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# Introduction

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The intellectual paternity of public procurement regulation can be traced in a neo-liberal economic approach to market integration.<sup>1</sup> Public procurement in the European Union has been significantly influenced by the internal market project. The White Paper for the Completion of the Internal Market<sup>2</sup> and the Single European Act provide for the conceptual foundations of the regulation of public markets of the Member States. The identification of public procurement as a major non-tariff barrier has revealed the economic importance of its regulation.<sup>3</sup> Savings and price convergence appeared as the main arguments for liberalizing the trade patterns of the demand (the public and utilities sectors) and supply (the industry) side of the public procurement equation.<sup>4</sup> The economic approach to the regulation of public procurement aims at the integration of public markets across the EU. Through the principles of transparency, non-discrimination and objectivity in the award of public contracts, it is envisaged that the regulatory system will bring about competitiveness in the relevant product and geographical markets, will increase import penetration of products and services destined for the public sector, will enhance the tradability of public contracts across the common market, will result in significant price convergence and finally it will be the catalyst for the needed rationalization and industrial restructuring of the European industrial base.<sup>5</sup>

In parallel with the economic arguments, legal arguments have emerged supporting the regulation of public procurement as a necessary ingredient of the fundamental principles of the European Treaties, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on nationality grounds.<sup>6</sup> The legal significance of the regulation of public procurement in the common market

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<sup>1</sup> See Bovis, 'Public Procurement and the Internal Market of the 21st Century: Economic Exercise versus Policy Choice', Chapter 17 in O'Keefe and Tridimas (eds), *EU Law for the 21st Century: Rethinking the New Legal Order*, Oxford: Hart Publishing 2005.

<sup>2</sup> See European Commission, *White Paper for the Completion of the Internal Market*, (COM) 85 310 fin., 1985.

<sup>3</sup> See Commission of the European Communities, *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, Luxembourg, 1988. Also the Cechinni Report 1992 *The European Challenge*, Aldershot: Wildwood House, 1988.

<sup>4</sup> The European Commission has claimed that the regulation of public procurement could bring substantial savings of ECU 20 bn or 0.5% of GDP to the (European) public sector. See European Communities, *The Cost of Non-Europe, op.cit.*

<sup>5</sup> See Commission of the European Communities, *Statistical Performance for keeping watch over public procurement*, 1992. Also *The Cost of Non-Europe, Basic Findings, Vol.5, Part.A; The Cost of Non-Europe in Public Sector Procurement, op.cit.*

<sup>6</sup> See Bovis, 'Recent Case Law Relating to Public Procurement: A Beacon for the Integration of Public Markets' (2002) 39(5) *Common Market Law Review* 1025–56.

has been well documented. It reflects the wish of European institutions to eliminate preferential and discriminatory purchasing patterns by the public sector and create seamless intra-community trade patterns between the public and private sectors. Procurement by member states and their contracting authorities is often susceptible to a rationale and policy that tends to favour indigenous undertakings and *national champions*<sup>7</sup> at the expense of more efficient domestic or Community-wide competitors. As the relevant product and geographical markets have been sheltered from competition, distorted patterns emerge in the trade of goods, works and services destined for the public sector. These trade patterns represent a serious impediment in the functioning of the common market and inhibit the fulfillment of the principles enshrined in the Treaties.<sup>8</sup>

The European Court of Justice has been instrumental in interpreting the public procurement legal framework. The Court has provided intellectual assistance to the efforts of European institutions in order to strengthen the three principles (non-discrimination, objectivity and transparency) underlying the regulation of public procurement,<sup>9</sup> to eliminate discrimination and non-tariff barriers in the fields of technical standards (product specification and standardization) and the selection procedures (quantitative and qualitative suitability criteria). The jurisprudence of the Court also reflects on a strategic goal of the European judiciary: to vest the regime wherever possible with direct effect. Arming the public procurement rules with direct effect will enhance access to justice at national level, improve compliance, increase the quality of the regulatory regime and finally streamline the public procurement process across the common market by introducing an element of uniformity. By conferring direct effect upon the public procurement directives and inviting national courts to play a prominent role in future public procurement litigation, the Court has hinted towards its preference for a decentralised enforcement of the public procurement regime. However, the most important lesson law and policy maker have learnt from the Court's jurisprudence reflects on a *rule of reason approach* which propels public procurement regulation as an instrument of policy making at national and European levels.

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<sup>7</sup> The term implies a firm with more than a third of its turnover made in its own country and has enjoyed formal or informal government protection. The term has been defined by Abravanel, and Ernst (1992), 'Alliance and Acquisition Strategies for European National Champions' (1992) 2 *The McKinsey Quarterly* 45–62.

<sup>8</sup> See Nicolaides (ed.), *Industrial Policy in the European Community: A Necessary Response to Economic Integration*, Dordrecht: Martinus Nijhoff, 1993.

<sup>9</sup> See the recital of Directive 89/440, [1989] OJ L210/1 amending the original works Directive 71/305 concerning co-ordination of procedures for the award of public works contracts, stating that '... it is necessary to improve and extend the safeguards in the directives that are designed to introduce transparency into the procedures and practices for the award of such contracts, in order to be able to monitor compliance with the prohibition of restrictions more closely and at the same time to reduce disparities in the competitive conditions faced by nationals of different Member States'.

## 1. A THEMATIC OVERVIEW OF PUBLIC PROCUREMENT REGULATION

European Directives which govern the award of public contracts in the supplies, works and services sectors, as well as in the public utilities<sup>10</sup> have been adopted by the European Union after a considerable amount of debate and consultation.<sup>11</sup> The new Directives reflect on the 1996 European Commission's Green Paper on Public Procurement<sup>12</sup> and the following 1998 Commission's Communication.<sup>13</sup> The Directives have been seen as an integral part of the Commission's 2000 Work Programme, which pledges to modernize the relevant legislation for the completion of the internal market and at the same time implement the Lisbon European Council's call for economic reform within the internal market.

The Directives are based upon two premises: *simplification* and *modernization*. Drawing on the wealth of experience from the application and implementation of previous legal regimes and the Court's jurisprudential inferences to public procurement regulation, the new Directives are set to achieve the challenging objective to fully integrate public sector purchasing in the common market and abolish any remaining non-tariff barriers.

Although the same fundamental principles underpin procurement liberalization in both the government and utilities sectors, the new regime maps a clear-cut *dichotomy* between the public sector and the utilities. Their separate regulation reveals the diametrically opposed nature of the contracting authorities/entities under these sectors and reflects on the process of transformation that utilities have been undergoing over

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<sup>10</sup> See Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134 and Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134. The new Directives amend the existing regime which is applicable until 31 January 2016 and includes the following instruments: the Public Supplies Directive 93/36/EC, [1993] OJ L199, as amended by Directive 97/52/EC [1997] OJ L328 and Directive 2001/78/EC [2001] OJ L285; the Public Works Directive 93/37/EC [1993] OJ L199, amended by Directive 97/52/EC [1997] OJ L328 and Directive 2001/78/EC [2001] OJ L285; The Utilities Directives 93/38/EC [1993] OJ L199, amended by Directive 98/4/EC [1998] OJ L101; the Public Services Directive 92/50/EEC [1992] OJ L209, amended by Directive 97/52/EC [1997] OJ L328 and Directive 2001/78/EC [2001] OJ L285; the Remedies Utilities Directive 92/13/EEC [1992] OJ L076; the Public Remedies Directive 89/665/EEC [1989] OJ L395.

<sup>11</sup> See the proposal from the European Commission [2001] OJ C29E/11 and [2002] OJ C203E/210; the opinion of the Economic and Social Committee [2001] OJ C193/7; the opinion of the Committee of the Regions [2001] OJ C144/23; the opinion of the European Parliament of 17 January 2002 [2002] OJ C271E/176), Council Common Position of 20 March 2003 [2003] OJ C147/1) and Position of the European Parliament of 2 July 2003. See also the Legislative Resolution of the European Parliament of 29 January 2004 and Decision of the Council of 2 February 2004.

<sup>12</sup> See the Green Paper on Public Procurement in the European Union: Exploring the way forward, European Commission 1996.

<sup>13</sup> See European Commission, Communication on Public Procurement in the European Union, COM(98) 143.

the past decade. Their change in ownership from public to private has stimulated commercialism and competitiveness and provided for the justification of a more relaxed regime and the acceptance that utilities, in some form or another represent *sui generis* contracting authorities which do not need a rigorous and detailed regulation of their procurement.

The dichotomy in regulation which the new public procurement regime has established to separate public sector procurement from utilities procurement exposes an insight into current market conditions and political priorities across the European Union, as well as an indication that the main emphasis should be placed on attempts to open up the public sector.

The merger of the rules governing supplies, works and services procurement into a single legal instrument represents a successful attempt on the part of the European Union to codify supranational administrative provisions which have the aim to harmonize domestic legal regimes, public or private, which co-ordinate the award of public contracts. The codification, apart from the obvious benefits of legal certainty and legitimate expectation, has two important implications: legal efficiency and compliance discipline. As far as legal efficiency is concerned, the new codified Directive will speed up and streamline its implementation process by Member States, especially the new arrivals from the 2004 Accession Treaty, and provide for a one-stop shop reference point in national legal orders, augmented by the Court's vesting of direct effectiveness upon the Directive's predecessors in numerous occasions. On the other hand, codification will enhance compliance, as it will remove any remaining uncertainties over the applicability of the previously fragmented regime and afford contracting authorities a disciplined method in dispersing their procurement functions. The main influence of the codified public sector procurement Directive can be traced in important recent case-law developments<sup>14</sup> from the European Court of Justice, in particular case-law on the definition of contracting authorities, the use of award procedures and award criteria, and the possibility for contracting authorities to use environmental and social considerations as criteria for the award of public contracts.<sup>15</sup>

As far as utilities procurement is concerned, the two main reasons for the introduction of a distinctive legal regime which aims at coordinating procedures for the award of contracts in the utilities sectors revolve around the relations of the state with such entities. First, the numerous ways in which national authorities can influence the

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<sup>14</sup> For a comprehensive analysis of the public procurement case law, see Bovis, 'Recent Case Law Relating to Public Procurement: A Beacon for the Integration of Public Markets', (2002) 39(5) *Common Market Law Review* 1025–56.

<sup>15</sup> See Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions, 'Working together to maintain momentum' 2001 Review of the Internal Market Strategy, Brussels, 11 April 2001, COM(2001)198 final. Also, European Commission, Commission Communication, Public procurement in the European Union, Brussels, 11 March 1998, COM (98) 143. See Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM (2001) 566, 15 October 2001. Also, Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274, 4 July 2001.

purchasing behaviour of these entities, such as participation in their capital and representation in their administrative, managerial or supervisory bodies. Secondly, the closed nature of the markets in which utilities operate, as a result of special or exclusive rights granted by the Member States, necessitates the operation of a procurement regulatory regime which ensures on the one hand compliance with the fundamental principles of the EU Treaties and on the other hand compatibility with anti-trust and sector specific regulation in the utilities sectors.

## 2. THE CONCEPTS IN PUBLIC SECTOR PROCUREMENT

The codified public sector Directive has introduced a series of new concepts which are the product of jurisprudential inferences and policy refining of the previous legal regimes. They intend to modernize public purchasing and align the procurement of government and its agencies with that of utilities which operate in a more commercially oriented environment.

### 2.1 Eligibility of Bodies Governed by Public Law to Tender

The new public sector Directive clearly accepts that entities which are covered by its rules can participate in the award of public contracts, alongside private sector undertakings. Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a public contract does not cause any distortion of competition in relation to private tenderers. The eligibility of bodies governed by public law to participate in tendering procedures has been influenced by case-law.<sup>16</sup> There is a protection mechanism built in Article 55(e) of the public sector Directive, which specifies that in case of abnormally low tenders, the contracting authority may reject those tenders, if it establishes that the tenderer is the recipient of state aid which may have been granted illegally. The onus to prove the legitimacy of the state aid rests with the tenderer.

It should be mentioned that the existing Directives provide for an automatic disqualification of an 'obviously abnormally low offer'. The term has not been interpreted in detail by the Court and serves rather as an indication of a 'bottom limit'.<sup>17</sup> The Court, however, pronounced on the direct effect of the relevant provision requiring contracting authorities to examine the details of the tender before deciding the award of the contract and to seek from the tenderer an explanation for the price submitted.

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<sup>16</sup> See Case C-94/99, *ARGE Gewässerschutz v Bundesministerium für Land-und Forstwirtschaft*, para 30, judgment of 7 December 2000, where the Court ruled that directly or indirectly subsidized tenders by the state or other contracting authorities or even by the contracting authority itself can be legitimately part of the evaluation process.

<sup>17</sup> Case 76/81, *SA Transporoute et Travaux v Minister of Public Works* [1982] ECR 457.

The debate over the terminology of ‘obviously abnormally low’ tenders surfaced when the Court held<sup>18</sup> that rejection of a contract based on mathematical criteria without giving the tenderer an opportunity to furnish information is inconsistent with spirit of the public procurement Directives. The Court, following previous case-law,<sup>19</sup> ruled that the contracting authorities must give an opportunity to tenderers to furnish explanations regarding the genuine nature of their tenders, when those tenders appear to be abnormally low. However, the Court did not analyze the meaning of ‘obviously’. It seems, in the author’s view, that the term ‘obviously’ indicates the existence of precise and concrete evidence as to the abnormality of the low tender. On the other hand, the wording ‘abnormally’ implies a quantitative criterion left to the discretion of the contracting authority. Nonetheless, if the tender is just ‘abnormally’ low, it could be argued that it is within the discretion of the contracting authority to investigate the genuine offer of a tender. *Impresa Lombardini*<sup>20</sup> followed *Transporoute* and maintained the unlawfulness of mathematical criteria used as an exclusion of a tender which appears abnormally low. Yet, it held that such criteria may be lawful if used for determining the abnormality of a low tender, provided an *inter partes* procedure between the contracting authority and the tenderer that submitted the alleged abnormal low offer presents the opportunity to clarify the genuine nature of that offer. Contracting authorities must take into account all reasonable explanations furnished and avoid limiting the grounds on which justification of the genuine nature of a tender should be made. In *ARGE*,<sup>21</sup> the rejection of a tender based on the abnormally low pricing attached to it got a different twist in its interpretation. Although the Court ruled that directly or indirectly subsidized tenders by the state or other contracting authorities or even by the contracting authority itself can legitimately be part of the evaluation process, it did not elaborate on the possibility of rejection of an offer, which is appreciably lower than those of unsubsidized tenderers by reference to the abnormally low disqualification ground.<sup>22</sup>

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<sup>18</sup> See Case 103/88, *Fratelli Costanzo S.p.A. v Comune di Milano*, [1989] ECR 1839; Case 296/89, *Impresa Dona Alfonso di Dona Alfonso & Figli s.n.c. v Consorzio per lo Sviluppo Industriale del Comune di Monfalcone*, judgment of 18 June 1991.

<sup>19</sup> See Case 76/81 *Transporoute*, [1982] ECR 417, *op.cit.*

<sup>20</sup> See Cases C-285/99 & 286/99, *Impresa Lombardini SpA v ANAS*, judgment of 27 November 2001.

<sup>21</sup> See Case C-94/99, *ARGE Gewässerschutz v Bundesministerium für Land-und Forstwirtschaft*, para 30, judgment of 7 December 2000.

<sup>22</sup> In *ARGE* the Court adopted a literal interpretation of the Directives and concluded that if the legislature wanted to preclude subsidized entities from participating in tendering procedures for public contracts, it should have said so explicitly in the relevant Directives. See paras 26 *et seq* of the Court’s judgment. Although the case has relevance in the fields of selection and qualification procedures and award criteria, the Court made no references to previous case-law regarding state aids in public procurement, presumably because the *Dupont de Nemours* precedent is still highly relevant.

## 2.2 Joint and Centralized Procurement

The public sector Directive aims at introducing a regime where procurement can benefit from scale economies and streamlining planning, operation and delivery. In the light of the diversity of public procurement contracts in Member States, contracting authorities have been given the freedom to make provision for contracts for the design and execution of work to be awarded jointly. The decision to award contracts jointly must be determined by qualitative and economic criteria, which may be defined by national law. According to Article 1(10) of the public sector Directive, a central purchasing body is a contracting authority which: (i) acquires supplies and/or services intended for contracting authorities, or (ii) awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.

## 2.3 Official List of Contractors

The public sector Directive provides for a central system of certification of private and public organizations for the purposes of providing evidence of financial and economic standing as well as levels of technical capacity in public procurement selection and qualification procedures. Such systems must be mutually recognized by all Member States and registration of entities in official lists of contractors, suppliers or service providers is influenced by the Court's case-law,<sup>23</sup> where an economic operator belonging to a group claims the economic, financial or technical capabilities of other companies in the same group in support of its application for registration. Member States may determine the level of requirements to be met for such registrations and the period of their validity, in particular requirements for joint and several liability where an operator relies on the financial standing of another company in the same group.

## 2.4 The Competitive Dialogue

The competitive dialogue is the most publicized change brought about by the new public procurement regime. Its inception is attributed to three reasons: (i) the inability of open or restricted procedures to facilitate the award of complex public contracts, including concessions and public-private partnerships; (ii) the exceptional nature of negotiated procedures without prior advertisement;<sup>24</sup> and (iii) the restrictive

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<sup>23</sup> See Case C-76/81, *SA Transporoute et Travaux v Minister of Public Works* [1982] ECR 457; Case C-27/86, *Constructions et Entreprises Industrielles S.A (CEI) v Association Intercommunale pour les Autoroutes des Ardennes*; Case C-28/86, *Ing.A. Bellini & Co. S.p.A. v Regie de Betiments*; Case C-29/86, *Ing.A. Bellini & Co. S.p.A. v Belgian State* [1987] ECR 3347; Case C-389/92, *Ballast Nedam Groep NV v Belgische Staat* [1994] 2 CMLR 836; Case C-5/97, *Ballast Nedam Groep NV v Belgische Staat*, judgment of 18 December 1997; Case C-176/98, *Holst Italia v Comune di Cagliari*, judgment of 2 December 1999.

<sup>24</sup> Negotiated procedures without prior advertisement are exceptionally allowed 'when for technical or artistic reasons or reasons connected with the protection of exclusive rights the services could only be procured by a particular provider ... and ... in cases of extreme urgency brought about by events unforeseeable by the contracting authority'. In Cases C-199/85,

interpretation<sup>25</sup> of the grounds for using negotiated procedures with prior advertisement.

Article 29 of the public sector Directive establishes the competitive dialogue as an award procedure, alongside open, restricted and negotiated procedures. The competitive dialogue must be used exceptionally in cases of particularly complex contracts, where the use of the open or restricted procedures will not allow the award of the contract, and the use of negotiated procedures cannot be justified. A public contract is considered to be particularly complex where the contracting authorities are not able to define in an objective manner the technical specifications which are required to pursue the project, or they are not able to specify the legal or financial make-up of a project.

The procedure is very complex, as it has three main phases and many options within these phases. First, the advertisement phase according to Article 29(2) obliges contracting authorities to publish a contract notice or a descriptive document outlining their needs and basic specifications of the project. After that phase and before launching a competitive dialogue for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications, provided that such advice does not have the effect of precluding competition.

Secondly, a selection phase reduces the candidates to be invited to the competitive dialogue according to the relevant provisions of Articles 44 to 52 of the public sector Directive.<sup>26</sup> The minimum number of candidates should be three but it could be lower if there is sufficient evidence of competitiveness in the process or the limited number of initial respondents to the contract notice precludes the invitation of at least three candidates.

Thirdly, the competitive dialogue is opened by the commencement of the award phase in accordance with Article 29(3). Contracting authorities must open a dialogue

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*Commission v Italy* [1987] ECR 1039 and C-3/88, *Commission v Italy* [1989] ECR 4035, the Court rejected the existence of exclusive rights and regarded the abuse of this provision as contrary to the right of establishment and freedom to provide services which are based on the principle of equal treatment and prohibit not only overt discrimination on grounds of nationality, but also all covert forms of discrimination, which, by the application of other criteria of differentiation, lead to the same result. Interestingly, in Case 199/85, *Commission v Italy*, *op.cit.*, the Court elucidated that exclusive rights might include contractual arrangements such as know-how and intellectual property rights. For urgency reasons brought by unforeseen events to contracting authorities the Court established two tests: (i) the need of a justification test based on the proportionality principle, and (ii) the existence of a causal link between the alleged urgency and the unforeseen events (see C-199/85, *Commission v Italy*, *op.cit.*; C-3/88, *Commission v Italy*, *op.cit.*; Case C-24/91, *Commission v Spain* [1994] 2 CMLR 621; Case C-107/92, *Commission v Italy*, judgment of 2 August 1993; Case C-57/94, *Commission v Italy*, judgment of 18 May 1995; Case C-296/92, *Commission v Italy*, judgment of 12 January 1994).

<sup>25</sup> The grounds for using this procedure are confined to: (i) the nature of the works or services or risks attached thereto do not permit overall pricing and (ii) the nature of the services is such that specifications cannot be established with sufficient precision. See Article 7(2)(c) of the Works Directive and Articles 11(2)(b) and 11(2)(c) of the Services Directive.

<sup>26</sup> Articles 44 to 46 of the Public Sector Directive 2004/18 govern the conduct of the procedure for verification of the suitability and choice of participants and award of contracts, criteria for qualitative selection, and suitability to pursue a professional activity.

with the candidates selected, the aim of which is to identify the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates, ensuring equality of treatment among all tenderers. In particular, they must not provide information in a discriminatory manner which may give some tenderers an advantage over others. Contracting authorities may not reveal to the other participants' solutions proposed or other confidential information communicated by a candidate participating in the dialogue without prior agreement granted from that candidate.

Contracting authorities may provide for the competitive dialogue to take place in successive stages in order to reduce the number of solutions to be discussed with the candidates in accordance with Article 29(4). They may continue the dialogue until they can identify the solution or solutions which are capable of meeting their needs. Having declared that the dialogue is concluded and having informed the participants, contracting authorities must ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

After this phase is over (closure of the competitive dialogue), there are four stages until the contract award. First, contracting authorities must ask all remaining candidates to submit their final tenders (Article 44(4)). Secondly, these tenders need to be finalized prior to their evaluation (Article 29(6)). Thirdly, the selection of the winning tenderer must take place in accordance with the criteria stipulated in the contract notice (Article 29(7)) and fourthly the winning tenderer must provide further clarification and his commitment to undertake the project (Article 29(7)).

The tenders must contain all the elements required and considered necessary for the performance of the project. They may be clarified, specified and fine-tuned at the request of the contracting authority. However, any additional information must not involve any changes to the basic features of the tender or the call for tender, nor allow for variations which are likely to distort competition or have a discriminatory effect. In the author's view, there is a great deal of uncertainty over the meaning of clarification, additional provision of tender specification and the extent of fine-tuning, to the degree of compromising the competitiveness and integrity of the procedure.

Contracting authorities must assess the tenders received on the basis of the award criteria laid down in the contract notice or the descriptive document and must choose the most economically advantageous tender in accordance with Article 53. At the request of the contracting authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or discriminating against other candidates.

Overall, the competitive dialogue has addressed many of the features that are important during the award of complex projects and are currently being addressed by negotiated procedures with prior advertisement. In comparison with these procedures, the competitive dialogue allows also for a limited number of participants (three in number), introduces a staged approach to tendering and permits elimination of participants during its internal phases. However it allows significant scope for post-tender negotiations, but it restricts the award of a contract to complete offers.

## 2.5 Framework Procurement

The existing utilities Directives have introduced framework agreements as a selection and tendering procedure which is influenced to a large extent by the benefits of chain supply management and partnering schemes operating in the private sector. The new utilities Directive has maintained the framework agreements regime in virtually unaltered format as laid down in Article 17(3). Within the provisions of the new utilities Directive, when an entity established a framework agreement under the relevant procedures which are common to other public contracts covered therein, subsequent individual contracts concluded under the framework agreement may be awarded without having recourse to a call for competition. Individual contracts which have been awarded under a framework agreement could be subject to the reopening of tendering procedures, provided the contracting entity does not invite new tenderers to participate. The Directive specifically stipulates that misuse of framework agreements may distort competition and trigger the application of the relevant rules, particularly with reference to concerted practices which lead to collusive tendering.

The new public sector Directive has for the first time introduced framework procurement to the public sector contracting authorities. According to Article 1(5) of the public sector Directive, a framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms and conditions of public contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity of supplies, works or services envisaged.

Contracting authorities may establish framework agreements in accordance with the provisions of the public sector Directive relating to advertising, time limits and conditions for the submission of tenders. The parties to the framework agreement must be chosen by applying the award criteria set in accordance with Article 53. Article 53 refers to the award criteria being the most economically advantageous offer or the lowest price. When the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, 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. When the award criterion refers to the lowest price only, no other factors should play a part. Contracting authorities may subsequently enter into contracts based on such framework agreements during their term of validity either by applying the terms set forth in the framework agreement or, if terms and conditions for the conclusion of contracts have not been fixed in advance, by reopening competition between the parties to the framework agreement. The reopening of competition should comply with certain rules<sup>27</sup> the aim of which is to guarantee the

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<sup>27</sup> According to Article 32(4) of the Public Sector Directive 2004/18, the conditions for reopening competition within a framework agreement include: (a) for every contract to be awarded, contracting authorities must consult in writing the economic operators capable of performing the contract; (b) contracting authorities must fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such

required flexibility and to guarantee respect for the general principles, in particular the principle of equal treatment.

Contracts based on a framework agreement must be awarded in accordance with the procedures of Article 32, which must be applied only between the contracting authorities and the economic operators originally party to the framework agreement. The duration of a framework agreement may not exceed four years, unless exceptional cases justify its extension. Framework agreements can be established between contracting authorities and a single economic operator according to Article 32(3) in exceptional circumstances which must be justified by the nature of the framework agreement, or with several economic operators according to Article 32(4). The latter must be at least three in number, provided that there are a sufficient number of economic operators to satisfy the selection criteria or there are a sufficient number of admissible tenders which meet the award criteria. Contracting authorities are under an obligation not to use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

## 2.6 Electronic Procurement

The rapid expansion of electronic purchasing systems in private sector procurement and the continuous development of electronic purchasing techniques have made an impact with the public sector Directive. Electronic procurement can contribute in increasing competition and streamlining public purchasing, particularly in cases where repetitive purchasing allows efficiencies to be achieved both in time and in financial terms.

### 2.6.1 Dynamic purchasing systems

Article 1(6) of the public sector Directive provides for the establishment of dynamic purchasing systems. A dynamic purchasing system is an electronic process which allows contracting authorities to utilize techniques available to the private sector in order to procure supplies or services of repetitive nature. Any economic operator which submits an indicative tender in accordance with the specification and meets the selection criteria should be allowed to join such a system. This purchasing technique allows contracting authorities, through the establishment of a pre-selected list of tenderers, to have a particularly broad range of tenders as a result of the electronic facilities available, and to ensure, in principle, optimum use of public funds through broad competition.

The use of dynamic purchasing systems is described in Article 33 of the public sector Directive. In order to set up a dynamic purchasing system, contracting authorities must follow the open procedure in all its phases up to the award of the contracts. All the tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the technical specification must be admitted to

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as the complexity of the subject-matter of the contract and the time needed to send in tenders; (c) tenders must be submitted in writing, and their content must remain confidential until the stipulated time limit for reply has expired; (d) contracting authorities must award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

the system; indicative tenders may be improved at any time provided that they continue to comply with the overall specifications.

With a view to setting up the system and proceeding to the award of contracts under that system, contracting authorities must use solely electronic means in accordance with Article 42(2) to (5). For these purposes contracting authorities must:

- (a) publish a contract notice making it clear that a dynamic purchasing system is involved;
- (b) indicate in the specification, amongst other matters, the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;
- (c) offer by electronic means, on publication of the notice and up to the expiry of the system, unrestricted, direct and full access to the specification and to any additional documents and must indicate in the notice the internet address at which such documents may be consulted.

Contracting authorities must give every economic operator participating in the dynamic purchasing system the possibility of submitting an indicative tender throughout the entire period of such system. Each specific contract must be the subject of an invitation to tender. Before issuing the invitation to tender, contracting authorities must publish a simplified contract notice inviting all interested economic operators to submit an indicative tender within a time limit of at least 15 days. The duration of a dynamic purchasing system may not exceed four years, except in duly justified exceptional cases. Contracting authorities are under an obligation not to levy any charges attributed to the operation of dynamic purchasing systems to the interested economic operators admitted to such systems

### **2.6.2 Electronic auctions**

According to Article 1.7 of the public sector Directive an electronic auction is a repetitive process involving an electronic device for the presentation of new prices which are revised downwards, or new values concerning certain elements of tenders. The presentation of such financial information occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

Article 54 of the public sector Directive stipulates the parameters for the use of electronic auctions. In open, restricted or negotiated procedures, contracting authorities may decide that the award of a public contract must be preceded by an electronic auction when the contract specifications can be established with precision. In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in the second indent of the second subparagraph of Article 32(4) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 33. The electronic auction must be based: (i) either solely on prices when the contract is awarded to the lowest price, or (ii) on prices and/or on the new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender.

Contracting authorities who decide to hold an electronic auction must indicate their intention in the contract notice. The contract specifications must include, *inter alia*, the following details:

- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) the relevant information concerning the electronic auction process;
- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation must provide the full evaluation framework in accordance with the respective weighting of the award criteria. The invitation must also state the mathematical formula to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices or new values submitted. That formula must incorporate the weighting of all the criteria fixed to determine the most economically advantageous tender. Where variants are authorized, a separate formula must be provided for each variant. After closing an electronic auction contracting authorities must award the contract in accordance with Article 53 on the basis of the results of the electronic auction. Contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as specified in the contract notice and defined in the specifications.

## **2.7 The Award Criteria and the Introduction of Policies in Public Procurement**

### **2.7.1 Contractual performance and public procurement**

Conditions relating to the performance of public contracts are compatible with the public sector Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment.

The new public sector Directives and the new utilities Directives remain silent over the possibility of expressly authorizing social or environmental consideration as part of the award criteria of public contracts. Although the draft Directives, at the insistence of the European Parliament, contained specific provisions relevant to workforce matters as part of the award criteria, such provisions were omitted from the final text. The Commission has adopted a myopic view that considerations related to contractual

performance cannot be used as criterion for the award of the contract. The Court had the opportunity to correct the Commission's interpretation and point to the right direction of its judgments,<sup>28</sup> where a condition relating to the employment of long-term unemployed persons or the protection of the environment can legitimately constitute a criterion for the award of the contract. However, the new public procurement regime has failed to adopt previous jurisprudential inferences and clarify the position of contacting authorities over the legitimacy of pursuing socio-economic and environmental policies through public procurement.<sup>29</sup>

Examples of conditions relevant to contractual performance in public contracts may include requirements to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the International Labour Organization (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

However, according to Article 19 of the public sector Directive, a specific category of public sector contracts are regarded as reserved contracts. This is the only concession the Commission afforded Member States in relation to the socio-economic dimension of the award criteria of public contracts. Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions. The contract notice must make reference to this provision.

In addition, the laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, providing that such rules, and their application, comply with Community law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services<sup>30</sup> lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.

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<sup>28</sup> See Case 31/87, *Gebroeders Beentjes v The Netherlands* [1989] ECR 4365 at para 14; Case C-225/98, *Commission v French Republic (Nord-Pas-de-Calais)* [2000] ECR I-7445), at para 52; Case C-513/99, *Concordia Bus Finlandia v Helsingin Kaupunki et HKL-Bussiliikenne* [2002] ECR I-7213, at para 31.

<sup>29</sup> For a detailed analysis of the ordo-liberal versus the neo-liberal approach in public procurement regulation, see Bovis, 'Public Procurement and the Internal Market of the 21st Century: Economic Exercise versus Policy Choice', Chapter 17 in *EU Law for the 21st Century: Rethinking the New Legal Order*, footnote 9, *op.cit.*

<sup>30</sup> See [1997] OJ L18/1.

### 2.7.2 The most economically advantageous offer

The most economically advantageous offer as an award criterion has provided the Court with the opportunity to balance the economic considerations of public procurement with policy choices. Although in numerous instances the Court has maintained the importance of the economic approach<sup>31</sup> to the regulation of public sector contracts, it has also recognized the relative discretion of contracting authorities to utilize non-economic considerations as award criteria.

The meaning of the most economically advantageous offer<sup>32</sup> includes a combination of factors chosen by the contracting authority, including price, delivery or completion date, running costs, cost-effectiveness, profitability, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitments with regard to spare parts and components and maintenance costs, security of supplies. The above list is not exhaustive and the factors listed therein serve as a guideline for contracting authorities in the weighted evaluation process of the contract award. The Court reiterated the flexible and wide interpretation of the relevant award criterion<sup>33</sup> and had no difficulty in declaring that contracting authorities may use the most economically advantageous offer as award criterion by choosing the factors which they want to apply in evaluating tenders,<sup>34</sup> provided these factors are mentioned in hierarchical order or descending sequence in the invitation to tender or the contract documents,<sup>35</sup> so that tenderers and interested parties can clearly ascertain the relative weight of factors other than price for the evaluation process. However, factors which have no strict relevance in determining the most economically advantageous offer by reference to objective criteria do involve an element of arbitrary choice and therefore should be considered as incompatible with the Directives.<sup>36</sup>

A question was put before the Court in *Concordia*<sup>37</sup> intended to assess the integral function of the factors that comprise the most economically advantageous offer for contracting authorities. The question was as to whether, under the most economically advantageous offer, each individual award factor has to provide an economic advantage which directly benefits the contracting authority, or whether it is sufficient that each

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<sup>31</sup> See Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge* [2000] ECR I-8035 at para 17; Case C-44/96, C-44/96, *Mannesmann Anlagenbau Austria AG et al v Strohal Rotationsdurck GesmbH*, [1998] ECR I-73 at para 33; Case C-360/96, *Gemeente Arnhem Gemeente Rheden v BFI Holding BV*, [1998] ECR I-6821 at paras 42 and 43; Case C-237/99, *Commission v France*, judgment of 1 February 2001 (OPAC), at paras 41 and 42.

<sup>32</sup> See Article 26 of Directive 93/36, Article 30 of Directive 93/37, Article 34 of Directive 93/38 and Article 36 of Directive 92/50.

<sup>33</sup> Case 31/87, *Gebroeders Beentjes v The Netherlands*, [1989] ECR 4365.

<sup>34</sup> Case C-324/93, *R. v The Secretary of State for the Home Department, ex parte Evans Medical Ltd and Macfarlane Smith Ltd*, judgment of 28 March 1995, where the national court asked whether factors concerning continuity and reliability as well as security of supplies fall under the framework of the most economically advantageous offer, when the latter is being evaluated.

<sup>35</sup> See para 22 of *Beentjes*.

<sup>36</sup> See para 37 of *Beentjes*.

<sup>37</sup> See Case C-513/99, *Concordia Bus Finlandia v Helsingin Kaupunki et HKL-Bussiliikenne*, [2002] ECR I-7213. The case concerns, *inter alia*, the permissibility of environmental considerations as part of the award criteria.

individual factor has to be measurable in economic terms, without the requirement that it directly provides an economic advantage for the contracting authority in the given contract.

Although there is wide discretion conferred on contracting authorities in compiling the relevant factors, subject to the requirements of relevance to the contract in question and their publicity, their relative importance, in economic terms, remains somehow unknown. In other words, the discretion conferred to contracting authorities would permit a wide range of factors to feature as part of award criteria in public contracts, without the need to demonstrate a direct economic advantage to a contracting authority which is attributable to each of these factors. On the contrary, if each individual factor has to establish a measurable (in quantifiable terms) economic advantage to the contracting authority, which is directly attributed to its inclusion as part of the award criterion, the discretion of contracting authorities is curtailed, since they would be required to undertake and publicise in the tender or contract documents a clear cost-benefit analysis of the relevant factors that comprise in their view the most economically advantageous offer.

*2.7.2.1 Social considerations* In *Beentjes*,<sup>38</sup> the Court ruled that social policy considerations and in particular measures aiming at the combating of long term unemployment could only be part of the award criteria of public contracts, especially in cases where the most economically advantageous offer is selected. The Court accepted that the latter award criterion contains features that are not exhaustively defined in the Directives, therefore there is discretion conferred on contracting authorities to specify what would be the most economically advantageous offer for them. However, contracting authorities cannot refer to such measures as a selection criterion and disqualify candidates who could not meet the relevant requirements. The selection of tenderers is a process, which is based on an exhaustive list of technical and financial requirements expressly stipulated in the relevant Directives and the insertion of contract compliance as a selection and qualification requirement would be considered *ultra vires*. The Court held that a contractual condition relating to the employment of long term unemployed persons is compatible with the public procurement Directives, if it has no direct or indirect discriminatory effect on tenders from other Member States. Furthermore, such a contractual condition must be mentioned in the tender notice.<sup>39</sup> Rejection of a contract on the grounds of a contractor's inability to employ long-term unemployed persons has no relation to the checking of the contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability. The Court maintained that measures relating to employment could be utilised as a feature of the award criteria only when they are part of a contractual obligation of the public contract in question and on condition that they do not run contrary to the fundamental principles of the Treaty. The significance of that qualification has revealed the Court's potential stance over the issue of contract compliance in public procurement.

In the recent case *Nord-pas-de-Calais*, the Court considered whether a condition linked to a local project to combat unemployment could be considered as an award

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<sup>38</sup> See Case 31/87, *Gebroeders Beentjes B.V v The Netherlands*, *op.cit.*

<sup>39</sup> See Case 28/86 *Bellini* [1987] ECR 3347.

criterion of the relevant contract. The Court held that the most economically advantageous offer does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination deriving from the provisions of the Treaty on the right of establishment and the freedom to provide services.<sup>40</sup> Furthermore, even if such a criterion is not in itself incompatible with Directive 93/37, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising.<sup>41</sup> The Court therefore accepted the employment considerations as an award criterion, part of the most economically advantageous offer, provided it is consistent with the fundamental principles of Community law, in particular the principle of non-discrimination and it is advertised in the contract notice.

The Court's rulings in *Beentjes* and *Nord-pas-de-Calais* have opened an interesting chapter in public procurement jurisprudence. *Beentjes* started a debate on the integral dimensions of contract compliance and differentiated between the *positive* and *negative* approaches. A positive approach within contract compliance encompasses all measures and policies imposed by contracting authorities on tenderers as suitability criteria for their selection in public procurement contracts. Such positive action measures and policies intend to complement the actual objectives of public procurement, which are confined in economic and financial parameters and are based on a transparent and predictable legal background. Although the complementarity of contract compliance with the actual aims and objectives of the public procurement regime was acknowledged, the Court has been reluctant in accepting such a flexible interpretation of the Directives and based on the literal interpretation of the relevant provisions disallowed positive actions of a social policy dimension as part of the selection criteria for tendering procedures in public procurement. However, it should be mentioned that contract compliance could incorporate not only unemployment considerations, but also promote equality of opportunities and eliminate sex or race discrimination in the relevant market.<sup>42</sup> Indeed, the Directives on public procurement stipulate that the

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<sup>40</sup> See *Beentjes*, para 29.

<sup>41</sup> See, to that effect, para 31, where the Court stipulated that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors may become aware of its existence.

<sup>42</sup> There are a number of legal instruments relevant to social policy at Community level that may apply to public procurement. They include, in particular, Directives on safety and health at work (for example, Council Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work, and Directive 92/57 on the implementation of minimum safety and health requirements at temporary or mobile construction sites), working conditions and the application of employment law (for example, Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, and Directive 2001/23 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L82/16, codifying Directive 77/187/EEC), Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ([2000] OJ L303/16).

contracting authority may require tenderers to observe national provisions of employment legislation when they submit their offers. The ability to observe and conform to national employment laws in a Member State may constitute a ground of disqualification and exclusion of the defaulting firm from public procurement contracts. In fact, under such interpretation, contract compliance may be a factor of selection criteria specified in the Directives, as it contains a *negative approach* to legislation and measures relating to social policy.<sup>43</sup>

*2.7.2.2 Environmental considerations* In *Concordia*,<sup>44</sup> the Court was asked, *inter alia*, whether environmental considerations such as low emissions and noise levels of vehicles could be included amongst the factors of the most economically advantageous criterion, in order to promote certain types of vehicles that meet or exceed certain emission and noise levels. The Advocate-General in his opinion<sup>45</sup> followed the *Beentjes* principle, establishing that contracting authorities are free to determine the factors under which the most economically advantageous offer is to be assessed and that environmental considerations could be part of the award criteria, provided they do not discriminate against alternative offers, and that they have been clearly publicized in the tender or contract documents. However, the inclusion of such factors in the award criteria should not prevent alternative offers that satisfy the contract specifications being taken into consideration by contracting authorities.<sup>46</sup> Criteria relating to the environment, in order to be permissible as additional criteria under the most economically advantageous offer must satisfy a number of conditions, namely they must be objective, universally applicable, strictly relevant to the contract in question, and clearly contribute an economic advantage to the contracting authority.<sup>47</sup>

Under Article 6 of the EU Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of the EU Treaty, in particular with a view to promoting sustainable development. The public sector Directive clarifies how contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring fairness and competition in the award of public contracts. Article 50 of the public sector Directive deals with environmental

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<sup>43</sup> It should be mentioned that adherence to health and safety laws have been considered by a British court as part of the technical requirements specified in the Works Directive for the process of selection of tenderers; see *General Building and Maintenance v Greenwich Borough Council*, [1993] IRLR 535. Along these lines, see the Commission's Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM (2001) 566, 15 October 2001.

<sup>44</sup> See Case C-513/99, *Concordia Bus Finlandia v Helsingin Kaupunki et HKL-Bussiliikenne* [2002] ECR I-7213.

<sup>45</sup> See the opinion of Advocate General Mischo delivered on 13 December 2001.

<sup>46</sup> Clearly the Advocate General wanted to exclude any possibility of environmental considerations being part of selection criteria or disguised as technical specifications, capable of discriminating against tenderers that could not meet them. See the debate in this article on selection and qualification and technical standards, pp. 2–5.

<sup>47</sup> See the analysis of the Advocate General Mischo in his opinion of *Concordia*, paras 77 to 123.

management standards. It provides that contracting authorities may require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they must refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. Contracting authorities must recognize equivalent certificates from bodies established in other Member States. They must also accept other evidence of equivalent environmental management measures from economic operators.

In appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required. Environmental management schemes, whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001 (EMAS),<sup>48</sup> can demonstrate that the economic operator has the technical capability to perform the contract. Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.

## 2.8 Small and Medium Enterprises and Subcontracting

In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting. According to Article 25 of the public sector Directive the contracting authority, in the contract documents, may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors. This indication must be without prejudice to the question of the principal economic operator's liability. The theme of public procurement and subcontracting originates in the original Works Directives where contracting authorities are allowed to specify to concessionaires a minimum percentage of the works to be subcontracted. Along these lines, Article 60 of the public sector Directive provides that the contracting authority may either: (a) require the concessionaire to award contracts representing a minimum of 30 per cent of the total value of the work for which the concession contract is to be awarded, to third parties, at the same time providing the option for candidates to increase this percentage, this minimum percentage being specified in the concession contract, or (b) request the candidates for concession contracts to specify in their tenders the percentage, if any, of the total value of the work for which the concession contract is to be awarded which they intend to assign to third parties.

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<sup>48</sup> See Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing a voluntary participation by organizations in a Community eco-management and audit scheme (EMAS) [2001] OJ L114/1.

## 2.9 Procurement and Culture

The award of public contracts for certain audiovisual services in the field of broadcasting should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For these reasons, an exception must therefore be made for public service contracts for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme and contracts concerning broadcasting times. However, this exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes. A broadcast should be defined as transmission and distribution using any form of electronic network.

## 2.10 Procurement and Probity

The award of public contracts to economic operators who have participated in a criminal organization or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Where appropriate, the contracting authorities should ask candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of a candidate or tenderer, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of *res judicata*. If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct. Non-observance of national provisions implementing Council Directives 2000/78/EC<sup>49</sup> and 76/207/EC<sup>50</sup> concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Article 45 of the public sector Directive deals with the personal situation of the candidate or tenderer. It provides that any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware

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<sup>49</sup> See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16).

<sup>50</sup> See Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40. amended by Directive 2002/73/EC of the European Parliament and of the Council [2002] OJ L269/15.

for one or more of the reasons listed below must be excluded from participation in a public contract:

- (a) participation in a criminal organization, as defined in Article 2(1) of Council Joint Action 98/733/JHA;<sup>51</sup>
- (b) corruption, as defined in Article 3 of the Council Act of 26 May 1997<sup>52</sup> and Article 3(1) of Council Joint Action 98/742/JHA<sup>53</sup> respectively;
- (c) fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities;<sup>54</sup>
- (d) money laundering, as defined in Article 1 of Council Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering.<sup>55</sup>

### 3. THE CONCEPTS IN UTILITIES PROCUREMENT

#### 3.1 Remit and Extent of Coverage

As a result of the liberalization process in public utilities across the European Union and the introduction of sector-specific regulation covering the operational interface of such entities, the regulation of their purchasing practices no longer requires the rigidity and disciplined structure of that of public sector authorities. Under the remit of flexibility envisaged by the new regime, utilities procurement has undergone a dramatic restructuring with effects varying from the relaxation of the competitive tendering regime to the total disengagement of the public procurement rules in industries that operate under competitive conditions, especially in the telecommunications and water sectors. The new utilities procurement Directive does not regard telecommunication utilities as contracting entities, since the sector has been subjected to competitive forces adequate enough to ensure its commercial character operation.

The existing utilities Directive 98/38/EC covers, at present, certain contracts awarded by contracting entities operating in the telecommunications sector. One of the consequences of telecommunications regulation has been the introduction of effective competition, both *de jure* and *de facto*, in this sector. The Commission, being aware of this development, has published a list of telecommunications services<sup>56</sup> which may already be excluded from the scope of the existing utilities Directive by virtue of Article 8 of the existing utilities Directive.

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<sup>51</sup> See [1998] OJ L351/1.

<sup>52</sup> See [1997] OJ C195/1.

<sup>53</sup> See [1998] OJ L358/2.

<sup>54</sup> See [1995] OJ C316/48.

<sup>55</sup> See [1991] OJ L166/77 as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 [2001] OJ L344/76.

<sup>56</sup> See [1994] OJ L336/1.

There are three milestones in EU telecommunications regulation. First, the actions which followed the 1987 Green Paper<sup>57</sup> opened the door for partial sector liberalization and set in motion the process of an integrated telecommunications market. Although the corporate structure of operators was left untouched and voice telephony and television broadcasting were excluded, some fundamental principles were established and created the necessary conditions for subsequent regulatory reforms. In particular, the liberalization of terminal equipment,<sup>58</sup> the community-wide interoperability,<sup>59</sup> the separation of regulatory and operational functions of public telecommunications operators,<sup>60</sup> the application of competition law to public telecommunications operators and private sector providers<sup>61</sup> and the installation of an Open Network Provision (OPN) to determine the level of competitiveness between public monopolies and private telecommunications providers.<sup>62</sup> The period that followed the 1992 Review<sup>63</sup> and the 1994 Green Paper<sup>64</sup> resulted, gradually, in a full liberalization of alternative infrastructures,<sup>65</sup> cable television networks and mobile networks. Voice telephony regulation and the liberalization of the relevant market were envisaged as the subsequent phase.

Secondly, the fully liberalized period, a period, which included the introduction of a competition regime in the telecommunications sector with the so-called full competition Directive (Directive 96/19EC).<sup>66</sup> This period witnessed significant regulatory adjustments in the field of OPN, such as interconnectivity and licensing provisions and

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<sup>57</sup> See European Commission, *Towards a Dynamic Economy – Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, COM (87) 290.

<sup>58</sup> Directive 88/301EEC on liberalizing terminal equipment in telecommunications is the first instrument that followed the 1987 Green Paper. The Directive required the abolition of exclusive rights for import, marketing, connection, bringing into service or maintenance of telecommunications terminal equipment.

<sup>59</sup> See Directive 91/263EEC replacing Directive 86/361EEC on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment. The Directive has been consolidated by Directive 98/13EC on telecommunications terminal equipment and satellite earth station equipment, including mutual recognition of its conformity. The system has been replaced with a mutual recognition framework by virtue of Directive 99/5EC on radio equipment and telecommunications terminal and mutual recognition of their conformity.

<sup>60</sup> See Directive 90/388EC (the Services Directive) as subsequently amended. The original Directive did not apply to television or radio broadcasting, telex mobile telephony paging, satellite services and voice telephony.

<sup>61</sup> See the Commission's Guidelines on the application of EC Competition Rules in the telecommunications sector [1991] OJ C233/2.

<sup>62</sup> See Directive 90/387EEC on the OPN Framework and Directive 92/44EEC on the ONP Leased Lines.

<sup>63</sup> See European Commission, *Review of the Situation in the telecommunications services sector, 1992*, SEC (92) 1048 fin.

<sup>64</sup> See European Commission, *Part I – Principles and Timetable, 1994*, COM (94) 440 fin and *Part II – A common approach to the provision of infrastructures for telecommunications in the European Union, 1995*, COM (94) 682 fin.

<sup>65</sup> Telecommunications infrastructure owned by parties different than local telecommunications operators.

<sup>66</sup> See Directive 96/19EC [1996] OJ L74 amending Directive 90/388EEC with regard to the implementation of full competition in telecommunications markets.

voice telephony and universal service liberalization.<sup>67</sup> In addition, common frameworks for interconnection of networks and licensing and authorization were provided by Directive 97/33EC<sup>68</sup> (the so-called Interconnection Directive) and by Directive 97/13EC<sup>69</sup> (the so-called Licensing Directive) respectively. The advent of competitiveness in the relevant markets introduced the notion of significant market power (SMP) in telecommunications markets,<sup>70</sup> a development which will provide a regulatory yardstick for future generations of legal and policy instruments.

Thirdly, the current phase of telecommunications regulation embraces the notion of convergence and the creation of a common regulatory framework for telecommunications, media and information technologies.<sup>71</sup> The most significant legislative measure has been the adoption of the Competition Directive 2002/76EC<sup>72</sup> on competition in the markets for electronic communications networks and services. The Directive consolidates all previous instruments and its main purpose is to reaffirm the obligation of Member States to abolish exclusive and special rights in the field of telecommunications. Furthermore, four additional Directives consolidate the telecommunications regime: the Framework Directive 2002/21EC<sup>73</sup> on a common regulatory framework for electronic communications networks and services; the Authorization Directive 2002/20EC,<sup>74</sup> the Universal Service Directive 2002/22EC<sup>75</sup> on universal service and users' rights relating to electronic communications networks and services; and the Access Directive 2002/19EC<sup>76</sup> on access to interconnection of electronic communications networks and associated facilities.

The regulatory process of telecommunications in the European Union is centred on the national regulatory authorities (NRAs), which will provide the necessary interface

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<sup>67</sup> The envisaged regulatory adjustments were enacted by virtue of Directive 97/51EC [1997] OJ L295/23 and Directive 98/10EC on the application of OPN to voice telephony and universal service for telecommunications in a competitive environment.

<sup>68</sup> See Directive 97/33EC [1997] OJ L199/32.

<sup>69</sup> See Directive 97/13EC [1997] OJ L117/15.

<sup>70</sup> See Article 4(3) of the Interconnection Directive 97/33EC regarding universal service and operability through the applications of OPN.

<sup>71</sup> See European Commission, Green Paper on the convergence of telecommunications, media and information technologies, COM (97) 623.

<sup>72</sup> See Directive 2002/76EC [2002] OJ L249/21, which consolidates the Services Directive 90/388EEC as amended by the Satellite Directive 94/46EC, the Cable Directive 95/51EC, the Mobile Directive 96/2EC, the full Competition Directive 96/19EC and the Cable Ownership Directive 1999/64 amending the Services Directive in relation to the requirement that telecommunications networks and cable TV networks owned by a single operator are separate legal entities.

<sup>73</sup> See Directive 2002/21EC [2002] OJ L108/33, which effectively replaces the OPN Framework Directive 90/387EEC, as amended by 97/51EC, and repeals Directives 90/387EEC, 92/44, the Interconnection Directive 97/33EC, the Licensing Directive 97/13EC, the Voice Telephony Directive 98/10EC and the Telecommunications Data Protection Directive 97/66EC.

<sup>74</sup> See Directive 2002/20EC, which effectively repeals all existing licensing and authorization instruments.

<sup>75</sup> See Directive 2002/22EC [2002] OJ L108/51 which replaces the relevant provisions of the Interconnection Directive 97/33EC and the Voice Telephony Directive 98/61EC.

<sup>76</sup> See Directive 2002/19 [2002] OJ 2002 L108/7, which replaces the relevant provisions of the Interconnection Directive 97/33EC and OPN Leased Lined Directive 92/44EC.

for implementing Community principles in line with national legal frameworks and market conditions. As a consequence of the above progress in the telecommunications sector and its relevant markets, the Commission considers that it is no longer necessary to regulate purchases by entities operating in this sector.

On the other hand, Directive 93/38/EC excludes from its scope purchases of voice telephony, telex, mobile telephone, paging and satellite services. Those exclusions were introduced to take account of the fact that the services in question could frequently be provided only by one service provider in a given geographical area because of the absence of effective competition and the existence of special or exclusive rights. The introduction of effective competition in the telecommunications sector removes the justification for these exclusions. The Commission has therefore included the procurement of such telecommunications services within the remit of the new utilities Directive.

Conversely, the postal sector which was previously excluded from procurement regulation is now covered (only from 1 January 2009) in order to allow sufficient time for transitional measures in the postal services sector of Member States. Taking into account the further opening up of Community postal services to competition and the fact that such services are provided through a network by contracting authorities, public undertakings and other undertakings, contracts awarded by contracting entities providing postal services should be subject to the rules of this Directive, create a framework for sound commercial practice and allow greater flexibility than is offered by the new utilities Directive 2004/18/EC. For a definition of the activities in question, it is necessary to take into account the definitions of Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service.<sup>77</sup>

The new concepts of Directive 2004/17 embrace the links of the state with utilities through special or exclusive rights and the notion of affiliated undertakings as a potential subject of utilities procurement coverage. Finally, the new regime introduces grounds for exemption for entities operating in competitive markets.

### 3.2 Special or Exclusive Rights in the Utilities

The remit and thrust of public procurement legislation has traditionally relied on the connection between contracting authorities and the state. However, that connection may be weak in covering entities which operate in the utilities sector and have been privatised. The *Foster* principle<sup>78</sup> established that state accountability could not embrace privatised enterprises.<sup>79</sup> The enactment of the Utilities Directives<sup>80</sup> brought under the procurement framework entities operating in the water, energy, transport and

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<sup>77</sup> See [1998] OJ L15/14. Directive as last amended by Regulation (EC) No 1882/2003 [2003] OJ L284/1).

<sup>78</sup> See Case 188/89, *Foster v British Gas* [1990] ECR I-1313, in which the European Court of Justice ruled that a Directive capable of having direct effect could be invoked against a body which is subject to the *control* of the State and has been delegated special powers.

<sup>79</sup> This was the view of Advocate General Lenz in Case 247/89, *Commission v Portugal* [1991] ECR I-3659.

<sup>80</sup> EC Directive 90/531, as amended by EC Directive 93/38 [1993] OJ L199.

telecommunications sectors. A wide range of these entities are covered by the term *bodies governed by public law*, which is used by the existing utilities Directives for the contracting entities operating in the relevant sectors.<sup>81</sup> Interestingly, another category of contracting authorities under the existing utilities Directives includes *public undertakings*.<sup>82</sup> The term indicates any undertaking over which the state may exercise direct or indirect dominant influence by means of ownership, or by means of financial participation, or by means of laws and regulations, which govern the public undertaking's operation. Dominant influence can be exercised in the form of a majority holding of the undertaking's subscribed capital, in the form of majority controlling of the undertaking's issued shares, or, finally in the form of the right to appoint the majority of the undertaking's management board. Public undertakings may cover utilities operators, which have been granted exclusive rights of exploitation of a service. Irrespective of their ownership, they are subject to the utilities Directive in as much as the *exclusivity* of their operation precludes other entities from entering the relevant market under substantially the same competitive conditions.

Entities in the utilities sector enjoying special or exclusive rights conferred on them by Member States have been covered by the utilities procurement regime. The intention of the legislature was to eliminate government interference over the purchasing behavior of the recipients of such rights arising from the pressure exercised by the respective governments as a condition of granting the special or exclusive rights and the inability of the recipient entity to resist such pressure as a result of the non-competitive environment of its operation. Traditionally, special or exclusive rights were demonstrable when the right to expropriate property or the right to place utility networks on, under or over highways were conferred upon the recipient. Also, a connection with an entity enjoying special or exclusive rights brought any supplier of a utility network within the remit of utilities procurement.

For the purposes of the new utilities Directive and in accordance with Article 2(3), 'special or exclusive rights' means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Articles 3 to 7 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.<sup>83</sup>

The new utilities Directive provides for a more restrictive definition of the notion of special or exclusive rights than its predecessor. The consequence of the definition is depicted in three ways: first, the availability of a procedure for the expropriation or use of property and the ability of an entity to place network equipment on, under or over a public highway for the purpose of constructing networks or port or airport facilities, do not automatically constitute exclusive or special rights within the meaning of the Directive; secondly a special or exclusive right does not exist merely due to the fact that an entity supplies drinking water, electricity, gas or heat to a network which is

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<sup>81</sup> See Article 1(1) of Directive 93/38.

<sup>82</sup> See Article 1(2) of Directive 93/38.

<sup>83</sup> The activities covering special or exclusive rights embrace the following utilities sectors: gas, heat and electricity, water, postal services, transport services, exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports.

itself operated by an entity enjoying special or exclusive rights granted by a competent authority of a Member State; and thirdly, rights granted by Member State through acts of concession, to a limited number of undertakings on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling those criteria to enjoy those rights are not considered special or exclusive rights.

The practical implication of the definition of special or exclusive rights under the new utilities Directive is the non-applicability of the regime to the entities that do not meet the conditions but are still covered under the existing regime.

The influence of the Court's jurisprudence in the restrictive application of special or exclusive rights is evident. The Court's approach in the *British Telecommunications*<sup>84</sup> case does not allow the application of the sector-specific definition of leased (licensed) lines in the telecommunications sector to the respective utilities procurement definition of special or exclusive right. In that case the Court ruled that special or exclusive rights under the Leased Lines Directive<sup>85</sup> did not exist as a result of the licenses conferred by Member States to entities.

The situation could be more complicated as entities compete for such special or exclusive rights such as concessions or public-private partnerships on the basis of objective, proportionate and non-discriminatory criteria which can restrict market access to other undertakings and by definition limit the number of interested parties. The analogous application of the *British Telecommunications* judgment is dubious, as the Court remained silent over such a scenario. The Commission however has indicated<sup>86</sup> that where Member States do not enjoy discretion in the conferral of special or exclusive rights, by definition they cannot detrimentally influence the procurement behavior of the recipient of such rights and as a consequence the utilities procurement regime need not apply.

### 3.3 Affiliated Undertakings

Article 13 of the existing Utilities Directive provides for the exclusion of certain contracts between contracting authorities and affiliated undertakings. The term affiliated undertaking, for the purposes of Article 1(3) of the Utilities Directive, is one the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Company Law Directive.<sup>87</sup> These are service contracts which are awarded to a service-provider which is affiliated to the contracting entity and service contracts which are awarded to a service-provider which is affiliated to a contracting entity participating in a joint venture formed for the purpose of carrying out an activity covered by the Directive.

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<sup>84</sup> See Case C-302/94, *R v Secretary of State for Trade and Industry ex parte British Telecommunications plc* [1996] ECR I-6417.

<sup>85</sup> See EC Directive 92/44 [1992] OJ L165/27.

<sup>86</sup> See European Commission, Explanatory Memorandum of the Proposal for the directive co-coordinating the procurement procedures of entities operating in the water, energy and transport sectors, COM (2000) 276 fin.

<sup>87</sup> See Council Directive 83/349 [1983] OJ L193/1).

The explanatory memorandum of the Utilities Directive<sup>88</sup> stated that this provision relates to three types of service provision within groups. These categories, which may or may not be distinct, are: the provision of common services such as accounting, recruitment and management; the provision of specialized services embodying the know how of the group; the provision of a specialized service to a joint venture. The exclusion from the provisions of the Directive is subject, however, to two conditions: the service-provider must be an undertaking affiliated to the contracting authority and, at least 80 per cent of its average turnover arising within the European Community for the preceding three years, derives from the provision of the same or similar services to undertakings with which it is affiliated. The Commission is empowered to monitor the application of this Article and require the notification of the names of the undertakings concerned and the nature and value of the service contracts involved.

Interestingly, the new utilities regime also excludes from its remit contracts awarded to affiliated undertakings. Article 23 of the new utilities Directive excludes contracts awarded by a contracting entity to an affiliated undertaking, or by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities which are covered by the utilities Directive to an undertaking which is affiliated with one of these contracting entities.

Under the new utilities procurement regime, the term affiliated undertaking means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349 on consolidated accounts.<sup>89</sup> In cases of entities which are not subject to that Directive, affiliated undertaking means any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of Article 2(1)(b), or any undertaking over which the contracting entity may exercise a dominant influence by virtue of ownership, financial participation or the rules which govern it.

### 3.4 Competitive Markets in Utilities

Privatized utilities could, in principle, be excluded from the procurement rules when a genuinely competitive regime<sup>90</sup> within the relevant market structure would rule out purchasing patterns based on non-economic considerations. The new utilities Directive should not apply to markets where the participants pursue an activity which is directly exposed to competition on markets to which access is not limited within the relevant Member State. The new utilities Directive has therefore introduced a procedure, applicable to all sectors covered by its provisions that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should

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<sup>88</sup> See COM (91) 347-SYN 36 1.

<sup>89</sup> See [1983] OJ L193/1, as last amended by Directive 2001/65/EC [2001] OJ L283/28).

<sup>90</sup> The determination of a genuinely competitive regime is left to the utilities operators themselves. See Case C 392/93, *The Queen and H.M. Treasury, ex parte British Telecommunications PLC* [1993] OJ C287/6. This is perhaps a first step towards self-regulation which could lead to the disengagement of the relevant contracting authorities from the public procurement regime.

provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of standards that result in the disengagement of the relevant procurement rules.

Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. The implementation and application of appropriate Community legislation liberalizing a utility sector will be considered to provide sufficient grounds for determining if there is free access to the market in question. Such appropriate legislation should be identified in an annex which will be provided by the Commission. The Commission will, in particular, take into account the possible adoption of measures entailing a genuine opening up to competition of sectors other than those for which legislation is already mentioned in Annex XI, such as that of railway transport services. Where free access to a given market does not result from the implementation of appropriate Community legislation, it should be demonstrated that such access is uninhibited *de jure* and *de facto*.

Article 30 of the new utilities Directive provides for the procedure for establishing whether a given activity of a utility entity is directly exposed to competition. The question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question. When a Member State considers that access to the relevant market activity is free, it must notify the Commission and provide all relevant facts, and in particular of any law, regulation, administrative provision or agreements, where appropriate together with the position adopted by an independent national authority that is competent in relation to the regulation of the activity concerned. The Commission can issue a Decision which verifies that the relevant activity is provided in a competitive environment. Such verification is also presumed if the Commission has not adopted a Decision concerning the inapplicability of the utilities Directive within a certain period.<sup>91</sup>

The disengagement of the utilities procurement regime as a result of the operation of the relevant entities in competitive markets by virtue of Article 30 of the new utilities Directive does not apply to the WTO Government Procurement Agreement. This represents a legal *lacuna* as the procedural flexibility envisaged in the European procurement regulatory regime does not cover entities covered under the GPA. Rectification of the problem would require amendment to the GPA with the conferral of concessions and reciprocal access rights to the GPA signatories.

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<sup>91</sup> According to Article 68(2), for the adoption of a Decision the Commission shall be allowed a period of three months commencing on the first working day following the date on which it receives the notification or the request. However, this period may be extended once by a maximum of three months in duly justified cases, in particular if the information contained in the notification or the request or in the documents annexed thereto is incomplete.

#### 4. THE REFORM OF THE PUBLIC PROCUREMENT DIRECTIVES

European institutions have introduced three new legal instruments which amend the public procurement Directives. In particular, Directive 2014/24/EU will replace Public Sector Directive 2004/18; Directive 2014/25/EU will amend the Utilities Directive 2004/17; and a new Directive 2014/23/EU on concessions to regulate the award of concessions.

Concessions regulation represents the most significant development of the reform agenda of the EU in public procurement regulation. The main principles envisaged in the proposed Concessions Directive are: legal certainty and better access to the concession markets. The current public procurement regime only partially applies to works concessions; service concessions are exempt. The Commission believes that the lack of a consistent framework for concessions across the EU means that concessions are often awarded without any transparent or competitive process and that, as a result, contracting authorities are often failing to achieve best value, and some economic operators, in particular SMEs, are denied access to the market.

Concessions are usually long term, complex arrangements where the concessionaire assumes responsibilities and risks traditionally borne by the contracting authorities and normally falling within their remit. Contracting authorities and entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire. The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition.

The rules of the legislative framework applicable to the award of concessions are clear and simple. Member States or public authorities should remain free to define and specify the characteristics of the services to be provided, including any conditions regarding the quality or price of the services. They should duly reflect the specificity of concessions as compared to public contracts and should not create an excessive amount of bureaucracy.

The scope of the concessions Directive indicates that it fully applies only to concessions with a cross-border interest with a value of at least €5 million. Service concessions of a value between €2.5 million and €5 million and concessions for social and other specific services are only subject to limited obligations under the Draft Directive, including the obligation to publish a concession award notice.

The concessions Directive does not apply to concessions awarded between contracting authorities or to concessions awarded by contracting authorities to affiliated undertakings or joint ventures. The Draft Directive also sets out various other specific exemptions such as concessions contracts for the provision or exploitation of electronic communications, as well as water and waste sectors.

The concessions Directive will not apply retrospectively. However, contracting authorities should be mindful that an extension of the duration of an existing concession may qualify as a new concession and would therefore have to comply with the rules of the concessions Directive.

If an existing concession were to be substantially modified during its term it will be considered to be a new concession and the Directive will apply. Under the Directive, providing the overall nature of the contract is not altered, a modification of a value of less than 5 per cent of the initial contract value shall not be considered to be

substantial. Modifications of the concession resulting in a minor change of the contract below the threshold should always be possible without the need to carry out a new concession procedure (Article 42). A new concession procedure is required in case of material changes to the initial concession, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that concession.

Non-economic services of general interest should not fall within the scope of the Concession Directive. It is appropriate to exclude from the full application of this Directive only those services which have a limited cross-border dimension, such as certain social, health, or educational services (Articles 8, 10, 11, 12, 14, 15 and 21). These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. In the case of mixed contracts, the applicable rules should be determined in accordance with the main subject of the contract where the different parts which constitute the contract are objectively not separable.

In the concession award procedures, contracting authorities or contracting entities should be allowed to use award criteria or concession performance conditions relating to the works, or services to be provided under the concession contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, including factors involved in the specific process of production, provision or commercialisation of those works or services or a specific process during a later stage of their life cycle, even where such factors do not form part of their material substance and so on. Contracting authorities and entities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of serious or repeated violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

The Concessions Directive outlines rules for the publication and award of concession contracts and sets time limits for various stages of the procurement process. Contracting authorities wishing to award a concession will be required to publish a concession notice (using a standard form and containing prescribed information). Potential tenderers must be given at least 52 days from the date on which the concession notice was sent to apply, although this time limit may be reduced by five days if tenderers are able to apply electronically. Within 48 days of awarding a concession, a contracting authority must send a concession award notice giving the results of the concession award procedure.

The Concessions Directive also introduces a standstill period for concession awards to be appealed by extending the scope of the Remedies Directive so that it applies to all concession contracts above the relevant threshold. Not later than 48 days after the award of a concession, the contracting authorities and contracting entities shall send a concession award notice on the results of the concession award procedure. In view of the detrimental effects on competition, awarding concessions without prior publication should only be permitted in very exceptional circumstances.

The concessions Directive does not outline any specific procurement procedure for the award of concessions and, in order to promote flexibility, instead sets out procedural guarantees of transparency, consistency and objective criteria which contracting authorities must fulfil when awarding a concession. In order to comply with these requirements, the contracting authority must give a description of the concession, the technical specifications, the award criteria and the minimum requirements to be met in the contract notice, the invitation to submit tenders or the concession documents. The award criteria must relate to the economic, financial and technical capacity of the party and be listed in descending order of importance. The contracting authority should also establish in advance and communicate to all participants the rules on the organisation of the concession award procedure, including the rules on communication, the stages of the procedure and timing. Throughout the procurement process, a contracting authority must ensure that the parties are treated fairly and equally. Contracting authorities should take care to ensure that the information provided to tenderers throughout the tender process does not give some tenderers an advantage over others, and retain records relevant to the procedure.

Before awarding the concession a contracting authority needs to ensure that the tender complies with the requirements, conditions and criteria set out in the concession notice, the invitation to tender and the concession documents, and that the tenderer is not excluded from participating in the award. Assuming that the tenderer is compliant, the contracting authority must, as soon as possible, then inform each tenderer of decisions reached concerning the award of a concession. Upon request from the party concerned, the contracting authority must, as quickly as possible (and within 15 days from receipt of a written request) inform any unsuccessful candidates of the reasons for the rejection of their application.

The concessions Directive limits the duration of concession contracts to 'the time estimated to be necessary for the party contracting with the contracting authority to recoup the investments made in operating the works or service together with a reasonable return on the invested capital'.

The Commission may, every three years, request that Member States transmit a monitoring report covering an overview of the most frequent causes of incorrect application of the rules for the award of concessions contracts, including possible structural or recurring problems in the application of the rules and possible cases of fraud and other illegal behaviour. All Decisions adopted prior to the entry into force of the new concession Directive adopted on the basis of Article 30 of Directive 2004/17/EC will apply.

