

COMMON MARKET LAW REVIEW

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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THE CHANGES TO THE PUBLIC CONTRACT DIRECTIVES AND THE STORY THEY TELL ABOUT HOW EU LAW WORKS

ROBERTO CARANTA*

Abstract

The new rules for public procurements and concessions were published early in 2014. The reform process laid bare the different preferences of and the consequent tensions among the different actors of legislation. The result are provisions which are innovative in many respects, even where the rationale of the law is the same, but also very complex, and at times obscure, making this area even more technical than it already was. This paper gives an introduction to the most relevant novelties in the law, at the same time, it highlights and discusses a number of issues in the law making process and problematic areas in the substantive rules enacted. The article aims not to describe all the new provisions in detail, but to analyse rather closely specific aspects in order to help understand, and interpret, EU public contract law.

1. Introduction

The public contracts reform package proposed by the Commission in 2011 was finally approved early in 2014. Three new instruments were enacted: Directive 2014/23/EU on concession contracts, Directive 2014/24/EU on public sector procurement, and Directive 2014/25/EU on procurements in the utilities sectors.¹ The directives lay down the rules which will apply to public contracts passed by the covered authorities and entities in the Member States. These are huge documents. Taken together, the three directives spread through 374 pages of the Official Journal of the EU. The text of Directive 2014/24

* University of Turin. I thank Carina Risvig Hamer, Albert Sanchez Graells, Sarah Schoenmaekers and Abby Semple for their remarks on a first draft of this article. For the same reasons, thanks to Zhou Fen, who also helped me tame the footnotes. I am solely responsible for mistakes.

1. Directive 2014/23/EU on the award of concession contracts, O.J. 2014, L 94/1–64; Directive 2014/24/EU on public procurement, O.J. 2014, L/65–242; and Directive 2014/25/EU, on procurement by entities operating in the water, energy, transport and postal services sectors, O.J. 2014, L 94/243–374. The highlights of the proposals were analysed by Ølykke, Risvig and Tvarnø (Eds.), *EU Procurement Directives: Modernization, Growth & Innovation* (DJØF, 2012).

alone, the longest one, runs for 79 pages, with 138 recitals and 94 articles. Its annexes take close to 100 additional pages. It is impossible here to go through all the changes in the regulatory environment of public contracts brought about by these massive pieces of legislation.²

The focus of this article will first be on the reasons of the reform, and the analysis will also provide the opportunity to shed light on some substantive changes in the regulatory framework.³ The directives repealed by the present package date from 2004. In terms of public contract law, this decade feels rather like centuries. What is in fact the same rationale for EU secondary law in this area has evolved if not changed.⁴ Technical innovation is providing new opportunities to cut costs while integrity in contract procedures has come into the spotlight.

This leads to a second lens through which the new legislative package is analysed. The reform process highlighted the different preferences and the ensuing tensions among the various makers of EU law: EU institutions but also the Member States. The institutional dynamics of EU law-making matters, and while looking at it some of the most relevant novelties brought about by the new directives will be examined as well.

The analysis will then go deeper into the details, highlighting some of the most relevant changes brought about by the new directives, especially focusing on the scope of their application and on the award procedures. A change in the regulatory preferences has affected the latter, while a large crop of cases has clarified a range of issues – but created uncertainty on a few, so that codification was necessary.⁵

A conclusion will follow to assess how the institutional dynamic at play has shaped the legislation to a considerable extent, impacting on its quality or at least on its suitability to attain some of the initial objective of the reform exercise such as flexibility and simplification. Finally, a few ideas about what needs to be done will be explained.

2. The most significant novelties are analysed in the works collected by Lichère, Caranta and Treumer (Eds.), *Modernising Public Procurement: The New Directive* (DJØF, 2014).

3. A very good starting point is Treumer, “Evolution of the EU public procurement regime” in Lichère, Caranta and Treumer, op. cit. *supra* note 2, 9 et seq.

4. The rationale of the public procurement rules was dissected by the contributions collected at the initiative of the Swedish Competition Authority (SCA) in SCA (Ed.) *The Cost of Different Goals of Public Procurement* (Västerås, 2012).

5. The reasons for the development of the case law are analysed by Bovis, “Developing public procurement regulation: Jurisprudence and its influence on law making”, 49 CML Rev. (2012), 461–495; Drijber and Stergiou, “Public procurement law and internal market law”, 46 CML Rev. (2009), 805–846.

2. The reasons for the reform

The 2004 EU public procurement law package was made up of two directives. Directive 2004/17/EC regulated public procurement in the utilities sectors (water, energy, transport and postal services).⁶ In a number of Member States these sectors are characterized by a mix of public and private involvement, which means that public procurement rules still apply, but somewhat more flexibly than those applicable in the fully public sector.⁷ Directive 2004/18/EC, the so-called classic or public sector directive, codified the rules applicable to works, supplies and services procurements and to works concessions, which had previously been dispersed in three different directives. The 2004 directives had to be implemented in the Member States by 31 January 2006 at the latest. Directive 2007/66/EC amending the existing directives on remedies⁸ and Directive 2009/81/EC on procurements in the fields of defence and security were adopted later.⁹

The Commission was hardly done with these pieces of legislation, when it started work on a new reform package of the 2004 directives.¹⁰ In early 2011, it published the Green paper on The modernization of EU public procurement policy, Towards a more efficient European Procurement Market – setting out a number of questions which were opened to the consultation with stakeholders and civil society at large.¹¹ A prior consultation had also been held on an EU initiative on concessions; this case was not open to the public, though, but specifically addressed to three groups of stakeholders with an interest in concessions: the business community, contracting authorities and the social partners.¹²

6. A complete history of the evolution of EU law in this area is provided by Arrowsmith, *The Law of Public and Utilities Procurement*, 3rd ed. (Sweet & Maxwell, 2014), at p. 182 et seq.

7. See Torricelli, “Utilities procurement” in Trybus, Caranta and Edelstam (Eds.), *EU Public Contract Law* (Bruylant, 2014), at p. 223.

8. See Bovis, “Remedies” in Trybus, Caranta and Edelstam, op. cit. *supra* note 7, at 368 et seq., and, also for the implementation of the remedies directives in selected Member States, Treumer and Lichère (Eds.), *Enforcement of the EU Public Procurement Rules* (DJØF 2011).

9. The book of reference is Trybus, *Buying Defence and Security in Europe* (Cambridge University Press, 2014).

10. An initiative in this area was announced in the Communication Towards a Single Market Act – For a highly competitive social market economy, COM(2010)608. Work on legislation in the area of concessions started even earlier: see Burnett, “The new European Directive on the award of concession contracts – promoting value for money in PPP contracts?”, (2014) *European Procurement & Public Private Partnership Law Review* (EPPPL), 86–103.

11. COM(2011)15 final.

12. The initiative was also supported by three earlier studies commissioned from academia (College d’Europe) and consultant firms (CSES and Pricewaterhouse Cooper). The materials are also available at: <ec.europa.eu/internal_market/publicprocurement/modernising_rules/consultations/index_en.htm> (last visited 28 Nov. 2014); a quite critical comment was

The difficult economic and social situation following the financial crises which had started in the US and swept through much of the world, Europe included, was what prompted the Commission into action. The above-mentioned Green paper states that “Obtaining optimal procurement outcomes through efficient procedures is of crucial importance in the context of the severe budgetary constraints and economic difficulties in many EU Member States”.¹³ The Green paper begins with a reference to the Europe 2020 strategy for smart, sustainable and inclusive growth.¹⁴ Public procurement is said to play a key role in this by a) improving framework conditions for business to innovate, making full use of demand-side policy; b) supporting the shift towards a resource-efficient and low-carbon economy, for instance “by encouraging wider use of green public procurement”, and finally c) improving the business environment, especially for innovative SMEs.¹⁵ Immediately thereafter, the Green paper recalls that the Europe 2020 strategy also stresses that public procurement policy “must ensure the most efficient use of public funds and that procurement markets must be kept open EU wide”. Late in 2011 the Commission tabled the three reform proposals which, with substantial changes, were approved by the European Parliament and the Council and entered into force in 2014.¹⁶

2.1. *Quest for a legal basis*

The objectives pursued by secondary legislation have a particular relevance in EU law, since they link to the issue of which legal basis allows the EU institutions to act and to the question of competence. The public procurement directives have always been based on the Treaty’s internal market provisions on free movement.¹⁷ The ECJ has often repeated that the principal objective of the (then) Community rules in the field of public procurement is “the free

penned by Kotsonis, “Green paper on the modernisation of EU procurement policy: Towards a more efficient European procurement market”, 20 *Public Procurement Law Review* (PPLR) (2011), NA51. 51–58.

13. COM(2011)15 final, at p. 3.

14. COM(2010)2020.

15. See Trybus, “The promotion of small and medium sized enterprises in public procurement: A strategic objective of the new public sector Directive?” in Lichère, Caranta and Treumer, op. cit. *supra* note 2, p. 256 et seq.

16. The proposals were published as COM(2011)895, 896 and 893 final.

17. Comba, “Variations in the scope of the new EU public procurement Directives of 2014” in Lichère, Caranta and Treumer, op. cit. *supra* note 2, at p. 30 et seq; Trybus, “Public contracts in European Union internal market law: Foundations and requirements” in Noguellou and Stelkens (Eds.), *Droit comparé des Contrats Publics – Comparative Law on Public Contracts* (Bruylant, 2010), at p. 85 et seq; Arrowsmith, op. cit. *supra* note 6, at p. 164 et seq.

movement of services and the opening-up to undistorted competition in all the Member States”.¹⁸

The preamble to Directive 2014/24 too recalls Article 53(1), Article 62 and Article 114 TFEU. The traditional rationale for the EU regulation of public contracts passed in the Member States is also repeated in Recital 1 of the new Public Sector Directive.¹⁹ While the award of all public contracts has to comply with the principles of the TFEU, for public contracts above a certain value, provisions must be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.²⁰

Directive 2014/23 is firmly grounded in internal market considerations,²¹ just updated with a fashionable reference to SMEs – which could be somewhat at odds with the particularly high thresholds set in Article 8 (over EUR 5 million).²² What is peculiar to the concessions Directive is that the light regulatory approach is explained with reference to the subsidiarity principle and Article 5 TFEU.²³

The reform has however made the definition of the rationale for EU public contract rules more complex.²⁴ The 2011 Green paper appears to have challenged the internal market rationale of EU public contract legislation.²⁵ The necessity to keep the EU wide market open is recalled almost as an afterthought: in the face of challenging times, “there is a greater need than ever for a functioning and efficient European Procurement Market”.²⁶ The idea that moved the Commission to present a reform package was to simplify and update the European public procurement legislation “so as to make the award of contracts more flexible and enable public contracts to be put to better use in support of other policies”.²⁷

18. E.g. Case C-26/03, *Stadt Halle and RPL Lochau*, EU:C:2005:5, para 44; see also for further references, Drijber and Stergiou, op. cit. *supra* note 5, at 804.

19. See also Rec. 2 of Dir. 2014/25.

20. Rec. 1 of Dir. 2014/24.

21. See, based on the proposal, Sanchez-Graells, “What need and logic for a new Directive on concessions, particularly regarding the issue of their economic balance?”, (2012) EPPPL, 94–109, at 98 and 103.

22. See Rec. 1 of Dir. 2014/23.

23. *Ibid.* Rec. 78; one could well make the point that the principle in question should also apply with reference to the other directives: Arrowsmith, “Modernising the European Union’s public procurement regime: A blueprint for real simplicity and flexibility”, 21 PPLR (2012), at 72.

24. For a general discussion: Arrowsmith “Understanding the purpose of the EU’s procurement directives: the limited role of the EU regime and some proposals for reform” in *The Cost of Different Goals...*, cited *supra* note 4, p. 44.

25. See critically Kotsonis, op. cit. *supra* note 12, at NA 56 et seq.

26. COM(2011)15 final, at p. 3.

27. *Ibid.*; on flexibility see the assessment by Treumer, op. cit. *supra* note 3, 9 et seq.

The same Green paper sketches a historical evolution of sorts.²⁸ This moves from the directives enacted up to that point, whose principal aim had been “to ensure that economic operators benefit fully from the basic freedoms in the field of public procurement”, to mention of “a number of objectives relating to the integration of other policies in this framework, such as protection of the environment and social standards or the fight against corruption”. The proposal aims at modernizing public procurement tools and methods “to make them better suited to deal with the evolving political, social and economic context” and more notably to achieving a number of complementary objectives. The first objective is to increase the efficiency of public spending. Another complementary objective is to allow procurers to make better use of public procurement in support of common societal goals. Collaterally, EU public procurement law could also help prevent and fight corruption and favouritism and improve the access of European undertakings to third country markets.²⁹

The preamble to Directive 2014/24 starts with a reference to the TFEU and in particular to the internal market provisions found in Articles 53(1), 62 and 114 thereof. Recital 2 of Directive 2014/24, however, draws heavily on the Green paper, referring to the Europe 2020 strategy and mentioning twice the efficient spending of public funds.³⁰ The possibility of “a general genetic modification of the procurement Directives” has even been advanced.³¹ It is here however submitted that not all the considerations listed in Recital 2 qualify as legal bases for secondary legislation within the competences of the EU and meeting the requirements of Article 5 TEU.³²

2.2. Green procurement

Under Article 4(2) TFEU, the Union and the Member States have shared competence in areas such as the internal market, the environment and social policy (but the latter only for aspects defined by the Treaty). Moreover, under Article 6 the Union may take supporting measures *inter alia* in the field of industry. According to the principle of consistency laid down in Article 7 TFEU, EU institutions must take all of the treaties’ objectives into account when adopting measures falling within their competences. It is therefore

28. But see the historical account by Comba, *op. cit. supra* note 17, at 30 et seq.

29. COM(2011)15 final, at p. 3.

30. See also Rec. 47 of Dir. 2014/24; Rec. 3 of Dir. 2014/23 and Rec. 4 of Dir. 2014/25 also refers to the Europe 2020 strategy; see the discussion in Comba, *op. cit. supra* note 17, 38 et seq.

31. Comba, *op. cit. supra* note 17, at 41.

32. Arrowsmith, *op. cit. supra* note 23, at 72 and her previous works referred therein, and Boyle, “EU procurement green paper on the modernisation of EU public procurement policy: a personal response”, 20 PPLR (2011), NA171 et seq.

legitimate and makes sense when enacting rules on public contracts based on the internal market provisions of the TFEU to address issues of sustainable procurement and more specifically green procurement.³³ This even more so since, under Article 11, environmental protection requirements must be integrated into the definition and implementation of the EU's policies and activities, "in particular with a view to promoting sustainable development".³⁴

The new directives have gone a long way in empowering contracting authorities to engage in sustainable procurement and more specifically in green procurement, to a certain extent lowering the regulatory risks attached to this approach under the 2004 directives. As has been remarked, the "sustainability paradigm is almost taking over the realm of public procurement, and it is marketed as a major 'selling point' of the new legislation".³⁵

The most relevant innovation is possibly the codification of life cycle costing analysis or methodologies.³⁶ Beside a margin of profit, the cost of any good or service is given by the sum of the costs incurred in producing the good or service at issue. Public procurement practice and law were of course aware of further costs ultimately borne by the contracting authority, such as for instance running costs, cost-effectiveness, after-sales service and technical assistance.³⁷ Where the uncertainties arose was in how to deal with externalities – and particularly environmental externalities such as pollution – in both the production, use and decommissioning phases of the life cycle of a good or service.³⁸

It is true that Article 53 of Directive 2004/18/EC had to a large extent codified the *Concordia Bus*³⁹ case law, which had permitted reference to green award criteria, provided that they were linked to the subject matter of the contract and established in advance in an objective and non-discriminatory

33. See also Rec. 41 of Dir. 2014/24 and Rec. 52 of Dir. 2014/25; also refer to Fisher, "The power of purchase: Addressing sustainability through public procurement", 8 EPPPL (2013), 2–7.

34. Art. 11 is referred to by Rec. 91 of Dir. 2014/24; in the rich literature on green procurement see now Dragos and Neamtu, "Sustainable public procurement in the EU: experiences and prospects" in Lichère, Caranta and Treumer (Eds.), op. cit. *supra* note 2, 302 et seq; for reference to the implementation of EU law in a number of Member States please refer to the works collected by Caranta and Trybus (Eds.), *The Law of Green and Social Procurement in Europe* (DJØF, 2010).

35. Dragos and Neamtu, op. cit. *supra* note 34, at 304.

36. See Semple, *A Practical Guide to Public Procurement* (Cambridge, 2015 *forthcoming*), para 4.43 et seq; Dragos and Neamtu, op. cit. *supra* note 34, 326 et seq.

37. Art. 53(1)(a) Dir. 2004/18/EC.

38. See Dragos and Neamtu, "Sustainable public procurement: Life Cycle Costing (LCC) in the new EU Directive proposal", 8 EPPPL (2013), 19–29.

39. Case C-513/99, *Concordia Bus*, EU:C:2002:495.

manner.⁴⁰ How these requirements had to be met, however, was not always easy to say. The outcome of the legislative process (analysed below) is that Directive 2014/24 both provides a working definition of life cycle costing and lays down award criteria through which contracting authorities (and entities) may take into account of externalities in their purchasing decisions. Under Article 2(1)(20) “life cycle” means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilization.⁴¹

Recital 96 further nails down the concept, adding that life cycle costing may also “include costs imputed to environmental externalities, such as pollution caused by extraction of the raw materials used in the product or caused by the product itself or its manufacturing”. The more traditional free trade concerns resurface in the same recital, which goes on to make clear that these costs may be included provided that “they can be monetized and monitored”. To this end, Article 68 of Directive 2014/24 lists the conditions which must be met by life cycle methodologies. They must be based on objectively verifiable and non-discriminatory criteria, must be accessible to all interested parties, and the data required may be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the Union is bound.⁴²

One question which was raised in the Green paper was if, and if so to what extent, EU law should not just empower but actually direct contracting authorities to purchase environmentally sound goods and services (or at least provide incentives to do so).⁴³ This is already the case with specific legislation – such as for instance Regulation 106/2008 (the so-called EU Energy Star Regulation), which introduced obligations on contracting authorities to require in their public contracts a certain level of energy efficiency, or Directive 2009/33/EC on promotion of clean and energy-efficient vehicles – which introduced obligations on contracting authorities to take energy or other environmental impacts into account in their public procurement decisions.

40. See Comba, *op. cit. supra* note 17, at 35.

41. Please refer to Caranta, “Award criteria under EU law (old and new)” in Comba and Treumer (Eds.), *Award of Contracts in EU Procurements* (DJØF, 2013), at p. 35 et seq.

42. See Semple, *op. cit. supra* note 36, at para 4.45 et seq. On the relevance of the GPA in this context: Tosoni, “The impact of the revised WTO Government Procurement Agreement on the EU procurement rules from a sustainability perspective”, 8 *EPPL* (2013), 41–48.

43. COM(2011)15 final, p. 41 et seq; see the discussion by Trepte, “The contracting authority as purchaser and regulator: Should the procurement rules regulate what we buy?” in Ølykke, Risvig and Tvarnø, *op. cit. supra* note 1, at 85.

Other measures call on the public sector to play an exemplary role in the field of energy efficiency (Directive 2012/27/EU on energy efficiency) and by promoting resource-efficient public buildings for instance due to low or zero primary energy consumption.⁴⁴

This time the EU institutions decided not to pursue this course of action further through sweeping provisions. The important differences between individual sectors and markets would make it inappropriate to set general mandatory requirements for environmental, social and innovation procurement. It was thought better to leave it to sector-specific legislation to set mandatory objectives and targets, while at the same time promoting the development and use of European approaches to life cycle costing.⁴⁵

2.3. *Social considerations*

While environmental considerations are a well-established – if not uncontroversial – feature of public contract law and practice, social considerations occupy a shakier ground.⁴⁶ This is not because the issue lacks relevance. Indeed one such condition – providing for the employment of long-term unemployed – met conditional approval in *Beentjes*, the first case on what is now called sustainable procurement.⁴⁷ The judgment was later affirmed in an infringement procedure brought against France.⁴⁸ These cases did not do much to clarify the conditions under which social considerations might be taken into account in public procurement. The concern was that such clauses might be misused to permit “buy national” and “beggar thy neighbour” policies (in the end, each government, and each level of government, is rather more worried about the long-term unemployed living on its own territory than unemployment in general). Instead, they led to some unnecessary theoretical misconstruction on the part of the Commission.⁴⁹

Article 9 TFEU, providing that the institutions must also take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, and so on, is somewhat weaker than

44. Directive 2009/28/EC on the promotion of the use of energy from renewable sources and Directive 2010/31/EU on the energy performance of buildings. Cf. Rec. 95 of Dir. 2014/24, see also Rec. 100 of Dir. 2014/25; see Dragos and Neamtu, op. cit. *supra* note 34, 310 et seq., for further references.

45. Rec. 95 of Dir. 2014/24 and Rec. 100 of Dir. 2014/25.

46. See generally Dragos and Neamtu, op. cit. *supra* note 34.

47. Case 31/87, *Beentjes*, EU:C:1988:422.

48. Case C-225/98, *Commission v. France*, EU:C:2000:494; see Arnould, “A turning point in the use of additional award criteria?”, (2001) PPLR, at NA13; Lambert, “Note” (2001) Act. Jur. Dr. Adm., 1055.

49. See Caranta, “Sustainable procurement” in Trybus, Caranta, and Edelstam, op. cit. *supra* note 7, at p. 164 et seq, and *infra* section 3.2.

Article 11, which mandates the integration of environmental protection requirements into the definition and implementation of the Union's policies and activities.⁵⁰ Article 9 TFEU does, however, seem enough to buttress a number of provisions in the new directives which pursue social considerations, together with environmental considerations or on their own.⁵¹ One instance of the latter will suffice for now:⁵² Article 20 of Directive 2014/24 on "Reserved contracts" is based on the consideration that sheltered workshops and other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons might not be able to obtain contracts under normal conditions of competition.⁵³ Consequently, Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons. Compared with Article 19 of Directive 2004/18, the legal requirements for reserved contracts have been significantly relaxed. Under the old Directive this possibility was limited to workshops employing disabled people, and it was required that at least 50 percent of the employees of those workshops were disabled. Today, that is 30 percent and includes workers who are disadvantaged as well as disabled.

One contentious problem concerns compliance with minimum wage provisions in the award of public contracts. This may take different forms, concerning for instance foreign workers posted in the Member State of the contracting authority in order to implement the contract, or workers working for a sub-contractor in a different Member State. In the first hypothesis, Directive 96/71 on the posting of workers in the framework of the provision of services applies. To avoid social dumping – seen as a distortion of the internal market – the Directive provides that workers temporarily posted abroad enjoy the same or possibly more generous rights as granted to local workers by rules of general application. The Directive is not specific to public procurement, but it was involved in *Rüffert*, a public procurement case in which a contract was terminated because a subcontractor employed workers from another EU country without complying with a collective agreement endorsed at sub-national level by contracting authorities only.⁵⁴ The ECJ reasoned in

50. The policy case is another matter, and it was forcefully pleaded by McCrudden, *Buying Social Justice. Equality, Government Procurement & Legal Change* (OUP, 2007).

51. See also Rec. 99 of Dir. 2014/24 and Rec. 104 of Dir. 2014/25.

52. But see also Art. 42(1) of Dir. 2014/24, providing that "technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users"; see also Rec. 53, 76 and 99, and the Art. 60(1) of Dir. 2014/25.

53. See Rec. 36 of Dir. 2014/24 and Rec. 51 of Dir. 2014/25.

54. Case C-346/06, *Rüffert*, EU:C:2008:189.

classic internal market terms, holding that Directive 96/71 expressly lays down the degree of protection for posted workers by referring to rules of general application in the host Member State. These harmonizing measures seek “in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty”.⁵⁵ On this basis, the Court inevitably concluded that provisions such as those in the sub-national legislation at issue could not be justified by the objective of ensuring the protection of workers or other overriding policy considerations, since the harmonization measure had already responded to those needs.⁵⁶

The second hypothesis was at the centre of the more recent *Bundesdruckerei* case.⁵⁷ In a call for tenders for a public contract relating to the digitalization of documents and the conversion of data, the City of Dortmund asked tenderers to declare their compliance with local rules guaranteeing payment of a minimum wage to the employees of subcontractors. This was challenged by the *Bundesdruckerei*, which informed the City of Dortmund that, if it were awarded the contract, the services under that contract would be performed exclusively in another Member State (Poland), by a subcontractor established in that State. The ECJ noted that, unlike in *Rüffert*, the tenderer did not intend to perform the public contract by posting, on the German territory, employees of its subcontractor; rather, the tenderer wanted to subcontract the service to a subcontractor established in another EU Member State and the employees of the subcontractor were to carry out the services exclusively in the subcontractor’s home country. On this basis, the Court held that the imposition, under national legislation, of a minimum wage on subcontractors of a tenderer which are established in a Member State other than that to which the contracting authority belongs, and in which minimum rates of pay are lower, constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State. Consequently, a measure such as that at issue in the main proceedings is capable of constituting a restriction within the meaning of Article 56 TFEU.⁵⁸

While such a measure might in principle be justified by the objective of protecting the employees, by ensuring that employees are paid a reasonable wage in order to avoid both “social dumping” and the penalization of competing undertakings which grant a reasonable wage to their employees,

55. *Ibid.*, para 36.

56. *Ibid.*, para 38 et seq; see also Arrowsmith and Kunzlik, *Public Procurement and Horizontal Policies in EC law: General Principles* (Cambridge University Press, 2009), at p. 7.

57. Case C-549/13, *Bundesdruckerei GmbH*, EU:C:2014:2235.

58. *Ibid.*, para 30.

according to the ECJ this cannot be the case here since it applies solely to those employed by economic operators who have been awarded public contracts and not to employees generally. In any case, the principle of proportionality is breached insofar as the scope of the local rules extends to cover a situation in which employees carry out a public contract in a Member State other than that to which the contracting authority belongs and in which the minimum wage rates are possibly lower. Indeed, there is no reason why minimum wages set in one Member State should apply to workers working in different Member States, who may experience different conditions, including the cost of living.⁵⁹

The objection is obviously that local firms which have to comply with minimum wages provisions will have a very hard time winning public contracts. However, as wages have not been harmonized in Europe, they – together with social benefits, working hours, taxation, energy costs, and so on – end up being one of the elements in the competition between economic operators established in different Member States. This does not mean that the protection offered under Directive 96/71 could not be extended, for instance to cover rules of particular application, but this should be done, if at all, by amending the posted workers Directive rather than the public contract ones.

After much debate inside the institutions, with very different drafts being put on the table, the new public contract Directives leave the issue very much as it was under the old ones. The recitals of Directive 2014/24 bear witness to a tension between high-flying social aspirations and the internal market juggernaut. True, “with a view to the better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles”.⁶⁰ However, award criteria or contract performance conditions concerning social aspects of the production process should be “applied in accordance with Directive 96/71/EC, as interpreted by the ECJ” and “should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States”. More specifically, “requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive”.⁶¹ This approach will also be relevant in the interpretation of Article 70 of Directive 2014/24 on contract performance conditions, whose

59. *Ibid.*, para 36 et seq.

60. Rec. 97 of Dir. 2014/24 and Rec. 102 of Dir. 2014/25.

61. Rec. 98 of Dir. 2014/24; see also Rec. 64 of Dir. 2014/23 and Rec. 103 of Dir. 2014/25.

text alone could be considered more permissive of social or employment-related considerations.⁶²

Finally, addressing situations in which the implementation of the contract is delocalized as compared with the seat of the contracting authority, the recitals of the directives make it clear that services “should be considered to be provided at the place where the characteristic performances are executed”.⁶³ This will also apply to supplies, the characteristic performance being production.⁶⁴

Linked to social considerations in some way are the measures to the benefit of SMEs. The reform package has introduced four main “new” regimes for the promotion of SMEs: the division of contracts into lots, the European Single Procurement Document, the limitation of participation requirements, and direct payments to subcontractors.⁶⁵

2.4. *The efficiency of public spending*

The efficiency of public spending does not relate to any of the competences the Treaties bestow on the EU institutions,⁶⁶ even if they refer more and more to it in order to make EU rules on public contracts more palatable – or less indigestible – for the Member States.⁶⁷

The ECJ case law does not support enlisting best value for money among the objectives of EU public contracts law either.⁶⁸ This contention requires a careful reading of more recent judgments, which admittedly are more nuanced as to a plurality of objectives being satisfied by EU secondary law on the award of public contracts. In *Manova*, the Court uses the plural to reiterate that “[o]ne of the principal objectives of the public procurement rules under EU law is to ensure the free movement of services and the opening up of undistorted competition in all the Member States”.⁶⁹ Objectives (plural) may well include strategic ones – but not, it is submitted, best value for money. True in *CoNISMa* and more recently in *Swm Costruzioni 2* the ECJ held that the

62. See to this effect Rec. 65 of Dir. 2014/23 and Rec. 98 of Dir. 2014/24 and Rec. 103 of Dir. 2014/25; the issue is to resurface in Case C-115/14, *RegioPost*, pending before the ECJ.

63. Rec. 56 of Dir. 2014/23; Rec. 38 of Dir. 2014/24; Rec. 53 of Dir. 2014/25; all of them refer to the instance of call centres.

64. Reference to compliance “in substance” with fundamental International Labour Organization (ILO) Conventions was made, not without much debate among the institutions, Rec. 98 of Dir. 2014/24; see also Rec. 65 of Dir. 2014/23 and Rec. 103 of Dir. 2014/25.

65. See Trybus, *op. cit. supra* note 15, esp. 262 et seq.

66. See Arrowsmith and Kunzlik, *op. cit. supra* note 56, at 30 et seq., and the discussion of their opinion in Comba, *op. cit. supra* note 17, at 41 et seq.

67. For early instances see Comba, *op. cit. supra* note 17, at 33 and 38 et seq.

68. See also the analysis by Arrowsmith, *op. cit. supra* note 24, at 84 et seq.

69. Case C-336/12, *Manova*, EU:C:2013:647, para 28.

objective of attaining the widest possible opening-up of public contracts to competition benefits not only economic operators but also contracting authorities.⁷⁰ In particular, in *CoNISMa* the ECJ added that “the widest possible opening-up to competition is contemplated not only from the point of view of the Community interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which will thus have greater choice as to the most advantageous tender which is most suitable for the needs of the public authority in question.”⁷¹

To this effect, the ECJ referred to *SECAP*.⁷² That case answered the question whether the fundamental principles of EU law oppose a domestic rule applicable to contracts below the threshold obliging contracting authorities to exclude tenders considered to be abnormally low without allowing them any chance of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those elements. The Court affirmed the applicability of the fundamental rules of the (then) EC Treaty and the principle of non-discrimination on the ground of nationality to below the threshold contracts of certain cross-border interest.⁷³ On this basis, the Court went on to find that domestic rules such as those at issue, although objective and not in themselves discriminatory, could undermine the general principle of non-discrimination because in practice they place at a disadvantage operators from other Member States who might be in a position to make a bid that is competitive and at the same time genuine and viable.⁷⁴ In addition, such legislation could give rise to anti-competitive conduct and agreements, namely collusion between national or local undertakings intended to secure public works contracts for themselves, thus further disadvantaging economic operators from other Member States.⁷⁵ Having effectively decided the case, the ECJ added that:

“It is also contrary to the contracting authorities’ own interests for them to be deprived of any power to assess the soundness and viability of abnormally low tenders, since they are not able to assess tenders which are submitted to them under conditions of effective competition and therefore

70. Case C-305/08, *CoNISMa*, EU:C:2009:807, para 37; Case C-94/12, *Swm Costruzioni 2*, EU:C:2013:646, para 34.

71. Case C-305/08, *CoNISMa*, para 37; in Case C-94/12, *Swm Costruzioni 2*, para 34, the Court concurred with the Advocate General in listing facilitating the involvement of SMEs in the contracts procurement market among the aims pursued by Dir. 2004/18/EC.

72. Joined Cases C-147 & 148/06, *SECAP and Santorso*, EU:C:2008:277.

73. *Ibid.*, para 20 and operative part; on the notion of cross border interest see Risvig Hansen, *Contracts not covered or not fully covered by the Public Sector Directive*, (DJØF, 2012), p. 121 et seq; Drijber and Stergiou, *op. cit. supra* note 5, at 811 et seq.

74. Joined Cases C-147 & 148/06, *SECAP and Santorso*, para 26.

75. *Ibid.*, para 27.

to award the contract by applying the criteria, which are also laid down in the public interest, of the lowest price or the most economically advantageous tender.”⁷⁶

The reference to best value for money was clearly *obiter* here. From the point of view of EU law, best value for money can indeed be a side effect of the rules enacted to foster EU-wide competition in the award of public contracts.⁷⁷ It is the latter, however, and not best value for money, that is one of the main objectives of EU secondary law in this area. As it is often the case in EU law, the *obiter* has been repeated in later judgments, without however ever becoming the *ratio decidendi* of any of them.⁷⁸

In describing the former objective (i.e. to increase the efficiency of public spending) the Green paper indicates that: “This includes on the one hand, the search for best possible procurement outcomes (best value for money). To reach this aim, it is vital to generate the strongest possible competition for public contracts awarded in the internal market. Bidders must be given the opportunity to compete on a level-playing field and distortions of competition must be avoided.”

It is actually the other way round. The aim is competition in the internal market. Best value for money is one possible side-benefit.⁷⁹ “Possible” because it has been argued that the procedures laid down in the directives, traditionally limiting the possibility to negotiate with tenderers, actually hinder contracting authorities aiming at the best possible economic outcome.⁸⁰

The reference to the efficiency of public spending seems, in the end, one element of a marketing exercise to make Brussels rules more palatable to domestic audiences. This in itself is rather inoffensive and unproblematic.⁸¹ No specific provision indeed seems to be justified on the efficiency of public spending alone. Problems would however arise if efficiency of public spending was to be taken too seriously, starting to question the need for EU

76. *Ibid.*, para 29.

77. See Semple, *op. cit. supra* note 36, at para 6.1. et seq., and Burnett, *op. cit. supra* note 10, at 1 and 7 et seq; see also the discussion on best value for money by Arrowsmith, *op. cit. supra* note 6, at 17 et seq.

78. See again *CoNISMa*, para 37; Case C-94/12, *Swm Costruzioni 2*, para 34.

79. See also the Opinion of A.G. Jacobs in Case C-19/00 *SIAC*, EU:C:2001:266, para 33.

80. Arrowsmith, *op. cit. supra* note 6, at 226 et seq; see also the appraisal by Treumer, “Flexible procedures or ban on negotiations? Will more negotiation limit the access to the procurement market?” in Ølykke, Risvig and Tvarnø, *op. cit. supra* note 1, at 135 et seq., and the economic analysis in Spagnolo, “Public procurement as a policy tool” in *The Cost of Different Goals ...*, cited *supra* note 4, at 25 et seq.

81. But it might point to the need for a restrictive interpretation of some provisions: cf. Comba, *op. cit. supra* note 17, at 48.

rules imposing complex and lengthy procedures to the award of contracts, most of which are only contended at domestic level.⁸²

2.5. Innovation

Smart growth again is at the very core of the Europe 2020 Strategy. As Recital 47 of Directive 2014/24 recalls, research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth. Fostering innovation is therefore one of the objectives of the reform.⁸³ The linkage between public procurement and innovation is legitimate under Article 6 TFEU read together with Article 7 laying down the principle of consistency, which allows the Union to take supporting measures in the field of industry.

Public procurement rules are often perceived as hinderances rather than facilitators of innovation, in that to counter discrimination they limit considerably the margins of choice of contracting authorities. A number of provisions in the new directives aim at addressing this situation. Article 14 of Directive 2014/24 lays down specific provisions for research and development services. A new procedure, the innovation partnership, has been introduced for the development of an innovative product, service or works as well as at its subsequent purchase; this procedure leads to a long-term partnership between a contracting authority and one or more economic operators in respect of very large projects or smaller innovative projects.⁸⁴ As has been rightly remarked, “this is not a typical procedure but a partnership”.⁸⁵ One could well question whether these new provisions, including the one

82. See the Final Report on *Cross-Border Procurement above EU Thresholds* available at <ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cross-border-procurement_en.pdf> (last visited 20 Nov, 2014), and specially table 2. For a discussion of the data: Sánchez Graells, “Are the procurement rules a barrier to cross-border trade within the European market? A view on proposals to lower that barrier and spur growth” in Ølykke, Risvig and Tvarnø, *op. cit. supra* note 1, at 114 et seq.; unsurprisingly this is the argument of choice for those criticizing the EU public contract regime per se, e.g. Boyle, *op. cit. supra* note 32, at NA 171 et seq.

83. See also Rec. 95; see Steinicke “The public procurement rules and innovation” in Ølykke, Risvig and Tvarnø, *op. cit. supra* note 1, at p. 259 et seq.; Telles and Butler, “Public procurement award procedures in Directive 2014/24/EU”, and Butler “Innovation in public procurement: Towards the ‘Innovation Union’”, both in Lichère, Caranta and Treumer, *op. cit. supra* note 2, respectively at p. 160 and 351; Cerqueira Gomez, “The innovative innovation partnership under the 2014 Public Procurement Directive”, (2014) PPLR, at 213 et seq.; Apostol, “Pre-commercial procurement in support of innovation: regulatory effectiveness”, (2012) PPLR, 213.

84. See Rec. 49 and Art. 31 of Dir. 2014/24; Rec. 59 and Art. 49 of Dir. 2014/25.

85. Cerqueira Gomez, *op. cit. supra* note 83, at 212.

introducing the innovation partnership, are really conducive to innovation.⁸⁶ The competitive dialogue was already foreseen in 2004 to answer the needs of innovative contracting authorities.⁸⁷ Also – but this is a more general problem which will be addressed later – it has been argued that the new directives provide too many procedures or purchasing methods whose rationales and conditions of applications are often hard to distinguish.⁸⁸

Article 42 of the Public Sector Directive now seems to indicate a preference for functional and performance-related technical specifications, seen as appropriate means to favour innovation in public procurement and which should be used as widely as possible.⁸⁹

Innovation is relevant as one of the reasons for reform from a different point of view as well. As Recital 68 of Directive 2014/24 puts it, “[n]ew electronic purchasing techniques are constantly being developed”. A full chapter of the Directive is therefore dedicated to techniques and instruments for electronic and aggregated procurement.⁹⁰ Technical innovation is providing new opportunities to cut costs while at the same time possibly contributing to the integrity of the public procurement process.⁹¹ As already recalled, the new directives place a novel emphasis on the fight against fraud and corruption in public contract markets.⁹² The new directives will make the use of electronic means of communication compulsory.⁹³ The rules on electronic auctions have been recast, and new provisions have been introduced for purchases from electronic catalogues.⁹⁴ The somewhat extensive regulation of this technical

86. See the discussion as to the effectiveness of this instrument by Apostol, “Pre-commercial procurement in support of innovation: regulatory effectiveness”, PPLR (2012), at 213 et seq.

87. Telles, “Competitive dialogue: Should rules be fine-tuned to facilitate innovation?” in Ølykke, Risvig Hansen and Tvarnø, op. cit. *supra* note 1, at 226 et seq.

88. Cerqueira Gomez, op. cit. *supra* note 83, 211; this so much so since Rec. 47 of Dir. 2014/24 specifies that pre-commercial procurement is still an option.

89. See also Rec. 74 of Dir. 2014/24; Rec. 83 of Dir. 2014/25.

90. See Lichère and Richetto, “Framework agreements, dynamic purchasing systems and public e-procurement”, and Racca, “Joint procurement challenges in the future implementation of the new directives”, both in Lichère, Caranta, Treumer, op. cit. *supra* note 2, p. 185 et seq. and p. 225 et seq.

91. As Rec. 52 of Dir. 2014/24 and Rec. 63 of Dir. 2014/25 put it, “Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes”.

92. See Sanchez Graells, “Exclusion, qualitative selection and short-listing in the new public sector procurement Directive 2014/24” in Lichère, Caranta and Treumer, op. cit. *supra* note 2, 105 et seq.; see also the contributions collected by Racca and Yukins (Eds.), *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant, 2014).

93. Lichère and Richetto, op. cit. *supra* note 90, p. 188 et seq.

94. See Art. 34, Art. 35 and Art. 36 of Dir. 2014/24 and Art. 52, Art. 53 and Art. 54 of Dir. 2014/25; see Lichère and Richetto, op. cit. *supra* note 90, p. 206 et seq.

aspect is linked to the worry that different standards might keep national markets separate and lead to discrimination of non-national bidders.⁹⁵ Security of the means of communication is another concern.⁹⁶ Centralized purchasing is linked to more technically advanced procurement practices (even if it often focuses on simple off the shelf goods and services).⁹⁷

2.6. *Linking public contract law to other EU policies, including the fight against corruption*

Strategic use of public contract money is a legitimate and important pillar of EU law. Contracting authorities are to some extent called to enforce other EU policies. This approach crystallizes in Article 18(2) of Directive 2014/24, according to which Member States must take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.⁹⁸ This is specifically relevant with reference to the selection of economic operators called to take part in award procedures. The exclusion regime has been strengthened and widened under the new directives, also with a view to help in enforcing environmental, social and labour law.⁹⁹

The exclusion regime has also been strengthened with the aim of fighting corruption.¹⁰⁰ Integrity of the procurement process is, as already recalled, one of the additional themes of the reform. Corruption, like collusion, bid-rigging, conflict of interest and so on distort award procedures and the proper functioning of the internal market itself.¹⁰¹ Accordingly, in the new directives we also find a specific provision on conflict of interest.¹⁰²

95. See also Rec. 55 of Dir. 2014/24 and Rec.66 of Dir. 2014/25.

96. See also Rec. 57 of Dir. 2014/24 and Rec. 68 of Dir. 2014/25.

97. Art. 37 of Dir. 2014/24 and Art. 55 of Dir. 2014/25; see more generally Racca, "The electronic award of public procurement" in Comba and Treumer, op. cit. *supra* note 42, esp. p. 315 et seq.

98. See also Art. 30(3) of Dir. 2014/23 and Art. 36 (2) of Dir. 2014/25; see critically Sanchez Graells, op. cit. *supra* note 82, 101 et seq.

99. See Steinicke, "Qualification and shortlisting" in Trybus, Caranta, Edelstam, op. cit. *supra* note 7, p. 122 et seq.

100. See the detailed analysis by Sanchez Graells, *supra* note 92, at p. 105 et seq.

101. Arrowsmith, op. cit. *supra* note 24, at 50 et seq.

102. E.g. Art. 24 of Dir. 2014/24; see also Rec. 13 of the same Directive; see again Sanchez Graells, *supra* note 92, p. 111 et seq.

2.7. *Brief conclusions on the objectives of EU public procurement law*

In the end, EU institutions lack competence to enact rules solely or principally aimed at pursuing best value for money for the contracting authorities. As rightly remarked, “[a]ll the other new objectives of the Directive (green, social, innovative, corruption) can be connected to specific EU policies. Efficiency in public spending cannot, because it rests exclusively with the competence of Member States”.¹⁰³ In fact, the law would be tidier if the specific TFEU provisions concerning the environment, social policy and industry were directly referred to as legal bases alongside the traditional internal market articles.

3. **The institutional dynamics and the political context of public contracts reform**

The above considerations on the reasons of the reform already make it clear that this was not a simple maintenance exercise. Deep changes have been introduced in the EU regulatory framework. All parties involved – EU institutions and the Member States – brought to the process their preferences, agendas and strategies. Conflicts were in plain view and tripartite dialogue was needed to iron them out (or sweep them under the carpet).¹⁰⁴ The result is quite complex – and at times perplexing – and this owes much to the institutional dynamics at play. The process however was quite dynamic and the democratic institutions of the EU were deeply involved in it. This is in itself very positive.

3.1. *The pro-integration duo performing magic: Where the Court of Justice helps the Commission in mellowing the resistance of the Member States*

The reform process obviously involved the Commission, the Council, and the Member States therein, and the Parliament. The CJEU is not formally part of law making. The EU does not normally follow the French pattern of having a top court – the *Conseil d’Etat* – advising on reform (Art. 218 TFEU is exceptional). In many ways however the Court plays the role of *primum*

103. Comba, op. cit. *supra* note 17, at 47; see also Arrowsmith, op. cit. *supra* note 24, at 83 et seq.

104. A knowledgeable account of the negotiation process is provided in Danish by Risvig Hamer, “Nyt udbudsdirektiv – væsentlige ændringer”, (2014) *Erhvervsjuridisk Tidsskrift*, 145; constructive ambiguity has in the end been much abused in the directives: see Treumer, op. cit. *supra* note 3, at 10 et seq.

movens. It has been rightly noted that “[p]ublic procurement regulation has evolved dynamically through the Court’s jurisprudence”,¹⁰⁵ so that “the Court of Justice has been the inspiration of some of the most fundamental and important novelties in the new Public Procurement Directive”.¹⁰⁶

As usual, Recital 2 of Directive 2014/24 acknowledges the need to incorporate certain aspects of well-established case law of the ECJ. However, this formula looks very much like an understatement. In recent years the case law has not just clarified the law, but has both overturned some basic assumptions – or understandings – underlying the old public procurement directives and laid down rules for novel aspects of public contract practice.

For instance the Council had always opposed EU rules being applicable to service concessions. Basically concessions are used to award services of general economic interest – SGEIs. While outsourcing the provisions of these services, the contracting authorities are still held accountable for their quality by users. This involves the need to change the contract to adapt it to changing demands from the public. Quite often those services to be provided according to the universal service principle still require considerable infusions of public money.¹⁰⁷ In many Member States their providers were privatized recently, and privatization was often only in form, the State or another public law entity still being the major if not the only shareholder. In this situation a good number of Member States, including France, wanted to keep their hands free when choosing concessionaires. Unsurprisingly, considering that contract notices were rarely advertised at EU level, concessions were usually awarded to domestic undertakings.¹⁰⁸

In 2000 the jealousy of the Member States was badly shaken by *Telaustria*.¹⁰⁹ Telekom Austria, which was at the time wholly owned by the State, published in a local newspaper an invitation to submit tenders for a public service concession for the production and publication of printed and electronically accessible telephone directories. *Telaustria* and *Telefonadress* took the view that public procurement award procedures should have applied and challenged the procedure followed. The ECJ recalled that the Commission had expressly proposed that “public service concessions” be included within the scope of Directive 92/50/EEC. However, it added that “during the

105. Bovis, op. cit. *supra* note 5, at 461.

106. Treumer, op. cit. *supra* note 3, at 17.

107. See the results of the research managed by CSES as summarized at p. 5 of the report available at <ec.europa.eu/internal_market/consultations/docs/2010/concessions/cs/es_en.pdf> (last visited 28 Nov.2014).

108. See the results in the report by the College of Europe available at <ec.europa.eu/internal_market/consultations/docs/2010/concessions/college_europe_en.pdf>(last revisited 28 Nov.2014).

109. Case C-324/98, *Telaustria*, EU:C:2000:669.

legislative process, the Council eliminated all references to public service concessions, in particular because of the differences between the Member States as regards the delegation of the management of public services and modes of delegation, which could create a situation of very great imbalance in the opening-up of the public concession contracts.”¹¹⁰ Had the legislature wished to include concessions within the scope of the directives, it would have done so expressly, as it did when adopting the public works Directive.¹¹¹ However, according to the ECJ, the fact that service concessions did not fall within the scope of the procurement directives did not rule out all relevance of EC (now EU) law. More specifically, the Court held that the contracting entities are “bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular”.¹¹² Following the judgment in *Unitron Scandinavia*, “that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with”.¹¹³ The Court also felt it necessary to give some indication as to the content of the obligation of transparency, stating that it “consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed”.¹¹⁴ As has been remarked: “This statement lacks clarity, but not importance”.¹¹⁵

Service concessions were still not regulated in the 2004 directives, but the pressure was already mounting on the Member States. The Commission had started a sustained campaign against direct awards, some of which had taken place through the award of service concessions. In one infringement action against Germany the ECJ had held that Germany had breached EU law when one of its municipalities directly awarded a long term contract for the

110. *Ibid.*, para 48.

111. *Ibid.*, para 56.

112. *Ibid.*, para 60; the judgement and the following case law has been thoroughly investigated by Risvig Hansen, *op. cit. supra* note 73; see also Risvig Hamer, “Treaty requirements for contracts ‘outside’ the procurement Directives” in Trybus, Caranta and Edelstam, *op. cit. supra* note 7, pp. 191–219; the analysis is extended to the case law in a number of Member States in the contributions collected by Dragos and Caranta (Eds.), *Outside the EU Procurement Directives – Inside the Treaty?* (DJØF, 2013).

113. Case C-324/98, *Telaustria*, para 61, referring to Case C-275/98, *Unitron Scandinavia*, EU:C:1999:567; the principle of transparency has been investigated by Drijber and Stergiou, *op. cit. supra* note 5, 809 et seq; Risvig Hamer, *op. cit. supra* note 73, 193 et seq, and please also refer to Caranta, “Transparence et concurrence” in Noguellou and Stelkens, *op. cit. supra* note 17, pp. 154–172.

114. Case C-324/98, *Telaustria*, para 62.

115. Treumer, “The discretionary powers of contracting entities – towards a flexible approach in the recent case law of the Court of Justice?”, (2006) PPLR, 82.

collection of waste water.¹¹⁶ The Commission thereafter brought a second infringement action, claiming that Germany had failed to comply with the first judgment by leaving the contract to stand, being content to write to the responsible authority to comply with the rules on the publication of calls for tenders when awarding future contracts. According to Germany and a number of Member States which had intervened in the proceedings, the principles of legal certainty, of protection of legitimate expectations, of *pacta sunt servanda*, and the fundamental right to property, *inter alia*, precluded the termination of the contracts at issue. The ECJ curtly retorted that those principles might be used against the contracting authority by the other party to the contract in the event of termination, but Member States cannot rely on them to justify the non-implementation of a judgment establishing a failure to fulfil obligations and thereby evade their own liability under (then) Community law.¹¹⁷ This judgement put a very high price on direct award, both for the contracting authority and its contractor. The stakes were only raised when direct awards were listed as a major breach of EU law normally leading to ineffectiveness of the contract under Article of Directive 89/665/EEC, as amended by Directive 2007/66/EC.¹¹⁸

Service concessions were just one front in the war against direct awards. Abuses of the in-house doctrine, which will be analysed below,¹¹⁹ very much took centre stage in this fight.¹²⁰ One of these judgments, *Parking Brixen*, involved service concessions to an in-house entity.¹²¹ The ECJ reaffirmed the applicability to the award of service concessions of the principles of equal treatment and non-discrimination on grounds of nationality and the duty of transparency linked to them.¹²² This rule has often been repeated since then,¹²³ the case law having specified that this is the case when the contract at issue presents a cross-border interest.¹²⁴

The freedom the Member States expected from the absence of regulation of service concessions suddenly evaporated. The risk was the development of a case law imposing more and more detailed obligations upon contracting

116. Joined Cases C-20 & 28/01, *Commission v. Germany*, EU:C:2003:220.

117. Case C-503/04, *Commission v. Germany*, EU:C:2007:432, para 36.

118. Bovis, op. cit. *supra* note 8, at 387.

119. See *infra* section 4.4.

120. Case C-29/04, *Commission v. Austria*, EU:C:2005:670; Case C-26/03, *Stadt Halle and RPL Lochau*; Case C-231/03, *Coname*, EU:C:2005:487; Case C-458/03, *Parking Brixen*, EU:C:2005:605.

121. Case C-458/03, *Parking Brixen*.

122. Para 48 et seq.

123. E.g. Case C-221/12, *Belgacom NV*, EU:C:2013:736, para 28; Case C-347/06, *ASM Brescia*, EU:C:2008:416, paras. 58 and 59.

124. E.g. Case C-221/12, *Belgacom NV*, para 31 et seq.; Case C-388/12, *Comune di Ancona*, EU:C:2013:734, para 50 et seq.

authorities. Already, directly awarded service concessions had to be terminated to comply with EU obligations. When given the chance to legislate again, the Member States were finally ready to accept the Commission's proposal for an EU directive on concessions, encompassing both works and service concessions whose value exceeds a fairly high threshold.¹²⁵ As a sort of compensation, the Member States included resounding proclamations of the "principle of free administration by public authorities" and of their "freedom to define services of general economic interest" in Articles 2 and 4 of Directive 2014/23 – which were both absent in the Commission proposal and were introduced during the legislative process. As already remarked, this is mirrored in Article 1(4) of Directive 2014/24.¹²⁶

These institutional dynamics and the opposing roles played by the Member States and the Commission (and the ECJ) are not manifest in Directive 2014/23. Its recitals very much stress the necessity to do away with the legal uncertainties related to possibly divergent interpretation of the Treaty principles.¹²⁷ Uncertainties are indeed a risk inherent in a regime based on case law,¹²⁸ and the recitals avow that the case law has "only *partially* addressed *certain* aspects of the award of concession contracts".¹²⁹ In line with the subsidiarity principle (expressly referred to in Recital 87), Directive 2014/23 designs a procedurally light regime, and Recital 8 refers to the need of "a minimum coordination" of award procedures. Much of the Directive consists of provisions defining its scope of application. The procedural rules are quite basic.¹³⁰

In a way, the Member States have been pushed by the combined efforts of the Commission and the ECJ to accept EU secondary law rules on concessions as a lesser of two evils as compared with judicial law-making – often prompted by the Commission by means of infringement procedures.¹³¹ However – as a compromise – the rules actually enacted place only limited constraints on contracting authorities or entities. One could even doubt whether the obligations flowing from the treaties have been really clarified. Another question is whether the remaining discretion will be left undisturbed by future ECJ decisions. Legislation does not always put institutional dynamic to rest. Indeed, and this is the most potent engine of EU law, competitors might

125. See also Rec. 23.

126. See also Rec. 7.

127. See Rec. 1, 2 and 4.

128. See with specific reference to our topic Sanchez Graells, *op. cit. supra* note 21, at 94.

129. Rec. 4, emphasis added.

130. See also *infra* section 5.

131. The outcome was long seen coming: Neergaard, "Public service concessions and related concepts – the increased pressure from Community law on Member States' use of concessions", (2007) PPLR, at 398 et seq.

still be willing to challenge the exercise of discretion by the buyers, and national courts might well be willing – and in some cases bound – to ask the Court for further clarification. Even if the EU legislature has shown much restraint, an increase in the number of rules on the award of concessions might yet be in the cards.¹³²

Not that the ECJ has constantly sought to widen the scope of application of EU rules (or to limit the margins of choice of contracting authorities). The case law on both in-house providing and public-public cooperation (discussed below) attests otherwise, since exceptions to the applicability of the old directives were recognized by the Court.¹³³

3.2. *Institutional drama, or of where and when the ECJ nurtured sustainable procurement, finally helping the Parliament (and some Member States) to break the resistance of the Commission*

In fact, it cannot be said that the ECJ constantly sides with the Commission. “At times the Court can be seen as attempting to tame the Commission’s wilder single market fantasies”.¹³⁴ The case law on sustainable procurement is possibly the best instance in point. The ECJ has taken the lead over a recalcitrant Commission in developing the law. The result has been a slowly unfolding drama involving other protagonists – Member States and litigants, and more recently the European Parliament and the political forces therein.¹³⁵

In the First Act, the Commission tries to enforce internal market orthodoxy, taking the oracular utterances of the ECJ literally. It all started with *Beentjes*, decided in 1982.¹³⁶ A contract was awarded to the second lowest bidder because the first was not capable of complying with an obligation to employ long-term unemployed persons. The ECJ first considered that such a condition had no relation to the checking of contractors’ suitability on the basis of their economic and financial standing and their technical knowledge and ability or to the criteria for the award of contracts.¹³⁷ This led the Court to qualify the requirement in question as an “additional specific condition”,

132. See also Craven, “The EU’s 2014 Concessions Directive”, (2014) PPLR, at 197; see also the reading of Case C-388/12, *Comune di Ancona*, EU:C:2013:734 and its discussion by Albert Sanchez Graells at <howtocrackanut.blogspot.co.uk/2013/11/cjeu-kicks-new-concessions-directive-in.html> (last visited 28 Nov.2014); more generally and in the same vein Semple, op. cit. *supra* note 36, para 1.82.

133. See *infra* section 4.4.

134. Semple, op. cit. *supra* note 36, para 1.74.

135. The role of the European Parliament in this area is stressed by Gormley, “New rules in Public Procurement – for better, for worse, or another dog’s breakfast?” in Bregman, Bröring and de Graaf (Eds.), *Onbegrensdse rechtsbeoefening* (Lubach-bundel), (IBR, 2014), p. 174.

136. Case 31/87, *Beentjes*.

137. *Ibid.*, para 28.

which must comply with the general principles of (then) EEC law and must be mentioned in the contract notice, so that contractors may become aware of its existence.¹³⁸ The Commission responded by developing the notion of contract performance condition as distinct from both selection and award criteria.¹³⁹ On this basis it structured an infringement procedure against France.¹⁴⁰ The notices for school buildings works set out the award criteria included an “additional criterion” relating to the promotion of employment. The Commission claimed that such a requirement could be used only as a contract performance condition, not as an award criterion; this was also because (then) Community law allowed two award criteria only, namely the lowest price and the most economically advantageous tender. The ECJ however held that, provided the Treaty general principles were complied with, the procurement directives did not “preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment”.¹⁴¹ Having rejected the Commission’s main argument, the Court found the Commission’s action wanting.¹⁴²

In the Second Act, the Commission repeats its past mistakes, clinging to words and small phrases uttered by the ECJ to try and keep internal market orthodoxy pure. *Concordia Bus* concerned a contract notice for the urban transport bus network of the Municipality of Helsinki.¹⁴³ The contract was to be awarded to the undertaking whose tender was most economically advantageous taking into account *inter alia* the quality of the vehicle fleet, with additional points awarded for the use of buses with limited nitrogen oxide emissions and external noise, and the operator’s quality and environment programme, with additional points to be awarded for a body of certified qualitative criteria and for a certified environment programme. In the procedure, the Commission claimed that only those criteria resulting in a direct benefit of an economic nature to the procuring entities could be allowed. The ECJ, following the Opinion of Advocate General Mischo, held otherwise. According to the Court, the words “for example” used by the Directive in introducing a list of possible criteria making up the most economically advantageous tender “read together with [then] Article 6 EC Treaty lead to the conclusion that public procurement law does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the

138. *Ibid.*, para 36.

139. See e.g. the recent *Buying social. A Guide to Taking Account of Social Considerations in Public Procurement*, (Publication Office of the EU, 2010), at 43 et seq.

140. Case C-225/98, *Commission v. France* EU:C:2000:494.

141. *Ibid.*, para 50 et seq.

142. *Ibid.*, para 53.

143. Case C-513/99, *Concordia Bus*, EU:C:2002:495.

environment when assessing the economically most advantageous tender”.¹⁴⁴ Here again the ECJ conceded something to internal market concerns.¹⁴⁵ Besides the usual need to comply with the general principles of the Treaty, the non-economic criteria had to be “linked to the subject-matter of the contract”.¹⁴⁶ This approach was affirmed in *EVN*, concerning the procurement of green electricity in Austria.¹⁴⁷

Concordia Bus was a major judgment, so much so that it was referred to in Recital 1 of Directive 2004/18/EC as a reason for redrafting public procurement rules. The Commission however went on fighting. While both the judgment and the new Directive required the link to the subject-matter of the contract with specific reference to award criteria only, the Commission in its documents made it a requirement for other phases of the procurement process, such as the qualification or the contract performance clauses.¹⁴⁸ Reference to production processes was however what the Commission was prepared to go to battle against. In its Communication on integrating environmental considerations into public procurement, the Commission opined that reference to a specific production process was possible only if this did not restrict competition and helped “to specify the performance characteristics (visible or invisible) of the product or service”.¹⁴⁹ One might have been excused for thinking that public procurement law was being turned over to psychics; the problem was however very practical. For instance, green energy is not materially different from normal energy: only the production process is. But that is where the Commission would rather not go, notwithstanding that the ECJ had opened up this possibility in *EVN*.¹⁵⁰

In the Final (so far) Act, the ECJ roundly rebukes the Commission, and the European Parliament seizes the opportunity to firmly root sustainable procurement in the directives.

A more detailed analysis than is permissible here should not treat the Commission as an indivisible entity. The preferences embodied in what until a few months ago was DG Market diverge from those defended by DG ENV or DG EMPL, as was clear from the enormous amount of time needed to adopt

144. *Ibid.*, para 57.

145. Which are well analysed by Hettne, “Sustainable public procurement and the Single Market – Is there a conflict of interest?”, 8 EPPPL (2013), 31–40, and Weller and Meissner Pritchard, “Evolving CJEU jurisprudence: Balancing sustainability considerations with the requirements of the internal market”, 8 EPPPL (2013), 55–59.

146. Para 58 et seq; Martens and de Margerie, “The link to the subject-matter of the contract in green and social procurement”, 8 EPPPL (2013), 8–18.

147. Case C-448/01, *EVN and Wienstrom*, EU:C:2003:651.

148. E.g. *Buying social...*, cited *supra* note 139, at 6 et seq.

149. COM(2001)274 final, point II.1.2.; see also COM(2001)566 final, point 1.2.

150. Case C-448/01, *EVN and Wienstrom*; see critically Arrowsmith, *op. cit. supra* note 23, at 80 et seq.

the Guide to taking into account social consideration in public procurement.¹⁵¹ Making distinctions within the Commission would help avoid the conclusion that the disconnect in the Commission proposals between spirited references to Europa 2020 and sustainability, and the very minimal changes proposed to the rules on sustainable procurement was due to bureaucratic double talk aimed at pleasing some stakeholders without really changing things. The substantive point is that the proposal was modest, to put it kindly. Then came the judgment in *Max Havelaar*.¹⁵² This case stemmed from infringement proceedings brought against the Netherlands because the province of North Holland had set an award criterion relating to the fact that the ingredients to be supplied were to bear the Eko and/or Max Havelaar labels. The Commission complained that a link to the subject-matter of the contract was absent, insofar as those labels do not concern the products to be supplied themselves, but the general policy of the tenderers (especially in the case of the Max Havelaar label). According to Advocate General Kokott, however, the Max Havelaar label, while not defining any product characteristics in the strict sense, does:

“provide information on whether or not the goods to be supplied were traded fairly. Such a factor can be taken into consideration in connection with conditions relating to performance of a contract (Article 26 of Directive 2004/18/EC). It cannot therefore be denied at the outset that it lacks any connection with the subject-matter of the contract (in this case, the supply of ‘ingredients’ such as sugar, milk powder and cocoa). From the point of view of a contracting authority which, as the contract documents show, attaches importance to socially responsible trade, the question whether or not the goods to be supplied were purchased from the producer thereof on fair conditions can indeed be relevant in determining best value for money. Of course the taste of sugar does not vary depending on whether it was traded fairly or unfairly. A product placed on the market on unfair conditions does however leave a bitter taste in the mouth of a socially responsible customer.”¹⁵³

This is as strong an endorsement of social considerations in public procurement as there could possibly be. What is not allowed under EU law is for a contracting authority to want to assess the general purchasing policy of potential tenderers and to take into consideration whether all the goods in its product range are fair trade, irrespective of whether or not they are the subject-matter of the contract, but this was not the case with the contract

151. *Buying social...*, cited *supra* note 139, 240.

152. Case C-368/10, *Commission v. Netherlands*, EU:C:2012:284.

153. *Ibid.*, para 110.

notice at issue. The Opinion was fully followed by the ECJ, which held that contracting authorities are “authorized to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons”.¹⁵⁴ Moreover the Court stressed that “there is no requirement that an award criterion relates to an intrinsic characteristic of a product”.¹⁵⁵

Max Havelaar closed the inter-institutional debate on award criteria. The proposal was changed, and now Article 67(3) clearly states that award criteria shall be considered to be linked to the subject-matter where they relate to any stage of the life cycle of the goods or services purchased, including the specific process of production, provision or trading, “even where factors do not form part of their material substance”. The last clarification is not an oblique reference to Saint Thomas Aquinas and to medieval logic; it intends to sweep away the weak categories to which the Commission clung in its fight against taking into account production processes in awarding public contracts.¹⁵⁶ The production process is now relevant in principle rather than exceptionally. Only, in line with Advocate General Kokott’s Opinion in *Max Havelaar*,¹⁵⁷ “the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterizing the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place”.¹⁵⁸

As already recalled, there are also safeguards in the way the life cycle cost analysis has been structured in Article 68 of Directive 2014/24. Here again the Commission has been forced to cede some ground. The proposal required methodologies used for the calculation of the life cycle cost to be “established for repeated or continuous application”. This was repealed at the instance of the European Parliament and now under Article 68(2)(a), where the methodology has not been established for repeated or continuous application, “it shall not unduly favour or disadvantage certain economic operators”.

The Commission did manage to get some limited satisfaction. The “link to the subject-matter” has metastasized throughout the directives.¹⁵⁹ Besides

154. *Ibid.*, para 85.

155. *Ibid.*, para 91.

156. This also appears in Rec. 64 of Dir. 2014/23, whose Art. 41 does not have the details found in Art. 67 of Dir. 2014/24. See Semple, *op. cit. supra* note 36, para 4.42.

157. Case C-368/10, *Commission v. Netherlands*, EU:C:2012:284, para 88.

158. Rec. 97 Dir. 2014/24.

159. Or, as Semple, *op. cit. supra* note 36, para 4.42, puts it: it has snowballed.

Article 67(3) of Directive 2014/24 on award criteria it pops up for instance in Article 42(1) on technical specifications; Article 43(1)(a) and (2) on labels; Article 45 on variants, and in Article 70 on contract performance conditions.¹⁶⁰ As the last provision makes clear, the link in question has to be understood in relation to the life cycle as defined with reference to award criteria.

3.3. *It's not all light: Of where the Court of Justice muddled up public procurement law, and other institutions tried to tidy up (but were not necessary successful)*

The ECJ is clearly a major engine in the development of EU public contract law. The results are not, however, always positive.¹⁶¹ The case law on the notions of both procurement and concession contracts has not always helped make the law clearer: the hope was that the new provisions enacted would help. Forecasts for concessions based on the wording of Article 5 of Directive 2014/23 are fair. The skies seem less clear for procurement, the new definition provided in Article 1(2) of Directive 2014/24 still leaving wide margins of ambiguity.¹⁶²

The most egregious mishap in the case law is however *Lianakis*.¹⁶³ The contract notice listed as award criteria: the proven experience of the expert on projects carried out over the last three years; the firm's manpower and equipment; and its ability to complete the project by the anticipated deadline, together with its commitments and its professional potential. Referring to *Beentjes*,¹⁶⁴ the ECJ, while accepting that EU law does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, stressed that the two procedures are nevertheless distinct and are governed by different rules.¹⁶⁵ This approach met with resounding criticism and was not always followed in the Member States. The quality of the performer is obviously relevant in many cases and may justify a higher contract price.¹⁶⁶ As has rightly been stressed “[t]he experience of the

160. Art. 58(1) on selection criteria has a somewhat different formulation, requiring them to be “related and proportionated to the subject-matter”.

161. See also the issues raised by Treumer, *op. cit.* *supra* note 3, at 18 et seq.

162. See *infra* section 4.2.

163. Case C532/06, *Lianakis and Others*, EU:C:2008:40.

164. Case 31/87, *Beentjes*.

165. *Ibid.*, para 26.

166. See Treumer, “The distinction between selection and award criteria in EC public procurement law: A rule without exception?”, (2009) PPLR, 103–111, 111; and the reports on the domestic situation in a number of Member States published in the same issue of the *Public Procurement Law Review*; see also the economic analysis on the role of reputation in procurement by Spagnolo, *supra* note 80, at 30 et seq.

proposed staff to provide the services may be used as a proxy for measuring the means for managing the risk of under-performance of the contract”¹⁶⁷

While the Commission was ready to relax the separation of qualification and award criteria for service contracts and for contracts involving the design of works, the Parliament introduced in what later became Article 67(2)(b) of Directive 2014/24, the less stringent reference to a significant impact on the level of performance of the contract – thus doing away with the *Lianakis* doctrine.¹⁶⁸

Surprisingly, a chamber of the ECJ has recently reaffirmed the *Lianakis* case law without even mentioning the new directives.¹⁶⁹ This points to some major issues in the working of the EU institutions. The Commission has been enforcing *Lianakis* orthodoxy, but at the same time it was accepting (to say the least) that the rigid distinction between selection and award criteria does not (always) make public procurement sense. The real issue was never raised in the case, and the ECJ, which proceeded without an Opinion of the Advocate General, simply ignored the developments in EU law, sticking to its own precedents. The Court will soon be provided with an opportunity to review its precedents. In his well-reasoned Opinion in *Ambisig*, Advocate General Wathelet, while intentionally focusing his analysis on Directive 2014/24, has concluded that the experience of those who will actually perform the contract is indeed a relevant and permissible award criterion in the procurement of some intellectual service contracts.¹⁷⁰

Another questionable judgment concerned the treatment of eco- and social-labels in the already recalled *Max Havelaar* case.¹⁷¹ Labels are shortcuts providing information, in this case that the works, services or supplies correspond to the required characteristics. In the infringement proceedings at issue the notice for the award of a public contract required tenderers to have either the Max Havelaar or EKO label. Advocate General Kokott considered that contracting authorities do not need to list separately in their contract documents every individual specification which forms part of an eco-label; rather, they are free to refer in the contract documents, by a simple reference to eco-labels, in general and to all the specifications on which those labels are based.¹⁷² In her view, an overall reference to all specifications on which an eco-label is based is compatible with the principle

167. Bordalo Faustino, “Evaluation models in public procurement” in Comba and Treumer, *op. cit. supra* note 41, pp. 339–358.

168. See Treumer, *op. cit. supra* note 3, at 15 et seq. and 20, writing of *Lianakis* being overruled.

169. Case C-641/13 P, *Spain v. Commission*, EU:C:2014:2264.

170. Case C-601/13, *Ambisig*, Opinion of 18 Dec. 2014.

171. Case C-368/10, *Commission v. Netherlands*, EU:C:2012:284.

172. *Ibid.*, para 52.

of transparency, “since a reasonably well-informed tenderer of normal diligence can indeed be expected to be familiar with the eco-labels used on the relevant market or at least to obtain information on such labels from the bodies certifying them”.¹⁷³ The ECJ, siding with the Commission, thought otherwise, holding that Article 23(6) of the Public Sector Directive confers on contracting authorities the option to use the detailed specifications of an eco-label, but not the eco-label as such; the obligation of the contracting authority to mention expressly the detailed environmental characteristics it intends to impose even where it refers to the characteristics defined by an eco-label, is considered to be indispensable in order to allow potential tenderers to refer to a single official document.¹⁷⁴

The problem is that, while (unlike *Lianakis*) this judgment is based on relevant concerns about transparency, (like *Lianakis*) it makes very little public procurement sense – and no sustainable public procurement sense – because it places a burden on contracting authorities which might easily discourage them from referring to labels at all.

What is remarkable is that all institutions were on the same page during the reform process. The Commission proposal allowed contracting authorities to refer directly to labels – as now foreseen in Article 43(1) of Directive 2014/24 – which also lays down the safeguards to be complied with. According to a further provision inserted in the trilogue, it is only where contracting authorities do not require the works, supplies or services to meet all the requirements of the label that they must indicate which label requirements are referred to. So as not to limit competition too much, contracting authorities are under an obligation to accept equivalent labels and, under given conditions, alternative means of proof.¹⁷⁵ This makes the life of contracting authorities somewhat simpler, but also means that the assessment whether the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract does not need to be repeated requirement by requirement, but is passed at a more abstract level.

These instances show that the “political institutions” may well – and in some cases it is submitted should – correct the ECJ when it interprets secondary law.¹⁷⁶ It may well be the case that the interpretation offered by the Court is not conducive to the soundest possible working of public procurement rules (or of any rules, for that matter). True: the ECJ *dit pour le droit*. But it is not infallible. It is submitted that, when proposing legislation,

173. *Ibid.*, para 56.

174. *Ibid.*, para 63 et seq.

175. See Dragos and Neamtu, *op. cit. supra* note 34, 321 et seq and 332 et seq.

176. See also Treumer, *op. cit. supra* note 3, at 10.

the Commission may be more critical than it is at present. As will be shown when discussing the definition of procurement contract, clinging to every word of the Court does not always help clarify the law. The position is obviously different when the Court is interpreting the Treaties. Unless and until the Treaties are changed, all EU institutions are bound by the construction placed on them by the ECJ. This does not mean that the Court should not be more ready to openly concede that its precedents might have been wrong, or at least to approach them more critically. But it is also possible that the recent judgment reaffirming *Lianakis* was simply given “per incuriam”, as the English might have it (when writing Latin).¹⁷⁷

3.4. *Of More Shadows: A few additional tales of a somewhat timid Commission and (often) messy political institutions (and Member States).*

The proposals from the Commission were conservative in many respects. If the proposal for a Concessions Directive is set aside for a moment, and the lip service paid to the Europa 2020 strategy, what was put on the table looked more like maintenance of the existing rules in the light of the case law and of technological developments rather than fundamental changes. Admittedly some truly innovative proposals, such as the European Procurement Passport, were simply shot down by the “political institutions” afraid of more bureaucracy imposed by Brussels. According to the Commission proposal, the Passport was to be used to prove the qualification of economic operators and had to be issued by national authorities.¹⁷⁸ In what has become Article 59 of Directive 2014/24 we have now the European Single Procurement Document, consisting of an updated self-declaration which has the simple value of preliminary evidence, replacing certificates issued by public authorities.¹⁷⁹

It is also lamentable that, in the process leading to the adoption of the new directives, the provisions on governance in the Commission proposal were much watered down at the insistence of a group of Member States. The same is true of the single independent body responsible for the oversight and coordination of implementation activities, whose institution in each Member State was foreseen in the Commission proposal.¹⁸⁰ This might have led, as has happened in other areas of EU law, to the creation of a network of independent

177. *Young v. Bristol Airplane Company Ltd* [1944] 1 KB 718 (CA) springs to the mind when reading the judgment (so far available in French and Spanish only).

178. The actual usefulness of the proposal had however been questioned: see Sanchez Graells, *op. cit. supra* note 92, at 124 et seq.

179. See Semple, *op. cit. supra* note 36, para 4.22 et seq.; Sanchez Graells, *op. cit. supra* note 92, 119 et seq.; Trybus, *op. cit. supra* note 15, 267 et seq.

180. See also Rec. 49 of the proposal.

administrative authorities, ultimately answering to the Commission.¹⁸¹ These authorities would inevitably end up acting as the Commission's eyes, reporting cases of fraud, corruption, conflict of interests and other serious irregularities, thus making easier the launch of infringement proceedings. Unsurprisingly this too was killed by the Council, the Member States being obviously keen on keeping the monitoring of the application of public procurement rules under their control. So as not to be too bothered by an inquisitive Commission, the Member States were cheeky enough to have inserted in what has become Article 83(3) of Directive 2014/24 a provision forbidding the Commission to request them to provide information on the practical implementation of national strategic procurement policies more than once every three years. It is of course doubtful whether this is consistent with the Commission's Treaty-granted role of guardian of the respect of EU law.

The choices just outlined will not contribute to the effectiveness of EU public contract law. At least, however, they are transparent enough in both their motivation and in the wording of the resulting provisions. Elsewhere, however, the political pressure has resulted in indigestible provisions.¹⁸² Article 67 of Directive 2014/24, on award criteria, is a good case in point. Traditionally, two award criteria were foreseen in EU legislation: the lowest price and the most economically advantageous tender or MEAT (which, as we learned from *Concordia Bus* may also comprise not strictly economic criteria).¹⁸³ The Commission proposal somewhat echoed Article 53(1) of Directive 2004/18, with "cost" taking the place of "price" in what should have become the "lowest cost". Lowest cost, in turn, could be based on either price or a cost-effectiveness approach, such as life-cycle costing.¹⁸⁴ The most advantageous tender was to include, in addition to price or cost, some of the criteria making up the old MEAT. Sharing a deeply felt suspicion against the lowest price as conducive to social dumping, the European Parliament proposed a radically new text providing for just one criterion, the MEAT.¹⁸⁵ The Council moved back to the Commission's proposal based on the traditional two award criteria. The final text of the first part of Article 67(2) owes much to the text approved by the European Parliament, only made more hard to understand (if that was possible). The first part of the provision now reads:

181. See generally Chiti, "Decentralisation and integration into the Community administrations: A new perspective on European agencies", 10 *ELJ* (2004), 402–438, 403.

182. See also, for more instances, Treumer, *op. cit. supra* note 3, 21 *et seq.*

183. Case C-513/99, *Concordia Bus*.

184. See Dragos and Neamtu, *op. cit. supra* 34, nt. 31.

185. See Semple, *op. cit. supra* note 36, para 4.40.

“The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.”

Beside the fact that the lowest price is still obviously an option, we have a provision collapsing together price, cost, cost-effectiveness and price-quality ratio in a way that will require much ingenuity from the practitioners and the courts to understand.¹⁸⁶ A reasonable assumption seems to be that contracts may be awarded either to *a)* the lowest price; *b)* the lowest life-cycle costing, *c)* the best price-quality ratio, or *d)* a combination of the latter two. True, Article 67(2) seems to indicate that life cycle costing is only one type of cost-effectiveness. However it is difficult to think of additional hypotheses of cost-effectiveness going beyond life cycle costing plus (some aspects of) the very broad criterion referred to as best price-quality ratio.¹⁸⁷

Similarly muddled outcomes and partly less noble motives characterize the present regime of service procurements following the demise of the traditional distinction between priority and non-priority services.¹⁸⁸ New entries among excluded service contracts, added at the request of the European Parliament in what has become Article 10, include a long list of legal services.¹⁸⁹ An alien landing in Brussels to study EU law would be both surprised and intrigued to discover how much effort has been spent on ambulance services.¹⁹⁰ In *Ambulanz Glöckner*, the ECJ held that providing on the market and for remuneration emergency transport services and patient transport services constitutes an economic activity for the purposes of the application of the Treaty competition rules.¹⁹¹ The Commission took lessons from *Ambulanz Glöckner* and brought two distinct infringement procedures against Italy and Ireland because of direct awards of ambulance services. The *Irish ambulances* case is not of interest here, since the ECJ held that the Commission had failed

186. See Semple, *op. cit. supra* note 36, para 4.41.

187. Cf. Caranta, “Award criteria under EU law (old and new)” in Comba and Treumer, *op. cit. supra* note 41, p. 36 et seq.

188. See Semple, *op. cit. supra* note 36, para 1.36 et seq; see also Caranta, “Mapping the margins of EU public contracts law: Covered, mixed, excluded and special contracts” in Lichère, Caranta and Treumer, *op. cit. supra* note 2, p. 87 et seq.

189. See again Semple, *op. cit. supra* note 36, para 1.39 et seq.

190. See also Caranta, *op. cit. supra* note 188, 84 et seq; and see Case C-50/14, *CASTA*, pending.

191. Case C-475/99, *Ambulanz Glöckner*, EU:C:2001:577, paras. 21 and 22.

to prove that the arrangement at issue indeed amounted to a public procurement contract.¹⁹² In the *Italian ambulances* case, however, the ECJ confirmed *Ambulanz Glöckner*, holding that NGOs providing such services are indeed market operators. The direct award of a number of contracts for healthcare transport services without a call for tenders in Tuscany was therefore found to be in breach of the internal market general principles.¹⁹³ A few years later, new infringement proceedings were brought, this time against Germany due to practice of awarding contracts for public emergency services in some *Länder*. The ECJ rules out that the activities in question could be considered to be connected, even occasionally, with the exercise of official authority, as such falling outside the scope of the Treaty and derived provisions.¹⁹⁴ The Commission had distinguished between contracts awarded for public ambulance services characterized by the predominance of the value of transport services as compared with the value of health services, and contracts characterized instead by the predominance of the value of latter services. While the former fall under the full rigour of the regime of the Directive, contracts where the value of health services predominate were considered as non-priority services. The ECJ however did not elaborate on the distinction, since the Commission had failed to prove which was the predominant component of the contracts at issue.¹⁹⁵

While Article 10(h) of Directive 2014/24 reflects the same distinction between health (emergency) and transport ambulance services, their legal regime has been shifted and made more flexible. Among the excluded services under Article 10(h) are civil protection, and danger prevention services provided by non-profit organizations or associations (including those covered by CPV code 85143000-3, which is the general label for ambulance services); Article 10(h) expressly excludes “patient transport ambulance services” from the exception. This means that, while patient transport ambulance services are now covered by the Directive, emergency ambulance services are excluded when provided by NPOs.¹⁹⁶ As a consequence, in some situations emergency ambulance services may no longer be considered to fall under what was the

192. Case C-532/03, *Commission v. Ireland*, EU:C:2007:801; Brown, “The Commission loses another action against Ireland owing to lack of evidence: A note on Case C-532/03 *Commission v. Ireland*”, 17 PPLR (2008), NA92.

193. Case C-119/06, *Commission v. Italy*, EU:C:2007:729; see Brown, “Application of the Directives to contracts to Non-for-profit organisations and transparency under the EC Treaty: A note on Case C-119/06 *Commission v. Italy*”, 17 PPLR (2008), NA96.

194. Case C-160/08, *Commission v. Germany*, EU:C:2010:230, para 94 et seq.

195. *Ibid.*, para 116 et seq; the distinction has, however, been referred to in the Opinion of A.G. Wahl in Case C-113/13, *ASL No 5 Spezzino*, EU:C:2014:291.

196. See also Rec. 28 of Dir. 2014/24; see also Rec. 36 of Dir. 2014/23 and Rec. 36 of Dir. 2014/25.

regime for non-priority services and are therefore fully outside the scope of the directive.¹⁹⁷ At the same time, “patient transport ambulance services” are listed in Annex XIV since all ambulance services in principle fall within the relevant range of CPV codes. As a consequence, they now qualify as special services under Article 74.¹⁹⁸

Indeed Directive 2014/24, while doing away with the distinction between priority and non-priority services, has introduced an ad hoc regime for social and other special services characterized by higher thresholds of application and very flexible rules on award procedures.¹⁹⁹ This flows from the Commission staff working paper “Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation” which suggested that the exclusion of certain services from the full application of the Public Sector Directive should be reviewed, extending the full application of this directive to a number of services.²⁰⁰ The definition of these services is in Article 74 of Directive 2014/24, which in turn refers to Annex XIV for a more precise description and CPV numbering. As a result of the tug-of-war between the EU institutions²⁰¹ combined with “ferocious lobbying”,²⁰² the list is quite long, and includes health, social and related services, administrative social, educational, healthcare and cultural services, compulsory social security services but also some surprising entries like tyre-remoulding and blacksmith services.²⁰³

To make a complex framework even more complex, Article 77 of Directive 2014/24 allows Member States to provide that contracting authorities may reserve the right for organizations to participate in procedures for the award of public contracts exclusively for specific health, social and cultural services listed in the first paragraph of the same provision, with reference to their specific CPV codes.²⁰⁴ This possibility again was not foreseen in the

197. It is therefore submitted that A.G.Wahl, in his Opinion in Case C-113/13, *ASL 5 Spezzino* was wrong to refer to the new Directive as an additional argument to demonstrate that all ambulance services fall under the scope of the public procurement directives (para 40).

198. See *infra*, section 5.

199. Parallel provisions are present in the other directives: see Craven, *op. cit. supra* note 132, 188 et seq.

200. See Rec. 113; see also the analysis by Smith, “Articles 74 to 76 of the Public Procurement Directive: the new ‘light regime’ for social, health and other services and a new category of reserved contracts for certain social, health and cultural services contracts”, 22 PPLR (2014), 160.

201. Schwab and Giesemann, “Mit mehr Regeln zu mehr Rechtssicherheit? Die Überarbeitung des europäischen Vergaberechts” (2014) *Vergaberecht*, 357 et seq.

202. Gormley, *op. cit. supra* note 135, 177.

203. See also Rec. 115 et seq. of Dir. 2014/24, and Rec. 121 et seq. of Dir. 2014/25.

204. See also Rec. 120 as to how these references must be read; see also Smith, *op. cit. supra* note 200, at 167 et seq.

Commission proposal, but was added at the eleventh hour. According to Recital 118 this derogation is justified by the need to ensure the continuity of public services. This is not easy to understand, since the distinction between for profit and non-for profit organizations could hardly be considered relevant when assessing the reliability of the service provider. The legislative history tells us that the UK insisted on this set aside regime to benefit organizations set up by former employees of the contracting authorities, thus possibly making externalization processes less contentious.²⁰⁵ However, this still does not by itself ensure the continuity of public services since legally speaking the contract has to be put for tender and could well be awarded to a different organization. A logical conclusion is that the real reason for having this regime has not been explained in the recitals, Recital 118 being simply misleading, and the limit to new direct awards, while running counter to what the recital says, must be an element in the compromise the Commission was ready to accept when pushed by the Council.

Finally, in a number of instances, the political institutions have flouted, or simply disregarded, the most fundamental principles of the EU Treaty in order to win some points with domestic audiences or to push back unwelcome scrutiny.

The first situation is illustrated by the treatment of concessions in the water sector. There is a significant resistance to the privatization of water services in some Member States and in some political quarters.²⁰⁶ In fact, the first successful European citizens' initiative was a petition on water.²⁰⁷ As was shown above, the public contract directives are not about privatization. Moreover, Articles 2 and 4 of Directive 2014/23, as added during the legislative process, go out of their way to stress the freedom of Member States to organize themselves and the way services of general economic interest are provided to the public. This was not enough to satisfy water rights proponents, and in the last stage of the legislative processes the Commission agreed to exclude water from the concessions directive.²⁰⁸ Article 12 of Directive 2014/23 now foresees specific exclusion in the field of water because, as Recital 40 now puts it, "concessions in the water sector are often subject to specific and complex arrangements which require a particular consideration

205. See also Smith, *op. cit. supra* note 200, 167.

206. Semple, *op. cit. supra* note 36, para 1.47; Craven, *op. cit. supra* note 132, 191 et seq.

207. <ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003> (last visited 28 Nov. 2014); see Thielbörger, *The Right(s) to Water* (Springer, 2014), p. 33 et seq.

208. <ec.europa.eu/commission_2010-2014/barnier/docs/speeches/20130621_water-out-of-concessions-directive_en.pdf> (last visited 28 Nov. 2014); the document betrays evident frustration at making the legal position clear to people who just do not want to listen.

given the importance of water as a public good of fundamental value to all Union citizens”²⁰⁹.

The provision may well have a placebo effect, but it will not change the regime of water concession. If a contracting authority decides to outsource its water services and the ensuing contract has a cross-border interest, that authority will still have to comply with the general principles of the TFEU, meaning it will have to devise an award procedure which is broadly speaking the same as if it had to comply with Article 30 of Directive 2014/23. When the Commission in 2019 reports to the Parliament and the Council on the economic effects on the internal market of the exclusions set out in Article 12, taking into account the specific structures of the water sector, as required under Article 53 of Directive 2014/23, it will probably have found out that the effects are very limited insofar as the general principles are indeed respected. It will also probably report that negative effects flows from the additional legal uncertainty coming from the exclusion brought in Article 12.²¹⁰

The disregard for the fundamental rights and principles enshrined in the Treaty is epitomized by Recital 78 of Directive 2014/24, added during the legislative process at the insistence of the Council, under which: “The contracting authority should have a duty to consider the appropriateness of dividing contracts into lots while remaining free to decide autonomously on the basis of any reason it deems relevant, without being subject to administrative or judicial supervision”. Besides the (un)suitability of having recitals masquerading as provisions, the safeguards of the general principle of effective judicial protection proclaimed by the case law, by Article 47 of the EU Charter of Fundamental Rights and now by Article 19(1) TEU cannot be obliterated by secondary legislation to satisfy the whims of some Member States.

4. The scope of EU public contract law following the reform

As already recalled when writing about service concessions, the re-codification of EU public contracts law has also impacted on the scope of application of the directives. This has been principally done in two different ways: by directly changing the scope of application of EU legal rules and by clarifying the law as to that scope. Moreover, the new directives make further inroads into the implementation of contracts.

209. See also Rec. 84.

210. See Semple, *op. cit. supra* note 36, paras. 1.47 and 1.82.

4.1. *Service concessions, services of general interest, and service procurements*

From the former point of view, the most significant innovation is the adoption of a directive specifically dedicated to concession contracts. Works concessions had been regulated since Directive 89/440/EEC.²¹¹ The Member States had however so far rebuffed the attempts by the Commission to bring service concessions within the scope of EU secondary law.²¹² Evolving institutional dynamics led to the enactment of Directive 2014/23 on the award of concession contracts (both works and services) by both contracting authorities and contracting entities.²¹³

While the need and suitability of having a separate legal instrument specific to concessions has been challenged,²¹⁴ those contracts have specific characteristics such as high value (which also means they are of cross-border interest), long duration and the related necessity of adjustments from time to time of the relevant contract terms, which certainly make it necessary to have some rules which are somewhat different from those applicable to procurement contracts.²¹⁵ In principle, the regime of award procedures laid down in Directive 2014/23 leaves more freedom of choice to contracting authorities.²¹⁶ It has however been rightly stressed that the characteristics of concessions require enhanced flexibility in the management phase, while the case for more flexible procedures is dubious to say the least.²¹⁷

The need to rethink the rules on concessions also arose because of uncertainties around the definition of a concession.²¹⁸ The old directives focused the notion of concession on the right of the concessionaire to exploit the works or services. This was in due time translated by the case law into the

211. See Art. 56 of Dir. 2004/18/EC.

212. See Noguellou, “Scope and coverage of the EU procurement Directives” in Trybus, Caranta and Edelstam, op. cit. *supra* note 7, at p. 30 et seq.; Pommer, “Public Private Partnerships”, in *ibid.* at p. 300 et seq.; Risvig Hansen, op. cit. *supra* note 73, 121 et seq.; Drijber and Stergiou, op. cit. *supra* note 5, at 74 et seq.

213. See also *supra* section 3.1; see generally Neergaard, op. cit. *supra* note 131, at 387; Risvig Hansen, op. cit. *supra* note 73, esp. 98 et seq.; Burnett, op. cit. *supra* note 10, 1–18, and Craven, op. cit. *supra* note 132, 188–200.

214. E.g. Sanchez Graells, op. cit. *supra* note 21, at 95 et seq.

215. See again Sanchez Graells, op. cit. *supra* note 21, at 96 et seq.; Burnett, op. cit. *supra* note 10, at 6 et seq.

216. See *infra* in this section.

217. Burnett, op. cit. *supra* note 10, at 7 et seq.

218. See also Rec. 18 of Dir. 2014/23; see Risvig Hansen, “Defining a service concession contract: Will the proposed new definition of service concessions contracts increase legal certainty in the field of concessions?” in Ølykke, Risvig and Tvarnø, op. cit. *supra* note 1, at p. 237 et seq.; see also Craven, op. cit. *supra* note 132, 192 et seq.

existence of an exploitation risk.²¹⁹ The ECJ however then somehow – and to what extent is debatable – retraced its steps. The contract at issue in *Eurawasser* concerned the distribution of drinking water and the disposal of sewage.²²⁰ On account of the application of the rules governing the sector concerned, the supply of this service normally involves very limited financial risks, even in the event that that service is provided by the contracting authority. Somewhat surprisingly, the ECJ rejected the argument that it is necessary that the risk transferred to the concession holder be a significant risk. According to the Court, it is not unusual that certain sectors of activity, in particular sectors involving public service utilities, are subject to rules “which may have the effect of limiting the financial risks entailed”.²²¹ In such a case, it would be enough that the contracting authority transfers to the concession holder “all, or at least a significant share, of the operating risk which it faces, in order for a service concession to be found to exist”.²²²

In the end, we could have a concession when a significant share of a very limited – possibly insignificant one could think – risk was transferred. This approach was affirmed in *Norma-A* which also reiterated the indications from a (then) recent preceding judgment as to the relevant risks.²²³ According to the ECJ, the risk linked to such an operation must be understood as the risk of exposure to the vagaries of the market “which may, in particular, consist in the risk of competition from other operators, the risk that supply of the services will not match demand, the risk that those liable will be unable to pay for the services provided, the risk that the costs of operating the services will not be met by revenue or also the risk of liability for harm or damage resulting from an inadequacy of the service”.²²⁴ Risks such as those linked to bad management or errors of judgment by the economic operator, however, are inherent in every contract, whether it be a public service contract or a service concession.²²⁵

Article 5(1) of Directive 2014/23 is expected to reinstate a more rigorous understanding of “risk”. Not only is demand or supply risk or both transferred to the concessionaire,²²⁶ but also “[t]he concessionaire shall be deemed to

219. Case C-458/03, *Parking Brixen*, para 40; see also Case C-234/03, *Contse and Others*, EU:C:2005:644, para 22.

220. Case C-206/08, *Eurawasser*, EU:C:2009:540.

221. *Ibid.*, para 72.

222. *Ibid.*, para 77; see also Case C-274/09, *Privater Rettungsdienst und Krankentransport Stadler*, EU:C:2011:130, para 33 et seq.

223. Case C-348/10, *Norma-A SIA*, EU:C:2011:721; see the analysis by Risvig Hansen, op. cit. *supra* note 218, at 241 et seq.; the precedent is Case C-274/09, *Privater Rettungsdienst und Krankentransport Stadler*.

224. Case C-348/10, *Norma-A SIA*, para 48.

225. *Ibid.*, para 49.

226. See also Rec. 20.

assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.” It would seem therefore that when the applicable legislation insulates the service provider from all significant risk, only a procurement contract may be awarded.²²⁷ This makes sense considering that the thresholds for service procurement and concessions are very different, and the procedures for awarding the latter much less structured, so that contracting authorities might too easily be tempted to award concessions.²²⁸

As recalled, while the new directives were widening the scope of EU secondary law to cover service concessions, they were also buttressing the freedom of the Member States in deciding how to organize themselves both generally and with specific reference to the provision of services of general interest (SGIs), and services of general economic interest (SGEIs) in particular.²²⁹

Unsurprisingly this is particularly explicit in Directive 2014/23. A whole series of provisions were added during the legislative process. In describing the scope of the Directive, Article 1(4) provides that agreements, decisions or other legal instruments that organize the transfer of powers and responsibilities for the performance of public tasks between contracting authorities (or entities) or groupings of contracting authorities (or entities), and which do not provide for remuneration to be given for contractual performance, are considered to be a matter of internal organization of the Member State concerned and, as such, are not affected in any way by the Directive.

This provision lays the ground for the rules on in-house and public-public co-operation which are discussed below.²³⁰ Article 2 of Directive 2014/23 introduces in quite sweeping terms the “principle of free administration by public authorities”. National, regional and local authorities are to be “free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public

227. See also Rec. 19. It has however been pointed out that the new Directive, which did not keep the requirement of a substantial risk transfer which was present in the proposal, still leaves a number of question marks: Burnett, *op. cit. supra* note 10, at 10 et seq.; also because of the absence of a definition of “operating risk”: Craven, *op. cit. supra* note 132, 193.

228. See Burnett, *op. cit. supra* note 10, at 13 et seq.

229. *Ibid.*, at 10 et seq.

230. *Infra* section 4.4.

services”. More specifically, those authorities “may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators”. Contextualizing the traditional rule now found in Article 345 TFEU, Article 2(2) further states that the Directive neither affects the systems of property ownership set out in national law nor requires the privatization of public enterprises providing services to the public. Again this translates into clarifying that in-house arrangements are perfectly fine under EU public contracts law.²³¹

Article 4 of Directive 2014/23 is specifically dedicated to the “Freedom to define services of general economic interest”. It provides that the Directive leaves unaffected “the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organized and financed, in compliance with the State aid rules, and what specific obligations they should be subject to”. The same principle is reiterated with reference to the organization of social security systems. Basically again the Member States may decide whether to provide SGEIs directly through their services or to outsource them. EU public contract law will only apply if the second option is chosen. The reference to State aid rules is of great relevance since the legal act entrusting a SGEI may “take the form of a legislative or regulatory instrument or a contract”.²³² This is confirmed by Recital 5 of Directive 2014/24 which reassures the Member States that nothing in the Directive obliges them to contract out or externalize the provision of services that they wish to provide themselves or to organize by means other than public contracts; more specifically, the provision of services based on laws, regulations or employment contracts is not covered.²³³ The correct qualification of the legal act involved may well be problematic, nevertheless, and open to abuses, with the Member States possibly being tempted to use legislative measures instead of contracts to try to evade the application of EU public procurement law.²³⁴

231. See also Rec. 5 of Dir. 2014/24 and Rec. 7 of Dir. 2014/25.

232. Communication from the Commission On the application of the European Union State aid rules to compensation granted for the provision of SGEI (2012/C 8/02), point 33; see more generally Neergaard, “Services of General (Economic) Interest and the services Directive” in Neergaard, Nielsen, Roseberry (Eds.), *The Services Directive* (DJØF, 2008), at p. 84 et seq.; Ølykke, “The definition of a ‘contract’ under Article 106 TFEU” in Szyszczak et al. (Eds.), *Developments in Services of General Interest* (T.M.C. Asser Press, 2011), at p.113 et seq.; Fiedziuk, “Putting Services of General Economic Interest up for tender: Reflection on applicable EU rules”, 50 CML Rev. (2013), at 99 et seq.

233. See also Rec. 6 of Dir. 2014/23; one example seems to be Case C-532/03, *Commission v Ireland*, EU:C:2007:801; Brown, op. cit. *supra* note 192, NA92.

234. See Neergaard, op. cit. *supra* note 131, at p. 397; cf. also the discussion in Caranta, “General Report” in Neergaard, Jacqueson and Ølykke (Eds.), *Public Procurement Law*:

The Concessions Directive goes some way in reiterating the division of tasks between EU institutions and Member States which is articulated in Article 14 TFEU and Protocol No 26 annexed to the TFEU and to the Treaty on European Union. Moreover, non-economic services of general interest are expressly said to fall outside the scope of the Directive by Article 4(2).²³⁵ Without proclaiming freedoms for the Member States, Article 1(4) to (6) of Directive 2014/24 are very much drafted along the same lines.²³⁶

The coverage of the new Concessions Directive could have been wider. Institutional public private partnerships fall outside its scope; contracting authorities will continue to refer to the soft law guidance provided by the Commission in its Communication on the application of Community law on public procurement and concessions to institutionalized public-private partnership.²³⁷

Parallel evolutions in the case law also led to the demise of the traditional distinction between priority and non-priority service procurement²³⁸ such as hotel and restaurant services and legal services.²³⁹ The old “non-priority services” have not however been brought under the full rigour of the Directive. Some have become excluded services. Article 10 of the Directive has a much longer and more articulated list of excluded service contracts as compared to Article 16 of Directive 2004/18/EC: “[a] motley collection of services enjoy exclusion from the directives, with justifications ranging from the obvious to the obscure”.²⁴⁰ Most of the former “non-priority services” have migrated to a new regime for social and other special services laid down by Article 75 et seq. of Directive 2014/24 (referred to above).²⁴¹

4.2. *The definition of procurement contract*

The scope of application of EU secondary public procurement law has also been somewhat clarified.²⁴² As Recital 4 of 2014/24 indicates: “The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself”. According to the same recital, the new provisions are however not intended to go beyond a clarification and,

Limitations, Opportunities and Paradoxes – The XXVI FIDE Congress Publications, vol. 3 (FIDE/DJØF, 2014), at 87 et seq.

235. See also Rec. 6 of Dir. 2014/23.

236. See also Rec. 5 and Rec. 6 of Dir. 2014/24, and Art. 1(4) to (6) of Dir. 2014/25.

237. COM(2007)6661 final.

238. Cf. Caranta, op. cit. *supra* note 188, 82 et seq.

239. See Art. 23 of Dir. 2004/18/EC; see Risvig Hansen, op. cit. *supra* note 73, at 111 et seq.

240. Semple, op. cit. *supra* note 36, at para 1.24.

241. *Infra* section 4.4.

242. Cf. also Caranta, op. cit. *supra* note 188, 68 et seq.

as such, they should “not broaden the scope of this Directive compared to that of Directive 2004/18/EC”. This is easier said than done, but indicates that Member States very much resent a case law which is perceived as creating new obligations.²⁴³

Article 1(2)(a) of Directive 2004/18 defined “public contracts” as “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services”. “Concessions” were defined along much the same lines by Article 1(3) and (4) with the difference that the consideration for the works to be carried out or the services to be provided consists either solely in the right to exploit the work or service or in this right together with payment.²⁴⁴

The actual meaning of the provision defining “public contracts” was litigated in a number of cases.²⁴⁵ *Helmut Müller* concerned a somewhat complex arrangement.²⁴⁶ The German federal agency responsible for managing public property (*Bundesanstalt*) put up for sale some land which the purchaser was to develop in conformity with the urban-planning objectives of the competent local authority. The buyer was chosen by the federal agency in agreement with the municipality and the choice was challenged on the ground that public procurement rules had not been followed. The ECJ remarked first of all that the sale by a public authority of undeveloped land or land which has already been built upon does not constitute a public works contract within the meaning of Article 1(2)(b) of Directive 2004/18. Indeed, such a contract requires that the public authority assume the “position of purchaser and not seller”.²⁴⁷

As to the relationship between the public authority (with town-planning powers) and the purchaser of the land, the ECJ held that the Directive covers contracts for pecuniary interest and “does not refer to other types of activities for which public authorities are responsible”.²⁴⁸ This means that to have a public contract, it is required that the contracting authority which has concluded a public contract – or members of the public in the pursuance of whose interests the contracting authority has acted²⁴⁹ – “receives a service

243. See also for further references Eleftheriadis, “Planning agreements as public contracts under EU procurement rules”, (2011) PPLR, at 49 et seq.

244. See Noguellou, op. cit. *supra* note 212, at 24 et seq.

245. Eleftheriadis, op. cit. *supra* note 243.

246. Case C-451/08, *Helmut Müller*, EU:C:2010:168.

247. *Ibid.*, para 41.

248. *Ibid.*, para 46.

249. *Ibid.*, para 49.

pursuant to that contract in return for consideration”.²⁵⁰ The exercise of urban-planning powers does not have the purpose of obtaining a contractual service.²⁵¹ Moreover, the mere fact that a public authority, in the exercise of its urban-planning powers, examines certain building plans presented to it, or takes a decision applying its powers in that sphere, does not satisfy the condition that there are “requirements specified by the contracting authority”, within the meaning of Article 1(2)(b) of Directive 2004/18/EC laying down the definition of public works.²⁵²

More recently, in *Libert*, the Flemish legislation at issue imposed on developers an obligation to build some social housing units in the framework of wider land development projects. The ECJ held that the obligation referred to the placement of these units on the market rather than the building of public works and consequently ruled out the applicability of Directive 2004/18.²⁵³

Article 1(2) of Directive 2014/24 has introduced a new definition for “procurement” in addition to the traditional definition of “public contracts” which may still be found in what has become Article 2(5). Under Article 1(2), procurement is “the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose”.²⁵⁴ The legislative drafting technique here leaves much to be desired. The two provisions might easily have been merged, and the distinction between “procurement” and “public contract” is simply lost in most of the other language versions. Moreover, “public contract” is clearly the genus, with “procurement” being the species. The genus should have been defined first, with the specification elements (in writing, acquisition, pecuniary interest, and so on) added at a later stage.²⁵⁵

What is, however, important is that the definition of procurement brings an additional requirement – “acquisition” – on top of the definition of public contract. This means that, in line with *Loutraki* and *Müller*, the mere sale of

250. *Ibid.*, para 48; this was followed in Case C-271/08, *Commission v. Germany*, EU:C:2010:426, para 75; the requirement of “direct benefit” is however in itself problematic since direct the beneficiary of public contracts is often the public at large: Caranta, *op. cit. supra* note 234, at 96; see also Eleftheriadis, *op. cit. supra* note 243, at 51.

251. Case C-451/08, *Helmut Müller*, para 57.

252. *Ibid.*, para 68.

253. Joined Cases C-197 & 203/11, *Libert*, EU:C:2013:288, para 114; the facts of the case had however been insufficiently clarified by the referring court.

254. The Commission’s proposal had “purchase” instead of “acquisition”, which was in the end rightly preferred; Rec. 4 further elaborates the notion of “acquisition”.

255. Please refer to Caranta, *op. cit. supra* note 188, 70 et seq.

public property falls outside the scope of the Public Sector Directive.²⁵⁶ EU State aids rules might instead be relevant.²⁵⁷

The new definition may help to bring some consistency in the case law. *Helmut Müller* may indeed be distinguished from *Auroux* and *Ordine degli Architetti delle Province di Milano e Lodi* which both involved some public works meeting requirements laid down by the contracting authorities.²⁵⁸ *Libert* however remains somewhat problematic. Basically, developers were “forced” to deliver affordable homes thus implementing a policy in the general interest designed by the public authority granting the building permission. It is however true that the authority did not provide any consideration, not even in the form of a discount on the duties the developer had to pay, as instead was the case in *Ordine degli Architetti delle Province di Milano e Lodi*,²⁵⁹ so the pecuniary interest was probably lacking.²⁶⁰

The same might be true for infringement proceedings brought against Spain because of the conclusion of development agreements in the Valencia region.²⁶¹ However, the ECJ decided the case on the finding that the Commission failed to demonstrate that the public works which are indeed among of the activities committed to the developer constituted the “main object of the contract”.²⁶² It is, however, hard to believe that building a theatre shell was the main object of the contract concluded by the Municipality of Milan and challenged in *Ordine degli Architetti delle Province di Milano e Lodi*. Indeed, that building was but one small facet of a complex redevelopment project affecting a major urban area. The ECJ is referring here albeit in a truncated way to the mixed contract doctrine. This demonstrates the difficulty inherent in developing the law through cases. When *Auroux* and *Ordine degli Architetti delle Province di Milano e Lodi* were decided, the mixed contracts doctrine had not yet been developed. Those cases would probably have been decided differently if it had.

256. Joined Cases C-145 & 149/08, *Club Hotel Loutraki*, EU:C:2010:247; Case C-451/08, *Helmut Müller*.

257. Commission Communication on State aid elements in sales of land and buildings by public authorities (O.J. 1997, C 209/ 3).

258. Case C-220/05, *Auroux and Others*, EU:C:2007:31; Case C-399/98 *Ordine degli Architetti and Others*, EU:C:2001:401.

259. Case C-399/98, *Ordine degli Architetti and Others*; this would also have distinguished *Libert* from Case C-576/10, *Commission v. the Netherlands*, EU:C:2013:510, where however the Court did not go into the qualification of the arrangement at issue.

260. Eleftheriadis, op. cit. *supra* note 243, at 44 et seq.

261. Case C-306/08, *Commission v. Spain*, EU:C:2011:347.

262. *Ibid.*, para 96; see also Gimeno Feliú and Valcárcel Fernández, “Spain” in Neergaard, Jacqueson and Ølykke, op. cit. *supra* note 234, at 713.

4.3. Mixed contracts

The ECJ refined its doctrine of mixed contracts in *Loutraki*.²⁶³ At the root of that case was a decision by the Greek Government to privatize a casino through a mixed contract comprising a sale of shares aspect, services (managing the casino) and works (refurbishment and development).²⁶⁴ According to the Court: “In the case of a mixed contract, the different aspects of which are, in accordance with the contract notice, inseparably linked and thus form an indivisible whole, the transaction at issue must be examined as a whole for the purposes of its legal classification and must be assessed on the basis of the rules which govern the aspect which constitutes the main object or predominant feature of the contract.”²⁶⁵ Having considered the transaction at issue as an inseparable whole,²⁶⁶ the Court found the privatization aspect to be the prevailing one, with the works and services being ancillary to the main object. As such, the contract could not be held to fall within the scope of the directives on public contracts.²⁶⁷

Another mixed contract case was *Mehiläinen Oy*.²⁶⁸ Oulu City Council decided to set up a joint venture with a private partner to provide occupational health care and welfare services. The two partners intended activities to be chiefly and increasingly focused on private clients. However, for a transitional period of four years, they undertook to purchase from the joint venture the health services they were required to provide for their staff. Unlike *Loutraki*, this case turned on the severability of the different transactions involved in the agreement. In *Mehiläinen Oy*, the transitional arrangement was intended as a parting gift to the new venture. According to the ECJ, however, this did not mean that the services envisaged for the transitional period were not

263. Joined Cases C-145 & 149/08, *Club Hotel Loutraki*; an earlier case was Case C-331/92, *Gestión Hotelera Internacional*, EU:C:1994:155, paras. 23 to 29.

264. *Ibid.*, para 46 et seq.

265. *Ibid.*, para 48.

266. *Ibid.*, para 51 et seq; one could argue that the severability test was already present in the case law: Case C-411/00, *Felix Swoboda*, EU:C:2002:660, para 57, referred to contracting authorities artificially grouping in one contract services of different types: Tokár, “Institutional Report” in Neergaard, Jacqueson and Ølykke, op. cit. *supra* note 234, at p. 189.

267. Joined Cases C-145 & 149/08, *Club Hotel Loutraki*, para 55 et seq; the Court also refers to the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004)327 final), where the Commission points out that it is necessary to ensure that privatization does not in reality conceal the award to a private partner of contracts which might be termed public contracts or concessions (which is held not to be the case). As already recalled, only the “main object” criterion was used in Case C-306/08, *Commission v. Spain*.

268. Case C-215/09, *Mehiläinen Oy*, EU:C:2010:807.

severable. Quite the contrary: they could and should have been awarded through a procurement procedure.²⁶⁹

Article 3 of Directive 2014/24 more or less codifies *Loutraki*.²⁷⁰ The provision, however, is far from straightforward – starting with the fact that it bears a title referring to “mixed procurement” rather than “mixed contract”.²⁷¹ In line with *Loutraki*, Article 3(3) introduces a different regime according to whether the different parts of a given contract are objectively separable or not.²⁷² Recital 11 provides some guidance as to how operate the test to distinguish the two situations.²⁷³ If the different parts of a given contract are objectively not separable, Article 3(6) provides that “the applicable legal regime shall be determined on the basis of the main subject-matter of that contract”. This will mainly be relevant in case of objectively non-separable mixed procurement and concession contract or mixed covered and excluded procurement.²⁷⁴

There is no reason why the very general provision laid down in Article 3(6) should not also apply by analogy to situations in which, as in *Loutraki*, one part of the contract, and possibly the most relevant part, does not fall under any EU public contract regime, in the sense that it is neither procurement (in either the public or the utilities or the defence and security sectors) nor a concession.²⁷⁵ This might be very relevant in situations where the contracting authority is pursuing what were once called “secondary objectives”, and especially social ones, as in the case of works procurements intended to provide training and jobs to long term unemployed.²⁷⁶

What is important to stress is that contracting authorities are now expressly empowered to shape complex contractual arrangements provided that this does not translate into bringing the resulting contract outside the scope of application of the Public Sector Directive. This brings us back to the infringement proceedings against Spain. What is disturbing in the way the case law is developed is that the ECJ reasoned along the lines of the mixed

269. *Ibid.*, para 37 et seq.

270. See also Art. 20 of Dir. 2014/23.

271. Rec. 11 et seq. refer to “mixed contracts” instead. However, the French, German, Italian, and Spanish versions all have the same word both in the Recitals and in the text of the Directive (*marché, Auftrag, appalti, contrato*); see also Caranta, *op. cit. supra* note 188, 77 et seq.

272. See also Art. 20(4) of Dir. 2014/23 and Art. 5(4) of Dir. 2014/25; for details, see Caranta, *op. cit. supra* note 188, 78 et seq.

273. See also Rec. 29 of Dir. 2014/23, and Rec. 13 of Dir. 2014/25.

274. Specifically on mixes of concession contracts and supply contracts see also Art. 20(5) of Dir. 2014/23.

275. Arrowsmith, *op. cit. supra* note 6, at 554.

276. Please refer to Caranta, *op. cit. supra* note 49, at 170 et seq.

contract doctrine all the way, forgetting about the severability requirement, which is one of its essential aspects.²⁷⁷

4.4. *In-house contracts and public-public cooperation*

Public procurement law is applicable when procuring authorities decide to externalize some activity, production or other task. It is not applicable when a procuring authority builds the works, or provides the goods and the services needed with its own means, according to the freedom of organization it is granted by the Treaty.²⁷⁸ In certain situations, procuring authorities, while not strictly speaking producing the works, goods and services they need themselves, have recourse to entities which cannot be said to be completely distinct from them. In these cases, the procuring entities are not procuring what they need from the market; as such, public procurement rules should not apply. The problem is to find out exactly when this happens.²⁷⁹

The leading case on in-house is *Teckal*, a case concerning the award of service concessions.²⁸⁰ Starting from the notion of contract as an agreement between two separate persons, the Court held that, for EU procurement law to apply:

“it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same

277. Case C-306/08, *Commission v. Spain*.

278. See the Opinion of A.G. Geelhoed in Case C-295/05, *Asemfo*, EU:C:2006:619, para 49; see also Rec. 5, Rec. 6 and Art. 2 of Dir. 2014/23 and Rec. 5 and Art. 1(4) of Dir. 2014/24; also the Commission Staff Working paper Concerning the Application of EU Public Procurement Law to Relations between Contracting Authorities SEC(2011)1169 final.

279. Burgi, “Contracting authorities, in-house services and public authorities cooperation” in Lichère, Caranta and Treumer, op. cit. *supra* note 2, p. 49 et seq; Janssen, “The institutionalised and non-institutionalised exemptions from EU public procurement law: Towards a more coherent approach?”, (2014) *Utrecht Law review*, 168. Before the new directives see the contributions collected in Comba and Treumer (Eds.), *The In-House Providing in European Law* (DJØF, 2010); Cavallo Perin and Casalini, “Control over in-house providing organisations”, (2009) PPLR, at 239; Pernas Garcías, *Las operaciones in house y el Derecho comunitario de contratos públicos* (Madrid, 2008); Avarkioti, “The application of EU public procurement rules to ‘in-house’ arrangements”, (2007) PPLR, 22; Weltzein, “Avoiding the procurement rules by awarding contracts to in-house entity: The Scope of the Procurement Directives in the Classical Sector”, (2005) PPLR, 252.

280. Case C-107/98, *Teckal*, EU:C:1999:562; see Tokár, op. cit. *supra* note 266, at 185 et seq. The background and aftermath of the case are analysed by Comba, “In-house providing in Italy: The circulation of a model” in Comba and Treumer, op. cit. *supra* note 147, at p. 101 et seq.

time, that person carries out the essential part of its activities with the controlling local authority or authorities.”²⁸¹

The subsequent case law has refined the requirements of legitimate in-house providing, holding that (i) private participation in the capital of the controlled entity rules out in-house,²⁸² (ii) the “similar” control may be exercised jointly by several contracting authorities,²⁸³ and (iii) the activities performed by the joint entity must essentially be addressed to the contracting authority(ies) exercising control considered together.²⁸⁴ The case law makes it clear that the doctrine of in-house providing constitutes an exception to the rule that public contracts are awarded following competitive procedures. As such it must be read narrowly.²⁸⁵ French authors talk of “*une notion à la portée presque fantomatique*”.²⁸⁶

The case law has been codified with some adjustments and additions²⁸⁷ in Article 12 of Directive 2014/24, which builds on the freedom of organization granted to Member States under Article 1(4) to (6).²⁸⁸ After some tug-of-war between the Commission and the Member States, Article 12(1) set at 80 percent the “essential part” of the activities which are to be carried out “in the performance of tasks entrusted to it by the controlling contracting authority”. This leaves in-house entities a considerable margin for market activities which might be seen as distorting competition because of the risk they are cross-subsidized with the revenues generated by in-house operations. The issue is not confined to in-house providing but also arises with reference to the market activity of public law entities. In *Data Medical Service*, the ECJ referred to the aim of attaining the widest possible opening-up to competition as the reason to preclude automatic exclusion of some categories of market

281. Case C-107/98, *Teckal*, para 50.

282. The leading case is Case C-26/03, *Stadt Halle and RPL Lochau*, para 49; see also Case C-324/07, *Coditel Brabant*, para 30, and Case C-573/07, *Sea*, EU:C:2009:532, para 46.

283. Case C-324/07, *Coditel Brabant*, para 45; see also Joined Cases C-182 & 183/11, *Econord*, EU:C:2012:758, para 28 et seq.; see Noguellou, op. cit. *supra* note 212, at 20 et seq. For specific arrangements meeting this requirement see also Kindl, Ráz, Hubková, Pavelka “Czech Republic”, Németh, “Hungary”, and Sołtysińska, “Poland”, all in Neergaard, Jacqueson and Ølykke, op. cit. *supra* note 234, at p. 283 et seq., 482, 653 et seq.

284. Case C-295/05, *Asociación Nacional de Empresas Forestales*, EU:C:2007:227, para 57.

285. Kaarresalo, “Procuring in-house: The impact of the EC procurement regime”, (2008) PPLR, 254.

286. Pilone, “Réflexions autour de la notion de contrat ‘in house’” in *Contrats publics. Mélanges en l’honneur du Professeur Michel Guibal* (Presses de la Faculté de droit de Montpellier, 2006), p. 712.

287. For a different assessment see however Janssen, op. cit. *supra* note 279, at 170; but see also at 179.

288. See also Art. 17 of Dir. 2014/23 and Rec. 45 thereof.

operators from taking part in public procurement procedures.²⁸⁹ The rules on abnormally low tenders must instead be used to police possible abuses leading to market distortions.²⁹⁰

At the instance of the European Parliament, Article 12(1) also allows for some private participation in the in-house entity under very specific conditions.²⁹¹ Article 12(2) provides for horizontal in-house, with all participants in an in-house group allowed to contract directly with other participants.²⁹² Article 12(3) specifies the rules applicable to in-house entities jointly controlled by a plurality of contracting authorities, adapting the *Teckal* criteria to this situation.²⁹³ The specific provision allowing one person to “represent several or all of the participating contracting authorities” will allow control also in cases of minimal participation in the capital of the in-house entities, something that would have seemed close to impossible in the wake of *Econord*.²⁹⁴

The in-house case law spun off a second line of cases concerning partnership agreements between contracting authorities which do not entail the setting up of a common – possibly in-house – entity.²⁹⁵ The leading case stems from infringement proceedings against Germany concerning the waste disposal arrangement concluded by the City-State of Hamburg and four adjoining *Landkreise*.²⁹⁶ Hamburg was to build a new incineration facility intended to produce both electricity and heat. It reserved a third of the overall capacity of the facility for the four *Landkreise*, for a price calculated using the same formula for each of the parties concerned. The price was to be paid to the facility’s operator.²⁹⁷ The Commission brought proceedings against Germany for its failure to have a call for tenders in the context of a formal tendering procedure. The ECJ accepted that the four *Landkreise* concerned did not exercise any “similar” control either over the other contracting party, Hamburg City-State, or over the operator of the waste incineration facility,

289. Case C-568/13, *Data Medical Service*, EU:C:2014:2466, para 34.

290. *Ibid.*, paras. 46 et seq.

291. See also Rec. 32; this has to be read restrictively, as the case law is quite strict on this point: Case C-574/12, *Centro Hospitalar de Setúbal and SUCH*, EU:C:2014:2004, para 37 et seq.

292. The problem was discussed by Casalini, “Beyond EU law” in Ølykke, Risvig and Tværnø, *op. cit. supra* note 1, at p. 174 et seq.; see also Burgi and Koch, “In-house procurement and horizontal cooperation between public authorities”, 7 EPPPL (2012), 86.

293. Case C-324/07, *Coditel Brabant*, is the main source for this sub-paragraph; contrast Case C-15/13, *Datenlotsen Informationssysteme*, EU:C:2014:303, para 31 et seq.; see also Janssen, *op. cit. supra* note 279, at 173 et seq.

294. Joined Cases C-182 & 183/11, *Econord*, para 31 et seq.

295. See Burgi, *op. cit. supra* note 279, 59 et seq.

296. Case C-480/06, *Commission v. Germany*, EU:C:2009:357.

297. While the details may change, similar arrangements are widespread: e.g. Poulsen, “Denmark” in Neergaard, Jacqueson and Ølykke, *op. cit. supra* note 234, at 310 et seq.

which is a company whose capital consists in part of private funds.²⁹⁸ Considering, however, that the infringement proceedings only concerned the contract between Hamburg and the four neighbouring *Landkreise* for reciprocal treatment of waste, and not the contract governing the relationship between the city and the operator of the waste treatment facility, the Court held that the contract at issue established a form of cooperation between local authorities with the aim of ensuring that a public task that they all have to perform is carried out.²⁹⁹

Unlike with in-house provision, the ECJ never spelt out a list of requirements defining public-public cooperation.³⁰⁰ In *ASL Lecce*, the Lecce branch of the national health service had concluded with the local University a consultancy contract relating to the study and evaluation of the seismic vulnerability of its hospital buildings.³⁰¹ Referring to the *Hamburg waste* case, the ECJ affirmed the principle that public cooperation agreements fall outside the province of EU public contract law provided *inter alia* that the “cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest”.³⁰² According to the Court, the agreement at issue contained a series of substantive aspects, a significant or even major part of which corresponded to activities usually carried out by engineers and architects and which, even though they have an academic foundation, did not however constitute academic research. In consequence, the contract did not appear to ensure the implementation of a public task which the ASL and the University both had to perform.³⁰³ Moreover, the agreement allowed the University to have recourse to “highly qualified external collaborators”, possibly including private service providers, who would therefore end up benefiting from a public service contract without going through a competitive award procedure.³⁰⁴ The latter aspect was possibly what pushed the ECJ to decide that the agreement was not a genuine

298. Case C-480/06, *Commission v. Germany*, para 33.

299. *Ibid.*, para 38; see also Treumer, “In-house providing in Denmark” in Comba and Treumer (Eds.), *The In-House Providing in European Law* (DJØF, 2010), at p. 174 et seq. Ølykke, *op. cit. supra* note 232, at 116 et seq. reads the case in the context of entrustment of SGEIs

300. See Opinion of A.G. Trstenjak in Case C-159/11, *ASL Lecce*, EU:C:2012:303, para 66 et seq., proposing her own list of criteria; see also Casalini, *op. cit. supra* note 292, at 174 et seq.

301. Case C-159/11, *ASL Lecce*, EU:C:2012:817; the case was followed in Case C-564/11, *Consulta Regionale Ordine Ingegneri della Lombardia*, EU:C:2013:307, in which a notice had been published, but participation was reserved to universities; the ECJ did not elaborate on this aspect since the referring court had not asked about it. It was also followed in Case C-352/12, *Consiglio Nazionale degli Ingegneri*, EU:C:2013:416, a case where a negotiated procedure would have probably be possible under Art. 31 Dir. 2004/18/EC.

302. Case C-159/11, *ASL Lecce*, para 35.

303. *Ibid.*, para 37.

304. *Ibid.*, para 39.

form of public-public cooperation. *A fortiori* public public-cooperation will be excluded when there is a private capital participation in any one of the participants to the agreement.³⁰⁵

It is however also possible that under EU law, as restated in *ASL Lecce*, cooperation agreements are possible only with reference to a common public task that those entities all have to perform.³⁰⁶ That would be unduly restrictive, since different public authorities may well pursue different general interests without this making cooperation between them less sensible. A different distinction runs between public law missions and commercial activities.³⁰⁷ The real issue in *ASL Lecce* was that the University was not pursuing a public law mission; it was engaged in a legitimate commercial activity which, like in *CoNISMa*, should have been channelled through public procurement rather than benefit from direct award.³⁰⁸

This analysis is confirmed by the more recent *Piepenbrock* case.³⁰⁹ One contracting authority had entrusted another with the task of cleaning certain office, administrative and school buildings; the second company discharged its obligation through a private service provider which was already cleaning its offices. The ECJ found that no genuine cooperation between the contracting public entities was established in this case.³¹⁰ Again the cleaning services at stake in *Piepenbrock* are commercial in nature and do not amount to public service missions.³¹¹ Moreover, an economic operator (the one already providing the services to the contracting authority being asked to provide the services) gets an advantage over its competitors by becoming the beneficiary of a direct award.³¹²

The distinction between public law missions and commercial activities is not in itself entirely devoid of problems. This would seem to rule out the legality of a number of instances of cooperation concerning the provision of

305. As happened in the Czech case discussed by Kindl et al., and Németh, and Sołtysińska, all op. cit. *supra* note 283, at p. 283 et seq.

306. See also Case C-159/11, *ASL Lecce*, para 40; on the same lines: the Order in Case C-564/11, *Ingegneri della Lombardia*, para 35; and Case C-352/12, *Consiglio Nazionale degli Ingegneri*, para 43; the requirement of the discharge of a common public task is deduced from the idea of cooperation by A.G. Trstenjak: Case C-159/11, *ASL Lecce*, para 76 et seq. of the Opinion.

307. See the discussion by Ølykke, op. cit. *supra* note 232, at 118 et seq.; Ferik and Ferik, “Slovenia” in Neergaard, Jacqueson and Ølykke, op. cit. *supra* note 234, at p. 690, rather refer to the distinction between economic and non-economic activities; this would however exclude public cooperation in the area of SGEIs.

308. Case C-305/08, *CoNISMa*, EU:C:2009:807.

309. Case C-386/11 *Piepenbrock Dienstleistungen GmbH & Co. KG*, EU:C:2013:385.

310. *Ibid.*, para 39 et seq.

311. Caranta, op. cit. *supra* note 188, 109 et seq; see also Arrowsmith, op. cit. *supra* note 6, 523.

312. See also the analysis by Tokár, op. cit. *supra* note 266, at 187 et seq.

back-office services, such as IT support, which do not take the permitted forms of central purchasing arrangements because no recourse is had to the market, but which may still be present in some Member States.³¹³

In the end, what is unclear from the case law on public-public cooperation is whether the legality of direct awards implied in such agreements is ruled out *a)* unless the cooperation is set up to perform a common task, and provided that no market participants get a competitive advantage from the agreement, or *b)* unless the cooperation is set up to perform a public law mission devoid of commercial nature, and provided that no market participants get a competitive advantage from the agreement, or simply *c)* when no market participants get a competitive advantage from the agreement. These alternatives place very different constraints on the organization freedom of contracting authorities and the Member States.³¹⁴ The real issue for EU law should be to make sure that public-public cooperation does not result in one private economic operator being placed in a position of advantage *vis-à-vis* its competitors.³¹⁵

Article 12(4) of Directive 2014/24 now specifically focuses on public-public cooperation. It lays down three conditions which must be cumulatively met. The first is that the cooperation must ensure that “public services they have to perform are provided with a view to achieving objectives they have in common”. The requirement seems to fall short of a common task (“public services”), and therefore the strictest reading of the case law that was discussed above would be wrong. This is confirmed by Recital 33, according to which “the services provided by the various participating authorities need not necessarily be identical; they might also be complementary”.³¹⁶ The issue will obviously be the meaning of “complementary”. The second condition requires the implementation of the cooperation to be solely governed by considerations relating to the public interest; one could be excused for thinking: *ça va de soi*, since we are talking about public services.³¹⁷ The third condition however is clearly aimed at restricting the cooperation, since it requires that “the participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation”.³¹⁸ Besides being restrictive, this does not seem to have much to do with either

313. E.g. Van de Meent and Manunza, “The Netherlands” in Neergaard, Jacqueson and Ølykke, *op. cit. supra* note 234, at 614.

314. See also Burgi, *op. cit. supra* note 279, 62 et seq.

315. Rec. 31 of Dir. 2014/24.

316. Also refer to Arrowsmith, *op. cit. supra* note 6, at 527.

317. See also Rec. 33, on the “cooperative” concept.

318. See the discussion by Sestier, “Les nouvelles dispositions relatives aux relations ‘in house’ et aux coopérations ‘public/public’”, (2014) *Bulletin Juridique des Contrats Publics*, at 176 et seq.; this is considered not to be restrictive enough on competition grounds by Sanchez Graells, *Public procurement and the EU Competition rules*, 2nd ed. (Hart, 2015 *forthcoming*), ch. 6.

ASL Lecce or *Piepenbrock*.³¹⁹ The involvement of private market participants is not expressly considered in the provision, the whole problem boiling down to the question whether the contracting authorities concerned have – or have not – a significant activity on the open market.³²⁰ On this basis it would seem that *ASL Lecce* should be decided differently today, since neither the ASL nor the University have such a significant market presence. This is of course assuming that, focusing on the same situation, the case law and the provision cannot coexist. *Piepenbrock* is more problematic, since in that case there was a significant change in the procurement contract concluded between one of the authorities and a market operator – which probably goes beyond what is permissible under Article 72 of Directive 2014/24; moreover the market operator had to agree. Public-public cooperation instead only involves contracting authorities.³²¹ Seen from another angle, one authority was acting as a central purchasing body, without however complying with the rules provided for this case.³²²

4.5. Licences, authorizations and similar

According to the more recent case law – focusing on licences for horse-race betting operations – the award of “simple authorization schemes” falls outside from the scope of application of EU public contract law.³²³ It is questionable whether this links with the public procurement case law based on Article 51 TFEU. Under this provision, the rules relating to the freedom of establishment and the freedom to provide services do not extend to activities which in a Member State are connected, even occasionally, with the exercise of official authority. As a consequence, according to this case law, such activities are also excluded from the scope of public procurement directives which are designed to implement the provisions of the Treaty relating to the freedom of establishment and the freedom to provide services.³²⁴ On the one hand, the distinction between contracts and authoritative measures does not always run according to substantive requirements, the ECJ often being happy with the

319. Case C-159/11, *ASL Lecce*; Case C386/11, *Piepenbrock Dienstleistungen GmbH & Co. KG*.

320. See however Rec. 33.

321. See Rec. 33.

322. See the discussion in Semple, op. cit. *supra* note 36, para 1.59, and Wollenschläger “Deutschland” in Neergaard, Jacqueson and Ølykke, op. cit. *supra* note 234, p. 404 et seq.

323. Case C-203/08, *Sporting Exchange*, EU:C:2010:307; Case C470/11, *Garkalns SIA*, EU:C:2012:505; see the discussion in Ølykke, “Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions? Recent developments in the case law and their implication for one of the last sanctuaries of protectionism”, (2013) PPLR, 1–20, at 8 et seq.

324. Case C-160/08, *Commission v. Germany*, para 73 et seq.

form adopted by the Member State.³²⁵ On the other hand, when assessing whether official authority has been exercised, the Court is at times very demanding.³²⁶ However it may be, this makes it necessary to distinguish between authorizations and public contracts. The recent case law reads into concessions an *obligation* for the beneficiary to pursue the activity transferred.³²⁷ The same criterion has crept into Directive 2014/23. Under Recital 14 thereof, acts such as authorizations or licences, whereby a public authority thereof establishes “the conditions for the exercise of an economic activity, including a condition to carry out a given operation granted, normally, on request of the economic operator and not on the initiative of the contracting authority or the contracting entity and where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions.”

According to the same recital, “concession contracts provide for mutually binding obligations where the execution of the works or services are subject to specific requirements defined by the contracting authority or the contracting entity, which are legally enforceable”. It is questionable whether this is really relevant in distinguishing concession contracts from authorizations. The need to differentiate between “a condition to carry out a given operation” from a “mutually binding obligation” is sure to raise difficulties and increase litigation, as contracting authorities may see in it an easy way to escape from the rules of the public contracts directives.³²⁸

It is submitted that the distinguishing element is again whether the contracting authority has “acquired” or not, for itself or for the benefit of the general public (or individual members thereof), some work, good or service. This is what is really missing from “simple authorization schemes”.

Divergences in the definitions however resulted from the decision to have a separate directive on concessions. As already remarked, “acquisition” is the new added defining element of public procurement contracts. “Acquisition” is not really part of the definition of concession under Directive 2014/23. This cannot be explained away simply by recalling that in most service concessions (but works concessions are already a different story) the service is rendered to

325. For discussion and references please refer to Caranta, *op. cit. supra* note 234, at 87 et seq.

326. See again Case C-160/08, *Commission v. Germany*, para 73 et seq.

327. Case C-221/12, *Belgacom NV*, EU:C:2013:736, para 27; see critically on the reference to “obligation” Caranta, *op. cit. supra* note 234, at 99 et seq., and, to a more limited extent, but still referring to the possibility of abuses, Arrowsmith, *op. cit. supra* note 6, 393 et seq. and 596 et seq.

328. This may already be happening considering the cases analysed by Doherty, “The United Kingdom” in Neergaard, Jacqueson and Ølykke, *op. cit. supra* note 234, at p. 769 et seq; see also the discussion in Eleftheriadis, *op. cit. supra* note 243, at 53.

the end users rather than to the contracting authority or entity. In service procurements too, end users may be the beneficiary of the services procured by the contracting authority or entity. In any case, the distinction between procurement and concession does not depend on the final beneficiary of the contract. It depends, as was shown, on the transfer of the exploitation risk. Indeed, “acquisition” could well have been a defining element for concession, as is shown by Recital 16 of Directive 2014/23, which indicates that agreements that grant rights of way covering the utilization of public immovable property for the provision or operation of fixed lines or networks intended to provide a service to the public fall outside the scope of application of the Directive “in so far as those agreements neither impose an obligation of supply nor involve any acquisition of services by a contracting authority or contracting entity to itself or to end users”. The latter test would alone be enough to distinguish concessions from other legal acts, such as licences, authorizations, but also “certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property”.³²⁹

The notion of “acquisition” also easily distinguishes procurement and concessions contracts from grants. The recitals to the directives feel the need to underline that grants fall outside their scope of application even if there is “an obligation to reimburse the amounts received where they are not used for the purposes intended”. This is because of the fixation with “obligation” as a defining element, but the point is quite simply that grants normally benefit the recipient, while nothing is “acquired” by the contracting authority or entity.³³⁰

“Selectivity” is needed beside “acquisition” in order to define a public procurement or concession contract. This is why arrangements where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as for instance customer choice and service voucher systems, fall outside the scope of application of the public contracts directives. The economic operators actually providing the service to an end user will indeed be chosen by the user him/herself rather than by the contracting authority. The latter will simply act as a gatekeeper, allowing any economic operator meeting the relevant requirements to be part of the scheme.³³¹ Otherwise the rules on framework agreements should be used by analogy.

329. Rec. 15 of Dir. 2014/23.

330. Rec. 12 of Dir. 2014/23; Rec. 4 of Dir. 2014/24.

331. Rec. 13 of Dir. 2014/23; Rec. 4 of Dir. 2014/24; unfortunately the wording of the recitals is somewhat different, the latter not mentioning “continuous access”; but there is no reason why this requirement should not apply to the classic sector as well.

Selectivity may as well be present in some authorization schemes without necessarily implying the application of public procurement rules in the absence of any “acquisition” on the part of the contracting authority. This is the case for instance with licences to operate gambling and betting schemes.³³² Directive 2006/123 on services in the internal market might rather be the applicable law to the granting of some licences or authorizations.³³³ In any case the general principles of the TFEU will normally apply to these situations as well.³³⁴

4.6. *Miscellaneous changes to or clarifications as to the scope of application of the directives.*

Directive 2007/66 amending the existing directives on remedies and Directive 2009/81 on procurements in the fields of defence and security while still in force have been affected by the reform package. More specifically, Articles 46 and 47 of Directive 2014/23 have amended both Directive 89/665 and Directive 92/13 (as already amended by Directive 2007/66), by changing the references to the 2004 directives into references to the 2014 ones. The applicability of the remedies directives to (most) service concessions has also been specified.³³⁵ Articles 3 and 15–16 of Directive 2014/24 affect the scope of application of the defence procurement Directive.³³⁶

4.7. *Inroads in the implementation of contracts.*

Just like international rules and documents on public contracts such as the WTO Government Procurement Agreement or the UNICTRAL Model Law on public procurement, EU law has traditionally focused on contract award.³³⁷ It is when choosing the contractor that domestic contracting authorities might

332. In this perspective, Rec. 35 of Dir. 2014/23 simply clarifies the legal position, without adding anything to the rules.

333. See also Rec. 14 of Dir. 2014/23; on Dir. 2006/123/ EC; see the contributions in Neergaard, Nielsen, and Roseberry op. cit. *supra* note 232, esp. at p. 65; see also Barnard, “Unravelling the Services Directive”, 45 CML Rev. (2008), 323–394, 323.

334. Case C-470/11, *Garkalns SIA*, EU:C:2012:505, para 42 et seq; see Wollenschläger op. cit. *supra* note 322, 416; see also Wollenschläger, *Verteilungsverfahren: die staatliche Verteilung knapper Güter: verfassungs- und unionsrechtlicher Rahmen, Verfahren im Fachrecht, bereichsspezifische verwaltungsrechtliche Typen- und Systembildung* (Mohr, 2010), esp. p. 379 et seq., and Wolswinkel, *De verdeling van schaarse publiekrechtelijke rechten. Op zoek naar algemene regels van verdelingsrecht* (Boom, 2013).

335. See Craven, op. cit. *supra* note 132, at 197.

336. See Trybus, op. cit. *supra* note 9, at 261 et seq.

337. See Caroli Casavola, “Global Rules for Public Procurement” in Noguellou and Stelkens, op. cit. *supra* note 17, at p. 54 et seq.

be tempted to discriminate against foreigners. The fight against buying national practices is – as already mentioned – at the core of EU legislation in this area. Contract implementation tends to be left to domestic law.³³⁸

Non-discrimination concerns may however spill over in the phase of the implementation of the contract.³³⁹ More specifically, contracting authorities may be tempted to change the scope of a contract to the benefit of a – usually domestic – contractor or to prolong its duration, thus denying an opportunity to other economic operators. Limits to the possibility to change the contract without opening it again to competition were already laid down in the case law.³⁴⁰ This is now comprehensively regulated in Article 72 of Directive 2014/24.³⁴¹ Article 72 links with Article 73 which lists a number of situations in which a contract must be terminated.³⁴² Besides unlawful changes to the contract, Article 73 lists award to a contractor which should have been excluded under Article 57 and award following a serious breach of EU rules declared in an infringement procedure. This complements ineffectiveness as provided for in the remedies directives as redrafted by Directive 2007/66.³⁴³ It compels Member States to have tools available which meet the requirements laid down in a well-known infringement case against Germany, when the ECJ ruled out the possibility to refer to sanctity of contract as an excuse to maintain illegally awarded contracts until their expiration date.³⁴⁴

Concerns about possible discrimination against foreign economic operators led to the regulation of contract performance clauses already in Directive 2004/18. Article 70 of the new Public Sector Directive basically reproduces

338. Trybus, *op. cit. supra* note 17, at 81 et seq.

339. See Comba, “Effects of EU law on contract management” in Trybus, Caranta and Edelstam, *op. cit. supra* note 7, at p. 322 et seq.

340. Case C-454/06, *Presstext Nachrichtenagentur*, EU:C:2008:351; Case C-91/08, *Wall*, EU:C:2010:182.

341. See also Art. 43 of Dir. 2014/23 and Rec. 75 et seq. thereof; in-depth analysis in Treumer, “Regulation of contract changes in the new public procurement Directive” in Lichère, Caranta and Treumer, *op. cit. supra* note 2, p. 281 et seq., and in Treumer, “Contract changes and the duty to retender under the new EU public procurement Directive”, (2014) PPLR, at 148 et seq.

342. See also Art. 44 of Dir. 2014/23 and Rec. 77 thereof.

343. Treumer, “Towards an obligation to terminate contracts concluded in breach of the E.C. Public procurement rules – the end of the status of concluded public contract as sacred cows”, (2007) PPLR, 371; Clifton “Ineffectiveness – the new deterrent: Will the new remedies Directive ensure greater compliance with the substantive procurement in the classical sector?”, (2009) PPLR, 167; cf. also Treumer, “Enforcement of the EU public procurement rules: The state of law and current issues”, and Caranta, “Many different paths, but are they all leading to effectiveness?” both in Treumer and Lichère, *op. cit. supra* note 8, at 32 et seq., and 77 et seq. respectively.

344. Case C-503/04, *Commission v. Germany*.

that provision, updated with a reference to innovation (and the insertion of the requirement of a link to the subject matter of the contract to be understood in the liberal way spelt out in Art. 67(3)).

What is really new is the regulation of subcontracting, to be found in Article 71 of Directive 2014/24. The provision is quite complex but most of it is in the nature of a framework spelling out what the Member States and the contracting authorities may do (and might have done anyway and in some cases were doing already).³⁴⁵ Indeed the views among the Member States and within the EU institutions as to the protection of subcontractors were quite polarized, a major issue being the legal base for provisions in this specific area of public contract law.³⁴⁶ The provision is at its most binding in the first paragraph, requiring the Member States to make sure that subcontractors comply with the obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions referred to in Article 18(2).³⁴⁷ As with this latter provision, on the one hand it is very much left to the Member States to organize their services to achieve this aim; on the other hand, the provision links with the specific rules on qualification recalled in Article 71(5) and (6). The most contentious aspect was the possibility for the contracting authority to pay subcontractors for their services directly. Article 71(3) leaves entirely to the Member States any decision about this, so that the situation is not really changed. For transparency reasons, this possibility must be spelt out in the contract documents. One could question the legal basis for a EU discipline of subcontracting, but Article 71 does not really bind the Member States beyond what is already required by the rules on qualification – which reflect equal treatment concerns – and transparency.

5. A different take on award procedures

Procedures are the life and soul of public procurement law and this is even more so with reference to supranational regimes, as is made plain by the traditional formula of Recital 1 of the Public Sector Directive. On the one hand: “The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the [TFEU]”. However, and

345. See Semple, *op. cit. supra* note 36, para 5.23 et seq; see also Comba, *op. cit. supra* note 339, at 326 et seq.

346. See also Trybus, *op. cit. supra* note 15, 278 et seq.

347. See Rec. 105; see also Art. 42(1) of Dir. 2014/23 and Rec. 72 thereof.

this justifies EU legislation under the subsidiarity principle,³⁴⁸ for public contracts above a certain value, “provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition”. This is echoed in the very first provision of the Public Sector Directive: Article 1(1) reaffirms: “This Directive establishes rules on the procedures for procurement by contracting authorities”

For award procedures, the starting point is that EU law has traditionally been very nervous as to the use of negotiations in contract awards, worrying about abusive conduct of the contracting authorities to steer the award procedures in favour of domestic economic operators. While “in the American procurement system, the negotiations are seen as creating a base for competition and are therefore an *optimizer* of competition. The competition is increased because of the negotiations. In the European system negotiations are seen to *limit*, not optimize competition. The negotiated procedure is a competitive procedure in spite of the negotiation not because of it”.³⁴⁹ Unlike US legislation, EU law is based on the fear of preferential treatment for domestic economic operators and discrimination against foreign ones. Negotiated procedures are inherently more flexible, and as such they provide greater opportunities for preferential treatment – if not for outright corruption – for instance through selective distribution of information by the contracting authority to the benefit of one economic operator.³⁵⁰ This time however the EU law-makers were under much pressure from various stakeholders – contracting authorities and some Member States, in particular – to introduce more flexible procedures involving negotiations. As the Green Paper preparing the reform recalled: “Contracting authorities sometimes complain that the regulatory instruments provided by the EU rules are not fully adapted to their purchasing needs. In particular, they claim that leaner and/or more flexible procedures are needed”.³⁵¹

One of the major innovations in the new Public Sector Directive is indeed the competitive procedure with negotiation, which allows for negotiations in a

348. See COM(2011)896 final, at p. 6; this has not gone without contestation even before the Directive was approved: see notably Arrowsmith, “The EC procurement directives, national procurement policies and better governance”, 27 *EL Rev.* (2002), 3 et seq.

349. Steinicke, “Public procurement and the negotiated procedure – A lesson to learn from U.S. Law?”, 8 *ECLR* (2011), at 331 et seq; see also Spagnolo, *supra* note 80, at 27.

350. The direct link between the discretion of contracting authorities and the risk of corruption is however challenged, albeit with reference to award criteria, by Faustino, “Regulating discretion in public procurement: An anti-corruption tool?” in Racca and Yukins, *op. cit. supra* note 92, at p. 150 et seq.

351. COM(2011)15 final, at p. 12; as to the position of the Member States see e.g. the clear view of Wijkman, “Major challenges for public procurement – A Swedish perspective”, in *The Cost of Different Goals...*, cited *supra* note 4, at p. 123.

way previously unheard of in EU public procurement law.³⁵² Moreover, the conditions allowing recourse to this procedure and to the competitive dialogue were relaxed at the instance of the Council and the Member States therein, especially when compared to those provided for under Article 29 of Directive 2004/18 with reference to the competitive dialogue.³⁵³ It may be too soon to say whether these changes will be enough to assuage the concerns of contracting authorities. Among the first reactions, some see the glass half full, others half empty.³⁵⁴ Generally speaking, however, since contracting authorities may today have recourse to these procedures in various vaguely defined situations,³⁵⁵ it cannot be denied that we are faced with a “truly remarkable widening of the scope of flexible tender procedures”.³⁵⁶ This in turn required additional procedural safeguards to be added, for instance in Article 29 of Directive 2014/24 regulating the competitive procedure with negotiations.³⁵⁷ It may be doubted whether these safeguards will be enough to keep a check on the openings for preferential treatment coming with more flexible procedures.³⁵⁸

Considering that the grounds allowing recourse to the innovation partnership, already referred to above, are stricter than those now applicable to both the competitive dialogue and the competitive procedure with negotiations, Article 26 of Directive 2014/24 now provides for two truly general (or normal)³⁵⁹ award procedures (open and restricted), two procedures which may be followed in many circumstances (competitive procedure with negotiation and competitive dialogue), and two truly exceptional procedures (innovation partnership and negotiated procedure without prior publication). Another way to see it, which is probably belied by the way Article 26(1) is drafted, would be to have the negotiated procedure without prior publication as the only truly exceptional award procedure, since the innovation partnership

352. Telles and Butler, *op. cit. supra* note 83, 145 et seq; Davey, “Procedures involving negotiation in the new Public Sector Directive: key reforms to the grounds for use and the procedural rules”, (2014) PPLR, 103–111, 103; a parallel evolution has taken place in the utilities sectors; however, the corresponding procedure laid down in Art. 47 of Dir. 2014/25 still bears the old label of “negotiated procedure with prior call for competition”.

353. See Lichère, “*Quid de la place nouvelle des procédures négociées et du dialogue compétitif?*”, (2014) *Bulletin Juridique des Contrats Publics*, 166.

354. See for further references Caranta, *op. cit. supra* note 234, at 171 et seq.

355. See also the remarks by Tokár, *op. cit. supra* note 266, at 214 et seq.

356. Treumer, *op. cit. supra* note 3, 12 et seq; see also Davey, *op. cit. supra* note 352, at 104 et seq.; Semple, *op. cit. supra* note 36, para 3.7.

357. See also Rec. 45.

358. See Tokár, *op. cit. supra* note 266, at 216, also referring to the difficulty in monitoring how negotiated procedures are actually managed.

359. Bovis, *op. cit. supra* note 5, at 92 et seq.

both involves a call for competition and the conditions for its use are not really very well defined. Indeed, a number of rules concerning both the competitive procedure with negotiation and the competitive dialogue and the innovation partnership are drafted in a very similar if not identical way.³⁶⁰ So, a distinction is made between “standard”, “special” and “exceptional” procedures. The open and restricted procedures which may be used in any circumstance and for any type of contract are truly “standard”. Competitive procedure with negotiation, competitive dialogue and innovation partnership have a special nature because they can be chosen only according to specific grounds for use. The negotiated procedure without prior publication is exceptional because it is a final option for contracting authorities when everything else fails.³⁶¹

A different approach characterizes the Concession Directive, whose procedural rules are quite basic.³⁶² As usual, because of its detrimental effects on competition, “the award of concessions without prior publication should only be permitted in very exceptional circumstances”.³⁶³ However we do not find here the usual panoply of different procedures to be used in different circumstances. Article 31 of the Concessions Directive simply foresees that “Contracting authorities and contracting entities wishing to award a concession shall make known their intention by means of a concession notice” drafted according to a specific model and published following the rules laid down in Article 33. The procedural guarantees provided to the economic operators mirror, at times in a more succinct form (e.g. Art. 36 on technical and functional requirements) those provided generally under the classic sector Procurement Directive. Under Article 39(1), limits for the receipt of applications or of tenders should be set taking into account in particular the complexity of the concession and the time required for drawing up tenders or applications.

The light regime foreseen in the Concessions Directive is also particularly evident with regard to award criteria. Article 41 of Directive 2014/23 is not just simpler than the – admittedly overly complex – corresponding provisions found in Articles 67 to 69 of Directive 2014/24. The point is that the contracting authority or entity is granted more leeway than is the case under the standard procurement regime. Under Article 41(3), it may exceptionally change the order of the chosen and advertised criteria when faced with “a tender which proposes an innovative solution with an exceptional level of

360. See also Lichère, *op. cit. supra* note 353, at 164 et seq.

361. Telles and Butler, *op. cit. supra* note 83, 132 et seq.

362. Referring to the proposal see Sanchez Graells, *op. cit. supra* note 21, at 96.

363. See Rec. 51; these circumstances are described in Art. 31(4) to (5).

functional performance which could not have been foreseen”. This is, admittedly, accompanied by safeguards for other tenderers or economic operators. But it is something unheard of in EU public procurement legislation.³⁶⁴

The shift of the regulatory preferences for award procedures is to raise serious State aid issues.³⁶⁵ As is well known, an entire section of the Commission Communication on the application of the EU State aids rules to compensation granted for the provision of SGEI is devoted to the selection of the provider.³⁶⁶ The starting point is that not every award procedure provided for in the public contracts directives will satisfy State aid rules. Indeed “a public procurement procedure only excludes the existence of State aid where it allows for the selection of the tenderer capable of providing the service at ‘the least cost to the community’”.³⁶⁷ Procedures like competitive dialogue or negotiated procedure with prior publication “confer a wide discretion upon the adjudicating authority and may restrict the participation of interested operators. Therefore, they can only be deemed sufficient to satisfy the fourth *Altmark* criterion in exceptional cases”. Finally, the negotiated procedure without publication of a contract notice is considered unsuitable to select a tenderer capable of providing those services at “the least cost to the community”.³⁶⁸

The new directives have changed the approach to award procedures considerably, responding to a “great need” for contracting authorities to have additional flexibility to choose a procurement procedure which provides for negotiations.³⁶⁹ Or is this only apparent, with contracting authorities having complied with the public contract directives still having to notify the award as a State aid in very many – if not in most – cases? This is clearly unsatisfactory but neither Article 4(1) of Directive 2014/23 nor Article 1(4) of Directive

364. The issue was discussed by Tvarnø, “Why the EU Public procurement Law should contain rules that allow negotiation for public private partnerships” in Ølykke, Risvig and Tvarnø, *op. cit. supra* note 1, 210 et seq.

365. See Burnett, *op. cit. supra* note 10, 17.

366. O.J. 2012, C 8/02; see also for the discussion of the case law Bovis, *op. cit. supra* note 5, 482 et seq.

367. Point 65; specific and more elaborate guidance is provided by the Communication from the Commission Framework for State aid for research and development and innovation – COM(2014)3282.

368. Point 66.

369. See Treumer, *op. cit. supra* note 3, at 12 et seq. The different issues surrounding negotiations in contract award procedures are analysed by Treumer, “Flexible procedures or ban on negotiations? Will more negotiations limit the access to the procurement market?” and, with reference to a specific procedure, by Tvarnø, “Why the EU public procurement law should contain rules that allow negotiation for public private partnerships” both in Ølykke, Risvig and Tvarnø, *op. cit. supra* note 1, at p. 135 and 201 respectively.

2014/24 do anything more than reaffirm the full rigour of State aid rules.³⁷⁰ Similar considerations apply to the structuring of award criteria, the public contract directives being much less demanding than State aids rules.³⁷¹

6. Conclusions and what remains to be done

One might be excused for having the impression that the reform of EU public contract law has involved many more problems than solutions. It is not like this. Important results in terms of flexibility, modernization, sustainability have been achieved, which go beyond the specific provisions which it was possible to analyse here.³⁷²

The new rules are however very complex. A certain degree of complexity is unavoidable. Clear and simple rules will always be an elusive if not utopian target.³⁷³ Finding partners in the internal market for the “Contracting State” is a complex business, and even more so if sustainability and other strategic objectives are to progress at the same time – for instance, as you cannot really avoid provisions on life cycle costing if you take green procurement seriously. Stricter rules are also the natural consequence of the “continuing attempts by contracting authorities to escape from such rules as already exist”.³⁷⁴ Complexity may also be a function of flexibility. The obvious approach to flexibility is to have basic rules allowing contracting authorities and entities wide margins of discretion. Procedural safeguards are needed in this case. The problem becomes that of deciding what are the minimal safeguards needed. Concerns that flexibility will lead to abuse cannot, however, simply be assuaged by new or strengthened rules on conflict of interest, fraud and corruption even if the risks may be different in different jurisdictions.³⁷⁵

The Commission proposal for the Public Sector Directive understood flexibility as an articulated toolbox of award procedures from which the Member States could choose those best suited to their own internal situation. This was good for both subsidiarity and flexibility – even if it would still have made the directive quite long. The European Parliament however insisted on

370. See however, in a sense strengthening the specific merits of State aid rules, Sanchez Graells, “Public procurement and State aid: Reopening the debate?”, (2012) PPLR, at 209 et seq.

371. These concerns are not shared by Arrowsmith, *op. cit. supra* note 6, at 310 et seq.

372. See also Treumer, *op. cit. supra* note 3, 9 et seq.; Gormley, *op. cit. supra* note 135, 182.

373. A balanced assessment in Treumer, *op. cit. supra* note 3, 11.

374. Gormley, *op. cit. supra* note 135, 182.

375. And even if a link between discretion and corruption is well established: Bordalo Faustino, “Regulating discretion in public procurement: An anti-corruption tool?” in Racca and Yukins, *op. cit. supra* note 92, at p. 147 et seq.

having the Member States implementing all procedures, the choices among them thus now falling on the public purchasers. From another perspective, flexibility required more negotiations. This, coupled with some reticence to openly allow recourse to negotiation on a generalized basis, led to the very complex system of procedures, as discussed.³⁷⁶

In the end, flexibility has entailed much complexity – but complexity goes well beyond what could reasonably have been expected. The institutional dynamics in the legislative process certainly made a major contribution to this unsatisfactory outcome. The interpreter will pay the price for the necessity of compromise and need “to have something for everyone and not to dissatisfy people too much”.³⁷⁷ The lawmaker “appears frequently to have used the legal technique ‘constructive ambiguity’ in order to strike compromises”.³⁷⁸ And the interpreter is not helped by scores of rules ending up masquerading as recitals.³⁷⁹

Overly complex and at times obscure rules should not be accepted as an inevitable consequence of a more democratic Union where the Parliament finally makes its voice heard. It is suggested that other aspects deserve consideration as well. One major issue seems to be – and academic bias is hereby acknowledged – a still somewhat weak intellectual structure of EU public contract law. Some key concepts such as public contract and public procurement have not yet been properly refined at EU level. The Green paper on The modernization of EU public procurement policy – Towards a more efficient European Procurement Market called on the EU institutions to do precisely this claiming that “the review of the legislative framework will also be an opportunity to examine if certain basic notions and concepts should be refined to ensure better legal certainty for contracting authorities and undertakings”.³⁸⁰ Again, not enough has been done.³⁸¹ As shown in a number of examples, the case law does not always provide clear indications. This situation can easily lead to misunderstandings. Contracting authorities and domestic courts will tend to read these concepts on the familiar lines of the national culture, which translates into diverging applications and in some cases misapplications of EU law. The ReNEUAL project is presently addressing the need for a common understanding of different parts of EU

376. *Supra* section 5.

377. Gormley, *op. cit. supra* note 135, 173.

378. Treumer, *op. cit. supra* note 3, at 21; see also at 23 et seq. for some instances.

379. Treumer, *op. cit. supra* note 3, at 10, quite rightly laments “The unfortunate tendency to regulate in the Preamble instead of in the substantive provisions . . . deliberately unclear provisions inserted in order to reach a compromise”; see also *ibid.* 21 et seq. That recitals are indeed relevant is shown by the cases recalled by Gormley, *op. cit. supra* note 135, 173.

380. COM(2011)15 final, at p. 5.

381. See also Caranta, *op. cit. supra* note 188, at 86 et seq.

administrative law, including public contracts,³⁸² but it is submitted that more should be done when new legislation is prepared to provide a coherent system of EU law autonomous concepts in these (and other) areas of the law.³⁸³

Reference to coherence inevitably leads to the additional issue of how the rules for different policy areas or partitions of EU law are actually coordinated. The Green paper went on to claim that “the review may present certain opportunities to increase convergence between the application of the EU public procurement and State aid rules”.³⁸⁴ As already remarked, the reform has utterly failed in enhancing convergence. Rather it has widened divergence.

The next question is what remains to be done. The Commission is expected to lead in the implementation of the new directives even before policing their application by and in the Member States. One obvious instance is life cycle costing methodologies. As already remarked, Article 68 of Directive 2014/24 very much treads a thin line between empowering contracting authorities to develop such methodologies and worrying that this could be done to favour certain economic operators.³⁸⁵ The obvious solution is to develop objectively verifiable, non-discriminatory, accessible and reasonably burdensome criteria at EU level. Recital 95 calls on the Commission to develop further life cycle methodologies and this is obviously necessary and urgent.³⁸⁶

The burden of implementing the directives will of course fall on the Member States, who are in principle given until 18 April 2016 (and longer times concerning mandatory use of electronic means). An important feature of the new directives, which makes them more flexible instruments than they used to be, is the room for choice the Member States are often left with. While this was already the case with the 2004 directives, allowing discretion to the Member States has reached a new climax with the 2014 reform. A good example is Article 18(2) of Directive 2014/24 which asks Member States to take appropriate measures to ensure the compliance with obligations in the fields of environmental, social and labour law and so on.³⁸⁷ Similarly under Article 24 of the same Directive it is up to the Member States to make sure that effective measures are taken to tackle conflicts of interest.³⁸⁸

382. <www.reneual.eu> (last visited 22 Nov. 2014)

383. For some suggestions, see Caranta, “Les exigences systémiques dans le droit administratif de l’Union européenne” in Blumann and Picod (Eds.), *Annuaire de Droit de l’Union Européenne 2012* (Éditions Panthéon Assas, 2014), p. 21.

384. COM(2011)15 final, at p. 5.

385. See Semple, *op. cit. supra* note 36, para 4.46 et seq.

386. Dragos and Neamtu, *op. cit. supra* note 34, 336 et seq.

387. See also Art. 30(3) of Dir. 2014/23 and Rec. 55 thereof.

388. See also Art. 35 of Dir. 2014/23 and Rec. 61 thereof.

In a way those provisions lead us back to the traditional idea of the directive as an instrument binding as to the result to be achieved but leaving to the national authorities the choice of form and methods.³⁸⁹ This very old but still somewhat novel approach reaches its climax with the light regime of the Concession Directive.³⁹⁰ More often than not the Member States are even free to decide whether or not to have some provisions incorporated in their domestic legislation. For instance under Article 20 of Directive 2014/24 they may choose to reserve the award of some contracts to sheltered workshops and other specific economic operators; under Article 36(1) they may render the use of electronic catalogues mandatory in connection with certain types of procurement; under Article 37(1) they may provide that contracting authorities may acquire supplies and/or services from a central purchasing body; under Article 46(3) they may provide that, where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots. As it shown by that last example, leaving the matter to be decided at national level was a way out of *impasses* in the legislative process. Other good instances are provided by the mostly elective discipline of subcontracting and by the last indent of Article 67(2), leaving to the Member States to rule out recourse to price only or cost only as the sole award criterion or to restrict their use to certain categories of contracting authorities or certain types of contracts. Among the many provisions on sustainable procurement only the obligation to reject abnormally low tender where this is due to the non-compliance with environmental or social rule is binding on the Member States. Running somewhat against this tendency is the decision to take away from the Member States the freedom left them under Directive 2004/18 whether or not to regulate some award procedures, as all of them now have to be implemented in domestic law, and the decision to make compulsory some aspects of e-procurement.³⁹¹

The Member States will ultimately have to make a number of choices appropriate to their social situations and political preferences.³⁹² One can expect deeply different approaches, which will perpetuate if not even reinforce the significant divergence in public contract law and practice in the Member States (albeit reduced when compared to say twenty years ago). The status of the public contract directives as a “notable example of codification of supranational administrative law” has not been much strengthened in this

389. See Arrowsmith, *op. cit. supra* note 6, 174, recalling that the directives should simply provide a framework for domestic legislation.

390. See *supra* section 4.1.

391. On the first aspect, see critically Arrowsmith, *op. cit. supra* note 6, 612 et seq.

392. For a less rosy take, see Arrowsmith, *op. cit. supra* note 6, 177.

reform round.³⁹³ The domestic traditions remain still strong in this area, and path dependency is deemed to perpetuate some measure of difference.³⁹⁴

The issue will be whether the choices made in this or that Member State will be sufficient to make sure that the aims of the directives – and more generally of EU public contract law – are achieved. As it has been rightly remarked leaving the Member States a wide discretion as to how these principles should be interpreted at national level has the obvious disadvantage to “lead to significant variations in the level of protection in the Member States”.³⁹⁵

393. The reference applied to the 2004 round: see Bovis, *op. cit. supra* note 5, 494.

394. This is evident from the reports collected in Neergaard, Jacqueson and Ølykke, *op. cit. supra* note 234.

395. Treumer, *op. cit. supra* note 3, at 11.

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