
**Public Contracts in Legal Globalization Network**

**Réseau Contrats publics dans la Globalisation juridique**

# Evaluation of the 2014 public procurement directives

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https://www.public-contracts.org/

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**Presentation of the PCLG network: origins, main activities, academic members**

**Part. I - Contribution of the PCLG network to the evaluation of the 2014 directives on public procurement – Article by article study**

**Part. II – Specific concerns and issues related to the revision of the 2014 directives**

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# Presentation of the Academic bilingual network « Public Contracts in Legal Globalization »

## History and main scientific activities

Created in 2008 on the initiative of Professor Jean-Bernard Auby, then Chair of Transformation of Public Action and Public Law at the Institut d'études politiques de Paris (Sciences Po), the bilingual CPGJ-PCLG network now includes 95 university professors, lawyers and experts in public procurement and PPP law, representing 46 countries and several languages (including Arabic, Dutch, English, French, German, Italian, Polish, Portuguese, Romanian and Spanish). Initially focused on European issues, the network has expanded to the United States, Latin America and Africa, with the forthcoming publication of the first French-language work on Public Procurement in Africa (with 40 contributors).

Since its creation, the network has met at least twice a year, once in Paris in December, for bilingual French/English workshops on topical issues and to finalize publications. The Network has already published several comparative works, and others are in preparation. As a forum for exchanging and sharing experiences, and in regular discussion with the OECD Public Procurement Team and SIGMA, the Network is an essential tool for understanding the diversity of public contracts systems in terms of existing legal traditions, their evolution and the difficulties they encounter. https://www.public-contracts.org/

## History and main scientific activities – collective publications

**S. de La Rosa, P. Valcárcel**, *Principles of public contracts in Europe*, Bruylant, coll. Administrative Law, 2022
**G. Racca, C. Yukin**s, *Joint Public Procurement and Innovation*, Bruylant, coll. Administrative Law, 2022
**L. Folliot-Lalliot, S. Torricelli**, *Oversight and Challenges of public contracts*, Bruylant, coll. Administrative Law, 2018
**M. Audit, S. W. Schill**, *Transnational Law of Public Contracts*, Bruylant, coll. Administrative Law, 2016
**M. Trybus, R. Caranta**, *EU Public Contract Law: Public Procurement and Beyond*, Bruylant, coll. Administrative Law, 2013
**R. Noguellou, U. Stelkens**, *Droit comparé des contrats publics*, Bruylant, coll. Administrative Law, 2011

**More information on the members of the Public Contracts in Legal Globalization Network ant the activities can be found in the website: https://www.public-contracts.org/**

## Position of the network in the context of the evaluation of the 2014 directives

The Public Contracts in Legal Globalisation network welcomes the Commission's initiative to evaluate the three main directives governing public procurement in the European Union (Directive 2014/23/EU - concessions, Directive 2014/24/EU - public procurement; Directive 2015/25 - utilities directives).

The evaluation aligns with the political context emphasised by the Commission, which has highlighted that public procurement in Europe is at a critical juncture, necessitating the simultaneous pursuit of enhanced efficiency in competition rules for the award of public procurement contracts and the need to consider strategic shifts.

This evaluation, conducted by academics and practitioners specialising in public procurement, has been conducted impartially and without representation of interests or special interest groups.

# Part. I

# Contribution of the PCLG network to the evaluation of the 2014 directives on public procurement - Article by article study

***The structure of the evaluation follows the structure of Directive 2014/24 – including references to dir. 2014/23 and dir. 2014/25***

- **Terminology: "Public contracts" and "public procurement contracts"**
  ***(Pr. L. Folliot Lalliot)***

The wording of Directive 2014/24, at least in English[1], seems outdated and misleading. The random use of the terms "public contracts" and "public procurement" may create a misunderstanding with the Concessions Directive, which also deals with a sub-category of "public contracts", whereas public-private partnerships (PPPs) could also be described as "public contracts". Consequently, it could be argued that the only term "public procurement contracts", as a sub-category of "public contracts", would be more appropriate in the wording of future directives intended to replace 2014/24 and 2014/25. The UNCITRAL Model Law on Public Procurement (2011) also provides a definition of public procurement : "Procurement" or "public procurement" means the acquisition of goods, construction or services by a procuring entity". Such definition would be appreciated in the future Directives.
In a broader sense, the term "public contracts" could designate the whole activity, representing all contractual arrangements used by public authorities (at large) to satisfy public needs according to specific rules implementing the principles of equality, non-discrimination and transparency of procedures, (and ethics - see below) with the aim of ensuring sustainable development.
Furthermore, while the term "public contracts" may also have a different meaning in some Member States (in France, for example, it also encompasses contracts for public servants or contracts on the public domain), the Commission could look for another generic term, which would not be connotative, such as "public acquisition" or "public command", or even "government contracts" (as in the USA) to cover together public procurement contracts, concession contracts and PPPs contracts.

- **Recommendations**

- Clarification is needed
-The term "public procurement contracts", as a sub-category of "public contracts", should replace "public contracts" in the wording of future directives amending 2014/24 and 2014/25;

[1] In the French version, "*contrats publics*" is never used but "*marchés publics*" with the narrow meaning of "public procurement contracts".

-"Public contracts" could become the generic terminology covering together public procurement contracts, concession contracts and PPPs contracts, or the Commission could opt for a new vocabulary such as "public acquisition" (contracts), or "public command" or even "government contracts" (used in the US) to better reflect this transversal public activity using different types of contracts to satisfy public/citizens needs.

# TITLE I - SCOPE, DEFINITIONS AND GENERAL PRINCIPLES (art. 1 to 24 dir. 2014/24 and articulation with dir. 2014/25 and dir. 2014/23)

## CHAPTER I - Scope and definitions – articulation with dir. 2014/24 and 2014/25

- **Art. 2 dir. 2014/24 - Articulation between public procurement directive and concession directive (dir. 2014/23) – scope of concession directive** (***Pr. Pim Huisman***)

In this general analysis of Directive 2014/23/EU on the award of concession contracts (the Concessions Directive) the focus is on Title I of this Directive and the following criterion from the evaluation:

> « ***EU added value****: assess how the directives have helped harmonise national procurement laws and practices and reduce legal fragmentation, and whether they have brought expected benefits (e.g. in terms of fair competition across the single market, implementation of EU policies, transparency, etc*). »

The following analysis is based on contributions in the forthcoming book of the network *Public Contracts in Legal Globalization* with the title « Concessions and similar instruments ».[2] This book contains national reports with case studies[3]. Each national report discusses the same four cases, namely the exploitation of:

- casinos and arcade halls;
- natural resources;
- advertising in the public space;
- municipal parking garages.

In the national rapports for each case three sets of questions are addressed:

- what legal instrument is used to allocate the right to exploit (a concession or another (similar) instrument)?
- what legal procedure is used to allocate the right (is competitive tendering required or not)?

[2] P. HUISMAN, E. POLTIER and S. VAN GARSSE (eds.), *Concessions and similar instruments / Concessions et instruments simulaires* (collection « Droit administratif / Administrative Law »), Bruylant, Brussels, 2025 (forthcoming).

[3] The book not only contains national reports and findings on six EU countries, but it also contains reports and findings on countries outside the EU (such as Switzerland and the United States). Only the findings regarding the six EU Member States were used for this analysis of the Concessions Directive. Although the book does not include national reports and an exhaustive comparison of all EU Member States, some valuable patterns can be discerned from the comparison of the six countries studied (Belgium, France, Germany, Italy, the Netherlands and Spain)

– and how are the private party and the investments made by this party protected?

- ***Observations on the encompassing definition of the concession contracts***

In all Member States, the Concessions Directive has been implemented and that helped – to some extent – harmonize national procurement laws.[4] Although, as will be discussed below, fragmentation can still be observed on certain points. The Concessions Directive contains a definition of concessions (Article 5). The case studies show that in the Member States the term « concession » is used both more broadly and more narrowly than in the Concessions Directive. Sometimes the term « concession » refers to another legal mechanism in a Member State, namely a license or an authorisation.[5] Sometimes the term « license » or « authorisation » is used in a Member State, while it actually concerns a concession.[6]

In line with the above, whether a concession or a similar legal instrument is used and how it is regulated varies from country to country and from sector to sector. Even within countries there are differences between the sectors studied. In none of the systems of the countries studied do the objects of the four case studies depend on a legal regime that is organized in a coherent and uniform manner. Consequently, the four types of operations are the subject of extremely fragmented legal analyses, despite the economic or material characteristics that seem to unite them a priori. Moreover, the sectors in which concessions are used fall under the jurisdiction of several levels of government in some countries, particularly those with a (quasi-)federal form.[7] This reinforces fragmentation, or at least the risk of fragmentation.

The four cases studied in the book do have something in common: the government is in a position to allocate limited rights (the number of rights to allocate is legally limited, physically limited or limited by economic strategy).The way a limited right is awarded to a private party varies not only depending on the legal instrument used, but also on the degree of competition that must be organized in the different Member States by the government when using that

[4] Report from the Commission to the European Parliament and the Council 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 {SWD(2023) 267 final}, Brussels, 28.7.2023, COM(2023) 460 final; European Commission: Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, P. RAMADA, D. MEISKE, J. CANNINGS, E. TENGE, et al., *Study on the implementation of the Concessions Directive – Final report*, Publications Office of the European Union, 2023.

[5] See also for a similar finding: Report from the Commission to the European Parliament and the Council 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 {SWD(2023) 267 final}, Brussels, 28.7.2023, COM(2023) 460 final, pp. 5-6; European Commission: Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, P. RAMADA, D. MEISKE, J. CANNINGS, E. TENGE, et al., *Study on the implementation of the Concessions Directive – Final report*, Publications Office of the European Union, 2023, par. 2.3.2.

[6] Y. MARIQUE, « Les ressources quantitativement limitées - Entre exploitation économique et considérations politiques », in: P. HUISMAN, E. POLTIER and S. VAN GARSSE (eds.), *Concessions and similar instruments / Concessions et instruments simulaires* (collection « Droit administratif / Administrative Law »), Bruylant, Brussels, 2025 (forthcoming), par. 8; S. SCHOENMAEKERS, « The award procedures for concessions and similar instruments », in: P. HUISMAN, E. POLTIER and S. VAN GARSSE (eds.), *Concessions and similar instruments / Concessions et instruments simulaires* (collection « Droit administratif / Administrative Law »), Bruylant, Brussels, 2025 (forthcoming), par. 1.2.

[7] Y. MARIQUE, « Les ressources quantitativement limitées - Entre exploitation économique et considérations politiques », op. *cit.*, par. 3; S. SCHOENMAEKERS, « The award procedures for concessions and similar instruments », op. *cit.*, par. 8.

instrument. The selection of a private party can take place in various ways, such as a full public procurement procedure, a more flexible and less strict procedure of tendering, on a basis of « first-come, first-served » and a direct award. Of course, this may include differences in terms of the protection of the private party.[8]

### ➢ Recommendations

Based on the above, the question is whether the current strategy and currently available rules at EU level provide the sufficient desired harmonisation from the Concessions Directive objectives. If, given the goals of the Concessions Directive, more harmonisation is desired, this may require a new or improved strategy.

From a *regulatory perspective*, the following suggestions can be made:

- ensure a clearer definition of concessions (ensure further clarification of the definition of concessions) and ensure a clearer demarcation vis-à-vis other legal instruments;
- provide a stronger guidance from the EU to ensure harmonisation;
- strengthen the governance in a new way, e.g. by simplifying EU rules, by using more fit-for-purpose rules, « etc. ».[9]

Although several studies have been done by the EU[10] and legal scholars,[11] it is worth noting that taking the appropriate regulatory steps requires *further research*. The network *Public Contracts in Legal Globalization* can be of assistance in this further research.

- **Art. 2 dir. 2014/24 – Definition of public work contracts – (*Pr. Stéphane de la Rosa)***

Following a well-established definition, art. 2 dir. 2014/24 defines public work contracts (marchés publics de travaux) as "public contracts' meaning contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services ».

[8] Y. MARIQUE, « Les ressources quantitativement limitées - Entre exploitation économique et considérations politiques », op. *cit.*, par. 1; S. SCHOENMAEKERS, « The award procedures for concessions and similar instruments », op. *cit.*, par. 8.

[9] For similar recommendations, although not specific on the topic of the Concessions Directive, see the reports of M. DRAGHI, *The future of European competitiveness*, 2024; E. LETTA, *Much more than a market – Speed, Security, Solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens*, 2024. See for similar recommendations on the topic of concessions: European Commission: Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, P. RAMADA, D. MEISKE, J. CANNINGS, E. TENGE, et al., *Study on the implementation of the Concessions Directive – Final report*, Publications Office of the European Union, 2023, pp. 158, 160, 162.

[10] See for example the Report from the Commission to the European Parliament and the Council 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 {SWD(2023) 267 final}, Brussels, 28.7.2023, COM(2023) 460 final.

[11] See, in addition to the research of the network *Public Contracts in Legal Globalization*, for example: X. VITORIA (ed.), *Service concessions in the EU: a comparative study of the transposition of directive 2014/23 on the award of concession contracts into national law*, Aranzadi, 2018; P. BOGDANOWICZ, R. CARANTA and P. TELLES (eds.), *Public-Private Partnerships and Concessions in the EU. An Unfinished Legislative Framework*, Cheltenham/Northampton, Edward Elgar Publishing, 2020.

However, since the CJEU's 25 March 2010 ruling in the *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben* case (C-451/08), case law has underscored the principle that public works contracts also mandate the contracting authority to pursue a direct economic interest. This broad concept entails demonstrating that the contracting authority, even if it does not formally acquire ownership of a structure, can derive a substantial benefit from its construction. This criterion was recently applied in the 'NFS' decision (C-28/23).

➢ **Recommendations**

Given the broad approach to the concept of direct economic interest of the contracting authority, particularly the search for decisive influence in the design of a structure, a definition of the public works contract incorporating the concept of direct economic interest could be considered.

- **Art. 7 dir. 2014/24 - Articulation with the public utility directive and other sectoral texts** (dir. 2014/25) (***Pr. Stéphane de La Rosa***)

According to Art. 7, the Directive does not apply to public contracts and designs under dir. 2014/25 awarded by public utilities.

**The placement of this provision in the category of "exclusions" (section 3) does not seem appropriate**. Indeed, Dir. 2014/25 has many similarities with Directive 2014/24/EU and the case law of the Court regularly emphasises that it is a 'lex specialis' in relation to the general framework of Directive 2014/24 (e.g. case C-521/18, Pegaso).

Moreover, in addition to the so-called network activities covered by Directive 2014/25 (water, energy, electricity, transport, gas), there are many other sectoral regulations relating to these sectors, such as the so-called "OSP" Regulation (1370/2007) or, more recently, the "zero net industry act" Regulation (regl. 2024/1735). Article 25 of regl. 2024/1735 imposes specific requirements in terms of technical specifications (Article 36 of Directive 2014/23/EU, Article 42 of Directive 2014/24/EU and Article 60 of Directive 2014/25/EU) and performance (Article 70 of Directive 2014/24/EU and Article 87 of Directive 2014/25/EU and the general principles of Directive 2014/23/EU).

➢ **Recommendation**

In view of the aforementioned elements, it may be pertinent to consider the separation of Directive 2014/25 and the sectoral rules (OSP reg. OSP, Zero Net Industry Act) from the category of exclusions, with the possibility of their attachment to either Title III of the Directive (specific procurement regimes, a title that should be revised) or the establishment of a new section in Title 1 entitled "Reference to specific sectoral texts". This approach would enhance the overall structure of the Directive, making it more readable and consistent with the regulations being developed in strategic areas.

- **Article 10- Specific exclusions for service contracts - *(Pr. Steven Van Garsse*)**

According to Art. 10, the Directive does not apply to specific public contracts for services.
This provision excludes a lot of services, placing them outside the scope of the Directive. However some of these exclusions are difficult to justify, whereas others are no longer in line with the case law of the Court of Justice. Moreover these exclusions give rise to a lot of discussions.
Take for example the exclusion 10 b related to production of programme material (media). This exception is justified because of "culturally and socially relevant aspects". Like social and environmental considerations, it is perfectly possible to integrate "cultural and societal aspects" into a public contract.[12]
On the other hand the exception related to the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon is probably to narrow. According to the case law of the Court of Justice, we have a public contract if there is decisive influence exerted by the public body over the design of the building .[13] Well, if the permit has already been granted and the project is being developed without decisive influence over the design then in principle there seems little reason not to apply this exception.

➢ **Recommendation**

Evaluate the exclusions, update and/or remove outdated exclusions and precise their application where necessary.

- **Art. 12 dir. 2014/24 - Public contracts between entities within the public sector – *(Pr. Stéphane de la Rosa)***

Article 12 of Directive 2014/24, which codifies the various cases of in-house arrangements as well as institutional cooperation between public entities (the so-called City of Hamburg case law), does not include an exception developed by the Court's case law since the ***Acoset*** ruling (15 Oct. 2009, C-196/08), which corresponds to the so-called institutionalised public-private partnership arrangement. In this arrangement, the call for competition takes place at the stage of the call to one or more private shareholders to join a semi-public company, subsequently incorporated, which is in charge of a contract or a concession. This arrangement is becoming increasingly widespread, as demonstrated by the SEMOP (sociétés d'économie mixte à opération unique) regime in France and the multi-service company regime in Italy (see the *Rome Multiservizi Court* case, 1 August 2022, C-332/20).

➢ **Recommendation**

In view of these factors, it might be appropriate to refer to the institutionalised public-private partnership arrangement, which safeguards the room for manoeuvre of local authorities.

[12] See Dirk De Keuster, https://ddk-law.be/actualiteit/schaf-uitzondering-op-de-wetgeving-overheidsopdrachten-voor-kant-en-klare-programmas-ten-voordele-van-de-vrt-af/
[13] ECJ, April 22, 2021, Wiener Wohnen, C 537/19, ECLI:EU:C:2021:319.

# CHAPTER II – General rules

## • Article 18 - Principles of procurement – *(Pr. Stéphane de la Rosa)*

### ▪ Diversity of meaning of "principles"

Through the very general - and not always well-defined[14] - qualification of "principles", article 18§2 goes beyond the issue of awarding contracts, and refers back to member states to define the conditions under which contracts are to be performed in compliance with social and environmental obligations.

The Court of Justice's recognition of the fundamental principles of public procurement is a central and inescapable dimension of the normative framework for public procurement under EU law. Since its landmark *Telaustria* ruling of December 7, 2000[15], the Court has identified three major principles that form the matrix of public procurement at European level: equality, non-discrimination and transparency of procedures. These principles are highlighted in the grounds for the directives; for concessions, Directive 2014/23 provides that "contracting authorities and entities shall treat economic operators equally and without discrimination, and shall act in a transparent and proportionate manner" ; for public contracts, Directives 2014/24 and 2014/25 affirm that their award must comply with the principles of the Treaty, the freedoms of movement and the principles deriving therefrom "such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency"[16].

In line with the *Telaustria case law* - the source of a very dense body of case law on principles - Article 18§1 of Directive 2014/24 formally identifies as procurement principles the obligation for contracting authorities to treat on an equal footing, not to introduce discriminatory clauses and to act "in a transparent and proportionate manner". This wording appears to be a codification of the principles derived from case law, albeit only partial in terms of their scope and consequences.

Indeed, Article 18 of Directive 2014/24 necessarily envisages procurement principles within its scope. Consequently, it does not formally cover the issue of the scope and consequences of the principles for contracts, of which there are many in practice, whose value is below the formalized procedure thresholds and which have a definite cross-border interest . Furthermore, Article 18 only covers the public procurement stage: it is the heading of the general rules on contract conclusion, but does not encompass all the consequences inherent in the principles of public procurement. As a result, it does not cover other issues associated with fundamental principles, such as the link between the principle of transparency and the conditions of performance, the relationship between the principle of equal treatment and the practice of sourcing, or the consequences of the principle of transparency in the definition of subcontracting clauses .

Insofar as it is confined to the award stage, the scope of Article 18 of Directive 2014/24 contrasts with certain formulations adopted in national laws, which generally include one or

[14] See Stéphane de la Rosa & Patricia Valcarel Fernandez (co-ed), Les principes des contrats publics en Europe – Principles of public contracts in Europe, coll. Administrative Law, Bruylant, 2022
[15] ECJ, December 7, 2000, Telaustria Verlags GmbH, Telefonadress GmbH v. Telekom Austria AG, Case C-324/98, ECLI:EU:C:2000:669.
[16] Directive 2014/23, art. 3. ; Directives 2014/24 and 2014/25, cons. 1.

more frontispiece provisions relating to fundamental principles in their legislation on public procurement[17].

With regard to the scope of Article 18, the reference to the principles of equality, non-discrimination, transparency and proportionality should be understood as a restatement of the requirements arising from case law at the contract preparation and award stage. This dimension also justifies the statement in this provision that "a contract may not be designed with the intention of removing it from the scope of this Directive or of artificially limiting competition".

There are links here between the wording of Article 18 and the position of certain Advocates General, who stress that respect for the principle of equality is a necessary precondition for the establishment of competition between public procurement operators. On this point, some authors believe that the link established by article 18 with the objective of not distorting competition should be understood as the expression of a specific principle of competition, which would have the same value as the fundamental principles . In our view, however, the reference to competition should be understood, perhaps more prosaically, as an inherent or derivative consequence of the principle of transparency, which itself implies adequate and sufficient publicity of the market. To consider that an autonomous principle of competition is enshrined in Article 18§2 would be to admit that it could be invoked, as such, to challenge contract clauses or notices. However, this is not the thrust of case law, which systematically analyzes contract documents in terms of equality, non-discrimination and transparency.

➢ **Recommandation**

- This diversity of meanings of the concept of principles justifies greater precision in the formulation of principles in future directives. For example, a distinction could be made between principles as such (equality, non-discrimination, transparency) and the ways in which they are exercised (proportionality, mutual recognition).
- The same requirement for precision also applies to article 18§2 dir. 2014/24. The overall wording of article 18 only makes sense if the notion of principles is broadly conceived, covering not only the principles of public procurement associated with primary law and systematized by case law, but also other obligations resulting from public policy objectives in the social or environmental fields. From this point of view, the notion of principle has a matrix

[17] For example, in France, Article L 3 of the *Code de la commande publique*, inserted in the preliminary title, states, in a formulation fairly close to the directives, that "purchasers and awarding authorities shall respect the principle of equal treatment of candidates for the award of a public procurement contract. They shall implement the principles of freedom of access and transparency of procedures, under the conditions defined in the present code. These principles make it possible to ensure the efficiency of public procurement and the proper use of public funds". In Spain, the Public Contracts Code recognizes, alongside these fundamental principles, the principles of free competition, proportionality and good administration. The Belgian law of July 24, 2016 adopts a more general formula according to which "contracting authorities treat economic operators on an equal footing and without discrimination and act in a transparent and proportionate manner" . In the Netherlands, the Procurement Act of November 1(th) 2012, amended when the 2014 directives were transposed, identifies, alongside equality, non-discrimination and transparency, proportionality, free competition and the fight against fraud, corruption and conflicts of interest as principles of public procurement . Equally indicative of this diversity of usage, German law recognizes, in addition to the aforementioned principles, a principle of economic efficiency in the award of public contracts (Wirtschaftlichkeit or "economic efficiency"), which aims to characterize the principle of awarding the contract according to the most economically advantageous offer – see e.g. Código de contractos del sector público, art. 132 ; Law of June 17, 2016 on public procurement (Mon. b. of July 14, 2016), art. 4. By contrast, in Luxembourg, article 12 of the law of April 8, 2018 on public procurement is formulated in the same terms as article 18 of Directive 2014/24 ; Dutch Procurement Act (2012), amended by decree on July 1, 2016 to incorporate the 2014 directives (Aanbestedingswet, see section 1.2.2 "Beginselen bij Europese aanbestedingen" or "General procurement principles") ; Act Against Restraints of Competition (GWB) Section 127, § 1.

dimension, in that it serves to link to a general and relatively polysemous qualifier, a plurality of objectives pursued by domestic law and by contracting authorities.

This methodological precaution is necessary in order not to confuse the principles contained in Article 18§1 and those implicitly referred to in Article 18§2. The aim of Article 18§2 is to link principles, understood as a frame of reference, to compliance by bidders with performance conditions resulting from obligations under EU law, national laws, international conventions or collective agreements in the fields of environmental, social and labour law[18].In line with Advocate General Mengozzi position in the Regio Post[19]. Article 18§2 is not so much about the identification of principles themselves (including in the broad sense), but should rather be understood as an enabling norm which underpins, in Union law, the competence of States and contracting authorities to impose specific social and environmental requirements. Such interpretation could also enable contracting authority to put forward certain overriding reasons capable of constraining or limiting the scope of a call for tenders.

– The growing emphasis on the strategic dimension of public procurement, including the social and environmental functions of public contracts, could justify rewriting the text to distinguish between, on the one hand, the principles governing the award and performance of contracts and, on the other, the principles linked to the economic and social, or even strategic, function of public procurement contracts. **The category of principles in the actual structure of art. 18§2 (social, green functions) could also refers to a more open list of overriding reasons of general interest, covering green, social, strategic issues, can could be able to counterbalance the classical meaning of transparency and equality in public procurement,**

[18] The scope of these obligations is not perfectly defined. Admittedly, from the point of view of social obligations, Annex X of the directive refers to ILO conventions, which constitute the "hard core" of social rights, although this reference does not of course exhaust the other applicable sources - foremost among which are the numerous harmonization directives existing in social matters on the basis of Article 153 TFEU, or the provisions of the "solidarity" chapter of the EU Charter of Fundamental Rights. Furthermore, the wording of Article 18§2 may give the impression of being redundant with Article 70 of Directive 2014/24, which deals specifically with contract performance conditions and states that special conditions concerning the performance of a contract may be defined by the contracting authority (provided they are linked to the subject-matter of the contract) in order to take account of considerations relating to the economy, innovation, the environment, the social field or employment. Lastly, the expression "States shall take appropriate measures" means that the directive does not achieve total harmonization: the way in which social and environmental requirements are taken into account at the execution stage is, in part, a matter for the individual States.

[19] See, in this regard, the conclusions of Advocate General Paolo Mengozzi, presented on November 25, 2015, under Case C-396/14, MT Højgaard A/S, Züblin A/S, pt 57: "the implementation and satisfaction of the objective of promoting the widest possible opening up to competition can, however, only be pursued if the economic operators participating in the public contract are in a position to do so on an equal footing, without the shadow of discrimination. Since the promotion of effective competition is part of a broader objective of promoting competition which, before it can be effective, must be healthy, its pursuit necessarily finds a limit in respect for the principle of equal treatment between tenderers". Opinion of Advocate General Paolo MENGOZZI, submitted on September 9, 2015, Case C-115/14, pt 71. In the Regio Post case (CJEU, November 17, 2015, RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz, aff. C-115/14, ECLI:EU:C:2015:760) the Court, through a combined interpretation of secondary legislation (art. 26 of Directive 2004/18 on contract performance conditions) and Directive 96/71 on posting, held that the obligation to pay posted workers a minimum rate of pay constitutes a mandatory rule of social protection. It follows that regional or national legislation which obliges tenderers and their subcontractors to undertake, by means of a written declaration to be attached to their tender, to pay the personnel who will be called upon to perform the services which are the subject of the public contract in question a minimum wage fixed by that legislation, complies with Union law.

**in order to target the awarding of public procurement contracts on strategic or public objectives.**

- **Article 18 - Principles of procurement** – ***Pr. Laurence Folliot Lalliot***

To better reflect many of the current provisions dealing with the exclusion of operators for cases of corruption or conflict of interests, plus other compliance requirements attached to the use of public money and governance requirements, a new principle of "Ethics" should be stated as a basic and guiding requirement in public contracting. Such wording would manifest a positive approach while "corruption" or "anti-corruption" suggests a more negative angle.
As listed above, several MS have already introduced such consideration in their domestic public procurement legislation.

- **Recommendation**

It is suggested to add "Ethics" as a new principle guiding the formation and performance of any public procurement and concessions contracts

# TITLE II - RULES ON PUBLIC CONTRACTS

## CHAPITRE I – Procedures

- **Article 25 - Conditions relating to the GPA and other international agreements *(Pr. Stéphane de la Rosa)***

In a significant ruling for ***Kolin Insaat*** (22 Oct. 2024, case C-652/22), the Court of Justice adopted a rigorous interpretation of Article 25, This provision clearly distinguishes between third-country operators that are parties to the WTO Agreement on Government Procurement (GPA) and operators established in third countries that are not party to the GPA or to free trade agreements containing opening clauses on public procurement.

For these operators, the Court referred to the Member States, in the absence of uniform legislation in the Union, the task of defining the rules that would be applicable, while emphasising that it was necessary to take into account the uniformity of Union law. The Court also stressed the importance of considering the 'IMPI' regulation (Regulation 2022/1031), which allows the number of tenders to be adjusted or even excluded in the case of an operator from a third country that introduces restrictions on access to its own public procurement markets.

However, it should be noted that the IMPI regulation only applies to Member States that are not party to the GPA or to free trade agreements (as per the *Kolin* judgment), while the 'foreign subsidies' regulation (Reg. 2022/2560) applies to all third countries when a third-country operator is suspected of having benefited from funding (which is equivalent to state aid) that favours its offer in the European market.

- **Recommendations**

In view of these factors, and given the many current geopolitical tensions, the following could be considered:
- to integrate into the wording of this provision the distinction made by the Court in the Kolin judgment, while specifying the leeway of the Member States to define the rules applicable to tenders from operators from non-covered countries;
- to emphasise that compliance with the GPA does not preclude an examination of state tenders on the basis of the foreign subsidies regulation

- **Article 26 Dir. 2014/24 and seq - *(Dr. Anna Wojtowicz-Dawid)***

- ***Complexification of the procedures***

The public procurement procedure has evolved from a typical economic tool to a complex tool that embodies and implements several dimensions of sustainability, now being a "multi-purpose instrument". Changes in the paradigm of sustainable development, the essence of innovative procurement or social procurement, the impact of non-financial factors, changes in the

perception of the role of finance in financing individual contracts, the need to maintain the financial stability of the public sector, the need to integrate the public financial system with the safety net, and above all, changes in the perception of the environment and the position of humans in it imply changes in the paradigm of public finance and procurement Public.

Public procurement has evolved from an economic instrument to a mixed instrument with the inclusion of horizontal policies (both environmental and social). When preparing the proper public procurement procedure, entities responsible for public procurement are obliged to take into account the standards developed by the European Union, such as the New Green Deal. The public procurement system introduced, m.in, new optional conditions for the exclusion of contractors from the public procurement procedure relating to environmental issues, it expressly indicated environmental aspects as acceptable conditions for the performance of the contract, m.in taking into account all stages of the life cycle.

One of the elements that can be observed in recent years on the public procurement market is the visible complexity of procurement procedures, which is the result of many factors. These include a systematic increase in the number of entities excluded from participation in the procedure, an increased emphasis on the use of innovative public procurement, or the inclusion of social or environmental aspects.

However, these changes face a number of obstacles, including:

- lack of understanding of the links between investments and the implementation of specific policies such as Sustainable Development;
- lack of knowledge of persons responsible in public finance sector units, mainly small and local units, about the requirements shaped by public procurement regulations;
- the contracting authority's concern that the application of the requirements for the achievement of specific objectives will be accused of restricting competition;
- conducting analyses of purchases made from the perspective of reducing the costs of their purchase;
- perceiving orders as only a process of purchasing goods or services.

The open procedure is one of the main public procurement procedures in the EU. According to the definition in Article 27 of Directive 2014/24/EU, in the open procedure, "any interested economic operator may submit a tender in response to a call for tenders". The open procedure does not preclude the selection of contractors, but it does not constitute the selection of contractors for the purpose of inviting tenders.

Conducting a public procurement procedure in accordance with the regulations on the open procedure is related to the purchase of various products or services. Contracts can be divided according to the availability of goods and services, their universality, or standardization.
The contracting authority's activities are mainly to ensure that the contracts awarded are opened to entities operating in specific sectors of the economy and dealing with a given type of services

or sales of specific products. In order to maintain competitiveness and at the same time improve the award of contracts, it is necessary to develop rules coordinating procurement procedures in relation to publicly available, uncomplicated contracts.

- **Recommendations related to a new simplified procedure**

The proposed solution should be defined by the subject and perhaps the maximum value. The new simplified open procedure should apply to supplies and services standardized in business transactions. Such coordination is needed to ensure the effectiveness of the Treaty rules and at the same time to increase the economic efficiency of the award.

Purchasing products or services that are widely available, similar or of the same quality standards does not require a complicated procedure as is the case with current orders based on an open procedure.

Streamlining the procurement procedure by separating the simplified mode of an open procedure which:

- it would be based mainly on the basic criterion for the evaluation of offers, which is the price – the statistical data published by the Office responsible in individual countries indicate that it is mainly the price that is the basic criterion for the selection of the offer;
- would use tools in the form of a purchasing platform to make purchases – we would be dealing with a situation in which an advanced digitization process would allow for quick and thus effective purchase of goods or services
- the procedure would allow for shorter deadlines than the current open procedure,
- offers would be submitted only in electronic form with the possibility of using the purchasing platform, which will allow for time-efficient conduct and award of the contract.

The essence of the procedure conducted in the simplified procedure would boil down to a comparison of the prices of the bids submitted. However, it should not be forgotten that the selection of contractors must ensure competition and the smooth course of the procedure, which in turn means that the contracting authority cannot select contractors as random. These are contractors who are potentially the best on a given market and guarantee the submission of the most advantageous offer. Although in this mode of the procedure the price is the criterion for evaluating bids, this does not release contractors from the obligation to properly present in the bid the necessary documents required by law and the terms of reference.

The conditions for the application of the proposed procedure should be strictly defined for uniform interpretation, and any doubts as to the legitimacy of awarding a contract in this mode should speak in favor of the application of an open procedure.

A key feature of products or services procured under a simplified open procedure is the standardisation of the subject of the contract. This, being generally available (“off-the-shelf”), does not require additional criteria to make a choice, guaranteeing the contracting authority a

comparison of prices of the same type of products or services offered by different suppliers or contractors. This is achieved by providing the name of the product or service and specifying its basic parameters or scope. Therefore, this procedure could be applied only to such supplies or services that are de facto offered to everyone who may be interested in purchasing them. The subject of the contract should be the typical and simplest ordered items or services, which should be fully comparable, because the only differentiating factor would be the price. The contractor can only propose one price and cannot change it. The contracting authority may award the contract and conclude the contract only with the contractor who offered the lowest price.

- **Article 32 – Use of the negotiated procedure without prior publication – (*Pr. Sarah Schoenmaekers*)**

The Directive lays down when this procedure can be used, but does not explain how this procedure works. This is not coherent when it comes to the other procedures which are all explained in detail.

➢ **Recommendation**

The Directive could add what the difference is between a direct award and a negotiated procedure without prior publication of a contract notice.

- **Article 37 - Centralised purchasing activities and central purchasing bodies – (*Abel Quessandier*)**

The analysis of the European normative framework reveals a significant gap between the proportion of purchases made within the European Union by central purchasing body[20], especially when the use of these entities is made mandatory[21], and the framework established by the 2014 "market" directive. This gap, welcome in some respects, generates difficulties that should be addressed.

This directive, less lacking than directive 2004/18[22], is noteworthy for a valuable step taken in identifying a central purchasing body. Article 2 of the "market" directive, in point 16, defines a central purchasing body as a contracting authority pursuing centralised purchasing activities, which are assessed as activities carried out on a continuous basis resulting in the acquisition of supplies and/or services intended for contracting authorities and in the awarding of public contracts or the conclusion of framework agreements for works, supplies, or services intended for contracting authorities; or ancillary purchasing activities, which consist of support activities for purchasing activities[23]. While the first series of activities that can be carried out by a

[20] Regarding France, the UGAP alone represents 6% of state spending, see the Report of the State Purchasing Department, July 2024.
[21] In Italy, Article 33, paragraph 3 bis, of Legislative Decree No. 163/2006 requires certain municipalities to use purchasing groups to make their purchases of works, supplies, and services.
[22] SIMMONET, Yann. « *Droit de l'Union Européenne – Centrales d'achat, en quête de précision*s », *in* Contrats et Marchés publics n° 10, Octobre 2015, Dossier 7 (fr).
[23] D. euro 2014, article 2, point 14 et 15.

purchasing group distinguishes two types of traditionally[24] accepted activities, namely wholesale and intermediary activities[25], the second innovates by introducing new activities, for which the purchasing group seems to have less autonomy. This terminological framework reveals a reversal of the original axiom defining purchasing groups, by highlighting the activities that can be carried out prior to qualifying their missions[26]. This reversal is accompanied by a now restrictive approach required by the European legislator in the execution of centralised purchasing activities, which must be carried out "continuously," eliminating the hypotheses of occasional establishment of a purchasing group to distort the rules of competition. In parallel to these contributions, the "market" directive specifies the latitude that member states have in establishing national regimes for purchasing groups. Thus, they are free to provide for the hypotheses of recourse to purchasing groups and the purchasing techniques that purchasing groups can use, within the limits of using the framework agreement or the dynamic purchasing system[27]. The directive continues by reminding that a contracting authority fulfills its obligations by resorting to a purchasing group and addresses the extraterritorial scope of purchasing groups. It should be noted that questions related to the practice of purchasing groups in another member state have been investigated[28] and resolved by the Court of Justice in its ruling "EVN Business Service."[29]

There is an observable approach to relative harmonization of the frameworks related to purchasing groups. The legislator generally admits the latitude of member states in implementing the deployment of purchasing groups. These numerous reservations hinder the clarity of the practice of purchasing groups and, due to legal blind spots, are likely to deprive the actions of purchasing groups of coherence.

The practice of purchasing groups is obscured by an exclusively material definition. While the legislator, "due to the importance of the volumes purchased"[30] and the benefits in terms of competition, as well as the professionalization of public procurement, considered that "it is

[24] Spiegel, N. et Urbani, M., « La « modernisation » des règles européennes sur les marchés publics : la nouvelle directive 2014/24/UE », R.D.U.E., 2014/4, p. 701-778 (fr)

[25] Recital Article 69 of the Market Directive: « *Firstly, they should be able to act as wholesalers by buying, stocking and reselling or, secondly, they should be able to act as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities. Such an intermediary role might in some cases be carried out by conducting the relevant award procedures autonomously, without detailed instructions from the contracting authorities concerned; in other cases, by conducting the relevant award procedures under the instructions of the contracting authorities concerned, on their behalf and for their account.*».

[26] CARANTA, Roberto, SANCHEZ-GRAELLS, Albert, European Public Procurement, Commentary on Directive 2014/24/EU : page 423 : « The definitional technique of the 2014 Directive differs from that of the 2004 Directive : the latter gave a description of what a CPB is, while the former begins by stating chat central purchasing activities are (Article 2(1)(14)) and chat ancillary purchasing activities are (15), after which a CPB is defined as a contracting authority providing central purchasing activities and, possibly, ancillary purchasing activities. The approach is thus primarily functional. The same scheme will be followed here, starting with analysis of the activity and then focusing on legal nature of CPBs ».

[27] On this point, it is clear that the European legislator sees central purchasing bodies as a valuable vector for the development of the dynamic purchasing system

[28] Taylor, Jonathan: Cross-border centralised purchasing, an illustration of the legal complexities: EVN Business Service GmbH (C-480/22), Public Procurement Law Review 2024, Issue 4, p. NA127-NA132.

[29] Case of 23 novembre 2023, EVN Business Service e.a., C-480/22, ECLI:EU:C:2023:918.

[30] Recital 69.

necessary to provide, at the Union level, a definition of the purchasing group intended for contracting authorities"[31]; it is clear that areas of ambiguity persist.

The establishment of a purchasing group is not addressed by the "market" directive for various reasons, notably due to widely differentiated practices depending on the member states. These fluctuations make it difficult to establish a harmonized regime for identifying a purchasing group through a statutory approach.

Moreover, it is not permitted to deduce a de facto status of purchasing groups through a functional approach. Indeed, subjection to the qualification of contracting authority is not sufficient, in our view, regarding the conditions of this qualification, to exclude the hypotheses of a purchasing group with a private status[32]. This observation reveals a dysmetria of practices generating uncertainties. While some states, like Italy, require the use of public status purchasing groups for their purchases[33], the majority of states impose no statutory restrictions. This difference results in a consequence highlighted by the Court of Justice in its ruling "*Asmel c/ ANAC*"[34]: difficulties regarding the determination of the market on which a purchasing group operates. In this ruling, the Court of Justice argues that "*given the close link between the notion of 'contracting authority' and that of 'purchasing group,' [...] purchasing groups cannot be considered as offering services on a market open to competition from private enterprises.*"[35] This reading and interpretation are subject to several interpretations.

On the one hand, it is consistent with certain national laws, such as Italian law, which emphasise that purchasing groups must be associated with public bodies that do not operate in the competitive market. This is, for example, the position of Prof. **Gabriella Racca**, who emphasises that the public body nature of purchasing groups avoids conflicts of interest and guarantees the integrity of procedures. According to this position, it might be advisable for the legislator to clarify the qualification of contracting authority that applies to purchasing groups, particularly if they cover contracting authorities understood as being solely public entities (e.g. associations of municipalities - Italian case) or if they can also cover public law bodies, which can have the character of a private entity and are subject to private law[36].

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[31] *Idem*.

[32] Unlike some members of the doctrine. Voy. en ce sens : COMBA Mario, RISVIG HAMER, Carina, EU perspective on CPBs, in Centralising Public Procurement: The Approach of the EU Member States, p. 12 : If taking a closer look at the definition of a CPB in the Directive, Article 2(16) states that a CPB "means a contracting authority providing centralised purchasing activities and, possibly, ancillary purchasing activities". It is necessary that the CPB itself is considered as a contracting authority, and hence private parties cannot establish a CPB.

[33] Article 33, paragraphe 3 bis, *op. cit.*

[34] Case of 4 juin 2020, Asmel societá consortile a r.l. contre Autorità Nazionale Anticorruzione (ANAC), C-3/19, ECLI:EU:C:2020:423.

[35] Point 63.

36 See, G. M. RACCA – C. R. YUKINS (a cura di), Joint Public Procurement and Innovation: Lessons Across Borders, in Droit Administratif / Administrative Law Collection (Directed by J.B. Auby), Bruxelles, Bruylant, 2019; G. M. RACCA, C. R. YUKINS (a cura di), Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally, in Droit Administratif / Administrative Law Collection (Directed by J. B. Auby), Bruylant, Bruxelles, 2014)

On the other hand, other states consider that purchasing groups have an industrial and commercial activity. For example, in France, a combined reading of the decisions of the Council of State[37] and the provisions of the Commercial Code confirms that the activities of purchasing groups are subject to a competitive market when they carry out industrial and commercial activities. The '*Asmel v. ANAC*' ruling, despite its consistency with the Italian system, is not necessarily clear on the industrial and commercial dimension of certain purchasing body.

➢ **Recommendation**

- Firstly, the 'permanent' nature of the activity of purchasing groups should be specified in future directives. It is assumed that purchasing groups must be specialised, excluding the possibility that a third party entity may carry out these purchasing activities. However, nothing is specified, and national judges have been able to classify an association as a purchasing group, even if it is not specialised, on the basis of a membership contract whose execution reveals that the association acts on behalf of the co-contractor[38].
- Secondly, the framework of the intervention modalities of a purchasing centre. Intervention as an intermediary, as opposed to intervention as a wholesaler, assumes that the purchasing centre acts on behalf of the contracting authority[39]. This point needs to be clarified in order to specifically regulate the involvement of purchasing centres in the execution phase of public procurement.
- Thirdly, in view of the diversity of the legal regime of central purchasing bodies, it seems advisable for the directives to maintain a reference to the institutional autonomy of the States and to the principle of self-determination of local authorities. This reference does not exclude the need to clarify the functioning of central purchasing bodies which, as in some States, operate in a competitive market.

## CHAPTER II - Techniques and instruments for electronic and aggregated procurement

## Chapter III – Conduct of the Procedure

- ### Article 42 – Technical specifications *(**Pr. Sarah Schoenmaeker**s)*

Article 42(4) of Directive 2014/24/EU stipulates that in the technical specifications it is not allowed to refer to a specific make or source, or a specific origin of production unless this is accompanied by the words 'or equivalent'. It can be questioned whether this 'or equivalent' addition is not an empty box for products that have received a protection of their designation of origin or a protected geographical indication. In such situation it is very hard to argue that

[37] CE, Sect., 3 Nov. 1997, *169907, Millions et Marais* (fr).
[38] CAA Paris, 12 May 2022, No. 21PA03760: JurisData No. 2022-007772.
[39] Jérôme Dietenhoeffer, Compétence de la juridiction administrative pour connaître des contrats conclus par une centrale d'achat agissant comme intermédiaire, Contrats et Marchés publics n° 8-9, August-September 2022, comm. 251 (fr).

another product is 'equivalent' as the protection of the designation of origin is linked to the quality and this quality is deemed to be influenced by elements as the method and place of production etc[40].

➢ **Recommendation on the drafting of art. 42.**

It might be useful to provide more clarification in the new Directive when it comes to the possible tension between Article 42(4) and the regulation 2024/1143 on geographical indications for wine, spirit drinks and agricultural products, as well as traditional specialities guaranteed and optional quality terms for agricultural products, in this regard. This is particularly worth to consider in case the EU would pursue more 'buy European' or 'buy local' policies, both for geopolitical reasons as for sustainability reasons.

- **Article 42 – Technical specifications *(Pr.Yseult Marique & Leana Derard*)**

▪ **Critical legal assessment of art. 42**

Article 42 of directive 2014/24 offers the possibility to include "environmental" or "green" technical specifications in procurement documents. Technical specifications have the potential to significantly impact the greening of procurement: they constitute conditions related to the goods, services and works that the successful tenderer will have to comply with during the performance of the contract. This analysis may be applied to other stages of the procurement procedure, but this is not considered here.

It has been observed that the introduction of environmental clauses in procurement documents has remained underutilised and very moderate (except for some Nordic countries)[41]. The practice of member states varies widely in this respect[42]. This could be the consequence of the absence of a coherent legal framework and the voluntary nature of green public procurement[43]. We might think that it is now clear which "green" technical specifications might be inserted in procurement documents after the adoption of directive 2014/24, the case law of the European Court of Justice (ECJ) and the Commissions' communications and other documents. However, the ECJ rendered a judgment on the matter no later than 16 January 2025[44], which demonstrates the lack of complete clarity on this issue. A clear, comprehensive and binding European legal

[40] See in this regard S. Schoenmaekers, 'Public Procurement, culture and mozzarella: Que dici?', in *European Procurement and Public Private Partnership Law Review*, vol 16 issue 3, Lexxion, Berlin, 2021, pp. 205-219

[41] M. MÄHÖNEN *et al.*, Public Procurement for Climate Neutrality: a transformative policy instrument? D4.2: 4i-TRACTION case study report. University of Eastern Finland & Ecologic Institute, Berlin, 2023, p. 15-18, referring to J. ROSSEL (2021). Getting the green light on green public procurement: Macro and meso determinants. Journal of Cleaner Production, 279, 123710. https://doi.org/10.1016/j.jclepro.2020.123710.

[42] See L. MÉLON, « More Than a Nudge ? Arguments and Tools for Mandating Green Public Procurement in the EU », *Sustainability*, 2020, 12, 12, 988, p. 5: "*The EU-wide GPP uptake has indeed been very fragmented, with the top four performers having an uptake up to 60% and 12 Member States having an uptake of less than 20%*", referring to Centre for European Policy Studies and College of Europe. The Uptake of Green Public Procurement in the EU.

[43] M. MÄHÖNEN *et al.*, *op.cit.*, p. 15-18. See for example the study of the Observatoire de la commande publique wallonne, OCPW, *Les clauses environnementales dans les marchés publics de travaux*, décembre 2020, where (work) procurement documents generally do not include environmental clauses.

[44] ECJ, *DYKA Plastics NV v. Fluvius System Operator CV*, C-424/23, 16 January 2025.

framework is necessary to tackle those fragmented practices and to offer legal certainty to procurement actors, so as to increase the attractivity of these technical specifications.

The requirement contained in article 42, § 1, al. 2 of directive 2014/24 that the technical specifications shall be linked to the subject-matter of the contract also contributes to legal uncertainty because of its vagueness[45].

Contracting authorities encounter practical difficulties to introduce green technical specifications in their procurement documents. We can mention the lack of knowledge of the environmental issues at stake related to the goods, services and works to be provided. This has likewise an impact on the verification of the proper specifications' implementation by the contracting authority. In this respect, we can also highlight the absence of a European legal framework ensuring effective monitoring of this implementation by the successful tenderer.

### ➢ Recommendations on article 42

To remedy the aforementioned difficulties, the following reforms could be implemented.

- First, ***measures should be taken concerning member states' general policies in relation to green procurement and administrative capacity building in this respect***. Different solutions were proposed with regard to the voluntary nature of green public procurement, which can be combined. Mandatory legislation would at least foster the improvement of environmental solutions and the adoption of green public procurements[46]. Given the environmental crisis, the need to move towards a "Circular Single Market"[47] and in accordance with the Commission's green agenda[48], the revised directive 2014/24 should oblige contracting authorities to adopt green technical specifications and if they do not, to justify it[49] (principle "comply or explain"). In order to reach the goal of 100% green public procurement, progressive milestones and targets could be adopted by member states, the deadline for reaching the 100% target being legally fixed[50]. Verification mechanisms to control the implementation of those milestones and targets will be necessary, such as reporting[51]. In this respect, standard reporting templates, and reporting requirements and indicators could be developed[52]. Member states should also have to adopt a strategy for green public procurement (including an implementation

[45] L. MÉLON, *op. cit.*, p. 11-12.
[46] L. MÉLON, *op. cit.*, p. 15.
[47] E. LETTA, *Much more than a market. Speed, security, solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU citizens*, April 2024.
[48] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Sustainable Europe Investment Plan. European Green Deal Investment Plan*, 14 January 2020, COM(2020) 21 final, p. 12.
[49] H. DELZANGLES, « Conditionnalité environnementale et commande publique », *La conditionnalité environnementale dans les politiques de l'Union européenne*, H. Delzangles et F. Fines (dir.), Bruxelles, Bruylant, 2019, p. 118.
[50] Cf. the mechanism of "milestones and targets" in Regulation (EU) of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 057, 18 February 2021.
[51] M. MÄHÖNEN *et al.*, *op. cit.*, p. 39-41.
[52] OECD (2024), *Harnessing Public Procurement for the Green Transition: Good Practices in OECD Countries*, OECD Public Governance Reviews, OECD Publishing, Paris, https://doi.org/10.1787/e551f448-en, p. 10.

plan of this strategy[53]), including their priorities in this respect and related standard clauses, as this would favor their effective adoption[54]. Contracting authorities could be obliged to make an environmental assessment before adopting procurement documents and so to identify which environmental specifications should be adopted. The modalities of this assessment could vary from "a duty to have regard" to a more comprehensive "risk assessment and mitigation". To this end, the specialised point of contact mentioned below could be involved as and when relevant. Specific technical specifications could be rendered mandatory, especially in key sectors[55] that would have to be identified by the directive; member states being able to identify additional ones. Those specifications and their related guidance will have to be regularly updated and provide the necessary verification mechanisms[56].

- Second, with respect to the actual wording of article 42 of directive 2014/24 and with the aim of simplifying the procurement process, **the requirement of the "link to the subject-matter" should be replaced by the "life cycle" notion (art. 2.1(20) of directive 2014/24) which would allow suppliers to prove the environmental quality of their products by means of their business model**[57]. This "life cycle" concept is now well-known in the European legislative framework. A European methodology for assessing the life cycle of goods and services should be developed too[58]. This would enhance transparency in public procurement. The principle of equal treatment will be preserved as well since the specifications will still need to be proven and thus be objective[59].

- Third, ***professionalisation measures should also be adopted.*** Regarding the practical difficulties encountered by contracting authorities (both at the award and performance phases), contracting authorities should be obliged to follow continuing professional training/development related to the introduction and implementation of environmental specifications[60]. They should also have a specialised point of contact (a single one for a member state, within a contracting authority or common to several ones) that could analyse the procurement's subject and determine which environmental specifications should be applied and

[53] Fair Trade Advocacy Office, *Beyond buying: how can the circular economy principles feed sustainable public procurement policies and practices ?*, March 2021, p. 36.
[54] T. UEHARA, « Public procurement for sustainable development. A framework for the public sector », *Research Paper, Energy, Environment and Resources Programme*, November 2020, p. 30 et seq. ; OCPW, *op. cit* , p. 10-11 ; for an example of toolkit in this respect see https://ec.europa.eu/regional_policy/policy/how/improving-investment/roadmap-admin_en.
[55] C. FALVO, « Bringing Sustainability to the Collective Table through Public Food Procurement », *Sapiens Network*, 13 June 2024.
[56] M. MÄHÖNEN *et al.*, *op. cit.*, p. 37-38.
[57] L. MÉLON, *op. cit.*, p. 11-12.
[58] 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 », *ERA Forum 21*, 2021, p. 717-718 ; see also J. J. CZARNEZKI and S. VAN GARSSE, « What is Life-Cycle Costing? », *COST AND EU PUBLIC PROCUREMENT LAW: LIFE-CYCLE COSTING FOR SUSTAINABILITY*, Routledge Press, 2019, https://ssrn.com/abstract=3789958.
[59] M. ANDHOV *et al.* (2020). *Sustainability through public procurement: the way forward – Reform Proposals*, p. 39.
[60] L. HOUSEN, J.-M. WOLTER et V. CHRISTIAENS, « Marchés publics et environnement : un outil de redynamisation économique locale ? », *Jaarboek Overheidsopdrachten 2018-2019/Chronique des marchés publics 2018-2019*, C. De Koninck *et al.* (dir.), Bruxelles, EBP Consulting, 2019, p. 880 et seq.

how they could be monitored. Experts (researchers, NGO's staff or the private sector) could assist this entity[61], possibly following a certification procedure to attest their "fitness". Discussions should also be organised between all the actors involved in green public procurement such as the above-mentioned experts but also with the different contracting authorities[62]. Those points of contact, that can be called "competence centers" for instance, could also give the previous mentioned trainings[63].

To ensure a proper implementation, contracting authorities should be obliged to adopt relevant sanction mechanisms related to their green specifications and justify why they might not be necessary in a specific context. The successful tenderer should have a duty to report the relevant information to the contracting authority on a regular basis[64]. Verification mechanisms of the environmental footprint of goods and services should be developed[65]. Specific sanction mechanisms could also be developed at the European level[66], while ensuring that they respect the principles of good administration[67].

- **Article 48 et s. – Publication and use of electronic tools (*Pr.Gabriella Racca*)**

Digital procurement platforms are evolving, structured to support the entire digital procurement lifecycle, interoperable with other databases, developing e-notification, e-access and e-submission[68].

- **Need to articulate e-forms and Common European Data Space**

It is expected that the e-senders identified by the Member States will send structured digital documents (e-forms) to the TED for the publication of public procurement data, aimed at reducing administrative burdens, helping companies find better business opportunities, improving data quality and analysis, increasing transparency and data-driven public decision-making. E-forms will enable the creation of a *Common European Data Space*[69], which will also include data on public contracts[70], which will not only help to obtain better data.

[61] T. UEHARA, *op. cit.*, p. 33-34.
[62] C. FALVO, *op. cit.*
[63] M. ANDHOV *et al*, *op. cit.*, p. 13-14.
[64] L. HOUSEN, J.-M. WOLTER et V. CHRISTIAENS, *op. cit.*, p. 882 et seq.
[65] M. MÄHÖNEN *et al.*, *op. cit.*, p. 28.
[66] M. COZZIO, « Public Procurement as a Tool to Promote Sustainable Business Strategies: the Way Forward for the European Union », *International Community Law Review*, 24, 2022, p. 182.
[67] On a parallel model as to the requirement included in article 41 of the Charter of Fundamental Rights of the European Union, as those principles would apply to the member states public bodies.
[68] European Commission, *Interoperability in end-to-end eProcurement*, Brussels, 2020 I. Da Rosa, *Digital transformation of public procurement*, in *Ius Publicum Network Review*, 2/2023: https://www.ius-publicum.it/wp-content/uploads/2024/02/DEF_Da-Rosa_Digital-Transformations-of-Public-Procurement.pdf .
[69] Envisaged in the European Data Strategy: European Commission, Communication: *A European Strategy for Data*, COM(2020) 66, 19 February 2020.
[70] European Procurement Data Space: European Commission, Communication of 16 March 2023, *Public procurement: A data space to improve public spending, promote data-driven policy making and improve SMEs' access to tenders*, 2023/C 98 I/01.

The quality, availability and completeness of the data will be greatly improved through close cooperation between the Commission and the Member States and the introduction of the new electronic forms (eForms), which will enable public purchasers to provide information in a more structured way. This wealth of data will be combined with a set of analytical tools that will include advanced technologies such as artificial intelligence (AI), e.g. in the form of machine learning (ML) and natural language processing (NLP).

The possibility to aggregate TED data to derive statistics and make data-driven decisions has already been envisaged. It will be possible to link information from tender notices and award notices, develop systems to assist operators (co-pilots) to suggest the most appropriate product sectors (CPV).

- **Recommendations to enhance the use of digital tools**

The ontology and the structure of CPV should be revised and shared in order to evolve TED in a database that collect structured information from national databases to provide market analysis and public cooperation also cross-border.

Therefore, the inclusion among the general principles of procurement (***Title I - Scope, Definitions and General Principles, Chapter II - General rules, art. 18 - Principles of procurement*** [71]), the obligation for Member States to provide for the use of digital public procurement platforms, including for the collection and analysis of procurement lifecycle data should be provided. Public procurement information should be published in open data standards to create better analytics for needs-driven policy-making and warning systems to signal and tackle corruption and inefficiency.

Furthermore, into **Recitals no. 52-53**[72] and into Art. 53 (***Title II - Rules on Public Contracts, Chapter III - Conduct of the procedure, Section 2 - Publication and transparency***[73]) an obligation to publish procurement data and documents digitally should be introduced: public procurement data and documents, covering the entire procurement process (from publication to award, execution and payment) must be published. Above the European relevance thresholds, publication must take place in the Tender Electronic Daily (TED), Supplement to the Official Journal of the European Union, that should evolve in a more and more structured database, interoperable with the National ones. It is necessary to create a task for the European Commission for a Public Procurement Data Space to collect data from national procurement platforms and registers, which should be directly linked and interoperable.

[71] Current version of Art. 18, Principles of procurement.

[72] Current version: "*(52) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes.*
*(53) Contracting authorities should, except in certain specific situations, use electronic means of communication which are non-discriminatory, generally available and interoperable with the ICT products in general use and which do not restrict economic operators' access*".

[73] Current version of Art. 53, Electronic availability of procurement documents: **"***1. Contracting authorities shall by electronic means offer unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with Article 51 or the date on which an invitation to confirm interest was sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which the procurement documents are accessible.*

Procurement platforms dedicated to specific sectors (like health) should be developed, promoting cooperation and developing new models of trust that respond to the specific challenges of the sector[74]. The creation of interoperable digital platforms aims to promote savings but especially to assure quality and innovation.

- **Article 55 – Informing candidates and tenderers (*Pr.Sarah Schoenmaekers*)**

Article 55 indicates that contracting authorities should inform each candidate and tenderer of the grounds for any decision 'not' to award a contract for which there has been a call for competition and for any decision to recommence the procedure.

➢ **Recommendation**

It should be clarified what is meant with recommencing 'the' procedure. This is most likely a new procedure with the same subject-matter. If a procedure is recommenced, it might be useful to ask for a more elaborate explanation as it can occur that procedures are terminated because certain 'preferred' economic operators did not participate in the first round. A higher motivation duty seems to be warranted in such cases, as well as a clarification of what is meant with 'the' procedure.

- **Article 56 and seq – use of electronic tools during the procedure – ESPD, eCertis (*Pr. Gabriella Racca)***

The introduction of the *Virtual Company Dossier* may enable contracting authorities to overcome the burden and red tape of verifying the economic operator's requirements[75]. Self-declarations should be overtaken by a real time acquisition of information through interoperable databases.

Trust and good faith between the contracting authority and the economic operator must remain throughout the selection and execution of the contract, avoiding unnecessary formalism. It must be made clear that this trust can only be based on facts, which can be acquired by any means, today digital.

The Court of Justice has just recalled that the final word should be left to the contracting authority, but on the basis of findings not limited to specific authorities or modalities, thus the sources of knowledge should be automatized[76]. It is precisely in the Virtual Company Dossier that the public entities and economic operator will be able to pour every useful element to

[74] EU COMMISSION, *Public procurement in healthcare systems, Opinion of the Expert Panel on effective ways of investing in Health* (EXPH), 2021: https://data.europa.eu/doi/10.2875/832331 .

[75] G.M. RACCA, *Digital Transformation for an Effective E-Procurement*, in C. RISVIG HAMER, M. ANDHOV, E. BERTELLSEN, R. CARANTA (eds.), *Into the Northern Light. In memory of Steen Treumer*, Ex Tuto Publishing, Copenaghen, 2022, 215-228, winner of the TED AMBASSADOR AWARD 2023: https://www.gabriellaracca.it/wp-content/uploads/2024/03/G_M_Racca_Digital-transformation-for-an-effective-e-procurement_2022_-1.pdf .

[76] Court of Justice, Case C-66/22, 21 December 2023, *Infraestruturas de Portugal SA*.

demonstrate its qualification, as well as the absence of grounds for exclusion to ensure correctness and reliability and possibly demonstrate that it has implemented self-cleaning.

In case this might not be possible, in a first step, the re-usability principle should be ensured firstly of the ESPD and the related checks. The contracting authority should no longer ask for what has already been verified by another contracting authority. Subsequently, the Virtual Company Dossier should allow full interoperability between the databases containing the information necessary for verifying the absence of grounds for exclusion and also for their qualification. The potentially disruptive innovation, already present in the Directives, but largely unapplied, will therefore consist in the generalised application of the "once-only principle"[77] whereby economic operators will not be required to self-certify or submit documents since the contracting authority will be able to acquire the necessary information directly by accessing interoperable databases , available free of charge in each Member State, or a Virtual Company Dossier, according to the requirements and documentary evidence to be indicated by the Member States in the European *e-Certis* register, fully digital and interoperable.

The final goal indicated by the European Commission is therefore to integrate a digitally native ESPD 4.0 model (not anymore a self- declaration, but as a collection of data, updated in real time) with databases and/or pre-qualification systems of companies, including the e-Certis system[78]. The data and documents contained in the Virtual Company Dossier will be constantly updated and will allow their possession to be verified according to a sort of "green pass" of the economic operator, with alerts, whenever self-cleaning is needed.

- **Recommendation**

We hereby propose the strengthening innovation in the means of proof for the qualification of economic operators (***Title II - Rules on Public Contracts, Chapter III - Conduct of the procedure, Section 3 - Choice of participants and award of contracts, Subsection 1 - Criteria for qualitative selection, Art. 60, Means of proof***)[79]: Member States must implement digital tools ("a sort of green pass") as Virtual Company Dossier to verify the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58 (also the capacity requirement should be standardized). Contracting authorities may not ask for certificates or self-certifications attesting to data relating to the requirements of economic operators that are already present in public databases. The Virtual Company Dossier

[77] R. KRIMMER, A. PRENTZA, S. MAMROT, *The Once-Only Principle. The TOOP Project*, Springer, Cham, 2021.
[78] EU Commission, *Report on the ESPD survey*, 2019.
[79] Current version of Art. 60, Means of proof: "*1. Contracting authorities may require the certificates, statements and other means of proof referred to in paragraphs 2, 3 and 4 of this Article and Annex XII as evidence for the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58.*

must be interoperable with other European means of proof, such as the Digital Identity Wallet[80] and the Single Digital Gateway[81].

The e-Certis system supports the European Virtual Company Dossier, for the exchange of evidence of economic operators from different Member States.
The European Single Procurement Document, which has to be digital and integrated into the Virtual company dossier, should collect data and information available only to the company but maybe confirmed by third parties and through other databased not directly available to the public administration.

The USA Determination of Responsibility Assistant (DORA) system, used by the US Department of the Army to check contractor qualification through an automated "bot" might be considered as a model as it permits to verify in few minutes the qualification of a supplier. "Army Contracting officials shall use the Determination of Responsibility Assistant (DORA) Contractor Responsibility bot to assist them to determine prospective contractor responsibility or non-responsibility[82].

Surely AI systems should overcome the idea of self-certifications, checks and require of certifications for each award procedure. Ready access to AI-driven qualification assessments will make qualification much easier, and more adaptable to procuring entities' varied tolerances for performance and reputational risk.

The exclusion grounds and qualification grounds should be defined in advance, before and separately from the offer submission that should be prepared having clear the market analysis for each different sector, wideness, and type of contract. In other words, qualification requirements may be done on a sector basis (for example), drawing upon similar experiences from other Member States and governments[83].

- **Article 57 – Exclusion grounds (*Pr. Stéphane de la Rosa*)**

Recent EU legislative acts have expanded the range of grounds for exclusion, including Deforestation Regulation, the 'Vigilance' Directive, Directive 2024/825 on misleading environmental claims, and Directive CRSD 2022/2464 on the exclusion of operators who do not publish sustainability indicators. These exclusions form part of a strategic use of the order, however, they give rise to issues of readability, appropriation by the contracting authority, and

[80] Regulation (EU) 2024/1183 of 11 April 2024, amending Regulation (EU) No. 2014/910 with regard to the establishment of the European framework for a digital identity, so called EIDAS 2.
[81] Regulation (EU) 2018/1724 of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012.
[82]See Army Federal Acquisition Regulation Supplement (AFARS) 5109.103 Policy Instructions on how to use the bot can be found on the Acquisition Innovation through Technology page located at: https://procurement.army.mil/bot and at AFARS PGI 5109.103(b)-1.").
[83] TenderX was a working model for this type of sharing and assessing qualification-based information. The model was developed by the Government Transparency Institute at the Central European University; further information on that model (which has been withdrawn) is available at https://publicprocurementinternational.com/procurement-without-borders/.

proportionality. This diversification of texts raises the issue of consistency with the 2014 directives.

➢ **Recommendation**

The European legislator will have to choose between two possibilities:
- either to integrate the new exclusions into the content of the optional exclusions that appear in the directives, but with the risk of having a fixed list, which does not take into account possible evolutions, in particular if 'European' preference clauses were to be introduced for the attribution of public contracts;
- or include a paragraph in the article on exclusions stating that the exclusions recognised in Directive 2014/24 do not prejudice other grounds for exclusion recognised in sectoral texts. This provision would also indicate that the general rules on exclusions (e.g. proportionality, self-cleaning) also apply to these additional sectoral exclusions.

- **Article 58 – Selection criteria (*Pr. Sarah Schoenmaekers*)**

Article 58(4) states that contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.

➢ **Recommendation**

This article renders it more difficult for start-ups to participate in public procurement procedures, especially if 'suitable references' is interpreted as '*public* contract references'. Past experience should not be given such importance if an economic operator can show in a different manner that the job can be done.

- **Article 67 – Contract award criteria and Article 68 – Life cycle costing – *(Pr. Sarah Schoenmaekers)***

Contracting authorities are required to base the award of public contracts on the most economically advantageous tender, which shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing. This may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as environmental and social aspects, linked to the subject-matter of the public contract.

The European Commission has established an ambitious agenda to transform the EU economy into a circular one, where the value of products and materials is maintained as long as possible, bringing major economic benefits.

➢ **Recommendations**

For procurement the following remarks should be made:
- as the EU wants to move to a circular economy in general, there is no reason why environmental aspects should be linked to the subject-matter of the contract. Environmental

aspects should be pursued by all companies, regardless of the context of a specific procurement. This also counts for social criteria. In this regard reference can for example be made to the Corporate Sustainability Due Diligence Directive which aims to foster sustainable and responsible corporate behaviour in companies' operations and across their global value chains.

- the current procurement Directive does not oblige contracting authorities to buy sustainable, but many sectoral legislation contains mandatory sustainable obligations, also when it comes to public purchasing. It is not desirable nor practical to have fragmented regulation in this regard, such as the Clean Vehicles Directive, the Ecodesign Regulation, the Battery Regulation and the Deforestation Regulation. It makes sense, in light of the EU's objectives, to pursue coherence and efficiency when it comes to the ways in which sustainability is taken into account in public procurement.

- **Article 69 – Abnormally low tenders – *Pr. Sarah Schoenmaekers***

Article 69(4) of the directive stipulates that 'where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender *may* be rejected on that ground alone after consultation with the tenderer where the latter is unable to prove, that the aid in question was compatible'.

This provision is unclear as the word 'may' can mean that:

- a contracting is allowed to reject a tender 'on the sole ground of having received State aid that is not proven to be compatible'. In this situation there is a focus on the fact that a contracting authority can reject without any additional proof.
- a contracting authority is allowed to reject a tender 'even if was not proven that the State aid was compatible'. In this situation there is a focus on the fact that a contracting authority is not even required to reject a tender even if case it would be abnormally low. The word 'may' seems to lead to this conclusion. While on the one hand one could argue that this makes sense as it is not up to a contracting authority but to the European Commission to determine whether State aid is compatible or not, on the other hand this conclusion seems to be wrong as Article 26(4)(b) and 35(5) indicate that tenders which are found to be abnormally low by the contracting authority are considered to be irregular.

➢ **Recommendation**

- Article 69(4) deserves clarification in this regard.
- Clarification is also needed with regard to whether the Commission should be informed in case of an abnormally low tender, as is the case in the Foreign Subsidies Regulation (see Article 29(2) Regulation 2022/2560).

The terminology should be reconsidered as well. While Directive 2014/24/EU makes reference to 'abnormally low tenders', Regulation 2022/2560 refers to 'unduly advantageous tenders'.

## CHAPTER IV - Contract performance

- **Article 70 - Conditions for performance of contracts : see art. 18§2 dir. 2014/24 – there is a need of consistency between the 2 provisions.**

- **Article 71 – Subcontracting *(Pr. Laurence Folliot Lalliot & Peter Mc Keen)***

- **General assessment**

**Building on the leverage of subcontracting to strengthen SMEs**. Public procurement has become a central instrument for governments and the Commission in the implementation of public policies. However, the economic impact of public procurement goes beyond first-tier contracts, i.e. the currently estimated $13,000 billion annual share of public procurement in the world economy. In fact, there is a trickle-down effect from public procurement to all contracts (sub-contracts, mere suppliers) entered into to ensure the performance of the main public contract. Therefore, new EU solutions should encourage the lever of subcontracting for SMEs in public procurement to have the desired effect on the EU market structure. Furthermore, promoting access to subcontracting for SMEs enables them to gain the experience they need for future first-tier tenders.

**Identifying subcontractors and alike**

There is a need to update the simplified approach of subcontracting carried on by the 2014 Directives. Several different roles can now be identified beyond the main contract between the C.A. and the operator.

Such a distinction is already necessary in order for the subcontractor to benefit from the direct payment mechanism introduced by Directive 2014/24. Then the Communication from the Commission Guidelines to facilitate the application of the IPI Regulation by contracting authorities and contracting entities and by economic operators 2023/C 64/04 in its §4.1. underscores that "subcontracting means arranging the execution of a part of a contract by a third party and does not include the mere delivery of goods or parts that are necessary for the provision of a service".

Moreover, according to the Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market, " only main subcontractors or main suppliers, that is those whose products or services relate to key elements of the contract or exceed a certain percentage of the value of the contract should notify foreign financial contributions" (Recital 54). Thus its article 29.5 states: "For the purposes of this Regulation, a subcontractor or supplier shall be deemed to be main where their participation ensures key elements of the contract performance and in any case where the economic share of their contribution exceeds 20 % of the value of the submitted tender". But the future directive should also consider the subcontracting chain or cascade of subcontracts to define respective obligations

**Mandatory transparency and advertisement of subcontracting opportunities?**

In the US, any large business can post a notice of a subcontracting opportunity, including the solicitation, to SBA's subcontracting database, SUBNet. Plus some federal agencies maintain

subcontracting websites that include directories of large prime contractors so that small businesses know what contractors may have subcontracting opportunities.

Collecting data on subcontracting is an issue. To better control public spending, the future set of directives could require more precise data, reflecting second-tier contracts and the granularity of impacts thanks to artificial intelligence. TED seems to be the ideal place to launch this data collection. New tools, mandatory data collection and AI could be usefully mobilised.
In the United States, the Small Business Administration[84] already collects and tracks data on prime and subcontract awards to small businesses.

**Regulating subcontracts -** Initially, subcontracting was less regulated by European public procurement law than the main contract. The directive left it up to national authorities to adopt appropriate measures to ensure compliance with the performance obligations (Dir 2014/24 art. 18.2 and Art 71.1).

However several requirements have been added since the enactment of the 2014 Directives, some of them being general but affecting public procurement, like the General Data Protection Regulation (GDPR), or sustainability and compliance[85], with the enactment of the Corporate Sustainability Reporting Directive (CSRD) 2022/2464/UE of 14/12/2022 or the Corporate Sustainability due diligence Directive2024/1760, or sectoral requirements like the Directive 2023/1791 of September 13, 2023 on energy efficiency, imposing the inclusion of energy efficiency performance specifications in any subcontracting (Annex XV) or the article 25 of the Regulation (EU 2024/1735) on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem of 13 June 2024. Last but not least, Recital 57 of Directive (EU) 2023/970 of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, suggested that Contracting authorities should be able to take into account non-compliance with the principle of equal pay by the bidder or one of the bidder's subcontractors during the qualification process.

Now, subcontractors must also participate in EU protectionist policy by limiting state aid (Regulation (EU) 2022/2560 *on foreign subsidies).* And the Communication from the Commission Guidelines to facilitate the application of the IPI Regulation by contracting authorities and contracting entities and by economic operators 2023/C 64/04 in its §4.1. sets a limit affecting subcontracting: "Economic operators who have been awarded a contract for the provision of services (including public works) are required not to subcontract more than 50 % of the total contract value to economic operators originating in a third country that is subject to an IPI measure.

[84] The disaggregated data collected by SBA for the past 5 fiscal years is available at: https://www.sba.gov/federal-contracting/contracting-data/disaggregated-data#data.
[85] OECD (2021), Background note on Regulatory Developments concerning Due Diligence for Responsible Business Conduct (RBC): The Role of Small and Medium Sized Enterprises (SMEs), https://mneguidelines.oecd.org/PMRT-2021-background-note-SMEs-and-duediligence.pdf.

All these new requirements may impact the formation of the main contract or its performance. As such, flow-down clauses could be considered as a way to ensure the consistency between the main and the subcontracts. In the US, prime contractors may be required to "flow down" some clauses of their contract to subcontractors, including termination clauses.

➢ **Recommendations**

- A new Section on subcontracting and the supply chain should be dealt with separately in the future Directive, as it should cover both the interaction between sub-participation and the formation and performance requirements of the main/prime contracts. This will help to regroup all elements addressing sub-participation in the same place, facilitating SMEs access to information.
- There is a need to clarify the role and status of different sub-participants such as the mere supplier, the sub-contractor, the 'sub-performer' and the 'sub-concessionnaire'.
- Regarding the qualification criteria and exclusions, the place and requirements of sub-participants should be clarified.
- Regarding the performance and oversight of the sub-participants in public contracts, the article/section should clarify the obligations attached to the supply chain, and the obligations attached to the sub-contractors chain, in accordance with the new compliance rules (revised CSRD and Due Diligence Directives)
- To stimulate SMEs as sub-participants, Member States should be encouraged to create national platforms for the public announcement of sub-contracting opportunities in public contracting. Main contractors would be required to publish their calls, but would be free to negotiate subcontracts, while sharing post-award information. SMEs would be registered with the EU "wallet" or "dossier" (see G. Racca comments) and be automatically informed when an opportunity is opened in their field.
- This will enlarge the monitoring of actual participation of SMEs in public contracting. It will make it possible to monitor the participation of SMEs as sub-participants and provide data on the actual role of SMEs in public procurement, tracking the trend of SMEs moving from sub-participant to prime contractor status.

- **Article 72 - Modification of contracts during their term - (*Daniel Schoeni and Pr. Patricia Valcárcel, Raphael Acevedo )***

➢ **General assessment**

One of the 2014 Directive's key innovations was the inclusion of a chapter on execution.[86] While this marked the consolidation of the jurisprudential work developed by the Court of Justice of the European Union (CJEU) since 2004,[87] it also signified a major departure from earlier iterations. Previously, execution had been entirely absent, and performance was

[86] Directive 2014/24/EU, Articles 70–73.
[87] *Succhi di Frutta SpA*, C-496/99 P (ECLI:EU:C:2004:236) [2004]. See also *Pressetext Nachrichtenagentur GmbH v. Rupublik Österreich*, C- 454/06 (E.C.R. I- 4401) [2008].

governed by the national laws of the authority awarding the contract.[88] The 2014 Directive, by contrast, recognized that the contract execution phase required some oversight or else the system's foundational objectives and principles would be imperiled.

This revision affords the chance to deliver on the Directive's principles and objectives. Thus, it seems appropriate to impose both (1) an obligation on Member States to monitor the execution of contracts awarded by contracting authorities and (2) to afford remedies during the execution phase (a) to the selected tenderers, (b) to the contracting authority, and (c) to third-party economic operators in certain cases (e.g., when follow-on work that lies outside the scope of the procurement is awarded to the incumbent contractor without the use of the appropriate competitive procedures).

Though caution is in order when undertaking legal transplants,[89] U.S. federal procurement may provide a useful model of a mature system[90] that comprehensively regulates the performance phase of procurement in its procedures, regulations, and jurisprudence.[91] Indeed, from a U.S. perspective, any public procurement system that does not address the performance phase is incomplete.[92]

- **Recommendations**

Proposals for the revision of the directives or which suggest the introduction of new tools

- **First.** A key feature in several Member States is the contract execution authority. This office verifies that the contract is being executed consistent with the terms of the original award. The establishment of such oversight authorities should be mandatory, at least for contracts that fall within the scope of the EU Directives. Further, minimum qualifications should be set, including technical expertise for the subject-matter of contract in question.

[88] Jean-Jacques Verdeaux, "Public Procurement in the European Union and in the United States", 32 Pub. Cont. L.J. (2003), pp. 713, 721, 723, 735.
[89] See generally Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974).
[90] See Christoher R. Yukins, "The U.S. Federal Procurement System an Introduction", Upphandlingsrättslig Tidskrift, pp. 69, 93 (2017).
[91] See Joshua Schwartz, "United States of America" in Rozen Noguellou, Ulrich Stelkens, and Hana Schröder (eds.), *Droit Comparé des Contrats Publics /Comparative Law on Public Contracts* (2010), pp. 613, 617–19 (suggesting the U.S. federal system is perhaps unique in that its coverage extends beyond the formation phase of the procurement process). See also Joshua Schwartz, "The Centrality of Military Procurement: Explaining the Exceptionalist Character of United States Federal Procurement Law" (2004) (unpublished manuscript), available at: http://scholarship.law.gwu.edu/faculty_publications, pp. 6-7 (observing that in contrast to the practice of EU Member States, which in general "treat rules of contract performance as lying outside the corpus of public contract law," the U.S. federal system "addresses both issues of contract formation and contract performance.")
[92] See Daniel Schoeni and Christopher Yukins, "Principles of Public Contracts in the United States", in Stéphane de La Rosa & Patricia Valcárcel (eds.) *Les Principes Des Contrats Publics En Europe* (2022), pp. 97, 98-99. (noting that from a U.S. perspective, "it seems strange not also to include contract administration within the same system because the two are complementary, and one informs the other" given that "the clauses entered into during formation determine the terms of the contract and remedies that are available during the administration phase"). See also Richard J. Astor, "The EC Source Selection Regime: Quick Introduction", 26 Pub. Cont. Newsletter (1991), p. 6 (marveling at the brevity of an earlier version of the public procurement directive and the fact that it said "virtually nothing" about contract performance).

- **Second.** While the principle of transparency is paramount in the 2014 Directive,[93] its inapplicability beyond the contract award phase undermines its effectiveness. Similarly, respect for the principles of competition and equal treatment must entail an appreciation for challenges that may arise during contract execution. So it is imperative that economic operators participating in the tendering process be advised of all contract modifications. Because the current obligation to publish notice of contract modifications is insufficient,[94] we would propose the following revisions:

  **a)** Such obligations should apply to all modifications. This would enable economic operators to monitor modifications and to ensure that they are consistent with the terms of the contract and that they do not alter the overall nature of the contract.
  **b)** Further, publication must be required before the execution of modifications, so that bidders can challenge them in a timely fashion.[95]

- **Third.** Effective execution requires that contracting authorities award contracts only to economic operators who are responsible business partners. This entails consideration of their past performance.[96] To this end, the new directive should require publication of data that may affect either qualification determinations[97] or exclusions.[98]

- **Fourth.** Insofar as the new regulations continue using the "overall nature of the contract" as a limit on modifications, the new directive should take into account CJEU jurisprudence and provide a better definition and better guidance for the interpretation of this concept. The United States' jurisprudence on cardinal changes may provide a useful comparison.[99]

- **Fifth.** Further, correct application of the transparency principle dictates that publication of contract modifications, past performance data, exclusions, etc. using digital formats that are open and reusable. This should be mandated in the new procurement directive. In the era of "big data" and machine learning, this would ensure that public procurement data is both widely available to the public and also consistent with European regulations on the use of public sector information.

[93] Directive 2014/24/EU, Article 18.1.
[94] Directive 2014/24/EU, Article 72.1, last paragraph.
[95] Directive 665/1989/EEC, Article 1.1.4.
[96] Directive 2014/24/EU, Article 57.4(g).
[97] The use of past performance throughout the procurement lifecycle in the United States, especially the Contractor Performance Assessment Reporting System, may provide a useful model. See Congressional Research Service, R41562, "Evaluating the 'Past Performance' of Federal Contractors: Legal Requirements and Issues" (2015); DAU, "Contractor Performance Assessment Report (CPAR) and the Contractor Performance Assessment Reporting System (CPARS)", https://www.dau.edu/acquipedia-article/contract or-performance-assessment-report-cpar-and-contractor-performance (last visited Feb. 15, 2025).
[98] See generally Christopher R. Yukins, "Cross-Debarment: A Stakeholder Analysis", 45 Geo. Wash. Int'l L. Rev. (2013), pp. 219-234 (urging better sharing of exclusion information across borders).
[99] See generally Mari Ann Simovart, "Is There a Devil in the Details? Modification of Public Contracts in the EU and the US", 11 Eur. Proc. Pub. Private Partnership L. Rev. (2016), pp. 292-300.

- **Sixth.** We would be remiss if we did not suggest further lessons across borders that may be found in the U.S. federal system's treatment of contract performance. The U.S. system grants the government extraordinary authorities that are absent in the realm of private contracts,[100] both to protect the public interest and ensure effective contract execution.[101] Indeed, as one commentator has argued, this system has thereby struck a proper balance between the rights of economic operators and protecting the government's interests.[102] There are, therefore, rich opportunities for comparative analysis.

- **Article 73 - Termination of contracts (*Pr. Stéphane de La Rosa*)**

Article 73 of Directive 2014/24 is limited to specifying cases of mandatory termination relating to specific scenario : substantial modification of the contract within the meaning of Article 72 of the Directive, grounds for mandatory exclusion of the contractor not identified at the award stage, serious breach by the contractor of obligations under primary Union law established by a judgment of the Court of Justice.

These limited cases do not cover all the grounds for termination recognised in national law (termination for misconduct, in the general interest, for force majeure, for breach of contract). The incomplete harmonisation of the grounds for termination was recently confirmed by the Court of Justice in a case concerning the collapse of the *Morandi* Bridge in Genoa (Italy) and the possibility for the contracting authority (in this case the Italian State) to terminate the contract unilaterally. The Court emphasises that, in the absence of harmonisation at EU level, it is for each Member State to lay down the rules enabling the contracting authority to react where the concessionaire has committed, or is suspected of having committed, a serious breach of the contract which calls into question his reliability in the performance of the concession or contract (CJUE, 7 novembre 2024, *Adusbef – Associazione difesa utenti servizi bancari e finanziari c. Presidenza del Consiglio dei ministri*, aff. C-683/22).

- **Recommandations**

The leeway recognised by the Court in the 'Morandi Bridge' case must be preserved in future directives. Indeed, the foundations of the termination of contracts under general contractual law, in relation to the conditions of validity, the existence of contractual defects or even gross negligence. These aspects refer to considerations that fall under general contract law, which is not harmonised at the European level. This leeway should be preserved, at the risk of encroaching on the contractual freedom of contracting authorities and on complex and unresolved issues of general contract law in the European Union.

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[100] For example, see Joshua Schwartz, "Government Oversight Powers Under U.S. Law" in Gérard Marcou, *Le Contrôle des Marchés Publics* (2009), pp. 219, 222-224 (describing the "exceptionalist" tendencies in U.S. federal procurement and listing some of the specific authorities that differ under in public contracts). See also Schwartz, "Centrality of Military Procurement", above note 91, at pp. 8, 10–11, 13 (observing that exceptionalist features of the system are the most striking as to the contract performance phase).

[101] See "Centrality of Military Procurement", above note 91, at pp. 16, 25, 42–82, 75 (discussing powers given to the federal government during the performance phase that are both "exceptional" and "extraordinary").

[102] See Joshua Schwartz, "Learning from the United States' Procurement Law Experience: On 'Law Transfer' and its Limitations", Pub. Proc. L. Rev. (2002), pp. 115, 117, 124–25 (suggesting that the U.S. system has afforded government agencies the tools needed for enforcing their rights during the performance phase).

# Title III – Particular Procurement Regimes

## Chapter II – Rules Governing design contests

### Article 78 – scope and Article 80 – Rules on the organisation of design contests and the selection of participants – *(Pr. Sarah Shoenmaekers)*

Article 78 stipulates that Chapter II applies to design contest organized *as part of a procedure* leading to the award of a public service contracts. One could argue that when a design contest is automatically part of an award procedure, contracting authorities are free to use any procurement procedure as long as the conditions mentioned in the Directive that allow for the use of that procedure are fulfilled. It should be noted however that the standardized procurement procedures that are mentioned in Chapter I of Title II of the Directive do not provide for the possibility of 'including' a design contest. ~~For this reason the word 'procedure' mentioned in~~

- **Recommandations**

Article 78(a) should not be interpreted as a standardized procurement procedure but rather as a particular course or mode of action or an established or prescribed way of conduct. Indeed, Article 80(1) indicates than contracting authorities are required to apply procedures that are adapted to the provisions of Title I of the Directive and Chapter I of Title III. It follows that the specific and detailed rules on the procurement procedures as listed in Articles 27-32 cannot just be copied.

This is in line with the fact that design contests are characterized in Title III as 'particular' procurement regimes. They are characterized as flexible instruments by Recital 120. For this reason the wording of Article 80 should be refined[103].

[103] See also S. Schoenmaekers, 'Article 78, Scope' in R. Caranta and A. Sanchez-Graels (eds.), *European Public Procurement*, Edward Elgar, 2021, p. 841

# Part. II

# Specific concerns and issues related to the revision of the 2014 directives

## SPECIFIC ISSUES ON SME's AND PUBLIC PROCUREMENT

***Pr. Andrea Sundstrand***

Small and medium-sized entrepreizes (SME) participation in public procurement is fundamental to promoting competition, diversity, regional development, economic growth and innovation. It benefits both small businesses and the society as a whole by creating a more dynamic and inclusive business environment. They represent around 99,8 percent of all enterprises in the EU and produce more than a half of the European GDP. It has also been argued that most innovations originated from small entrepreneurial firms which support the sustainability agenda.[104]

If we use Sweden as an example, it has a population of around 10,5 million. There are currently around 1.2 million companies in Sweden. The vast majority of these, roughly 96 percent, are small businesses with fewer than 10 employees. SME, with 0-249 employees, make together up 99.9 percent of all companies in Sweden. The larger companies, with 250 or more employees, thus make up only *one per thousand* of the total number of Swedish companies.[105]

In the EU Directives on public procurement from 2014 (2014 Directives) several articles where adopted with the purpose of simplifying for SMEs to participate in public procurements. One example is the provision that sets a maximum limit of twice the estimated contract value on the bidder's yearly turnover as a proof of the bidder's financial standing, article 58.3 Directive 2014/24/EU. Other possibilities for contracting authorities to facilitate for SMEs are to divide a contract into lots. Where contracts are divided into lots, contracting authorities are also allowed to limit the number of lots for which an economic operator may tender and to limit the number of lots that may be awarded to any one tenderer, preamble no 79 of Directive 2014/24/EU. The purpose is to preserve competition and/or to ensure reliability of supply, since large contracts are usually only available to larger companies. There are a few more examples where the 2014 Directives tries to facilitate the participation of SME in EU public procurement.

[104] Andhov, Marta, Sustainability, Public Procurement and SMEs - Challenges and Opportunities, Legal Studies Research Paper Series, paper no. 2019-81, University of Copenhagen Faculty of Law, 2019.
[105] See https://tillvaxtverket.se/tillvaxtverket/statistikochanalys/statistikomforetag/foretagande/basfaktaomforetag.1719.html.

Even though there was a focus on facilitating for SMEs when adopting the 2014 Directives, the outcome for SMEs haven´t been what was expected. Two surveys made by 2 different Swedish organizations for SME show that these companies still find it difficult to participate in public procurements.[106] Statistics show that 17 percent of small businesses do not participate in public procurement because they perceive it to be too complicated and take too long, 40 percent of small businesses believe that procuring organizations do not divide their public procurement into smaller parts, 73 percent of small businesses believe that requirements are often made that are irrelevant and 48 percent of small businesses believe that it has become more difficult to participate in public procurement in recent years.

Below is a summary of these two reports where different types of problems and conclusions relating to SME are highlighted.

- **Uncertain game rules for submitting tenders**

The uncertain rules of the game is a major challenge. In order to increase the proportion of SME that participate in public procurement, the knowledge of those who write tenders needs to increase, since these are difficult to get it right.

Several SMEs find it difficult to participate in public procurement because of all the requirements that must be met. To a greater extent, large companies find it easier to live up to and devote time to all the demands that are made. Protracted processes and high complexity contribute to the fact that SMEs find it difficult to establish themselves in the market. There is a great need to simplify the language and the rules within the procurement processes. The lack of procurement competence at the municipalities is also an obstacle. The complexity of a procurement is often underestimated by the contracting authorities, especially in smaller municipalities. SME also often have to bear a disproportionately large part of the responsibility for everything to be correct according to the regulatory framework, which can be difficult and costly.

- **Too extensive requirements and criteria**

Many SMEs feel that requirements in public procurements are extensive and designed without the required industry insight. There is an overall positive attitude among the companies to participate in dialogue before future procurements, but SMEs are also pointing out that these processes are time-consuming and often have limited effect on the actual design of the procurements.
Many of the difficulties SMEs have in public procurement can be attributed to the actual circumstances of a procurement procedure. SMEs are not prevented *per se* from participating in public procurement by the EU Directive. Much of the criticism that exists is linked to how contracting authorities actually carry out the procurements. Too extensive administrative requirements and criteria are examples of difficulties that exist.

[106] Almega, Offentlig upphandling – ur tjänste-företagens perspektiv, 22 October 2024, https://www.almega.se/2024/10/rapport-offentlig-upphandling-ur-tjansteforetagens-perspektiv/ and Företagarna, Offentlig upphandling och småföretag, 2023, https://www.foretagarna.se/politik-paverkan/rapporter/2023/offentlig-upphandling-och-smaforetag/.

- **Too much focus on price**

Many SME believe that price is weighted higher than quality in too many public procurements. This makes it difficult for small companies to be able to participate and win, since they often are focused on high quality services and goods.
A strong price focus in the procurements creates more and more frustration among SMEs. This is still the single most common reason why companies opt out of public procurement altogether. 73 percent of SMEs that participate in public tenders are reluctant or rather reluctant to participate in tenders with a strong focus on price. There is a general resignation and feeling among the companies that it is only about price and not the quality of the delivery.

- **Non-existent or poor follow-up of public contracts**

There is no follow-up of the work done in a public contract to know whether the supplier who won the procurement delivered the right product or service. This means that SMEs are in competition with companies that have provided poor or non-existent service or delivered poor quality.

- **Conclusion**

There are significant challenges in Sweden with the fact that few tenders are received in the procurements, both in service procurements and in general. With regard to service procurement, only one (1) tender was received in a full 19 percent of the procurements and two (2) tenders in 20 percent, which means that a maximum of two tenders were received in a full 39 percent of the procurements.
A conclusion of the two reports mentioned above is that SME in Sweden consider the following to be the major problems in public procurements:

- too much focus on the lowest price,
- the formality of public procurement is too time-consuming and
- there are too many and irrelevant requirements.

➢ **Recommendations**

- Regarding the complexity of the EU procurement legislation, simplify the procurement processes so that more companies can participate, i.e.d rely more on the basic principles and less on rigid procurement rules.
- A larger part of public procurements based on price/quality and not only on price would benefit SMEs.
- The follow-up on contracts must increase and become better, to make sure the best bidder won the contract.
- When it comes to the difficulty of writing winning bids, something that would be of great help to several entrepreneurs are pilot cases in municipalities regarding public procurement to see and learn from others.
- The contracting authorities need help with education and templates so as to simplify and standardize the procurement process.

- Contracting authorities must become better at identifying tenders with abnormally low prices in order not to risk opening up the market to suppliers who do not comply with laws and regulations, which is a great risk to SME.

## Considerations on the legal form of European provisions regarding public procurement and the development of interoperable EU compliant platforms

***Pr. Gabriella Racca*** *(see also comments above on art. 48 and 56)*

The European legal framework for public procurement might consist in new Directives with some clearly identified mandatory rules, directly applicable, in order to avoid 27 different but mostly similar implementations, for a core part of the Directive. Moreover, general provisions should cover not only the award procedure, but also the execution phase of public contracts[107]. Thus, implementing the idea that the goal is the prompt execution of public contracts for the benefit of EU citizens and not only for compliance to the procedure[108]. A system of EU provision compliant National Platforms should be in place to evolve a public e-commerce based on transparent market analysis and networks of qualified supplier (having below a set of award procedures (Framework Agreements or SDA in place). The activities might thus be fully traceable inside the different platforms.

Specialized platform should implement "typical public contracts" concerning specific sectors, such as for the healthcare sector, with specific provisions for the implementation of joint procurement and innovation procurement in specific sectors[109].

Also work procurement should evolve with a separate specific provision connected to the fully digitalizes BIM approach, and framework alliances[110].

Specific platforms should deal with pre-commercial activities and procurement of innovation connected in the different Member States that would be willing to participate.

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[107] G.M. RACCA, R. CAVALLO PERIN, G.L. ALBANO, *Competition in the execution phase of public procurement*, in *Public Contract Law Journal*, 2011, Vol. 41, n. 1, 89 -108: https://www.gabriellaracca.it/wp-content/uploads/2024/03/2011-Racca_Cavallo-Perin_Albano-Competition-1.pdf .

[108] G.M. RACCA, C.R. YUKINS (eds.), *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, in Droit Administratif / Administrative Law Collection (*Directed by J. B. Auby*), Bruylant, Bruxelles, 2014: https://www.gabriellaracca.it/wp-content/uploads/2024/03/RACCA_YUKINS_Integrity-and-Efficiency-in-Sustainable-Public-Contracts-1.pdf .

[109] G.M. RACCA, C.R. YUKINS (eds.), *Joint Public Procurement and Innovation: Lessons Across Borders*, in *Droit Administratif / Administrative Law Collection* (Directed by J.B. Auby), Bruxelles, Bruylant, 2019: https://www.gabriellaracca.it/wp-content/uploads/2024/03/G_M_Racca-C_R_Yukins-Joint-Public-Procurement-and-Innovation-lessons-across-borders-Bruylant-2019-1.pdf .

[110] For the new paradigm in public contracts due to digital transformation, "digital trust" and framework alliances: G.M. RACCA, *La digitalizzazione dei contratti pubblici: adeguatezza delle pubbliche amministrazioni e qualificazione delle imprese*, in R. Cavallo Perin, D.U. Galetta (eds.), *Il diritto dell'amministrazione pubblica digitale*, Giappichelli, Torino, 2025.