the Court of Justice excluded the possibility to read the old directive in the light of the new.[226] Therefore the reasoning was based on the objectives of the directive and its general principles. The Court recalled that reliance on other entities is consistent with the objective of the widest opening up to competition of procurement markets.[227] However, contracting authorities and entities are "required to afford economic operators equal, non-discriminatory and transparent treatment".[228] These requirements preclude any negotiation with a tenderer.[229] While clarifications are allowed,[230] a change in the consortium would amount to a substantial change of the tender which would be inconsistent with the principle of equal treatment.[231]

One might argue that in *Casertana Costruzioni*, the Court of Justice was particularly strict. However, technically speaking, a 'consortium' is a more structured form of cooperation than reliance on the capacities of other entities, so much so that it is the consortium as a whole to be the tenderer.[232] A tenderer and the entity it relies upon are separate and stay distinguished, including in terms of responsibility towards the contracting authority or entity. Still, the cases relied upon by the Court in *Casertana Costruzioni* were not so strict. In *Idrodinamica Spurgo Velox*, the Court of Justice had held that "the decision authorising the change in composition of the consortium to which the contract had been awarded necessitates an amendment of the award decision which may be regarded as substantial if, in the light of the particular features of the tender award procedure in question, it alters one of the essential elements that were decisive in the

[224] R. Vornicu, 'Comment to Article 18(2)' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) at p. 683.

[225] Case C-223/16, *Casertana Costruzioni*, ECLI:EU:C:2017:685.

[226] Paragraph 27; see above § I.3.1.

[227] Paragraph 31.

[228] Paragraph 33.

[229] Paragraph 35.

[230] Paragraph 36.

[231] Paragraph 39 f.

[232] Case C-129/04, *Espace Trianon and Sofibail*, ECLI:EU:C:2005:521.

adoption of the award decision".[233] Such a change was therefore not automatically nor necessarily to be considered as a substantial amendment to the tender. This was even clearer with reference to changes to subcontractors. In *Wall* the Court of Justice held that such a change could only in exceptional cases constitute a 'substantial change'.[234]

As already recalled, Article 63(1) second phrase, of Directive 2014/24/EU, has provided for the replacement of auxiliary entities, and this change has fed into the case law. At issue in *Rad Service* were some Italian provisions which did not allow for replacement or substitution of the ancillary undertakings that made an untruthful declaration as to the existence of criminal convictions.[235] The Court of Justice held that the Member States cannot deprive the contracting authority of the power to allow substitution given them by the last part of the second phrase in Article 63(1).[236] According to the Court, even before requiring the replacement of the ancillary undertaking, the contracting authority must give the tenderer and/or the relevant entity the "opportunity to submit to it corrective measures which it may have adopted in order to remedy the irregularity found and, consequently, to demonstrate that it may once again be considered a reliable entity" (below I.6.1.c.).[237] The conclusion is buttressed by the principle of proportionality whose relevance is even stronger in case of an exclusion imposed not for a failure attributable to the tenderer, but "for a failure committed by an entity on whose capacities the tenderer intends to rely and over which it has no power of review".[238]

However, in accordance with the principles of transparency and of equal treatment, the replacement of the entity relied upon must "not materially amend the tenderer's bid".[239] More specifically,

> The obligation on the contracting authority to comply with the principle of equal treatment of tenderers, which seeks to encourage the development of healthy and effective competition between undertakings participating in a public procurement procedure, and which lies at the very heart of the EU rules on public procurement procedures, implies, in particular, that tenderers must be on an equal footing both when they formulate their

[233] Case C-161/13, *Idrodinamica Spurgo Velox and Others*, EU:C:2014:307, paragraph 39.

[234] Case C-91/08, *Wall*, EU:C:2010:182, paragraph 39.

[235] Case C-210/20, *Rad Service Srl Unipersonale*, ECLI:EU:C:2021:445; the case was upheld by Order in Case C-316/21, *Monument Vandekerckhove*, ECLI:EU:C:2021:837, paragraphs 36 ff.

[236] Paragraph 33; paragraph 34 of the judgement upholds the concussion by reference to the principle of proportionality, requiring the decision about any replacement not to go beyond the objective "to enable the contracting authority to satisfy itself that each of the tenderers has integrity and is reliable and, consequently, that the relationship of trust with the economic operator concerned will not be broken".

[237] Paragraph 36.

[238] Paragraph 39.

[239] Paragraph 42.

> tenders and when those tenders are assessed by that contracting authority. The principle of equal treatment and the obligation of transparency thus preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer.[240]

In *Rad Service*, the Court draws a parallel between a request for clarification of a tender and a request by a contracting authority for the replacement of an ancillary undertaking. In both cases, the change "must not result in the tenderer submitting what would in reality appear to be a new tender, since this would materially amend the initial tender".[241]

Still, because of Article 63(1) of Directive 2014/24/EU, changing the entity relied upon seems even easier than clarifying a tender and the same reasoning applies *a fortiori* to the change of named subcontractors. Given the rather liberal approach in the recent case law, it is doubtful whether *Casertana Costruzioni* is still good law and still holds true or whether it should be reconsidered in the light of the proportionality principle. The inescapable conclusion is that contracting authorities are called to perform uncertain balancing exercises in deciding which changes to the team are allowed and which are not. Moreover, members of the Network of first instance public procurement review bodies highlighted that economic operators not availing themselves of other entities are in a worse position if found not meeting the selection criteria. Unsurprisingly, those members call for a clarification of the case law just discussed above.

Rules about consortia, reliance upon other entities and subcontracting are not clear as to what changes are allowed and the application of the general principles is not helping in clarifying the law.

I.6.1.c. Optional exclusions and self-cleaning

As already recalled, (some of the) optional exclusion clauses are there to ensure the reliability of potential contractors. Exclusions limit the 'wider participation' which is at the core of the Internal Market objective of the 2014 directives to protect contracting authorities' and entities' trust in their contractors (above § I.3.5.). Exclusions just do public procurement 'common sense' which act as a sensible limit to those directives' principal objective. Under the 2004 directives

[240] Paragraph 43; the Court refers to Case C-131/16, *Archus and Gama*, EU:C:2017:358, paragraphs 25 and 27 and to the case-law therein cited.

[241] Paragraph 44; the Court refers to Case C-599/10, *SAG ELV Slovensko and Others*, EU:C:2012:191, paragraph 40; Case C-324/14, *Partner Apelski Dariusz*, EU:C:2016:214, paragraph 64, and to Case C-131/16, *Archus and Gama*, EU:C:2017:358, paragraphs 31 and 37.

the Court of Justice upheld national provisions mandating exclusion in case of breaches then considered e.g. in Article 45(2) of Directive 2014/24/EU.[242]

In recent years, however, the Court of Justice started to refer to proportionality and to other general principles to make sure that the 'limit' does not go beyond what is necessary to achieve the 'specific' objective - ensuring the reliability of prospective contractors - laid down for instance in Recital 101 of Directive 2014/24/EU.

This ballet of limits and counter limits was well illustrated in *Tim*.[243] Given the importance of sustainability in the overall scheme of EU public contracts law (above § I.2.1.), the Court of Justice was ready to recognise that national legislation may provide that a contracting authority has the possibility or even the duty to exclude economic operators in breach of the obligations relevant under Article 18(2) of Directive 2014/24/EU.[244] However, that possibility is qualified immediately thereafter, as the Court binds the contracting authority to compliance with the principles of procurement, equal treatment and proportionality first among them.[245] This entails that the contracting authority must take into account the 'minor nature' of the irregularities committed or their repetition.[246] Moreover, it must give the contractor - or the subcontractor - the opportunity to provide evidence as to the measure taken to reestablish their reliability.[247]

HSC Baltic concerned a Lithuanian rule providing for the automatic exclusion of all members of a consortium when a previous contract had been terminated for misperformance. According to the Court, the principle of proportionality stands in a way of automatic exclusion, instead requiring "a specific assessment of all the relevant factors adduced by that operator in order to demonstrate that its entry on that list is not justified in the light of its individual conduct".[248]

This approach was also followed in *RAD*, a case focusing on the means available to the economic operator to be aware of any exclusion ground.[249] The Court of Justice held once more that "The principle of proportionality requires the contracting authority to carry out a specific and individual assessment of the

[242] E.g. Case C-470/13, *Generali-Providencia Biztosító*, ECLI:EU:C:2014:2469, in case of infringement of competition rules.

[243] Case C-395/18, *Tim*, ECLI:EU:C:2020:58.

[244] Paragraph 43.

[245] Paragraphs 44 f.

[246] Paragraph 48.

[247] Paragraphs 50 ff.

[248] Case C-682/21,*'HSC Baltic' UAB*, ECLI:EU:C:2023:48, paragraph 46.

[249] Case C-210/20, *Rad Service Srl Unipersonale*, ECLI:EU:C:2021:445.

conduct of the entity concerned on the basis of all the relevant factors".[250] It did not help to save the rigid application of the exclusion grounds the fact that under the applicable Italian legislation the head of the *ad hoc* consortium had no way to know about the past conviction as the criminal conviction "did not appear in the extract from the judicial record which may be inspected by private entities".[251]

The case law is requiring a 'specific assessment' not just with reference to the materiality of a ground of exclusion, but also on the applicability of self-cleaning. In *Tim* the Court of Justice held that contracting authorities must be given the power to assess, "on a case-by-case basis, the particular circumstances of the case or the economic operator being able to demonstrate its reliability despite the finding of that failure". This places a relevant burden on contracting authorities and entities and is a source of litigation.

I.6.1.d. Dubious competitive practices

The recent cases breaking the link between 'competition' and wider participation in the Internal Market show that the shift is not without costs to other objectives or principles in EU public contracts law (above § I.3.4.).

In *BTA Baltic Insurance Company* the Court of Justice has found to be inconsistent with EU law some national Latvian provisions providing for the termination of the tender process in case the successful tenderer had declined to sign the contract to the benefit of the second ranked one. Based on the 'objective' of promoting "healthy and effective competition", according to the Court, the collusive behaviour had instead to be proven on the specific facts of the case.[252]

Arguably, 'on the facts of the case', the indices of collusive behaviours were rather clear, as the two tenderers formed part of a single economic operator even if declaring that they had prepared their tenders independently and without coordination. Most probably here the coordination had taken place when deciding the withdrawal of the first – and cheaper for the public authority – tender. In any case, it is doubtful whether a procurement procedure is an appropriate framework for launching complex antitrust investigations.

Another troubling case is *Landkreis Aichach-Friedberg*.[253] Under Article 57(4)(d) of Directive 2014/24/EU, an economic operator may be excluded in the presence of "sufficiently plausible indications" that it "has entered into agreements with

[250] Paragraph 40; the Court refers to Case C-465/11, *Forposta and ABC Direct Contact*, EU:C:2012:801, paragraph 31, and to Case C-267/18, *Delta Antrepriză de Construcţii şi Montaj 93*, EU:C:2019:826, paragraph 29.

[251] Paragraph 41.

[252] Case C-769/21, *AAS 'BTA Baltic Insurance Company'*, ECLI:EU:C:2022:973, paragraphs 37 ff.

[253] Case C-416/21, *Landkreis Aichach-Friedberg*, ECLI:EU:C:2022:689.

other economic operators aimed at distorting competition". A trader operating under his own company name but being also the managing director and sole shareholder of a separate bus transport company submitted two tenders answering to the same contract notice, one in his own name and one in the name of the bus company. According to the referring court, the problem in the application of Article 57(4)(d) to such a situation was that EU competition law does not apply to agreement within an 'economic unit'.[254] However, according to the Court of Justice, that provision "covers cases in which economic operators enter into any anti competitive agreement and cannot be limited solely to the agreements between undertakings referred to in Article 101 TFEU".[255] A broad interpretation is necessary to achieve the 'objective' of the provision - i.e. "to enable contracting authorities to assess and take into account the integrity and reliability of each of the economic operators, so that they may exclude from procurement procedures unreliable tenderers with whom they cannot maintain a relationship of trust".[256] Therefore, "agreements between economic operators which do not affect trade between Member States are to be taken into account by the contracting authorities in connection with the optional ground for exclusion provided for therein".[257]

Still, according to the Court of Justice, Article 57(4)(d) presupposes an agreement between *two* economic operators. On the facts of the case, and subject to the assessment of the referring court, the Court came to the conclusion that "it cannot be considered that two economic operators who, in substance, pass through the same natural person to take their decisions, may enter into 'agreements' between them, in so far as there do not appear to be two separate intentions that are capable of converging".[258] This makes Article 57(4)(d) inapplicable. However, according to the Court of Justice, the inapplicability of the provision does not mean that the two tenders should be accepted. The fact that the optional grounds for exclusion are listed exhaustively, is held not to prevent "the principle of equal treatment [...] from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent".[259] According to the Court, the principle of equal treatment "would be infringed if those tenderers were allowed [to] submit coordinated or concerted tenders, that is to say, tenders

[254] See Case C-531/16, *Ecoservice projektai*, ECLI:EU:C:2018:324; see also I. Hasquenoth, *Contrats publics et concurrence* (Paris, Dalloz, Nouvelle Bibliothèque de Thèses, vol. 206, 2021) n° 545.

[255] Paragraph 29; see also the *Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground*, C (2021) 1631 of 15.03.2021.

[256] Case C-416/21, *Landkreis Aichach-Friedberg*, ECLI:EU:C:2022:689, paragraph 42.

[257] Paragraph 44.

[258] Paragraph 50.

[259] Paragraph 57; see also paragraph 58.

that are neither autonomous nor independent, which would be likely to give them unjustified advantages in relation to the other tenderers".[260]

In conclusion, in *Landkreis Aichach-Friedberg* the 'objective' of the Article 57(4)(d) of Directive 2014/24/EU to limit participation to reliable economic operators vouchsafes its broad interpretation. On the facts of the case, however, this broad interpretation is not sufficient to ensure that the objective is met. The general principles need to be called for help. This, to the price of introducing an exception and thus substantially negating the exhaustive character of the list of exclusion clauses in the 2014 directives. It is doubtful whether ripping through the fabric of exclusion clauses was really needed, as the wider exclusion clause under Article 57(4)(c) - professional misconduct - was clearly applicable to the case.[261]

This seems to be one case in which the hurry to have recourse to the general principles is actually interfering with the plain application of the provisions in the directives.

A peculiar understanding of 'competition' as an objective served by 'equal treatment' was at play in *Staten og Kommunernes Indkøbsservice*. The call for tenders for library services avowed that "The market for library materials is characterised by there being only a few specialised suppliers and potential tenderers. Danish books and sheet music constitute the largest product area in terms of turnover and are commercially important for the potential tenderers. In order to safeguard competition in the market in the future, the contracts relating to Danish books and sheet music are divided geographically into two lots". Any tenderer could bid for both lots, and the lower value lot was to be awarded to the second ranked, provided that it accepted the price offered by the tenderer ranked first. Two Danish tenderers bid and the one having submitted the lowest lot in both lots complained about not being awarded the smaller value one as well. The Court of Justice upheld the scheme based on the finding that "The objective of the principle of equal treatment, set out in Article 18(1) of Directive 2014/24, is to encourage the development of healthy and effective competition between undertakings taking part in a public procurement procedure and lies at the very heart of the EU rules on public procurement procedures. In accordance with that principle, tenderers must be on an equal footing both when they formulate their

[260] Paragraph 59.

[261] "where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable". See also paragraph 45. In Case C-470/13, *Generali-Providencia Biztosító*, ECLI:EU:C:2014:2469, paragraphs 34 f, the Court of Justice in applying Directive 2014/24/EU had indeed held that infringement of competition rules - which was then not expressly mentioned as a cause for optional exclusion - amounted to 'grave professional misconduct'; see A. Sanchez Graells, 'CJEU supports interaction between competition and public procurement rules (C-470/13)'.

tenders and when those tenders are being assessed by the contracting authority".[262]

This is a very formal understanding of equal treatment, as indeed the bid documents were clear and known beforehand. However, the scheme, to ensure the continued existence of a competitive market, allowed a second chance to get a contract to one of the competitors, the one having fared poorly in the award procedure. Clearly, this is a case of 'competition' for the sake of competition, and for sure not of cross-border competition. At the same time, one might well wonder why EU law should be involved in a 100% Danish case without any cross-border interest as it is doubtful that economic operators from other Member States might be interested in providing books and other material in Danish. The answer is in the thresholds that were greatly exceeded.

It is submitted that, by adhering to a wide understanding of 'competition' oblivious of its Internal Market hallmark, the Court of Justice is increasing the uncertainty in the application of the 2014 directives.

I.6.1.e. Compliance with mandatory requirements

Traditionally, EU public contracts law has not regulated the full procurement cycle, leaving room for national rules. However, how EU and national mandatory legal requirements are to be incorporated in the procurement process is all but clear. There are two distinct but closely interlinked topics. The first relates to the identification of the phase in the acquisition process in which such mandatory requirements are to be assessed. The second addresses the problem of whether mandatory legal requirements are applicable even if the contracting authority or entity failed to mention them in the call for tenders or in any other contract documents. On both points the case law is less than straightforward.

The first issue was addressed in *Sanresa*, a case concerning a contract for hazardous waste management services.[263] A temporary association was excluded from the procedure as none of its members had the authorisation required under Regulation (EC) No 1013/2006 on shipments of waste. However, under Article 5 and the Annexes to the regulation, the authorisation to the shipment required the applicant to declare the designation and the composition of the waste and its physical characteristics. This information was not known to the contracting authority nor to the tenderers as waste had to come from an old dump 'managed' well before strict rules were enacted in the implementation of the relevant EU rules. On this specific facts of the case and on the basis of the EU rules applicable to the shipment of waste, the Court of Justice excluded that the requirement of an authorisation could be treated as a 'a particular

[262] Paragraph 30.

[263] Case C-295/20, *Sanresa*, ECLI:EU:C:2021:556.

authorisation' under Article 58(1)(a) and (2) of Directive 2014/24/EU,[264] or as a requirement concerning technical or professional ability under Article 58(1)(c) and (4) as the latter pertains to experience and is therefore retrospective.[265] Indeed, the authorisation could have been required by the contractor only after having assessed the content of the dump. The Court is however ready to concede that the contracting authority could well have required as a selection criterion that tenderers had already carried out activities practically equivalent to those required by the contract i.e. previous experience in the shipment of hazardous waste.[266] This was not the case, and the Court held that the requirement of an authorisation under Regulation (EC) No 1013/2006 relates to the performance of the contract.[267]

In *NV Construct* the contract related to preliminary studies for road construction.[268] Under the applicable Romanian legislation, the contractor and its subcontractors were to be authorised by the Romanian railway authority. The reasoning of the Court of Justice starts by indicating that the contracting authority has discretion in determining which requirements for participation it considers appropriate to ensure "the performance of the contract to a quality standard which it considers appropriate".[269] The following reasoning of the Court slowly slips from the acknowledgement of a 'broad' discretion to a stricter approach to the requirements. According to the Court, a contracting authority may either decide to include or not, amongst the selection criteria, obligations under special laws applicable to the activities that may be required to be carried out in the context of performing the public contract,[270] or instead prefer to "refer to those same obligations as part of the conditions for performance of contracts in order to require compliance with them from a single tenderer only" (i.e. the chosen contractor).[271]

However, and the change in track is abrupt, the Court of Justice then refers to *Sanresa* to the effect that "to oblige tenderers to satisfy all the conditions of

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[264] Paragraph 44.

[265] Paragraphs 47 f.

[266] Paragraph 54.

[267] Paragraph 52.

[268] Case C-403/21, *NV Construct*, ECLI:EU:C:2023:47.

[269] Paragraph 60; the Court refers to Case C-195/21, EU:C:2022:239, *Smetna palata na Republika Bulgaria*, paragraph 50.

[270] Paragraphs 61 f.

[271] Paragraph 62; the Court refers to Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, EU:C:2021:700, paragraphs 88 and 89; see also paragraph 63 to the effect that While, in general terms, Directive 2014/24/EU does "not preclude the consideration of technical requirements simultaneously as selection criteria relating to technical and professional ability, as technical specifications and/or as conditions for the performance of the contract" (Article 58(4), Article 42 and Article 70 respectively), a contracting authority may opt for only one of those classifications; *Klaipėdos regiono atliekų tvarkymo centras*, Case C-927/19, EU:C:2021:700, paragraph 84, is referred to concerning the possibility of simultaneous consideration.

performance of the contract at the time of submission of their tenders would be to impose an excessive requirement – one which might dissuade economic operators from participating in procurement procedures – and would thus infringe the principles of proportionality and transparency guaranteed by Article 18(1)".[272]

The Court is thus extending the rationale of *Sanresa* well beyond the specific circumstances of that case. Indeed, the requirement under the Romanian legislation might well have been qualified as an authorisation requirement under Article 58(1)(a) and (2) of Directive 2014/24/EU. Basically, in compliance with the above-mentioned principles, it is in theory possible - but in practice very difficult - to impose compliance with obligations under special laws as selection criteria.[273] The Court is thus showing a clear preference for treating domestic mandatory requirements as contract performance conditions.

In *Sanresa*, the Court of Justice also addressed the question concerning the applicability of legal requirements that were not expressly mentioned in the contract documents. According to the Court, "while a contracting authority is required, in principle, to state any condition of performance in the call for tenders or the procurement documents, the failure to do so does not make the procurement procedure unlawful where the condition of performance in question clearly arises from *EU legislation* applicable to the contractual activity" (*emphasis added*).[274]

In *NV Construct* as well, the requirement that the contractor and its subcontractors were to be authorised by the Romanian railway authority was not set out in the procurement documents.[275] The question was therefore if the proportionality and transparency principles stood in the way of procurement documents being automatically supplemented with qualification criteria arising under special laws. The answer is in the negative, "otherwise the broad discretion that the contracting authority has in determining the selection criteria that it wishes to impose on economic operators as conditions for participating in a procurement procedure would be rendered devoid of any substance".[276]

The Court of Justice is here conflating the two issues. One problem is whether transparency precludes referring to requirements that were not mentioned in the contract documents. A different question is whether proportionality - and the discretion to be left to the contracting authorities - stand in the way of imposing by law selection criteria. Obviously the question for preliminary reference was not well fine-tuned, but the impression is that the Court intends to rule out the

[272] Paragraph 65; Case C-295/20, *Sanresa*, EU:C:2021:556, paragraph 62 is referred to.

[273] Paragraph 66.

[274] Case C-295/20, *Sanresa*, ECLI:EU:C:2021:556, paragraph 60.

[275] Case C-403/21, *NV Construct*, ECLI:EU:C:2023:47.

[276] Paragraph 68.

possibility to refer to *national requirements* not mentioned in the contract documents, thus introducing a difference of treatment compared to EU law requirements and basically imposing contract execution in breach of domestic legislation.[277] Moreover, referring to the principle of proportionality and to the discretion of contracting authority, the Court appears to rule out the possibility for the Member States to introduce mandatory requirements as selection criteria (see also below I.6.2.b.).

Finally, the lingering uncertainty is not eased by the case law holding - based on the equal treatment and transparency principle - that tenderers may not be excluded from award procedures based on an interpretation of the law by the national authorities when an obligation did expressly arise from the documents relating to that procedure or out of the national law in force.[278] It is indeed uncertain whether 'clear' legislative obligations are sufficient to bind tenderers or whether they need being recalled in the contract documents.[279]

Even when the general principles are called in to help with the interpretation of the relevant provisions, it remains unclear whether national mandatory standards are to be expressly recalled in the contract documents or whether economic operators are to be knowledgeable of the legal environment they want to operate in (see further below I.6.2.b.).

I.6.1.f. Non-compliance with environmental and social criteria

As already recalled (above § I.5.1.), even if progresses compared to pre-existing legislation are significant, the consideration of social - including workers' rights - and environmental obligations is somewhat lukewarm in the 2014 directives. Article 18(2) of Directive 2014/24/EU and the corresponding provisions in the other directives trust the Member States to take appropriate measures to ensure that the 'applicable obligations in the fields of environmental, social and labour law' are enforced in the performance of public contracts. The only obligation to act is in the case of abnormally low tenders (Article 69(3) last phrase). This falls short of a clear indication of how breaches of those obligations – and of any sustainability clause drafted by a contracting authority - should be treated, even if arguably these breaches might amount to unlawful contract changes.[280]

Under the last phrase of Article 56(1) of Directive 2014/24/EU "Contracting authorities may decide not to award a contract to the tenderer submitting the most

[277] Contrast Case C-295/20, *Sanresa*, ECLI:EU:C:2021:556, paragraph 60.

[278] Case C-27/15, *Pizzo*, EU:C:2016:404, paragraph 51, and C-162/16, *Spinosa Costruzioni Generali and Melfi*, EU:C:2016:870, paragraph 32.

[279] P. Friton & J. Zöll, 'Comment to Article 57' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) at p. 571.

[280] See E. Uysal, *Enforcing Sustainability in Contract Performance under the Public Sector Directive,* PHD thesis defended at the University of Turin, Dec. 2024.

economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2).” This is a comparatively weak provision, since under Article 56(1)(a), contracts should instead not be awarded when the tender does not comply “with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable”. Indeed, breaches of the ‘applicable obligations in the fields of environmental, social and labour law’ are treated as less relevant than non-compliance with tender requirements.[281]

Moreover, under Article 57(4) of Directive 2014/24/EU, “Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator” when they can “demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)”. Here, the differences compared with mandatory exclusions under Article 57(1), including lit. (f) - child labour - and also under Article 57(2), first phrase - tax and social contribution violations - are both the discretion conferred on the contracting authorities and the weaker evidence required compared to a final judgment or administrative decision.

However, equal treatment and ‘fair’ competition requires the exclusion from the procurement and concession markets of dishonest economic operators.[282] Dishonest economic operators breach the rules to save on costs, making tenders from law-abiding economic operators less competitive and thus either pushing the latter economic operators out of the market or encouraging them too to breach the rules. Therefore, exclusion should be mandatory any time a contracting authority - or entity - is knowledgeable about the breach. This in turn calls for more and more reliable information about selection and exclusion grounds (below § I.6.1.g.).

From a practice perspective, some Member States’ experts in the EXPP and members of some review bodies have highlighted the difficulties in the application of the criterion of the link to the subject-matter which is today hindering contracting authorities and entities in the uptake of SPP, including in its social aspects.[283] Sarah Schoenmaekers rightly highlighted that such a criterion is

[281] The weak nature of the mandatory horizontal clause in Article 18(2) of Directive 2014/24/EU is often lamented: e.g. P. Giosa, ‘Environment and Public Procurement’ to be published in K-M. Halonen, W. Janssen & F. Lichère (eds), Reforming EU Public Procurement: Proposals for the Reform of Directive 2014/24/EU (Cheltenham, Elgar, 2026 *forthcoming*).

[282] P. Friton & J. Zöll, ‘Comment to Article 56’ in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) at p. 574 f.; the Authors argue that the discretion on whether to exclude should be limited to past breaches; if the tender itself is such that it is going to lead to such breaches in the implementation of the contract, exclusion should be pronounced, whether or not the tender is abnormally low.

[283] In the literature see A. Semple, ‘The Link to the Subject Matter - A Glass Ceiling for Sustainable Public Contracts?’ in B. Sjåfjell and A. Wiesbrock (eds), *Sustainable Public Procurement Under EU Law- New Perspectives on the State as Stakeholder* (Cambridge University Press, 2015), pp. 50-74; V. Caimi & S. Sansonetti, *The social impact of public procurement. Can the EU do more?*

inconsistent with the policy direction to pivot towards a circular economy and to use public procurement to achieve different policy goals.[284] Yseult Marique and Leana Derard have sensibly suggested replacing the criterion of the link to the subject-matter with the notion of 'life-cycle'.[285]

The weak enforceability of sustainability obligations sits uncomfortably together with the indication that sustainability corresponds to a cardinal value in the framework of the 2014 directives.[286]

I.6.1.g. Information and data (TED, eForms, ESPD and eCertis)

The importance of information and data in present day societies could hardly be overestimated and the award of public contracts is no exception. One of the reasons for the 2014 reform as indicated in Recital 52 to Directive 2014/24/EU was to provide for the use of electronic means of information and communication as they can "greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes". However, "no elements of the public procurement process after the award of the contract should be covered by the obligation to use electronic means of communication, nor should internal communication within the contracting authority".

To enable eProcurement, the Commission created a number of eForms to be used across the acquisition process, which allow public buyers to provide information in a more structured way.[287]

Moreover, also to help SMEs participation into award procedures, the European Single Procurement Document (ESPD) consisting of an updated self-declaration,

publication for the Committee on Employment and Social affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2023, p. 12 s. e 50; F. Michéa, 'Le droit européen des marchés publics mis au service d'exigences sociales : une alliance aux résultats en demi-teinte', *Énergie, environnement, infrastructures* 2018, fasc. 10, 36; F.G. Trébulle, Marchés publics et responsabilité sociale des entreprises … il reste du chemin à faire, *Énergie, Environnement, Infrastructures* 2018, fasc. 7.

[284] In '*Evaluation of the 2014 public procurement directives. Answer to the call of evidence Ref. Ares(2024)8928678*' by the Public Contracts in Legal Globalization Network / Réseau Contrats publics dans la Globalisation juridique, available at https://www.public-contracts.org/news-new-publications/ at pp. 29 f.

[285] *Ibid.*, at p. 23.

[286] Case C-395/18, *Tim*, ECLI:EU:C:2020:58, paragraph 38.

[287] See Commission Implementing Regulation (EU) 2019/1780 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986; see also Commission Implementing Regulation (EU) 2022/2303 of 24 November 2022 amending Implementing Regulation (EU) 2019/1780 establishing standard forms for the publication of notices in the field of public procurement. The updated Regulation and the extended version of its annex in the Excel file can be found here https://ec.europa.eu/docsroom/documents/38172 ; there are 46 eForms; two should be added that fall under the transport Regulation 1370/2007 on Public passenger transport by rail and by road. Moreover, eForms for defence and security procurements were not streamlined with the other eForms.

was introduced (see Recital 84 and Article 59 of the same directive).[288] However, before concluding the contract, the winning tenderer may be asked to provide evidence to support the self-declaration with actual documentation. To some extent, actual documentation may be substituted with recourse to e-Certis.[289]

Technological progress has been fast since 2014. The Commission Communication *Public Procurement: A data space to improve public spending, boost data-driven policy-making and improve access to tenders for SMEs* indicates that "To unlock the full potential of public procurement, access to data and the ability to analyse it are essential. However, data from only 20 % of all call for tenders as submitted by public buyers is available and searchable for analysis in one place. The remaining 80 % are spread, in different formats, at national or regional level and difficult or impossible to re-use for policy, transparency and better spending purposes".[290] It has been remarked that, up until today, the Member States collect different data relevant for selection and exclusion and that only a fraction of the data available are linked to the ESPD.[291]

To address some of these issues, the Commission has launched the Public Procurement Data Space (PPDS), creating a platform at EU level to access public procurement data so far scattered at EU, national and regional level. The platform comes assorted with analytics toolset including advanced technologies such as Artificial Intelligence (AI).[292]

It is clearly too early to assess whether the PPDS will fully deliver on its promises.[293] However, that will very much depend on the cooperation of Member States and contracting authorities and entities. Also, it is up to each Member State to decide whether to include information on below the threshold contracts in the PPDS.[294]

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[288] See P. Telles, 'Comment to Article 59' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) pp. 645 ff.

[289] See P. Telles, 'The evolution of electronic public procurement under Directive 2014/24/EU' (October 04, 2024).

[290] 2023/C 98 I/01.

[291] N-A. Sava, *Industry 4.0. for Sustainable Public Procurement. Data as the Nexus between Digitalisation and Sustainability in Public Procurement*. PHD Thesis, Cluj-Napoca and Turin 2025 (to be defended).

[292] *Ibidem*; see also the works collected by C. Krönke § P. Valcárcel Fernández (eds.), *Buying AI. The legal framework for public procurement of artificial intelligence in the EU* (Edgbaston, Elgar, 2025,).

[293] For some early criticism see P. Telles 'Looking Into the Public Procurement Data Space and eForms' 33(1) *Public Procurement Law Review* 2024, 14-27, and Sanchez Graells, 'How to Crack a Nut, Digital procurement, PPDS and multi-speed datafication - some thoughts on the March 2023 PPDS Communication' https://www.howtocrackanut.com/blog/2023/3/28/digital-procurement-ppds-and-multi-speed-datafication .

[294] N-A. Sava, *Industry 4.0. for Sustainable Public Procurement. Data as the Nexus between Digitalisation and Sustainability in Public Procurement*. PHD Thesis, Cluj-Napoca and Turin 2025 (to be defended); Austria and Croatia are among the countries providing data for below the threshold contracts.

The above analysis of the issues raised by the application of exclusion clauses and selection criteria and inputs from members of the Network of first instance public procurement review bodies make it clear the need to provide contracting authorities with more data to allow informed decisions, including about the past performance of procurement contracts. Appropriate information would lessen the burden placed by the case on contracting authorities and entities to assess case by case the reliability of an economic operator.

Technology must be used more proactively to provide more reliable and easy to access information on economic operators, lessening the burden on contracting authorities and entities as well as on tenderers.

I.6.1.h. Pursuing sustainability

Arguably, the enforcement of social and environmental obligations through the 2014 directives is rather weak (above I.6.1.f.). Still, the 2014 directives might be seen as a progress - including in terms of legal certainty - when compared with the precedent situation. Indeed, they more clearly allow contracting authorities and entities to pursue sustainable goals, including by going beyond mandatory requirements.

A recent judgment is however hard to reconcile with the case law that filtered in the 2014 reform. The issue in *DYKA Plastics* was whether a contracting authority could require the use of sewage pipes made of vitrified clay and of concrete, thus excluding the use of plastic pipes.[295] Arguably, the issue could have been easily settled by the second phare in Article 42(1) of Directive 2014/24/EU. After indicating in the first phrase that “the technical specification shall lay down the characteristics required of a works, service or supply”, the second phrase provides that “Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives”. In *Max Havelaar*, a case concerning the purchase of fair-trade coffee, the Court of Justice, basing itself on the less specific wording in Directive 2004/18/EC, held that “the technical specifications may be formulated in terms of performance or functional requirements which may include environmental characteristics. According to recital 29 in the preamble to that directive, a given production method may constitute such an environmental characteristic”.[296]

Arguably vitrified clay or concrete sewage pipes should be treated the same as organic coffee (or as less polluting buses, to recall the subject matter of

[295] Case C-424/23, *DYKA Plastics*, ECLI:EU:C:2025:15.

[296] Case C-368/10, *Commission / the Netherlands*, ECLI:EU:C:2012:284, paragraph 61.

another well-known case).[297] However, the relevant phrase in Article 42(1) is not recalled in the 'legal context' of both the opinion of the Advocate general and the judgment and never even mentioned in both documents. Moreover, the judgment does not refer either to *Max Havelaar* or to *Concordia Bus*. Following the opinion, the Court of Justice chose to focus on those provisions in Article 42 referring to 'competition'. More specifically, the Court refers to Article 42(4) "Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words "or equivalent"".[298] Basing itself on a less than full reading of the directive, the Court of Justice admits that "contracting authorities may state, in the technical specifications of a public works contract, the materials of which the products proposed by the tenderers must be made".[299] However, to avoid 'effect of creating unjustified obstacles to the opening up of public procurement to competition',[300] the Court of Justice held that "any economic operator whose products meet the performance and functional requirements imposed by the contracting authority" must be allowed "to submit a tender, irrespective, in particular, of the process used in manufacturing its products and the material of which those products are made".[301] To this end, the technical specifications "must be accompanied by the words 'or equivalent'".[302]

What remains unclear is whether the 'equivalence' might extend to environmental characteristics sought after by the contracting authority, or on the contrary only narrowly functional characteristics will be relevant. The Court of Justice held that "the requirement relating to the use of particular material for a public contract or part thereof may, in particular, follow inevitably from the subject matter of the contract where it is based on the aesthetic sought by the contracting authority, or on the need for a work to be in line with its environment".[303] The use of 'its' seems to narrow the relevance of the exception to a visible characteristic of the works - aesthetics again - rather than to their environmental impact. If so, we will be somehow back to the notion of 'material substance' that was beaten by *Max Havelaar* and whose irrelevance is openly declared by the already recalled

[297] Case C-513/99, *Concordia Bus Finland*, EU:C:2002:495.

[298] Case C-424/23, *DYKA Plastics*, ECLI:EU:C:2025:15, paragraphs 33 ff.

[299] Paragraph 39.

[300] Paragraph 42; see also paragraph 44.

[301] Paragraph 45.

[302] Paragraph 46; see also paragraph 50.

[303] Paragraph 60.

second phrase Article in 42(1) of Directive 2014/24/EU. Only we will have a difference between what is visible or invisible to the human eye. In any case, it is clear that *DYKA Plastics* will make the task of contracting authorities and entities willing to pursue sustainable solutions much more complex, as it will require them to clearly indicate in the technical specifications what are the measurable environmental benefits expected from each component of a work to allow for a demonstration of equivalence. In *DYKA Plastics* the Court has not just departed from its earlier case, it has created inconsistency between the principles and rules in the 2014 directives.

In *DYKA Plastics* the Court of Justice referred to the 'competition' principle to defeat one of the main objectives of the directive. In the wake of *DIKA Plastics*, what contracting authorities and entities can lawfully do in pursuing sustainability has been cast into doubt anew and contracting authorities and entities are burdened with giving reasons for their sustainability choices.

I.6.1.i. Maximum (and minimum) value/quantity in framework agreements

As already indicated, the reference to competition *tout court* may lead to sacrificing the general principle of transparency (§ I.3.4.). Reference to competition *tout court* has also been combined with reference to the general principles to defeat rather clear provisions in the directives.

It is argued that *Simonsen & Weel* was such a case.[304] The issue was whether contract notices for framework agreements must state the estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value of the supplies and whether the relevant agreements will no longer have any effect once the limit is reached. Under the second phrase of Article 33(1) of Directive 2014/24/EU, a framework agreement is to establish the terms governing contracts to be awarded during a given period, "in particular with regard to price and, where appropriate, the quantity envisaged".[305] The Court of Justice acknowledged that, 'taken in isolation', some provisions in Directive 2014/24/EU may suggest that setting a 'maximum' falls within the discretion of contracting authorities.[306] The indications from the wording of these provisions were, however, swiftly dismissed as inconclusive and literal interpretation was deemed to be insufficient.[307] According to the Court, "in the light of the principles of equal treatment and transparency laid down in Article 18(1) of Directive 2014/24 and of

[304] Case C-23/20, *Simonsen & Weel*, ECLI:EU:C:2021:490.

[305] See M. Socha, *Parallel Framework Agreements*, PHD Thesis defended at Copenhagen University on 10 December 2024, esp. 76 ff.

[306] Paragraphs 49 ff.; the Court refers to 33(1) and to points 8 and 10 of Part C of Annex V of Directive 2014/24/EU; the same effect Annex II to Implementing Regulation 2015/1986 is referred to.

[307] Paragraph 53.

the general scheme of that directive, a failure by the contracting authority to indicate, in the contract notice, a maximum value of the supplies under a framework agreement cannot be accepted".[308] The indications from the provisions are discarded based on a reading of the general principles. Only after the decision was reached, the Court somewhat buttressed it with reference to the provision in the directive that refers to the maximum estimated value of the framework agreement to set the value of a contract to determine whether it exceeds the EU thresholds.[309] And the principle of transparency and equal treatment were recalled again to stress the conclusion.[310]

Lastly, the requirement to set the maximum value or quantity is reinforced with reference to competition *tout court*. The requirement is said to flow from the third subparagraph of Article 33(2) of Directive 2014/24, under which contracts based on a framework agreement may under no circumstances "constitute improper use or use intended to prevent, restrict or distort competition, as referred to in recital 61 of the directive. It follows that the requirement that the contracting authority that is an original party to the framework agreement indicate therein the maximum quantity or the maximum value of the services that that agreement will cover is a manifestation of the prohibition on using framework agreements improperly or in such a way as to prevent, restrict or distort competition".[311]

What is striking in *Simonsen & Weel* is that the wording of the specific rules is basically set aside based on a reference to the general principles, which conclusion is in turn 'strengthened' by reference to other provisions focusing on different aspects of the EU regime of framework agreements. While it may be conceded that knowing the maximum quantity and/or maximum value may be relevant for aspiring tenderers, and the directive indeed provides that the estimated value may be indicated 'where appropriate', it could be argued that the lawmakers struck a compromise between this and the need for flexibility of contracting authorities. This 'compromise' was upended by the Court of Justice based on the general principles. In a bid to make the argument more compelling the Court fell in a logical trap when it tried arguing that "if the maximum estimated value or quantity which such an agreement covers were not indicated or if that indication were not legally binding, the contracting authority could flout that maximum quantity. As a result, the successful tenderer could be held contractually liable for non-performance of the framework agreement if he or she were to fail to supply the quantities requested by the contracting authority, even though those quantities exceed the maximum quantity in the contract notice".[312]

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[308] Paragraph 54.

[309] Paragraphs 56 ff; the reference is to Article 5(5); the Court also refers to point 7 of Part C of Annex V and to Annex II to Implementing Regulation 2015/1986 (paragraphs 59 f.).

[310] Paragraphs 61 f.

[311] Paragraphs 66 f.

[312] Paragraph 64.

If there is no maximum, it cannot be exceeded, as the contractor decided to be bound for an essentially open ended quantity. However it might be, the Court of Justice reaffirmed not only that maximum quantity and/or maximum value must be indicated, but that once the ceiling is reached, the framework agreement is no longer to have effects and further call offs are unlawful.[313]

Simonsen & Weel followed *Autorità Garante della Concorrenza e del Mercato*, a case decided under the similar provisions found in Directive 2004/18/EC.[314] Advocate General Campos Sanchéz-Bordona argued that "the phrase 'where appropriate' does not mean that of the 'quantity envisaged' is an optional matter. It is, on the contrary, a mandatory requirement, albeit subject to the degree of precision with which the volume of services can be anticipated in the framework agreement, having regards to the nature of the services with which the subsequent contracts will be concerned".[315] In *Autorità Garante della Concorrenza e del Mercato*, the Court of Justice referred to the provisions on thresholds, to the Annexes of the directive and finally to the fundamental principles to hold that "all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question".[316] The conclusion was that those principles would be breached if the total quantity had not been set in the contract documents.[317]

Departing from the letter of the law based on the general principles is confusing for contracting authorities and entities and bound to cause practical problems.[318] To avoid the need to tender again, the reaction is often to set unrealistically high maximum values or quantities, hardly a practice conductive to transparency.

The reciprocal situation, i.e. whether the EU principles require a minimum quantity to be set, was dealt with in *Kauno miesto savivaldybė* (AKA as *Irgita*).[319] Irgita had been awarded a contract for a period of 3 years for the supply of services relating to the maintenance and management of plantations, forests and

[313] Paragraph 68.

[314] Case C-216/17, *Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2018:1034.

[315] Case C-216/17, *Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2018:797, paragraph 75.

[316] Case C-216/17, *Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2018:1034, paragraph 63.

[317] Paragraph 64.

[318] See the analysis by C. Risvig Hamer, 'CPBs and their users: shared liability, contract management and remedies' in C. Risvig Hamer & M. Comba (eds), *Centralising Public Procurement. The approach of EU Member States* (Cheltenham, Elgar, 2021) at pp. 96 ff.

[319] Case C-285/18, *Kauno miesto savivaldybė (Irgita)*, ECLI:EU:C:2019:829.

parks in the Lithuanian city of Kaunas. The contract made provision for the maximum quantity of services that could be sought from Irgita. However, the contracting authority gave no commitment to order all the services nor the entire quantity of services provided for in that contract. Moreover, the contracting authority was required to pay Irgita only for those services that were actually performed according to the tariffs laid down in that contract. During the contract duration, the city concluded an in-house transaction concerning the same services. Unsurprisingly, Irgita was not pleased and sought to defend its contract. The Court held that the fact "that an in-house transaction, within the meaning of Article 12(1) of Directive 2014/24, does not fall within the scope of that directive cannot relieve the Member States or the contracting authorities of the obligation to have due regard to, inter alia, the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency".[320] Moreover, the Court referred to Recital 31, indicating that cooperation between entities belonging to the public sector should not "result in a distortion of competition in relation to private economic operators".[321] However, the Court did not very much delve on the topic of a minimum quantity to be provided under the contract. It left to the referring court to assess whether, by concluding the in-house transaction at issue "the contracting authority has not acted in breach of its contractual obligations, arising from that public contract, and of the principle of transparency; whether it had to be established that the contracting authority failed to define its requirements sufficiently clearly, in particular by not guaranteeing the provision of a minimum volume of services to the party to whom that contract was awarded, or, further, whether that transaction constitutes a substantial amendment of the general structure of the contract concluded with Irgita".[322]

Arguably, *Irgita* stands for the proposition that transparency requires a minimum quantity (or value) being set in public contracts. It is however doubtful whether this would benefit Irgita, as not setting such a minimum would simply make the contract unlawful and unenforceable. This would be very much a Pyrrhic victory. From another perspective, the Court of Justice just stopped short of making an inroad into contract implementation. Arguably, in many Member States, the private law principle of good faith would have been called in to decide the case.

Pursuing competition tout court, the Court of Justice has limited the flexibility inherent in framework agreements, imposing on contracting authorities the need to start a new award procedure in case they have underestimated their needs.

[320] Paragraph 61.

[321] Paragraph 62.

[322] Paragraph 63.

I.6.2 Macroanalysis: trends in the case law

The analysis of the above nine specific - but mostly closely interrelated - issues allows the identification of very consistent trends in the case law. Firstly, to favour participation in award procedures, the Court of Justice tends to push the verification of both participation and substantive requirements to the contract performance phase (§ I.6.2.a.). In parallel, and to the same end of allowing wider participation, the Court of Justice has often charged contracting authorities and entities with the burden of selecting and enforcing the relevant general interests leading to exclusion from procurement procedures (§ I.6.2.b.). This approach makes it difficult to centralise at national or EU level the assessment of the reliability of economic operators, further consolidating the burden on individual contracting authorities or entities and exposing them to heigthened litigation risks (§ I.6.2.c.).

I.6.2.a. Delaying verification of compliance with rules and criteria

The case law indicates that the clear preference for treating mandatory requirements as contract performance conditions is justified by the fact that checking compliance at the selection stage might "dissuade economic operators from participating in procurement procedures".[323]

The early origin of this trend is to be found in the case law concerning the requirement of a seat or office in the place where a service has to be rendered. As repeated in *ASADE*, such a criterion

> is clearly disproportionate to the attainment of such an objective [...]. Even if the establishment of the economic operator in the territory of the place where it is called upon to provide the social services concerned is necessary in order to guarantee the proximity and accessibility of those services, such an objective could, in any event, be attained just as effectively by requiring that that economic operator satisfies that condition only at the stage of performance of the public contract in question.[324]

This trend, however, has metastasised with reference to different aspects, including requirements to pursue a profession or activity.

As already recalled (above § I.6.2.b.), in *Sanresa* the Court of Justice held that the requirement to hold an authorisation for waste shipment required under Regulation (EC) No 1013/2006 had to be considered as a contract performance

[323] Case C-403/21, *NV Construct*, ECLI:EU:C:2023:47, paragraph 65; Case C-295/20, *Sanresa*, ECLI:EU:C:2021:556, paragraph 62.

[324] Case C-436/20, *ASADE*, ECLI:EU:C:2022:559; the Court refers to Case C-234/03, *Contse and Others*, EU:C:2005:644, paragraph 43.

condition and could not be treated as a 'a particular authorisation' under Article 58(1)(a) and (2) of Directive 2014/24/EU, or as a requirement concerning technical or professional ability under Article 58(1)(c) and (4) as the latter pertains to experience and is therefore retrospective.[325] Moreover, in *NV Construct* the Court of Justice read *Sanresa* to hold in very general terms that that requiring a tenderer to fulfil conditions required for performance already at the selection stage would be excessive and in breach of both the principles of proportionality and of transparency.[326]

This preference has a number of consequences, starting from the different moments in which the different aspects must be assessed. As indicated by the Court of Justice in *Klaipedos*, "compliance with the conditions for the performance of a contract is not to be assessed when a contract is awarded. It follows that, if the requirement at issue in the main proceedings were classified as a performance condition and if the successful tenderer did not satisfy it when the public contract was awarded to it, the non-compliance with that condition would have no effect on the question whether the award of the contract to the Consortium was compatible with the provisions of Directive 2014/24".[327]

Arguably, pushing the verification of requirements at the stage of contract performance hollows out the provision in Article 56(1) of Directive 2014/24/EU, thus creating inconsistency between how the general principles are interpreted and applied and some specific provisions in the 2014 directives. According to Article 56(1) contracts should be awarded after verification that both (a) "the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents" and (b) "the tender comes from a tenderer that is not excluded in accordance with Article 57 and that meets the selection criteria set out by the contracting authority in accordance with Article 58".[328]

A more meaningful distinction would be the one between authorisation that can be sought only after contract conclusion and authorisations, in the meaning of Article 58(1)(a) and (2) of Directive 2014/24/EU that might well be asked before. For the latter, it does make very little sense to award the contract and then wait for possibly long bureaucratic times and hoping that the contractor will get the authorisation sought. In the interest of a seamless contract execution, the authorisation should be asked already at the tendering stage. This is clearly one instance where **the interpretation by the Court of Justice of the 2014**

[325] Case C-295/20, *Sanresa*, ECLI:EU:C:2021:556, paragraphs 44 f.

[326] Case C-403/21, *NV Construct*, ECLI:EU:C:2023:47.

[327] Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, ECLI:EU:C:2021:700, paragraph 89.

[328] P. Friton & J. Zöll, 'Comment to Article 56' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) 565 ff.

directives in trying to achieve maximum competition - be it cross-border or *tout court* - trumps public procurement common sense.

More generally, the very distinction between technical specification, selection criteria and contract performance conditions is not clearcut. It is thus of little comfort that in *NV Construct* the Court of Justice held that "Directive 2014/24 does not preclude the consideration of technical requirements simultaneously as selection criteria relating to technical and professional ability, as technical specifications and/or as conditions for the performance of the contract, within the meaning of Article 58(4), Article 42 and Article 70 of that directive, respectively".[329]

Moreover, this approach is going to impact effective judicial review negatively. The cases discussed in this section have been brought by economic operators right after the conclusion of award procedures. Post-award breaches are instead litigated seldomly and - often lacking a contract modification notice - the same economic operators might not even know of the unlawful change.

Conclusively, the case law analysed in this section might well in some cases increase competition, but more often than not it will make award procedures cumbersome and judicial protection possibly ineffective.

Pushing the verification of requirements at the stage of contract performance increases the risk that contracting authorities or entities have to restart tendering process after finding too late that the contractor does not meet the requirements or - worse - to accept even tacitly non-compliance to avoid going into the troubles of retendering. The latter will fly in the face of equal treatment and in many cases will amount to unlawful contract modification.[330]

I.6.2.b. MS's discretion vs CAs/CEs' discretion

An important legislative (and interpretative) choice is about the allocation between the Member States and contracting authorities or entities of the power to choose about aspects that define the award procedure and therefore describe the ambit and limits of the competition, such as for instance participation and selection rules.

In recent years, the Court of Justice has shown a preference for giving this power to individual contracting authorities and entities rather than to the Member States (and their legislators). The proportionality principle is usually called to stand in the way of rules generally providing for the exclusion of tenderers by requiring *ad hoc*

[329] Case C-403/21, *NV Construct*, ECLI:EU:C:2023:47, paragraph 63; the Court is referring to Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, ECLI:EU:C:2021:700, paragraph 84; see also paragraph 90 thereof.

[330] Joined C-441/22 and C-443/22, *Obshtina Razgrad*, ECLI:EU:C:2023:970.

assessments that can only be committed to individual contracting authorities or entities (see also above § I.6.1.d.).[331] This is because *ad hoc* choices allow for restrictions strictly tailored to the general interests pursued, thus in principle allowing the application of the proportionality principle at a micro level of individual administrative action. On the contrary, legislative choices, being necessarily general and abstract, might be limiting participation in award procedures more than strictly necessary. However, this approach burdens contracting authorities with difficult balancing exercises and might fail to comply with the adequacy test that is part of the wider proportionality test.

Caruter was one of the many cases concerning attempts by Italian lawmakers to limit recourse to subcontracting or groups of economic operators to both protect the interests of public buyers by having one main contractor responsible for the exact implementation of the contract and to limit the risk of organised crime obtaining a share of the business.[332] In previous cases, the Court of Justice had held quantitative limits to subcontracting to be inconsistent with EU law, and specifically with the principle of proportionality.[333] In this case, the Italian legislation at stake required the undertaking which is the agent of the group of economic operators to provide 'the majority' of the services in relation to all the members of the group and therefore to provide the majority of all the services covered by the contract. This condition was more restrictive than what provided for under Article 63(2) of Directive 2014/24/EU which merely authorises the contracting authority to ask that certain critical tasks are to be performed directly by a participant in the group of economic operators. According to the Court of Justice, "the intention of the EU legislature is, in accordance with the objectives set out in recitals 1 and 2 of that directive, to limit what can be imposed on a single operator of a group, following a qualitative approach rather than merely a quantitative approach, in order to facilitate the participation of groups such as temporary associations of small- and medium-sized undertakings in public procurement procedures". The requirement in the Italian legislation was therefore found to be inconsistent with such an approach, as it went beyond the not just the 'targeted' wording in Article 63(2) and was found to undermine "the objective pursued by EU law in that area of attaining the widest possible opening-up of public contracts to competition and of facilitating the involvement of small- and medium-sized undertakings".[334]

The case law is firm in entrusting contracting authorities and entities with the task of setting appropriate selection criteria, their discretion being guided by principles such as equal treatment and proportionality. In *Smetna palata na Republika Bulgaria*, an audit authority had penalised a mayor for requiring experience

[331] See also Case C-63/18, *Vitali*, ECLI:EU:C:2019:787, paragraph 40.

[332] Case C-642/20, *Caruter*, ECLI:EU:C:2022:308.

[333] Case C-63/18, *Vitali*, ECLI:EU:C:2019:787.

[334] Case C-642/20, *Caruter*, ECLI:EU:C:2022:308, paragraph 42.

criteria exceeding those set in the applicable legislation.[335] The Court of Justice held that,

> as it is best placed to assess its own needs, the contracting authority has been granted a broad discretion by the EU legislature when determining selection criteria, as can be seen inter alia from the recurring use of the term 'may' in Article 58 of Directive 2014/24. Thus, in accordance with paragraph 1 of that article, it has some flexibility in setting those requirements for participation in a procurement procedure which it considers to be related and proportionate to the subject matter of the contract and appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. More specifically, according to paragraph 4 of that article, the contracting authority is free to determine which requirements for participation it considers appropriate, from its point of view, to ensure inter alia the performance of the contract to a quality standard which it considers appropriate.[336]

According to the Court, national law must be interpreted, to the extent possible, as allowing such discretion.[337] If not, it should be set aside as conflicting with the procurement directive.

A subtle, not to say inherently contradictory, approach was displayed in *Tim*.[338] Given the importance of sustainability in the overall scheme of EU public contracts law, the Court of Justice was ready to recognise that national legislation may provide that the contracting authority has "the option, or even the obligation, to exclude the economic operator who submitted the tender from participation in the contract award procedure where the ground for exclusion referred to in that provision is found in respect of one of the subcontractors mentioned in that operator's tender".[339] However, as already recalled (above § I.5.1.), the obligation is qualified immediately thereafter, as the Court binds the contracting authority to compliance with the principle of procurement, equal treatment and proportionality first among them.[340] Proportionality specifically requires a case by case analysis which can only be performed by a contracting authority or entity who must be granted the necessary discretion, thus precluding legislative intervention. Otherwise said, "national legislation providing for such automatic exclusion of the economic operator who submitted the tender infringes the principle of proportionality by requiring the contracting authorities to proceed automatically to

[335] Case C-195/21, *Smetna palata na Republika Bulgaria*, ECLI:EU:C:2022:239.

[336] Paragraph 50.

[337] Paragraph 51.

[338] Case C-395/18, *Tim*, ECLI:EU:C:2020:58.

[339] Paragraph 43.

[340] Paragraphs 44 f.

that exclusion on the ground of the failure of a subcontractor".[341] Moreover, the finding of a breach on the part of a subcontractor can only lead to the replacement of that subcontractor.[342]

Until fairly recently, optional exclusions were understood as clauses that the Member States could - or not - implement in their domestic legislation. In the just recalled *Tim* case, the Court of Justice was following a pretty stable case law when it held that "the Member States may choose not to apply those grounds, or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. Member States therefore enjoy some discretion in determining the implementing conditions of the optional grounds for exclusion laid down in Article 57(4) of Directive 2014/24".[343] In *Rad Service*, the Court of Justice confirmed that approach by holding that, "In accordance with Article 57(4) and (7) of Directive 2014/24, the Member States are free not to apply the facultative grounds for exclusion set out in that directive or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level".[344]

A tectonic shift has happened since then. The 2004 directives deferred most of the clauses for optional exclusion to domestic legislation. These references have all but disappeared in the 2014 directives, thus empowering contracting authorities or entities to modulate the exclusion clauses.[345] In *Infraestruturas de Portugal* the Court of Justice held that:

> irrespective of whether the public procurement procedure in question falls within the scope of Directives 2014/24 or 2014/25, the Member States must, at the very least, provide for the possibility for contracting authorities to include the exclusion grounds set out in Article 57(4) of Directive 2014/24 amongst the objective exclusion criteria in public procurement procedures, without prejudice to any decision by those Member States to transform that option into an obligation to do so. The Member States therefore cannot, in any event, restrict the scope of those exclusion grounds.[346]

Concerning specifically the objective pursued concerning the facultative grounds for exclusion, the Court referred to its previous case-law to the effect that that objective is "reflected in the emphasis placed on the powers of contracting authorities. Thus the EU legislature intended to confer on the contracting

[341] Paragraph 53.

[342] Paragraph 47.

[343] Case C-395/18, *Tim*, ECLI:EU:C:2020:58, paragraph 34.

[344] Case C-210/20, *Rad Service Srl Unipersonale*, ECLI:EU:C:2021:445, paragraph 28.

[345] Case C-41/18, *Meca*, EU:C:2019:507, paragraph 27.

[346] Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016, paragraph 71.

authority, and on it alone, the task of assessing whether a candidate or tenderer must be excluded from a procurement procedure during the stage of selecting the tenderers".[347] According to the Court of Justice, the need for an *ad hoc* assessment flows from the proportionality principle, which requires that "a specific and individual assessment of the conduct of the individual concerned, on the basis of all the relevant factors" is made in each individual case.[348]

In *Infraestruturas de Portugal* the Court of Justice changed the understanding of the adjective 'optional' in 'optional exclusion grounds'. The option is not for the Member States, it is for contracting authorities or entities. What power is left to the Member States is to make the application of those grounds of exclusion - or of some of them - mandatory for contracting authorities or entities.

This is just a very striking example of a wider tendency. As already recalled, in *NV Construct* the question was whether mandatory domestic requirements concerning the performance of the contract had to be included in the selection criteria.[349] The Court of Justice answered in the negative. According to the Court, "As it is best placed to assess its own needs, the contracting authority is granted a broad discretion by the EU legislature when determining selection criteria".[350] Consequently, "obligations under special laws applicable to activities connected with the public contract to be awarded cannot automatically be added as selection criteria to the criteria expressly referred to in the procurement documents, otherwise the broad discretion that the contracting authority has in determining the selection criteria that it wishes to impose on economic operators as conditions for participating in a procurement procedure would be rendered devoid of any substance".[351]

It is more discussed whether contracting authorities and entities enjoy the same wide discretion in classing a given technical requirement as either a technical specification or a contract performance condition. In *Altea Polska*, the Court of Justice held - quite in passing and as a kind of *obiter* - that "contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions".[352] However, as already recalled (§ I.6.2.a.), to facilitate participation in procurement procedures, in *NV Construct* the Court of Justice showed a clear preference for treating domestic mandatory legislative requirements as contract performance conditions.[353]

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[347] Paragraph 55; among the precedents referred to C-41/18, *Meca*, EU:C:2019:507, paragraph 34.

[348] Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016, paragraph 77.

[349] Case C-403/21, *NV Construct*, ECLI:EU:C:2023:47.

[350] Paragraph 60.

[351] Paragraph 68.

[352] Case C-54/21, *Antea Polska*, ECLI:EU:C:2022:888, paragraph 90.

[353] Case C-403/21, *NV Construct*, ECLI:EU:C:2023:47, paragraph 65.

It is, however, very difficult to understand how the discretion of contracting authorities might extend itself so far as not to include the compliance with applicable special laws. As already recalled, in *Sanresa* the Court of Justice held that compliance with EU legislation applicable to the contractual activity was always to be considered as required. Why should national obligations be treated differently? Also, under the applicable EU rules, in *Sanresa*, the authorisation could only be asked by a contractor having all relevant information, not by tenderers who did not have the needed information. It is all but evident that the requirement could not be incorporated into a selection criterion (see above § I.6.1.e.).

An input from members of the EXPP correctly points out that the case law evolved over the past few years and the Member States have no longer the liberty to regulate certain circumstances, which have turned out to be a real challenge for the contracting authorities and entities, as they bear the responsibility and burden both of assessing this information and/or these situations and of making the right decision.

Arguably, the problem with these judgments and with many other that were analysed in this Study is that the Court of Justice focuses so much on the 'administrative' reading of the proportionality principle as enshrined in Article 18(1) of Directive 2014/24/EU and seems to forget its 'constitutional' dimension as recalled in the recitals to the 2014 directives. This is not a small choice. From an institutional point of view, the 'administrative' reading of proportionality puts the decision on the shoulders of individual contracting authorities or entities, limiting the role of the Member States which is instead central when considering the repartition of competences between the EU and the Member States.[354] From a substantive point of view, when focusing on proportionality in the individual award procedure, the efficiency drawbacks in pursuing wider participation in the procedures might look smaller than the increased competition.[355] **The burden on contracting authorities and its impact on the overall efficiency of tender procedures will instead be obviously considered by the Member States when deciding about the opportunity to make decisions centralised or decentralised**.

Against this consistent preference for leaving choices with contracting authorities and entities rather than with the Member States, the judgment in *ATIVA* must be remembered as the Court of Justice instead upheld the choice in Italian legislation not to allow the renovation of directly awarded motorway concessions through a

[354] See e.g. Recital 136 to Directive 2014/24/EU.

[355] But this might not even always be the case, as indeed the benefits of wider participation might look very slim compared to drawbacks such as administrative burden even in individual cases: see e.g. the discussion of Case C-436/20, *ASADE*, ECLI:EU:C:2022:559 (above § I.4.1.) and of Case C-267/18, *Delta Antrepriză de Construcţii şi Montaj 93 SA*, ECLI:EU:C:2019:826 (below § I.6.2.c).

project financing procedure as this was motivated by the desire to open that specific market to the 'widest possible competition'.[356]

The recent case law deprives the Member States of the power to modulate participation requirements. While this might facilitate participation in individual procurement procedures, it is burdening contracting authorities and entities with difficult choices and exposing them to significant litigation risks.

I.6.2.c. Obstacles to the centralisation of the assessment of exclusion criteria

Pedro Telles has argued that "*excluding* exclusions from the procurement process would yield the easiest win in terms of simplifying public procurement". He proposes "to move the compliance and enforcement outside the procurement process altogether".[357]

The trend in the case law charging each individual contracting authority with assessing the reliability of economic operators on a case by case basis makes it difficult to fully embrace this proposal that still deserves to be considered in an articulate way. Exclusions clauses that are mandatory for all contracting authorities EU wide (those in Article 57(1) and (2) of Directive 2014/24/EU) must be distinguished from those exclusions clauses that are not mandatory at EU level as discretion is now left to the contracting authorities (those in Article 57(4)) lacking a different decision by a Member State. Moreover, self-cleaning (Article 57/6) and (7)) will also have to be discussed.

Concerning *mandatory exclusion clauses*, a centralisation of compliance checks is eminently doable as there is no room for discretion of either the Member States or of contracting authorities and entities. The requirement of a final judgment ensures legal certainty to any repository. Centralisation might be limited at national level, but it might be extended at EU level. Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation provides for such a system. Under Article 25(3) thereof, "Member States shall notify the Commission of final judgments against legal persons for

[356] Case C-835/19, *Autostrada Torino Ivrea Valle D'Aosta – Ativa*, ECLI:EU:C:2020:970, paragraph 51: "it is apparent both from the decision to refer and the written observations submitted to the Court by the Italian Government and the European Commission that the article in question sought to ensure that motorway concessions are opened up to the widest possible competition. Since the motorway concessions sector has only recently been opened up to competition, the Italian legislature opted for a system of public tender procedures prohibiting the alternative system in the form of awarding concessions by means of project financing. Article 178(8*bis*) of the new Public Procurement Code sought in that way to avoid enshrining any advantage, even a de facto one, for the outgoing concessionaires".

[357] P. Telles, 'Rethinking the procurement Directives: Moving exclusions out of the procurement process'.

infringements of this Regulation and the penalties imposed on them, within 30 days from the date on which the judgments become final, taking into account the relevant data protection rules. The Commission shall publish on its website a list of such judgments [...]".[358] There is no reason why such a system should be confined to deforestation. If this option was not to be followed, it would be important that any national database is linked to the ESPD or searchable through the PPDS (above § I.6.1.g.).

Concerning *optional exclusion clauses* and *self-cleaning*, a few recent judgments from the Court of Justice may make centralised control of compliance difficult.

The Court of Justice was reasonably open in *Vossloh Laeis*, its first judgment on the matter.[359] An economic operator had been sanctioned by the national competition authority, but leniency had been shown on account of its cooperation with the authority. The contracting authority asked the economic operator to disclose the decision, but this was refused due to fear of incurring in liability actions from the same contracting authority. The Court of Justice referred to the last phrase in Recital 102 of Directive 2014/24/EU, according to which "it should be left to Member States to determine the exact procedural and substantive conditions applicable" in case self-cleaning measures are adopted. According to the recital, the Member States should "be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task".[360] Lacking a centralised system, according to the Court of Justice, it is for each "contracting authority to assess not only whether there exists a ground for exclusion of an economic operator, but also whether, as the case may be, that economic operator has actually re-established its reliability".[361] However, if there is a specific authority charged with investigating breaches - as it is the case in competition law - the contracting authority must in principle rely on the findings of such authority.[362] What is instead in any case left to the contracting authority is to assess whether the economic operator may be relied on, in case because of the self-cleaning measures taken.[363] Still, in principle, and under reserve of confirmation by the national court, the disclosure of the competition authority decision "should be sufficient to prove to the contracting authority that that economic operator clarified, in a comprehensive manner, the facts and circumstances by collaborating with that authority".[364] However, even if the

[358] See C. Falvo & F. Muscaritoli, 'Towards Deforestation-Free Public Procurement? Reflections on the Interplay between the Deforestation Regulation (EUDR) and Public Procurement in the EU' 19(2) *European Procurement & Public Private Partnership Law Review* pp. 91-103.

[359] Case C-124/17, *Vossloh Laeis*, ECLI:EU:C:2018:855.

[360] Paragraph 22.

[361] Paragraph 23 *in fine*.

[362] Paragraph 25.

[363] Paragraph 26.

[364] Paragraph 31.

contracting authority must limit its demand to what it is 'strictly necessary',[365] it may still ask for evidence already provided to the competition authority unless its content is already clear from that decision.[366]

Clearly, in this case, relying on the privilege against self-incrimination, the economic operator was falling far from what was required to reestablish its reputation. However, even absent a centralised qualification and 'rehabilitation' system, in *Vossloh Laeis* the Court was clearly limiting the effort required from contracting authorities, nudging them to rely on the results of official investigations.

The first relevant case in a more restrictive trend was *Meca*.[367] This was a reasonably easy case from Italy. Possibly to avoid future liability actions against contracting authority, the law had provided that a tender whose previous contract had been terminated for grave breaches could not be excluded from future procurements if the termination had been challenged and until the claim had been decided upon in courts. This was the procurement version of the Italian torpedo well known in international private law. This basically consisted in starting a case in a slow moving judicial system - Belgium was a candidate along Italy - to stay possible decisions elsewhere by raising an exception of *lis pendens*.[368] Clearly EU law could not stand such delaying tactics, and the Court of Justice held - in somewhat general terms - that "it is the contracting authorities, and not a national court, that have been entrusted with determining whether an economic operator must be excluded from a procurement procedure".[369] Further referring to Recital 101 of the directive, the Court also relied on proportionality holding that "if a contracting authority were to be automatically bound by an assessment conducted by a third party, it would probably be difficult for it to pay particular attention to the principle of proportionality when applying the optional grounds for exclusion".[370]

Meca could have easily been read as a *suis generis* case. However, the following case law took it as a new gold standard. In *Delta* the Court of Justice reaffirmed that "the EU legislature intended to confer on the contracting authority, *and to it alone*, the task of assessing whether a candidate or tenderer must be

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[365] Paragraph 28.

[366] Paragraph 32.

[367] Case C-41/18, *Meca*, EU:C:2019:507.

[368] See e.g. T. Panighetti, *Has London Outmaneuvered the Italian Torpedo*? 5 *Yearbook. Arb. & Mediation* 2013, 277.

[369] Case C-41/18, *Meca*, EU:C:2019:507, paragraph 28; in Case T-126/23, *VC*, ECLI:EU:T:2024:666, paragraph 28, *Meca* was followed to the effect that a EU agency could still exclude an economic operator that had challenged a national decision fining it for anti-competitive conduct, and this even if a national court had suspended the decision pending the assessment of the merits. It is true that the suspension was based on the *periculum in mora* only, without any assessment - even *prima facie* - of the merits of the challenge.

[370] Case C-41/18, *Meca*, EU:C:2019:507, paragraph 32.

excluded from a public procurement procedure during the stage of selecting the tenderers" (*emphasis added*).[371] In that case, the contracting authority decided upon the exclusion based on an entry into an official on-line platform stating that a previous contract had been terminated due to the contractor's misconduct. The Court of Justice reaffirmed its position that a contracting authority "is not automatically bound by an assessment conducted, in the context of an earlier public procurement procedure, by another contracting authority, so that in particular it may be in a position to pay particular attention to the principle of proportionality when applying the optional grounds for exclusion", but also added that that "principle requires the contracting authority to examine and assess the facts itself".[372] Two aspects are conflated here. One is the discretion of each contracting authority, the other is a duty to (re)examine and (re)assess the 'facts itself'. The Court refers here to Advocate General Campos Sanchéz-Bordona's opinion. The Advocate General had stated that the irregularity must have been serious ('significant') enough to make it justifiable, in the light of the principle of proportionality, to terminate the contract early. He concluded that, "For the exclusion to apply, it is not therefore sufficient for the prior public contract simply to have been unilaterally terminated. The contracting authority will have to carry out the additional task of assessing the breach for which the contractor was held responsible at the time in order to establish whether or not the requirements of Article 57(4)(g) of Directive 2014/24 are met".[373]

The Court of Justice deduces from the Advocate General's opinion a duty of the contracting authority to

> carry out its own evaluation of the economic operator's conduct covered by the early termination of a prior public contract. In that regard, it must examine, diligently and impartially, on the basis of all the relevant factors, in particular the early termination decision, and in the light of the principle of proportionality, whether that operator is, from its point of view, responsible for significant or persistent deficiencies in the performance of a substantive requirement imposed on it under that contract, those deficiencies being such as to break the relationship of trust with the economic operator in question.[374]

Therefore, the contracting authority must assess whether having used a subcontractor without having sought prior authorisation "constituted a significant deficiency and, if so, whether that deficiency affected the performance of a substantive requirement imposed on the successful tenderer" in what was a

[371] Case C-267/18, *Delta Antrepriză de Construcţii şi Montaj 93 SA*, ECLI:EU:C:2019:826, paragraph 25; the Court refers to Case C-41/18, *Meca*, EU:C:2019:507, paragraph 34.

[372] Paragraph 27; Case C-41/18, *Meca*, EU:C:2019:507, paragraphs 30 and 32 are referred to.

[373] Case C-267/18, *Delta Antrepriză de Construcţii şi Montaj 93 SA*, ECLI:EU:C:2019:826, paragraphs 32 and 34 respectively; the Court only refers to paragraph 32-

[374] Paragraph 29.

different contract with a different contracting authority.[375] As if this was not enough, when considering whether excluding or not a tenderer, the contracting authority should also determine "whether the subcontractor's involvement had an adverse impact on the performance of that [other] contract".[376] Moreover, our contracting authority should also check "whether the actual contract included an obligation which had to be performed by the successful tenderer itself or whether it made using a subcontractor conditional upon obtaining prior authorisation from the municipality".[377] Finally, the contracting authority should "ask itself whether or not the use of a subcontractor is likely to constitute a substantial amendment of the tender submitted by the successful tenderer".[378]

Basically, the Court of Justice asked the contracting authority 'two' to redo the assessment made by a different contracting authority 'one' on the performance of a contract the contracting authority 'two' was not part of.[379] We are very far from the 'strictly necessary' investigation committed to contracting authorities in *Vossloh Laeis*.[380] Neither the Advocate General nor the Court of Justice ask themselves for a moment whether and if so how contracting authority 'two' may have access to a contract it was not part to, to a tender that was not addressed to it and to information about how that contract was performed and how the performance was affected by the unauthorised use of a subcontractor. It is argued that the approach chosen not only makes no procurement sense - piling a very demanding investigation duties on the shoulders of the contracting authority - but it is basically undoable. These unrealistic demands on contracting authorities and entities are bound to discourage them from excluding tenderers of dubious rectitude and to shoulder the risks involved in concluding contracts with them.

More generally, the approach preferred by the Court of Justice to lie complex decisions on the shoulders of contracting authorities and entities would allow for proportional and adequate case by case decisions only provided that (a) the relevant public servants have been trained in advanced public procurement management as opposed to mere legal compliance *and* (b) they are confident to exercise their discretion. These conditions are far from widespread in the Member States and changing the situation on the ground is going to be time consuming and frustrating. Concerning specifically the condition sub (b), the limited recourse to non-price criteria in many Member States shows that flexibility is not going to be used just because it is granted in the law books.[381] While the topic would deserve in-depth *ad hoc* research availing itself of social and public management

[375] Paragraph 30.

[376] Paragraph 31.

[377] Paragraph 31.

[378] Paragraph 32.

[379] Unlike in Case C-41/18, *Meca*, EU:C:2019:507.

[380] Case C-124/17, *Vossloh Laeis*, ECLI:EU:C:2018:855, paragraph 28.

[381] See the criticism by the European Court of Auditors, *Special Report 28/2023. Public Procurement in the EU* (Luxembourg, Publication Office of the EU, 2023), at p. 31, table 11.

sciences and psychology, it is already clear from expert's opinions that public buyers' aversion for discretion is often due to a national legal framework grounded on mistrust. This is e.g. the case in Italy and Romania, where public servants tend to stick to strict legal compliance to avoid being unjustly suspected of maladministration when not of outright corruption.[382]

In the end in *Delta* the Court of Justice points out that the contracting authority should also consider whether, by not disclosing its previous blunders, the tenderer was acting in bad faith and might deserve to be excluded on this ground alone.[383]

In the already recalled *Infraestruturas de Portugal* case (above § I.6.2.b.),[384] the applicable Portuguese law bound contracting authorities and entities to act upon the competition authority's findings that an economic operator had, or had not, entered into agreements with other economic operators aimed at distorting competition (Article 57(4)(d)). As already recalled, in *Infraestruturas de Portugal* the Court of Justice held that the Member States are under the obligation to transpose optional grounds of exclusion into their national law.[385] Concerning specifically the objective pursued by the facultative grounds for exclusion, the Court referred to its previous case-law to the effect that that objective is "reflected in the emphasis placed on the powers of contracting authorities. Thus the EU legislature intended to confer on the contracting authority, and on it alone, the task of assessing whether a candidate or tenderer must be excluded from a procurement procedure during the stage of selecting the tenderers".[386] As already recalled above § I.6.2.a.), according to the Court of Justice, the need for an *ad hoc* assessment flows from the proportionality principle, which requires that "a specific and individual assessment of the conduct of the individual concerned, on the basis of all the relevant factors" is made - and redone - in each individual case[387]. Following *Vossloh Laeis*,[388] a finding of a breach by the competent competition authority must be in principle relied upon, but a decision by the competition authority to or not to prohibit participation in procurement procedures does not bind the contracting authority or entity which must carry out the necessary assessment.[389] Conclusively, according to the Court, "point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as

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[382] See also the Report by the Osservatorio Appalti Pubblici *Consultazione pubblica sulle direttive UE in tema di appalti pubblici e concessioni* at pp. 30 ff.

[383] Case C-267/18, *Delta Antrepriză de Construcţii şi Montaj 93 SA*, ECLI:EU:C:2019:826, paragraph 34 ff.

[384] Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016.

[385] Paragraph 50.

[386] Paragraph 55; among the precedents referred to C-41/18, *Meca*, EU:C:2019:507, paragraph 34.

[387] Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016, paragraph 77.

[388] Case C-124/17, *Vossloh Laeis*, ECLI:EU:C:2018:855.

[389] Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016, paragraph 79.

precluding national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority".[390]

Members of the Network of first instance public procurement review bodies have highlighted that this trend leads to conflicting decisions by different contracting authorities or entities and to litigation. Faced with this case law, a centralised application of the optional exclusion clauses in Article 57(4) of Directive 2014/24/EU would hardly be possible. It is true that, in *Vossloh Laeis* the Court of Justice allowed for centralised assessment of self-cleaning as it is expressly indicated in Recital 102 of Directive 2014/24/EU. The Court of Justice also clarified in *HSC Baltic* that EU law does not stand in the way of setting a portal for centralised registration of 'delinquent' economic operators to facilitate the management of public procurement procedures. However, "such a system must be structured in such a way that, before the entry on the list of unreliable suppliers of an economic operator, which is a member of a group to which a public contract had been awarded and that contract was terminated early, it is necessary to conduct a specific assessment of all the relevant factors adduced by that operator in order to demonstrate that its entry on that list is not justified in the light of its individual conduct".[391]

Basically, according to the case law, a centralised system cannot substitute an *ad hoc* assessment of the reliability of each and any economic operator in each and any procurement procedure. This *a fortiori*, but inconsistently with Recital 102, would apply to self-cleaning, as different contracting authorities and entities may differently appreciate the measures taken by the relevant economic operator.

It must, however, be stressed once more that requiring *ad hoc* evaluation places a huge burden on each contracting authority or entity and has a multiplier effect on litigation, including because of the potential for conflicting decisions embedded in the interpretative choice. From this latter point of view, the centralised approach to self-cleaning adopted in some Member States such as Greece appears to be preferable in the light of a constitutional reading of the proportionality principle, provided that the proportionality test, including adequacy, is applied to the costs and benefits analysis of a regulatory or interpretative choices instead than to an individual exclusion decision.

It is noteworthy that **the cases discussed above do not refer to the general 'objectives' of the directives, but to the specific objective of the exclusion regime. This is arguably a problem, as what are actually limited procompetitive effects flowing from an *ad hoc* approach to exclusions and self-cleaning might easily hide discriminatory treatments and in any case burden contracting authorities and entities with extraordinary**

[390] Paragraph 84.

[391] Case C-682/21,*'HSC Baltic' UAB*, ECLI:EU:C:2023:48, paragraph 46.

investigative duties and a further duty to give reasons in individual cases which can easily lead to litigation.[392]

I.7. Possible regulatory gaps?

The 2014 public procurement and concessions directives do not cover all and every aspect of all and every arrangement linking economic operators and contracting authorities or entities. Leaving aside the distinction between below and above the threshold contracts, which makes sense when the objective is Internal Market integration, but less if the concern is sustainability or resilience or even less competition *tout court*, two main potential gaps are to be pointed out, namely the lack of specific reference to Institutional Public Private Partnerships (IPPPs) (below § I.7.1.) and the limited inroads into contract performance (below § I.7.2.).

I.7.1 Institutional Public Private Partnerships

Article 2 of Directive 2014/23/EU has codified the principle of free administration by public authorities. Through it, the EU recognises that national, regional and local authorities "are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services". More specifically, "Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators".

The latter choice includes recourse to joint public-private undertakings in the framework of Institutionalised Public-Private Partnerships (IPPPs). IPPPs are not directly regulated under the 2014 directives. The rules applicable have been sketched by the case-law and in the 2008 Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP).[393] According to the Communication, "public authorities are free to pursue economic activities themselves or to assign them to third parties, such as mixed capital entities founded in the context of a PPP". Still, contracting authorities and entities must comply with the EU rules on public contracts or concessions. However, how precisely these rules apply is not fully clear.

[392] Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016, paragraph 79; in his Opinion, AG Sanchéz-Bordona reiterated the idea that the EU provisions on exclusion confer "certain functions having investigative connotations on contracting authorities" (paragraph 98).

[393] 2008/C 91/02.

A good instance is provided by the *Roma Multiservizi* case.[394] The municipality of Rome published a call for tender looking for a private partner in a public-private entity that was to be awarded a contract for the management of school services. The municipality was to own 51% of the company to be set up, while the private partner was to own 49% and to bear the entire operational risk. The only tenderer, an undertaking that indirectly was mostly owned by the same municipality, was excluded as otherwise a contract award would have raised the public participation beyond the 51% limit and would have transferred a large share of the operational risk back to the municipality. The Court of Justice started by recalling that "it must be borne in mind, first of all, that the creation of a joint venture by a contracting authority and a private economic operator is not covered as such by the rules of EU law on public contracts or services concessions". However, it is necessary to "ensure that a capital transaction does not, in reality, conceal the award to a private partner of contracts which might be considered to be 'public contracts' or 'concessions'".[395] Furthermore, the fact that "a private entity and a contracting entity cooperate within a mixed-capital entity cannot justify failure to observe those rules when awarding such a contract to that private entity or to that mixed capital entity".[396]

To avoid the risk that IPPPs are used to dodge the application of public contract rules, the Court of Justice has somewhat attracted the IPPPs within the discipline of procurement and concessions. It has considered the choice of a partner to form the IPPP and the following direct award of the contract to the joint entity as a mixed and indivisible contract whose main component is the award.[397] Indeed, on the facts of the case, "the essential objective of the procedure at issue in the main proceedings was not to create a semi-public company, but to require the partner of the city of Rome, within that company, to bear the entire operational risk connected with the provision of services ancillary to that city's school activities, that company being conceived solely as the means by which that city considered that the quality of the services would be best ensured".[398]

Therefore, the rules of either Directive 2014/23/EU or Directive 2014/24/EU are applicable. Starting the analysis from the latter, the Court of Justice held that the requirements from that directive are complied with where "the economic operator with which the contracting authority is required to form the semi-public company to which that contract is awarded has been selected in accordance with a procedure which complies with those requirements". However, the Court stopped short of requiring the adoption of one of the procedures designed in Articles 26 ff

[394] Case C-332/20, *Roma Multiservizi*, ECLI:EU:C:2022:610.

[395] Paragraph 53. The Court refers to C-215/09, *Mehiläinen and Terveystalo Healthcare*, EU:C:2010:807, paragraphs 33 and 34.

[396] Case C-332/20, *Roma Multiservizi* ECLI:EU:C:2022:610, paragraph 53; see also paragraph 73.

[397] Paragraph 54 and 55.

[398] Paragraph 56.

of Directive 2014/24/EU. Instead, it contented itself with requiring that the procedure make it possible to "select the partner of the contracting authority to which the operational activity and the management of the service covered by the public contract is entrusted, in accordance with the principles of equal treatment and non-discrimination, free competition and transparency". Finally, following precedents such as *Acoset*,[399] the "criteria for selecting that partner cannot, therefore, be based solely on the capital provided, but must enable candidates to establish, in addition to their ability to become a shareholder, primarily their technical capacity to provide the services which are the subject of the public contract and the economic and other advantages of their tender".[400]

Given that the contracting authority intended the contractor to shoulder the entire operational risk to limit both its investment in that company and the ensuing financial uncertainties which follow from it, the selection criteria might have gone further. The Court of Justice indeed held that the contracting authority was "allowed to take account of the participation which it holds, albeit indirectly, in the capital of economic operators which have expressed an interest in becoming" in deciding which economic operators were allowed to take part in the procedure.[401]

The problem with a judgment such as *Roma Multiservizi* is that the decision about what was the 'essential objective' had in mind by the contracting authority might very much depend on the facts of the case, thus leading to legal uncertainty.[402]

The fact that IPPPs are not specifically covered under EU secondary public contracts law creates legal uncertainty as to the legal regime applicable to them.

I.7.2 Limited regulation of contract implementation

The 2014 directives made some inroad into contract performance. The rules about contract modifications, however, are logically linked to the award stage as post-award changes risk to render nugatory all the procedures designed to ensure equal treatment in the choice of the contractor. Following *Obshtina Razgrad*, this also applies to tacit modifications.[403] Within the limits set in the rules on contract modifications, national law regulates breaches of contract.[404] As already indicated above (§ I.6.1.f.), this is also true of breaches of the "applicable

[399] Case C-196/08, *Acoset*, EU:C:2009:628.

[400] All the above quotations are from paragraph 83.

[401] Paragraph 87.

[402] See also S. de la Rosa in '*Evaluation of the 2014 public procurement directives. Answer to the call of evidence Ref. Ares(2024)8928678*' by the Public Contracts in Legal Globalization Network / Réseau Contrats publics dans la Globalisation juridique, at p. 10.

[403] Joined C-441/22 and C-443/22, *Obshtina Razgrad*, ECLI:EU:C:2023:970.

[404] See E. Uysal, *Enforcing Sustainability in Contract Performance under the Public Sector Directive,* PHD thesis defended at the University of Turin, Dec. 2024.

obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions" but also of sustainability clauses devised by contracting authorities or entities. Indeed, Article 18(2) of Directive 2014/24/EU and the corresponding provisions in the other 2014 directives leave it to the Member States the choice as to the means to enforce those obligations.

A related issue concerns contract termination. The Italian *Adusbef* case sits at the crossroad between contract modifications and breach of contract, basically treating as tacit modification any inaction by the contracting authority when faced with a serious breach. Here too, however, national law is called to fill the gaps in the scant EU law provisions. According to the Court of Justice,

> […] even though Article 44 of Directive 2014/23 requires Member States to provide that contracting authorities have the possibility to terminate a concession during its term in three situations, inter alia, under point (a) of that article, where the modification of the concession should have been the subject of a new award procedure, neither that article nor any other provision of that directive identifies the obligations on the contracting authority that the Member States should lay down in the event that the concessionaire is in breach of its obligations under the concession contract. Failing any harmonisation at EU level, it is for each Member State to determine the rules allowing the contracting authority to react when the concessionaire has committed a serious failure to fulfil its obligations or is suspected to have done so, which calls into question its reliability, during the term of the concession.[405]

Arguably such an approach is to lead to huge divergence among the Member States and to heighten the risk of tacit contract changes.

Besides rules on contract modification, the other big inroad in the implementation phase concerns rules about subcontracting. However, rules such as those relating to direct payment to subcontractors are not binding on the Member States. Other rules, such as for instance those requiring/allowing checks concerning compliance with exclusion grounds, are again a projection of rules on contract award. The situation will dramatically change if a suggestion from the *Report on Public Procurement* of the European Parliament was to be followed. The document "Considers that further simplification and standardisation of public procurement practices are needed; supports the introduction, where appropriate, of standard contract section templates across the Member States in order to create greater uniformity in tendering procedures, reduce administrative burdens and ensure legal clarity for contracting authorities and economic operators, while maintaining flexibility for market-driven solutions; notes, moreover, that the introduction of standard contract section templates across the Member States

[405] Case C-683/22, *Adusbef – Associazione difesa utenti servizi bancari e finanziari* ECLI:EU:C:2024:936, paragraph 102 f.

would also facilitate the integration of contract data into digital platforms, enabling easier tracking and comparison; considers that such standardisation contributes significantly to administrative efficiency and the reduction of transaction costs, as it enables contracting authorities to streamline the preparation of tender documents and economic operators to reuse elements of previous tenders, particularly when participating in multiple procurement procedures; points to the use of standard models, which should allow shorter and more consistent tender documents".[406]

Having for instance UE sanctioned contract modifications clauses will for sure help legal certainty, but an appropriate legal basis should be identified supporting such a sweeping change.

[406] A10-0147/2025, paragraph 52.

II. Convergences and divergences among the three 2014 directives

As already recalled, this Study also aims to:

- Assess whether and to what extent the three directives are complementary or conflict with each other when there are different approaches.

This part of the Study intends to fulfil the tasks (a) by assessing whether and if so to what extent the three 2014 directives answer to different objectives (§ II.1.), (b) by assessing the extent to which the provisions in the three directives actually converge (§ II.2.) even beyond what would have been reasonable to expect (§ II.3.) and (c) by analysing whether any difference in the objectives actually justifies somewhat divergent rules (§ II.4.). This Study is not expected to produce a full-fledged and detailed comparison of the three 2014 directives and therefore reference will be made to selected aspects. However, the examples of (i) conflict of interest and (ii) of exclusion grounds and selection criteria will be used to assess in more depth whether differences among the three directives really depend on diverging objectives (below §§ II.5 & II.6.).

Before going into the details, one must recall that while the Commission's proposals were more finely aligned, the final texts of the three 2014 directives resulted from much discussions, conflicts and compromises among the Commission itself, the Council and the European Parliament.[407] It would, however, be a leap of faith to argue that changes increasing the divergences were introduced to better pursue the marginally different goals of the three texts. For instance, while the Concessions Directive allows for more flexibility, the longer contract duration was compensated by a maximum duration, and therefore the benefits in terms of flexibility are rather limited.[408]

II.1. The objectives of the 2014 Directives

As it has already been clarified (above §§ I.2.1. and I.2.2). the objectives of the three 2014 directives are largely convergent. Internal Market integration is the

[407] See the contributions collected by G.S. Ølykke & A. Sanchez-Graells (eds.), *Reformation or Deformation of EU Public Procurement Rules* (Cheltenham, Elgar, 2016); also refer to R. Caranta 'The changes to the public contract directives and the story they tell about how EU law works' 52 *CMLRev.* 2015, 391-459.

[408] See the analysis by J. Wolswinkel, 'The magic of five in the duration of concessions: refining corollaries in the Concessions Directive', G.S. Ølykke & A. Sanchez-Graells (eds.), *Reformation or Deformation of EU Public Procurement Rules* (Cheltenham, Elgar, 2016) 318 ff.

main goal, together with - but with a weaker endorsement in Directive 2014/23/EU - different strategic considerations.

Only, compared with Directive 2014/24/EU, the recitals in Directives 2014/23/EU and 2014/25/EU very much insist on flexibility. Instead, flexibility is only mentioned in Recital 42 of Directive 2014/24/EU to explain the enhanced flexibility in negotiated procedures, and in Recital 61, concerning framework agreements, a flexibility this one severely curtailed in *Simonsen & Weel* (above § I.6.f.)[409].

Flexibility is a true leitmotif of Directive 2014/23/EU. The term already pops up in Recital 1 with the indication that "An adequate, balanced and *flexible* legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators" (*emphasis added*). More specifically, Recital 8 indicates that

> For concessions equal to or above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives and to ensure a *certain degree of flexibility*. Member States should be allowed to complete and develop further those provisions if they find it appropriate, in particular to better ensure compliance with the principles set out above (*emphasis added*).

Moreover, the first part of Recital 68 of Directive 2014/23/EU indicates that "Concessions are usually long-term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and contracting entities and normally falling within their remit. For that reason, subject to compliance with this Directive and with the principles of transparency and equal treatment, contracting authorities and contracting entities should be allowed *considerable flexibility* to define and organise the procedure leading to the choice of concessionaire" (*emphasis added*). It is however to be noted that the following phrases in the recital highlight the need to "ensure equal treatment and transparency throughout the awarding process".

Directive 2014/25/EU too calls for flexibility. Recital 2 indicates that "In view of the nature of the sectors affected, the coordination of procurement procedures at the level of the Union should, while safeguarding the application of [the Internal Market] principles, establish a framework for sound commercial practice and should allow maximum flexibility". Moreover, Recital 92 indicates that "In so far as compatible with the need to ensure the objective of sound commercial practice

[409] Case C-23/20, *Simonsen & Weel*, ECLI:EU:C:2021:490.

while allowing for maximum flexibility, it is appropriate to provide for the application of Directive 2014/24/EU in respect of requirements concerning economic and financial capacity and documentary evidence [...]".

Finally, the recitals in all three the directives refer to flexibility in the context of contract changes.[410] Experts from the EXPP and members of the Network of first instance public procurement review bodies have however complained that the relevant provisions are far from being flexible.

Because of the worries of the Member States that the new concessions directive was to limit their freedom to choose how to provide services to their citizens, the principle of 'free administration' was spelt out in a much clearer way in Article 2 of Directive 2014/23/EU compared with the other 2014 directives. The Court of Justice was however ready to find the same principle applicable under Directive 2014/24/EU. In *Kauno miesto savivaldybė* (AKA as *Irgita*), the Court affirmed the Member States' "freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others. That freedom implies a choice which is at a stage prior to that of procurement and which cannot, therefore, fall within the scope of Directive 2014/24".[411] The Court derived that freedom from Recital 5[412] of the general procurement directive and was quick to point out that "the freedom thus left to the Member States is more clearly distinguished in Article 2(1) of Directive 2014/23/EU".[413]

The objectives of the three 2014 directives are largely convergent. However, the utilities and the concessions directives focus very much on flexibility, providing inspiration if flexibility has to become a hallmark of EU public contracts rules.

II.2. Examples of substantial convergence among two or three of the 2014 Directives

Many of the provisions in the three 2014 directives are actually the same or very similarly worded. This has been pointed out in the case law, with the Court of Justice being able to decide cases grounded on one directive by reference to precedents based on another directive because of this

[410] See Recital 76 to Directive 2014/23/EU, Recital 109 to Directive 2014/24/EU and Recital 115 of Directive 2014/25/EU.

[411] Case C-285/18, *Kauno miesto savivaldybė (Irgita)*, ECLI:EU:C:2019:829; *Irgita* was affirmed by Joined Cases C-89/19 to C-91/19, *Rieco*, ECLI:EU:C:2020:87, and by Case C-11/19, *Azienda ULSS n. 6 Euganea*, ECLI:EU:C:2020:88.

[412] See also Joined Cases C-383/21 and C-384/21, *Sambre & Biesme*, ECLI:EU:C:2022:1022, paragraph 72; the Court also refers to the second subparagraph of Recital 31.

[413] Paragraphs 45 and 47 respectively; see also Case C-11/19, *Azienda ULSS n. 6 Euganea*, ECLI:EU:C:2020:88, paragraphs 42 ff. Lacking a specific provision, Recital 5 of Directive 2014/24/EU was referred to in Case C-260/17, *Anodiki Services*, ECLI:EU:C:2018:864, paragraph 26.

convergence (for further examples of convergence see also above § II.1. and below §§ II.3. and II.6.).[414]

The notions of contracting authority, including the one of body governed by public law, are the same – and it would not be workable to have them different – across the three 2014 directives (see Article 6 of Directive 2014/23/EU; Recital 12 and Article 1(2) of Directive 2014/24/EU; Recital 10 and Article 1(2)). Only, Recital 21 in Directive 2014/23/EU mirrors the wording of the notion of body governed by public law found in the other two directives, leaving the notion of contracting authority aside. There is no reason for a (limited) difference in the recitals corresponding to identical articles.

Directives 2014/24/EU and 2014/25/EU converge for instance on the rules about in house providing (Articles 12 and 28 respectively).[415] The corresponding rules in Article 17 of Directive 2014/23/EU have been written using the same mould.

Convergence is also the case concerning the issue of the requirement of the legal and substantive identity of the candidate and tenderer in two stage procedures such as restricted or competitive procedures with negotiations. In *Telecom Italia*, a merger had taken place between two candidates admitted to a restricted procedure and the question was whether the resulting entity might still participate in the procedure. The case was regulated under Article 28(2) of Directive 2014/24/EU, but the Court of Justice had no hesitation to refer to *MT Højgaard and Züblin* to assess whether the requirement was met given "the analogous context of Directive 2004/17", the utilities procurement directive that preceded Directive 2014/25/EU (see today Article 46(2) thereof).[416] This ruling points out to the fact that the different procedures in Directives 2014/24/EU and 2014/25/EU are actually described in the same way.

At times convergence extends to very specific institutes, such as is the case with reserved award procedures to the benefit of sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons.[417]

There is a significant convergence in the recitals and provisions across the 2014 directives and this is even stronger when Directives 2014/24/EU and 2014/25/EU are considered.

[414] E.g. Case C-697/17, *Telecom Italia*, ECLI:EU:C:2019:599; Case C-263/19, *T-Systems Magyarország*, ECLI:EU:C:2020:373, paragraph 47.

[415] Joined Cases C-266/17 and C-267/17, *Rhein-Sieg-Kreis*, ECLI:EU:C:2019:241, paragraph 25.

[416] Case C-697/17, *Telecom Italia*, ECLI:EU:C:2019:599, paragraph 31.

[417] See respectively Article 24 of Directive 2014/23/EU, Article 20 of Directive 2014/24/EU and Article 38 of Directive 2014/25/EU.

II.3. Unjustified convergence: the contract modifications regime

At times, the rules in the 2014 directives are basically the same even when, because flexibility has a greater importance in the utilities sectors and with reference to concessions, one would have expected divergence.

A good example of where the specificity of concession contracts does not translate into materially different provisions concerns 'contract modifications'. Rules on contract modifications were first introduced with the 2014 reform to codify the *pressetext*[418] case law that had created much uncertainty.[419]

While Recital 75 of Directive 2014/23/EU stresses that "Concession contracts typically involve long-term and complex technical and financial arrangements which are often subject to changing circumstances", Article 43 of that directive is not really different from Article 72 of Directive 2014/24/EU. A phase is added in Article 43(3) as compared to Article 72(3) concerning the calculation of value changes. Article 43(3) of Directive 2014/23/EU, after referring – the same as Article 72(3) of Directive 2014/24/EU – to indexation clauses adds that "If the concession does not include an indexation clause, the updated value shall be calculated taking into account the average inflation in the Member State of the contracting authority or of the contracting entity". This can hardly be explained by referring to the additional flexibility of the concession directive. As the experience of the past few years has shown, this a common sense provision that should find its place across the three directive. The specificity of concession contracts does not therefore alter the fact that the list of circumstances allowing for contract modifications without the need to launch a new award procedure is treated as exhaustive.[420] If flexibility was taken seriously, being complex and long-term contracts, concessions should be easier to modify doing their execution than standard procurement contracts.

Even wider are the convergences between Recitals 113, 115 and 117 as well as Article 89 of Directive 2014/25/EU on the one hand and the corresponding Recitals 107, 109 and 111 and Article 72 of Directive 2014/24/EU on the other hand.

The correspondence among the regime in the two directives goes so deep that in *T-Systems Magyarország* the Court of Justice could decide a case on contract modification without even knowing for sure which of the directives was applicable.[421] Only, Article 72(1)(b) of Directive 2014/24/EU has a phrase that is missing in Article 89 of Directive 2014/25/EU. This indent provides that "However, any increase in price shall not exceed 50% of the value of the original contract. Where several successive modifications are made, that limitation shall apply to

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[418] Case C-454/06, 19 June 2008, *pressetext Nachrichtenagentur*, EU:C:2008:35.

[419] Case C-683/22, *Adusbef – Associazione difesa utenti servizi bancari e finanziari* ECLI:EU:C:2024:936; Joined Cases C-721/19 and C-722/19, *Sisal SpA,* ECLI:EU:C:2021:672.

[420] Case C-683/22, *Adusbef – Associazione difesa utenti servizi bancari e finanziari* ECLI:EU:C:2024:936, paragraph 51.

[421] See Case C-263/19, *T-Systems Magyarország*, ECLI:EU:C:2020:373, paragraphs 46 and 47.

the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive". The absence of this limitation in Directive 2014/25/EU allows for more flexibility in contract changes under the utilities directive. One might well wonder why the same (limited) flexibility is not retained in the concessions directive. The last phrase of Article 43(1)(b) of Directive 2014/23/EU indeed repeats the limitation to the increase in price found in Directive 2014/24/EU.

Being very similar, the provisions on contract changes are not consistent with the different degrees of flexibility allowed in the three 2014 directives, flexibility that in Directive 2014/23/EU is expected to correspond to the heightened complexity of concessions contracts. This translates into a conflict between the objectives and actual provisions in Directive 2014/23/EU.

II.4. Differences in award procedures

As already recalled, both Directives 2014/23/EU and 2014/25/EU provide for additional flexibility when compared to Directive 2014/24/EU.[422] The award procedures are the ideal candidates for allowing the choice between rigidity and flexibility. It is fair to recall that, compared to previous enactments, Directive 2014/24/EU itself introduced some measure of procedure liberalisation. As Recital 42 indicates, "There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations". The law makers even put up a strong face in front of change claiming that "A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders". Still, recourse to very competitive - and rigid - award procedures such as the open and restricted ones is the default position under Directive 2014/24/EU. Indeed, the "Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes". While the terminology somewhat changes between different authors, in Articles 26 and following of Directive 2014/24/EU we still have: two general award procedures - open and restricted - that can always be used; two special procedures - competitive dialogue and competitive procedure with negotiations - that may be used in given - admittedly widely defined - situations, and finally two exceptional procedures - negotiated procedure without prior publication of a contract notice and innovation partnership.[423] While the characterisation of the latter as a procedure might be questioned, the fact is that the recourse to the two last mentioned procedures is

[422] See also, concerning Directive 2014/23/EU, Case C-486/21 *SHARENGO*, ECLI:EU:C:2022:868, paragraph 88.

[423] See Ch. Krönke, 'Comment to Article 26' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) 287 ff.

bound by the recurrence of exceptional circumstances.[424] The Member States are not allowed to design award procedures different from those designed in the directive.[425]

On the contrary, Directive 2014/23/EU has chosen minimum procedural harmonisation. Recital 8 indicates that "it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty". Article 30 opens with one more declaration of the freedom for contracting authorities or contracting entities. They "shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive". The only limits come from the need to comply with the principles of EU public procurement law laid down in Article 3, namely equal treatment, non-discrimination - the latter specifically reiterated with reference to the forbidden preferential disclosure of information - transparency and proportionality. Transparency is further buttressed by the provision in Articles 31 and 32 on mandatory notices to make both the intention to award a concession and the results of the concession award procedure known. The notices must follow specific templates detailing which information is required.

Directive 2014/25/EU stands a bit in between the other two directives. As Directive 2014/24/EU, the utilities directive provides for six procedures. However, under Article 44(2), "Member States shall provide that contracting entities may apply open or restricted procedures or negotiated procedures with prior call for competition". Therefore, we have three standard procedures *in lieu* of two, and this includes a procedure allowing for negotiations. Conditions for recourse to the competitive dialogue are loosely - and arguably not bindingly - described in Recital 60. Recourse to innovation partnership and negotiated procedures is instead confined under specific conditions by Recital 59 and Article 49(1) and by Articles 44(5) and 50 respectively.

One might argue that having six procedures available is an overkill. The original proposal from the Commission had a toolkit approach allowing each Member States to choose which procedures it considered fit to its conditions. Apparently, the restricted procedure is seldom used, and the take up of procedures such as the competitive dialogue or the innovation partnership is uneven in the Member States.

Flexibility in choosing and even designing award procedures is uneven among the three 2014 directives. The objective of flexibility is stronger with reference to concessions directive, still strong concerning the utilities and limited when it comes to classic procurement. Correspondingly, the procedural flexibility is higher under Directive

[424] See P. Cerqueira Gomes, 'Comment to Article 31' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) 335 ff.

[425] See, referring to Directive 2004/18/EC, Case C-299/08, *Commission* v *France*, ECLI:EU:C:2009:769, paragraph 29: "The award of public contracts by means of other procedures is not permitted by that directive".

2014/23/EU, lower under Directive 2014/24/EU and 'medium' under Directive 2014/25.

II.5. A distinction without a difference: the treatment of conflict of interest

The 2011 Green Paper *on the modernisation of EU public procurement policy — Towards a more efficient European Procurement Market* launched a broad public consultation on options for legislative changes.[426] Among the key areas for reform, combating favouritism, corruption and conflicts of interest was included. Following the proposal, Directive 2014/24/EU has for the first time enacted specific rules on conflict of interest. Recital 16 indicates that "Contracting authorities should make use of all possible means at their disposal under national law in order to prevent distortions in public procurement procedures stemming from conflicts of interest. This could include procedures to identify, prevent and remedy conflicts of interests". Article 24 defines 'conflict of interest' and provides, in its first phrase, that "Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators". The above provisions find a parallel respectively in Recital 26 and in Article 42 of Directive 2014/25/EU. Both directives refer to 'conflicts of interest' when sketching the content of the report that the Member States have to submit biannually to the Commission (Article 83(3) of Directive 2014/24/EU and Article 99(3) of Directive 2014/25/EU respectively).

However, Directive 2014/24/EU also mentions conflict of interest as an optional ground for exclusion in Article 57(4)(e), in case the effects of the conflict "cannot be effectively remedied by other less intrusive measures". Moreover, according to the second phrase in Article 58(5), "A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract". As it will be discussed below (§ II.6.c.), Directive 2014/25/EU follows a less and differently articulated treatment of selection and exclusion which explains - but does not justify - the absence of parallelism.

Directive 2014/23/EU instead takes a more encompassing approach to integrity going well beyond conflict of interest to include other aspects of integrity in public buying. Recital 61 indicates that, "In order to combat fraud, favouritism and corruption and prevent conflicts of interest, Member States should take appropriate measures to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers. Such measures should in

[426] COM(2011) 15 Final.

particular aim at eliminating conflicts of interest and other serious irregularities". Article 35 of Directive 2014/23/EU - titled *Combating corruption and preventing conflicts of interest* - is correspondingly more encompassing. Its first phrase clarifies that the

> Member States shall require contracting authorities and contracting entities to take appropriate measures to combat fraud, favouritism and corruption and to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession award procedures, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers.

The provision then defines the concept of conflicts of interest and finally indicates that "the measures adopted shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest that has been identified".

A further difference between the treatment of conflict of interest in Directives 2014/23/EU and 2014/24/EU will be highlighted in the next section (below §§ II.6.)

In conclusion, conflicts of interest are dealt differently in Directives 2024/23/EU and 2014/24/EU. More specifically, the concessions directive provides more articulated rules including conflict of interest among different integrity issues. Since the risks of conflict of interests are not significantly different in procurement or concessions, **there is no reason why the more widely encompassing provisions in Directive 2014/23/EU should stay so confined to a specific directive.** So much so that the recent *Report on Public Procurement* of the European Parliament shows concern that "favouritism, unclear or biased selection criteria and insufficient oversight mechanisms for enforcement and sanctions undermine trust in public contracting and fairness".[427] The Commission Report *on the functioning of Directive 2014/23/EU on the award of concession contracts and on the impact on the internal market of the exclusions set out in Article 12* too has stressed the importance of mitigating the risks from conflict of interest and corruption in general terms, without distinguishing between procurement and concessions.[428]

The provisions concerning fraud, favouritism, corruption and conflicts of interest diverge in the procurement and concessions directives without any appreciable reason.

[427] A10-0147/2025 esp. paragraph 18.

[428] COM(2023) 460 final at pp. 7 f.

II.6. Another example of overdone divergence: the selection and exclusion regime

The treatment of selection and exclusion in the three directives has some shared elements. Besides the differences, often just in formulation, that will be highlighted in the following discussion, some aspects of the selection and exclusion regimes in the three directives are indeed convergent and as such add to the examples of convergence highlighted above (§ II.2).

Convergence among the three directives concerns first the mandatory exclusion regime, with a difference for public undertakings and other entities enjoying special and exclusive rights operating in the utilities sector in both Directives 2014/23/EU and 2014/25/EU (below § II.6.a.). This is also the case concerning reliance on other entities (see Article 38(2) and (3) of Directive 2014/23/EU, Article 63 of Directive 2014/24/EU and Article 79 of Directive 2014/25/EU).

However, generally speaking, the treatment of selection and exclusion in the three directives is on its face very different, leading to divergence among the directives. At the same time, specifically concerning exclusions, there is a 'common core' of rules with limited – and not always easily justifiable from the point of view of the partially different objectives of the three directives – divergences in the regulatory framework.

II.6.1 Selection and exclusion under the concession directive as compared with what is provided under the other two directives

Directive 2014/23/EU deals with *Selection and qualitative assessment of candidates* (and exclusions) in just one provision, Article 38. It is a long provision, but most of it is devoted to exclusion and self-cleaning.

Article 38(1) provides the 'conditions for participation' that must be fulfilled by tenderers under Article 37(1)(b). It refers to "professional and technical ability and the financial and economic standing" without any further elaboration and shortly lists means of proof that may be required ("self-declarations, reference or references"). The only requirements are compliance with non-discrimination and proportionality and the need of "of ensuring genuine competition". Recital 63 adds 'fairness' to the lot.

As already indicated, Article 38(2) allows reliance on the capacity of other entities - which according to Recital 63 is of specific importance for SMEs - and sets minimum conditions to be complied with. The same applies to groups of economic operators under Article 38(3).

The rest of Article 38, namely paragraphs (4) to (10) very much follows Article 57 of Directive 2014/24/EU. As is well known, Article 57 distinguishes between mandatory and optional exclusion clauses.

Concerning the first set of exclusions, Article 38(4) and (5) Directive 2014/23/EU introduce a distinction between contracting authorities and entities, on the one hand, and public undertakings and other entities enjoying special and exclusive rights operating in the utilities sector on the other hand. The former must apply exclusion clauses. The latter "may", but are not obliged to. It is already to be highlighted that contracting entities are not obliged to apply exclusion grounds under Article 80 Directive 2014/25/EU, which creates a difference in the application of exclusion grounds depending on which directive applies.

Besides the clumsy way the different provisions are drafted, there is no indication of why contracting entities are treated differently from contracting authorities. The first phrase in Recital 69 of Directive 2014/23/EU is content with indicating in very general terms that "Concessions should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering, terrorist financing or trafficking in human beings." Which, by the way, is only reasonable. However, one phrase in Recital 105 of Directive 2014/25/EU provides some additional indication stating that "Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether to apply the exclusion criteria listed in Directive 2014/24/EU to such contracting entities".

The example of the treatment of exclusions by contracting entities shows that **having rules dispersed in three directives creates situations in which a necessary explanation of the rationale for one rule is missing in one of the directives (Directive 2014/23/EU) and must be found in another one (Directive 2014/25/EU), making the task of the interpreter very difficult**.

Concerning optional exclusions, there are three divergences between the lists in Article 38(7) of Directive 2014/23/EU on the one hand and Article 57(4) of Directive 2014/24/EU on the other hand. Firstly, Article 57(4)(f) lists a situation "where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures". As illustrated in the previous paragraph (above § II.5), Article 35 of Directive 2014/23/EU does not really correspond to Article 41 of Directive 2014/24/EU, but this can hardly explain why an exclusion is not provided in Article 38(7) of Directive 2014/23/EU. An exclusion would arguably seem possible under Article 35, last phrase, of the concessions directive which requires that "the measures adopted shall not go beyond what is strictly necessary to prevent a potential conflict of interest or eliminate a conflict of interest". While the case may be made that the different wording in Article 35, last phrase, of Directive 2014/23/EU and in Article 57(4)(f)

of Directive 2014/24/EU, might be read as to avoid inconsistent applications of the two directives to similar situations, the different approaches in the two directives is bound to raise unnecessary uncertainties.

Secondly, there is a simpler difference in drafting. Article 38(7)(b) of Directive 2014/23/EU adds a phase to the exclusion for insolvency allowing the contracting authorities or entities to allow the participation of an economic operator who "will be able to perform the concession, taking into account the applicable national rules and measures on the continuation of business in the case of those situations". The same possible exception from exclusion instead comes to the end of Article 57(4) Directive 2014/24/EU.

Thirdly, Article 38(7)(i) of Directive 2014/23/EU adds a specific exclusion clause for concessions in the field of security and defence that replicates Article 39(2)(e) of Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

Finally, Article 38(8) to (10) of Directive 2014/23/EU closely corresponds to 57(5) to (7) of Directive 2014/24/EU, covering circumstances possibly leading to exclusion arising during the procedure and self-cleaning. The analogy has been pointed out by the Court of Justice in *Vert Marine*.[429]

The rules on exclusion in Directive 2014/23/EU are drafted differently from the corresponding rules in Directive 2014/24/EU - and in Directive 2014/25/EU as far as concessions in the utilities sectors are concerned - without these differences being justified by partially different objectives of the directives.

II.6.2 Selection and exclusion in the procurement (classic sectors) directive

The most articulated regime for selection and exclusion is laid down in Directive 2014/24/EU.

Article 57 lays down EU mandatory exclusion clauses (at (1) and (2)), lists exclusions situations left to the discretion of contracting authorities (at (4)) and for the first time provided a legal regime for self-cleaning (at (6) and (7).[430]

Article 57 adds much flesh to the scant provision in Article VIII(4) of the WTO GPA. The latter, besides not providing for self-cleaning, has a mish mash approach to exclusion and provides that. "4. Where there is supporting evidence,

[429] Case C-472/19, *Vert Marine*, ECLI:EU:C:2020:468, paragraph 16.

[430] See P. Friton & J. Zöll, 'Comment to Article 57' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) 588 ff.

a Party, including its procuring entities, may exclude a supplier on grounds such as: (a) bankruptcy; (b) false declarations; (c) significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts; (d) final judgments in respect of serious crimes or other serious offences; (e) professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier; or (f) failure to pay taxes." Lett. (d) is the basis for EU mandatory exclusion clauses, including for the requirement of a final judgment, while lit. (e) provides the basis for many of the more specific optional grounds for exclusion listed in Article 57(4), at least in so far as the adjective 'commercial' is not given a restrictive interpretation.

Article 58 develops the selection criteria that may be imposed by contracting authorities.[431] While Article VIII(1) of the WTO-GPA refers to "legal and financial capacities and the commercial and technical abilities", EU law traditionally makes reference on the one hand to "economic and financial standing" and to "technical and professional ability" on the other hand. Content-wise, and unlike EU law, the WTO-GPA does not further elaborate on those selection criteria. Moreover, Article 58 makes explicit the need for a link to the subject matter of the contract and the requirement of proportionality which is further detailed with reference to the 'minimum yearly turnover'. As already indicated, Article 38(1) of Directive 2014/23/EU is much shorter.

Article 60 links to both Article 57 and 58 as it regulates, together with Annex XII, the means of proof that may be required from economic operators to demonstrate the absence of exclusion clauses and their meeting of selection criteria. Once again, the level of detail is much higher here compared with Article 38(1) of Directive 2014/23/EU and this difference is much compounded once Annex XII and its parts are considered.

Article 63 regulates in some details the reliance on the capacity of other entities to demonstrate "economic and financial standing" and/or "technical and professional ability". This possibility was introduced by the case law, but was much resisted in some Member States, leading to a more specific regulation. Article 38(2) of Directive 2014/23/EU very much condenses the same provision.

Article 64 of Directive 2014/24/EU lays rules for Official lists of approved economic operators and certification by bodies established under public or private law. This refers to lists established or maintained by the Member States, not by individual contracting authorities as is the case with qualification systems under Article 77 of Directive 2014/25/EU. Moreover, the Member States may provide for a certification by certification bodies complying with European certification standards within the meaning of Annex VII. Nothing on these lines is provided by Directive 2014/23/EU. While concession contracts are normally large and complex and these systems might not be suitable, those lists might in principle

[431] See R. Vornicu, 'Comment to Article 57' in R. Caranta & A. Sanchez-Graells (eds.), *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham, Elgar, 2021) 636 ff.

be relevant to subcontractors to which exclusion and selection provisions are applicable under Article 42 of the concessions directive.

Finally, Article 59 of Directive 2014/24/EU regulates the European Single Procurement Document (ESPD), Article 61 is dedicated to the Online repository of certificates (e-Certis) and Article 62 deals with Quality assurance standards and environmental management standards, including EMAS. None of these provisions is mirrored in Directive 2014/23/EU notwithstanding the fact that especially quality assurance and environmental management standards are even more relevant in large and complex contracts. Instead, Recital 92 of Directive 2014/25/EU allows contracting entities to use the ESPD. Finally, Article 81 of Directive 2014/25/EU corresponds to Article 62 of Directive 2014/24/EU.

Compared with Directive 2014/23/EU, Directive 2014/24/EU provides for a very articulated selection and exclusion regime. These differences may only to a very limited extent be justified by the partly different objectives in the two directives - i.e. the higher relevance of flexibility for the concessions regime. For the rest, these differences seem to be random and risk creating inconsistency in the application of the rules.

II.6.3 Selection and exclusion in the procurement (utilities) directive

As indicated already in the last phrase of Recital 2 to Directive 2014/25/EU, “In view of the nature of the sectors affected, the coordination of procurement procedures at the level of the Union should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility”.

This need for staying close to commercial practices and their inherent flexibility impacts exclusions and selection. The subsection about qualification opens with Article 77 on Qualifications systems. Unlike official lists regulated under Article 64 of Directive 2014/24/EU, these systems do not operate at Member State level, but at the level of (each) contracting entity, with the possibility for other entities to refer to one of such systems. The fundamental rule is enacted in the second phrase of Article 77(1), providing that “Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification”. This provision creates a pro-competitive opening of the system that goes beyond the requirements in Article IX of the WTO-GPA, “Qualification of Suppliers”, which under (1) provides that “A Party, including its procuring entities, may maintain a supplier registration system under which interested suppliers are required to register and provide certain information”.

Recital 92 doubles down on flexibility. It clarifies that,

> In so far as compatible with the need to ensure the objective of sound commercial practice while allowing for maximum flexibility, it is appropriate to provide for the application of Directive 2014/24/EU in respect of requirements concerning economic and financial capacity and documentary evidence. Contracting entities should therefore be allowed to apply the selection criteria provided for in that Directive and, where they do so, they should then be obliged to apply certain other provisions concerning, in particular, the ceiling to requirements on minimum turnover as well as on use of the European Single Procurement Document".

On this basis, Article 78 provides for the need of objective and transparent rules for qualitative selection. This must be read together with Article 80(2), which gives contracting entities the possibility to refer to the selection criteria in Article 58 of Directive 2014/24/EU. Requirements concerning 'yearly turnover' are explicitly recalled. Still, as this might easily become a source of litigation, Article 79 deals extensively with the reliance on the capacity of other entities, distinguishing on whether or not the contracting authority decided to refer to the exclusion clauses in Article 57 of Directive 2014/24/EU.

Finally, Article 80(1) of Directive 2014/25/EU indicates that contracting entities may refer to the exclusion grounds in Article 57 of Directive 2014/24/EU. Moreover, in case they are contracting authorities, they must apply Article 57(1) and (2). The Member States may ask contracting entities that are contracting authorities to also apply the exclusions in Article 57(4) (but see below § II.6.4.). Recital 105 explains that "Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offences, money laundering or terrorist financing. The non-payment of taxes or social security contributions should also lead to mandatory exclusion at the level of the Union". However, as already indicated, "Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether to apply the exclusion criteria listed in Directive 2014/24/EU to such contracting entities. The obligation to apply Article 57(1) and (2) of Directive 2014/24/EU should therefore be limited to contracting entities that are contracting authorities". That is a rather weak excuse, as EU law should rather make sure that information about grievous misdoing is made available in compliance with Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR). Such communication of information is necessary to avoid dishonest tenderers having access to public or semi-public resources.

The increased flexibility of Directive 2014/25/EU and its attempt to stay closer to commercial practice is reflected in the specific rules on qualification systems. The rules on exclusions give rise to such complications that can hardly be considered to be consistent with the objectives of the directive.

II.6.4 A case law bent on erasing the differences among the approaches in the directives

As shown in the previous analysis (above § II.6.a. to c.; but see also § II.5), besides some commonalities, the treatment of selection and exclusions in the 2014 directives shows differences about drafting and normative contents that are often not justified by the partially different objectives in the three directives. Therefore, these differences may amount to idiosyncratic and unjustified divergences in the regulatory framework. The aim of staying closer to commercial practice and flexibility specific of Directives 2014/23/EU and 2014/25/EU boils down to the possibility for contracting authorities and entities bound by the two above mentioned directives to refer or not to the more specific regime in Directive 2014/24/EU. Moreover, as already recalled, Article 77 of Directive 2014/25/EU allows for the use of qualification systems (above § II.6.c.).

Besides what has just been mentioned, it does not seem that flexibility allows for creating a new and very different selection and exclusion regime as the provisions in Directive 2014/24/EU very much answer to requirements from the equal treatment and non-discrimination principles that are common to the three directives.

Moreover, Directive 2014/23/EU and Directive 2014/25/EU do not refer explicitly to ESPD and eCertis.[432] As these are instruments of simplification for economic operators and contracting authorities and entities alike, there is no reason why their use should not be extended across all the realm of EU public contracts law.[433] It may be assumed that if the issue was to be brought in front of the Court of Justice, it will reason by analogy, but this will just be one more instance of unnecessary and unwarranted difference among the three directives which has no justification in the limited differences among their objectives and thus leads to incoherence in the regulatory framework.

Whatever differences there are among the three regimes, they are in being reduced by the case law. As already recalled (§ I.6.2.b.), in *Infraestruturas de Portugal SA* the Court of Justice obliterated a relevant difference between the regime in Article 57(4) of Directive 2014/24/EU and Article 80(1) of Directive 2014/25/EU, indicating that the Member States must in any case provide at least

[432] But, concerning the former, see Rectial 92 of Directive 2014/25/EU.

[433] See e.g.the first phrase in Recital 84 of Directive 2014/24/EU: “Many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through use of a European Single Procurement Document (ESPD) consisting of an updated self-declaration, could result in considerable simplification for the benefit of both contracting authorities and economic operators”.

the possibility for their contracting authorities and entities to foresee the optional exclusions.[434]

In *Vossloh Laeis* the Court of Justice acted on the understanding that, once a contracting entity has decided - or has been asked by the relevant Member State - to apply an exclusion clause, the concerned economic operator will have the possibility to have recourse to self-cleaning under Article 57(6) and (7) of Directive 2014/24/EU even if those provisions are not expressly referred to in Article 80 of Directive 2014/25/EU.[435] Therefore, once the optional exclusion regime is adopted, the full package follows, including self-cleaning.

The increased convergence in the application of the directives provisions on selection and exclusion extends itself to Directive 2014/23/EU. In *Roma Multiservizi* analysed above (§ I.7.1.), the referring court had not clarified whether the award at issue concerned a procurement or a concession.[436] The Court of Justice examined the issue of the legality of the exclusion first in the light of Directive 2014/24/EU.[437] When addressing the issue under Directive 2014/23/EU, the Court simply referred back to the arguments already developed with reference to the other directive.[438]

Implicit parallelism between the procurement and the concessions directives was affirmed in *SHARENGO*.[439] The referring court had pointed out that, while Article 58(1) and (2) of Directive 2014/24/EU allows the contracting authority to require economic operators to be enrolled in one of the professional and trade registers which are kept in the Member State of establishment, the concept of 'professional activity' does not appear in Directive 2014/23/EU. According to the Court of Justice, "The silence observed on that point by Article 38(1) of Directive 2014/23 cannot, however, preclude the contracting authority from imposing, as a criterion for participation in a procedure for the award of a concession, selection criteria relating to suitability to pursue a professional activity".[440] The 'objective of flexibility and adaptability' allows a broad interpretation of the concept of 'professional … ability' referred to in Article 38(1). Moreover, "the absence of any reason to distinguish the situation under the two directives is further motivated

[434] Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016, paragraphs 71 and 77.

[435] Case C-124/17, *Vossloh Laeis*, ECLI:EU:C:2018:855, paragraph 19: "Article 57 of Directive 2014/24, to which Article 80 of Directive 2014/25 refers, imposes or gives the contracting authority the power to exclude an economic operator from participation in a public procurement procedure in the event that there is one of the exclusion grounds listed in paragraphs 1, 2 and 4 of that article".

[436] Case C-332/20, *Roma Multiservizi*, ECLI:EU:C:2022:610, paragraph 60.

[437] Paragraphs 70 ff.

[438] Paragraphs 94 ff.

[439] Case C-486/21 *SHARENGO*, ECLI:EU:C:2022:868.

[440] Paragraph 87.

with reference to the forms to be used by contracting authorities, which are materially the same".[441]

The case law has been effacing the differences in the selection and exclusion regime of the three 2014 directives as they do not correspond so much to the enhanced flexibility of Directive 2014/23/EU and of Directive 2014/25/EU and rather creates uncertainty in the practice of contracting authorities and entities.

There are not many differences about the treatment of selection and exclusions in the three 2014 directives that may be justified by the enhanced flexibility in Directives 2014/23/EU and 2014/25/EU. This might lead to unsubstantiated differences that can lead to inconsistent application. However, the case law is slowly effacing those differences and instating coherence in this area of the law.

[441] Paragraph 88.

III. Conclusions

Two main findings come out from the above analysis: (1) while the objectives of the 2014 directives are well balanced in the relevant specific provisions of the same directives, the application of the general principles have made the law much less predictable; heavy burdens related to case by case decisions have been placed on the shoulders of contracting authorities and entities; heightened litigation risks are a collateral - but very significant - damage from this trend; (2) the differences among the three 2014 directives are limited, and do not always correspond to the somewhat different declared (specific) objectives of those directives.

More specifically concerning the first point, and even if the enforcement of environmental and social obligations could have arguably been stronger, the goal of achieving an integrated internal market for public contracts, and the objective to contribute to sustainability and SMEs inclusion in procurement markets have been combined throughout the directives without placing excessive burdens either on contracting authorities or on law-abiding economic operators. Therefore, the cause for the limited success in achieving market integration in procurement and concessions markets is not to be found in any conflict among the objectives or among these and the existing rules.

However, in a growing number of cases, reference by the Court of Justice to the proportionality and/or competition principles as listed in Article 18(1) of Directive 2014/24/EU has led to judgments that place very heavy burdens on contracting authorities and entities and increase the risks of litigation, with unclear - if any - benefits on the integration of the internal market. Indeed, research has confirmed that requiring the widest possible competition might lead to higher administrative and human resources costs more than offsetting the incremental benefits of more tenders being submitted.[442] In one case, the judgment further conflicts with the objective of sustainability and with the balance among the two main goals achieved in the 2014 directives.[443] Judicial legislation is not new,[444] but it is argued here that the case law of the past ten years has much altered the design embedded in the legislation.[445]

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[442] E. Korem, 'Equality qualities in public procurement' *P.P.L.R.* 2025, 3, 200-2016 esp. at 211 f, where further references.

[443] Case C-424/23, *DYKA Plastics*, ECLI:EU:C:2025:15.

[444] See the pioneering research by S. de Mars, 'The Limits of General Principles: A Procurement Case Study' in 38 *European Law Review* 2013, 316.

[445] For earlier examples see G.S. Ølykke & A. Sanchez-Graells, 'Introduction' in G.S. Ølykke & A. Sanchez-Graells (eds.), *Reformation or Deformation of EU Public Procurement Rules* (Cheltenham, Elgar, 2016) 9 f.

Finally on this point, a gap was identified in EU secondary law rules in so far as the 2014 directives do not cover Institutional Public Private Partnerships. In addition, their provisions covering contract executions seem to fall short from ensuring the proper working of the Internal Market and the pursuance of strategic objectives.

Concerning the interrelations among the three 2014 directives, the research has shown that the directives pursue the same main objectives of market integration and sustainability, including measures to favour the inclusion of SMEs in public contract award procedures. While sustainability is less emphasised in Directive 2014/23/EU, the concessions and utilities directives place a higher emphasis on flexibility compared to Directive 2014/24/EU. By itself, this emphasis is not inconsistent with - and indeed it might even be more conducive to - the achievement of the main objectives of the 2014 directives.

The issues here lie in the fact that the different emphasis on flexibility does not always translate in rules giving wider margins of choice to contracting authorities and entities in the utilities sectors and with reference to concessions, thus leading to incoherence between the objectives and the provisions especially concerning Directive 2014/23/EU. This is for instance the case with reference to contract changes. At the same time, some of the differences in the rules in the 2014 directives (e.g. those on conflict of interest or exclusion) do not correspond nor can they be related to the partly different objectives of the directives. As such, they just add to the incoherence among the three directives.

Moreover, as confirmed by the case law but also by some of the members of the Network of first instance public procurement review bodies, the multiplicity of legal texts may be confusing for the relevant actors, including for national courts who often enough refer to the wrong directive in their references for preliminary ruling under Article 267 TFEU,[446] or do not provide enough information to the Court of Justice to assess whether the correct directive was referred to,[447] or simply fail to identify the relevant directive - and this especially so in urgent procedures.[448]

This shows that complementarity of the 2014 directives is more apparent than real and that the repetition of the same or of very similar provisions across the three of them goes against the objective of making rules simple.

[446] E.g. Case C-66/22, *Infraestruturas de Portugal SA*, ECLI:EU:C:2023:1016; Case C-631/21, *Taxi Horn Tours*, ECLI:EU:C:2022:869, esp. paragraph 39; Case C-416/21, *Landkreis Aichach-Friedberg*, ECLI:EU:C:2022:689; Case C-263/19, *T-Systems Magyarország*, ECLI:EU:C:2020:373, paragraph 46 f.

[447] Case C-424/23, *DYKA Plastics*, ECLI:EU:C:2025:15, paragraphs 23 ff; Case C-452/23, *Fastned Deutschland*, ECLI:EU:C:2025:284, paragraph 44.

[448] E.g. Case C-332/20, *Roma Multiservizi*, ECLI:EU:C:2022:610.

IV. Some reflections for the future reform

Based on the findings in this Study, some aspects will be worth considering in the ongoing reform process. They concern (a) the preferred method of regulation, (b) the benefits of consolidating the three directives, (c) the risks of outright 'simplification', (d) the merits of enhanced flexibility and (e) finally the need for better monitoring.

Concerning the preferred method of regulation, it is well known that the Letta Report "identifies the challenge of simplifying the regulatory framework as a principal hurdle for the future Single Market. A pivotal proposition emerges: to reaffirm and embrace the Delors method of maximum harmonisation coupled with mutual recognition, fully enshrined by the European Court of Justice's rulings".[449] This rather general stance is replicated with specific reference to public procurement. The Report claims that "it is to be avoided in the Single Market that individual Member States gold plate European procurement rules. Due consideration should be awarded to the option of transforming the EU procurement framework into a Regulation, thus limiting the discretion for national fragmentation."[450]

However, many of the experts in the EXPP and of the members of the Network of first instance public procurement review bodies have highlighted that EU public contracts law is very far from regulating the entire matter as it focuses mainly on the award procedures. Those procedures are grafted in domestic rules governing how the public budgets are allocated and disbursed. These rules diverge widely from Member State to Member State. The same differences resurface concerning contract implementation which is only marginally regulated under EU law (above § I.7.2.). Having directives allows each Member State a measure of discretion in adapting the procurement rules to its overall public spending legislation but also to its institutional framework and market development, which would not be possible with one-size fits all regulation. Some experts in the EXPP have specifically argued that a regulation will pose serious adaptation risks in federal or very decentralised Member States. The recent *Report on public procurement* approved by the European Parliament "Points to significant legal and administrative differences across the Member States and their procurement systems, ranging from varying degrees of autonomy for local authorities to differing procurement strategies; recognises the benefits of the directive format, which allows for such diversity while ensuring legal coherence and mutual respect for national systems; calls on the Commission to assess the most appropriate legal instrument in view of the forthcoming reform.[451]

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[449] E. Letta, *Much More than a Market* (2024), at p. 10.

[450] *Ibid.*, at p. 46.

[451] A10-0147/2025 paragraph 9.

The price that is paid by sticking to directive(s) is a degree of divergence in the implementation across the Internal Market which might become severe when a Member State engages in egregious gold plating. It is however doubted whether a regulation would solve the problem. Harmonising all public spending rules across the Member States might lack a legal basis in the Treaties and will anyway go well beyond the reform of the three 2014 directives. This means that the Member States will still need to adopt implementing measures - legislative or otherwise - to graft the EU provisions in their legal orders.

Moreover, and more generally, the Court of Justice holds that "the fact that a provision of a regulation is worded in general or imprecise terms is an indication that domestic measures of application are required".[452] In a recent opinion, Advocate general Rantos followed that case. He accepted that "the adoption of national legislation or a national administrative practice which specifies in detail how that concept is applied within a single Member State inevitably runs the risk of heterogeneous national rules being applied within the European Union".[453] However, "the existence of that risk cannot, per se, preclude the Member States from being entitled to adopt national implementing measures, since any national implementation of a provision of a regulation by definition entails such a risk".[454] The opinion further indicates, and this will be very relevant here, that implementing powers must be recognised to the Member States so that they are "able to guarantee that EU law is applied effectively by the national authorities".[455] The case concerned the application of Regulation (EC) No 1073/2009 on common rules for access to the international market for coach and bus services. However, it is clear that many Member States will apply the same reasoning on a possible regulation on public contracts so that the risks of gold plating will not be abated simply by adopting a regulation.

Some experts are suggesting avoiding the problem of implementation by calling for a principle-based regulation. This will anyway require not to refer any more to Articles 53(1) and 62 TFEU among the legal bases, as the former refers to 'directives' and the latter cross refers to it. Besides the constitutional issue of the legal basis, the above analysis bears witness to the uncertainty that the interpretation of the general principles may introduce in a rule-based system. Just having a principle-based regulation will not help contracting authorities and entities who, in most Member States, are not used to very wide margins of discretion. This will call for rules at national level, with even more divergence - and gold plating - than it is the case presently. Moreover, a principle-based regulation will lead to more - and at times unpredictable - judicial legislation.

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[452] Case C-541/16, *Commission* v *Denmark*, EU:C:2018:251, paragraph 39.

[453] Opinion of 6 March 2025, *Commission* v *Denmark*, C-482/23, ECLI:EU:C:2025:150, paragraph 34.

[454] Paragraph 35.

[455] Paragraph 37.

Some members of the Network of first instance public procurement review bodies have proposed to integrate principle-based regulation with guidance from the Commission, possibly designed with the collaboration from the Member States. However, contracting authorities and entities in other Member States might prefer hard rules to guidance. Moreover, the case law will easily prevail on any guidance so provided.

It is submitted that a regulation will fail to achieve full harmonisation and a directive is to be preferred as it allows each Member State to better adapt the rules on the award of public contracts to their specific situation, including to their national budgetary rules.

It is clear from the above analysis (§ II.) that having three different directives is not justified by the extent of the differences in the rules applicable to general procurements, utilities procurements and concessions.[456] In a context where the final binding text is achieved by negotiations (trialogue) involving the Commission, the Council and the Parliament, working on three directives is bound to result in unnecessary differences and divergences compounding the uncertainty already normally flowing from compromises on the final text.[457]

Consolidating the (not so) different texts in one directive will go some way towards meeting demands for simplification of the regulatory framework for public contracts. The *Report on Public Procurement* of the European Parliament recognises "in order to make public procurement more accessible for smaller actors, including social economy organisations involved in public procurement, and particularly for SMEs and start-ups, updated versions of directives must aim at reducing the current 476 articles or 907 pages of law".[458]

However, as highlighted by some experts of the EXPP, consolidation should not be meant as a way to erase the specificities of either the concessions or the utilities sectors. The one directive should have specific chapters reflecting the specificities of those two sectors. This is already the case in some national implementing legislation, such as for instance in Italy and Luxembourg.

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[456] See A. Sanchez Graells, 'What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of Their Economic Balance' 2 *EPPPL* 2012, 94-102; S. Arrowsmith, 'Revisiting the Case against a Separate Concessions Regime in the Light of the Concessions Directive: a Specific Directive without Specificities?' in F. Amtenbrink, G. Davies, D. Kochenov & J. Lindeboom (eds.), *The Internal Market and the Future of European Integration: Essays in Honour of Lawrence W. Gormley* (Cambridge, Cambridge University Press, 2019) 370-395.

[457] On the latter A. Sanchez-Graells & G.S. Ølykke, 'Under the political science magnifying glass: reformation or deformation of the EU public procurement rules in 2014' in G.S. Ølykke & A. Sanchez-Graells (eds.), *Reformation or Deformation of EU Public Procurement Rules* (Cheltenham, Elgar, 2016) esp. 372 f.

[458] A10-0147/2025 esp. paragraph 6.

An alternative shared by some members of the Network of first instance public procurement review bodies would be to have two directives, one for 'standard' procurements and one for complex procurements such as concessions but also PPPs. The latter should allow for more flexible rules adequate to long term and complex contracts. One issue with such an approach would be to clearly distinguish complex from standard contracts.

It is therefore suggested that the texts of the 2014 directives are consolidated in one directive in the forthcoming reform.

The analysis of the case law in the preceding pages shows that the pursuit simplification might end up being elusive. The Court of Justice is muscularly using the general principles to limit the regulatory power of the Member States and to ask contracting authorities and entities to take *ad hoc* decisions. Making the directive(s) lighter would most probably than not directly translate into more judicial regulation. This would not just run counter to the objective of simplification, but would create uncertainty in the legislation and lead to a substantial increase in litigation. It is worth recalling that to avoid this risk Directive 2014/23/EU was adopted in the first place.

Outright simplification is to be avoided as it is expected to be followed by increased judicial legislation creating uncertainty for both contracting authorities and entities and for economic operators.

Flexibility might be a safer option than outright simplification in order to ensure adequate margins of choice to both the Member States and contracting authorities and entities. As indicated in the input from EXPP experts, more flexibility in award procedures might bring everyday public procurement somewhat closer to commercial procurement or be more suited to specific areas such as for instance for the procurement of medicines. Some of the tools in Directives 2014/23/EU and 2014/25/EU might be worth considering for extension as the flexibility in the utilities directive and concessions directives is broader compared to the stricter approaches in the classical directive. This might for instance be the case with qualification systems or with making the competitive procedure with negotiations a standard procedure. Specifically taking heed from the rules about the competitive procedure with negotiations, experts from the EXPP have suggested abandoning the requirement of completeness of contract documents for the open and restricted procedures too in favour of a 'sufficiently precise' description of the works, services or goods required.[459] Such an approach will work well with functional technical specifications and will empower innovation, but it needs to be carefully designed to avoid increased litigation.

[459] Article 29(1) third phrase of Directive 2014/24/EU; see also Recital 45 thereof.

Aspects pertaining to integrity in public contracts should also be considered. Flexible award procedures such as the competitive procedure with negotiations or the competitive dialogue are presently less transparent than open procedures. Non-price award criteria give more or less wide margins of discretion to contracting authorities or entities. Again, Member States where the risk of maladministration is strongly feared tend to favour rigid public contracts rules. Some experts in the EXPP have suggested that transparency should be increased to counter risks of conflicts of interests if not outright corruption. This requires some adaptations to the present approach. If flexibility encourages recourse to less rigid but less transparent award procedures, the loss of transparency must be compensated otherwise. Such an approach will require the reversal of the *Klaipedos* case law that is restricting transparency - and effective judicial review - in the interest of competition *tout court* (above § I.5.3.).[460]

One approach worth considering is to enhance transparency of information about the concluded contracts and about contract changes. The more data is available, the easier it will be to spot red flags for potential misconducts reflected in price and in other contract conditions.[461]

An interesting alternative proposed by some experts of the EXPP would be to provide for more flexible rules applicable to procurement by highly professional public buyers such as for instance central purchasing bodies.

It is up to the EU lawmakers to decide at what level - legislation or individual procurement decision - to allocate choices left to the Member States. Given the deep differences among the Member States, the opportunity to leave them some of the choices about flexibility should be considered. However, it is clear from this Study that pursuing competition at all costs the Court of Justice is laying the burden to make choices on contracting authorities and entities (above § I.6.2.b.). Any future rule will have to be extra clear when indicating at what level - legislation or individual procurement decision - it considers it to be proportionate and adequate to allocate any exercise of flexibility.

One size fits all approach to flexibility will be seen as over-restrictive in some Member States and as too generous in others. Flexibility in granting flexibility should be designed allowing each Member State to decide the appropriate balance between flexibility and rigidity in general or with reference to different types of contracting authorities or entities. Flexibility will have to be compensated with enhanced transparency to buttress accountability.

[460] Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, ECLI:EU:C:2021:700.

[461] For an introduction see M. Fazekas, I.J. Tóth & L.P. King, 'An objective corruption risk index using public procurement data' 22(3) *European Journal on Criminal Policy and Research*, 2016, 369–397

Finally, as already indicated, better data is needed. The *Special Report* of the European Court of Auditors clearly indicates the need to improve the data quality and quantity and to update the Commission tools to better monitor public procurement and to "align the Scoreboard's scope with the objectives in the directives, in particular by including additional indicators, e.g. relating to cross-border and strategic procurement".[462]

Better data will be of limited usefulness without better monitoring. The *Report on Public Procurement* of the European Parliament as well requests "the establishment of uniform non-binding guidelines, standardised monitoring and reporting mechanisms, procedural guarantees, independent oversight bodies with sufficient powers and effective enforcement and compliance tools to promote legal certainty, fair competition, and consistency across public procurement in the EU, without restricting contracting authorities' discretion …".[463]

In the past round of reform, the Commission had indeed proposed stronger oversight measures.[464] It is now time to go back to those suggestions especially since most Member States have already appointed a single Public Procurement Monitoring Authority.[465] Monitoring authorities should be knowledgeable of the reality of public procurement and respectful of the discretion necessary to benefit from any flexibility allowed under the law, including when embracing non-price award criteria.[466] Situations such as the one underlying *Smetna palata na Republika Bulgaria* are an example – of many – of a formalistic approach to oversight that undermine the effectiveness of public procurement.[467]

Worth considering is also the proposal by Nadia Sava Man to create a national public procurement data management office – PPDMO. "The responsibilities of this office would be to manage data collection, data management and data

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[462] European Court of Auditors, *Special Report 28/2023. Public Procurement in the EU* (Luxembourg, Publication Office of the EU, 2023), at p. 49.

[463] 2024/2103(INI), at p. 7, point 19

[464] See P. Cerqueira Gomes, 'EU Public Procurement Oversight Bodies – the way forward' *Public Procurement Law Review* 2017, 6, pp. 249-256.

[465] See the Commission Report *on the functioning of Directive 2014/23/EU on the award of concession contracts and on the impact on the internal market of the exclusions set out in Article 12* COM(2023) 460 final at p. 7.

[466] Which is resisted by contracting authorities: see the Report from the Commission on *Implementation and best practices of national procurement policies in the Internal Market* COM/2021/245 final, at p. 5.

[467] Case C-195/21, *Smetna palata na Republika Bulgaria*, ECLI:EU:C:2022:239; see also the criticisms to audit practices by P. Santos Azevedo, M. Assis Raimundo & A. Gouveia Martins, 'Public Contracts and Sustainable Development in Portugal' in F. Lichère (dir.), *Green Public Procurement: Lessons from the fields. Canada, France, Italy, Portugal, Netherlands and Switzerland* (Presses de l'Université Laval 2025) 269 and in the Report by the Osservatorio Appalti Pubblici *Consultazione pubblica sulle direttive UE in tema di appalti pubblici e concessioni* at pp. 30 ff.

analysis at the central level. The institution would work with the eForms as well as other data collection systems at Member State level".[468]

This might be linked to the further proposal to publish data concerning contract performance which would make taking decisions on qualification and exclusion easier, even at the present decentralised level (above § I.6.2.).[469] A PPDS 2.0 would then go well beyond its present scope, possibly to include data on contract performance. Members of the Network of first instance public procurement review bodies have stressed the importance of centralised data to be used in exclusion. The problems of course will be to overcome language barriers and to comply with rules limiting accessibility to personal and sensitive data.

The conclusions of this Study fully support the recent indications from the Commission's *Internal Market Strategy* according to which

> Although the new public procurement data space is already bringing benefits, the Single Market's public procurement IT ecosystem remains fragmented, and data exchanges are inefficient. This means that national databases are not sufficiently interoperable, resulting in less competition and meaning suppliers have to submit the same information and evidence again and again.[470]

What is needed is a Public Contracts Sherpa as a specialised institution of the wider Single Market Sherpa called for in the *Single Market Strategy*.[471]

National public procurement monitoring authorities with a clear EU mandate including data management should be created in each Member State to collect public contracts data and - along with the Commission - to make sure that data is fed into the PPDS and available to contracting authorities and entities across the EU.

The above considerations have been articulated based on the research conducted through the European Legal Method. In no way they do detract from findings based on different approaches - including from public policy and management. More specifically it is believed that any meaningful reform will have to rest on adequate training of - and incentives for - those public servants and

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[468] N-A. Sava, *Industry 4.0. for Sustainable Public Procurement. Data as the Nexus between Digitalisation and Sustainability in Public Procurement*. PHD Thesis, Cluj-Napoca and Turin 2025 (to be defended).

[469] D. Schoeni, P. Valcarcel & R. Acevedo in '*Evaluation of the 2014 public procurement directives. Answer to the call of evidence Ref. Ares(2024)8928678*' by the Public Contracts in Legal Globalization Network / Réseau Contrats publics dans la Globalisation juridique, at p. 35.

[470] Commission Communication *The Single Market: our European home market in an uncertain world. A Strategy for making the Single Market simple, seamless and strong* COM(2025) 500 final, at p. 27.

[471] *Ibid.* at p. 6.

other professionals – including auditors, members of review bodies and judges – involved in public procurement.[472]

[472] See, from a specific angle but with arguments that may be generalised to all aspects of public purchasing, M. Andhov et al., 'Sustainability Through Public Procurement: The Way Forward – Reform Proposals' (March 23, 2020).

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