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ARTICLE

The ten-year anniversary of public procurement reforms: a critical assessment of the European Union public procurement Directives

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Abstract
This article evaluates the objectives of the legal framework on public procurement in the European Union and assesses its contribution to the internal market. The author provides for a critical analysis of the evolution of the public procurement acquis, which reveals an environment occupied with conceptual and regulatory interfaces, exhibiting advanced interoperability with legal systems of Member States and faced with continuous market-driven modality changes in awarding and financing public contracts for the delivery of public services.

Keywords Public procurement · Concessions · Utilities · Judicial activism · Procurement reforms

1 Introduction

In order to ensure public procurement's role as a crucial lever of competitiveness and growth[1] as well as an indispensable tool for providing public services[2] in European Union Member States, the 2014 European Union legislative framework on

[1]European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

[2]European Commission, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, 7.12.2010, SEC(2010) 1545 final. European Commission, Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, SEC(2010) 1258, final.

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public, utilities, and concessions procurement was enacted. With the introduction of the Concessions Directive[3] and the amendments to the Public Sector[4] and Utilities[5] Directives, which aim to strategically use simpler, more flexible, and sound procedures to improve market access and cross-border trade in public contracts and to ensure robust governance through the professionalisation of public procurement, the Single Market Act[6] has served as the cornerstone of legislative action on the part of European institutions. The 2014 European Union legislative framework's reform plan did not include the Remedies Directive[7] or the Defense Procurement Directive.[8] Previous reforms in 2007 addressed remedies in public procurement with the goal of enhancing access to justice and legal redress.

The decentralised implementation, observance, and enforcement of the public procurement regulations have been handled by the Remedies Directives.[9] They did not, however, offer efficient review processes between the contract award and contract completion stages, which was a major shortcoming. Therefore, based on the *pacta servanta sunt* principle, the Remedies Directives have unintentionally promoted direct awards and the so-called "race to sign" the required contract to protect immunity from any remedy. Furthermore, neither the procedural nor substantive public procurement procedures have any effective deterrents in place neither the pre-contractual nor post-contractual phases. The amending Remedies Directive[10] addressed these shortcomings by establishing a distinct separation between pre- and post-contractual phases, striking a balance between the necessity of efficient public procurement and effective contract review, imposing a strict standstill requirement for contract conclusion, including direct awards by contracting authorities, and imposing stringent communication and monitoring requirements.

Streamlining the application of the substantive regulations and modernising the procedures all contribute to the benefits of the 2014 European Union legislative framework. Since its origin, public procurement law has been based on harmonisation, which is responsible for providing a standard framework while granting Member States the required latitude over the forms and methods of implementation. This is accomplished through Directives. In order to gradually create a uniform public procurement market throughout the European Union, decentralised aspects that support behavioural norm adjustments have been implemented into public policy through the use of harmonisation as a tool for legal integration in public procurement.

[3]Directive 2014/23/EU, OJ L 94, 28.3.2014, p. 1–64.

[4]Directive 2014/24/EU, OJ L 94, 28.3.2014,p.65–242.

[5]Directive 2014/25/EU. OJ L 94, 28.3.2014, p. 243–374.

[6]European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

[7]Directive 2007/66/EU, O.J. 2007, L335/31.

[8]Directive 2009/81/EU, OJ L 216, 20/08/2009, p. 76–136.

[9]Public Sector Remedies Directive 89/665 OJ 1989, L 395/33, and the Utilities Remedies Directive 92/13, OJ 1992, L 76/14.

[10]Directive 2007/66, O.J. 2007, L335/31.

For two reasons, public sector procurement and utilities procurement are subject to different regulatory treatment under the public procurement *acquis*.[11] First, the benefits of network industry liberalisation, which have boosted sectoral competitiveness, have made a more lenient regime for utilities procurement acceptable, regardless of whether they are owned by the public or private sector. Second, to achieve the opening up of the relatively closed and segmented national public sector procurement markets, a codified set of rules covering supplies, works, and services procurement in a single legal instrument for the public sector is intended to produce legal efficiency, simplification, and compliance.

The public procurement Directives have sought to achieve five objectives. First, unobstructed access to public markets through transparency of expenditure relating to public and utilities procurement; second, elimination of technical standards capable of discriminating against potential contractors: third, uniform application of objective criteria of participation in tendering and award procedures; fourth, regulatory alignment between public sector and utilities procurement; and fifth, improved market information through the introduction of technology to the application of the procurement rules.

The envisaged outcome of the Directives has been the gradual establishment of a homogenous public procurement market in the European Union, which are simplified, modernised and yet flexible.

The effectiveness of the judicial review system, which offers independent remedies to Member States' legal orders for disagreements pertaining to the awarding of public, utility, and concession contracts, is a key indicator of the homogeneity of the public procurement framework. A climate of regulatory convergence and compliance alignment for conflicts originating in the public sector, utilities, and concession procurement has been established by the public procurement framework.

The public sector Directive on supplies, works, and services, which is a noteworthy example of the codification of supranational administrative law, has largely addressed the need for simplification. By defining key legal concepts like public contracts, contracting authorities, the scope of selection and qualification criteria, and the conditions under which contracting authorities may use environmental and social considerations as award criteria, significant advancements in the application of public procurement rules have largely influenced the codification of the public sector Directive and shaped the development of public procurement law.

Newly presented notions have enabled modernisation. The ability of private enterprises to bid on public contracts alongside entities subject to public law; the introduction of competitive dialogue to speed up the awarding of complex projects like trans-European networks and public-private partnerships; the introduction of framework procurement to the public sector; the use of electronic procurement concepts like dynamic purchasing systems and e-auctions; and the digitisation agenda and concessions procurement regulation.

[11] Directive 2014/24/EU on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2014/25/EU coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2014/23/EU on the on the coordination of procedures for the award of concessions.

In utility sectors like telecommunications, where there is genuine competition in the relevant market, flexibility is reflected in the loosening and disengagement of governmental procurement regulations. The disengagement of regulations in contractual arrangements like public-public partnerships and internal relations, as well as in specific industries like water for concessions procurement, is another instance of flexibility.

The genealogy of public procurement regulation reveals a pattern of predictable harmonisation. The Directives on public procurement, diachronically, are based on the same principles and the same objectives, allowing for discretion on the part of the Member States not only for implementing the Directives into domestic legal orders, but opting for the most appropriate method of implementation, depending on priorities, particularities, or preferences of regulatory intervention in the relevant public and utility procurement markets. Through gradual liberalisation and a phased expansion of the envisaged regulatory coverage, public and utilities procurement establish a composite intervention with the laws of the internal market, especially competition law and policy.

The legal principles which underpin public procurement regulation, transparency, objectivity, equity and non-discrimination, and procedural autonomy, have been augmented by the substantive spine of the Directives in terms of the regulatory concepts of public and utilities procurement: the concept of contracting authority, the concept of public contract, and the concept of material regulatory coverage through contract value threshold of purchasing behaviour of public sector and utilities. The regulatory concepts reflect on commonality and their evolution takes into account inferences from market and policy dynamics, as well as judicial activism.

2 The reform of the public procurement regime and its reasons

One of the most important elements of the European Union Single Market[12] is a liberalised and integrated public procurement sector. The European Union's regulations governing public procurement have its roots in soft law, which recognised Member States' purchasing practices as significant non-tariff barriers that impeded the development of a truly competitive market.[13] Many have argued that fundamental Treaty principles, like free movement of goods and services, establishment rights, and the prohibition on nationality-based discrimination, are protected by the requirement for competition and transparency in public procurement markets.[14] Public procurement regulation is justified economically by the need to create competition in the markets

[12]See Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM (2010) 608 final.

[13]See Commission, *White Paper for the Completion of the Internal Market*, COM (85) 310 fin, 1985; Green Paper on Public Procurement in the European Union: *Exploring the way forward*, European Commission 1996; also Commission, Communication on Public Procurement in the European Union, COM (98) 143.

[14]See cases C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR 3605; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821; C-44/96, *Mannesmann Anlangenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, [1998] ECR 73.

that supply goods and services to the public sector, promote cross-border trade in these goods and services, and achieve price transparency and convergence throughout the European Union, which will result in significant cost savings.[15]

Public procurement regulation[16] is decentralised[17] but reflects upon the establishment by the Court of Justice of the European Union of several doctrines which have guided the application of rules by defining essential legal concepts such as public contracts,[18] contracting authorities,[19] the remit of selection and qualification criteria,[20] and the parameters for contracting authorities to use environmental and social considerations[21] as award criteria and which have influenced public procurement law

[15] See Commission, *The Cost of Non-Europe, Basic Findings, Vol.5, Part. A; The Cost of Non-Europe in Public Sector Procurement* (Official Publications of the European Communities, 1988). Also the Cechinni Report *1992 The European Challenge*, (Wildwood House, 1988).

[16] See Directive 2014/24 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2014/25 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2014/23 on the on the coordination of procedures for the award of concessions.

[17] The decentralisation of public procurement regulation is depicted in Member States' exclusive jurisdiction in both application and enforcement of the substantive provisions of the EU Directives.

[18] See cases C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409; C-324/98 *Telaustria and Telefonadress*, [2000] ECR I-10745; C-59/00 *Vestergaard* [2001] ECR I-9505; C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1; C-264/03, *Commission v. France* [2005] E.C.R. I-8831; C-231/03, *Consorzio Aziende Metano* (*Coname*). *v. Comune di Cingia de' Botti* [2005] ECR I-7287; C-507/03, *Commission v Ireland*, (An Post) [2007] ECR I-9777; C-231/03 *Coname* [2005] ECR I-7287; C-458/03 *Parking Brixen* [2005] ECR I-8585; C-264/03 *Commission* v *France* [2005] ECR I-8831; C-412/04 *Commission* v *Italy* [2008] ECR I-0000; C-295/05, *Asociación Nacional de Empresas Forestales* (*Asemfo*) *v Transformación Agraria SA* (*Tragsa*) *and Administración del Estado*, [2007] ECR I-2999; C-220/05, *Jean Auroux and Others v Commune de Roanne*, [2007] ECR I-385; C-382/05 *Commission* v *Italy* [2007] ECR I-6657; C-6/05 *Medipac-Kazantzidis AE v Venizelio-Pananio* (*PE.S.Y. KRITIS*), [2007] ECR I-4557; C-480/06, *Commission v Germany*, [2009] ECR I-04747; C-148/06, *SECAP SpA* and *Santorso Soc. coop. arl* [2008] ECR I-3565; C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*, [2007] ECR I-12175. C-324/07, *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29; C-437/07 *Commission* v *Italy* [2008] ECR I-0000; C-147/06 *Commission* v *Ireland* [2007] ECR I-0000; C-206/08 *WAZV Gotha v. Eurawasser Aufbereitungs* [2009] ECR I-8377.

[19] See cases C-31/87 *Beentjes* [1988] ECR 4635; C-343/95 *Diego Cali et Figli* [1997] ECR 1-1547; C-44/96 *Mannesmann Anlagenbau Austria*, [1998] ECR I-73; C-360/96 *BFI Holding* [1998] ECR I-6821; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821; C-380/98 *University of Cambridge* [2000] ECR I-8035; C-107/98 *Teckal* [1999] ECR I-8121; C-470/99 *Universale-Bau and Others* [2002] ECR I-11617; C-237/99 *Commission* v *France* (OPAC), [2001] ECR I-939; C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano*, and case C-260/99 *Excelsior Snc di Pedrotti runa & C v. Ente Autonomo Fiera Internazionale di Milano*, [2001] ECR 3605; C-373/00 *Adolf Truley* [2003] ECR-193; C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-1; C-18/01 *Korhonen and Others* [2003] ECR I-5321.

[20] See cases C-176/98 *Holst Italia* [1999] ECR I-8607; C-324/98 *Telaustria and Telefonadress*, [2000] ECR I-10745; C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409; C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233; C-315/01, (*GAT*) *and Österreichische Autobahnen und Schnellstraßen AG* (*ÖSAG*), ECR [2003] I-6351; C-314/01 *Siemens and ARGE Telekom & Partner* [2004] ECR I-2549; C-57/01 *Makedoniko Metro and Mikhaniki* [2003] ECR I-1091; C-126/03, *Commission v Germany*, [2004] ECR I-11197.

[21] See case C-31/87, *Gebroeders Beentjes B.V. v. State of Netherlands* [1988] ECR 4635; case C-225/98, *Commission v. French Republic* (*Nord-Pas-de-Calais*), [2000] ECR 7445; case C-513/99, *Concordia Bus*

making. These doctrines were created by judicial developments, which have shaped the interpretation and application of the procurement *acquis* and have positioned public procurement regulation as an instrument which creates compliance safeguards by authenticating established principles of European Union law and which verifies compatibility links with European policies.

The European Union Court of Justice has provided a helpful interpretation of the concepts in the Directives, which has made the revisions of the public procurement Directives easier to implement. Upon receiving referrals from national courts, the Court created theories that aided in accurately defining vague terms. First, with the support of the test of equivalency, the doctrine of objectivity aims to remove non-tariff barriers in the areas of technical standards, product specification, and standardisation. It also intends to provide a restrictive interpretation of the rules governing selection procedures (quantitative and qualitative suitability criteria) and award procedures, particularly negotiated procedures. Second, in order to meet the needs of prompt national dispute resolution and the enforceability of decisions made by national courts or tribunals, the doctrine of effectiveness has been applied through the tests of functionality and dependency to define the concept of contracting authorities. According to the notion of effectiveness, national remedies—which are up to the individual Member States—must be successful in upholding and respecting European Union legislation and public procurement law through the use of enforcement mechanisms. A measure of effectiveness is the capacity to uphold the law on public procurement. Thirdly, the principle of procedural equality, which is embodied in the clear mandate given to Member States to refrain from establishing procedures for actions for damages and review processes for disputes involving public procurement that are discriminatorily different from other procedures for these kinds of proceedings under national law. A limit on Member States' authority to create remedies for enforcing public procurement regulations is the procedural equality theory. The principle of procedural equality dictates that Member States' procedural autonomy for public procurement remedies cannot create systems that are distinct from those used for resolving other conflicts within their legal orders.

3 The exhibited side-effects of public and utilities procurement regulation

3.1 Discretion in public procurement Directives

Member States' discretion in implementing public procurement legislation stems from the fact that harmonisation serves as the integration mechanism for its absorption into each state's domestic legal orders. Harmonisation extends beyond national systems' choice to carry out the mandated acquis; rather, it builds on a brand-new idea of decentralisation, in which Member States are responsible for enforcing and

Filandia Oy Ab v. Helsingin Kaupunki et HKL-Bussiliikenne, [2002] ECR 7213; C-448/01, *EVN AG, Wienstrom GmbH and Republik Österreich*, [2003] ECR I-14527.

complying with public procurement law. The Remedies Directives[22] provide unambiguous proof of these decentralisation consequences, as they alone delegate the duty of enforcing the substantive procurement regulations for the public sector and the utilities to the national judicial system. The decentralisation of public procurement occurs concurrently with comparable outcomes in the implementation and enforcement of European Union antitrust laws.

There are two primary areas where Member States' discretion in enforcing public procurement rules may manifest itself. First, there is procedural discretion; this includes the ability to create independent remedies for redress and access to justice in public procurement contracts, as well as the choice of award procedures. Second, there is substantive discretion in the application of public procurement rules regarding the choice and characteristics of contract award criteria, primarily the most economically advantageous tender, the selection and qualification of economic operators, and the exclusion of applicants.

Acquisitions in public procurement have always involved discretion. One the one hand, based on harmonisation, discretion seems to have had the biggest impact on the development of decentralised public procurement rules. It has been assigned to Directives to convey the ideas and tenets of the dictatorship. On the other hand, discretion is visible in the concepts surrounding procurement, such as public contracts and contracting agencies, as well as in the actual process, which includes phases for selection and qualifying, award procedures, and award criteria. Finally, the CJEU's jurisprudence, which aims to bring discretion in the application of public procurement regulations into line with fundamental European Union legal principles, verifies that discretion.

Two judicially developed doctrines—the concept of procedural autonomy in the application of remedies in the awarding of public contracts and the doctrine of flexibility in the administration of substantive public procurement rules—present opportunities for discretion in public procurement. The concept of contracting authorities and the compatibility test between socio-economic and environmental policies and the economic approach to public procurement regulation have been used to verify public procurement as a policy instrument of the European integration process. The doctrine of flexibility, which is defined through the tests of dualism, commercialism, and competitiveness, has been applied to determine the scope, thrust and inapplicability of public procurement rules. The principle of procedural autonomy is shown by the broad latitude granted to Member States in establishing suitable fora for the receipt of grievances over the decisions made by contracting authorities and utilities, in addition to actions seeking damages.

3.2 The porosity of the public procurement Directives and its treatment

The public procurement regulation's most obvious flaw is its porosity, which undermines the effectiveness of the law by allowing a large number of public contracts to evade the regulatory system. Porosity is a condition brought about by exhaustive

[22] Directives 89/665 OJ 1989, L 395/33 and 92/13 OJ 1992, L 76/14 as amended by Directive 2007/66/EC, OJ L 335.

harmonisation. It disqualifies public contracts below certain thresholds and certain contractual relationships that represent inter-administrative interfaces in the public sector from the scope of the public procurement Directives and, thus, from the main body of European Union law. Additionally, it disqualifies service concessions, public contracts based on exclusive rights, public contracts pursuing services of general economic interest, in-house contracts, and non-priority services contracts. The silo effect of the Utilities and Public Sector Directives, as well as the restricted interoperability of the public procurement acquis, are further factors contributing to porosity.

The porosity is caused by the limited convergence of the public procurement *acquis* with Article 296 EC (346 TFEU) which results in the non-applicability of the procurement Directives in cases of public contracts awarded pursuant to international rules,[23] or secret contracts and contracts requiring special security measures or contracts related to the protection of Member States' defence interests.[24]

4 The common themes in the Directives on public procurement

4.1 Contracting authorities

In public procurement, the terms contracting authorities or entities embrace the state, regional or local authorities, and bodies governed by public law.[25] A body governed by public law as an effective concept of European Union law which must receive an autonomous and uniform interpretation throughout the European Union[26] and refers to the ability of contracting authorities to pursue market-oriented activities without losing their classification as contracting authorities for the purposes of public procurement law. In the Utilities procurement Directive, the term contracting entities also includes public undertakings, over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of them, their financial participation therein, or the rules which govern them.[27] The Utilities

[23] See Article 15 of the Public Sector Directive and Article 22(a) of the Utilities Directive.

[24] See Article 14 of the Public Sector Directive and Article 21 of the Utilities Directive.

[25] See Article 1(9) of the Public Sector Directive and Article 2(1)(a) of the Utilities Directive. A body governed by public law means any organisation which satisfies the following conditions in a cumulative manner. First, the organisation must be established for the specific purpose of meeting needs in the general interest which do not have an industrial or commercial character; secondly, it must have legal personality; and thirdly, it must be financed, for the most part, by the state, regional or local authorities, or other bodies governed by public law. Alternatively and as part of the third criterion, a body governed by public law must be subject to management supervision by the State, regional or local authorities, or other bodies governed by public law or it must have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law.

[26] See case C-44/96 *Mannesmann Anlagenbau Austria and Others*, [1998] ECR I-73, paragraphs 20 and 21; case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53; case C-214/00 *Commission* v *Spain* [2003] ECR I-4667, paragraphs 52 and 53; and case C-283/00 *Commission* v *Spain* [2003] ECR I-11697, paragraph 69.

[27] See Article 2(1)(b) of the Utilities Directive. Contracting authorities exercise dominant influence upon public undertakings when directly or indirectly, in relation to an undertaking, hold the majority of the

procurement Directive also includes undertakings which, although they are not contracting authorities or public undertakings themselves, operate on the basis of special or exclusive rights granted by a competent authority of a Member State[28] by virtue of legislative, regulatory or administrative provisions as contracting entities. The conferral of such special or exclusive rights substantially affects the ability of other entities to carry out such activities in the marketplace.

The term contracting authority in public procurement is interpreted in effective and functional terms[29] as encompassing private law entities,[30] private entities for industrial and commercial development,[31] entities meeting needs of general interest retrospectively,[32] semi-public undertakings,[33] state commercial companies[34] and statutory sickness funds.[35]

undertaking's subscribed capital, or control the majority of the votes attaching to shares issued by the undertaking, or can appoint more than half of the undertaking's administrative, management or supervisory body.

[28] See Article 2(3) of the Utilities Directive.

[29] See case C-44/96 *Mannesmann Anlagenbau Austria and Others*, [1998] ECR I-73, paragraphs 20 and 21; case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53; case C-214/00 *Commission* v *Spain* [2003] ECR I-4667, paragraphs 52 and 53; and case C-283/00 *Commission* v *Spain* [2003] ECR I-11697, paragraph 69.

[30] An entity which is governed by private law but nevertheless meets all the requirements of bodies governed by public law is considered to be a contracting authority. The entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority, and in particular as being incompatible with requirement of non-industrial or commercial character of the general interest needs which the body concerned satisfies, since these factors must be assessed individually and separately from the legal status of an entity. A private law-governed entity as contracting authority is also compatible with the concept of public undertakings, in accordance with the Utilities Directive. See case C-214/00 *Commission* v *Spain* [2003] ECR I-4667, paragraphs 54, 55 and 60; and case C-283/00 *Commission* v *Spain* [2003] ECR I-11697, paragraph 75.

[31] A limited company established, owned and managed by a regional authority meets a need in the general interest which has not a commercial or an industrial character, where it acquires services for the development of business and commercial activities on the territory of that regional authority. See case C-18/01, *Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy, Rakennuttajatoimisto Vilho Tervomaa and Varkauden Taitotalo Oy*,, [2003] ECR I-5321 paragraphs 48 and 59; also case C-373/00, *Adolf Truly*, [2003] ECR-193, paragraph 66.

[32] Entities which have not been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, but which have subsequently taken responsibility for such needs are considered as bodies governed by public law, on condition that the assumption of responsibility for meeting those needs can be established objectively. See case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraphs 51 to 53.

[33] A company governed by private law and legally distinct from a contracting authority, in which the contracting authority has a majority capital holding and exercises a certain control is considered as a contracting authority. See case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH* v. *Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-1.

[34] State controlled companies are regarded as contracting authorities as it is deemed unlikely that they bear the financial risks related to their activities, where the State would take all necessary measure to protect the financial viability of such entities. See case *C − 283/00, Commission v Spain*, [2003] ECR I-11697. See also cases *Adolf Truley*, paragraph 42, and *Korhonen*, paragraphs 51 and 52, op.cit.

[35] A sickness fund which was indirectly financed without any consideration in return by the state but received mandatory contributions set by law from employers and private individual members and had no discretion in setting the levels or conditions of contributions was considered as a body governed by

Contracting authorities are free to set up legally independent entities if they wish to offer services to third parties under normal market conditions. If such entities aim to make profit, bear the losses related to the exercise of their activities, and perform no public tasks, they are not to be classified as contracting authorities.[36] This indicates that profitability and commercially motivated decision-making on the part of an undertaking render the public procurement Directives inapplicable.

The similarity of control of an undertaking to that exercised by contracting authorities over their own departments and the operational connection of the undertaking's activities to the objectives of the contracting authority reveals an in-house entity, which is not a contracting authority for the purposes of public procurement regulation.[37]

Public service contracts awarded on the basis of an exclusive right awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty[38] do not fall under the premises of the public sector Directive.[39] Furthermore, the Utilities Directive does not apply to contracts awarded by a contracting entity to an affiliated undertaking[40] nor to contracts awarded by a joint venture, formed exclusively by a number of contracting entities to an undertaking which is affiliated with one of those contracting entities.[41]

A public authority has the possibility of performing the public interest tasks conferred on it by using its own administrative, technical and other resources, without

public law. See Case C-300/07, *Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik*, v. *AOK Rheinland/Hamburg*, [2009] ECR I-4779.

[36] See case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 51.

[37] See case C-107/98 *Teckal* [1999] ECR I-8121.

[38] See Article 18 of the Public Sector Directive.

[39] However, Article 3 of the Public Sector Directive includes a non-discrimination clause for the cases of granting special or exclusive rights. Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted must provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality.

[40] See Article 23(2)(a) of the Utilities Directive. For the preceding three years at least 80% of the average turnover of the affiliated undertaking must derive from the provision of works, supplies and services to undertakings with which it is affiliated. An affiliated undertaking is an undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive on consolidated accounts, or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it. According to Article 2(1)(b) of the Utilities Directive, contracting authorities exercise dominant influence upon public undertakings when directly or indirectly, in relation to an undertaking, hold the majority of the undertaking's subscribed capital, or control the majority of the votes attaching to shares issued by the undertaking, or can appoint more than half of the undertaking's administrative, management or supervisory body.

[41] See Article 23(2)(b) of the Utilities Directive.

being obliged to call on outside entities which are not part of its own departments.[42] That possibility for public authorities to use their own resources to perform the public interest tasks conferred on them may be exercised in co-operation with other public authorities.[43] Public co-operation[44] between independent contracting authorities in the form of establishing an entity upon which no similar control is exercised to that over their own departments, resulting in the entrustment of a contract on behalf of the participant contracting authorities can be deemed to meet the criteria for an in-house exception, provided that the remit of such public co-operation exists in relation to a public task or service specified under European Union law, that there is no intention to circumvent public procurement rules and that the contractual relation is not based on any pecuniary interest consideration or any payments between the entity and the participant contracting authorities. Contractual relations between inter-municipal co-operative societies whose members are contracting authorities and a jointly controlled entity can be deemed as an in-house contractual relation.[45]

4.2 Public contracts

The existence of a public contract is a requirement for the application of the public procurement Directives. Public contracts[46] are written agreements for financial gain between one or more business owners and one or more contracting agencies, with the object of carrying out construction,[47] supplying goods,[48] or rendering services.[49] The meaning of a public contract may only be determined by public procurement law. Its character is determined not by what and how national laws define a public contract, nor by the public or private legal system that sets its terms and conditions, nor by the

[42] See case C-26/03, *Stadt Halle,RPL Recyclingpark Lochau GmbH v. Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, [2005] ECR I-1; paragraph 48.

[43] See case C-295/05, *Asociación Nacional de Empresas Forestales* (*Asemfo*) *v. Transformación Agraria SA* (*Tragsa*) *and Administración del Estado*, [2007] ECR I-2999, paragraph 65.

[44] See case C-480/06, *Commission* v. *Germany*, [2009] ECR I-4747.

[45] See case C-324/07, Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale, [2009] ECR I-8457.

[46] Article 1(2)(a) of the Public Sector Directive.

[47] Article 1(2)(b) of the Public Sector Directive specifies as public works contracts, contracts which have as their object either the execution or both the design and execution, of works, or the completion, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A work means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

[48] Article 1(2)(c) of the Public Sector Directive specifies as public supply contracts, contracts having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products. A public contract having as its object the supply of products and which also covers, as an incidental matter, placement and installation operations must be considered as a public supply contract.

[49] Article 1(2)(d) of the Public Sector Directive specifies as public service contracts, contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II of the Directive. A public contract having as its object both products and services within the meaning of Annex II must be considered as a 'public service contract' if the value of the services in question exceeds that of the products covered by the contract.

parties' intentions.[50] Aside from the apparent need for a written structure, the two most important aspects of a public contract are: (i) a financial interest consideration provided by a contracting authority; and (ii) it must be in exchange for works, goods or services that directly benefits the contracting authority financially.

A range of payment mechanisms, such as direct or deferred payments from the contracting authority to the economic operator, an agreement to lease back an asset after it is constructed, asset swaps between the contracting authority and the economic operator or granting the economic operator the sole right to collect payments from third parties, could be included in the concept of public contracts' pecuniary interest consideration. According to the Court's functional application, leasing and subleasing agreements fall under the financial interest group as well. The financial interest is inextricably tied to the contracting authority's capacity to define the public contract's objective. The contracting authority may specify requirements that define the kind of work to be done or take action that will have a significant impact on how a project is designed or how the work is carried out. In the sense that prime contracting or subcontracting could be used to fulfil the contract's objective without having an impact on contractual responsibilities or liability issues originating from the public contract, the means of execution are meaningless.

Sales of land or assets do not constitute public contracts unless the contracting authority or another contracting authority is about to enter into a directly related public contract with that land or asset;[51] in that case, the sale of the land or asset and the ensuing public works should be considered as a single public contract. State assistance is not allowed[52] in sales of real estate or other assets that are the result of a "sufficiently well-publicised, open and unconditional bidding procedure." Since a public contract is based on a contracting authority's "purchasing" capacity and the requirement that a contracting authority be able to determine standards and specifications suitable to meet the conditions of immediate economic benefit, sales of assets by contracting authorities to economic operators or other contracting authorities are not considered public contracts. The idea behind public works contracts is that the works included by the agreement do not have to be physically or materially completed for the contractual authority; instead, they can be completed for the authority's immediate financial gain.

[50] See case C-536/07, *Commission* v. *Germany*, ECR I-10355. The case (Köln Messe) considered the conclusion of a contract between the City of Cologne and Grundstücksgesellschaft Köln Messe for the construction and use for 30 years of four exhibition halls including ancillary buildings and relevant infrastructure through complex lease-back arrangements without a prior call for tender.

[51] See case C-451/08, *Helmut Müller* v. *Bundesanstalt für Immobilienaufgaben*, [2010] ECR I-2673. The case was concerned with whether the rules on public contracts and, more specifically, the rules on public works concessions apply when a public authority sold assets and land to the prospective buyer who, in the opinion of the local authority responsible for town planning, presented the best and most interesting plans for the use of the land and the construction of buildings.

[52] See Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ 1997 C 209/3, at para. 1.

4.3 The treatment of sub-dimensional public contracts

Contract value thresholds have resulted in some public contracts being excluded [53] from the public procurement Directives due to exhaustive harmonisation; however, contracting authorities are still required to abide by the general principles of European Union law,[54] including the principles of non-discrimination on the basis of nationality,[55] transparency, and equal treatment.[56] However, it is assumed that the contracts in question are of some cross-border importance when applying the fundamental norms and general principles of the Treaty to procedures for the award of contracts below the threshold for the application of the public procurement Directives.[57] Due to the estimated value of the contract combined with its technical complexity or the fact that the work will be located in an area that is likely to draw interest from foreign operators, it is likely to be of some cross-border interest and thus attract operators from other Member States. In theory, contracting authorities are responsible for determining whether sub-dimensional public contracts would be of interest to parties outside of their country. However, national courts should be able to review such an assessment.

It is permissible, however, for legislation at national level to lay down objective criteria stipulating certain cross-border interest for public contracts which fall below the thresholds of the public procurement Directives. Such criteria could include, *inter alia*, the quantum of the monetary value of a contract, or its strategic importance to economic operators, in conjunction with the place where the work is to be carried out. The projected profitability to an economic operator from a sub-dimensional contract may also be part of such criteria to determine certain cross-border interest for public contracts. Where the financial returns in the relevant contracts are modest,[58] the likelihood of a cross-border interest is considerably weakened. However, in certain cases, the geography and the particular location of the performance of a public contract could trigger cross-border interest, even for low-value contracts. Exclusion of sub-dimensional public contracts of certain cross border interest from the application of the fundamental rules and general principles of the Treaty could undermine the general principle of non-discrimination, could give rise to collusive conduct and anti-competitive agreements between national or local undertakings and finally could

[53] See cases C-59/00, *Bent Mousten Vestergaard and Spøttrup Boligselskab*, [2001] ECR I-9505; C-6/05, *Medipac-Kazantzidis AE v Venizelio-Pananio* (*PE.S.Y. KRITIS*), [2007] ECR I-4557; C-147 & 148/06, *SECAP SpA* and *Santorso Soc. coop. arl*, [2008] ECR I-3565; see also Case C-412/04, *Commission* v. *Italy*, [2008] ECR I-619, para 65.

[54] See case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 60.

[55] See *Telaustria and Telefonadress* (fn 3) paragraph 60; *Vestergaard* (fn 3) paragraphs 20 and 21; Case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraph 32; and Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557, paragraph 33.

[56] See case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 and 17, and *Parking Brixen* (fn 3) paragraphs 46 to 48.

[57] See case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777 paragraph 29.

[58] See case C-231/03 *Coname* [2005] ECR I-7287, paragraph 20.

impede the exercise of freedom of establishment and freedom to provide services.[59] The Court of Justice of the European Union ruled in *Correos*[60] that although certain contracts are excluded from the scope of the procurement Directives because of value thresholds, contracting authorities are nevertheless bound to comply with the fundamental rules of the Treaty[61] and in particular the principle of non-discrimination on grounds of nationality.[62] Even in the absence of any discrimination on grounds of nationality, the principle of equal treatment of tenderers is also applicable to such public contracts.[63] Observance by contracting authorities of the principles of equal treatment and non-discrimination on grounds of nationality is verified by adhering to the principle of transparency which is utilised as verification mechanism.[64]

4.4 Award criteria

The procedural phase of the procurement process resulted in the application of objectively specified criteria that show the rationale behind the actions of contracting authorities throughout the history of public procurement acquis. The contracting authority must base their decision to award public contracts on either (a) the lowest price or (b) the most economically advantageous offer.

Various factors related to the subject matter of the public contract in question, such as quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, can be taken into consideration when the tender that is most economically advantageous from the contracting authority's point of view is awarded. The characteristics that make up the most economically advantageous proposition are not limited to the items mentioned above.

The contracting authority must specify the relative weighting it assigns to each of the criteria selected to determine the most economically advantageous tender in the contract notice, contract documents, or, in the case of a competitive dialogue, the descriptive document. This will help define what exactly makes a most economically advantageous offer. By defining a range with a suitable maximum spread, such weightings can be expressed. The contracting authority shall specify the criteria in descending order of importance in the contract notice, contract documents, or, in the case of a competitive dialogue, in the descriptive document, if the contracting authority determines that weighting is not feasible for clearly defined reasons.

[59] See case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 26; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 12 and 13; and Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 46.

[60] See case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*, [2007] ECR I-12175.

[61] See case C-59/00 *Vestergaard* [2001] ECR I-9505, paragraph 19.

[62] See case C-264/03 *Commission* v *France* [2005] ECR I-8831, paragraph 32.

[63] See, by analogy, *Parking Brixen* (fn 3) paragraph 48, and case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 20.

[64] See *Parking Brixen*, ibid, paragraph 49, and *ANAV*, ibid, paragraph 21.

A number of variables selected by the contracting authority are included in the definition of the most economically advantageous offer: price, delivery or completion date, running costs, profitability, technical merit, product or work quality, aesthetic and functional qualities, after-sales service and technical assistance, commitments regarding spare parts and components and maintenance costs, and supply security. Although not all-inclusive, the aforementioned list of characteristics provides contracting authorities with guidelines for the weighted review process of the contract award.

5 Conclusions

The outcomes of the improvements to public procurement have been noted favourably. Important recent case-law developments, particularly those pertaining to the definition of contracting authorities, the use of award procedures and criteria, and the potential for contracting authorities to use environmental and social considerations as criteria for the award of public contracts, demonstrate the flexibility of the public procurement regulatory regime. Furthermore, the links between procurement regulation and anti-trust are demonstrated by the flexibility that supports the easing of the competitive tendering regime and the disengagement of the public procurement laws in areas of the economy that are competitive, such as the utilities sector. The fact that the regime does not apply to telecommunications companies is a significant milestone that bodes well for future legal and regulatory frameworks.

A new regulatory regime, The European Union Foreign Subsidies Regulation,[65] to control foreign subsidies and distortions caused by foreign subsidies has closed the *lacuna* in international trade instruments and improved the multilateral legal framework addressing distortive subsidies, thus creating a pre-emptive strike in WTO reforms.

The reforms of the public procurement regime have opened multiple options in the delivery of public services through concessions and focus mainly upon the way service concessions and contracts awarded by a contracting authority to another contracting authority on the basis of exclusive rights are regulated, in the light of the interface of the public procurement *acquis* with the Services Directive.[66] The 2014 Public Procurement Directives' positive dimension of inherent flexibility is, however, reflected in the positive dimension of public-public partnerships and in-house contractual relationships between contracting authorities or undertakings that, while operationally dependent on them, exercise control similar to that which they do over their own departments and public services contracts relating to services of general economic interest and contracts having the character of a revenue-producing monopoly.

Sub-dimensional contracts, or public contracts with values below specified criteria, are the hardest to reform and offer the greatest latitude for using discretion in public procurement. On the one hand, they contain a large portion of public spending

[65] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14.12.2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022.

[66] See Directive 2006/123/EC of the European Parliament and of the Council of 12.12.2006 on services in the internal market (2006) OJ L376.

in Member States that eludes the public procurement acquis. However, it is essential that these contracts be open to competition of some kind, and European Union law standards have been included in the public procurement Directives to guarantee a parallel procurement process with dimensional public contracts. This development has led to a dysfunctional application of procurement laws to such contracts and confusion in the marketplace. The contracting authorities' administrative and procedural requirements frequently outweigh any possible gains in efficiency from competitively bidding sub-dimensional contracts. Furthermore, the current acquis has appropriate protections against the deliberate separation of dimensional contracts into lots in order to circumvent the applicability of the Public Procurement Directives.

The concepts of discretion and flexibility in the implementation of Public Procurement Directives by Member States are advantageous to all of them. The concept of proportionality serves as a stand-in for Member States' discretion when implementing public procurement laws. The notion of flexibility in public procurement law, which has been established and applied by the CJEU's jurisprudence, serves as the conceptual link. The discretion derives from the fact that domestic legal systems adopt and enforce European Union public procurement laws through harmonisation; yet, procurement regulations are naturally adaptable to provide for legal conformity and interoperability with European Union policies and principles. National legal systems may apply the proportionality principle while implementing public procurement regulations thanks to the doctrine of flexibility.

The reforms have successfully addressed the porosity of the acquis by introducing the regulation of service concessions and providing a balance for dimensionality (below threshold procurement) through soft law. There is an overwhelming acceptance of judicial activism for internalisation of procurement through in-house and inter-administrative contractual co-operation, and for enhancing award criteria by embracing environmental and socio-economic factors. The procurement acquis offers the optionality for decoupling in competitive markets (telecommunications) and provides for cross-fertilisation/implants by transplanting the notions of affiliation through in-house arrangements from utilities to public sector procurement and for framework procurement. Flexibility is demonstrated through division of contracts into lots and discretionary exclusions from award procedures. The public procurement framework offers regulatory correction through self-cleaning and price abnormality adjustment in tendering, which leads to a bigger picture of multilateral subsidy control through the foreign subsidy regulation. The public procurement Directives strive for automation through the introduction of information technologies in procurement in the selection and qualification stages by introducing the ESPD throughout the award procedures by creating the option of electronic auctions and dynamic purchasing.

More reforms will eventually be forthcoming. Due to exhaustive harmonisation, the public sector Directive and the public procurement Directives suffer from legal porosity. The CJEU has implemented a hybrid transplant of European Union legal principles to the public procurement Directives in order to regulate their porosity, as the effectiveness of the procurement laws is compromised. This is done through the application of the rule of reason. Nevertheless, this course of action has established regulatory standardisation between public sector and utilities and as a result promoted legitimate expectation and legal certainty in the application of the public procurement acquis.

Declarations

Competing Interests The author declares no competing interests.