A new generation of public procurement Directives: background, objectives and results

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§ 1. Introduction

The purpose of legislation should be amongst others the creation of a definite stability and of a certainty in legal and commercial transactions. Legislation that undergoes changes and amendments every ten years fails to achieve these objectives. However, since 1969-1970 the European legislator compels all actors of public procurement to deal with a new generation of public procurement Directives almost every ten years.

Two new Directives regulating the awarding of public contracts (4th generation) were issued in 2014: the Directive 2014/24/EU[1] and the Directive 2014/25/EU[2]. In addition to these two Directives, the European legislator also thought it necessary to adopt for the first time a Directive on concessions: the Directive 2014/23/EU[3]. They all have to be transposed into Member States' national law by the 18th of April 2016. That process is well under way in the Member States.[4]

(1) Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ [2014] L94, pp. 65-242 (hereafter 'Public Procurement Directive 2014').

(2) Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ [2014] L94, pp. 243-374.

(3) Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts OJ [2014] L94, pp. 1-64.

(4) Eg: In England the *Public Contracts Regulations* 2015 came into force. France: Ordonnance n° 2015-899 du 23 juillet 2015 *relative aux marchés publics*.

The public procurement Directives contain a rather detailed legislation that, as the European institutions adopt new generations of Directives, leads to a constantly diminishing room of appreciation for Member States when going through the implementation process. This is even more pronounced in the new Directives. However, the new Directives also tend to transfer some competences from the EU to the Member States.[5] Both an analyse and a discussion of these Directives will be useful for the subsequent implementation and interpretation of national law in this area.

The important number of Directives and the large extent their content render it impossible to discuss them in full details. If a choice has to be made on what the discussion should focus on, it often concerns the legislation that is the most relevant in practice. In the field of public procurement, Directive 2014/24/EU applies to the classic sectors. This book thus focuses on this Directive and on a number of topics that are governed by a new legal regime under the new Directive.

The purpose of this paper is to provide an introduction to the topics where changes are the most clear. First, this paper summarizes the general framework of the Directive, namely primary European Union law, and then outlines briefly the different generations of Directives (Section 2). Second, this paper examines the system directly preceding the 2014 Directive, its objectives and which principles the Directive seeks to give shape to (Section 3).

§2. EU framework and historical background of the public procurement Directives

I. EU framework

A public authority acts in the general public interest. It daily takes decisions and actions to safeguard this interest. Most often these actions and decisions also have legal consequences. Some of these consequences may be economic in nature, and may indeed have an impact on the market itself. Where a decision or action of a public authority has an impact on the operation of the economic market, EU law has to be considered, given that a key objective of the EU is the achievement of an internal market where goods and services are freely provided across national borders. The impact of EU law on decisions of public authorities is continuously growing.[6]

(5) This has been demonstrated for cooperation between public authorities: see K. Wauters, *Cooperative agreements between public authorities* (Antwerp: Intersentia, 2015) 253 p.

(6) See C. Harlow and R. Rawlings, *Law and Administration* (Cambridge: CUP, 2009), pp. 89-92: the spill-over effect.

A decision of a public authority to conclude a contract (public contract, service concession) is a decision that a public authority may take in the general public interest. In absolute terms both internal market rules and the rules of competition may be applied: the decision may either hinder free movement or distort competition between private entities – for example, by creating a monopoly.[7] Especially important is to know which of the two areas of EU law constitutes the broader framework for the public procurement Directives.

It is generally accepted that public procurement Directives are based on the internal market rules,[8] and that the Directives '*are in essence a concrete expression of several fundamental freedoms relating to the internal market*'.[9] The Directives are not directly related to competition law.[10] More specifically, the Directives are based on the rules on free movement.[11] The first consideration that raises the issue of the applicability of EU internal market law is, of course, that some measure has been taken. For a long time the question was raised if individual decisions (e.g. tendering decisions, the decision to cooperate with other public authorities) were also covered by this notion. It is implicitly clear from CJEU case law that the notion 'measure' receives an extensive interpretation. Any decision or action that affects the fundamental freedoms and deters cross-border trade is covered by the notion 'measure'. It may be a directive, an individual decision,[12] or even an administrative practice. It may concern an obligation, a prohibition, a condition, or a restriction. The action needs not to have any direct influence on an economic activity. An indirect influence is sufficient.[13] Every decision taken by a public authority in the context of a tender procedure could constitute a measure.[14]

(7) Regarding EU competition law on public contracts see C. MUNRO, 'Competition law and public procurement: two sides of the same coin?' (*PPLR,* 2006), pp. 352 ff.; P.-A. TREPTE, 'Public procurement and the Community competition rules' (*PPLR,* 1993), pp. 93-114.

(8) S. ARROWSMITH, *The Law of Public and Utilities Procurement* (London: Sweet and Maxwell, 2005), p. 126; S.E. HJELMBORG, P.S. JACOBSEN and S.T. POULSEN, *Public Procurement Law* (Copenhagen: Djof Publishing, 2006), p. 35; B.J. DRIJBER and H. STERGIOU, 'Public procurement law and Internal market law' (*CMLR,* 2008), p. 805.

(9) J. WOLFSWINKEL, 'The allocation of a Limited Number of Authorisations' (*Review of European Administrative Law,* 2010), pp. 74-75.

(10) Opinion Adv. Gen. STIX-HACKL, Case C-274/02, *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici*, [2004] ECR I-09215 at [30].

(11) G.S. OLYKKE, 'How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?' (*PPLR,* 2011), p. 180.

(12) Case C-244/97, *Erich Ciola v. Land Vorarlberg* [1999] *ECR* I-02517, at [32].

(13) H.D. JARASS, 'A Unified Approach to the Fundamental Freedoms', in M. ANDENAS and W.-H. ROTH (eds.), *Services and Free Movement in EU Law* (Oxford: OUP, 2002), p. 149.

(14) M. TRYBUS, 'Public contracts in European Union Internal Market Law: Foundations and Requirements', in R. NOGUELLOU and U. STELKENS (eds.), *Comparative law on Public Contracts* (Brussels: Bruylant, 2010), p. 90.

The free movement provisions are aimed at removing barriers between Member states: '*The market freedoms are traditionally considered to have an identity of aim: to contribute to the completion and functioning of the internal market through the elimination of obstacles to economic free movement between Member states and the creation of an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured*'.[15] The objective of the Directives is to facilitate the free movement of goods and services.[16] The reason the public procurement Directives exist is to remove the barriers in public markets, a corollary of removing trade barriers. Internal market rules aim in general to prohibit State measures that hinder free trade. Procurement is one of the important barriers to trade, taking into account its economic importance and the preferences of public authorities for national industry.[17]

Public procurement Directives are based on and include concrete applications of, in particular, the TFEU dispositions on the free movement of goods and on free movement of services.[18] In essence, the Directives are above all '*a concrete expression of … the free provision of services*'.[19]

II. Historical background[20]

The first and most important pillar of the EU concerns above all the establishment of an internal market, resting on four fundamental freedoms: free movement of goods, persons, capital, and services. The EU has the competence to achieve these objectives.[21] Each Member State must guarantee that the citizens of any other Member State has equal access to its territory to the end of providing services to economic operators and private persons, establishing residence, and engaging in profitable activities. Member States cannot take measures that hinder free movement.

(15) P. Caro de Sousa, 'Catch me if you can? The Market Freedoms Ever-expanding Outer Limits' (*EJLS*, 2011), p. 167.

(16) Opinion Adv. Gen. Trstenjak Case C-503/04, *Commission v. Germany* [2007] *ECR* I-6153, at [76].

(17) See for example Case 45/87, *Commission v. Ireland ("Dundalk")* [1988] *ECR* 4929.

(18) Opinion Adv. Gen. Stix-Hackl, Case C-274/02, *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici*, [2004] ECR I-09215 at [29].

(19) B.J. Drijber and H. Stergiou, 'Public procurement law and internal market law' (*CMLR*, 2009), p. 805.

(20) S. Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2014, 3rd edn), pp. 180 ff.; Ch. Bovis, *The Law of EU Public Procurement* (Oxford: OUP, 2015), pp. 24 ff.; J.M. Fernandez Martin, *The EC Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon Press, 1996), pp. 4 ff.; P. Trepte, *Public Procurement in the EU* (Oxford: OUP, 2007), pp. 27 ff.; F. Weiss, *Public Procurement in European Community Law* (London: Athlone, 1993), pp. 40 ff.

(21) The European Union is an overarching name, comprising the EC and EAEC (formerly Euratom).

Public authorities in the different Member States need goods, services and people to manage tasks of general interest and for which they conclude contracts with third parties. The decision to conclude such a contract might also be considered a measure that could hinder the realisation of the internal market. Thus in taking these kinds of decisions Member States have to ensure they abide by EU law.

The CJEU case law has created the means of exercising a degree of control on what a public authority may or may not do when looking for a contractual partner. The driver is not principles of private contract law, but the strictly economic objective that defines the EU, namely, the greatest possible competition between economic actors. To ensure free competition between the different undertakings interested in concluding such a contract, a public authority has to treat equally these undertakings and to ensure transparency throughout the tender procedure.

The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) contain a number of negative obligations imposed on the Member States, all to the end of achieving the internal market. Member States quite quickly discovered that these obligations were not in themselves sufficient to banish each and every form of discrimination or every difference. Thus, a difference in legislation could put economic actors from some Member States in an unequal position. Therefore, to maintain effective competition harmonisation of the different national legislations was necessary in certain areas. So, the Member States were encouraged to take positive action. Harmonisation of national rules with the aim of eliminating distortions of competition is conducive to the attainment of the internal market.[22]

The EU Council and the European Commission have two main instruments at their disposal to harmonise legislation: the regulation and the directive.[23] They have made abundant use of these instruments. The directive as a legal instrument is used when it is necessary to implement a goal in different ways in the various Member States. How a matter is handled may involve social and economic choices or a variety of administrative procedures, depending on the individual Member State. Every Member State has the possibility to adjust the content of the directive to its own legal and judicial system. The law applicable to public contracts was in a several continental EU Member States administrative law (France, Italy, Portugal, Luxemburg, Spain, Belgium, Greece). This branch of law is rather different from Member state to Member State. This explains why the tendering of public contracts was best regulated through directives.

(22) Case C-300/89, *Commission of the European Communities v. Council of the European Communities* [1991] *ECR* I-2901, at [23].

(23) On directives see S. Prechal, *Directives in EC Law* (Oxford: OUP, 2004).

Harmonisation has also led the EU to assuming a regulatory role in matters that *prima facie* did not come under the provisions of the treaties. A typical example, as adduced by legal scholars, is the adoption of Directives on public procurement, wherein the EU – via these measures – encourages the Member States to harmonise their national law with one another.[24] Although the TEU and TFEU, like the previous EU Treaties, contain no specific provisions on public procurement,[25] it was deemed more necessary to harmonise in this area: national public authorities seemed to have a very strong protectionist tendency when tendering and awarding public contracts.[26] Purchasing activities by Member States were identified as considerable non-tariff barriers.[27]

The economic importance of public contract markets in the EU needs no further emphasis.[28] In light of the achievement of the internal market, it should be stated that public authorities are normally not bound by market principles when taking decisions. Their decisions are based on the pursuit of the general public interest and public authorities therefore, need not worry about competitiveness and financial attractiveness. It would regularly come about that public authorities gave the advantage to their own national undertakings. Such decisions could distort the market.[29] These two circumstances were major factors making the introduction of public procurement Directives necessary. The provisions of the EU treaties were not sufficiently specific to prevent public authorities from taking discriminatory decisions fostering unequal treatment among bidders.

The first sign of positive action in the field of public procurement appeared very early on in two general programmes, adopted by the EU Council in 1962, which effectively removed all obstacles on freedom of cross-border services

(24) K. Lenaerts and P. Vanuffel, *Constitutional Law of the European Union* (London: Sweet & Maxwell, 2005), pp. 268-269.

(25) See for the reasons M. Trybus, 'Public contracts in European Union Internal Market Law: Foundations and Requirements', in R. Noguellou and U. Stelkens (eds.), *Comparative Law on Public Contracts* (Brussels: Bruylant, 2010), pp. 83-84. On the absence of public procurement dispositions in the original Treaty of Rome see M.A. Flamme, 'La libération de la concurrence dans les marchés publics au sein de la C.E.E.' (*RMC*, 1965), p. 277, footnote 2 : according to the author the national parliaments would not have accepted such provisions in the Treaty because of the protectionist traditions of some Member States.

(26) M. Trybus and R. Caranta, 'European Union Law of Public Contracts: Public Procurement and Beyond', in M. Trybus, R. Caranta and G. Edelstam (eds.), *European Union Law of Public Contracts* (Brussels: Bruylant, 2013), p. 3.

(27) Ch. Bovis, 'Public procurement in the EU: jurisprudence and conceptual directions' (*PPLR*, 2012), p. 247.

(28) M. Monti, 'A New Strategy for the Single Market: At the Service of Europe's Economy and Society' (May 9, 2010), http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

(29) S. Arrowsmith, 'The past and future evolution of EC procurement law: from framework to common code?' (PCLJ, 2006), p. 339.

and establishment.[30] These two general programmes contained several provisions on public procurement. The need was recognised for the adoption of European legislation (via directives) on this specific topic. Public procurement was (and is) considered a very important aspect of the common / internal market[31].[32] The acquisition of work, goods and services of public authorities represents a major activity in the EU economy. Barriers to these kinds of trade would jeapordise – to a great extent – the realization of the internal market. Two directives concerning public procurement were then issued on the basis of these two programmes.

The first legislative initiatives were Directive 70/32/EEC[33] and Directive 71/304/EEC[34]. Directive 70/32/EEC forbade measures hindering free movement of goods. Directive 71/304/EEC, which had been exclusively applied to the completion of public work contracts, obliged Member States to i) lift restrictions affecting the right to enter into or award public works contracts, ii) perform or participate in the performance of such public works, on behalf of the State, regional or local authorities, or legal persons governed by public law. However, these Directives did not yet compel Member States to bring their national laws on public contracts in harmony with one another.

More importantly, however, was the adoption of Directive 71/305/EEC.[35] This Directive sought not simply to facilitate freedom of establishment and the free provision of cross-border services in the area of public procurement, but also to provide a competitive market for potential bidders. In the event, the drafters of the Directive attached special significance to the provision of adequate information for potential bidders. Thus the very first Directive on public procurement contained an indication of the principle of transparency. The second co-ordination directive was Directive 77/62/EEC[36]. The two

(30) *The General Programme for the abolition of restrictions on freedom to provide services*, OJ 2/32 English Special Edition Series II Volume IX pp. 3-6 and the *General Programme for the abolition of restrictions on freedom of establishment,* OJ 2/36 English Special Edition Series II, Volume IX, pp. 7-15.

(31) See S. Arrowsmith, *The Law of Public and Utilities Procurement*, Vol. I, (London: Sweet & Maxwell, 2014, 3rd edn), p. 1: 19 % of GDP of the 27 EU Member States and 21,6 % of the GDP in the UK.

(32) M.A. Flamme, 'La libération de la concurrence dans les marchés publics au sein de la C.E.E.' (*RMC*, 1965), p. 277.

(33) Commission Directive 70/32/EEC of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies, OJ [1970] L 13.

(34) Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJ [1971] L 185/1.

(35) Council Directive 71/305/EEC of 26 July 1971 on the coordination of procedures for placement of public contracts for the completion of public works, OJ [1971] L 185/5.

(36) Council *Directive 77/62/EEC* of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ [1977] L 13/1.

Directives are comparable in structure and content. Both Directives allowed autonomy to Member States in the implementation of the Directives into national legislation. In particular, these Directives set out no specific awarding procedures that contracting authorities should follow. They merely laid down several conditions for whenever a contracting authority used its own procedures. The two Directives were not successful since the Member States were not inclined to comply them.

In 1985, the Internal Market programme required the harmonisation of Member States laws in many sectors that had a direct impact on achieving the EU Internal market by 1992. In the 1980s there was an attempt to improve the procurement Directives. Thus, respectively Directive 88/295/EEC[37] and Directive 89/440/EEC[38] were adopted amending the previous Directives. In themselves these Directives brought few changes to the existing Directives, but they added a plethora of new provisions that concerned, in particular, the introduction of a negotiating procedure, the application of EU standards and rules of notification. As there was no coordination between the new and the old Directives, the regulatory measures were difficult to interpret. This led to new coordinating Directives, namely, Directive 93/36/EEC[39] and Directive 93/37/EEC,[40] closely followed, by yet another set of Directives: Directive 89/665/EEC,[41] Directive 93/38/EEC,[42] Directive 92/13/EEC[43] and Directive 92/50/EEC.[44]

(37) Council Directive 88/295/EEC amending Directive 77/62/EEC coordinating procedures for the award of public supply contracts as well as for the repeal of some provisions of Directive 80/767/EEC, OJ [1988] L127.

(38) Council Directive 89/440/EEC amending Directive 71/304/EEC concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJ [1989] L210.

(39) Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ [1993] L199/1.

(40) Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ [1993] L199/54.

(41) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ [1989] L395/33.

(42) Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ [1993] pp. 84–138.

(43) Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ [1992] L76/14.

(44) Council Directive 92/50/EEC of 18 June 1992 to the coordination of procedures for the award of public service contracts, OJ [1992] L209.

Until recently there were mainly two Directives regarding public procurement in the EU.[45] These were Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors[46] (telecommunications was no longer one of the utility sectors) and Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[47].[48] These two Directives sought simplification and clarification of the existing rules.

§3. A new generation of directives

Precisely as was the case with the 2004 Directives, a long period of preparatory work preceded the issuing of Directive 2014/24/EU. This resulted in a rather long and complex text based on a number of objectives. In that text itself, the Directive mentions a number of principles that a contracting authority has to respect in all its activities and actions.

I. Antecedents

On 20th October 2009, the President of the European Commission asked Mr Mario Monti to prepare a report containing options and recommendations to relaunch the Single Market as a key strategic objective for the EU. Mr Monti delivered the report on 9th May 2010.[49] It contains a significant

(45) See also Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ [2009] L216.

(46) OJ [2004] L134/1 (hereafter: Public Procurement Directive 2004).

(47) OJ [2004] L134/114.

(48) S. Arrowsmith, 'An Assessment of the New Legislative Package on Public Procurement' (*CMLR* 41, 2004), pp. 1-49; V. Bertrand, 'La réforme européenne des marchés publics dans les secteurs classiques' (*JTE*, 2005), pp. 1-11; R. Beuter, 'European public procurement reform: main innovations in the Public Sector Directive – A preliminary assessment' (*Eipascope* 3, 2005), pp. 5-11; D. D'Hooghe, I. Vos and Ph. De Keyser, 'Recente evoluties in het aanbestedingsrecht', in K. De Ketelaere and A. Verbeke (eds.), *Jaarboek Bouwrecht 2004-2005* (Brugge: Die Keure, 2005), pp. 4-20; A. Mattera, 'Vers un Code européen des marchés publics. Simplification, modernisation et clarification de la reglementation existante' (*RDUE*, 2000), pp. 528-570; I. Ramsey, 'The New Public Procurement Directives: a partial solution to the problems of procurement compliance' (*EPL*, 2006), pp. 275-294; R. Williams, 'The New Procurment Directives of the European Union' (*PPLR*, 2004), pp. 153-159; X., 'Les Nouvelles directives européennes' (ACCP 33, 2004), pp. 45-68.

(49) http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf.

number of initiatives to enforce the single market. One of these initiatives is the integration of EU's policy goals in public procurement policy. There is a need, according to the report, to simplify, continue to modernize and sharpen public procurement rules. One of the aims is to integrate better horizontal policy concerns: climate change, innovation, gender equality employment or social inclusion goals.

The European Commission used the Monti report as a basis to issue a Communication[50] that served as a preparation to the Single Market Act and contained propositions to reinforce the Single Market. Legislative proposals on public procurement were therefore submitted with a view to simplifying and updating the European rules to make the award of contracts more flexible and to enable public contracts to support better other policies. The Single Market Act[51] even contains a part that is devoted to the necessary reform of the public procurement Directives. The Commission states the following objective on this subject: '*Revised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs*'.[52]

In December 2011, as announced in the Single Market Act, the Commission adopted its new proposals on public procurement. These proposals are part of an overall program aimed at a thorough modernization of public procurement in the EU. This program includes the revision of Directives 2004/17/EC (procurement in water, energy, transport and postal services sectors) and 2004/18/EC (public works, supply and service contracts), as well as the adoption of a Directive on concessions, which were until now not regulated at the EU level.

These proposals originated in the European Commission communication on smart, sustainable and inclusive growth.[53] Public procurement is one of the market-based instruments for achieving the objectives set out in the *Europe*

(50) Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: *Towards a Single Market Act – For a highly competitive social market economy*, COM (2010) 608.

(51) Communication from the Commission to the European Parliament, the Council, the economic and social Committee and the Committee of the regions, *Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth"*, COM (2011) 0206 final.

(52) See footnote 1.

(53) Communication from the Commission of 3 March 2010 – *Europe 2020 A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final.

2020 Strategy. The *Europe 2020 Strategy* wants to develop an economy based on knowledge and innovation, the promotion of a low carbon, resource efficient and competitive economy, the fostering of a high-employment economy delivering social and territorial cohesion. The communication seems to stress three objectives in the field of public procurement: the most efficient use of public funds, a wider use of green public procurement and the encouragement of innovative SMEs.

On 27th January 2011, the European Commission issued a *Green Paper on the modernisation of EU public procurement policy*[54] to initiate a consultation on new proposals. The Green paper contains 114 questions that the European Commission wanted to use in order to sound the wishes of the different interest groups concerning the new Directives on public procurement. The public consultation closed on 18th April 2011. The European Commission received 623 answers in total, which indicates a high level of interest for the new initiative.

On 20th December 2011, the Commission published its proposals for two new procedural Directives on public procurement, the first one[55] to replace Public Sector Directive 2004/18/EC and the second one[56] to replace Utilities Directive 2004/17/EC, with the stated aims of 'simplification' and 'flexibility' of the rules to improve value for money.[57] The proposals aim also to enable public contracts to support better other EU policies. The Commission also proposed a new directive to regulate the award of concessions.[58]

In choosing these key actions, the European legislator was guided by the wishes expressed by different interest groups and advisory committees. In that respect, it is noteworthy that the objectives of the different interest groups and committees significantly differ on certain matters. In this case, the proposal was submitted to the European Economic and Social Committee, which led to an advice published on 26th April 2012.[59] The consultation of that body was

(54) *Green Paper on the modernisation of EU public procurement policy*, COM (2011) 15 final.

(55) Proposal for a directive on public procurement, COM (2011) 896 final.

(56) Proposal for a directive on procurement by entities in the water, energy, transport and postal services sectors, COM (2011) 895 final.

(57) See e.g. the Explanatory Memorandum to the proposal for a directive on public procurement, p. 2.

(58) Proposal for a directive on the award of concession contracts, COM (2011) 897 final.

(59) Opinion of European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (COM (2011) 895 final – 2011/0439 (COD)), the 'Proposal for a Directive of the European Parliament and of the Council on public procurement (COM (2011) 896 final – 2011/0438 (COD)) and the 'Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (COM (2011) 897 final – 2011/0437 (COD)), OJ [2012] C191/16.

mandatory on the basis of article 114 of the TFEU. The Committee of the Regions was also consulted in relation to the proposal. This request for an opinion was not mandatory on the basis of the TFEU, but increased the range of the impact of the new Directive since it gave the Committee of the Regions the possibility to give its comments, which it did.[60]

The proposals of the Commission sparked many discussions within the European Parliament and led to numerous amendments. Compromise texts were the result.[61] These compromise texts were submitted to the vote in January 2014 in the plenary session of the European Parliament. They were published in the Official Journal of the European Union (OJ) on 28th March 2014.[62]

II. Objectives

The first section examines the objectives the Commission advanced in its proposals to justify the 2014 reform. The second section explains which objectives can be found in the Directive itself. Finally, the most important principles that govern public procurement law is analysed.

A. *Objectives of the proposals*

The European Commission had different objectives in mind with the new Directives on public procurement amongst which simplification and flexibility.

1) *Concrete means of actions*

After the public consultation was conducted, the European Commission noticed that the interest groups insisted on the simplification and flexibility of

(60) Opinion of the Committee of the Regions on 'public procurement package, OJ [2012] C391/09.

(61) Proposal for a directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading) – Approval of the final compromise text – 2011/0438 (COD).
Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (First reading) – Approval of the final compromise text – 2011/0437 (COD).
Proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (First reading) – Approval of the final compromise text – 2011/0439 (COD).

(62) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

procedures.[63] The majority of the interest groups indeed posit to broaden the field of application of the awarding procedure through the use of negotiations.[64] Since simplification and flexibility go hand in hand with diminishing administrative costs, that point was also agreed on by the various interest groups.

The European Commission has decided to tackle that concern and proposed a number of measures to achieve that goal: "'the clarification of the field of application', 'a toolbox-approach', 'lighter regulation for lower contracting authorities', 'the promotion of electronic procurement' and the 'modernisation of procedures'".[65]

The flexibility and simplification both stress the need to clarify the field of application of the Directive. The Commission proposed to revise a number of definitions of the key concepts. However, finally the definition of a number of key concepts remain the same. These definitions led to too much discussions among the Member States. Finally, it was decided to maintain a status quo.

The objective of flexibility appears in the proposals as a "toolbox-approach".[66] That approach would mean that each Member State would be able to adapt its procedures and its instruments to the specific situation in which it has to award a contract. It seems to us that the concept of "Member State" is not really adequate in this particular context since the flexibility and more specifically the adaptation to specific situations is only possible for the different contracting authorities and not for the Member States. Indeed, it is the concerned contracting authority that acts and intervenes in a specific set of circumstances, not the Member State.

In order to achieve the goals of simplification and flexibility, the European Commission posited that a lighter regulation should exist for lower contracting authorities, i.e. the authorities under the central government authorities. In the Directive proposal, these authorities are described as "lower contracting authorities".[67] In the final version of the Directive, this definition was scrapped and replaced by another one where the authorities are defined as "sub-central contracting authorities".[68] However, the field of application has not changed. The light regime contains three elements: a threshold of a higher amount of money for public supply contracts and public service contracts (1); a more flexible call for competition (2) and a more flexible system for time constraints relating to the submission of the tenders (3).

(63) Proposal for a directive on public procurement, COM (2011) 896 final, 3 and 5.
(64) Proposal for a directive on public procurement, COM (2011) 896 final, 5.
(65) Proposal for a directive on public procurement, COM (2011) 896 final, 8-10.
(66) Proposal for a directive on public procurement, COM (2011) 896 final, 9.
(67) Proposal for a directive on public procurement, COM (2011) 896 final, art. 2.
(68) Public Procurement Directive 2014, art. 2 (1).

For public works contracts, there is only one threshold concerning both central and sub-central contracting authorities, whereas a differentiated system exists for public contracts of delivery and performance. The European threshold of 134.000 EUR applies to central government authorities, whereas its value for sub-central contracting authorities is of 207.000 EUR.[69] This distinction is not novel, but the innovation lies in the possibility for sub-central contracting authorities to use prior information notice as a means of calling for competition for both restricted procedures and competitive procedures with negotiation.[70] Normally, the means to call for competition is the use of a contract notice on the basis of article 49. The prior contract notice has to fulfill a number of conditions that are listed in article 48 (2). If sub-central contracting authorities choose for the light regime, the operators are invited to introduce an 'invitation to confirm interest'. Finally, in the framework of a restricted procedure, the new Directive offers the possibility for Member States to allow (some) sub-central contracting authorities to depart from the standard system that governs the time constraints for the submission of the tenders. Member States have the possibility to provide that all or specific categories of sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all selected candidates have the same time to prepare and submit their tenders.[71] The new Directive provides for a default system if an agreement cannot be reached. In the absence of agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender was sent.[72]

Electronic procurement would lead to significant savings and would help preventing mistakes and waste. In that regard, the new Directive contains a system that promotes electronic procurement.[73] The proposal drawn-up by the European Commission provides for a mandatory electronic transmission of the notices and for a mandatory availability of the procurement documents. After that and within a period of two years, the communication of the public procurement procedures should mandatorily be completely achieved through electronic means. The obligation has finally been incorporated in the preamble of the new Directive, and the period of two years was extended to 30 months.[74] This adaptation was made in reaction to the criticism of the Committee of the Regions in the advice it handed in. The Committee pointed

(69) Public Procurement Directive 2014, art. 4.
(70) Public Procurement Directive 2014, art. 26 (5).
(71) Public Procurement Directive 2014, art. 28 (4).
(72) Public Procurement Directive 2014, art. 28 (4).
(73) Proposal for a directive on public procurement, COM (2011) 896 final, 9.
(74) Public Procurement Directive 2014, recital 52 and 72.

out that the period of two years was not achievable for SMEs.[75] It was also made clear that mandatory electronic communication does not require either the electronic processing of the tenders or an electronic evaluation.[76] It was also explicitly pointed out that on the basis of the Directive, the use of electronic communication after the awarding of the contract could not be made mandatory.

Besides that, flexibility and simplification also require a modernisation of the procedures. That can be achieved through the shortening of time limits for participating and the submission of tenders, a softening of the distinction between selection and awarding, a clarification of the grounds for exclusion with the possibility of 'self-cleaning' and a regulation concerning the modification of the contract during its duration.[77]

Concerning the shortening of the time limit, there is effectively a change since the standard time limits are shortened in comparison with the 2004 Directives. The standard minimum time limit for the submission of tenders is shortened to 35 days for public procedures.[78] In the proposal for a directive on public procurement of the Commission the standard minimum time limit for submission was 40 days.[79] Previously, that period was of 52 days.[80] Concerning the submission of the requests to participate and the inscription to restricted procedures, the standard time limit is shortened to a minimum of 30 days.[81] Previously, that period was a minimum of 37 or 40 days.[82]

The binding and facultative grounds for exclusion have also effectively been changed. Concerning the binding grounds for exclusion, three new grounds have been introduced.[83] New is that economic operators are excluded from participating in a procurement procedure if they have been the subject of a conviction by final judgment for terrorist offences or offences linked to terrorist activities, for terrorist financing and child labor and other forms of trafficking in human beings.[84]

An economic operator shall also be excluded from participation in a procurement procedure if it is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by

(75) Opinion of the Committee of the Regions on 'public procurement package, OJ [2012] C391/09, p. 51.
(76) Public Procurement Directive 2014, recital 52.
(77) Proposal for a directive on public procurement, COM (2011) 896 final, 10.
(78) Public Procurement Directive 2014, art. 27 (1).
(79) Proposal for a directive on public procurement, COM (2011) 896 final, art. 27 (1).
(80) Public Procurement Directive 2004, art. 38 (2).
(81) Public Procurement Directive 2014, art. 28 (1).
(82) Public Procurement Directive 2004, art. 38 (3) (a) and (b).
(83) Public Procurement Directive 2014, art. 57 (1).
(84) Public Procurement Directive 2014, art. 57 (1) (d) and (f).

a judicial or administrative decision having final and binding effect.[85] The European legislator provides for two specific forms of moderation for what concerns these new mandatory grounds for exclusions. Firstly, it gives the possibility for a ground of 'self-cleaning'.[86] There is no binding or facultative ground for exclusion if the operator can show that it has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any accrued interest or fines.[87] Secondly, the legislator has provided for the possibility for contracting authorities to depart from these mandatory grounds for exclusion when it would be clearly disproportionate.[88]

A novelty is that contracting authorities have the possibility to depart from the binding grounds for exclusion on an exceptional basis, for overriding reasons relating to the public interest. The Directive illustrates this with the examples of public health or protection of the environment.[89]

Besides the mandatory grounds for exclusion, the facultative grounds for exclusion have also been dealt with.[90] The number of facultative grounds for exclusion has been extended and it can be noticed that the European legislator has wanted to strengthen the policy against distortion of competition. This is not only coherent for the simplification and flexibility but also represents one of the means of action for 'adequate procedures'. The new facultative grounds for exclusion are based on the need for mechanisms that can ensure the adequacy of the procedures. In fact, a contracting authority can exclude an economic operator if the authority has enough plausible indications to infer that that operator has concluded a contract with other operators with the aim of distorting competition.[91] The contracting authority can also exclude an operator if it has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.[92]

Concerning the facultative grounds for exclusion, the European legislator has given the possibility to contracting authorities to exclude economic operators that have shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a

(85) Public Procurement Directive 2014, art. 57 (2).
(86) Proposal for a directive on public procurement, COM (2011) 896 final, 10.
(87) Public Procurement Directive 2014, art. 57 (3).
(88) Public Procurement Directive 2014, art. 57 (3).
(89) Public Procurement Directive 2014, art. 57 (3).
(90) Public Procurement Directive 2014, art. 57 (4).
(91) Public Procurement Directive 2014, art. 57 (4) (d).
(92) Public Procurement Directive 2014, art. 57 (4) (i).

contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions.[93] This facultative ground for exclusion functions alongside another facultative ground that was kept in the Directive and that is based on a serious professional misconduct.[94]

Besides the addition to the Directive of these facultative and binding exclusion grounds, the European legislator has also provided for a general possibility of 'self-cleaning' for the economic operators.[95] This possibility is rather general and the legislator seems to not have taken in consideration the distinction between binding and facultative grounds for exclusion. The possibility for 'self-cleaning' is open for both types of grounds. Each operator has the possibility to prove that the measures he has taken are sufficient to demonstrate its reliability. If the contracting authority decides that these measures are indeed sufficient, the operator is not excluded from the procurement procedure.[96] These measures can consist in the payment of compensation in respect of any damage caused by the criminal offences or professional misconducts, actively collaborating with the investigating authorities and taking concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct. Nevertheless, an economic operator that has been excluded by final judgment from participating in procurement or concession award procedures cannot be entitled to make use of that 'self-cleaning' possibility.

Finally, the impact of the practice of simplification and flexibility can also be found in article 72 on the modification of contracts during their terms. This provision shows how the European legislator concretely tackles this problem. The new legislation on this topic is a codification of the case law of the Court of Justice.[97]

2) *Critical analysis*

The first objective of the reform of the Directive on public procurement, namely simplification, has been a complete failure. On the one hand, the other objectives of the European Commission have led to the extension of the field of application of the Directive. That was caused firstly by the implementation of the case law of the CJEU that resulted in the broadening of the rules. Secondly, making legislation more flexible also requires a broadened framework. Finally, the biggest impediment to simplification was the will to include

(93) Public Procurement Directive 2014, art. 57 (4) (g).
(94) Public Procurement Directive 2014, art. 57 (4) (c).
(95) Public Procurement Directive 2014, art. 57 (6).
(96) Public Procurement Directive 2014, art. 57 (6).
(97) Proposal for a directive on public procurement, COM (2011) 896 final, 10.

horizontal policies into the objectives of the reform. In reality, the European Commission should have realized in 2011 that this objective was completely unrealistic. Instead, it gave the impression that the Commission adopted that objective to legitimize a new generation of public procurement Directives in the eyes of some interest groups.

On the other hand, the increase of the number of Member States combined with the suspicion with which the European Union is being currently regarded also resulted in making the provisions more complex. Member States attempt to find their own vision into the provisions as much as possible. Besides that, they also try to limit the influence of the European Union law into their own national legal systems.

The second objective was the flexibility of the system based on the observation that the existing regime only allowed a very limited room for manoeuvre for States if they wanted to get out of the rigid framework of the awarding procedures. It can be observed that the approved texts tolerate a more flexible approach.[98] However, the modifications do not fundamentally change all the elements of the legislation, as was noted by some scholars in the field of public procurement.[99]

The third objective concerned principally the clarification of the existing regime. This clarification was needed on the one hand on the basis of a number of observations that were made in practice and on the other hand because of the evolution of the CJEU case law. The objective has indeed resulted in the incorporation of a number of elements that were previously not explicitly provided for in the legislation. This obviously promotes legal certainty. Unfortunately, these new provisions do not make the legislation more readable and will raise a lot of questions in practice. The provisions on cooperation between public authorities and concerning modifications illustrate this point. They provide a legal basis to the CJEU case law. But they are actually the result of a compromise. Therefore, the texts are prone to be given different interpretations. Eventually, the CJEU will have to settle the matter. This will probably once again result in a whole number of case law. This all seems rather contradictory with the situation that preceded the adoption of the Directives, since at that moment, the case law had managed to slowly create a certain stability through different judgments on the aforementioned topics.

(98) S. Treumer, 'Evolution of the EU Public Procurement Regime: The New Public Procurement Regime', in F. Lichère, R. Caranta and S. Treumer (eds.), *Modernising Public Procurement: The New Directive* (Copenhagen: Djof publishing, 2014), pp. 12-17.
(99) S. Arrowsmith, 'Modernising the European Union's public procurement regime: a blueprint for real simplicity and flexibility' (*PPLR*, 2012), pp. 73-75.

B. *Objectives of the public procurement Directive*[100]

On the basis of the Preamble of Directive 2014/24/EU, this paper makes a distinction between two important sets of objectives. The first type of objectives can already largely be found in the existing case law of the CJEU. It deals with economic objectives (1.). Directive 2014/24/EU however seems to add a second set of objectives. These are the so-called horizontal policies (2.).

1) *Economic objectives*

The main objectives of the public procurement Directives remain almost the same: the realisation of the internal market and effective competition. Preamble (1) of Directive 2014/24/EU states: '*The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition*'.[101] These objectives guided and will continue to guide the CJEU in interpreting the various provisions of the Directives.

The public procurement Directives were, and remain, one of the major legislative acts furthering the achievement of the internal market; their legal basis is found in the TFEU provisions on free movement. Both Directives and the TFEU provisions on free movement seek EU integration.[102] The Directives should be considered a further concretization to the TFEU provisions. The EU public procurement system is the outcome of a progressive development over a period of several decades, with the ultimate goal of opening up public markets to competition as an ideal means of promoting economic efficiency.[103]

(100) On this subject see S.E. Hjelmborg, P.S. Jacobsen and S.T. Poulsen, *Public Procurement* Law (Copenhagen: Djof Publishing, 2006), pp. 19-33; A. Sanchez-Graells, *Public Procurement and the EU Competition Rules* (Oxford: Hart Publishing, 2011), pp. 189-220; C.R. Hansen, *Contracts not Covered or not Fully Covered by the Public Sector Directive* (Copenhagen: Djof Publishing, 2012), pp. 51-56; S. Arrowsmith, 'The purpose of the EU Procurement Directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies' (*CYELS*, 2011-2012), pp. 1-47.

(101) See also Preamble (2) Directive 2014/25/EU.

(102) G.S. Olykke, 'How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?' (*PPLR*, 2011), p. 181.

(103) P. Wang, R. Cavallo Perin and D. Casalini, 'Addressing purchasing agreements between public sector entities: what can the WTO learn from the EU's experience?', in S. Arrowsmith and R.D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge: CUP, 2011), p. 255.

Early CJEU case law on public procurement is regularly based on Treaty provisions concerning free movement.[104] In Directive 71/305/EEC, freedom of establishment and the free performance of services were the primary objectives of the opening of public markets. However, the authors of this Directive added the following aim as well: *"To ensure development of effective competition in the field of public contracts"*.

In its first judgment in this area the CJEU laid special stress on the freedom of establishment and free movement of services as objectives to the achievement of the internal market.[105] In later case law, the CJEU tended to see the achievement of a free market as a goal for facilitating attainment of the internal market and for making it easier for undertakings to pursue their business interests.[106] In any event, the realisation of the internal market and the attainment of the conditions for a dynamic and effective competition[107] now stand side by side as parallel objectives in the context of public procurement Directives.[108] According to the CJEU, the widest possible opening to competition is contemplated not only from the point of view of the EU's objective of achieving the free movement of goods and services but also from the interest of the contracting authority, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question.[109]

(104) See P. Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford: OUP, 2004), pp. 350-351. Case 45/87, *Commission v. Ireland ("Dundalk")* [1988] *ECR* 4929; Case C-3/88, *Commission v. Italy ("Re Data Processing")* [1989] *ECR* 4035; Case C-243/89, *Commission v. Danmark ("Storebaelt")* [1993] *ECR* I-03353; Case C-359/93, *Commission v. Netherlands ("UNIX")* [1995] *ECR* I-00157.

(105) Case C-31/87, *Gebroeders Beentjes BV v. the State of the Netherlands* [1988] *ECR* 4635, at [9].

(106) Case C-532/06, *Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v. Dimos Alexandroupolis and Others* [2008] *ECR* I-251, at [39]; Case C-454/06, *Pressetext Nachrichtenagentur GmbH v. Austria, APA-OTS Originaltext-Service GmbH and APA Austria Press Agentur registrierte Genossenschaft mit beschränkter Haftung* [2008] *ECR* I-4401, at [31].

(107) Case C-95/10, *Strong Segurança SA v. Município de Sintra and Securitas-Serviços e Tecnologia de Segurança* [2011] *ECR* I-01865, at [37]. For a more extended study regarding the influence of the 'competition objective' in the public procurement Directives see A. Sanchez-Graells, *Public Procurement and the EU Competition Rules* (Oregon: Oxford and Portland, 2011), pp. 190 ff.. See also C. Estevan de Quesada, 'Competition and transparency in public procurement markets', (*PPLR*, 2014), pp. 229-244.

(108) Case C-454/06, *Pressetext Nachrichtenagentur GmbH v. Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung* [2008] *ECR* I-04401, at [31]; see also Case C-480/06, *Commission v. Germany* [2009] *ECR* I-04747, at [47].

(109) Case C-305/08, *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v. Regione Marche* [2009] ECR I-12129 at [37].

The CJEU has described the purpose of the public procurement Directives as follows: '*the Directive … is aimed at eliminating restrictions on the freedom of establishment and the free movement of goods and services in the area of public procurements for the purpose of opening tenders to real and effective competition*'.[110] The CJEU sees this objective in broad terms as: '*attaining the widest possible opening-up of public contracts to competition*'.[111] The Directives' purpose is to put an end to '*practices that seek to limit competition in general, and the participation of subjects of other Member States in tender calls, in particular, by facilitating access to procurement procedures for service providers [in other Member States]*'.[112] In other words, the intention is to protect market participants established in another Member State,[113] i.e. to avoid favouritism.[114]

The original intent of the Directives is to constrain public authorities and to get them to allow their works to be done in a similar manner as the private sector; i.e. permitting them to seek the best and cheapest solution. In this sense they may not favour some situations without good reason and all similar situations must be treated alike.

The objectives of the EU public procurement Directives differ radically from the objectives the Member States sought to achieve via the national regulations on tendering of public contracts. Several Member States desire, first and foremost, best value for money or aim at boosting their national economy by granting public contracts to their domestic firms. The Directives, together with the interpretation given to some of the Directives' provisions by the CJEU, encouraged a complete rethinking of how a public contract has to be tendered. This gave rise to tensions in the past between EU and national objectives.

The Directives try to improve the realisation of the economic objectives in six different ways: 1) to improve the access of SMEs, 2) to open the market to foreign operators, 3) to encourage the use of electronic procurement, 4) to prevent corruption, 5) to professionalize and 6) to incorporate the CJEU case law.

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(110) Case C-399/98, *Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti and Leopoldo Freyrie v. Comune di Milano, and Pirelli SpA, Milano Centrale Servizi SpA and Fondazione Teatro alla Scala* [2001] *ECR* I-05409, at [52].

(111) Case C-94/12, *Swm Costruzioni 2 SpA, Mannocchi Luigino DI v. Provincia di Fermo* [2013] *ECR* I-00000, at [34].

(112) Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH v. Stadt Wien* [2002] *ECR* I-5553, at [44].

(113) Case C-226/09, *European Commission v. Ireland* [2010] *ECR* I-11807.

(114) Joint cases C-285/99 and C-286/99, *Impresa Lombardini SpA – Impresa Generale di Costruzioni v. ANAS – Ente nazionale per le strade and Società Italiana per Condotte d'Acqua SpA and Impresa Ing. Mantovani SpA v. ANAS – Ente nazionale per le strade and Ditta Paolo Bregoli* [2001] *ECR* I-09233, at [35].

2) *Horizontal policies*

Even if the Preamble of Directive 2014/24/EU confirms the former objectives of the legislation on public procurement, it also seems to incorporate a number of objectives that are placed at the same level as the former ones. The influence of the Member States on the legislation appears in these new objectives. The Member States obviously wanted to stress a number of their own concerns, which they wanted to see addressed in the legislation on public procurement. The original objectives (as described under A. above) also did not seem to have been really successful, which made it seem necessary to find a new approach. The facts show that a relatively small number of public procurement contracts attracted interest from economic operators based in other Member States. Moreover, national habits and national characteristics do not facilitate the participation to public procurement procedures in another Member State despite all the harmonization achieved thanks to the previous Directives.

Preamble 2 of Directive 2014/24/EU states: *'Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council and Directive 2004/18/EC of the European Parliament and of the Council should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals*'.

The new objectives of the European legislator are usually called 'horizontal policies'.[115] Through the awarding of public procurement, the contracting authorities have the possibility to pursue other policy objectives. These objectives often relate to the protection of the environment or social protection. More generally, it refers to what is sometimes called 'sustainable public procurement'. The purpose being that current needs should not endanger the needs of the future.[116]

(115) See also S. Arrowsmith and P. Kunzlik, 'Public Procurement and Horizontal Policies in EC Law: General Principles' in S. Arrowsmith and P. Kunzlik (eds.) *Social and Environmental Policies in EC Procurement Law*, (Cambridge: CUP, 2009), pp. 35 ff; M. Comba, 'Green and Social Considerations in Public Procurement Contracts: A Comparative Approach' in R. Caranta and M. Trybus (eds.) *The Law of Green and Social Procurement in Europe,* (Copenhagen: Djof, 2010), pp. 307 ff.

(116) WCED, *From One Earth to One World: An overview*, (Oxford: OUP, 1987).

As a result of these 'horizontal policies', public procurement contracts become heavy policy instruments as described by S. Arrowsmith:

> *"The use of public procurement as a policy tool is a longstanding and much-analysed phenomenon, which covers a range of policy areas such as support for fair labour conditions, regional development and the provision of economic opportunities for disadvantaged groups."*[117]

The European Commission correctly states that the public procurement contracts are also instruments that can serve the implementation of the *Europe 2020 strategy*.[118]

The new public contract Directive does not bring anything new to that effect. However, a thorough reading of the new Directive immediately shows that the 'horizontal policies' receive a far more important role than under the previous Directives. This paper endorses the four advantages observed by S. Arrowsmith.[119] These 'horizontal policies' can prevent contracting authorities from being associated with illegal behavior by an operator.[120] A strengthening of the 'horizontal policies' does seem to reinforce this and can only be encouraged. In this manner, both corruption and nepotism will be discouraged at the same time. This is positive, as they were one of the concerns of the European Commission in its Green paper '*on the modernization of EU public procurement policy – towards a more efficient European Procurement Market*', published on 27th January 2011.[121] It also appears that 'horizontal policies' encourage operators to observe EU law and the national environmental, social and labor law.[122] 'Horizontal policies' therefore represent additional instruments to enforce environmental, social and labor law. Moreover, 'horizontal policies' encourage the equal treatment of economical operators, which represents a strengthening of the public procurement principle of 'equal treatment and non-discrimination'. An economic operator that does not care the least about all the regulations concerning 'horizontal policies' therefore receives an advantage that distorts competition rules, when that should actually be avoided at all times.[123] Finally, the usefulness of 'horizontal policies'

(117) S. Arrowsmith, 'Horizontal policies in public procurement: a taxonomy', (Journal of public procurement, 2010), p. 149.

(118) Proposal for a directive on public procurement, COM (2011) 896 final, p. 2.

(119) S. Arrowsmith, 'Horizontal policies in public procurement: a taxonomy', (Journal of public procurement, 2010), p. 149, spec. p. 154.

(120) *Ibid.*

(121) Proposal for a directive on public procurement, COM (2011) 896 final, 4.

(122) S. Arrowsmith, 'Horizontal policies in public procurement: a taxonomy', (Journal of public procurement, 2010), p. 149, spec. p. 154.

(123) *Ibid.*

lies in preventing the use of government money to achieve illegal objectives, such as terrorism.[124]

It is doubtful whether these 'horizontal policies' can still be named 'secondary policies' under the new Directive, as they used to be called previously.[125] In the past, they could be categorized as such because public procurement Directives always insisted on the primary objective, which was obtaining or acquiring works, supplies and services in the best conditions. The 'horizontal policies' only came up sporadically in the old Directives and were not given such an important role in comparison to the one that the new Directive gives to them. The 'horizontal policies' receive the status of '*general public procurement procedure principles*' in the new Directive. The general public procurement principles are in that regard also extended in comparison to those contained in the Directive 2004/18/EC of the European Parliament and of the Council. Earlier, the general principles were that operators had to be treated in an 'equal and non-discriminatory way' and that contracting authorities should act with transparency (article 2 Directive 2004/18/EC). The European legislator has extended these general public procurement principles in the following way:

> *"Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X." (article 18, al. 2).*

These new public procurement objectives are incorporated in the selection phase of the tender as well as in the tender phase.

The European legislator has hereby provided for the possibility for contracting authorities to exclude a tenderer if they show that the tender does not fulfill the obligations in the field of environmental law, social law and labour law under European Union law, national law and collective agreements or provisions of international environmental, social and labour law mentioned under the annex X.[126] Through this, the European legislator offers Member States the possibility to make these specific new exclusion grounds binding for contracting authorities.

The new public procurement objectives appear in the awarding phase through the concepts of 'life-cycle-costing' and 'production process'. The economically most advantageous tender will be chosen on the basis of the price or the cost by using a cost effectiveness approach such as a life-cycle-costing. The good

(124) *Ibid.*

(125) See also *Ibid.,* p. 149.

(126) Public Procurement Directive 2014, art. 57 (4) (a).

quality-price ratio can also be taken into account and shall be assessed on the basis of criteria as quality and environmental and/or social aspects linked to the subject-matter of the public contract.[127]

A new aspect of the Directive is the concept of 'life-cycle-costing' on the basis of which a public procurement contract could be awarded.[128] The 'life-cycle-costing' covers all costs that are required for the product, the service or the work. The concept of 'costing' is broadly interpreted in the Directive. It contains the internal costs, borne by the contracting authority or other users. These internal costs relate namely to the acquisition, the use, the maintenance and the collection and recycling.[129] But it also includes the costs imputed to environmental externalities such as costs of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.[130] The Directive does not provide for a common method to calculate the costs, but states that it should be created and if such a method for the calculation of the cycle costs has been made mandatory by a legislative act of the Union, that common method has to be applied for the assessment of life-cycle costs.[131] This will not receive a warm welcome from the Committee of the Regions, who ware against it.[132] In this way, the European legislator has also given the possibility to the contracting authorities to be able to determine the most advantageous tender and the lowest price on the basis of a 'life-cycle-costing'.[133] However, contracting authorities cannot use the 'life-cycle-costing' if the price is the only criterion for the assessment of the tender.[134]

Besides this, the European legislator allows contracting authorities – through the new article 67 (3) – to use awarding criteria relating to social measures or environmental measures that are linked to the specific production process.[135] A presumption has been attached to that provision: the award criteria are deemed to be linked to the subject-matter of the public contract « *where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle* ». The same provision refers to factors involved in the specific process of production, provision or trading of those works, supplies or services; or involved in a specific process for another

(127) Public Procurement Directive 2014, art. 67 (2).
(128) Public Procurement Directive 2014, art. 67 and 68.
(129) Public Procurement Directive 2014, art. 68 (1) (a).
(130) Public Procurement Directive 2014, art. 68 (1) (b).
(131) Public Procurement Directive 2014, art. 68 (3) and Public Procurement Directive 2014, recital 96.
(132) Opinion of the Committee of the Regions on 'public procurement package, OJ [2012] C391/09, 71.
(133) Public Procurement Directive 2014, recital 96.
(134) Public Procurement Directive 2014, recital 96.
(135) L. Richer, 'La concurrence concurrencée: à propos de la directive 2014/24 du 26 février 2014', Contrats et Marchés publics n° 2, February 2015, (1) 7.

stage of their life cycle. This is valid even where such factors do not form part of their material substance.[136] In the Preamble of the new Directive, there is a reference to the social aspect of the production process that could aim at the protection of health of the staff involved in the production process.[137] Previously, this criterion could only be applied as a technical specificity and not as an award criterion. Finally, it has to be stressed that this only applies to factors that are directly concerned by the specific production process and not in relation to the entirety of the activities of the operator.[138]

Even if these new objectives seem equivalent to the economic ones, the question arises whether the CJEU will use the new objectives on an equal footing as the economic ones when interpreting the new provisions. In any case, it would be more in line with primary Union law. Social objectives have acquired more importance in the current version of the EU Treaty (or EU priorities). Some important Treaty articles have been altered or new articles added by the Treaty of Lisbon, such as article 14 TFEU[139]. Environmental objectives were already present in the Treaty provisions.

III. Principles[140]

The public procurement Directives were historically aimed at guaranteeing free access and promoting competition via harmonisation of the diverse national legislations and to this end the CJEU imposed certain obligations with regard to the award of a contract: specifically, the obligation of non-discrimination, the obligation of equal treatment (A.) and the obligation of transparency (B.).[141] The provisions of public procurement Directives were

(136) Public Procurement Directive 2014, art. 67 (3) *in fine.*

(137) Public Procurement Directive 2014, recital 98-99.

(138) Proposal for a directive on public procurement, COM (2011) 896 final, 11.

(139) Article 14 TFEU: *Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.*

(140) See for recent studies: C.R. Hansen, *Contracts not covered or not fully covered* (Copenhagen: Djof publishing, 2012), pp. 51-66; S. de Mars, 'The limits of general principles: a procurement case study' (*ELR*, 2013), pp. 316-334.

(141) Case C-599/10, *SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s., TESLA Stropkov a.s., Autostrade per l'Italia SpA, EFKON AG, Stalexport Autostrady SA v. Úrad pre verejné obstarávanie* [2012] *ECR* I-00000.

likewise interpreted and complemented on the basis of these obligations. Article 18 of Directive 2014/24/EU confirms those principles, but refers for the first time to the principle of proportionality (C.).

These principles help ensure undistorted market access for public procurement markets. They are applicable only insofar as market access can be distorted by a specific situation.

A. *Equal treatment*[142]

Equality is one of the cornerstones of the internal market. However, this principle is not simply a milepost on the way toward the achievement of economic union: it has also contributed to the genesis of the European Union legal order. It is a democratic guarantee that European institutions and the Member States have put in place to ensure that no unjustified distinctions are drawn. This is also why the CJEU deems the general principle of equality to be a general principle of constitutional law.[143]

In accordance with the principle of equality, equal circumstances may not be treated unequally or unequal circumstances may not be treated equally, unless this is justified objectively[144]: '*Discrimination in substance would consist in treating either similar situations differently or different situations identically*'.[145] Discrimination or inequality cannot arise in legal situations that are not comparable.[146] If the Court establishes that an inequality is nevertheless present, it will then explore whether the given differences may not be justified in the particular case in the light of the objective served by the provisions in question.[147] The principle of non-discrimination on grounds of nationality (Article 18 TFEU) is merely an expression of this more general principle of equal treatment.[148]

(142) For a recent more extended contribution see S. Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2014, 3rd edn), p. 614 ff.

(143) Case C-162/99, *Commission of the European Communities v. Italian Republic* [2001] *ECR* I-00541, at [23].

(144) See for public procurement: Joined cases C-31/03 and C-34/03, *Fabricom SA v. Belgian State* [2005] *ECR* I-1559, at [27]; Case C-336/12, *Ministeriet for Forskning, Innovation og Videregående Uddannelser v. Manova A/S* [2013] *ECR* I-00000, at [30]; Case T-289/09, 20 September 2011, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v. Europese Commissie* [2011] *ECR* II-0000.

(145) Case 13/63, *Italian Republic v. Commission of the European Economic Community* [1963] *ECR* 00165, at [4].

(146) Case 22/67, *Fonds national de retraite des ouvriers mineurs v. Giovanni Mura* [1977] *ECR* 1699, at [9] tot [10].

(147) K. Lengertz, 'L'égalité de traitement et droit communautaire' (*Cah.dr.eur.,* 1991), p. 21.

(148) Case 810/79, *Peter Uberschär v. Bundesversicherungsanstalt für Angestellte* [1980] *ECR* 2747, at [16].

Equal treatment in the awarding of contracts concluded by public authorities aims at achieving a single internal market: '*the application of the principle of equal treatment to public procurement procedures does not constitute an end in itself, but must be viewed in the light of the aims that it is intended to achieve*'.[149] Equal treatment assures interested undertakings established in other Member States that they will have the same opportunity to conclude the contract. It ensures a degree of competitiveness.

A public authority must treat undertakings from another Member State equally, a responsibility flowing from the principle of non-discrimination on grounds of nationality. This principle of non-discrimination was affirmed by the CJEU (i.e. without reference to public procurement Directives) in two milestone decisions: *Unitron Scandinavia*[150] and *Telaustria Verlag*.[151]

In an Interpretative Communication of the European Commission, dated April 12, 2000 on concessions, the Commission affirmed the principle of equal treatment.[152] According to the Commission, this principle follows from the principle of non-discrimination on grounds of nationality and from the fundamental freedoms, and is also applicable to situations other than public procurement, such as concessions. In *Parking Brixen*,[153] the CJEU stated that public authorities concluding service concessions must comply with the principle of non-discrimination and the principle of equal treatment.[154] This last principle applies regardless of nationality.[155] It supersedes the principle of non-discrimination.[156] As a consequence, this last principle is not necessary to interprete or explain the dispositions of the public procurement Directive.

In particular, in the context of the public procurement Directives, the Court confirmed that the principle of equal treatment of tenderers aims at the

(149) Joined cases C-31/03 and C-34/03, *Fabricom SA v. Belgian State* [2005] *ECR* I-1559, at [29]; Case C-336/12, *Ministeriet for Forskning, Innovation og Videregående Uddannelser v. Manova A/S* [2013] *ECR* I-00000, at [30].

(150) Case C-275/98, *Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v. Ministeriet for Fødevarer, Landbrug og Fiskeri* [1999] *ECR* I-08291.

(151) Case C-324/98, Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG, joined party: Herold Business Data AG [2000] *ECR* I-10745.

(152) OJ [2000] C121/2.

(153) Case C-458/03, *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG* [2005] *ECR* I-08585.

(154) At [46]. Case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari and AMTAB Servizio SpA* [2006] *ECR* I-03303, at [20]; Case 196/08, *Acoset SpA v. Conferenza Sindaci e Presidenza Prov. Reg. ATO Idrico Ragusa and Others* [2009] *ECR* I-09913, at [48].

(155) Critised by S. Arrowsmith and P. Kunzlik, 'EC regulation of public procurement', in S. Arrowsmith and P. Kunzlik, *Social and environmental Policies in EC Procurement Law* (Cambridge: CUP, 2009), p. 86.

(156) A. Semple, *A practical guide to public procurement* (Oxford: OUP, 2015), p. 43.

promotion of a healthy and purposeful competition among firms participating in the public tendering procedure. The principle has to ensure the selection of the best bid.[157] According to the CJEU this principle implies that tenderers must be in a position of equality both when they formulate their tenders and when the adjudicating authority is assessing those tenders.[158] The same conditions must apply to the interested undertakings and to the tenderers.

B. *Transparency*

In *Telaustria Verlag,* the CJEU acknowledged for the first time, on the basis of a number of provisions from the EU Treaty, that when a public authority awards a public service concession it must comply with the obligation of transparency.[159] In *Parking Brixen,* the CJEU summed up the basic consequences of the obligation of transparency.[160] The obligation of transparency which is imposed on the public authority consists of ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the contract to be opened up to competition and the impartiality of procurement procedures to be reviewed. The obligation of transparency, which is its corollary, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority with respect to certain tenderers or certain tenders.[161]

The obligation of transparency on the basis of the public procurement Directives appears for the first time in *Beentjes*.[162] Although the Court did not explicitly mention an obligation of transparency, it affirmed that a contracting authority '*must provide adequate information on the terms and applicable to any tender offer*'.[163]

(157) Case C-243/89, *Commission v. Danmark ('Storebaelt')* [1993] ECR I-03353, at [33].
(158) Case C-19/00, *SIAC Construction Ltd v. County Council of the County of* Mayo [2001] *ECR* I-07725; Case C-470/99, *Universale-Bau AG and Bietergemeinschaft: Hinteregger & Söhne Bauges.mbH Salzburg, ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH* [2002] *ECR* I-11617, at [93]; T-50/05, *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v. European Commission* [2010] *ECR* II-01071, at [56].
(159) Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v. Telekom Austria AG, joined party: Herold Business Data AG* [2000] *ECR* I-10745.
(160) Case C-458/03, *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG* [2005] *ECR* I-08585*, at* [49]; see also Case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari and AMTAB Servizio SpA* [2006] *ECR* I-03303, at [21].
(161) Case C-496/99, *Commission* v *CAS Succhi di Frutta*, EU:C:2004:236, at [111]; Case C-42/13, *Cartiera dell'Adda*, EU:C:2014:2345, at [44]; Case C-538/13, *eVigilo* Ltd v. Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos, ECLI:EU:C:2015:166 at [34].
(162) Case C-31/87, *Gebroeders Beentjes BV v. the Netherlands* [1988] *ECR* 4635.
(163) At [21].

The Walloon buses case marks the first time that an obligation of transparency and even a principle of transparency flowing from the preambles of Directive 90/531 pertaining to utility sectors was stated clearly. In one of the preambles, contracting authorities are enjoined to guarantee a minimum of transparency in awarding contracts. The Court considered on this basis: '*Furthermore, the 33rd recital in the preamble shows that the Directive aims to ensure a minimum level of transparency in the award of the contracts to which it applies. The procedure for comparing tenders therefore had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders*'.[164] (underlining added).

According to CJEU case law, an obligation of transparency implies for every contracting authority '*that sufficient information must be guaranteed to every potential tenderer, so that the services market is always open to competition and the tendering procedures can be tested for impartiality*'.[165] The obligation of transparency must ensure '*that the principle of equal treatment of tenderers, with which every tendering procedure governed by the Directive must comply, is taken into account*'.[166]

The principle of transparency entails that all conditions and terms of the award procedure be clearly, precisely, and unambiguously worded in the procurement notice or in the contractual conditions. This allows all reasonably well-informed tenderers to know the exact scope of the award. It enables the tenderers, to interpret the contractual conditions in the same way. Finally, the contracting authority is able to verify whether the bids meet the award criteria.[167]

In the context of the public procurement Directives, the obligation of transparency and the principle of equal treatment have become the leading principles applied by the CJEU when filling lacunae in the Directives and interpreting unclear provisions.

(164) Case C-87/94, *Commission of the European Communities v. Kingdom of Belgium* [1996] *ECR* I-2043, at [54].
(165) Case C-470/99, *Universale-Bau AG and Bietergemeinschaft: Hinteregger & Söhne Bauges GmbH Salzburg, ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH* [2002] *ECR* I-11617, at [92].
(166) *Case C-421/01, Traunfellner GmbH v. Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG* [2003] *ECR* I-11941, at [29].
(167) Case C-368/10, *Commission v. Netherlands* [2012] *ECR* I-00000, at [88].

C. *Proportionality*[168]

In 2000, the European Commission has enshrined the application of the proportionality principle to a national measure setting the conditions for providing economic services.[169]

The European Parliament and the Council of the European Union have approved new Directives on public procurement in the beginning of 2014.[170] For the first time, these Directives explicitly oblige contracting authorities and contracting entities to act in a proportionate way.[171] According to this principle state measures must be appropriate to achieve the objectives they pursue and they cannot go beyond what is needed to attain these objectives.

This obligation appears amongst the provisions that contain the 'principles of public procurement'. The same can be found in the Article 3 of the Directive 2014/23/UE.[172] The Court of Justice had already confirmed in its case law that the principle of proportionality is to be applied to awarding decisions.[173] On the basis of the new Directives, the contracting authorities and the contracting entities should act in a proportionate way for every decision they take in a public procurement procedure.

Through its case law, the CJEU forbids contracting authorities to impose absolute restrictions to the access to a procurement procedure (access to the market). A tenderer should always have the possibility to prove that it is not in a more favorable position compared to the other tenders or that public interest does not impose a restriction to what. The self-cleaning system introduced by the new Directives could be a consequence of this case law that allows the tenderer to prove that it is able to perform the public contract that has to be awarded.[174] This system allows the economic operator that should normally be excluded from participating to the tender procedure to prove that he is reliable (article 57 (6) of Directive 2014/24/UE).

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(168) K. Wauters and J. Ghysels, 'Le principe de proportionnalité et l'attribution de contrats publics', in *D'urbanisme et d'environnement. Liber Amicorum Francis Haumont* (Brussels: Bruylant, 2015), pp. 1107-1120.

(169) *Commission interpretative communication on concessions under Community law*, *JO* [2000] C121/2.

(170) Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ [2014] L94, pp. 65–242; Directive of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ [2014] L94, pp. 243–374.

(171) Art. 18 Directive 2014/24/UE ; art. 36 Directive 2014/25/UE.

(172) Directive 2014/23/UE.

(173) See A. Semple, *A Practical Guide to Public Procurement* (Oxford: OUP, 2015), pp. 52-55.

(174) S. Arrowsmith, H.-J. Priess et P. Friton, "Self-cleaning as a Defense to Exclusions for Misconduct – An emerging Concept in EC Public Procurement Law ?" (*PPLR,* 2009), pp. 237 ff.

The principle of proportionality is an additional key that the CJEU uses to ensure the safeguard of the objectives of the European Union, in this case the objectives of the European legislation on the awarding of public procurement.

§4. Conclusions

As the historical background summed up in this paper has shown, competition was a cornerstone principle in the first generations of procurement Directives. The reforms in the 2014 Directives sought to integrate wider European policy goals (such as climate change, innovation, gender equality employment or social inclusion goals) in public procurement policy. Drawn from a conference organized by the Belgian journal *Marchés et Contrats Publics – Overheidsopdrachten en – overeenkomsten* held in Brussels in May 2015, this collection gathers contributions analysing how the new Directives square the competing aims of promoting cross border trade and facilitating broader socio-economic aims. As expressed throughout the contributions in this collection, the exercise was even more ambitious that the 2014 reforms also intended to secure more legal certainty. The contributions highlight how this diversity of objectives raises a lot of questions that the CJEU will need to address.

The contributions are arranged in three main themes: first, the reforms brought to the procurement process as such; secondly, the reforms that were explicitly meant to integrate broader socio-economic goals in public contracts; and finally the reforms relating to the performance of the contracts.

The first theme – the reforms focused on the procurement process as such – focuses on the different categories of procedures and the award criteria. In her contribution based on a thorough documentation of the CJEU case-law, Professor Ann Lawrence Durviaux analyses how the 2014 Directives reform the award of contracts. Her paper highlights how the new provisions are complexifying the process so much so that she suggests that a different strategy would be taken: less detailed provisions in the EU directives but a stronger emphasis on the key principles that need to be complied with by contracting authorities.

Turning to the specific "mystery" of the award criteria, Professor David D'Hooghe and Nathanaelle Kiekens equally argue with force technical evidence that the overriding concept of one single award criterion, namely "*the most economically advantageous tender*" has been achieved only with a light touch: beneath this ostensible clothing, the system developed under the previous Directives remains largely applicable.

Secondly, this collection turns to the ways in which public procurement may pursue other objectives than the actual purchase of goods, works or services. Indeed, the economic power of public authorities and the attractiveness for economic actors to rely on public procurement as a market may have significant leverage effect on economic growth and more especially on the main principles and socio-economic values that such economic growth can have.

In his paper, Professor François Lichère analyses the techniques that makes public procurement a vehicle to favour SMEs and to facilitate their access to public contracts. On balance, his assessment of the 2014 Directives is positive as his paper concludes that the 2014 Directives succeed in preventing these techniques to distort competition in public procurement.

In their contribution, Professor Van Garsse and Dr De Mars turn to the issue of corruption and conflict of interests as a cause to exclude economic actors from public procurement. Their analysis highlights clearly that the 2014 Directives sought to reflect changing policy considerations at the level of the European Union. Yet, the 2014 Directives succeed in striking a difficult balance between policing economic actors' behavior and maintaining competition thanks to two devices: first, the provision for "self-cleaning" and secondly, the recognition of some latitude for Member States and contracting authorities in the implementation of the exclusion grounds in practice.

Putting the issues of green and social procurement in their wider ideological context, Professor Kunzlik contributes significantly to the conceptualization of public procurement. His original approach suggests three models to understand how the European Union regulates public procurement and the interactions between public authorities and economic actors: neoliberal, state-centred and global governance. His contribution assesses how these three models are interlinked in the 2014 Directives. He suggests that the internal incoherence in the 2014 Directives are cause for uncertainty and may fail to deliver the *Europe 2020 Strategy.*

Finally, these discussions on the scope of competition in the awarding process are broadened to the extent to which competition has to prevail during the contractual performance stage. Dr Marique's contribution asserts that competition may be a useful tool in some circumstances, when public authorities and economic actors seek to bypass the application of public procurement regulation. However, contractual performance may benefit from loyal cooperation between public and economic partners, in such a way that other strategies than extending competition in the performance stage needs to be developed: for instance, more robust monitoring procedures or better sharing of information among public authorities in Europe.

The reader will thus find here some very fine analysis of the 2014 Directives shedding hopefully light on the tensions between competition and broader socio-economic policy goals in public procurement.

This new reform encourages Member States to review their own legislation on some fundamental aspects. The most fundamental choice could be the integration of horizontal policies in the existing legal framework. Every Member State has the possibility to make its own choices. However, those choices cannot jeopardise in themselves the realisation of the internal market, which is still the major goal of the public procurement Directives.

In order to achieve the greater legal certainty that the 2014 Directives were meant to secure, the Directives should now be a good basis for the following twenty years. This book draw the attention of the reader on areas where the CJEU may need to develop a teleological interpretation to the dispositions of the Directive so that the new Directives could contribute to regulatory evolutions whereby public authorities and economic actors develop relationships that secure economic growth to the benefit of all in society.

All internet addresses are given as available in March 2016.