

# Utilities Procurement: The state of play before Brexit

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## *Abstract*

Utilities procurement resembles commercial procurement practices and its regulation provides many deviations from the Public Sector Procurement Directives. Utilities procurement regulation is different from Public Sector procurement regulation and its development has taken a different path in the European legal integration. This path adheres basically to the same principles but with notable exceptions and enhanced flexibility for utilities procurement. The exit of the the UK from the EU brings a dilemma to either endorse a regime of three decades and follow its paradigm or create a new set of rules for entities which are operating in the utilities sectors.

## **Introduction**

The Utilities Procurement regime<sup>1</sup> was initiated in 1990 and was the third Europe legal instrument to regulate public procurement in supplies and works contracts in the transport, water, energy and telecommunications sectors, which were previously excluded from the relevant Supplies Procurement Directive and Works Procurement Directive.

In 1990 the Council adopted Directive 90/531<sup>2</sup> on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. The regime imposed was similar to the Supplies Directives with some important differences as to the flexibility given to the contracting authorities over the choice of methods to be used to make the award process competitive.<sup>3</sup> The Utilities Directive has been amended by Directive 93/38,<sup>4</sup> which mainly incorporates the newly enacted Public Services Directive 92/50<sup>5</sup> into the Utilities regime.

The exclusion of the utilities sectors from the framework of Supplies and Works Directives had been attributed to the fact that the authorities entrusted with the operation of public utilities had been subject to different legal regimes in the Member States, varying from completely state-controlled enterprises to private-controlled ones.

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<sup>1</sup> Utilities: Directive 90/531, O.J.1990 L 297, Directive 93/38/EC, OJ L 199, amended by Directive 98/4/EC OJ L 101

<sup>2</sup> See O.J.1990 L 297.

<sup>3</sup> The Directive provided different implementing periods for Spain, Greece and Portugal. Spain has to implement its provisions by January 1, 1996 whereas Greece and Portugal by January 1, 1998 respectively. The delay in the uniform implementation of the Utilities Directive could be attributed to the preparations needed for the integration of the public utilities sectors in the respective countries.

<sup>4</sup> See O.J. 1993, L 199.

<sup>5</sup> See O.J. 92/50, O.J. 1992, L 209.

Three reasons appear as grounds for the late regulation of utilities procurement. First, the belated regulation of utilities procurement could be attributed to the fact that due to their purchasing volume and relative magnitude, public utilities procurement constituted an important domestic industrial policy instrument and as a result Member States appeared reluctant in subjecting the procurement of their utilities to the rigorous transparent and competitive regime of public works and supplies purchasing, as they have relied upon preferential and closed utilities procurement in order to sustain strategic industries. Secondly, the introduction of a distinctive legal regime for utilities procurement projects the interface of the state with utilities companies and specifically the manner in which national authorities can influence the purchasing behaviour of these entities, such as participation in their capital and representation in their administrative, managerial or supervisory bodies. Thirdly, the closed markets in which utilities operate, as a result of special or exclusive rights granted by the Member States appeared as a compelling reason to enactment a distinctive regime for utilities procurement which ensures on the one hand alignment with the public supplies and public works Directives and on the other hand, compliance with the fundamental principles of the EU Treaties.

## **2. The Principles of Utilities Procurement**

The legislative background of the utilities Directive and the ordeal of the regulation of public utilities procurement justify the high complexity of the regime. The fact that public utilities often have an unclear legal status or their legal nature varies within the member states' legal systems has obviously rendered difficult to introduce a single legal instrument to regulate their purchasing, although such a prolonged delay should be attributed to other factors.

Public utilities absorb the vast majority of high technology equipment designated to the public sector. Protectionism in strategic industrial sectors has been pursued through preferential purchasing with a view to either sustaining the relevant industries or to assisting the development of infant industries in member states. The regulation of utilities purchasing not only had to overcome the significant legislative barriers accountable to their nature but also the abandoning of individual industrial policies of member states through strategic procurement.

In addition to these constraints, the fear of an uncontrolled flow of direct investment which would target vulnerable European-based high technology industries and the subsequent possible increase in take-overs and acquisitions, mainly from Japanese and American investors poured cold water on the attempts of European Institutions to integrate the utilities procurement within the common market.

The Utilities Directive has been the most radical approach to the public sector integration in Europe and its enactment coincided with the envisaged international liberalisation of public procurement during the Uruguay GATT negotiations. One could question such a strategy by European Institutions, particularly bearing in mind the vulnerability of Europe's high-tech industry in comparison with that in the USA and Japan. However, the GATT regime has introduced a new era in the accessibility of international public markets, to the extent that highly protectionist countries like the USA and Japan must, under the new regime, abolish their buy-national laws and

policies and open, on a reciprocal basis, their public markets to international competition.

The ambit of the Utilities Directive and the field of its application appear more complicated than those in the Supplies and Works Directives, although the internal legal structure among the three Directives is very similar. Articles 1 and 2 of the Utilities Directive form the broad framework of the Directive's application, by providing various definitions and the scope of some preliminary exemptions. The Utilities Directive devotes a substantial amount of provisions in an attempt to exempt from its application certain contracts or activities that have been deemed ineligible for community-wide regulation.

Apart from the normal exemptions under the grounds of defence and security and confidentiality, the major exemptions are provided for under Articles 1 and 2. Radio and television broadcasting have not been classified as telecommunication activities and have been specifically excluded from the ambit of the Directive by virtue of Article 2. Also, bus transport services to the public are excluded on condition that their providers operate under a regime of competitive conditions, which means that other potential contractors or suppliers of similar services are allowed to enter the relevant geographical and product markets and compete against the existing utilities provider (Article 2 (4)). A similar rule applies to telecommunication services which operate within a competitive market.<sup>6</sup>

Under the same Article (2) special exemptions are also provided to private entities supplying gas, heat, drinking water and electricity. Although the wording and spirit of the Directive covers private entities operating under exclusive and special rights in the utilities sectors, nevertheless under certain conditions, these entities can be exempted from the application of the rules of the Directive. In the case of the production of drinking water and electricity, if a private entity is able to show that it does so for its own purposes, which are not related to the provision of drinking water or electricity to the public, it is exempt. Similarly, if a private entity is able to show that it supplies to the public network drinking water or electricity which is destined for its own consumption, and that the total so supplied to the network is not more than 30% of the total produced by that network in any one year over a three year period, it is also exempt.<sup>7</sup>

In the case of gas and heat supplies, if the production by a private entity is related to an activity other than the supply to a network for public consumption, then these entities are also exempt. In the same line, if the supply of gas and heat by a private entity to a public network relates to economic exploitation only and does not exceed 20% of the firm's turnover in any one year, taking an average of the preceding three years and the current year, then such an entity is also exempt.<sup>8</sup> These exemptions predominantly cover entities which have research and development as their main objective in the relevant utilities sector, or do not play a major role in supplying public networks with water or energy.

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<sup>6</sup> See Article 2(4) and Article 8 of the Utilities Directive amended by Directive 93/38.

<sup>7</sup> See Article 2(5) (a) of the Utilities Directive amended by Directive 93/38.

<sup>8</sup> See Article 2(5) (b) of the Utilities Directive amended by Directive 93/38.

There are also exemptions for entities exploring for gas, oil, coal and other solid fuels under Article 3. Entities operating in these sectors will not be regarded as having an exclusive right provided that certain conditions are fulfilled. These conditions are cumulative and stipulate that, when an exploitation right is granted to the entity in question, the latter is exempt from the Utilities Directives provided that other bodies are able to compete for the same exclusive rights under free competition; that the financial and technical criteria to be used in awarding rights are clearly spelt out before the award is made; that the objective criteria are specified as to the way in which exploitation is to be carried out; that these criteria are published before requests for tenders are made and applied in a non-discriminatory way; that all operating obligations, royalty and capital and revenue participation agreements are being published in advance; and finally, that contracting authorities are not required to provide information on their intentions about procurement except at the request of national authorities.<sup>9</sup> Furthermore, member states have to ensure that these exempted bodies apply, at least, the principles of non-discrimination and competition. They are obliged to provide a report to the Commission on request about such contracts. However, this requirement is less stringent than the mandatory reporting rules in the Supply and Works Directives. It should be mentioned that the Utilities Directive does not apply to concession contracts granted to entities operating in utilities sectors, awarded prior to the coming into force of the Directive. All exemption provisions within the Utilities Directive are subject to assessment in the light of the four year overall review of the process.<sup>10</sup>

Other exemptions cover entities in the relevant sectors which can demonstrate that their service and network associated contracts are not related to the specific supplies and works functions specified in the Directive, or if they are related, they take place in a non-member state and they are not using a European public network or a physical area.<sup>11</sup> The member states are under an obligation to inform the European Commission, on request, of the cases when these exemptions have been allowed. There are also provisions which allow for resale and hire contracts to third parties to be exempt when the awarding body does not possess an exclusive or special right to hire or sell the subject of the contract, and there is competition already in the market from other suppliers or producers to provide the commodity or service to third parties.<sup>12</sup>

Article 8(1) of the Utilities Directive provide for an exemption from the regime and for the inapplicability of the Directive, when contracting authorities in the telecommunications sector operate under substantially the same competitive conditions within the same geographical market.<sup>13</sup>

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<sup>9</sup> See Article 3(1) of the Utilities Directive amended by Directive 93/38.

<sup>10</sup> See Article 3(2) to (4) of the Utilities Directive amended by Directive 93/38.

<sup>11</sup> See Article 6(1) of the Utilities Directive amended by Directive 93/38.

<sup>12</sup> See Article 7(2) of the Utilities Directive amended by Directive 93/38.

<sup>13</sup> See Case C-392/93, *The Queen and H.M. Treasury, ex parte British Telecommunications PLC*, O.J. 1993, C 287/6. A national court asked for an interpretation of Article 8(1) of the Utilities Directive and in particular the competence of member states to determine the sufficiently genuine competitive regime and the criteria for such evaluation, in a geographical area between telecommunications operators in order to exclude them from the application of the Directive. The Court held that a member state could not decide, when implementing the Directive, which telecommunication services were excluded from the scope of the Directive, as that power was reserved to the telecommunications entities themselves. The Court maintained that in order for the criterion in Article 8(1) to be satisfied, other contracting

Another set of significant exemptions is provided for water authorities under Article 9. Under this provision water authorities specified in Annex 1 are specifically exempt from the rules when they purchase water. They are however covered by the Directive when they purchase other supply and construction products.<sup>14</sup> Similarly, there are specific exemptions for the electricity, gas and heat, oil and gas and coal and other solid fuels entities outlined in Annex II, III, IV and V, but only when they award contracts for the supply of energy or for fuels for the production of energy. For all other relevant contracts these bodies are included in the rules. These exemptions were provided because of the need to allow contracting authorities to buy from local sources of supply, which may not always be the cheapest, but which are important on the basis of regional development policies or environmental grounds, and because these purchases are central to the entities' operations and not part of normal supply and works procurement process.<sup>15</sup>

Finally, specific exemptions under the Utilities Directive are provided for those carriers of passengers and providers of transport services by air and by sea. In the preamble of the Directive it is stated that, under a series of measures adopted in 1987 with a view to introducing more competition between firms providing public air services, it was decided to exempt such carriers from the scope of the legislation. Similarly, because shipping has been subject to severe competitive pressures, it was decided to exempt certain types of contracts from the Directive.<sup>16</sup>

Article 29 renders possible for European contracting authorities in the utilities sector to reject offers from outside the Community and requires Community preference where Community offers are equivalent to offers from third countries (where the price difference does not exceed 3%). With reference to an international agreement granting access to public markets, the Utilities Directive opens the door for the application of the GATT Agreement on Government Procurement in the utilities sector.

### ***3. The current Utilities Procurement Regulation***

The 2014 EU legislative framework on Public Procurement has allowed for changes and amendments on issues specific to the Utilities Directive 2014/25/EU which provide for clarity and certainty in order to take into account the flexibility required in the procurement of entities which operate in the Utilities sectors.

#### ***3.1. Coverage of Utilities Procurement***

Non-economic services of general interest are excluded from Utilities procurement. Exploration for oil or natural gas has been excluded from the Utilities Procurement Directive 2014/25/EU as the relevant sector is deemed to be subject to a competitive environment thus rendering the Utilities Procurement Directive 2014/25/EU

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entities had, in all the circumstances of the case, to be able to compete as a matter of fact as well as of law.

<sup>14</sup> See Article 9(1) (a) of the Utilities Directive amended by Directive 93/38.

<sup>15</sup> It has been considered that these exemptions might be the appropriate framework to introduce a common energy policy.

<sup>16</sup> In the future sea-ferry operators would be excluded, but their position has been kept under review. Inland water ferry services and river ferry services operated by public authorities were to be brought within the rules.

inapplicable. However activities related to the extraction of oil or gas are subject to the Utilities Procurement Directive 2014/25/EU.

Public passenger transport services by rail or metro are excluded<sup>17</sup> from the Utilities Procurement Directive 2014/25/EU. The exclusion of passenger bus services under the Utilities Procurement Directive 2004/17/EU has been abolished. Entities providing bus transport services to the public, which were also excluded from the scope of the previous Utilities Directive 93/38 on the grounds that relevant activities were performed in a sufficiently competitive market and the need to preserve a multitude of specific arrangements applying to that sector cannot longer rely on that exemption.

Services ancillary<sup>18</sup> to postal services previously covered by the Utilities Procurement Directive 2004/17/EU, and in particular, mail service management services (services both preceding and subsequent to dispatch, such as mailroom management services), added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail), services concerning postal items such as direct mail bearing no address, financial services including in particular postal money orders and postal giro transfers, philatelic services, and finally logistics services (services combining physical delivery or warehousing with other non-postal functions), are excluded from the Utilities Procurement Directive 2014/25/EU.

Postal services such as *poste restante*, mail box rental, post counter services fall under the remit of the light procurement regime which is similar to the Public Sector Procurement Directive 2014/24/EU.

There is a toolbox approach created for the Utilities Procurement Directive 2014/25/EU in relation to the procurement procedures. Member State systems can provide the three basic forms of procedure which already exist under the Public Sector Procurement Directive 2014/24/EU: open procedures, restricted procedures as well as competitive negotiated procedures. They can further provide competitive dialogue and the innovation partnership.

As in the Public Sector Procurement Directive, the Utilities Procurement Directive 2014/25/EU establishes preliminary market consultation, where prior involvement of candidates or tenderers is allowed. Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting entity or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

Contracting authorities and contracting entities under the Utilities Procurement Directive 2014/25/EU have at their disposal a set of six specific procurement

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<sup>17</sup> Article 21(g) of Directive 2014/25/EU.

<sup>18</sup> Article 6(2)(c) of the Utilities Procurement Directive 2004/17/EU, OJ 2004, L134/1. The ancillary to postal services were subject to the Utilities Procurement Directive on condition that such services are provided by an entity which also provides postal services and that the such logistics services are not directly exposed to competition on markets to which access is not restricted.

procedures intended for aggregated and electronic procurement: framework agreements, central purchasing bodies, joint procurement, dynamic purchasing systems, electronic auctions, electronic catalogues. There are shorter time-limits for the open procedure and an option for the urgent open procedure. There are also shorter time-limits for the restricted and negotiated procedure, with no accumulation of shortening time-limits. In open procedures, contracting entities may decide to examine tenders before verifying the fulfilment of the selection criteria. Compared to the previous Utilities Procurement Directive 2004/17/EC these procedures have been improved and clarified, particularly with a view to facilitating e-procurement. The use of electronic procurement in particular in relation to the transmission of notices and the availability of the all procurement documents is mandatory since October 2018.

Framework agreements should not exceed 8 years. The award of framework agreements is to be made with additional procedural safeguards on objective rules and criteria of their formation, however without any further alignment with the Public Sector Procurement Directive 2014/24/EU.

In order to award contracts under a dynamic purchasing system, contracting entities must now follow the rules of the restricted procedure instead of open procedure (Article 34 Public Sector Directive 2014/24/EU and Article 52 Utilities Procurement Directive 2014/25/EU). The dynamic purchasing system shall not contain a maximum duration period and candidates who satisfy the selection criteria shall be admitted to the dynamic purchasing system, and the number of candidates to be admitted to the system shall not be limited. The dynamic purchasing system must allow economic operators to seek entry at any point during its duration. Evaluation of tenders from economic operators must be accomplished with 10 working days, without any indicative tenders or simplified notices, features which made the previous regime under Directive 2014/17 /EU difficult to operate.

Electronic catalogues represent standardised formats for presentation of tenders. There are new rules regulating the formatting of electronic catalogues. Member States may require use of e-catalogues for specific procurements and have the power to make their format and standards mandatory. E-catalogues can be utilised in particular for framework agreements and dynamic purchasing systems. There is specific provision of e-catalogues when used within framework agreements, where resubmission of updated catalogues is allowed before the award of new contracts. For this purpose, adequate time must be given between notification of the need for update and collection of bid information.

There are new exclusions envisaged in the 2014 Utilities Procurement Directive. Public contracts and design contests which the contracting entity awards in accordance with procurement rules provided by an international organisation or international financing institution<sup>19</sup> which finances these contracts or design contests, are excluded from the Utilities Procurement Directive 2014/25/EU. Contracts or design contests which are co-financed the most part by an international organisation or international financing institutions are subject to applicable procurement procedures agreed by the parties.

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<sup>19</sup> Article 20 of Directive 2014/25/EU.

### 3.2. *Exclusion criteria*

The mandatory exclusion criteria include conviction by final judgment for one of the following reasons: participation in a criminal organization; corruption; fraud; terrorist offences or offences linked to terrorist activities; money laundering or terrorist financing; child labour and other forms of human trafficking; non fulfilment of obligations relating to the payment of taxes or social security contributions specified in the Public Sector Procurement Directive 2014/24/EU are obligatory under the Utilities Procurement Directive 2014/25/EU only in cases where the contracting entity is a contracting authority<sup>20</sup>. Contracting entities or public undertakings may apply these exclusion criteria.

Contracting authorities, contracting entities and public undertakings may be required by Member States to apply exclusion criteria covering the discretionary grounds for exclusion of economic operators specified in the Public Sector Procurement Directive 2014/24/EU and include violations of applicable obligations referred to in Article 18(2); bankruptcy or subject of insolvency or winding-up proceedings; grave professional misconduct; distortion of competition; conflict of interest; distortion of competition from prior involvement with the contracting authority; significant or persistent deficiencies in the performance of public contracts; serious misrepresentation; undue influence of the decision making process of contracting authorities;

*Re-Establishment of reliability* follows common rules with the Public Sector Procurement Directive 2014/24/EU in all cases of contracting authorities, contracting entities and public undertakings under the Utilities Procurement Directive 2014/25/EU. If a contracting authority or a contracting entities or a public undertakings has sufficient evidence by any economic operator falling under the mandatory or discretionary exclusion grounds in public procurement procedures that measures have been taken by that economic operator to demonstrate its reliability despite the existence of a relevant ground for exclusion, the economic operator concerned shall not be excluded from the procurement procedure.

Measures that have been taken by economic operators seeking re-establishment of reliability must be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct and must prove that the economic operator has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

Member States must determine by law, regulation or administrative provision the maximum period of exclusion of economic operators who fall under the mandatory or discretionary exclusion grounds, if no reliability measures have been taken or proven sufficient. Where the period of exclusion has not been set by final judgment of the relevant Member State, that period shall not exceed five years from the date of the conviction by final judgment in the mandatory exclusion grounds cases and three years from the date of the relevant event in the discretionary exclusion grounds cases.

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<sup>20</sup> Article 80 of Directive 2014/25/EU.



### *3.3. Light regime procurement*

For contracts related to social and other specific services listed in Annex XVII of the Utilities Procurement Directive 2014/25/EU, the threshold is EUR 1 000 000. Such services include health, social and related services, administrative social, educational, healthcare and cultural services, compulsory social security services ; benefit services, community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services; religious services; hotel and restaurant services; legal and administrative government services; provision of services to the community; prison related services; public security and rescue services; investigation and security services; international services such as services provided by extra-territorial organisations and bodies and services specific to international organisations and bodies; postal services; miscellaneous services related to tyre-remoulding services and blacksmith services.

The light procurement regime for such services implies only ex-ante ex-post publicity requirements plus adherence to the principle of non-discrimination principle. Member States have the choice to apply only the best price-quality ratio (BPQR) which must to be assessed on the basis of award criteria linked to the subject-matter of the contract.

### *3.4. Activities directly exposed to competition*

The material conditions related to any utilities activities directly exposed to competition<sup>21</sup> remain unchanged by the Utilities Procurement Directive 2014/25/EU. If an activity in the gas and heat sector, the electricity production and distribution sector, the water sector, in transport services, in ports and airports, in postal services and for extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels is directly exposed to competition on markets to which access is not restricted, after a request by Member States or contracting entities<sup>22</sup> engaged in such activity and an assessment by the European Commission that the activity is directly exposed to competition on markets to which access is not restricted, contracts intended to enable an activity are not be subject to the Utilities Procurement Directive 2014/25/EU.

Access to a market is presumed not to be restricted if Member States have implemented and applied the EU law listed in Annex III<sup>23</sup> of the Utilities Procurement Directive 2014/25/EU. The Utilities Directive has updated the list of EU legislation giving legal presumption of free access by adding Directive 2012/34/EEC to cover the markets of rail freight transport and international passenger transport.

Where tenders appear to be abnormally low in relation to the works, supplies or services, the contracting entity shall require economic operators to explain<sup>24</sup> the price or costs proposed in the tender and in particular the economics of the manufacturing process, of the services provided or of the construction method or the technical

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<sup>21</sup> Article 34 of Directive 2014/25/EU.

<sup>22</sup> The procedural framework of Member States or contracting entities to request the non-applicability of the Utilities Procurement Directive 2014/25/EU to activities directly exposed to competition is regulated by Article 35 of the Utilities Procurement Directive 2014/25/EU which has been amended to provide Uniform and more flexible deadlines to Member States or contracting entities.

<sup>23</sup> For transport or distribution of gas or heat, Directive 2009/73/EC; for production, transmission or distribution of electricity, Directive 2009/72/EC; For contracting entities in the field of rail services, International rail passenger transport, Rail freight transport, Directive 2012/34/EU.

<sup>24</sup> Article 84 of Directive 2014/25/EU.

solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work; or the originality of the supplies, services or work proposed by the tenderer. Abnormally low tenders may be the result of non-compliance with responsible procurement requirements<sup>25</sup>, which must lead to exclusion of the tenderer from the procurement process or the result of non-compliance with subcontractor obligations<sup>26</sup> or reflect on the possibility of the tenderer having obtained State aid, which could lead to exclusion of the tenderer from the procurement process if the latter cannot prove the compatibility of state aid received.

The Utilities Procurement Directive 2014/25/EU maintains the detailed regulation of tenders comprising products originating in third countries which do not have either multilateral or bilateral relations with the European Union as the previous Directive 2014/17/EU in specifying market access conditions for undertakings<sup>27</sup> and relations with those countries<sup>28</sup>.

There is the option for Member States for establishing a system for direct payment for subcontractors<sup>29</sup> in the same regulatory manner as in the Public Sector Procurement Directive 2014/24/EU.

A modification of a contract or a framework agreement during its term shall be considered as substantial where it renders the contract or the framework agreement materially different in character from the one initially concluded<sup>30</sup>. A modification shall not be considered to be substantial where the following cumulative conditions are fulfilled and in particular, the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee; and that the modification does not alter the overall nature of the contract. The Utilities Procurement Directive 2014/25/EU specifies that there is the threat of termination of contracts when a modification to that contract constitutes a new award<sup>31</sup>.

For the award of contracts for social and other specific services<sup>32</sup>, public contracts for social and other specific services with a contract threshold value of EUR 1 000 000 listed in Annex XVII shall be awarded in accordance with more flexible regulation which covers ex ante and ex post publicity, as in the Public Sector Procurement Directive 2014/24/EU.

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<sup>25</sup> Article 36(2) of Directive 2014/25/EU, referring to standards in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law standards.

<sup>26</sup> Article 88 of Directive 2014/25/EU.

<sup>27</sup> Article 85 of Directive 2014/25/EU.

<sup>28</sup> Article 86 of Directive 2014/25/EU.

<sup>29</sup> Article 88 of Directive 2014/25/EU.

<sup>30</sup> Article 89 of Directive 2014/25/EU.

<sup>31</sup> Article 90 of Directive 2014/25/EU.

<sup>32</sup> Article 91 of Directive 2014/25/EU.

## Conclusions

The enactment of the Single Market Act<sup>33</sup> have identified public procurement as an essential component of competitiveness and growth<sup>34</sup> and as an indispensable instrument of delivering public services in the EU<sup>35</sup>. The UK through its membership of the EU has influenced utilities procurement and the correct application of a regime so critical for the delivery of public services.

The UK has a legacy in creating the Utilities Procurement Regulation for the EU. A generation of legal instruments which aim at establishing gradually a homogenous public procurement market has sought to reform public procurement by accomplishing unobstructed market access through transparency of expenditure relating to public and utilities procurement, improved market information through the introduction of technology to the application of the procurement rules, elimination of technical standards capable of discriminating against potential contractors, uniform application of objective criteria of participation in tendering and award procedures and regulatory alignment between public sector and utilities procurement.

The reforms on public procurement have met three principal objectives: simplification, modernization and flexibility. The objective of simplification has been met by the introduction of a single public sector Directive on supplies, works and services which represents a notable example of codification of supranational administrative law. The main influence for the codification of the public sector Directive can be traced in important developments in the application of the public procurement rules by defining essential legal concepts such as public contracts, contracting authorities, the remit of selection and qualification criteria, and the parameters for contracting authorities to use environmental and social considerations as award criteria and which have influenced public procurement law making.

The objective of modernization has been met mainly as a result of the newly introduced concepts. The ability of private undertakings, which pursue activities of general interest of non-commercial or industrial character to tender for public contracts alongside bodies governed by public law, the introduction of the competitive dialogue to facilitate the award of complex projects such as public private partnerships and trans-European networks, the introduction of framework procurement to the public sector, the use of electronic procurement concepts such as e-auctions and dynamic purchasing systems, the digitization agenda and the introduction of concessions procurement regulation.

The flexibility objective of the public procurement reforms reflects on the relaxation and the disengagement of the public procurement rules in industries that operate under

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<sup>33</sup> 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.

<sup>34</sup> European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

<sup>35</sup> 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.

genuinely competitive conditions in the utilities sectors, such as telecommunications. Flexibility is also present at the disengagement of the rules in contractual arrangements such as public-public partnerships and in-house relations, as well as in certain sectors such as water for concessions procurement.

The public procurement rules have established an effective judicial review system and provided for autonomous remedies to Member States legal orders for disputes related to the award of public and utilities contracts. The public procurement rules have created an environment of convergence and alignment between the public sector and utilities procurement.

The UK Withdrawal Agreement from the EU provides very little insights as to the legal regime on public and utilities procurement after the end of the transition period of 31 December 2020. A likely outcome could be the de facto adoption of the EU Directives, which have been already transposed into UK legal order via statutory instruments, with modifications to allow practical issues arising from the exit of the UK. Another outcome could be the reversion of utilities procurement regulation to WTO trade remit which covers only a skeleton of entities and provides limited market access. Utilities procurement will feature heavily in future and forthcoming negotiations between the UK and the EU as well as UK and third countries.