Public Procurement Law:

Limitations, Opportunities and Paradoxes

The XXVI FIDE Congress in Copenhagen, 2014
Congress Publications Vol. 3

Editors: Ulla Neergaard,
Catherine Jacqueson & Grith Skovgaard Ølykke

Kammeradvokaten
Law Firm Poul Schmith

Legal Adviser to the Danish Government

www.en.kammeradvokaten.dk/eu

Public Procurement Law:

Limitations, Opportunities and Paradoxes

Public Procurement Law:
Limitations, Opportunities and Paradoxes

Vergaberecht für öffentliche Aufträge:
Begrenzungen, Möglichkeiten und Widersprüche

Le droit des marchés publics :
Restrictions, possibilités et paradoxes

The XXVI FIDE Congress in Copenhagen 2014
Congress Publications Vol. 3

Editors: Ulla Neergaard, Catherine Jacqueson, Grith Skovgaard Ølykke
General Rapporteur: Roberto Caranta

DJØF Publishing
Copenhagen 2014

Editors: Ulla Neergaard, Catherine Jacqueson, Grith Skovgaard Ølykke
Public Procurement Law: Limitations, Opportunities and Paradoxes

1. edition

© 2014 by DJØF Publishing
Jurist- og Økonomforbundets Forlag

All rights reserved.
No part of this publication may be reproduced,
stored in a retrieval system, or transmitted in any
form or by any means – electronic, mechanical,
photocopying, recording or otherwise – without
the prior written permission of the Publisher.

Cover: Thea Nisted Svendsen
Print: Toptryk Grafisk, Gråsten

Jacket illustration: The main building of the University of Copenhagen;
gouache from about 1860 by Peder Christian Rosengreen.
Owner and photo: University of Copenhagen. The XXVI FIDE Congress
Copenhagen 2014 was hosted by the Danish Association for European Law
in cooperation with the Faculty of Law, University of Copenhagen.
One of the social events took place in the main building pictured on the cover.

Printed in Denmark 2014
ISBN 978-87-574-2924-4

Published with the support of
dreyersfond

Table of Contents

Introduction 7
Introduction 17
Vorwort 27

Questionnaire in English 37
Questionnaire in French 51
Questionnaire in German 65

General report 79
Institutional report 177

National reports
- Austria 221
- Bulgaria 241
- Croatia 255
- Czech Republic 273
- Denmark 307
- Estonia 327
- Finland 337
- France 363
- Germany 389
- Greece 453
- Hungary 473
- Ireland 523
- Italy 539
- Luxembourg 561
- Malta 587
- Netherlands 609
- Poland 649
- Portugal 665
- Slovenia 685
- Spain 707

Sweden 727
Switzerland 737
United Kingdom 757

List of editors and authors 803

Annex: Abbreviated version of the questionnaire in English 809

Introduction

Ulla Neergaard and Catherine Jacqueson

Nina Holst-Christensen,
Jens Hartig Danielsen and Grith Skovgaard Ølykke[1]

From 1978 to 2014

From 28-31 May 2014 the XXVIth FIDE Congress will take place in Copenhagen. Thus, it will be the second time that Copenhagen has the pleasure to host a FIDE Congress. 36 years earlier, in 1978, one took place for the first time in Copenhagen.[2] The president of FIDE at that time, Professor Ole Lando, said the following in his opening speech:

'When you get gr[e]y hairs you tend to look back to your childhood and early youth more often than you did earlier. You often remind yourself of how you looked upon the world then. You also remember how the grown-ups of that time looked upon it. Forty years ago those who had grey hairs and compared Europe with the Europe of their youth were generally very gloomy in their outlook. Whereas in 1898 Europe had seemed set on a course of peaceful progress, in 1938 many people prophesied war, tyranny and poverty, and they were right. In 1939 we had war. During the war most of us experienced tyranny, and when the war ended in 1945 we lived in misery and poverty. Yet, only ten years after the war six European countries, two of which had been at war with the other four, created an Economic Community. Their aim was to establish a closer union among the European people, to further economic and social progress, to improve living conditions, and to maintain and strengthen freedom and peace. When in 1955 it was thus proposed to establish a Common Market, the people of Europe still remembered the war, and were willing to accept

1. Professor, Dr. Ulla Neergaard, University of Copenhagen, President of the Danish Association for European Law, President for FIDE 2013-14; Associate Professor, Dr. Catherine Jacqueson, University of Copenhagen, Secretary General for FIDE 2013-14; Commissioner in EU Law and Human Rights, Nina Holst-Christensen, Ministry of Justice; Professor, Dr.jur., Dr. Jens Hartig Danielsen, University of Aarhus; and Associate Professor, Dr. Grith Skovgaard Ølykke, Copenhagen Business School. Ulla Neergaard and Catherine Jacqueson have had the overall responsibility for all three volumes, whereas Jens Hartig Danielsen has been primarily involved in Volume 1; Nina Holst-Christensen in Volume 2; and Grith Skovgaard Ølykke in Volume 3.
2. The topics then dealt with were: 1. 'Equal Treatment of Public and Private Enterprise'; and 2. 'Due Process in the Administrative Procedure'.

measures which could guarantee peace and freedom. Peace and freedom were in the minds both of those who had visions of a brotherhood of European nations and of those who wanted to secure prosperity by creating a wider market for trade and industry. During the years which have passed since then, the fears of tyranny and war have faded. The organization known as the European Communities is no longer seen as a preserver of peace and liberty. The prosperity which so many had hoped for has come and has gone away again. Today the former enthusiasm for a united Europe has evaporated.'[3]

Again, almost four decades have passed by, and one can again look back anew in the same manner as Professor Ole Lando did. As we all know, so much has happened. The European Union of today has experienced many successes such as the profound enlargement; the enactment of the Charter of Fundamental Rights; the broadening of democracy and important values; the strengthening of free trade; the relative prosperity; the establishment of Union citizenship; and the improved degree of security and peace. However, one could still say that the enthusiasm for a united Europe has to some extent evaporated, and that crisis and challenges at several different levels are deeply felt. The FIDE Congress of 2014 will explore many layers thereof with outset taken in the selection of significant and important themes, which to some degree become clear from reading the present volume and its 'sisters'.

FIDE – an Unusual European Organisation

FIDE (*i.e. Fédération Internationale pour le Droit Européen/International Federation of European Law*) focuses on research and analysis of European Union law and EU institutions, as well as their interaction with the legal systems for the Member States. It unites the national associations for European law of most of the EU Member States and candidate countries, as well as Norway and Switzerland. At present, there are 29 member associations – each situated in different countries – who all work voluntarily for the spreading of knowledge of the EU.

FIDE was established already in 1961, and is by many seen as having been a very important actor in the original establishment of EU law as a legal discipline.[4] Even today, despite the establishment of many other channels for

3. See Ole Lando: 'Europe: From quantity to quality. Speech delivered on the occasion of the opening of the Congress on June 22 1978', in 'FIDE. Eighth Congress 22-24 June 1978. Adresses Summing up of discussions. Volume 1. Copenhagen 1979', p. 6.
4. See for discussions Morten Rasmussen *e.g.*: 'Establishing a Constitutional Practice: The Role of the European Law Associations', in Wolfram Kaiser and Jan-Henrik Meyer (Eds): '*Societal Actors in European Integration. Polity-Building and Policy-*

dealing with EU law, FIDE's most important activity consists in the organisation of the biennial FIDE Congresses and the related publications are viewed by many as still having an extraordinary design, significance and influence.[5]

The XXVI FIDE Congress and Its Main Themes

The main topics of the XXVI FIDE Congress have been selected a couple of years in advance after several 'hearings' of relevant actors all over Europe and are the following:

- General Topic 1 – The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU;[6]
- General Topic 2 – Union Citizenship: Development, Impact and Challenges;[7]
- General Topic 3 – Public Procurement Law: Limitations, Opportunities and Paradoxes;[8] and
- Saturday's General Topic – In the Era of Legal Pluralism: The Relationship between the EU, National and International Courts, and the Interplay of the Multiple Sources of Law.[9]

Making, 1958-1992', Palgrave Macmillan, 2013, pp. 173-197; and Alexandre Bernier: 'Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970', in 'Contemporary European History', 2012, pp. 399-415.

5. See further Julia Laffranque: 'FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law', Juridica International, 2011, pp. 173-181.
6. Appointed as 'General Rapporteur' is: Professor Fabian Amtenbrink; and as 'Institutional Rapporteur': Jean-Paul Keppenne, Legal Service, European Commission.
7. Appointed as 'Joint General Rapporteurs' are: Professor Niamh Nic Shibhne & Professor Jo Shaw; and as 'Institutional Rapporteur': Michal Meduna, DG Justice, European Commission.
8. Appointed as 'General Rapporteur' is: Professor Roberto Caranta; and as 'Institutional Rapporteur': Adrián Tokár, Legal Service, European Commission.
9. The treatment of this topic has not followed the 'system' of 'questionnaires', 'General Rapporteurs', 'Institutional Rapporteurs', and 'National Rapporteurs'. Instead a panel discussion of leading court presidents and judges from both the international and the national courts, as well as academics has been organised. Although the 'Saturday's General Topic' thus is not the direct focus of the present publications, it may for the sake of completeness be mentioned that this topic might on the surface seem a bit theoretical, but in actual fact it is of great and also concrete importance in the daily

The selected topics all have in common that they are very central and important for the understanding of the challenges facing Europe these years, and for the development of European law. With the selection it is ensured that both constitutional and institutional elements are dealt with. It is also made certain that one of the most significant founding stones of the EU, namely the internal market, is touched upon. In addition, the importance of the EU to the individuals, namely the Union citizens themselves, is given heavy weight. We therefore hope that both practitioners, officials, academics, civil society, and so on, will all find a huge interest in the topics selected.

Everyone is likely to agree that the first topic on economic governance constitutes a very natural and unavoidable choice. Indeed, the Economic and Monetary Union was created more than twenty years ago and is heavily challenged in this tumultuous time of financial and economic crisis. Although improvements of the economic situation in Europe have recently occurred, nothing is yet completely stabilised, and in any event there is real need for a legal analysis of the developments which have taken place. It is thus time to assess the legal status of EU economic governance, and the issue of constitutional asymmetry in respect of economic and monetary issues. Other issues to be dealt with are: what are the legal consequences of possible divergences from EU law; what is the role of the Court of Justice of the European Union; what are the prospects for the future; is an ever closer Fiscal Union a question of balancing national sovereignty and the Euro's fundamental governance structures; is there a need for Treaty changes in order to introduce Eurobonds; and to what extent may tax law be harmonised.

Union citizenship is equally topical and challenging. What is the reality of Union citizenship in the Member States more than two decades after the insertion of Union citizenship in the Treaty? The intention is to enhance the understanding of how the rights attached to Union citizenship have been implemented and respected by the national authorities. It is also to address the interesting issue for the citizens of whether Union citizenship might backfire and negatively affect the 'acquired' rights of the workers. Union citizenship

legal work of many lawyers, and others. It focuses more specifically on how EU law has to operate in a multi-level legal order and thereby on the interrelationship of courts and the phenomenon of a plurality of sources of law. According to the conception of legal pluralism, hierarchies no longer exist in the same manner as in the traditional nation state. Also, it is part of this conception that one has to accept that the present state of affairs to some degree contains elements of complexity and unpredictability, and that there is a need for compromises. As part of the search for compromise, some may prefer to leave forever open the issue of supremacy.

is also interesting from the perspective of the Union's legitimacy and it is worth considering how far-reaching the sense of solidarity of the Member States and their citizens is towards other Member States and their citizens. In addition, delicate issues such as family reunification, expulsion, and the particular case of third country nationals might be of relevance.

The third general topic, which concerns public procurement law, touches upon an area of law which has a huge practical importance in most Member States. It is linked to public spending and thus to some degree to the financial and economic crisis. Public procurement regulation is increasingly relevant for many lawyers, undertakings, and public authorities. Very timely, the public procurement directives have been under revision for the last couple of years, and the FIDE Congress offers the possibility of discussing in which direction the proposed changes go and analyse their implications. The same is true in respect of the remedies directive. In times of economic crisis the issue of public-private partnerships and the financing of services of general economic interest is crucial and at times a rather controversial issue. This may also be true in respect to the environmental and social protection, which increasingly figures as considerations in this area.

Altogether, the XXVIth FIDE Congress and this volume, together with its two 'sisters', propose to take the temperature of EU law at both the level of the EU and at the national level with the outset taken in three topical and essential legal areas. Thereby, they hopefully constitute a goldmine for comparative and EU lawyers.

A Collaboration of Great Minds of EUropean Law[10]

In order to lift discussions and analysis even further, in conformity with the traditions of FIDE detailed comparative studies have been provided. Therefore – long time in advance of the actual congress – for each of the three topics, a 'questionnaire' has been carefully prepared by the 'General Rapporteur(s)' responsible of the topic. Based on these 'questionnaires', national

---

10. This headline is inspired from the slogan of the XXVIth FIDE Congress, which again is inspired from the headline of the following article: Julia Laffranque: 'FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law', Juridica International, 2011, pp. 173-181. This use as the slogan has been permitted by Julia Laffranque. A slight change was made so that the slogan became: 'FIDE – Uniting Great Minds of EUropean Law'. The purpose was to stress the relationship between EU law and European law.

analyses were elaborated by national experts appointed by the national associations of FIDE.

All these reports have subsequently been published in this collection, along with the 'general reports' prepared by the 'General Rapporteurs' supplemented by so-called 'institutional reports' prepared by representatives of the EU institutions.[11] As FIDE and its congresses – based on long tradition – function on a trilingual basis, these are elaborated either in English, French, or German.[12]

Words of Gratitude

A project such as the organisation of an event like the FIDE Congress and the present publications could not have been possible without the help of many! Therefore, on behalf of the Danish Association for European Law (DFE), which is the Danish member association of FIDE (since 1973), we wish to express our gratitude to everyone whom we have met on our way, some having helped perhaps a little, others a great deal – some having helped at a more practical level, others financially.[13] FIDE and its congresses can only live on the basis of almost endless voluntary forces. We owe our thanks to all. No one mentioned, no one forgotten, it is often said in Danish when one wants to express one's gratitude, however being in fear of not being forgiven, if someone is unintendedly forgotten. Nevertheless, we dare to try to express our ex-

11. The analyses and results regarding Topic 1 are presented in Volume 1; of Topic 2 in Volume 2; and of Topic 3 in Volume 3. Those oral presentations received as papers, etc., are intended to be published on the website www.fide2014.eu.
12. That is also the reason why *e.g.* the 'questionnaires' and this introductory chapter exist in all three languages.
13. DFE was the seventh Member State association to become a member of FIDE, and thereby the first the join the 'original six' in the context of FIDE. The Board of Directors of DFE consists for the time being of: Partner Peter Biering, Kammeradvokaten; Partner Andreas Christensen, Horten Law Firm; Professor, Dr.jur., Dr. Jens Hartig Danielsen, School of Law, Aarhus University; Commissioner in EU Law and Human Rights, Nina Holst-Christensen, Ministry of Justice; Head of Division, Christian Thorning, Ministry of Foreign Affairs; Justice Lene Pagter Kristensen, Supreme Court; Partner Charlotte Friis Bach Ryhl, Friis Bach Ryhl Law Firm; and Associate Professor, Dr. Grith Skovgaard Ølykke, Law Department, Copenhagen Business School. Until 14 November 2013, the Ministry of Foreign Affairs was instead of Christian Thorning 'represented' by Vibeke Pasternak Jørgensen, who stepped out due to a promotion.

plicit thanks to the following, and hope for forgiveness if anyone has been left out unintendedly.[14]

Warm and sincere tributes to His Royal Highness, the Crown Prince Frederik of Denmark, who had kindly accepted to be the Patron of the Congress as his mother HM the Queen did in relation to the FIDE Congress in 1978 in Copenhagen.

In 2009, at a meeting in the Steering Group (also known as the 'Comité Directeur' or the executive committee) of FIDE in Madrid, it entrusted to the DFE not only the Presidency of FIDE, but also the organisation of the FIDE Congress to take place in 2014. It was eventually decided by DFE to invite the Faculty of Law at the University of Copenhagen to be involved in the organisation for practical reasons and in order to ensure a high academic standard. Luckily, the Dean at that time, Henrik Dam, was very enthusiastic about the idea, and decided to support the forthcoming congress in various ways. It is clearly our wish to offer the most sincere thanks to him from DFE and FIDE for this decision and his continuous support. In that connection, our gratitude is also due to the more administrative team at the Faculty of Law helping the event come true, in particular project coordinator Tina Futtrup Borg, but also all her many helpers, as well as Head of Communications Birgitte Faber. At the Faculty of Law special mention should also be made of the PhD school and those persons who organised a PhD course on European Union Law in connection with the Congress (in particular Associate Professor Constanze Semmelmann and Associate Professor Clement Petersen).[15]

Also to be mentioned with great appreciation is the help provided by Secretary Jette Nim Larsen, Horten Law Firm, who in particular has given her precious administrative support with regard to all matters of concern to the Steering Group of FIDE. In addition, DIS Congress Service has been our professional partner, and from this company in particular Marianne Sjødahl and Peder Andersen have been invaluable. Chief editor Vivi Antonsen from DJØF Publishing, which is behind the present publications, has as always been efficient and patient, and indeed she deserves our deeply felt acknowledgement. Regarding the volume concerning 'General Topic 3' thanks to stud.HA-jur., Mette Marie Lamm Larsen should be expressed.

---

14. Since this 'Introduction' was written and turned in for publication, more help might have been received, and we are of course also grateful to all these at the present stage unknown supporters, *etc.*
15. To our knowledge, this is the first time such a course has been organised in relation to a FIDE Congress, and may among others be looked upon as an attempt to support the coming generations of researchers' interest and involvement in FIDE.

Furthermore, a sincere tribute to our supporters, foundations, and partners, should be paid. In particular, we are more than grateful to the following:

- The European courts (in particular President Vassilios Skouris; Vice-President Koen Lenaerts; Judge Lars Bay Larsen; and the many interpreters) and other European institutions;
- The Danish Ministry of Foreign Affairs (in particular Head of Division Vibeke Pasternak Jørgensen and Head of Division Christian Thorning);
- The Danish Supreme Court (in particular President Børge Dahl and Justice Lene Pagter Kristensen);
- The contributors Knud Højgaards Fond; Professor Dr.jur. Max Sørensens Mindefond; Reinholdt W. Jorck og Hustrus Fond; Dreyers Fond, Fonden til Støtte af Retsvidenskabelig Forskning ved Københavns Universitet; and EURECO at the University of Copenhagen.
- The premium partner Kammeradvokaten, Law Firm Poul Smith (in particular partner Peter Biering);
- The congress supporter Horten Law Firm (in particular partner Andreas Christensen);
- The congress supporter Copenhagen Business School
- The congress supporter DJØF Publishing;
- Partner Per Magid, Bruun & Hjejle Law Firm;
- The congress exhibitioners; and
- The City of Copenhagen.

We also owe our special gratitude to the many members of the FIDE Steering Group who have so kindly been helpful in answering our many questions regarding FIDE traditions, expectations, *etc.* In particular, the associations of the following countries have provided extraordinary help: Austria (in particular Professor Heribert Köck), Estonia (in particular Judge Julia Laffranque), Germany (in particular Professor Peter-Christian Müller-Graff), and Spain (in particular Advocate Luis Ortiz Blanco).

Last, but not least, of course the XXVIth FIDE Congress and the present volumes could never have come to life without our enthusiastic, hardworking, flexible, and dedicated 'General Rapporteurs', *i.e.* Professor Fabian Amtenbrink, Professor Niamh Nic Shuibhne, Professor Jo Shaw, and Professor Roberto Caranta. In addition, the 'Institutional Rapporteurs', *i.e.* Jean-Paul Keppenne, Michal Meduna, and Adrián Tokár, have met the challenge with a similar positive spirit, which is equally highly appreciated. All national rapporteurs have made it possible to get a fairly full picture of the law and practice as this stands today in most of the Member States of the European

Union, and a huge tribute should consequently be paid to them for their tremendous and valuable contributions. Although lastly mentioned, not least important are the excellent speakers, moderators, and participants, whose work will undoubtedly contribute to the Congress becoming an excellent event as ever.

To sum up, what everyone has done and will do deserves the highest praise, and we are indeed grateful to all. It has been an honour and a pleasure – but also a challenge – to organise the XXVIth FIDE Congress and bring the present volumes to life. It is our belief that FIDE and its congresses even after having reached the age of more than half a century still have a lot to offer us all, which the present volumes hopefully can help document to some degree. We hope that both will continue to live and successfully develop themselves for many years to come.

Introduction

Ulla Neergaard et Catherine Jacqueson

Nina Holst-Christensen,
Jens Hartig Danielsen et Grith Skovgaard Ølykke[1]

De 1978 à 2014

Le XXVIe congrès de la FIDE se tiendra du 28 au 31 mai 2014 à Copenhague. Ce sera la deuxième fois que Copenhague aura le plaisir d'accueillir un congrès de la FIDE. La première fois remonte à 1978, il y a 36 ans.[2] Le Professeur Ole Lando, Président de la FIDE à cette époque, tenait alors ces propos dans son discours d'ouverture :

« Quand vous commencez à avoir des cheveux blancs, vous avez tendance à vous retourner plus souvent vers votre enfance et votre jeunesse. Vous vous rappelez de votre façon de voir le monde à ce moment-là. Vous vous souvenez aussi comment les grandes personnes voyaient le monde à cette époque. Il y a quarante ans, ceux qui avaient des cheveux blancs étaient généralement très pessimistes à l'égard de l'Europe, par comparaison avec l'Europe de leur jeunesse. Alors qu'en 1898, l'Europe semblait être lancée sur la voie d'un progrès pacifique, en 1938, nombreux sont ceux qui prédirent la guerre, la tyrannie et la pauvreté, et à juste titre. En 1939, la guerre éclata. Pendant la guerre, la plupart d'entre nous ont subi la tyrannie, et en 1945, à la fin de la guerre, nous vivions dans la misère et la pauvreté. Pourtant, seulement dix ans après, six pays européens, dont deux avaient été en guerre contre les quatre autres, créèrent une Communauté économique. Ils avaient pour objectif de renforcer les liens entre les peuples européens, afin de favoriser le progrès éco-

---

1. Professeur, Dr Ulla Neergaard, Université de Copenhague, Présidente de l'Association danoise pour le droit européen, Présidente de la FIDE 2013-14 ; Maître de conférences, Dr Catherine Jacqueson, Université de Copenhague, Secrétaire générale de la FIDE 2013-14 ; Commissaire au droit de l'UE et aux droits de l'homme, Nina Holst-Christensen, Ministère de la Justice ; Professeur, Dr et Dr.jur, Jens Hartig Danielsen, Université d'Aarhus ; et Maître de conférences, Dr Grith Skovgaard Ølykke, Copenhagen Business School. Ulla Neergaard et Catherine Jacqueson ont supervisé les trois volumes ; Jens Hartig Danielsen a contribué principalement au Volume 1, Nina Holst-Christensen au Volume 2 et Grith Skovgaard Ølykke au Volume 3.
2. Les sujets abordés étaient les suivants : 1. « L'égalité de traitement des entreprises publiques et privées » et 2. « Les garanties légales dans la procédure administrative ».

nomique et social, d'améliorer les conditions de vie et de maintenir et consolider la liberté et la paix. Lorsqu'en 1955 la création d'un Marché commun fut proposée, les peuples d'Europe se souvenaient encore de la guerre et étaient prêts à accepter des mesures susceptibles de garantir la paix et la liberté. La paix et la liberté étaient dans les esprits de ceux qui rêvaient de fraternité entre les pays européens et également de ceux qui souhaitaient garantir la prospérité en créant un marché élargi pour le commerce et l'industrie. Depuis, les craintes liées à la tyrannie et à la guerre se sont dissipées. Les organisations appelées Communautés européennes ne sont plus considérées comme destinées à préserver la paix et la liberté. La prospérité tant espérée est arrivée et a disparu à nouveau. Aujourd'hui, l'enthousiasme exprimé par le passé en faveur d'une Europe unie s'est évaporé. »[3]

Alors que près de quarante ans ont passé, nous pouvons à notre tour nous tourner vers le passé tout comme le Professeur Ole Lando. Comme nous le savons tous, il s'est passé tant de choses. L'Union européenne a connu de nombreux succès : un profond élargissement, la promulgation de la Charte des droits fondamentaux, l'élargissement de la démocratie et des valeurs essentielles, le renforcement du libre-échange, une relative prospérité, la création de la citoyenneté européenne et un plus haut degré de sécurité et de paix. Néanmoins, force est de constater que l'enthousiasme exprimé en faveur d'une Europe unie s'est dans une certaine mesure évaporé, et que la crise et les défis rencontrés à plusieurs niveaux sont durement ressentis. Le Congrès 2014 de la FIDE en explorera de nombreux aspects au travers d'une sélection de thèmes significatifs et importants, ce qui apparaît clairement à la lecture du présent volume et de ses « acolytes ».

La FIDE : une organisation européenne hors du commun

La FIDE (*Fédération Internationale pour le Droit Européen*) s'intéresse à la recherche et à l'analyse du droit de l'Union européenne et des institutions de l'UE, ainsi qu'à leurs interactions avec les systèmes juridiques des Etats membres. Elle réunit les associations nationales pour le droit européen de la plupart des Etats membres de l'UE et des pays candidats, ainsi que de la Norvège et de la Suisse. À l'heure actuelle, il existe 29 associations membres (toutes situées dans un pays différent). Toutes œuvrent bénévolement à la diffusion du savoir dans l'UE.

---

3. Ole Lando (traduit de l'anglais), « Europe: From quantity to quality. Speech delivered on the occasion of the opening of the Congress on June 22 1978 », dans « FIDE. Eighth Congress 22-24 June 1978. Adresses Summing up of discussions. Volume 1. Copenhagen 1979 », p. 6.

La FIDE a été créée en 1961 et beaucoup considèrent qu'elle a joué un rôle très important dans la création initiale du droit de l'UE en tant que discipline juridique.[4] Aujourd'hui encore, malgré la mise en place de nombreuses autres organisations consacrées au droit communautaire, la conception, l'importance et l'influence extraordinaires des congrès biennaux de la FIDE et de ses publications connexes (l'activité la plus importante de la FIDE) sont toujours largement reconnues.[5]

Le XXVIe Congrès de la FIDE et ses thèmes principaux

Les thèmes principaux du XXVIe Congrès de la FIDE ont été choisis plusieurs années à l'avance, après avoir consulté à plusieurs reprises les acteurs concernés dans toute l'Europe. Ces thèmes sont les suivants :

– Thème général 1 : L'Union économique et monétaire : les aspects constitutionnels et institutionnels de la gouvernance économique dans l'UE ;[6]
– Thème général 2 : La citoyenneté de l'Union : développement, impact et défis ;[7]
– Thème général 3 : Le droit des marchés publics : restrictions, possibilités et paradoxes ;[8] et
– Thème général du samedi : À l'ère du pluralisme juridique : relations entre les cours nationales, internationales et celles de l'UE et les interactions entre les multiples sources de droit.[9]

---

4. Voir à ce sujet Morten Rasmussen, p. ex. : « Establishing a Constitutional Practice: The Role of the European Law Associations », dans Wolfram Kaiser et Jan-Henrik Meyer (éd.) : « *Societal Actors in European Integration. Polity-Building and Policy-Making, 1958-1992 »*, Palgrave Macmillan, 2013, p. 173-197 ; et Alexandre Bernier : « Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970 », dans « Contemporary European History », 2012, p. 399-415.
5. Voir également Julia Laffranque : « FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law », Juridica International, 2011, pp. 173-181.
6. Sont nommés « Rapporteur général » : Professeur Fabian Amtenbrink ; et « Rapporteur institutionnel » : Jean-Paul Keppenne, Service juridique, Commission européenne.
7. Sont nommées « Co-rapporteures générales » : Professeur Niamh Nic Shibhne et Professeur Jo Shaw ; et « Rapporteur institutionnel » : Michal Meduna, DG Justice, Commission européenne.
8. Sont nommés « Rapporteur général » : Professeur Roberto Caranta ; et « Rapporteur institutionnel » : Adrián Tokár, Service juridique, Commission européenne.

Les thèmes choisis sont tous très importants pour la compréhension des défis auxquels l'Europe est actuellement confrontée et pour le développement du droit européen. Cette sélection permet d'aborder aussi bien les aspects constitutionnels qu'institutionnels. Par ailleurs, l'une des pierres fondatrices les plus importantes de l'UE, à savoir le marché intérieur, n'est pas oubliée. D'autre part, le choix des thèmes souligne l'importance de l'UE pour les individus, c'est-à-dire les citoyens de l'Union eux-mêmes. Nous espérons donc qu'il satisfera aussi bien les praticiens, les fonctionnaires, les universitaires, la société civile, etc.

Tout le monde conviendra certainement que le premier thème sur la gouvernance économique constitue un choix naturel et inévitable. En effet, l'Union économique et monétaire, créée il y a plus de vingt ans, est fortement contestée en cette période tumultueuse de crise financière et économique. Malgré la récente amélioration de la situation économique en Europe, rien n'est encore complètement stabilisé, et dans tous les cas une analyse juridique des faits s'impose. Le temps est donc venu d'évaluer le statut juridique de la gouvernance économique de l'UE, et la question de l'asymétrie constitutionnelle entre les politiques économiques et monétaires. D'autres questions restent à traiter, telles que : quelles sont les conséquences juridiques des possibles divergences par rapport au droit de l'UE ? Quel est le rôle de la Cour de justice de l'Union européenne ? Quelles sont les perspectives pour l'avenir ? Le renforcement de l'union budgétaire est-il une question d'équilibre entre la souveraineté nationale et les structures de gouvernance fondamentales de l'euro ? Est-il nécessaire de modifier le traité pour introduire les euro-

---

9. Le traitement de ce sujet n'a pas suivi le « système » de « questionnaires », « Rapporteurs généraux », « Rapporteurs institutionnels » et « Rapporteurs nationaux ». Une table ronde réunissant les présidents et juges de cours internationales et nationales, ainsi que des universitaires, a été organisée à la place. Bien que le « Thème général du samedi » ne fasse pas directement l'objet de la présente publication, par souci d'exhaustivité, il convient de mentionner que ce sujet, en apparence un peu théorique, a en fait une importance concrète dans le travail quotidien de nombreux juristes et d'autres acteurs. Il porte plus particulièrement sur la façon dont le droit communautaire doit opérer dans un ordre juridique à plusieurs niveaux, et donc sur la relation des cours entre elles, et sur la pluralité des sources de droit. Dans la conception du pluralisme juridique, les hiérarchies n'existent plus de la même manière que dans l'Etat-nation traditionnel. En outre, cette conception nous invite à accepter que l'état actuel des choses contient dans une certaine mesure des éléments de complexité et d'imprévisibilité, et qu'il convient de faire des compromis. Dans le cadre de la recherche de compromis, certains préféreront laisser à jamais ouverte la question de la suprématie.

obligations ? Dans quelle mesure la législation fiscale doit-elle être harmonisée ?

La citoyenneté de l'Union est un sujet tout autant d'actualité et stimulant. Quelle est la réalité de la citoyenneté de l'Union dans les Etats membres, plus de deux décennies après l'insertion du concept dans le traité ? L'objectif est de mieux comprendre la mise en œuvre et le respect des droits associés à la citoyenneté de l'Union par les autorités nationales. Il s'agit également d'aborder une question essentielle pour les citoyens, à savoir si la citoyenneté de l'Union pourrait avoir un effet inverse à celui prévu et affecter les droits « acquis » des travailleurs. La citoyenneté de l'Union est également intéressante du point de vue de la légitimité de l'UE, et il est intéressant d'examiner l'étendue du sentiment de solidarité des Etats membres et de leurs citoyens à l'égard des autres Etats membres et citoyens. En outre, d'autres sujets délicats, comme le regroupement familial, les expulsions et le cas particulier des ressortissants de pays tiers, peuvent s'avérer pertinents.

Le troisième thème général, qui concerne le droit des marchés publics, touche à un domaine du droit qui joue un rôle pratique considérable dans la plupart des Etats membres. Il est lié aux dépenses publiques et donc, dans une certaine mesure, à la crise financière et économique. La réglementation des marchés publics revêt une importance croissante pour de nombreux juristes, entreprises et pouvoirs publics. Il se trouve justement que les directives sur les marchés publics ont fait l'objet d'une révision ces deux dernières années, et le Congrès de la FIDE offre ainsi la possibilité de discuter de l'orientation des changements proposés et d'analyser leurs implications. Le même constat s'applique à la directive sur les recours. En période de crise économique, la question des partenariats public-privé et du financement des services d'intérêt économique général est cruciale et parfois assez controversée. Cela est probablement également vrai concernant la protection sociale et environnementale, qui prend une place de plus en plus importante dans ce domaine.

En résumé, le XXVIe Congrès de la FIDE et ce volume, ainsi que ses deux « acolytes », se proposent de prendre la température du droit de l'UE, tant au niveau de l'Union qu'au niveau national, en s'intéressant à trois domaines juridiques essentiels et d'actualité. Ils constitueront ainsi, nous l'espérons, une mine d'or pour les juristes de l'UE et les spécialistes du droit comparé.

Une collaboration des grands esprits du droit Européen[10]

Afin d'approfondir plus encore les discussions et les analyses, ces volumes comprennent des études comparatives détaillées, conformément aux traditions de la FIDE. Par conséquent, longtemps avant le congrès proprement dit, un « questionnaire » a été soigneusement préparé pour chacun des trois thèmes par le ou les « Rapporteurs généraux » en charge du thème. À partir de ces « questionnaires », des analyses ont été réalisées par des experts nationaux nommés par les associations nationales de la FIDE.

Tous ces rapports sont publiés dans cette collection, ainsi que les « rapports généraux » rédigés par les « Rapporteurs généraux », complétés par les « rapports institutionnels » élaborés par les représentants des institutions de l'UE.[11] Du fait de la longue tradition de trilinguisme adoptée par la FIDE et ses congrès, les rapports sont rédigés soit en anglais, français ou allemand.[12]

Remerciements

L'organisation d'un événement comme le Congrès de la FIDE et les présentes publications n'auraient pas pu voir le jour sans l'aide d'un grand nombre de personnes ! Aussi, au nom de l'Association danoise pour le droit européen (DFE), qui est l'association danoise membre de la FIDE (depuis 1973), nous tenons à exprimer notre gratitude à tous ceux que nous avons rencontrés sur notre chemin, quelle que soit l'étendue de leur aide, qu'elle soit à un niveau pratique ou financier.[13] La FIDE et ses congrès ne pourraient exister sans les

10. Ce titre s'inspire de la devise du XXVIe Congrès de la FIDE, elle-même inspirée du titre de l'article suivant : Julia Laffranque : « FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law », Juridica International, 2011, p. 173-181. Julia Laffranque nous a autorisés à en faire notre devise. Celle-ci a été légèrement modifiée ainsi : « FIDE – Uniting Great Minds of EUropean Law », le but étant de souligner les relations entre le droit de l'UE et le droit européen.
11. Les analyses et les résultats concernant les thèmes 1, 2 et 3 sont présentés respectivement dans les volumes 1, 2 et 3. Les présentations orales reçues sous forme d'article, etc, sont destinées à être publiées sur le site Internet www.fide2014.eu.
12. Cela explique aussi pourquoi les « questionnaires » et ce chapitre d'introduction sont disponibles dans les trois langues mentionnées.
13. La DFE a été la septième association d'Etat membre à faire partie de la FIDE, et ainsi la première à se joindre aux « six premiers » dans le contexte de la FIDE. Le Conseil d'administration de la DFE comprend actuellement: Peter Biering, Kammeradvokaten ; Andreas Christensen, cabinet d'avocats Horten ; Professeur, Dr et Dr.jur. Jens Hartig Danielsen, Faculté de droit, Université d'Aarhus ; Commissaire au droit de

forces bénévoles quasi infinies qui les animent. À tous, nous disons merci. « Ne citons personne pour n'oublier personne », dit-on souvent en danois pour exprimer sa gratitude, mais également lorsque l'on craint de ne pas être pardonné si l'on a involontairement oublié quelqu'un. Néanmoins, nous osons exprimer explicitement nos remerciements aux personnes suivantes, en espérant être pardonnés si quelqu'un a été omis involontairement.[14]

Nous présentons nos hommages chaleureux et sincères à Son Altesse Royale, le Prince héritier Frederik de Danemark, qui a aimablement accepté d'être le parrain du Congrès, comme sa mère Sa Majesté la Reine le fut pour le Congrès de la FIDE organisé en 1978 à Copenhague.

En 2009, lors d'une réunion du Groupe de pilotage (appelé également « Comité directeur » ou comité exécutif) de la FIDE à Madrid, la DFE s'est vue confier non seulement la présidence de la FIDE, mais aussi l'organisation du Congrès de la FIDE en 2014. La DFE a ensuite décidé d'inviter la Faculté de droit de l'Université de Copenhague à participer à l'organisation, pour des raisons d'ordre pratique et afin d'assurer un haut niveau universitaire. Heureusement, Henrik Dam, doyen à ce moment-là, s'est montré très enthousiaste quant à cette idée, et a décidé de soutenir le prochain congrès de diverses manières. Nous souhaitons lui offrir les plus sincères remerciements de la part de la DFE et de la FIDE pour cette décision et son soutien continu. À cet égard, nous sommes également reconnaissants à l'équipe administrative de la Faculté de droit pour son aide dans la réalisation de cet événement. Nous remercions en particulier la coordinatrice du projet, Tina Futtrup Borg, mais aussi ses nombreux assistants, ainsi que la Chef de la communication, Birgitte Faber. À la Faculté de droit, nous souhaitons mentionner aussi l'école doctorale et les personnes ayant organisé un cours de doctorat sur le droit de l'Union européenne dans le cadre du Congrès (en particulier, Maître de conférences Constanze Semmelmann et Maître de conférences Clement Petersen).[15]

---

l'UE et aux droits de l'homme Nina Holst-Christensen, Ministère de la Justice ; Chef de division, Christian Thorning, Ministère des Affaires étrangères ; Juge Lene Pagter Kristensen, Cour suprême ; Charlotte Friis Bach Ryhl, cabinet d'avocats Friis Bach Ryhl ; et Maître de conférences, Dr Grith Skovgaard Ølykke, Département de droit, Copenhagen Business School. Jusqu'au 14 novembre 2013, le ministère des Affaires étrangères était « représenté » par Vibeke Pasternak Jørgensen au lieu de Christian Thorning, celle-ci s'étant retirée à la suite d'une promotion.

14. Depuis la rédaction de cette « Introduction » et sa remise pour publication, il est possible que nous ayons reçu de l'aide supplémentaire, et nous sommes bien sûr également reconnaissants à l'égard de tous ces soutiens non mentionnés, *etc.*

15. À notre connaissance, il s'agit de la première fois qu'un tel cours est organisé dans le cadre d'un congrès de la FIDE, et peut être considéré comme une tentative de favori-

Nous devons également exprimer notre grande reconnaissance pour les services reçus de la Secrétaire Jette Nim Larsen du cabinet d'avocats Horten, qui a notamment apporté un soutien administratif précieux sur de nombreux sujets au Groupe de pilotage de la FIDE. En outre, DIS Congress Service, notre partenaire professionnel, et ses collaborateurs, en particulier Marianne Sjødahl et Peder Andersen, ont joué un rôle inestimable. La rédactrice en chef Vivi Antonsen de DJØF Publishing, responsable des présentes publications, s'est comme toujours montrée efficace et patiente, et mérite amplement notre profonde reconnaissance. En ce qui concerne le volume abordant le « thème général 3 », nous devons également remercier Mette Marie Lamm Larsen, stud.HA-jur.

D'autre part, nous présentons notre sincère reconnaissance à nos soutiens, fondations et partenaires. En particulier, nous sommes plus que reconnaissants aux entités et personnes suivantes :

- Les cours européennes (en particulier, Président Vassilios Skouris ; Vice-président Koen Lenaerts ; Juge Lars Bay Larsen ; et les nombreux interprètes) et autres institutions européennes ;
- Le ministère danois des Affaires étrangères (en particulier, Chef de division Vibeke Pasternak Jørgensen et Chef de division Christian Thorning) ;
- La Cour suprême du Danemark (en particulier, Président Børge Dahl et Juge Lene Pagter Kristensen) ;
- Les contributeurs Knud Højgaards Fond ; Professor og Dr.jur Max Sørensens Mindefond ; Reinholdt W. Jorck og Hustrus Fond ; Dreyers Fond, Fonden til Støtte af Retsvidenskabelig Forskning ved Københavns Universitet ; et EURECO à l'Université de Copenhague.
- Le partenaire premium Kammeradvokaten, cabinet d'avocats Poul Smith (en particulier, Peter Biering) ;
- Le soutien du congrès, cabinet d'avocats Horten (en particulier, Andreas Christensen) ;
- Le soutien du congrès, Copenhagen Business School ;
- Le soutien du congrès, DJØF Publishing ;
- Per Magid, cabinet d'avocats Bruun & Hjejle ;
- Les exposants du congrès ; et
- La ville de Copenhague.

---

ser l'intérêt et la participation des prochaines générations de chercheurs à l'égard des activités de la FIDE.

Nous tenons également à exprimer notre gratitude aux nombreux membres du Groupe de pilotage de la FIDE, qui ont répondu si gentiment à nos nombreuses questions sur les traditions de la FIDE, les attentes, *etc.* Les associations des pays suivants ont notamment fourni une aide extraordinaire : Autriche (en particulier, Professeur Heribert Köck), Estonie (en particulier, Juge Julia Laffranque), Allemagne (en particulier, Professeur Peter-Christian Müller-Graff) et Espagne (en particulier, Avocat Luis Ortiz Blanco).

Enfin, le XXVIe Congrès de la FIDE et les présents volumes n'auraient jamais vu le jour sans nos « Rapporteurs généraux » enthousiastes, travailleurs, flexibles et dévoués : Professeur Fabian Amtenbrink, Professeur Niamh Nic Shibhne, Professeur Jo Shaw et Professeur Roberto Caranta. D'autre part, les « Rapporteurs institutionnels », Jean-Paul Keppenne, Michal Meduna et Adrián Tokár, ont relevé le défi avec un esprit positif similaire, également très apprécié. Grâce à tous les rapporteurs nationaux, nous avons pu obtenir une image assez complète du droit et des pratiques en vigueur dans la plupart des Etats membres de l'Union européenne, et nous leur témoignons notre immense reconnaissance pour leurs considérables contributions si précieuses. Enfin, citons les excellents conférenciers, modérateurs et participants, dont le travail contribuera sans aucun doute à faire de ce Congrès, encore une fois, un événement d'exception.

En résumé, les actions de chacun méritent les plus grands éloges, et nous sommes profondément reconnaissants à tous. Ce fut un honneur et un plaisir (mais aussi un défi) d'organiser le XXVIe Congrès de la FIDE et de donner jour à ces volumes. Nous sommes convaincus que, même après plus d'un demi-siècle d'existence, la FIDE et ses congrès ont encore beaucoup à nous offrir à tous, comme en témoigneront à leur façon, nous l'espérons, les présents volumes. Nous espérons également que la FIDE et ses congrès perdureront et se développeront avec succès pendant de nombreuses années à venir.

Vorwort

Ulla Neergaard und Catherine Jacqueson

Nina Holst-Christensen,
Jens Hartig Danielsen und Grith Skovgaard Ølykke[1]

Von 1978 bis 2014

Vom 28. bis 31. Mai 2014 findet in Kopenhagen der XXVI. FIDE-Kongress statt. Es ist bereits das zweite Mal, dass Kopenhagen die Ehre zuteil wird, diese Veranstaltung auszurichten. Im Jahre 1978, das heißt vor 36 Jahren, fand der Kongress zum ersten Mal in Kopenhagen statt.[2] Der damalige Präsident der FIDE, Professor Ole Lando, eröffnete das Treffen mit folgenden Worten:

»Wenn sich die ersten grauen Haare zeigen, denken Sie häufiger an Ihre Kindheit und frühe Jugend zurück. Sie erinnern sich oftmals daran, wie Sie damals die Welt sahen. Sie erinnern sich auch, wie die Erwachsenen der damaligen Zeit die Welt sahen. Vor 40 Jahren waren die ‚älteren Semester', die Europa mit dem Europa ihrer Jugend verglichen, im Allgemeinen von einer sehr düsteren Perspektive geprägt. Im Jahre 1898 schien Europa auf einen Kurs des Fortschritts in Frieden zu setzen. 1938 prophezeiten viele Menschen Krieg, Tyrannei und Armut, und sie hatten Recht. 1939 kam der Krieg. Fortan litten die meisten von uns unter der Tyrannei, und als der Krieg 1945 zu Ende war, lebten wir in Elend und Armut. Doch bereits 10 Jahre nach dem Krieg gründeten sechs europäische Länder, von denen zwei gegen die anderen vier Krieg geführt hatten, die Europäische Wirtschaftsgemeinschaft. Ihr Ziel war es, die europäischen Völker einander näher zu bringen, um wirt-

1. Professor, Dr. Ulla Neergaard, Universität Kopenhagen, Präsidentin der Dänischen Vereinigung für Europarecht (DFE), Präsidentin der FIDE 2013-14; Associate Professor, Dr. Catherine Jacqueson, Universität Kopenhagen, Generalsekretärin der FIDE 2013-14; Kommissarin für EU-Recht und Menschenrechte, Nina Holst-Christensen, Justizministerium; Professor, Dr. jur., Dr. Jens Hartig Danielsen, Universität Aarhus; und Associate Professor, Dr. Grith Skovgaard Ølykke, Copenhagen Business School. Ulla Neergaard und Catherine Jacqueson tragen die Gesamtverantwortung für alle drei Bände, wohingegen Jens Hartig Danielsen in erster Linie an Band 1 arbeitete, Nina Holst-Christensen an Band 2 und Grith Skovgaard Ølykke an Band 3.
2. Die behandelten Themen waren: 1.»Gleichbehandlung von öffentlichen und privaten Unternehmen«; und 2. »Fairer Prozess im Verwaltungsverfahren«.

schaftliches Wachstum und sozialen Fortschritt zu fördern, die Lebensbedingungen zu verbessern sowie Freiheit und Frieden zu bewahren und zu stärken. Als 1955 vorgeschlagen wurde, einen Gemeinsamen Markt zu schaffen, erinnerten sich die Menschen in Europa noch immer an den Krieg und waren bereit, eine Politik zu akzeptieren, die dazu bestimmt war, Frieden und Freiheit zu garantieren. Frieden und Freiheit dominierten sowohl in den Köpfen der Menschen, die die Vision einer Annährung der europäischen Nationen hatten, als auch jener, die den Wohlstand durch Schaffung eines größeren Marktes für Handel und Industrie gewährleisten wollten. In den zurückliegenden Jahren haben sich die Ängste vor Tyrannei und Krieg gelegt. Die als Europäische Wirtschaftsgemeinschaft bekannte Organisation wird nicht länger als Hüterin von Frieden und Freiheit gesehen. Der Wohlstand, den so viele herbeisehnten, ist gekommen und wieder gegangen. Heute hat sich die anfängliche Begeisterung für ein geeintes Europa verflüchtigt.«[3]

Auch jetzt, nachdem wieder fast vier Jahrzehnte vergangen sind, kann man in der gleichen Weise zurückblicken, wie es Professor Ole Lando getan hat. Wie wir alle wissen, ist sehr viel passiert. Die Europäische Union von heute hat viel erreicht, z. B. eine tiefgreifende Erweiterung; die Verabschiedung der Grundrechtecharta; der Demokratiegedanke und europäische Grundwerte wurden weiter verbreitet; die Stärkung des freien Handels; beachtlichen Wohlstand; die Unionsbürgerschaft und mehr Sicherheit und Frieden. Allerdings könnte man weiterhin behaupten, dass sich die Begeisterung für ein geeintes Europa teilweise verflüchtigt hat und dass die Krise und die damit verbundenen Herausforderungen unterschiedlich bewertet werden. Der FIDE-Kongress 2014 wird zahlreiche Facetten der Krise untersuchen in der Hoffnung, die richtigen Schwerpunkte gesetzt zu haben.

FIDE – eine besondere Europäische Organisation

Die FIDE (*Fédération Internationale pour le Droit Européen / Internationale Föderation für Europarecht*) konzentriert sich auf die Untersuchung und Analyse des Rechts der Europäischen Union und seiner Institutionen sowie auf deren Berührungspunkte mit den Rechtssystemen der Mitgliedsstaaten. Sie vereint die nationalen Verbände für Europäisches Recht der meisten EU-Mitgliedsstaaten und Beitrittsländer sowie der norwegischen und Schweizerischen Verbände. Gegenwärtig gibt es 29 Mitgliedsverbände – alle in einem anderen Land beheimatet – die es sich aufgrund eigener Initiative zum Ziel gesetzt haben, das Wissen über die EU zu verbreiten.

3. Siehe Ole Lando (übersetzt aus dem Englischen): »Europe: From quantity to quality. [Europa: von Quantität zu Qualität] Rede anlässlich der Kongresseröffnung am 22. Juni 1978« in »FIDE. Achter Kongress, 22.-24. Juni 1978. Zusammenfassung der Diskussionen. Band 1. Kopenhagen 1979«, S. 6.

Die FIDE wurde bereits 1961 gegründet und gilt gemeinhin als treibende Kraft hinter der Etablierung des EU-Rechts als juristischer Disziplin.[4] Heute gibt es zwar viele andere Kanäle, die sich mit dem EU-Recht befassen. Dennoch werden der alle zwei Jahre stattfindende FIDE-Kongress und die damit verbundenen Publikationen von vielen als außerordentlich wichtig angesehen aufgrund ihrer Gestaltung, ihres Stellenwertes und nicht zuletzt ihres Einflusses in Politik, Gesetzgebung und Wissenschaft.[5]

Der XXVI. FIDE-Kongress und seine Hauptthemen

Die Hauptthemen des XXVI. FIDE-Kongresses wurden bereits einige Jahre im Voraus bestimmt. Der Auswahl gingen eingehende Beratungen mit wichtigen Akteuren in ganz Europa voraus. Folgende Themen stehen zur Diskussion:

- Allgemeines Thema 1 – Die Wirtschafts- und Währungsunion: konstitutionelle und institutionelle Aspekte der wirtschaftspolitischen Steuerung innerhalb der EU;[6]
- Allgemeines Thema 2 – Unionsbürgerschaft: Entwicklung, Auswirkungen und Herausforderungen;[7]
- Allgemeines Thema 3 – Vergaberecht für öffentliche Aufträge: Begrenzungen, Möglichkeiten und Widersprüche;[8] und

4. Siehe die Diskussionen in Morten Rasmussen, z. B. »Establishing a Constitutional Practice: The Role of the European Law Associations«, in Wolfram Kaiser und Jan-Henrik Meyer (Hrg.): »*Societal Actors in European Integration. Polity-Building and Policy-Making, 1958-1992*«, Palgrave Macmillan, 2013, S. 173-197; und Alexandre Bernier: „Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970“, in »Contemporary European History«, 2012, S. 399-415.
5. Siehe weiterhin Julia Laffranque: »FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law«, Juridica International, 2011, S. 173-181.
6. Ernannt als »Generalberichterstatter«: Professor Fabian Amtenbrink; »Berichterstatter aus den EU-Institutionen«: Jean-Paul Keppenne, Juristischer Dienst, Europäische Kommission.
7. Ernannt als »Generalberichterstatter«: Professor Niamh Nic Shibhne und Professor Jo Shaw; »Berichterstatter aus den EU-Institutionen«: Michal Meduna, Generaldirektion Justiz, Europäische Kommission.
8. Ernannt als »Generalberichterstatter«: Professor Roberto Caranta; «Berichterstatter aus den EU-Institutionen«: Adrián Tokár, Juristischer Dienst, Europäische Kommission.

– Generalthema am Samstag – Das Verhältnis zwischen EU, nationalen und internationalen Gerichten und das Zusammenspiel mehrerer Rechtsquellen im Zeitalter des Rechtspluralismus.[9]

Die ausgewählten Themen sind alle von eminenter Bedeutung, um die Herausforderungen Europas in diesen Jahren und die Entwicklung des Europäischen Rechts zu veranschaulichen. Mit dieser Auswahl ist sichergestellt, dass sowohl verfassungsrechtliche als auch institutionelle Aspekte behandelt werden. Damit ist auch gewährleistet, dass der EU Binnenmarkt, einer der wichtigsten Grundsteine der EU, auf dem Kongress in angemessener Form Beachtung findet. Zusätzlich wird der Bedeutung der EU für die EU-Bürger, also die Menschen innerhalb der EU, großes Gewicht beigemessen. Wir hoffen, dass die ausgewählten Themen auf breites Interesse stoßen im privaten und öffentlichen Sektor sowie in den Bereichen Forschung, Lehre und Zivilgesellschaft.

Das Thema der »Economic Governance« ist gegenwärtig relevant wie kaum ein anderes. Die Wirtschafts- und Währungsunion wurde vor mehr als zwanzig Jahren ins Leben gerufen und war während der turbulenten Finanz- und Wirtschaftskrise nicht unerheblichem Druck ausgesetzt. Obwohl sich die wirtschaftliche Situation in Europa zuletzt verbesserte, hat sie sich noch nicht gänzlich stabilisiert. Eine rechtliche Analyse der Entwicklungen ist unum-

9. Die Behandlung dieses Themas orientiert sich nicht am »System« der »Fragebögen«, »Generalberichterstatter«, »Berichterstatter aus den EU-Institutionen« und »Berichterstatter eines Länderberichts«; stattdessen wird eine Podiumsdiskussion der Präsidenten und Richter führender internationaler/nationaler Gerichte sowie von Vertretern aus der Wissenschaft organisiert. Obwohl die vorliegenden Publikationen nicht direkt auf das »Generalthema am Samstag« Bezug nehmen, muss aus Gründen der Vollständigkeit erwähnt werden, dass dieses Thema auf den ersten Blick etwas theoretisch erscheint, aber in Wirklichkeit von großer und konkreter Bedeutung für die tägliche Arbeit vieler Juristen ist. Es befasst sich damit, wie EU-Recht in einer vielschichtigen und zusammengesetzten Rechtsordnung angewandt werden muss, mit dem Zusammenwirken der Gerichte und dem Phänomen des Nebeneinanders verschiedener Rechtsquellen. Im Zeitalter des Rechtspluralismus fehlen Normhierarchien wie sie aus den meisten nationalen Rechtsordnungen bekannt sind. In einem solchen zusammengesetzten Gebilde scheint es unumgänglich, ein gewisses Maß an Komplexität und Unvorhersehbarkeit zu akzeptieren und auf Kompromisse bei der Interaktion verschiedener normativer Ebenen hinzuarbeiten. Auf der Suche nach derartigen Kompromissen wird zum Teil dafür plädiert, die Frage nach dem Geltungsgrund des Rechts in einer zusammengesetzten Rechtsordnung jenseits des Geltungsgrundes der einzelnen normativen Ebenen und damit der letztlich verbindlichen Autorität offenzulassen.

gänglich. Es ist daher angebracht, den rechtlichen Status der 'Economic Governance' in der EU und die Asymmetrie in Bezug auf die Gesetzgebungskompetenzen in Wirtschafts- und Währungsfragen zu bewerten. Des Weiteren ist eine Auseinandersetzung mit folgenden Fragen notwendig: Wie sind mögliche Abweichungen vom EU-Recht zu sanktionieren? Welche Rolle spielt der Gerichtshof der Europäischen Union? Wie sind die Aussichten für die Zukunft? Müssen in einer Fiskalunion nationale Souveränität und grundlegende Governance-Strukturen des Euro aufeinander abgestimmt werden? Sind Eurobonds nur nach Vertragsänderungen möglich? In welchem Umfang kann das Steuerrecht harmonisiert werden?

Die Unionsbürgerschaft ist ein gleichermaßen aktuelles wie komplexes Thema. Wie sieht die Realität der Unionsbürgerschaft in den Mitgliedsstaaten mehr als zwei Jahrzehnte nach Einführung der Unionsbürgerschaft im Vertrag aus? Es gilt zu untersuchen, wie die mit der Unionsbürgerschaft verknüpften Rechte von den nationalen Behörden umgesetzt und angewendet wurden. Aus Sicht der EU-Bürger drängt sich die Frage auf, ob die Unionsbürgerschaft gar kontraproduktive Wirkungen zeigen und die ‚erworbenen' Rechte der Arbeiternehmer negativ beeinflussen könnte. Die Unionsbürgerschaft besitzt außerdem erhebliches Potenzial, die Legitimität der EU zu beeinflussen. In diesem Zusammenhang stellt sich die Frage, wie groß die Solidarität der Mitgliedsstaaten und ihrer Bürger mit anderen Mitgliedsstaaten und deren Bürgern ist. Darüber hinaus gewinnen politisch und sozial sensible Themen wie Familienzusammenführung, Ausweisung und die Rolle von Angehörigen aus Drittstaaten an Relevanz.

Im dritten allgemeinen Thema geht es um das Recht der Vergabe öffentlicher Aufträge. Damit wird ein Bereich des Rechts berührt, der in den meisten Mitgliedsstaaten von herausragender praktischer Bedeutung ist. Das Thema berührt Fragen der öffentlichen Haushalte und ist von der Finanz- und Wirtschaftskrise kaum zu trennen. Das Regelwerk für die Vergabe öffentlicher Aufträge prägt die tägliche Arbeit vieler Anwälte, Unternehmen und Stellen im öffentlichen Sektor mit zunehmender Tendenz. Als Reaktion auf aktuelle Entwicklungen wurden die Vergaberechtsrichtlinien in den letzten Jahren überarbeitet. Der FIDE-Kongress bietet die Möglichkeit, die vorgeschlagenen Änderungen zu erörtern und ihre Implikationen kritisch zu analysieren. Das Gleiche gilt in Bezug auf die Richtlinie über Nachprüfungsverfahren. In Zeiten wirtschaftlicher Krisen sind Fragen der »public-private-partnerships« und der Finanzierung von Dienstleistungen von Allgemeinem Wirtschaftlichen Interesse von entscheidender Bedeutung – sie werden daher nicht selten kontrovers diskutiert. Dies mag auch für Umwelt- und Sozialfragen gelten, denen

in diesem Zusammenhang in Zukunft größere Beachtung geschenkt werden muss.

Insgesamt laden der XXVI. FIDE-Kongress und die damit verbundenen Publikationen dazu ein, sich sowohl auf EU-Ebene als auch auf nationaler Ebene mit dem Stand des EU-Rechts auseinanderzusetzen. Zu Beginn stehen drei hochaktuelle und ebenso gewichtige Themen, die weitreichende Betätigungsmöglichkeiten für rechtsvergleichend und europarechtlich arbeitende Anwälte bieten.

Eine Zusammenarbeit kenntnisreicher Spezialisten und großer Denker im Europäischen Recht[10]

Um umfangreiche Diskussionen und Analysen anzuregen, wurden in Übereinstimmung mit den Traditionen der FIDE detaillierte Vergleichsstudien erstellt. Lange Zeit vor dem eigentlichen Kongress wurde daher für jedes der drei Themen sorgfältig ein »Fragebogen« von dem für das Thema verantwortlichen »Generalberichterstatter« vorbereitet. Auf Grundlage dieser »Fragebögen« wurden von nationalen Experten, die von nationalen Verbänden der FIDE ernannt wurden, nationale Untersuchungen durchgeführt.

All diese Berichte wurden anschließend in dieser Sammlung zusammen mit den von den »Generalberichterstattern« vorbereiteten »Allgemeinen Berichten« veröffentlicht. Ergänzend wurden so genannte »Berichte aus dem EU-Institutionen« beigefügt, die von den Vertretern der EU-Institutionen erarbeitet wurden.[11] Wie die FIDE und ihre Kongresse werden diese Unterlagen traditionsgemäß dreisprachig (Englisch, Französisch, Deutsch) gehalten.[12]

---

10. Diese Überschrift orientiert sich am Slogan des XXVI. FIDE-Kongresses, der sich wiederum von der Überschrift des folgenden Artikels leiten ließ: Julia Laffranque: »FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law«, Juridica International, 2011, S. 173-181. Der Verwendung als Slogan hat Julia Laffranque zugestimmt. Eine kleine Änderung wurde vorgenommen, so dass der Slogan im Englischen wie folgt lautet: »FIDE – Uniting Great Minds of European Law«.
11. Die Analysen und Ergebnisse in Bezug auf Thema 1 werden in Band 1 vorgestellt, für Thema 2 in Band 2 und für Thema 3 in Band 3. Mündliche Präsentationen, die in Papierform etc. eingehen, werden, soweit möglich, auf der Webseite www.fide2014.eu veröffentlicht.
12. Aus diesem Grund sind die »Fragebögen« und dieses Vorwort auch in drei Sprachen verfasst.

Dankesworte

Die Organisation einer Veranstaltung wie des FIDE-Kongresses und die Vorbereitung der vorliegenden Publikationen wäre nicht möglich ohne die Hilfe der zahlreichen Mitarbeitenden. Daher danke ich im Namen der Dänischen Vereinigung für Europarecht (DFE) – seit 1973 der dänische Mitgliedsverband der FIDE – allen, die uns in der eine oder anderen Form durch tatkräftige Unterstützung und finanzielle Zuwendungen geholfen haben.[13] Die FIDE und ihre Kongresse basieren größtenteils auf der Unterstützung freiwilliger Helfer. Wir sind allen zu großem Dank verpflichtet. »Niemand erwähnt, niemand vergessen«, wie man im Dänischen sagt, um seinen Dank auszudrücken. Wir bitten um Verzeihung, wenn wir jemanden aus Versehen vergessen haben sollten. Dennoch möchten wir ausdrücklich folgenden Personen danken:[14]

Unser herzlicher und aufrichtiger Dank gebührt Seiner Königlichen Hoheit, dem Kronprinzen Frederik von Dänemark, der freundlicherweise die Schirmherrschaft für den Kongress übernommen hat, ebenso wie seiner Mutter, Ihrer Königlichen Hoheit, der Königin, anlässlich des FIDE-Kongress 1978 in Kopenhagen.

Die DFE hat nicht nur die Präsidentschaft der FIDE, sondern auch die Organisation des FIDE-Kongresses 2014 übernommen. Es wurde schließlich von der DFE beschlossen, die Juristische Fakultät der Universität Kopenhagen einzuladen, sich an der Organisation zu beteiligen, um einen hohen akademischen Standard zu gewährleisten. Glücklicherweise konnte der Dekan, Herr Henrik Dam, für diese Idee gewonnen werden und entschied sich dan-

---

13. Die DFE war die siebte nationale Vereinigung, die der FIDE beitrat und damit die erste, die zu den sechs Gründungsvereinigungen der FIDE dazustiess. Derzeit arbeiten folgende Personen im Vorstand der DFE: Partner Peter Biering, Kammeradvokaten; Partner Andreas Christensen, Horten Rechtsanwälte; Professor, Dr. jur., Dr. Jens Hartig Danielsen, Rechtsfakultät Universität Aarhus; Kommissar für EU-Recht und Menschenrechte; Nina Holst-Christensen, Justizministerium; Referatsleitung, Christian Thorning, Außenministerium; Richterin Lene Pagter Kristensen, Oberster Gerichtshof; Partner Charlotte Friis Bach Ryhl, Friis Bach Ryhl Rechtsanwälte; und Associate Professor, Dr. Grith Skovgaard Ølykke, Abteilung Rechtswissenschaften, Copenhagen Business School. Bis zum 14. November 2013 war das Außenministerium durch Vibeke Pasternak Jørgensen vertreten. Nachdem diese wegen einer Beförderung den Posten aufgab, trat Christian Thorning an ihre Stelle.
14. Nachdem dieses Vorwort geschrieben und zur Veröffentlichung eingereicht worden ist, haben wir vermutlich noch weitere Unterstützung erhalten. Daher danken wir natürlich auch allen zum jetzigen Zeitpunkt noch unbekannten Unterstützern.

kenswerterweise, den bevorstehenden Kongress auf verschiedene Arten zu unterstützen. Seitens des DFE und der FIDE möchten wir Herrn Dekan Dam unseren aufrichtigen Dank für seine Entscheidung und die fortdauernde Unterstützung aussprechen. In diesem Zusammenhang danken wir auch dem administrativen Team der Juristischen Fakultät für die Unterstützung der Veranstaltung, insbesondere der Projektkoordinatorin, Frau Tina Futtrup Borg, und ihren vielen Helfern sowie der Leiterin der Kommunikationsabteilung, Frau Birgitte Faber. Innerhalb der Juristischen Fakultät möchten wir besonders die PhD School und jene Personen erwähnen, die einen PhD-Kurs zum Recht der Europäischen Union in Verbindung mit dem Kongress organisiert haben (insbesondere den beiden assoziierten Professoren, Frau Constanze Semmelmann und Herrn Clement Petersen).[15]

In großer Anerkennung und Dankbarkeit erwähnen wir die Hilfe, die wir von Jette Nim Larsen, Sekretärin der Rechtsanwaltskanzlei Horten, erfahren haben. Ihre administrative Unterstützung war bei allen Anliegen der FIDE-Lenkungsgruppe sehr wertvoll. Darüber hinaus fungierte der DIS Congress Service als unser Partner. Die Mitarbeit von Marianne Sjødahl und Peder Andersen war von unschätzbarem Wert. Die Chefredakteurin Vivi Antonsen von DJØF Publishing, die für die vorliegenden Publikationen verantwortlich ist, war eine höchst effiziente und geduldige Ansprechpartnerin, der unser besonderer Dank gilt. Mit Blick auf den Band »Allgemeines Thema 3« danken wir insbesondere Frau stud.HA-jur. Mette Marie Lamm Larsen.

Darüber hinaus gilt unser Dank unseren Unterstützern, sowie den beteiligten Stiftungen und Partnern. Ganz besonders danken möchten wir:

- Dem Europäischen Gerichtshof (insbesondere dem Präsidenten, Herrn Vassilios Skouris, dem Vizepräsidenten, Herrn Koen Lenaerts, dem Richter, Herrn Lars Bay Larsen, und den vielen Dolmetschern) und anderen europäischen Institutionen;
- Dem dänischen Außenministerium (insbesondere den Referatsleitern Vibeke Pasternak Jørgensen und Christian Thorning);
- Dem Obersten Dänischen Gerichtshof (insbesondere dem Präsidenten Børge Dahl und Richterin Lene Pagter Kristensen);
- Den Autoren Knud Højgaards Fond; Professor Dr. jur. Max Sørensens Mindefond; Reinholdt W. Jorck og Hustrus Fond; Dreyers Fond, Fonden

15. Unseres Wissens ist dies das erste Mal, dass ein solcher Kurs im Zusammenhang mit dem FIDE-Kongress organisiert wurde. Dieses Projekt kann als Versuch angesehen werden, die kommenden Generationen von Forschenden und ihr Engagement für die FIDE zu unterstützen.

til Støtte af Retsvidenskabelig Forskning ved Københavns Universitet; und EURECO an der Universität von Kopenhagen.
- Dem Premiumpartner Kammeradvokaten, Rechtsanwaltskanzlei Poul Smith (insbesondere dem Partner Peter Biering);
- Den Kongress-Helfern der Rechtsanwaltskanzlei Horten (insbesondere dem Partner Andreas Christensen);
- Den Kongress-Helfern von der Copenhagen Business School
- Den Kongress-Helfern von DJØF Publishing;
- Dem Partner Per Magid, Rechtsanwaltskanzlei Bruun & Hjejle;
- Den Kongress-Ausstellern; sowie
- Der Stadt Kopenhagen

Unser besonderer Dank gebührt auch den vielen Mitgliedern der FIDE-Lenkungsgruppe, die uns freundlicherweise geholfen haben, unsere vielen Fragen zu den Traditionen und Erwartungen im Zusammenhang mit FIDE zu beantworten, insbesondere den Verbänden folgender Länder, die uns tatkräftig unterstützt haben: Österreich (Professor Heribert Köck), Estland (Richterin Julia Laffranque), Deutschland (Professor Peter-Christian Müller-Graff) und Spanien (Rechtsanwalt Luis Ortiz Blanco).

Zuallerletzt bleibt hervorzuheben, dass der XXVI. FIDE-Kongress und die vorliegenden Bände niemals ohne die tatkräftigen und engagierten »Generalberichterstatter« möglich gewesen wären. Wir bedanken uns bei Professor Fabian Amtenbrink, Professor Niamh Nic Shibhne, Professor Jo Shaw und Professor Roberto Caranta. Darüber hinaus haben die »Berichterstatter von den EU-Institutionen« Jean-Paul Keppenne, Michal Meduna und Adrián Tokár, die Herausforderungen voller Enthusiasmus angenommen und mit Bravour erfüllt, wofür Ihnen unser höchster Dank gilt. Die nationalen Berichterstatter haben es ermöglicht, ein weitgehend vollständiges Bild von Gesetzgebung und Rechtspraxis in den meisten Mitgliedsstaaten der Europäischen Union zu erhalten. Wir danken ihnen für ihre umfangreichen und wertvollen Beiträge. Außerdem sollen die exzellenten Redner, Moderatoren und Teilnehmer nicht unerwähnt bleiben, deren Arbeit unzweifelhaft dazu beiträgt, den Kongress zu einem herausragenden und unvergesslichen Ereignis werden zu lassen. Tausend Dank an alle, die uns in welcher Form auch immer unterstützend zur Seite standen.

Es war uns eine große Ehre, Freude und zuweilen zugegebenermaßen eine kleine Herausforderung, den XXVI. FIDE-Kongress zu organisieren und die vorhandenen Bände zu vorzubereiten. Wir sind davon überzeugt, dass die FIDE und ihre Kongresse auch nach mehr als einem halben Jahrhundert noch immer eine große Bereicherung und Inspirationsquelle darstellen. Wir hoffen,

die vorliegenden Bände stellen dies unter Beweis. Wir wünschen uns, dass sowohl die FIDE als auch die Kongresse in Zukunft erfolgreich fortgeführt und weiterentwickelt werden können.

FIDE 2014

Questionnaire General Topic 3

Public Procurement Law: Limitations, Opportunities and Paradoxes

Roberto Caranta[1]

Introduction

This questionnaire is intended to provide the framework for national and institutional reports on the present state, future and systematic relevance of Public Procurement Law. Public procurement is taken here in the rather broad meaning of public contract, including concessions, to cover all aspects of contractual activities of national and EU public institutions. Rapporteurs are asked to answer the questions from the perspective of how EU rules/judgments are applied in their jurisdictions.

The theme is obviously relevant considering the outsourcing trend having taken place in Europe during the past decades. This evolution has many implications for EU law. To begin with, contracting out involves interactions with market operators. The Four Freedoms have a role to play. Competition law is relevant too, including reference to the rules on the provision of services of general economic interest (SGEIs).

Public procurement law is riddled with challenging technicalities which cannot all be discussed in the reports. The questionnaire therefore focuses on those aspects believed to be more problematic for a systematic approach to public procurement law and to internal market law generally. Inconsistencies – or, at least unsolved questions – are still to be found in the present regime of EU public procurement law. Dissonances between this regime and other areas of EU law may lead to legal paradoxes. Those aspects are the ones calling louder for investigation and development in the law. At the same time, it is believed that the level of refinement of public procurement law presents

1. All three questionnaires have originally been elaborated in English, and subsequently translated into French and German. Therefore, in case of any discrepancies, it is the English versions which best represent the thinking of the General Rapporteurs.

considerable opportunities to contribute in the development of the wider European administrative law which took its first tentative steps only some years ago.[2]

The context

Question 1

Which main systemic challenges were/are Member States confronted with when adopting EU style public procurement rules?

In theory, different approaches are possible to public procurement; 1) trust the public servants and leave them wide discretion on how to choose contractors (minimal regulation: this used to be the case in the UK); 2) do not trust public servants too much, after all, this is the taxpayers' money (or, and there are ideological implications in the alternative, this is the public budget); public accountancy and auditing rules do therefore apply, but they are not enforceable in courts on the behalf of competitors (internal rules: this used to be the case in Germany); 3) again do not trust public servants too much, however this is administrative law after all and the Rule of law must prevail; conferring on competitors' enforceable rights is a means to this end (this is the French approach).

Consistently with its van Gend en Loos DNA, EU law has inevitably opted for the third option as it was made clear when the first remedies directive 89/665/EC was enacted in 1989. This is expected to have led to adaptation challenges which were more or less intense in different jurisdictions.

Rapporteurs are asked to give some information on both the challenges faced, the ways they were overcome, and possibly on how the original legal (including theoretical) framework is still creating frictions in the full implementation of EU law. Additionally, the rapporteurs are asked how public procurement law fits in the overall system of their administrative law.

2. Public contracts are one of the four areas of concern for European administrative law; please refer to http://www.reneual.eu/

The boundaries of EU public procurement law

This set of questions endeavours to map the province of public contracts, distinguishing them from legislative measures, administrative decisions, and other measures, while at the same time finding out which public contracts fall outside the scope of application of EU public procurement law.

Question 2

How are public contracts defined, and what are the criteria that set them apart from legislative measures, administrative decisions, or other arrangements which are not considered public contracts?

The distinction between contracts and other measures, such as legislative or regulatory acts and administrative decisions, is obviously quite topical in defining the scope of application of EU public procurement law.

In Commission/Ireland (C-532/03, Ambulances) the Court of Justice indicated that the provision of services to the general public by a public authority in the exercise of its own powers derived directly from statute and applying its own funds was not regulated by the EU public procurement directives, although a contribution is paid for that purpose from another authority, covering part of the costs of those services. Although in a different context (the *in house* exception), in *Asemfo* (C-295/05) the Court considered both the fact that the building service provider was required by law to carry out the orders given to it by the public authorities, and the fact that the service provider was not free to set the tariff for its services as relevant for excluding the application of EU public procurement law.

A number of aspects may potentially come into play here, like the fact that all the entities involved in providing the service were entities of public law (please link with the next question if necessary), or the fact that costs only were covered, and no profit was made by the service provider (on this contrast *Commission/Italy* C-119/06; *Ordine degli Architetti delle Province di Milano e Lodi* C-399/98 also addressed the relevance of the public law aspect in an agreement between a contracting authority and a private party).

Situations like the one relevant in *Helmut Müller* (C-451/08) (urban planning) deserve consideration too. *Helmut Müller* needs to be distinguished from the *Auroux* case (C-220/05), a possible reason being that *Auroux* did not only involve planning decisions and building licences, but also the building of some public works to the benefit of the licencing authority (and the same can be said in *Ordine degli Architetti delle Province di Milano e Lodi* (C-399/98)).

Licences to operate games of chance present classification problems too. They were qualified as service concession in an infringement procedure against Italy (C-260/04), but in the more recent *Sporting Exchange* (C-203/08) the Court of Justice held otherwise.

Finally, in many jurisdictions, 'concession' is a unilateral administrative decision, at times similar to a 'licence'. Under EU Law, works and services concessions are contracts. A number of legal acts named 'concessions' under national law may be considered not to be public contracts under national and EU public contracts law, such as for instance concessions for the exploitation of natural resources.

Question 3
How are in house arrangements and instances of public-public partnerships or other public-public cooperation forms regulated?

According to a line of cases starting with Teckal (C-107/98) expanding in *Coditel Brabant* (C-324/06), *Sea* (C-573/07), and *Commission* v *Germany* (C-480/06), 'genuine' forms of in house and public-public cooperation are excluded under given conditions (please see question 4) from the application of EU public procurement rules and principles. The first aspect to be considered, linked to the previous question, is how are these forms regulated (e.g., by a contract under private law, a public law contract, administrative decisions, laws or bylaws)?

Additional aspects to be considered are whether public-public partnerships are limiting the amount of business contended on the market and under competitive market rules in a significant way?, whether and if yes under which conditions the partnerships may also provide services on commercial basis on the market and in competition with economic operators?, and whether and how the conditions for public-public partnership laid down in the case law (now including *Ordine degli Ingegneri della Provincia di Lecce and Others* C-159/11) are understood and complied with?

Question 4
Which (if any) consensual arrangement between the public and private sectors is considered to fall outside the scope of application of EU rules?

The *Stadt Halle* (C-26/03) judgment made clear that any involvement of the private sector rules out the in house exception considered in the previous question and leads to the application of EU rules. However, Articles 12 ff of Directive 2004/18/EC list a number of service contracts which are excluded

from the scope of application of the same directive. Additionally, even contracts not listed in those provisions may be excluded, depending on the interpretation given to the definition of works, supply, and services contracts given in Article 1 of the same Directive. For instance, in *Helmut Müller* (C-451/08) the Court held that the sale to an undertaking, by a public authority, of undeveloped land or land which has already been built upon does not constitute a public works contract; according to *Loutraki* (C-145/08 and C-149/08), the same is true with reference to privatisation agreements.

Licences for the organisation of games of chances as those relevant in *Sporting Exchange* (C-203/08) could also be considered under this point if their consensual nature is accepted.

On the contrary, EU rules – if not yet EU directives provisions – do apply to services concessions, which are to be regulated in the new directive on the award of concession contracts.

Question 5
What kind of mixed arrangements are to be found in your jurisdiction and how are they regulated?

In *Loutraki* (C-145/08 and C-149/08) and in *Mehiläinen Oy* (C-215/09) the Court of Justice was confronted with mixed (part procurement, part non-procurement) arrangements. In considering whether public procurement rules were applicable, the Court first considered whether the procurement component is severable from the rest of the agreement; if so, public procurement rules will apply to that component. If not, the prevalent object of the arrangement is the one determining which rules are applicable. On this basis, is the case of mixed agreement relevant in your jurisdiction, and if so, under which specific circumstances? Has the question of severability been addressed, and if so, how?

The general principles of EU law: public procurement law and beyond

The Public procurement directives obviously apply to public procurement contracts. However, as already recalled, a number of contracts are expressly or impliedly excluded from the scope of application of the directives. Moreover, those directives do not apply to contracts below given thresholds and (but legislation is pending on this) to service concessions, and apply only partly to a number of service procurements (priority services).

Since *Telaustria* (C-324/98), however, the general principles of non-discrimination/equal treatment and transparency are supposed to be applicable to the award of contracts not covered, or not fully covered by the EU procurement directives. Recent cases seem to indicate that the same principles are also applicable to non-contractual arrangements, therefore possibly constituting the foundations for the overall EU administrative law.

Question 6
Which rules or principles are applicable to the award of contracts (or consensual arrangements) excluded, not covered, or not fully covered by the EU procurement directives?

Do the general principles of non-discrimination/equal treatment and transparency apply for the award of contracts expressly excluded (e.g. contracts listed in Article 16 of Directive 2004/18/EC)? If not what are the principles or rules applied to those contracts? More generally, how have the above mentioned principles in practice been translated in specific operative rules which also apply to below the threshold contracts, non-priority services and, for the moment being, service concessions?

The same questions are also referred to *Helmut Müller* (C-451/08) like situations (contracts excluded from the area of application of the directives because they fall outside the definition of public procurement contracts given for instance by Article 1 of Directive 2004/18/EC).

Utilities and defence procurements too are excluded from the coverage of Directive 2004/18/EC; however, they are under specific EU rules, and therefore do not necessarily concern us here (but the somewhat lighter regime provided for instance under Directive 2004/17/EC could well be a source of inspiration for the concretisation of the above recalled principles).

Question 7
Do the principles of non-discrimination/equal treatment and transparency (or rules derived therefrom) also apply to the selection of the beneficiary of unilateral administrative measures?

The recent cases referring to licences to operate games of chance *Sporting Exchange* (C-203/08) and *Garkalns* (C-470/11), while ruling out the nature of service concessions of those arrangements, have affirmed the applicability of the principles of non-discrimination/equal treatment and transparency to those arrangements.

The same principles (or rules derived from them) may be relevant for the attribution of other benefits (e.g. concessions for the exploitation of natural resources or public domain land, provided these concessions are not considered to be contractual in nature).

It is to be noted that Articles 9 ff of Directive 2006/123/EC on services in the internal market lay down authorisation procedures which are supposed to comply with those principle. Again, in many jurisdictions authorisations will be classed as unilateral administrative decisions.

This question, in connection with question 2, aims at finding the general principle applicable potentially to all instances where the State or any other public law entity disburses money or grant benefits or privileges (including the right to carry out an economic activity), on a selective basis, choosing among a number of market participants potentially exceeding the resources being distributed.

To a certain extent this situation is similar to the one where exclusive rights are granted to a specific economic operator in connection with the provision of SGEIs which is discussed below (see question 11).

Public procurements and general EU law, including competition and State aids law

EU procurement law is based on the Treaty provisions on the Four Freedom. A basic question is whether contracting authorities deciding what to buy are considered as private market participants or rather as taking public law measures potentially restricting the competition?

Provided that in principle public procurement rules foster competition among economic operators, it is to be considered whether some specific rules might instead be abused to stifle competition. Moreover, rules on State aids allow for derogations to the prohibitions they edict in the case of SGEIs, and it is to be assessed whether and to what extent the doctrines devised with reference to SGEIs are in line with those concerning public procurements.

Question 8
Can decisions taken by contracting authorities be treated as measures imposing restrictions on the internal market? If so, shall they comply with the non-discrimination and proportionality principles and be additionally justified by imperative requirements in the general interest?

Choices by contracting authorities as to what to buy should reflect their preferences (provided they do not entail discriminations on the basis of nationality in line with the principles recalled above under questions 6 and 7).

In a few cases, the most recent being *Contse* (C-234/03), the Court of Justice has however couched its reasoning in pure internal market terms (including reference to imperative requirements in the general interest), and this even if the relevant restrictions could have easily been considered in breach of the non-discrimination principle according to the well-established public procurement case law.

The question intends to elicit information on how the contracting authorities in different jurisdictions see themselves and the room of choice allowed to them concerning what to buy (this also being related to the issues discussed below under questions 12 and 13).

Question 9
Which if any public procurement rules may lend themselves to abuse thus potentially limiting competition?

In principle collusion and bid rigging should be taken care of by the Treaty rules on competition; however, transparency itself, the basis of many public procurement rules, may end making it easier for economic operators to collude.

Other rules and practices, concerning for instance long term concessions, framework agreements, and central purchasing bodies may be abused by either shutting down markets for a certain time and/or giving a very relevant market power to contracting authorities. Unduly demanding qualification requirements may also restrict competition to the detriment of SMEs. The role of the contracting authority as economic operators may also lead to distortions of the competition (again *Ordine degli Ingegneri della Provincia di Lecce and Others* C-159/11).

Question 10
Can SGEIs be outsourced to market participants without following public procurement-like procedures, including through direct award? Do EU State aid rules apply if the latter is the case?

In the well-known *Altmark* case (C-280/00) the Court of Justice held that in principle and under given conditions exclusive rights for the provision of SGEIs may be granted through non-competitive procedures. The 2012 Communication of the Commission on the application of the EU State aids rules to compensation granted for the provision of SGEI is in line with the *Altmark* judgement (2012/C 8/02, see points 63 ff). The Communication is without prejudice to the application of EU public procurement law but does not by itself advance coherence between public procurement law and State aids law. The Communication 'EU Framework for State aid in the form of public service compensation' refers instead to the general principles of EU public procurement law in a much more directive way (2012/C 8/03, point 19). The proposed directive on concessions might help bring in line public procurement and State aid law and developments under this respect will have to be considered.

Specific rules applicable to this or that SGEI (e.g. Regulation 2007/1370/EC on public passenger transport services by rail and by road) might also be relevant.

Strategic use of public procurement

The Commission Green Paper 'on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market' (COM(2011) 15 final) has introduced a novel emphasis on the 'complementary objectives' of public procurement regulation, in a way putting sustainability on the same footing as other objectives. A specific part of the Green paper is dedicated to what is referred to as 'strategic use of public procurement'. The overall idea is that these complementary objectives may reinforce one another, for instance 'by moving focus from lowest initial price to lowest life-cycle cost'.

This set of questions dwelves on the most relevant aspects of the strategice use of public procurement, including how public procurement may contribute to meet the development goals of Agenda 2020.

Question 11
Are public procurements used as a tool to achieve environmental and social policy goals and if so what are the challenges?

Traditionally, the basic idea in public procurement legislation has been to achieve better value for money; however, according to the 2011 Green Paper, this must be coordinated with environmental and social concerns. The economic crisis may sharpen the focus on costs or, given resource scarcity, encourage contracting authorities to strike twice with one stone. If the latter is the case, how is this achieved in different jurisdictions? Life-cycle costing methods may help in this endeavour, but how far are they developed? On this background, the question is whether strategic concerns could be abused by contracting authorities to favour local product/producers (and linked with question 9)?

Overall, Member States, or regions within Member States, may be seen to be either embracing strategic procurement or being lukewarm at best. The reasons for these attitudes should be briefly elaborated upon.

Additionally, a number of secondary law instruments (e.g. Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, and Regulation 2008/106/EC on a Community energy-efficiency labelling programme for office equipment) actually impose instances of what to buy, and this opens to the more traditional questions of whether these measures have been correctly implemented into national legislation and whether the contracting authorities comply with them?

Question 12
Are public procurements used as a tool to foster innovation?

Innovation, already a concern when the 2004 directives were being drafted, is now more central than ever (cf Agenda 2020). The EU framework, including its suspicion of dialogue (see below question 14), is however often considered as a straightjacket hindering innovation.

The 2004 directives allowed on performance based technical specifications, and a first aspect could be how far are contracting authorities as to having recourse to this kind of specifications and with which problems and results? The competitive dialogue too was expected to help innovation. The question is how often and for which kinds of projects has the competitive dialogue been used in different jurisdictions?

Moreover, Article 16(f) of Directive 2004/18/EC excludes from the scope of application of the directive contracts having research as their sole reason

(with potential State aids problems). The proposal for a new directive rather aims at introducing a new and more far ranging procedure to foster innovation. The question is how this should be designed to be both effective and in line with other Treaty provisions, such as those on State aids?

The topic also links with the rules protecting intellectual property rights.

Remedies

Question 13
To what extent (if any) and how has Directive 2007/66/EC strengthened the remedies against breaches of EU public procurement rules?

In 2007 the Remedies Directive was strengthened with quite vigorous remedies unheard of before in many Member States. The question is how effective is the remedy system in practice? More specifically, is interim relief granted before the conclusion of the contract? In which cases have contracts been declared ineffective? Is the use of voluntary *ex ante* transparency notices widespread? Are damages frequently awarded in procurement cases and which heads of damages are recoverable? The question of the remedies available in case of contracts not covered by the directives should also be considered.

Moreover, and from a systematic point of view, how have the new remedies impacted the domestic system? More specifically, is there a preference for remedies which affect the award decision and possibly the contract (interim relief, ineffectiveness) or are rather damages the preferred remedy (this in Germany translates in the difference between primary and secondary legal protection – Rechtsschutz)?

Conclusion and reform

The legislative work in progress has already been referred to in a number of questions, and especially so in those concerning the strategic use of public procurement. The final question addresses different aspects of the reform process which are expected to impact how public contracts are regulated in the EU Member States with a specific focus on the modernisation of EU law.

Question 14
How are the new directives to contribute to the modernisation of EU public contracts law?

Different aspects are possibly relevant here and rapporteurs are asked to refer to any additional one which might be particularly relevant to their jurisdiction.

Among those aspects which surely deserve consideration, the first one is obviously the new directive on concession contracts, providing a new legislative framework for all concession contracts, including service concessions. The definition of concession still focuses on the right to exploit the works or services and the new directive provides a definition of the risk of exploitation. The question is how this reflects the way concessions are understood in different jurisdictions (see also question 2) and how the requirement concerning the transfer of the risk of exploitation has been applied in different member States? A further problem is if and if so to what extent the new regime is applicable to institutional public-private partnerships.

At policy level, the economic crisis might have either provided an additional impetus to public-private partnerships or dried up private capital; the questions therefore are whether private funding and long-term contracts have been used strategically by the Member States? At the same time, the preference for long-term contracts may end up in restricting competition and effectively shutting up some markets over a long period (please refer to question 9).

Another facet of the modernisation attempt focuses on the award procedures. According to some critics, the procedures laid down in the 2004 directives are too cumbersome, leading to high costs and inefficiency.

The competitive dialogue introduced in 2004 was already expected to allow a measure of procedural flexibility, albeit under restrictive if somewhat vague conditions ('complex contracts') (see also question 12). The question is whether the new rules on the competitive dialogue are liable or not to widen the recourse to this procedure?

The more general question is what is the place for negotiations in EU public procurement rules? Contrary to the US approach and fearing very much nationality-based discrimination, EU public procurement law is generally hostile to negotiation and dialogue between contracting authorities and tenderers. This could be about to change if the new Public sector directive introduces the kind of flexibility found in the utilities sector, thus allowing on a general basis contracting authorities to have recourse to negotiated procedures with prior advertisement. The question about the minimal procedural

safeguards is, however, relevant here, and links with the discussion on the general principles of non-discrimination and transparency (above, question 6).

Electronic procedures and more generally the use of technology are also relevant. The doubt is to what extent contracting authorities and the market in different jurisdictions are ready for a paperless world?

Finally, and more generally, in line with the systematic ambition of the present questionnaire, do the new rules (and the new definitions in the directives) portend a systemic change in the EU public procurement law (and if so in which direction), liable to impact national administrative law? Or must they be simply read as maintenance works on a building whose main structures remain unaltered?

FIDE 2014

Questionnaire du thème général 3

Le droit des marchés publics : restrictions, possibilités et paradoxes

Roberto Caranta[1]

Introduction

Ce questionnaire a pour objectif de fournir un cadre aux rapports nationaux et institutionnels sur l'état actuel du droit des marchés publics, son futur et son importance systématique. La notion de marchés publics doit être comprise ici au sens large du terme incluant tous les contrats publics, notamment les concessions, de façon à couvrir tous les aspects des activités contractuelles des institutions publiques nationales et européennes. Les rapporteurs sont demandés de répondre aux questions en examinant comment la règlementation et les arrêts de l'UE s'appliquent dans leurs juridictions respectives.

Ce sujet est particulièrement pertinent au regard de la tendance à l'externalisation qui s'est développée en Europe au cours des dernières décennies. Cette évolution a de nombreuses répercussions sur le droit européen. Tout d'abord, le fait de confier des activités à un tiers (contracting-out) crée des interactions avec les opérateurs du marché. Les quatre libertés ont leur rôle à jouer. Le droit de la concurrence intervient également, y compris les règles sur les prestations de services d'intérêt économique général (SIEG).

Le droit des marchés publics est truffé de détails techniques qui ne peuvent pas tous être abordés dans les rapports. Ce questionnaire se focalise donc sur les aspects que l'on considère comme les plus problématiques lorsqu'il s'agit d'adopter une approche systématique du droit des marchés publics, et plus généralement, du droit du marché intérieur. Des incohérences, ou du moins certaines questions non résolues, existent encore au sein du régime actuel du droit européen des marchés publics. Les dissonances entre ce régime

1. Les trois questionnaires ont été initialement rédigés en anglais, puis ils ont été traduits en français et en allemand. En cas de divergence, veuillez vous reporter aux versions anglaises qui représentent mieux la pensée des rapporteurs généraux.

et d'autres domaines du droit européen peuvent conduire à des paradoxes juridiques. Ces aspects sont ceux qui se font les plus pressants dans la recherche et le développement du droit. Dans un même temps, nous estimons que le degré de précision du droit des marchés publics est riche en possibilités permettant de contribuer au développement du droit administratif européen, qui n'a fait ses premiers pas que depuis quelques années seulement.[2]

Le contexte

Question 1
Quels sont les principaux défis auxquels les Etats membres sont/étaient systématiquement confrontés en adoptant les règles européennes des marchés publics ?

En théorie, plusieurs approches sont possibles en termes de marchés publics ; 1) faire confiance aux autorités publiques et leur laisser toute discrétion pour choisir les entreprises contractantes (régulation minimale : c'était généralement le cas au Royaume-Uni) ; 2) avoir une confiance plus limitée envers les autorités publiques, car il s'agit après tout de l'argent des contribuables (ou bien, et il y a alors un enjeu idéologique dans ce cas, il s'agit des finances publiques) ; les règles de la comptabilité publique et de l'audit s'appliquent alors, mais elles ne peuvent être invoquées devant les juridictions nationales par les concurrents (règles internes : c'était généralement le cas en Allemagne) ; 3) avoir, encore une fois, une confiance plus limitée envers les autorités publiques, mais dans la mesure où il s'agit de droit administratif, l'état de droit doit prévaloir ; conférer aux concurrents des droits exécutoires est un moyen d'y parvenir (approche française).

Conformément au principe de l'arrêt van Gend en Loos, le droit européen a inévitablement opté pour la troisième option, comme cela a clairement été exprimé lorsque la première directive 89/665/CE sur les procédures de recours a été promulguée en 1989. Cela a dû engendrer un certain nombre de défis en matière d'adaptation, plus ou moins complexes selon les différentes juridictions.

Les rapporteurs sont invités à donner des informations sur les défis rencontrés, la manière dont ils ont été résolus, et le cas échéant, sur la manière

2. Les contrats publics font partie des quatre domaines qui concernent le droit administratif européen ; nous vous invitons à consulter le site http://www.reneual.eu/

dont le cadre juridique initial (notamment le cadre théorique) crée encore actuellement des frictions dans la mise en œuvre complète du droit européen. En outre, les rapporteurs sont invités à répondre sur la manière dont le droit des marchés publics s'inscrit dans le système général du droit administratif national.

Les limites du droit européen des marchés publics

Cette série de questions a pour objectif de répertorier dans quels domaines s'inscrivent les contrats publics afin de les distinguer des mesures législatives, des décisions administratives et autres mesures, tout en déterminant quels sont les contrats publics qui sortent du champ d'application du droit européen des marchés publics.

Question 2
De quelle manière se définissent les contrats publics, et quels sont les critères qui les différencient des mesures législatives, des décisions administratives et autres contrats qui ne sont pas considérés comme des contrats publics ?

La distinction entre les contrats et les autres mesures comme les actes législatifs ou réglementaires, et les décisions administratives, est assez classique lorsqu'il s'agit de définir le champ d'application du droit européen des marchés publics.

Dans l'affaire de la Commission contre l'Ireland (C-532/03, Ambulances) la Cour de Justice a indiqué que les prestations de services effectuées auprès du grand public par une autorité publique dans l'exercice de ses fonctions dérivant directement de la loi, et utilisant ses fonds propres n'était pas réglementée par les directives sur les marchés publics, bien qu'une contribution soit versée à cet effet par une autre autorité couvrant ainsi une partie des frais de ces services. Dans un autre contexte (l'exception *in-house*), dans l'affaire *Asemfo* (C-295/05), la Cour a considéré à la fois le fait que le prestataire de services en bâtiment était légalement tenue d'exécuter les ordres qui lui étaient donnés par les pouvoirs publics, et le fait que le prestataire de services n'était pas libre de fixer le tarif de ses services, comme des éléments pertinents pour exclure l'application du droit européen des marchés publics.

Un certain nombre d'aspects pourraient jouer un rôle à ce propos, notamment le fait que toutes les entités concernées par la fourniture des services étaient des personnes morales de droit public (veuillez faire le lien avec la

question suivante si nécessaire), ou le fait que seuls les frais étaient couverts et que le prestataire de services ne faisait aucun profit (contrairement à l'affaire de la *Commission contre l'Italie*, C-119/06 ; *Ordine degli Architetti delle Province di Milano e Lodi* C-399/98, qui abordait également la question de la pertinence du droit public dans un accord entre un pouvoir adjudicateur et une entité privée).

Des situations comme celles de l'affaire *Helmut Müller* (C-451/08) (planification urbaine) doivent également attirer notre attention. *L'affaire Helmut Müller* doit être distinguée de *l'affaire Auroux* (C-220/05), une des raisons possibles étant que *l'affaire Auroux* n'incluait pas seulement des décisions d'aménagement et des permis de construire, mais également la construction de travaux publics pour le compte de l'autorité délivrant les permis (et il en est de même pour l'affaire *Ordine degli Architetti delle Province di Milano e Lodi* (C-399/98)).

Les permis d'exploitation des jeux de hasard présentent également des problèmes de classification. Ils étaient classés comme concession de services dans une procédure d'infraction contre l'Italie (C-260/04), mais dans l'affaire plus récente du *Sporting Exchange* (C-203/08), la Cour de Justice en a jugé autrement.

Finalement, dans de nombreuses juridictions, la « concession » est une décision administrative unilatérale, parfois similaire à un « permis ». En droit européen, les concessions de travaux et de services sont des contrats. Certains actes juridiques dénommés « concessions » en droit national peuvent ne pas être considérés comme des contrats publics dans le droit national et européen des marchés publics, comme par exemple les concessions pour l'exploitation des ressources naturelles.

Question 3
Comment sont réglementés les contrats internes et les cas de partenariats public-public ou d'autres formes de coopération public-public ?

Selon une série d'affaires commençant par celle de Teckal (C-107/98) et se poursuivant par celle de *Coditel Brabant* (C-324/06), *Sea* (C-573/07), et *la Commission* contre *l'Allemagne* (C-480/06), de « véritables » formes de coopération interne et de coopération public-public sont exclues dans certaines conditions (voir également la question 4) du champ d'application des règles et principes européens des marchés publics. Le premier aspect à considérer, lié à la question précédente, porte sur la manière dont ces formes sont réglementées (par exemple par un contrat de droit privé, un contrat de droit public, des décisions administratives, des lois ou des règlements) ?

D'autres aspects sont aussi à considérer, notamment si les partenariats public-public limitent de manière significative les activités commerciales en concurrence sur le marché selon les lois du marché ? Si oui, dans quelle mesure les partenariats peuvent-ils aussi fournir des services aux conditions commerciales du marché et en concurrence avec des opérateurs économiques ? Le cas échéant, de quelle manière les conditions s'imposant à un partenariat public-public formulées dans la jurisprudence (qui inclut maintenant l'affaire *Ordine degli Ingegneri della Provincia di Lecce et autres,* C-159/11) sont-elles comprises et respectées ?

Question 4
Quel accord consensuel éventuel entre les secteurs public et privé est considéré comme étant hors du champ d'application des règles communautaires ?

L'arrêt *Stadt Halle* (C-26/03) a montré clairement que toute implication du secteur privé permet d'écarter l'éventualité de l'exception "in-house" évoquée dans la question précédente, et conduit à une application des règles communautaires. Néanmoins, les articles 12 et suivants de la directive 2004/18/CE énumèrent un certain nombre de contrats de service qui sont exclus du champ d'application de cette directive. En outre, certains contrats qui ne sont pas énumérés peuvent être exclus, selon l'interprétation qui est faite des termes de travaux, fournitures et contrats de service, dans l'article 1 de cette directive. Par exemple, dans l'affaire *Helmut Müller* (C-451/08), la Cour a jugé que la vente à un sous-traitant, par des pouvoirs publics, de terrains non viabilisés ou qui ont déjà été construits, ne constituait pas un marché de travaux publics ; selon l'affaire *Loutraki* (C-145/08 et C-149/08), il en va de même pour les accords de privatisation.

Les permis d'exploitation des jeux de hasard comme ceux de l'affaire *Sporting Exchange* (C-203/08) pourraient également être considérés sous ce point si leur nature consensuelle est acceptée.

A l'inverse, les règles communautaires, contrairement aux dispositions des directives de l'UE, s'appliquent déjà aux concessions de services qui seront réglementées par la nouvelle directive sur l'attribution des contrats de concession.

Question 5
Quels types d'accords mixtes existe-t-il dans votre juridiction, et comment sont-ils réglementés ?

Dans l'affaire *Loutraki* (C-145/08 et C-149/08) et dans l'affaire *Mehiläinen Oy* (C-215/09), la Cour de Justice a été confrontée à des accords mixtes (une partie marchés publics, et une partie qui n'est pas marchés publics). En examinant si les règles des marchés publics pouvaient s'appliquer, la Cour a d'abord examiné si l'élément portant sur les marchés publics était séparable du reste de l'accord ; auquel cas, les règles des marchés publics pourraient s'appliquer à cet élément. Si ce n'est pas le cas, l'objet qui prévaut dans l'accord est celui qui détermine les règles à appliquer. Compte tenu de ce qui précède, la question des accords mixtes est-elle pertiente dans votre juridiction, et le cas échéant, dans quelles circonstances spécifiques ? La question de la « séparation » a-t-elle été évoquée, et si oui, de quelle manière ?

Les principes généraux du droit européen : le droit des marchés publics et au-delà

Les directives sur les marchés publics s'appliquent évidemment aux contrats de marchés publics. Néanmoins, comme nous l'avons déjà précisé, certains contrats sont explicitement ou implicitement exclus du champ d'application des directives. En outre, ces directives ne s'appliquent pas aux contrats au-dessous des critères minimum fixés, ni (mais une réglementation est en préparation) aux concessions de services, et elles ne s'appliquent que partiellement à certains marchés publics concernant les services (services prioritaires).

Depuis l'affaire *Telaustria* (C-324/98), les principes généraux de non-discrimination, d'égalité de traitement et de transparence sont supposés être applicables pour l'attribution des contrats non couverts, ou partiellement couverts, par les directives sur les marchés publics. Des affaires récentes semblent indiquer que ces mêmes principes sont également applicables aux accords non contractuels, susceptibles ainsi de constituer les fondements généraux du droit administratif de l'UE.

Question 6
Quels sont les principes ou règles qui s'appliquent dans l'attribution des contrats (ou des accords consensuels) exclus, non couverts ou partiellement couverts par les directives sur les marchés publics ?

Les principes généraux de non-discrimination, d'égalité de traitement et de transparence s'appliquent-ils pour l'attribution des contrats explicitement exclus (notamment les contrats mentionnés sous l'article 16 de la directive 2004/18/CE) ? Si ce n'est pas le cas, quels sont les principes et règles qui s'appliquent pour ces contrats ? Plus généralement, de quelle manière les principes mentionnés ci-dessus se sont-ils traduits en pratique dans les règles de fonctionnement spécifiques s'appliquant également aux contrats au-dessous des critères minimum fixés, aux services non-prioritaires et, pour le moment, aux concessions de services ?

Les mêmes questions sont également évoquées dans l'affaire *Helmut Müller* (C-451/08) pour des situations semblables (contrats exclus du champ d'application des directives parce qu'ils ne tombent pas sous le coup de la définition de contrats de marchés publics figurant par exemple à l'article 1 de la directive 2004/18/CE).

Les marchés des services publics et de la défense sont également exclus du champ de la directive 2004/18/CE ; néanmoins, ils sont couverts par des règles communautaires spécifiques et ne nous concernent donc pas nécessairement dans le cas présent (mais le régime plus léger prévu par la directive 2004/17/CE pourrait être source d'inspiration pour la concrétisation des principes mentionnés ci-dessus).

Question 7
Les principes de non-discrimination, d'égalité de traitement et de transparence (ou les règles qui en sont dérivées) s'appliquent-ils également à la sélection du bénéficiaire de mesures administratives unilatérales ?

Les récentes affaires qui font référence aux permis d'exploitation des jeux de hasard, *Sporting Exchange* (C-203/08) et *Garkalns* (C-470/11), alors qu'elles excluent le caractère de concessions de services de ces accords, ont affirmé l'applicabilité des principes de non-discrimination, d'égalité de traitement et de transparence à ces accords.

Les mêmes principes (ou les règles qui en sont dérivées) peuvent s'appliquer pour l'attribution d'autres avantages (notamment les concessions pour l'exploitation des ressources naturelles ou des terrains du domaine public, à

condition que ces concessions ne soient pas considérées comme étant de nature contractuelle).

Il est à noter que les articles 9 et suivants de la directive 2006/123/CE sur les services dans le marché intérieur, fixent des procédures d'autorisation qui sont supposées satisfaire à ces principes. Encore une fois, les autorisations sont classées, dans de nombreuses juridictions, comme des décisions administratives unilatérales.

Cette question, en relation avec la question 2, a pour but de définir un principe général applicable à toutes les instances, selon lequel l'Etat ou toute autre entité juridique publique, alloue des fonds ou accorde des avantages ou des privilèges (y compris le droit d'exercer une activité économique) de manière sélective, en choisissant parmi certains acteurs du marché dépassant potentiellement les ressources qui ont été allouées.

Cette situation est similaire, dans une certaine mesure, à celle dans laquelle des droits exclusifs sont octroyés à un opérateur économique spécifique dans le cadre des prestations des SIEG qui sont discutées ci-dessous (voir la question 11).

Les marchés publics et le droit européen, notamment le droit de la concurrence et le droit relatif aux aides d'Etat

Le droit européen sur les marchés publics se base sur les dispositions du Traité relatives aux quatre libertés. Une des questions fondamentales est de savoir si les pouvoirs adjudicateurs qui décident des achats sont considérés comme des acteurs du marché privé ou comme des décideurs qui prennent des mesures relevant du droit public, susceptibles de restreindre la concurrence ?

Si l'on admet qu'en principe, les règles des marchés publics favorisent la concurrence parmi les opérateurs économiques, il est bon de considérer le fait que certaines règles spécifiques pourraient, à l'inverse, être appliquées abusivement pour étouffer la concurrence. En outre, les règles relatives aux aides d'Etat permettent des dérogations aux interdictions qu'elles dictent dans le cas des SIEG, et il faut évaluer en quelle mesure les règles s'appliquant aux SIEG sont conformes à celles relatives aux marchés publics.

Question 8

Des décisions prises par les pouvoirs adjudicateurs peuvent-elles être considérées comme des mesures imposant des restrictions sur le marché intérieur ? Si tel est le cas, doivent-elles satisfaire aux principes de non-

discrimination et de proportionnalité, et doit-on en outre les justifier par des raisons impérieuses d'intérêt général ?

Le choix des pouvoirs adjudicateurs et les décisions d'achat doivent refléter leurs préférences (à condition qu'ils ne supposent aucune discrimination basée sur la nationalité, conformément aux principes évoqués ci-dessus aux questions 6 et 7).

Dans certaines affaires, dont la plus récente est l'affaire *Contse* (C-234/03), la Cour de Justice a néanmoins raisonné purement en termes de marché intérieur (mentionnant aussi des raisons impérieuses d'intérêt général), alors même que les restrictions en cause auraient facilement pu être jugées en contradiction avec les principes de non-discrimination selon la jurisprudence bien établie concernant les marchés publics.

La question a pour but d'obtenir des informations sur la manière dont les pouvoirs adjudicateurs des différentes juridictions se percoivent et considèrent l'étendue du choix qui est le leur pour décider des achats (ce point étant lié aux autres points abordés ci-dessous aux questions 12 et 13).

Question 9
Quelles règles éventuelles relatives aux marchés publics peuvent comporter des risques d'être détournées de leur objectif, et donc de restreindre la concurrence ?

En principe, la collusion et les manipulations de soumission des offres doivent être encadrées par les dispositions du traité sur la concurrence ; cependant, la transparence, qui est à la base de nombreuses règles relatives aux marchés publics, peut finir par faciliter les tentatives de collusion des opérateurs économiques.

D'autres règles et pratiques concernant par exemple les concessions à long terme, les accords-cadres, les centrales d'achat, peuvent être détournées, soit en fermant les marchés pendant un certain temps, soit/ou en donnant aux pouvoirs adjudicateurs un pouvoir très important sur le marché. Des exigences de qualification trop strictes peuvent également restreindre la concurrence au détriment des PME. Le rôle des pouvoirs adjudicateurs en tant qu'opérateurs économiques peut également conduire à des distorsions de la concurrence (encore une fois *Ordine degli Ingegneri della Provincia di Lecce et autres,* C-159/11).

Question 10
Les SIEG peuvent-elles être externalisées àdes acteurs du marché sans suivre des procédures similaires à celles des marchés publics, notamment par le biais de l'attribution directe ? Les règles relatives aux aides d'Etat s'appliquent-elles dans ce cas-là ?

Dans l'affaire notoire *d'Altmark* (C-280/00), la Cour de Justice a jugé que les droits exclusifs dans le cadre des prestations de SIEG pouvaient, en principe et dans certaines conditions, être octroyés par le biais de procédures sans procédure de mise en concurrence. La communication de la Commission de 2012 relative à l'application des règles de l'UE sur l'octroi d'aides d'Etat pour les compensations accordées aux prestations des SIEG, est conforme à l'arrêt *Altmark* (2012/C 8/02, voir les points 63 et suivants). La communication est sans préjudice de l'application du droit européen sur les marchés publics, mais elle ne favorise pas la cohérence entre le droit relatif aux marchés publics et le droit relatif aux aides d'Etat. La communication « l'encadrement communautaire des aides d'Etat sous forme de compensations de service public » fait plutôt référence aux principes généraux du droit européen des marchés publics, et cela d'une manière bien plus directive (2012/C 8/03, point 19). La proposition de directive sur les concessions pourrait contribuer à harmoniser le droit relatif aux marchés publics et le droit relatif aux aides d'Etat, et à cet égard, l'évolution de la situation devra être prise en considération.

Des règles spécifiques applicables à telle ou telle SIEG (notamment le règlement (CE) n° 1370/2007 relatif aux services publics de transport de voyageurs par chemin de fer et par route) pourraient également être pertinentes.

Utilisation stratégique des marchés publics

Le livre vert de la Commission « sur la modernisation de la politique de l'UE en matière de marchés publics. Vers un marché européen des contrats publics plus performant » (COM(2011) 15 final) a mis l'accent sur le concept novateur des « trois objectifs complémentaires » de la règlementation des marchés publics, en mettant la durabilité au même plan que les autres objectifs. Une partie du livre vert est dédiée à ce que l'on nomme « l'utilisation stratégique des marchés publics ». L'idée générale est de faire en sorte que les objectifs complémentaires se renforcent l'un l'autre, par exemple « en mettant l'accent sur le cycle de vie le moins coûteux, plutôt que sur le prix initial le plus bas ».

Cette série de questions porte sur les aspects les plus pertinents de l'utilisation stratégique des marchés publics, notamment la manière dont les marchés publics contribuent à satisfaire aux objectifs de développement de l'Agenda 2020.

Question 11
Les marchés publics sont-ils utilisés comme outils pour atteindre les objectifs environnementaux et sociaux, et dans l'affirmative, quels défis cela pose-t-il ?

Traditionnellement, l'idée fondamentale de la législation sur les marchés publics était de faire un meilleur usage de son argent ; cependant, selon le livre vert de 2011, la décision doit s'assortir de préoccupations environnementales et sociales. La crise économique peut amener à faire davantage attention aux coûts ou, faute de ressources, encourager les pouvoirs adjudicateurs à faire d'une pierre deux coups. Dans ce dernier cas, de quelle manière cela se passe-t-il dans les différentes juridictions ? Les méthodes d'évaluation des coûts du cycle de vie peuvent aider à cette fin, mais jusqu'à quel point sont-elles développées ? Dans ce contexte, la question est de savoir si les préoccupations d'ordre stratégique peuvent être abusivement exploitées par les pouvoirs adjudicateurs pour favoriser les produits et les fabricants locaux (en relation avec la question 9) ?

De manière générale, les Etats membres ou les régions des Etats membres semblent soit adopter l'achat stratégique à bras ouverts ou soit être au mieux peu enthousiastes. Les raisons de ces attitudes doivent être brièvement expliquées.

En outre, certains instruments de droit secondaire (notamment la directive 2009/33/CE relative à la promotion de véhicules de transport routier propres et économes en énergie, et le règlement (CE) n° 106/2008 concernant un programme communautaire d'étiquetage relatif à l'efficacité énergétique des équipements de bureau) pose des obligations en termes d’achats, ce qui nous amène à des questions plus traditionnelles, à savoir si ces mesures ont été correctement transposées dans la législation nationale, et si les pouvoirs adjudicateurs s'y conforment ?

Question 12
Les marchés publics sont-ils utilisés comme outils pour encourager l'innovation ?

L'innovation, qui était déjà une préoccupation déjà présente lors de la rédaction des directives de 2004, est devenue plus importante que jamais (cf. Agenda 2020). L'encadrement communautaire, qui se méfit du dialogue (voir la question 14 ci-dessous), est souvent considéré comme une entrave à l'innovation.

Les directives de 2004 ont permis de se conformer à des spécifications techniques axées sur la performance, et dans une première étape, il pourrait s'agir de déterminer jusqu'où vont les pouvoirs adjudicateurs pour avoir recours à ce type de spécifications, et quels sont les problèmes et les résultats? Le dialogue compétitif aussi devait favoriser l'innovation. La question est de déterminer la fréquence et le type de projets pour lesquels le dialogue compétitif a été utilisé dans les différentes juridictions ?

En outre, l'article 16, lettre f, de la directive 2004/18/CE exclut du champ d'application de la directive les contrats dont la seule raison d'être est la recherche (avec les problèmes éventuels pour les aides d'Etat). La proposition d'une nouvelle directive tend davantage à introduire une procédure novatrice élargie pour encourager l'innovation. La question est de savoir comment celle-ci sera conçue pour être à la fois efficace et conforme aux autres dispositions du traité, et notamment celles concernant les aides d'Etat ?

Le sujet est également lié aux règles protégeant les droits de la propriété intellectuelle.

Solutions

Question 13
En quelle mesure (le cas échéant) et de quelle manière la directive 2007/66/CE a-t-elle renforcé les recours possibles contre les infractions aux règles de l'UE relatives aux marchés publics ?

En 2007, la directive sur les procédures de recours a été renforcée par des moyens rigoureux encore jamais employés dans certains Etats membres. La question est de savoir si ce système de recours est efficace en pratique ? Plus spécifiquement, les mesures provisoires sont-elles octroyées avant la conclusion du contrat ? Dans quelles affaires les contrats ont-ils été déclarés dépourvus d'effet ? L'utilisation volontaire d'avis de transparence *ex ante* est-

elle répandue ? Des dommages-intérêts sont-ils accordés dans les affaires de marchés publics et à quel titre le dommage est-il susceptible d'être recouvré ? La question des voies de recours disponibles, pour les marchés non visés par les directives, devrait également être examinée.

En outre, et d'un point de vue systématique, quel impact les nouveaux recours ont-ils eu dans le cadre du système des recours en droit interne ? Plus spécifiquement, existe-t-il une préférence pour les voies de recours qui affectent la décision d'attribution des marchés, et donc peut-être aussi le contrat lui-même (mesures provisoires, inefficacité) ou les dommages-intérêts constituent-ils le recours privilégié (ce que l'Allemagne traduit comme la distinction entre protection primaire et protection secondaire – Rechtsschutz) ?

Conclusion et réforme

Les travaux législatifs en cours ont déjà été évoqués dans certaines questions, notamment celles concernant l'utilisation stratégique des marchés publics. La dernière question concerne les différents aspects du processus de réforme qui sont susceptibles d'avoir un impact sur la manière dont les marchés publics sont réglementés dans les Etats membres et qui sont spécifiquement axés sur la modernisation du droit européen.

Question 14

De quelle façon les nouvelles directives contribuent-elles à la modernisation du droit européen des marchés publics ?

Différents aspects peuvent avoir une pertinence en la matière, et les rapporteurs sont invités à évoquer tout aspect supplémentaire qui aurait une pertinence particulière dans leur juridiction.

Parmi les aspects qui méritent certainement d'être pris en compte, le premier est évidemment la nouvelle directive sur les contrats de concession, qui offre un nouveau cadre législatif pour tous les contrats de concession, dont les concessions de services. La définition de concession reste centrée sur le droit d'exploiter les travaux ou services, et la nouvelle directive donne une définition du risque d'exploitation. La question est de savoir comment cela se reflète sur la manière dont les concessions sont comprises par les différentes juridictions (voir également la question 2), et comment le transfert du risque d'exploitation s'applique dans les différents Etats membres ? Un problème supplémentaire se pose, à savoir si et dans quelle mesure, le nouveau régime s'applique aux partenariats public-privé institutionnels.

Au niveau politique, la crise économique peut avoir donné une impulsion supplémentaire aux partenariats public-privé, ou asséché les capitaux privés ; la question est donc de savoir si le financement privé et les contrats à long terme ont été utilisés stratégiquement par les Etats membres ? Parallèlement, la préférence pour les contrats à long terme pourrait déboucher sur une limitation de la concurrence et une fermeture des marchés sur une longue période (se reporter à la question 9).

Un autre aspect de la modernisation tente de se focaliser sur les procédures d'attribution. Selon certaines critiques, les procédures définies dans les directives de 2004 sont trop lourdes, trop onéreuses et inefficaces.

Le dialogue compétitif introduit en 2004 devait déjà permettre de mesurer la flexibilité des procédures, en dépit des conditions restrictives, voire vagues (« marchés complexes ») (voir également la question 12). La question est de savoir si les nouvelles règles sur le dialogue compétitif sont de nature, ou non, à élargir le recours à cette procédure ?

De manière plus générale, quelle est la place donnée aux négociations dans le cadre des règles de l'UE relatives aux marchés publics ? Contrairement à l'approche américaine, et craignant considérablement la discrimination fondée sur la nationalité, le droit communautaire des marchés publics est généralement hostile à la négociation et au dialogue entre les pouvoirs adjudicateurs et les soumissionnaires. Cela pourrait changer si la nouvelle directive relative au secteur public introduisait la même flexibilité que celle du secteur des services d'utilité publique, permettant alors aux pouvoirs adjudicateurs d'avoir recours aux procédures négociées après publicité préalable. La question sur les garanties minimales en matière de procédures prend ici toute son importance, et est liée à la discussion sur les principes généraux de non-discrimination et de transparence (voir la question 6 ci-dessus).

Les procédures électroniques, et de façon plus générale, l'utilisation des technologies, sont également pertinentes. Il reste à savoir en quelle mesure les pouvoirs adjudicateurs et le marché sont prêts à passer à un « monde sans papier » dans les différentes juridictions ?

Enfin, et de façon plus générale conformément à l'ambition affichée du présent questionnaire, les nouvelles règles (et les nouvelles définitions introduites dans les directives) annoncent-elles un changement systématique du droit européen des marchés publics (et le cas échéant, dans quelle direction), qui soit capable d'influer sur le droit administratif national ? Ou bien celles-ci doivent-elles simplement être comprises comme des travaux de maintenance sur une construction dont les principales structures demeurent inchangées ?

FIDE 2014

Fragebogen, Generalthema 3

Vergaberecht für öffentliche Aufträge: Begrenzungen, Möglichkeiten und Widersprüche

Roberto Caranta[1]

Einleitung

Dieser Fragebogen soll den Rahmen für nationale und institutionelle Berichte über die gegenwärtige Situation, die Zukunft und die systematische Bedeutung des Vergaberechts schaffen. Das öffentliche Auftragswesen wird hier in der verhältnismäßig umfassenden Bedeutung von Aufträgen der öffentlichen Hand, einschließlich Konzessionen, verwendet, um alle Aspekte der Auftragsvergabe durch öffentliche nationale und EU-Einrichtungen abzudecken. Berichterstatter werden gebeten, die Fragen unter dem Blickwinkel zu beantworten, wie EU-Vorschriften/Urteile Anwendung in der Rechtsprechung ihres Landes finden.

In Anbetracht der zunehmenden Vergabe von Aufträgen in Europa innerhalb der letzten Jahrzehnte ist dieses Thema offensichtlich von Bedeutung. Diese Entwicklung hat auch zahlreiche Auswirkungen für das EU-Recht. Zum einen bedeutet eine Auftragsvergabe immer ein Zusammenspiel von Marktteilnehmern. Auch die vier Freiheiten spielen hier eine Rolle. Ein weiterer wichtiger Punkt ist das Wettbewerbsrecht, auch in Verbindung mit den Vorschriften für Dienstleistungen von allgemeinem wirtschaftlichem Interesse (SGEI).

Das Vergaberecht strotzt förmlich vor komplexen Einzelheiten, die gar nicht alle in diesem Bericht angesprochen werden können. Stattdessen konzentriert sich der Fragebogen auf die Aspekte, die offenbar einen systemati-

1. Alle drei Fragebögen wurden ursprünglich auf English ausgearbeitet und anschließend ins Französische und Deutsche übersetzt. Sollten es Abweichungen geben, sind es die englischen Versionen, die am besten das Denken der Berichterstatter repräsentieren.

schen Ansatz bei dem Vergaberecht und dem Binnenmarktrecht im Allgemeinen erschweren. Selbst das derzeit gültige EU-Vergaberecht enthält noch Unvereinbarkeiten – oder zumindest unbeantwortete Fragen. Unstimmigkeiten zwischen dem Regelwerk und anderen EU-Rechtsbereichen können zu juristischen Widersprüchen führen. Aus diesen Gründen müssen die entsprechenden Vorschriften genauer geprüft und verbessert werden. Experten sind aber auch der Auffassung, dass das Vergaberecht aufgrund seiner Ausgefeiltheit gute Möglichkeiten bietet, zur Weiterentwicklung des umfassenderen EU-Verwaltungsrechts beizutragen, die vor wenigen Jahren mit den ersten vorsichtigen Schritten begann.[2]

Kontext

1. Frage
Welchen wichtigen systematischen Herausforderungen standen bzw. stehen die Mitgliedstaaten bei der Annahme eines EU-ähnlichen Vergaberechts gegenüber?

Theoretisch kann man sich dem öffentlichen Auftragswesen auf mehreren Wegen nähern: 1) Vertrauen in Beamte und Gewährung großer Freiheiten bei der Wahl der Auftragnehmer (minimale Regulierung; ehemalige Vorgehensweise im Vereinigten Königreich); 2) kein besonderes Vertrauen in Beamte, es geht schließlich um Steuergelder (oder, wobei diese Alternative einer gewissen ideologischen Note nicht entbehrt: es geht schließlich um den öffentlichen Haushalt), sodass die Vorschriften des öffentlichen Rechnungswesens, einschließlich Prüfung, gelten, aber von Wettbewerbern nicht gerichtlich durchsetzbar sind (interne Regulierung; ehemalige Vorgehensweise in Deutschland); 3) wiederum kein besonderes Vertrauen in Beamte, aber es gilt das Verwaltungsrecht und Recht muss durchgesetzt werden; die Übertragung von durchsetzbaren Rechten auf Wettbewerber ist Mittel zum Zweck (französischer Ansatz).

Das EU-Recht folgt seit van Gend en Loos konsequent der dritten Option, was auch die Annahme der ersten Rechtsmittelrichtlinie 89/665/EWG im Jahr 1989 zeigt. Dies führte wahrscheinlich in mehreren Ländern zu mehr oder weniger großen Anpassungsschwierigkeiten.

2. Der Bereich öffentliche Aufträge ist einer von vier Problembereichen des EU-Verwaltungsrechts, siehe http://www.reneual.eu/

Berichterstatter werden gebeten, die festgestellten Schwierigkeiten zu nennen, die Lösungsmöglichkeiten zu beschreiben und ggf. anzugeben, ob der ursprüngliche rechtliche (einschließlich theoretische) Rahmen weiterhin zu Problemen bei der vollständigen Umsetzung von EU-Recht führt. Weiterhin werden die Berichterstatter gebeten, das Verhältnis von Vergaberecht zum Verwaltungsrecht ihres Landes im Allgemeinen beschreiben.

Grenzen des EU-Vergaberechts

Mithilfe dieses Fragensatzes soll das Gebiet der öffentlichen Aufträge beschrieben werden, wozu auch die Unterscheidung zu Rechtsakten, Verwaltungsakten und anderen Maßnahmen gehört. Gleichzeitig wird der Versuch unternommen festzulegen, welche öffentlichen Aufträge nicht in den Anwendungsbereich des EU-Vergaberechts fallen.

2. Frage
Wie sind öffentliche Aufträge definiert und anhand welcher Kriterien werden sie von Rechtsakten, Verwaltungsakten und anderen Maßnahmen unterschieden, die nicht als öffentliche Aufträge gelten?

Die Unterscheidung zwischen Aufträgen und anderen Maßnahmen, wie Rechtsakten und Verwaltungsakten, ist für die Definition des Anwendungsbereichs des EU-Vergaberechts offensichtlich von Bedeutung.

In Kommission der Europäischen Gemeinschaften gegen Irland (C-532/03, Rettungstransportdienste) erklärte der Europäische Gerichtshof, dass die Erbringung von Dienstleistungen für die Öffentlichkeit durch eine Behörde in Wahrnehmung ihrer eigenen, unmittelbar durch Gesetz verliehenen Zuständigkeiten und unter Aufbringung eigener Mittel nicht durch die EU-Vergaberichtlinien geregelt wird, auch wenn sie hierfür von einer anderen Behörde einen Finanzbeitrag erhält, der einen Teil der Kosten dieser Dienste abdeckt. In einem anderen Zusammenhang (der In-house-Ausnahme) ist der Europäische Gerichtshof in *Asemfo* (C-295/05) der Auffassung, dass sowohl die Tatsache, dass der Erbringer der Bauleistungen gesetzlich verpflichtet war, die von den öffentlichen Stellen erteilten Aufträge auszuführen, als auch die Tatsache, dass der Leistungserbringer die Gebühren für seine Tätigkeit nicht frei festlegen konnte, die Nichtanwendung des EU-Vergaberechts begründen.

Hier können eine Reihe von Aspekten eine Rolle spielen, wie die Tatsache, dass alle an der Leistungserbringung beteiligten Parteien öffentliche Ein-

richtungen waren (bitte, falls erforderlich, mit der nächsten Frage verknüpfen), oder die Tatsache, dass Kosten nur gedeckt wurden und vom Leistungserbringer kein Gewinn erzielt wurde (wobei in *Kommission der Europäischen Gemeinschaften gegen Italienische Republik* (C-119/06); *Ordine degli Architetti delle province di Milano e Lodi, Piero De Amicis, Consiglio Nazionale degli Architetti und Leopoldo Freyrie gegen Comune di Milano* (C-399/98) auch die Relevanz des Aspekts öffentlichen Rechts im Rahmen einer Vereinbarung zwischen einem öffentlichen Auftraggeber und einer Privatperson angesprochen wird).

Weiterhin gilt es, Situationen zu beachten wie diejenige, die für *Helmut Müller* (C-451/08) (Städtebau) relevant ist. *Helmut Müller* muss von *Auroux* (C-220/05) unterschieden werden. Ein möglicher Grund hierfür ist die Tatsache, dass *Auroux* nicht nur Erschließungsentscheidungen und Baukonzessionen betrifft, sondern auch die Errichtung von Bauwerken zum Nutzen der die Konzession ausstellenden Behörde (was auch für *Ordine degli Architetti delle Province di Milano e Lodi* (C-399/98) gilt).

Glücksspielkonzessionen stellen ebenfalls Klassifikationsprobleme dar. Sie wurden in einem Verletzungsverfahren gegen Italien (C-260/04) zunächst als Dienstleistungskonzessionen eingestuft, in der jüngeren Entscheidung *Sporting Exchange* (C-203/08) entschied der Europäische Gerichtshof jedoch anders.

Schließlich sei angemerkt, dass eine »Konzession« in vielen Ländern ein einseitiger Verwaltungsakt ist, gelegentlich einer »Genehmigung« ähnlich. Nach EU-Recht sind Arbeits- und Dienstleistungskonzessionen Aufträge. Eine Reihe von nach nationalem Recht als »Konzession« bezeichneten Rechtsakten müssen nach nationalem und EU-Vergaberecht nicht als öffentliche Aufträge betrachtet werden, dies gilt beispielsweise für Konzessionen für die Rohstoffausbeutung.

3. Frage
Wie ist die In-house-Vergabe, die Partnerschaft zwischen zwei öffentlichen Einrichtungen oder andere Formen der Zusammenarbeit zwischen zwei öffentlichen Einrichtungen geregelt?

Gemäß einer Reihe von Rechtssachen, angefangen mit Teckal (C-107/98) und weitergeführt mit *Coditel Brabant* (C-324/06), *Sea* (C-573/07), und *Kommission der Europäischen Gemeinschaften gegen Bundesrepublik Deutschland* (C-480/06) sind »echte« Formen der In-house-Vergabe und der Zusammenarbeit zwischen zwei öffentlichen Einrichtungen (siehe hierzu 4. Frage) von der Anwendung der Vorschriften und Grundsätze des EU-Ver-

gaberechts ausgenommen. Der erste hier zu berücksichtigende Aspekt, der mit der vorherigen Frage verknüpft ist, betrifft die Frage nach der Regelung dieser Arbeitsformen (z. B. durch einen privatrechtlichen Auftrag, einen Auftrag nach dem Vergaberecht, einen Verwaltungsakt, ein Gesetz oder eine Verordnung).

Außerdem ist zu berücksichtigen, ob eine Partnerschaft zwischen zwei öffentlichen Einrichtungen die Aktivitäten auf einem bestimmten Markt und unter Wettbewerbsbedingungen wesentlich begrenzt, ob eine solche Partnerschaft auch auf kommerzieller Basis und im Wettbewerb mit Wirtschaftsakteuren Leistungen auf dem Markt erbringen kann und, wenn ja, unter welchen Bedingungen und ob die Bedingungen für eine Partnerschaft zwischen zwei öffentlichen Einrichtungen im Sinne der Rechtsprechung (jetzt auch unter Berücksichtigung von *Ordine degli Ingegneri della Provincia di Lecce und andere* (C-159/11)) verstanden und eingehalten werden und, wenn ja, wie?

4. Frage
Gibt es Arten von Konsensualverträgen zwischen dem öffentlichen und privaten Sektor, die nicht in den Anwendungsbereich der EU-Vorschriften fallen und, wenn ja, welche?

Das Urteil in *Stadt Halle* (C-26/03) macht deutlich, dass jede Beteiligung eines privaten Unternehmens die Anwendung der im vorigen Abschnitt angesprochenen In-house-Ausnahme verbietet und die Anwendung der EU-Vorschriften gebietet. In Artikel 12 ff. der Richtlinie 2004/18/EG ist jedoch eine Reihe von Aufträgen genannt, die nicht in den Anwendungsbereich der Richtlinie fallen. Außerdem können auch nicht in diesen Vorschriften genannte Aufträge befreit sein. Dies hängt von der Auslegung der Begriffsbestimmung für öffentliche Bauaufträge, Lieferaufträge und Dienstleistungsaufträge in Artikel 1 der Richtlinie ab. In *Helmut Müller* (C-451/08) war der Gerichtshof beispielsweise der Auffassung, dass der Verkauf von nicht erschlossenem Land oder bereits bebautem Land durch eine öffentliche Einrichtung an ein Unternehmen keinen Bauauftrag darstellt; gemäß *Loutraki* (C-145/08 und C-149/08) gilt dies auch unter Verweis auf Privatisierungsvereinbarungen.

Konzessionen für die Organisation von Glücksspielen, wie solchen in *Sporting Exchange* (C-203/08) könnten ebenfalls unter diesen Punkt fallen, falls ihr konsensueller Charakter akzeptiert wird.

Andererseits gelten EU-Vorschriften, wenn auch noch nicht EU-Richtlinien, für Dienstleistungskonzessionen, die in der neuen Richtlinie über die Vergabe solcher Konzessionen geregelt werden sollen.

5. Frage
Welche Arten von gemischten Verträgen gibt es in Ihrem Land und wie sind diese geregelt?

In *Loutraki* (C-145/08 und C-149/08) und in *Mehiläinen Oy* (C-215/09) sah sich der Europäische Gerichtshof mit gemischten (teils Vergabe, teils nicht Vergabe) Verträgen konfrontiert. Bei der Entscheidung, ob die Vorschriften des Vergaberechts hier anwendbar sind, erwog der Gerichtshof zunächst, ob die Vergabekomponente vom Rest des Vertrags getrennt behandelt werden kann. Wenn ja, ist das Vergaberecht auf diese Komponente anwendbar. Wenn nicht, wird das anwendbare Recht durch das vorrangige Ziel des Vertrags bestimmt. Ist das Problem gemischter Verträge vor diesem Hintergrund in Ihrem Land relevant und, wenn ja, unter welchen genauen Umständen? Wurde die Frage der Trennbarkeit angesprochen und, wenn ja, wie?

Allgemeine Grundsätze des EU-Rechts: Vergaberecht und mehr

Für öffentliche Aufträge gelten selbstverständlich die Vergaberichtlinien. Wie bereits gesagt ist jedoch eine Reihe von Aufträgen ausdrücklich oder implizit vom Anwendungsbereich der Richtlinien ausgeschlossen. Außerdem gelten diese Richtlinien nicht für Aufträge unterhalb gewisser Schwellenwerte und (dies ist rechtlich jedoch noch nicht endgültig festgelegt) für Dienstleistungskonzessionen und nur teilweise für eine Reihe von Dienstleistungsaufträgen (als prioritär definierte Dienstleistungen).

Seit *Telaustria* (C-324/98) gelten die allgemeinen Grundsätze des Verbots der Diskriminierung bzw. der Gleichbehandlung und Transparenz auch für die Vergabe von Aufträgen, die nicht oder nicht vollständig durch die EU-Vergaberichtlinien abgedeckt sind. Jüngste Entscheidungen lassen erkennen, dass dieselben Grundsätze auch für nicht vertraglich geregelte Vereinbarungen gelten und so möglicherweise die Grundlage für das allgemeine EU-Verwaltungsrecht bilden.

6. Frage
Welche Vorschriften oder Grundsätze gelten für die Vergabe von Aufträgen (oder Konsensualverträgen), die in den EU-Vergaberichtlinien ausgeschlossen oder von diesen nicht oder nur teilweise abgedeckt sind?

Gelten die allgemeinen Grundsätze des Diskriminierungsverbots/der Gleichbehandlung und Transparenz für die Vergabe von ausdrücklich ausgeschlossenen Aufträgen (z. B. in Artikel 16 der Richtlinie 2004/18/EG genannten Aufträgen)? Wenn nicht, welche Grundsätze oder Vorschriften gelten dann für diese Art von Aufträgen? Allgemeiner gefragt, wie wurden die vorstehend genannten Grundsätze in der Praxis in Anwendungsregeln umgesetzt, die auch für Aufträge mit einem Wert unterhalb des Schwellenwerts, für nicht prioritäre Dienstleistungen und, jedenfalls im Augenblick, für Dienstleistungskonzessionen gelten?

Dieselben Fragen gelten auch für Situationen, die der von *Helmut Müller* (C-451/08) ähnlich sind (vom Anwendungsbereich der Richtlinien ausgeschlossene Aufträge aufgrund der Nichterfüllung der Begriffsbestimmungen für öffentliche Aufträge wie beispielsweise in Artikel 1 der Richtlinie 2004/18/EG).

Aufträge im Versorgungs- und Verteidigungsbereich sind ebenfalls vom Anwendungsbereich der Richtlinie 2004/18/EG ausgeschlossen. Für diese Bereiche gelten jedoch spezielle EU-Vorschriften, weswegen uns diese Bereiche nicht zwangsläufig interessieren (die etwas weniger strengen Vorschriften beispielsweise der Richtlinie 2004/17/EG könnten jedoch Anregungen für die Konkretisierung der vorstehend genannten Grundsätze bieten).

7. Frage
Gelten die Grundsätze des Diskriminierungsverbots/der Gleichbehandlung und Transparenz (oder daraus abgeleitete Vorschriften) auch für die Auswahl des Begünstigten eines einseitigen Verwaltungsakts?

In den jüngsten Rechtssachen in Verbindung mit Konzessionen zum Betrieb von Glücksspielen, *Sporting Exchange* (C-203/08) und *Garkalns* (C-470/11), wurde die Erteilung von Dienstleistungskonzessionen für derartige Vereinbarungen verneint, die Anwendbarkeit der Grundsätze des Diskriminierungsverbots/der Gleichbehandlung und Transparenz für derartige Vereinbarungen aber bestätigt.

Dieselben Grundsätze (oder daraus abgeleitete Vorschriften) sind möglicherweise für die Vergabe anderer Vergünstigungen (z. B. Konzessionen für

den Rohstoffabbau oder die Nutzung öffentlicher Ländereien, mit der Maßgabe, dass diese Konzessionen nicht als Auftrag betrachtet werden) relevant.

Es sei darauf hingewiesen, dass Artikel 9 ff. der Richtlinie 2006/123/EG über Dienstleistungen im Binnenmarkt Genehmigungsregelungen enthält, die diese Grundsätze erfüllen sollen. In der Rechtsprechung vieler Länder werden derartige Genehmigungen jedoch als einseitige Verwaltungsakte klassifiziert.

Mit dieser Frage soll in Verbindung mit der 2. Frage der allgemeine Grundsatz festgelegt werden, der potenziell für alle die Fälle gilt, in denen der Staat oder eine Einrichtung des öffentlichen Rechts selektiv Gelder verteilt oder Vergünstigungen oder Privilegien vergibt (einschließlich des Rechts, eine Tätigkeit auszuüben) und dabei eine Wahl unter einer Anzahl von Marktteilnehmern trifft, um potenziell begrenzte Ressourcen zu verteilen.

Diese Situation ähnelt in gewissem Grad der Situation, in der einem bestimmten Wirtschaftsakteur in Verbindung mit den SGEI-Vorschriften Exklusivrechte eingeräumt werden, was nachstehend (siehe 11. Frage) diskutiert wird.

Öffentliches Auftragswesen und allgemeines EU-Recht, einschließlich Wettbewerbsrecht und staatliche Beihilfen

Das EU-Vergaberecht basiert auf den Vertragsvorschriften zu den vier Freiheiten. Eine grundlegende Frage in diesem Zusammenhang ist, ob öffentliche Auftraggeber mit Beschaffungsabsichten als private Marktteilnehmer zu betrachten sind oder vielmehr als Einrichtungen, die mit öffentlichem Recht unterliegenden Maßnahmen den Wettbewerb einschränken?

Unter der Annahme, dass Vergaberechtsvorschriften prinzipiell den Wettbewerb zwischen Wirtschaftsakteuren fördern, ist dabei doch zu erwägen, ob einige bestimmte Vorschriften auch dazu missbraucht werden können, den Wettbewerb zu dämpfen. Hinzu kommt, dass die Vorschriften über staatliche Beihilfen Ausnahmen von den Verboten im Falle von Dienstleistungen von allgemeinem wirtschaftlichem Interesse ermöglichen. In diesem Fall ist zu beurteilen, ob und, wenn ja, in welchem Ausmaß, die für Dienstleistungen von allgemeinem wirtschaftlichem Interesse entwickelten Grundsätze denjenigen des Vergaberechts entsprechen.

8. Frage

Können Entscheidungen eines öffentlichen Auftraggebers als Maßnahmen behandelt werden, die Einschränkungen des Binnenmarkts darstellen? Wenn ja, müssen diese mit den Grundsätzen des Diskriminierungsverbots

und der Verhältnismäßigkeit übereinstimmen und zusätzlich durch zwingende Gründe im Allgemeininteresse gerechtfertigt werden?

Die Wahl eines öffentlichen Auftraggebers bei Beschaffungen sollte dessen Präferenzen widerspiegeln (mit der Maßgabe, dass es dadurch nicht in Übereinstimmung mit den in der 6. und 7. Frage genannten Grundsätzen zu einer Diskriminierung auf der Grundlage der Staatsangehörigkeit kommt).

In einigen wenigen Rechtssachen, zuletzt *Contse* (C-234/03), hat der Europäische Gerichtshof seine Begründung ausschließlich unter Verweis auf den Binnenmarkt formuliert (einschließlich Verweise auf zwingende Gründe des Allgemeininteresses), sogar selbst dann, wenn die einschlägigen Einschränkungen ohne Weiteres als Verletzung des Grundsatzes des Diskriminierungsverbots im Sinne der anerkannten Rechtsprechung im Vergaberecht hätten betrachtet werden können.

Mit dieser Frage sollen Informationen darüber gesammelt werden, wie öffentliche Auftraggeber in verschiedenen Ländern sich selbst und die ihnen zur Verfügung stehenden Freiräume bei der Beschaffung betrachten (was auch mit den in der nachstehenden 12. und 13. Frage diskutierten Themen verknüpft ist).

9. Frage
Gibt es Vergabevorschriften, die einem Missbrauch Vorschub leisten und so den Wettbewerb einschränken und, wenn ja, welche?

Im Prinzip werden wettbewerbsbeschränkende Absprachen und Angebotsabsprachen durch die Wettbewerbsvorschriften der Verträge verboten; das Transparenzgebot, die Grundlage zahlreicher Vergabevorschriften, kann aber dazu führen, dass Wirtschaftsakteure derartige Absprachen leichter treffen können.

Andere Vorschriften und Praktiken, beispielsweise langfristige Konzessionen, Rahmenabkommen und zentrale Beschaffungsstellen, können einen Missbrauch verursachen, da Märkte dadurch entweder für einen bestimmten Zeitraum nicht zugänglich sind und/oder öffentliche Auftraggeber dadurch erhebliche Marktmacht erhalten. Unangemessen hohe Qualifikationsanforderungen können den Wettbewerb zum Nachteil von KMU einschränken. Die Rolle von öffentlichen Auftraggebern als Wirtschaftsakteure kann auch zu Wettbewerbsverzerrungen führen (siehe wiederum *Ordine degli Ingegneri della Provincia di Lecce und andere* (C-159/11)).

10. Frage
Dürfen Dienstleistungen von allgemeinem wirtschaftlichem Interesse ohne die im Vergaberecht festgelegten Verfahren an Marktteilnehmer vergeben werden, einschließlich einer direkten Vergabe? Gelten in diesem Fall die EU-Vorschriften für staatliche Beihilfen?

In der bekannten Rechtssache *Altmark* (C-280/00) entschied der Europäische Gerichtshof, dass ausschließliche Rechte in Bezug auf die Bereitstellung von Dienstleistungen von allgemeinem wirtschaftlichem Interesse grundsätzlich und unter bestimmten Bedingungen ohne Ausschreibungsverfahren vergeben werden dürfen. Die Mitteilung der Kommission aus dem Jahr 2012 über die Anwendung der EU-Beihilfevorschriften auf Ausgleichsleistungen für die Erbringung von Dienstleistungen von allgemeinem wirtschaftlichem Interesse steht in Übereinstimmung mit dem Urteil *Altmark* (2012/C 8/02, siehe Punkt 63 ff). Die Mitteilung berührt nicht die Anwendbarkeit des EU-Vergaberechts, stellt aber auch keine verbesserte Kohärenz zwischen Vergaberecht und Beihilferecht dar. Die Mitteilung der Kommission »Rahmen der Europäischen Union für staatliche Beihilfen in Form von Ausgleichsleistungen für die Erbringung öffentlicher Dienstleistungen« bezieht sich stattdessen sehr viel direkter auf die allgemeinen Grundsätze der EU-Vorschriften für das öffentliche Auftragswesen (2012/C 8/03, Punkt 19). Die vorgeschlagene Konzessionsrichtlinie mag eine bessere Vereinbarkeit des Vergaberechts und des Beihilferechts bewirken, die entsprechenden Entwicklungen müssen berücksichtigt werden.

Spezifische Vorschriften, die nur für bestimmte Dienstleistungen von allgemeinem wirtschaftlichem Interesse gelten (z. B. Verordnung (EG) Nr. 1370/2007 über öffentliche Personenverkehrsdienste auf Schiene und Straße), können hier ebenfalls greifen.

Strategische Nutzung des öffentlichen Auftragswesens

Im »Grünbuch über die Modernisierung der europäischen Politik im Bereich des öffentlichen Auftragswesens. Wege zu einem effizienteren europäischen Markt für öffentliche Aufträge« (KOM/2011/15 endgültig) hebt die Kommission als Neuerung »zusätzliche Ziele« für die Regelung des öffentlichen Auftragswesens hervor und stellt damit die Nachhaltigkeit auf dieselbe Ebene wie andere Ziele. Ein Abschnitt des Grünbuches beschäftigt sich mit der »strategischen Nutzung der öffentlichen Auftragsvergabe«. Generell soll damit bezweckt werden, dass diese zusätzlichen Ziele einander verstärken, »in-

dem z. B. der Schwerpunkt vom niedrigsten Anfangspreis auf die niedrigsten Lebenszykluskosten verlagert wird«.

Die folgenden Fragen beschäftigen sich mit den wichtigsten Aspekten der strategischen Nutzung der öffentlichen Auftragsvergabe, einschließlich eines Beitrags zur Erfüllung der Ziele der Agenda 2020.

11. Frage

Lässt sich das öffentliche Auftragswesen als Instrument dafür nutzen, umwelt- und sozialpolitische Ziele zu erreichen und, wenn ja, welche Probleme sind dabei zu erwarten?

Traditionell besteht der Grundgedanke des Vergaberechts darin, ein besseres Preis-Leistungs-Verhältnis zu erreichen. Gemäß dem Grünbuch 2011 müssen jetzt aber auch umwelt- und sozialpolitische Aspekte berücksichtigt werden. Die Wirtschaftskrise mag zu einer höheren Gewichtung des Kostenfaktors führen oder, angesichts der Ressourcenknappheit, öffentliche Auftraggeber dazu motivieren, zwei Fliegen mit einer Klappe zu schlagen. In letzterem Fall stellt sich die Frage, wie das in den verschiedenen Ländern erfolgt. Verfahren, die Lebenszykluskosten berücksichtigen, sind eine Möglichkeit, aber wie weit sind sie entwickelt? Vor diesem Hintergrund stellt sich die Frage, ob strategische Überlegungen von öffentlichen Auftraggebern dahingehend missbraucht werden können, lokale Produkte/Produzenten zu bevorzugen (siehe hierzu auch die 9. Frage)?

Insgesamt gesehen erscheinen die Mitgliedstaaten oder die Regionen der Mitgliedstaaten entweder sehr aufgeschlossen gegenüber einer strategischen Auftragsvergabe oder, im besten Fall, eher zurückhaltend. Die Gründe für diese Einstellung sollten kurz erläutert werden.

Eine Reihe von sekundären Rechtsinstrumenten (z. B. die Richtlinie 2009/33/EG über die Förderung sauberer und energieeffizienter Straßenfahrzeuge und die Verordnung (EG) 2008/106 über ein gemeinschaftliches Kennzeichnungsprogramm für Strom sparende Bürogeräte) enthalten direkte Vorschriften für die Beschaffung. Hier stellt sich die Frage, ob diese Maßnahmen korrekt in nationales Recht umgesetzt wurden und ob öffentliche Auftraggeber dieses Recht auch einhalten.

12. Frage
Wird das öffentliche Auftragswesen als Instrument zur Förderung der Innovation verwendet?

Innovation, die bereits bei der Ausarbeitung der Richtlinien aus dem Jahr 2004 eine Rolle spielte, ist heute (siehe Agenda 2020) ein noch wichtigeres Thema geworden. Die von der EU geschaffenen Rahmenbedingungen, einschließlich eines gewissen Argwohns gegenüber dem wettbewerblichen Dialog (siehe nachstehend 14. Frage), gelten aber in der Regel als eine die Innovation unterdrückende Zwangsjacke.

Die Richtlinien aus dem Jahr 2004 erlaubten bereits leistungsbezogene technische Spezifikationen. Ein erster Aspekt bei der Beantwortung der Frage wäre beispielsweise, inwieweit öffentliche Auftraggeber sich dieser Spezifikationen bedienen und, wenn ja, welche Probleme dabei auftreten. Der wettbewerbliche Dialog sollte ebenfalls die Innovation fördern. Die Frage ist, wie häufig und für welche Projekte der wettbewerbliche Dialog in verschiedenen Ländern genutzt wird.

Weiterhin sind die in Artikel 16(f) der Richtlinie 2004/18/EG genannten Dienstleistungen vom Anwendungsbereich der Richtlinie ausgenommen, wobei als einzige Begründung die Forschung angeführt wird (wobei möglicherweise auch Beihilfeprobleme entstehen). Der neue Richtlinienvorschlag zielt auf die Einführung eines neuen und weitergehenden Verfahrens zur Förderung der Innovation ab. Die Frage ist, wie dies effektiv machbar ist, ohne gegen andere Vorschriften der Verträge, wie Beihilfevorschriften, zu verstoßen.

Dieses Thema steht auch mit gewerblichen Schutzrechten in Zusammenhang.

Nachprüfungsverfahren

13. Frage
Stärkt die Richtlinie 2007/66/EG die Nachprüfung bei Verstößen gegen das EU-Vergaberecht und, wenn ja, in welchem Ausmaß und wie?

Die Nachprüfungsrichtlinie aus dem Jahr 2007 enthält ausgesprochen effektive Nachprüfungsverfahren, die in den meisten Mitgliedstaaten bisher unbekannt waren. Es stellt sich die Frage, wie wirksam dieses System in der Praxis ist. Sind, genauer gefragt, vorläufige Hilfsmaßnahmen vor Vertragsschluss möglich? In welchen Fällen wurde ein Vertrag für nichtig erklärt? Ist

die Verwendung von Bekanntmachungen für die Zwecke der freiwilligen Ex-ante-Transparenz weit verbreitet? Wird in Vergabesachen auch häufig Schadenersatz gewährt und welche Schadenspositionen werden erstattet? Weiterhin sollte berücksichtigt werden, welche Nachprüfungsverfahren in solchen Fällen zur Verfügung stehen, die nicht unter die Richtlinien fallen.

Aus systematischer Sicht gefragt, wie haben sich die neuen Nachprüfungsverfahren im nationalen System bewährt? Besteht, genauer gefragt, eine Präferenz für Verfahren, die die Vergabeentscheidung und möglicherweise den Vertrag betreffen (vorläufige Hilfe, Unwirksamkeit) oder ist das Rechtsmittel der Wahl eher Schadenersatz (was in Deutschland als Unterschied zwischen primärem und sekundärem Rechtsschutz bezeichnet wird)?

Abschluss und Reform

In Verbindung mit einer Reihe von Fragen, insbesondere betreffend die strategische Nutzung des Auftragswesens, wurde bereits auf die laufende gesetzgeberische Arbeit verwiesen. In der letzten Frage werden verschiedene Aspekte dieses Reformprozesses angesprochen, die wahrscheinlich Auswirkungen auf die Regelung des öffentlichen Auftragswesens in den EU-Mitgliedstaaten unter besonderer Berücksichtigung der Modernisierung des EU-Rechts haben werden.

14. Frage
Wie werden die neuen Richtlinien zur Modernisierung des EU-Vergaberechts beitragen?

In diesem Zusammenhang sind möglicherweise mehrere Aspekte von Relevanz. Berichterstatter werden aber gebeten, auch weitere Aspekte anzuführen, die in ihrem Land von besonderer Bedeutung sind.

Ein Aspekt, der mit Sicherheit nicht missachtet werden darf, ist selbstverständlich die neue Richtlinie über Konzessionsverträge, die einen neuen rechtlich bindenden Rahmen für alle Konzessionsverträge, einschließlich Dienstleistungskonzessionen, bilden wird. Bei der Definition einer Konzession steht weiterhin das Recht im Vordergrund, Arbeiten oder Dienstleistungen zu nutzen, außerdem bietet die neue Richtlinie eine Begriffsbestimmung des Nutzungsrisikos. Das wirft die Frage auf, wie dies das unterschiedliche Verständnis von Konzessionen in den verschiedenen Ländern widerspiegelt (siehe auch 2. Frage) und wie die Auflagen für die Übertragung des Nutzungsrisikos in verschiedenen Mitgliedstaaten angewendet werden. Ein weiteres

Problem besteht darin, ob, und wenn ja in welchem Ausmaß, die neuen Vorschriften für institutionelle öffentlich-private Partnerschaften gelten.

Auf politischer Ebene hat die Wirtschaftskrise öffentlich-private Partnerschaften entweder zusätzlich gefördert oder Privatkapital ganz zum Erliegen kommen lassen. So stellt sich die Frage, ob Privatfinanzierung und langfristige Verträge von den Mitgliedstaaten strategisch genutzt wurden. Allerdings kann die Vorliebe für langfristige Verträge durchaus zu einer Begrenzung des Wettbewerbs und der über Jahre wirksamen Unzugänglichkeit einiger Märkte führen (siehe auch 9. Frage).

Ein weiterer Aspekt der Modernisierung betrifft die Vergabeverfahren. Laut einigen Kritikern sind die in den Richtlinien aus dem Jahr 2004 festgelegten Verfahren schwerfällig, kostenintensiv und ineffizient.

Der 2004 eingeführte wettbewerbliche Dialog sollte ein gewisses Maß an Verfahrensflexibilität bereitstellen, wenn auch unter restriktiven und etwas vagen Bedingungen (»komplexe Aufträge«) (siehe auch 12. Frage). Die Frage ist nun, ob die neuen Vorschriften für den wettbewerblichen Dialog die Möglichkeiten dieses Verfahrens verbessern oder nicht.

Generell muss jedoch gefragt werden, welchen Stellenwert Verhandlungen im EU-Vergaberecht einnehmen. Im Gegensatz zu dem in den USA geltenden Verfahren steht man Verhandlungen und einem Dialog zwischen öffentlichen Auftraggebern und Anbietern in der EU aus Angst vor Diskriminierung aufgrund der Nationalität generell negativ gegenüber. Dies könnte sich ändern, wenn mit der neuen Vergaberichtlinie die Art von Flexibilität eingeführt wird, die bereits auf dem Versorgungssektor existiert, sodass öffentliche Auftraggeber generell die Möglichkeit haben, nach vorheriger Bekanntmachung ein Verhandlungsverfahren zu wählen. Hier stellt sich jedoch die Frage nach Mindestanforderungen an Verfahrensgarantien. Auch die Diskussion über die allgemeinen Grundsätze des Diskriminierungsverbots und der Transparenz (siehe oben 6. Frage) spielen hier eine Rolle.

Elektronische Verfahren und generell die Verwendung der Technik sind ebenfalls relevant. Allerdings bestehen Zweifel dahingehend, ob öffentliche Auftraggeber und der Markt in verschiedenen Ländern für ein papierloses Vorgehen bereit sind.

Schließlich darf, auch in Übereinstimmung mit dem systematischen Ansatz dieses Fragebogens, nicht vergessen werden, dass die neuen Vorschriften (und die neuen Definitionen in den Richtlinien) möglicherweise einen Richtungswechsel des EU-Vergaberechts ankündigen (wenn ja, in welche Richtung?), der sich auch auf nationales Verwaltungsrecht auswirken kann. Oder sind diese Anstrengungen einfach als »Instandhaltungsmaßnahmen« an einem Gebäude zu verstehen, dessen Grundfesten unverändert bleiben?

General report

Roberto Caranta[1]

Introduction

Public procurements and more generally public contracts are obviously important in the EU and in EU law. According to data released by the European Commission in 2013, public procurement alone accounts for 19% of EU GDP.[2]

This high number is to a considerable extent due to a trend in outsourcing which has been very strong in Europe during the past decades.[3] Outsourcing has many implications for EU law. To begin with, contracting out involves interactions with market operators. The Four Freedoms have a role to play. Competition law is relevant too alongside with State aid law, including reference to the rules on the provision of services of general economic interest (SGEI).[4]

Public contract law is riddled with challenging technicalities which however cannot all be discussed here. Moreover, as it has been so far the case with EU law (but also with all global legal regime tasked in opening up public contracts markets to competition), the questionnaire and the report shied

1. Professor, University of Turin. I want to thank the institutional and the national rapporteurs for their excellent reports, which taken together represent a giant leap forward in the intellectual understanding of public contract law in the EU. This report cannot do full justice to the richness of insights and perspectives coming from the reports and, as I did in drafting the questionnaire, I have focused on those aspects I thought to be more relevant (which is an eminently subjective judgment). All mistakes are of course mine.
2. http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=6941&lang=en &title = Public- procurement-package%3A-getting-the-best-value-for-money.
3. A number of contributions on this topic were collected by C. Mignone, G. Pericu and F. Roversi Monaco (Eds) *Le esternalizzazioni* (Bologna, Bonomia University Press, 2007).
4. See generally J. Vaquero Cruz ‘Beyond Competition: Services of General Interest and European Community Law’ in G. de Búrca (ed.) *EU Law and the Welfare State. In search of Solidarity* (Oxford, Oxford University Press, 2005).

away from contract implementation, where the role of non-harmonised private or commercial law is often much more relevant than in the award stage.[5]

The questionnaire therefore focused on those aspects of contract award procedures believed to be more problematic from a systematic approach to public contract law and to internal market law generally. Inconsistencies – or, at least unsolved questions – are still to be found in the present regime of EU public contract law. Dissonances between this regime and other areas of EU law may lead not just to legal uncertainty but to legal paradoxes. Those aspects are the ones calling louder for investigation and development in the law.[6]

At the same time, it is believed that because of its level of refinement, which is such to have made it a reference model for the renegotiation of the WTO Government procurement Agreement – GPA,[7] EU public procurement law affords considerable opportunities to contribute in the development of the wider European administrative law which took its first tentative steps only some years ago.[8]

The XXVI FIDE Congress could not come at a more auspicious time, since a complex reform package of EU secondary public contracts law has just been approved.[9]

---

5. In most jurisdictions contract implementation is, with some relevant inroads opened by the new Public Sector Directive, the province of domestic law: see for instance the analysis by I. Mazos – E. Adamantidou 'Grèce' qu. 1, A. Németh 'Hungary' qu. 1, and A. Sołtysińska 'Poland' qu. 1; see also the comparative analysis by M.E. Comba 'Contract Execution in Europe: Different Legal Models with a Common Core' *Eur. Proc. & Public Private Partnership L. Rev. EPPPL* 2013, 302; on the contrary, the award phase is normally regulated under public law (the most remarkable exception being the Netherlands: G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 1); the new directives are however adding a few rules concerning contract implementation: see M. Comba 'Effects of EU Law on Contract Management' in M. Trybus, R. Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* (Bruxelles, Bruylant, 2014) 317.
6. See for instance U. Neergaard 'Public Service Concessions and Related Concepts – The Increased pressure from Community Law on Member States' use of Concessions' *Public Procurement L. Rev*. 2007, 409, calling for a holistic approach to concessions.
7. As it is rightly remarked by E. Clerc 'Suisse' qu. 1.
8. Public contracts are one of the four areas of concern for European administrative law; please refer to http://www.reneual.eu/
9. http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform proposals/index_en.htm ; the proposal was thoroughly analysed in the contributions

The context

Question 1 – National Traditions and EU law

In theory different approaches are possible to public purchase, and in practice the Member States procure differently.[10] Three deeply different patterns may be briefly sketched:

1) trust the public servants and leave them wide discretion on how to choose the best contractor; there is no specific regulation of contracts passed by public authorities (the traditional position in some Nordic Country,[11] including Denmark where the traditional method for forming a contract was based 'on direct contact with potential trading partners, negotiation with them to agree the nature of the supplies and their technical specifications')[12] or there is only minimal regulation (this used to be the case in the UK[13] and in Ireland,[14] but also in Bulgaria).[15]
2) do not trust public servants too much, after all this is the taxpayers' money (or, and there are ideological implications in the alternative, this is the public budget); public account and auditing rules do therefore apply, but they are not enforceable in courts on the behalf of competitors (internal rules: this used to be and to some extent still is the case with Germany);[16]

---

collected by G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* (Copenhagen, DJØF, 2012).

10. This point is very well argued by M. Fruhmann 'Austria' qu. 1; for a comparative analysis see M. Fromont 'L'évolution du droit des contrats de l'administration – Différences théoriques et convergences de fait' in R. Noguellou – U. Stelkens (dir) *Droit comparé des Contrats Publics. Comparative Law on Public Contracts* (Bruxelles, Bruylant, 2010) 263.
11. See A. Dimoulis 'Finland' qu. 1, who stresses how this translated into a tendency to favour local business.
12. S. Troels Poulsen 'Denmark' qu. 1.
13. The case for minimal regulation is forcefully made by B. Doherty 'United Kingdom' qu. 1; the English tradition may also be worded as a preference for controlling procurement by non-legal rather than by legal means: *ibidem* 4 & 5.
14. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 1.
15. A. Velkova 'Bulgaria' qu. 1.
16. See F. Wollenschläger 'Deutschland' qu. 1; see also M. Burgi 'EU Procurement Rules – A report about the German Remedies System' in S. Treumer – F. Lichère (Eds) *Enforcement of the EU Public Procurement Rules* (Copenhagen, DJØF, 2011) 109 f; M. Fromont 'L'évolution du droit des contrats de l'administration – Différences théo-

3) again do not trust public servants too much (or at all, especially so if they are elected officials); however this is administrative law after alland the Rule of law hold sway over public procurement; conferring enforceable rights on economic operators seeking contract opportunities is a means to this end (this is the French approach which was also followed in Luxembourg,[17] Hungary, Spain, Slovenia and Estonia and is possibly brought to the extremes in the Czech Republic).[18]

EU law has *van Gend en Loos* in its DNA and 'vigilance of individuals to protect their rights amount to an effective supervision' mechanism over the member States which complements the powers given to this end to the Commission.[19] Inevitably the EU opted for the third option. Enforceable rights given to economic operators – the *Mobilisierung des Einzelnen* – were a necessary tool to open up national public procurement markets to EU wide competition.[20]

For its own peculiar reasons, the then EEC ended up following the French approach to public procurement regulation.[21] The choice was made unmistakably clear when the first remedies Directive 89/665/EC was enacted in 1989 clarifying the procedural rights of economic operators.[22]

What is now the EU therefore casted the substantive and later remedial rules for the award of public procurement rules on a very specific administrative law model.

Some Member State had to go through a complex evolution process to accommodate the EU law approach. Germany for instance recognised subjective rights and granted judicial protection to economic operators for the first

riques et convergences de fait' in R. Noguellou – U. Stelkens (dir) *Droit comparé des Contrats Publics. Comparative Law on Public Contracts* above fn 10, 270 f.

17. G.F. Jaeger 'Luxembourg' qu. 1: 'Le droit luxemburgeois est essentiellement d'origine napoléonienne'.
18. A. Németh 'Hungary' qu. 1; J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 1; P. & B. Ferk 'Slovenia' qu. 12 (with reference to the scaremonger role played by the Court of auditors); A. Peedu 'Estonia' qu. 1; J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 1.
19. Case 26/62 *van Gend en Loos* [1963] ECR, English special edition, at p. 13.
20. See the very compelling analysis by F. Wollenschläger 'Deutschland' qu. 1. The aims of the EU rules are clearly outined by A. Tokár 'Institutional Report – The context'.
21. Indeed, 'La France a été précurseur s'agissant du droit des marchés publics': A. Merle-Beral – I. Tantardini 'France' qu. 1; see also A. Velkova 'Bulgaria' qu. 1.
22. Please refer to R. Caranta 'Many Different Paths, but Are They All Leading to Effectiveness?' in S. Treumer – F. Lichère (Eds) *Enforcement of the EU Public Procurement Rules* above fn 16, 57 ff.

time in 1993. However this was – and to some extent still is – limited to contracts covered by the public contract directives; the public accountancy approach is still prevalent with reference to other contracts.[23]

An additional facet to the divergence between the EU chosen option and the traditions of some Member States lies in the private law – public law divide. The EU is following a public (administrative) law approach to the choice of the contractual partner by public administrations. The Netherlands and – according to the case law – Germany and – to some extent – the UK instead have a private law approach to the award of public contracts.[24]

This latter option entails again a less structured regulation of public contracts and a consequently wider discretion for contracting authorities. Just to give one instance, the private law principle of good faith may indeed be applied to award procedures, but for sure it is much less constraining than public contract principles like non-discrimination and transparency, not to speak about detailed rules for choosing the contractual partner. It has been remarked that 'characteristic with a common law tradition of subjecting parties to duties to act 'reasonably' and/or (more controversially) in 'good faith', it has been difficult to determine the precise nature and extent of a contracting authority's obligations towards an aggrieved tenderer'.[25]

More generally, as it has been quite well remarked in the German report, the private law approach may suit bipolar litigation, but is hardly adequate as an intellectual framework to address multipolar conflicts between a contracting authority and multiple economic operators all interested in being awarded a given contract.[26] The application of at least the general principles of public law to the award of every contract, including those not covered by the directives, seems an inevitable conclusion; as the German constitutional court has

23. See the detailed analyis by F. Wollenschläger 'Deutschland' qu. 1 and 13.
24. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 1; F. Wollenschläger 'Deutschland' qu. 1; the same is true of Canada: see D. Lemieux 'EU Law of Public Contracts: A View from the Outside' in M. Trybus, R. Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* above fn 5, 466 f.
25. L. Butler 'Below the Threshold and Annex II B Service Contracts in the United Kingdom: A Common Law Approach' in D. Dragos – R. Caranta (Eds) *Outside the EU Procurement Directives – Inside the Treaty?* (Copenhagen, DJØF, 2012) 285; Irish courts have been more resistant to the call of private law: C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 1.
26. F. Wollenschläger 'Deutschland' qu. 1.

finally accepted:[27] 'Während der Bürger prinzipiell frei ist, ist der Staat prinzipiell gebunden'.[28]

The traditions of the Member States are still impacting the way EU public contract law is understood and – when needed – is implemented. For instance, the UK insists or not going beyond the minimum requirements of the measure being transposed so to make most use of the flexibility allowed by the EU Directives.[29] This is often translated into 'cut & paste' or 'copy out' implementation mode[30] which is the approach also followed in other jurisdictions with limited public contract law national traditions like Denmark and Sweden.[31] It is worth noticing how the Netherlands has instead evolved in a matter of a decade form a minimalist approach to a comprehensive codification.[32]

The Dutch approach has a further peculiarity linked to the use of guidelines like the *Gids Proportionaliteit* (Proportionality Guide) which leave contracting authorities the option between complaining or explaining why they do procurement the way they do.[33]

From another point of view, the highly procedural and formal approach to contract award which characterise EU legislation sits uncomfortably with traditions focusing on the integrity of those responsible for procurement decision as it is the case in Finland,[34] while it is well integrated in the overall administrative law approach in Malta.[35]

Member States with a tradition of public procurement legislation, or at least with a developed administrative law approach,[36] are indeed more used to the approach followed by the EU and some of them like the Czech Republic and Italy thought it expedient to recast all their domestic rules, including

27. BVerfGE 116 135 (151, 153); see the in-depth analysis by F. Wollenschläger 'Deutschland' qu. 1.
28. BVerfGE 128, 226 (245).
29. B. Doherty 'United Kingdom' qu. 1.
30. B. Doherty 'United Kingdom' qu. 1.
31. S. Troels Poulsen 'Denmark' qu. 1; P. Norman – E.-M. Mühlenbock 'Sweden' qu. 1.
32. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 1.
33. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 6; a similar approach is used for contracts not covered by the directives in Ireland: C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 4.
34. A. Dimoulis 'Finland' qu. 1.
35. I. Sammut 'Malta' qu. 1.
36. The latter only would be the case with Ireland: see C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 1.

those concerning contracts not covered by the directives, on the lines laid down in the 2004 directives.[37]

What is in any case original in the EU approach, and this also for Member States following the French approach, is that the public contract rules are seen first and foremost as a safeguard of competition (and therefore of the economic operators fighting for their bite of the cake).[38] In domestic law the main aim of public procurement rules was rather the integrity of the public budget. As it has been rightly remarked:

> Les règles françaises de passation des marchés publics se fondent sur le souci de préserver le deniers publics contre d'une part les entreprises, dont on craint qu'elles ne jouent pas le jeu de la concurrence face à des acheteurs publics, et contre les agents publics d'autre part, eux dont l'ignorance de l'économie ou plus rarement la concupiscence pourrait pousser à ne pas choisir le cocontractant de l'administration en fonction de l'intérêt public. Le droit français de marchés publics est donc historiquement et structurellement un droit de la demande, tourné vers la protection des acheteurs publics contre les tiers et contre eux-mêmes. Le droit communautaire des marchés publics au contraire a pour vocation de contribuer à la réalisation du marché intérieur et pour ce faire tend à assurer une égalité entre entreprises provenant d'un autre Etat que celui sur lequel s'exécutera le contrat. Il vise donc à protéger les entreprises contre les personnes publiques, soupçonnées de vouloir favoriser – sciemment ou non – les entreprises nationales et se présente ainsi comme un droit de l'offre.[39]

Finally, some of the 'new' and 'newest' (but not the 'very newest')[40] Member States have yet to fully implement the relevant directives,[41] while other live in a permanent revolution of ever changing rules.[42] It is however fair to say that

---

37. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 1; R. Mastroianni 'Italie' qu. 1, reports that the notion of 'body governed by public law' has thus become a permanent fixture of the Italian administrative law landscape.
38. E.g. Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 31; Case 26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44 is referred to.
39. F. Lichère 'L'influence du droit communautaire sur le droit de contrats publics' in J.-B. Auby – J. Dutheil de la Rochère (dirr) *Droit Administratif Européen* (Bruxelles, Bruylant, 2007) 947. See also R. Mastroianni 'Italie' qu. 1; as it will be stressed again later in this contribution, it is remarkable how the latter aim has suddenly taken the fore in EU law discourse as well with the reform of the substantive directives: see the first of the complementary objectives listed in the Commission Green Paper 'on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market' COM(2011) 15 final.
40. N. Popović – F. Kuhta 'Croatia' qu. 1.
41. A. Velkova 'Bulgaria' qu. 1.
42. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 1; A. Németh 'Hungary' qu. 1.

even very 'old' Member States are still found in breach of EU public contract law.[43]

The boundaries of EU public procurement law

EU law has laid down what are in the end quite detailed rules on the award of public procurement contracts and works concessions. The general principles apply to the award of service concessions. A new directive on concessions is due to be enacted at the time of writing. A preliminary – and somewhat contentious – point has to do with the definition of the province of EU public procurement and concession law. 'Definitions' are important because we are dealing here with EU notions which must be understood (and applied) in a uniform way throughout the EU.[44]

Definition has been problematic with reference to a number of aspects which will be discussed in this part.

Question 2 – Public Contracts and Unilateral Measures

A first problem in the definition of the province of public contract law is the distinction between contracts and authoritative measures, such as legislative or regulatory acts and administrative decisions. In theory, there should be no issue in distinguishing situations where a private party agrees something form situations where it is ordered to do something.[45] In practice it is more complicated,[46] and in some Member States the grey area between contracts and unilateral measures has many nuances.[47] In Portugal for instance public authorities may confer advantages or benefits with unilateral decisions rather than

43. This is the case for instance (but not only) of Italy: R. Mastroianni 'Italie' qu. 1.
44. F. Wollenschläger 'Deutschland' qu. 2, with references to the case law of the Court of Justice.
45. See the clear distinction in M. Fruhmann 'Austria' qu. 1; see also S. Troels Poulsen 'Denmark' qu. 1; N. Popović – F. Kuhta 'Croatia' qu. 2; G.F. Jaeger 'Luxembourg' qu. 2; A.L. Guimarães 'Portugal' qu. 2; E. Clerc 'Suisse' qu. 2; see also, with reference to the specific Swedish concept ot *Myndighetsutövning* P. Norman – E.-M. Mühlenbock 'Sweden' qu. 2.
46. See A. Merle-Beral – I. Tantardini 'France' qu. 2.
47. See the detailed scale designed by J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 4 & 5.

contracts; but this will not – and shall not – short circuit the applicability of public contract rules.[48]

For instance, in many jurisdictions, 'concessions' are classified as a unilateral authoritative administrative decisions at times similar to 'licences'. It is however obvious that the beneficiary of a concession or a licence has in substance agreed to be granted the measure. Actually he/she has normally asked for it. From a legal perspective, granting may be different from agreeing. From an economic point of view, however, the two situations are identical.

EU law finds itself here at a delicate crossroad. It can either preserve the authoritative powers of the Member States (and see the province of public procurement and concession law shrink if the Member States decide to give a public law cloak to some arrangements), or look into the economic substance.

Concerning works and services concessions, EU law has opted for the latter option. Under Article 1(3) of Directive 2004/18/EC, ''Public works concession' is a contract'; the same is true for services concessions under Article 1(4). The notion of 'concession' is an EU concept, meaning that it is exhaustively defined under EU law. National concepts are not relevant.[49]

The *effet utile* of EU law indeed requires focusing on the substance of a given arrangement rather than on its formal appearance.[50] However national classifications and categories are hard to die, has it is shown by the quite idiosyncratic French system of administrative which is in no way being restructured on the simpler lines of EU categories.[51]

It is difficult to say whether this approach focusing on the substance of the transaction has consistently been followed in EU law.[52]

---

48. A.L. Guimarães 'Portugal' qu. 7; that there is no public procurement in these situations is another problem, which will be discussed below.
49. G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions? Recent development in the case law and their implication for one of the last sanctuaries for protectionism' *Public Procurement L. Rev.* 2013, 1.
50. See U. Neergaard 'Public Service Concessions and Related Concepts' above fn. 6, 397.
51. The French system distinguishes public and private contracts of public administration, make a special place to the *délegation de service public* etc.: see A. Merle-Beral – I. Tantardini 'France' qu. 2; some of these distinctions were imitated by other Member States: e.g. G.F. Jaeger 'Luxembourg' qu. 2.
52. Concerning entrustment of SGEIs through legislative measure, the Court of Justice has instead left undisputed the national qualification of the measures at issues: see G.S. Ølykke 'The definition of a 'Contract' Under Article 106 TFEU' in E.

The question of the nature of the arrangement at issue arose in the *Irish ambulances* case.[53] The Eastern Regional Health Authority had directly entrusted the Dublin City Council to provide emergency ambulance services without putting up for tender the service in question. The Court of Justice noted that under the applicable domestic legislation both the Authority and the Council had the power to carry out emergency ambulance services. The Court therefore dismissed the action of the Commission holding 'conceivable that Council provides such services to the public in the exercise of its own powers derived directly from statute, and applying its own funds, although it is paid a contribution by the Authority for that purpose, covering part of the costs of those services'.[54]

This case has to be distinguished from another infringement procedure decided in the same year and concerning the award of a number of contract for healthcare transport services (ambulances again) without a call for tenders in Tuscany.[55]

The first distinction between the Irish and the Italian ambulances cases in the end was that the in the former the services was provided on the basis of law provisions, while in the latter the basis was a contract. Additionally, the Irish case could have been considered as a case of public-public cooperation if only that idea had been already developed at the time the judgement was handed down. Market participants – although not for profits ones – were instead involved in the Italian case, ruling out public-public cooperation.

Therefore arrangements between two public authorities where, on the basis of the authority provided by the law, one is bound to discharge a mission on behalf of the other cannot be classified as procurement contracts, and this even if one authority is paying the other a contribution.

A similar conclusion can be derived from Asemfo, a case on in house providing.[56] As an additional reason to uphold the direct award of some forestry works to an entity owned by the Spanish State and, to a very limited ex-

---

Szyszczak et al. (Eds) *Developments in Services of General Interest* (The Hague, T.M.C. Asser Press, 2011) 113 ff.

53. Case C-532/03 *Commission* v *Ireland* [2007] ECR I-11353; A. Brown 'The Commission Loses another Action against Ireland Owing to Lack of Evidence: A Note on Case C-532/03 Commission v Ireland' *Public Procurement L. Rev.* 2008 NA92.
54. Paragraph 35.
55. Case C-119/06 *Commission* v *Italy* [2007] ECR I-168; see A. 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' *Public Procurement L. Rev.* 2008 NA96.
56. Case C-295/05 *Asemfo* [2007] ECR I-2999.

tent, by the Comunidades autónomas, the Court of Justice stressed that the works provider, being an instrument and technical service of the Spanish Administration, is required to implement the work entrusted to it by its shareholders.[57] Moreover, it is not free to fix the tariff for its actions.[58] The Court of Justice concluded therefore that the relationships in question were 'not contractual' and that the works provider could 'not be regarded as a third party in relation to the Autonomous Communities which hold a part of its capital'.[59]

Asemfo indicates that legislative mandate would by itself be enough to rule out contractual relationships since it denies any freedom of choice to the parties entrusted with the provision of the services at issue.[60] In Libert too, a case concerning land development in which, according to the applicable Flemish legislation, the developer had to build a number of social housing units, the Court of Justice stressed that the requirement of 'a contract concluded in writing' would probably not be met 'inasmuch as the social obligation entailing the development of social housing units is imposed in the absence of an agreement concluded between the housing authorities and the economic operator concerned'.[61]

This is also confirmed by Recital (5) of the new Public Sector Directive. The basic understanding is that nothing in the directive 'obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts'. As a consequence, the provision of services 'based on law or regulations, or employment contracts, should not be covered'.[62]

---

57. Paragraphs 53 f.
58. Paragraph 60.
59. Paragraphs 60 f.
60. See also the discussion in G.S. Ølykke 'The definition of a 'Contract' Under Article 106 TFEU' above fn 52, 111 f.
61. Joined Cases C-197/11 and C-203/11 *Libert* [2013] ECR I-0000, paragraph 111; the factual information provided by the referring court were howeer insufficient to rule in a more definitive way; Advocate General Mazák did however forcefylly stressed that the real question was not whether or not there was any agreementbut whether economic the operator did or did not have an opportunity to refuse to conclude such an agreement (see paragraphs 83 ff, and the discussion of Case C-295/05 *Asemfo* [2007] ECR I-2999 therein).
62. See also A. Tokár 'Institutional Report – The boundaries of EU public procurement law', who rightly also refers to Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175; see also the analysis by F. Wollenschläger 'Deutschland' qu. 2; the case was commented by D. McGowan 'A Contract or Not? A Note on Asociación Profesional de Empresas de

It is suggested that the unilateral conferral, either by legislation or by an administrative order based on legislation, of the duty to discharge a given service amounts to a delegation of duties. Besides the Irish ambulances and the other cases recalled above, another interesting case is the Irish Student transport Scheme.[63] The competent minister gave Bus Éireann, the Irish State-owned operator of bus 'services' the responsibility for the transport of school students allowing the recovery of costs. The Irish court held that there was no contract (and anyway the case could have been considered as an in house arrangement under the Teckal doctrine).[64]

The distinction between contracts and authoritative measures, such as legislative or regulatory acts and administrative decisions is of a more general relevance, since the legal act entrusting SGEI may 'take the form of a legislative or regulatory instrument or a contract'.[65] All the possible options are on different occasions used in the Member States. In Greece the crisis and the consequent need to mobilize private and possibly foreign capital had the choice tilting in favour of contract.[66]

Provided that there is no unilateral power or law mandate, but a freely entered into contract, the fact that costs only were covered and possibly only partially covered, and that no profit accrued to the service provider has no possible relevance in bringing a contract outside public procurement rules.[67] In the Italian ambulances case, whose decision turned anyway on other considerations (and in any case the compensation foreseen was not linked to the costs), the Court of Justice held that the 'pecuniary interest', which is one of the elements in the definition of 'public contract' under what has become Ar-

---

Reparto y Manipulado de Correspondencia (Case C-220/06)' *Public Procurement L. Rev.* 2008 NA 204.

63. See the analysis by C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 2.
64. Case C-107/98 *Teckal* [1999] ECR I 8121; see C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 23; see the discussion in the next paragraph.
65. 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 A. Dimoulis 'Finland' qu. 2; see more generally U. Neergaard 'Services of General (Economic) Interest and the Services Directive' in U. Neergaard, R. Nielsen, L.M. Roseberry (Eds) *The Services Directive* (Copenhagen, DJØF, 2008) 84 ff; G.S. Ølykke 'The definition of a 'Contract' Under Article 106 TFEU' above fn 52, spec. 113 ff; N. Fiedziuk 'Putting Services of General Economic Interest up for Tender: Reflection on Applicable EU Rules' *Common Market L. Rev.* 2013, 99 f.
66. I. Mazos – E. Adamantidou 'Grèce' qu. 1.
67. A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.

ticle 1(2)(a) of Directive 2004/18/EC, can't be ruled out when the remuneration given to the service providers exceeds the costs shouldered by the same provider.[68]

It was doubtful whether this would mean that, were costs only covered, the 'pecuniary interest' could be ruled out. It is worth noting that the case law in the UK had developed on the basis of the assumption that reimbursement of costs put an agreement outside the scope of EU public procurement law.[69]

The issue of 'pecuniary interest' and 'remuneration' resurfaced in the more recent ASL Lecce case where the Court of Justice held that:

> and as is clear from the usual and ordinary meaning of the phrase 'pecuniary interest', a contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service.[70]

Leaving aside legislation and unilateral administrative decisions, another gray area centres on urban planning and development. The most relevant case is Helmut Müller.[71] The case concerned a somewhat complex arrangement. The German federal agency responsible for managing public property (Bundesanstalt) put on for sale land on which the purchaser was subsequently to carry out works corresponding to 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 Court of Justice 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/EC. Indeed, such a contracts require that the public authority assume the 'position of purchaser and not seller'.[72]

---

68. Case C-119/06 *Commission* v *Italy* [2007] ECR I-168, paragraphs 50 f.
69. *R (Chandler)* v *Secretary of State for Children Schools and Families* [2010] LGR 1, and the thorough discussion thereof by B. Doherty 'United Kingdom' qu. 7; see also N. Fiedziuk 'Putting Services of General Economic Interest up for Tender' above fn 65, 109 f.
70. Case C-159/11, *ASL Lecce* [2012] ECR I-, paragraph 29; it is submitted that additional grounds brought this case outside the boundaries of public-public cooperation, which will be discussed in the next section; see however A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.
71. Case C-451/08 *Helmut Müller* [2010] ECR I-2673; see the discussion of the backgrounds of the case in F. Wollenschläger 'Deutschland' qu. 4.
72. Paragraph 41.

Concerning instead the relationship between the public authority with town-planning powers and the purchaser of the land the Court of Justice held that the directive covers contracts for pecuniary interest and 'does not refer to other types of activities for which public authorities are responsible'.[73] This means 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 acted[74] – 'receives a service pursuant to that contract in return for consideration'.[75] The exercise of urban-planning powers, however, has not the purpose of obtaining a contractual service.[76] 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 obligation that there be '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.[77]

Planning decisions therefore do not amount to public procurement contracts.[78]

Helmut Müller has to be distinguished from Auroux and Ordine degli Architetti delle Province di Milano e Lodi.[79] In the latter case, the beneficiary of a building permission had undertaken to build a work according to the specifications given by the contracting authority in lieu of paying duties due to the same contracting authority. This was therefore building licence coupled with works procurement.[80] The agreement relevant in Auroux provided the development of a leisure centre in successive phases, consisting inter alia in the construction of a multiplex cinema and commercial premises intended to be transferred to third parties and works intended to be transferred to the contracting authority (car park as well as access roads and public spaces). The Court of Justice regarded the construction of the leisure centre as a whole as

73. Paragraph 46.
74. Paragraph 49, requiring 'direct economic benefit to the contracting authority' was misleading and Article 1(2) of the new Public Sector Directive runs against this notion.
75. Paragraph 48.
76. Paragraph 57.
77. Paragraph 68.
78. Neither can they be read as works concessions: see paragraph 70 ff.
79. Case C-220/05 *Auroux and Others* [2007] ECR I-385; Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409.
80. See also the analysis in Case C-451/08 *Helmut Müller* [2010] ECR I-2673, paragraphs 50 ff.

corresponding to the requirements specified by the municipality.[81] While it could be disputed that buildings to be sold to third parties amount to 'public works', some of the works envisaged clearly were public, and anyway it was provided that all areas and building not sold at a given date had to be transferred to the municipality. Here we have urban planning and decisions to develop (or re-develop) urban areas plus public works.[82]

In the more recent Libert case, the Court of Justice held that the obligation to build some social housing units in the framework of land development projects concerned placing the said units on the market rather than building public works and consequently ruled out the applicability of Directive 2004/18/EC.[83]

In Ordine degli Architetti delle Province di Milano e Lodi the Court of Justice denied any relevance to the circumstance that the agreement at issue was not ruled by private law in Italy, being rather something akin a public law contract (Öffentlisch-rechtlicher Vertrag according to the German dogmatic).[84]

According to the Court, 'the fact that the development agreement is governed by public law and was concluded in the exercise of public power does not preclude, but rather militates in favour of, the existence of a contract as required by Article 1(a) of the Directive. In several Member States, any contract concluded between a contracting authority and a contractor is an administrative contract, which as such is governed by public law'.[85]

Giving relevance to the distinction between private and public law contracts would easily lead to classification decisions aimed at short-circuiting the application of EU law.[86]

The UK Government has issued specific guidance on the application of the public procurement rules to development agreements especially focusing on the 'direct economic benefit' requirement which seem to anticipate the

---

81. Paragraph 42.
82. See also the analysis in Case C-451/08 *Helmut Müller* [2010] ECR I-2673, paragraphs 52 ff.
83. Joined Cases C-197/11 and C-203/11 *Libert* [2013] ECR I-0000, paragraph 114; the facts of the case had however been insufficiently clarified by the referring court.
84. Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409.
85. Paragraph 73; the public nature of the agreement at issue, and more specifically the circumstance that it had been concluded between public law entities, similarly failed to impress the Court in both Case C-220/05 *Auroux and Others* [2007] ECR I-385; Case 160/08 *Commission* v *Germany* [2010] ECR I-3713, paragraph 90, and Case C-159/11, *ASL Lecce* [2012] ECR I-.
86. This leads to a convergent approach in Switzerland: E. Clerc 'Suisse' qu. 2.

Libert judgment concerning 'affordable homes'.[87] The case law seems instead rather reticent to link different arrangements between municipalities and developers and in establishing the existence of an obligation to build public works in the framework of complex development arrangements.[88] Mere 'intentions' are considered falling outside public contract law in the Netherlands as well.[89]

It is submitted that, in analogy to what was held in the Mödling case, these arrangements should be treated as a whole, taking into account the different agreements concluded and obligations taken to strike out schemes designed to avoid the application of EU rules.[90]

The UK approach might be considered correct in the light of the Court of Justice judgment on an infringement procedure brought against Spain because of the conclusion of development agreements in the Valencia region.[91] The activities entrusted to the developer included the preparation of the development plan, the proposal and management of the corresponding land consolidation project, obtaining for the administration free of charge plots for public ownership and for the community's public land bank, management of the legal conversion of the plots concerned or even the equitable division of the costs and profits between the parties concerned as well as the transactions for financing and guaranteeing the cost of the investments, works, installations and compensation necessary for the execution of the project; the developer might also have been tasked to organise the public competition for the appointment of the building contractor to which the execution of the urban development works was to be entrusted. According to the Court of Justice, 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'.[92]

One could indeed approach the cases on urban planning and building licenses as mixed arrangements in which, under given conditions which will be discussed below under question 5, the public works procurement or concession component has to be dealt with the applicable EU public contract legislation.

87. See the detailed analysis by B. Doherty 'United Kingdom' qu. 2.
88. See again B. Doherty 'United Kingdom' qu. 2.
89. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 2 and 4.
90. Case C-29/04, *Commission v Austria* [2005] ECR I-9705.
91. Case C-306/08 *Commission* v *Spain* [2011] ECR I-4541.
92. Paragraph 96; see also J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 2.

However, as it will be seen, in mixed agreement the ‘main object of the contract’ criterion operates only in so far the object of the contract covered by the public contracts directives is not ‘severable’ from the remaining parts of the contract, an aspect which was not discussed in the infringement procedure against Spain. In any case, it is difficult to see what are the real differences between this case and Ordine degli Architetti delle Province di Milano e Lodi (the building of the Bicocca theatre shell on behalf to the municipality was obviously incidental in the overall development of the area).[93]

The cases on urban development will in the future decided on the basis of Article 1(2) of the new Public Sector Directive which has introduced a new definition: procurement is

> the acquisition by means of a public contract as defined in Article 2(7) 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.

There was no ‘acquisition’ whatsoever in Müller or Libert, while public works were in the end being built both in Auroux, and Ordine degli Architetti delle Province di Milano e Lodi, and in the Valencia case.

The notion of ‘acquisition’ is further elaborated upon in Recital 4 to the new Public Sector Directive: ‘The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities’.

From a comparative law point of view it is interesting to remark that ‘acquisition’ requirement is already at work in the case law of some Member States. For instance it is an element in the Maltese definition of ’public procurement.[94] A contract for the construction of a shopping centre in Tampere to be build by a private contractor on land sold by the municipality was thus held to fall outside the province of EU public contract law.[95] Similarly, ‘Construction concessions’ allowing an undertaking to develop some privately held land are not procurement contracts in Bulgaria.[96] On the other hand, arrangements like the ones in the Czech Republic where contracting authorities

93. Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409.
94. I. Sammut ‘Malta’, background.
95. A. Dimoulis ‘Finland’ qu. 5, where other cases are discussed along the same principles.
96. A. Velkova ‘Bulgaria’ qu. 2.

do not pay directly insurance brokers, who will be paid by insurance companies being awarded service contracts are indeed procurement contracts; the pecuniary interest may be indirect, but the acquisition is plain (and in the end it is the contracting authorities' money ending up in the brokers' pockets).[97] As the Dutch report convincingly remarks, the effet utile of the public procurement directives requires to take into account also indirect compensation.[98]

That 'acquisition' is a much more useful notion than both 'pecuniary interest' – whether direct or indirect – and 'economic benefit' – here again both direct and indirect – is shown by concession contracts, and especially service contracts. What contracting authorities are usually getting from these contracts is the provision on their behalf of some services – often SGEIs – to the general public or to sections thereof.[99]

One problem is that 'acquisition' is not one of the elements in the definition of concession in Article 5 of the Concession Directive, which instead is a clone of the definition found in Article 1 of Directive 2004/18/EC. However, Recital 16 states that:

> In addition agreements that grant rights of way covering the utilisation of public immovable property for the provision or operation of fixed lines or networks intended to provide a service to the public should also not be considered to be concessions within the meaning of this 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 recital is syntactically structured in a German way but English words are used, and 'acquisition' is clearly working as a distinguishing feature for concessions. Moreover, Article 1(1) of the Concessions Directive provides that the directive itself 'establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession'. For reasons of systemic coherence, 'procurement' cannot but have the same meaning here and in Article 1(2) of the new Public Sector Directive. Procurement is therefore the 'genus' and 'acquisition' is one of its defining elements. Concession being a 'species' of procurement, it necessarily implies 'acquisition'.

97. See the analysis of this and other situation in the very articulate analysis by J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 2.
98. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 2.
99. See also A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.

As already remarked at the beginning of this section, the word ’concession’ may cover very different types of contractual arrangements and non-contractual unilateral measures. The basic idea behind all of them is that the State (or another public law entity) is acting as a bouncer which must be passed to engage in certain economic activities. The State may want to act as a bouncer for many different reasons. The most relevant here seems to be: 1) competitive market conditions alone would not allow a profitable exploitation of given works or the provision of some services but the competent public authority has decided that those works and services must be made available to the general public or a section thereof; 2) competitive market conditions alone would allow a profitable exploitation of works or provision of services but the competent public authority has decided that those works or services must be made available at prices which are lower or conditions that are different from those which will result from the free play of demand and supply (the universal service principle is the most relevant instance);[100] 3) competitive market conditions alone would allow a profitable exploitation of works or provision of services but the competent public authority (here normally the State) has decided because of overriding reasons in the public interest that only economic participants having some qualification may provide those services.

In both the first and second situations two options (which are not mutually exclusive) are open to the competent authority:
1) to limit access to the market, so that only one or few economic operators can act on it; special or exclusive rights are awarded to the lucky one(s) who end(s) up having a monopolistic or oligopolistic market to himself (or themselves); the changed market structure may 1a) make the economic activity (potentially) attractive, even if universal service has to be provided, by granting a special or exclusive right; in this case we would normally have a concession under EU law (and under the law of many Member States), but special or exclusive rights my also be granted through legislative measures;[101] 1b) the changed market structure may even make the economic activity so attractive that market operators are ready to pay to be awarded those special or exclusive rights; based on the ’acquisition’ element these latter cases should not be considered concessions under EU law; in many Member States these

100. See J. Davies – E. Szyszczak ‘Universal Service Obligations: Fulfilling New generations of Services of General Economic Interest’ in E. Szyszczak et al. (Eds) *Developments in Services of General Interest* above fn. 52, 155.
101. See G.S. Ølykke ‘Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?’ above fn 49, 12 f.

would be licences; for instance, a contract whereby a contracting authority confers the exclusive right to exploit a broadband telecommunication network – which will be called a licence in most Member States – still is not a concession under the definition in Article 2 of the Concessions Directive.[102]
2) to grant some compensation to those engaged in the activity; 2a) this would be necessary if, even in a market made monopolistic, there is not (enough) profit to be made to attract any interest from economic operators; this would again be normally achieved through what under EU law is a concession, more specifically a concession combining the right to exploit the works or services with a price; 2b) compensation could as well as go alone (without the grant of special and exclusive rights) by supporting the creation of a competitive market; this can be done by providing the intended beneficiaries of public largesse with vouchers to exchange against the services (or part of the costs thereof); as it will be seen, this is no concession and more generally no public procurement. It was often assumed in the past that creating a monopoly would reduce the need for compensation and vouchers are a relatively new development, but this is still a possible option for contracting authorities, one that normally falls outside public procurement law.

Where 3) competitive market conditions alone would allow a profitable exploitation of works or provision of services but the competent public authority (here normally the State) has decided that only economic participants having some qualification may provide those services. This is normally done to solve 'asymmetric information problems between providers and consumers which would be present if the quality of the services was not ensured by requirements that must be fulfilled to obtain authorisation'.[103] In principle there should be no limit to entry into the market different from compliance with the conditions required. Under Article 9 of Directive 2006/123/EC on services in the internal market, however Member States may make access to a service activity or the exercise thereof subject to an authorisation scheme where the need for such scheme is justified by an overriding reason relating to the public interest and the objective pursued cannot be attained by means of a less restrictive measure; in any case those schemes shall not discriminate against the potential service providers.[104] One specific instance is provided in the leg-

102. See the case discussed by G.F. Jaeger 'Luxembourg' qu. 2.
103. G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, 8.
104. On the directive see the contribution collected by U. Neergaard, R. Nielsen, L.M. Roseberry (Eds) *The Services Directive* above fn 65; see also C. Barnard 'Unravelling the Services Directive' *Common Market L. Rev.* 2008, 323.

islation on telecommunications; in principle, under Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive) any operator meeting given conditions has a right to be authorised to provide these services. The assignment of radio frequencies for telecommunications is however subject to restrictions and follows competitive procedures under Articles 9 f of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive). The essential aspect is that there is no 'acquisition' here, so no public procurement under either EU law or the national law of the Member States.

It is true however that so far the case law has not been following a consistent line. In particular the recent Belgacom judgment adds much to the confusion.[105] The case concerned the transfer by some bodies governed by public law of their television broadcasting service activities and television subscription contracts signed by their clients and, for a fixed period, ancillary rights on their cable networks and the grant of long-term leasehold rights on those networks. According to the Court, the agreement in dispute must be examined as a service concession because 'in so far as it obliges the transferee to pursue the activity transferred, such an agreement is a public contract for the provision of services' and because 'the requirement that the risk of operation must be passed on to the transferee' is also fulfilled.[106]

The latter requirement is for sure characteristic of concessions – and for what matters of every authorisation, licences or whatever its name administrative measure allowing an undertaking to operate on the market. The point is that the distinguishing criterion between procurement – in a wide sense – contracts and unilateral measures is traced on the existence or not on an obligation to pursue the activity at issue.[107] This is a rather novel criterion, which might be traced to some passages in Müller.[108] In that case, however, the absence of a binding obligation to develop the land was taken as an indication of the absence of a contract. In a somewhat iterative way the Court held that:

105. Case C-221/12 *Belgacom NV* v *Interkommunale voor Teledistributie van het Gewest Antwerpen (Integan)* [2013] ECR I-.

106. Paragraph 26.

107. See also A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.

108. Case C-451/08 *Helmut Müller* [2010] ECR I-2673, paragraph 63, referring to a 'direct or indirect obligation to carry out the works'.

> Article 1(2)(a) of Directive 2004/18 defines a public works contract as a contract for pecuniary interest. That concept is based on the premise that the contractor undertakes to carry out the service which is the subject of the contract in return for consideration. By concluding a public works contract, the contractor therefore undertakes to carry out, or to have carried out, the works which form the subject of that contract.[109]

To hold like in Belgacom that the reciprocal is true, and that we have a procurement contract every time there is an obligation for the economic operator to do something, is a well-known logical fallacy.

Belgacom is at odds with the case law having developed the notions of 'acquisition', 'pecuniary interest' or 'economic benefit'. It is submitted that an innovative approach should not have been developed without even hearing the Advocate general. Moreover, Belgacom much enlarges the province of public procurement law, since all the times a special or exclusive right is granted the beneficiary is under a duty to perform the relevant activity. Also, in many jurisdictions (Italy being an instance), the beneficiary of a building permission is under a duty to develop the land according to the permission given to him/her. This means that situations like the one present in Müller should then be treated like public procurement cases.[110]

The difficulty of distinguishing between procurement contracts and legal acts which do not imply the acquisition of works, goods, or services is illustrated by another type of licences having raised questions of classification, that is licences to operate games of chance.[111] In one earlier case the Court of Justice found that, by renewing 329 licences for horse-race betting operations without inviting any competing bids, Italy had failed to fulfil its obligations under the (then) EC Treaty and had, in particular, infringed the general principle of transparency.[112] In its application the Commission had submitted that, under Community law, the award of licences for horse-race betting operations had to be considered as a public service concession. Italy never challenged this qualification, limiting itself to list a series of grounds which in its opinion, ultimately not shared by the Court of Justice, justified direct award.[113]

109. Paragraph 60.
110. Case C-451/08 *Helmut Müller* [2010] ECR I-2673.
111. The case law is analysed in details by G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, 1.
112. Case C-260/04 *Commission* v *Italy* [2007] ECR I-7083.
113. See paragraph 20; the classification had some precedents in cases which however were not public contract cases: Joined cases C-338/04, C-359/04 and C-360/04

In the more recent Sporting Exchange case the issue of the qualification of betting licences was hotly debated, and the Court of Justice changed its position. It based its reasoning on '[t]he fact that the issue of a single licence is not the same as a service concession contract', to conclude that the general principles of the Treaty, in particular the principle of equal treatment and the obligation of transparency, do also apply when granting an administrative licence such as that at issue in the main proceedings.[114]

Here again, as it was the case with the urban planning cases, the distinguishing feature is that the contracting authority does not acquire anything (be it work, supply, or services), even if it could get a payment.[115]

Provided that in many jurisdictions the State is getting a share of the betting money and therefore those having been given a betting licence are not left the option to set idly, if the Belgacom[116] criterion were to be applied, we would back to square one, and these licences would become again service concessions as it was the case in the early infringement procedure against Italy.[117]

Article 10(9) of the Concessions Directive expressly provides that its provisions shall not apply to service concessions for lottery services falling under CPV code 92351100-7, awarded by a Member State to an economic operator on the basis of an exclusive right granted pursuant to applicable national laws, regulations or administrative provisions in accordance with the Treaty Treaties.[118]

This does not seem to change the legal position flowing from Sporting Exchange (or Belgacom). The general principles of the Treaty will in any case continue to apply. It is to be remarked that in many Member States

---

Placanica [2007] ECR I-1891; the judgement was rightly criticized by A. Brown 'Seeing Through Transparency: the Requirement to Advertise Public Contracts and Concessions Under the EC Treaty' in *Public Procurement L. Rev.* 2007, 12.

114. Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 46; see the discussion in G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, 8 f; see also Case C-470/11 *Garkalns SIA* [2012] ECR I-, paragraph 42; see also, with reference to the situation in Greece, I. Mazos – E. Adamantidou 'Grèce' qu. 1.
115. See also E. Clerc 'Suisse' qu. 2, observing that the State here 'n'acquiert aucune prestation'.
116. Case C-221/12 *Belgacom NV* v *Interkommunale voor Teledistributie van het Gewest Antwerpen (Integan)* [2013] ECR I-.
117. Case C-260/04 *Commission* v *Italy* [2007] ECR I-7083.
118. See also Recital 35.

transparent and competitive procedures have to be followed as a matter of domestic law when granting licences or other privileges.[119]

It is worth noticing that the principle being the same, as it will be further discussed under question 7, prior administrative authorisation schemes too must be based 'on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily'.[120]

From a comparative law point of view it is to be finally recalled that in many jurisdictions, 'concessions' have been traditionally understood as unilateral administrative decisions, at times similar to a 'licences', while in others the word 'concession' covers both consensual and unilateral legal acts.[121] Under EU Law, works and services concessions are contracts. A number of legal acts named 'concessions' under national law may be held not to be public contracts under either national or EU public contracts law, such as for instance concessions for the exploitation of natural resources,[122] or chimney sweeping services.[123]

119. E.g. S. Troels Poulsen 'Denmark' qu. 2; but see also under qu. 7; for similar development in the Swiss case law see E. Clerc 'Suisse' qu. 2; the situation is somewhat different in France and in the Czech republic concerning transparency: A. Merle-Beral – I. Tantardini 'France' qu. 4; J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 6 & 7.
120. Paragraph 50; Case C-389/05 *Commission* v *France* [2008] ECR I-5397, paragraph 94, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 64 are referred to; see also the analysis by G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, 1.
121. The latter is the case for instance in Austria: M. Fruhmann 'Austria' qu. 2. In Portugal the tendency is to consider concessions as contracts but it has not always been like this: A.L. Guimarães 'Portugal' qu. 2. Concessions are granted both through contracts and administrative decisions in Germany: F. Wollenschläger 'Deutschland' qu. 2. Concessions would be normally considered as public contracts in Spain, but those concerning the public domain are though to be administrative decisions: J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 2; see also the analysis by U. Neergaard 'Public Service Concessions and Related Concepts' above fn. 6, 387.
122. But see also Directive 94/22/EC on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, which is referred to by B. Doherty 'United Kingdom' qu. 2; see also E. Clerc 'Suisse' qu. 2.
123. A. Dimoulis 'Finland' qu. 7.

Question 3 – Public Contracts and the Organisation of the Public Sector

The distinction between contracts and authoritative measures is often interwoven with, but different from the distinction between agreements between the public sector and market participants on the one hand and organisational decisions within the public sector. The Irish ambulances and Asemfo cases should rather be analysed from the latter perspective.[124]

From a constitutional point of view, already Article 345 TFEU[125] and more specifically Article 14 TFEU and Protocol No 26 annexed to the Treaties give the Member States the freedom to decide whether to have recourse to the market for the provision of goods and services or to keep the production of these goods and services in house.[126] So for instance, turning the boards on decades long global policies favouring externalisation, in the Netherlands the belief is growing that 'market performance, and competition, are not always able to provide the desired outcomes for certain services'.[127]

The option to keep the provision of given goods or services in the public hands include the possibility, which normally must be provided under national law, to set up different forms of cooperation between different public law entities,[128] a possibility that some Member States consider not only natural but a necessary,[129] cherished part of their national identity.[130]

---

124. Case C-532/03 *Commission* v *Ireland* [2007] ECR I-11353, and Case C-295/05 *Asemfo* [2007] ECR I-2999.
125. On the systemic relevance of Article 345 TFEU for SGEIs see U. Neergaard 'Services of General (Economic) Interest and the Services Directive' above fn 65, 75 f; A. Sánchez Graells *Public Procurement and EU Competition Rules* (Oxford, Hart, 2011) 232 ff.
126. The point is rightly stressed by B. Doherty 'United Kingdom' qu. 2 f; see also N. Fiedziuk 'Putting Services of General Economic Interest up for Tender: ' above fn 65, 87 f; D. Casalini 'Beyond EU Law: the New 'Public House' in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 151 ff; M. Ross 'Article 16 EC and services of general interest: from derogation to obligation' *Eur. L. Rev.* 2000, 22; the situation is different in Switzerland: E. Clerc 'Suisse' qu. 10.
127. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 3.
128. E.g. S. Troels Poulsen 'Denmark' qu. 2; J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 2 f. In the UK different departments are considered as part of the Crown, which itself is indivisible; interdepartmental cooperation is therefore an internal matter and public contract rules are not relevant; the situation is different with non-departmental public bodies: B. Doherty 'United Kingdom' qu. 2 f.
129. A. Merle-Beral – I. Tantardini 'France' qu. 3; see also A. Peedu 'Estonia' qu. 1 and 3.

While the choice to keep a given service in house in principle depends on political preferences which fall within the discretion left to the Member States, and there may be sound reasons for doing so,[131] it has been remarked that some contracting authority may be pushed to rule out externalisation to avoid the need to have to follow public procurement procedures considered to be too cumbersome.[132]

Said otherwise, EU public contracts law is not applicable when the procuring entity builds the works, or provides the goods and the services needed with its own means according to the freedom of organisation granted by the Treaty.[133]

In principle, as is now said clearly in Article 1(6) of the Public Sector Directive,

> Agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities or groupings of contracting authorities and do not provide for remuneration to be given for contractual performance, are considered as a matter of internal organisation of the Member State concerned and, as such, are not affected in any way by the present Directive.

However the case law, and today the legislation, have gone a long way in laying down the conditions under which the exercise of the institutional and procedural autonomy does not amount to a breach of public procurement legislation.

---

130. F. Wollenschläger 'Deutschland' qu. 3; for some comparative insights E. Picard 'The Public-Private Divide in French Law Through the History and Destiny of French Administrative Law in M. Ruffert (Ed.) *The Public-Private Divide: Potential for Transformation?* (London, BIICL, 2009) 81 ff, and M. Lombard 'L'impact du droit communautaire sur le service public' D. Ritleng 'L'influence du droit communautaire sur les catégories organiques du droit administratif' and J. Ziller 'Les droits administratifs nationaux : caractéristiques générales' al published in J.-M. Auby – J. Dutheil de la Rochère (dirr.) *Droit Administratif Européen* above fn 39, at 969, 866, and 546 respectively.
131. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 3.
132. B. Doherty 'United Kingdom' qu. 3; J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 9, concerning utilities; the same concern does not hold in other Member States: e.g. A. Peedu 'Estonia' qu. 3.
133. See the conclusions by AG Geelhoed in Case 295/05 *Asemfo* [2007] ECR I-2999, paragraph 49; see also B. Doherty 'United Kingdom' qu. 2; the situation is somewhat different in Switzerland, where Article 94 of the Constitution provides that the production of goods and the provision of services on the market is in principle reserved to the private sector (E. Clerc 'Suisse' qu. 10).

Besides central purchasing bodies, which were already subject to the detailed rules laid down in Article 11 of Directive 2004/18/EC, and the conferral of exclusive rights under Article 18,[134] two different kinds of arrangements are specifically relevant here: in house providing and public-public partnerships or cooperation.[135] They are to be ruled in different sections of Article 11 of the new Public Sector Directive.[136]

The leading case on in house is *Teckal*, a case concerning the award of service concessions.[137] Moving from the notion of contract as an agreement between two separate persons, the Court held that 'in accordance with Article 1(a) of Directive 93/36, 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 time, that person carries out the essential part of its activities with the controlling local authority or authorities'.[138]

The successive case law has refined the requirements of legitimate in house providing holding that 1) private participation in the capital of the controlled entity rules out in house,[139] 2) the 'similar' control may be exercised jointly by several contracting authorities,[140] and 3) the activities performed by

134. On the use of the latter A.L. Guimarães 'Portugal' qu. 2.
135. Even if the evolution of the case law has been all but tidy, the two are very well distinguished by A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.
136. Most of the works on in house also deal with public-public partnerships: see the works collected by M. Comba – S. Treumer (Eds) *The In-House Providing in European Law* (Copenhagen, DJØF, 2010); see also D. Casalini 'Beyond EU Law: the New 'Public House' in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eeds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 164 ff.
137. Case C-107/98 *Teckal* [1999] ECR I 8121; see A. Tokár 'Institutional Report – The boundaries of EU public procurement law'; the background and aftermaths of the case are analysed by M. Comba 'In-House Providing in Italy: the circulation of a model' in M. Comba – S. Treumer (Eds) *The In-House Providing in European Law*, above fn 135, 101 ff.
138. Paragraph 50.
139. The leading case is Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49; see also Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 30, and Case C-573/07 *Sea* [2009] ECR 8127, paragraph 46.
140. Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 45; see also Joined cases C-182/11 and C-183/1 *Econord* [2012] ECR I-, paragraphs 28 ff; see R. Noguellou 'Scope and Coverage of the EU Procurement Directives' in M. Trybus, R.

the joint entity must essentially be addressed to the contracting authority(ies) exercising control considered together.[141]

In a number of Member States like Austria the Teckal case law has been codified in the national legislation to provide a firmer guidance to contracting authorities.[142] In others, like Germany, the case law of the Court of Justice plays direct effects in delimiting what is allowed under the law.[143]

The English Brent London Borough Council v Risk Management Partners Ltd case provides a very interesting example of in house providing.[144] A number of London Boroughs directly awarded insurance contracts to the London Authority Mutual, a mutual insurance company owned by the same Boroughs. The awards were challenged by a commercial insurance company but were upheld by the Supreme Court, the 'similar control' requirement being met.[145]

Quite often in house entities have all the characteristics of bodies governed by public law and are therefore bound to follow public procurement rules in their contractual activities, leaving a loophole in the public procurement legislation when they are not.[146] French and Italian law extend this obligation to all in house entities.[147]

Concerning partnership agreements which do not entail the setting up of a common – possibly in house – entity, the leading case stems from an infringement procedure against Germany concerning the waste disposal arrangement concluded by the City-state of Hamburg and four adjoining Landkreise.[148]

Beside collection and treatment of wastes, we find cases of cooperation between authorities concerning water provision services,[149] or more generally the management of water resources (and potential dangers they pose) as it is the case with cooperation among waterschappen (waterboards) in the Nether-

Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* above fn 5, 20 f; for specific arrangements meeting this requirement see also A. Németh 'Hungary' qu. 3; A. Sołtysińska 'Poland' qu. 3, and J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 3.

141. Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 57.
142. M. Fruhmann 'Austria' qu. 2.
143. F. Wollenschläger 'Deutschland' qu. 3.
144. [2009] ECWA Civ. 490.
145. See the analysis by B. Doherty 'United Kingdom' qu. 2.
146. A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.
147. A. Merle-Beral – I. Tantardini 'France' qu. 3.
148. Case C-480/06 *Commission v Germany* [2009] ECR I-4747.
149. A. Merle-Beral – I. Tantardini 'France' qu. 3.

lands;[150] rescue services,[151] or health care services.[152] In some Member States this include the provision of back office services, such as IT support.[153]

The problem here is that, unlike with in house provision, the Court of Justice never spelt out a list of requirements.[154] The case law has therefore to be analysed in some depth. In the German case the City-state of 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.[155] The Commission brought an infringement procedure against Germany for the failure to have a call for tenders in the context of a formal tendering procedure. The Court of Justice accepted that the four Landkreise concerned did not exercise any 'similar' control neither over the other contracting party, the City-state of Hamburg, nor over the operator of the waste incineration facility, which is a company whose capital consists in part of private funds.[156] Considering however the infringement procedure only concerned the contract between the City-state of 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.[157]

The requirements of genuine public-public cooperation have been somewhat refined in the case brought by the local Architects Board and a number of professionals against the Health Service of Lecce, in the South of Italy.[158]

---

150. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 3.
151. A. Dimoulis 'Finland' qu. 3.
152. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 10.
153. Again G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 3.
154. See Advocate general Trstenjak: Case C-159/11, *ASL Lecce* [2012] ECR I-, paragraphs 66 ff, proposing her own list of criteria; see also D. Casalini 'Beyond EU Law: the New 'Public House' in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 174 ff.
155. While the details may change, similar arrangements are widespread: e.g. S. Troels Poulsen 'Denmark' qu. 3.
156. Paragraph 33.
157. Paragraph 38; see also S. Treumer 'In-House Providing in Danemark' in M. Comba – S. Treumer (Eds) *The In-House Providing in European Law* above fn 135, 174 ff; the case is read in the context of entrustment of SGEIs by G.S. Ølykke 'The definition of a 'Contract' Under Article 106 TFEU' above fn 52, 116 ff.
158. Case C-159/11, *ASL Lecce* [2012] ECR I-.

The Health Service of Lecce had concluded with the local University a consultancy contract relating to the study and the evaluation of the seismic vulnerability of its hospital buildings. According to the public authorities concerned, the consultancy contract constituted a cooperation agreement between public administrations in respect of activities of general interest. Referring to the Hamburg waste case, the Court of Justice affirmed 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'.[159] 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. Consequently, the public task which is the subject-matter of the cooperation between the public entities established by the abovementioned contract did not appear to ensure the implementation of a public task which the ASL and the University both have to perform.[160] Moreover, the agreement allowed the University to have recourse to 'highly qualified external collaborators', possibly including private service providers, which would therefore end up benefiting from a public service contracts without going through a competitive award procedure.[161]

The latter aspect was possibly what pushed the Court of Justice in deciding that the agreement was not a genuine 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.[162]

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.[163]

159. Paragraph 35.
160. Paragraph 37.
161. Paragraph 39; the case was followed in order in C-564/11 *Consulta Regionale Ordine Ingegneri della Lombardia* [2013] ECR I-; in that case a notice had been published, but participation was reserved to universities; the Court of Justice did not elaborate on this aspects since the referring court had not asked; and in order C-352/12 *Consiglio Nazionale degli Ingegneri* [2013] ECR I-, a case where a negotiated procedure would have probably been possible under Article 31 Directive 2004/18/EC.
162. As it was the case in the Czech case discussed by J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 3.
163. See also paragraph 40; on the same lines the order in C-564/11 *Consulta Regionale Ordine Ingegneri della Lombardia* [2013] ECR I-, paragraph 35, and C-352/12 *Con-*

That would be unduly restrictive, since different public authorities may well pursue different general interests without this making cooperation between them less sensible. The distinction should rather be between public law missions and commercial activities.[164] 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.[165] This analysis is confirmed by the more recent Piepenbrock case, in which the Court of Justice held that a situation in which one public entity assigns to another the task of cleaning certain office, administrative and school buildings, while reserving the power to supervise the proper execution of that task, in return for financial compensation intended to correspond to the costs incurred in the performance of the task, the second entity being, moreover, authorised to avail itself of the services of third parties which might be capable of competing on the market for the accomplishment of that task does not establish cooperation between the contracting public entities with a view to carrying out a public service task that both of them have to perform.[166] Therefore the Czech practice of 'extending' service contracts – for instance bus services or waste collection – from one municipality to the other is inconsistent with EU law.[167] More correctly a court in Bayern found a contract between two public hospitals whereby one of them sold, at no profit, medicines and medical devices to the other to be in breach of EU law.[168]

Here again the cleaning services at stake in Piepenbrock and the procurements relevant in the national cases just recalled are commercial in nature and do not amount to public service missions. Moreover, an economic operator (the one already providing the services to the 'first' contracting authority)

---

siglio Nazionale degli Ingegneri [2013] ECR I-, paragraph 43; the requirement of the discharge of a common public task is deduced from the idea of cooperation by Advocate general Trstenjak: Case C-159/11, *ASL Lecce* [2012] ECR I-, paragraphs 76 ff of the conclusions.

164. See the discussioni by G.S. Ølykke 'The definition of a 'Contract' Under Article 106 TFEU' above fn 52, 118 f; P. & B. Ferk 'Slovenia' qu. 3, rather refer to the distinction between economic and non-economic actitivies; this would however exclude public public cooperation in the area of SGEIs.
165. Case C-305/08 *CoNISMa* [2009] ECR I-12129.
166. Case C-386/11 *Piepenbrock Dienstleistungen GmbH & Co. KG* [2013] ECR I-.
167. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 4 & 5.
168. OLG München, PharmR 2013, S. 249; see the discussion in F. Wollenschläger 'Deutschland' qu. 3.

gets an advantage over its competitors by becoming the beneficiary of a direct award.[169]

The Greek practice of cooperation contracts whereby municipalities directly award the design and execution of works to bodies governed by public law outside any in house relation (unlike in Asemfo)[170] is obviously problematic, since design and execution are commercial activities offered by many private undertakings.[171]

At the same time, it would seem quite an inroad in the organisational autonomy of Member States to forbid them to have technical operative structures which are available to all the public sector (or to 'dependent' – sous tutelle – public authorities).

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 back office services, such as IT support, which do not take the permitted forms of central purchasing arrangements but still may be present in some Member States.[172]

The question will have now to be referred to the provisions of Article 11(4)(a) of the new Public Sector Directive, which on the one hand refers to objectives but on the other requires that these objectives are in common to the contracting authorities involved.[173]

In any case and already today the main avenues to structure cases of cooperation in commercial procurement between contracting authorities seems either for them to establish a jointly controlled in-house authority acting as central purchasing body or to entrust one of them with the tasks of central purchasing body.[174] Indeed, under Article 11(2) of Directive 2004/8/EC contracting authorities which purchase from or through a central purchasing body shall be deemed to have complied with the same directive insofar as the central purchasing body has complied with it. The problem with cases like Piepenbrock is that the scope of a procurement contract is significantly altered after its award, widening its parties and in most cases the quantities originally

---

169. See also the analysis by A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.
170. Case C-295/05 *Asemfo* [2007] ECR I-2999.
171. These contracts are outlined in I. Mazos – E. Adamantidou 'Grèce' qu. 2.
172. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 3.
173. See also Article 15 of the Concessions Directive.
174. The in house option is indeed recalled by OLG München, PharmR 2013, S. 249 (254 f); see again the discussion in F. Wollenschläger 'Deutschland' qu. 3.

foreseen.[175] This runs against the pressetext case law which is to be codified in Article 72 of the new Public Sector Directive.[176]

Beside in house providing and public-public partnerships, delegation of public powers and functions must also be considered. Delegation often takes place through legislation, but quite often the legislative authorisation to delegate and possibly the actual identification of the public law entity which is delegated by the law itself is coupled with an agreement laying down the details of the duties (and possibly rights) of the parties. This is the case with the statistic research activities in the Netherlands.[177]

As already recalled, Article 1(6) of the new Public Sectors Directive exempts from the application of the rules of the same directive agreements, decisions or other legal instruments that organise the transfer of powers and responsibilities for the performance of public tasks between contracting authorities which do not provide for remuneration to be given for contractual performance.

The question will again be whether 'remuneration' must be read as 'costs plus profit' or instead any amount of reimbursement will be tantamount to remuneration.[178] ASL Lecce the Court of Justice would rather point to the latter interpretation.[179] However, since Article 1(6) aims at enabling the cooperation within the public sector and financial considerations are obviously relevant in that the conferral of public tasks normally entails providing the resources to discharge the same tasks (and this is still covered by the freedom of self-organisation enjoyed by the Member States), the former interpretation seems preferable. Moreover, a 'price' was due by the municipalities in both the Irish ambulances and in the Hamburg Waste case, and by the Comuni-

175. For these reasons the Italian highest administrative court already in 2008 held that a public hospital could not buy some of the shares of an institutional public-private partnership previously set up by other hospitals in the same region to provide cleaning and other services: Cons. Stato, Ad. plen., 3 marzo 2008, n. 1, in *Giorn. dir. amm*, 2008, 1071, notes R. Caranta 'Ancora in salita la strada per le società miste' and G. Piperita 'Modelli societari e compiti pubblici'; see also the discussion in M. Comba 'In-House Providing in Italy: the circulation of a model' above fn 137, 106 ff.

176. Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401.

177. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 2.

178. See also the discussion, which refer to the situation which preceded the adoption of the new directives, in N. Fiedziuk 'Putting Services of General Economic Interest up for Tender' above fn 65, 109 f.

179. A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.

dades Autonomas in Asemfo,[180] but this did not prevent the arrangement to be seen as a genuine form of public-public cooperation.[181] The agreements between central and local government in Poland and in the Czech health sector seem to follow the same pattern and should therefore be in line with EU law.[182]

The provisions of services through different forms of public-public cooperation is met with what seems growing uneasiness in some Member States and possibly in some EU institution.[183] The problem is the extent to which public-public cooperation agreements or arrangements do limit the amount of business contended on the market and under competitive market rules and the way this ends up hindering interstate trade.[184] Business driven market participants are of course keen on challenging decisions not to externalise the provision of given services.[185]

The problem is exacerbated by the fact that, to some extent – 20% according to Article 11 of the new Public Sector Directive – in house entities and associations of public authorities beneficiaries of direct awards may than operate on the market in competition with more traditional market operators.[186]

This has led to a backlash against different forms of public-public cooperation. Even in France, a country not in principle hostile to public law entities

---

180. Case C-295/05 *Asemfo* [2007] ECR I-2999; Case C-480/06 *Commission v Germany* [2009] ECR I-4747; Case C-532/03 *Commission* v *Ireland* [2007] ECR I-11353.
181. But see A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.
182. See the description by A. Sołtysińska 'Poland' qu. 2, and: J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 10; see also G.F. Jaeger 'Luxembourg' qu. 3.
183. Given the very limited cross-border cooperation, this also leads to a fragmentation of the internal market: see A. Tokár 'Institutional Report – Public Procurements and general EU law etc.'.
184. See for instance the report by the Spanish Competition Authority recalled by J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 3, and R. Mastroianni 'Italie' qu. 3, referring to domestic legislation restricting the possibility to directly award contracts in in house situations; see also the Polish legislation imposing outsourcing of waste disposal services: A. Sołtysińska 'Poland' qu. 3. This concern moved the Italian *Consiglio di Stato* to raise its question for preliminary ruling in Case C-159/11, *ASL Lecce* [2012] ECR I-; the concern is far from being general: see a very different approach A. Merle-Beral – I. Tantardini 'France' qu. 3; C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 3.
185. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 3.
186. According to some readings of Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 63, this was previously set at about 10%; raising some highbrows legislation in Hungary shifted the limit from 10% to 20%: A. Németh 'Hungary' qu. 3.

being active on the market, the possible downsides of public-public cooperations are understood, and kept in check by a case law of the *Conseil d'Etat* excluding participation with the aim at making profits in the agreement of public law entities active on the market, thus benefiting of a direct award to the detriment of potential competitors.[187] In Estonia, the legality of in house arrangements is instead ruled out in case of service concessions.[188] In the Czech Republic the in house entity is required by the case law to directly perform the all contract being entrusted to it; any subcontracting brings the arrangement outside the limits of permissible in house providing.[189] On a more neutral level, every decision, to externalise or not to externalise must be supported by reasons in the Netherlands.[190]

The issues raised by decisions not to have recourse to the market for the procurement of goods and services do however go well beyond the area of in house or public-public cooperation. Public authorities acting on the market may indeed take part to public procurement procedures.[191] In that context there is the risk they might cross-subsidise their bids from the public resources they derive from taxpayers.[192] For instance in Denmark municipal and other authorities may sell at market price by-products or surplus capacity.[193] From an economic point of view one could well see this surplus altering the market prices. But again, the same fact that contracting authorities, and not just their subsidiaries, are allowed to operate on the market may lead to distortions.[194]

As it has been remarked, the participation of public law entities, their emanations, and their associations, in public procurement procedures 'must not distort competition, but this does not mean that they can be automatically ex-

187. CE 3 février 2012, *Commune de Veyrier-du-Lac*, which is analysed by A. Merle-Beral – I. Tantardini 'France' qu. 3.
188. A. Peedu 'Estonia' qu. 3.
189. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 3.
190. See G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 3; the decisions not to have recourse to the market have been often challenged, but they have usually been upheld by courts.
191. Case C-305/08 *CoNISMa* [2009] ECR I-12129.
192. A steady flow of business from the public law controlling entities would already be a competitive advantage: A. Tokár 'Institutional Report – Public Procurements and general EU law etc'.
193. S. Troels Poulsen 'Denmark' qu. 3.
194. A new and blunter question has been raised in *Azienda Ospedaliero-Universitaria di Careggi-Firenze*, Cons. St., Sez. III, 30 ottobre 2013, n. 5241.

cluded if they enjoy an advantage due to public financing; such exclusions can only happen in certain limited cases'.[195]

This leads to think that the answer to these possible problems should be found in State aid rules, possibly coupled with the application of the rules on abnormally low tenders.[196]

Question 4 – Contracts with the Private Sector which are not EU Public Contracts

A number of consensual arrangements between the public and private sectors falling outside the scope of application of EU directives on public contracts has already been recalled, such as for instance licenses to operate game of chances[197] or the sale of public assets.[198] The list is obviously much longer.[199]

As was already mentioned, the requirement of 'acquisition' which is present in the new Public Sector Directive and which seems much better than the 'direct economic benefits' which popped up in the case law[200] is due to distinguish public contracts to which the EU rules investigated here do apply from other agreements,[201] such as those bringing a pecuniary benefit to the contracting authority.[202]

Concerning specifically privatisation agreements, in Loutraki the Court of Justice had already held that 'The transfer of shares to a tenderer in the context of a privatisation of a public undertaking does not fall within the scope of the directives on public contracts'.[203] It is however necessary to ensure that privatisation decisions do not actually conceal the award to a private partner

195. A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.
196. Case C-305/08 *CoNISMa* [2009] ECR I-12129, paragraph 34; see also A. Tokár 'Institutional Report – Public Procurements and general EU law etc.'.
197. Case C-203/08 *Sporting Exchange* [2010] ECR I-4695.
198. Case C-451/08 *Helmut Müller* [2010] ECR I-2673.
199. The report from Bulgaria has indeed a very long list: A. Velkova 'Bulgaria' qu. 2.
200. More notably in Case C-451/08 *Helmut Müller* [2010] ECR I-2673; that case was basically distinguished in Case C-115712 P *France* v *Commission* [2013] ECR I-, paragraph 81.
201. 'Acquisition' is in any case to be different from the peculiar common law notion of 'consideration' discussed by B. Doherty 'United Kingdom' qu. 4 & 5.
202. See A. Merle-Beral – I. Tantardini 'France' qu. 4.
203. Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others* [2010] ECR I-4165, paragraph 59.

of contracts which might be seen as public procurement contracts or concessions.[204]

Procedures designed to bring the most benefit to public authorities in case of privatisation and/or sale of public assets are in any case normally provided for under domestic law.[205] At least in Greece public procurement rules have been a source of inspiration for the privatisation procedures made necessary to answer to the financial crisis.[206] This does not rule out the possible existence of areas where national legislation or practice still fall short of the requirements of EU as it seems to be the case for instance with the organisation of games of chance in Slovenia.[207]

The general principles of the TFEU and some specific rules such as those on State aids might also be applicable and will be discussed later on.[208]

Articles 12 ff of Directive 2004/18/EC list a number of service contracts which are excluded from the scope of application of the same directive. The problem remains – and will be addressed under question 6 – whether the general principles of EU law still apply to these contracts as they for instance apply – waiting for the entry into force of the new Concessions Directive – to service concessions.

Recital 4 to the new Public Sector Directive clarifies that two more contracts will not normally be considered as procurement contracts[209] that is contracts whose subject matter is the mere financing, in particular through grants, of an activity, and contracts concluded with all operators fulfilling certain conditions which are thus entitled to perform a given task, without any selectivity (such as for instance customer choice and service voucher systems[210] or the recommendation of ambulatories to provide health services on behalf of the public health care system).[211]

---

204. See the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final); the Green paper is referred to in Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others* [2010] ECR I-4165, paragraph 56.
205. E.g. P. & B. Ferk 'Slovenia' qu. 4 and 7; S. Troels Poulsen 'Denmark' qu. 4; A. Peedu 'Estonia' qu. 4.
206. I. Mazos – E. Adamantidou 'Grèce' qu. 2 and 4.
207. P. & B. Ferk 'Slovenia' qu. 4.
208. See the remarks by A. Merle-Beral – I. Tantardini 'France' qu. 4.
209. A. Németh 'Hungary' qu. 4 rightly points out that this would have best regulated in the provisions of the Direcitve.
210. The voucher system which is today used in many countries: e.g. A. Dimoulis 'Finland' qu. 2.
211. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 10.

It is submitted that agreements which on their face appear as grants should to be scrutinised very closely, as this opens a chasm for eluding EU public procurement rules. The UK experience seems to show a great osmosis between public contracts, including procurements, and grants, and the notion of 'acquisition' will have to be construed with great care.[212] More encompassing legislation like the Portuguese one do away with the problem since grants fall squarely under the public contracts legislation.[213]

The voucher system does not pose major problems provided it is open, meaning that every economic operator having the required qualification may easily and at every time become part of the systems. Otherwise the rules on framework agreements should be used by analogy. For sure public procurement rules do apply where a specific economic operator is chosen to issue the voucher on behalf of the contracting authority which ultimately bear the costs of the system.[214]

The Austrian reporter further excludes from the scope of public procurement law acts conferring to some private individual the discharge of public law duties (notaries would be a good example in some other jurisdictions).[215] This might indeed be approached to the second kind of arrangements excluded under Recital to the new Public Sector Directive. More problematic seems the second category of arrangements excluded in Austria, that is contracts concluded by public authorities at the risk and expenses (auf Gefahr und Kosten) of private individuals.[216]

Question 5 – Mixed or Complex Agreements

Helmut Müller could also be analysed as a mixed or complex agreement.[217] In essence, one public authority was selling land to an undertaking while another public authority was pondering whether award a works contract in respect of that land without yet having formally decided to award that contract. Indeed, one of the questions referred to the Court of Justice concerned the

---

212. B. Doherty 'United Kingdom' qu. 2; A. Németh 'Hungary' qu. 4.
213. A.L. Guimarães 'Portugal' qu. 7.
214. See the case law referred to by J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 2.
215. M. Fruhmann 'Austria' qu. 2.
216. M. Fruhmann 'Austria' qu. 2; true in principle the consideration should in the end come from a private party, but what if in the end the private does not pay (e.g. because he/she's insolvent)?
217. Case C-451/08 *Helmut Müller* [2010] ECR I-2673.

possibility of regarding as a unity, from a legal point of view, the sale of the land and the subsequent award of a works contract in respect of that land. The Court of Justice started stressing that 'it is prudent not to exclude from the outset the application of Directive 2004/18/EC to a two-phase award procedure in the form of the sale of land which will subsequently form the subject of a works contract, by considering those transactions as a unity'.[218] That possibility was however ruled out in the case at hand since at no point the municipality had assumed any legally binding contractual obligation as the future of the land being sold by the Bundesanstalt[219] and there was no evidence to indicate that the award of a public works contract was imminent.[220] The situation in this case was therefore quite different from the one which prompted the Court of Justice to consider together different contracts in Mödling.[221]

Soon after Helmut Müller was decided the Court of Justice had the opportunity to develop a general doctrine of mixed agreements in Loutraki.[222] At the roots of the Loutraki case stood a decision by the Greek government to privatize a casino. The foreseen contract was a mixed contract including: a) an agreement under which the State would sell 49% of the shares in the company managing the casino to a 'single purpose limited company' (AEAS) to be set up by the successful tenderer; b) an agreement under which the AEAS would undertake to implement a development plan comprising the refurbishment of the casino and of two adjoining hotel units; c) an agreement under which AEAS would take over management of the casino business, in return for payment, having as its remuneration a percentage of the annual operating profits, and d) a provision to compensate AEAS in the event that another casino were to be lawfully established in the same geographical area during the period of validity of the contract (10 years). Concurring with the findings of the referring court, the Court of Justice concluded that the transaction at issue was a mixed contract comprising a sale of shares aspect, services (managing the casino) and works (refurbishment and development).[223] The Court held that basically the same rules apply to the legal classification of mixed contracts, irrespective of whether or not the aspect constituting the main object of

218. Paragraph 83.
219. See paragraphs 85 ff.
220. Paragraph 87.
221. Case C-29/04, *Commission v Austria* [2005] ECR I-9705.
222. Joined Cases C-145/08 and C-149/08, *Club Hotel Loutraki* [2010] ECR I-4165.
223. Paragraphs 46 f.

a mixed contract falls within the scope of the directives on public contracts. 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.[224]

Having considered the transaction at issue as an inseparable whole,[225] the Court found the privatisation 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.[226]

Another mixed contract case was Mehiläinen Oy.[227] 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. The Court of justice again held that

> as regards a mixed contract, the different aspects of which are inseparably linked and thus form an indivisible whole, that contract must be examined as a whole for the purposes of

---

224. Paragraph 48; Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 19; Case C-331/92 *Gestión Hotelera Internacional* [1994] ECR I-1329, paragraphs 23 to 26; Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraphs 36 and 37; Case C-412/04 *Commission* v *Italy* [2008] ECR I-619, paragraph 47; and Case C-536/07 *Commission* v *Germany* [2009] ECR I-10355, paragraphs 28, 29, 57 and 61, are referred to.
225. Paragraphs 51 ff; one could argue that the severability test was already present in the case law: Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, paragraph 57, referred to contracting authorities artificially grouping in one contract services of different type: A. Tokár 'Institutional Report – The boundaries of EU public procurement law'.
226. Paragraphs 55 ff; 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 privatisation 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). The aftermath in the Greek courts is described by I. Mazos – E. Adamantidou 'Grèce' qu. 5. As already recalled, the 'main object' criterion only was used in Case C-306/08 *Commission* v *Spain* [2011] ECR I-4541.
227. Case C-215/09 *Mehiläinen Oy* [2010] ECR I-13749.

its legal classification in the light of the rules on public contracts, 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.[228]

Differently from Loutraki, this case turned on the severability of the different transactions involved in the agreement. In that context, the transitional arrangement was intended as a parting gift to the new venture. According to the Court of justice, however, this did not mean that the services envisaged for the transitional period were not severable. Quite on the contrary, they could and should have been awarded through a procurement procedure.[229]

A UK court had anticipated by a decade this approach by bringing under public procurement law an agreement which included both the sale of the in house business unit and the purchase of the services from the buyer.[230]

The all matter is now regulated under Article 3 of the new Public Sector Directive and in particular by Section 6 thereof which basically codifies the two steps (severability and main object) Loutraki analysis.

The implementation of the new provision should not raise major problems in some Member States like France, Greece or the Netherlands where the main object criterion is already used in the case law.[231] In other Member States, like in Austria and Poland, the indication is rather that the contracts should be severed.[232] In Portugal a different criterion is at work: the more demanding legal regime does apply; even if this it at variance with EU law, it does ensure that public contract law, or a stricter regime if any, will apply to all mixed arrangement, in a sense going beyond what is required by the case

228. Paragraph 36; Joined Cases C-145/08 and C-149/08, *Club Hotel Loutraki* [2010] ECR I-4165, paragraphs 48 and 49 are referred to.
229. Paragraphs 37 ff; the follow up of this case in front of the referring court is discussed in A. Dimoulis 'Finland' qu. 5; as C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 5, remark, the approach taken in this case by the Court of Justice was more robust as compared with *Loutraki*.
230. See *Severn Trent* v *Dur Cymru Cyfyngrdig (Welsh Water) Ltd.* [2001] EuLR 136; the decision was however criticised: see the discussion in B. Doherty 'United Kingdom' qu. 4 & 5.
231. A. Merle-Beral – I. Tantardini 'France' qu. 5; severability might be more problematic as it is shown by the Douai case recalled therein; I. Mazos – E. Adamantidou 'Grèce' qu. 5; G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 5.
232. M. Fruhmann 'Austria' qu. 5; A. Sołtysińska 'Poland' qu. 5; the same might be the case in N. Popović – F. Kuhta 'Croatia' qu. 5, but the law is still waiting for clarification.

law and by Article 3 of the new Public Sector Directive.[233] The latter will also be the case in Ireland.[234]

The operation of both the severability and the main object criteria are well illustrated in a German case concerning a contract for the building, operation and maintenance for a period of 30 years (to be possibly further extended) of a restaurant with annexed petrol station on a motorway. The court, having considered the contract as a coordinated whole held that operation was its main object on the basis of a detailed analysis of the costs involved in the different components of the agreement. In that case, the building costs were less than 10% of the overall investment required.[235]

Another interesting case arose in Hungary and concerned a contract whereby a contracting authority leased some public spaces while at the same time ordering advertisement services from the same firm. The Arbitration board held the contract not to be severable and on the basis of the main object criterion classed the contract as a service concession (which are covered by public contracts rules in that jurisdiction).[236] A similar arrangement was univocally considered a service concessions by the parties to the Wall case, which was brought to the attention of the Court of Justice under other respects.[237]

The general principles of EU law: public procurement law and beyond

As already recalled, a number of public contracts are expressly or impliedly excluded from the scope of application of the public procurement directives. Moreover, the 2004 directives do not apply to contracts below given thresholds and to service concessions, and apply only partly to a number of service procurements.[238] A good indication as to the relevance of the not covered

233. A.L. Guimarães 'Portugal' qu. 5.
234. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 5.
235. OLG Karlsruhe, GewArch 2013, S. 325; see for the discussion of this and other cases the discussion in F. Wollenschläger 'Deutschland' qu. 5.
236. A. Németh 'Hungary' qu. 5.
237. Case C-91/08 *Wall* [2010] ECR I-2815.
238. See C. Risvig Hansen *Contracts not covered or not fully covered by the Public Sector Directive* (DJØF Publishing, 2012); D. Dragos – R. Caranta (Eds) *Outside the EU Procurement Directives – Inside the Treaty?* above fn 25.

contracts is given by the German report, providing a figure of about 90% of the value of all procurement contracts.[239]

True service concessions will be regulated by a new directive and the new Public Sector Directive is to provide a lighter regime for social and other specific services, but institutional public-private partnerships seem to fall outside the scope of the new directive and the thresholds indicated are anyway quite high.[240]

Question 6 – The General Principles of the Treaty and Public Contracts

Since Telaustria, however, the general principles of non-discrimination/equal treatment and transparency are held to be applicable to the award of contracts not covered, or not fully covered by the EU procurement directives,[241] provided, as was clarified in following cases, that they are of certain cross-border interest.[242]

Telaustria itself was a service concession case.[243] The applicability of both the general principle of non-discrimination and the obligation of transparency has been affirmed a number of times in cases concerning service concessions.[244] For instance, in Coname, the Court of Justice held that the award, in the absence of any transparency, of a service concession to an undertaking located in the same Member State of the contracting authority 'amounts to a

---

239. F. Wollenschläger 'Deutschland' qu. 6.
240. The different kinds of public-private partnerships are precisely analysed in P. & B. Ferk 'Slovenia' qu. 4, to which the reader is referred.
241. Case C-324/98 *Telaustria* [2000] ECR I-10745; please refer to R. Caranta 'The Borders of EU Public procurement Law' in D. Dragos – R. Caranta (Eds) *Outside the EU Procurement Directives – Inside the Treaty?* above fn 25, 25; more recently C. Risvig Hamer 'Requirements for contracts 'outside' the Directives' in M. Trybus, R. Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* above fn 5, 191.
242. E.g. Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565; 'certain' is translated into 'probable' in Case C-221/12 *Belgacom NV* v *Interkommunale voor Teledistributie van het Gewest Antwerpen (Integan)* [2013] ECR I-, paragraph 30; the notion is thoroughly analysed by S. Treumer 'Cross-border Interest and Application of EU Law Principles in the Public Procurement Context at National Level', in D. Dragos – R. Caranta (Eds) *Outside the EU Procurement Directives – Inside the Treaty?* above fn 25, 335, and C. Risvig Hansen *Contracts not covered or not fully covered by the Public Sector Directive* above fn 238, 121 ff.
243. Case C-324/98 *Telaustria* [2000] ECR I-10745.
244. E.G Case C-91/08 *Wall* [2010] ECR I-2815; Case C-206/08 *Eurawasser* [2009] ECR I-8377; Case C-458/03 *Parking Brixen* [2005] ECR I-8585.

difference in treatment to the detriment of the undertaking located in the other Member State'. Indeed, 'in the absence of any transparency, the latter undertaking has no real opportunity of expressing its interest in obtaining that concession'.[245]

The same conclusion has been reached concerning list B – or non-priority – services.[246] The leading case concerned an infringement procedure arising from the direct award of services relating to the payment of social welfare benefits to An Post, the Irish postal service.[247] The Grand Chamber of the Court of Justice accepted that the Community legislature based itself on the assumption that non priority service contracts are not of cross-border interest and therefore do not justify award EU-wide award procedure.[248] The Court was however fast in pointing out that it was common ground among the parties that 'the award of public contracts is to remain subject to the fundamental rules of Community law, and in particular to the principles laid down by the Treaty on the right of establishment and the freedom to provide services'.[249]

The Court of Justice was quite straightforward underlining the 'constitutional underpinning' in the Treaties for the principles of non-discrimination, equal treatment, and transparency. As such, those principle cannot but override the choices made by the Member States when giving their approval to the directives in the Council. Primary law necessarily overrides secondary law.

A number of cases concerned below the threshold contracts.[250] One relevant instance is SECAP.[251] The case arose from an Italian legislative provision on below the threshold public works contracts according which tenders considered to be abnormally low were to be automatically excluded without affording the economic operators concerned the opportunity to show that their tender made commercial sense. The Court of Justice stressed once more that the specific provisions of the directive do not apply to below the thresh-

245. Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 17 f; C-324/98 *Telaustria* [2000] ECR I-10745, is referred to.

246. The latter terminology was introduced in Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, paragraph 35; see C. Risvig Hansen *Contracts not covered or not fully covered by the Public Sector Directive* above fn 238 111.

247. Case C-507/03, *Commission* v *Ireland* [2007] ECR I-9777; another case was Case C-226/09 *Commission* v *Ireland* [2010] ECR I-11807, concerning translation services.

248. Paragraph 25.

249. Paragraph 27; Case C-92/00 *HI* [2002] ECR I-5553, paragraph 42 is referred to.

250. An early instance is Case C-59/00 [2001] *Vestergaard* ECR I-9505.

251. Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565.

old contracts.[252] However, it also affirmed that the fundamental rules of the Treaty and the principle of non-discrimination on the ground of nationality in particular do apply,[253] provided that the contracts in question are of certain cross-border interest.[254]

Finally, in Acoset the Court of Justice addressed the situation of institutional public-private partnerships – IPPPs.[255] As it is well known, 'In a PPP the asset or service is entrusted to the private sector, and in the IPPP the asset or service is entrusted to the joint company. By setting up a IPPP instead of a PPP, the public party can retain a relatively high degree of control over the infrastructure project or service'.[256]

The Court, following the conclusions of Advocate general Ruiz-Jarabo Colomer,[257] held that the general principles of the Treaty do not preclude the direct award of a public service to a semi-public company formed specifically for the purpose of providing that service and possessing a single corporate purpose, the private participant in the company being selected by means of a public and open procedure after verification of the financial, technical, operational and management requirements specific to the service to be performed and of the characteristics of the tender with regard to the service to be delivered, provided that the tendering procedure in question is consistent with the principles of free competition, transparency and equal treatment laid down by the Treaty with regard to concessions.[258]

Moreover, as it has rightly been remarked, 'However detailed the procurement directives are, there will always be space for administrative discretion to be exercised by contracting authorities. Such discretion needs to be exercised in accordance with the basic principles of Union procurement

252. Paragraph 19.
253. Paragraph 20; see also the opinion by AG Colomer, parargaphs 23 ff.
254. Paragraph 21.
255. Case C-196/08 *Acoset* [2009] I-9913; see also A. Tokár 'Institutional Report – The boundaries of EU public procurement law', and S. Pommer 'Public Private Partneships' in M. Trybus, R. Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* above fn 5, 293 ff.
256. Ch.D. Tvarnø 'A Critique of the Commission's Interpretative Communication on Institutionalised Public-Private Partnership' *Public Procurement L. Rev.* (2009) NA12.
257. Paragraphs 83 ff.
258. Paragraphs 58 ff; see also the interpretative communication on the 'Community law applicable to contract awards not or not fully subject to the provisions of the 'Public Procurement' Directives' 2006/C 179/02; the French *Conseil d'Etat* prefers a more cumbersome procedure to set up this kind of arrangements: A. Merle-Beral – I. Tantardini 'France' qu. 4.

law'.[259] It is no chance that those principles are recalled in Article 2 of Directive 2004/18/EC and indeed may justify more detailed domestic provisions, such as the Maltese and Italian rules.[260]

Recent cases seem to indicate that the same principles are also applicable to some non-contractual arrangements, such as licences to exploit games of chance. These principles could possibly constitute the foundations for the general administrative law of the EU.[261]

This is even more important since, as it results from the analysis under the previous questions, a number of contracts or consensual arrangements are anyway excluded from the scope of EU secondary public contract law.

What is still uncertain as a matter of EU law is whether the general principles of non-discrimination/equal treatment and transparency apply for the award of contracts expressly excluded (e.g. contracts listed in Article 16 of Directive 2004/18/EC). The Commission in its interpretative communication on the 'Community law applicable to contract awards not or not fully subject to the provisions of the 'Public Procurement' Directives'[262] indicated that the general principles do not apply.[263]

This is easily understandable for contracts which are excluded because there is no cross-border interest such as in the case of acquisition of immovable property, or because they fall under a specific EU law regime, such as for instance contracts to which Directive 2009/81/EC on defence and security procurement apply,[264] or employment contracts in the public sector to which the exclusion laid down Article 45(4) TFEU does not apply.[265]

Other instances are more problematic. It is clear that the exclusion referred to the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time has been set to protect domestic production thus respecting the sensitivity of some Member State. It is doubtful however whether Article 3(3)

---

259. A. Tokár 'Institutional Report – The general principles of EU law: public procurement law and beyond'.
260. I. Sammut 'Malta' qu. 4, and R. Mastroianni 'Italie' qu. 4.
261. Case C-203/08 *Sporting Exchange* [2010] ECR I-4695; Case C-470/11 *Garkalns SIA* [2012] ECR I-
262. 2006/C 179/02, point 2.
263. A. Tokár 'Institutional Report – The general principles of EU law: public procurement law and beyond'.
264. See the discussion in N. Popović – F. Kuhta 'Croatia' qu. 4.
265. See, also for other instances, Tokár 'Institutional Report – The boundaries of EU public procurement law'.

TEU provides a sufficient constitutional coverage for the exclusion in Article 16(b) Directive 2004/18/EC.

Moreover, under Article 10 of the new Public Sector Directive most legal services which were considered to be non-priority services are now excluded from the scope of the directive. Considering the constitutional standing of the general principles under discussion it is unclear why they should not be applicable to these contracts once the deadline for transposition expires?

It is submitted that the correct approach is the one outlined in the Austrian contribution. Provided that no special regime is applicable, the general principles will apply to excluded contract unless they must be considered to be excluded by the scope of EU law as defined by the Treaties.[266]

Most of the Member States have enacted rules applicable to contracts which fall outside the scope of application of the 2004 public contracts directives, and especially to below the thresholds contracts. The main alternative is between the pure and simple applications of the EU based procurement rules to the full spectre of contracts[267] or, as it is more often the case, the design of simplified rules for low value contracts for instance excluding publicity at EU level, or providing for shorter terms or giving more scope to negotiated procedures.[268] The latter option may be further structured by possibly being coupled with an exemption from public award procedures for very small contracts which fall below a nationally set threshold.[269] For minor contracts

266. M. Fruhmann 'Austria' qu. 6.

267. This is rarely the case, but see J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 1; I. Sammut 'Malta' qu. 2; P. & B. Ferk 'Slovenia' qu. 8.

268. See for instance A. Velkova 'Bulgaria' qu. 2; *in Switzerland too the simplified procedures approach is followed:* E. Clerc 'Suisse' qu. 6; at federal level judicial review is however excluded. See also S. Treumer 'On the Development of a Danish Public Procurement Regime outside the Scope of the EU Public Procurement Directives: EU Principles of Law do not Come Easy', L. Butler 'Below the Threshold and Annex II B Service Contracts in the United Kingdom: A Common Law Approach' and M. Comba – S. Richetto 'Minor Contracts': Outside the directives and outside the Treaties? Comparative analysis on public procurement below the thresholds in Europe' in D. Dragos – R. Caranta (Eds) *Outside the EU Procurement Directives – Inside the Treaty?* above fn 25, 68 ff, 292 ff and 359 ff respectively.

269. E.g. N. Popović – F. Kuhta 'Croatia' qu. 6; J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 1; A. Peedu 'Estonia' qu. 6; A. Dimoulis 'Finland' qu. 6; A. Németh 'Hungary' qu. 6; I. Sammut 'Malta' qu. 2; see also M. Comba – F. Cassella 'Public Procurement below the EU Thresholds', and D. Dragos – B. Neamtu – R. Veliscu 'Public Procurement outside EU Directives in Romania: is Voluntary Compliance Leading to Effectiveness?' in D. Dragos – R. Caranta (Eds) *Outside the EU Procurement Directives – Inside the Treaty?* above fn 25, 168 f and 231 f respectively.

Polish contracting authorities may ask a small number of economic operators for quotations, but the general principles are complied with for the award of contracts benefiting from EU grants.[270] Portugal allows direct award for low value contracts.[271]

Differentiating the regimes applicable to contracts having different nature and value may go some way towards assuaging the fears that disproportionate burdens are being placed on contracting authorities.[272]

Germany has instead kept (almost) intact its traditional minimalist public account law approach to below the EU thresholds contracts, therefore in principle denying both subjective rights and judicial protection to concerned economic operators. In the past few years, however, the case law has applied across the public contracts realm the general principles of constitutional law, starting with the equality principle from which a requirement of publicity flows. The same has happened with reference to judicial protection. The German system however remains strikingly dualistic.[273]

Italy has introduced what is possibly one of the most inclusive regime. Beside specific rules for below the thresholds contracts and for minor contracts, the *Codice dei contratti pubblici* provides a very long list of general principles applicable to all contracts, including institutionalised public private partnerships, a list of principles applicable to the award of excluded contracts, and a list of principles applicable to the award of service concessions.[274] Additionally, specific provisions apply to below the thresholds contracts.[275] The problem is that the three different provisions on principles have not been coordinated and the *Consiglio di Stato*, the highest administrative law court in the land, muddles through and holds that most of the detailed provisions in the *Codice* are directly implied in the principles.[276]

---

270. A. Sołtysińska ‘Poland’ qu. 6 and 7; see also A. Németh ‘Hungary’ qu. 9.
271. A.L. Guimarães ‘Portugal’ qu. 1.
272. G.F. Jaeger ‘Luxembourg’ qu. 6.
273. F. Wollenschläger ‘Deutschland’ qu. 6.
274. R. Mastroianni ‘Italie’ qu. 6; more in details M.P. Chiti ‘I principi’ in M.A. Sandulli, R. De Nictolis, R. Garofoli (curr.) *Trattato sui contratti pubblici* (Milano, Giuffré, 2008) vol. I, 150 ff.; similar provisions were instead deleted from the Croatian legislations : N. Popović – F. Kuhta ‘Croatia’ qu. 6.
275. M. Comba – F. Cassella ‘Public Procurement below the EU Thresholds’ above fn 269, 175 ff.
276. Cons. St., Ad. plen., 7 maggio 2013, n. 13, in *Giur. it.*, 2013, 2368, note R. Caranta ‘I principi ‘‘dettagliati’’ e le concessioni di servizi’; the court held that some very detailed rules on the composition of the jury responsible for choosing the winning tender was applicable to the award of service concession.

On similar lines, the Dutch Public Procurement Act 2012 covers contracts covered, fully or in part, in the EU directives, contracts not covered but having a clear cross-border significance, and also contracts not having this significance. Beside some general principles, specific provision apply to the different contract categories just mentioned.[277] Very inclusive public contract legislation is found in Portugal, the Czech Republic and Hungary as well.[278]

In Greece too public procurement law principles have a quite wide sphere of application, ranging from transactions to raise money or capital to telecommunication to the award of exclusive rights in sectors like energy and games.[279]

It is worth noticing that the most stringent regimes are often a feature of those Member States where concern about corruption and mistrust for public – elected or otherwise – officials run deeper.[280]

The Netherlands are not really an exception to this picture since while the coverage of the public contract legislation is quite wide, the legal framework for contracts not covered by the directives has often the nature of guidance rather than of hard rules.[281] Guidelines again are used in Ireland.[282]

Other options than creating multiple legal regimes are available to the Member States. For instance in France the contracting authorities are tasked to devise procedures adapted to the value and subject matter of the contract at issue having as guidance the general principles of domestic law (which are in line with the EU principles).[283] This means that the task of designing the award procedures falls upon the contracting authorities rather than on the law makers.[284] The situation is similar in Sweden, where the EU general principle are applicable to below the thresholds contracts.[285]

---

277. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 6.
278. A.L. Guimarães 'Portugal' qu. 2 (the wider coverage however only apply to public law entities, not to bodies governed by public law); J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 1 and qu. 4 & 5; A. Németh 'Hungary' qu. 1.
279. I. Mazos – E. Adamantidou 'Grèce' qu. 4 and 6.
280. E.g. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 1.
281. G.-W. Van de Meent – E.R. Matunza (Eds) The Netherlands' qu. 6.
282. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 4 and 6.
283. A. Merle-Beral – I. Tantardini 'France' qu. 6.
284. See also F. Lichére 'Public Procurement Contracts below EU Thresholds and Annex II B Services in France' in D. Dragos – R. Caranta (Eds) *Outside the EU Procurement Directives – Inside the Treaty?* above fn 25, 100 ff.
285. P. Norman – E.-M. Mühlenbock 'Sweden' qu. 6.

Even if no specific national rules have been enacted, contracting authorities are normally free to voluntary apply EU award provisions as it often happens in the UK.[286]

In Finland the rules on the award of public contracts also apply to service concessions and therefore the impact of the new Concessions Directive will be limited,[287] while in the Czech Republic, Croatia, France and Estonia a specific procedure has been designed, possibly for both works and service concessions;[288] in Austria and Malta the general principles are applicable.[289] The general rules on the award of public contract already apply to the choice of the service concessionaire in Portugal quite independently form the value of the concessions; however direct award is allowed by reasons of relevant public interest (which of course is not allowed under EU law).[290]

Finally, as it will be shown in more details in the next section, in many jurisdictions, and Finland is again one of them, domestic administrative law general principles such as non-discrimination and transparency apply to all and every public contract (and more generally to all measures taken by public authorities).[291] The same is true in Portugal where the general principles of administrative law which reflect constitutional provisions apply to every contract, including expressly excluded ones, and to unilateral decisions.[292]

In all the Member States which have not purely and simply extended to all contracts the application of the EU rules, the question becomes whether any simplified regime is still in compliance with the general principles of EU law applicable to non-covered contracts having a certain cross-border interest?[293]

Indeed, whatever the scope of application of the general principles which were discussed above, the next issue, which has shown to be relevant in some

286. B. Doherty 'United Kingdom' qu. 4 & 5.
287. A. Dimoulis 'Finland' qu. 14; the same will be true of Poland, where concessions are already regulated: A. Sołtysińska 'Poland' qu. 14, and Hungary, where there are however gaps in the coverage of the legislation presently in force: A. Németh 'Hungary' qu. 6.
288. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 4 & 5; N. Popović – F. Kuhta 'Croatia' qu. 6; A. Merle-Beral – I. Tantardini 'France' qu. 6 (for a service concessions); A. Peedu 'Estonia' qu. 6.
289. M. Fruhmann 'Austria' qu. 10; I. Sammut 'Malta' qu. 4.
290. A.L. Guimarães 'Portugal' qu. 10.
291. A. Dimoulis 'Finland' qu. 6.
292. A.L. Guimarães 'Portugal' qu. 6.
293. See the criticism of the Danish regime in S. Troels Poulsen 'Denmark' qu. 6.

Member States,[294] is how in practice they may be translated into specific operative rules?[295]

As it has rightly been written, 'The principle of transparency inter alia obliges contracting authorities to create competition by carrying out a sufficient degree of advertising prior to the award of the contract and to ensure that the impartiality of the procedure may be reviewed'.[296]

In *Coname* the Court of Justice held that it was for the referring court to satisfy itself that the award at issue complies with transparency requirements which, without necessarily implying an obligation to hold an invitation to tender, are, in particular, such as to ensure that an undertaking located in the territory of a Member State other than that of the Italian Republic can have access to appropriate information regarding that concession before it is awarded.[297]

A very relevant case stemmed from an infringement procedure against Ireland occasioned by a translation services contract. Translation services are list B services. One would be tempted to simply extend to non priority services the rules laid down in the directive for list A services. This however should be resisted, because it was the directive itself to limit the application of its provisions to list B services. According to the Court of Justice, the analysis has to focus on each provision. To be applicable to list B services – but the same applies to below the threshold contracts and service concessions – a rule must be such to 'be regarded as constituting a direct consequence of the fact that the contracting authorities are required to comply with the principle of equal treatment and the consequent obligation of transparency'.[298]

The Irish contracting authority had a) failed to advertise the relative weights given to the award criteria, and b) changed the weighting during the procedure, after a number of tenders had already been examined. The Court of Justice accepted that 'the purpose of the requirement to inform tenderers in

---

294. E.g. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 6 & 7; see also the concerns on legal certainty voiced by G.F. Jaeger 'Luxembourg' qu. 6.

295. See also the interpretative communication on the 'Community law applicable to contract awards not or not fully subject to the provisions of the 'Public Procurement' Directives' 2006/C 179/02; see U. Neergard 'Public Service Concessions and Related Concepts' above fn. 6, 387; A. Brown 'Seeing Through Transparency: the Requirement to Advertise Public Contracts and Concessions Under the EC Treaty' *Public Procurement L. Rev.* 2007, 1.

296. G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, 5 f.

297. Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 21.

298. Case C-226/09 *Commission* v *Ireland* [2010] ECR I-11807, paragraph 41.

advance of the award criteria and, where possible, of their relative weighting, is to ensure that the principles of equal treatment and transparency are complied with'.[299] The Court however pointed out that even under Art. 53 of Directive 2004/18/EC contracting authorities are not under an absolute duty to assign the relative weighting. As such, the failure to do so with reference to a contract for list B services cannot amount to a breach of the principle of equal treatment.[300] Tampering with the weighting after some of the tenders had been opened is quite another matter. The Court of Justice recalled here its precedents holding that

> the principles of equal treatment and transparency of tender procedures imply an obligation on the part of contracting authorities to interpret the award criteria in the same way throughout the procedure. [i]t is *a fortiori* clear that they must not be amended in any way during the tender procedure.[301]

The Commission has provided useful guidance as to the procedures which appear to be consistent with the principles of non-discrimination and transparency in its interpretative communication on the 'Community law applicable to contract awards not or not fully subject to the provisions of the 'Public Procurement' Directives'.[302] As it is well known the Communication resisted a challenge from large number of Member States led by Germany which were not happy to see what they considered their preserve invaded by the Commission.[303]

It is submitted that the somewhat lighter procedures provided for in the Utilities Directive 2004/17/EC might in the past been a source of inspiration for the concretisation of the above recalled principles. For the final approval

---

299. Case C-226/09 *Commission* v *Ireland* [2010] ECR I-11807, paragraph 42.
300. Paragraphs 43 f.
301. Paragraphs 59 f; Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraphs 92 f, are referred to.
302. 2006/C 179/02; see A. Brown 'Seeing Through Transparency: the Requirement to Advertise Public Contracts and Concessions Under the EC Treaty' *Public Procurement L. Rev*. 2007 1; R. Williams 'Contracts Awarded Outside the Scope of the Public Procurement Directives' *Public Procurement L. Rev*. 2007 NA1; please also refer to R. Caranta 'The Borders of EU Public procurement Law' above fn 241, 48 ff.
303. Case T-258/06 *Commission* v *Germany* [2010] ECR II-0000; see Z. Petersen 'Below-threshold Contract Awards under EU Primary Law: Federal Republic of Germany v Commission (T-258/06) *Public Procurement L. Rev*. 2010, NA215; M. Trybus 'Public Contracts in European Union Internal Market Law: Foundations and requirements' in R. Noguellou – U. Stelkens (dir) *Droit comparé des Contrats Publics. Comparative Law on Public Contracts* above fn 10, 113 ff.

of the new Public Sector Directive Articles 74 f. on the award of social services and other specific contracts are due to become the most relevant blueprint for assessing compliance with the general principles of EU public contracts law.

As already recalled, Member States have either opted to extend the application of the rules enacted in the implementation of Directive 2004/18/EC to contracts not covered or not fully covered by that directive or designed lighter regimes. Domestic general principles may be applicable to those contracts which are further in the periphery of the public contract galaxy and to legal acts which are not even classed as contracts.

Question 7 – The General Principles of the Treaty and Unilateral Measures

As already recalled, in Sporting Exchange, a case on the award of betting licences, the Court of Justice held that the general principles of the Treaty, in particular the principle of equal treatment and the obligation of transparency, do also apply when granting an administrative licence such as those at issue.[304]

The same principles (or rules derived from them), possibly on the basis of domestic law and quite independently from EU influence, may be relevant for the attribution of other benefits (e.g. concessions for the exploitation of natural resources or public domain land),[305] including access to public sector job positions.[306]

A case law mandated non-discrimination principles has been developed in Switzerland, including in one case concerning the authorisation to exploit Summer pavillons on the Geneva Lake.[307]

The rule of the thumb is that the principles developed by the Court of Justice will apply in any case when EU applies, while domestic general principles (if any) will apply to purely domestic situations.[308]

---

304. Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 46; see also Case C-470/11 *Garkalns SIA* [2012] ECR I-, paragraph 42.
305. E.g. I. Mazos – E. Adamantidou 'Grèce' qu. 7.
306. F. Wollenschläger 'Deutschland' qu. 7; see also the analysis by G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, 1.
307. E. Clerc 'Suisse' qu. 7.
308. M. Fruhmann 'Austria' qu. 7.

It is to be recalled that the general principles discussed here, and especially the non-discrimination principle, have been developed in many jurisdictions well before and quite independently from EU law.[309] They are part of an incipient Europeum jus commune.[310] In one interesting Dutch case, a District Court held that a municipality wanting to sell advertisement place on the back of parking tickets had to follow a transparent and competitive procedure.[311]

The idea of jus commune does not entail a total harmonisation. Therefore these principles have a more or less wide sphere of application[312] as a matter of domestic general, constitutional, administrative, public finance, and/or public contracts law.[313]

One cannot however sweep under the carpet the possible recognition at domestic level of principles which have not been developed in the case law of the Court of Justice or might have a special meaning at national level.[314]

One such case is the variously shaped principle of efficient administration which has a prominent place in many Member States[315] as it is linked with public finance rules requiring sound management of public money.[316] True efficiency of public spending was the first objective of public procurement reform listed in the Green Paper and it is mentioned in Recital 2 of the new Public Sector Directive. It is however a goal rather than a principle, and it is not recalled in Recital 1 where the usual internal market principles are duly listed.[317]

As is usually the case, the more principles one takes into the picture, the more occasion for conflict arises. Moreover, conflicts between different prin-

309. E.g. A. Németh 'Hungary' qu. 7.
310. And the CEDU is also relevant here: see B. Stirn *Vers un droit public européen* (Paris, Monchrétien, 2012).
311. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 7.
312. Some principle may be less developed domestically, such as with transparency, and anyway not applicable to unilateral measures: J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 6 & 7; in a number of cases, Articles 9 ff of Directive 2006/123/EC could however be applicable.
313. See for instance A. Peedu 'Estonia' qu. 7; A. Merle-Beral – I. Tantardini 'France' qu. 7; R. Mastroianni 'Italie' qu. 7; A. Sołtysińska 'Poland' qu. 6 and 7; P. & B. Ferk 'Slovenia' qu. 6 and 7; private law too may be relevant in the Netherlands since public contracts generally, including award procedures, are classified under private law: G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 6.
314. This is the case for instance with the specific Dutch take on the principles of good administration: G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 6.
315. E.g. A.L. Guimarães 'Portugal' qu. 1 and 6.
316. P. & B. Ferk 'Slovenia' qu. 6.
317. Contrast also Recitals 2 f. of the Concessions Directive.

ciples, or different understandings of the same principles may beget diverging practical rules in different legal orders depending inter alia on the weight attached to each relevant principle.[318] Balancing transparency and efficiency could lead to different rules on the award of below the thresholds contracts as compared with the present case law of the Court of Justice exclusively focused on transparency.[319] The same could be said if the reduction of administrative burdens was to be treated as a general principle of public contracts law as it is already the case in the Netherlands.[320]

At the same time, with the circularity of legal ideas engendered by European integration, in many jurisdictions EU law has influenced and reinforced the relevance at domestic level of the general principles of non-discrimination, equal treatment, and transparency.[321]

It is to be noted that Articles 9 ff of Directive 2006/123/EC on services in the internal market lay down authorisation procedures which are supposed to comply with those principles.[322] Again, in many jurisdictions authorisations will be classed as unilateral administrative decisions.[323]

One can assume that non-discrimination, equal treatment and transparency are general principles potentially applicable to all instances where the State or any other public law entity disburses money or grant benefits or privileges (including the right to carry out an economic activity), on a selective basis, choosing among a number of market participants potentially exceeding the resources being distributed, such as for instance when exclusive rights are granted to a specific economic operator in connection with the provision of a SGEI (see question 11).[324]

---

318. A.L. Guimarães ‘Portugal’ qu. 1 and 6 and f.
319. G.F. Jaeger ‘Luxembourg’ qu. 6.
320. G.-W. Van de Meent – E.R. Matunza (Eds) ‘The Netherlands’ qu. 6 ; on this aspect see generally A. Sánchez Graells ‘Are the Procurement rules a Barrier for Cross-border Trade within the European Market? A view on proposals to lower that barrier ans spur growth’ in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 107.
321. E.g. I. Mazos – E. Adamantidou ‘Grèce’ qu. 6; G.F. Jaeger ‘Luxembourg’ qu. 6; P. Norman – E.-M. Mühlenbock ‘Sweden’ qu. 7.
322. See also A. Németh ‘Hungary’ qu. 7, and F. Wollenschläger ‘Deutschland’ qu. 7; see also U. Neergaard ‘Public Service Concessions and Related Concepts’ above fn. 6, 395 f.
323. E.g. G.-W. Van de Meent – E.R. Matunza (Eds) ‘The Netherlands’ qu. 7; R. Mastroianni ‘Italie’ qu. 7.
324. This possible tendency is underlined by F. Wollenschläger ‘Deutschland’ qu. 7, who quite convincingly pleads the case for the reconstruction of a general idea of *Verteilung-*

If so the case law on public contracts may have a relevance going beyond its subject matter in that it may shed light on the application of the mentioned general principles in other areas of EU law. One could for instance consider that the nationality requirement for being granted licences to organise games of chances provided in the Croatian legislation is in breach of the principle of non-discrimination.[325]

At the same time, it could be doubted whether the public contract rules provide the only adequate standard. True the games of chance case extended the scope of application of what have been quite appropriately defined as the public procurement specific content of the general principles of equal treatment and transparency.[326] On the other hand, as it will be shown, there is some variance between the standards for public contract legislation and those developed under State aid rules regarding compensation to SGEI providers.[327] Additionally in one of the games licences cases the Court of Justice seemed to allow direct award of a licence to a private operator, so going well beyond the limits of in house providing as laid down in the public contracts case law.[328]

One could anyway question whether directly contacting four economic operators – as it was the case in the award of a service concession in Luxembourg – really meets the requirement of an adequate publicity flowing from the transparency principle.[329] On the other hand, but the distinction between principles and rules might well be at play here, in some Member States the domestic general principles are seen as leaving wider margins of discretion to the decision maker that public procurement rules.[330]

Finally, other sectoral rules may be applicable in other areas, such as State aids rules, and a coherent reading of the general principles is obviously need-

verfahren; see also G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, spec. 8 ff.

325. N. Popović – F. Kuhta 'Croatia' qu. 4 and 7.
326. G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, 3.
327. See also the discussion in C.H. Bovis 'Financing services of general interest, public procurement and State aids: The delimitation between market forces and protection' *European L. Journ.* 2005, 79.
328. Case C-203/08 *Sporting Exchange* [2010] ECR I-4695; see again the discussion in G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, 9.
329. This case is discussed by G.F. Jaeger 'Luxembourg' qu. 7.
330. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 7.

ed, so that EU public contract law may benefit from the legal and intellectual developments taking place in other areas.[331]

Public contracts and general EU law, including competition and State aids law

EU procurement law is based on the Treaty provisions on the Four Freedom.[332] As already recalled, the Court of Justice has often stressed that the principal objective of the EU rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States.[333]

This raises the question whether contracting authorities deciding what to buy are treated as private market participants or rather as regulators, taking public law measures potentially restricting the competition?

Provided that in principle the public procurement rules are there to foster competition among economic operators, it is also to be questioned whether some specific rules might instead be abused to stifle competition.[334]

Finally, public contract rules need to be coordinated with the provisions on State aids and specifically with the rules applicable to the services of general economic interest – SGEI and to the choice of the service provider.

Question 8 – Public Contracts and General Internal Market Law

Choices by contracting authorities as to what to buy should reflect their preferences (provided they do not entail discriminations on the basis of nationality in line with the general principles recalled above).[335] In a few cases, the

---

331. The possible relevance of State aid rules is stressed by F. Wollenschläger 'Deutschland' qu. 7.
332. See A. Tokár 'Institutional Report – The general principles of EU law: public procurement law and beyond'; see also the analysis by M. Trybus 'Public Contracts in European Union Internal Market Law: Foundations and Requirements' above fn 303, 81.
333. E.g. Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 31; Case 26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 44 is referred to.
334. B. Doherty 'United Kingdom' qu. 8 & 9 more radically suggests that 'to regulate the procurement process, particularly in the detail which the procurement rules provide for, inevitably gives rise to distortions of competition'.
335. On the discretion of contracting authorities F. Wollenschläger 'Deutschland' qu. 8; M. Fruhmann 'Austria' qu. 8; on the same and on some interesting cases in which the general principles of non discrimination and transparency were breached see A. Tokár

most recent being Contse, the Court of Justice has however couched its reasoning in pure internal market terms.[336]

Under internal market law, Member States may hinder trade only to pursue public interest goals such as public order or the protection of health; moreover, restrictions must not go beyond what is strictly necessary to pursue the goals in question.

According to one line of thought, choices about what to buy should pass the internal market test. This means that contracting authorities would be called to provide reasons which can stand the test of proportionality about their choices as to the products or services they purchase. The basic assumption under this approach is that contracting authorities act as market regulators instead than as market participants.[337] According to the institutional rapporteur 'Most contracting authorities are sufficiently closely related to the State to consider decisions taken by them in the context of a procurement procedure as measures for the purpose of free movement'.[338] An argument for this position is that taken together the decisions of different contracting authorities may indeed impact on the structure of the market.[339]

This would however be tantamount to imposing on contracting authorities a EU duty to provide reasons why they choose given products rather than other, for instance wood furniture instead of steel one, in particular as to the overriding reasons of public policy to do so.[340] Unsurprisingly this approach is not really mainstream in public procurement literature, contracting authori-

---

'Institutional Report – The general principles of EU law: public procurement law and beyond', and S. Troels Poulsen 'Denmark' qu. 8. See also more generally P. Trepte 'The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate what we Buy?' in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 84 f.

336. Case C-234/03 *Contse and Others* [2005] ECR I-9315; this case is referred to in the Magyar case law: A. Németh 'Hungary' qu. 8; pure internal market concepts are also used in Case C-231/03 *Coname* [2005] ECR I-7287: see the discussion in U. Neergaard 'Public Service Concessions and Related Concepts' above fn 6, 399.
337. This approach has been clearly articulated by J. Hettne 'Sustainable Public Procurement and the Single Market – Is There a Conflict of Interest?' in *Eur. Proc. & Public Private Partnership L. Rev. EPPPL* 2013, 31; see also A. Peedu 'Estonia' qu. 8; R. Mastroianni 'Italie' qu. 8, and A.L. Guimarães 'Portugal' qu. 8.
338. A. Tokár 'Institutional Report – The general principles of EU law: public procurement law and beyond'; the Author concedes that Case C-425/12 *Portugás* [2013] ECR I-, paragraph 25, does not really upholds this conclusion.
339. G.F. Jaeger 'Luxembourg' qu. 8.
340. This probably goes even beyond what the Dutch Proportionality Guide requires: G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 8.

ties being instead considered as market participants,[341] or at least market participants enjoying wide discretion,[342] and for sure the need to reason in terms of imperative requirements in the general interest is not felt.[343]

As Advocate general Kokott made it clear in the well-known Max Havelaar case, provided that given procedural rules to safeguard non-discrimination and transparency are complied with, 'contracting authorities are free to determine themselves what products they wish to procure'.[344]

In its interpretative communication on the 'Community law applicable to contract awards not or not fully subject to the provisions of the 'Public Procurement' Directives' the same Commission is content with requiring a non-discriminatory description of the subject-matter of the contract, that is a description which is not referring to any specific make or sources etc.[345]

Having been part of the debate, I think it is fairer to just repeat here that the restrictions to trade relevant in Contse amounted to residence requirements which could have easily been considered in breach of the non-discrimination principle according to the well-established public procurement case law,[346] if only the referring courts had so couched its question,[347] without any need to resort to more generic and possibly misleading internal market consideration.[348]

341. The reference is to some of the writings collected in S. Arrowsmith – P. Kunzlik (Eds) *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009), including the long introductory chapter by the editors; see also the analysis by: J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 8.
342. F. Wollenschläger 'Deutschland' qu. 8.
343. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 8.
344. Case C-368/10 *Commission* v *Netherlands (Max Havelaar)* [2012] ECR I-, paragraph 44.
345. 2006/C 179/02, point 2.2.1; proportionality may be relevant to ends different from defining the subject-matter of the contract: see M. Trybus 'Public Contracts in European Union Internal Market Law: Foundations and requirements' above fn 303, 109 f.
346. E.g. Case 21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889; for the analysis of additional cases see C.H. Bovis 'Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making' *Common Market L. Rev.* 2006, 463 f ; see also J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 8, with reference to some Czech cases.
347. A. Németh 'Hungary' qu. 8.
348. See a comprehensive discussion in J.J. Czarnezki *States as Market Participants in the U.S. and the EU? Public purchasing and the environment* (Stockholm, Siepsa, 2013), also available at http://www.sieps.se/sites/default/files/2013_2.pdf.

It has been maintained that the application of internal market rules may look like a friendlier option that the application of the 'arcane details' of public procurement provisions.[349]

However the general principles of EU public contract law are not really arcane any more and from the point of view of EU public procurement law too discriminatory requirements are illegal.[350] Indeed, Article 2 of Directive 2004/18/EC lists the triad of the public procurement principles: equal treatment, non discrimination and transparency.[351] For instance, the indication of a specific IT system in the technical specifications and the exclusions of other systems having equivalent performance clearly breaches the principle of non discrimination unlawfully limiting the competition.[352]

In the end, EU public contract legislation itself takes care of internal market concerns, and there is no reason to impose additional requirements.[353] As already remarked the role of the general principles derived from the internal market provisions in the TFEU is instead relevant in award of the contracts falling outside the scope of application of the substantive public contracts directives.[354] Here again a procurement specific case law has already developed the constraints relevant for the contracting authorities.[355]

The freedom to define the subject matter of the contract entails that contracting authorities may in principle impose higher requirements on products

349. B. Doherty 'United Kingdom' qu. 8 & 9.
350. See with reference to some interesting cases S. Troels Poulsen 'Denmark' qu. 8.
351. A. Tokár 'Institutional Report – The general principles of EU law: public procurement law and beyond'; see also J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 8; A. Németh 'Hungary' qu. 8; R. Mastroianni 'Italie' qu. 8; see also, substituting 'competition' to 'equal treatment' C.H. Bovis 'Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making' above fn 346, 461.
352. See the discussion in A. Merle-Beral – I. Tantardini 'France' qu. 8; for a Greek case I. Mazos – E. Adamantidou 'Grèce' qu. 8.
353. A. Dimoulis 'Finland' qu. 8; the Author also stresses that outside the scope of application of the directives the general principles do apply. And here the general principles are the same (having already being adapted to public contracts, I would add); see however A. Tokár 'Institutional Report – The general principles of EU law: public procurement law and beyond'.
354. This is rightly stressed by A. Tokár 'Institutional Report – The general principles of EU law: public procurement law and beyond'; see also A. Dimoulis 'Finland' qu. 8.
355. E.g. Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 21; Case C-226/09 *Commission* v *Ireland* [2010] ECR I-0000, paragraph 41; see M. Trybus 'Public Contracts in European Union Internal Market Law: Foundations and requirements' above fn 303, 98.

and services that the ones stipulated at EU level[356] (unless there is a situation of full harmonisation).[357]

Question 9 – Public Contracts and Competition Law

EU Public contracts law is very much about fostering competition. Its rules however at times may somewhat facilitate anticompetitive behaviours.[358] In principle collusion and bid rigging should be taken care of by the Treaty rules on competition; however, transparency itself, which is the foundation of many public procurement rules, from the description of the subject matter of the contract, to the prior publicity of award criteria, to information as to the merits of the chosen tender,[359] may end making it easier for economic operators to collude.[360] For instance, in restricted procedures knowing the names of the other tenderers is tantamount to an invitation to collude.[361] The same effect may have the rules allowing the submission of joint bids.[362] The possibility to submit joint tenders again may favour collusion.[363]

Bid rigging is indeed a problem in many jurisdictions,[364] including the Netherlands[365] and Switzerland.[366] It is usually repressed under competition

356. A. Sołtysińska 'Poland' qu. 8.
357. Case C-6/05, *Medipac-Kazantzidis* [2007] ECR I-4557; please also refer to R. Caranta 'The Borders of EU Public procurement Law' above fn 241, 39 f; according to A. Tokár 'Institutional Report – Strategic use of Public Procurements', however, minimal harmonisation would also bind contracting authorities.
358. Proposals to better coordinate the two sets of rules were laid down by G.S. Ølykke 'How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the new Directive?' in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 57.
359. Different aspects are analysed by G.F. Jaeger 'Luxembourg' qu. 9, and G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 9, where also an in depth discussion of the OECD recommendations.
360. The book of reference on this aspects is A. Sánchez Graells *Public Procurement and EU Competition Rules* above fn 125, especially 69 ff. and 104 ff.; see also U. Bassi 'Appalti pubblici e antitrust nel diritto comunitario', in E.A. Raffaelli, *Antitrust between EC Law and National Law – Antitrust fra diritto nazionale e diritto comunitario* VIII (Bruxelles – Milano, Bruylant – Giuffré, 2009) 536 ff.
361. See the articulate analysis by S. Troels Poulsen 'Denmark' qu. 9.
362. P. Norman – E.-M. Mühlenbock 'Sweden' qu. 9.
363. A.L. Guimarães 'Portugal' qu. 9.
364. E.g. A. Velkova 'Bulgaria' qu. 6; J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 9.
365. The dates reported by G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 9, are staggering.

rules by ad hoc authorities having investigation powers contracting authorities normally lack[367] and being able to avail themselves of effective cartel busting tools such as leniency programs.[368]

To this end Spanish contracting authorities are to forward to the competition authorities any evidence – including circumstantial evidence – of bid rigging. The system is however criticised because it entails awarding the contract in the meantime that the competition authority investigates.[369] The Czech solution of having one and the same authority competent with both competition law and hearing appeals on public procurement decisions may be a smart move at least in not too big countries. For instance, in one case three companies active in the waste disposal market challenged what they alleged was an award to an abnormally low tender; the authority however found that the companies had rigged their bids, all submitting expensive tenders.[370]

Private enforcement of competition rules could also contribute to the moralization of public procurement markets as it is shown by the ingenuity displayed by a Dutch court in establishing a right to compensation to the benefit of a contracting authority which met higher procurement costs due to bid rigging.[371] Criminal law may also be relevant in some jurisdiction.[372]

Having clearer rules on exclusion of tenderers in such situations could indeed help,[373] as it would help to have effective integrity monitoring tools.[374] The same apply to the definition of the information which may be disclosed to both tenderers and litigants, especially concerning the confidentiality of

366. E. Clerc 'Suisse' qu. 9.
367. E.g. A.L. Guimarães 'Portugal' qu. 9; P. Norman – E.-M. Mühlenbock 'Sweden' qu. 9; E. Clerc 'Suisse' qu. 9 ; see more generally C. Munro 'Competition Law and Public Procurement: Two Sides of the Same Coin?' in *Public Procurement L. Rev.*, 2006, pp. 359 ff, and J. Temple Lang 'Subsidiarity and Public Puchasing: Who Should Apply Competition Law to Collusive Tendering and How Should They Do It?' in *Eur. Public L.* 1998, 55 ff.
368. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 9.
369. J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 9; for a discussion of elements which may indicate collusion was present see A. Velkova 'Bulgaria' qu. 9.
370. See the description of this institutional arrangement in J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 1 and 9.
371. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 9.
372. E.g. P. & B. Ferk 'Slovenia' qu. 9.
373. A. Dimoulis 'Finland' qu. 9.
374. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 9.

technical and trade secrets,[375] the provisions in Article 6 of Directive 2004/18/EC being considered too vague.[376]

Other rules and practices, concerning for instance long term concessions, framework agreements, and central purchasing bodies might be abused by either shutting down markets for a long time and/or giving a very relevant market power to contracting authorities.[377] At the same time, the effort needed to manage heavily regulated procurement procedures inevitably prods contracting authorities to choose longer term and more encompassing procurement tools to avoid repeating the exercise too often. This in turn may penalise SMEs.[378]

According to the Danish experience, however, centralised procurement is not such a threat to the proper working of the market,[379] and as the Finnish report points out, there are ways, such as subdivision of contracts into lots, to minimise the possible downsides of procurement centralisation.[380] The new Public Sector Directive is specifically addressing the problem of SMEs access to public procurement, pushing contracting authorities to subdivide their contracts into lots.[381]

In any case, following the FENIN judgement the application of the law on abuse of market position to contracting authorities, such as in particular cen-

375. A. Dimoulis 'Finland' qu. 9, also pointing out to the accrued risks posed by competitive dialogue procedures.
376. E.g. I. Sammut 'Malta' qu. 4.
377. E.g. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 14.
378. B. Doherty 'United Kingdom' qu. 8 & 9.
379. S. Troels Poulsen 'Denmark' qu. 9.
380. A. Dimoulis 'Finland' qu. 9; subdivision into lots itself, however, can affect the competition discouraging or limiting participation of large enterprises: A. Merle-Beral – I. Tantardini 'France' qu. 9.
381. See the analysis by A. Tokár 'Institutional Report – Public Procurements and general EU law etc'; see also C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 11; the legislative options were analysed by M. Fana – G. Piga 'SMEs and Publicv Contracts. An EU Based Perspective' and A. Sánchez Graells 'Are the Procurement rules a Barrier for Cross-border Trade within the European Market? A view on proposals to lower that barrier ans spur growth' in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 50 ff and 127 ff respectively.

tral purchasing bodies, is not easy.[382] The situation is instead different in Switzerland.[383]

Unduly demanding qualification requirements too may restrict competition especially to the detriment of SMEs.[384] The case law in some Member States is however already applying rigorous proportionality tests, thus anticipating the changes to be brought about by the new directives.[385] Dutch practice is significantly more advanced even when compared to the EU reform: the Gids Proportionaliteit (Proportionality Guide) put the ceiling to past references which can be asked to 60% of the value of the contract.[386]

Generous policies to the benefit of SMEs in some Member States like Germany largely compensate the possible disadvantages flowing form the application of the rules just discussed.[387]

The role of the contracting authority as economic operators may instead lead to distortions of the competition relevant under EU law and this especially so in case of highly centralised procurement systems. This however does not seem to be a very sensitive problem everywhere,[388] and the specific public law rules about the conduct of public law entities are considered a quite effective safeguard.[389]

A more troubling but already discussed issue is the possibility for public law entities which act as market operators (without however running the risk of insolvency) to cross-subsidise their economic activities benefiting from the resources which are either given to them to perform their public law tasks or have been earned through direct award in 'in house' situations. The requirement that the most part of the activities of the in house entity is directed to contracting authorities exercising control over the entity somewhat answers the latter concern. Moreover, the risk is that contracting authorities having

382. Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295; see the detailed analysis by A. Tokár 'Institutional Report – Public Procurements and general EU law etc.', who also refer to the different position of contracting entities.

383. E. Clerc 'Suisse' qu. 9.

384. E.g. A. Peedu 'Estonia' qu. 9.

385. A. Dimoulis 'Finland' qu. 9; also R. Mastroianni 'Italie' qu. 9; see also A. Tokár 'Institutional Report – Public Procurements and general EU law etc'.

386. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 6.

387. F. Wollenschläger 'Deutschland' qu. 8.

388. E.g. N. Popović – F. Kuhta 'Croatia' qu. 9.

389. A.L. Guimarães 'Portugal' qu. 9.

benefited from direct awards may then allow privileged access to some of their business to some market participant.[390]

Question 10 – Public Contracts and SGEIs

The State and the other public law entities are set up to look after the wellbeing of the population. To this end they provide services, whose number, characteristics and coverage differ from Member State to Member State because they depend on policy choice normally left at national level. This differentiation has indeed a constitutional basis in Article 14 TFEU and Protocol No 26 annexed to the Treaties.[391]

Article 4(1) of the Concessions Directive reiterates that it does:

> not affect 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 organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

The Member States therefore enjoy a discretionary power as to which service to class as SGEIs, thus organising their market. Once they choose to externalise, however, public contract rules usually become relevant.[392] Otherwise said, once a Member States decides to have recourse to the market to provide a given SGEI, its discretion has been largely exhausted.[393]

Among the possible differences a relevant one concern the way the provision of the services is organised. Services may be provided directly by the State or other public law entities. In the past few decades the trend has however been towards the externalisation of services, but this trend has been more or less strong in different Member States. From another point of view, the alternative between self-production and externalisation has to be coordinated with the distinction between economic and non-economic services. 'The

390. Case C-159/11, *ASL Lecce* [2012] ECR I-, paragraph 38.
391. See B. Doherty 'United Kingdom' qu. 8 & 9; see also M. Ross 'Article 16 EC and services of general interest: from derogation to obligation' above fn 126, 22.
392. See also G.S. Ølykke 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions?' above fn 49, 6 ff: Ead. 'The definition of a 'Contract' Under Article 106 TFEU' above fn 52, 109 f.
393. See however the opposite take by N. Fiedziuk 'Putting Services of General Economic Interest up for Tender' above fn 65, 88.

question whether a market exists for certain services may depend on the way those services are organised in the Member State concerned'.[394] However,

> The decision of an authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned.[395]

On the other hand, the introduction of market mechanisms by a Member State entails the reclassification of an activity/service as an economic one.[396]

Market rhymes with competition and State aid control and calls for the application of Article 106(2) TFEU:

> where markets have been opened up to competition either by Union or national legislation or de facto by economic development, State aid rules apply. In such situations Member States retain their discretion as to how to define, organise and finance SGEIs, subject to State aid control where compensation is granted to the SGEI provider, be it private or public (including in-house).

However, the compensation granted to that undertaking is subject to State aid control also 'where the market has been reserved for a single under taking (including an in-house provider)'.[397]

It is to be recalled that externalisation is not necessarily the same as liberalisation. Liberalisation is an option when services can be provided by market participants competing against each other without specific financial sup-

394. 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 12.
395. 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 13.
396. 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 16; the all process may be quite complex, as it is shown by the case of postal services in Croatia: N. Popović – F. Kuhta 'Croatia' qu. 8.
397. 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 also J. Vaquero Cruz 'Beyond Competition: Services of General Interest and European Community Law' above fn. 4, 170 ff, referring to Article 106(2) TFEU as 'the normative locus for the balancing of market and non-market values'.

port.[398] When the competent authority wants a given service to be provided according a the universal service system which derogates from natural market conditions,[399] the 'private' service provider will have to be motivated through a financial compensation from the public purse.[400]

Compensation raises as a matter of course the issue of State aid. In the well-known *Altmark* case the Court of Justice laid down the conditions under which compensation does not constitute State aid.[401] The circumstance that the service providers were chosen through a competitive award procedure was held not to be a necessary condition to the legality of the compensation granted. However, the default position seems to be that the undertaking which is to discharge public service obligations is 'chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community' (fourth *Altmark* criterion).[402]

The ruling raised more questions than provided answers.[403] The 2005 Monti package failed to address all the questions raised by Altmark and in 2012 a new and quite articulated package was introduced. Logically but shortly sketched, the Alumnia package comprises a) Commission Regulation (EU) No 360/2012 On the application of Articles 107 and 108 TFEU to de minimis aid granted to undertakings providing SGEI, declaring that do not constitute State aids compensations below EUR. 500.000 over any period of three fiscal years; b) Commission Decision 2012/21/EU On the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI, clarifying that certain types of SGEI compensation constituting State aid to be compatible with the Treaty pursuant to Article 106(2) TFEU and exempting them from the notification obligation under Article 108(3) of the Treaty, c) a Communication of the Commission On the application of the EU State aids

398. 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 2.
399. See for instance, with reference to telecommunications and postal services, J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 10.
400. *Ibidem*.
401. Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.
402. Paragraph 93.
403. As C.H. Bovis 'Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making' above fn 346, 486 remarks, 'The *Altmark* ruling is ambiguous'.

rules to compensation granted for the provision of SGEI, which having the Altmark judgment has its principal reference point lays down the conditions under which compensation granted to SGEI providers complies with State aid rules, and d) another Communication EU Framework for State aid in the form of public service compensation, which sets out the conditions under which State aid for SGEIs not covered by the Decision can be declared compatible under Article 106(2) of the Treaty.[404]

The Communication and the Framework are more relevant in the definition of the relationships between public procurement and State aid laws. The Communication, which has already been extensively referred to in outlining the law of State aid as applicable to SGEIs, clarifies its indications are without prejudice to the application of other provisions of Union law, 'in particular those relating to public procurement and requirements flowing from the Treaty and from sectoral Union legislation'. Finally, the Communication expressly refer to Articles 49 to 56 TFEU, the 2004 Directives, and the general principles of EU law applicable to the contracts non covered or not fully covered by the directives.[405]

Beside the safeguard for primary and secondary law provisions, and obviously a communication cannot amend the legal framework, the Communication toes with Altmark stating that a:

> decision to provide the SGEI by methods other than through a public procurement procedure that ensures the least cost to the community may lead to distortions in the form of preventing entry by competitors or making easier the expansion of the beneficiary in other markets.[406]

Indeed, the simplest way for public authorities to meet the fourth Altmark criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with the public contracts directives.[407] Unsurpris-

404. 2012/C 8/03, point 7.
405. Point 5.
406. 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 also point 64: 'Also in cases where it is not a legal requirement, an open, transparent and non-discriminatory public procurement procedure is an appropriate method to compare different potential offers and set the compensation so as to exclude the presence of aid.'
407. *Ibidem*, point 63; see also the analysis in P. & B. Ferk 'Slovenia' qu. 10.

ingly in a number of Member States, including Austria, SGEIs are entrusted through competitive award procedures.[408]

The application of competitive award procedures is anyway often compulsory under EU public contract law. The entry into force of the Concessions directive is to make clearer – if not to widen – the quantity and quality of contracts entrusting the provision of SGEIs which must be awarded according to competitive procedures.[409]

In any case similar procedures were applied in Finland to the award of SGEIs concerning non priority service as this was the preferred option under State aid rules even if it was not mandatory under EU public contract law.[410] Moreover, in a number of Member States contract award procedures have become the standard procedure to entrust a SGEI even beyond what is required by EU public contract law.[411]

An entire section of the Communication is devoted to the selection of the provider. 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''.[412] This stricter requirement will for sure be met by an open procedure and also by a restricted one (unless interested operators are prevented to tender without valid reasons). Procedures like competitive dialogue or negotiated procedure with prior publication instead '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'.[413]

From the point of view of present EU public contract law and considering that competitive dialogue and negotiated procedure are allowed only in exceptional circumstances, the question then is whether 'exceptional' is to be

---

408. M. Fruhmann 'Austria' qu. 10.
409. For a discussion a sto the present situation N. Fiedziuk 'Putting Services of General Economic Interest up for Tender' above fn 65, 100 ff.
410. A. Dimoulis 'Finland' qu. 4.
411. I. Mazos – E. Adamantidou 'Grèce' qu. 10.
412. Point 65.
413. Point 66.

understood in the same way under in both public contract and State aid laws. The positive answer is commended by the need for coherence in EU law.

As is well-known, the new directives have considerably changed the approach to award procedures to respond to a 'great need' for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations.[414] Member States will be allowed to provide for the use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes.[415] The proposed Concession Directive leaves Member States even more scope to design award procedures, provided they are competitive. The suspicion the Communication *On the application of the EU State aids rules to compensation granted for the provision of SGEI* is showing towards these procedures is probably unwarranted, since it is the same law maker to avow that 'A greater use of these procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders'.[416]

Since the cases in which the new Public Sector directive allows for the use of competitive dialogue or a negotiated procedure with prior publication are cases in which recourse to open or restricted procedure would either be impossible or not useful, additional restrictions will make the provision of SGEIs impossible, frustrating the freedom of Member States to decide which services deserve to be considered SGEIs or as a minimum compelling the to internalise the provision of these services.

Concerning award criteria, the Communication of the Commission shows a clear preference for the 'lowest price'. The 'most economically advantageous tender' is deemed sufficient only provided that the award criteria, including environmental or social ones are 'closely related to the subject-matter of the service provided and allow for the most economically advantageous

---

414. The different issues surrounding negotiations in contract award procedures are analysed by S. 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 C.D. Tvarnø 'Why the EU Public Procurement Law should contain Rules that allow Negotiation for Public Private Partnerships' in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 135 and 201 respectively.

415. See also the remarks by A. Tokár 'Institutional Report – Public Procurements and general EU law etc.'

416. See Recital 42 of the new Public Sector Directive.

offer to match the value of the market'.[417] The adverb 'closely' is possibly used to convey a somewhat stricter approach that the one generally allowed under the present public procurement legislation. The concern is that criteria are defined in such a way as to allow for 'an effective competition that minimises the advantage for the successful bidder'.[418]

Here again the Commission is running against the grain of the new public contracts directives, which limit the role of the lowest price to foster sustainable procurement and innovation.[419] Reasons of legal certainties cry loud for a recast of this entire section of the Communication.[420]

All summed up, it is difficult to affirm the need for differences between public contract and State aid law as far as the award procedures and criteria are considered.[421] An extant difference is however bound to remain in that, as it was already said, SGEIs may be entrusted through legal acts which fall outside the definition of public contracts.[422] The EU allows Member States the discretion to organise the provision of SGEIs and the choice to reserve a given service to an emanation of the State will normally take place through a legislative measure.[423] For instance, in Croatia the provider of the universal postal services has been named in a legislative measure.[424]

The Communication *EU Framework for State aid in the form of public service compensation* makes compliance with the applicable public contracts

417. Point 67.

418. *Ibidem*, fn. 12.

419. Please refer to R. Caranta 'Award criteria under EU law (old and new)' in M. Comba – S. Treumer (Eds) *Award of Contracts in EU Procurements* (Copenhagen, DJØF, 2013) 21.

420. This need is clearly articulated by P. & B. Ferk 'Slovenia' qu. 10.

421. The need to have a market research when only one tender is received is probably one situation in which State aid law is responsible of regulatory overkill; for a case see S. Troels Poulsen 'Denmark' qu. 10; A. Dimoulis 'Finland' qu. 7 rightly stresses that in the area of SGEIs long deadlines would usually be appropriate, but public contract rules lay down minimal deadlines which set a minimum, not a maximum.

422. 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 the detailed analysis by G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 10; of course Member States are not bound to use the possible alternatives to award procedures: also R. Mastroianni 'Italie' qu. 10.

423. See B. Doherty 'United Kingdom' qu. 10, defending the EU constitutionnally granted discretion of Member States; see in general G.S. Ølykke 'The definition of a 'Contract' Under Article 106 TFEU' above fn 52, 105 f; N. Fiedziuk 'Putting Services of General Economic Interest up for Tender' above fn 65, 99.

424. N. Popović – F. Kuhta 'Croatia' qu. 10.

legislation and with the general principles of EU law a condition to consider the aid compatible with Article 106(2) TFEU. 'Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) of the Treaty'.[425]

As it has been rightly remarked, 'the new framework therefore leads to a systematic investigation of SGEIs from the perspective of procurement rules'.[426]

It is to be kept in mind that specific rules are applicable to this or that SGEI such as Regulation 2007/1370/EC on public passenger transport services by rail and by road[427] or Regulation 92/3577/EEC applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).[428] For instance public passenger transport contracts are normally awarded following a competitive procedure in the Netherlands, but the largest cities have opted to keep the service in house as they are specifically allowed to under the special regime laid down in Regulation 2007/1370/EC.[429]

Strategic use of public procurement

The Commission Green Paper 'on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market' has introduced a novel emphasis on the 'complementary objectives' of public procurement regulation, in a way putting sustainability on the same footing as other objectives.[430] A specific part of the Green paper is dedicated to what is

425. Point 19.
426. A. Tokár 'Institutional Report – Public Procurements and general EU law etc.'; see also N. Fiedziuk 'Putting Services of General Economic Interest up for Tender' above fn 65, 97 f.
427. See J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 10; A. Németh 'Hungary' qu. 10; the regulation is analysed by *G.S. Ølykke, 'Regulation 1370/2007 on Public Passenger Transport Services' Public Procurement L. Rev. (2008) NA84*.
428. See S. Troels Poulsen 'Denmark' qu. 10.
429. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 10; see also F. Wollenschläger 'Deutschland' qu. 10.
430. COM(2011) 15 final; see generally R. Caranta 'Sustainable Procurement' in M. Trybus, R. Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* above fn 5, 165; J.J. Pernas García *Contratación pública verde* (Madrid, La Ley, 2011); S. Arrowsmith – P. Kunzlik (Eds) *Social and Environmental Policies*

referred to as 'strategic use of public procurement'. The overall idea is that these complementary objectives may reinforce one another, for instance 'by moving focus from lowest initial price to lowest life-cycle cost'.[431]

This set of questions dwelves on the most relevant aspects of the strategice use of public procurement, including how public procurement may contribute to meet the development goals of Agenda 2020.[432]

Question 11 – Sustainable Public Procurement

Traditionally, the basic idea in public procurement legislation has been to achieve better value for money.[433] The specific existential needs of the EU translated this in rules aimed at fostering competition (best value for money becoming a useful by-product). According to the 2011 Green Paper, this must now be coordinated with environmental, social concerns, innovation,[434] but as the institutional rapporteur stressed, the list of legitimate strategic policy goals is potentially very long.[435]

Overall, Member States (or regions within Member States) may be seen to be either embracing strategic procurement or being lukewarm at best.[436] For instance the UK under Margaret Thatcher's conservative government focused on 'letting the market operate without adding what were seen as extraneous requirement'.[437]

---

in EC Procurement Law above fn 341; Ch. McCrudden *Buying Social Justice. Equality, Government Procurement, & Legal Change* (Oxford, UPO, 2007); a review of the law as it is in a number of Member States in R. Caranta – M. Trybus (Eds) *The Law of Green and Social Procurements in Europe* (Copenhagen, DJØF, 2010).

431. Critically T. Kotsonis 'Green Paper on the Modernisation of EU Public Procurement Policy: Towards a more Efficient European Procurement Market' in *Public Procurement L. Rev.* 2011, NA51.
432. See also E. Fisher 'The Power of Purchase: Addressing Sustainability through Public Procurement' *Eur. Proc. & Public Private Partnership L. Rev. EPPPL* 2013, 2; for the reference to Agenda 2020 see also G.F. Jaeger 'Luxembourg' qu. 11.
433. See also E. Clerc 'Suisse' qu. 11.
434. COM(2011) 15 final; the potential conflict of these objectives is underlined by M. Fruhmann 'Austria' qu. 1.
435. A. Tokár 'Institutional Report – Strategic use of Public Procurements'.
436. Given the federal structure of Germany, this kind of policy choices may be differently addressed in different *Länder*: F. Wollenschläger 'Deutschland' qu. 11.
437. B. Doherty 'United Kingdom' qu. 11, also specifically focusing on the relevant evolution in Northern Ireland; see also M. Trybus 'Sustainability and Value for Money: Social and Environmental Consideration in United Kingdom Public Procurement

In other countries, like in Finland, the Netherlands and the Czech Republic, there is a strong and long standing policy commitment to foster sustainable procurement,[438] and sustainability is recognised as a general principle of public contracting *au par avec* best value for money in Austria[439] and Luxembourg (provided its application does not entail disproportionate administrative burdens).[440]

The Italian *Codice dei contratti pubblici* too lists environmental and social considerations among its general principles, even if they are rather seen as a possible correction to the best value principles,[441] while the relation between the two sets of value is unclear in Hungary.[442] In Sweden a strong link with the subject matter of the contract is required and the choices of contracting authorities are reviewed against the proportionality test.[443]

Where strong ideological preference are not at play, as it is the case in Denmark, the default position of contracting authorities seems to be the focus on costs, possibly also taking into account those incurred in using the products purchased, such as lifetime energy consumption.[444]

The economic crisis may have been seen as sharpening the focus on costs in some Member State;[445] given resource scarcity, it has instead encouraged contracting authorities in other jurisdictions to strike two birds with one stone.[446] As the Irish reporters write, ‘The financial crises has increased enthusiasm for the use of public procurement to achieve wider social policy goals’.[447] In the end, has it has been rightly remarked, pollution and social tensions have their costs as well.[448]

Law’ in R. Caranta – M. Trybus (Eds) *The Law of Green and Social Procurements in Europe* above fn 430, 262 ff.

438. A. Dimoulis ‘Finland’ qu. 11; G.-W. Van de Meent – E.R. Matunza (Eds) ‘The Netherlands’ qu. 11; J. Kindl, M. Rá, P. Hubková, T. Pavelka ‘Czech Republic’ qu. 11, the latter however with some reservations as to the real legal force of the sustainability principle.
439. M. Fruhmann ‘Austria’ qu. 11.
440. G.F. Jaeger ‘Luxembourg’ qu. 11.
441. R. Mastroianni ‘Italie’ qu. 11.
442. A. Németh ‘Hungary’ qu. 11.
443. P. Norman – E.-M. Mühlenbock ‘Sweden’ qu. 11.
444. S. Troels Poulsen ‘Denmark’ qu. 11; see also F. Wollenschläger ‘Deutschland’ qu. 11.
445. A.L. Guimarães ‘Portugal’ qu. 14.
446. See A. Merle-Beral – I. Tantardini ‘France’ qu. 11: ‘Les marchés publics représentent une manne incontournable pour promovoir le développement durable’; see also F. Wollenschläger ‘Deutschland’ qu. 11, and I. Mazos – E. Adamantidou ‘Grèce’ qu. 11.
447. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon ‘Republic or Ireland’ qu. 11.
448. A. Merle-Beral – I. Tantardini ‘France’ qu. 11; see also R. Mastroianni ‘Italie’ qu. 11.

At the same time the argument that environmentally friendly products are more expensive does not necessarily hold true; as it is shown by the Danish example about energy consumption life-cycle costing methods may help in the push for sustainable procurement.[449]

From the point of view of both policy and law, what has become the EU has much struggled to find an acceptable balance point between competition and sustainability concerns.[450] This also links with the discussion above about the discretion of contracting authorities to choose what to buy without unlawfully discriminating among economic operators potentially interested to be awarded a contract. As Advocate General Kokott brilliantly put it in the infringement procedure against the Netherlands, a case also known as Max Havelaar:

> Whether and to what extent environmental and social considerations may be taken into account and, in particular, reference may be made to environmental and fair trade labels, is a question of fundamental importance for the further development of the public procurement law. In giving its answer, the Court is faced with the challenge of finding an equitable balance between the requirements of the internal market and environmental and social concerns, without, however, ignoring the practical requirements of award procedures. On the one hand, there can be no discrimination between potential tenderers or partitioning of markets. On the other hand, contracting authorities must be allowed to procure environmentally friendly, organic and fair trade products without excessive administrative burdens.[451]

The tension between open competition and sustainability values collapsed in the idea, first expounded by the Court of Justice in Concordia Bus with reference to award criteria, that green (or social) requirements had to be linked to the subject-matter of the contract.[452]

This was much clarified in Max Havelaar. The province of North Holland had set an award criterion consisting in the fact that the ingredients to be supplied were to bear the Eko and/or Max Havelaar labels. The Commission lamented that the link to the subject-matter of the contract was absent in so far 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). Moreover, the award criterion was inconsistent with the requirements

449. S. Troels Poulsen 'Denmark' qu. 11; see also I. Mazos – E. Adamantidou 'Grèce' qu. 11.
450. See also A. Tokár 'Institutional Report – Strategic use of Public Procurements.'.
451. Case C-368/10 *Commission* v *Netherlands (Max Havelaar)* [2012] ECR I-, paragraph 3 of the conclusions.
452. Case C-513/99, *Concordia Bus* [2002] ECR I-7213.

regarding equal access, non-discrimination and transparency. The second argument had clear merit on the facts of the case, but the reply given to the first one has led sustainable procurement a giant step forward. The Commission tended to reason as if reference to a specific production process were possible only if this does not restrict competition and helps to specify the performance characteristics (visible or invisible, whatever the latter could be) of the product or service.[453] This approach was rightly and strongly criticized by the Advocate General. In her opinion, the Eko label directly concerns the product characteristics – more precisely the environmental characteristics – of the ingredients to be supplied.[454] Moreover, the Max Havelaar label, while not defining any product characteristics in the strict sense, does, however, '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'.[455]

This was a strong endorsement as there could possibly be of social considerations in public procurement. 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 whether or not they are the subject-matter of the contract; but this was not the case with the contract notice at issue.[456]

The conclusions were fully followed by the Court of Justice, holding that contracting authorities are 'authorised 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,

453. COM(2001) 274 final, point II.1.2; see also COM(2001) 566 final, point 1.2.
454. Paragraph 109.
455. Paragraph 110.
456. Paragraphs 111 f.

but also other persons'.[457] Moreover, referring to EVN and Wienstrom,[458] the Court reiterates that 'there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof.'[459]

This judgment clearly shows that anything taking place during the life-cycle of a product or service is linked to the subject-matter of the contract. Reference to life-cycle costing is seen as the main avenue for taking sustainability issues into account in public contracts. What is still not allowed is reference to the general policy of the economic operator.[460]

One specific concern is the possible abuse of strategic considerations to favour local product/producers or more generally local economic operators, which traditionally was a widespread occurrence in national procurement praxis which EU law is supposed to fight against.[461] In some cases the requirements are clearly protectionist and therefore are in breach of both general internal market principles and public procurement principles and rules. A requirement in a forestry procurement that trees should be of Danish provenance to make sure that they would have been able to thrive in the Danish climate was rightly struck out by the Procurement Appeals Tribunal noting that regions in other Member States have a climate not dissimilar from Denmark.[462]

In many Member States public procurement is seen as a tool in the fight against unemployment.[463] Special conditions providing for the hiring of (usually long term) unemployed and other disadvantaged are lawful under Beentjes[464] and Nord-Pas-de-Calais.[465] They are for instance used in Poland

457. Paragraph 85.

458. Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527; see Th. Gliozzo, 'L'admissibilité d'un critère environnemental au regard de la réglementation communautaire des marchés' *Actualité Juridique Droit Administratif* 2004, 334.

459. Paragraph 91.

460. A. Tokár 'Institutional Report – Strategic use of Public Procurements'; F. Wollenschläger 'Deutschland' qu. 11.

461. See for instance A. Dimoulis 'Finland' qu. 1; P. Norman – E.-M. Mühlenbock 'Sweden' qu. 11.

462. See the references in S. Troels Poulsen 'Denmark' qu. 9; for the Spanish approach J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 8.

463. E.g. S. Troels Poulsen 'Denmark' qu. 11, indicating that the focus has now shifted towards creating work placement for young people in training; see also A. Merle-Beral – I. Tantardini 'France' qu. 11; I. Mazos – E. Adamantidou 'Grèce' qu. 11; Spain may be an exception under this respect J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 11.

464. Case 31/87, [1988] ECR 4635.

to the benefit of unemployed, youth and disabled.[466] However the law is still somewhat uncertain and contracting authorities may rather stay on the safe said opting for rather modest schemes as it was the case in Northern Ireland.[467]

The concern about local preference is also strong when transportation costs are taken into account in award criteria. In an interesting Swiss case concerning the collection of waste the *Tribunal federal* judged unlawful an award criterion which considered the distance the lorries had to travel without distinguishing the different pollution of empty and full lorries and without considering the pollution created in the actual collection of waste which is due to a number of stops and goes.[468]

This case brilliantly illustrates the necessity of scientifically sound approaches to lifecycle costing as required by the new Public Sector Directive.[469] Indeed, as it result from a long standing case law, the award criteria must not only be objective, but verifiable.[470] The same conclusions might be drawn from the Estonian experience about the clean vehicles directive which will be briefly recalled below.[471] The Finnish experience on calculating carbon footprints, while sectoral, is of obvious relevance as a potential trendsetter.[472] The Slovenian Decree on Green Public Procurement mandates lifecycle costing for the purchase of a number of product and service groups.[473]

The same considerations as to the need to develop scientifically sound LCC methodologies also apply to the preference for local food, which is a hot topic in a number of member States.[474]

465. Case C-225/98 *Commission* v *France* [2000] ECR I-7445.
466. A. Sołtysińska 'Poland' qu. 11, who stresses that the condition about emplyment must be met in the implementation of the contract and it is not a selection criterion.
467. This is beautifully discussed by B. Doherty 'United Kingdom' qu. 11.
468. E. Clerc 'Suisse' qu. 11.
469. See D. Dragos – B. Neamtu 'Sustainable Public Procurement: Life-Cycle Costing in the New EU Directive Proposal' *Eur. Proc. & Public Private Partnership L. Rev. EPPPL* 2013, 19; critically on the Commission's proposal I. Sammut 'Malta' qu. 14; see also P. Norman – E.-M. Mühlenbock 'Sweden' qu. 11.
470. See Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 50; see also A. Tokár 'Institutional Report – Strategic use of Public Procurements'.
471. A. Peedu 'Estonia' qu. 12.
472. A. Dimoulis 'Finland' qu. 11.
473. P. & B. Ferk 'Slovenia' qu. 11.
474. See A. Merle-Beral – I. Tantardini 'France' qu. 11; A. Dimoulis 'Finland' qu. 11; P. Norman – E.-M. Mühlenbock 'Sweden' qu. 8, and B. Doherty 'United Kingdom' qu. 8 & 9.

Labels tend to be little used outside the area of energy efficiency[475] It is expected that the new Public Sector Directive, which is relaxing the quite strict approach uphold in the case law (and specifically in the *Max Havelaar* case)[476] by allowing direct reference to labels, provided that equivalent products or services are accepted, will change this situation.[477]

Another interesting development concern set aside for the third sector. Under Article 19 Directive 2004/18/EC (to become Article 20 in the new directive) Member States may reserve the right to participate in public contract award procedures to sheltered workshops where most of the employees concerned are handicapped persons.[478] Article 77 of the new Public Sector Directive goes in a way much further by expressly restating the *Sodemare* principle and consequently allows Member States to reserve to NGOs having specific characteristics the participation in procedures for the award of a number of health, social and cultural services.[479] The provision is now quite generous, and in principle it might cover the Polish experience of public social partnership.[480]

The provision does not however dispense contracting authorities from the use of competitive procedures. Only access to these procedures may be limited to some categories of economic operators. On this basis cases like the Magyar legislation mandating contracting authorities to procure from prison workshops will still fall outside its protection.[481] The same may be the case with direct award of social support service contracts in the Netherlands, even if here the possible lack of a certain cross-border interest might bring (some of) these contracts which fall below the relatively high thresholds outside the scope of application of EU law.[482]

---

475. N. Popović – F. Kuhta 'Croatia' qu. 11; S. Troels Poulsen 'Denmark' qu. 11.
476. Case C-368/10 *Commission* v *Netherlands (Max Havelaar)* [2012] ECR I-, paragraphs 63 ff.
477. Please refer to R. Caranta 'Sustainable Procurement' above fn 430, 172 f; the risks linked to direct reference to national labels are however rightly stressed by A. Dimoulis 'Finland' qu. 11.
478. This has been for instance provided in Poland: see A. Sołtysińska 'Poland' qu. 11, and a specific legislative act has been passed in the Netherlands: G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 11; the relevance of the provision is marginal according to J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 11, and to P. & B. Ferk 'Slovenia' qu. 11.
479. Case C-70/95 *Sodemare* [1997] ECR I-3395; please refer to R. Caranta 'Sustainable Procurement' above fn 430, 175 f.
480. A. Sołtysińska 'Poland' qu. 11.
481. A. Németh 'Hungary' qu. 9.
482. See G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 4.

A number of secondary law instruments (e.g. Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, and Regulation 2008/106/EC on a Community energy-efficiency labelling programme for office equipment) actually impose instances of what to buy.[483] Slovenia chose to implement a number of these EU rules in one Decree on Green Public Procurement.[484]

The actual use of the clean vehicles directive by national contacting authorities has at times be problematic. In Estonia a green procurement for buses aborted because the standardised test procedures to evaluate fuel consumptions and CO2 emissions had not been established and the contracting authority could neither be expected to run complex tests on the proposed vehicles nor to rely on the information provided by the tenderers themselves.[485] The administrative burdens imposed on contracting authorities and tenderers alike are an obviously relevant problem.[486] Possibly unsurprisingly the directive was simply ignored in Croatia in an award procedure launched well after the deadline for implementation had expired.[487]

Guidance on how to incorporate sustainability considerations in the public procurement process are widely perceived to be a key element in succesful and EU law compliant sustainable procurement,[488] even if the view form Budapest is less rozy.[489] The preparadness problem may affect both contracting authorities and the supplier base.[490] From this point of view, the setting up of a dedicated advisory service as it has been the case in Finland recently may constitute a big step forwards.[491]

483. This issue is discussed by P. Trepte 'The Contracting Authority as Purchaser and Regulator' above fn 335, 100.
484. P. & B. Ferk 'Slovenia' qu. 11.
485. A. Peedu 'Estonia' qu. 11.
486. G.F. Jaeger 'Luxembourg' qu. 11.
487. See N. Popović – F. Kuhta 'Croatia' qu. 11, referring that this was even after, if but a few days, the directive was belatedly implemented into domestic legislation.
488. E.g. B. Doherty 'United Kingdom' qu. 11; G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 11; M. Fruhmann 'Austria' qu. 11; appropriate training is also relevant: A. Peedu 'Estonia' qu. 11, and again M. Fruhmann 'Austria' qu. 11.
489. A. Németh 'Hungary' qu. 11; guidance may of course err on the safe side, as it seems to be the case in the Netherlands: G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 11.
490. The latter is the case e.g. in Slovenia: P. & B. Ferk 'Slovenia' qu. 11.
491. A. Dimoulis 'Finland' qu. 11; see also the French experience reffered to by A. Merle-Beral – I. Tantardini 'France' qu. 11.

Question 12 – Public Procurement & Innovation

Innovation, already a concern when the 2004 directives were being drafted, is now more central than ever in the light of Agenda 2020.[492] In a number of countries public procurement is seen as a means to promote innovation,[493] including with reference to environmentally friendly technologies.[494] As it is the case with sustainable procurement, policy documents abound in many Member States. For instance in Malta innovative public procurement is part of a National Strategic Plan for Research and Innovation.[495]

The EU normative framework is however often considered as a straight-jacket hindering innovation,[496] including the reference to innovative purchasing techniques,[497] especially because EU law has traditionally been very suspicious of dialogue between the contracting authorities and market participants; it is however fair to say that most contracting authorities themselves are often too risk averse,[498] as are economic operators at least in some Member States.[499]

Some provisions in the current directives however already help in pursing innovation. For instance Article 23(3) of Directive 2004/18/EC allows performance based technical specifications which are used, albeit normally in a non-exclusive way, in a number of Member States[500] but not yet in Croatia.[501]

---

492. A. Merle-Beral – I. Tantardini ‘France’ qu. 12; the topic is thoroughly analysed by M. Steinicke ‘The Public Procurement Rules and innovation’ and M. Burgi ‘Can Secondary Considerations in Procurement Contracts be a Tool for Increasing Innovative solutions?’ in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 259 and 275 respectively.
493. E.g. S. Troels Poulsen ‘Denmark’ qu. 12; P. Norman – E.-M. Mühlenbock ‘Sweden’ qu. 12.
494. A. Dimoulis ‘Finland’ qu. 12; also R. Mastroianni ‘Italie’ qu. 12.
495. I. Sammut ‘Malta’ qu. 12, who provides an interesting case study.
496. E.g. A. Németh ‘Hungary’ qu. 12.
497. See B. Doherty ‘United Kingdom’ qu. 1 and 12.
498. This is rightly stressed by S. Troels Poulsen ‘Denmark’ qu. 12; C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon ‘Republic or Ireland’ qu. 12, and by P. & B. Ferk ‘Slovenia’ qu. 12 (underlying that the Court of auditors plays a role in this), and seems to be the case in Spain as well: J.M. Gimeno Feliú – P. Valcárcel Fernández ‘Spain’ qu. 12.
499. This is my reading of the analysis of R. Mastroianni ‘Italie’ qu. 12.
500. Please refer to F. Wollenschläger ‘Deutschland’ qu. 12; A. Németh ‘Hungary’ qu. 12; B. Doherty ‘United Kingdom’ qu. 12.
501. N. Popović – F. Kuhta ‘Croatia’ qu. 12.

Similar considerations may apply to the variants, whose use is allowed under Article 24 of the same directive.[502]

Another obstacle to innovation is the preference for the lowest price award criterion in many jurisdictions due either to legislation concerned about the integrity of the procurement process[503] or to the contracting authorities lacking trained staff[504] or being made risk averse by litigation.[505]

In Sintesi however the Court of Justice held that Member States do not have the power to restrict the discretion of contracting authorities to chose which award criterion, between lowest price and most economic advantageous tender, is more appropriate to a given award procedure.[506]

Article 67(2) of the new Public Sector Directive has gone some way in reducing recourse to the lowest price allowing Member States 'to provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts'.

The competitive dialogue too was expected to help innovation and indeed it seems to have played some influence for instance in Estonia, where it is very much used,[507] and also beyond the boundaries of the EU and more notably in Switzerland.[508] In Ireland competitive dialogue was fairly often used, even if enthusiasm has somewhat abated in the past few years.[509] In Northern Ireland the competitive dialogue is often used for complex ICT procurements.[510] In a quite striking instance, the Czech competition authority struck down for lack of clarity the technical specifications of a complex IT procurement to be awarded following an open procedure; the authority suggested

502. E.g. G.F. Jaeger 'Luxembourg' qu. 12; G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 12; see also M. Steinicke 'The Public Procurement Rules and innovation' above fn 492, 263.
503. See for instance J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 11; see also D. Dragos – B. Neamtu – R. Suciu 'The Theory and Practice of Award Criteria in the Romanian Procurement Law' in M. Comba – S. Treumer (Eds) *Award of Contracts in EU Procurements* above fn 419, 184.
504. N. Popović – F. Kuhta 'Croatia' qu. 14.
505. B. Doherty 'United Kingdom' qu. 12.
506. Case 247/02 *Sintesi* [2004] ECR I-9231.
507. A. Peedu 'Estonia' qu. 12.
508. E. Clerc 'Suisse' qu. 1 and 12.
509. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 12.
510. B. Doherty 'United Kingdom' qu. 12.

that competitive dialogue would have been the appropriate procedure in such a case.[511]

There are however some uncertainties as to the proper scope of application of this procedure[512] and as to operate it effectively,[513] which may have led some contracting authorities to opt for the more traditional procedures while leading more enterprising ones into litigation.[514] The new Public Sector Directive, relaxing the conditions for recourse to competitive dialogue, is supposed to dissipate concerns about recourse to this procedure.[515]

The new Public Sector Directive has also introduced a new procedure, the innovative partnership, to foster innovation.[516] It is too soon to say whether it may really be a game changer.[517]

Research and development contracts too are expected to contribute to innovation. Article 14 of the new Public Sector Directive has redrafted the exclusion already provided for in Article 16(f) of Directive 2004/18/EC.[518]

Facilitation of cross-border joint procurement has also been seen as a facilitator of innovation.[519]

Innovation also links with the rules protecting intellectual property rights.[520] For instance in Switzerland contracting authorities are not allowed to disclose to their contractor information included in the tenders of competi-

511. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 12.
512. F. Wollenschläger 'Deutschland' qu. 12; A. Németh 'Hungary' qu. 12. See more generally the discussion by F. Lichère 'New Award Procedures' in M. Trybus, R. Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* above fn 5, 85 ff.
513. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 12.
514. For some interesting Danish cases S. Troels Poulsen 'Denmark' qu. 12; for a more detailed analysis see the contributions collected by S. Arrowsmith – S. Treumer (Eds) *Competitive Dialogue in EU Procurement* (Cambridge, Cambridge University Press, 2012).
515. Again F. Lichère 'New Award Procedures' above fn 512, 103; see also A. Tokár 'Institutional Report – Conclusion and reform'; see also P. Telles 'Competitive Dialogue: Should Rules be Fine-tuned to Facilitate Innovation?' in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9, 221.
516. A. Merle-Beral – I. Tantardini 'France' qu. 12; I. Sammut 'Malta' qu. 14; J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 12.
517. A. Dimoulis 'Finland' qu. 12.
518. See F. Wollenschläger 'Deutschland' qu. 12, raising possible State aid issues in the award of these contracts.
519. J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 12.
520. See also also R. Mastroianni 'Italie' qu. 12.

tors.[521] The most pressing issue, especially for small contracting authorities but also for the contractors, is the regulation of IP rights on the innovative solutions which might have been developed during the implementation of the contract.[522] The tendency of many contracting authorities seems to claim exclusive ownership of the innovative results, thus limiting the potential of innovation.[523]

Remedies

Question 13

Directive 2007/66/EC much strengthened the remedies system originally laid down in directive 89/665/EEC introducing new and quite vigorous remedies like standstill, stay (automatic suspension), and ineffectiveness (of the concluded contract).[524] A strong decentralised enforcement of EU public contract law is indeed necessary to supplements the oversight of the Commission by way of infringement procedures under Article 258 TFEU.[525]

These new remedies were unheard of in many Member States,[526] some of which were already at pain in accommodating the 'old' remedies in a legal tradition where procurement rules were not enforceable in courts.[527] Ineffectiveness in particular dissolves the sanctity of contract, which is a cherished value in a number of jurisdictions,[528] so much so that in Germany contracts

521. E. Clerc 'Suisse' qu. 12.
522. See also A. Dimoulis 'Finland' qu. 12.
523. A. Merle-Beral – I. Tantardini 'France' qu. 12.
524. See the analysis by S. Treumer 'Enforcement of the EU Public Procurement Rules: The State of the Law and Current issues' in S. Treumer – F. Lichère (Eds) *Enforcement of the EU Public Procurement Rules* above fn 16, 17 ff, and by C.H. Bovis 'Legal Redress in Public Procurement Contracts' in M. Trybus, R. Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* above fn 5, 363.
525. See C.H. Bovis 'Legal Redress in Public Procurement Contracts' above fn 524, 264 ff.
526. E.g. M. Fruhmann 'Austria' qu. 1; G.F. Jaeger 'Luxembourg' qu. 1.
527. See M. Burgi 'EU Procurement Rules – A report about the German Remedies System' above fn 16, 109 f; but see also with reference to Switzerland E. Clerc 'Suisse' qu. 1, speaking of the introduction of judicial remedies as a 'révolution copernicienne' and on the same lines B. Doherty 'United Kingdom' qu. 13.
528. In Poland this led to the introduction of provisions derogating to the civil code: A. Sołtysińska 'Poland' qu. 13. For additional information see also the chapters collected in S. Treumer – F. Lichère (Eds) *Enforcement of the EU Public Procurement Rules*

concluded in breaches of EU rules which under Directive 89/665/EEC as amended by Directive 2007/66/ EC lead necessarily to ineffectiveness are classed as *de facto* contracts. Sanctity of contract is thus saved while complying with EU law.[529]

It has to be kept in mind that, beside and beyond the specific provisions in the directives, the general principle of effective judicial protection now enshrined in Article 19(1) and Article 47 of the EU Charter of Fundamental Rights do apply, including to contracts not covered by the substantive and remedies directives.[530] Malta is one of the Member State having more widely extended the coverage of public procurement remedies.[531]

The new remedies seem to have significantly strengthened the protection of unsatisfied bidders,[532] leading to the development of a new area of litigation in jurisdictions where this was not the case,[533] at times causing delays in contract implementation.[534] The limited legal expertise of contracting authorities (especially small ones) when compared with tenderers is also seen as a potential distortion in the proper working of the remedies system.[535]

To implement effectively the remedies directive some Member States have created, either through legislation or case law, special procedures to rapidly dispose of cases,[536] or at least give priority to public procurement cas-

above fn 16, and the comparative assessment by R. Caranta 'Many Different Paths, but Are They All Leading to Effectiveness?' *ivi*, 77 ff; see also the contributions collected by P. Devolvé (dir.) *Le contentieux des contrats publics en Europe* in *Revue Française de Droit Administratif* 2011.

529. F. Wollenschläger 'Deutschland' qu. 13.
530. See the analysis by A. Tokár 'Institutional Report – Remedies'.
531. With some reticence on service concessions: I. Sammut 'Malta' qu. 13.
532. See among others A. Velkova 'Bulgaria' qu. 13, and A. Merle-Beral – I. Tantardini 'France' qu. 13.
533. B. Doherty 'United Kingdom' qu. 1 and 13; see also with some data M. Trybus 'An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales' in S. Treumer – F. Lichère (Eds) *Enforcement of the EU Public Procurement Rules* above fn 16, 232; another downside is conflicting case law: A. Sołtysińska 'Poland' qu. 13.
534. J. Kindl, M. Rá, P. Hubková, T. P?avelka 'Czech Republic' qu. 1; B. Doherty 'United Kingdom' qu. 1 and 13; the Author however remarks that the delay are due to the choices the Member States have the right to make as to venues and procedures applied in judicial review cases; the increase in litigation is a widespread refrain: see also A. Dimoulis 'Finland' qu. 1. Denmark has introduced a number of procedural rules to check litigation: see S. Troels Poulsen 'Denmark' qu. 13.
535. See A. Dimoulis 'Finland' qu. 1.
536. E.g. A. Sołtysińska 'Poland' qu. 13; G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 13; as C.H. Bovis 'Legal Redress in Public Procurement Contracts'

es.[537] In some jurisdictions, such as in France and in Spain, the courts are empowered to decide in one and the same time on applications for interim measures as well as on the merits of the case at hand.[538] Other Member States, like Greece, Malta and the Czech Republic, rely on an administrative appeal system before judicial review.[539] Germany has established independent review panels at first instance (Vergabekammern).[540] In Hungary a special body, the Public Procurement Arbitration Board operates in the framework of the Public Procurement Authority, which is an independent authority.[541] An Ombudsman-like institution has been recently created in the Netherlands.[542] Slovenia has possibly the most articulate system with (1) a pre-review procedure taking place before the contracting authority; (2) a review procedure taking place before the National Review Commission, which consists of five members, of which one is acting as President and one as Deputy-president, and (3) judicial protection.[543] Austria has just abandoned its ad hoc appeal system making first instance administrative courts the first step in public procurement litigation.[544]

The possibility for disaffected bidders to ask the contracting authority to remedy its (perceived) mistakes has been stressed in the legislation in Hunga-

above fn 524, 367, remarks, speed is a requirement flowing from the principle of effective judicial protection.

537. P. Norman – E.-M. Mühlenbock 'Sweden' qu. 13; the same happens in Slovenia in case of projects co-financed by the EU: P. & B. Ferk 'Slovenia' qu. 13.
538. A. Merle-Beral – I. Tantardini 'France' qu. 13; P. J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 1 and 13; on the French system of *référé* see also F. Lichère – N. Gabayet 'Enforcement of the Public Procurement rules in France' in S. Treumer – F. Lichère (Eds) *Enforcement of the EU Public Procurement Rules* above fn 16, 305 ff.
539. I. Mazos – E. Adamantidou 'Grèce' qu. 13; I. Sammut 'Malta' qu. 7; J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 1 and 13; the appeal system is criticised by D. Dragos – B. Neamtu – R. Veliscu 'Remedies available for Procurement outside the Directives – A Comparative Assessment' in D. Dragos – R. Caranta (Eds) *Outside the EU Procurement Directives – Inside the Treaty?* above fn 25, 389 f; on appeals as a venue for redress in public procurement cases see K. Wauters 'Review Bodies (including Antifraud Measures)' in M. Trybus, R. Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* above fn 5, 344 f.
540. F. Wollenschläger 'Deutschland' qu. 13.
541. A. Németh 'Hungary' qu. 13.
542. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 13.
543. P. & B. Ferk 'Slovenia' qu. 13.
544. M. Fruhmann 'Austria' qu. 1.

ry (but also in Italy) as a way to deflate litigation.[545] Proactive behaviour is expected from tenderers in the Netherlands and some courts are very ready – and possibly too ready – to dismiss claims based on the fact that the tenderer did not promptly inform the contracting authorities of his/her grievances.[546]

European jurisdictions markedly differ concerning the attitude of courts on interim relief, including staying the procedure until decision on the merits of the case is taken (this obviously after the expire of the period of automatic suspension).[547] So for instance Danish and Portuguese courts are very restive to allow interim relief,[548] while Finnish ones usually stay the all procedure until final determination.[549] The latter is also the case in Poland, where the contracting entity may ask the court for the prohibition on concluding the contract to be revoked on the ground that the failure to conclude the contract may cause negative consequences for the public interest, particularly in the fields of public defence and security, exceeding the benefits gained from the necessary protection of the interests of the claimants.[550] A similar arrangement has been followed in Germany, where respect for the sanctity of contract (Stabilitätsdogma) leads to a preference for präventive Rechtsschutz and a tendency to stay the conclusion of the contract until final judicial decision on the merit of the case.[551]

As is well known, in a couple of infringement procedures the Court of Justice interpreted Directive 89/665/EEC in the sense that Member States are under a duty more generally to empower their review bodies to take, independently of any prior action, any interim measures, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract in question.[552] This led some Member States, like France and Luxemburg, to adopt fast track procedures allowing courts not just to stay the

545. A. Németh ‘Hungary’ qu. 13; for Italy see Article 243 *bis* of the *Codice dei contratti pubblici*.

546. G.-W. Van de Meent – E.R. Matunza (Eds) ‘The Netherlands’ qu. 13, referring of hundereds of cases dismissed for this reason.

547. A difference has been noted between Northern Ireland and other UK courts: B. Doherty ‘United Kingdom’ qu. 13; on the effectiveness of automatic suspension see the data in A. Németh ‘Hungary’ qu. 13.

548. S. Troels Poulsen ‘Denmark’ qu. 13; A.L. Guimarães ‘Portugal’ qu. 13.

549. A. Dimoulis ‘Finland’ qu. 13.

550. A. Sołtysińska ‘Poland’ qu. 13.

551. F. Wollenschläger ‘Deutschland’ qu. 13.

552. Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459; Case C-214/00 *Commission* v *Spain* [2003] I-4667.

procedure but to take a decision on the merits of the case[553] and, at least in Luxemburg, to change the contract documents to bring them in line with the legal requirements (recours en réformation).[554]

The big issue of the standard of judicial review has lain dormant in most jurisdictions, domestic courts being content with the application of their usual standards.[555] A clever exception is Ireland.[556] It may well be doubted whether the Slovenian legislative attempt to limit the grounds of review in procurement case is consistent with the principle of effective judicial protection.[557]

As it had been foreseen, ineffectiveness is rarely declared if ever,[558] and this even if only prospectively.[559] Its value seems rather to lay in the deterrent effect it plays on both contracting authorities and potential contractors when tempted to forgo the award procedures.[560] Even if there is a limited experience with the new rules, in some countries like Finland financial penalties are preferred to ineffectiveness.[561] In Hungary the new public contract specific provisions on ineffectiveness have not been coordinated with the general rules in the Civil Code, leading to the risk of an overextension of the remedy.[562]

While Germany did not transpose the rules on voluntary ex ante transparency notices into national law,[563] they have been used in Northern Ireland,[564]

553. See again F. Lichère – N. Gabayet 'Enforcement of the Public Procurement rules in France' in S. Treumer – F. Lichère (Eds) *Enforcement of the EU Public Procurement Rules* above fn 16, 322 ff.
554. A. Merle-Beral – I. Tantardini 'France' qu. 13; G.F. Jaeger 'Luxembourg' qu. 1 and 13.
555. Please refer to R. Caranta 'Many Different Paths, but Are They All Leading to Effectiveness?' above fn 22, 67 ff.
556. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 1.
557. P. & B. Ferk 'Slovenia' qu. 13.
558. E.g. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 13.
559. As it is the case in the UK: see M. Trybus 'An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales' in S. Treumer – F. Lichère (Eds) *Enforcement of the EU Public Procurement Rules* above fn 16, 222 ff; retrospective ineffectiveness is rather the case in Italy: see M. Comba 'Enforcement of EU Procurement Rules. The Italian System of Remedies' *ibid.*, 249.
560. See S. Treumer 'Enforcement of the EU Public Procurement Rules' above fn 525, 50; on the deterrent effect see also C.H. Bovis 'Legal Redress in Public Procurement Contracts' above fn 524, 387.
561. See the cases listed by see also A. Dimoulis 'Finland' qu. 13.
562. A. Németh 'Hungary' qu. 13.
563. F. Wollenschläger 'Deutschland' qu. 13.
564. B. Doherty 'United Kingdom' qu. 13.

France,[565] Greece,[566] more rarely in Hungary,[567] but they are regularly used in the Netherlands and systematically so in Denmark, thus in principle short circuiting ineffectiveness.[568] The Italian Consiglio di Stato has just raised a question for preliminary reference asking whether the publication of a voluntary ex ante transparency notice deprives the courts of the power to declare a contract ineffective and, if so,[569] whether such a rule is consistent with the principles of equal treatment in judicial procedures, non-discrimination, and competition since it is believed to infringing the overarching principle of effective judicial protection enshrined in Article 47 of the Charter of Human Rights of the EU.[570] The same concerns have prompted the Danish Procurement Appeals Tribunal to require good faith on the part of the contracting authority as an additional condition to be added to the publication of a voluntary transparency notice to avoid ineffectiveness being declared.[571]

Concerning damages, the reports confirm[572] the sharp distinction between common law and Nordic jurisdictions, which are quite restive to allow damages,[573] and jurisdictions following the French model, where damages are usually available in many cases of breach of public contract rules[574] even if

---

565. A. Merle-Beral – I. Tantardini 'France' qu. 13.
566. I. Mazos – E. Adamantidou 'Grèce' qu. 13.
567. A. Németh 'Hungary' qu. 13.
568. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 13; S. Troels Poulsen 'Denmark' qu. 13.
569. The point is also discussed in Finland: see A. Dimoulis 'Finland' qu. 3, and Denmark: see S. Treumer 'Enforcement of the EU Public Procurement Rules' above fn 524, 34.
570. Cons. Stato, Sez. III, 7 gennaio 2013, n. 25 (ord.), in *Corriere giur.*, 2013, 514, note V. Carbone 'Tramonto della scelta dell'appaltatore senza gara: ma il contratto resiste?'; the systematic importance of this reference is underlined by A. Tokár 'Institutional Report – Remedies'.
571. S. Troels Poulsen 'Denmark' qu. 13.
572. The reports confirm the picture provided a few years ago by the major investigation whose results are published in D. Fairgrieve – F. Lichère (Eds) *Public Procurement Law. Damages as an Effective Remedy* (Oxford, Hart, 2011).
573. B. Doherty 'United Kingdom' qu. 13; S. Troels Poulsen 'Denmark' qu. 13; in Finland too loss of chances is normally not compensated but if the plaintif shows he/she should have won the contract compensation is quite substantial: A. Dimoulis 'Finland' qu. 13; the same requirement apply to damages actions in Sweden: P. Norman – E.-M. Mühlenbock 'Sweden' qu. 13.
574. F. Lichère – N. Gabayet 'Enforcement of the Public Procurement rules in France' and M. Comba 'Enforcement of EU Procurement Rules. The Italian System of Remedies' in S. Treumer – F. Lichère (Eds) *Enforcement of the EU Public Procurement Rules* above fn 16, 319 ff and 252 ff respectively.

the multiplication of procedures may give rise to some challenges.[575] For instance Dutch court may in some case award damages pro rata to claimants proving they had a reasonable chance to get the contract.[576] In Germany courts are seen to lift somewhat the burden of proof from plaintiffs claiming breach of good faith (Vertrauensschaden).[577]

Finally, concerning the scope of application of the remedies foreseen in EU secondary law,[578] in Italy, Hungary, and Portugal the rules resulting from the implementation of Directives 89/665/EEC and 2007/66/EC apply generally to litigation concerning public contracts.[579]

However, in many jurisdictions domestic remedies only (and if any) apply in case of breaches of the rules for the award of contracts not covered by the directives.[580] Besides possibly bringing national law in conflict with the general principle of effective judicial protection,[581] this may lead to double standards in the remedies available to economic operators which are difficult to justify as a matter of internal coherence of any legal order,[582] so much so that following a judgement of the Constitutional Court in Austria the remedies are the same whatever the value of the contract.[583] In Germany a similar evolution is taking place even if in principle the rules laid down in the remedies directive do not apply to litigation concerning contracts which are not covered by the substantive directives.[584]

In some jurisdictions we have a mixed bag approach to remedies: in Sweden for instance standstill applies to every contract, ineffectiveness also to be-

575. A. Merle-Beral – I. Tantardini 'France' qu. 13; I. Mazos – E. Adamantidou 'Grèce' qu. 13.
576. G.-W. Van de Meent – E.R. Matunza (Eds) 'The Netherlands' qu. 13.
577. F. Wollenschläger 'Deutschland' qu. 13.
578. See the analysis by D. Dragos – B. Neamtu – R. Veliscu 'Remedies available for Procurement outside the Directives – A Comparative Assessment' above fn 539, 397.
579. A. Németh 'Hungary' qu. 13 (recalling a few exceptions); A.L. Guimarães 'Portugal' qu. 13.
580. E.g. F. Wollenschläger 'Deutschland' qu. 13; B. Doherty 'United Kingdom' qu. 13.
581. See the analysis by C. Risvig Hansen *Contracts not covered or not fully covered by the Public Sector Directive* above fn 238, 253 ff; see also S. Treumer 'Enforcement of the EU Public Procurement Rules: The State of the Law and Current Issues' and R. Caranta 'Many Different Paths, but Are They All Leading to Effectiveness?' above fn 22, 44 ff and 57 ff respectively.
582. G.F. Jaeger 'Luxembourg' qu. 13, focusing specifically on interim relief; admittedly coherence may be a less relevant preoccupation in Common Law jurisdictions.
583. M. Fruhmann 'Austria' qu. 1 and 6 (but service concessions are still a world apart: qu. 10).
584. F. Wollenschläger 'Deutschland' qu. 13.

low the thresholds contracts, but EU remedies are not available for service concessions.[585] In Greece instead the EU remedies apply to service concessions while the traditional domestic – and less effective remedies – apply to other contracts not covered by the substantive directives.[586]

From a systematic point of view Member States may either show a preference for remedies which affect the award decision and possibly the contract (interim relief, annulment of the procedure, ineffectiveness of the concluded contract) or on the contrary prefer damages to the dissatisfied bidder (this in Germany translates in the difference between primary and secondary legal protection – *primärer / sekundärer Rechtsschutz*) with the former being a condition precedent to the latter.[587]

The new remedies, and in particular standstill and automatic suspension, seems to have strengthened the preference in some jurisdictions for remedies which affect the award decision and possibly the contract, since interim relief can be sought when the contract has not yet been concluded.[588]

Some jurisdictions might however be seen as going out of their way to deprive litigants of effective remedies. In Denmark, Ireland, and Portugal interim relief is normally denied because the claimant's rights may be redressed through damages, but either the tenderer's in house costs and/or the lost profit are then usually held not to be recoverable in liability actions,[589] or the burden of proof to be discharged to get any compensation is very high.[590]

In some Member States, like Hungary, appeal and court fees have been raised to the extent of discouraging prospective applicants, thus breaching the principle of effective judicial protection.[591] An Italian first instance administrative court has just raised a preliminary question under Article 267 TFEU

---

585. P. Norman – E.-M. Mühlenbock 'Sweden' qu. 6 and 13.
586. I. Mazos – E. Adamantidou 'Grèce' qu. 13.
587. F. Wollenschläger 'Deutschland' qu. 13; see also M. Burgi 'EU Procurement Rules – A report about the German Remedies System' above fn 16, 106 f.
588. E.g. M. Fruhmann 'Austria' qu. 13; A. Dimoulis 'Finland' qu. 13; I. Mazos – E. Adamantidou 'Grèce' qu. 13; R. Mastroianni 'Italie' qu. 13; F. Wollenschläger 'Deutschland' qu. 13; G.F. Jaeger 'Luxembourg' qu. 13; see also E. Clerc 'Suisse' qu. 13; so much so that plaintiffs not granted interim relief often dropt their case; this is also linked to the fact that in Switzerlald the head of damages recoverable for the succesful plaintiff are severely limited, loss profit being ruled out (*ibidem*).
589. S. Troels Poulsen 'Denmark' qu. 13; A.L. Guimarães 'Portugal' qu. 13; lost profits are however at times awarded in Denmark: S. Treumer 'Enforcement of the EU Public Procurement Rules' above fn 524, 286 f.
590. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 13.
591. A. Németh 'Hungary' qu. 13.

concerning the compatibility with the principles of proportionality, non discrimination, and effective judicial protection of similar provisions which are considered to have led to a drop in public procurement cases brought in front of the Italian courts.[592] High litigation costs (rather than court fees) are instead an issue in Ireland.[593] As already recalled, in Slovenia only substantial breaches, that is breaches having affected or having the potentiality to affect the final award – may be challenged in judicial review.[594]

On the other hand of the spectrum, the Czech system is remarkable because combining the tasks of competition authority and public procurement appeal board in the same body it empowers the UOHS to fine both contracting entities for breaches of public procurement law and dishonest tenderers or contractors.[595]

Conclusion and reform

Question 14

The legislative work in progress has already been referred to under a number of questions. The final question addresses different aspects of the reform process which are expected to impact how public contracts are regulated in the EU Member States with a specific focus on the modernisation of EU law.[596]

Among those aspects deserving consideration the first one is obviously the new directive on concession contracts, providing a legislative framework for all concession contracts, including service concessions.[597] The prevalent reaction seems to be that the Concession directive comes at a good time,[598] also

592. T.R.G.A., Sez. Trento, 29 gennaio 2014, n. 23 (ord.).
593. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 1.
594. P. & B. Ferk 'Slovenia' qu. 13; a non-exhaustive list of such breaches is present in the legislation.
595. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 13.
596. A similar impact is having in Switzerland the revision of the WTO-GPA: E. Clerc 'Suisse' qu. 14.
597. The proposal was thoroughly analysed by C. Risvig Hansen 'Defining a Service Concession Contract: Will the Proposed New Definition of Service Concession Contracts Increase Legal certainty in the Field of Concessions?' in G.S. Ølykke, C. Risvig Hansen, C.D. Tvarnø (Eds) *EU Public Procurement – Modernisation, Growth and Innovation* above fn 9 258 ff.
598. G.F. Jaeger 'Luxembourg' qu. 14.

given the budget constraints felt in many Member States prodding some of them to court private capitals.[599]

In theory, the economic crisis might have either provided an additional impetus to public-private partnerships especially for long term projects (and not without concerns about the openness of some procurement markets: see also under question 9) or dried up public commitment and/or private capital. Specific rules have been passed in Italy to entice private investors.[600] However in Estonia contracting authorities are unwilling to take long terms commitments.[601]

The definition of concession focuses on the right to exploit the works or services and Article 5(1) of the new directive provides a definition of the risk of exploitation[602] which can dispel the doubts raised by some cases such as *Eurawasser*.[603] Some concerns have been voiced that the emphasis on risk might however jeopardise the necessary continuity in the provision of services which is safeguarded by national rules on balanced budget.[604] More generally, in some Member States, like Germany, a detailed regulation of service concessions was seen with suspicion, which might have been assuaged by the exclusion of some like water and emergency rescue services.[605]

The new regime is not directly applicable to institutional public-private partnerships so that the Green paper of the Commission on this subject will still be the reference point,[606] even if Member States are of course allowed to

599. J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 14.
600. R. Mastroianni 'Italie' qu. 14.
601. See R. Mastroianni 'Italie' qu. 14 and A. Peedu 'Estonia' qu. 14.
602. For an enlightening discussion as to the notion of 'exploitation' refer to A. Tokár 'Institutional Report – The boundaries of EU public procurement law'; see also A. Merle-Beral – I. Tantardini 'France' qu. 14.
603. Case C-206/08 *Eurawasser* [2009] *ECR* I-8377.
604. J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 14.
605. F. Wollenschläger 'Deutschland' qu. 14; the latter exclusion inserted in Article 12 does not seem to revert the findings in Case 160/08 *Commission* v *Germany* [2010] ECR I-3713; because of reference to non-profit organisations, Case C-119/06 *Commission* v *Italy* [2007] ECR I-168 might no more be good law.
606. COM(2007) 6661; see Ch.D. Tvarnø 'A Critique of the Commission's Interpretative Communication on Institutionalised Public-Private Partnership' above fn 256, NA12; see also the Green Paper on public-private partnerships and Community law on public contracts and concessions (COM(2004) 327 final), on which see R. Williams 'The European Commission Communication on Public Private Partnerships and Community Law on Public Contracts and Concessions' *Public Procurement L. Rev.* (2006) NA33.

bring institutional public-private partnerships under the scope of concessions rules, as Greece and Slovenia already do.[607]

Concerning the scope of the new Public Sector Directive, the relevance of the new provisions on social and special services along with the ditching of the distinction between priority and non-priority services are also quite relevant and go in the direction of clearer rules.[608]

From a systematic point of view, one could say that the new directives could have done more in going beyond public contracts, in particular in regulating the different forms of public cooperation.[609] On the other hand, the organisation autonomy of Member States is safeguarded by the Treaties and it is doubtful whether the EU can go much beyond the provisions to be found in Article 12 of the new Public Sector Directive.[610]

Another facet of the modernisation attempt focuses on the award procedures. According to some critics, the procedures laid down in the 2004 directives are too cumbersome, leading to high costs and inefficiency.

The competitive dialogue introduced in 2004 was already expected to allow a measure of procedural flexibility, albeit under restrictive if somewhat vague conditions ('complex contracts'). The new rules on the competitive dialogue are expected to widen the recourse to this procedure.[611]

A more general question is what is the place for negotiations in EU public procurement rules? Contrary to the US approach and fearing very much nationality-based discrimination, EU public procurement law is generally hostile to negotiation and dialogue between contracting authorities and tenderers. The new Public Sector Directive has introduced some of the kind of flexibility previously found in the utilities sector,[612] providing for the use of the

---

607. I. Mazos – E. Adamantidou 'Grèce' qu. 14; P. & B. Ferk 'Slovenia' qu. 2; Member States may also simply not allow them, as it seems to be the tendency in Hungary these days: A. Németh 'Hungary' qu. 14.
608. See A. Tokár 'Institutional Report – Conclusion and reform'; see also C. Risvig Hansen *Contracts not covered or not fully covered by the Public Sector Directive* above fn 238, 118 ff.
609. A. Peedu 'Estonia' qu. 14; an improvement as compared with the present situation is however foreseen by M. Fruhmann 'Austria' qu. 14, and J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 14..
610. Case C-119/06 *Commission* v *Italy* [2007] ECR I-168; and this quite aside from the fact that it will be considered undesirable by many: B. Doherty 'United Kingdom' qu. 14.
611. A. Peedu 'Estonia' qu. 14.
612. See S. Torricelli 'Utilities Procurement' in M. Trybus, R. Caranta, G. Edelstam (Eds) *EU Public Contract Law. Public Procurement and Beyond* above fn 5, 241 ff.

competitive procedure with negotiation or the competitive dialogue in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes.[613] This, while criticised as tepid by some,[614] has been welcomed in many Member States,[615] including the UK where the repulsion for a too stringent legal framework for public purchasers runs deep.[616] The reaction is strikingly different in Italy and Croatia, where negotiations are seen as a highway for preferential treatment of certain economic operators if not outright corruption,[617] and some worries surface in Luxembourg as well.[618]

The legislative decision to leave to each Member State the choice as whether to have the competitive procedure with negotiations among the alternative generally available procedures was therefore the right one.[619] It is however easy to foresee a substantial litigation as to whether the conditions laid down in Article 26(4) of the new Public Sector Directive will be met. Allowing negotiations on a larger and – in some jurisdictions – unheard of before scale really requires a change in the 'administrative culture'.[620]

Flexibility is necessarily coupled with strengthened minimal procedural safeguards,[621] and this again links with the discussion on the general principles of non-discrimination and transparency.[622]

Discretion of the contracting authorities is more generally a problem in some Member States (while admittedly being a *desiderata* in others). The strengthening of the power to exclude economic operators for breach of social and other rules is seen as a possible source of abuse.[623]

Electronic procedures and more generally the use of technology are also relevant and have been more and more used in some Member States, with Portugal leading the pack.[624] Many Member States may therefore be ready

613. See F. Lichère 'New Award Procedures' above fn 512, 103 f.
614. A. Németh 'Hungary' qu. 14.
615. A. Merle-Beral – I. Tantardini 'France' qu. 14; P. & B. Ferk 'Slovenia' qu. 14; P. Norman – E.-M. Mühlenbock 'Sweden' qu. 14.
616. B. Doherty 'United Kingdom' qu. 14.
617. R. Mastroianni 'Italie' qu. 14; N. Popović – F. Kuhta 'Croatia' qu. 14.
618. G.F. Jaeger 'Luxembourg' qu. 14.
619. But it was later abandoned: A. Tokár 'Institutional Report – Conclusion and reform'.
620. I. Mazos – E. Adamantidou 'Grèce' qu. 14; see also the emphasis on formation in A. Tokár 'Institutional Report – Conclusion and reform.
621. A. Tokár 'Institutional Report – Conclusion and reform'.
622. See A. Merle-Beral – I. Tantardini 'France' qu. 14.
623. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 14.
624. A.L. Guimarães 'Portugal' qu. 14.

for a world where procurement is done without paper,[625] even if at times doubts as to the interpretation of the existing rules do arise.[626] The crisis could slow the technology change in other Member States.[627]

More generally, the recasting of the (substantive) public procurement rules is seen as welcome streamlining and clarification of the rules,[628] bringing them closer to normal contracting practices without surrendering the principles of equal treatment and transparency,[629] rather than to portend an overall change in the approach followed so far.[630] However 'reform fatigue' is felt in some member States.[631]

From a comparative law point of view the new directives are expected to provide additional impetus for the tendency already apparent in many Member States (but for sure not in the UK) toward a codification of the rules applicable to different kind of public contracts, including but not limited to contracts covered under the same directives, and at times, as it is the case with Portugal, also including privatisation agreements and donations to public authorities.[632]

It is more uncertain whether the push towards a systematisation of EU public contract law will go beyond public contracts, including administrative (unilateral) decisions which confer benefits on 'chosen' market participants. A revision of the *Alumnia* package would probably go this way, further extending the imprinting of EU law on the general administrative law of the Member States.

In some quarters, however, the stance has been taken that EU public contract law should stop short of meddling into the general administrative law,

---

625. E.g. A. Peedu 'Estonia' qu. 14; A. Dimoulis 'Finland' qu. 14; R. Mastroianni 'Italie' qu. 12; P. & B. Ferk 'Slovenia' qu. 14; for a more recent experience G.F. Jaeger 'Luxembourg' qu. 14; see also G.M. Racca 'The electronic award of public procurement' in M. Comba – S. Treumer (Eds) *Award of Contracts in EU Procurements* above fn 419, 309. For some criticism on e-procurement however A. Merle-Beral – I. Tantardini 'France' qu. 12; Hungary had an even number of goes and stops on the road to e-procurement: A. Németh 'Hungary' qu. 14.
626. P. Norman – E.-M. Mühlenbock 'Sweden' qu. 14.
627. I. Mazos – E. Adamantidou 'Grèce' qu. 14.
628. E.g. C. Donnelly, J. Mellerick, A. Murtagh, J. Finn, B. Gordon 'Republic or Ireland' qu. 14; J.M. Gimeno Feliú – P. Valcárcel Fernández 'Spain' qu. 13.
629. S. Troels Poulsen 'Denmark' qu. 14.
630. A. Tokár 'Institutional Report – Conclusion and reform'; B. Doherty 'United Kingdom' qu. 14.
631. J. Kindl, M. Rá, P. Hubková, T. Pavelka 'Czech Republic' qu. 14.
632. A.L. Guimarães 'Portugal' qu. 2 and 4.

best left to the different traditions of the Member States.[633] In any case, as already recalled, national classifications and categories are often quite resilient to change, and this also concerning public contracts.[634] As the Austrian reporter very neatly remarked – and his perspective holds good also in non-Alpine countries – '*(vergabe)rechtliche Konzepte des unionsgesetzgebers oft nicht oder nur schwer in die historisch gewachsene Systematik des nationalen Rechtssystem eingeordnet warden können*'.[635]

On the other hand, outside observers bear witness to how much harmonisation has already been achieved and this notwithstanding pre-existing national traditions.[636] As Christopher Bovis remarked with reference to Directive 2004/18/EC, 'The new public sector Directive represents a notable example of codification of supranational administrative law'.[637]

Advancements are there, but it is still a long and winding road to a complete and coherent EU law of public contracts and a longer and more winding one to rules applicable to all instances where the State or any other public law entity disburses money or grant benefits or privileges on a selective basis. Only this general rapporteur thinks there is no alternative sensible path.[638]

---

633. A. Dimoulis 'Finland' qu. 14.
634. See concerning the French A. Merle-Beral – I. Tantardini 'France' qu. 2.
635. M. Fruhmann 'Austria' qu. 1.
636. D. Lemieux 'EU Law of Public Contracts: A View from the Outside' above fn 24, 463.
637. C.H. Bovis 'Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making' above fn 346, 494.
638. But see also F. Wollenschläger 'Deutschland' qu. 7.

Institutional report

Adrián Tokár[1]

The context

Union public procurement law is anchored in the basic freedoms of the Treaties, namely the free movement of goods, the freedom to provide services and the freedom of establishment. This fact is symbolically expressed in the triple legal basis of the current procurement directives[2] and goes a long way to explaining the internal logic of the relevant rules, as well as the mandate of Union institutions entrusted with applying them.

The basic logic and structure of Union public procurement legislation has proved to be rather stable during the decades that passed since the adoption of the first procurement directives in the early1970's. Although the scope of secondary law rules was gradually extended from works to supplies and services, from the public sector to utilities and the defence sector, from public contracts to concessions, the leading idea continued to be the opening up of public contracts to Union-wide competition on the basis of fundamental prin-

1. Member of the Legal Service, European Commission. The views presented in this report are those of the author alone and do not represent and official position of the European Commission.
2. All three substantive directives – Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC – have been adopted on the basis of Articles 47(2), 55 and 95 of the EC Treaty (now Articles 53(1), 62 and 114 TFEU), which regulate the freedom of establishment, the free movement of services and the harmonisation of national laws, respectively.

ciples such as non-discrimination, equal treatment, transparency and the comparison of tenders based on objective and predominantly economic criteria. The chosen approach also implies the gradual harmonisation of laws of the Member States concerning public procurement. The approach has been criticized by some authors as misguided and not taking into account market realities.[3] The fact remains however, that it has never been abandoned. On the contrary, the harmonization approach underpins the on-going reform of procurement rules, which is characterised by, among other things, an increased level of detail and an important extension of the scope of secondary law rules to encompass service concessions.

Adopting the public procurement rules of the Union in the form of directives meant that Member States were responsible for transposing these into their national legal systems as they saw fit. Procurement law is not an island, however, within the Union legal order. The link to the Treaty freedoms is evident, and is most visible in the case of service concessions, which are still regulated only by Treaty principles, even though an important strand of case-law evolved around them.

Although public procurement is part of the internal market agenda, there are other policies, which are affected by it. Structural funds need to be disbursed in accordance with Union public procurement rules,[4] which gave rise to an important strand of case-law related to financial corrections imposed for irregularities in this field. The public procurement directives also inspired the internal rules of the Union, to be found in the Financial Regulation[5] and in specific legislation related to Union programmes.

Competition and state aid law is another area closely connected to public procurement. The Commission's 2011 framework on services of general economic interest is an important recent development:[6] not only does the frame-

3. See e.g. Fernández Martín: The EC Public Procurement Rules: A Critical Analysis, Oxford, 1996.
4. See Article 12 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds.
5. Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002; Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union.
6. Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011), OJ 2012 C 8, p. 15; Communication from the Commission on the application of the European Union State aid rules to

work stipulate that the Commission will systematically control the compliance with procurement law in the framework of state aid procedures, it also establishes a link between the criteria laid down in the *Altmark* judgment[7] and various procurement procedures, deemed to be more or less suitable to meet the requirements regarding the appropriate level of compensation for the provision of services of general economic interest.

Union procurement rules are also relevant in an external context. Procurement rules based on the Financial Regulation (which is, in turn, inspired by the procurement directives) are often used in programmes where the Union funds actions in third countries.

The Union is bound by the Agreement on Government Procurement and the procurement directives are aligned to its requirements.[8] Regarding non-GPA signatories (and third countries with which the Union does not bilateral free trade agreements) Union rules are less clear. Articles 58 and 59 of Directive 2004/17 allow the rejection of tenders, where the proportion of third country goods exceeds 50%. The possibility is limited to the utilities sector and has been hardly used in practice. In 2012, the Commission presented a legislative proposal containing measures to deal with tenders containing products from third countries where substantive reciprocity is not ensured.[9] The legislative process is still on-going.

Finally, other Union policies – such as protection of the environment, labour law and social standards – have been gradually integrated into the framework of procurement law by case-law of the Court of Justice and are expected to take a more prominent position in the system after the adoption of the new procurement directives.

Union procurement law is undergoing an important transformation. The existing directives are being replaced and a new directive for concessions is being created.[10] Some important features of this new development are men-

---

compensation granted for the provision of services of general economic interest, OJ 2012 C 8, p. 4. Although the new state aid framework was adopted at the same time as the Commission proposals for the reform of procurement directives, it already applies in the context of the *current* procurement directives.

7. Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*.
8. See also recital 5 and Article 5 of Directive 2004/18.
9. Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (COM(2012) 124 final).
10. The proposals to replace Directive 2004/17 (COM/2011/0895 final), to replace Directive 2004/18 (COM/2011/0896 final) and to adopt a new directive on concessions

tioned along the way, as important themes of public procurement law are discussed. A more general overview and evaluation of the reform is to be found in the concluding part of this report.

The boundaries of EU public procurement law

The concepts of public contract and concession are central to delimit the scope of application of public procurement law vis-à-vis regulatory or other unilateral acts of the administration, or such arrangements of an economic nature where the administration is exempted from the application of public procurement rules.

Definition of public contracts

Public contracts are defined as (a) contracts (b) for pecuniary interest concluded (c) in writing (d) between one or more economic operators and one or more contracting authorities and (e) having as their object the execution of works, the supply of products or the provision of services within the meaning of the directives.[11]

The term »contract« is not defined in itself and since most of the elements of a doctrinal definition of contract are contained in the definition of a public contract, it will not be specifically analysed here.

Pecuniary interest

The issue of pecuniary interest is self-explanatory and rather unproblematic as long as contracts between a public authority and private market operator are concerned. The amount of compensation is not relevant. It is assumed that the contracting authority is looking for best value for money and is therefore

---

(COM(2011) 897 final) were adopted by the Commission on 20 December 2011. The legislative procedure was still on-going at the time of submission of this report. A political agreement between the institutions was reached in the summer of the 2013, but the text of the new directives was still not finalized at the time of submission of this report. In order to give up-to-date information, this report reflects the political agreement, but avoids precise quotations or references. The version of the text taken into account as the political agreement is to be found at the following website: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0025#BKMD-22 (last accessed on 18 February 2014).

11. See Article 1(2)(a) of Directive 2004/18/EC.

attracted to bids displaying low prices; it is further assumed that the pricing policy of the private contractor is driven by purely economic considerations. Any profits to be made or foregone by a private operator will presumably reflect its willingness to conclude the contract. Even abnormally low tenders can be accepted. The contracting authority is only obliged to verify an abnormally low tender, if it intends to exclude it. However, even this check, according to the directives, aims at verifying whether the tender is genuine, not that it ensures a profit to the economic operator.[12]

The question became more important in the context of horizontal cooperation between contracting authorities. Such arrangements are often based on a non-profit basis, where one authority only reimburses the costs that another authority incurred when providing the service. This argument was used in the recent judgment in the *Lecce*[13] case as a possible justification for excluding a contract from the scope of the directives. However, the Court clearly rejected this line of reasoning and confirmed that even a simple reimbursement of costs constitutes pecuniary interest.[14] According to the opinion of Advocate General Trstenjak, the two main reasons for this interpretation are the need to prevent circumventions of the directive and ensure is practical effects, as well as the need to maintain a broad interpretation in light of the case-law on freedom to provide services on the internal market, which does not require the provider of a service to be a profit-making undertaking.[15]

Concessions

In the case of concessions different considerations apply. The definition of concessions in the directives requires the existence of consideration in the form of either the right of exploiting the work or service, or with the right of exploitation, together with a payment.[16]

---

12. See Article 55 of Directive 2004/18/EC. The question of state aid – also relevant in the context of abnormally low tenders – will be examined later.
13. See case C-159/11, *Ordine degli Ingegneri della Provincia di Lecce and Others*.
14. See paragraph 29 of the judgment in case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others*.
15. AG Trstenjak considered that the simple existence of an economic advantage – such as the provision of a service of monetary value by the provider to the contracting authority – can establish the pecuniary nature of the contract, possibly without taking into account the amount of consideration at all. See paragraphs 32 to 34 of the opinion of Advocate General Trstenjak in case C-159/11. But see also case C-451/08 *Helmut Müller*, paragraph 48, where consideration is expressly mentioned.
16. See Article 1(3) and (4) of Directive 2004/18/EC.

This formulation makes it clear that payment is not necessary at all for there to be concession; if a payment is made, it is not intended to be the main means of remuneration and therefore even relatively low levels of payment, clearly not covering the costs of the concessionaire, are acceptable. On the contrary, payment must not reach a level where it would guarantee all debts of the contractor, lest the contract be qualified as a public contract and not a concession.[17] The proposed directive on concessions clarifies this point by requiring that the award of a concession imply the transfer of substantial risk related to the exploitation thereof to the concessionaire. Risk can be demand or supply side or both and is considered to be substantial if, under normal operating conditions, the concessionaire is not guaranteed to recoup the investments made or the costs incurred in relation to the concession. It must imply a real exposure to the vagaries of the market; the possibility of nominal or negligible loss shall not be considered a substantial risk for these purposes.

The term »exploitation« is not defined in the directives and applying it may be challenging in an environment where contractual arrangements become more and more complex. However, certain clarifications are emerging from the case-law.

The Court of Justice added some elements to the definition of exploitation in case C-451/08 *Helmut Müller* (in the context of land development). It decided that risk related to the exercise of regulatory powers by the contracting authority (such as the risk of not approving a plan submitted by the developer). The Court of Justice also decided, by narrowing down the concept of economic link between the contracting authority and the economic operator, proposed by Advocate General Mengozzi, that the pecuniary nature of a work contract requires the contracting authority to derive a direct economic benefit from the contract.[18]

17. See e.g. case C-220/05 *Auroux and others*, paragraph 18.
18. The Court of Justice was recently called upon to decide whether exploitation of a work may be based on the right of property. In case C-576/10 *Commission/Netherlands* the developer purchased a piece of land and developed it in accordance with the specifications of the contracting authority. It then became the sole owner of the work with the right to exploit it, but also the obligation to maintain certain public functions within the development. The question was whether in such circumstances one can speak of exploitation, or, on the contrary, one can only exploit a thing the ownership of (or at least some legal title to which) is held by another person. The Court of Justice did not reply to this question. However, Advocate General Wathelet considered that the current legislation does not allow such interpretation. This case highlights the difficulties that the legal qualification of different arrangement with a very similar economic purpose may pose. Another recent case to be mentioned in this

It can be said, more generally, that not every monetary payment form a contracting authority towards an economic operator is subject to procurement rules: mere financing operations, such as grants, even if linked to certain conditions imposed unilaterally by the contracting authority, are exempted from the rules. It should be noted, however, that subsidies granted for the execution of certain works, although not themselves subject to procurement law, may trigger the obligation to apply procurement procedures by the beneficiary.[19] Such obligations of the beneficiary may also be based on the grant agreement in question.

The new concessions directive also uses the concept of benefit accruing to the contracting authority to delimit the concept of a concession. It is a complex concept, which will need to be clarified in the future in order to ensure a smooth application of the new directives. In the case of works, the discussion can at least focus on the definition of ownership of other rights in a physical object, i.e. the resulting work. Where service concessions are concerned, the benefit may be more difficult to identify. The Commission communication on concessions also mentions the fact that works and service concessions have different functions and that service concessions normally concern activities whose nature and purpose, as well as the rules to which they are subject, are likely to be the State's responsibility and may be subject to special or exclusive rights.[20]

Probably the most difficult boundary to be drawn is between a service concession, entrustment of services of general economic interest to one or more economic operators and the issuance of an authorisation to carry out a certain economic activity, including the grant of a special or exclusive right for that purpose. The main factor of differentiation between these arrangements needs to be based on Union law in order to ensure a uniform and effective application of Union law.

The Court of Justice has recently provided some clarifications in the *Belgacom* case,[21] which concerned a cable television network created by an in-

---

context is joined cases C-197/11 and C-203/11 *Libert* (paragraphs 111 to 119), where the Court did not exclude the application of public procurement rules to a complex Belgian housing development scheme.

19. See Article 8 of Directive 2004/18 and case T-488/10 *France/Commission* where the General Court adopted a functional interpretation of this provision (the judgment of the General Court was upheld on appeal in case C-115/12).
20. See Commission interpretative communication on concessions under Community law, OJ 2000 C 121, p. 2, point 2.2.
21. Case C-221/12 *Belgacom*.

ter-municipal association. The exclusive right to use that network was later transferred to a private undertaking without any *ex ante* transparency.

The Court of Justice qualified this arrangement as a service concession because it involved a transfer of the provision of a service from the inter-municipal association to a private undertaking, while also providing for an obligation of the private undertaking to provide the service. This arrangement also implied a transfer of operational risk to the private undertaking. The Court of Justice then confirmed the applicability of basic principles of non-discrimination, equal treatment and transparency to such a concession.[22] The Court of Justice also confirmed that the same obligations would apply if the arrangement were to be considered as an authorisation scheme,[23] and analysed the reasons invoked for lack of transparency both under case-law related to public procurement as well as under the case-law of overriding reasons in the public interest.

The new concessions directive also emphasizes that the main difference between service concessions and authorisation schemes lies in the fact that concession agreements provide for mutually binding obligations where the execution of the service is subject to specific requirements defined by the contracting authority and is legally enforceable.

Contract in writing

The written nature of the contract is usually not problematic. It is difficult to imagine that arrangements where a contracting authority is a party and the value of which exceeds the threshold laid down in the directives would not be recorded in writing. However, even arrangements that are not written are subject to the provisions of the Treaty.[24]

Contractual parties

For there to be a contract, there must be at least two contractual parties, one of which must be an economic operator, i.e. a contractor, service provider or supplier who offers works, supplies or services on the market. The Court of Justice decided in the *CoNISMa* case that even public bodies which are not primarily profitmaking, are not structured as an undertaking and do not have

22. See case C-221/12 *Belgacom*, paragraphs 27-31.
23. Case C-221/12 *Belgacom*, paragraph 33.
24. See case C-532/03 *Commission/Ireland*, paragraph 15.

a continuous presence on the market may qualify as economic operators.[25] Their participation in a procurement procedure must not distort competition, but this does not mean that they can be automatically excluded if they enjoy an advantage due to public financing; such exclusion can only happen in certain limited cases.[26]

In-house arrangements

The original justification of exempting in-house arrangements, set out in the *Teckal* judgment, builds on the premise that in certain situations two seemingly separate entities may be so closely integrated by a relationship of control that they form a single person and their mutual relationships cannot be described as a 'contract'.[27] The case-law seems to have departed from this premiss: for instance, it is not very convincing to argue that in a situation such as the one in the *Econord* case,[28] in which various municipalities each held between 1 and 19 shares out of a total 173 785 shares issued by the service provider and had the right to be consulted on appointments to the supervisory council of the service provider, the service provider forms a single person with the municipalities in question.

The case-law of the Court of Justice on in-house arrangements is built on the more detailed criteria, already laid down in *Teckal*: first, the contracting authority must exercise a control over the in-house entity which is similar to the control it exercises over its own departments, and second, the essential part of the activities of the in-house entity must be performed for the benefit of the contracting authority. There is a considerable body of case-law clarifying these criteria, including important pending cases. Furthermore, the new

25. See case C-305/08 *CoNISMa*.
26. See recital 4 of Directive 2004/18 and case C-305/08 *CoNISMa*, paragraphs 32 to 35. This begs the question whether a contractual arrangement can be exempted from the procurement directives for the reason that the provider is not an economic operator since it never offers works, services or supplies on the market. If all other elements of a public contract are present, the provider cannot be exempted from procurement rules due to its public nature. This is all the more true in the case of consortia, such as the one in the *CoNISMa* case. Consortia can be created *ad hoc* for a concrete contract and it is therefore quite possible that a specific consortium as such has no history on the market.
27. See case C-107/98 *Teckal*, paragraphs 49 and 50.
28. See joined cases C-182/11 and C-183/11 *Econord.*

procurement directives codify and further develop the concept of in-house contracts.[29]

One question that still remains open concerns the use of subcontracting by the in-house entity. In the case of public contracts, subcontracting is not limited and can even be welcome, e.g. as a means of allowing SMEs to participate in large-scale contracts for which they would not be able compete independently. However, one of the underlying ideas of in-house arrangements is that the public administration is using its own resources, without turning to the market. If the contracting authority is procuring supplies, services or works from the market, it should not be exempted from the application of procurement law by using an in-house entity for this purpose.[30]

A contract will also not be deemed to exist where the economic operator does not qualify as an in-house entity, but still has no margin of manoeuvre vis-à-vis the contracting authority. In such a case the contracting authority is considered to be addressing unilateral administrative measures at the operator, which the latter is in no position to refuse.[31] It would seem that in such an arrangement one could entirely dispose of the second *Teckal*-criterion, and only focus on the first one. Indeed, one could argue that where a contracting authority does control a separate entity as one of its own departments (within the meaning of the first *Teckal*-criterion), it would presumably be in a position to instruct the behaviour of that in-house entity by unilateral administrative acts, as can be expected between various parts of the administration in a hierarchical relationship. Such an interpretation would blur the limits of the in-house case-law. The judgment in the *Correos* case should therefore be read in its context, as referring to a situation where the behaviour of the provider is regulated by legal rules, which give the administration the power to impose unilateral administrative acts on the operator. In fact, the Court of Justice did distinguish the *Correos* case from the *Asemfo* case,[32] where an in-house situation was recognized to exist.

---

29. See the conclusion of this report.
30. If the in-house entity itself satisfied the conditions for becoming a contracting authority (e.g. it is a body governed by public law in accordance with the directives), it will be subject to procurement law because of that fact. Subcontracting arrangements will therefore be considered as public contracts and will be subject to the directives. In other cases, however, a loophole may arise. See also case C-386/11 *Piepenbrock*.
31. See case C-220/06 *Correos*, paragraph 54.
32. Case C-295/05 *Asemfo*.

A situation such as in the *Correos* case still leaves some questions open. As the Court of Justice already stressed,[33] the nature of the rules limiting the economic operator's room for manoeuvre should not be taken as a decisive criterion. The fact that certain provisions are laid down in national legislation cannot in itself prove that there is no public contract at stake.

Public-public cooperation

It was in-house arrangements that inspired the second type of exception from the procurement rules created by the Court of Justice, namely public-public cooperation. It appears from paragraph 47 of the *Hamburg* judgment[34] that the Court of Justice considered that exempting a public-public arrangement from the procurement directives could be justified by the fact that an in-house provider, controlled by the same contracting authorities could also have been exempted.

The common theme between in-house arrangements and (horizontal) public-public cooperation is that public resources are used to satisfy the needs of the contracting authorities, without involving market participants. However, the conditions are quite different. Whereas an in-house entity is exempted from procurement rules because it is assumed to have no autonomous will vis-à-vis its master(s), for participants in a public-public arrangement there is no question of control and it is clear that the participants cooperate voluntarily, as autonomous agents. The exemption still presupposes cooperation based on a contractual arrangement and therefore does not seem to cover cases where cooperation is governed exclusively by law or internal organizational acts. Such acts would rather be determined by the legal regime of competences of different parts of the administration and their public tasks.

The conditions for the exception based on public-public cooperation to apply as set out by the Court of Justice are that (a) the aim of the contract is to ensure that a public task that all participants have to perform is carried out, (b) the contract is concluded exclusively by public entities, without the participation of a private party, (c) no private provider of services is placed in a position of advantage vis-à-vis competitors and (d) implementation of the cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.[35]

---

33. See case C-220/06 *Correos*, paragraph 50.
34. Case C-480/06 *Commission/Germany*.
35. See cases C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraphs 34 and 35, and C-386/11 *Piepenbrock*, paragraphs 36 and 37.

These conditions are rather complex. The requirement that cooperation must concern a public task means that the participating authorities must perform in common gives rise to the question what exactly is to be considered a public task. The question whether an ancillary task such as office cleaning can be the subject of public-public cooperation was posed in the *Piepenbrock* and the Court of Justice gave a negative answer, suggesting that the public task in question must relate to the core public activity of the cooperating authorities.[36]

The public task in question must therefore be part of the public task or mandate of the authority in question. At the same time, as already mentioned, it must be a task, which the authority can organise with relative liberty and decide whether to use its own resources, an in-house provider, a market provider, or to cooperate with other contracting authorities. What exactly can constitute a public task within these limits is open to interpretation. In the *Stadtreinigung Hamburg* case the public task in common (recognized by the Court of Justice) was waste disposal. In that case the Court also referred to the Union waste legislation, which suggests that although Member States are free to organise their administrative structures as they see fit, the concept of public tasks needs to be delimited with regard to Union law in order to ensure uniform interpretation and application of the procurement directives.[37] The cooperative concept also excludes arrangements where one authority simply obtains a service from another one in exchange of payment, as it happened in the *Lecce* case.[38] It therefore presumes mutual rights and obligation of the parties. The contributions of various authorities do not need to be equal but may diverge as to their size and nature.

The second condition requires that only public authorities participate in the cooperation. This leaves a doubt as the position of certain bodies governed by public law, which may not qualify as public authorities. The new procurement directives clarify this point by providing that any contracting authority may join a public-public cooperation arrangement.

As it was already stressed in connection with in-house arrangements, where the public sector enjoys an exception from public procurement rules because it is not turning to market participants to satisfy its needs, it is to be expected that no market participant is offered a business opportunity outside the procurement rules. Hence the importance of the condition that no private provider be put in a situation of advantage vis-à-vis its competitors. This was

36. See case C-386/11 *Piepenbrock*, paragraph 39.

37. See case C-480/06 *Commission/Germany*, paragraph 37.

38. See case C-159/11, *Ordine degli Ingegneri della Provincia di Lecce and Others.*

also demonstrated in the *Piepenbrock* case where the Court of Justice rejected an arrangement whereby one public authority »lent« a private service provider to another public authority under the guise of public-public cooperation.[39]

The condition that the cooperation be governed solely by considerations and requirements relating to the pursuit of objectives in the public interest would catch cases where the cooperation agreement goes beyond what is necessary for the performance of the public task in question by providing for excessive compensation or contributions not related to the public task in question. It is also questionable whether this condition allows the participants to offer services forming the object of the cooperation on the market (i.e. to anyone who is not a party to the cooperation agreement). The new procurement directives draw a parallel with in-house arrangement and allow such activities as long as they remain marginal.[40]

Finally, a public contract must relate to a work, supply or service within the meaning of the procurement directives. This criterion can give rise to classification problems, which may lead to circumvention of the directives. For example, the current distinction between priority and non-priority services[41] may lead to a situation where a contract, the object of which is supply or products and provision of non-priority services might entirely fall into the so-called 'light regime' foreseen for non-priority contracts.[42] In such cases it must be borne in mind that the Court of Justice clarified that the directives prohibit not only the artificial splitting, but also artificial *grouping* of contracts in order to avoid application of the procurement directives.[43]

Involvement of the private sector

It is one of the basic principles of Union procurement law that contracting authorities may not be allowed to make arbitrary decisions that would breach

39. See case C-386/11 *Piepenbrock*, paragraph 40.
40. The new directives also provide that the essential part of activities is to be understood as 80% of activities, calculated on the basis of average total turnover.
41. According to Articles 20 and 21 of Directive 2004/18, services listed in Annex II A to that directive must be awarded in accordance with all provisions of that Directive, but services listed in Annex II B are only governed by the provisions on technical specifications and contract award notices. However, according to the case-law of the Court of Justice, a sufficient degree of transparency needs to be assured before the award of contracts relating to non-priority services as well, as long as there is a certain cross-border interest in the contract.
42. Article 1(3)(d) of Directive 2004/18.
43. See case C-411/00 *Felix Swoboda*.

the principles of non-discrimination on the basis of nationality and of equal treatment and thus confer an undue advantage on a specific private economic operator.

On the other hand, appropriate contacts with the private sector may be essential for the public sector for several reasons. There may be an information asymmetry on what the market can realistically offer[44] and preliminary market consultations – including contacts with market participants – may help to better design the procurement process. Public authorities may also want to involve market participants in projects as a source of capital or know-how, and establish public-private partnerships (PPPs) for this purpose.

However, such contacts must not distort competition. A direct award of a contract to private operator without any competition would be clearly against competition and it is therefore not surprising that the case-law of the Court of Justice is quite strict in this regard. Already in the *Stadt Halle* case,[45] the Court of Justice made it clear that private capital follows different interests from public capital and therefore an in-house entity cannot be entitled to the in-house exception if it has (even minority) private shareholding.[46] Similarly, according to the case-law, public-public cooperation must not lead to granting an advantage to a private undertaking vis-à-vis its competitors.

Preliminary market consultations[47] (which are referred to as 'technical dialogue' in the current procurement directives[48]) are another form of contact between the public and private sectors. Although there are no binding rules, it is clarified that such a dialogue is in principle allowed as long as any advice received from the private sector is used for the preparation of specifications to be provided during the procurement procedure and it does not have the effect of precluding competition. The Court of Justice also ruled on a national rule not allowing an undertaking, which carried out research, experiments, studies or development in connection with a certain public contract to participate in the procedure leading to the award of that contract was without allowing the undertaking to demonstrate that in the given case no distortion of competition

44. See e.g. Trepte, P.: Transparency Requirements, in: Nielsen, R., Treumer, S. (Eds): The New EU Public Procurement Directives, Copenhagen, 2005, pp. 54-56.
45. See case C-26/03 *Stadt Halle.*
46. Whether capital held by charitable institutions is to be considered as private or public is the object of a pending preliminary reference, case C-574/12 *Centro Hospitaler de Setúbal and SUCH.*
47. Preliminary market consultations is the term used by the new procurement directives, which also contain a specific article on this subject.
48. See recital 8 of Directive 2004/18.

arose from its prior involvement. According to the Court of Justice, such a national rules was considered to be disproportionate and hence precluded by the procurement directives applicable at the time.[49]

Prior involvement of the private sector can be crucial for the procurement of innovative solutions, where the object of procurement is by definition not available on the market. The tools used for that purpose include direct procurement of research and development services (excluded from the procurement directives[50]), pre-commercial procurement and innovation partnership.

Contracting authorities may also want to involve the private sector as a source of capital, know-how or for other reasons. Such arrangements can come about in different forms. For example, a specialised company operating as in-house provider of a public authority could be partially privatised to admit a private shareholder; or a contracting authority could set up a new company together with a private entity and entrust a public task to that company. These arrangements are referred to as »institutionalised public-private partnerships« (or »IPPPs«). The Commission considers that entrustment of public service tasks to IPPPs must respect public procurement rules since, in the presence of a private shareholder, such companies cannot benefit from the in-house exception.[51]

Admitting the principle that public procurement rules apply to IPPPs leaves open the question of how to apply those rules in practice. Considering a case where a contracting authority sets up a company together with a private shareholder to perform public tasks, two separate steps can be distinguished. The first one is the selection of the private shareholder; the second one the actual entrustment of a public task to the new company. In principle, public procurement rules apply to both steps, but in practice contracting authorities may find it easier to organise only one competitive tendering procedure. Such a solution was permitted by the Court of Justice in case C-196/08, *Acoset*. In that case the Court of Justice admitted that only one selection procedure could be sufficient, but only if it respects the principles of Treaty (the case concerned a concession, not a public contract) and if it also entails verification of the financial, technical, operational and management requirements specific to the service to be performed.

49. See joined case C-21/03 and C-34/03, *Fabricom*.
50. See Article 16(f) of Directive 2004/18.
51. See Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP), OJ 2008 C 91, p. 2.

The general principles of EU law: public procurement law and beyond

The three principles of Union law that are most often quoted in the field of public procurement are non-discrimination, equal treatment and transparency.[52] The procurement directives build on these principles and set out a body of rules which is designed to ensure that they are respected in practice.

This does not mean that other principles are no longer applicable. The directives make it clear that the »procurement-specific« principles are derived from the Treaty principles of freedom of movement of goods, freedom of establishment and the freedom to provide services.[53] The Court of Justice applies the Treaty provisions on free movement alongside the »procurement-specific« principles.[54] Most contracting authorities are sufficiently closely related to the state to consider decisions taken by them in the context of a procurement procedure as measures for the purposes of free movement.[55] The scope of such analysis in case of contracts covered by the directives is limited, but by no means excluded; it remains more important in the case of contracts not or not fully covered by the procurement directives.[56]

The Court of Justice took an active role in developing the main principles of Union procurement rule. For instance, the principle of equal treatment was described by the Court of Justice as a principle requiring that all tenderers be treated alike, which »lies at the very heart« of the procurement directives[57] and requires contracting authorities to treat comparable situations equally and non-comparable situations differently unless there are objective reasons for the contrary.[58] It must inform the conduct of contracting authorities even when making choices in questions that are not covered by the directives in detail. The Court of Justice ruled, for instance, that the principle of equal treatment does not allow contracting authorities to amend the selection criteria in the course of the procedure,[59] requires them to address requests for clarification of tenders to tenderers in a way that ensures equal and fair treat-

52. See Article 2 of Directive 2004/18.
53. See recital 2 of Directive 2004/18.
54. See e.g. cases C-359/93 *Commission/Netherlands (UNIX)*, paragraphs 27-29, and C-72/10 *Costa and Cifone*, paragraph 54.
55. But see case C-425/12 *Portgás*, paragraph 25, where the Court of Justice took a cautious approach in the context of direct effect of the procurement directives.
56. See e.g. case 45/87 Commission/Ireland (Dundalk).
57. See case C-243/89 *Commission/Denmark*, paragraph 33.
58. See joined cases C-21/03 and C-34/03 *Fabricom*, paragraph 27.
59. See case C-496/99 P *Commission/CAS Succhi di Frutta SpA*, paragraphs 108-116.

ment,[60] or to reject offers submitted in a negotiated procedure that do not fulfil the minimum requirements published in the contract notice.[61] However detailed the procurement directives are, there will always be space for administrative discretion to be exercised by contracting authorities. Such discretion needs to be exercised in accordance with the basic principles of Union procurement law.

In situations where a contract is only partially covered by the procurement directives, the main procedural provisions of the procurement directives will not apply. This could be the case of contracts under the thresholds; non-priority services; or service concessions. However, the Court of Justice confirmed that such contracts are also covered by the basic principles as long as there is a certain cross-border interest in obtaining them. In the *Teleaustria* case[62] the Court of Justice decided that the fundamental rules of the Treaty imply an obligation of transparency by the contracting authorities, which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. The Commission practice is to require *ex ante* transparency for service concessions and public contracts not or not fully covered by the directives as long as there is a certain cross-border interest; the principle has not been used for unilateral measures, such as licences or authorisations.[63]

What about contracts that are explicitly excluded from the scope of the directive? The case-law of the Court of Justice suggests that exceptions provided for in the directives apply also in situations, which are only covered by the Treaty principles. For instance, Advocate General Jacobs in his in case C-525/03 *Commission/Italy* suggested that the exception laid down in Directive 93/36/EEC apply in a situation where that directive was not applicable. Advocate General Jacobs argued that the Treaty cannot be interpreted as not allowing a derogation which is expressly permitted by the directives.[64] The Court did not rule on this point in that case but the Commission included the

60. See case C-599/10 *SAG ELV Slovensko.*
61. See case C-561/12 *Nordecon*.
62. Case C/324/98 Teleaustria and Telefonadress.
63. However, the Services Directive requires a very similar standard in these cases: see Article 12 of Directive 2006/123.
64. See paragraphs 46 to 48 of the opinion of AG Jacobs in case C-525/03 *Commission/Italy.*

principle in its communication on contracts not covered by the directives.[65] When the validity of that communication was challenged, the General Court upheld this provision, as it did with the entire communication.[66]

Another similar example of »exporting« an exception from the procurement directives to a situation covered by the Treaty principles is the development of the in-house exception. That exception was originally based on interpreting the directives,[67] but was later extended to situations covered by the Treaty as well.[68]

However, exempting a certain situation from the scope of the procurement directives or the »procurement-specific« principles of the Treaty does not mean exempting it from Union law as such. An arrangement not covered by the procurement directives may be covered by other Union legislation, and therefore the question is one of delimiting the scope of various pieces of Union legislation rather than the relevance of Union law as such. For instance, it is clear that the exemption of employment contracts from the scope of the procurement directives does not mean that employment contracts are beyond the reach of Union law as such; similarly, the exemption of central banking services from procurement rules has no bearing on the rules relating to the common currency.[69]

For these reasons, excluding the application of the Treaty principles in situations where the procurement directives would not apply must be subject to a proximity test. The test should be twofold: first, only such arrangements should be excluded that are reasonably similar to a public contract that would otherwise (e.g. was its value higher or the type of service concerned different) be covered by the directives. Second, the consequence of the exclusion must be limited to those obligations that would oblige the contracting authority to obtain the supplies, services or works in question in a manner similar to that prescribed by the relevant provisions of the Treaty.

65. See Commission interpretative communication on the Community law applicable to contract awards no tor not fully subject to the provisions of the public procurement directives, OJ 2006 C 179, p. 2
66. See case T-258/06 *Germany/Commission*, paragraph 141.
67. See case C-107/98 *Teckal*, paragraph 50.
68. See case C-573/07 *Sea*, paragraph 40.
69. See Article 16(d) and (e) of Directive 2004/18.

Public procurements and general EU law, including competition and State aids law

Public procurement and competition law

In Union law, public procurement is treated as part of the rules on the internal market. By definition, the internal market is an area where competition is not distorted.[70] Unfortunately, the relationship between competition rules and public procurement rules is less straightforward. As the Court of Justice made clear in the *FENIN*[71] case, the nature of a purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity. Where the overall activity of the contracting authority is not an economic activity – such as the activity of providing free healthcare was held to be by the Court of First Instance in the *FENIN* case[72] – the purchases necessary to carry on such an activity will not be dissociated from the overall activity and therefore will not be submitted to competition law rules.

This judgment has very important implications for procurement law and practice. First of all, the principle set out in the judgment may lead to different treatment of contracting authorities and contracting entities, which are all subject to procurement rules, but some of which may not be subject to competition rules. The reason for this lies in the vast variety of entities subject to procurement rules, which include the state (which is very often acting in the framework of a non-economic activity), various bodies governed by public law and, in the utilities sectors, public undertakings or private undertakings holding special or exclusive rights and submitted to the utilities directive exactly for the reason that their purchases are made in order to enable a relevant activity as defined in the Utilities Directive, which is usually economic in nature. The result is that while all contracting authorities and contracting entities are covered by procurement rules, some – those engaged in an economic activity, such as most utilities – may also be covered by competition rules. For the sake of completeness, it should be added that utilities, which are exposed

70. See Protocol no 27 on the internal market and competition, annexed to the Lisbon Treaty.
71. See case C-205/03 P *FENIN*.
72. The Court of Justice did not rule on this question, because it decided that the part of the appeal relating to the economic nature of the activity was inadmissible. Advocate General Poiares Maduro proposed to admit that part of the appeal but considered that more information was need to judge on the (non-)economic nature of the activity.

to competition on markets to which entry is not restricted may be exempted from the application of procurement rules; they will continue to be bound by competition rules, however.[73]

Second, it is important to bear in mind that Union procurement rules regulate a relatively narrow part of the procurement process when this process is being looked at from a viewpoint of its effects on competition. The very design of procurement (the question 'what to buy') is not subject to procurement rules. The application of procurement rules starts at the definition of technical specifications and the publication of a contract notice and, in principle, ends with the award decision. The rules are relatively detailed as far as selection of economic operators and award of contracts are concerned. After the award decision, procurement rules still apply to the performance of the contract, but the relevant rules – on contract performance conditions and modifications of contracts that are allowed without a new procurement procedure – are less detailed and are mostly based on general principles. The reform of the procurement directives brings more clarity also into this area by codifying the rules on contract modifications that are today contained in the directives and in the case-law of the Court of Justice, but this does not change the general approach valid already today.[74]

It is therefore apparent that important aspects of the process such as the definition of the object of procurement, contractual conditions or even factual behaviour of the contracting authority towards the economic operator are not or are only very lightly regulated by procurement law. Obviously, these aspects of the process may have an economic impact and be relevant from a competition point of view. Some of these same issues may also be beyond the reach of competition law for the reason that the contracting authority does not engage in an economic activity.

Anti-competitive practices and solutions

The question therefore is how procurement law can rise to the challenge posed by the non-application of competition rules to a significant part of procurement transactions. A perfect harmony between the two sets of rules cannot be achieved. For instance, the pursuit of secondary policy objectives –

73. See Article 30 of Directive 2004/17.
74. Electronic invoicing is expected to be another post-award issue to be regulated in more detail by Union rules. The Commission adopted a legislative proposal for a directive on electronic invoicing in public procurement on 26 June 2013 (COM/2013/0449 final).

such as environmental goals – is by now accepted in procurement law, even though it is considered to inherently anti-competitive by some commentators.[75] Similarly, various types of procurement procedures can be distinguished on the basis of their effects on competition, as will be discussed further in relation to the new framework on services of general economic interest. However, procurement law can offer practical tools to render the overall procurement transaction more competitive.

It is well-established case-law that contracting authorities must not artificially split – or group together – contracts in order to avoid the application of Union procurement rules.[76] The strength of this approach lies in the fact that it allows for the creation of transparency for economic operators searching for business opportunities and thus also increases competition on the market. On the downside, even where contracting authorities do apply procurement law, the design of procurement can be more or less competitive. For instance, grouping together an unduly wide variety of services or supplies in a single contract can limit the possibilities of SMEs or more specialised operators to compete for the contract and thus restrict competition.

A practical solution offered – but not imposed – by the procurement directives is the division of contracts into lots. Thus even SMEs can compete for individual lots of a larger contract. The new procurement directives contain more detailed rules and encourage division into lots, but still do not make it mandatory. They encourage division into lots by expressly allowing Member States to make division into lots mandatory and requiring contracting authorities to provide reasons for not dividing contracts into lots in other cases. It is therefore up to the contracting authorities to adopt a more competition-friendly attitude when designing their procurement procedures.

Overly restrictive selection criteria can also lead to a restriction of competition. Such criteria need to be already today proportionate and related to the contract (at least in the public sector; the rules for utilities are more relaxed).[77] One concrete improvement brought about by the new procurement directives will be a cap on the maximum amount of turnover that can be required to prove economic and financial standing; this should also improve the position of SMEs.

---

75. See Albert Sánchez Graells: Public Procurement and the EU Competition Rules, Oxford, 2011, p. 111.
76. See cases C-16/98 Commission/France, C-411/00 Felix Swoboda and C-574/10 Commission/Germany.
77. See Article 44 of Directive 2004/18 and Article 54 of Directive 2004/17.

Overly long contracts may also lead to market closure. Union procurement rules at present only limit the maximum duration of framework agreements; the length of other contracts is not limited.[78] It is therefore a very important development that the new directive on concessions will limit the maximum duration of concessions to the time necessary to recoup the investment made by the concessionaire.

Contracting authorities may also promote competition policy by excluding candidates with a history of proven anti-competitive behaviour from procurement procedures, on grounds of grave professional misconduct, or even on the basis of past offences, if national law qualifies certain breaches of competition law as offences.[79]

However, the fact remains that most of the measures mentioned are more tools than obligations of the contracting authority and may not be sufficient to prevent anti-competitive practices by contracting authorities. The proper use of these tools to achieve greatest possible competition for the contract will depend on the competence, diligence and good faith of the contracting authority. Even the simplest procedures can be conducted in a way that significantly decreases competition, e.g. by defining the object of the contract in a way that favours certain undertakings, setting overly tight time limits or not providing all information necessary to participate in the procedure or to submit a tender in time. If the object of procurement is a more complex contract and the procedure is a more flexible one (e.g. using a negotiated procedure to procure a complex contract) the contracting authority will need more competence and diligence to ensure optimal competition.

Contracting authorities acting as economic operators

Contracting authorities may also act as economic operators. With the emerging case-law on the in-house exception and the public-public cooperation ever larger conglomerates of in-house providers or public networks may be created. These forms of cooperation lead to market closure, since private operators are unable to compete for such 'internalised' contracts. Since in-house providers (and, according to the new directives, also public-public cooperative structures) are also allowed to some extent to conduct operations on the open market, they enjoy a competitive advantage flowing from public financing or at least a steady flow of business.

---

78. See also case C-454/06 *pressetext*, paragraph 74.
79. See Article 45(2)(c) and (d) of Directive 2004/18.

Finally, those arrangements may lead to a fragmentation of the internal market and go against the goal of the procurement directives. Up to now, the examples in the case-law of the Court of Justice related to in-house arrangements or public-public cooperation concern arrangements where the parties are based in the same Member State. Although Union law offers forms of cooperation to public authorities from different Member States,[80] the creation of cooperative structures seems to follow other reasons. Given these concerns it is imperative that the strict conditions imposed by the Court of Justice on these arrangements be maintained in the future; only by respecting these conditions can the inherent anti-competitive effects of these arrangements be minimized.

State aid

The related field of state aid law also has close links to procurement law. Two perspectives should be considered. First, the contract being awarded may qualify as granting state aid in some cases, i.e. the contracting authority may be granting state aid through the procurement procedure. Second, the contracting authority may receive tenders that benefit from state aid provided by other public authorities (including those of other Member States than where the contracting authority is based).

State aid potentially granted by the contracting authority

As pointed out by some commentators,[81] a procurement procedure fulfils most of the criteria for the existence of state aid: transfer of state resources, selectivity, and effect on trade between the Member States are usually present (given that the thresholds of *de minimis* aid do not exceed the thresholds to apply the procurement directives; moreover, the thresholds in the public procurement directives themselves indicate the existence of cross-border interest in a given contract). However, a crucial aspect of procurement procedures in this regard is that they are designed to identify the cheapest or economically most advantageous tender available on the market, and therefore to avoid any undue economic advantage accruing to the economic operator, which would be the fourth condition of the existence of state aid.

80. See Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC).
81. See Albert Sánchez Graells: Public Procurement and the EU Competition Rules, Oxford, 2011, pp. 119-121.

The Union procurement directives create a general framework and, as has already been discussed, the competition a given procedure can generate will depend on many factors, including objective ones (market structure, timing of the procedure, available capacities on the market etc.), but also subjective ones that can be attributed to the contracting authority (design of the contract, choice of type of procedure, setting time limits, etc.). Nonetheless, a procurement procedure is an ideal way to test what and at what price the market can offer, provided that it is conducted properly.

The current approach of the Union institutions is to consider that a procurement procedure establishes a presumption against the existence of state aid. However, two conditions must be fulfilled: the procurement procedure must be genuine and it must be properly conducted.

The concept of a genuine procurement procedure originates from the judgment of the General Court in the *BAI* case[82] where the Court examined whether the long-term purchase of travel vouchers was a normal commercial transaction in the sense that the purchase of the vouchers by a public authority covered a real need of the contracting authority. The Court decided that in the circumstances of the case this condition was not met.[83]

The second condition is that the procurement procedure is properly conducted, i.e. it is in line with the applicable Union procurement rules. At first sight the condition is straightforward, but there are some conceptual differences between procurement law and state aid law in this respect.

Services of general economic interest

In December 2011, together with the adoption of the procurement reform package, the Commission also adopted a new framework for the application of state aid rules to compensation granted for the provision of services of general economic interest (SGEIs). The new SGEI framework brings two novelties that are important for procurement law.

82. Case T-14/96 *BAI/Commission*.
83. The contracting authority originally intended to buy a certain amount of vouchers at a price exceeding the market price. This scheme was later modified: the price was lowered, but the number of vouchers considerably increased. See case T-14/96 *BAI/Commission*, paragraphs 79-81.

First, the new framework establishes a formal link between the enforcement of procurement rules and state aid law. According to paragraph 19 of the framework on public service compensation:[84]

> 'Aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non- discrimination resulting directly from the Treaty and, where applicable, secondary Union law. Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) of the Treaty.'

The new framework therefore leads to a systematic investigation of SGEIs from the perspective of procurement rules. This is an important challenge given that a lot of SGEIs may take the form of service concessions, which are only governed by the Treaty principles and therefore Member States have a large margin of manoeuvre when designing the procedure to award them. A uniform standard for award of concessions is exactly what is missing from secondary legislation today, but the Commission still needs to assess SGEIs in different Member States objectively and to apply a common standard of assessment.

The new SGEI framework also makes it clear that while non-compliance with procurement rules leads to the existence of aid, the opposite is not true. Even if a procurement procedure is conducted, overcompensation may occur and therefore the procedure may result in granting state aid.

The communication on compensation granted for the provision of SGEIs starts from the fourth *Altmark*-criterion, according to which a 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 *lowest cost* to the community'. The term 'lowest cost' is different from 'lowest price' (which is one of the admissible award criteria under the procurement directives, the other one being the most economically advantageous tender) and therefore the framework, while stating that using the lowest price as award criterion will always satisfy the fourth *Altmark* criterion, also allows the use of most economically advantageous tender as award criterion, as long as the criteria used are closely linked to the subject-matter of the contract.

84. Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011), OJ 2012 C 8, p. 15.

However, not all procurement procedures are equally capable of fulfilling the fourth *Altmark* criterion. The condition will not be fulfilled in situations where only one bid is received or competition is limited due to intellectual property rights or exclusive infrastructure owned by one economic operator or due to the decision of the contracting authority to use a negotiated procedure without the publication of a prior contract notice. Even negotiated procures with the publication of a prior contract notice and competitive dialogues are considered to only exceptionally lead to the identification of an operator providing the service at the lowest cost to the community due to the fact that these procedures offer a large scope of appreciation to the contracting authority.[85]

The last aspect deserves special attention in light of the on-going reform of procurement rules. One of the goals of the reform is to give more flexibility to contracting authorities in public procurement by making the negotiated procedure with a prior publication of a contract notice (to be renamed as competitive procedure with negotiations) and the competitive dialogue more easily available to contracting authorities. In submitting exactly these types of procurement procedures to a closer scrutiny, the new SGEI framework makes it more difficult to achieve a convergence between the two sets of regulations.

Bids from tenderers benefiting from state aid

Even where a contracting authority is conducting a genuine and proper procurement procedure, it may receive a bid from an economic operator which has received state aid from another public authority. In this context, the procurement directives give considerable leeway to the contracting authority awarding the contract.

Where the tender submitted by an operator receiving state aid is not abnormally low, the contracting authority can accept the tender without further ado (the contracting authority may also reject the tender for reasons that are not related to the state aid in question). Only where the tender appears to be abnormally low in relation to the goods, works or services offered is the contracting authority under an obligation to request in writing details of the constituent elements of the tender. Should it come to light that the tender is abnormally low because of the possibility of the tenderer to obtain state aid, the contracting authority is, in principle not obliged to reject the tender. It can on-

85. Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012 C 8, p. 4, paragraphs 62-68.

ly reject it for the sole reason of obtaining state aid where the tenderer is unable to prove that the aid was received legally.[86]

The now codified rule mirrors the judgment of the Court of Justice in the *ARGE* case[87] where the Court of Justice decided that accepting a tender from an operator which benefited from state aid did not breach the principle of equal treatment and is not a restriction of free movement either. The Court of Justice was very circumspect in its reasoning and stressed that an obligation to reject such tenders would have been clearly stated in the directives; since not such obligation was laid down in the directive, the Court confirmed that contracting authorities are not obliged to reject tenders from operators receiving state aid, but it could not rule on the question under what conditions a contracting authority *may* reject such a tender. The Court of Justice did, however, concur with the suggestion of the Commission that rejection should be allowed in situations where repayment of illegal state aid would prevent the operator from offering the necessary economic or financial guarantees to perform the contract (or, *a fortiori*, the repayment would jeopardise the economic viability of the operator as such).

The ruling of the Court of Justice in the *ARGE* case suggests that there may be various cases where tenders from operators receiving state aid can be rejected due to possible adverse economic effects on the tenderer. The language of the directives is more open and only refers to a situation where aid was not granted legally.[88] Situations such as a possible misuse of aid (where the repayment of misused aid would put the operator in the same type of difficulty as repayment of aid that was granted illegally) are therefore not clearly addressed. Since the reform directives do not significantly change the wording of the relevant provisions, it will be for the Court of Justice to clarify the situation.

Strategic use of public procurement

Strategic use of public procurement leads us to further areas of Union law coming into contact with procurement law. Several conceptually different questions can be identified and it is proposed to discuss three of them here. First, it is important to know what the role of strategic policies in the procurement process is. Second, the various types of legitimate strategic policies

86. See Article 55 of Directive 2004/18.
87. See case C-94/99 *ARGE*.
88. See Article 55(3) of Directive 2004/18 and Article 57(3) of Directive 2004/17.

need to be examined. Third, the criteria used for finding an appropriate balance between the different policy objectives should be determined.

The functions of public procurement

Public procurement is not only a process designed to fulfil economic needs of the administration, but can also become a powerful tool for the achievement of other policy objectives. Several commentators make this point. For instance, Fernández Martín, building on the work of others, mentions the following possible instrumental uses of public procurement: a Keynesian expansion of demand in times of economic recession; protection of national industry from competition; improvement of the competitiveness of certain industrial sectors, possibly by encouraging innovation; remedying regional disparities.[89]

The Treaty and the procurement directives define the objectives of Union procurement legislation in terms of the basic freedoms on the internal market. Recital 2 of Directive 204/18/EC states that procurement procedures in the Member States are »subject to respect of the principles of the Treaty«. The starting point therefore is clearly the need to allow economic operators from across the Union to compete for procurement opportunities within the internal market without being subject to discriminatory treatment. Procurement procedures must therefore be based on objective and non-discriminatory criteria. The directives – especially the provisions of award criteria – make it also clear that economic considerations are the most suitable for complying with those principles. The starting point is therefore clearly a model of »best value for money«, where strategic policies enter the scene as secondary policy goals, which may enrich, but not entirely detour the procedures.

Therefore, to come back to Fernández Martín's categorisation, procurement as means of protectionism is immediately disqualified in the Union, as is regional preference, which amounts to the same thing as national protectionism vis-à-vis bidders established in other Member States. On the contrary, Union procurement rules do not affect the right of Member States to have an expansionary economic policy and increase public investment (provided that it is done in accordance with the applicable rules).

Support for innovation is clearly an acceptable policy, as is shown by establishing a dedicated procedure in the new procurement directives. The in-

89. Fernández Martín: The EC Public Procurement Rules: A Critical Analysis, Oxford, 1996, pp. 46-49.

novation partnership is a flexible procedure aimed at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works. The new procedure complements, but does not replace various possible models of pre-commercial procurement.[90]

The legitimate strategic objectives

The list of legitimate strategic policy goals is potentially very long. As a starting point, Articles 8 to 12 TFEU need to be taken into account, which sum up the political goals that need to be taken into account when defining and implementing Union policies and activities. The list is partly a reformulation of objectives that existed under the EC Treaty, but there are also additions. Policies to be mainstreamed include equality between men and women; promotion of a high level of employment, adequate social protection, fight against social exclusion, a high level of education, training and protection of human health; combatting discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; environmental protection; and consumer protection.

The example of environmental protection, which was defined as a horizontal policy goal in ex-Article 11 of the EC Treaty is instructive. The horizontal nature of environmental protection was reflected in secondary legislation.[91] It was also taken into account by the Court of Justice when allowing the use of an award criterion linked to protection of the environment.[92] If this logic is correct, then the expansion of horizontal policy goals in the Treaty should also lead to their acknowledgment for the purposes of procurement law. In fact, some of the currently acknowledged horizontal objectives had already been recognized by the Court of Justice, such as the promotion of employment of long-term unemployed persons.[93]

The Commission Green Paper introducing the current reform of procurement rules states in similar terms that:

90. See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Pre-commercial Procurement: driving innovation to ensure sustainable high quality public services in Europe (COM(2007) 799 final).
91. See recital 5 of Directive 2004/18.
92. See case C-513/99 *Concordia Bus Finland*, paragraph 57.
93. See cases 31/87, *Beentjes v State of the Netherlands* and C-225/98 *Commission/France (Nord-Pas-de-Calais)*.

»public authorities can make an important contribution to the achievement of the Europe 2020 strategic goals by using the purchasing power to procure goods and services with higher »societal« value in terms of fostering innovation, respecting the environment and fighting climate change, reducing energy consumption, improving employment, public health and social conditions, and promoting equality ... »[94]

The list of possible secondary policy objectives is rather open in the current directives. For instance, it is possible to exclude economic operators for grave professional misconduct, and non-compliance with environmental legislation or legislation relating to the equality of workers has been identified as possible grave professional misconduct.[95] The same is true for award criteria, the list of which is open and expressly includes environmental criteria,[96] as well as for contract performance criteria, which expressly include environmental and social criteria.[97]

The new procurement directives follow the same approach, with the ambition to expand the list of admissible strategic goals and to ensure consistency between different phases of the procedure.[98] The policy objectives expressly mentioned by the new procurement directives will be environmental, social and labour law standards established by Union law, national law, collective agreements or international agreements.

Balance between policy objectives

The most important question then becomes that of balance between various policy objectives. The approach has been set out by the Court of Justice in the *Concordia* case. According to that judgment, secondary policy goals can be used in defining award criteria,

»provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract docu-

94. COM(2011)15.
95. See recital 43 and Article 45(2)(d) of Directive 2004/18.
96. See Article 53(1)(a) of Directive 2004/18.
97. See Article 26 of Directive 2004/18.
98. As the Court of Justice pointed it out in the *Nord-Pas-de-Calais* case, even a contract performance criterion can be used to reject a tender, and therefore there may be little practical difference between a selection criterion, an award criterion and a contract performance criterion. See case C-225/98, *Commission/France*, paragraph 52.

ments or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination«.[99]

Some clarifications have been added in further case-law. For instance, in the *Wienstrom* case[100] the Court of Justice clarified that an award criterion is not linked to the subject matter of the contract if it relates to a part of the production by the economic operator that the contracting authority is not going to buy; the Court of Justice also decided that the fulfilment of an award criterion must be verifiable.

The new procurement directives build on this case-law and provide a definition of the link to the subject-matter of the contract. According to that definition, a link to the subject-matter does not require that a specific factor form part of the material substance of the supplies, services or works offered and can relate to any aspect and any part of the life-cycle thereof, including production, provision or trading.[101] However, as confirmed by the Court of Justice in the *Wienstrom* case, the factor in question must relate to supplies, service or works to be provided under the contract and can therefore not cover general corporate policy.

The new directives provide that contracting authorities must ensure that operators comply with applicable environmental, social and labour law obligations throughout the procurement process and the performance of the contract. This begs two questions: the first is one of collision; the second is that of requirements going beyond compliance with legal provisions.

Protection of the environment, social policy and labour law are areas where the level of protection provided by various Member States and third countries covered either by the Government Procurement Agreement or bilateral free trade agreement can vary significantly; Union measures can often take the form of minimum harmonisation.[102] The contracting authority is therefore not entitled to automatically require that a tender complies with the requirements applicable at the place where the authority is based. Doing so would mean granting a specific national or regional legislation (or even Union legislation) extra-territorial effects. The procurement directives do not provide a universal collision rule to determine the applicable legal regime. It will

99. See case C-513/99 *Concordia Bus Finland*.
100. See case C/448/01 *EVN and Wienstrom.*
101. This criterion may apparently also refer to fair trading arrangements, such as those that were contested in case C-368/10 *Commission/Netherlands*.
102. Concerning environmental protection, see Article 193 TFEU.

therefore have to be identified in accordance with other rules of Union law and the basic principles of non-discrimination and equal treatment.

The same considerations apply in situations where a contracting authority sets criteria going beyond compliance with legal provisions. The application of such criteria cannot be discriminatory and go against free movement on the internal market.

The new directives also offer practical means to make public procurement more sustainable. For instance, the provisions on the use of environmental or other labels are clarified and more detailed. The provisions on award criteria are also modified. The most economically advantageous tender is likely to be the only admissible award criterion, although it can also be reduced to simply lowest price or lowest cost. The use of lowest cost as award criterion can also comprise the use of life-cycle costing, on the basis of methodologies based on objective, non-discriminatory and transparent criteria.

Remedies

The obligation of Member States to provide for effective remedies for the safeguard of rights that individuals derive from Union law is a well-established principle of Union law and, since the adoption of the Treaty of Lisbon, is also enshrined in primary law. Article 19(1) second subparagraph TEU obliges Member States to »provide remedies sufficient to ensure effective legal protection in the fields covered by Union law«, and Article 47 of the Charter of Fundamental Rights of the European Union guarantees the right to an effective remedy before a tribunal to everyone whose rights and freedoms guaranteed by the law of the Union are violated.

These general principles give a large room of manoeuvre to Member States when implementing them. The procedural autonomy of the Member States is, however, subject to two important limits. First, the principle of effectiveness requires that the procedural arrangements in place do not make it impossible of excessively difficult to obtain a remedy for violations of a right derived from Union law. Second, the principle of equivalence prohibits the making of remedies for violations of rights derived from Union law more difficult to obtain than remedies for the violations of rights derived from national legal orders.

The existence of two important pieces of secondary legislation covering the field of remedies in public procurement – Directive 98/665/EEC covering the public sector and Directive 92/13/EC covering the utilities sector – does not render these general principles irrelevant.

There are two types of situations where they still apply. First, contracts not covered by the substantive procurement directives – such as public contracts under the thresholds[103] or service concessions – are not covered by the remedies directives either. Second, the remedies directive themselves do not harmonize the field of remedies fully and leave some questions open. When the Member States transpose – or apply – the directives on remedies, they must use their discretion in a way that is compatible with the principles of effectiveness and equivalence. For example, the directives on remedies do not harmonize the extent of damages to be paid for violations of public procurement rules. Despite this fact, the Court of Justice confirmed that Member States are bound by the principles of effectiveness and equivalence where damages are concerned.[104]

When applying the right to an effective remedy to cases involving public contracts and concessions, the specificities of those contracts should be taken into account when determining what constitutes an effective remedy. The most important difference between an unlawful award of a public contract or a concession and other types of breaches the Treaty principles – such as unduly restrictive or discriminative conditions on the exercise of a certain type of economic activity – is that in the case of the public contract economic operators are competing for a single and concrete business opportunity. They may well be authorised to pursue their economic activity in the given Member State and search for other opportunities in the private or public sector, but once the contract at stake is awarded and the needs of the contracting authority are thus satisfied, it is unlikely that the same opportunity will arise soon and – especially in the case of long-term contracts – a *de facto* closure of the

---

103. See Commission interpretative communication on the Community law applicable to contract awards no tor not fully subject to the provisions of the public procurement directives (OJ 2006 C 179, p. 2), point 2.3.2. It is important to note that in the case of not *fully* covered contracts, i.e. public contracts with a value above the thresholds but falling within Annex II B of Directive 2004/18/EC or Annex XVII B of Directive 2004/17/EC only certain provisions of the substantive directives apply, but the remedies directives are applicable in their entirety, because the contract is covered by the respective substantive directive.
104. See case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, paragraph 92. The Court of Justice seems to have gone further in case C-314/09 *Strabag and others*, especially in paragraph 39. For a critical analysis of this inconsistency see Steen Treumer: Basis and Conditions for a Damages Claim for Breach of the EU Public Procurement Rules, in: Duncan Fairgrieve, François Lichère (editors): Public Procurement Law: Damages as an Effective Remedy, Oxford, 2011, pp. 159-161.

market can arise. Therefore remedies aimed at rectifying breaches of procurement law need to be timely and targeted at the contract in question.

A significant reform of the remedies directives carried out in 2007.[105] Two important elements were introduced: a mandatory standstill period between the award decision and the conclusion of the contract and more detailed provisions on remedies, including making the ineffectiveness of contracts mandatory in some cases.

The reform of the remedies directives did not lead to a large case-load of the Court of Justice. The situation is not comparable to the explosion of remedies-related cases around the year 2000, mainly from Austria. The lack of judicial activity can be taken as a signal of relative clarity of the rules, but by no means as proof. Certain minor inconsistencies are apparent on a legislative level. For instance, contract award notices – which must contain information on available remedies[106] – sit somewhat uncomfortably in the new system, because the dispatch of information sent to candidates and tenderers is preferred as the starting point of the standstill period, during which application for remedies is to be made.[107]

Another important point concerning the reform of the remedies directives is the strong preference for maintaining the validity of a concluded contract. Member States are only obliged to provide for ineffectiveness in a limited number of cases, such as where a direct award took place or the standstill period was not respected.

Even if ineffectiveness would be mandatory, the contracting authority may create a »safe haven« by publishing a mandatory *ex ante* transparency notice before concluding the contract, in which it must set out the reasons why it considers that the contract can be awarded without publishing a contract notice. It is striking that the contract *cannot* be declared ineffective if an *ex ante* transparency notice had been published. This contrasts with taking into account overriding reasons against ineffectiveness in exceptional cases, which is left to the discretion of the competent body ruling on the remedy in question. An authority no less important than the Italian *Consiglio di Stato* is currently enquiring the Court of Justice about the interpretation and validity of

105. See Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.
106. See Annex VII A to Directive 2004/18.
107. See Article 41 of Directive 2004/18 and recital 7 of Directive 2007/66.

the provisions on *ex ante* transparency notices in a case that will no doubts provide important clarifications.[108]

Conclusion and reform

This report would not be complete without a treatment of the on-going reform of the procurement directives. This part will focus on the modernisation of procurement procedures. Other aspects are treated more fully or are at least mentioned in other parts of this report.

New procurement directives

The reform will lead to a re-arrangement of the legislation. The most recent additions to the legislative framework are not being touched: Directive 2009/81 on defence procurement is not amended and the two remedies directives (Directives 89/665 and 92/13, which were both significantly amended in 2007) are only modified in order to bring contracts concluded under the new concessions directive under their remit. The two main substantive directives, Directive 2004/18 on the public sector and Directive 2004/17 will be replaced; the new directives can be expected to be longer and somewhat more detailed than the current ones. Rules on works concessions will no longer be contained in the public service directive, but will be moved to the new directive on concessions, which will regulate both work and service concessions and cover both the public sector and utilities.

Scope of the new procurement directives

The current directives are sometimes criticized because, allegedly, procurement procedures are cumbersome and the savings they help to generate do not justify their administrative costs. An obvious solution would be to narrow down the scope of Union procurement rules to either higher value contracts or to contracts that represent a priority from the point of view of the internal market, and leave it to the Member States to institute less cumbersome procedures for other contracts.

It is easy to see that the legislator did not go down this way during the reform. The thresholds (which are to a large extent determined by the Govern-

108. Case C-19/13 *Fastweb*, OJ 2013 C 86.

ment Procurement Agreement) are not increased compared to the current directives. Two changes are apparent: first, sub-central authorities will be subject to a higher threshold than central ones; second, a new threshold for social, health and educational services is introduced, which is significantly higher than the threshold for other services.

The list of exemptions is not much extended, either. The conditions for the use of a negotiated procedure without the publication of a contract notice remain virtually unchanged. Some new entries are added to the list of specific exceptions (in what is today Article 16 of Directive 2004/18): examples include certain legal services, as well as political campaign services, which, according to the corresponding recital, need to be awarded to operators of the appropriate political persuasion and are therefore not suitable for public tendering.

The most important change concerning the coverage of services is the abolition of the division of services into priority and non-priority (or 'A' and 'B') categories. This is a move towards a larger coverage of procurement rules. However, since many of the current non-priority service present limited cross-border interest, a lighter regime is applied to these.[109] The list of services benefiting from the lighter regime under the new directives is shorter than the current list of non-priority services and the presumption is reversed. Whereas today, the list of priority services is closed and all other services are non-priority, the reform directives apply fully to all services, unless they are specifically excluded or expressly mentioned as being subject to the light regime. This leads to some surprising realisations: some readers may not have been aware of the fact that the current residual category of 'other services'[110] includes, among other things, religious services, which need to be expressly included in the light regime in order to avoid a full application of the directive.

The services falling into the light regime are also referred to in the recitals as 'services to the person' and include mostly social, health and educational services. Above the threshold, cross-border interest in these contracts will be presumed and they will be subject to requirements similar to the ones already applicable today by virtue of the directives and the case-law of the Court of

---

109. Some of the current non-priority services are going to be excluded altogether, e.g. certain legal services referred to in the previous paragraph. The rest of legal services will be included in the light regime, which means in practice that the threshold for these services to be covered by the directive will increase.

110. See point 27 of Annex II B of Directive 2004/18 and point 27 of Annex XVII B of Directive 2004/17.

Justice.[111] Transparency will need to be ensured by publishing a contract notice or a periodic information notice (as well as the publication of a contract award notice). Award procedures will need to respect the basic principles of procurement law, but Member States will have a considerable margin of manoeuvre in designing them (and will of course remain free to use the same procedures as for contracts fully covered by the directives).

In-house arrangements and public-public cooperation arrangements, the two exceptions created by the Court of Justice, will be codified. The Commission proposal of the reform directives followed the case-law of the Court of Justice rather closely. However, during the legislative process the scope of the exemptions has been somewhat extended, mostly as concerns the in-house exception. Here, the legislator clearly departed from the case-law by allowing some private capital participation in the controlled entity. This is subject to strict conditions, though: the participation of private capital will have to be non-controlling, non-blocking and not allowing a decisive influence over the controlled entity, and also *required* by national legislation, which itself must be in compliance with the Treaties. The exception will also be available in a quasi-group context, i.e. it will not only cover contract awarded by a contracting authority to an entity, but also to the authority controlling the contracting authority in question or to other entities controlled by the same authority. However, this quasi-group setting can only apply if there is one single controlling authority. In-house entities jointly controlled by several controlled entities are also expressly allowed by the directives, as are public-public cooperation arrangements along the lines of the conditions that are already today set out in the case-law of the Court of Justice.

Modernisation of procedures

Given that the scope of Union procurement rules is expanding, modernisation of procedures needs to take place within the system, by providing for new procedures or modifying existing ones.

The only new procedure created by the new directives is the innovation partnership. Since the main features of that procedure have already been described, it will not be further discussed here.

---

111. According to Article 21 of Directive 2004/18, non-priority services are already today covered by the provisions of the directive on technical specifications and contract award notices. Furthermore, if there is a certain cross-border interest in a contract concerning non-priority services, the Treaty principles of non-discrimination, equal treatment and transparency also apply.

The open and restricted procedures will continue to be available to contracting authorities for all types of contracts. The nature of these procedures will not change significantly. This confirms their central importance, in the eyes of the Union institutions, for the improvement of the internal market. This was clearly visible in the legislative proposal of the Commission, which only made mandatory for Member States the transposition of these two procedures. The transposition of the competitive procedure with negotiations, the competitive dialogue and of the innovative partnership was to remain optional. This approach was changed during the legislative procedure, and according to the latest version of the text, all procedures must be transposed by Member States and thus made available to contracting authorities, albeit under the conditions provided for in the directives.

The wider availability of more flexible procures is one of the core elements of modernisation. Under the current legislative framework applicable to the public sector, a competitive dialogue is available for 'particularly complex' contracts,[112] whereas the negotiated procedure for with prior publication of a contract notice can be used if certain conditions, primarily linked to the complexity of the contract, are met.[113]

Both the competitive procedure with negotiations and the competitive dialogue will be more widely available in the future. Contracting authorities will be able to use them where their needs cannot be met without adaptation of readily available solutions; where the contract includes design or innovative solutions; where specific circumstances related to the nature, the complexity or the legal or financial make-up of the contract of to the risks attached to it make it impossible to award the contract without prior negotiations; or where the technical specifications cannot be established with sufficient precision with reference to a standard or other types of technical reference as set out in the directive.

These conditions appear to be repetitive and overlapping: an innovative solution may take the form of the adaptation of readily available solutions and probably cannot be described by using an already available standard or technical specification; however, these three criteria are still treated as distinct in the directive. Nonetheless, the list is useful in providing legal certainty to contracting authorities and it clearly conveys a central idea: that negotiations or a dialogue are only allowed if they can bring an added value to the con-

112. See Article 1(11)(c) of Directive 2004/18.
113. See Article 30 of Directive 2004/18. Pursuant to Article 40(2) of Directive 2004/17, the negotiated procedure with prior publication of a contract notice is generally available in the utilities sector.

tracting authority in the form of identifying the best solution to the contracting authority's needs in situations where the contracting authority, for objective reasons, is unable to define the preferred solution with sufficient precision at the beginning of the procedure.[114]

Although the competitive procedure with negotiations and the competitive dialogue are going to be available under the same conditions, the actual possibility of contracting authorities to use one of these procedures will also depend on the procedural safeguards included in the directives. To start a competitive procedure with negotiations, a contracting authority will have to be in a position to identify the subject matter of procurement by providing a description of their needs and the characteristics required of the supplies, services or works to be procured, as well as the minimum requirements, which will not be subject to negotiations. The information thus provided will need to be sufficiently precise for economic operators to decide whether to participate in the procedure.

Selected economic operators will submit an initial tender based on the specifications and needs of the contracting authority set out in the contract notice. The contracting authority will then be able (but not obliged, if such indication is contained in the contract notice) to negotiate with the economic operators in order to improve their tenders. All aspects of the tender will be open to negotiations, except for the minimum requirements and the award criteria. The final tenders submitted by economic operators will not be subject to negotiations; they will be evaluated according to the applicable award criteria.

The competitive dialogue will also be more widely available than it currently is, in respect of both currently applicable conditions. The condition of it being objectively impossible to specify the legal and/or financial make-up of a project[115] is reformulated and possibly somewhat softened by requiring that the difficulties related to specify the legal and financial make-up of the project will make it impossible to award the contract without prior negotiations. The condition relating to technical specifications is softened, because the new directives will also allow the use of a competitive dialogue in situations where the contracting authority is able to set out technical specifications by means of functional or performance requirements, which is excluded to-

114. Both procedures will also be available in cases where, in response to an open or restricted procedure, only irregular or unacceptable tenders are received, as is the case today for the negotiation procedure with prior publication of a contract notice.

115. See Article 1(11)(c) second subparagraph second indent of Directive 2004/18.

day.[116] To this are added further two cases where a competitive dialogue can be used: those of design and/or innovative solutions and the need to adapt readily available solutions.

The design of the procedure is not going to change significantly compared to the current directives. At the outset, the contracting authority needs to specify its needs and requirements. Compared to the competitive procedure with negotiations, a competitive dialogue features a round of dialogue aimed at identifying the best solution to meet those needs and requirements. The dialogue takes places between the selection phase and the evaluation of first tenders, which are submitted on the basis of the solution(s) identified in the dialogue. These tenders can still be clarified, specified and fine-tuned at the request of the contracting authority; after this second round of negotiations the tenders will be evaluated according to the applicable award criteria (which must be the criterion of most economically advantageous tender). Even after the identification of the most economically advantageous tender, negotiations between the contracting authority and the economic operator are possible, as long as the tender or the call for tender is not substantially changed or a risk of distorting competition arises.

Since procedures allowing for negotiations give a considerable margin of manoeuvre to contracting authorities – who may covertly favour national operators – and are more difficult to monitor than other types of procedures, they pose a potential risk to the internal market goals of the procurement directives. It is therefore important to balance the wider scope of availability of these procedures with adequate procedural safeguards.

The situation did not change with regards to the competitive dialogue, as the rules governing the procedure have not changed much in general. The two main rules are, first that contracting authorities must ensure equal treatment of tenderers and, in particular not to communicate information in a discriminative manner that could put some tenderers in a position of advantage; second, that the needs and requirements of the contracting authority and tenders submitted by the economic operators must not be substantially changed during negotiations.

As the current negotiated procedure with prior publication of a contract notice is very lightly regulated,[117] it was all the more important to set out appropriate procedural safeguards for the competitive procedure with negotiations. These are based on the rules of the competitive dialogue, although

116. See Article 1(11)(c) second subparagraph first indent of Directive 2004/18.
117. See Article 30(2), (3) and (4) of Directive 2004/18.

providing some more detail. It is expressly set out that minimum requirement cannot be subject to negotiations,[118] adequate time limits must laid down and tenderers must be allowed to submit final tenders after the conclusion of negotiations.

It is difficult to judge whether the positive potential of flexibility guaranteed by the new directives will be realised in full. It seems almost certain, however, that should these procedures become more widely used, many practical questions regarding their conduct will need to be clarified in practice, including by references to the Court of Justice.

Modernisation of public procurement also means simplification of the way the various procedures are conducted. Reducing documentation requirements and turning to a more electronic procurement reduces administrative burden of contracting authorities, but also makes it easier for economic operators to identify and compete for business opportunities. The European Single Procurement Document will make it easier for economic operators to provide the means of proof to be used by economic operators to show that they fulfil the selection criteria. Only the tenderer to whom the contract would be awarded will be required to submit the full documentation, without prejudice to the right of the contracting authority to require the documentation at any stage of the procedure where this is necessary to ensure the proper conduct of the procedure.

Electronic procurement under the directives means that all communication and information exchange under the directive is to be performed by electronic means. The means of electronic communication need to be non-discriminatory, generally available and interoperable with the information and communication products in general use. Non-electronic means may be used only specific, duly justified cases. However, according to the latest version of the text of the reform directives, e-procurement is still music of the future: its application will only become obligatory 78 months after the entry into force of the directive, which means that in an ideal case it will be just before the end of the decade. However, Member States are not obliged to wait that long and even the Member States that do so will have to allow individual contracting authorities to use electronic means of communication during the transitional period if they see fit.

118. The Court of Justice already decided that this requirement follows from the principle of equal treatment. See case C-561/12 *Nordecon*. See also case C-243/89 *Commission/Denmark*, paragraphs 35-44.

Conclusion

Public procurement is well-established area of Union law with its own specific and sometimes very technical rules. It builds on the basic freedoms of the internal market by providing for specific procedures designed to open up public contracts to competition across the Union. It also presents multiple connections with other areas of Union law, where some open questions remain.

The new public procurement directives do not mark a paradigm shift. There is improvement and development, the main directions of which are not entirely surprising. A major policy decision is to make the procedures more flexible and to allow more room for negotiations between contracting authorities and tenderers. The new directives also provide more clarity and detail on questions, which for a large part have already been treated by the case-law of the Court of Justice.

The clarification and completion of rules on concessions is another major development, all the more that it will encompass service concessions as well. However, the field of gambling and lotteries, as well as the water sector will, in all likelihood, be exempted from the new concessions directive. This means that the case-law of the Court of Justice on the applicability of basic Treaty principles to arrangements not covered by secondary law will continue to be relevant in the future.

An important feature of the new procurement directives is the emphasis they put on choices to be made by individual contracting authorities. Opening up the possibilities to use more flexible procedures based on dialogue and negotiations with economic operators, to divide contracts into lots to encourage the participation of SMEs or to use environmental and social criteria in the award of contract to promote wider societal goals are tools that contracting authorities are allowed, but by no means obliged to use. The proper and effective use of these tools will require competence and determination of the contracting authorities. The institutions of the Union and the Member States still have work to do in order to make sure that this potential is fully realised.

National reports

AUSTRIA

Michael Fruhmann[1]

Allgemeiner nationaler Kontext

Österreich ist ein Bundesstaat in dem die Zuständigkeit zur Erlassung der materiellen Regelungen des »Öffentlichen Auftragswesens« verfassungsrechtlich dem Bundeskompetenzbereich zugeordnet ist.[2] Dieser Kompetenztatbestand der österreichischen Bundesverfassung ermächtigt den Bundesgesetzgeber insbesondere zur Erlassung staatsspezifischer Sonderregelungen über das Verhältnis des privatwirtschaftlich handelnden Staates zu »echten« Privaten. Der Kompetenztatbestand wird in einem weiten Sinn verstanden und ermächtigt nicht nur zur Umsetzung des derzeit geltenden materiellen Sekundärrechts, sondern auch zur innerstaatlichen Umsetzung künftiger Rechtsakte und der Rechtsprechung des EuGH auf diesem Gebiet. Demzufolge sind die materiellen Regelungen des Vergaberechts in Österreich einheitlich im Bundesvergabegesetz 2006 (BVergG 2006)[3] enthalten. Die Zuständigkeit zur Erlassung von Regelungen betreffend den Rechtsschutz im Zusammenhang mit der Vergabe (öffentlicher) Aufträge sind hingegen zwischen dem Bund und den Ländern aufgeteilt.[4] Diese Regelungen finden sich daher in unterschiedlichen Gesetzen (einerseits als Teil des Bundesvergabegesetzes, andererseits

1. Dr. Leiter des Referates V/8/a im Bundeskanzleramt-Verfassungsdienst, Wien. Der Autor dankt seinen Mitarbeitern Dr. Christian Eisner, Mag. Johanna Hayden, Mag. Lukas Marzi und Mag. Martina Winkler (alle sind Mitarbeiter des Bundeskanzleramtes-Verfassungsdienst in Wien) für die Erstellung von Textbeiträgen. Die Endredaktion des Beitrages erfolgte durch Dr. Michael Fruhmann.
2. Darüber hinaus wird der Kompetenztatbestand »öffentliches Auftragswesen« als Sonderzivilrecht für die Vergabe öffentlicher Aufträge qualifiziert. Vgl. dazu die Erläuterungen zur verfassungsrechtlichen Kompetenzbestimmung des Art. 14b B-VG, AB 1118 BlgNR XXI. GP.
3. BVergG 2006, BGBl I 17/2006. In der Folge beziehen sich Paragraphenzitate ohne Gesetzesangabe auf das BVergG 2006 in der geltenden Fassung (abrufbar unter: http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004547).
4. Vgl. dazu Art. 14b Abs. 3 B-VG.

als Sondergesetze der Länder). Als Besonderheiten des österreichischen materiellen Vergaberechts sind insbesondere zu nennen:

1. die enge Orientierung des Wortlautes des Gesetzes am Wortlaut der Richtlinien[5] und
2. die Regelung des Ober- und Unterschwellenbereiches (unter Einbeziehung der Vergabe von Konzessionsverträgen).

Frage 1

Probleme bei der Einordnung in das nationale (verfassungs)rechtliche (Kompetenz)System

In Österreich wurde das Vergaberecht einschließlich eines vergabespezifischen Rechtsschutzes auf Bundesebene erstmals 1993 gesetzlich geregelt und trat mit dem Beitritt Österreichs zum EWR am 1.1.1994 in Kraft. Da Österreich ein föderal konstituierter Staat ist, erfasste das Bundesvergabegesetz 1993[6] aufgrund der damals geltenden verfassungsrechtlichen Kompetenzverteilung nur Auftragsvergaben durch den Bund und diesem zurechenbare Rechtsträger, während Auftragsvergaben der Länder und Gemeinden in neun verschiedenen Landesvergabegesetzen geregelt waren. Davor waren Auftragsvergaben im Wesentlichen durch einen Vertragsstandard mit Empfehlungscharakter (die sog. ÖNORM A 2050) geregelt, dessen Einhaltung von der zuständigen Verwaltung entweder für verbindlich erklärt wurde oder als Basis für spezifische Vergabeordnungen diente.[7] Rechtsschutz wurde vor-

5. Im Erkenntnis des Verfassungsgerichtshof VfSlg 18642/2008 führte dieser zu einer Bestimmung des BVergG, die fast wortwörtlich der RL entsprach, aus: »Auf Grund des Vorrangs des Gemeinschaftsrechts auch vor dem Verfassungsrecht der Mitgliedstaaten (vgl. VfSlg. 16.050/2000) wäre aber die Aufhebung einer Bestimmung, die Gemeinschaftsrecht umsetzt, unzulässig, wenn das Gemeinschaftsrecht dem innerstaatlichen Gesetzgeber keinen Spielraum für die inhaltliche Gestaltung einräumt, sodass der Gesetzgeber keine Möglichkeit hätte, eine Ersatzregelung zu schaffen, die sowohl dem Gemeinschaftsrecht als auch dem innerstaatlichen Verfassungsrecht entspricht. Die gesetzliche Bestimmung, deren Aufhebung begehrt wird, entspricht inhaltlich fast wörtlich dem Art 31 Z1 litb der Vergabe-RL.« Vor diesem Hintergrund und der zum Gemeinschaftsrecht ergangenen extensiven Judikatur des EuGH (vgl. dazu etwa Rs C-57/94, C-385/02, C-394/02) wies der VfGH den Anfechtungsantrag des Bundesvergabeamtes ab.
6. BGBl Nr. 462/1993.
7. Zur geschichtlichen Entwicklung des österreichischen Vergaberechts vgl. *Langer*, Österreichisches und internationales Vergaberecht (1990). Zur rechtlichen Darstel-

mals von den ordentlichen Gerichten eingeräumt. Systematisch wird das Vergaberecht in Österreich der Privatwirtschaftsverwaltung zugerechnet, also jenem Teil des Verwaltungsrechts in welchem das nicht hoheitliche Handeln des Staates (abgesehen vom Vergaberechtsschutz) geregelt ist.

Die kompetenzrechtliche Zersplitterung des österreichischen Vergaberechts hatte sowohl in der Fachliteratur als auch in der Praxis vielfach zu Kritik geführt, da die bundes- und landesrechtlichen Regelungen zum Teil ident waren, andererseits aber auch Unterschiede aufgewiesen haben, die insbesondere für die Bieterinnen und Bieter zu einer unübersichtlichen Situation geführt haben. Darüber hinaus führte die Umsetzung der Vergaberichtlinien zu großen Problemen.[8]

Diese Situation wurde erst 2002 insoweit beseitigt, als die materiellen Vergaberegeln in einem einzigen einheitlichen Vergabegesetz zusammengeführt wurden, welches seither für alle Auftraggeber auf Bundes-, Länder- und Gemeindeebene gilt. Der vergabespezifische Rechtsschutz hingegen ist nach wie vor getrennt zwischen Bund und Ländern geregelt und oblag bis 31.12.2013 spezialisierten Verwaltungsbehörden mit Tribunalcharakter und ist seit dem 1.1.2014 bei den neu eingerichteten Verwaltungsgerichten erster Instanz (ein Bundesverwaltungsgericht und neun Landesverwaltungsgerichte) angesiedelt.[9] Es wird demnach weiterhin eine wichtige Aufgabe des österreichischen Verwaltungsgerichtshofes als letztinstanzliches Gericht sein, auf die Konvergenz der österreichischen Rechtsprechung in Vergabeangelegenheiten hinzuwirken.

Ferner ist zu konstatieren, dass (vergabe)rechtliche Konzepte des Unionsgesetzgebers oft nicht oder nur schwer in die historisch gewachsene Systematik des nationalen Rechtssystems eingeordnet werden können.[10] Als Beispiele

---

lung der Situation vor 1994 vgl. *Wenger*, Recht des öffentlichen Beschaffungswesens (öffentliche Aufträge) in *Wenger*: Wirtschaftsrecht II (1990).

8. So konnten vor der Verfassungsreform 2002 etwa bestimmte Auftraggeber, die gemäß den RL eindeutig als öffentliche Auftraggeber identifizierbar waren, in Österreich kompetenzrechtlich keinem Gesetzgeber zugeordnet werden: der Salzburger Festspielfonds ist auf der Grundlage eines Bundesgesetzes (BGBl Nr 147/1950) eingerichtet, wird aber von Landesorganen »beherrscht«.
9. Vgl. dazu die Verfassungsreform mit der die Verwaltungsgerichtsbarkeit eingeführt wurde, Verwaltungsgerichtsbarkeits-Novelle 2012, BGBl I Nr. 51/2012.
10. Nicht zuletzt auch aus diesem Grund lehnen die MS etwa die Verwendung von Verordnungen als Regelungsinstrument im Bereich des Vergabewesens grundsätzlich ab: würde etwa eine VO einen Regelungsansatz des common law verfolgen, so könnte dies manche kontinentaleuropäischen Gesetzgeber bei der Umsetzung in Schwierigkeiten bringen, da die Kohärenz mit der restlichen nationalen Rechtsordnung (auf-

können hier etwa angeführt werden: das Konzept der »Unwirksamkeit« von Verträgen gemäß der RL 2007/66/EG und (aus dem VergabeRL Paket 2014) die Möglichkeit von Auftraggebern, bei grenzüberschreitenden gemeinsamen Beschaffungen im Wege einer zivilrechtlichen Vereinbarung Dispositionen über das anzuwendendene nationale Recht treffen zu können.

Dynamik der Rechtsentwicklung, (strukturelle) Divergenzen in und zwischen den MS, inhärente legistische Mängel der Normtexte und steigende (politische) Erwartungen bzw. Anforderungen an das Vergaberecht

Die Umsetzung und praktische Anwendung der EU-Vorgaben wirft aber laufend weitere neue Fragen auf, die in der Praxis oft nicht, nur mit einem hohen Aufwand oder nur unbefriedigend zu lösen sind. Ursächlich dafür sind zum einen die Dynamik der Rechtsetzung des Unionsgesetzgebers bzw. der Rechtsprechung des EuGH. So ist festzustellen, dass sich der »Lebenszyklus« der unionsrechtlichen Regelungen laufend verkürzt. Stand die erste Generation der materiellen VergabeRL[11] noch über 15 Jahre in Geltung, verkürzte sich dieser Zeitraum auf ca. 10 Jahre.[12] Im Bereich der Judikatur finden sich einige signifikante Beispiele für eine Rechtsfortbildung extra legem: aus der jüngeren vergaberechtlichen Rechtsprechung kann hier die in-house Judikaturlinie und die Rechtsprechung zur öffentlich-öffentlichen Kooperation angeführt werden.[13] Die Dynamik in beiden erwähnten Bereichen führt dazu, dass der Rechtsrahmen seit geraumer Zeit als nicht mehr stabil empfunden wird und dies hat letztlich zu Rechtsunsicherheit bei den betroffenen Kreisen geführt.

Des Weiteren ist in letzter Zeit zu beobachten, dass sich die vergaberechtlichen Regelungen außerhalb der VergabeRL stark vermehren.[14] Dies lässt

---

grund divergierender Regelungskonzepte und –grundlagen) kaum oder gar nicht herstellbar wäre.

11. Vgl. dazu die RL 71/305/EWG und 77/62/EWG.
12. Vgl. dazu die »zweite« Generation (RL 93/36/EWG, 93/37/EWG, 93/38/EWG, 92/50/EWG) und die »dritte« Generation (RL 2004/17/EG und 2004/18/EG), die mit 31.1.2006 umzusetzen waren und Anfang 2016 (Umsetzungszeitpunkt) durch die neuen Regelungen des Vergabepaketes 2014 abgelöst werden.
13. Zur ersteren vgl. das Leitjudikat des EuGH Rs C-107/98, *Teckal*, zu zweiterem vgl. das Leitjudikat des EuGH Rs C-480/06, *Kommission/Deutschland*.
14. Vgl. dazu zuletzt etwa RL 2009/33/EG (Verpflichtung zur Beschaffung »sauberer« Fahrzeuge), RL 2011/7/EU (Bekämpfung des Zahlungsverzuges im Geschäftsverkehr) und RL 2012/27/EU (Beschaffung energieeffizienter Produkte). Vgl. ferner et-

sich u.a. auf die Position der EK (GD MARKT) zurückführen, die sich ausschließlich für verfahrensrechtliche Regelungen im engsten Sinn als zuständig erachtet.[15] Dies hat in einigen Fällen schon dazu geführt, dass mangels Einbindung der für das Vergaberecht fachlich zuständigen Experten, Regelungen beschlossen wurden, die in einem Spannungsverhältnis zueinander stehen. Außerdem führt diese Entwicklung dazu, dass das Vergabewesen als »uferlos« bzw. »ausufernd« angesehen wird.

Eine weitere Herausforderung stellen die großen (strukturellen) Divergenzen im Auftragswesen dar. Dies betrifft einerseits den Aspekt, dass Auftraggeber- und Bieterseite über höchst unterschiedliche Kapazitäten verfügen, mit den Vergaberegeln adäquat – das heißt sowohl rechtlich korrekt als auch wirtschaftlich sinnvoll – umzugehen. Der nationale Gesetzgeber steht folglich regelmäßig vor der Herausforderung, gegenläufige Interessen ausgleichen zu müssen und ein Regelwerk zur Verfügung zu stellen, das kleinen Organisationen ausreichend Anleitung bietet und gleichzeitig größeren Organisationen eine angemessene Flexibilität wahrt. Andererseits wird damit auch folgender Aspekt angesprochen: Auf Unionsebene ist festzustellen, dass zwischen den Mitgliedstaaten sehr große Unterschiede hinsichtlich der strukturellen Kapazitäten und des Standards der jeweiligen Vergabesysteme bestehen. Während einige Mitgliedstaaten eine Reduktion der Vergaberegelungen fordern und lediglich Grundsätze des Vergabeprozesses festschreiben möchten, fordern andere Mitgliedstaaten sehr detaillierte Regelungen, die als »Check-Listen« für eine rechtskonforme Vorgangsweise dienen sollen. Diese Dychotomie der Regelungsideologien führt letztlich zu beidseits unbefriedigenden Ergebnissen. Dies wird noch durch die Tendenz des Gesetzgebers zu Formelkompromissen[16] verschärft, die zu teils vagen und vielseitig interpretierbaren Formulierungen in den Richtlinien führt.

---

wa den Vorschlag für eine VO über den Zugang von Waren und Dienstleistungen aus Drittländern zum EU Beschaffungsmarkt, KOM(2012) 124.

15. Gemäß dieser Sichtweise fallen inhaltliche Festlegungen (»was ist zu beschaffen«) nicht in die Zuständigkeit der GD MARKT, die – als weiterhin zentrale Stelle – für den Bereich »öffentliches Auftragswesen« zuständig ist. Hinzuweisen ist freilich darauf, dass die Grenze zwischen inhaltlichen Festlegungen und Verfahrensregeln nicht exakt festlegbar ist und letztlich oft auf die Frage der Formulierung einer Regelung hinausläuft.

16. Vgl. dazu schon *Seidl/Mertens* in: *Dauses* (Hrsg.), Hdb. EU-WirtschaftsR H.IV Rz 88, die zutreffend darauf hinweisen, dass sich die MS oft nur auf Begriffe »wegen ihrer Unschärfe verständigen können«. Dadurch sollen etwa bestehende (nationale) Praktiken abgesichert werden (oder zumindest nicht geändert werden müssen) oder

Eine der wesentlichen Zielsetzungen des Vergabereformprozesses auf Unionsebene seit 2010/2011 war, neben der Vereinfachung des Regelungsrahmens die Vergaberegelungen »besser« für die Verfolgung gesamtwirtschaftlicher Zielsetzungen einsetzen zu können – Stichwort: bessere Berücksichtigung sozialer, ökologischer und innovativer Aspekte im Vergabewesen bei gleichzeitig optimaler Allokation öffentlicher Gelder.[17] Dass die beiden genannte Ziele miteinander nicht oder nur schwer in Einklang zu bringen sind, bedarf keiner weiteren Ausführung.[18] Dies wird voraussichtlich dazu führen, dass die schon bisher wahrgenommene Komplexität der rechtlichen Rahmenbedingungen weiter verstärkt und als Unsicherheitsfaktor qualifiziert werden wird.

Um den geschilderten Problemen zu begegnen, wäre es aus österreichischer Sicht wünschenswert gewesen, die jüngste europäische Vergabereform dazu zu nützen, die EU Vorgaben auf zwingende Grundregeln zu reduzieren, auf bürokratische Detailregeln zu verzichten und in Abstimmung mit den GPA-Partnern, eine längst überfällige, deutliche Anhebung der Schwellenwerte zu erwirken.

---

unterschiedliche Interpretationen für den jeweiligen nationalen Kontext ermöglicht werden.

17. Vgl. dazu etwa die Begründung des Vorschlages für eine klassische RL (KOM(2011) 896):»Die öffentliche Auftragsvergabe spielt im Rahmen der Strategie 'Europa 2020' eine zentrale Rolle, da sie – als eines der marktwirtschaftlichen Instrumente, die zur Verwirklichung dieser Ziele eingesetzt werden sollen – zur Verbesserung des Unternehmensumfelds und zur Schaffung günstiger Bedingungen für Innovationen der Unternehmen beitragen, eine umweltfreundliche öffentliche Auftragsvergabe auf breiterer Basis fördern und so den Übergang zu einer ressourceneffizienten Wirtschaft mit geringem CO2-Ausstoß unterstützen kann. Gleichzeitig wird in der Strategie 'Europa 2020' betont, dass die Politik auf dem Gebiet des öffentlichen Auftragswesens die wirtschaftlichste Nutzung öffentlicher Gelder gewährleisten muss und dass die Beschaffungsmärkte unionsweit zugänglich sein müssen.«

18. Es sei nur am Rande darauf hingewiesen, dass das Vergabepaket 2014 noch weitere, miteinander schwer vereinbare Ziele verfolgt: etwa Förderung der Beteiligung von KMU's an Vergabeverfahren bei gleichzeitigen Anreizen zur Nutzung von zentralen elektronischen Beschaffungssystemen.

Grenzen des EU-Vergaberechts

Frage 2

Als »öffentliche Aufträge« werden in Österreich – in Entsprechung der Definitionen in den VergabeRL – entgeltliche Verträge über Bau-, Liefer- oder Dienstleistungen definiert.[19] Der Vertragsbegriff der RL als zweiseitig verbindliches (synallagmatisches) Rechtsgeschäft[20] deckt sich mit dem traditionellen österreichischen Vertragsverständnis.[21] Daraus folgt, dass Leistungserbringungen auf der Basis einseitiger Rechtsgeschäfte,[22] Leistungsbeziehungen, die auf generell-abstrakten Rechtsnormen (Gesetz, Verordnung)[23] oder einseitigen öffentlich-rechtlichen Rechtsakten mit imperium (Bescheid)[24] beruhen oder Leistungsbeziehungen im Rahmen der Rechtsprechung[25] oder einem verwaltungsbehördlichen Verfahren[26] nicht dem öffentlichen Auftrags-

---

19. Vgl. dazu § 4 ff BVergG 2006. Auf die Verankerung des Schriftlichkeitserfordernisses wurde, um mögliche Umgehungen zu unterbinden, verzichtet, denn (zivilrechtliche) Verträge können auch mündlich abgeschlossen werden.
20. Vgl. dazu etwa SA von GA *Trstenjak* in der Rs C-536/07, *Kommission/Deutschland*, Rz 47, SA von GA *Mengozzi* in der Rs C-451/08, *Helmut Müller*, Rz 77 und SA von GA *Jääskinen* in der Rs C-306/08, *Kommission/Spanien*, Rz 85 (87).
21. Zum Begriff des synallagmatischen Rechtsgeschäftes vgl allgemein *Koziol/Welser*, Bürgerliches Recht13 I (2006), 115, *Apathy/Riedler* in *Schwimann*, ABGB Praxiskommentar3 (2006) § 859, Rz 9f, *Rummel* in *Rummel*, ABGB3 (2000) § 859 Rz 6ff.
22. Vgl. dazu etwa EuGH Rs C-295/05, *Asemfo/Tragsa*, Rz 52ff.
23. Vgl. dazu EG 8 der RL 92/50/EWG.
24. Vgl etwa § 120 WRG 1959, BGBl. Nr. 215/1959 idgF, wonach die Wasserrechtsbehörde zur Überwachung der Bauausführung bewilligungspflichtiger Wasseranlagen geeignete Aufsichtsorgane (wasserrechtliche Bauaufsicht) durch Bescheid bestellen kann.
25. Z.B. Bestellung eines Sachverständigen per Gerichtsbeschluß.
26. So sind etwa als nichtamtliche Sachverständige gemäß § 52 Abs. 2 AVG geeignete Personen heranzuziehen. Der Bestellung zum nichtamtlichen Sachverständigen muss nach § 52 Abs. 4 AVG Folge leisten, wer zur Erstattung von Gutachten der geforderten Art öffentlich bestellt ist oder wer die Wissenschaft, die Kunst oder das Gewerbe, deren Kenntnis die Voraussetzung der geforderten Begutachtung ist, öffentlich als Erwerb ausübt oder zu deren Ausübung öffentlich angestellt oder ermächtigt ist (dies betrifft zB allgemein beeidete gerichtliche Sachverständige, Ziviltechniker, Gewerbetreibende oder Universitätsprofessoren). Die Bestellung ist gegenüber dem Sachverständigen ein verfahrensrechtlicher Bescheid (den er bekämpfen kann), gegenüber den Parteien eine Verfahrensanordnung (die nur iZm dem Endbescheid bekämpft werden kann).

wesen zugerechnet werden. Ferner stellen Leistungserbringungen für die öffentliche Hand aufgrund von Beleihungen[27] und im Rahmen von Ersatzvornahmen[28] keine Leistungen aufgrund eines Auftragsverhältnisses dar.

Anders als im bisher geltenden sekundären Unionsrecht wird das Verfahren zur Vergabe von Dienstleistungskonzessionsverhältnissen im BVergG geregelt.[29] Die Definition der Dienstleistungskonzession folgt der Definition der RL.[30] Begrifflich ist dieses Konzessionsverhältnis von der ebenfalls als »Konzession« bezeichneten behördlichen Gestattung einer Erwerbsausübung[31] zu unterscheiden.[32] Ein wesentlicher Unterschied zwischen den Phänomenen liegt darin, dass bei Dienstleistungskonzessionsverhältnissen iSd VergabeRL die Leistung durch den (öffentlichen) Auftraggeber festgelegt wird und der Vertragspartner des (öffentlichen) Auftraggebers zur Leistungserbringung verpflichtet ist; ferner ist diese Verpflichtung auch einklagbar (bzw. durchsetzbar).[33] Demgegenüber scheidet eine zwangsweise Durchsetz-

---

27. »Beleihung« ist eine Form der Erfüllung hoheitlicher Verwaltungsaufgaben durch Private (vgl. zum folgenden *Antoniolli/Koja*, Allgemeines Verwaltungsrecht3 (1996) 401 mH auf *Schäffer*, Erfüllung von Verwaltungsaufgaben durch Private, in FS *Antoniolli*): »Bei einer Verwaltung durch Beliehene handelt es sich darum, dass eine natürliche oder juristische Person des privaten Rechts damit betraut wird, im eigenen Namen bestimmte Akte der Hoheitsverwaltung zu setzen. Funktionell gleicht der Beliehene einer Behörde, ohne allerdings in den staatlichen Organapparat eingegliedert zu sein. ‚Beleihung' ist also ‚Übertragung von Hoheitsrechten auf Privatpersonen mit der Verpflichtung, diese wahrzunehmen'.« Beliehene üben somit unmittelbar öffentliche Gewalt iSv Art. 51 AEUV aus und zwar nicht nur bloß in einer helfenden und/oder vorbereitenden Rolle.
28. »Ersatzvornahmen« sind Leistungen, die im Rahmen der Verwaltungsvollstreckung zur Erzwingung vertretbarer Leistungen (z.B. Abbruch eines Gebäudes aufgrund eines Abbruchauftrages) nicht durch den (behördlich) Verpflichteten sondern durch Dritte erbracht werden (vgl. dazu *Thienel*, Verwaltungsverfahrensrecht5 (2009) 567ff mwN der Lehre und Judikatur). Die Ersatzvornahme wird durch Vollstreckungsverfügung behördlich angeordnet und ist auf Gefahr und Kosten des Verpflichteten zu bewerkstelligen.
29. Siehe dazu die §§ 11 und 177 BVergG, die ein vereinfachtes, an der Judikatur des EuGH orientiertes Vergaberegime vorsehen.
30. § 8 BVergG 2006 und Art. 1 (4) RL 2004/18/EG. Ähnlich bereits Art. 1 lit h des Vorschlages zur DienstleistungsRL, KOM(90) 372, ABl Nr. C 23 vom 31.1.1991, 1.
31. Vgl. dazu etwa § 4 AFIMG, BGBl I Nr. 135/2013, § 2 Apothekengesetz, RGBl Nr. 5/1907, § 1 BWG, BGBl Nr. 532/1993 u.v.a.m.
32. Vgl. dazu schon die Mitteilung der Kommission betreffend Konzessionen, ABl Nr C 121 vom 29.04.2000, 2.
33. Der EuGH (vgl. dazu Rs C-451/08, *Helmut Müller*, Rz 62/63) hat iZm Bauaufträgen festgehalten, dass ein Kriterium des Auftragsverhältnisses die Einklagbarkeit der Verpflichtung zur Erfüllung ist. Da sich »Aufträge« von »Konzessionen« nur durch

barkeit der Aufnahme und Fortsetzung einer behördlich genehmigten Tätigkeit an sich aus.[34] Ein Konzessionsverhältnis iSd VergabeRL liegt ebenfalls nicht vor, wenn die von der »Konzession« umfassten Leistungen weder auf der Basis eines besonderen oder eines ausschließlichen Rechts, grundsätzlich daher von einer unbeschränkten Anzahl von Wirtschaftsteilnehmern, auf der Grundlage von transparenten, nicht diskriminierenden Voraussetzungen erbracht werden dürfen. Aber auch wenn die von der »Konzession« umfassten Leistungen auf der Basis eines besonderen oder eines ausschließlichen Rechts erbracht werden, diese Rechte jedoch auf der Grundlage von transparenten und nicht diskriminierenden Verfahren eingeräumt worden sind, liegt kein Konzessionsverhältnis im vergaberechtlichen Sinn vor.[35]

Frage 3

Im BVergG 2006 wurde aus Gründen der Transparenz und der Rechtssicherheit eine Ausnahmebestimmung betreffend »in-house« – Vergaben explizit aufgenommen.[36] Der Wortlaut der Bestimmung orientiert sich eng an der Formulierung des EuGH im Leiterkenntnis »*Teckal*«[37] und ist gemäß den Erläuterungen des Gesetzgebers unionsrechtskonform auszulegen.[38] Andere Formen der öffentlich-öffentlichen Kooperation wurden im BVergG bislang

---

die Art der Gegenleistung (Risikoübernahme) unterscheiden (arg. »nur insoweit abweichen« in Art. 1 (3) und (4) der RL 2004/18/EG), gilt diese Aussage des EuGH auch für Konzessionsverhältnisse.

34. Die manchmal bei »Konzessionen« (behördlichen Genehmigungen) vorgesehene »Betriebspflicht« des »Konzessionärs« (vgl. dazu etwa § 13 ApothekenG, § 9 StudentenheimG) steht dem nicht entgegen. Die »Betriebspflicht« besagt bloß, dass (und gegebenenfalls wie) die behördlich genehmigte Tätigkeit zu entfalten ist. Der Konzessionär kann aber stets (frei) darüber entscheiden, die Konzession zurückzulegen und die Tätigkeit nicht mehr auszuüben. Die Behörde kann den Konzessionär jedenfalls nicht dazu zwingen, die Tätigkeit weiterhin auszuüben.
35. Vgl. dazu etwa EuGH Rs C-392/93, *British Telecommunications*, Rz 30ff, und EuGH Rs C-302/94, *British Telecommunications II*, Rz 35ff.
36. Siehe die §§ 10 Z 7 und 175 Z 6 BVergG.
37. Rz 50 des Erkenntnisses Rs C-107/98, *Teckal*.
38. So explizit 1171 BlgNR XXII. GP, 30/31. Dies bedeutet u.a., dass alle einschlägigen Judikate des EuGH unmittelbar zur Auslegung des innerstaatlichen Ausnahmetatbestandes heranzuziehen sind. Deshalb ist auch die in den ursprünglichen Erläuterungen des Gesetzes angedeutete Auslegung des »Wesentlichkeitskriteriums« (iSv 80 % des Umsatzes) im Lichte der nachfolgenden Rechtsprechung (vgl. dazu insbes. Rs C-340/04, *Carbotermo*, Rz 55/56) unbeachtlich. So auch das Rundschreiben des BKA-VD vom 8.8.2006, GZ BKA-VA.C-340/04/0004-V/A/8/2006.

nicht geregelt. Daher ist im Einzelfall zu prüfen, ob etwa die Voraussetzungen für eine Ausnahme gemäß der Rechtsprechung des EuGH in der Rs »*Stadtreinigung Hamburg*«[39] vorliegen oder nicht.

Frage 4

Das BVergG erhält in den §§ 10 und 175 eine Auflistung aller Vergabeverfahren, die vom Geltungsbereich des Gesetzes ausgenommen sind. Diese Bestimmungen setzen insbesondere die einschlägigen Ausnahmetatbestände der RL 2004/17/EG und 2004/18/EG um, enthalten aber auch Ausnahmetatbestände, die durch die Judikatur des EuGH kreiert wurden (insbesondere die »*Teckal*« – Ausnahme; vgl. dazu oben bei Frage 3).

Da sich das Umsetzungskonzept des BVergG eng an den RL orientiert, sind Aussagen des EuGH über den Anwendungsbereich des unionsrechtlichen Vergaberechtes unmittelbar auf die österreichische Rechtslage übertragbar ohne dass es hierzu einer Anpassung der innerstaatlichen Rechtslage bedarf. In diesem Sinne führen etwa Feststellungen des EuGH wie in den Rs »*Helmut Müller*« und »*Loutraki*« dazu, dass sie gleichzeitig (und ohne legistischen Anpassungsbedarf) als Klarstellungen für den Anwendungsbereich des BVergG herangezogen werden können. Zur Abgrenzung des Anwendungsbereiches betreffend Konzessionen vgl. die Ausführungen zu Frage 2.

Frage 5

Als gemischte Verträge werden in Österreich alle Verträge bezeichnet, die mehrere Leistungen beinhalten, welche unterschiedlichen (vergaberechtlichen) Vorschriften unterliegen. Das Regime der Zuordnung derartiger Verträge folgt den einschlägigen Bestimmungen der RL.[40]

Für Verträge, die zum Teil den Vergaberechtsvorschriften unterliegen, zum Teil jedoch gänzlich außerhalb des Anwendungsbereich des Vergaberechts fallen, besteht keine explizite gesetzliche Regelung. Im Einklang mit

---

39. Vgl. dazu die mit der Rs C-480/06 eröffnete neue Rechtsprechungslinie des EuGH, fortgesetzt durch die Entscheidungen in den Rs C-159/11, *Lecce*, C-386/11, *Piepenbrock*, C-564/11 – *Consulta Regionale Ordine Ingegneri della Lombardia e.a.* und C-352/12, *Consiglio Nazionale degli Ingegneri*.
40. Vgl. § 9 BVergG 2006 für den »klassischen« Bereich und § 174 leg. cit. (der auf § 9 verweist) für den Sektorenbereich, sowie § 1 Abs. 2 leg. cit. für die Zuordnung eines gemischten Vertrages zum klassischen bzw. Sektorenbereich.

der Rs. *Loutraki*[41] ist daher auf den Hauptgegenstand oder vorherrschenden Bestandteil des Vertrages abzustellen.

Die Trennbarkeit von Vertragskomponenten wird im österreichischen Vergaberecht in zweifacher Hinsicht angesprochen: einerseits in Bezug auf die Frage Gesamt- oder Teilvergabe (Losvergabe) von Leistungskomponenten eines einheitlichen, zusammengehörigen[42] (dem BVergG unterliegenden) Auftrages und andererseits in Bezug auf die Frage, ob Leistungskomponenten mit der Konsequenz kombinierbar sind, dass kein Vergaberegime oder ein Spezialregime anwendbar ist oder ob derartige Komponenten getrennt werden müssen.

Hinsichtlich des erstgenannten Aspektes (Losvergabe) gilt die allgemeine Regel des § 22 Abs. 1 BVergG 2006, die dem Auftraggeber grundsätzlich die Wahl zwischen getrennter und gemeinsamer Vergabe überlässt.[43] Für die Gesamt- oder getrennte Vergabe sind wirtschaftliche und technische Gesichtpunkte, wie zB die Notwendigkeit einer einheitlichen Ausführung und einer eindeutigen Gewährleistung maßgebend.[44] Dem Auftraggeber kommt daher bei der Beurteilung der Frage, ob eine Gesamt- oder Teilvergabe stattfinden soll, Ermessen zu. Die Entscheidung darf jedoch nicht willkürlich getroffen werden. Sie muss nach wirtschaftlichen oder technischen Gesichtpunkten vertretbar sein und darf nicht gegen die Grundsätze des freien und lauteren Wettbewerbs und der Gleichbehandlung verstoßen.

Hinsichtlich des zweitgenannten Aspektes sieht § 22 Abs. 3 BVergG 2006 ein Umgehungsverbot vor: Die Wahl zwischen der Vergabe eines einzigen Auftrages (oder der Vergabe mehrerer getrennter Aufträge) darf nicht mit der Zielsetzung erfolgen, die Anwendung des BVergG 2006 zu umgehen.[45] Grundsätzlich ist der Auftraggeber frei darüber zu bestimmen, welche Leistung er beschaffen möchte; der Auftragsgegenstand kann somit nach den individuellen Vorstellungen und Bedürfnissen des Auftraggebers festgelegt werden. Die dabei zu beachtenden Grenzen der »Bestimmungsfreiheit« werden in Anlehnung an die Judikatur des EuGH dort gezogen, wo die Leistung in diskriminierender (weil bestimmte Unternehmer bevorzugender) Weise

41. EuGH verb Rs C-145/08 und C-149/08, *Loutraki*, Rz 48f.
42. Zur Frage der willkürlichen diskriminierenden Kombination von Leistungskomponenten vgl. den Sachverhalt in der Rs C-230/03, *Grossmann*.
43. Vgl. § 22 Abs. 1 erster Satz BVergG 2006: »Leistungen können gemeinsam oder getrennt vergeben werden.«
44. Vgl. § 22 Abs. 1 dritter Satz leg. cit.
45. Gleiches gilt für den Bereich der Verteidigungs- und Sicherheitsbeschaffung gemäß BVergGVS 2012, BGBl I 10/2012 (vgl. den diesbezüglich § 2).

festgelegt wird oder wo der Auftraggeber verschiedene Leistungen zusammenfasst, »ohne dass zwischen diesen ein Zusammenhang aufgrund eines gemeinsamen Zwecks oder eines gemeinsamen Vorgangs bestünde«.[46] Eine willkürliche Zusammenfassung verschiedener Leistungen durch einen Auftraggeber in einem einzigen Auftrag (insbes. zur Verfolgung eines von der RL verpönten Zwecks) ist daher verboten. Vor der Beurteilung, ob ein einziger Auftrag vergeben werden kann bzw. der Zuordnung zum anzuwendenden Regelungsregime ist daher in diesen Fällen zu prüfen, ob die Teile eines zu vergebenden Auftrages »aus objektiven Gründen« zusammen vergeben werden müssen (Teil- oder Nichtteilbarkeit eines Auftrages, der aus unterschiedlichen Leistungen besteht). Nach der Rechtsprechung des EuGH wird dabei geprüft, ob der Auftragsgegenstand ein »untrennbares Ganzes bildet«.[47] Es reicht nicht aus, dass die Absicht der Vertragsparteien, die verschiedenen Teile eines gemischten Vertrags als untrennbar zu betrachten, zum Ausdruck gebracht oder vermutet wird. Diese Absicht muss sich vielmehr auf objektive Gesichtspunkte stützen, die sie rechtfertigen und die Notwendigkeit begründen, einen einheitlichen Vertrag abzuschließen.[48] Es muss daher vom Auftraggeber nachgewiesen werden, dass ein (einziger) Vertragspartner zwingend erforderlich ist, anderenfalls das Ziel des Auftrages nicht realisiert werden kann oder dass die Trennung der Leistungen (und deren getrennte Vergabe) dazu führen würde, dass die Einzelleistungen für den Auftraggeber (nahezu oder großteils) wert- oder sinnlos sind.

Bislang spielte die Frage der Trennung von Verträgen vor allem unter dem Gesichtspunkt des »Auftragssplitting«, das ist die willkürlich Trennung von zusammengehörigen Leistungen zur Umgehung der Anwendung des BVergG in der Judikatur eine Rolle. Die Frage, welche Leistungsteile als zusammengehörig zu bewerten und daher einem einheitlichen (wenngleich vielleicht auch in Losen abzuwickelnden) Vergabeverfahren zu unterwerfen sind, kann

46. So der EuGH in der Rs C-411/00, *Swoboda*, Rz 57. Zu den vergaberechtlichen Grenzen der Bestimmungsfreiheit des öffentlichen Auftraggebers hinsichtlich des Auftragsgegenstandes vgl. aus deutscher Sicht OLG Düsseldorf, Beschluss v. 22.5.2013 – VII-Verg 16/12-, Hochschulverwaltungssoftware, VergabeR 2013, 744 (747).
47. So der EuGH in der Rs C-215/09, *Mehiläinen Oy*, Rz 36 mit Hinweis auf den verb Rs C-145/08 und C-149/08, *Loutraki*, Rz 48/49.
48. EuGH in der Rs C-215/09, *Mehiläinen Oy*, Rz 39.

durchaus als ein »Dauerbrenner« des österreichischen Vergaberechts bezeichnet werden.[49]

Allgemeine Grundsätze des EU-Rechts: Vergaberecht und mehr

Frage 6

Die allgemeinen Grundsätze des Unionsvergaberechts gelten auch für jene Vergaben, die nicht von der VergabeRL erfasst sind aber gemäß der Judiktur des EuGH den unionsrechtlichen Grundsätzen unterliegen. Die legistische Umsetzung dieses Ansatzes ist jedoch nicht einfach und in Österreich differenziert gestaltet worden:

Die Republik Österreich entschloss sich ursprünglich (1993) dazu, die gemeinschaftsrechtlichen Vorgaben, insbesondere auch jene hinsichtlich des Zugangs zum vergabespezifischen Rechtsschutz, nur im Anwendungsbereich der europäischen Richtlinien umzusetzen.[50] Für Vergaben im »Unterschwellenbereich« bestand ein im Vergleich dazu kaum reglementiertes System, welches insbesondere auch im Bereich des Rechtsschutzes wesentliche Unterschiede aufwies. Aufgrund der Rechtsprechung des Verfassungsgerichtshofes,[51] wonach diese Differenzierung sachlich nicht gerechtfertigt ist, wurde in der Folge auch im Unterschwellenbereich ein in wesentlichen Zügen den Richtlinien entsprechendes Vergaberegime eingeführt (siehe dazu auch schon Frage 1).

Bei Auftragsvergaben, die von den VergabeRL und dem BVergG 2006 explizit ausgenommen sind,[52] sind dennoch die aus dem Unionsprimärrecht erfließenden Grundsätze, wie etwa das Tranparenzgebot oder das Gebot der Gleichbehandlung aller Bieter, zu beachten, soferne nicht auch korrespondierende Ausnahmen vom Primärrecht der Union bestehen.[53] Eine entsprechen-

---

49. Vgl. dazu auch Rs C-271/08, *Kommission/Deutschland*, Rz 83ff (92) zur Zusammenrechnung von Versichterungsdienstleistungen. Siehe allgemein dazu auch *Fuchs/Ziniel*, Zusammenrechnen oder Aufteilen?, Fragen der Berechnung des geschätzten Auftragswerts im Vergaberecht, RFG 2013, 20.
50. Vgl. *Holoubek/Fuchs/Holzinger*, Vergaberecht[3] (2012), 29.
51. Siehe dazu insbes. VfSlg 16027/1999 und die Nachfolgejudikate.
52. Vgl. dazu etwa die Art. 14ff der RL 2004/18/EG und § 10 BVergG 2006.
53. Vgl. dazu etwa Art. 10 iVm Art. 14 und 346 AEUV (Verteidigungsbereich, nationale Sicherheit) oder § 10 Z 7 BVergG 2006 iVm der Judikatur des EuGH zur in-house

de explizite Anordnung hinsichtlich der Geltung der Unionsgrundsätze findet sich im BVergG selbst jedoch nicht.

Für die Vergabe von Dienstleistungskonzessionen wurde hingegen die Geltung der Unionsgrundsätze explizit angeordnet. Darüber hinaus wurden einige wenige Grundsatzregelungen für die Gestaltung des Verfahrens im BVergG getroffen[54] (vgl. dazu auch bei Frage 10).

Frage 7

Diese Frage kann generell nicht dahin beantwortet werden, dass nach der jeweils maßgebenden Rechtsgrundlage differenziert werden muss. Soweit Materien im Anwendungsbereich des Unionsrechtes liegen, finden die angesprochenen Grundsätze selbstverständlich vollumfänglich Anwendung. Ist dies nicht der Fall, folgt die Anwendbarkeit bestimmter Verfahrensgrundsätze aus dem nationalen Verfassungsrecht. Aus diesem ergibt sich ein allgemeines Gleichbehandlungsgebot bzw. Sachlichkeitsgebot, das grundsätzlich zu beachten ist.[55]

Öffentliches Auftragswesen und allgemeines EU-Recht, einschließlich Wettbewerbsrecht und staatliche Beihilfen

Frage 8

Aus den Aussagen des EuGH in der Rs *Contse*[56] folgt, dass jede Anforderung eines öffentlichen Auftraggebers in einem Vergabeverfahren eine einschränkende Maßnahme darstellt, die nach dem allgemeinen Prüfschema des GH auf ihre Rechtfertigung hin zu prüfen ist. Trotzdem bietet das geltende Vergaberecht genügend Freiräume, damit der Auftraggeber die für ihn optimalen Beschaffungsstrategien implementieren kann. So wird dem Auftraggeber bei der Festlegung des Auftragsgegenstandes ein sehr weiter Spielraum

---

Ausnahme. Ausführlich dazu auch *Fruhmann* in *Schramm/Aicher/Fruhmann/Thienel*, Bundesvergabegesetz 2006, § 10 Rz 15ff.

54. Vgl. dazu für den klassischen Bereich § 6 iVm § 11 BVergG 2006. Der Rechtsschutz hinsichtlich dieser Verfahren wurde nicht dem vergabespezifischen Rechtsschutzsystem sondern gesamthaft der ordentlichen Gerichtsbarkeit zugewiesen.
55. Siehe u.a. Art. 7 Abs. 1 B-VG und Art. 2 StGG.
56. Siehe insbesondere Rs C-234/03, *Contse*, Rz 26.

eingeräumt, dem nur durch die zitierten (Diskriminierungsverbot, Verhältnismäßigkeit) Grundsätze Grenzen gezogen werden. Auch bei der Gestaltung und Festlegung von Kriterien (wirtschaftliche Leistungsfähigkeit, Zuschlagskriterien) hat der Auftraggeber große Freiräume, die er kreativ für sich nutzen kann. Darüber hinaus ist darauf hinzuweisen, dass im sekundärrechtlich nicht erfassten Bereich (insbesondere daher im Unterschwellenbereich und bei Konzessionsvergaben) das Unionsrecht die Verfahrensgestaltung dem Auftraggeber weitgehend überlässt.

Frage 9

In Österreich sind keine diesbezüglichen Vorschriften bekannt bzw ist dieses Problem – soweit ersichtlich – auch in der nationalen (vergabespezifischen) Rechtsprechung bislang nicht thematisiert worden. Die Erfahrung zeigt, dass nicht die Rechtsvorschriften an sich sondern deren nicht sachgemäße Anwendung wettbewerbsbeschränkende Effekte nach sich ziehen können.

Frage 10

Das BVergG 2006 differenziert nicht zwischen Dienstleistungen von allgemeinem wirtschaftlichem Interesse (DAWI) und sonstigen Dienstleistungen. DAWI sind daher grundsätzlich in einem im BVergG 2006 festgelegten Verfahren zu vergeben. Daraus folgt auch, dass falls die DAWI eine nicht prioritäre Dienstleistung iSd Anhang II Teil B der RL 2004/18/EG darstellt oder in Form einer Dienstleistungskonzession vergeben wird, die entsprechenden flexibleren Regelungen des Gesetzes anwendbar sind.[57] Auftraggeber sind bei der Vergabe von nicht-prioritären Dienstleistungsaufträgen und Dienstleistungskonzessionsverträgen nicht an die Verfahrenstypen des BVergG 2006 gebunden, sondern können diese in einem formfreien Verfahren unter Beachtung der unionsrechtlichen Grundfreiheiten sowie des Diskriminierungsverbotes vergeben. Soweit es auf Grund des Wertes und des Gegenstandes des Auftrages erforderlich erscheint, sind nicht-prioritäre Dienstleistungsaufträge und Dienstleistungskonzessionen dabei grundsätzlich in einem Verfahren mit mehreren Unternehmern, durch das ein angemessener Grad an Öffentlichkeit gewährleistet ist und das dem Grundsatz des freien und lauteren Wettbewerb entspricht, zu vergeben.[58] Verfahren über die Vergabe von Dienstleistungs-

57. Vgl. dazu die §§ 11 (betreffend Dienstleistungskonzessionen) und 141 (betreffend nicht-prioritäre Dienstleistungsaufträge) BVergG 2006.
58. Vgl. §§ 11 und 141 BVergG 2006.

konzessionen sind darüber hinaus vom vergabespezifischen Rechtsschutz ausgenommen.[59]

Für die Vergabe von Dienstleistungsaufträgen und -konzessionen im Bus- und Straßenbahnverkehr sowie Eisenbahn- und U-Bahnbereich bestehen erweiterte Möglichkeiten der Nutzung der Direktvergabe gemäß Art. 5 der Verordnung (EG) 1370/2007 über öffentliche Personenverkehrsdienste auf Schiene und Straße.[60]

Die Anwendbarkeit der unionsrechtlichen Vorschriften für staatliche Beihilfen auf DAWI wird durch die Bestimmungen des BVergG 2006 nicht berührt.

Strategische Nutzung des öffentlichen Auftragswesens

Frage 11

Das österreichische Bundesvergabegesetz hat bereits in seiner Stamfassung aus dem Jahr 1993[61] in seinen Grundsatzbestimmungen eine verpflichtende Bedachtnahme auf die Umweltgerechtheit der Leistung im Vergabeverfahren vorgesehen[62] sowie seit 1998 auch auf die Beschäftigung von Personen im Ausbildungsverhältnis.[63] Der Gesetzgeber ist damit hinsichtlich des Umweltschutzes einem verfassungsrechtlichen Konkretisierungsauftrag nachgekommen[64] und betreffend die Lehrlingsbeschäftigung einer sozialpolitischen Forderung.[65] Die Berücksichtigung von sekundären Zielen in öffentlichen Beschaffungsverfahren hat sich im Laufe der folgenden Jahre sukzessive sowohl in der Diskussion auf nationaler als auch internationaler Ebene weiterentwickelt, was sich auch in der Ausgestaltung des geltenden BVergG 2006 widerspiegelt, welches nicht nur in seinen Grundsatzbestimmungen allgemein auf um-

---

59. Rechtsschutz besteht in diesem Fall vor den ordentlichen Gerichten.
60. ABl. Nr. L 315 vom 3.12.2007 S. 1.
61. Vgl. dazu das BVergG 1993, BGBl Nr. 462/1993.
62. Siehe § 10 Abs. 7 BVergG 1993 idF BGBl Nr. 462/1993.
63. Siehe § 16 Abs. 7 zweiter Teil BVergG 1997, BGBl I Nr 56/1997 idF BGBl I Nr 27/1998.
64. Vgl. dazu das Bundesverfassungsgesetz über den umfassenden Umweltschutz, BGBl Nr. 491/1984.
65. Vgl. dazu den Ministerratsvortrag vom 25.11.1997 betreffend die verpflichtende Berücksichtigung von Unternehmen, die Arbeitnehmer zu Ausbildungszwecken beschäftigen.

welt- und sozialpolitische Ziele Bezug nimmt, sondern horizontale und konkrete Regelungen für die Berücksichtigung dieser Aspekte in allen relevanten Phasen eines Vergabeverfahrens vorsieht.[66] Darüber hinaus setzt das BVergG auch die einschlägigen vergaberechtlichen Bestimmungen der Richtlinien 2009/33/EG sowie 2012/27/EU um.[67]

In Österreich spielt überdies der Nationale Aktionsplan (NAP) für nachhaltige Beschaffung von 2010 eine wesentliche Rolle. Dieser zielt darauf ab, das Produktions- und Konsumverhalten in Richtung Nachhaltigkeit zu verändern.[68] Der NAP wurde von allen Bundesministerien – auch jeweils für deren ausgegliederte Rechtsträger – für verbindlich erklärt. Er enthält insbesondere einen ökologischen Kriterienkatalog für 16 verschiedene Produktkategorien, der von der größten österreichischen zentralen Beschaffungsstelle (der Bundesbeschaffung GmbH) verpflichtend einzuhalten ist. Die Kriterienkataloge im Rahmen des Aktionsplans werden außerdem laufend fortentwickelt und berücksichtigen zunehmend sozialpolitische Zielsetzungen.

In Österreich herrscht grundsätzlich eine hohe Bereitschaft, Aspekte der Nachhaltigkeit in öffentliche Beschaffungsverfahren zu integrieren. Da jedoch die Auftraggeber bzw. die beschaffenden Stellen über unterschiedliche Resourcen und Know-how verfügen, haben sich eine intensive Schulung der handelnden Personen, die Erstellung von Leitfäden bzw. die Entwicklung von unmittelbar verwendbaren Mustern und Kriterienkatalogen als zielführend für die praktische Realisierung einer nachhaltigen Beschaffung erwiesen.

Da bei der Berücksichtigung von Nachhaltigkeitsaspekten die Anforderungen an die Leistungsfähigkeit der Unternehmen und die Qualität der Leistungen steigen, haben Unternehmen aus jenen Mitgliedstaaten einen komparativen Vorteil, die eine aktive Nachhaltigkeitspolitik verfolgen und entsprechende Rahmenbedingungen geschaffen haben. Eine Lokalpräferenz folgt daraus jedoch nicht.

---

66. Vgl. dazu etwa § 78 Abs. 2 BVergG 2006 – Grundsatz der umweltgerechten Ausschreibung und Pflicht zur Verwendung technischer Spezifikationen zugunsten von Menschen mit Behinderung – und § 84 leg. cit. – Verpflichtung zur Einhaltung arbeits- und sozialrechtlicher Bestimmungen (insbes. der ILO Konventionen Nr. 29, 87, 94, 95, 98, 100, 105, 111, 138, 182 und 183).
67. Siehe die §§ 80 und 80a BVergG 2006.
68. Der NAP ist abrufbar unter www.bka.gv.at/vergaberecht – Rubrik: Österreichisches Vergaberecht.

Frage 12

In Österreich wurde nach der Veröffentlichung der »Österreichischen Strategie für Forschung, Technologie und Innovation« im März 2011 ein Leitkonzept für innovationsfördernde öffentliche Beschaffung (IÖB) formuliert, welches am 25. September 2012 von der Bundesregierung beschlossen wurde.[69]

Dieses zielt darauf ab, zum einen die Industrie zur Entwicklung von innovativen Produkten und Dienstleistungen anzuregen und zum anderen, öffentliche Stellen und Bürgerinnen mit modernen, ökologisch effizienten Leistungen zu versorgen. Zur Erreichung dieser Ziele stellt das Leitkonzept darauf ab, die betroffenen Stakeholder in einem regelmäßigen Dialog zusammenzuführen und eine Stelle einzurichten, die insbesondere auch einen technischen Support für konkrete Beschaffungsvorhaben leisten kann. Darüber hinaus werden Pilotprojekte, auch im Bereich der vorkommerziellen Auftragsvergabe durchgeführt, um konkrete Erfahrungen zu gewinnen. In das BVergG 2006 wurde außerdem eine Grundsatzbestimmung aufgenommen, welche explizit hervorhebt, dass innovative Aspekte im Rahmen der Durchführung von Vergabeverfahren berücksichtigt werden können (§ 19 Abs. 7 und § 187 Abs. 7 leg. cit.).

Nach dem österreichischen Ansatz ist es daher weniger relevant, welches mögliche vergaberechtliche Instrument eingesetzt wird (wettbewerblicher Dialog, funktionelle Ausschreibung, Zulassung von Alternativen oder die Inanspruchnahme der Ausnahmebestimmung für F&E Dienstleistungen), sondern es soll die öffentliche Beschaffung gezielt als nachfrageseitiges Instrument komplementär zu Fördermaßnahmen eingesetzt werden, um die Effizienz der Verwaltung zu steigern, die Bürgerinnen und Bürger adäquat mit öffentlichen Leistungen zu versorgen und die Wettbewerbsfähigkeit der Unternehmen zu steigern.

69. Abrufbar unter: http://www.bmwfj.gv.at/ForschungUndInnovation/InnovationsUndTechnologiepolitik/Seiten/Beschaffung.aspx.

Nachprüfungsverfahren

Frage 13

In Österreich liegt der Schwerpunkt des Rechtsschutzes eindeutig auf der Gewährung von primärem Rechtsschutz. Gemäß § 332 Abs. 5 BVergG 2006 ist ein Antrag auf Feststellung[70] unzulässig, sofern der behauptete Verstoß im Rahmen eines Nachprüfungsverfahrens hätte geltend gemacht werden können. Vor diesem Hintergrund kann gesagt werden, dass schon seitens des nationalen Gesetzgebers eine Präferenz für Verfahren besteht, die die Vergabeentscheidung betreffen, und der »sekundäre Rechtsschutz« (d.h. die Gewährung von Schadenersatz) nur in Ausnahmefällen greifen soll. Als Maßnahmen vor Vertragsschluss sind die Möglichkeit eines Nachprüfungsantrages[71] iVm einem Antrag auf Erlassung einer Einstweiligen Verfügung[72] zu nennen. Dass sich das Rechtsschutzsystem als österreichisches Spezifikum auf den Ober- und Unterschwellenbereich erstreckt, wurde bereits erwähnt (siehe Frage 6).

Bisher wurden – soweit ersichtlich – erst in wenigen Fällen Verträge für nichtig erklärt bzw. Geldbußen verhängt.[73] Beim Bundesvergabeamt (BVA)[74] wurden im Zeitraum 1.9.2002 bis 31.12.2012[75] insgesamt 1313 Nachprüfungsanträge, 1133 Anträge auf Erlassung einer einstweilligen Verfügung und 95 Feststellungsanträge eingebracht.[76]

Insgesamt kann festgehalten werden, dass sich das vergaberechtliche Rechtsschutzsystem in Österreich bewährt hat und durch die Richtlinie 2007/66/EG eine weitere Stärkung des Rechtsschutzes erfolgt ist.

---

70. Diese Anträge richten sich gegen Vergabeverfahren, die bereits durch Zuschlag (d.h. Vertragsschluss) oder durch Widerruf beeendet wurden (vgl. dazu die §§ 331ff BVergG 2006).
71. Siehe dazu die §§ 320ff BVergG 2006.
72. Siehe dazu die §§ 328ff BVergG 2006.
73. Vgl. dazu etwa die Entscheidung des Bundesvergabeamtes vom 2.10.2012, F/0009-BVA/03/2012-17.
74. Das war die vergabespezifische Kontrollbehörde für Vergaben des Bundes bzw. von Einrichtungen, die dem Bund zugerechnet werden. Seit dem 1.1.2014 hat diese Aufgabe das Bundesverwaltungsgericht übernommen.
75. Das BVA in seiner Ausprägung bis 31.12.2013 wurde erst im Rahmen der Neuordnung der vergaberechtlichen Kompetenzverteilung (siehe dazu Kontext und Frage 1) eingerichtet.
76. Vgl. den Tätigkeitsbericht des Bundesvergabeamtes für das Jahr 2012, S. 9ff.

Abschluss und Reform

Frage 14

Aus der Sicht Österreichs werden folgende Hauptpunkte des neuen Legislativpaketes wesentliche Auswirkungen auf die Modernisierung des Vergaberechts haben.

- die Verpflichtung zur Umstellung auf eine vollelektronische Vergabe
- die Flexibilisierung der Anwendbarkeit des Verhandlungsverfahrens und des Wettbewerblichen Dialoges
- die Vereinfachungen betreffend die Vorlage von Nachweisen im Vergabeverfahren (insbesondere die Einführung der Eigenerklärung, Selbstreinigungsmechanismus, Abruf von Nachweisen aus Datenbanken und der Einsatz von IMI im Vergabeverfahren)
- die Positivierung der in-house Ausnahme und der Ausnahme für öffentlich-öffentliche Kooperationen
- die Neugestaltung des Dynamischen Beschaffungssystems
- die Stärkung der zentralen Beschaffungsstellen
- die Möglichkeit der verstärkten Berücksichtigung von sogenannten »sekundären« Zielsetzungen im Vergabeprozess und
- die detaillierte Regelung von Konzessionsvergaben einschließlich deren Unterstellung unter das vergabespezifische Rechtsschutzsystem

Es ist jedoch festzuhalten, dass die den (neuen) VergabeRL inhärenten Spannungen (vgl. dazu schon oben bei Frage 1) die Auftraggeber in der Anwendungspraxis vor erhebliche Probleme stellen werden. Auch hat die Neugestaltung der RL nicht dazu geführt, dass das Vergaberecht (wie ursprünglich intendiert) »einfacher« gestaltet wurde. Es bleibt abzuwarten, ob die positiven Effekte letztlich überwiegen werden oder nicht.

BULGARIA

Ivaylo Dermendjiev[1]

The context

Question 1

The main systematic changes are to implement nationally at least some of the provisions and key points that represent the very core of the EU public procurement rules. It should be pointed out that answering the questions in terms of the application of EU rules and judgements in the Bulgarian jurisdiction constitutes quite a challenge. Bulgarian legislation in this particular regard is not so detailed, thus some of the questions inevitably will remain unanswered. However efforts have been put to create legislative framework which is more or less in line with the EU requirements.

Since June 1999 the Bulgarian Public Procurement Act (PPA) is in effect, a new Public Procurement Act has replaced the old one since 2004. At present a new version of the Public Procurement Act is already in effect with the latest amendments being in effect since October 2012 and March 2013. The new act is elaborated in line with a Concept adopted by the Bulgarian Council of Ministers for the time being aimed at diminishing the role and effect of a number of bylaws which by their very nature create a chaos in the legislation. Moreover the new version of the Public Procurement Act is aimed at implementing the provisions of Directive 2009/81 of the European Parliament and of the Council of the EU dated 13.07.2009 in terms of coordinating the procedures of awarding the public procurement contracts (or arrangements) therein.

The new amendments include approval of the terminology thus making it more precise in terms of comprehending the meaning of the respective provisions. The more important amendments are in substance. In general terms such changes are related to the implementation of new mechanism of awarding the relevant contracts, the new approach in the relations between the ten-

1. Dr., Attorney-at-law, Senior Partner 'Simeonov & Dermendjiev' Law Firm.

derers on the one side and the Commission for assessing and approving the public procurement awards on the other side, the implementation of certain new procedures of negotiating the terms of the contracts etc.

In brief, parties to public procurement procedures as per Bulgarian law are the contracting authorities, the candidates, the tenderers and the suppliers, the contractors and the service providers. The approach adopted by Bulgarian legislator to public procurement is to trust public servants thus leaving them wide discretion on how to choose contractors – the principle of the so called minimal regulation. The principles of public openness and transparency, free and fair competition, equality and non-discrimination are also promoted therein.

Bulgarian Public Procurement Act (PPA) provides for four mechanisms of awarding:

a. Open tender;
b. Limited tender by using preselected list;
c. Competitive dialogue;
d. Direct negotiations.

The applicability of each mechanism is determined by the rules of Article 5 of the PPA which follows the philosophy of Articles 20-22 inch and 33 of Directive 2004/17/EC as Appendixes IIA and IIB of the same EU law Act.

The choice of the relevant mechanism in each case is decided as per the character of the subject and as per the value of the public procurement contract itself.

Subjects of public procurement procedures are in mandatory:

i. supply of goods, obtained by means of purchase, rent, lease with or without option of buying, hire purchase, as well as preliminary operations as shall be necessary for the actual use of the goods, such as installation, testing of machinery and plants, etc.
ii. rendering services;
iii. works, including: building or civil engineering (design and construction) of building sites; realization or design and execution, by whatever means, of one or several construction and erection works covered under Annex 1 hereto, related to the construction, redevelopment, remodelling, maintenance, restoration or rehabilitation of buildings or construction facilities; integrated engineering services and realization, by whatever means, of one or more activities related to construction of building sites in compliance with the requirements of the contracting authority, such as

feasibility study, design, organization of building, supply and installation of machinery, plant and technical equipment, preparation and commissioning of works.

iv. supply of military equipment, including any parts, components and/or subassemblies thereof, including the equipment covered by the list of defence-related products adopted in pursuance of Article 2(1) of the Defence-Related Products and Dual-Use Items and Technologies Export Control Act;
v. supply of special-purpose equipment, including any parts, components and/or subassemblies thereof;
vi. works and services directly related to the equipment referred to in Items 1 and 2 for any and all elements of the life cycle thereof;
vii. works and services for specifically military purposes or special-purpose works and special-purpose services.

In a nutshell, the process of awarding public procurement contracts is related to the spending of public funds aimed at satisfying the economic needs of the contracting authorities, respectively of the thorough society.

According to the Organization for Economic Cooperation and Development (OECD), between 15-20% of the GDP of a country worldwide are spent on purchasing goods and services in the public sector. Through its policy in the sphere of public procurement, the public sector could exert impact on the structure of the market, influence the competition among market participants and affect significantly the economic behaviour of the participants in the respective public tenders.

The awarding of public procurement rests on the economic principle of supply and demand which predetermines the bilateral nature of the relations between the authorities contracting the public procurement procedures and the participants in the relevant market. As a rule, the contracting authorities in public procurement rely on competition to ensure that their budgets will be spent in the most effective way. They have interest in purchasing products of high quality at low prices because their resources are always limited unlike the needs that have to be satisfied. In the conditions of market economy the effective competition process is the one which could lead to lower prices or higher quality, or more innovations in offering goods or services in public procurement procedures.

Bulgarian legislation, related to public procurement definitely is within the ambit of the Bulgarian administrative legislation. Despite that fact, the PPA is to a certain extent in line with the EU requirements.

The boundaries of EU public procurement law

Question 2

As already stated above, the Bulgarian public procurement legislation is firmly within the scope of the Bulgarian administrative legislation, thus public contracts are not set apart from the legislative administrative acts and decisions.

The contracts which are not considered as public procurement contract are precisely but at all pointed out in Article 4 of PPA.[2] Its provisions are closely connected with the Articles 1 paragraph 4, 16, 24 and 57 of Directive 2004/17/EC.

---

2. 1. the acquisition or rental of land, existing buildings or other corporeal immovable, as well as the creation of limited rights in rem, with the exception of the financial services in connection with such transactions; 2. the acquisition, development, production and co- production of programme material by radio and television broadcasters and the provision of broadcasting time; 3. the financial services in connection with the issue and transfer of securities or other financial instruments; the services provided by the Bulgarian National Bank; the services provided in connection with the management of the government debt; the services provided in connection with the management of the assets of the State Fund for Guaranteeing the Stability of the State Pension System, upon purchase and certification of produce, approval of warehouses for storage and conduct of auctions for sale with intervention on the farm produce markets under the Agricultural Producers Support Act; 4. the scientific research and experimental developments, where the contracting authority wholly remunerates the service but the benefits from the said research and development do not accrue exclusively to the contracting authority in the conduct of its own affairs; 5. arbitration and conciliation services; 6. the employment contracts; 7. the extending of loans by the Bulgarian Development Bank for the financing of the shortage of financing for projects under Operational Programmes Transport, Environment and Regional Development, approved by the European Investment Bank in accordance with the procedure under the Credit Agreement for a Structural Programme Loan, Bulgaria EU Funds Co-financing 2007-2013, between the Republic of Bulgaria and the European Investment Bank; S. (new, SG No. 15/2013, effective 1.01.2014) the agreements referred to in Article 154(9) of the Public Finance Act, the operation, software and resources of SEBRA and the operations related to the collection of revenue and other income receipts of budgetary organisations through the card payments referred to in Article 154(8) and (10) of the Public Finance Act, the operations related to the liquidity management of the treasury single account system and the provision of guarantee deposits as well as other deposits referred to in Article 154(22) and (23) of the Public Finance Act.

At the same time even there are within the scope of the PPA objects some public contracts are not under the provisions of the PPA. For example, any contracts or the award of a construction concession within the meaning given by the Concessions Act; any contracts which the contracting authorities covered under Item 5 or 6 of Article 7[3] herein conclude in connection with an activity other than the activities covered under Articles 7a to 7c and in Article 7e[4] herein, or in connection with any such activities which are pursued in a third country and which does not involve the use of a network or geographical area within a Member State of the European Union; any supply contracts concluded by a contracting authority covered under Item 5 or 6 of Article 7 herein for purposes of resale or hire of the subject matter of the contract to third parties, provided that the contracting authority enjoys no special or exclusive right to sell or hire the subject matter of such contracts and other entities are free to carry out the said activity under the same conditions [as the contracting authority]; any contracts for the supply of energy or of fuels for the production of energy, concluded by contracting authorities covered under Item 5 or 6 of Article 7 herein, carrying out an activity under Article 7a herein; any contracts for the supply of water, concluded by contracting authorities covered under Item 5 or 6 of Article 7 herein, carrying out activities under Article 7b herein; any service, supplies or works contracts concluded by a contracting authority referred to in Item 5 or 6 of Article 7 herein with an affiliated enterprise, provided that at least 80 per cent of the average annual turnover of the said enterprise with respect to services, supplies or works arising within the Republic of Bulgaria for the preceding three years derives from the provision of such services, supplies or works to enterprise wherewith the said enterprise is affiliated; any contracts awarded by a combination formed by a number of contracting authorities for the purpose of carrying out an activity covered under Articles 7a to 7e herein, to any of the partners in the said combination; any contracts awarded by a partner in a combination formed by a number of contracting authorities for the purpose of carrying out an activity covered under Articles 7a to 7e herein, to the said combination, provided that

3. 5. the public undertakings and any combinations thereof, where carrying out one or several of the activities covered under Articles 7a to 7e herein; 6. the merchants and other persons which are not public undertakings, where carrying out one or several of the activities covered under Articles 7a to 7e herein on the basis of special or exclusive rights.
4. Activities relating to natural gas, heat or electricity, drinking water; to transport services; to the provision of a universal postal service; to exploitation of a geographical area.

the said combination has been formed in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the said combination stipulates that the contracting authorities which form it will be part thereof for the same period; any service contracts awarded by a contracting authority to another contracting authority referred to in Items 1 and 3 of Article 7 herein or to an association of such contracting authorities which enjoy exclusive rights to provide such services by virtue of a law, a statutory instrument of secondary legislation or an administrative act; the act conferring the exclusive rights shall be issued in compliance with the provisions of the Treaty on the Functioning of the European Union; 11. any contracts for medicinal products, medical goods and for dietetic foods for special medical purposes, concluded by the National Health Insurance Fund under Article 45 (8) of the Health Insurance Act; contracts whereby activities are assigned pertinent to afforestation, logging and timber harvesting and the utilization of non-timber forest resources within the meaning given by the Forestry Act; contracts for public utility services, concluded by the contracting authorities referred to in Item 1 of Article 7 herein, which are local executive authorities or combinations thereof, with a corporation created according to the procedure established by the Municipal Property Act, which is a contracting authority referred to in Item 3 of Article 7 herein and which simultaneously meets the following conditions: (a) the capital of the said corporation is wholly municipal-owned; (b) the said corporation is subject to control similar to the control exercised by contracting authorities over their own structural units; (c) the objects, according to the basic or organic instruments of the said corporation, are carrying out public utility services; (d) at least 90 per cent of the turnover of the said corporation derives from the provision of public utility services to the contracting authority or combination of contracting authorities concerned; contracts awarded in implementation of an international treaty, concluded in compliance with the provisions of the Treaty on the Functioning of the European Union, between the Republic of Bulgaria and a third country and providing for supplies, services or works intended for the joint implementation or exploitation by the signatories thereto; contracts awarded according to specific procedural rules of an international organization.

As it was mentioned in the paragraph above, Bulgarian PPA permits under certain conditions an award of public procurement to be put out of scope of law even it is within it. An illustrative example to this is chapter 8a[5] within

5. Chapter Eight Л (New, SG No. 93/2011, effective 26.02.2012); AWARD OF PUBLIC PROCUREMENTS BY PUBLIC CALL FOR TENDERS; Article 101a. (New, SG No. 93/2011, effective 26.02.2012) (1) (Amended, SG No. 33/2012) The terms

and procedure under this Chapter shall apply upon the award of public procurements covered under Article 14(4) herein.; (2) (Amended, SG No. 33/2012) For the award of the procurements covered under Article 14(4) herein, the contracting authority shall solicit tenders by publication of a call.; Article 101b. (New, SG No. 93/2011, effective 26.02.2012) (1) The call for tenders shall be prepared in a standard form endorsed by the Executive Director of the Agency and shall include at least the following information: 1. name and address of the contracting authority; 2. description of the subject matter of the procurement and, where applicable, quantity or scope as well; 3. the requirements set by the contracting authority for performance of the procurement: 4. the criterion for award and, where the criterion of the most economically advantageous tender applies in making the selection, also the criteria for arrival at an integral evaluation, including the relative weighting given to each of the criteria; 5. deadline for receipt of the tenders.; (2) (Supplemented, SG No. 33/2012) The contracting authority shall publish the call for tenders on the Public Procurement Portal according to a procedure established by the Regulations for Application of this Act and shall indicate a time limit for public access to the said call which may not be shorter than seven days. The said time period shall begin to run as from the day next succeeding the day of publication. The call for tenders shall simultaneously be published on the buyer profile.; (3) The contracting authority may furthermore insert an announcement of the call for tenders in print media, as well as dispatch the said call to persons selected thereby, without changing the conditions referred to in Items 2 to 5 of Paragraph (1). The announcement may not contain more information than the information in the call as published on the Portal.; (4) The deadline referred to in Item 5 of Paragraph (1) may not be shorter than the time limit for public access to the call for tenders.; (5) Upon change of the conditions as initially announced, the contracting authority shall be obligated to re-apply the procedure for soliciting tenders under Paragraphs (1) to (3),; Article 101c. (New, SG No. 93/2011, effective 26.02.2012) (I) The tender referred to in Article 101a (2) herein must include at least: 1. particulars of the person who or which makes the proposal; 2. proposal for meeting the requirements referred to in Item 3 of Article 101b (1) herein; 3. price proposal; 4. period of tender validity, where applicable.; (2) The content of the tender shall be submitted in an opaque sealed envelope.; Article 101d. (New, SG No. 93/2011, effective 26.02.2012) (1) The tenders shall be received, examined and evaluated by officials designated by the contracting authority.; (2) Upon receipt of the tenders, the persons referred to in Paragraph (1) shall submit declarations on the circumstances referred to in Items 2 and 3 of Article 35(1) herein.; (3) The persons referred to in Paragraph (1) shall establish a procedure for examination of the tenders and shall draw up a memorandum on the results of the work thereof. The said memorandum shall be submitted to the contracting authority for endorsement.; Article 101e. (New, SG No. 93/2011, effective 26.02.2012) The contracting authority may award the performance of the procurement even in the cases where a single tender has been submitted.; Article 101f. (New, SG No. 93/2011, effective 26.02.2012) (1) (Amended, SG No. 33/2012) The contractor shall conclude a written contract including all proposals of the tender of the selected supplier, contractor or service provider.; (2) (Amended, SG No. 33/2012) Upon conclusion of a contract, the selected supplier, contractor or service provider shall

the PPA. Within this part of the PPA the very mechanism in the technical sense of the word for awarding public procurement contracts has been developed in a detailed way. The invitation itself for public procurement awards issued by the contracting authorities contains certain elements that are compulsory therein and are strictly defined (numerus clausus). As per Article 101b of the PPA the elements are the following: the name and address of the contracting authority; description of the subject of the public procurement therein thus specifying quality and volume; requirements of the contracting authority in terms of the execution; criteria for awarding; In cases when the choice is based on the 'economic efficiency', the indications for the overall estimation/evaluation with the relative burden included; terms for receiving the relevant offers; the invitations are published in line with the requirements of the Regulation for applying the provisions of the PPA. The offers should contain at least the following information as per Article 101c: personal data in respect to the personality who has delivered the offer; proposal for meeting the requirements in line with Article 101b; price proposal; term of validity therein.

Article 101g is structured as to the evaluation of the offers that is done by the public servants, elected to this end by the contracting authorities. As per Article 101d, the contracting authority may award the public procurement contract also in case there is a single offer.

As per Article 101e, the contracting authority concludes a written contract (agreement), which includes all the proposals within the scope of the offer of the defined contractor.

The contracting authority concludes the final agreement with all the proposals therein. When concluding the contract, the contractor presents all the documents issued by the relevant authorities. The public servants responsible in terms of the public procurement procedures are chosen accordingly. The chosen public servants are due to fill in declarations in terms of the circumstances involved.

---

submit documents, issued by a competent authority, certifying the non-existence of the circumstances covered under Item I of Article 47(1) herein, and declarations on the non-existence of the circumstances covered under; Article 47(5) herein, except in the cases where the procurement is awarded by a contracting authority referred to in Item 2 of Article 7 herein.; Article 101g. (New, SG No. 93/2011, effective 26.02.2012) The contracting authority shall be obligated to preserve all documents relating to the award of procurements under this Chapter for a period of three years after completion of the performance of the contract.

Peculiar in this mechanism is that it cannot be challenged furthermore. That procedure closes by the Protocol prepared by the Evaluation Committee of the contracting authority who (its legal representative) just ‘confirm’ it.

This procedure is applicable for public contracts between BGN 22 000 and BGN 66 000 VAT excluded (for reference EUR 1 – BGN 1,95583).

It is disputable if the advantages or its disadvantages are more. The bureaucracy s really less but the principles of transparency and fairness are really broken as far as for the Bulgarian economic standard these amounts are not very low.

Question 3

Bulgarian Public Procurement Law is applicable even for those partnership and cooperation when their subjects enter within the scope of the law.

Question 4

For example in certain cases the bidders may try to share the economic benefit they have gained as a result of bid-rigging. This is highly likely in the cases of public procurement contracts of high value. There is suspicion of bid-rigging if the bid winner refuses to sign a public procurement contract with the contracting authority and later appears as a subcontractor of another bidder in the same public procurement procedure. On the other hand, the bid winner could carry out direct payment to other bidders in the procedure, or could subcontract a significant part of the tender to other participants. Such subcontracting, however, needs to be distinguished from the cases of winning a tender by undertakings which participated in it as a consortium, or through establishing a joint undertaking which may well be in some form of cooperation.

Question 5

The general principles of EU law: public procurement law and beyond

Question 6

The following example is illustrative in terms of rules and principles applicable to the award of contracts (or consensual arrangements) excluded, not at all covered by the EU procurement directives: Anticompetitive bid-rigging gives rise to considerable harms for the contracting authorities as their budget

funds or funds for implementing activities of social importance are taken away from them, thus undermining the advantages of the competitive market.

Question 7

Surely the principles of public openness and transparency, free and fair competition; equality and non-discrimination are widely promoted by the PPA. Even where a contracting authority grants special or exclusive rights to carry out a public service activity to a person other than a contracting authority, the act by which these rights are granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the person concerned must comply with the principle of non-discrimination on the basis of nationality.

In practice, there are certain deviations from these principles. For example, in art. 33 of the PPA where the technical requirements of the offer are revised, the Bulgarian legislator provides the contracting authority with the discretion to decide if certain documents are 'appropriate means to the satisfaction of the contracting authority*. In this way the contracting authority is not bound by the objectivity of those means as it is the philosophy of from Directive 2004/18/EC. Another example is chapter 8a already cited above.

Public procurements and general EU law, including competition and State aids law

Question 8

The potential restrictions of competition in awarding public procurement contracts can be divided into two groups: public and private.

Public restrictions of competition: The violation of the competition principle should be considered a public restriction of competition when it stems from acts, actions or omissions of the contracting authorities in public procurement procedures. Those acts, actions or omissions have been issued or realized in implementing the authoritative (administrative) competences of the contracting authorities and are most often manifested in the phase of opening of public procurement procedures as well as in assessing the participants and selecting the contractor. The public restrictions of competition can be implemented by the contracting authorities themselves through introduction of discriminatory conditions and requirements to the participants during

opening a procedure, which narrows the circle of potential bidders and create unreasonable obstacles for the candidates while favouring a certain participant in the market. The principle of free and loyal competition could also be violated by enacting a decision for assessing the participants in which a bidder which should have been eliminated by the contracting authority has been illegally admitted to the evaluation and rating stage.

In the case of public restrictions of competition the violation of the principle of free and loyal competition could serve as grounds for repealing the respective acts, actions or omissions of the contracting authorities in accordance with the control competences of the CPC further to Article 120 and the following articles of the Public Procurement Act (PPA).

Private restrictions of competition: The private restrictions of competition cover the actions of the economic operators in the relevant market which could lead to prevention, restriction or distortion of competition in the process of awarding public procurement procedures. In this case bid-rigging is a form of horizontal anti-competitive conduct of enterprises as the rules of free and fair competition have been violated by the very participants in the procedures who happen to be competitors on the relevant market. The enterprises that take part in the public procurement procedures are interested in being awarded the procurement at conditions that are most favourable for them as in this way they could maximize the economic benefit they get once given the opportunity to implement the respective contract. As in the conditions of an effective competitive process there is an economic risk for the enterprises not to receive the public procurement contract by being displaced by their real or potential competitors on the market, the bidders are willing to participate in agreements among themselves for fixing the prices, quality or quantity of the procurement as well as to close the market for potential competitors or to boycott the participation of their real competitors. For achieving this objective they exchange among themselves sensitive market information and trade secrets, thus coordinating their behaviour when participating in public procurement procedures. The forms of coordination among undertakings lead to anticompetitive bid-rigging as they distort the competitive process among the participants in them.

Anticompetitive bid-rigging may cause to considerable harms for the contracting authorities as their budget funds or funds for implementing activities of social importance are overspent by them, thus undermining the advantages of the competitive market.

In establishing certain behaviour of enterprises which could objectively lead to the prevention, restriction or distortion of competition in awarding public procurement contracts, there are grounds to hold these enterprises the

legally responsible for committing an infringement of Article 15, para. 1 of the Law on Protection of Competition /LPC/.

Question 9

Suspicious patterns with regard to participating in consecutive procedures:

Some of the bid-rigging schemes designed by the enterprises could be manifested or observed as a pattern, only after a number of public procurement award procedures have been carried out. For example, patterns could be observed when consecutive tenders are won by one and the same bidders. It is possible, in observing consecutive tenders, one winning bidder to stand out in relation to certain types and sizes of tenders, or it could also be noticed that certain bidders always win in certain geographic regions. Other patterns in consecutive procedures can be established when a certain participant never wins a tender but keeps participating, or when certain participants rarely take part in a tender but when they do, they are always the winning bidders. In observing the characteristics of the offers of the same participants it could be established that for certain tenders such participants submit comparatively high price offers while others unreasonably submit comparatively low price offers.

In analysing the presence of suspicious patterns in participating in similar public procurement procedures, some unusual characteristics of the price offers could be outlined as well – e.g. ail offers are unusually high, or the offered discounts are unusually low. Similar are the cases when the offers under a given public procurement procedure are different from those in previous procedures, without a change of the economic factors which could justify such difference, or the size of the price offers of the traditional participants changes drastically when an offer is submitted by a new participant in the market.

The procedure of Article 101a mentioned above is within the scope of this question also.

Question 10

N/A

Strategic use of public procurement

Question 11

A lot of environmental and social policies can be impacted in a significant way by public procurements. The challenges are so many that it is truly difficult to avoid them.

All of the challenges are focused on trying to avoid anticompetitive behaviour in the broadest sense of the word. In certain cases, for example, the bidders may try to share the economic benefits they have gained as a result of bid-rigging. This is in principle highly likely to happen in the cases of public procurement contracts of high value. Of such a sort are the main challenges.

Question 12

Innovative thinking is often fostered by problems of such kind. To what extent public procurements are used as a tool to foster innovation is difficult precisely to say.

Remedies

Question 13

Strengthening the remedies against breaches of EU public procurement rules in line with Directive 2007/66/EC: Art. 120, para. 2 of the PPA constitutes one of the significant improvements created as to increase the efficiency of the relevant procurement – like procedures and especially the mechanism of control over all of the procedures thus enumerating in an exhaustive way the reasons for proclaiming public procurement contracts null and void, i.e.: (i) Through lack of any public procurement award despite the existing relevant reasons in this respect. This item includes the cases where there are no official acts for starting the procedure and/or the existing acts are themselves null and void; (ii) Contracts are concluded before the expiry of the deadlines for challenging the decisions in terms of defining the executor.; (iii) Before putting into effect the relevant act aimed at imposing interim measures as well as in cases of infringements of the public procurement awards.

The exceptions contained in the new provision within art. 43 of the PPA are of importance therein and are the following: (1) When as a result of force majeure the terms of the contracts have to be changed; (ii) In cases of making the contracted prices lower thus taking into account the interest solely of the contractors; (iii) In cases of amendment of the state-regulated prices when the main subject of the public procurement contract is any activity whose price is object to state regulation and the terms of execution is set to be more than 12 months.

Conclusion and reform

Question 14

It is indeed rather disputable if the modernization attempts in line with the procedures laid down in the 2004 directives are too burdensome and resulting in extremely high costs and inefficiency. Intended to allow measures of procedural flexibility, it remains quite unclear where and if there is room for any negotiations in EU public procurement rules. It is also clear that nationality – based discrimination is unavoidable. Moreover, hostile approaches to any negotiations and/or dialogues have to be taken into account.

CROATIA

Nikola Popović and Filip Kuhta[1]

The context

Question 1

It has to be said at the beginning that there is little experience with the application of European Union law either at courts or in the administration since Croatia joined the European Union 1 July 2013. The application of EU law prior to accession was limited mainly to the work of the Croatian Competition Agency and it could only have been used as an 'auxiliary interpretative tool'.[2] As it will be seen in the rest of the report the education of public servants and judges about the effects and scope of EU law is still ongoing and still needed. Therefore, many issues regarding the interplay of EU and national law, and some specific EU law issues, could not have been spotted so far either by judges or public servants. Also, the research for this report could not have included judgments of Croatian courts to the fullest extent since they are only partially accessible.

Therefore, this report includes, in some of its parts, assumptions as to possible present or future approaches of the judges based on the analysis of legislative acts and academic writings. The research is also based on decisions of the State's Commission for the Control of Public Procurement Procedures, the Council of the Croatian Agency for Post and Electronic Communications and interviews with a judge of the High Administrative Court[3] and a public

1. Nikola Popović, PhD in law, Member of the Council of the Croatian Agency for Post and Electronic Communications (HAKOM, NRA). Filip Kuhta, LL.M. is a research fellow at Jean Monnet Chair for European Public Law at the Faculty of Law in Zagreb.
2. Decision of Croatian Constitutional Court U-III / 1410 / 2007, par 7.
3. The interview was held 14 October 2013 in Zagreb with judge Lidija Vukičević.

servant in charge of providing information to the public at the State's Office for Central Public Procurement.[4]

Regarding the influence of European public procurement law it seems that it did not impact the Croatian administrative legal framework in a significant way and in some respects it did not influence to the degree that was hoped for by the academic community (which will be elaborated as an answer to Question 3). It did, however, give rise to a couple of conceptual problems but with no real consequences on the case law.

Although new in the Croatian administrative system, public contracts do not seem to have caused many problems for the administrative judges. According to the judge at the High Administrative Court, the judges went through education in order to be introduced to this and some other novelties in the legislation and did not find any problems in the application of public contracts even though public contracts were completely foreign to the system.

A minor conceptual problem which did arise among legal practitioners concerned the question if decisions by non-administrative bodies could be considered as administrative acts at all. The problem was noticed when the 2001 Public Procurement Act was introduced which envisaged that some companies could come under the scope of the Act.[5] The problem arose because it is considered by a part of the academia that only those acts that are enacted by administrative bodies can be considered as administrative acts. But the problem is discarded by some academics since the issue had been solved by the Croatian Constitutional Court.[6]

What the new public procurement legislation also brought might not have been revolutionary from a theoretical point of view but it did remedy a significant shortcoming of a 2001 Public Procurement Act. The new legislation strengthened the effectiveness of the protection of individual rights and thus, quite possibly, had an effect on achievement of the goals of European public procurement rules, mainly opening-up of public procurement to competition.

---

4. The interview was held 25 October 2013 in Zagreb. State's Office for Central Public Procurement is in charge of public procurement for the Office of the President, the Government, the Parliament, all the Government's offices and professional services, all the Ministries, state's administrative organisations and state's offices according to the Regulation on Inner Organisation of the State's Office for Central Public Procurement (Official Gazette 31/2012).
5. 2001 Public Procurement Act, Art. 4 (National gazette 117/2001).
6. Prof., dr.sc. Boris Ljubanović, Mr. sc. Bosiljka Britvić-Vetma: Hrvatsko pravo javne nabave javne Zbornik radova Pravnog fakulteta u Splitu, year 48, 2/2011., page 407-417, page 412.

This change will be elaborated more broadly as part of the answer to Question 13.

The boundaries of EU public procurement law

Question 2

The Act on General Administrative Procedure[7] from 2009 (the AGAP) regulates public contracts. The elements of a public contract as prescribed by the Act are: a) a public law body and a party conclude the contract, b) the object of the contract is execution of rights and obligations established in an administrative act, c) it is possible to conclude a public contract if a legislative act prescribes its conclusion. Even though the courts have not had a chance to deal with the issue of delineation of public contracts from the legislative or administrative acts, it could be presumed that the expression of will as an essential element of contracts, would exclude the application of public procurement rules to legislative or administrative acts.

In the professional and academic literature the dualistic view of public contracts so far prevails – public contracts have certain private law as well as public law traits. Contracts are of private law nature since they are contracts and they need an expression of wills in order to produce legal effects.[8] The strongest basis for the assumption that the administrative courts would delineate the legislative and administrative acts from public procurement contracts on the basis of its crucial element of public law nature, the expression of wills, is the Art. 105 of the 2011 Public Procurement Act.[9] It prescribes that the Obligations Act,[10] which regulates contracts, is applicable to the issues of parties' responsibilities.

However, it is possible that the courts take the opposite approach if they, as administrative courts, only see the public law side of public contracts. A

7. The Act on General Administrative Procedure (National gazette 47/09).
8. For example Boris Ljubanović, Upravni ugovori i upravno sudovanje, Zbornik radova Pravnog fakulteta u Splitu, year 47, 1/2010., pages 37-52. page 38; Stanka Pejaković, Je li ugovor o javnoj nabavi upravni ugovor?, Informator 61(2013),6171; pages 1-3, page 1; see also Ivan Šprajc, Kritička analiza važnijih novina u Zakonu o javnoj nabavi, Hrvatska javna uprava, year 6. (2006.), no. 1, pages 93-122.
9. Public Procurement Act (National gazette 90/2011, 83/2013).
10. Obligations Act (National gazette 35/2005, 41/2008, 125/2011).

general stance that the relation of the parties to public contracts is not one of equality but that of hierarchy rests on provisions of the AGAP which indicate that private interest and the private party is subordinate to the public interest.[11] Thus, even though public contract is a contract, its nature would not be different from legislative or administrative acts. The provisions of the AGAP that support the view of public contracts as public law contracts prescribe that: a) one party to the contract is a public law body, b) the intention is to satisfy a public need and c) the norms that regulate public contracts are of public law nature (the AGAP).[12] However, as mentioned previously, this does not seem as a likely outcome.

Question 3

The public-public cooperation is considered under-regulated.[13] Since it is thought to be regulated under the system of private law, there is lack of incentives for its growth. It was hoped by some in the academic community that the introduction of public contracts in the Croatian system would not be constrained only to the area of public procurement but that they would be regulated by the Act on General Administrative Procedure in a way which would render them widely accessible.[14] It was advocated that the German approach should be followed in that regard so it may enable a deeper public-public cooperation.[15] The Croatian legislature opted for a drastically more restricted approach effectively leaving the decision on the appropriateness of public contracts in particular fields to itself. The Act on General Administrative Procedure prescribed that public contracts were only to be used when envisaged by other legislative acts. So far there are only three pieces of legislation that allow the usage of public contracts in the fields which they regulate and one of them is Public Procurement Act. Except for the Public Procurement Act,

11. See fn 8 and Inga Vezmar Barlek, Novo uređenje predmeta upravnog spora u Republici Hrvatskoj, Zb. Prav. fak. Sveuč. Rij. (1991) v. 33, br. 1, 485-504 (2012), page 493.
12. Damir Aviani i Dario Đerđa, Aktualna pitanja uređenja upravnih ugovora u hrvatskom pravu, Zbornik radova Pravnog fakulteta u Splitu, year. 48, 3/2011., page. 475-486., pages 352-354.
13. Đulabić, Novi hrvatski Zakon o općem upravnom postupku kao poluga modernizacije javne uprave, Hrvatska javna uprav, god. 9. (2009), no. 2, pages 307-316, pages 313 and 314.
14. Ibid., pages 312 and 313.
15. Ibid. pages 312 and 313.

acts that enable the usage of public contracts are the Act on Concessions[16] and the Act on Public-Private Partnerships.[17] None of those acts regulate the public-public cooperation which is therefore regulated by norms of private law.[18]

Question 4

The Public Procurement Act excluded from its application all the consensual arrangements between the public and the private sector that are excluded from the application of the 2004/18/EC Directive by Articles: 13, 15, 16 and 18.[19] The Act added to the list of exclusions the contracts relating to the schedule of broadcasting certain programmes on radio and television.

The Public Procurement Act prescribed in a general manner that it is applicable to public procurement contracts in the area of defence and security. However, many aspects of that area are excluded from the provisions of the Act since the Act itself also prescribes that the Regulation on Public Procurement for the Needs of Defence and Security[20] is applicable to the procurement of: a) military equipment, b) equipment sensitive security wise, c) works, goods and services connected to the mentioned equipment, d) works and services for strictly military purposes, e) works and services sensitive security wise.[21]

The Regulation gives a choice to contracting authorities to use either the restricted procedure or the negotiated procedure with prior publication of a contract notice. The negotiated procedure without prior publication of a contract notice may be used under similar conditions as those prescribed by the 2014/18/EC Directive. The difference lies in additionally allowing the use of the procedure in the event of irregular tenders or the submission of tenders which are unacceptable under national provisions.

The rules for the restricted procedure, the negotiated procedure with prior publication of the contract notice and the competitive dialogue are identical to

16. Act on Concessions (National gazette 143/2012).
17. Act on Public-Private Partnerships (National gazette 78/2012).
18. See fn 12, page 313.
19. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114-240.
20. Regulation on Public Procurement for the Needs of Defence and Security (National gazette 10/2012).
21. Art. 11 of the 2011 Public Procurement Act.

the ones of the Public Procurement Act, except for one difference. The contracting authority may choose, if it has mentioned it in the contract notice, not to open the proposals in public.[22]

Even though the Regulation, which has similarly strict rules to the ones of the Public Procurement Act and the 2004/18/EC Directive, seems to cover a substantial part of the defence and security procurement, there is still a part which is not covered by the Act or the Regulation. For example, any special procedural rules of procurement envisaged by international agreements with the third states, contracts for the needs of the security-intelligence services, contracts whose publicity of data would be contrary to the important interests of the security to the state, etc.

Even though not mentioned in the Public Procurement Act as excluded, the licences for the organisation of the games of chance are most definitely not covered by the Act. They are regulated by the Games of Chance Act from 2009, last modified in 2013.[23] The Act does not prescribe any criteria for the award of the licences except one which will be mentioned later in the text. The criteria are left to the Minister of Finance to establish. The overall number of the organisers of the games of chance limited and left to the Government to prescribe.

It is important to emphasise that the Act allows only to those tenderers which are established in Croatia to apply for the tender. Such a restriction of the freedom of establishment and freedom to provide services is most probably not justified. What the Government is primarily concerned as regards the games of chance is an economic interest. In Art. 23 par. 5 of the Act it is prescribed that the choice of the tenderer will especially be assessed on the basis of the financial impact on the state budget, while no other criteria is required by the Act. It is hard to predict how Croatian courts will approach this issue since there have not been cases of application of EU primary law.

Question 5

The question of the mixed arrangements has not been regulated and case law on that issue has not been found as part of this research. However, certain assumptions could be made on the basis of the Obligations Act which, as mentioned in Question, applies to the public procurement contracts. The Obligations Act prescribes that a contract will not be null and void if the other part

22. Art. 11 of the 2011 Public Procurement Act.
23. Games of Chance Act (National gazette 87/2009, 35/2013).

of the contract is self-sustainable and if the condition for the contract, which is null and void, is not the decisive motive for the contract. Therefore, there are two conditions for severability that have to be met cumulatively: 1. only one part of the contract can be performed and 2. the parties would have agreed to the contract regardless of the other part of the contract. While the rule for the severability could be used in the case of mixed (public procurement and non-public procurement) contracts, there is no reason to consider that, if the contract is not severable, the contract ought to be nullified because the public procurement procedure was not followed. Although it is possible that Croatian courts could take such a stance, they could consider that the question of classifying such a contract as public procurement contract is still open since only part of the contract being subject to public procurement rules does not make the entire contract subject to it.

The general principles of EU law: public procurement law and beyond

Question 6

Since Croatia has been a Member State of the European Union for only four months at the time of writing of this report, the level of awareness as well as the understanding of the issues in the judiciary and the administration regarding the effects as well as the scope of application of EU law is rather low.

First, the public administration did not undergo extensive education regarding the change that the membership the EU brings which is reflected on the application of EU law. When asked if EU primary law was adhered to in situations not covered by the public procurement directives or the Croatian Public Procurement Act, the answer of the State's Office for Central Public Procurement[24] was that they apply the Public Procurement Act which, as it is stated in the Act itself, is harmonised with the relevant EU directives. Such an answer shows a lack of awareness for the Office's obligations to a) apply the national legislation in accordance with the provisions and the purpose of the EU legislation and b) put aside national legislation when contrary EU law and apply a directly effective EU norm. It also seems that the public administration is widely unaware of its obligations stemming from EU primary law. In

24. See fn 4.

addition, the answer of the State's Office suggests that they were not confronted with a court decision which would instruct them of their obligations.

Some situations which are not covered by the Directives, but come under EU law, have been regulated by the legislature. These are below the threshold contracts and service concessions. Also, it is interesting how the legislature deleted a provision from the 2007 Public Procurement Act[25] which prescribed the application of what were called the principles of public procurement (free movement of goods, freedom of establishment, free provision of services, market competition, effectiveness, equal treatment, prohibition of discrimination, mutual recognition, proportionality and transparency) to all procedures and all values of procurement. The way the 2011 Public Procurement Act tries to implement those principles even in situations not covered by the 2014/18/EC Directive is the following. The provisions of the Act apply to contracts which are below the European thresholds but above 70,000.00 HRK (9,186.35 EUR on 25th October 2013).[26] They are called public procurement procedures of small value. The procedure for that type of procurement is not simplified in any way except that the time limits are shorter and that there is no obligation of publishing the contract notice in the Official Journal of the EU (but they may be published). According to the mentioned the Proposal of the Amendment to the Public Procurement Act,[27] the threshold will be raised to 200,000.00 HRK (26,246.72 EUR) for goods and services and 500,000.00 HRK (65,616.80 EUR) for works. The claimed explanation for the increase is too high administrative costs when compared to the value of contracts.

In addition, the Act on Concessions[28] regulates the award of concessions for public works, services and concessions for economic usage of general or other goods. The Act prescribes preparatory activities, for example studies on the justifiability of awarding a concession and estimation of the value of the concession and it regulates them extensively. A difference is made between public service concessions above the 5,000,000.00 EUR threshold and public works concessions on the one hand and below the threshold public service concessions and concessions for economic usage of general or other goods on the other. For the first group of concessions the rules of public procurement for open procedure, restricted procedure, and negotiated procedure with prior

25. 2007 Public Procurement Act (National gazette 110/2007).
26. Art. 20 of the 2011 Public Procurement Act.
27. Accessible at: http://www.vlada.hr/hr/naslovnica/sjednice_i_odluke_vlade_rh/sjednice_i_odluke_vlade_rh/121_sjednica_vlade_republike_hrvatske/121_1/(view_online)/1#document-preview.
28. See fn 16.

publication of the contract notice or competitive dialogue are applied. For the second group of concessions the rules of the Act on Concessions apply which are less strict than those of the Public Procurement Act.

Question 7

It was presented in Question 6 how the Act on Games of Chance regulates the award of licences. Unlike in the Public Procurement Act and the Act on Concessions, the Act on Games of Chances does not prescribe any of the principles that have to be followed in the procedure. However, some rudimentary rules that to a certain extent ensure the transparency of the procedure are prescribed. The contract notice has to be published in the daily newspapers which are available on the entire territory of Croatia and the Ministry of Finances has to inform all the tenderers of the decision. Documents regarding the existence, properties, criminal record (rather lack thereof), tax record and a three year business plan of the tenderers are required by the Act.

In conclusion, the approach of the legislature in the case of public procurement and concessions is starkly different from the case of organisation of games of chance. On the one hand public procurement and concessions are extensively regulated which ensures a high level of transparency and equal treatment of tenderers and the principles are even prescribed in the respected acts *verbatim.* On the other hand, the legislature did not see the need for the same approach to licensing the organisation of games of chance. The reason seems to be that during the negotiations for accession the Commission scrutinised the Games of Chance Act on the basis of its impact on free movement of capital and money laundering but not on freedom of establishment and freedom to provide services. This can be seen in the 2010 Progress Report which does not mention the Games of Chance Act except as regards money laundering while subsequent progress reports do not mention organisation of games of chance at all.[29]

29. Croatia 2010 Progress Report, Brussels, 09 November 2010 SEC(2010) 1326.

Public procurements and general EU law, including competition and State aids law

Question 8

In Croatia the example of the postal sector might be of interest when assessing the behavior of contracting authorities and possible adverse effects to the EU internal market in particular competition rules. Since 1 January 2013, the provision of postal services has been fully liberalized in Croatia, meaning that no reserved postal area is possible anymore according to the Croatian Postal Service Act (PSA).[30] Competitors of the former postal monopolist (Croatian Post, CP) are free to provide competitive services to the universal services offered only by CP. If those services are competitive to the universal service,[31] than they are named – interchangeable services. This means that they may be incompliant with the conditions of the universal service, such as daily delivery obligation or complete national coverage, however, from the user's perspective they can be regarded as universal services since the interchangeability with the universal service is present in a sufficient degree. The National regulatory authority (NRA) Croatian Agency for Post and Electronic Communications (HAKOM) evaluates whether particular postal services are interchangeable, taking into consideration the characteristics of the postal services, intended use from the user's perspective and the price of the service. If this is the case HAKOM adopts a decision confirming the interchangeable nature of these postal services. Prior to adopting this decision HAKOM shall request the opinion of the Croatian Competition Authority. This short introduction to the Croatian legal framework, which is aligned with the EU acquis, is necessary before going into the following situation.

In July 2013 the Croatian State Commission for Supervision of Public Procurement Procedure (SCSPPP) has annulled a part of the invitation to tender published by the city of Rovinj in Croatia. Rovinj city's administration has defined in the relevant tender documentation as procurment item – *universal postal service.* According to PSA universal services are defined as a

30. Postal Services Act (National gazette 144/12).
31. The universal service comprise the following postal services in domestic and international traffic: clearance, sorting, transport and delivery of items of correspondence up to 2 kilograms; clearance, sorting, transport and delivery of postal packages up to 10 kilograms; clearance, sorting, transport and delivery of registered and insured items; and some others.

set of postal service available to all users of postal services in the entire territory of Croatia at an affordable price whereby the universal service provider must ensure the quality of provision of universal services.[32] Since the postal market is a competitive one, defining the subject of procurement as universal postal services would mean to exclude all competitors of the incumbent CP, as they do not provide universal postal services but – *interchangable postal services*. Such definition of the procurement item benefits the incumbent provider CP and restricts competition and discriminates undertakings offering postal services not labeled as universal services, but which are to a sufficiently degree interchangeable from the perspective of the user. Postal services therefore need to be clearly described by their objective characteristics in a generic way and not by the legal terms used in the PSA, as this may hamper the process of market liberalization. The City of Rovinj was bound by the decision of the SCSPPP to amend the tender documentation and thereby avoid any unlawfulness and distortion of competition in the future.[33]

Question 9

An example of interaction of public procurement rules and specific network industry regulation may be found in the sector of electronic communications in Croatia which is liberalized according to the EU Acquis. Any operator may start providing services to the public if fulfilling the minimum requisites prescribed by the Electronic Communications Act.[34] In order for competition to develop in electronic communications, the incumbent operator Croatian Telecom (CT) is bound by the law to offer access to its infrastructures and facilities under fair terms in order to make possible to its competitors to interconnect and offer services to the end users. These asymmetric regulatory obligations are set to counter the market power of dominant operators on particular electronic communications markets. Dominant operators are referred as significant market power (SMP) operators in electronic communications. One of the regulatory obligations that may be imposed to SMP operators is *retail*

32. The universal service provider shall ensure the provision of the following services to all users at least five workdays per week: one clearance of a postal item; one delivery of a postal item to home address or facilities of any natural or legal person. Besides, it must ensure in domestic postal traffic, the delivery of 85% of postal items of the fastest category within one workday, or 95% within two workdays, and for all other items in national traffic within three workdays.
33. SCSPPP Decision of 8 July 2013 (URBROJ: 354-01/13-6).
34. Electronic Communications Act (National gazette 73/08, 90/11, 133/12, 80/13).

services price control.[35] The obligations imposed may include requirements that the identified undertakings do not charge excessive prices, inhibit market entry or restrict competition by setting predatory prices, show undue preference to specific end-users or unreasonably bundle services. National regulatory authorities may apply to such undertakings appropriate retail price cap measures, measures to control individual tariffs, or measures to orient tariffs towards costs or prices on comparable markets, in order to protect end-user interests whilst promoting effective competition. The Croatian Agency for post and electronic communications (HAKOM) has imposed on CT the regulatory measure of retail services price control in two different markets:[36] Accordingly CT is not allowed to go into predatory pricing, discrimination of users and unreasonable bundling of its services.

However, Optima Telekom (OT) a competitor of CT, argues that CT has been in breach of its retail regulatory obligations by offering a set of electronic communications services in an invitation to tender published by the Ministry of Social Politics and Youth (Ministry). OT has filed a complaint to the Croatian State Commission for Supervision of Public Procurement Procedure (SCSPPP) where it contends that CT in this particular case has gone into a predatory pricing offer to the Ministry. During the complaint procedure, OT has also submitted to SCSPPP a proof it has filed a complaint to HAKOM requesting inspection of the prices tendered by CT, in this case, to the Ministry. In its decision SCSPPP said, among others, that the main criterion used by the Ministry was the lowest price offered on the tender. Since it was CT, the choice of the Ministry was lawful and therefore SCSPPP dismissed the complainant OT with its request to annul the public tender. SCSPPP added further, it is not the obligation of the Ministry in this case to check whether tendered offers are in line with special laws and regulatory obligations i.e. Electronic Communications Act or not:[37] In the meantime, HAKOM inspector has conducted an investigation into alleged breaching of regulatory obligations of CT and found that CT has indeed violated the regulatory obligations:[38] As a consequence and taking note of the SCSPPP Decision, the in-

35. See article 17 of the Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services as amended by Directive 2009/136/EC.
36. Access to the public communications network on a fixed location for business and residential users and Access to the broadband retail and closely related TV program transmition market.
37. SCSPPP Decision of 6 June 2013 (URBROJ: 354-01/13-8).
38. HAKOM Decision of 14 June 2013 (URBROJ: 376-04/DM-13-08).

spector ordered CT to terminate its contract with the Ministry within four months (time necessary for the Ministry to proceed with a new public procurement). Procedurally and efficiently SCSPPP might have deferred its decision in order to observe the outcome of the inspection of HAKOM. Thus, the direct addressee of the SCSPPP decision would have been the Ministry what might have been a more efficient way to remedy this situation, instead of putting the obligation to end the contract on CT, by HAKOM whose main task in principle is not remedying directly with regard to appeals in public procurements cases.

This situation illustrates that sometimes procurement control practices may have as an unintended effect the limiting of competition and therefore there is a need to take into account in procedures for supervision of public procurement the specific regulation existing in network industries before rendering the final verdict. Legal cooperation of competent authorities SCSPPP and HAKOM in this case could be facilitated by a procedure of solving a *preliminary question* i.e. has a particular regulatory obligation been breached in public procurement? This should be the case in particular when the complainant party uses it as legal argument before the SCSPPP.

Question 10

Services of general economic interest are services (SGEI) of an economic nature that public authorities identify as being of particular importance to citizens, but which are not supplied by market forces alone, or at least not to the extent and under the conditions requested by the society. Their provision may therefore require public intervention:[39] In network industries the notion of SGEI is implemented under the term Universal services obligation (USO). The role of universal services is generally to guarantee access for everyone, whatever the economic, social or geographic situation, to a service of specified quality at an affordable price:[40]

In Croatia, the Postal Services Act (PSA)[41] contains a provision stating that the incumbent operator the Croatian Post (CP) is the universal service provider and is entitled and obliged to provide this service. This right and the obligation are acquired by CP for a period of 15 years from the date of entry

39. Pesaresi, N. et al.: The new state aid rules for SGEI, Competition policy newsletter 2012-1.
40. Green paper on SGEI, COM(2003) 270 final.
41. Postal Services Act (National gazette 144/12).

into force of the PSA:[42] The national regulatory authority HAKOM conducts an analysis of the postal services market in Croatia every five years, from the date of entry into force of the Act, to establish the existence of postal service providers who may ensure the provision of the universal service. When HAKOM, after conducting the market analysis, establishes the existence of providers who may ensure the provision of universal services, it shall carry out a public tender.The aforementioned is an example of *ex lege* designation of PSO to a market participant without following public procurement-like procedure:[43] Comparatively, it can be mentioned that in electronic communications sector universal services obligations may be imposed by the national regulatory authority to an operator in case if no operator shows interest in a public announcement for the provision of universal services and under condition the universal services are not provided adequately. It may be concluded that in early market liberalisation, finding providers of universal services beside the incumbent operator might not be feasible. However, does this justify an *ex lege* reservation of universal service for the incumbent, even for a limited period of time, without testing other market participants may be in principle arguable.

As regards the financing of universal services and the application of EU State aid rules, in Croatia as a Member State, EU Acquis applies in that respect with no exception. The PSA stipulates that if the amounts of contributions from the compensation fund[44] and the amount of contribution of the universal service provider do not suffice to cover the overall obligation for financing the net cost, the remaining unpaid amount of net cost will be paid from the funds of the State Budget of the Republic of Croatia, in accordance with the state aid rules:[45] Besides, in Croatia there is a separate national law on state aid where the competences of the Ministry of Finance and the Competition Agency and the procedures towards the European Commission are further regulated:[46]

---

42. 1st January 2013.
43. NB. The postal services market is fully liberalised as of 1st January 2013.
44. HAKOM establishes a compensation fund by opening a special bank account where the USO provider (incumbent) and providers of interchangeable postal services pay contributions into the compensation fund. The amount of the contribution paid by the provider of interchangeable postal services may not exceed 5% of the revenue from the provision of interchangeable postal services in the previous calendar year.
45. Article 52 PSA.
46. State Aid Act (National gazette 72/13).

Strategic use of public procurement

Question 11

The State's Office for Central Public Procurement shows awareness regarding the need to include environmental concerns in the conditions for the award of public procurement contracts while social concerns, however, were said in the interview to be completely disregarded.

On the web pages of the State's Office for Central Public Procurement[47] and in the Strategy and Action Plan of the Office,[48] it was stated that it is the goal of the Office to implement 'green public procurement' through defining technical specifications and describing the object of the procurement. The Energy Star 5.0, ROHS, WEEE, ISO 9296 CE standards and norms are used when procuring computers and computer equipment (regulated by Regulation (EC) 106/2008[49]):[50] Also, in the most recent case of procurement of electricity 95 points were awarded for the price and 5 points for the electricity that comes from the renewable sources:[51] On the other hand there were no environmental conditions in the procurement of vehicles through operational leasing which was published 21th October 2013 even though an Act implementing the Directive 2009/33/EC on the promotion of clean and energy-efficient transport vehicles had already been enacted (although only 3 days before the publishing of the tender).

Question 12

The State's Office for Central Public Procurement nor the Ministry of the Economy do not mention public procurement in their strategies as a tool to

47. http://www.sredisnjanabava.hr/default.aspx.
48. Strategy and Action Plan State's Office for Central Public Procurement, 2013, page 6 accessible at: http://www.sredisnjanabava.hr/UserDocsImages/Pravni%20izvori/STRATEGIJA-DUSJN-31032013-za%20objavu.pdf.
49. Regulation (EC) No 106/2008 of the European Parliament and of the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment, OJ L 39, 13.2.2008, p. 1-7.
50. Contract notice accessible at: http://www.sredisnjanabava.hr/default.aspx?id=522&nid=7.
51. Contract notice accessible at: http://www.sredisnjanabava.hr/default.aspx?id=522&nid=22.

foster innovation.[52] In addition the State's Office confirmed that performance/functional specifications are not being used.

Remedies

Question 13

Croatian system of rights protection in public procurement was significantly changed first in 2007, afterwards in 2011. The first important change in 2007 Public Procurement Act[53] encompassed what might have been seen as clarification but what was really a significant step towards more effective rights protection. While a complaint could have been lodged only by a person who participated in the procurement procedure according to the 2001 Public Procurement Act,[54] the Act from 2007 enabled filing a plea to anyone who had an interest to obtain the public procurement contract:[55] The change is significant because it dealt with situations where there had not been any procedure at all – the direct award prescribed by Art. 12 of the 2001 Act. The most recent Act on Public Procurement from 2011 prescribed the same condition as the 2007 Act.

There are several reasons why interim reliefs are seldom granted by the State's Commission for the Control of Public Procurement. First, the Act from 2007 and the Act from 2011 left little room for granting interim reliefs. The reason is the suspension of the procedure in almost all circumstances once an appeal has been lodged.[56] Vast majority of pleas for interim relief are dismissed on those grounds. Second, the Commission interpreted the 2011 Public Procurement Act in a way which grants the Commission the permission to wait for the contracting authority's documents before deciding on the

52. Strategy Plan of the State's Office for Central Public Procurement for the period 2012-2016, accessible at: http://www.sredisnjanabava.hr/UserDocsImages/Strateski%20plan/Strateski%20plan%20Ureda%202014%20%20-%202016%20.pdf and Strategy Plan of the Ministry of the Economy for the period 2013!2015. accessible at: http://www.mingo.hr/userdocsimages/STRATE%C5%A0KI%20PLAN%20 MINGO%202013-2015%20kona%C4%8Dno.doc.
53. See fn 25.
54. See fn 5, Art. 71.
55. See fn 25, Art. 137.
56. Ibid., Art. 161.

interim relief, regardless of the delay in the submission of those documents.[57] That sometimes means granting the decision a couple of months after the lodging of the plea for interim relief. Third, the Commission interpreted the 2007 Act in a way that a plea for interim relief had to be lodged together with appeal.[58] Such an interpretation disregards the cases in which new or newly revealed circumstances might justify granting interim relief. There is no indication that the approach changed in interpreting the 2011 Act which did not change significantly in that regard.

Unfortunately, it is impossible to assess the impact of the 2007/66/EC Directive on the basis of award of damage. Damages are awarded not by the Administrative Court but by Civil Court and there is no accessible data regarding award of damages in public procurement cases.[59]

Conclusion and reform

Question 14

There seem to be two factors that have a significant impact on the State's Office for Central Public Procurement's work. One is quite limited funding of the Office and the other is public perception of its work. These two considerations have bearing on the extent of the impact of the new Directives.

The limited funding of the Office results in the lack of employees in general and the lack of employees with qualifications other than the legal ones.[60] That leads to the overuse of the lowest price criterion (which is said to be

57. In the case before the State's Commission for the Control of Public Procurement from 19 July 2013 (URBROJ: 354-01/13-4) the plea for interim relief was granted lodged 15 April 2013.
58. The Decision of the State's Commission for the Control of Public Procurement from 28 June 2011 (URBROJ: 354-01/11-8).
59. Case law of Civil Courts is publicly inaccessible. However, an attempt was made to find public procurement cases through an unofficial civil courts' search engine which is in the process of being developed but among 29,113 judgments there were none that involved public procurement.
60. Interview in the daily newspaper Jutarnji list with the Head of the State's Office for Central Public Procurement Danijel Janković published 13 September2013, accessible at: http://www.jutarnji.hr/dario-jankovic--ja-radim-najstresniji-posao-u-drzavnoj-upravi--odgovaram-za-600-milijuna-kuna--a-nemam-dovoljno-strucnih-ljudi-za-posao-/1125813/.

changed). The Art. 66 in the European Parliament's and Council's Proposal[61] prescribes the use of the most economically advantageous criterion which ought to be based on the cost-effectiveness approach. The question remains to what extent the Office and other contracting authorities will be equipped to adequately prescribe those criteria for specific notices.

In addition, the interview with the public servant in charge of providing information revealed a concern about the Office's public perception. When asked if less strict rules for the use of competitive dialogue might make the work of the Office easier to purchase works, goods and services more adequate to the needs of the government bodies, the answer was that it would not be appropriate since such procedure could lead to the suspicion of corruption. Thus it seems that however the new rules are seen, as loosening or constraining the conditions for the use of competitive dialogue, these new rules would not result in its more frequent use.

Furthermore, it was stressed in the interview that paper documentation will not be used starting 2014 but only e-procurement and that the education of Office staff had already started. It is, however, hard to predict if tenderers will be prepared for the change.

In summary, the impact of the change of the new EU public procurement rules to the Croatian system of public procurement depends primarily on the human and financial resources of Croatian contracting authorities. In addition, the public procurement might become more mistrusted by the public if the change brings more discretion to contracting authorities.

61. Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading) – Approval of the final compromise text, Interinstitutional File: 2011/0438 (COD), Brussels, 12 July 2013, accessible at http://register.consilium.europa.eu/pdf/en/13/st11/st11745.en13.pdf

CZECH REPUBLIC[1]

Jiří Kindl,[2] Martin Ráž,[3] Pavlína Hubková[4] and Tomáš Pavelka[5]

The context

Question 1

Czech public procurement law is a relatively new and ever-changing phenomenon, having first appeared during an advanced phase of the country's transition to market economy in mid-nineties and having been continuously re-worked, reformed and expanded since. While the key driving force in its early evolution has been the country's association with and, later, accession to the European Union, in recent years this has been overshadowed by the political priority of (more) effective control over public expenditures and the fight against corruption. Negative perceptions and mistrust to public servants and political decision-makers dominates the current public debate so much that any internal market concerns or prospective reforms of EU law are discussed only marginally and only in expert circles. The consequences include high degree of formalization of the procurement procedures by binding legal

1. This chapter reflects the legal statud as of the end of Oktober 2013.
2. Mgr. (Charles University, Prague), M.Jur. (Oxon), JUDr. (Charles University, Prague), Ph.D. (Charles University, Prague). The author is a partner in Weil, Gotshal & Manges (Prague) and a member of the Czech Bar Association. He also lectures Czech and EC competition law at the Faculty of Law, Charles University in Prague. He can be contacted at jiri.kindl@weil.com or jiri.kindl@univ.oxon.org.
3. Mgr. (Charles University, Prague), M.Jur. (Oxon). The author is a senior associate in Havel, Holásek & Partners (Prague) and a member of the Czech Bar Association. He holds irregular seminars on public procurement law for students of the Faculty of Law, Charles University in Prague. He can be contacted at martin.raz@havel holasek .cz or martinraz@seznam.cz.
4. Mgr. (Charles University, Prague), Ing. (University of Economics, Prague). The author is a researcher at the European University Institute (Florence). She can be contacted at pavlina.hubkova@eui.eu or hubkova.pavlina@gmail.com
5. Mgr. (Charles University, Prague), LLM (Cantab), JUDr. (Charles University, Prague). The author is a stagiaire attorney at Cleary Gottlieb Steen & Hamilton LLP (Brussels). He can be contacted at tpavelka@cgsh.com or tomas.pavelka@cantab.net

rules (far exceeding the minimum EU requirements), reliance on enforceable remedies and the continuously increasing burden of legal obligations imposed on the contracting entities. As to its systemic and institutional framework, to a large extent the Czech public procurement law is purely administrative in nature. The supervision of the contract award procedures is entrusted to a centralized public authority, which issues binding decisions, which may be subject to judicial review, and which may impose administrative fines.

Historically, the very first phase of Czech economic transformation (post-1990) has been marked by relative 'lawlessness.' Public expenditure has been governed by few fiscal rules. Despite rapid privatization, many major providers of works, supplies and services (especially utilities) have also long been in national ownership. However, following the conclusion of European Association Agreement[6] in 1993, the first specific legislation dealing with public procurement was adopted – the Act No. 199/1994 Coll., on Awarding Public Contracts. Its contents were mostly based on UNCITRAL Model Law on Public Procurement and it can be stated that since the beginning of its autonomous existence, Czech public procurement law has consisted of binding legal rules.

The narrow scope and brevity of the Act No. 199/1994 Coll., many exceptions to the obligations imposed therein, inadequate remedies and little experience with enforcement of regulation of this type soon led to a mounting criticism by the European Commission. An inadequate adoption of the procurement *acquis* by the Czech Republic is mentioned in many pre-accession reports. The Act No. 199/1994 Coll. has consequently been amended several times. A major amendment intended to bring it in line with the (then) contemporary European directives on public contracts has been adopted in 2000 (which e.g. included utilities among the contracting entities). Ever since, there has hardly been a year or two without any legislative changes, including a multitude of amendments and two new Acts, which replaced their earlier counterparts.

The first of these was a new Act No. 40/2004 Coll., on Public Procurement, adopted to take effect on the day of the Czech Republic's accession to the EU (May 1, 2004). This Act was purported to reflect the Directives 71/304/EEC, 89/665/EEC, 92/13/EEC, 92/50/EEC, 93/36/EEC, 93/37/EEC, 93/38/EEC, 97/52/EC, 98/4/EC and 2001/78/EC. It has later been subject to several major amendments in order to achieve this declared purpose. No at-

6. European Agreement establishing an Association between the European Communities and their Member States, on one part, and the Czech Republic, of the other part from 3 October 1993.

tempt has however been made to incorporate the 2004 reform of the EU public procurement law (i.e., Directives 2004/18/EC and 2004/17/EC), due to perceived structural differences. Instead, a new Act No. 137/2006 Coll., Public Procurement Act (hereinafter also referred to as '*PPA*') has been adopted. It is still in force – with 19 amendments adopted, several others rejected and one additional amendment recently adopted by the so-called legislative measure of the Senate which (if confirmed by the newly to be elected Chamber of Deputies) would enter (in its main part) into force as of 1 January 2014.[7]

In the future, another new Act is expected to replace the current rules in order to transpose the prospective new EU Directives. With some exaggeration, the post-2000 situation in the area of Czech public procurement law may be described as a 'permanent revolution.'

As noted above, reasons for frequent changes to the 2006 PPA no longer include solely the approximation to EU law (or other external causes, such as the need to adapt the PPA to other reforms of Czech civil, administrative or fiscal law). The perceived need to prevent foul play and outright corruption in public tenders has driven the gradual tightening of the public procurement rules, far beyond what is required under the EU law.

To illustrate the above, the PPA applies basically the same set of rigid rules to public contracts which are covered by the relevant EU Directives as well as to contracts that are not covered at all or that are not covered fully by the said Directives. The PPA governs tenders above and below financial thresholds stipulated by the applicable EU legislation. Broader exclusions are only made for *de minimis* tenders[8] and below-threshold tenders under Directive 2004/17/EC. The PPA is also fully applicable to contracts for services according to Annex II.B of Directive 2004/18/EC. In addition, the PPA makes every single decision of a contracting entity subject to a complaint procedure, often open to any supplier with an interest in the matter (not only the bidders). This allows for appeals and judicial disputes in all such issues and considerably prolongs all procurement processes where a complaint appears.

Furthermore, transparency obligations of the contracting entities are officially intended to place all the prospective bidders on totally equal footing, which is difficult to guarantee in all respects in practice and complicates con-

7. The legislative measure of 10 October 2013, adopted by the Senate's resolution No. 353.
8. Currently contracts with below CZK 3 mil. for works, CZK 1 mil. for supplies and services, but see below.

tract negotiations in the few procedures where negotiations are allowed. Some of the more controversial 'anti-corruption' measures introduced into the PPA in recent years, which have later been abolished (or should be abolished under the amendment currently in official preparation) have included prohibition of participation of suppliers with bearer shares in public tenders,[9] obligatory cancellation of tenders with only one bidder (with some exceptions), or reduction of *de minimis* tender threshold for works from CZK 3 mil. to a mere CZK 1 mil.[10] The frequent legislative changes, of course, do nothing to increase legal certainty of stakeholders. Also, the recent ideology of absolute mistrust to public officials and the resulting stringency of the Czech public procurement rules may actually lead to unintended consequences, such as perverse incentives to avoid application of the PPA. At present, the above problems and challenges cannot be considered resolved.

As to the systemic context of the Czech public procurement law, there is still some confusion in legal theory as to whether the contracting processes and remedial complaint procedure (at the stage resolved by the contracting entity itself) are public-law or private-law in nature. Nevertheless, formal appeals against decisions of the contracting entities are heard in standard administrative proceedings by a public authority, which makes binding decisions on rights and obligations of the participants and can impose administrative fines for breaches of the PPA (the participants, in turn, having enforceable procedural rights guaranteed by law).

This supervision of the contract award procedures has been entrusted to the Office for the Protection of Competition (Úřad pro ochranu hospodářské soutěže, hereinafter the '*UOHS*'). It is a centralized body located in the city of Brno (with a branch office in Prague), formally independent from the executive government, the other key competency of which includes competition law. Pre-accession, the UOHS also supervised state aid law. Decisions of the UOHS in public procurement matters may be appealed to its chairman, whose decisions, in turn, may be challenged in the administrative (judicial review) courts. In the first instance, the Regional Court in Brno (Krajský soud v Brně) has jurisdiction, extraordinary judicial appeals being resolved by the

9. This measure was adopted despite expert warnings that it is likely in violation of EU free movement law, as companies with bearer shares lawfully exist in several EU member states (including the Czech Republic). Later, it has been abolished and replaced by certain ownership disclosure requirements.
10. The above referred legislative measure of the Senate which is to enter into force as of 1 January 2014 increases the limits somewhat: 2 mil. CZK for supplies and services contracts and 6 mil. CZK for public works contracts.

Supreme Administrative Court (Nejvyšší správní soud). In legislative matters, the PPA and its amendments are adopted by the Czech Parliament, whilst the executive government body responsible for public procurement legislation (its preparation, implementing decrees in detailed matters, monitoring of relevant EU obligations, etc.) is the Ministry for Local Development (Ministerstvo pro místní rozvoj). This institutional framework has remained relatively stable, although it has of course developed gradually as the country's transformation progressed.[11]

The boundaries of EU public procurement law

Question 2

Public contracts are currently defined in Section 7 of the PPA in line with the EU Directives. Accordingly, public contracts are defined as contracts for pecuniary interest concluded between a contracting entity and one or more suppliers and having as their subject-matter the supply of products, the provision of services or the execution of public works. The public contract must be in writing if it falls under the procedures in the PPA.

The above statutory definition was, for instance, explicated in detail in Regional Court in Brno's judgment Ref.No. 62 Ca 25/2009-159 of 2 February 2011.[12] In that case, the court held that the definition of public contracts consists of the following six conditions. First, a public contract is a contractual relation between a contracting entity (as defined in Section 2 of the PPA) and a supplier or suppliers. Second, the subject-matter of the contract is the supply of goods, public services or public works. Third, the contracting entity demands the performance under the public contract. Fourth, the performance is to be delivered by the supplier. Fifth, the supplier demands reimbursement for its performance, and, sixth, the reimbursement is to be provided by the contracting entity. These six conditions are cumulative.

The decision-making practice of UOHS and case-law of the respective Czech courts dealt primarily with the element of the 'pecuniary interest'. In addition, there were several cases which dealt with the distinction between

11. E.g., the judicial framework had stabilized with the advent of 2002 reforms and a new Administrative Procedure Code has applied to UOHS since 2004.
12. Available at <www.nssoud.cz> or <www.uohs.cz>. Similarly, see also the judgment of Regional Court in Brno Ref.No. 62 Af 36/2011-127 of 4 August 2011.

public contracts under the PPA and public concession contracts pursuant to the Act No. 139/2006, on Concession Agreements and Concession Proceedings (the Concession Act), as amended (hereinafter the 'Concession Act').

Firstly, it is worth mentioning that UOHS dealt numerous times with contracts regarding insurance brokers and cases when they were not paid directly by contracting entities but they have been receiving 'reimbursement' indirectly via commissions from the insurance companies whose insurance policies they procured for the contracting entity in question. Leaving aside potential conflict of interest on the side of insurance brokers, there were cases when contracting entities entered into such 'gratuitous' contracts with insurance brokers and they did not follow the PPA arguing that the contracts in question were not for pecuniary interest as there was no direct payment provided by the contracting entity.

UOHS rejected this line of arguments and consistently held that such seemingly gratuitous contracts with insurance brokers were 'public contracts' and, if the respective threshold values were exceeded (on the basis of calculation of estimated value of commissions to be received by the insurance broker over the duration of the contract), needed to be subject to procurement procedures under the PPA.

For instance, UOHS held in this regard that:

> 'services of an insurance broker are not provided to the contracting entity for free but for pecuniary interest in the amount of the commission (brokerage). The payment of the commission is ensured in that way that the broker is paid by that insurance company with which the contracting entity had concluded the insurance contract in question. (...) The Act does not define the meaning of the 'pecuniary interest' but it would be too purpose-driven to understand the pecuniary interest only in the sense of a direct payment by the contracting entity to the supplier.'[13]

The above UOHS decision-making practice was confirmed also by the Czech courts, including both the Regional Court in Brno[14] and the Supreme Administrative Court.[15] In this regard both UOHS as well as the courts referred also

13. Decision of UOHS Ref.No. S257/2008; available at <www.uohs.cz>. Similarly see number of other UOHS' decisions: Ref.No. S565/2011 of 16 May 2012, S447/2011 of 22 February 2012 or S159/2007 of 23 July 2007.
14. E.g., judgment Ref.No. 62 Ca 30/2008-190 of 11 August 2009; <www.nssoud.cz> or <www.uohs.cz>.
15. E.g., judgment Ref.No. 2 Afs 132/2009-275 of 26 January 2011; <www.nssoud.cz>.

to CJEU judgment in C-220/05, *Jean Auroux v Commune de Roanne*[16] as an authority confirming their view.

Similar line of arguments was used also in other cases where the 'advantage' (consideration) to the supplier was provided indirectly via third persons. For instance, the Regional Court in Brno found that also a contract the subject-matter of which was a lease of part of enterprise (laboratories) by a contracting entity (a regional group of hospitals) to a subsequent supplier of laboratory services to the said hospitals (in connection with treating patients of those hospitals) while the supplier was expected to be reimbursed by health insurance companies for such laboratory services was a public contract.[17] The court again argued that the payment was provided indirectly because the contracting entity in question effectively transferred the possibility to exploit payments for the laboratory services to a private supplier. In this regard, the court found that it was not relevant that the payments to be received by the supplier in question were not provided to detriment of the contracting entity's budget but were financed through public health insurance (a different public budget).

A similar issue was also addressed in several cases which concerned legal qualification of contracts with a supplier of 'food vouchers' which were meant to be distributed primarily to socially needed persons. The legal issue that arose was what kind of payments to be received by the supplier (issuer) of the food vouchers must be included into the notion of consideration for the provision of the respective services and, hence, potentially also included into the estimated value of the public contract in question. In case 'Food Vouchers Litvinov', the UOHS held (similarly as in 'insurance brokers' cases) that even payments to be received by the supplier from commissions to be paid to him by third persons (typically retailers which would be accepting payments by the food vouchers[18] for their products) were to be included into such notion and should have been included into 'estimated value' of the public contract.[19]

In the subsequent judicial review proceedings the Regional Court in Brno came to a different view. It concurred with UOHS that the notion of pecuniary interest may be fulfilled even in case when the payment is not provided

16. ECR [2007] I-385.
17. Judgment Ref.No, 62 Ca 31/2009-86 of 3 February 2011.
18. Food vouchers are a kind of payment instruments which may be used in outlets of certain retailers for payments for various products, usually food and drinks.
19. See decisions of the UOHS Ref.No. S175/2008 of 30 October 2008 and Ref.No. R195, 196/2008 of 24 March 2009; <www.uohs.cz>.

by the contracting entity itself and, hence, that even an indirect payment from different resources may be included under such notion when it follows from the contract concluded between the contracting entity and the respective supplier. Yet, it emphasized (and to that extent disagreed with UOHS) that the resources funding the supplier's performance in question must be public. In other words, the 'indirect payment' must be to the detriment of public resources. The court then did not consider the commissions to be received by the issuer of food vouchers from third private parties (which commissions were not in any way borne by any public budget) to fall under the notion of 'consideration' or pecuniary interest for the purposes of the PPA.[20]

In the same case, the UOHS (which was to decide anew in the same case) was, however, reluctant to accept the Regional Court's view and in its new decision issue after the Regional Court's judgment it held again (with reference to the above mentioned CJEU *Jean Auroux* case) that:

> 'ECJ emphasized when construing estimated price of public procurement contracts the view of the tenderers for that public contract which are – when forming an interest in participation in the tender –incentivized by the total amount of financial payments that they might receive irrespective of their source (i.e. irrespective of whether those payments will come from public or private resources or some proportion between thereof). ... Accordingly, the total value of the public contract in question from the point of view of an interest of a potential supplier that is relevant for determination of the method of its award and, as the case may be, for calculation of deposit fee, and not only a part of that value which would have had an impact on public resources.'[21]

Very similar facts were dealt with also in a case concerning food vouchers for State Agricultural Intervention Fund. In that case the issue, fortunately, ended up before the Supreme Administrative Court which seems to take a middle way between the opinion of the Regional Court in Brno and the UOHS. The Supreme Administrative Court disagreed with the opinion of the Regional

20. Judgment of the Regional Court in Brno, Ref.No. 62 Ca 25/2009, 2 February 2011; <www.nssoud.cz>. In this regard see also UOHS decision Ref.No. S451/2011 of 9 December 2011 (concerning the so-called 'S-Card' – a payment card to be used by socially needed persons) where UOHS held that the contract in question tendered by the Ministry of Labour and Social Affairs was not a public (procurement) contract subject to the PPA because no payments to the detriment of public budget were contemplated. The payments which the issuer of the payment card (a bank) were meant to receive from third parties (mostly interbank fees or merchant fees for payments via payment cards) did not count in for the purposes of the public contract definition as they were not to the detriment of public budget.
21. UOHS decision Ref.No. R195, 196/2008 of 14 May 2012; <www.uohs.cz>.

Court that the estimated value of a public contract shall contain only such payments that have direct or indirect impact on public resources. Accordingly, even payments in favor of the supplier that do not have such impact may be included. However, the court also concluded that the potential revenues from third persons may be included into the estimated value of the public contract only if there is a specific relation between the payments from third persons and the specific public contract in question. On the basis of the fact, that the issuers of food vouchers do not contract for commissions with third persons on the basis of specific public contracts but rather on the basis of long-term contracts independently from any public procurement proceedings and procurement contracts, the Supreme Administrative Court found that the commissions from private third parties should not have been included into the 'estimated value' of the public contract in question.[22] This seems to be the current view on the notion of 'pecuniary interest' for the purposes of definition of public (procurement) contract.

In the above mentioned 'food vouchers' saga, the UOHS also dealt with the issue whether the contracts in question should not have been classified as public concession contracts rather than public (procurement) contracts. Pursuant to Section 16 of the Concession Act, the concession contract is defined as a contract under which the concessionaire undertakes to provide services or perform works and the contracting entity undertakes to allow the concessionaire to receive profits ensuing from the provision of such services or from the use of the performed works. In this connection UOHS held the crucial distinction between the public contract under the PPA and concession contract under the Concession Act depends on the allocation of risks between the concessionaire and the contracting entity. In order to be a concession contract rather than public (procurement) contract and, hence, be subject to a (slightly) more lenient regime of Concession Act (instead of the PPA), the concessionaire has to bear substantial part of risks associated with the receipt of profits from the provision of services or use of works. In the above mentioned food vouchers saga, the UOHS considered the risks borne by the issuer of food vouchers too low for the contract to be considered a concession contract.[23] The same legal test (allocation of risks) was applied by UOHS in number of other cases where it dealt with a distinction between a concession contract

---

22. Judgment of the Supreme Administrative Court, Ref.No. 8 Afs 12/2012 of 29 January 2013; <www.nssoud.cz>.
23. UOHS decision Ref.No. S175/2008 of 30 October 2008; <www.uohs.cz>.

and a public (procurement) contract.[24] That legal test is, in principle, in line with the approach to that issue in the EU.

Question 3

The Czech Republic transposed directly the gist of the relevant case-law of the CJEU in the field of in-house arrangements[25] into its legal order. In-house contracts are, thus, explicitly exempted from the scope of application of the PPA pursuant to its Section 18(1)(e). The exemption covers provision of supplies, services or public works to a contracting authority by a person which performs substantial part of its activities for the benefit of the contracting authority and the contracting authority holds exclusive ownership rights in that person. The said provision of the PPA also stipulates that the contracting authority holds exclusive property rights in a certain person in this sense, *inter alia*, when it controls all voting rights arising from an equity holding in such a person.[26]

The above two conditions must be fulfilled cumulatively. Pursuant to the guidelines issued by UOHS with respect to 'in-house contracts',[27] the requirement that the contractor shall perform substantial (or predominant) part of its activities for the benefit of the contracting authority is to be construed in accordance with the applicable case-law of the CJEU. Hence, the contractor should pursue its essential activities for the contracting authority and its other activities shall be rather marginal. Nonetheless, there is no clear-cut *ex ante* rule which would predetermine when this condition is fulfilled. Its (non-)fulfillment must be verified on a case-by-case basis.

---

24. See, e.g., UOHS decision Ref.No. S212/2009 of 8 February 2010; <www.uohs.cz>.
25. Namely, judgments in cases C-107/98 Teckal, C-26/03 Stadt Halle, C-340/04 Carbotermo, C-295/05 Asemfo.
26. Another example explicitly mentioned in the PPA relates to the special Act No. 77/1997 Coll., On State Enterprise, as amended. State enterprises are special legal entities (which are not corporations under the Czech Commercial Code) controlled exclusively by the State and which usually do not have their own property but only manage property of the State. In this respect the mentioned Section 18(1)(e) of the PPA provides that the respective condition of 'exclusive property rights' is fulfilled also when the person performing the public contract is entitled to manage assets of the contracting authority in question, it possesses no assets of its own and the management of assets of that person is exclusively controlled by the contracting authority.
27. Available at <www.uohs.cz>. The said guidelines were issued when the applicable wording of the said exemption was different in certain respects (the guidelines related to the wording applicable until 15 September 2010) but the emphasis on the reliance on EU case-law is still relevant.

The said statutory provision does not deal with a situation also addressed in the CJEU case-law,[28] namely joint control by several contracting authorities over the respective in-house entity and it is questionable whether this 'defectiveness' of statutory wording may be overcome by interpretation only (or whether a statutory amendment would be required). At the same time, we are not aware of any reportable case before UOHS which would deal with such application of the 'in-house exception' in case of joint control by several contracting authorities.

In addition, the emphasis on the holding of exclusive ownership rights might seem insufficient also in another respect, namely that there may be situations when formal 100% ownership need not be equivalent to control which is similar to that exercised over own departments of the contracting authority as required by the CJEU case-law, esp. if the in-house entity would enjoy a degree of independence despite the full ownership or would become market oriented.[29] Yet, on the strict reading of the above quoted provision of the PPA the formal criterion of 'full ownership' would be sufficient. This strict reading might be, however, overcome by the EU loyal construction of the said text but, again, this issue is rather untested before the UOHS or the Czech administrative courts.

In its practice, UOHS dealt with situations when there was a chain of contractual relations between contracting authorities, their subsidiaries and their private subcontractors. The limits of the applicability of the 'in-house exception' in this respect were dealt with, for example, in the case Ref.No. S101/2007.[30] The case involved construction of flats and technical infrastructure. A department (the so-called 'funded organization') of a municipality entered into a contract regarding the said public works with a limited liability company in which this municipality had 100% shares. The municipality in question as a contracting authority did not proceed in accordance with the PPA (Act No. 199/1994 Coll., at that time) and argued the award of the contract was exempted on the basis of the in-house exception. However, the respective 'in-house' contractor did not perform the contract in its entirety and used private subcontractors for parts of the works in question. UOHS held

---

28. See esp. case C-324, Coditel Brabant SA v Commune d'Uccle and Region de Bruxelles-Capitale [2008] ECR I-08457.
29. See, in this regard, Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), SEC(2011) 1169 final, Brussels, 4.10.2011 ('*WP on Public-Public Cooperation*'), p. 8 and 10.
30. UOHS decision Ref.No. S101/2007 of 9 July 2007; <www.uohs.cz>.

that given the presence of private subcontractors in the case at hand the condition for application of the in-house exception was not fulfilled and the respective course of conduct was in violation of the law.[31] The Regional Court, which was asked to review the respective UOHS decision, was of the same opinion and in its judgment Ref.No. 62 Ca 32/2008[32] it stated:

> 'In order to conclude a contract out of the scope of the PPA, the legal entity established by the municipality shall perform the subject-matter of the contract 'in its entirety'. Regarding the interpretation of this term (...), it shall be construed in a manner that the whole contract is performed by the legal entity established by the contracting municipality and it is inadmissible that this entity concludes subcontracts with other entities. Such an exception cannot be transferred to consequent relations.'

This opinion was then approved also by the Supreme Administrative Court.[33] A similar problem arose also in case Ref. No. S105/2007 and the UOHS came up with a similar finding.[34] Its decision was then approved by both the Regional Court in Brno and the Supreme Administrative Court.[35]

As far as horizontal public-public cooperation is concerned, UOHS dealt recently with it in case Ref. No. S091/2012.[36] In order to ensure reconstruction of a railway bridge, the Directorate of the Waterways as a contracting authority awarded a contract to the Railway Infrastructure Administration, a state organization (also a contracting entity). The Directorate claimed to be outside the scope of the PPA, because the relation fulfilled all conditions of the horizontal public-public cooperation, as it is defined in the Commission's WP on Public-Public Cooperation, and that it is in compliance with the case-law of the CJEU (namely, Commission v Germany, C-480/06[37]). UOHS assessed the fulfillment of the three cumulative conditions, namely that (1) the arrangement involves only contracting authorities, and there is no participation of private capital; (2) the character of the agreement is that of real co-

---

31. This finding was also confirmed by the chairman of UOHS – decision Ref.No. R142/07 of 18 February 2008; <www.uohs.cz>.
32. Judgment of the Regional Court in Brno, Ref.No. 62 Ca 32/2008-58 of 23 September 2009; <www.nssoud.cz>.
33. Judgment of the Supreme Administrative Court, Ref.No. 2 Afs 12/2010-88 of 3 February 2011; <www.nssoud.cz>.
34. UOHS decision, Ref.No. S105/2007 of 9 July 2007; <www.uohs.cz>.
35. Judgment of the Regional Court in Brno, Ref.No. 62 Ca 29/2008-42 of 19 May 2009; judgment of the Supreme Administrative Court, Ref.No. 2 Afs 128/2009-66 of 27 October 2010; <www.nssoud.cz>.
36. UOHS decision, Ref.No. S91/2012 of 19 November 2012; <www.uohs.cz>.
37. Case C-480/06, Commission v Germany, [2009] ECR I-04747.

operation aimed at the joint performance of a common task, as opposed to a normal public procurement contract; and (3) their cooperation is governed only by considerations relating to the public interest. Eventually, the UOHS concluded that the first condition was not fulfilled because on the side of the tenderer there were two external private entities which took part in the performance of the contract which meant a participation of private capital.

UOHS did not resolve many cases of this kind but it seems to follow from the reasoning of the above mentioned recent case that in the case of horizontal public-public cooperation, UOHS is prepared to proceed along the lines of the Commission's WP on Public-Public Cooperation and the relevant CJEU case-law which is spelled out therein.

Question 4 and Question 5

The above questions (4-5) are answered together, due to the overlapping character of the issues discussed.

The PPA is fully applicable to a very broad spectrum of contracts, including below-threshold tenders under Directive 2004/18/EC, or services under Annex II.B of the same Directive. The PPA applies basically the same set of rigid rules to all such public contracts, as are applicable to public contracts fully subject to the Directive 2004/18/EC. However, exclusions under Articles 14 to 16 of the same Directive are generally transposed *verbatim*. *De minimis* tenders[38] and below-threshold tenders under Directive 2004/17/EC are also exempt.

The Concession Act is also applicable to the conduct of contracting authorities, defined therein in the same manner as under Directive 2004/18/EC. The said Act regulates works *and service* concessions, as understood in the recitals and applicable provisions of the EU public procurement Directives, including certain IPPP structures, in much the same manner as the PPA regulates public contracts. Indeed, the Concession Act makes many procedural rules of the PPA applicable to works and service concessions by reference.

The legal definition of a concession agreement is fairly broad and reads as follows:

38. Currently contracts with below CZK 3 mil. for works, CZK 1 mil. for supplies and services, with prospective reduction of the works threshold to CZK 1 mil., but as mentioned above due to the legislative measure of the Senate this thresholds should (if confirmed by the newly to be elected Chamber of Deputies) increase as of 1 January 2014 to CZK 6 mil. for public works and CZK 2 mil. for supplies and services. See also question no. 1.

'By a concession agreement, the concessionaire obliges to provide services or perform works and the contracting authority obliges to enable the concessionaire to utilize the benefits stemming from the performance of services or exploitation of the works so performed, optionally together with monetary remuneration.'

The concessions covered by the Concession Act are also fully subject to fundamental principles of equal treatment, non-discrimination and transparency.

There are also cases of separate concession regulations being included in special pieces of legislation – notably the highway construction concessions under the Act No. 13/1997 Coll., on Road Communications, as amended. These are generally hitherto untested in practice, but said legislation certainly cannot exclude the applicability of fundamental principles derived from EU primary law. It is actually rather likely that the contracting entity wishing to procure such a concession would need to apply both the provisions of the special legislation and provisions of the Concession Act or the PPA.

On the other hand, there are many cases where Czech legislation grants authorization to private or quasi-private organizations to perform a specific gainful activity, which are either generally considered to be outside the ambit of procurement rules or at the borderline, as mixed arrangements.

On the far end of this scale, the awards of administrative authorizations (i.e., unilateral administrative measures) are generally neither consensual nor subject to public contract or concession award rules.[39] Please see answers to questions 6 and 7 for more details.

Significant mixed arrangements can be found in the area of administrative contracts. These, apart from administrative authorizations, are consensual, governed by Sections 159-170 of the Administrative Procedure Code and are defined as bilateral or multilateral legal acts which constitute, alter or cancel rights and duties in the field of public law. Two major types exist. The first comprises 'coordination contracts', which may be concluded exclusively between public corporations (typically, various bodies of the state and municipalities) and serve to transfer or assist in performance of their public duties, often outside of direct administrative hierarchy. The second type is 'subordination contract', which are concluded between a public corporation (authority) and another person, who could otherwise be a party to administrative proceedings, instead of a classical unilateral administrative decision. Although in legal theory, public-law content should distinguish administrative contracts from public procurement contracts, there are many cases when the situation is

39. Somewhat confusingly, however, such authorizations are often called 'koncese' ('concessions') under the accepted terminology of Czech administrative law.

not so clear. Even the coordination contracts are often concluded so that one of the parties obtains a certain service from the other party in exchange for pecuniary remuneration – a service which would otherwise need to be tendered under public procurement rules. Examples include provision of local bus transport or waste management services, which are contracted by a municipality with a private operator and then extended to an area of another municipality by a coordination contract. Little attention is usually devoted to whether such a contract may also be covered by public procurement rules or not.[40]

As to further mixed situations, institutional arrangements similar to concessions exist, which entitle a certain entity to perform a quasi-public gainful activity without any procurement procedures being held, but, to a degree, on behalf of the granting authority. Examples may be found in the field of environmental law. The Act No. 477/2001 Coll., on Packaging, as amended,[41] establishes the so-called 'authorized packaging companies,' which ensure collective compliance with the obligations of the take-back and recovery of packaging waste. Such companies work as quasi-public authorities. The Act determines strict requirements and obligations regarding internal arrangements of these companies, it defines conditions of the performance of collective compliance and it provides for the public law supervision of their activities. A similar example may be found in the Act No. 185/2001 Coll., on Waste, as amended, which governs the authorizations to operate a collective system for take-back of certain products (such as batteries or electronic equipment). In the above cases, various subjects are legally obliged to make use of collective take-back systems and may only discharge such obligations via the authorized operators, who receive remuneration either from the obligated subjects directly or from special collective funds. Little attention has been devoted to the question whether the establishment of such operators involves procurement activities or indeed, whether the operators themselves could be considered contracting authorities (and the practice is inconsistent with respect to the last issue).

---

40. Although in the above example, it is relatively clear that the (first) contract with the private operator would need to comply with public procurement rules, including the doctrine of a material change (see CJEU case C-454/06 *pressetext Nachrichtenagentur*, ECR 2008 I-04401).

41. This Act transposes Directives 94/62/EC and 2004/12/EC (on packaging and packaging waste).

The general principles of EU law: public procurement law and beyond

Question 6 and Question 7

The above questions (6-7) are answered together due to the overlapping character of the issues discussed.

As noted above, the PPA is fully applicable to a very broad spectrum of contracts, including below-threshold tenders under Directive 2004/18/EC, or services under Annex II.B of the same Directive. The PPA applies basically the same set of rigid rules to all such public contracts, as are applicable to public contracts fully subject to the Directive 2004/18/EC. However, exclusions under Articles 14 to 16 of the same Directive are generally transposed *verbatim*. *De minimis* tenders and below-threshold tenders under Directive 2004/17/EC are also exempt. There is also a special Concession Act, governing both works and service concessions and applying very similar rules thereto as are applicable to public contracts under the PPA. Please see answers to questions 4 and 5 for more details.

Fundamental principles of equal treatment, non-discrimination and transparency are still applicable to the exempt contracts under Section 6 of the PPA and the applicability of certain obligations under the EU law, as summarized in the appropriate Commission interpretative communication,[42] has, to our knowledge, not been challenged in the courts of law or by legal doctrine. However, such principles and their implications are rarely enforced, or even properly understood in the Czech legal environment. The main reasons include unavailability of formal complaint or appeal procedures in such cases and lack of awareness on the part of contracting entities and other stakeholders.[43] Nevertheless, the question whether a specific contract does constitute a public contract, or whether it is exempt from the applicability of the PPA, can

42. Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).
43. Although the Supreme Adinistrative Court held that the UOHS may exercise its jurisdiction even in *de minimis* tenders (see its judgment Ref. No. 2 Afs 132/2009 of 26. January 2006, available at <www.nssoud.cz>), UOHS rarely ever does so in practice. This judgment also affirms the applicability of the fundamental principles stemming from the EU law, such as non-discrimination, equal treatment and transparency, to *de minimis* tenders.

be and often is litigated. Please see question no. 2 for more information on the understanding of definitional boundaries of public contracts.

However, administrative authorizations (i.e., unilateral administrative measures) are generally neither consensual nor subject to public contract or concession award rules. Most often, the appropriate authorization must be granted to anybody who applies therefor and meets the criteria stipulated in the specific regulatory legislation. There is also a number of cases where the awarding body may exercise discretion (‘*správní uvážení*’), which is, however, generally subject to principles of good governance[44] rather than principles of the EU public procurement law. The Code of Administrative Procedure is usually applicable to the procedure itself, which often includes the applicant as the sole participant.

With respect to EU-like fundamental principles, Section 2(4) of the said Code stipulates that:

> ‘The administrative authority shall take heed so that the solution adopted is in accordance with the public interest, commensurate to the circumstances of the case and also, so that unwarranted differences do not arise in deciding cases with the same or similar facts.’

This provision requires that in ‘awarding’ unilateral administrative measures, the administrative authorities shall respect the principle of equal treatment and non-discrimination (nevertheless, the ‘source’ of this obligation is Czech constitutional[45] and administrative law rather than the EU law).

With respect to transparency, the situation is somewhat different – administrative proceedings are, as a rule, not public and the administrative authorities are obliged to keep the submissions and data of the participants confidential. There is no general obligation to publish all decisions on unilateral administrative measures (award of authorizations), although in many cases, special legislation will provide for mandatory listing of beneficiaries in pub-

44. The main such principles of good governance are: principle of legality, principle of conferred competences and prohibition to misuse discretion, principle of the respect of rights acquired in good faith, principle of public interest and principle of equal treatment/non-discrimination (Sections 2 to 8 of the Code of Administrative Procedure). With respect to the last principle, see below.
45. On the more general level, classical constitutional provisions prohibiting discrimination and ensuring equal treatment, due process etc., may be found for example in Articles 1, 3 or 36 of the Charter of Fundamental Rights and Freedoms (Act no. 2/1993 Coll., on promulgation the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, as amended).

licly available lists (or the beneficiaries themselves will publish their authorizations in the generic public lists such as the Trade Register).

There are also virtually no award competitions for unilateral administrative measures in practice that would be similar to the tenders under public procurement procedures. Interestingly enough, Section 146 of the Code of Administrative Procedure theoretically allows for them, as it includes a special type of administrative procedure. The '*Proceedings on choice of application'* allow for tendering of administrative measures in cases where 'permitted' by special legislation. However, as noted above, we are not aware that the provision would be used much in practice and the significance of its existence appears to be rather limited.[46]

The above remarks regarding unilateral administrative measures are, for example, true with respect to gambling. The Czech administrative authorities grant authorization to operators of gambling machines, lotteries and raffles, sports-books and betting games according to the Act No. 202/1990 Coll., on Lotteries and Other Similar Games, as amended. The award decisions are not deemed public contracts, but rather administrative decisions, within the discretion of the awarding bodies.

Public procurements and general EU law, including competition and State aids law

Question 8

Decisions by contracting authorities relating to public procurement are generally neither analyzed nor evaluated as measures imposing restrictions on the internal market. Instead, UOHS and the administrative courts concentrate on the 'simple' conformity of such decisions with domestic legislation. This,

46. In the sole available case, the Municipal Court in Prague has decided that the proceedings regarding the authorization to discharge waste water with multiple applicants are not 'proceedings on choice of application'; however, if the administrative authority refuses the other applicants solely for the reason of granting one of the applications, it acts in breach of the principles of equal treatment and non-discrimination enshrined in Section 2(4) of the Code of Administrative Procedure. See judgment of the Municipal Court Ref. No. 7 Ca 253/2007-84 of 6. June 2008, Supreme Administrative Court Decisions Collection (Sb.NSS) 1/2009, p. 23.

however, includes the analysis of conformity of such decisions with the European principles of equal treatment, non-discrimination and transparency.

A situation similar to such as described in *Contse* (C-234/03) would likely be analyzed as a breach of the non-discrimination principle. In recent series of cases, the Vysočina region has imposed a criterion for qualitative selection of bidders that required road construction contractors to submit, as part of their bid, evidence of ownership or a supply contract with the operator(s) of asphalt packaging facilities within a certain distance from the construction site (expressed as max. delivery time). In addition, some of the facility operators seem to have purposefully refused to contract with the claimant. While the UOHS has originally endorsed the above criterion, both the Regional Court in Brno (an appellate court against the decisions of UOHS) and the Supreme Administrative Court found that such a criterion was *per se* discriminatory and disproportional to the type, extent and character of the public contract. No analysis regarding restrictions on the internal market appeared in the decisions.[47]

The prevailing expectation of the Czech contracting authorities, most legal advisors and regulatory bodies is that the decisions of the contracting entities conformant to the requirements of the PPA (which should, in turn, be conformant to the relevant EU directives) do not impose any restrictions to the internal market and, hence, no additional analysis is necessary. This view may be afforded some credence by the CJEU decision in C-5/94 *Hedley Lomas*, according to which where harmonized rules are in place, a decision or any action by a Member State or its bodies cannot be justified otherwise than according to the respective harmonization measure.[48] In any event, a national measure liable to hinder the exercise of fundamental freedoms, which would be applied in a discriminatory manner and would result in disparate treatment of bidders, could not be justified by imperative requirements of public interest.[49]

From the point of view of the regulatory bodies, an eventual ruling that a procurement decision represents a measure imposing restrictions on the inter-

---

47. See decision of the Supreme Administrative Court 1 Afs 69/2012 of 28 March 2013, decisions of the Regional Court in Brno 62 Af 1/2011 of 19 July 2012 and 62 Af 74/2010 of 21 June 2012 and decisions of the UOHS R084,085/2010 of 2 November 2010, S079,087/2010 of 21 June 2010 R086/2010 of 7 October 2010 and S082/2010 of 21 June 2010, all available at <www.uohs.cz>.
48. Judgment of the CJEU C-5/94, R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd, [1996] ECR I-02553.
49. Judgment of the CJEU in C-55/94 Gebhard [1995], ECR I-04165.

nal market would be fraught with difficulty, even those of constitutional nature. The competence of UOHS to make such a conclusion is far from clear (and the PPA does not stipulate any direct sanctions connected therewith). The administrative courts, in turn, do not adjudge cases directly and do not make new findings, but serve as judicial review bodies against UOHS decisions. On the other hand, the principles of equal treatment, non-discrimination and transparency are directly enshrined in Section 6 of the PPA and there are no doubts as to whether the UOHS has competence to quash decisions of the contracting authorities for violating these principles.

Czech contracting entities generally feel almost an unfettered freedom of choice as to the determination of their purchasing needs, whether based on political or business priorities. An influential factor in recent years has, however, been the (non)availability of EU funding, primarily Structural Funds financing. As to the selection of the contractor, many contracting entities consider that they may decide freely, including on the basis of regional or local preferences, in cases exempt or not fully covered by the procurement legislation (*de minimis* tenders, excluded contracts and negotiated procedures without publication). Although the principles of equal treatment, non-discrimination and transparency (and consequently the non-discrimination test referred to above) apply in these cases, this has not been considered sufficient by the national legislator. Consequently, there has been a gradual tightening of rules, esp. with regard to *de minimis* tenders.

More broadly, while it is true that most of the public contracts are awarded to undertakings established in the Czech Republic, this should not be overemphasized. In many cases, such undertakings are part of multinational groups based in Western Europe. This is especially true in the most lucrative public procurement sectors such as construction and ITC. Indeed, nearly all major construction companies, most of the telecommunication operators and a great part of significant IT contractors are in foreign ownership. One would also struggle to find any large tender whatsoever without participation of local branches of European undertakings, at least above the regional procurement level. Consequently, in today's liberal economy, the classical test of 'measures imposing restrictions on the internal market' could be practically relegated to the SME sector and the comparatively infrequent cross-border supply situations. It could be argued that due to the focus of the public procurement legislation on ensuring the level playing field amongst all undertakings, including those 'domestic' without regard to their ultimate ownership, the 'simple' non-discrimination test (without the additional elements of 'measures imposing restrictions on the internal market') is more fitting to handle the situations described above.

Question 9

The Czech public procurement law generally follows EU public procurement directives and, hence, it is difficult to highlight any specific Czech public procurement rules that may lend themselves to abuse and, thus, potentially limit competition.

One might, however, point out that in cases of contracts in markets with several sophisticated suppliers, it may be relatively easy for the not chosen supplier to block or, at least, significantly prolong the actual conclusion of the contract with a contracting authority. That state of affairs may be considered to be limiting competition (in the sense of a process that should lead to a maximization of consumer welfare) as the result of such an 'abuse' of procedure (or regulatory gaming) is that it makes contracting entities more reluctant to procure supplies form the market (sometimes even vertical integration especially in the utilities sector may be preferred), it takes longer for contracting entities to procure supplies and it costs the contracting entities a lot to successfully pass through such a process. Hence, resources are wasted.

At the same time, the public procurement rules are very complex in the Czech Republic, imposing a lot of requirements upon the contracting entities which are difficult to comply with in all respects in practice, and the PPA requires much broader scope of contracts to be tendered under it than it would be required under the EU directives (e.g. the threshold for contracts to fall under the obligatory public procurement regime is very low, even the non-priority services need to be tendered under the PPA, award of concessions on both public works and services must follow much the same rules as public procurement contracts etc.). In addition, the general rule that an award procedure must be cancelled if there is just one supplier who successfully submitted a final bid[50] yet again leads to propulsion of procedures and gives a scope for 'regulatory gaming' by participants who would not be ready to provide the demanded product in question but are rather interested just in blocking the contract for their competitors.

The above-mentioned abuse of procedure might have been dealt with if the rules on standing of complainants would allow exclusion of the complainants that do not show genuine interest in the public contract in question. Even though the wording of the Czech PPA would allow for such a construction,[51] the practice (esp. before UOHS) is such that it interprets the standing

50. Section 84(1)e PPA.
51. Section 110(1) of the PPA defines persons, which have standing to lodge complaints before UOHS in much the same way as the relevant EU Directive, i.e. persons having

extremely broadly.[52] Even the bailment payment does not represent a sufficient deterrent against such abuse of procedure given that it is not that high[53] and especially given the fact that UOHS is anyway quite prone to initiating proceedings on its own (*ex officio*) on the basis of a simple motion (without a formal submission by the affected supplier). The overall situation is then aggravated by the relatively high willingness of UOHS to issue interim injunctions suspending the procedure or preventing the contracting entity from entering into the public contract in question until the procedure before it (which may take several months or even more) is finally over. UOHS shall, in our view, be more reluctant when issuing interim injunctions and in all cases it should properly substantiate why the injunction is so needed (such proper substantiation is quite lacking in the current practice of UOHS).

On the basis of UOHS practice in competition law matters[54] it seems that bid rigging is not uncommon in the Czech public contract award procedures. Such cases should be primarily dealt as hard-core cartels and prosecuted accordingly. Recently, for instance, three companies active in the waste disposal market have jointly lodged a complaint against an award of contract to allegedly suspiciously low tender price, and they were finally found by the UOHS to have committed bid rigging by entering into a price fixing cartel. The investigation under the Czech Competition Act (Act No. 143/2001 Coll., as amended) in that case revealed series of prohibited agreements on the country-wide level.[55] Further bid rigging investigations were initiated in the fields of medical technologies, agriculture and farming industry etc.

It is notoriously difficult to investigate and prove cartel cases (incl. bid rigging) without leniency applications (as was, for instance, the case in the

---

or having had an interest in obtaining a particular public contract and who had been or risks being harmed by the alleged infringement.

52. For example, see the decision of the UOHS R158/2009 of 15 July 2010.
53. In order to obligatory start procedure before UOHS on the basis of an application, the applicant has to pay a deposit (bailment) in the amount of 1% of the tendered price, with the lower limit 50 thousands and upper limit 2 million Czech crowns. Even UOHS seems to support increase in the upper limit so as to limit the regulatory gaming on the part of applicants; Martin Švanda, *Does public procurement need another amendment?* UOHS the Information paper No. 1/2013 on 'Public Procurement Contracts', May 2013, p. 10; <www.uohs.cz>.
54. In the Czech Republic, UOHS is empowered to deal with both public procurement law matters as well as with competition law matters. Different departments within UOHS are responsible for such tasks.
55. The decision of UOHS on the public procurement part of the case was Ref. No. S275/2010 of 23 May 2011, and the cartel investigation was closed by a decision Ref. No. S346/2010 of 19 November 2012.

above-mentioned waste disposal case). And yet, one might suspect that some steps by UOHS may be counterproductive in this regard. For example, in multiple Lesy ČR (a forestry company[56]) cases the contracting authority imposed an obligation on tenderers to disclose any agreements with subcontractors. This was intended to equip the contracting authority with better information about the companies actually performing a substantial part of the public contracts in question. However, the UOHS and the Regional Court in Brno alike ruled that such a requirement is in violation of the PPA rules.[57] It was only the Supreme Administrative Court, which subsequently ruled that when the PPA does not preclude such a requirement of disclosure, and it does not breach principles of non-discrimination and transparency, contracting authorities may include it in tender documentation.[58]

Question 10

As the EU Treaties leave a broad margin of discretion to the Member States in defining which services fall into the category of SGEI,[59] UOHS enumerates some of them, including public transportation, postal services, energy, waste disposal and water supplies, financial services, broadcasting, broadband infrastructure, some healthcare and social services. That list is, of course, only indicative and the Czech law does not provide any legislative definition or limitation as to what activity might be a SGEI.

Where the outsourcing of SGEI is a public contract, it must be in principle tendered under the PPA provided that the relevant thresholds are met. As regards the state aid elements involved in awards of SGEI, the EU state aid law is directly applicable and UOHS, in its role of advisory public body in the area of state aid, seeks to explain the requirements and limitations following from the EU state aid regime to both public bodies and market participants.[60]

56. A state owned company administering forests in the ownership of the Czech Republic.
57. Decision of UOHS Ref. No. R102/2008 of 26 September 2008, judgment of the Regional court in Brno Ref. No. 62 Ca 94/2008-130 of 27 May 2010.
58. See, the judgments of the Supreme Administrative Court of 30 September 2011, Ref. No. 5 Afs 78/2010-195, and of 19 October 2011, Ref. No. 5 Afs 77/2010- 156; <www.nssoud.cz>.
59. Article 14 TFEU, together with the Protocol No. 26 on Services of General Interest, Article 1.
60. E.g. UOHS published in cooperation with the Ministry of Regional Development a Manual for SGEI’s, available in Czech at http://www.uohs.cz/download/Sekce_VP/Zpravy/Manual-sluzeb-obecneho-hospodarskeho-zajmu.pdf.

In this regard UOHS refer to the well-known Altmark criteria and subsequent instruments issued by the European Commission. There are two reports on the implementation of the old Commission Decision under the Altmark Package of 2005 in the Czech Republic.[61]

Special award procedures, incl. direct awards of contracts and/or concessions regarding SGEIs are provided for, for example, in the following sectors: public transportation, healthcare, telecommunications, postal services, waste disposal and public road concessions.

Public transportation

Concessions in public transportations may be awarded directly on the basis of Public Passenger Transport Services Act,[62] in line with the Regulation 1370/2007/EU,[63] where they are awarded to internal operators of public transportation or in other special cases.[64] When this is not the case, such contracts may be awarded only after a competitive tender procedure. The Public Passenger Transport Services Act is for this purpose a *lex specialis* to the PPA and thus provides a self-standing special competitive procedure for awarding public transportation contracts, albeit in certain cases it refers to specific provisions of the PPA which are to be applied directly. The supervision over the tender procedures under the Public Passenger Transport Services Act is entrusted to the UOHS.[65]

Healthcare services

In the field of healthcare services, the hospital treatment is usually provided by facilities (hospitals) owned by the state or by regions. The financing of such institutions depends on whether the function in question falls within the self-government competence of regions or within the competences delegated by the state. In the first case, the financing of the services will be covered directly from regional budgets, in the second case, the state reimburses the re-

---

61. 2009 -2011 report can be found at http://ec.europa.eu/competition/state_aid/public_services/2009_2011/czech_republic_en.pdf, the 2006-2008 report at http://ec.europa.eu/competition/consultations/2010_sgei/cz_cs.pdf
62. Act No. 194/2010 Coll., as amended.
63. Regulation 1370/2007 on public passenger transport services by rail and by road, OJ L 351/1.
64. Section 18 et seq. of the said Act.
65. Section 25 et seq. of the said Act.

gions for carrying out its tasks in public interest. In any way, from the public procurement perspective the legal form of such transactions will usually be either 'in-house contracts' or public-to-public cooperation contracts.

As opposed to general hospital treatment, the facilities for ambulatory treatment are contracted out by regions on the basis of special tender procedure provided for by the Public Healthcare Insurance Act.[66] Reimbursement for ambulatory healthcare services is provided by public healthcare insurance companies on the basis of the contracts awarded in that procedure. The Act contains detailed requirements on the offers, composition of the commission for evaluating the offers etc. The outcome of the tender is a recommendation by the commission rather than a conclusion of the contract itself. Such a recommendation does not confer an enforceable right of the providers of medical services to enter into a contract for reimbursement with a healthcare insurance company, but a contract for reimbursement can be concluded only on the basis of such a recommendation.

The tender procedures under the Public Healthcare Insurance Act are considered as administrative procedures (as they are in fact run by regional authorities) and as such are supervised by the supervisory authorities in the context of administrative supervision of public service.

Telecommunications

The Electronic Communication Act[67] requires running a special tender procedure in cases where the Czech Telecommunication Office wants to impose an obligation of universal service. Among these obligations are the duty to provide connections to public telecommunication network in certain areas, to regularly publish the list of telephonic contacts etc.[68] The Act provides couple of special provisions on the procedure, which is, however, generally governed by analogy to the provisions on public tender for commercial contracts in the Commercial Code.[69] In case no undertaking submits a bid in the procedure for selection of a provider of universal service, the Office may impose such a service to an undertaking it considers fit for the task.

66. Act No. 48/1997 Coll., as amended, Section 46 et seq.
67. Act No. 127/2005 Coll., as amended.
68. Ibid, Section 38.
69. The Commercial Code, Act No. 513/1991 Coll., as amended, Sections 281 to 288.

Postal services

A license for provision of postal services on the territory of the Czech Republic may be awarded on the basis of a tender procedure provided for by the Postal Services Act.[70] The procedure is run by the Czech Telecommunication Office, and again, where no undertaking participates in the procedure or no tenderer was selected, the Office can impose the license on the undertaking best fitted to bear the obligation of public postal service. The award procedure is conducted and supervised under the Code of Administrative Procedure.[71]

Waste disposal

In this case there are special statutory provisions which provide for a detailed self-standing administrative procedure for licensing waste disposal facilities, including the length of the concession (maximum 4 years) and other requirements on qualitative assessment of applicants.[72]

Public Road Concessions

Under Czech law there are special provisions dealing with public road concession contracts, meaning contracts (incl. PPP or PFI type contracts) pursuant to which a private operator would build, operate and/or maintain public highways and roads. Generally, the respective public contracting authority (e.g. the Directorate of Roads and Highways of the Czech Republic) may use 'normal' public procurement contracts in this regard. But if it would want to include some PPP elements in such contracts, it should follow special provisions in the Act on Road Communications.[73] As regards, the choice of such concessionaires the said Act, however, refers to the procedure for awarding public contracts under the PPA. There are, however, various additional requirements provided in the said Act, e.g. Section 18e provides a detailed list of provisions, which must be incorporated into the concession contract, thus creating a self-standing type of a public contact in this context as well.

70. Act No. 29/2000 Coll., as amended, Sections 21 et seq.
71. Act No. 500/2004 Coll., as amended.
72. Act No.185/2001 Coll., as amended, Section 14.
73. Act. No. 13/1997 Coll., as amended, Sections 18a to 18f.

Strategic use of public procurement

Question 11

The Czech central government's tendencies to achieve strategic policy aims through public procurement have actually been quite pronounced, if not exactly reflected by the contracting entities at large. Environmental and social policy aims are, however, not at the forefront of the public debate and may even be overshadowed by the more intensely pursued priorities, such as the effectiveness and overall reduction in public spending, the 'fight against corruption,' or the support of (Czech, or local) industries. For example, there has been a serious debate on making the award criterion of lowest bid price mandatory in many tenders, which would mean the prohibition of more complex criteria such as, for example, life cycle costs. On the other hand, Czech contracting entities generally feel wide freedom of choice as to the determination of their purchasing needs, whether based on political or business priorities. An influential factor in recent years has, however, been the (non-)availability of EU funding, primarily Structural Funds financing, for certain types of projects and priorities only. Please see the answers to questions no. 1 and 8 above.

As to the legal framework for environmental and social aims, the PPA provides in its Section 78 that the contracting authority may award the contract based on either the lowest price criterion or the best economically advantageous offer criterion. The second alternative may comprise partial award criteria concerning the impact on environment or the impact on employment of disabled persons, or other criteria, insofar as they are linked to the performance of the public contract in question. The list of partial criteria in Section 78(4) is only indicative.[74] A recent amendment, however, prohibited the use of 'contractual conditions securing the obligations of the supplier, or payment conditions' as partial award criteria.[75] This actually makes the use of criteria such as 'lowest life cycle costs' quite difficult because (arguably) it

---

74. As confirmed e.g. by the decision of UOHS Ref.No. S33/05 of 15 April 2005; <www.uohs.cz>.
75. This happened on the basis of negative experience with over-use of evaluation of the highest amounts of contractual penalties offered by the bidders. In many cases, the penalties offered were unrealistically high, exercising a negative leverage effect with respect to the other award criteria (especially the bid price).

may even be controvesial for contracting entities to take even a simple payment calendar into account.

Promotion of 'green public procurement' by other instruments has a surprisingly long tradition. Already in 2000, the government decision no. 720 was intended to promote the sale and use of environment friendly products. The decision specifically recommended inclusion of 'environmental effectiveness' among the award criteria in procurement procedures. The government adopted another decision in 2010 (no. 465), endorsing a rather timid document entitled: '*Rules on applying environmental criteria in awarding public contracts and purchasing by the public administration and local governments*'. These rules are internally binding on the public authorities subordinate to the central government and of persuasive effect only as far as the independent municipalities, regions and other decentralised contracting authorities are concerned. In other words, these rules are of soft law nature only and their impact in practice is quite limited and hard to measure. There are several other initiatives on green public procurement, but these are mostly based on non-government initiatives or international projects. As a result, their institutional framework is not well developed.

There has been a recent study of the Centre for European Policy Studies,[76] which concludes that the development of the green public procurement in the Czech Republic is well below EU average. The uptake of green public procurement oscillates around 20%, which is far below the 50% target set by the European Commission in 2008, to be achieved by the Member States in 2010. The study further states that as of 2010, the Czech Republic has failed to apply green criteria in all stages of procurement cycle (i.e. technical specifications, award phase and the contract performance stage) and had also failed to promote green procurement in practice in providing practical guide, training materials, ad hoc advice or any code of practice.[77] The country is also said to award 65% of contracts based on the purchasing costs rather than life-cycle costing or total costs of ownership.[78] There are, however, several public instruments of sector-specific nature, which are intended to ameliorate the situation. For example, this is the case of the government decision no. 1592 of 16 December 2008, on the programme of renewal of the vehicle fleet of public administration with eco-friendly vehicles. There is also an initiative promoting eco-labelling run by the Czech Eco-labelling Agency and support-

76. The Uptake of Green Public Procurement in the EU27 (2012) pg.vii, available at http://ec.europa.eu/environment/gpp/pdf/CEPS-CoE-GPP%20MAIN%20REPORT.pdf
77. Ibid, table 3, p. 44.
78. Ibid, table 2 p. 39.

ed by the Ministry of Environment and the Czech Environmental Information Agency. Non-binding rules for procurement of furniture and IT equipment have been introduced in 2010. More guidelines were meant to follow, but have not been introduced so far.

On the other hand, there is no coherent national programme for promoting socially responsible public procurement, despite the fact that the Czech Republic is apparently counted among the Member States which do refer to social responsibility objectives in public procurement 'in some way' by the Commission.[79] The PPA makes directive-driven references to the possibility of including social and environmental considerations among the conditions governing the performance of a contract and on obtaining information on obligations relating to taxes, environmental protection, employment protection provisions and working conditions (see Sections 44(9) and 44(10) of the PPA and Articles 26 and 27 of Directive 2004/18/EC). Section 45(3) of the PPA also allows for accessibility requirements to be included in the technical specifications, specifically referring to handicapped persons, if this is called for by the subject matter of the contract. Finally, section 101 of the PPA allows for reserving public contracts to suppliers employing more than 50% handicapped persons and provides for more advantageous treatment of their bid prices (these shall be considered 15% lower). However, since in practice such employers rarely produce goods of high value, most tenders where they could compete will fall into *de minimis* or below-threshold regimes (and *de minimis* tenders do not require a competition to be held at all). The practical impact of the above provisions may, therefore, be considered relatively limited. It can be said that social policy objectives are usually targeted by more traditional methods than public procurement, especially various subsidies and direct financing, the Social Fund (ESF) being a far more influential European factor than public procurement law.

Question 12

In innovative tenders, there is usually heavy information asymmetry, meaning that the bidders have more information, more know-how and generally a better understanding of the subject matter of contract than the contracting entity itself. In such cases, if the contracting entity is not able to specify precisely how the public contract should be performed, it may avail itself of the

79. Commission Staff Working Paper, Evaluation report: Impact and Effectiveness of EU Public Procurement Legislation (2011), p. 80, available at http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/evaluation/index_en.htm.

competitive dialogue procedure, or, in the case of utilities (contracting entities subject to Directive 2004/17/EC), of a modified negotiated procedure with publication which allows for pre-bid negotiations.[80]

The use of such procedures even has got some support from the UOHS. In a recent case, UOHS cancelled an open procedure tender for modernization and maintenance of the information system, for the reason that the contracting authority did not identify the subject-matter of the public contract in details which are necessary to process a bid and did not determine the contracting conditions precisely and unambiguously. It follows from the reasoning of the UOHS that a competitive dialogue would have been more suitable:

> '... the competitive dialogue may be used when the contracting authority awards a public contract which has a particularly complex subject-matter, and due to the character of the subject-matter, it is impossible to use the open procedure or restricted procedure. It should be used in cases where the contracting authority is able to identify its needs and goals but it is not able to determine the ideal way how to fulfil its needs and goals (especially in the field of complex projects, for example in the field of infrastructure, information technologies, large investment projects and so on).'[81]

It is rather important to note that an unmodified negotiated procedure with publication is not much suitable in such cases, as it involves only the negotiation over the *bids*, as opposed to negotiation of the *requests for bids.* The invitation to submit bids and detailed tender documentation must be finally determined by the contracting entity before any bids are invited. This is exacerbated by the fact that negotiations of bids are limited by many rules of the Czech and EU law. For example, the PPA forces the contracting entities to negotiate with all the bidders until the final selection, or gradually decreasing the number of bidders by a predetermined short-listing. There is no concept of negotiations with the only 'preferred bidder'. In addition, any negotiations must not make the results of the previous phases of procedure meaningless, such as by amending the contract so substantially that the application of criteria for qualitative selection of bidders (made previously) would be practically voided. Accordingly, the flexibility of the contracting entity in such negotiations may be limited.

Competitive dialogue and its utility equivalent noted above are mostly used in cases regarding complex IT solutions or large construction projects involving complex technology. Probably the most significant current example

---

80. Available only for such specific situations and only to the utilities under Section 33 of the PPA.
81. Decision of the UOHS Ref.No. S249/2012 of 3 May 2013; <www.uohs.cz>.

is the tender for construction of the 3rd and the 4th unit of the nuclear power plant Temelín. Further examples would include certain PPP projects classified as public contracts, or complex services, such as waste management in larger cities. And, in fact, the Concession Act recognises a 'concession dialogue' procedure, which is markedly similar to competitive dialogue under the PPA. However, in general, tenders seeking for 'innovative solutions' are relatively rare – not in the least due to various legal risks involved.

Remedies

Question 13

The remedies (both in public and private law) seem much the same under the Czech law irrespective of the implementation of Directive 2007/66/EC. The procedure to challenge awards (or other steps taken) by contracting entities was very similar both before and after the implementation of the said Directive into the Czech law. The severity of penalties (esp. fines) which may be imposed by UOHS both upon the contracting entities for violations of the PPA and upon dishonest contractors has, however, increased throughout the time. The PPA, in addition, provides (Section 117) for an interim relief as required by the Remedies Directive.[82] The PPA also provides for the voluntary *ex ante* transparency procedure. Section 146(2) of the PPA provides for the possibility of the contracting authority to publish a voluntary ex ante transparency notice in cases where it believes that publication is not required, in order to strengthen its legal position. Section 118(2) of the Act stipulates, as required by the Remedies Directive, that the sanction of ineffectiveness (invalidity) of the contract does not apply in cases where such a voluntary notice was duly published.

In so far as private law remedies are concerned (esp. damages actions), the implementation of the said Directive has not changed much in the Czech law and it still remains quite difficult in practice to establish any actionable claim for violations of the PPA. It might be, however, mentioned that the Act No.

82. The statistics of UOHS show that the interim relief is granted quite often. In 2012, it was granted in 205 cases out of 1049 cases dealt with by UOHS, but more importantly, out of 233 cases which eventually led to a finding of violation of the PPA. 121 applications for an interim relief were denied and 28 decisions granting interim relief were subsequently quashed. See 2012 Annual Report on activities of UOHS, p. 30.

417/2009 Coll. which amended the PPA explained that contracts entered into by contracting entities which violated in so doing the PPA are invalid (ineffective) only in case UOHS has prohibited performance of the contract in question (Section 118(5) of the PPA). The private law consequence of invalidity, therefore, entirely depends on the outcome of the decision of UOHS and the sole declaration of PPA's violation is not enough if the performance of the contract was not prohibited by UOHS.

Conclusion and reform

Question 14

The new directive proposals are presented as something more than just a necessary periodic review of law, which is supposed to be growing old but not more mature. In fact, this might resonate with the Czech situation, which is marked by a 'permanent revolution' in public procurement law, frequent changes and alternating tightening and relaxation of rules (see answer to question 1 for more details). In this respect, the first impacts of the reform of EU public procurement law will definitely include the introduction of further instability into the Czech market. The PPA should be replaced by a brand new piece of legislation, which may also lead to unuseability of some former case-law and decision-making practice of the UOHS. It is difficult to estimate how long exactly would the adaptation take, but it is likely that this would be directly commensurate to how far the new legislation strays from the path of simple restatement of the current EU law and jurisprudence.

Some of the new provisions, if enacted, will require development of new rules, or even involve a reversal of the current Czech position. This will be the case in connection with the new emphasis on social and environmental objectives. For example, as noted in relation to question no. 11, the PPA currently prohibits the use of 'contractual conditions securing the obligations of the supplier, or payment conditions' as award criteria, making the evaluation of life cycle costs very difficult. This will have to change, as the new public procurement Directive proposal[83] envisages evaluation of the life cycle, un-

83. Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on public procurement, /* COM/2011/0896 final – 2011/0438 (COD) */, available at http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm

derstood as all stages of the existence of a product or works or provision of a service, from raw material acquisition or generation of resources until disposal, clearance and finalisation. Thereby, not only internal costs, including costs relating to acquisition, such as production costs, use, such as energy consumption, maintenance costs, and end of life, such as collection and recycling costs will be evaluated, but also external environmental costs where they can be monetised and verified, such as with respect to climate change [see Articles 2(22) and 67 of the public procurement Directive proposal]. This is a substantial broadening of how the allowed partial award criteria are currently understood in the Czech Republic.

Further provisions are likely to bring new risks of abuse – such as the contracting authority's right to exclude economic operators from the procedure, if it identifies infringement of obligations established by the EU legislation in the field of social, labour or environmental law or international labour law provisions [Article 55(3)(a) of the public procurement Directive proposal]. However, if the UOHS maintains its current stringency with respect to the interpretation of such rights, it is rather likely that this will be construed as an *obligation* of the contracting entity, even with respect to rather marginal infringements. The net effect could, therefore, further increasing of the burden laid upon the contracting entities and, hence, more juridification of the process and more disputes.

On the other hand, the legal certainty as to how far the cooperation between public authorities is covered by the public procurement rules may improve. Cooperation for the joint execution of the public service tasks of the participating contracting authorities will apparently be exempt from the application of the specific rules on tender procedures. Czech administrative contracts of the coordination type, as defined by the Code of Administrative Procedure and described in relation to questions 6 and 7, may thereafter be clearly removed from the ambit of the public procurement rules, provided that Article 11(4) of the public procurement Directive proposal would not change in the legislative process.

As a final note, one interesting new development which will merit monitoring is cross-border procurement by contracting authorities from different Member States (Article 38 of the public procurement Directive proposal). While the PPA did not prohibit this expressly, the practical obstacles, such as differences in the status of contracting authorities and non-equivalence of detailed rules of procedure, lead to almost insurmountable obstacles in practice.

DENMARK

Sune Troels Poulsen[1]

The context

Question 1

There has been a Law on procurement in Denmark since 1966. It covered procurement of building and construction works and was based on the principles of equal treatment and fair competition. The Law sought to promote competition, prevent restrictions on competition and protect tenderers against abuse of the competition system.[2] Only a very limited number of cases of alleged infringement of the Law on public procurement came before the general courts, but it must be assumed that a number of cases were decided by arbitration, thus not coming to public attention.

Prior to the implementation of the EU rules on public procurement there were only few rules on public purchasing in Denmark, and these were primarily based on administrative law and local government law. Any claims about breaches of these rules could either be brought before the administrative or local government tribunals system or they could be brought before the general courts. However, the number of claims was very limited.

The EU procurement directives have been implemented in Denmark on the basis of a framework law under which the Minister for Business and Growth can adopt executive orders for implementing the directives.[3] In reality the directives have been implemented in Denmark in such a way as to give them effect in essentially the same form as the EU law; the Danish legislator has only made a few adjustments in connection with their implementation, and has not undertaken any recasting of the directives.[4]

---

1. Associate professor, PhD, University of Copenhagen Faculty of Law.
2. Erik Hørlyck, *Tilbudsloven med kommentarer*, Ed. 2, 2006, p. 23 f.
3. See Law No 600 of 30 June 1992 on the coordination of the procedures for entering into contracts for building and construction works, purchases etc.
4. The Utilities Directive (Directive 2004/17/EC) has been implemented by Executive Order No 936/2004; the Public Procurement Directive (Directive 2004/18/EC) has

In contrast to the public procurement directives, Directive 89/665/EEC (remedies directive)[5] was implemented in Danish law by a recasting of the Directive, thereby creating a new set of rules for the enforcement of the procurement rules.[6] Under the Law, a special administrative Procurement Appeals Tribunal was set up, to which claimants can refer alleged breaches of the EU procurement rules. The Appeals Tribunal is composed of judges from the District and High Courts, as well as a number of lay experts.

The implementation of the EU procurement rules and the setting up of the Procurement Appeals Tribunal gave rise to a number of challenges.

The EU procurement rules are in sharp contrast to the traditional method for forming a contract, which is based on direct contact with potential trading partners, negotiation with them to agree the nature of the supplies and their technical specifications for meeting the contracting authority's needs, adjusting them to take account of what the market can offer, and finally, not least through close cooperation, building up mutual respect and a long-term trading relationship which can be beneficial to both parties. This method of entering into contracts and these advantages of the traditional approach has been significantly challenged by the implementation of the procurement rules.

From the perspective of the contracting authority, the setting up of the Procurement Appeals Tribunal posed a special challenge, as the Tribunal is governed by the inquisitorial principle (*Offizialmaxime*) whereby the Tribunal directs the proceedings and can itself indict any breaches of the EU procurement rules. In the event of an appeal, a contracting authority thus had both to defend itself against the claims of an appellant, as well as against any complaints about a procurement procedure raised by the legal or lay members of the tribunal. This particular challenge for contracting authorities has now been changed, as proceedings before the Procurement Appeals Tribunal are now subject to the adversarial principle, whereby the Tribunal may not grant

---

been implemented by Executive Order No 712/2011; and the Defence and Security Procurement Directive (Directive 2009/81/EC) has been implemented by Executive Order No 892/2011.

5. Council Directive 92/13/EEC, and Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC, were also implemented by means of recasting.

6. See Law No 492 of 12 May 2010 on the enforcement of the procurement rules etc., as amended by § 13 of Law No 1556 of 21 December 2010, Law No 618 of 14 June 2011, and Law No 511 of 27 May 2013.

a party more than they have claimed and it cannot take into account circumstances that are not raised by the appellant.[7]

The boundaries of EU public procurement law

Question 2

A number of the activities of public authorities fall outside the scope of the procurement rules. This includes the exercise of authority where a public body grants licences or permits, issues orders or prohibitions, or disburses cash payments etc.

Where a public body carries out municipal activities for its citizens, for example providing services by means of its own personnel, these activities will fall outside the procurement rules. Examples of this include the provision of care services, care for the elderly, health services, education etc. In Denmark such activities are mainly provided by municipal or regional authorities, or mutually-owned institutions set up for general public purposes, and such activities are financed entirely or mainly from public funds, as any payments by users of the services only cover a small part of the costs.

A number of activities, especially the exercise of administrative authority, cannot be delegated to private operators unless there is specific legal authority to do so, as in the case motor vehicle inspections, for example.[8]

For a number of other activities, such as care services, it may be considered appropriate for this to be provided by a public body or by private operators, with a view to making provision of the services more effective or cheaper. In Denmark there is no obligation for municipal authorities to delegate activities to private operators, and in a number of areas, such as primary and middle-school education, legislation requires the task to be carried out by the municipal authority itself.[9] On the other hand, the state authorities have a du-

---

7. Law No 618 of 14 June 2011 amending the Law on the enforcement of the procurement rules etc. and the Law on the invitation of tenders for certain public contracts and contracts supported by public funds.
8. Law No 959 of 24 September 2012 on the inspection and approval of motor vehicles.
9. Law No 521 of 27 May 2013 on primary and middle schools. See Karsten Revsbech, *Kommunernes opgaver, Kommunalfuldmagten mv.*, Ed. 2, 2010, p. 237.

ty to keep under review whether a given activity can be more effectively carried out by private operators.[10]

On the question of granting permits or licences to carry on certain business activities, a distinction must be made between general and specific permits. In Denmark a number of professional occupations may only be practised with prior permission or authorisation which can be obtained, for example, by presentation of exam certificates, evidence of achievement of certain qualifications, evidence of the possession of sufficient equity capital, evidence of third party and business insurance etc. There is normally no restriction on the number of such permits that may be issued, provided the conditions are fulfilled (see Question 7 below).

The situation will be different in the case of permits to carry on a specific activity, such as the exploitation of land with a view to mining for minerals, establishing electricity or heat generating plants, waste recycling facilities, providing ferry services on certain routes etc., where it may not be appropriate to grant an unlimited number of licences. In these latter situations there will typically be a requirement to hold a public procurement procedure for awarding a licence or contract.

Question 3

In Denmark there is a widespread practice whereby public bodies at all levels (municipal, regional and state) cooperate to carry out public tasks. This public cooperation can take various legal forms, ranging from informal cooperation in practice or under a contract, to the setting up an independent company. A number of arguments can be made in favour of public-sector cooperation, such as the better performance of a task, specialisation, economies of scale, greater effectiveness and cost savings. In the following a distinction is made between tasks carried out jointly and tasks carried out by a single party, which reflects the case law of the Court of Justice of the European Union (CJEU) in this area.[11]

There is nothing in Danish law to prevent public bodies cooperating to carry out jointly tasks which a public body could not carry out on its own. Two public bodies can enter into a contract for jointly carrying out a task without having to obtain permission to do so.

10. Circular No 2 of 13 January 2010 on tendering for the operation or construction of State tasks.
11. See Case C-159/11 *Lecce* [2012] ECR 0000.

There can be a requirement for prior approval of municipal cooperation, if an authority intends to delegate some of its powers to a joint public body, or if a municipal authority takes on financial liabilities in relation to the joint body, which can be the case if there is a need to invest in a joint production plant, network etc. In this situation the cooperation will require the approval of the municipal supervisory authorities.[12] Moreover, such cooperation must be within the framework of a partnership or a cooperative corporate form, as these forms give owners more direct influence on the decisions of the company.

In Denmark there is separate authority for municipal authorities and other public bodies to carry out tasks for each other. This authority is based on the general rules of the law on municipal authorities whereby authorities may offer by-products or surplus capacity on the market, including to other public bodies. It is a condition that such provision is offered at the market price. There is also separate authority allowing municipal authorities and other public bodies to carry out tasks for each other, as long as the value of such services does not exceed the thresholds of EU procurement directives.[13]

Public-public cooperation significantly restricts the private performance of tasks in the same area, which is both a logical and observable consequence. For example, in Denmark the incineration of waste is typically carried out by municipal authorities in cooperation, and the large incineration plants are typically jointly owned by the participating authorities. There are virtually no privately operated incineration plants. The jointly owned incineration plants are also operated in cooperation and the operating acitivity are thus not exposed to competition.

Conversely, where public bodies cease performing certain tasks, private sector providers spring up. Traditionally, municipal authorities had their own building and engineering departments, but these activities have now been almost entirely passed over to private operators, and today in both the construction and the engineering industries there many large and competitive Danish operators carrying on business both nationally and internationally.

12. Law No 971 of 25 July 2013 on the management of municipal authorities, § 60.
13. Law No 548 of 8 June 2006 on municipal authorities carrying out tasks for other public bodies and municipal and regional authorities' participation in companies, as amended by Law No 1234 of 18 December 2012, § 2.

Question 4

The kinds of contracts that are subject to the procurement rules must be determined directly on the basis of the directives, re the answer to Question 1.

The sale by public bodies of publicly owned assets, such as buildings, land etc., is not covered by the EU procurement rules, but when selling real property such as buildings and land, municipal, regional and state authorities are bound to offer these for sale in accordance with the Danish rules.[14] Public activities drawing up plans for the use of buildings or land are not covered by the procurement rules.

The renting out of public buildings is not generally a lawful activity for a public body. A public body may very well own buildings for its own activities, but it must sell buildings for which it no longer has a use. A number of public buildings, such as schools or sports centres, will only be in use part of the time and a public body will often lend or hire out the premises when they would otherwise be vacant, and a public body may even have a direct obligation to do so.

Question 5

In Denmark, municipal authorities are entitled to set up companies to perform municipal tasks, as long as the individual authority does not have decisive influence over the company; see the answer to Question 3.[15] Under Danish law there is nothing to prevent a private operator participating in the company, as long as it only performs public tasks and the company has a not-for-profit aim.[16] As is well known, under EU procurement law a public authority contractor cannot award a task to a company if there is private participation in its ownership without following the procurement rules.

Under the Law on the performance of public tasks etc., there is special authority whereby a municipal or regional authority can set up a company together with a private operator, if the company's purpose is to adapt public

14. Circular No 7 of 25 January 2010 on the sale of real property by the State. Executive Order No 799 of 24 June 2011 on the public offering for sale of the real property of municipal and regional authorities.
15. See Karsten Revsbech, *Kommunernes opgaver, Kommunalfuldmagten mv.*, Ed. 2, 2010, p. 199 ff.
16. See Karsten Revsbech, *Kommunernes opgaver, Kommunalfuldmagten mv.*, Ed. 2, 2010, p. 204 ff.

knowledge with a view to making it sellable and to undertake the sale.[17] The purpose of the provision is to exploit and commercialise special public knowledge in specific areas and to examine whether there is a possibility for hiving off such activities if they should be shown to be viable in a competitive market.

The Law on the performance of public tasks etc., requires there to be a minimum of 25% private ownership of the company. The Law does not lay down any restrictions or requirements for how the private sector partner should be selected. According to the Law, the joint public-private company can sell its services to both public and private operators, but if sales to private operators constitute more than 50% of its sales, the public owners must sell their share of the company. Under EU procurement rules, a public authority cannot award a task to such a company without following a procurement procedure, as it is partly privately owned.

There are a number of examples of such public-private cooperation in the area of catering for home care ('meals-on-wheels'), and *Det Danske Madhus* is an example of such a cooperation.[18] The Danish Government has put significant focus on the potential for public-private cooperation, and in 2013 it set up the Council for Public-Private Collaboration[19]

The general principles of EU law: public procurement law and beyond

Question 6

Since 1966, in Denmark under the Law on procurement (*Licitationslov*) there has been an obligation to open building and construction works of a certain size to competition. This obligation was carried forward in the Law on tendering for building and construction works with a value of DKK 3 million and above, which is below the threshold in the EU procurement directives.[20]

---

17. Law No 548 of 8 June 2006 on municipal authorities carrying out tasks for other public bodies and municipal and regional authorities' participation in companies, as amended by Law No 1234 of 18 December 2012, §§ 3-13.
18. See further at: http://www.detdanskemadhus.dk/ejerskab.html.
19. See the Council's website: http://www.rops.dk/
20. Law No 1410 of 7 December 2007 on the invitation of tenders for certain public contracts and contracts supported by public funds, as amended by Law No 618 of 14 June 2011, § 2, and Law No 1234 of 18 December 2012, § 1.

For such tasks there can be procurement by open or restricted procedures on the basis of an advertised notice, but it is also permitted to make a procurement by means of negotiated procedures where a group of selected economic operators is contacted without publicising that a public contract is to be entered into. This last named possibility cannot be assumed to be fully in accordance with the obligations under Union law.

For public building and construction works with a value of less than DKK 3 million, the contracting authority can enter into a direct contract, but several private offers must be obtained if the value of the works is for more than DKK 300,000.

In 2007 the Danish legislator introduced new rules for entering into public contracts for the purchase of goods and services.[21] The aim of the amendment to the law was to make it clear how the Union law principles of equal treatment and transparency, and the requirement for openness, should be understood in the Danish context. The new Law introduced the obligation to give prior public notice that a contract is to be entered into if the value of the contract exceeds DKK 500,000, as long as the value does not exceed the threshold in the procurement directives.

This Law required the public contractor to draw up an announcement containing at least the following information: 1) A description of the task, 2) Contact details, 3) The deadline for receiving tenders or requests to participate, 4) The address to which to send tenders or requests to participate, and 5) The criteria for the award of the contract.

There were no requirements beyond this as to the procedure which the contracting authority should follow in entering into a contract, though in arranging and carrying out the procedure, the contracting authority is obliged to ensure that the selection of tenderers is made on the basis of objective, proper and non-discriminatory criteria, and that there is no discriminatory treatment of tenderers.

With effect from 1 January 2013, the obligation to advertise service contracts covered by Annex II B of the procurement directive has been repealed, as it was the opinion of the Danish legislator that the advantage of such ad-

---

21. Law No 572 of 6 June 2007 amending the Law on competition, the Law on the administration of justice, the Law on the invitation of tenders in the building and construction sector, and the Law on the Procurement Appeals Tribunal.

vertising in increasing competition did not exceed the disadvantages associated with the advertising in the form of increased costs and delays.[22]

Question 7

In Denmark, a large number of professional activities may only be carried on with prior permission or authorisation which can be obtained, for example, by presentation of exam certificates, evidence of achievement of certain qualifications, evidence of the possession of sufficient equity capital, evidence of third party and business insurance etc. There is no requirement to tender for such permits as the administrative authority has an obligation to grant permits to carry on such professions if an applicant fulfils the requirements of the law. There is also normally no restriction on the number of such permits since the administrative authority must grant a permit if the requirements of the law are satisfied.

The situation is different in the case of the grant of permits for specific activities, such as the exploitation of land with a view to mining for minerals, establishing electricity or heat generating plants, waste recycling facilities, providing ferry services on certain routes etc.

This second kind of permit can have a different legal character, since the factual circumstances can make it appropriate to limit the number of permits granted (e.g. for reasons of environmental protection), to licence (grant a concession for) the commercial exploitation of an installation or to carry on some activity (e.g. for financial reasons), and a sole right can be associated with a permit whereby others may not initiate or continue parallel competing activities (e.g. for reasons of security of supply or for financial reasons).

There is no general obligation under Danish law to invite tenders for the second kind of permits even though a limited number of permits may be granted which are in the nature of a licence, or a sole right is associated with the permit. However, a number of specific legislative provisions have introduced an obligation to invite tenders, for example for the construction of wind turbines at sea, licences for the exploration for minerals in sea areas, and the provision of ferry services on specific routes.

---

22. Law No 1234 of 18 December 2012 amending the Law on the invitation of tenders for certain public contracts and contracts supported by public funds and the Law on municipal authorities carrying out tasks for other public bodies and municipal and regional authorities' participation in companies, § 1.

Public procurements and general EU law, including competition and State aids law

Question 8

It is the general view in Danish law that contracting authorities have wide discretion to determine their requirements for the subject-matter of a contract and that, on the basis of its own preferences, a contracting authority may prioritise price over quality or vice versa, may select a specific technology as the basis for its purchase, and may include non-financial considerations in formulating the requirements for its purchase. The procurement rules do not prevent a contracting authority using public funds on prestige projects, in particular using specially durable materials, building 'super' hospitals, impressive administration buildings etc.

However, the decisions of the Procurement Appeals Tribunal include a number of examples where, under the procurement rules, it has restricted the requirements which a contracting authority may lay down for the subject-matter of a contract.

There have been a number of cases in which a contracting authority has referred to specific brands or manufacturers, and in these cases the Procurement Appeals Tribunal has examined closely whether such a reference may, exceptionally, be justified, and in most of these cases the Tribunal has found such references unjustified. In these cases the Procurement Appeals Tribunal has mostly referred to Article 23(8) of the Public Procurement Directive.

In a case concerning the purchase of trees, there was a requirement that the trees should be of Danish provenance.[23] The reason given was that the trees should be able to thrive in the Danish climate. In principle this was a relevant and proper consideration. However, the Procurement Appeals Tribunal found that the requirement was contrary to the Treaty rules on the free movement of goods, as it must be assumed that trees of North German or South Swedish provenance could also thrive in the Danish climate.

There have been a number of cases in which the requirements specified by a contracting authority have effectively meant that only one economic operator has had a possibility of being awarded the contract. While in principle a contracting authority can specify requirements on the basis of its own preferences, and while it is not contrary to the principles of equal treatment to specify re-

23. Ruling of 18 September 2007, *P. Kortegaards Planteskole A/S* v *Kolding Kommune*.

quirements which only few, or maybe only one, economic operator can fulfil, by making very specific requirements a contracting authority can *de facto* favour a specific supplier. This situation arose in a case concerning the purchase of flooring for a sports hall. The contracting authority was required to show that the chosen flooring had special qualities and to show why these qualities were of special interest to it. The Procurement Appeals Tribunal stated that it was up to the contracting authority to show that the advantages sought in the works put out to tender were genuine and that, despite their restrictive effect on competition, the requirements were both proper and proportionate.[24]

Question 9

In the context of procurement, the principle of transparency may facilitate collusion and cartels. The basic condition for entering into a cartel is knowing which undertakings may compete for a specific contract. In at least three situations a contracting authority may disclose to undertakings the identities of their competitors: (i) if the authority organises a joint session at which undertakings can ask questions about the tender documents and the contract; (ii) if the authority organises a joint session to inspect a production plant, existing facility etc.; and (iii) where, in a restricted tender procedure, the authority informs the undertakings of the identity of the other undertakings that are considered qualified to tender. The last situation in particular is troublesome, as under a restricted tender procedure five undertakings are normally selected to submit tenders and knowing the identity of the undertakings competing for a specific contract can make collusion very easy. Under Danish law there is a duty to inform undertakings of the identity of their competitors in this situation.[25]

In Denmark there has been a discussion of whether the practice of central purchasing agencies which pool purchases in a single contract might cause long term damage to the competitive structure of a market. It is debatable whether there has in fact been any such effect, as Denmark is a small and quite open economy and central purchasing agencies only account for a small part of the market. In any event, it is also debatable whether the positive effects of central purchasing agencies in increasing volumes and lowering prices in the short term outweigh the potential long term negative effects on market structures and any prices increases following from this.

24. Ruling of 14 March 2011, *Virklund Sport A/S* v *Vejle Kommune*.
25. Ruling of 14 July 2011, *Tensid Danmark ApS* v *Aarhus Kommune*; and Ruling of 24 October 2011, *Kinnarps A/S* v *VUC Sønderjylland*.

Contracting authorities may decide to supply goods and services for their own needs, either individually or jointly. On the other hand it will normally be unlawful for contracting authorities to supply goods or services to the market and in principle it will also be unlawful for contracting authorities to supply goods or services to other contracting authorities; see the answer to Question 3.

Question 10

Services of general economic interest (SGEIs) can involve many different kinds of services, for example care services, postal services in remote districts, waste removal, electricity supplies, provision of ferry services to small islands etc. A state or municipal authority can choose to provide such services itself, or it can cooperate with other public authorities to provide such services. If the conditions for a joint project to carry out public tasks are fulfilled and no private economic operator is involved, then there is no obligation to put a contract out to tender in either of these situations, as the performance of the task remains within the public sector.

A state or municipal authority can only delegate the performance of an SGEI which is a public body responsibility to a public or private undertaking or a mutual institution (an economic operator) if there is legal authority to do so. Moreover, a state or municipal authority can only require an economic operator to perform an SGEI if there is legal authority to do so.

There is such authorisation in for example in the legislation on electricity supply[26] and telecommunications legislation,[27] which allow the delegation to economic operators of the obligation to supply, without paying support for any additional costs associated with performing the supply obligation. Any additional costs can be covered by the electricity consumers' payments to the network operator or by other telecommunications operators making payments to the operator with the obligation to supply.

There need not necessarily be any financial benefit for an economic operator associated with an obligation to perform an SGEI, but such an advantage can arise if the state reimburses any additional costs for the performance of the task. A financial advantage can also arise where the state grants a sole right to perform an activity possibly enables cross-subsidisation.

---

26. Law No 279 of 21 March 2012 on electricity supply.
27. Law No 169 of 3 March 2011 on electronic communications networks and services.

If the performance of an SGEI, such as the provisions of care services or ferry services, is transferred to an economic operator under a contract, there will be an obligation to comply with the procurement rules if the value of the contract exceeds the thresholds in the procurement directives. The obligation to put a contract for care services out to tender follows from the Public Procurement Directive, and the obligation relating to ferry services follows from the Law on ferry services[28] and the Directive on maritime cabotage.[29] If, in a procurement procedure for an SGEI, only one tender is received, so there can be reasonable doubt as to whether the tender reflects the market price, the contracting authority is expected to make an independent evaluation of whether the tender does in fact reflect the market price, in order to avoid providing State aid to the economic operator. The contracting authority in a procurement procedure for the provision of ferry services to the Danish island of Bornholm undertook such a double process with a special evaluation of whether the tender reflected the market price.

Strategic use of public procurement

Question 11

With regard to environmental considerations, on the one hand there is considerable political focus on making green (environmentally friendly) purchase decisions, while on the other hand the contracting authorities largely keep to the traditional considerations, with their focus on the actual characteristics, quality, durability, price and overall costs associated with a purchase, and the content, quality and price for services linked to the purchase. To some extent consideration is given to the lifetime energy consumption associated with a purchase.

An analysis has been made of the use of eco-labelling, such as the EU's flower logo, and in practice these are little used. Likewise, an analysis has been made of the use of environmental certification, but this too is only used exceptionally by contracting authorities in Denmark.

---

28. Law No 915 of 27 August 2008 on ferry services.
29. Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).

The reason for this lack of a focus on environmental protection is that there is often an additional cost associated with such considerations. The focus of public purchasing has been on creating larger public entities, as can be seen in the recent reform of Danish local government in which 275 municipal authorities were restructured as 98. There has also been a trend towards establishing joint purchasing companies and central purchasing organisations in order to contract for bigger purchases, to make efficiency gains and create greater financial freedom.

Environmental considerations do not fit well with these developments, unless there is a business case and clear evidence that taking account of green considerations will lead to budgetary savings. There can be such evidence, for example in the calculation of the total costs associated with a purchase, including energy efficiency. Thus the focus is on the bottom line, looking at the total lifetime cost of a purchase rather than at the promotion of environmental considerations in isolation.

With regard to social considerations, there is a significant political focus on these. However, it is difficult to get evidence of their application. Social considerations only apply to building and construction works and in the performance of services such as the care of park areas. Also, social considerations are presumably only taken into account in a small percentage of the total number of contracts in these areas.

Social considerations in public procurement have traditionally been seen as drawing people into employment who have either been long-term unemployed or who have reduced working capacity. In the present situation there is greater focus on creating work placements for young people in training.[30] However, a training period normally lasts 3 to 4 years and is part of a formal process which is planned for the whole training period, while work placements for carpenters, electricians, bricklayers etc. are typically found in the building and construction sector, where contracts are usually for a shorter period and/or where they are of a modest scope, making it difficult to fit them into a longer training period. This should also be seen in the context that wage agreements in this area can prevent the inclusion of employees with reduced working capacity if such workers are to be paid a full wage despite their reduced capacities.

In the provision of services it has been seen that very few tasks are suitable for persons with reduced working capacity. For example, winter work,

30. See the Danish Competition and Consumer Authority's guidelines, 'Sociale klausuler om uddannelses- og praktikaftaler i forbindelse med udbud', 2013, available at: www.kfst.dk.

clearing snow from roads and pavements, depends on the weather and is very difficult to plan. Moreover, tasks involving road vehicles normally only need one driver. In such cases a person with reduced working capacity might be able to act in a back-up function, in case of an accident, sickness or suchlike.

There is also the fact that not all public bodies have the same perspective on the importance of taking account of social considerations. In a municipal authority it may be relevant to take account of social considerations in carrying out public tasks, since it is municipal authorities that bear the social costs. But this will not necessarily have the same resonance for regional authorities or the state, as the social costs are borne by the municipal authorities. Thus if, for example, the State Agency for Palaces and Cultural Properties needs to have building and construction work carried out, the Agency would incur extra costs if it took care of social considerations in carrying out the work.

Even within a municipal authority there can be difficulties in coordinating between the technical department and the social department, as the technical department is typically focused on carrying out the task and does not necessarily include in its thinking whether it can save money for the social department. And since many projects will be of very limited scope, the technical department may question whether the investment of time and effort in consultation really makes much difference. Moreover purchasing is often a central administration function, which arranges for the procurement which is to be used by the technical department, so that in effect there is a need for coordination between three parties for taking care of social considerations.

Question 12

In Denmark there is considerable focus on using purchasing as a means to promote innovation. For example, in 2013 the Council for Public-Private Collaboration issued guidelines on promoting innovation through procurement.[31] In general there is a lot of interest in using public procurement as a means for innovation, and it is believed that there is great potential associated with implementing better public solutions which can lead to savings, better solutions and more contented citizens.

In Denmark the competitive dialogue procedure has only been used to a limited extent, which is largely because the Procurement Appeals Tribunal has adopted a very narrow interpretation of the scope for using the procedure. However, in one case the Tribunal's interpretation of this scope was over-

31. The guidelines are available on the Council's website: www.rops.dk

ruled by the Eastern High Court which, in contrast to the Tribunal, found that the conditions for using the procedure had been satisfied.[32]

In the health service there have been cases where it has been possible to carry out innovation by cooperation between public and private operators. One example has been the development of the 'intelligent bed' by Randers Hospital.[33] Another example is that of a region there has been development of the 'KOL kuffert', which is a kind of briefcase with a combination of equipment for treating patients in their homes and a wireless-connected medical work station. It contains all the medicines and equipment the patient needs.[34]

In Denmark there have been several public initiatives to promote innovation, for example the Market Development Fund. The Market Development Fund has an annual budget of DKK 135 million for the period from 2013 to 2015, to promote innovation and market development. The Market Development Fund has so far (2013) supported seven projects for innovative public procurement, mostly in the area of public caring services.[35] Another public initiative is OPI-Lab (a laboratory for public-private innovation and welfare technology).[36]

There can be quite a leap from successful small-scale innovation to the implementation of innovation throughout the whole health service, and according to the information available the few examples of successful innovation have not so far had large-scale implementation. Among other things the problem is that innovation is often driven by an enthusiastic torch-bearer who does not have the attention of top management or influence on purchasing organisations. Another problem is that a successful innovation in one region, such as the development of the 'KOL kuffert', will not necessarily be adopted in other regions as other regions may prefer some other composition for a 'KOL kuffert'.

The barriers to the implementation of innovation are typically a lack of capital and a lack of risk tolerance. Municipal authorities are under financial pressure and do not have a pot of money free to be used on carrying out experiments and innovation. Moreover, municipal authority investments are typically written off in Year 1 and may not be spread over four years, for ex-

---

32. Judgment of the Eastern High Court of 13 May 2013, *Hans Damm Research A/S v Erhvervsstyrelsen, Moderniseringsstyrelsen og Forsvarsministeriet*.
33. http://www.regionshospitalet-randers.dk/om+os/projekter+og+innovation/frem tidens+seng
34. http://www.dagensmedicin.dk/nyheder/patientkuffert-med-potentiale/
35. http://markedsmodningsfonden.dk/cases_off
36. http://opilab.dk/wm346224

ample, which puts considerable budgetary pressure on them. For example, even though there is clear evidence that the introduction of flush and dry toilets will reduce the incidence of urinary infection, and thus lead to savings for the health service, the introduction of such toilets is restricted because of the lack of capital. The lack of risk tolerance is also a problem, as innovation leads to the use of untried and unproven solutions, and any failed project will lead to the dissatisfaction of citizens and additional costs for making good failings, and unsuccessful projects will be blamed on the authority's employees.

Remedies

Question 13

How effective is the enforcement system in practice? The introduction of the legal measure whereby a contract can be declared to be 'without effect' raised awareness in Denmark of the need to comply with the procurement rules, and of the consequences of infringing them. The tightening up of enforcement must thus be regarded as have significantly contributed to compliance with the procurement rules.

However, only a very modest number of contracts have been declared to be 'without effect'. The Procurement Appeals Tribunal has the power to declare a contract as being without effect, and there have only been four cases in which the Tribunal has used this power.[37] The reason for this is in part that contracting authorities systematically use voluntary prior public statements (pre-emptive statements) in those cases where there is doubt about whether the authority is entitled to enter into a direct contract. Moreover, in its decisions the Procurement Appeals Tribunal has adopted a formal approach to the use of such public statements, so that publication of a statement is sufficient for a contract to avoid being declared without effect, regardless of whether the contracting authority may have acted in good faith with regard to the possibility of making a direct purchase.

Are interim measures used in practice? In Denmark such measures are only used wholly exceptionally. The most important reason for the non-use of inter-

37. Ruling of 3 January 2012, *Danske Arkitektvirksomheder* v *Thisted Gymnasium*; Ruling of 13 January 2012, *Danske Arkitektvirksomheder* v *Skanderborg Gymnasium*; Ruling of 6 March 2012, *RenoNorden A/S* v *Skive Kommune*; and Ruling of 20 August 2012, *Intego A/S* v *NRGi Net A/S*.

im measures is presumably the requirement for there to be an urgent need for action, as in most cases claimants are considered as having sufficient protection in the right to bring a claim for compensation against the contracting authority. However, this is in contrast to the fact that claimants cannot normally obtain a compensation for loss of potential profit, and in many cases not even have the costs of their participation in the procurement proceedings covered; see below.

Are pre-emptive statements used (voluntary prior public statements)? Contracting authorities make wide use of such statements, and according to information obtained, such statements are used in all cases in which there is doubt about whether a contract may be directly entered into.

Is compensation often given, and in relation to what claims? There have been a number of Danish cases on compensation, but it is only exceptionally that compensation is given for loss of potential profit. Moreover, it is acknowledged that in those cases where compensation is given for loss of potential profit, the contracting authority's cost savings from breaching the procurement rules will often be far greater than the amount of compensation payable and the legal costs associated with the compensation case. Thus, in many cases it can be worthwhile breaching the procurement rules.

In a number of cases compensation has been awarded corresponding to the costs of drawing up a tender, but in this situation the compensation is often considerably below the amount claimed, as a tenderer's in-house costs are typically not covered. Moreover, compensation is not given for unsuccessful participation in a procurement procedure if the tenderer is presumed to have been aware of some mistake in the procurement at the time they submitted their tender.

How is enforcement arranged outside the scope of the procurement directives? The Danish Competition and Consumer Authority has issued guidelines on entering into contracts for services covered by Annex II B of the Public Procurement Directive.[38] The guidelines state as follows with regard to contracts outside the scope of the procurement directives:

> Contacts with a cross-border dimension. Among other things, the Procurement Appeals Tribunal can deal with claims under Union law which concern entry into public contracts. This refers both to Treaty law and the principles derived from it. The Appeals Tribunal thus has jurisdiction to deal with claims relating to contracts for the purchase of Annex B services, as long as the contract has a cross-border dimension.
>
> Contacts without a cross-border dimension. If a contract for the purchase of Annex B services does not have a cross-border dimension, then it is not covered by the Treaty and

38. www.kfst.dk

the principles derived from it. Such contracts will only be covered by the principles of general administrative law.

The Appeals Tribunal does not have jurisdiction to decide on compliance with the principles of general administrative law. Claims in relation to such contracts can only be brought before the general courts or within the general administrative tribunal system. However, the Appeals Tribunal naturally has jurisdiction to decide whether a contact has a cross-border dimension.

How have the new remedies affected the national system – is there a preference for remedies aimed at the award decision and/or contract, or is there a preference for compensation?

There has been considerable criticism in Denmark directed at the appeals system that was introduced in relation to breaches of the procurement rules, as it has been found too easy to complain about a procurement. In general the appeals system is considered to be an obstacle to day-to-day administration and for carrying out purchases.

In recent years there has been a clear tendency for the complaints system to be made more difficult for complainants. There have been several amendments to the law which have made it more difficult to make a complaint, including raising the fee for making a complaint, laying down requirements as to the content of a complaint, removing the possibility for the Procurement Appeals Tribunal to indict any breaches of the procurement rules on its own initiative, and complainants can now be required to pay the legal costs of contracting authorities etc.

Conclusion and reform

Question 14

In my view, the new directives will help improve the scope for contracting authorities to make purchases which reflect their needs, and thus the directives will, to a greater degree than the present directives, help improve the public fulfilment of tasks. The most important reason for this will be that the new directives will give contracting authorities a better possibility of entering into dialogue with tenderers and to use tenderers' qualifications as a criterion for awarding a contract. The new directives thus better reflect the normal contracting process than the present directives, without surrendering the principles of equal treatment and transparency.

ESTONIA

Agris Peedu[1]

The context

Question 1

In Estonia, as far as public procurement regulation is concerned, the third theoretical approach has been taken – most of the rules and regulations are given in public procurement law and only some discretion has been left to the contracting authorities. Decisions of contracting authorities made in course of procurement are all disputable in court, as well as decisions of supervisory board.

Adopting EU public procurement rules we have not been confronted with any systemic challenges as our legal system is in line with EU law in general.

Friction between public procurement and original legal framework comes from administration co-operation. Namely it seems to be difficult to make it clear, how services in the meaning of public procurement directive are distinct from some administrative duties granted to other contracting authorities or economic operators. In other words, when, granting an administrative duty with administrative contract is one actually obliged to concur with public procurement rules.

The boundaries of EU public procurement law

Question 2

As mentioned before, distinction between public procurement contracts and administrative duties not covered by public procurement rules is very difficult to make in Estonia.

1. Deputy Secretary General, Ministry of Finance of the Republic of Estonia.

In public procurement act, a public contract means a contract establishing mutual material obligations and since there is no definition of administrative duty, mutual material obligations are the only criteria stated in law to make the distinction. It is said in administration co-operation act, that administrative contract is not allowed, when only entry into a public law contract is provided by law, or the contract regulates the rights or obligations of persons using public services or other third persons, or the state or a local government is released from its duties, or the authority to exercise executive power is used upon performance of the duties. However none of these criteria is relevant in order to finally exclude the obligation to follow public procurement rules.

Question 3

In-house and public-public partnerships are regulated in public procurement law and this regulation is mostly in line with relevant EU court cases, in exception of one additional condition – namely in-house rules cannot be applied and compliance with public procurement rules must be granted when service concessions are concerned (please refer also to answer 6, last subparagraph).

In Estonia it is not considered to be a major limitation to the market as far as in-house and public-public partnerships are concerned since in classical sector there are not too many in-house situations and it is considered more economically advantageous to outsource most services.

Question 4

In line with Helmut Müller (C-451/08) and Loutraki (C-145/08 and C-149/08) cases, in Estonia, sale or rental of immovable or movable property to a private undertaking, by a public authority, whether local or governmental, is not considered to be public procurement. In case of property owned by state, there is a separate law to regulate sale, rental and other forms of utilization of property. In case of local ownership, it falls under the jurisdiction of local council to determine how property sale and rental is managed.

Question 5

The question of mixed contracts is not addressed in law. However, there are some possibilities for mixed contracts and in practice two specific cases have been dealt with by our advisory specialists.

There are several small islands in Estonia and on one small island the local government was faced with a problem related to operation of a local gas sta-

tion. There was no interest in relevant economic operators in operating this particular station for the reason of lack of market. However, there was some small demand for gas still there. So the local government offered economic operators some compensation for their losses in order to keep the station running. As the station itself was owned by the local government, there were two different elements to this contract: one as service concession and the other a question of utilization of property.

The other case was also in connection with utilization of local government owned property and the concession part of the contract had to do with catering.

In such cases, in Estonia matter of severability is not addressed and therefore both regulations must somehow be applied.

The general principles of EU law: public procurement law and beyond

Question 6

In principle, the general principles of non-discrimination /equal treatment and transparency should always be applied when entering into agreements with economic operators. However since direct award is allowed for the contracts which are expressly excluded from the scope of PP rules, compliance with the principles is not a priority, as far as there is sufficient ground to use direct award.

Almost full set of public procurement rules apply to contracts below thresholds if procurement directives and above national thresholds (40 000 EUR for services and supplies, 250 000 for works), in exception of time limits for submitting tenders or requests to participate, which are shorter.

For contracts below national threshold, some recommended provisions are in place, however, there are obligatory rules for transparency: obligation to publish a simplified contract notice in national public procurement registry as well as award notice and requirement for communicating the relevant decisions to the interested parties; and minimum time limits for submitting tenders, also full set of public procurement rules to modifying contracts apply.

In case of service procurements related to priority services, the principles in question must be applied and in particular, there are in place transparency clauses as described in previous paragraph.

Since in case of mixed contracts both, public procurement regulation and the other regulation, that deals with utilization of property, which also is in line with the principles in question, must be applied, there may be no question whether these principles apply or not.

As far as service concessions are concerned, from 1st of January 2012 there is a piece of legislation in place which states that only open or negotiated procedure with prior publication of contract notice may be applied.

Question 7

Yes, the principles of non-discrimination/equal treatment and transparency also apply in case of administrative measures, whether these measures are taken unilaterally by an administrative act or by an agreement entered in with the beneficiary. However, in Estonia most of these measures are contractual in nature. For example an agreement is concluded when granting a permission to excavate on a state owned land. Lots of measures are also taken by granting a license, but in those cases the procedure is laid down step by step and is in line with the principles in question.

Public procurements and general EU law, including competition and State aids law

Question 8

Since contracting authorities are not completely free to choose exactly what the buy, but are bind with the requirements imposed by public procurement rules in terms of technical specifications, the contracting authorities cannot be equal private market participants. So in that sense their decisions may be treated as measures imposing restrictions to the market. In favour of this reasoning speaks also the possibility to dispute the decisions, which is not possible in case of private undertaking. So all decisions must of course comply with the principles of non-discrimination and proportionality as well as be additionally justified by imperative requirements in the general interests, however the latter may sometimes be indirect in nature.

Question 9

All of the rules and practices listed in the second subparagraph of the question, when abused, may lead to limiting competition. In Estonia, it seems to be the case that contracting authorities tend to set disproportionate qualification requirements that restrict competition for small companies.

Question 10

The fourth criterion in Altmark case provides an alternative option besides public procurement procedure to select an undertaking for providing SGEI. Also EU Courts case-law indicates that public procurement procedure is not the only option to select SGEI provider. In Olsen v Commission case T-17/02 the General Court said that 'it is not apparent either from the wording of Article 86(2) EC or from the case-law on that provision that a general interest task may be entrusted to an operator only as a result of a tendering procedure (point 239).' In case T-442/03, SIC v Commission, the court said that 'absence of competitive tendering cannot, by contrast, have the result that State funding of the SGEI holder's public service obligations must, even though the requirements concerning the definition of the SGEI, the remit and proportionality are fulfilled, be considered to be State aid incompatible with the common market (point 147)'.

Public procurement procedure would not work in all cases. Public procurement process might not necessarily result in the provision of SGEIs at the least cost to the community. In the case of procedures where only one bid is submitted, the tender cannot be deemed sufficient to ensure that the procedure leads to the least cost for the community. If this is the case, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.

Regulation (EC) No 1370/2007 provides rules on public procurement for transport contracts with rules on public procurement of transport concessions and it also foresees the regulation when compensation payments in these contracts are compatible with the internal market and exempted from prior notification to the Commission. The regulation provides certain conditions for awarding public service contracts. Under Article 5 (4) of the Regulation, the competent authorities may decide to award public service contracts directly, unless prohibited by national law.

Strategic use of public procurement

Question 11

Under the EU procurement rules a contract can be awarded based on lowest price or most economically advantageous tender. Where the most economically advantageous tender is chosen, costs may be calculated on the basis of the whole life-cycle cost (LCC) of the supplies, services or works, and not solely on the purchase price. LCC is a tool which evaluates the costs of an asset throughout its life-cycle.

An example of how environmental criteria may be included in LCC is given by the Clean Vehicles Directive (2009/33/EC). Under this Directive, contracting authorities and entities are obliged to take energy consumption and emissions into account in their purchases of road transport vehicles. In Estonia LCC is mainly used in the cause of the Clean Vehicle Directive, as it is implemented into national legislation.

There are several barriers why environmental criteria are not widely used. The main concern is that green products are perceived to cost more. Also there is a lack of training in applying environmental criteria. Contracting authorities do not have enough knowledge and practice for applying environmental criteria. These are the main obstacles why environmental criteria are not widely used.

As concerns Directive 2009/33/EC Estonia carried out in October 2010 public procurement to buy environmentally friendly buses which will help to popularise the use of public transport and reduce CO_2 emissions caused by the transportation sector. The most significant problem which emerged during the course of the procurement process arose from the fact that evaluating the tenders based on the fuel consumption and CO_2 emissions of the buses proved impossible. The Clean Vehicles Directive (2009/33/EC) states, that contracting authorities should take into account lifetime energy and environmental values of the vehicles and also defines a corresponding accounting methodology. The directive also stipulates that evaluation of fuel consumption and CO_2 emissions shall be based on standardised test defined in Community type approval legislation (CTAL). For vehicles not covered by standardised Community test procedures, comparability between different offers is ensured by using widely recognised test procedures, or the results of tests for the authority, or information supplied by the manufacturer.

At the time of the procurement process there had not been any established standardised test procedures under CTAL to evaluate fuel consumption and

CO_2 emissions of category M3 whole vehicles (buses). Also, there were no widely recognised test procedures which could be used for the evaluation of tenders. Conducting appropriate tests by the contracting authority was not feasible and relying on data provided by the tenders of bus manufacturers would have been associated with the risk of unequal treatment of tenderers and lack of transparency in evaluating tenders. Therefore the contracting authority was unable to evaluate these environmental criteria highly relevant to the objective of the action.

In the interest of effective and transparent Green Public Procurement processes involving the purchase of vehicles it would be essential to complement CTAL and establish mandatory test procedures for fuel consumption and CO_2 emissions measurements for all vehicle categories.

Question 12

To encourage contracting authorities to foster innovation is to use pre-commercial procurement (PCP) in the cause of research and development procurements. When PCP is performed in a competitive, open and transparent way in accordance with the EU Treaty principles, where the assignment of intellectual property rights ownership to companies is reflected at market terms in the price paid for the R&D service procured, then PCP is not considered to be State aid.

Since introducing competitive dialogue in Estonian public procurement rules there have been 125 competitive dialogue procedures all in all which constitutes approximately 0.3% of all procedures. It has mostly been used in IT-projects as well as complicated technical equipment, some cases of works and preparation of spatial plans.

Remedies

Question 13

In terms of remedies, there are two aspects of matter. First, Estonian public procurement law has introduced a standstill period and interim relief since 1. January 1996, so the new remedies directive did not offer any new aspects in that regard. Second, after introducing ineffectiveness and possibility for claiming damages, there has been only one case where damages were imposed after the contract had been concluded and no cases of declaring a pro-

curement contract ineffective. In that particular case, damages only consisted of direct expenditure what the tenderer had made in course of preparing his tender and participating in the procurement procedure.

So, in practice there have not been any changes how remedies are foreseen, still interim relief is the most common remedy.

Conclusion and reform

Question 14

Since as per now there is no aspect of risk covered in the definition of concessions in Estonian public procurement law, there shall be some changes in how concessions shall be understood once we have harmonized the new concessions directive. We do not see major problems in understanding the transfer of the risk of exploitation since there is elaborate explanation about that subject in the relevant recitals of the directive itself.

In Estonia, we have not noted significant increase in long-term contracts, just the contrary – since funds are scarce, contracting authorities are vary in taking long-term commitments. There have been only 8 concession procedures since harmonizing the 2004 directives.

We have high hopes for modernization of the award procedures. In Estonia it tends to be the case that contracting authorities apply full set of public procurement rules voluntarily even to those cases where it is nowhere near obligatory, for example for contracts with very low value. This is the case because there is ambiguity of how the general principles can be followed where there are no specific rules in place. So as the award procedures shall be less complicated, there shall be less administrative burden also for those contracting authorities, whose contracts usually are low value.

On one hand there are some improvements and clarifications in the new rules for competitive dialogue that make the implementation more clear. On the other hand we don't think that these improvements will have much to do with widening the recourse to this procedure. We think that the use of competitive dialogue shall increase steadily onwards as contracting authorities become more familiar to it and its possibilities to foster innovation. The same thing will happen with new introduced procedure – innovation partnership. At first the number of contracting authorities that jump to the opportunity to use this procedure shall be scarce.

We think there is a right balance between allowing and not allowing negotiations in public procurement. In some cases, for example off-the shelf supplies or services, negotiations are not necessary and therefore not allowed, which is reasonable, since it is imperative that contracting authorities comply with general principles of equal treatment and transparency, otherwise there may be a major hindrance to the competition because public contracts are usually high value and high general interest.

We believe that in Estonia it shall not be difficult to introduce totally paperless public procurement, neither on contracting authorities' nor on contractors' side. In Estonia, innovative e-procurement portal was put to use in February 2011 and since the beginning of 2013 50% of all procurements must be conducted as e-procurements.

In general, the only systemic change in national administrative law shall be in terms of administrative co-operation (in this regard refer to answer 1 and 2) since many contracts, that in fact fall under the definition of service concession, are at present treated as administrative contracts that do not follow public procurement rules to the tee, although the rules that do apply are similar and follow the principles of equal treatment and transparency.

FINLAND

Eija Kontuniemi,[1] *Markus Ukkola,*[2]
Anna Kuusniemi-Lain,[3] *and Anna Dimoulis*[4]

The context

Question 1

Finland started applying the public procurement regime of the EU in the 1990's, first through the EEA agreement in 1994 and later by joining the EU in the beginning of 1995. Before this, the procurement activities of Finnish authorities were controlled only on state level with statutes concerning mainly contractual relations (tendering procedures were addressed in works contracts, though). Other authorities, such as municipalities, were not subject to procurement provisions at all, which led to quite general practices of favouring local economic operators during the 70's and 80's. Finnish administrative law as a system has been heavily influenced by German and Nordic legal culture with emphasis on a high level of responsibility of an official for the legality of his actions. In Finland there is also a distinctive judicial system for administrative issues (administrative courts, specific procedural rules for administrative cases etc.) in which authorities are usually under stricter rules and scrutiny than their counterparts, citizens dealing with authorities.

The nearly instant shift in mid-1990's to the detailed and procedure-oriented legal system of the EU procurement directives, was not an easy task, especially for Finnish municipalities. Challenges were seen in learning that transparency and equal treatment could only be guaranteed by going through pre-determined procedures step by step. As the level of detail in the provisions became greater in the 2004 Directives (implemented in the national legislation in 2007), a great surge of legal textbooks, administrative training ser-

---

1. Chief Legal Councel, Hansel Ltd, State central procurement unit.
2. Senior Adviser, Competition Policy, Ministry of Employment and the Economy, Finland.
3. Partner, Castrén & Snellman Attorneys Ltd, Helsinki.
4. Lawyer-linguist, European Court of Justice, Finnish Translation Unit, Luxembourg.

vices and procurement cases in Finnish courts emerged. Procurement cases are handled by a special court (the Market Court), applying the procedural rules for administrative cases, where the fundamental idea of an individual in need of (procedural) protection against the state is hard to reconcile with the fact that many of the appellants are large companies with legal expertise overweighing that of their municipal counterparts.

Due to the procurement directives as well as the case law based on the Directives, procurement procedures and practices have focused heavily on procedural and formal issues instead of the efficiency or quality of the outcome of procurement procedures.

Year by year the knowledge and expertise of Finnish authorities in procurement matters have grown to the point that at the moment procurement procedures and procurement legislation are considered a part of the everyday work of the authorities. The systemic challenges, if there are any, lie in the risk of procurement legislation gathering more and more space, previously occupied by traditional administrative law, such as rules on incompetence due to the likelihood of bias. National systems of public accountancy and auditing have struck a balance with the procurement rules in leaving procedural questions up to the procurement legislation and dealing mainly with issues of direct awards and their consequences to public spending.

The boundaries of EU public procurement law

Question 2

The fact that public contracts are at the center of the scope of application in procurement legislation, has somehow gathered more importance and come to public awareness only during the last five or so years. During the first ten to fifteen years of application, the focus was quite evidently on procedural issues. Different arrangements were presumed to be within the scope of application, and discussion dwelled on whether bids could be fine-tuned or whether award criteria could be changed during the course of the procurement procedure. It was only after the range of different arrangements between public authorities and economic operators became vaster, that contracting authorities, economic operators and courts started to look into what types of arrangements should be covered by procurement rules.

The primary focus on issues relating to public contracts has been on *the contractual relationship*: could the transaction be considered to fall outside

the scope of application because it takes place within one legal person or in an 'in house' relationship; could we be talking about *partnerships* instead of contracts with buying and selling. The issue of *remuneration* or *compensation* is a quite new one in the Finnish procurement system. National court rulings addressing *service concessions* have only begun surfacing during the last three or four years. Differences between legislative measures and unilateral administrative decisions and public contracts on the other hand have started to become more interesting as the discussions on the role of SGEI (Services of General Economic Interest) have emerged in the field of procurement legislation.

The issue of *selectivity* as a key element in public procurement has gained importance as we have seen the introduction of *service voucher systems* and other *customer choice systems* in Finnish legislation. A service voucher system was introduced in the beginning of the 2000s in the field of services for the elderly. In 2009 the system was extended to other fields of social and health care services. The key question has been whether the authorities responsible for organizing the system have to put the services out to tender or whether these services fall outside the scope of application because it is *the citizen/patient/customer* that actually chooses the service provider. The idea is: if the contracting authority has no room for discretion, this discretion does not have to be subject to rules on procurement. The question of discretion and selectivity has been addressed summarily in a couple of Finnish court cases. There is also a relevance to different types of licensing or authorizing schemes. A clarifying statement about situations where there is no selectivity and which are therefore not covered by the Directive has been included in the fourth recital in the preamble to the new directive, as well.

The questions of *mixed procurement* and *partnership schemes* have also been discussed in Finland. For instance, the well-known *Mehiläinen* ruling (C-215/09) of the ECJ was about the possibilities of 'direct award' partnerships in health care services. Some of the firms operating in the health care sector are very keen on suggesting different types of partnership schemes to public authorities arguing that these partnerships fall outside the scope of application of procurement law.

In general, Finnish contracting authorities and experts working in the field of procurement can be expected to welcome any clarification or specification of the notion of a public contract in the new procurement directive, as the role of public contracts will probably gain even more importance in the future.

Question 3

The Act on Public Contracts (348/2007), Section 10, includes rules on in-house procurement. This Section corresponds to the case law of the European Court of Justice (ECJ), especially (Teckal (C-107/98), Stadt Halle (C-26/03) and Coditel Brabant (C-324/07).

Section – 10 Public contracts awarded in-house

This Act shall not apply to public contracts which contracting authorities award to entities which are formally independent of the contracting authority with autonomous decision-making powers, insofar as the contracting authority independently or in cooperation with other contracting authorities exercises over the entity concerned a control that is similar to that which it exercises over its own departments and the entity carries out the essential part of its activities with those controlling authorities.

The term 'essential part' is understood in Finnish case law similarly as under EU jurisprudence. For example, whereas an in-house entity could obtain 10% of its turnover from customers other than the controlling contracting entities, the in-house criteria were not fulfilled in a situation where a claimed in-house unit obtained approximately 25% of its turnover from customers other than the controlling authorities. (Supreme Administrative Court 3.8.2012, 2012:61; Työsyke Oy).

Finnish legislation does not include detailed rules on the form of in-house units. Rather, it is common that the possibility of operating as an in-house unit is registered in the articles of association of such a unit, but this is not a requirement for in-house status. Agreements between the contracting entity and the in-house entity are normally contracts under private law.

Other forms of public-public cooperation have not been regulated in Finland. Certain cooperation arrangements which took place without a jointly owned in-house unit have been examined under the in-house rules: For example, the Market Court and the Supreme Administrative court have examined a case where several cities and municipalities agreed on organizing the transportation of patients in cooperation. According to the cooperation agreement, one city's rescue department would take care of the transportation of patients on behalf of all the parties in a way that ensured that the legal responsibility for organizing the transportation would remain with each municipality. The cooperation agreement was considered to be a public procurement contract under the Act on Public Contracts. However, since the Department operated fully under the control of the parties and most of its turnover and operations came

from the parties, it was considered an in-house department of the cities and municipalities involved in the cooperation. The contractual arrangement was therefore not subjected to regulation under the Act on Public Contracts. (Supreme Administrative Court 11.3.2011, 2011:24).

There are certain markets in which public-public partnerships and in-house procurement arrangements limit the amount of business conducted on the market. For example, maintenance of streets as well as certain secondary services such as laundry services and ambulance services are examples of markets where a large number of local contracting authorities seem to lack a clear policy on which operations are taken care of by the public sector, either alone or in cooperation with other public entities, and which services are bought from the private sector. Some entities claiming to be in-house units seem to obtain, on a regular basis, more than 10% of their turnover from customers other than the owners. Yet, the same entities benefit from the possibility of selling services or goods to the owners without a public procurement procedure. There are cases pending before the Market Court concerning such situations.

Question 4

It is only under rare circumstances that Finnish courts have found that a contracting entity could procure goods, services or works from a private party without a public procurement procedure. Finland has enacted national legislation on public procurement that also covers secondary services (Annex B services) and service concessions. The obligation of a contracting entity to organize a public procurement procedure is, in practice, interpreted in a broad manner; i.e. unless a clear exception of the Directive and corresponding national law applies, a public procurement procedure shall be organized.

In addition to statutory exemptions included in the Directive, the Market Court has dealt with this question mainly in the circumstances of mixed agreements where the main purpose of the arrangement has not been public procurement. Some examples of national case law are briefly discussed under question 5.

Licenses for the organization of games of chance are not a relevant issue from the perspective of public procurement in Finland as the country has, through legislation, granted exclusive rights to three gaming companies to organize different types of games.

A public procurement procedure has been considered necessary for purchasing services of general economic interest (SGEI) even in the case of secondary (Annex B) services. The Supreme Administrative Court confirmed

this principle in the following case: The city of Helsinki procured housing services for long-term homeless persons without organizing a competitive bidding procedure in accordance with the Act on Public Contracts by merely appointing three suppliers to provide SGEI to the city. The Supreme Administrative Court found that the Act on Public Contracts does not include any exceptions for Annex B services that would allow the procurement of SGEI outside the scope of the Act. Thus, the city of Helsinki had violated the Act on Public Contracts as it had not organized a public procurement procedure. (Supreme Administrative Court 28.3.2013, 2013:53).

It is somewhat unclear in Finland whether public procurement rules should be applied in a situation where all suppliers that meet the qualification criteria are admitted to a framework contract, and the end customer (and not the contracting entity) finally makes the choice between the suppliers. This is the case e.g. with respect to selecting suppliers that provide services in exchange for service vouchers financed by municipalities. The question has not yet been decided with certitude. Such arrangements are, however, normally treated as public procurement contracts.

Question 5

The question concerning severability in the analysis of mixed contracts was addressed in the Mehiläinen case before the Market Court (MAO:195/11 Dnro 263/08/JH) following the judgment of the European Court of Justice (ECJ) in case C-215/09. With regard to severability, the ECJ paid attention to the following issues:

- The original reasoning of the city of Oulu for not organizing a public procurement procedure for the award of a public contract did not show that the contract would have been indissociable from the rest of the contract. The city of Oulu had argued that 'the current contract is advantageous and competitive' and that, by that undertaking, 'the joint venture will commence its activities in favourable conditions'
- The alleged but unsubstantiated inclusion of the value of the undertaking entered into by the city of Oulu with respect to its capital contribution to the joint venture constitutes, in those circumstances, a legal technicality which does not justify the view that the first aspect of the mixed contract would be indivisible from the latter.
- In addition, the contracting authority's intention to launch a call for tenders for the purchase of health care services for its staff at the end of the

transitional period also constitutes evidence to support the severable nature of that aspect of the mixed contract.
– Furthermore, the fact that the joint venture has operated since August 2008 without the contract tends to show that the two partners appear to be in a position to deal with any impact that that absence might have on the financial position of that venture, which is further relevant evidence of the divisible nature of that aspect.

The Market Court referred to the reasoning of the ECJ, and emphasized the following: The city of Oulu had decided to organize a public procurement procedure concerning the purchase of the services after the four-year transitional period, and the joint venture had, in practice, operated since 2008 without the contract. This showed that the contract in question was severable from the rest of the contracts.

The Market Court and its predecessor, the Competition Council have dealt with mixed contracts e.g. in two cases concerning construction of shopping centers, with different outcomes:

Market Court case 12.10.2007, 369:07 concerned a mixed contract for the construction and realization of a shopping center and its surrounding area in cooperation with the city of Tampere. The city and the selected supplier would plan the shopping center in cooperation and the supplier would be responsible for construction and financing. The supplier would also buy the relevant real estate from the city. The Market Court found that the main part of the mixed contract was not the construction contract, but selling of city-owned property to a supplier that would build a shopping center at its own expense and risk. The transaction was considered to fall outside the scope of public procurement rules and the competence of the Market Court. (The Market Court 12.10.2007, 369:07)

In a fairly similar case the city of Helsinki requested tenders for the realization of a shopping center, a bus traffic station and its surrounding area, and this was considered to be a public procurement contract. In this case, the city procured more: the city would benefit from the planning of the area, new bus station terminals and public areas. The supplier would obtain title to the real estate, rights of use and lease rights, and the possibility to utilize such rights financially. (The Competition Council 20.2.2002, 219/690/2001)

The Market Court has not dealt with the question of the application of the general principles of non-discrimination/equal treatment with regard to mixed contracts that fall outside the scope of the public procurement legislation. However, there are other cases, which indicate that the Market Court has not, in general, paid specific attention to the application of the general principles;

e.g. case MAO:87/13 concerned procurement of secondary services (Annex B services) by a utility under Directive 2004/17/EC. The value of the procurement exceeded the EU thresholds and the contracting entity had published an ex-ante voluntary transparency notice without organizing a public procurement procedure. A competitor appealed to the Market Court, which rejected the appeal as the contracting entity had applied all the specific paragraphs applicable to Annex B services and these paragraphs do not oblige a contracting entity to organize a competitive bidding procedure. The Market Court did not refer to the general principles in its decision. The decision has been somewhat criticized.

The general principles of EU law: public procurement law and beyond

Question 6

The contracts expressly excluded from the scope of the Directive in Article 16 are not covered by the Finnish Act on Public Contracts (348/2007) or other national procurement rules. Administrative legislation imposes non-discrimination obligations for administrative measures if administrative legislation applies to the contracting entity. Employment contracts are covered by labor law, which contains non-discrimination and equal treatment requirements. As regards consensual agreements relating to state aid, see answer to question 7. Contracts falling outside the definition of public procurement contract are likewise not covered by the Finnish public procurement legislation. Transparency or equal treatment principles may apply to these contracts if administrative law applies – in other words if an administrative measure is in question and the authority is in the scope of application of administrative law – or there is special legislation containing transparency or equal treatment obligations.

Procurements below EU thresholds and Annex B services are in the scope of the Finnish Public Procurement Act. The national thresholds for the application of the Act are:

Procurement category	Threshold
Goods and services (Annex A + B) Service concessions Design contests	30.000 €
Health and social services	100.000 €
Works Works concessions	150.000 €

General principles of non-discrimination, equal treatment and transparency apply equally to contracts below EU-thresholds and Annex B services. There are also detailed procedural rules for awarding contracts below EU thresholds and Annex B services. These rules provide some flexibility compared with the rules in the Directive. Service Concessions are covered by the Finnish Act on Public Procurement, as well (see answer to question 14).

Question 7

Competitive procedures based on principles of transparency and equal treatment are gaining ground outside procurement contracts in Finland and in the EU. In state aid law, the European Commission has introduced competitive procedures as a tool for indicating non-state aid measures. For instance, in its Communication on state aid elements in sales of land and buildings by public authorities (OJ C 209, 10.07.1997), the Commission states that a sale of land and buildings following a sufficiently well-publicized, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain state aid. Competitive bidding procedure is used for similar purposes in Commission decisions and ECJ case law on state aid law and public service compensation in services of general economic interest (Commission decision C(2011) 9380 and case C-280/00, Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark [2003] ECR I-7747). Acts of granting special or exclusive rights to economic operators are increasingly being investigated as possible concession contracts, subject to principles of equal treatment and transparency. Such arrangements may concern, for instance, chimney sweeping services or rights to operate public transport services on certain routes. In the EU Regulation No 1370/2007 on public passenger transport services by rail and by road, competitive tendering procedures are introduced when public authorities entrust general interest services to a third party.

A key challenge in applying competitive procedures in arrangements other than procurement contracts is assessing the distinctive features of such other

types of arrangements and finding out which parts of procedural rules applicable to procurement contracts are compatible with these arrangements. In state aid rules, for instance, some of the more detailed procedural rules do not necessarily lend themselves to figuring out the market price. In the act of granting special or exclusive rights, there might be greater need for longer deadlines for preparing tenders. According to the case law of the ECJ, the principles of equal treatment and transparency do not necessarily lead to full application of the rules contained in EU procurement directives. On the other hand, the ECJ has derived quite detailed procedural obligations from these principles in procurement cases. In addition to these, there are general principles in Finnish administrative law, invoking principles of non-discrimination and transparency (however, applicable only to those contracting authorities that are also public authorities).

Public procurements and general EU law, including competition and State aids law

Question 8

Decisions by contracting authorities to award public contracts to economic operators are viewed as containing risks of imposing restrictions on the internal market. This is embedded in the foundations of public procurement legislation. There will also be references to primary law provisions on internal market law in the new procurement directive. Thus, the application of the procurement directives should, in most cases, minimize the risks of decisions by contracting authorities having detrimental effects on the internal market. If the procurement directives are viewed as protecting the fundamental freedoms of the internal market, then any exclusions or gaps in the scope of application would have to be, if the law-makers of the European Union are considered as logical operators, free or at least nearly free of any risks of harmful effects to the internal market. Internal market considerations can be seen, for instance, in the conditions regarding in-house exceptions or direct awards (negotiated procedure without publication).

One can also consider if the provisions in the Treaties could be invoked in a public procurement context as additional conditions for not putting public contracts or concession contracts out to tender. First of all, there should be room to invoke such rules outside the scope of the provisions of the procurement directives (the Tedeschi principle: substantive primary law only applies

if there is no applicable secondary law). This might be the case in some instances where there are exclusions from the scope of application or where there are no clear applicable rules in the Directives. In these situations one could look into the possibilities of the contracting authority to invoke, for instance, provisions on justification to restrictions of the market freedoms, provisions regarding services of general interest or provisions concerning defense interests of the Member States (although the latter is expressly mentioned as an exclusion to the defense sector directive on procurement). In all such cases the contracting authority would also have to apply the principle of proportionality to show that there is no less-detrimental way (than not forming a competitive procedure) of securing, for example, general interest considerations.

Question 9

Since increasing competition is one of the leading objectives behind the whole regulation of public procurement, there are numerous ways in which any small dysfunction or loophole in the system might lead to distortions of competition, either through abuse or simple negligence/ ignorance/ thoughtlessness. Because of the brevity required from the answers, we have tried to choose a few that we find worthy of attention.

As mentioned in the questions posed, transparency itself, a guiding principle in procurement, might indeed sometimes make it easier for economic operators to collude. It is not uncommon for enterprises to try to direct the procurement contract to a certain tenderer either by agreeing that only one of the economic operators submits a tender or that the others prepare their tenders in such a way as to make one tender stand out as the best, since they know how their offers will be assessed. Sometimes the economic operators act in a more subtle way, though, and even if the contracting authority would be able to detect this, it might feel that its hands are tied because finding a legal basis for excluding these tenderers is difficult. Co-operation may take place by using the same chains of subcontracting, using subcontractors even if the tenderer would be able to execute the contract by using its own resources or by two subsidiaries submitting a tender in the same procurement procedure etc. Having clearer European legislation on exclusion in such situations could be deemed useful and a provision such as the one in Article 57(4)(d) of the new procurement directive will be most welcome.

Another downside of transparency can be that information that is considered confidential by the companies taking part in the procurement process might be disclosed to their competitors. A weighing exercise is always neces-

sary to balance the conflicting interests of one party to the confidentiality of its technical or trade secrets and of the other party to understand why its tender was not chosen and to decide whether or not to challenge the decision of the contracting authority. Sometimes, as in the recent decision of the Supreme Administrative Court, the result is the disclosure of pricing information, such as unit prices.[5] It is a fact that this makes some companies reluctant to take part in procurement procedures and thus limits competition.

The (mostly) positive sides of the technical dialogue will be covered in relation to fostering innovation (question 12), but the contact between the contracting authority and the economic operators during the dialogue might have some negative effects to competition, as well. It needs to be used with care, because the exact same information needs to be given to the participants. If more information is inadvertently given to one participant (who is perhaps 'fishing' for it), this will lead to its getting an advantage over its competitors. The same applies, of course, when a clever economic operator convinces the authority to change something in the tender documents to its liking. These aspects are not unlike to competitive dialogues and negotiated procedures, but contracting authorities might let their guards down easier and disclose something they should not in a technical dialogue, considering they are acting outside the official procedures. Moreover, in theory technical dialogue gives a possibly corrupted contracting authority an excellent excuse to meet its 'co-conspirator' legitimately without anyone on the outside knowing what is being discussed. This has not been an issue in Finland, though.

A similar theme has been touched upon by the ECJ in its judgment on cases C-21/03 and C-34/03 Fabricom concerning participation in the preparation of tender documents.[6] In a Finnish judgment previous to Fabricom, MAO 163/I/02, the technical department of the town of Pyhäjärvi was involved in all the stages of the preparation of the tender and also submitted a tender. This was claimed to be discriminative by another tenderer, but the Market Court did not agree, because it considered that the technical department had no more information on the procurement than the other tenderers. This estimation might well be put into question (and considered an outdated decision[7]), but perhaps the logic behind it was that since the municipality could have just given the contract to the technical department without putting it out to tender, the department being part of the same legal person, it must have truly wanted to see if an economic operator might offer it better value. In any

5. Supreme Administrative Court decision of 16 May 2013, vol. 1714.
6. Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559.
7. Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559.

case, in order to avoid negative effects to competition, the Article 41 of the new directive that is related to this subject will be very useful.

Another applaudable development would be the regulation of amendments to procurement contracts. Some ECJ[8] and national case law[9] already exists, but clear dispositions on the matter would certainly not be of harm. Cases where, for example, a contractor that has given a global price in its offer for completing a certain task asks for a compensation exceeding this amount for 'additional tasks' are not unheard of in practice. Article 72 of the new procurement directive might give contracting authorities a stronger foothold or a simple reminder of their obligations. The line between prohibited and permitted is still very vague at present and since there is no monitoring authority in Finland[10] and the competitors of the enterprise to which the contract has been awarded have lesser means of being informed after the procurement decision, this stage is more prone to distortions of competition from the side of either corrupted contracting authorities or from dubious attempts of the contractor to (slowly) change the contract to its advantage, perhaps taking advantage of the inexperience of the contracting authority in the field.

Taking switching costs or other similar costs into consideration is obviously a practice that favours the previous supplier. The European Court of Justice has accepted it on certain conditions in case C-19-00 SIAC[11] and the General Court of the European Union has precised this jurisprudence in case T-345/03 Evropaïki Dynamiki.[12] Albert Sánchez Graells has criticised the latter judgment for being lax from a competition point of view. He has suggested a model where switching costs are taken into consideration but so that the lowest switching costs presented in the other tenders will also be considered to be the switching costs of the previous supplier when evaluating the tenders. This way the costs that will be caused to the contracting authority are, quite sensibly, taken into consideration (the winner has to compensate costs exceeding its estimate) but the previous contractor does not get a considerable advantage

8. C-454/06 *Pressetext* [2008] ECR I-4401 and C-91/08 *Wall AG* [2010] ECR I-2815.
9. Supreme Administrative Court: KHO 19.10.2005, vol. 2647 and KHO:2009:88; Market Court: MAO:197/09, MAO:618/10.
10. Although this is probably due to change with Article 84 for of the proposed directive.
11. C-19/00 *SIAC Construction* [2001] ECR I-7725.
12. T-345/03 *Evropaïki Dynamiki* [2008] ECR II-341, paras 73-80.

over its competitors.[13] The Market Court has also found the use of switching costs unjustified on occasion.[14]

Unduly demanding selection criteria may likewise preclude competition and inhibit SMEs from submitting tenders. The ECJ has accordingly stated that the minimum capacity level required must be related and proportionate to the subject-matter of the contract.[15] The matter of a minimum turnover has not been an issue in Finland because the Supreme Administrative Court has abided by the same principle as the ECJ and stated that a certain minimum annual turnover cannot be required, unless there is a particular reason connected to the subject-matter of the contract. This jurisprudence has mostly been followed by the Market Court.[16] As a result, the dispositions of the new directive will not constitute a big change to this state of things, but will, of course, be recommendable from the point of view of legal certainty. The bar should not be set too low, though, and limiting the required turnover to two times the estimated contract value, except in justified circumstances, as has been done in the new directive (Article 58(3)), might be too stringent, since it is sometimes a fact that only a large operator has the necessary resources to perform the contract.

Some have expressed a concern that the excessive use of central purchasing bodies may restrict competition. In Finland, public procurement has not become so centralised yet as to cause remarkable limitations to competition. The value of the contract notices published in the national system was over 10 billion euros in 2012.[17] To put things into perspective, the value of the purchases through the framework contracts of the central procurement unit of the Finnish government (Hansel Oy) was 687 million euros and that of the central procurement unit of the municipalities and local government (KL-Kuntahankinnat Oy) 170 million. There are naturally other joint procurement units besides these two but the value of their contracts is by no means larger.

To make it possible for small and medium-sized companies to take part in the procedure, the central procurement units often divide the contracts into lots and/or conclude their framework agreements with three or more contrac-

13. See A. Sánchez Graells, *Public Procurement and the EU Competition Rules* (Oxford and Portland, Oregon: Hart Publishing 2011), p. 334-338.
14. MAO:96/06 and MAO:240/06.
15. E.g. C-218/11, *Édukövízig and Hochtief Construction*, judgment of 18 October 2012, not reported yet, para. 29.
16. See, for example, MAO:407/09, MAO:255/09, MAO:262/13. See also Supreme Administrative Court decisions of 23 November 2005, vol. 3049 and of 20 August 2009, vol. 1987. For cases on technical capacity, see e.g. MAO:183/11 and MAO:358/11.
17. See the statistics of HILMA, the national electronic notification system, available at http://www.hankintailmoitukset.fi/fi/docs/Tilastot_2012.

tors. Considering this, we find it a good thing that the mandatory threshold of 500 000 euros for dividing contracts, which was proposed by the Commission, was removed and Article 46 of the new directive leaves the Member States a margin of appreciation when it comes to the division into lots.. On the other hand, all depends on how broadly or narrowly the duty to provide an explanation for not dividing the contract is interpreted. To sum up, establishing joint procurement bodies does not only mean centralising procurement but also gathering knowledge and know-how about public procurement into one place, which often translates into procurement processes that run more smoothly and according to the rules. This practice should not be criticised as such, because the effects on competition also depend on how these bodies conclude their contracts, which can be done so as to encourage SMEs.

The role of the contracting authorities as economic operators has already been discussed in the context of the previous questions. Corruption is possible amongst the contracting authorities, as mentioned, but more restrictions to competition in general is caused by the ever increasing complexity of the legal relations between public authorities and other entities, be they public or private, and trying to fit these contracts into the framework of the Directive. Classification of different arrangements as in-house procurement or public-public co-operation falling outside the scope of the Directive/ state aid/ SGEIs/ procurement under the Directive is very problematic. Article 12 of the new directive is mostly a codification of the case law of the ECJ but will probably bring more certainty into the interpretation of public-public and public-private co-operation.

The changes to the Directive mentioned under this heading seem to constitute much-hoped clarifications. Nonetheless, the flip-side of the coin is that despite the wish expressed by the Commission to make tendering easier for SMEs,[18] the increasing regulation and the large amount of detailed rules might actually make them more reluctant to submit an offer and, in addition, increase the administrative burden of the member states. A delicate balance needs to be struck here.

Question 10

The relationship between SGEIs and public procurement legislation and competitive procedures is one of the more complicated issues in EU internal

18. Examples of these attempts for SME-friendliness are the simplification of information obligations, the division into lots mentioned above, the limitation of selection criteria and direct payment of subcontractors, COM(2011) 896 final, p. 11.

market/procurement law. This has to do with many things. Firstly, the rules on SGEIs in the Treaties seem to have been drafted for the purpose of protecting *existing* national monopolies from the EU competition law; not for the purpose of handling *active* measures of *entrusting* public service obligations to market operators/economic operators. *Secondly, m*ost of the ECJ case law and Commission guidance deal with competition law and state aid law; not with procurement legislation. Even though there are references to public procurement legislation in the Commission's guidance on state aid law and SGEIs, these references usually fall short in stating that procurement legislation has to be applied, *if* the arrangements in organizing SGEIs fall within the scope of application of procurement rules. The Commission's guidance does not, however, instruct us much on *when* the entrusting of a public service obligation *could fall within the scope of procurement rules*. *Thirdly,* many stakeholders see SGEIs as 'extra grounds' for direct awards which make these issues very 'hot' in terms of politics.

As *Sanchéz Graells* has elegantly pointed out, compliance with public procurement rules and principles concerns the contracting authority (not the public contractor) and must take place *before* the undertaking starts rendering the services of general interest. It does not affect in any material way the ability of the public contractor or concessionaire to discharge effectively and fulfill an obligation that (as regards the time of conducting the procurement process) still does not exist. Hence, the award of the special or exclusive right to provide services of general economic interest in breach of public procurement rules will hardly ever fulfill the conditions of Article 106(2) of TFEU.[19]

Actions of granting special or exclusive rights in SGEIs come quite close to the distinctive features of *concession contracts*: transfer of risk, right to exploit services etc. Academic discussions have also pointed towards application of rules concerning service concessions (TFEU principles at the moment, specific directive in the future). There is, however, little or no debate as to whether the service provided by the contractor/right holder is directed towards the contracting authority *or towards the general public*. In other words, is there contract-like *reciprocity* in remuneration for the authority (is there an economic interest à la Helmut Müller case). This question might pose the most difficult challenges in SGEI/procurement issues. A recent ruling was given by the Supreme Administrative Court in Finland stating that a transac-

19. Sanchés Graells, Alberto. Public Procurement and the EU Competition Rules, Hart Publishing, 2011, p. 127.

tion considered as public procurement could not be left untendered by evoking the rules on SGEI (Supreme Administrative Court 28.3.2013, 2013:53).

Strategic use of public procurement

Question 11

As regards the so-called horizontal, secondary or strategic aspects in public procurement, Finland has continued on the path dictated by its procurement tradition. Unlike some other countries, which have chosen to rank environmental and social objectives or competition first,[20] the guiding principle is still the best value for money.[21] This has been provided for in Section 1(2) of the Act on Public Contracts, which expressly states that the purpose of the Act is to increase the efficiency of the use of public funds. In spite of this golden rule, Finland has been and wants to be a pioneer in advancing strategic goals. These objectives are not conceived as conflicting with the best value for money[22] but might sometimes actually be considered to bring added value.

In the light of a study commissioned by the European Commission and published in 2011, the relative use of green public procurement (hereafter GPP) in Finland was a bit below 50% (most used in the EU by the Netherlands with around 65%) and that of socially responsible public procurement (hereafter SRPP) somewhat over 30% (most used in the EU by the United Kingdom with about 54%),[23] which means that Finland is performing rather

---

20. See e.g. M.E. Comba, 'Green and social considerations in public contracts' in R. Caranta and M. Trybus (Eds), *The Law of Green and Social Procurement in Europe* (Copenhagen: Djøf Publishing 2010).
21. E.g. S. Eskola and E. Ruohoniemi, *Julkiset hankinnat* (Helsinki: WSOYpro 2011), p. 126, and E. Pekkala, *Hankintojen kilpailuttaminen* (Jyväskylä: Tietosanoma 2007), p. 24.
22. Nor has the conversation about perceiving them as state aid been prevalent. For further information on the subject, see H.-J. Priess and M. Graf von Merveldt, 'The impact of the EC state aid rules on horizontal policies in public procurement' in S. Arrowsmith and P. Kunzlik (Eds), *Social and Environmental Policies in EC Procurement Law – New Directives and New Directions* (Cambridge: Cambridge University Press 2009), p. 249-270; and M.E. Comba, 'Green and social considerations in public contracts' in R. Caranta and M. Trybus (Eds), *The Law of Green and Social Procurement in Europe* (Copenhagen: Djøf Publishing 2010), pp. 310-314.
23. W. Kahlenborn, C. Moser, J. Frijdal and M. Essig, *Strategic Use of Public Procurement in Europe – Final Report to the European Commission MARKT/2010/02/C* (Berlin: adelphi 2011), p. 14 and 17.

well on European level. The Finnish government wants the country to be a forerunner, however, especially when it comes to environmental technology, and has published a new strategic programme regarding sustainable environmental and energy solutions (cleantech solutions) in public procurement in June 2013. This means that state authorities shall take energy and environmental objectives into consideration and require cleantech solutions in all their procurement. Special attention should be paid when procuring waste disposal, electricity, new buildings, transport services, energy-related products and services, particularly food services. The decision is binding for state authorities and serves as a recommendation to other public authorities. Since, despite the generally positive attitude towards the matter, lack of know-how is sometimes seen as the largest impediment to GPP and SRPP, one of the 'revolutionary' aspects of the new strategy may turn out to be the sustainable development advisory service about to be made available to all public authorities.[24]

Regulation No 106/2008 on a Community energy-efficiency labelling programme for office equipment is duly taken into consideration and Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles has been transposed by Act No 1509/2011 that came into force on 1 February 2012. Different kind of GPP are taken into consideration by many authorities in all the stages of the procurement procedure, whenever reasonably possible. This is done, for instance, by life-cycle costing and measuring the carbon footprint of different product groups (IT, paper, office chairs, outdoor lighting, hygiene products).[25]

GPP and SRPP are by nature no more prone to abuse than any other requirements, criteria or obligations set in public procurement. That does not mean, though, that they could not be intentionally or unintentionally used to favour local products. Using criteria derived from eco-labels or other standards as technical requirements is expressly permitted by the current Directive (art. 23(6)). This applies to national as well as European labels. Nevertheless, one might ask if using national eco-labels as a basis for specifications might

---

24. Valtioneuvoston periaatepäätös kestävien ympäristö- ja energiaratkaisujen edistämisestä julkisissa hankinnoissa, 13 June 2013. Available at http://www.tem.fi/files/36938/Valtioneuvoston_periaatepaatos_kestavien_ymparisto-_ja_energiaratkaisujen_(cleantech_ratkaisut)_edistamisesta_julkisissa_hankinnoissa.pdf, a summary on the focus areas in English available at http://www.tem.fi/files/34087/Measures_for_the_focus_areas_of_the_Strategic_Programme_for_Cleantech.pdf.
25. There are no actual calculators in Finnish for life-cycle costing, but a carbon foot-print calculator is available at https://www.webropolsurveys.com/Answer/Survey Participation.aspx?SDID=Fin331151&SID=aedbb3de-a9f7-4491-bde3-e343c4be 7952.

actually favour local economic operators. Even if other means than a certain label must be accepted as proof of fulfilling the criteria, it seems that local producers would be more likely to have the specific label and thus apply this specific criteria already, whereas tenderers from other EU states might have some other eco-label with slightly lower standards concerning these aspects, although a higher level in others (not required by the contracting authority).[26]

In the last few years, so-called 'local food' and 'seasonal food' have been much debated in Finland. Contracting authorities may in general decide relatively freely on what they wish to buy, as long as they do not state where the products should stem from. It should therefore be perfectly feasible for Finnish authorities to buy blueberry jam instead of orange jam[27] or name seasonal local produce as the subject-matter of the contract, but in reality this means that they are more likely to get Finnish than, for instance, Spanish products. On the other hand, it does not seem unreasonable to want to provide diners of public officials, prisons or, in particular, schools with food that these people are already accustomed to.

Socially responsible public procurement is also a part of the EU strategy 2011-14 for Corporate Social Responsibility (CSR).[28] In Finland, the Ministry of Employment and the Economy has produced a web site with two sections, one aimed at contracting authorities and another at SMEs, named the CSR compass. The objective of the compass is to provide practical tips and support on how to promote social responsibility in production chains in the context of public procurement.[29] The participating authorities have used social criteria in all stages of the procurement process with more or less favorable results. Plenty of material has been produced as the result of the project, including a guide on social procurement in Finnish.

In order to fight black economy, the Act on the Contractor's Obligations and Liability when Work is Contracted Out (1233/2006) was enacted in 2006. It obliges all entrepreneurs and authorities to ask for certain documents when they use temporary agency workers, when employees of their subcon-

26. See E. Pekkala, *Hankintojen kilpailuttaminen* (Jyväskylä: Tietosanoma 2007), p. 280, that points in this direction.

27. This example is one use by the Swedish Falk, in J.-E. Falk, K. Pedersen, *Centrala frågeställningar vid offentlig upphandling* (Stockholm: Jure Förlag AB 2004), p. 18.

28. COM(2011) 681 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A renewed EU strategy 2011-14 for Corporate Social Responsibility, p. 11.

29. The CSR compass is available in Finnish and Swedish at http://www.csr-kompassi.fi/.

tractor are working on their premises and, in the construction industry, when there are subcontractors. Before entering into contract on these occasions, they shall require from the other party to the contract to provide information on its registration in different tax registers and the trade register, on the collective agreement or basic terms of employment applicable to the employees, as well as on certificates of tax payment and pension insurances. Since this obligation applies to contracting authorities, it is often mentioned in relation to SRPP.

Tax evasion has been a hot topic on European and Finnish level of late. At the moment, the authorities' hands are tied if they suspect that a tenderer might have evaded taxes without there being an actual conviction by final judgment. The measures proposed by the European Parliament in its resolution of 21 May 2013, more specifically the establishment of a European blacklist of tax havens and prohibiting access to public procurement to companies based in blacklisted jurisdictions, would probably be greeted warmly by most contracting authorities.[30] This is to be supported in principle, but might lead to problems of definition as well as to difficulties in the interpretation and application of the rules on procurement in practice.

Question 12

Public procurement as a means to promote innovations is an important part of the strategic programme of the Finnish government mentioned in the answer to the previous question. According to the strategy, authorities should have incentives to improve the productivity and quality of public services in the long term. In order to achieve this, sufficient funding should be directed to the preparation of cleantech procurement.[31] Funding and assistance for innovative procurements related to reforming the services or the functioning of a public authority is available from Tekes, the Finnish Funding Agency for Technology and Innovation.[32]

Competitive dialogue is mentioned in the strategic programme, but, to our knowledge, it has been rarely used in the country. The conditions for using the negotiated procedure are more flexible and it can yield the same results, hence the competitive dialogue has provided no added value. The technical

30. 2013/2060(INI): European Parliament resolution of 21 May 2013 on Fight against Tax Fraud, Tax Evasion and Tax Havens.
31. Valtioneuvoston periaatepäätös kestävien ympäristö- ja energiaratkaisujen edistämisestä julkisissa hankinnoissa, 13 June 2013, p. 4 and Annex I, p. 5-6.
32. See http://www.tekes.fi/info/julkisethankinnat#top_of_content.

dialogue in its different forms (written questions and answers, conversation with each operator separately or with all of them in an information session, asking for comments on the tender documents etc.) is also widely in use. It is very effective if the authority wants to find out what kind of products are available on the market, which requirements, criteria and contract terms are reasonable and which could be the sensible performance based technical specifications, to name but a few examples. Finding the right balance between accuracy and flexibility will in turn help the contracting authority get more innovative offers in its future award procedure.

In its proposition for a new directive on public procurement, the Commission envisioned a new procurement procedure called the innovation partnership. Something of this kind is sorely needed and Article 31 of the new directive seems to be a step in the right direction. The conditions for choosing this procedure and for conducting it are rather flexible, which is mostly positive. It is to be hoped that after the details added in the legislative process, authorities will not be timid to use it (as has been the case previously with the competitive dialogue) in fear of errors.

Intellectual property rights (hereafter IPRs) are a matter not to be overlooked when talking of innovations. They are a difficult concept especially to small authorities who cannot rely on legal expertise. Problems occur when contracting authorities do not give the matter much thought and put a term into the draft contract included in the tender documents stating that they want all the IPRs to themselves 'just in case'. What they do not always take into account is that IPRs may constitute nearly the whole of the property of a company or that, in any case, the more IPRs they acquire, the higher the price. To ease this problem, the clause included in the General Terms of Public Procurement in service contracts states that (unless agreed otherwise) IPRs are not transferred to the buyer but it gets an irrevocable right to use the end result of the service.[33] This clause should be modified or excluded and a specific contract term added depending on the procurement at hand and perhaps its innovativeness.[34]

In the current state of affairs, public procurement regulation is seen not as a catalyst but as an obstacle to innovation. This is mainly due to its complexi-

33. General Terms of Public Procurement in service contracts, Jyse 2009 Services, paragraph 20. Available in English at http://www.vm.fi/vm/en/04_publications_ and_documents/01_publications/08_other_publications/20100217Genera/JYSE_2009_services.pdf.

34. Contract terms are also available specifically for IT procurement, namely the Terms and Conditions of Government IT Procurement. Available at http://www.jhs-suositukset.fi/suomi/jhs166.

ty, but as mentioned above, many enterprises also fear that their ideas may be leaked to their competitors and this keeps them from tendering. Consequently, to foster innovation it is not sufficient to develop procurement procedures, but more attention should be paid to the rules on disclosure in general and not just in the context of the negotiated procedure, the competitive dialogue and new innovation partnership, for which there are provisions in the new directive (Articles 29(5), 30(3), 31(4) and 31(6)).

Remedies

Question 13

The new provisions of the Public Procurement Act implementing the Remedies Directive came into force on 1 June 2010. The new provisions have strengthened the remedies system, but at the same time the risks for the contracting entities and the selected suppliers have increased and serious practical problems have risen.

In Finland the national review body is the Market Court, which is a special court. The second instance is the Supreme Administrative Court. The court procedures and the remedies are the same in all procurements, except the ineffectiveness, shortening the contract period and the financial penalty, which are applicable only in procurements covered by the Directive 18/2004.

The available remedies are:

- cancellation of the decision of the contracting authority
- prohibition to apply a section in a document relating to the contract or otherwise to pursue an incorrect procedure
- requirement to rectify the incorrect procedure
- compensation fee to a party who would have had a genuine chance of winning the contract if the procedure had been correct.
- ineffectiveness in the case of illegal direct award, infringement of standstill period or automatic suspension
- financial penalty in addition or as an alternative to the ineffectiveness sanction, infringement of standstill period or automatic suspension (available also in Annex B-services and in contracts based on framework agreements)
- shortening of the duration of the contract in addition or alternatively to financial penalty

The ineffectiveness, the financial penalty and the shortening of the duration of the contract are new remedies, which were introduced in the legislation in 2010. These new remedies have been ordered by the Market Court in the following cases:

- MAO:510/12 Haaga Helia University of applied sciences, ineffectiveness, illegal direct award
- MAO: 200/13 City of Espoo ineffectiveness and shortening of the duration of the contract, illegal direct award
- MAO:212-213/13 City of Seinäjoki financial penalty and shortening of the duration of the contract, infringement of automatic suspension.
- MAO:205/13 City of Imatra, financial penalty, infringement of standstill
- MAO:159/13 City of Oulu, financial penalty, infringement of standstill
- MAO:403/12 City of Lahti, financial penalty, infringement of standstill

It can be argued, that the new remedies provide efficient measures in the case of infringement of the standstill period and the automatic suspension, because these violations are quite straightforward. The concept of illegal direct award is more unclear, so there might also be some room for debate on whether the needs of legal certainty are met in all cases. For example in the case mentioned above, MAO 512/12, the dispute related to the applicability of Section 27(1) of the Act, I.e. the use of negotiated procedure without a notice after an open procedure, where no suitable tenders were received (see Article 31(1)(a) of the Directive 18/2004). The conditions for the use of the procedure in the case of unsuitable tenders are ambiguous, but the consequences for even a minor misinterpretation are severe if the procurement is considered an illegal direct award.

There are some cases where the Market Court has ordered a compensation fee to a party who would have had a genuine chance of winning the contract if the procedure had been correct. The remedy is applicable in situations where there is no doubt of the infringement and of the correct winner and secondary compared to the other remedies. The compensation fee is efficient, because of its comparatively high amount, which can be up to 10 per cent of the contract price and because there is no need to demonstrate any proof of the damage caused. On the other hand, it is often difficult to demonstrate the correct winner. However, the possibility of compensation has probably decreased the claims for damages in general courts.

The main problem of the Finnish remedies system relates to the slow court proceedings. One might question whether the Finnish remedies system meets the requirements for an effective and rapid review system presented in the

Remedies Directive. 449 complaints were filed in 2012 and the average handling time was 6.1 months. In the case of an appeal to the Supreme Administrative Court, the review takes further 2-2.5 years. During these proceedings, it is prohibited to sign the contract and this suspension applies automatically. The court may lift the suspension because of reasons relating to public interest, but in many cases the court has denied an application to lift the suspension. The lengthy period of time used for the proceedings endanger the effectiveness of the remedies system. Connected to the automatic suspension it also causes practical problems for the contracting entities as signing the contracts can be delayed for months or years. The Finnish speciality that is designed to ease the problem is a provision allowing temporary agreements while cases are pending in the Market Court or in the Supreme Administrative Court.

Conclusion and reform

Question 14

Service concessions are covered by the Act on Public Contracts. The definition of service concessions corresponds to the definition of the Directive 18/2004 (Article 1(4)). The applicable procedural rules are the same that apply to procurements below the EU-thresholds (e.g. requiring advertising, assessment of the technical and financial capacity of the tenderers, technical specifications, awarding contracts. In practice, the procurement procedures are the same as those in procurements covered by the Directive. Negotiated procedure is always possible when awarding service concessions).

Service concessions are not very widely used in Finland. The new definition and especially the condition of exploitation risk have not been deeply analyzed. This might due to the reason that the procedural rules are quite similar than in service contracts and thus the rules on awarding service contracts are usually followed for the sake of simplety. One example of a typical service concession is a contract on restaurant/canteen services in official buildings.

Public-private partnerships are also covered by the Act on Public Contracts, in situations where the partnership also contains procurement (see mixed contracts, question 5). According to Section 66 (1) (4) of the Act, the negotiated procedure is possible in respect to contracts related to the partnership arrangements of an individual project between the public and the private sector or contracts related to a permanent partnership agreement and long-

term contracts. However the Act does not contain specific definition of these arrangements and projects.

Public private partnerships have been used only moderately in Finland. Some examples are the construction of the E18 Highway and the construction and maintenance of school buildings in Espoo. Because of the economic crisis eagerness to use public-private partnerships has increased among public sector entities, but the political process especially in municipalities is often cumbersome.

The effects of *long term contracts* are usually analyzed and balance sought between the needs of the suppliers for a long term contract (because of investments, financial aspects linked to the investment etc.) and the negative effects to competition. On the other hand, this kind of contracts are often used for service/works that have been produced by the public sector itself, so awarding public private partnerships opens the markets and in this perspective is usually welcomed by the private sector.

The procedures of the 2004 Directives are effective, but contracting authorities have considered the detailed provisions of the Directive very complicated. Although one of the aims of the current directives was to provide more flexibility, the general view is that the directives are even more difficult to comply with than the previous ones.

A further challenge is the strict manner in which the Market Court has interpreted the national legislation implementing the Directives. Especially smaller procurement entities have neither the competence nor the capacity to follow the detailed rules developed by the jurisprudence.

The 2014 Directives have raised the general level of knowledge about the procurement rules. This has also led to centralization of the purchasing function in procurement units, establishment of centralized purchasing entities and the increased use of existing ones. The increased interest for centralized procurement is also a result of the decrease in the number of staff in state and municipal entities – and thus the need to increase efficiency and concentrate on core functions.

Competitive dialogue has only been used on small scale in Finland. The experiences have usually been positive and the tenderers have not questioned the use of the procedure. However, the scope and the availability of the procedure are not very clear. Also the conditions for using the competitive dialogue and the negotiated procedure are quite similar. There is ambiguity as to the usability and also in the practical application of the procedural rules. Since the complexity of the procurements has increased, there is a practical need for a wider recourse to the procedures allowing negotiations between suppliers and procurement entities. It is noteworthy that in many cases the

tenderers themselves request the use of the competitive dialogue or negotiated procedure even if it means increased costs for participation.

The use of electronic tools has increased. Electronic communication is widely used in tender procedures and electronic purchasing systems are also used in many procurement entities. However, it can be argued that the only few entities with a high degree of professionalism conduct tender competitions from the beginning to the end in specialized IT systems. The central procurement unit of the Finnish municipalities (KL-Kuntahankinnat Ltd) has awarded a framework agreement on an electronic procurement system for the municipalities and the state central purchasing unit (Hansel Ltd) a similar one for the state entities. These units have expressed concerns whether available systems fulfill the detailed requirements of the Directive.

It can be argued that the use of electronic communication or electronic procurement systems has not caused obstacles or special problems for the potential tenderers. On the contrary, tenderers see that the use of electronic tools increases the effectiveness of the procedures. The availability of an online information system on taxes, social security payments and exclusion grounds (convictions etc.) would decrease the administrative task of the contracting entities and the suppliers.

The impact of the new rules to the national administrative law is small. The Public Procurement Act as a special law takes precedence over general administrative law. Article 24 of the new procurement directive contains a special provision on conflicting interests in the case of personal interests of the staff members of the contracting entities. Article 57 provides a ground for exclusion in a situation where conflicting interests cannot be remedied effectively by other measures. The new provisions are to be supported as they provide more clarity for these situations. On the other hand, it can be argued that EU procurement rules should not regulate issues that are administrative and relate to all activities of public entities, since these questions should be left to be solved by national administrative legislation. A situation that cannot be avoided is one where administrative law and procurement law overlap and this raises difficult judicial questions as regards, for example, the competent courts and the remedies available.

FRANCE

Arthur Merle-Beral et Ines Tantardini[1]

Le contexte

Question 1

Le principal défi auxquel les Etats membres sont constamment confrontés aujourd'hui est l'adaptation de leur législation aux normes européennes.

La France a été précurseur s'agissant du droit des marchés publics, avec l'adoption du Code des marchés publics en 1964. Celui-ci a été modifié à de nombreuses reprises (2001, 2004, 2006) ce qui s'explique par le fait que le droit administratif français de la commande publique a eu du mal à transposer les directives européennes et à accepter de perdre ses spécificités au profit d'une législation supranationale.

Un exemple de cette transition difficile a été l'adoption de l'ordonnance n°2005-649 du 6 juin 2005:

– D'une part, alors que les marchés publics constituent un domaine à géométrie variable soumis aux contraintes du monde des affaires, l'application du droit des marchés publics présente des difficultés notamment pour les Etablissements publics industriels et commerciaux (EPIC) les plus importants.
– D'autre part, les personnes publiques qui cherchent à être et se comporter comme des opérateurs privés (via des SEM, SPL) y voyent une manière plus efficace de servir l'intérêt général. La souplesse de l'ordonnance de 2005 a donc finalement pour but de se rapprocher autant que possible de la souplesse de l'intervention privée tout en restant de l'intervention publique. C'est une lecture confortable des directives.

1. Elèves-avocats au barreau de Paris. Avec la participation de la Chambre de Commerce et d'Industrie de Paris.

Enfin, le droit communautaire des marchés publics, qui prévaut sur celui des Etats membres, a un champ d'application très large alors que le Code des marchés publics français a, lui, un champ d'application plus restreint. Il s'applique à :

– L'Etat et à ses établissements publics autres que ceux à caractère industriel et commercial ;
– Aux collectivités territoriales et aux établissements publics locaux.

Un grand nombre d'organismes dépendant de la sphère publique doivent néanmoins être regardés comme soumis au droit communautaire des marchés publics, bien qu'ils ne soient pas soumis au Code des marchés publics proprement dit (sociétés d'économie mixte, certaines associations financées ou contrôlées par des collectivités publiques, etc.).

Par ailleurs, les décrets d'application de l'ordonnance de 2005 ont été modifiés. Le décret n° 2008-1334 du 17 décembre 2008 a apporté des modifications attendues aux décrets d'application de l'ordonnance susuisèe, qui sur plusieurs aspects n'étaient pas en conformité avec le droit communautaire, n'intégrant pas certaines contraintes sectorielles nationales (loi MOP notamment) ou à l'inverse étant trop contraignants par rapport aux possibilités ouvertes par le droit communautaire. Aussi nécessaire était-elle, cette réforme reste toutefois relativement partielle au regard des contraintes communautaires et nationales qui ne sont toujours pas expressément intégrées par l'ordonnance du 6 juin 2005 ou ses décrets d'application, et au regard des incertitudes qui pèsent encore sur plusieurs aspects fondamentaux du régime de passation et d'exécution des marchés qui relèvent de ces textes.

Les limites du droit européen des marchés publics

Question 2

Concernant d'une part la notion de « contrat public » elle-même : elle n'est pas une notion de droit français. Le droit français ne connait lui que le « contrat administratif ».

Les contrats administratifs sont tout d'abord des contrats (au sens de l'article 1101 du Code civil) de l'administration qui se décomposent entre contrats de droit privé pour lesquels le juge judiciaire est compétent et de droit public pour lesquels le juge administratif est compétent.

Un contrat est administratif tout d'abord par détermination de la loi.[2]

La jurisprudence a également dégagé deux critères cumulatifs permettant de qualifier un contrat de contrat administratif :

- Critère organique préalable : un des signataires du contrat doit être une personne publique.[3] Cela n'exclut pas qu'un contrat entre deux personnes privées soit exceptionnellement qualifié d'administratif.[4]
- Critère formel ou matériel (alternatifs) :
  - Insertion dans le contrat de clauses exorbitantes du droit commun ;[5]
  - Association étroite du cosignataire du contrat au service public : le cocontractant de l'administration se voit confier l'exécution même du service public,[6] ou une modalité de ce dernier.[7]

Ainsi, aujourd'hui, la doctrine tend à utiliser le terme « contrats publics », en ce qu'il fait appel à un critère organique – celui de l'Administration – ces contrats étant soit de droit administratif soit de droit privé. Dès lors qu'une personne publique est présente, même si le droit privé s'applique, il y aura des adaptations à faire, par exemple dans la conclusion du contrat. En tant que de besoin, le juge civil va donc accueillir des notions de droit administratif. Ainsi, tous les contrats publics ne sont pas des contrats administratifs, et il n'existe pas à leur égard de définition particulière. L'enjeu essentiel de la qualification de contrat administratif ou de contrat de droit privé est celui de la compétence juridictionnelle.

D'autre part, quant à la différence entre les contrats publics et les mesures législatives et décisions administratives, le critère majeur qui les différencie est le caractère unilatéral de ces dernières.

---

2. Aux termes de l'article 2 de la loi n° 2001-1168 du 11 décembre 2001, « les marchés passés en application du code des marchés publics ont le caractère de contrats administratifs ».
3. Rappelé par l'arrêt TC, 26 juin 1989, SA Compagnie générale d'entreprise de chauffage.
4. Exemple : marchés passés pour le compte de l'Etat entre des entrepreneurs et sociétés concessionnaires d'autoroutes.
5. Conseil d'Etat, 31 juillet 1912, n° 30701, Société des granits porphyroïdes des Vosges.
6. Conseil d'Etat, 20 avril 1956, n° 98637, Epoux Bertin.
7. Conseil d'Etat, 20 avril 1956, n° 33961, Ministre de l'agriculture c/ consorts Grimouard.

En effet, les mesures législatives sont édictées par le Parlement, à l'exception des lois référendaires. La loi est l'expression de la volonté générale, mais il n'existe aucun échange lors du processus d'adoption d'une mesure législative entre le destinataire de la loi et le pouvoir législatif.

Concernant les décisions administratives (ordonnances, décrets, décisions individuelles), on comprend aisément que la décision provenant de l'administration sont unilatérale cependant, la qualification de certains actes administratifs est aujourd'hui problematique car la frontière entre l'acte unilatéral ou bilatéral peut être difficile à établir. C'est de ce qu'on appelle « l'acte unilatéral négocié ».

A cet égard, l'analyse de la jurisprudence révèle que certaines formes d'action de l'administration ne sont pas considérées par le juge comme des actes unilatéraux *stricto sensu* ou des contrats. Ainsi, par exemple, le fait que des discussions interviennent, qu'un accord de volontés soit conclu entre deux entités distinctes, devrait permettre d'affirmer que l'acte en cause entre dans la catégorie des contrats. Tel n'est pourtant pas toujours le cas. Malgré l'existence de certains indices, le juge refuse de qualifier les actes de contrat et les considère comme des actes administratifs unilatéraux.[8] En effet, il n'y a pas de réel partage de décision entre l'Administration et le destinataire de l'acte. L'Administration n'est finalement pas tenue par le résultat de ces négociations.

Enfin, concernant la différence entre les contrats publics et les autres contrats, de deux choses l'une :

- Soit l'on considère que les contrats publics sont les marchés publics, les autres contrats représentent tout le reste (contrats de droit privé, mais aussi délégations de service public, contrats de partenariats etc.)
- Soit l'on considère que les contrats publics sont les contrats de l'Administration selon ce que nous avons exposé précédemment et il est alors possible d'effectuer une distinction. En effet, dans ce cas, un contrat ne sera pas un contrat public par définition de la loi. Le vrai critère est celui de la volonté de l'Administration : lorsqu'elle contracte, l'Administration choisit de contracter soit en tant que puissance publique soit comme le ferait une personne privée selon les clauses qu'elle inclut dans le contrat ou l'objet qu'elle lui donne. Si elle contracte en tant que puissance publique, que le contrat soit de droit public ou de droit privé, il est un contrat de l'Adminis-

8. Par exemple, pour la nomination d'un fonctionnaire, le consentement de ce dernier est nécessaire, mais il est seulement une condition d'efficacité de la volonté unilatérale de l'administration : l'acte juridique existe alors indépendamment de ce consentement.

tration donc un contrat public. En revanche, si l'Administration entend agir comme une personne privée (ex : réponse à un appel d'offres pour un marché public, en concurrence avec des entreprises), alors le contrat n'est pas un contrat public.

Question 3

Les cas de partenariats public-public touchent à l'exception dite des contrats « *in house* » définie par l'arrêt de la Cour de Justice des Communautés Européennes (CJCE) du 18 novembre 1999, Teckal. Dans cet arrêt, la Cour de Justice décide pour la première fois qu'il n'y a pas lieu d'appliquer le droit des marchés publics dans l'hypothèse où une collectivité territoriale exerce sur une personne un contrôle analogue à celui qu'elle exerce sur ses propres services,[9] et où celle-ci réalise l'essentiel de son activité avec la ou les collectivités qui la détiennent.[10]

Il est à préciser que l'exception « *in house* » s'applique à tous les contrats relevant du noveau paquet législatif « commande fulliqe » adopté definitivement le 1er février 2014.

L'exception « *in house* » a été reprise dans le Code des Marchés publics dès 2001 et confirmeépar un arrêt du Conseil d'Etat du 4 mars 2009.[11] Aux deux conditions précédemment évoquées, le Code des marchés publics est venu en ajouter une troisième selon laquelle, s'il est admis que, dans de telles conditions, le respect des règles de publicité et de mise en concurrence n'a pas à être assuré, le prestataire intégré se devra, quant à lui, de respecter de telles règles lorsqu'il contractera. L'objectif est d'assurer la mise en concurrence en aval dès lors qu'elle n'a pas eu lieu en amont. En effet, il serait dangereux pour la sécurité juridique que découle de ce premier contrat « *in house* », une situation contractuelle ne respectant pas du tout les règles de la concurrence. Ce mécanisme traduit une volonté de transparence de la chaine contractuelle.

---

9. Sur le contrôle de la composition du capital du prestataire intégré : CJCE, 11 mai 2005, Stadt Halle ; CJCE, 19 avril 2007, Semfo ; mais aussi sur le contrôle de l'intensité du contrôle exercé par le pouvoir adjudicateur : CJCE, 13 octobre 2005, Parking Brixen ; CJCE, 13 novembre 2008, Coditel Brabant.
10. À ce titre la jurisprudence communautaire n'exige pas l'exclusivité mais elle exige toutefois que les activités extérieures soient marginales.
11. Conseil d'Etat, 4 mars 2009, n° 300481, Syndicat national des industries d'information de santé (SNIIS), Publié au recueil Lebon.

Dans le cadre d'une relation « *in house* » comme définie ci-dessus, on parle de « coopération verticale institutionnalisée ».

Quant aux autres formes de coopération public-public : les accords de coopération entre pouvoirs adjudicateurs sont nombreux puisqu'ils représentent tous les contrats conclus entre les collectivités territoriales, ou entre celles-ci et des EPIC. Les institutions européennes, quant à elles, se méfient de tels contrats puisqu'elles y voient une volonté manifeste de contourner les règles de mise en concurrence imposées par les directives. À l'inverse, en France, dans une logique de mutualisation des services, de rationalisation de l'activité publique et même de mise en œuvre de l'intercommunalité il apparaît que de tels contrats sont naturels mais plus encore, nécessaires.

Une seconde hypothèse existe : les coopérations horizontales non institutionnalisées. Il s'agit de coopérations ne permettant pas la création d'une entité autonome. Un arrêt de la Cour de Justice de l'Union Européenne (CJUE) a précisé cette notion dans une décision du 6 juin 2009.[12] Pour la CJUE, il peut y avoir dispense de publicité et de mise en concurrence « *dès lors que la mise en œuvre de cette coopération est uniquement régie par des considérations et des exigences propres à la poursuite d'un intérêt public* ». La CJUE semble donc autoriser le non-respect des règles de mise en concurrence car cette coopération public-public révèle une absence totale de personne privée à l'opération.

La solution de la CJUE a été reprise puis précisée par le Conseil d'Etat dans un arrêt du 3 février 2012.[13] Dans cet arrêt, il a été jugé qu'une commune pouvait valablement confier le service de distribution d'eau à la communauté d'agglomération et ce sans mettre en place les règles de publicité et de mise en concurrence. Le Conseil d'Etat précise que la commune pouvait accomplir cette mission par ses propres moyens ou en coopération avec d'autres personnes publique. Toutefois, et l'apport de l'arrêt repose sur cet élément, le Conseil d'Etat ajoute une condition à cette dispense de mise en concurrence pour de telles coopérations public-public : la coopération ne doit pas permettre l'intervention, à des fins lucratives, de l'une des personnes publiques agissant comme un opérateur économique sur un marché concurrentiel.

Dès lors, face à de telles coopérations, il est à vérifier en quelle qualité la personne publique a agi. Exerce-t-elle une activité pour laquelle elle peut re-

12. CJCE, 6 juin 2009, *Commission c/ Allemagne*, affaire C-480/06.
13. CE, 3 févr. 2012, Cne de Veyrier-du-Lac et Communauté d'agglomération d'Annecy, n° 3535737.

courir à ses services, ou davantage une activité devant être ouverte à concurrence entre les opérateurs économiques ?

Cette condition tend à assurer que les personnes publiques ne profitent pas de leur qualité pour passer des marchés publics déguisés, les faisant intervenir sur un marché concurrentiel, et ce pour se soustraire aux règles de la concurrence.

Reste à préciser la notion de « *personne publique agissant comme un opérateur économique sur un marché concurrentiel* » ; ce qui, semble-t-il, sera le fruit de la jurisprudence.

La difficulté est donc bien réelle quant à la distinction entre les véritables accords de coopérations horizontaux et les contrats de la commande publique. Il semble que l'état du droit ne soit pas suffisamment fixe en la matière, créant une véritable insécurité juridique.[14]

Toutefois le projet de nouvelles directives européennes sur les marchés publics souhaite redéfinir les critères cumulatifs que nous avons ci-dessus précisés pour les contrats dits « *in house* ». De même, ce projet de directives souhaite préciser les conditions de non qualification de marché public pour les contrats conclus entre les personnes publiques.

Question 4

A titre liminaire, il convient de préciser ce qu'on entend par « règles communautaires ». En effet, cette notion peut toucher soit aux directives européennes, soit au Traités. Pour l'intérêt de la question, nous nous réfèrerons à la notion de directives.

Dans ce cadre, l'accord consensuel public-privé qui serait considéré comme étant hors du champ d'application des directives serait celui où la personne publique est vendeur et non-acheteur. C'est notamment l'exemple de l'autorisation d'occupation temporaire du domaine public (AOT), un instrument juridique qui permet à l'Etat d'accorder à un tiers un droit d'occuper son domaine afin que ce dernier construise un ouvrage qu'il exploite.[15] En effet, dans son arrêt du 3 décembre 2010 concernant le stade Jean Bouin,[16] le CE décide qu'« *aucune disposition législative ou réglementaire ni aucun principe*

14. D'autres hypothèses de coopération public-public existent ; notamment dans le cadre de relations entre pouvoirs adjudicaments (accords d'achats conjoint ou centraux) au lors de la création de sociétés publiques locales.
15. Articles L. 2122-6 et L. 2122-9 du Code de la propriété des personnes publiques.
16. CE 3 décembre 2010, Ville de Paris c/ association Paris Tennis, req. N°338272.

n'imposent à une personne publique d'organiser une procédure de publicité préalable à la délivrance d'une autorisation ou à la passation d'un contrat d'occupation d'une dépendance du domaine public, ayant dans l'un ou l'autre cas pour seul objet l'occupation d'une telle dépendance ; il en va ainsi même lorsque l'occupant de la dépendance domaniale est un opérateur sur un marché concurrentiel ». Ce faisant, il tranche un débat qu'avaient nourri à la fois la doctrine et plusieurs tribunaux administratifs ayant pris position en sens contraire.[17]

On peut penser que dans cette décision, le juge administratif a raté une occasion de devancer ce qui pourrait résulter à terme de la jurisprudence européenne au nom du principe de transparence, elle qui admet déjà depuis 1985 que le principe de non-discrimination s'applique aussi pour les conventions d'occupation du domaine public, ce qui semble relever du bon sens.[18] Mais on peut aussi penser qu'en la matière, il serait trop réducteur d'assimiler la non discrimination à une obligation de mise en concurrence, dès lors qu'il est possible de garantir l'égalité de traitement des opérateurs par d'autres moyens (tarifs uniformes, listes d'attentes etc.) et qu'il n'existe pas toujours de rareté objective de l'accès au terrain dans une zone considérée.

Un autre cas d'exclusion du champ d'application des directives est celui d'un accord conclu hors du territoire de l'Union Européenne. En effet, et même si la personne publique est acheteur, des lors qu'elle effectue ses achats en dehors de l'Union Européenne alors le contrat conclu n'est pas un marché public au sens du droit national ou communautaire, ce qui a pu être rappelé dans un arrêt du Conseil d'Etat du 4 juillet 2008.[19]

Enfin, la mise en place de partenariats public-privé institutionnalisé (« PPPI ») en France est actuellement difficile à réaliser compte tenu de l'avis du Conseil d'Etat rendu sur la question le 1er décembre 2009[20] qui prend le contrepied d'une communication de la Commission du 12 avril 2008[21] confirmée par la jurisuprudence de la Cour de Justice dans l'arrêt *Acoset* du 15 octobre 2009.[22]

---

17. Par exemple : TA Nîmes, 24 janvier 2008, Société des trains touristiques G. Eisenreich, req. n° 0620809.
18. CJCE 18 juin 1985, Steinhauser contre ville de Biarritz.
19. Conseil d'Etat, 4 juillet 2008, no 316028, Société Colas Djibouti.
20. Avis du Conseil d'Etat du 1er décembre 2009, n°383264.
21. Communication interprétative de la Commission concernant l'application du droit communautaire des marchés publics aux PPPI, 14 avril 2008.
22. CJUE, Acoset, 15 octobre 2009.

Dans sa communication, la Commission admet que dans le cas de « *la participataion d'un partenaire privé à une entreprise publique déjà existante qui exécute des marchés publics ou des concessions obtenus par le passé dans le cadre d'une relation in house* », le principe qui doit prévaloir de la mise en place de deux appels d'offre successifs – le premier pour la sélection du partenaire privé qui contractera avec la personne publique, le second pour l'attribution du marché public ou de la concession – est difficilement praticable. La Commission considère que dans ces conditions un appel d'offres unique suffit pour satisfaire aux règles du droit de la concurrence et de la commande publique, l'objet de cet appel d'offres étant à la fois « *la concession qui doit être attribuée à l'entité à capital mixte et la contribution opérationnelle du partenaire privé à l'exécution de ces tâches (...)* » Cette position a été entièrement validée par la Cour de Justice dans un arrêt *Acoset* du 15 octobre 2009 rendu sur renvoi préjudiciel concernant la conformité d'une loi italienne, prévoyant un appel d'offres unique pour la sélection d'un opérateur privé devant entrer au capital d'une entité in house pour gérer, au sein de l'entité devenue alors mixte, la concession en cours.

Pourtant, le Conseil d'Etat, dans un avis rendu le 1er décembre 2009, semble aller à l'encontre de cette jurisprudence au nom des principes généraux du droit français des contrats. Son raisonnement est le suivant : « *l'inclusion de l'opérateur choisi dans une société préexistante, dont le capital serait déjà constitué, est difficielemnt concevable en raison de la nécessité de préserver l'intégrité du contrat, base de la relation entre l'opérateur et le pouvoir adjudicateur. Il ne serait pas conforme aux exigences de bonne fin du contrat, de continuité du service public et d'égalité des usagers devant celui-ci, qui conditionnent la régularité de la concession de contrat, que la structure de la société conjointe place l'opérateur dans une position le privant du pouvoir réel de décision* ». L'analyse du Conseil d'Etat se fonde également sur l'article 53 du code des marchés publics (voir infra) dont il déduit « *la règle de l'identité entre le candidat ayant présenté une offre et le titualire du contrat à l'issue de la compétition* » pour retenir l'obligation dans de deux appels d'offre successifs.

Ces propos doivent cependant être nuancés : on ne peut totalement échapper à l'application du droit communautaire, et notamment du fait de l'application des libertés du marché intérieur telles que prévues par le Traité sur le fonctionnement de l'Union Européenne, notamment la liberté d'établissement, libre prestation de service, et la libre circulation des travailleurs. La Cour a ainsi fait valoir que « *la sélection de l'associé privé dans le respect des exigences (dégalité de traitement et de non-discrimination) et le choix des critères de sélection de l'associé privé permettent de remédier à cette situation,*

dès lors que les candidats doivent établir, outre leur caacité à devenir actionnaire, avant tout leur capacité technique à fournir le service et les avantages économiques et autres découlant de leur offre. »[23]

Question 5

Comme il n'existe pas de typologie des accords mixtes en droit administratif français, ces accords sont appréciés *in concreto* par les juridictions administratives. Ainsi, à l'instar de la Cour de Justice de l'Union européenne (CJUE) dans ses décisions *Loutraki* (C-145/08 et C-149/08) et *Mehiläinen Oy* (C-215/09), les juridictions administratives françaises retiennent comme critère pour l'application des règles relatives à la passation des marchés publics – dans le cadre d'accords mixtes – le caractère principal ou accessoire de l'objet portant sur le marché public dans ledit contrat.

Dans son arrêt du 3 décembre 2010 *Ville de Paris*, le Conseil d'Etat donnait déjà un indice sur l'appréciation que devait faire les juridictions administratives de l'application des règles relatives à la passation des marchés publics, lorsqu'en son considérant n°26, il rappelait « *qu'aucune disposition législative ou réglementaire ni aucun principe n'imposent à une personne publique d'organiser une procédure de publicité préalable à la délivrance d'une autorisation ou à la passation d'un contrat d'occupation d'une dépendance du domaine public, ayant dans l'un ou l'autre cas pour seul objet l'occupation d'une telle dépendance* » et précisait « *qu'il en va ainsi même lorsque l'occupant de la dépendance domaniale est un opérateur sur un marché concurrentiel* ».

La décision de la Cour administrative d'appel de Douai *Société immobilière Carrefour* du 25 octobre 2012, suivant la direction donnée par le Conseil d'Etat et la CJUE dans les arrêts susmentionnés, a écarté l'application des règles relatives à la passation des marchés publics à la convention de vente de parcelles comprenant un engagement de prendre en charge la réalisation de travaux de voirie.

On notera toutefois le caractère libéral de la décision prise par la Cour d'Appel de Douai au regard de la position de la CJUE : en effet, alors que la non-application du droit des marchés publics ne se justifie, aux yeux de la CJUE, que si le contrat mixte forme un « *tout indivisible* » dont la part correspondant à un marché public n'est pas détachable, la Cour de Douai, en dépit de l'incertitude qui entourait l'identité du propriétaire de la voirie suite aux

23. CJUE, Acoset, 15 octobre 2009, § 59.

travaux (la commune ou la société acquéreur), s'est contentée de retenir la non-application du droit relatif à la passation des marchés publics, au cas en l'espèce en raison du caractère accessoire des travaux.

Les principes généraux du droit européen : le droit des marchés publics et au-delà

Question 6

Les principes qui s'appliquent à l'attribution des contrats exclus, non couverts ou partiellement couverts par les directives sur les marchés publics sont ceux prévus à l'article 1er du Code des marchés publics : les principes de liberté d'accès à la commande publique, d'égalité de traitement des candidats et de transparence des procédures.

En effet, trois types de contrats échappent à l'application des directives marchés publics :

En premier lieu, les procédures formalisées imposées par le droit communautaire ne s'imposent qu'aux marchés d'un montant supérieur aux seuils qu'il fixe. Ces seuils sont prévus par la directive 2004/18/CE et sont les suivants :

- 134 000 euros HT pour les marchés de fournitures et de services de l'Etat et de ses établissements publics ;
- 207 000 euros HT pour les marchés de fournitures et de services des collectivités territoriales et de leurs établissements publics, des établissements publics de santé, et des établissements publics du service de santé des armées ;
- 207 000 euros HT pour les marchés de fournitures acquises par des pouvoirs adjudicateurs opérant dans le domaine de la défense et pour les marchés de service de recherche et de développement pour lesquels le pouvoir adjudicateur acquiert la propriété exclusive des résultats et qu'il finance entièrement ;
- 5 186 000 euros HT pour les marchés de travaux.[24]

Au-dessous de ces seuils, l'acheteur est libre d'organiser sa procédure comme il l'entend, dans le respect des principes constitutionnels de liberté d'accès à la

24. Seuils actualisés au 1er janvier 2014.

commande publique, d'égalité de traitement des candidats et de transparence des procédures.[25]

Le deuxième type de contrat concerné par cette préoccupation est la concession de service : la directive 92/50/CEE sur les marchés publics de services ne définit pas les concessions de services. La directive 2004/18/CE les définit comme des contrats présentant les mêmes caractéristiques qu'un marché public de services, à l'exception du fait que la contrepartie de la prestation de services consiste soit uniquement dans le droit d'exploiter ce service, soit dans ce droit assorti d'un prix. Le nouveau paquet législatif « commande publique » en drésse enfin les principales modalités.

Jusqu'alors, seuls les principes généraux du Traité et quelques décisions de la Cour de Justice[26] posaient, à ce jour, les jalons des principes devant trouver à s'appliquer.

En France, la loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques, dite « loi Sapin », limite la durée de tous les contrats de délégation de service public et prévoit une procédure de publicité et de mise en concurrence préalable à leur signature.

Quant á la concession de travaux, des modalités seront également définies par le nouveau paquet législatif ???

En droit français, l'ordonnance du 15 juillet 2009 en donne la définition suivante : « *Les contrats de concession de travaux publics sont des contrats administratifs dont l'objet est de faire réaliser tous travaux de bâtiment ou de génie civil par un concessionnaire dont la rémunération consiste soit dans le droit d'exploiter l'ouvrage, soit dans ce droit assorti d'un prix*. »

Pris en application de l'ordonnance n° 2009-864 du 15 juillet 2009 relative aux contrats de concession de travaux publics, le décret n° 2010-406 du 26 avril 2010 fixe les nouvelles règles applicables à ces contrats. Ces contrats sont soumis au respect des principes fondamentaux de la commande publique, liberté d'accès, égalité de traitement et transparence des procédures (article 5), et prennent en compte les objectifs de développement durable (article 6). Les interdictions de soumissionner sont celles du droit commun de la commande publique (article 8).

---

25. CE, Avis, 29 juillet 2002, Société MAJ Blanchisseries de Pantin, n° 246921 ; 2003-473 DC 26 juin 2003.
26. Notamment CJCE, 7 décembre 2000, Telaustria, affaire C-324/98.

Question 7

S'agissant du principe de non-discrimination, il s'applique normalement à la sélection du bénéficiaire d'une mesure administrative unilatérale. Il découle en effet du principe constitutionnel d'égalité, repris par le droit de l'Union européenne aux articles 2, 3 et 8 du traité sur l'Union européenne et expressément formulé à l'article 18 du TFUE.

Concernant le principe d'égalité de traitement, il renvoie de prime abord au principe d'égalité devant la loi. Or, ce principe, aux termes de la jurisprudence du Conseil constitutionnel,[27] est appliqué de manière plus souple par le législateur français qu'il ne l'est en droit de l'Union. Appliqué par l'administration, ce principe suppose que soient satisfaites trois conditions cumulatives :

– Une contradiction entre deux décisions au minimum ;
– Ces décisions ont été prises par une même autorité sinon il n'y a pas de comparaison possible. Le terma « *même autorité* » doit être comprise de manière large. Les autorités pourraient être des autorités différentes mais se trouvant dans une même hiérarchie (dans le sens souveraineté). Ex : le secrétaire communal et le bureau de routes dans une commune. Tous deux faisant partie d'une même hiérarchie, ils constituent donc une seule et même autorité ;
– La contradiction, la différence que l'on établit est infondée. Cela signifie que l'autorité n'est pas en mesure, ne peut pas justifier cette contradiction.

Mais à l'instar de la souplesse dont bénéficie le législateur dans l'application du principe d'égalité de traitement, l'administration ne peut normalement pas se voir opposer ce principe lorsqu'elle prend une mesure unilatérale. On nuancera toutefois notre propos au regard du développement de la pratique des « *directives tacites* » de l'administration qui visent à traiter de manière spécifique les administrés placés dans une même situation spécifique.

Enfin, le principe de transparence s'applique dès lors que le droit de l'Union le prévoit. A contrario, dans le silence des textes, l'administration n'est pas tenue de respecter ce principe comme c'est le cas en matière d'autorisation d'occupation temporaire du domaine public.

En tout état de cause, le principe de non-discrimination est dissociable de celui de la concurrence pour faire respecter l'égalité (exemples : système de

27. Conseil constitutionnel, DC n°2009-578, 18 mars 2009, Loi de mobilisation pour le logement et la lutte contre l'exclusion, considérant n°19.

prix réglementé de l'occupation du domaine pour les câbles électriques des éoliennes, / système de « premier arrivé – premier servi »). Cependant, il est indissociable de la question de la rareté du terrain public. Dans ce cadre, le droit européen des marchés publics, finalement, peut fragiliser les personnes publiques. En effet, l'application de toutes ces règles communautaires est source de risque et d'insécurité compte tenu du flou de leur champ d'application (que ce soit de leur champ d'application personnel ou matériel) et des conséquences qui s'y attachent (compte tenu notamment de l'assimilation quelque peu hâtive de obligation d'assurer l'absence de discrimination et de celle de garantir une forme de transparence dont les contours exacts sont mal définis[28]).

Les marchés publics et le droit européen, notamment le droit de la concurrence et le droit relatif aux aides d'Etat

Question 8

Le sujet des décisions prises par les pouvoirs adjudicateurs est extrêmement vaste, tant du point de vue des questions qu'il pose que des réponses qu'on lui apporte. Ainsi il paraît utile de se concentrer sur un type de décisions permettant d'apprécier l'état de la jurisprudence communautaire et surtout française sur le sujet. Il s'agit des spécifications techniques dans les critères d'attribution des offres.

Les spécifications techniques peuvent être définies comme l'ensemble des prescriptions techniques contenues dans les documents de consultation et définissant les caractéristiques requises d'un matériau, d'un produit ou d'une fourniture permettant de les identifier de telle manière qu'ils répondent à l'usage auquel ils sont destinés par le pouvoir adjudicateur.

La raison d'être des spécifications techniques récide donc dans la définition précise par le pouvoir adjudicateur de ses besoins. Dés lors, si ces spécifications techniques permettent une définition précise des besoins d'un pouvoir adjudicateur, qui la plupart du temps est en charge de missions d'intérêt général, alors elles remplissent elles-mêmes un objectif d'intérêt général. Autrement dit, elles se justifient par des motifs d'intérêt général.

---

28. On notera toutefois l'existence de procédures de mises en concurrence, notamment dans le secteur minier.

Par ailleurs, la CJUE a jugé que les principes fondamentaux de la commande publique, au nombre desquels figurent le principe de non-discrimination, doivent s'appliquer aux critères d'attribution d'une offre,[29] notamment en matière de spécifications techniques.

Ainsi, si les spécifications techniques sont l'expression d'un besoin au service du pouvoir adjudicateur, celles-ci se doivent de respecter les principes fondamentaux de la commande publique.

Depuis la directive 2004/18 transposée pour grande partie dans le code des marchés publics de 2006 (CMP), les pouvoir adjudicateurs peuvent recourir à des critères faisant référence à des normes techniques et également à des spécifications techniques.[30] La souplesse permise par l'utilisation tant de normes que de spécifications techniques est encore accrue par l'article 6-V du CMP qui dispose que le pouvoir adjudicateur « *ne peut pas rejeter une offre au motif qu'elle n'est pas conforme à cette spécification si le candidat prouve dans son offre, par tout moyen approprié, que les solutions qu'il propose respectent de manière équivalente cette spécification* ». Cette obligation de reconnaître les spécifications techniques « équivalentes » a été fermement rappelé par la CJUE dans sont arrêt du 10 mai 2012 précité (§ 96). Ainsi, en s'attachant réellement à la satisfaction des besoins du pouvoir adjudicateur, une concurrence réelle et efficace entre les candidats est mise en œuvre.

Par ailleurs et logiquement, les spécifications techniques doivent être en lien avec l'objet du marché (art. 6-III du CMP).[31]

Cependant, cette exigence de lien avec l'objet du marché semble, dans certaines hypothèses au moins, perdre de sa vigueur. En effet, le Conseil d'Etat n'a pas hésité à s'éloigner de la jurisprudence communautaire dans son arrêt *Région Picardie*.[32] Dans cet arrêt, le Conseil d'Etat vérifie en premier lieu si la spécification technique (en l'espèce le recours à un logiciel pour un marché de service à l'exclusion de logiciels équivalents) a un effet anticoncurrentiel.

---

29. CJUE 10 mai 2012, Commission c/ Pays-Bas, aff. C-368/10, § 95 : « Contrairement à ce que soutient le Royaume des Pays-Bas, aucune raison ne conduit à considérer que les principes d'égalité, de non discrimination et de transparence emporteraient des conséquences différentes lorsqu'il s'agit des critères d'attribution, lesquels sont également des conditions essentielles d'un marché public, puisqu'ils vont être décisifs dans le choix de l'offre qui sera retenue parmi celles qui correspondent aux exigences exprimées par le pouvoir adjudicateur dans le cadre des spécifications techniques. »
30. Art 6-I-2° du Code des marchés publics.
31. Pour un refus d'adéquation avec l'objet du marché : CJCE, 7 juin 2007, Commission c/ Royaume de Belgique, aff. C-254/05. Pour une validation du critère : CE, 18 décembre 2012, Département de la Guadeloupe, no 362532.
32. CE, 30 septembre 2011, Région Picardie, n° 350431.

En l'absence de celui-ci, il ne vérifie alors pas si cette spécification technique est en lien avec l'objet du marché. Le critère principal de validité de la spécification technique devient donc son absence de restriction de la concurrence, le critère subsidiaire le lien avec l'objet du marché.

On remarque donc que loin de restreindre la concurrence, ces spécifications techniques sont perçues de plus en plus comme un moyen de la renforcer en ce qu'elle précisent les critères d'évaluation des candidats. C'est pour cette raison que désormais une spécification technique peut être légale sans avoir besoin d'apprécier si des exigences impérieuses d'intérêt général la justifient.

Il reste que les critères d'attribution doivent respecter les principes fondamentaux de la commande publique, au nombre desquels figure le principe de non-discrimination.

Si les spécifications techniques ne doivent, bien entendu, pas avoir pour effet de discriminer directement ou indirectement en fonction de la nationalité des candidats[33] c'est surtout le juste degré des spécifications techniques qui est déterminant pour apprécier leur conformité aux principes fondamentaux de la commande publique.

Les spécifications techniques peuvent restreindre la concurrence soit en raison de leur trop grande précision, exigence[34] soit en raison de leur imprécision voire de leur absence. Ainsi c'est l'insuffisance des spécifications techniques qui sera sanctionnée lorsque le cahier des charges est trop imprécis.[35] C'est ici que l'objet du marché permet le contrôle du respect des principes fondamentaux de la commande publique, le pouvoir adjudicateur ne pouvant leur porter atteinte en l'absence de lien avec celui-ci.

En conclusion, les pouvoirs adjudicateurs doivent, pour leur critère d'attribution en tant qu'ils peuvent constituer des mesures de restriction au marché intérieur, respecter les principes fondamentaux de la commande publique, notamment le principe de non-discrimination. Le principe de proportionnalité entre également en jeu lorsque ces critères restreignent la concurrence mais se

---

33. Pour la prohibition d'une discrimination directe : CJCE 20 mars 1990, Du Pont de Nemours Italiana SPA contre Unità Sanitaria locale n°2 di Carrara ; et pour une discrimination indirecte : CJCE 26 septembre 2000, Commission c/ France, aff. C-225/98.
34. Par exemple : Un pouvoir adjudicateur ne peut donc pas exclure d'une procédure d'attribution d'un contrat public un opérateur économique en raison de sa nature juridique : CJCE 18 décembre 2007, Frigerio Luigi et C. Snc, aff. C-357/06 et CE, avis, 8 novembre 2000, Société Jean-Louis Bernard consultants, n° 222208.
35. CAA Douai, 17 janvier 2013, commune d'Hazebrouck, n° 12DA00780.

justifient par des motifs impérieux d'intérêt général (plus simplement l'objet du marché), la satisfaction de ceux-ci devant être nécessaire, proportionnée et adéquate.

Question 9

Le principe de l'allotissement dans le but de susciter une plus large concurrence peut cependant mener à une restriction de concurrence : l'alinéa 1 de l'article 10 du Code des marchés publics dispose que : « *Afin de susciter la plus large concurrence, et sauf si l'objet du marché ne permet pas l'identification de prestations distinctes, le pouvoir adjudicateur passe le marché en lots séparés. A cette fin, il choisit librement le nombre de lots, en tenant notamment compte des caractéristiques techniques des prestations demandées, de la structure du secteur économique en cause et, le cas échéant, des règles applicables à certaines professions. Les candidatures et les offres sont examinées lot par lot. Les candidats ne peuvent présenter des offres variables selon le nombre de lots susceptibles d'être obtenus. Si plusieurs lots sont attribués à un même titulaire, il est toutefois possible de ne signer avec ce titulaire qu'un seul marché regroupant tous ces lots*. »

L'article 10 du code érige l'allotissement en principe pour susciter la plus large concurrence entre les entreprises et leur permettre, quelle que soit leur taille, d'accéder à la commande publique. Tous les marchés doivent être passés en lots séparés, lorsque leur objet permet l'identification de prestations distinctes. Le choix entre un marché unique et un marché passé en lots séparés doit se faire, au cas par cas, en fonction des intérêts économiques, financiers ou de la capacité technique de chaque pouvoir adjudicateur. Quoi qu'il arrive, les pouvoirs adjudicateurs sont donc fortement incités à recourir à l'allotissement pour l'ensemble de leurs marchés et la dévolution sous forme de marché global devient désormais l'exception.[36]

Ce principe semble toutefois comporter un effet indésirable, à savoir la restriction de concurrence : en effet, au lieu de susciter une plus large concurrence, l'allotissement peut dissuader les plus grandes entreprises de soumissionner à un seul lot qui ne représenterait pas une opportunité financière intéressante. De plus, la division en lot peut ne pas permettre une réelle ouverture de ces marchés aux PME et TPE si les lots représentent toute la construction ou toute l'exploitation d'un projet.

---

36. Conseil d'Etat, 3 décembre 2012, no 360333, SYBERT : Marché global et manque de justification pour l'absence d'allotissement. L'absence d'allotissement peut léser un candidat et engendrer l'annulation de la procédure.

Neanmoins, le Conseil constitutionnel[37] a nuancé la potée de ce systéme en considérant portée « *qu'aucun principe ou règle de valeur constitutionnelle n'impose de confier à des personnes distinctes la conception, la réalisation, l'aménagement, la maintenance et l'entretien d'un ouvrage public ; qu'aucun principe ou règle de valeur constitutionnelle n'interdit non plus, en cas d'allotissement, que les offres portant sur plusieurs lots fassent l'objet d'un jugement commun, en vue de déterminer l'offre la plus satisfaisante du point de vue de son équilibre global* ».

Les commentateurs ont déduit de cette décision qu'à l'invitation du gouvernement, le Conseil constitutionnel avait refusé de voir dans les principes de libre concurrence et de transparence des normes de valeur constitutionnelle.[38] Dans la même décision, la Haute juridiction a également considéré que les dispositions en cause ne portaient pas, par elles-mêmes, atteinte au principe d'égalité, au regard notamment de la possibilité, pour les PME, de constituer un groupement leur permettant d'être candidates à l'attribution d'un tel contrat global, de la faculté qu'a l'Etat d'allotir le marché, et, enfin, du possible recours à la sous-traitance. Sur ces deux points (validité des contrats globaux et accès des PME à la commande publique), le Conseil d'Etat a repris sensiblement les mêmes arguments pour rejeter les moyens dirigés contre l'ordonnance du 17 juin 2004 sur les contrats de partenariat.[39]

Question 10

L'article 106 § 2 TFUE suppose l'élimination des règles de concurrence dès lors que les entreprises chargées de la gestion des SIEG doivent en être affranchies afin d'accomplir la mission particulière qui leur a été impartie.

Pour autant, lorsqu'un SIEG est confié à un opérateur privé, il apparait que quand bien même les règles relatives à la passation des marchés publics ne sont pas applicables, les règles relatives à la liberté d'établissement, à la libre prestation de services ainsi que les principes de transparence et d'égalité de traitement s'appliquent et contraignent l'autorité publique à procéder à une mise en concurrence.[40]

Il est en revanche possible de s'interroger sur une telle obligation lorsque le SIEG est externalisé via une procédure directe : le règlement OSP CE n°

37. Conseil Constitutionnel, décision n° 2002-460 DC du 22 août 2002.
38. Notamment J.-Y. Chérot et J. Trémeau, La commande publique et le partenariat public / privé à nouveau devant le Conseil constitutionnel : AJDA 2002, p. 1061.
39. CE, 29 oct. 2004, M. Sueur et a., cité supra n° 22.
40. Arrêt CJCE Parking Brixen 13 octobre 2005.

1370/2007 en matière ferroviaire fournit un bon exemple d'une telle attribution sans mise en concurrence et sans que ne s'appliquent les règles relatives aux aides d'Etat. On notera toutefois que cette hypothèse dérogatoire (article 5 §2 dudit règlement OSP) semble s'inscrire dans le cadre d'une relation juridique entre la personne publique et le délégataire qui s'apparent à une relation « *in-house* ».

Utilisation stratégique des marchés publics

Question 11

Les marchés publics représentent une manne incontournable pour promouvoir le développement durable dans ses aspects tant sociaux qu'environnementaux et c'est d'ailleurs un objectif assumé par l'UE qui n'a pas caché sa volonté d'œuvrer en ce sens et l'a même posé en principe au sein de la stratégie Europe 2020. Plus encore, les objectifs environnementaux et sociaux de l'UE sont inscrit dans la Charte des droits fondamentaux (Articles 36 et 37) dont la force contraignante est égale à celle des traités depuis Lisbonne. En France, le code des marchés publics (CMP) a parfaitement intégré cette dimension.[41] La proposition de directive réformant le cadre des marchés publics s'inscrit aussi dans ce mouvement[42] et pourrait aller beaucoup plus loin.[43]

41. Conformément au droit de l'UE, les objectifs environnementaux et sociaux guident la personne publique dès la détermination du besoin à l'origine de l'achat public (article 5 du CMP) et constituent des critères d'attribution appréhendés en termes de performances (article 53 du CMP) sous la forme pour l'essentiel de conditions d'exécution du contrat (article 14 du CMP). Mais ils peuvent encore constituer l'objet même du contrat (article 30 CMP marchés d'insertion professionnelle), se voir réserver des marchés publics ou des lots (articles 15 CMP) ou enfin bénéficier d'un droit de préférence (article 53 – IV CMP).
42. Proposition de Directive sur la passation des marchés publics du 20 décembre 2011, COM(2011) 896 final.
43. Le rapport du député Marc Tarabella pour la Commission IMCO du Parlement de l'UE propose d'exclure les candidats contrevenant aux droits sociaux et environnementaux définis par la législation nationale et européenne et les conventions collectives respectueuses du droit de l'Union.

Déjà aujourd'hui, par exemple, la traite des déchets doit être faite au plus près du lieu d'origine : cela restreint la concurrence mais c'est parfaitement assumé.

Reste que l'achat public responsable procède d'une démarche complexe, les référentiels labels et certifications et leur mise en œuvre étant souvent jugés abscons. Les pouvoirs publics français ont donc multiplié les instruments pédagogiques et les campagnes d'incitation.[44] L'effort a été concluant : entre 2009 et 2011,[45] la proportion de marchés publics supérieurs ou égaux à 90 000 € comportant des clauses sociales est passée de 1,9 % à 4,1 % (4.5 % de leur montant) et, pour ce qui concerne les clauses environnementales, de 2,6 % à 5,3 %.[46] L'évolution récente de la jurisprudence administrative[47] pourrait encore avoir un effet favorable.

Cette utilisation stratégique des marchés publics comporte cependant le risque d'une promotion dissimulée de l'achat local interdit par le droit de l'Union.[48] Ce détournement peut résulter du choix de critères d'attribution fondés sur la protection de l'environnement, les circuits courts[49] ou encore l'insertion professionnelle des publics en difficulté. Ainsi, le pouvoir adjudicateur ne pose certes pas la proximité locale parmi les critères de sélection ou d'attribution des offres mais aboutit en réalité à un résultat équivalent. Il en est ainsi, en pratique, de l'insertion d'une clause sociale dans les contrats de travaux et de fournitures.[50]

---

44. Voir, notamment, la circulaire du Premier Ministre n°5351/SG du 3 décembre 2008 pour un Etat exemplaire et celle n° 5451/SG du 11 mars 2010 mais aussi les Plans d'Action pour des Achats Publics Durables ou encore les travaux du Groupe d'Etude des Marchés Développement durable.
45. Lettre de l'Observatoire économique de l'achat public, n° 27, février 2013.
46. Lettre de l'Observatoire économique de l'achat public n° 22, octobre 2011.
47. Alors que le lien du critère environnemental ou social avec l'objet du marché exigé par l'article 53.I.1 du CMP était interprété strictement, le Conseil d'Etat a considérablement infléchi sa position (CE, arrêt du 25 mars 2013, req. n° 364950 sur les performances en matière d'insertion des publics en difficultés).
48. CJCE, 11 juillet 1991, aff. C-351/88, Rec. CJCE 1991, I, p. 3641.
49. L'article 18 du décret n°2011-1000, dans la droite ligne de l'article 1-V de la loi n° 2010-874 du 27 juillet 2010 de modernisation de l'agriculture et de la pêche, a introduit dans le CMP (article 53-I-1) le critère tiré des « performances en matière de développement des approvisionnements directs de produits de l'agriculture ».
50. Lettre de l'Observatoire économique de l'achat public, n°27, février 2013.

Question 12

Objectif phare de la stratégie Europe 2020, l'innovation bénéfice déjà du levier des marchés publics au titre de la directive 2004/18CE et en France du CMP. Au-delà des moyens classiques mis à la disposition de la stratégie d'innovation des acheteurs publics,[51] ces derniers peuvent aussi initier l'émergence de procédés novateurs pour répondre à leurs besoins en optant pour le « dialogue compétitif ». Cette procédure connaît toutefois un succès mitigé[52] notamment en ce qu'elle peut entraîner la divulgation de solutions innovantes et déraper vers leur mutualisation au seul profit de l'acheteur public. La future directive tend à corriger ces effets pervers.[53] Le concours[54] peut aussi être un atout avec l'avantage pour les concurrents non retenus de bénéficier d'une indemnité.[55] Enfin, des moyens innovants peuvent pourvoir à des exigences de performances énergétique ou écologique, grâce aux contrats globaux.[56]

Pour aller plus loin, la France, à titre expérimental, pour une période de cinq ans,[57] a permis aux pouvoirs adjudicateurs de réserver aux PME innovantes jusqu'à 15% de leurs marchés à procédure adaptée (MAPA) de haute technologie, de R&D et d'études technologiques ou leur accorder un traitement préférentiel en cas d'offres équivalentes. Toutefois, le champ étroit de mise en œuvre de cette disposition a eu raison de son maintien.[58] Notons, par

51. Par exemple, le choix d'attribuer le marché à l'offre économiquement la plus avantageuse telle que fondée sur une pluralité de critères incluant le caractère innovant. Un autre réside dans l'acceptation des variantes, lesquelles sont en outre plus accessibles aux PME innovantes. Ces dernières sont aussi favorisées par l'obligation d'allotissement qui pèse sur les pouvoirs adjudicateurs.
52. Elle représente 0.2 % des achats publics pour un montant en baisse entre 2010 et 2011 de 2.07 % à 1 %.
53. Voir article 28 de la proposition de directive sur la passation des marchés publics du 20 décembre 2011, COM(2011)896 final.
54. Article 38 du CMP.
55. Il ne représente toutefois que 0.4% du nombre d'achats et 0.6% en montant.
56. Issu du décret du 25 août 2011, il s'inscrit au sein de l'article 73 du CMP qui le décline en deux modèles : un contrat de réalisation et d'exploitation ou de maintenance – REM (article 73-I du CMP) et un contrat de conception-réalisation et d'exploitation ou de maintenance – CREM (article 73-II du CMP).
57. Article 26-I de la loi de modernisation de l'économie du 4 août 2008.
58. Un élargissement de son champ d'action aurait cependant pu être préféré. En ce sens, le Pacte national pour la croissance, la compétitivité et l'emploi demande qu'au moins 2% de la commande publique courante de l'Etat soient réservés aux entreprises innovantes. (Pacte national pour la croissance, la compétitivité et l'emploi, présenté par le

ailleurs, qu'une commission « innovation 2030 » a été mise en place en avril 2013 pour déterminer les secteurs et les technologies où la France est susceptible d'occuper des positions de leader à l'horizon 2030. Il conviendra de suivre quel sera le montage contractuel choisi pour soutenir ensuite ces innovations.

Il pourrait s'inspirer du partenariat d'innovation envisagé par la proposition de directive relative aux marchés publics[59] : un contrat public/privé structuré pour le développement d'un produit, de services ou de travaux innovants. L'acheteur acquerrait ensuite les fournitures, services ou travaux résultants, sous réserve que ces derniers « *correspondent aux niveaux de performance et aux coûts convenus* ». Reste que les modalités juridiques d'acquisition par le pouvoir adjudicateur des droits de propriété intellectuelle relatifs à l'innovation objet du partenariat peuvent entraîner un transfert de propriété de celle-ci au profit de la personne publique, ce qui devrait pourtant être évité.

Enfin, la dématérialisation des procédures de passation des marchés publics, présentée comme une « innovation » par les pouvoirs publics européens, présente parfois des effets pervers : en fait, cela peut défavoriser les étrangers qui n'ont pas forcément les compétences linguistiques suffisantes pour répondre à des appels d'offres dans une langue étrangère (sauf à rendre ces procédures électroniques obligatoirement en anglais, ce qui est difficilement envisageable pour des raisons tant matérielles que politiques) ou les outils techniques nécessaires pour pouvoir répondre sur les plateformes de dématérialisation et cela engendre de facto un « régime » différent entre nationaux et ressortissants des autres Etats membres. C'est donc une sorte de « discrimination déguisée » que permet la dématérialisation des procédures de passation de marchés publics.

Premier ministre le 6 novembre 2012 suite à la remise du rapport du commissaire général à l'Investissement Louis Gallois).

59. Article 29§1, voir la Communication « Achats publics avant commercialisation : promouvoir l'innovation pour assurer des services publics durables et de qualité en Europe » et l'exemple d'approche de l'acquisition de services de R&D par le partage des risques et bénéfices aux conditions du marché, COM(2007) 799 final.

Solutions

Question 13

La directive « Recours », transposée par l'ordonnance de 2009,[60] a rénové le paysage du contentieux administratif français en renforçant l'effectivité du référé précontractuel[61] établi en 1992[62] et en créant son pendant post-contractuel.[63] Désormais, dans un délai très court,[64] les candidats évincés peuvent obtenir jusqu'à l'annulation d'un contrat public et, en attendant le verdict, suspendre sa passation ou de son exécution. Toutefois, ces procédures d'urgence ne permettent pas d'obtenir d'indemnités et ont un champ d'intervention particulièrement restreint.[65]

Par ailleurs, la voie précontractuelle est en pratique fermée aux concurrents évincés d'un MAPA[66] faute de moyen pour eux de prendre connaissance de l'attribution du marché avant sa signature. En effet, il n'existe pas à leur profit d'obligation de notification de l'attribution du contrat comme il en est pour les marchés à procédure formalisée. De plus, si l'acheteur, sans être tenu de le faire, rend publique son intention de conclure le contrat et respecte un

---

60. Ordonnance n°2009-515 du 7 mai 2009 *relative aux procédures de recours applicables aux contrats de la commande publique* et son décret d'application n°2009-1456 du 27 novembre 2009.
61. Articles L. 551-1 à L. 551-12 du Code de justice administrative (CJA).
62. En application de la directive n°89/665 du 21 décembre 1989, la loi du 4 janvier 1992 puis celle du 29 décembre 1993 ont introduit un référé précontractuel.
63. L. 551-13 et s. du CJA.
64. Le juge se doit de statuer sous 20 jours.
65. Réservées aux manquements de l'acheteur public aux règles de publicité et de mise en concurrence, les voies d'action sont soumises à une stricte interprétation de l'intérêt à agir au bénéfice du préfet et de ceux qui « ont un intérêt à conclure le contrat » et sont lésés « ou susceptibles de l'être » par le manquement invoqué (CE, Section, 3 octobre 2008, Syndicat Mixte Intercommunal de Réalisation et de Gestion pour l'Elimination des Ordures Ménagères du secteur Est de la Sarthe – SMIRGEOMES, req. n°305420, concl. B. Dacosta).
66. L'exercice du référé précontractuel est conditionné par le délai dit de « stand still » gelant la procédure de passation. Dans les procédures formalisées, avant toute signature, le pouvoir adjudicateur doit notifier aux candidats évincés le rejet de leur dossier puis respecter un délai d'attente de 16 jours (réduit à 11 en cas de notification électronique) avant la conclusion du marché. La notification qui fait partir le délai de stand-still n'existe pas en matière de MAPA, l'acheteur public peut signer rapidement le contrat pour empêcher ce recours.

délai de onze jours[67] avant de le signer, les candidats qui n'auront pas formé un référé précontractuel ne pourront pas tenter ensuite son pendant post contractuel.

Les travaux préparatoires de la directive « recours » ont aussi influencé le Conseil d'Etat qui a créé une voie de droit de pleine juridiction pour contester la validité du contrat ou de certaines de ses clauses qui en sont divisibles. D'un champ d'application plus large que les référés,[68] il a néanmoins le défaut de ne pas emporter la suspension du contrat ou de sa signature alors même qu'il peut constituer une lourde menace pour les conventions en cours compte tenu de l'imprécision du point de départ du délai d'action de deux mois qu'il ouvre.[69]

Au-delà de son apport décisif, la Directive a donc donné naissance à un ensemble dense et parfois confus de recours qui se chevauchent et impactent la stabilité de l'exécution de contrats.[70] Une rationalisation serait souhaitable à ce titre.[71]

Conclusion et réforme

Question 14

Au-delà de l'utilisation stratégique des marchés publics en faveur du développement durable et de l'innovation (voir supra), la réforme de la commande publique proposée par la Commission en décembre 2011, présente aussi des avancées majeures en termes notamment de dematerialisation,[72] de simplification et d'accès aux PME.[73]

---

67. Article L. 551-15 du CJA.
68. D'autres moyens que les règles de publicité et de mise en concurrence peuvent être soulevés, des demandes indemnitaires peuvent être formulées et l'intérêt à agir ne s'arrête pas aux seuls candidats évincés.
69. Le délai court à compter de l'accomplissement d'une mesure de « publicité appropriée ».
70. Sur toutes ces questions, « Rationalisation des référés et recours en matière de contrats et marchés publics », Rapport de la CCI Paris Ile-de-France du 7 mars 2013.
71. Voir Ibidem, les propositions de la CCI Paris Ile-de-France en ce sens.
72. La future directive porte généralisation des procédures électroniques de passation des marchés à échéance de juin 2016. Par ailleurs, la Commission a proposé le 26 juin 2013 une directive relative à la facturation électronique et a publié une communica-

Sur ces deux derniers points, la Commission a affirmé sa volonté de réintégrer davantage de négociation à travers la création d'une consultation préalable au marché et surtout une procédure concurrentielle avec négociation permettant aux pouvoirs adjudicateurs d'examiner avec les soumissionnaires les offres présentées par ceux-ci « *en vue d'améliorer leur contenu afin de les faire mieux correspondre aux critères d'attribution et aux exigences minimales* ». Cette démarche resterait toutefois encadrée : ni la description du marché, ni la partie des spécifications techniques qui définit les exigences minimales, ni les critères d'attribution du marché ne pouvant être modifiés en cours de procédure. Par ailleurs, elle incorporerait des garanties de protection des données transmises comparables à celles également posée par la future directive dans le cadre du dialogue competitive.[74] Les PME seraient favorisées par deux innovations majeures que sont, d'une part, le principe dit « *only once* » (« Seulement une fois ») visant à réduire les frais de transaction en n'exigeant la production des documents originaux qu'à l'issue de la procédure d'appel d'offres et, d'autre part, un « passeport européen » (délivré par les autorités nationales et élaboré sur la base d'un formulaire standard émanant de la Commission) permettant d'attester du respect des conditions de participation par le soumissionnaire.

Relevons enfin une tentative de la Commission de mettre en place un système européen de gouvernance vivement décrié par les représentants des Etats.

Dans la directive concession, l'heure est à l'ouverture des marchés internes à la concurrence au moyen d'un renforcement des exigences européennes et d'une unification des régimes des concessions de travaux et de services, les dernières étant jusque-là exclues des exigences communautaires. Le texte fait œuvre de cohérence en incorporant aussi dans la définition textuelle des concessions le critère jurisprudentiel du risque. Les efforts de la Commission emportent toutefois une levée de bouclier de la part des Etats qui soit, sont repliés sur des gestions de services de type « *in house* » soit, n'ont pas de législation aussi aboutie. Ce n'est pas le cas de la France qui bénéficie déjà d'un

---

tion sur la « passation électronique de bout en bout des marchés publics » (COM (2013) 453).

73. Voir notamment, « Proposition de directive sur l'attribution de contrats de concession. Position de la CCI Paris Ile-de-France », Rapport du 23 février 2012.

74. Voir supra.

encadrement avancé de la mise en concurrence des contrats de concession.[75] Il faut cependant veiller à ce que les futures exigences ne deviennent pas si draconiennes qu'elles mettent en cause la spécificité de la concession qui repose sur le principe de *l'intuitu personae*.[76]

75. La future directive exige néanmoins une publication européenne alors que jusque-là aucun texte ni principe ne l'imposait (CE, 27 janv. 2011, Commune de Ramatuelle, req. n°338285).
76. Sur les modifications à opérer, voir « Proposition de directive sur l'attribution de contrats de concession – Position de la CCI Paris Ile-de-France », Rapport du 22 mars 2012.

GERMANY

Ferdinand Wollenschläger[1]

Kontext

Frage 1

Die Europäisierung der öffentlichen Auftragsvergabe hat das deutsche Vergaberecht vor *wesentliche systematische Herausforderungen* gestellt: In erster Linie galt es, das überkommene haushaltsrechtliche Verständnis des Vergaberechts zu überwinden – ein zäher Prozess, der für vom EU-Sekundärrecht erfasste Beschaffungsvorgänge bewältigt, im Übrigen indes noch im Fluss ist (1). In diesem Kontext stellt sich zudem die Frage nach der systematischen Verortung des Vergaberechts in der deutschen Rechtsordnung (2). Schließlich hat die Europäisierung zu einer vermehrt gesetzlichen Regelung der öffentlichen Auftragsvergabe geführt und die Regelungsmacht der (privaten) Verdingungsausschüsse beschnitten (3).

(1) Überwindung des haushaltsrechtlichen Verständnisses

Bei der Umsetzung der im Jahre 1993 verabschiedeten EG-Vergaberichtlinien galt es zunächst, das bis dahin *vorherrschende haushaltsrechtliche Verständnis der öffentlichen Auftragsvergabe zu überwinden*: Als binnengerichtete Vorgaben für die Verwendung öffentlicher Mittel sahen die deutschen Vergabevorschriften weder subjektive Rechte der Bieter noch gerichtlichen Rechtsschutz vor.[2] Hierauf setzte indes das EG-Sekundärrecht, um (auch)

---

1. Univ.-Prof. Dr., Inhaber des Lehrstuhls für Öffentliches Recht, Europarecht und Öffentliches Wirtschaftsrecht an der Juristischen Fakultät der Universität Augsburg. Ich danke meiner Assistentin, Frau Jennifer Ricketts, und meiner studentischen Mitarbeiterin, Frau Cornelia Kibler, für ihre Recherchearbeiten.
2. Siehe dazu und zum Folgenden bereits *F. Wollenschläger*, Europäisches Vergabeverwaltungsrecht, in: J.P. Terhechte (Hrsg.), Verwaltungsrecht der Europäischen Union, 2011, § 19, Rn. 80 ff. m.w.N.

durch eine »Mobilisierung des Einzelnen«[3] eine Öffnung der nationalen Beschaffungsmärkte im Interesse der Realisierung eines Binnenmarktes für öffentliche Aufträge zu erreichen. Der damit europarechtlich vorgezeichnete Paradigmenwechsel gelang dem deutschen Gesetzgeber erst – nach Einleitung eines Vertragsverletzungsverfahrens – im zweiten Anlauf; die zunächst vom Umsetzungsgesetzgeber mit dem Zweiten Gesetz zur Änderung des Haushaltsgrundsätzegesetzes vom 26.11.1993[4] erstrebte »haushaltsrechtliche Lösung« hielt noch am Status Quo (keine subjektiven Rechte; kein gerichtlicher Rechtsschutz) fest, da Gegenteiliges, wie die Gesetzesbegründung betonte, »mit den erprobten deutschen Vergabeverfahren nicht vereinbar« erschien.[5] Seit Inkrafttreten des Vergaberechtsänderungsgesetzes zum 1.1.1999[6] kennt das dann nicht mehr im Haushalts-, sondern im Kartellrecht [Gesetz gegen Wettbewerbsbeschränkungen (GWB); zum Kaskadenmodell sogleich unter 3.] verortete deutsche Kartellvergaberecht nunmehr einen Anspruch auf Einhaltung der Vergabevorschriften (§ 97 Abs. 7 GWB) und ein zweistufiges, nach dem Kartellrecht modelliertes Rechtsschutzverfahren, das erstmals gerichtlichen Primärrechtsschutz vorsieht (§§ 102, 104 ff. GWB; zu diesem Frage 13).

(2) Systematische Verortung des Vergaberechts in der deutschen Rechtsordnung

Infolge der Umsetzung der EG-Vergaberichtlinien durch ein neu geschaffenes Kartellvergaberecht entstand ein komplexes *Sonderregime für den Abschluss zivilrechtlicher Beschaffungsverträge*, das namentlich Vergabekriterien, Vergabeverfahren sowie den Rechtsschutz speziell regelt. Damit kam den Fragen nach der *systematischen Einordnung des Vergaberechts in die deutsche Rechtsordnung* und seinem *Verhältnis zum Verwaltungsrecht* keine praktische Bedeutung zu. Von Relevanz sind diese indes im Kontext der Vergabe von nicht vom EU-Sekundärrecht erfassten öffentlichen Aufträgen, namentlich solchen, die die EU-Schwellenwerte nicht erreichen. Trotz auch insoweit bestehender, zunehmend erkannter und auch durchgesetzter europa- und verfassungsrechtlicher Vorgaben an Vergabeverfahren, -kriterien und

3. Zum Konzept *U. Everling*, NVwZ 1993, S. 209 (215); *J. Masing*, Die Mobilisierung des Bürgers für die Durchsetzung des Rechts, 1996.
4. BGBl. I, S. 1928.
5. Begründung zum Entwurf eines Zweiten Gesetzes zur Änderung des Haushaltsgrundsätzegesetzes, BT-Drs. 12/4636, S. 2.
6. BGBl. I, S. 2512.

Rechtsschutz (näher Frage 6)[7] sah der deutsche Gesetzgeber nämlich – unbeschadet noch nicht eingelöster Reformversprechen[8] – von einer eigenständigen Regelung ab; so sollte das im Jahre 1999 verabschiedete kartellvergaberechtliche Rechtsschutzverfahren »schon wegen der Vielzahl der Fälle nicht auf die Aufträge unterhalb der Schwellen ausgedehnt werden«,[9] eine Entscheidung, die das Vergaberechtsmodernisierungsgesetz des Jahres 2009 bekräftigte.[10] Somit sind nicht vom umgesetzten EU-Vergabekoordinierungsrecht erfasste Auftragsvergaben im Rahmen der allgemeinen Rechtsordnung zu bewältigen, was eine Beleuchtung der soeben aufgeworfenen Grundsatzfragen verlangt: Welcher Handlungsformen bedient sich die Beschaffungsverwaltung und welche Rechtsbindungen bestehen? Welche Fehlerfolgen und Rechtsschutzmöglichkeiten knüpfen hieran an?

Die öffentliche Auftragsvergabe, die der Beschaffung der für die Erledigung von Verwaltungsaufgaben erforderlichen sachlichen Mittel dient (und heutzutage infolge der Privatisierung auch über dieses Anliegen hinausweist[11]), stellt selbst eine *Verwaltungsaufgabe* dar.[12] Das sie steuernde und die öffentliche Hand adressierende *Vergaberecht ist Öffentliches Recht*.[13] Die Beschaffung des benötigten Guts selbst erfolgt indes in *zivilrechtlichen Handlungsformen*, namentlich mittels des Abschlusses von Kauf-, Werk- oder

7. Siehe m.w.N. nur *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 198 ff.; *ders.*, Primärrechtsschutz außerhalb des Anwendungsbereichs des GWB, in: M. Müller-Wrede (Hrsg.), Kompendium des Vergaberechts, 2. Aufl. 2013, Kap. 26, Rn. 7 ff.
8. Siehe Koalitionsvertrag zwischen CDU, CSU und FDP für die 17. Legislaturperiode des Bundestags vom 26.10.2009, http://www.bmi.bund.de/SharedDocs/Down loads/DE/Ministerium/koalitionsvertrag.pdf?__blob=publicationFile (Abruf: 25.2.2014), S. 17. Der neue Koalitionsvertrag zwischen CDU, CSU und SPD für die 18. Legislaturperiode vom 16.12.2013, »Deutschlands Zukunft gestalten« (https://www.cdu.de/sites/default/ files/media/dokumente/koalitionsvertrag.pdf, Abruf: 10.2.2014) , enthält kein entsprechendes Reformversprechen mehr.
9. Begründung zum Entwurf eines Gesetzes zur Änderung der Rechtsgrundlagen für die Vergabe öffentlicher Aufträge (Vergaberechtsänderungsgesetz – VgRÄG), BT-Drs. 13/9340, S. 12.
10. Begründung zum Entwurf eines Gesetzes zur Modernisierung des Vergaberechts, BT-Drs. 16/10117, S. 14.
11. Siehe nur *F. Wollenschläger*, Vergabeverwaltungsrecht (Fn. 2), Rn. 74 ff.
12. *H. Maurer*, Allgemeines Verwaltungsrecht, 18. Aufl. 2011, § 1, Rn. 19.
13. Siehe nur m.w.N. (auch zur Gegenauffassung) *O. Dörr*, in: M. Dreher/G. Motzke (Hrsg.), Beck'scher Vergaberechtskommentar, 2. Aufl. 2013, Einleitung, Rn. 106 ff.; *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 234 f.

Dienstverträgen.[14] Letzteres hat das Bundesverwaltungsgericht in seiner Entscheidung zu Unterschwellenvergaben vom 2.5.2007 – in Einklang mit der überkommenen Auffassung in Schrifttum und Rechtsprechung,[15] aber entgegen gegenteiligen Vorstößen von Teilen der Verwaltungsgerichtsbarkeit[16] sowie Stimmen in der Literatur[17] – dazu veranlasst, den Vergabevorgang insgesamt zivilrechtlich zu deuten:

»Die von der öffentlichen Hand abgeschlossenen Werk- und Dienstverträge gehören ausschließlich dem Privatrecht an ... Das Gleiche gilt für das dem Abschluss des Vertrags vorausgehende Vergabeverfahren, das der Auswahl der öffentlichen Hand zwischen mehreren Bietern dient. Mit der Aufnahme der Vertragsverhandlungen entsteht zwischen dem öffentlichen Auftraggeber und den Bietern ein privatrechtliches Rechtsverhältnis, welches bis zur Auftragsvergabe an einen der Bieter andauert. Die öffentliche Hand trifft in diesem Vergabeverfahren eine Entscheidung über die Abgabe einer privatrechtlichen Willenserklärung, die die Rechtsnatur des beabsichtigten bürgerlich-rechtlichen Rechtsgeschäfts teilt. Die Vergabe öffentlicher Aufträge ist als einheitlicher Vorgang insgesamt dem Privatrecht zuzuordnen ...«[18]

Dieser Abfärbungs-These ist, wie andernorts näher ausgeführt, entgegenzutreten, namentlich weil sie die Differenzierung zwischen dem öffentlich-rechtlich zu beurteilenden multipolaren Auswahlverhältnis zwischen öffentlicher Hand und Bewerbern und dem zivilrechtlich zu qualifizierenden bipolaren Vertragsverhältnis zwischen öffentlicher Hand und erfolgreichem Bieter verwischt.[19] Auf keinen Fall darf jedoch die zivilrechtliche Qualifikation des Vergabevorgangs darüber hinwegtäuschen, dass der Staat kein Marktakteur wie andere Private ist, und sie darf keinesfalls dazu führen, dass sich die öffentliche Hand vergaberechtlichen Bindungen entzieht, die im Unions-, aber auch im Verfassungsrecht und in einfachen Vergabevorschriften wurzeln

---

14. *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 49 m.w.N., auch zur Gegenauffassung.
15. Siehe nur BVerwGE 5, 325 (326, s. auch 328); GmS-OGB, NJW 1986, S. 2359 (2359 f.); BGH, NJW 1967, S. 1911 (1911 f.).
16. Siehe nur die Lenkwaffen-Entscheidung des OVG Koblenz, DVBl. 2005, S. 988.
17. Siehe nur *M. Burgi*, NVwZ 2007, S. 737 (738 ff.); *P. M. Huber*, JZ 2000, S. 877 (881); *F. Wollenschläger*, DVBl. 2007, S. 589 (593 f.); *ders.*, Primärrechtsschutz (Fn. 7), Rn. 45 ff. m.w.N.
18. BVerwGE 129, 9 (13). Zu Recht gegen die Anwendung der Zwei-Stufen-Theorie ibid., S. 19.
19. Näher m.w.N. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 232 ff.; *ders.*, Primärrechtsschutz (Fn. 7), Rn. 51 m.w.N.

(*keine »Flucht ins Privatrecht«*; näher zu den bestehenden Bindungen Frage 6). Entsprechende Tendenzen sind aber nicht von der Hand zu weisen.

So sah sich die Grundrechtsbindung der öffentlichen Hand bei der öffentlichen Auftragsvergabe – da privatrechtliches Handeln – teils lange Zeit verneint.[20] Allgemeine Anerkennung hat sie erst im Beschluss des Bundesverfassungsgerichts (BVerfG) zu Unterschwellenvergaben vom 13.6.2006 gefunden, allerdings nur für den allgemeinen Gleichheitssatz, wohingegen das BVerfG die Fiskalgeltung der Berufsfreiheit (Art. 12 Abs. 1 GG) noch offen gelassen (und im Übrigen auch die Auftragsvergabe nicht als Ausübung öffentlicher Gewalt i.S.d. Rechtsschutzgarantie des Art. 19 Abs. 4 GG qualifiziert[21]) hat;[22] umfassend bejaht hat es die Fiskalgeltung der Freiheitsrechte dann (in anderem Zusammenhang) in seinem Fraport-Urteil vom 22.2.2011:

»Gemäß Art. 1 Abs. 3 GG binden die Grundrechte Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht. Sie gelten nicht nur für bestimmte Bereiche, Funktionen oder Handlungsformen staatlicher Aufgabenwahrnehmung, sondern binden die staatliche Gewalt umfassend und insgesamt. Der Begriff der staatlichen Gewalt ist dabei weit zu verstehen und erstreckt sich nicht nur auf imperative Maßnahmen. Entscheidungen, Äußerungen und Handlungen, die – auf den jeweiligen staatlichen Entscheidungsebenen – den Anspruch erheben können, autorisiert im Namen aller Bürger getroffen zu werden, sind von der Grundrechtsbindung erfasst. Grundrechtsgebundene staatliche Gewalt im Sinne des Art. 1 Abs. 3 GG ist danach jedes Handeln staatlicher Organe oder Organisationen, weil es in Wahrnehmung ihres dem Gemeinwohl verpflichteten Auftrags erfolgt.

Art. 1 Abs. 3 GG liegt dabei eine elementare Unterscheidung zugrunde: Während der Bürger prinzipiell frei ist, ist der Staat prinzipiell gebunden. Der Bürger findet durch die Grundrechte Anerkennung als freie Person, die in der Entfaltung ihrer Individualität selbstverantwortlich ist. Er und die von ihm gegründeten Vereinigungen und Einrichtungen können ihr Handeln nach subjektiven Präferenzen in privater Freiheit gestalten, ohne hierfür grundsätzlich rechenschaftspflichtig zu sein. Ihre Inpflichtnahme durch die Rechtsordnung ist von vornherein relativ und – insbesondere nach Maßgabe der Verhältnismäßigkeit – prinzipiell begrenzt. Demgegenüber handelt der Staat in treuhänderischer Aufgabenwahrnehmung für die Bürger und ist ihnen rechenschaftspflichtig. Seine Aktivitäten verstehen sich nicht als Ausdruck freier subjektiver Überzeugungen in Verwirklichung persönlicher Individualität, sondern bleiben in distanziertem Respekt vor den verschiedenen Überzeugungen der Staatsbürger und werden dementsprechend von der Verfassung

---

20. BGH, NJW 1962, S. 196 (197 f.) – offen gelassen demgegenüber in DÖV 1967, S. 569 (570), und NJW 2001, S. 1492 (1494); *G. Dürig*, in: T. Maunz/ders. (Hrsg.), Grundgesetz, Art. 3 I, Rn. 490 (Grundwerk); *E. Forsthoff*, Der Staat als Auftraggeber, 1963, S. 13 f.
21. BVerfGE 116, 135 (149 f.). Kritisch und m.w.N. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 88 f.
22. BVerfGE 116, 135 (151, 153).

umfassend an die Grundrechte gebunden. Diese Bindung steht nicht unter einem Nützlichkeits- oder Funktionsvorbehalt. Sobald der Staat eine Aufgabe an sich zieht, ist er bei deren Wahrnehmung auch an die Grundrechte gebunden, unabhängig davon, in welcher Rechtsform er handelt. Dies gilt auch, wenn er für seine Aufgabenwahrnehmung auf das Zivilrecht zurückgreift. Eine Flucht aus der Grundrechtsbindung in das Privatrecht mit der Folge, dass der Staat unter Freistellung von Art. 1 Abs. 3 GG als Privatrechtssubjekt zu begreifen wäre, ist ihm verstellt.«[23]

Setzt sich demnach auch die Einsicht in grundrechtliche – wie auch unions- und einfach-rechtliche – Bindungen im Vergaberecht zunehmend durch, so wirft des Weiteren deren Durchsetzung angesichts der einheitlich zivilrechtlichen Deutung des Beschaffungsvorgangs Schwierigkeiten auf. Dies liegt einmal daran, dass sich im Verwaltungsrecht keine Fehlerfolgenlehre für privatrechtliche Verträge etabliert hat, zumal letztere auch nicht dem Anwendungsbereich des Verwaltungsverfahrensgesetzes (VwVfG) unterfallen (siehe nur § 1 Abs. 1, § 9 VwVfG). Insoweit verbieten sich vorschnelle Stabilitätsannahmen oder eine Beschränkung des Rechtsschutzes auf willkürliche Vergabeverstöße.[24] Aufgabe der Verwaltungsrechtswissenschaft ist es hier, eine die konfligierenden Bestands- und Rechtsschutzinteressen adäquat ausbalancierende Fehlerfolgenlehre zu entwickeln.[25] Ferner ist infolge der einheitlich zivilrechtlichen Qualifikation Rechtsschutz vor den ordentlichen Gerichten zu suchen, ohne dass dort spezifische Rechtsbehelfe und für den Verwaltungsrechtsschutz bedeutsame prozessuale Kautelen (Akteneinsicht; Amtsermittlung) existierten (näher zum Rechtsschutz Frage 13.7).

(3) Verteilung der Regelungsbefugnisse: das Kaskadenmodell

Als weitere systemrelevante Konsequenz hat die Europäisierung der öffentlichen Auftragsvergabe zu einer *verstärkten gesetzlichen Regelung* des Vergaberechts geführt.

Das bis zur Reform der 1990er Jahre maßgebliche Haushalts(vergabe)-recht enthielt nur einen rudimentären Rahmen (näher Frage 6.2). Die eigentlichen Vergaberegeln, und in dieser überkommenen Systementscheidung für die Selbstregulierung liegt ein Spezifikum des deutschen Vergaberechts, normierten *private Regelwerke*, nämlich die erstmals 1926 (VOB) bzw. 1936 (VOL) verabschiedeten Verdingungs- (bzw. moderner: Vergabe- und Ver-

23. BVerfGE 128, 226 (244 f.).
24. Siehe nur OLG Brandenburg, VergabeR 2009, S. 530 (532); ferner VergabeR 2012, S. 133 (135 f.). Dagegen *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 51 m.w.N.
25. Siehe allgemein *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 617 ff. m.w.N.

trags-)Ordnungen.[26] Erarbeitet wurden diese von den Verdingungs- (bzw. moderner: Vergabe- und Vertrags-)Ausschüssen, mithin von privaten Gremien, die als rechtsfähige Vereine organisiert und im Interesse der Ausgewogenheit paritätisch aus Vertretern der Auftragnehmer- und Auftraggeberseite zusammengesetzt waren.[27]

Seit Inkrafttreten des Kartellvergaberechts zum 1.1.1999 finden sich nunmehr allgemeine Grundsätze des Vergaberechts, dessen persönlicher und sachlicher Anwendungsbereich, (einige) Verfahrensfragen und der Rechtsschutz parlamentsgesetzlich normiert; konkretisiert wird dieser Rahmen in einer Rechtsverordnung, der Verordnung über die Vergabe öffentlicher Aufträge (Vergabeverordnung – VgV).[28] Festgehalten hat der Reformgesetzgeber des Jahres 1999 indes an der Regelungsbefugnis der Verdingungsausschüsse: Über einen (statischen und wegen des privaten Ursprungs rechtstechnisch notwendigen) Verweis in den §§ 4 ff. VgV erlangen deren Regelwerke, die Verdingungsordnungen, Verbindlichkeit. Mit diesen drei Regelungsebenen (GWB – VgV – Verdingungsordnungen) ist – statt einer einheitlichen gesetzlichen Regelung, wie etwa in Österreich – ein komplexes *Kaskadenmodell* entstanden, das hinsichtlich Transparenz und Kohärenz des vergaberechtlichen Rechtsrahmens und wegen der Verkomplizierung des Rechtsetzungsprozesses Kritik auf sich zieht,[29] mag man auch die Regelungstechnik (noch)

---

26. Vergabe- und Vertragsordnung für Bauleistungen (VOB), Teil A, Ausgabe 2012 i.d.F. der Bek. vom 24.10.2011, BAnz Nr. 182 a/2011, ber. in BAnz AT vom 7.5.2012 B1, geänd. in BAnz vom 13. 7. 2012 B3; Vergabe und Vertragsordnung für Leistungen (VOL), Teil A, Ausgabe 2009 i.d.F. der Bek. vom 20.11.2009, BAnz Nr. 196 a/2009, ber. in BAnz Nr. 32/2010, S. 755; ferner Vergabeordnung für freiberufliche Leistungen (VOF), Ausgabe 2009 i.d.F. der Bek. vom 18.11.2009, BAnz Nr. 185 a/2009. Siehe zum Ursprung *O. Dörr*, in: Dreher/Motzke (Fn. 13), Einleitung, Rn. 45, 65; *M. Knauff*, NZBau 2010, S. 657 (658).
27. VOB: Deutscher Vergabe- und Vertragsausschuss für Bauleistungen (DVA) – dessen Satzung findet sich unter http://www.bmvbs.de/SharedDocs/DE/Anlage/Bauen Und-Wohnen/Bauen/dva-satzung.pdf?_blob=publicationFile (Abruf: 25.2.2014); VOL: Deutscher Vergabe- und Vertragsausschuss für Lieferungen (DVAL) – dessen Arbeits- und Organisationsschema findet sich unter http://www.bmwi.de/BMWi/Redaktion/PDF/C-D/dval-deutscher-vergabe-und-vertragsausschuss-fuer-liefe run gen- und-dienstleistungen, property=pdf,bereich=bmwi2012,sprache= de,rwb=true.pdf (Abruf: 25.2.2014).
28. Neugefasst durch Bekanntmachung vom 11.2.2003, BGBl. I, S. 169, zuletzt geändert durch Art. 1 der Verordnung vom 15.10.2013, BGBl. I, S. 3584.
29. Siehe etwa *O. Dörr*, in: Dreher/Motzke (Fn. 13), Einleitung, Rn. 15; *M. Dreher*, NVwZ 1999, S. 1265 (1265): »sehr eigentümliche[r] und unbefriedigende[r] Zustand«; *M. Knauff*, NZBau 2010, S. 657 (660 ff.).

für unions- und verfassungsrechtskonform erachten.[30] Das Festhalten an der überkommenen Regelungsbefugnis der Verdingungsausschüsse darf freilich nicht darüber hinwegtäuschen, dass deren Regelungsmacht jedenfalls im Anwendungsbereich des EU-Vergaberechts abgenommen hat, gilt es doch nunmehr lediglich noch, so nicht ohnehin gesetzliche Regelungen vorliegen, in weitem Umfang EU-Sekundärrecht umzusetzen.[31]

Eine *partielle Abkehr vom Kaskadenmodell* vollzog der deutsche Gesetzgeber im Jahre 2009 für Auftragsvergaben im Sektorenbereich; diese sind im GWB und einer Rechtsverordnung, der Sektorenverordnung,[32] abschließend unter Verzicht auf die weitere Ebene der Verdingungsordnungen geregelt. Bislang hat dieses Modell indes jenseits des Sektorenbereichs (und partill des Verteidigungsbereichs) keinen Einzug in das Vergaberecht gehalten.

Grenzen des EU-Vergaberechts

Frage 2

(1) Begriff des öffentlichen Auftrags

Der Begriff des öffentlichen Auftrags und damit der sachliche Anwendungsbereich des Kartellvergaberechts ist in § 99 Abs. 1 GWB *legaldefiniert*:

»Öffentliche Aufträge sind entgeltliche Verträge von öffentlichen Auftraggebern mit Unternehmen über die Beschaffung von Leistungen, die Liefer-, Bau- oder Dienstleistungen

---

30. *O. Dörr*, in: Dreher/Motzke (Fn. 13), Einleitung, Rn. 15 f.; *M. Knauff*, NZBau 2010, S. 657 (658 ff.); anders *M. Dreher*, NVwZ 1999, S. 1265 (1266 ff.).
31. *M. Knauff*, NZBau 2010, S. 657 (661).
32. Verordnung über die Vergabe von Aufträgen im Bereich des Verkehrs, der Trinkwasserversorgung und der Energieversorgung (Sektorenverordnung – SektVO) vom 23.9.2009, BGBl. I, S. 3110, zuletzt geändert durch Art. 7 des Gesetzes vom 25.7.2013, BGBl. I, S. 2722. Eine partielle Abkehr vom Kaskadenmodell ist überdies für verteidigungs- und sicherheitsrelevante Auftragsvergaben durch die Vergabeverordnung für die Bereiche Verteidigung und Sicherheit zur Umsetzung der Richtlinie 2009/81/EG des Europäischen Parlaments und des Rates vom 13. Juli 2009 über die Koordinierung der Verfahren zur Vergabe bestimmter Bau-, Liefer- und Dienstleistungsaufträge in den Bereichen Verteidigung und Sicherheit und zur Änderung der Richtlinien 2004/17/EG und 2004/18/EG (Vergabeverordnung Verteidigung und Sicherheit – VSVgV) vom 12.7.2007 erfolgt (BGBl. I, S. 1509, geändert durch Artikel 8 des Gesetzes vom 25.7.2013, BGBl. I, S. 2722).

zum Gegenstand haben, Baukonzessionen und Auslobungsverfahren, die zu Dienstleistungsaufträgen führen sollen.«

Zentrale Anwendungsvoraussetzungen des Vergaberechts sind damit das Vorliegen eines Vertrages zwischen öffentlichen Auftraggebern und Unternehmen mit einem bestimmten Inhalt, die Entgeltlichkeit sowie der Beschaffungscharakter (dazu noch Frage 4.2) des Vorgangs.[33] Angesichts des *unionsrechtlichen Hintergrunds* von § 99 Abs. 1 GWB – dieser setzt die Begriffsdefinition in Art. 2 Abs. 2 lit. a VRL[34] um – ist eine unionsrechtlich-autonome Begriffsbildung und eine unionsrechtskonforme Auslegung angezeigt und anerkannt.[35]

(2) Vertragserfordernis und einseitige Handlungsformen

Nachdem § 99 Abs. 1 GWB eine vertragliche und damit konsensuale Grundlage fordert, unterfallen *Verwaltungsakte und sonstige einseitig-hoheitliche Handlungsformen* (namentlich Gesetze) grundsätzlich nicht dem Anwendungsbereich des Vergaberechts. Vor dem skizzierten unionsrechtlichen Hintergrund des § 99 Abs. 1 GWB können freilich nationale Begrifflichkeiten und Kategorien nicht letztentscheidend für die Qualifikation sein; vielmehr ist das Gesamtgepräge der Aufgabenübertragung in den Blick zu nehmen und anhand aller Umstände des Einzelfalles funktional zu fragen, ob diese vertraglichen oder einseitigen Charakter hat.[36] Für ersteres können auch bei hoheitlicher Handlungsform Einflussmöglichkeiten des Privaten auf Inhalt, Erbringung und Vergütung der Tätigkeit sprechen; umgekehrt hat der EuGH den vertraglichen Charakter eines Akts verneint, der »Verpflichtungen allein für [das Unternehmen vorsieht] und der deutlich von den normalen Bedin-

33. Siehe zu den einzelnen Tatbestandsmerkmalen nur *J. Ziekow*, in: ders./U.-C. Völlink (Hrsg.), Vergaberecht, 2. Aufl. 2013, § 99 GWB, Rn. 6, 9 ff.
34. Richtlinie 2004/18/EG des Europäischen Parlaments und des Rates vom 31.3.2004 über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge, ABl. L 134 vom 30.4.2004, S. 114, zuletzt geändert durch Richtlinie 2013/161/EU, ABl. L 158 vom 10.6.2013, S. 184.
35. EuGH, Rs. C-264/03, Slg 2005, I-8831, Rn. 36 – EK/Frankreich; Rs. C-220/05, Slg. 2007, I-385, Rn. 40 – Auroux; *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 11; *F. Wollenschläger*, Vergabeverwaltungsrecht (Fn. 2), Rn. 24.
36. *M. Burgi*, NZBau 2007, S. 383 (385); *O. Esch*, KSzW 2012, S. 152 (156, 160 f.), m.w.N., auch zur Gegenauffassung; *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 22, 29; *R. Walz*, Die Bau- und Dienstleistungskonzession im deutschen und europäischen Vergaberecht, 2009, S. 142 ff.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 17 ff. Vgl. auch BGH, NZBau 2009, S. 201 (203).

gungen des kommerziellen Angebots dieser Gesellschaft« abweicht.[37] Auch sind Umgehungen des Vergaberechts zu verhindern.[38] Eine prinzipielle Klärung der Abgrenzungsproblematik ist indes noch nicht gelungen. Aus vergleichbaren Gründen ist unerheblich, ob die Beschaffung auf der Grundlage eines öffentlich-rechtlichen oder privatrechtlichen Vertrages erfolgt.[39]

(3) Dienstleistungskonzessionen

Dienstleistungskonzessionen, mithin nach der Legaldefinition des Art. 1 Abs. 4 VRL Dienstleistungsaufträge, bei denen »die Gegenleistung für die Erbringung der Dienstleistungen ausschließlich in dem Recht zur Nutzung der Dienstleistung oder in diesem Recht zuzüglich der Zahlung eines Preises besteht«, klammert das Unionsrecht bislang (zur Reform Frage 14) vom Anwendungsbereich der Vergaberichtlinien aus. Diese Ausnahme gilt auch, ohne dass dies ausdrücklich geregelt wäre, in Einklang mit der Gesetzesbegründung[40] im deutschen Kartellvergaberecht,[41] das im Übrigen keine eigene Definition enthält.[42] Damit sind die unionsrechtliche Begriffsbildung und Abgrenzung zwischen Dienstleistungsaufträgen und -konzessionen (mit ihren Streitfragen) unmittelbar auch im nationalen Kontext relevant.[43] Unbeschadet

37. Vgl. EuGH, Rs. C-220/06, Slg. 2007, I-12175, Rn. 49 ff., 84 f. – Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia.
38. Siehe BGH, NZBau 2009, S. 201 (203): »vertragsähnlich«; *M. Burgi*, NZBau 2007, S. 383 (385): »funktionales Äquivalent zum Vertrag«; *J. Ruthig*, DVBl. 2010, S. 12 (15 f.); *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 22; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 18.
39. Siehe nur BGH, NZBau 2009, S. 201 (203). Näher *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 29; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 17.
40. Begründung Gesetz Modernisierung VergabeR (Fn. 10), BT-Drs. 16/10117, S. 17.
41. BGH, NZBau 2012, S. 248 (249 f.); *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 84; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 192. Siehe demgegenüber aber *P. F. Bultmann*, NVwZ 2011, S. 72 (75 f.).
42. Siehe für die Baukonzession aber den in Anlehnung an Art. 1 Abs. 3 VRL formulierten § 99 Abs. 6 GWB: »Eine Baukonzession ist ein Vertrag über die Durchführung eines Bauauftrags, bei dem die Gegenleistung für die Bauarbeiten statt in einem Entgelt in dem befristeten Recht auf Nutzung der baulichen Anlage, gegebenenfalls zuzüglich der Zahlung eines Preises besteht.«
43. Siehe im Einzelnen BGH, NZBau 2011, S. 175 (179 ff.); *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 193 ff. Siehe für Beispiele aus der Rechtsprechung zu SPNV-Dienstleistungen: BGH, NZBau 2011, S. 175, und OLG München, NZBau 2008, S. 668; zur Alttextilentsorgung OLG Düsseldorf, NZBau 2012, S. 382; zum Betrieb eines Freizeitzentrums einerseits OLG Düsseldorf, NZBau 2012, S. 518, und

ihrer Ausnahme aus dem Kartellvergaberecht unterliegt die Konzessionsvergabe den verfassungs- und marktfreiheitlichen Rahmenvorgaben für jedwede staatliche Verteilungstätigkeit (zu diesen Frage 6.3); mitunter finden sich auch punktuelle Regelungen im einfachen Recht, so etwa in § 5 des Hessischen Spielbankgesetzes,[44] in § 4b des Glücksspielstaatsvertrags (»Konzessionsverfahren«),[45] in § 46 des Gesetzes über die Elektrizitäts- und Gasversorgung (EnWG; Wegenutzungsverträge) oder in Art. 13 des Bayerischen Rettungsdienstgesetzes.[46]

Aus der Perspektive des *allgemeinen Verwaltungsrechts* ist festzuhalten, dass Konzessionen, anders als Verwaltungsakte oder öffentlich-rechtliche Verträge, weder ein im deutschen Verwaltungsverfahrensgesetz (VwVfG) definiertes oder geregeltes Institut noch eine etablierte und scharf konturierte Kategorie des allgemeinen Verwaltungsrechts darstellen; Konzessionen werden als Unterfall der Genehmigung, die Nutzungsrechte im Rahmen eines Nutzungsregimes zuweist, verstanden.[47] Trotz fehlender Legaldefinition und begrifflicher Unschärfen sind Konzessionen der deutschen Rechtsordnung nicht unbekannt und punktuell im Besonderen Verwaltungsrecht geregelt (siehe etwa die soeben zitierten Beispiele). Konzessionen können sowohl durch Vertrag als auch durch Verwaltungsakt verliehen werden (siehe etwa Art. 11 Abs. 1 S. 2 des Hessischen Rettungsdienstgesetzes[48]).

Schließlich sei festgehalten, dass der Abgrenzung zwischen Dienstleistungsauftrag und Dienstleistungskonzession sowie der Frage nach der Vertragsähnlichkeit von (mitwirkungsbedürftigen) Verwaltungsakten erhebliche

---

andererseits OVG Münster, NZBau 2011, S. 319; zum Betrieb einer Renn- und Teststrecke OLG Brandenburg, NZBau 2009, S. 139; zum Rettungsdienst EuGH, Rs. C-274/09, Slg. 2011, I-1335 – Stadler (auf Vorlage von OLG München, NZBau 2009, S. 666; zum Fortgang OLG München, NZBau 2011, S. 505, und BGH, NZBau 2012, S. 248); ferner der Überblick bei *C. Jennert*, Öffentlich-Private Partnerschaft, in: M. Müller-Wrede (Fn. 7), Kap. 10, Rn. 41; *J. Polster/C. Kokew*, KSzW 2012, S. 144 (148 ff.).

44. GVBl. I 2007, 753, geändert durch Gesetz vom 27.9.2012, GVBl. I, S. 290.
45. GVBl. 2012, S. 318.
46. GVBl. 2008, S. 429, zuletzt geändert durch Gesetz vom 22.3.2013, GVBl., S. 71.
47. Siehe *C. Bumke*, Verwaltungsakte, in: W. Hoffmann-Riem/E. Schmidt-Aßmann/ A. Voßkuhle (Hrsg.), Grundlagen des Verwaltungsrechts, Bd. 2, 2. Aufl. 2012, § 35, Rn. 90 ff. (gleichwohl zurückhaltend gegenüber der Ordnungsleistung der Kategorienbildung); zum Institut der Konzession ferner *C. Koenig*, Die öffentlich-rechtliche Verteilungslenkung, 1994, S. 100 ff.; *O. Mayer*, Deutsches Verwaltungsrecht, Bd. 2, 1969 (unveränderter Nachdruck der 3. Aufl. 1924), S. 95 ff.; *J. Wieland*, Die Konzessionsabgaben, 1991, S. 124 ff.
48. GVBl. I 2010, S. 646, geändert durch Gesetz vom 13.12.2012, GVBl. I, S. 622.

praktische Bedeutung zukommt, kann die öffentliche Hand doch Private in diesen drei Formen mit der Erbringung von (Dienst-)Leistungen gegenüber Dritten beauftragen und gelten jeweils unterschiedliche Vergaberegeln; die Abgrenzung ist in Deutschland etwa bei der Vergabe von Rettungsdienstleistungen virulent geworden.[49] Am Rande vermerkt sei, dass im Gesundheits- und Sozialrecht auch im Übrigen zahlreiche Streitfragen hinsichtlich der Vergabepflichtigkeit der Leistungserbringung unter Einbeziehung von Dritten bestehen; ein besonders prominentes Beispiel stellen Arzneimittelrabattverträge (§ 130a SGB V) dar.[50]

Frage 3

Obgleich das deutsche Verwaltungsrecht eine *Vielzahl teils gesetzlich normierter Kooperationsformen* zwischen Trägern der öffentlichen Verwaltung kennt, findet sich die Frage der *Vergabepflichtigkeit* derartiger Kooperationen nicht ausdrücklich (im Kartellvergaberecht) geregelt. Sie ist vornehmlich für die kommunale Ebene von Relevanz. Diesbezüglich enthält das – in die Regelungskompetenz der einzelnen Länder fallende – Kommunalrecht nähere Regelungen, wohingegen für Kooperationen zwischen sonstigen Verwaltungsträgern kein spezifischer Rechtsrahmen – jenseits allgemeiner verfassungs- und verwaltungsorganisationsrechtlicher Vorgaben – existiert.

(1) Bedeutung der kommunalen Selbstverwaltungsgarantie

Besonderer Hervorhebung verdient einleitend, dass die Entscheidung der Kommunen, eine Aufgabe selbst, durch verselbstständigte eigene Einrichtungen und Unternehmen oder in Zusammenwirken mit (privaten) Dritten bzw. anderen Verwaltungsträgern zu erbringen, als Ausfluss der kommunalen Organisationshoheit *verfassungsrechtlichen Schutz durch die kommunale Selbstverwaltungsgarantie* (Art. 28 Abs. 2 GG sowie landesverfassungsrechtliche Parallelnormen) genießt.[51] Dies rechtfertigt, auch wenn unionsrechtlich bestehende Ausschreibungspflichten den Handlungsspielraum der Kommunen einschränken, indem sie einen Privatisierungszwang zur Folge haben

49. Siehe – neben den in Fn. 43 zitierten Entscheidungen – nur *O. Esch*, KSzW 2012, S. 152 (153); *J. Ruthig*, DVBl. 2010, S. 12 (15 f.).
50. Siehe nur *D. Heinemann*, Vergaberecht und Sozialrecht, in: M. Müller-Wrede (Fn. 7), Kap. 38; *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 523 ff.
51. Siehe nur *F. Wollenschläger*, in: T. Meder/W. Brechmann (Hrsg.), Die Verfassung des Freistaates Bayern, 5. Aufl. 2014, Art. 11, Rn. 39, i.E.

können, angesichts des Vorrangs des Unionsrechts auch vor nationalem Verfassungsrecht zwar keine Vergabefreiheit inter- und intrakommunaler Kooperationen (wie teils gefordert);[52] allerdings ist der auch unionsrechtlich in Art. 4 Abs. 2 S. 1 EUV als Teil der nationalen Identität anerkannte Schutz der kommunalen Selbstverwaltung bei der Bestimmung der Reichweite von Ausschreibungspflichten zu berücksichtigen.[53] Am Rande vermerkt sei, dass politische Forderungen nach einer Freistellung interkommunaler Kooperationen vom Vergaberecht häufig (und bislang erfolglos) artikuliert werden (siehe zur Reform nunmehr aber Frage 14), etwa durch den Bundesrat im Kontext der Vergaberechtsmodernisierung des Jahres 2009;[54] auch zieht die Vergabepflichtigkeit interkommunaler Kooperationen rechtspolitische Kritik wegen einer Missachtung der Organisationshoheit der Kommunen und der Auslösung eines Privatisierungszwanges auf sich.[55]

(2) In-house-Vergaben

Mit Blick auf *In-house-Vergaben* ist aus kommunalrechtlicher Sicht zunächst auf das kommunale Unternehmensrecht zu verweisen [siehe in Bayern etwa Art. 86 ff. Gemeindeordnung für den Freistaat Bayern (GO)[56]], das den Gemeinden die Gründung von außerhalb ihrer allgemeinen Verwaltung angesiedelten Unternehmen ermöglicht, unterschiedliche Organisationsformen vorsieht (öffentlich-rechtlich und privatrechtlich; mit oder ohne eigener Rechtspersönlichkeit; mit und ohne Beteiligung Privater) und gleichzeitig die unternehmerische Tätigkeit im Interesse von Gemeinde, Allgemeinheit und auch Privatwirtschaft begrenzt.

Beauftragt die Gemeinde nun ein derartiges Unternehmen, so bestimmt sich die Ausschreibungspflicht nach den in der EuGH-Rechtsprechung für die Auslegung der EU-Vergaberichtlinien entwickelten Grundsätzen der vergabefreien In-house-Vergabe (Kontroll- und Wesentlichkeitskriterium); Auftragsvergaben, die diesem Ausnahmetatbestand unterfallen, werden auch aus

52. Siehe auch *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 145.
53. Siehe auch *M. Burgi*, NVwZ 2005, S. 208 (210 f.).
54. Siehe Begründung Gesetz Modernisierung VergabeR (Fn. 10), BT-Drs. 16/10117, S. 30, 40. Näher *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 10.
55. Siehe etwa *R. Gruneberg/A. Wilden*, ZfBR 2013, S. 438 (446).
56. GVBl. 1998, S. 796, zuletzt geändert durch Gesetz vom 24.7.2012, GVBl. S. 366. Vorgaben für die Gründung von Unternehmen auf Bundes- und Landesebene enthält namentlich das Haushaltsrecht, siehe für die Beteiligung an privatrechtlichen Unternehmen etwa § 65 BHO.

dem sachlichen Anwendungsbereich des (nationalen) Kartellvergaberechts ausgeklammert, ohne dass dies dort ausdrücklich geregelt wäre.[57] Damit determiniert wiederum das Unionsrecht – ähnlich wie etwa hinsichtlich der Frage der Vertragsähnlichkeit von Verwaltungsakten (siehe Frage 2.2) – die Auslegung und Anwendung des nationalen Kartellvergaberechts, so dass auf nationaler Ebene die Konkretisierung dieser Vorgaben, soweit Spielraum besteht, im Mittelpunkt steht. Exemplarisch verwiesen sei etwa auf die Verneinung des Kontrollkriteriums für Aktiengesellschaften aufgrund deren eigenverantwortlicher Leitung durch den Vorstand gemäß § 76 Abs. 1 Aktiengesetz (AktG),[58] die Konkretisierung des Wesentlichkeitskriteriums[59] oder die Diskussion der Behandlung von Vergaben an Mutter-, Schwester- oder Enkelunternehmen.[60]

(3) Verwaltungskooperationen auf kommunaler Ebene

Den Rechtsrahmen für *Verwaltungskooperationen auf kommunaler Ebene* steckt etwa für Bayern das Gesetz über die kommunale Zusammenarbeit (KommZG)[61] ab. Dieses sieht kommunale Arbeitsgemeinschaften, Zweckvereinbarungen, mit eigener Rechtspersönlichkeit ausgestattete Zweckverbände sowie gemeinsame Kommunalunternehmen des öffentlichen Rechts vor. Je nach dem, ob nur die Durchführung der Aufgabe oder auch die Zuständigkeit verlagert wird, werden mandatierende und delegierende Vereinbarungen unterschieden.[62] Daneben steht die Möglichkeit, ein im Miteigentum

57. Siehe nur – auch zur Auslegung der Kriterien im Detail – *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 47 ff.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 3, 91 ff.
58. BGH, NZBau 2008, S. 664 (666 f.); ferner OLG Düsseldorf, VergabeR 2009, S. 905; *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 53.
59. Siehe etwa OLG Hamburg, NZBau 2011, S. 185 (LS): »Ein Unternehmen wird nicht hauptsächlich für den öffentlichen Auftraggeber tätig, wenn das Unternehmen 90,5 % innerhalb des Stadtgebiets des öffentlichen Auftraggebers und 9,5 % außerhalb des Stadtgebiets erzielt und die innerhalb des Stadtgebiets mit öffentlichen Einrichtungen erzielten Umsätze sich nur auf 84,09% belaufen«. Siehe ferner BGH, NZBau 2008, S. 664 (667); OLG Celle, NZBau 2007, S. 126 (127); NZBau 2010, S. 194 (197 f.); OLG Düsseldorf, NZBau 2012, S. 50 (52); OLG Frankfurt, KommJur 2011, S. 462 (464).
60. Dazu im Überblick *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), or § 99 GWB, Rn. 59 ff.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 109 ff., 146 ff.
61. GVBl. 1994, S. 555, zuletzt geändert durch Gesetz vom 11.12.2012, GVBl. S. 619.
62. Siehe *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 137.

stehendes Unternehmen in Privatrechtsform zu gründen.[63] Wie diese intrakommunalen Kooperationsformen *vergaberechtlich* zu behandeln sind, ist, genauso wie für In-house-Vergaben, im Kartellvergaberecht *nicht geregelt*;[64] auch hier werden die in der EuGH-Rechtsprechung entwickelten Ausnahmetatbestände zur Bestimmung des sachlichen Anwendungsbereichs des Kartellvergaberechts herangezogen.[65] Insoweit ist, wenn namentlich mangels hinreichender Kontrolle der beauftragten Einrichtung keine In-house-Vergabe vorliegt, der vom EuGH in seiner jüngeren Rechtsprechung anerkannte Ausnahmetatbestand für »Verträge, mit denen eine Zusammenarbeit von öffentlichen Einrichtungen bei der Wahrnehmung einer ihnen allen obliegenden Gemeinwohlaufgabe vereinbart wird«, relevant. Solche Verträge unterfallen dann nicht dem Vergaberecht, wenn sie »ausschließlich zwischen öffentlichen Einrichtungen ohne Beteiligung Privater geschlossen werden, kein privater Dienstleistungserbringer besser gestellt wird als seine Wettbewerber und die darin vereinbarte Zusammenarbeit nur durch Überlegungen und Erfordernisse bestimmt wird, die mit der Verfolgung von im öffentlichen Interesse liegenden Zielen zusammenhängen«.[66] Die Einschlägigkeit dieses Ausnahmetatbestands für die vielfältigen Kooperationsformen ist derzeit Gegenstand eines Diskussionsprozesses auf nationaler Ebene.[67] So hat etwa das OLG München in einer aktuellen Entscheidung vom 21.2.2013 die Vergabepflichtigkeit eines »Kooperationsvertrag[s] zwischen zwei öffentlich-rechtlichen Klinikträgern über Leistungen der Arzneimittelversorgung sowie der Versorgung mit apothekenüblichen Waren [bejaht], wenn die zur Dienstleistung verpflichtete Klinik zugleich auf dem freien Markt als Wirtschaftsteilnehmer in erheblichem Umfang mit Apotheker- und sonstigen Dienstleistun-

---

63. Siehe nur *B. Ruhland*, VerwArch 101 (2010), S. 399 (400).
64. Eine Regelung anmahnend *M. Burgi*, NVwZ 2005, S. 208 (212).
65. Siehe nur – auch zur Auslegung der Kriterien im Detail – *H. Pünder*, Öffentlicher Auftrag, in: M. Müller-Wrede (Fn. 7), Kap. 6, Rn. 16 ff.; *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 62 ff.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 3, 137 ff.
66. EuGH, Rs. C-386/11, n.n.v., Rn. 36 f. – Piepenbrock Dienstleistungen GmbH & Co. KG; ferner Rs. C-159/11, n.n.v., Rn. 34 f. – Ordine degli Ingegneri della Provincia di Lecce u.a.; Rs. C-480/06, Slg. 2009, I-4747, Rn. 37 ff. – EK/Deutschland.
67. Siehe nur *R. Gruneberg/A. Wilden*, ZfBR 2013, S. 438; *B. Ruhland*, VerwArch 101 (2010), S. 399; *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 64; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 3, 137 ff.

gen Umsätze erzielt und das vereinbarte Entgelt allgemeine Fixkosten aus diesen Geschäften mit abdeckt.«[68] Im Einzelnen hat das Gericht ausgeführt:

»Problematisch erscheint jedoch, ob Gegenstand der Zusammenarbeit eine allen gemeinsam obliegende öffentliche Aufgabe ist und ob die Zusammenarbeit nur durch Erfordernisse und Überlegungen bestimmt wird, die mit der Verfolgung von im öffentlichen Interesse liegenden Zielen zusammenhängen.

Die wesentliche Aufgabe der Antragsgegnerin und der Beigeladenen ist die ordnungsgemäße ärztliche Behandlung ihrer Patienten. Der Versorgungsvertrag regelt nicht die gemeinsame ärztliche Behandlung und Betreuung der Patienten, sondern die Erbringung von Leistungen, die üblicherweise Apotheker erbringen. Apotheker erfüllen zweifelsfrei zentrale, im öffentlichen Interesse liegende Aufgaben, nämlich die Sicherstellung der ordnungsgemäßen Versorgung der Allgemeinheit mit Arzneimitteln (vgl. § 1 ApoG). Ungeachtet gewisser behördlicher Regularien, denen Apotheker unterworfen sind, sind sie jedoch private, auf dem freien Markt tätige und dem Wettbewerb unterworfene Unternehmer, die marktgängige Leistungen gegen Entgelt erbringen. Kliniken können zwar nach § 14 ApoG (mit behördlicher Genehmigung) selbst eine hausinterne Apotheke einrichten, zu ihren Pflichtaufgaben zählt diese Tätigkeit nicht ... Insoweit besteht ein erheblicher Unterschied zum Fall ‚Stadtreinigung Hamburg'. Die ordnungsgemäße Müllentsorgung ist zweifelsfrei eine den staatlichen Stellen gemeinsam obliegende öffentliche Aufgabe (vgl. auch EuGH vom 19. 12. 2012, C-159/11, Rn. 37: dort äußert der EuGH erhebliche Zweifel an einer derartigen öffentlichen Aufgabe, soweit es um eine Tätigkeit geht, die im Allgemeinen von Ingenieuren und Architekten ausgeübt wird).

Soweit im Verfahren ... eine weitreichende Zusammenarbeit der Kliniken zum Wohle der Patienten hervorgehoben wurde, ist festzustellen, dass der vorliegende Versorgungsvertrag hierfür keine Grundlage bietet. Gleiches gilt für die Auffassung, der Klinikapotheker der Beigeladenen werde quasi zum »Mitbehandler« der Patienten der Antragsgegnerin. Der Vertrag ist in Bezug auf seine Zielsetzung und die Leistungspflichten weitestgehend deckungsgleich mit dem Vertrag, den die Antragsgegnerin vormals mit der Antragstellerin geschlossen hat. Die einzige Besonderheit, die der Vertrag erkennen lässt, ist die Preisgestaltung, insbesondere die Lieferung von Medikamenten zum Selbstkostenpreis (zuzüglich Mehrwertsteuer). Der bisherige und der neue Vertrag dienen der ausreichenden und zweckmäßigen Versorgung der Patienten der Antragsgegnerin mit Arzneimitteln. Auch die Antragstellerin war zur pharmazeutischen Beratung und Information der Antragsgegnerin verpflichtet. Anhaltspunkte dafür, dass der Versorgungsvertrag den Zweck verfolgt, eine beiden öffentlichen Trägern gemeinsam obliegende Aufgabe zu erfüllen, lässt der Vertrag nicht erkennen. Vielmehr hat die Antragsgegnerin lediglich ihren bisherigen privaten Vertragspartner durch einen anderen Dienstleister ausgetauscht, weil sie dessen Leistungen für preisgünstiger und qualitativ besser hält.

Darüber hinaus vermochte sich der Senat nicht davon zu überzeugen, dass die Zusammenarbeit der Antragsgegnerin und der Beigeladenen nur durch Erfordernisse und Überlegungen bestimmt wird, die mit der Verfolgung von im öffentlichen Interesse liegenden Zielen zusammenhängen. Ein wesentlicher Aspekt, den der EuGH in diesem Zusammenhang hervorhebt, ist das Fehlen eines Finanztransfers zwischen den beteiligten Stellen.

---

68. OLG München, PharmR 2013, S. 249 (LS).

Vorliegend haben die Antragsgegnerin und die Beigeladene zwar erklärt, die Leistungen würden zum reinen Selbstkostenpreis erbracht ... Zwar spricht die Lieferung von Medikamenten zum Selbstkostenpreis für eine reine Kostenerstattung. Allerdings ist dies nicht die einzige Vergütung, die die Beigeladene erhält. Berücksichtigt man die weiteren Angaben der Beigeladenen, so muss festgestellt werden, dass sie die Pauschalen nicht ausschließlich nach dem konkreten (zusätzlichen) Kostenaufwand berechnet, den die Leistungen an die Antragsgegnerin auslösen. Vielmehr deckt sie mit den Pauschalen in nicht unerheblichem Umfang Fixkosten, die sie zugleich über ihre sonstigen geschäftlichen Aktivitäten refinanziert. Im Ergebnis führt die Kalkulation dazu, dass der Beigeladenen aus den mit anderen Klinikträgern erwirtschafteten Umsätzen ein höherer Gewinn verbleibt, weil bestehende Kosten über die Pauschalen der Antragsgegnerin mitbezahlt sind. Nähere Erläuterungen zur Berechnung der Logistikpauschale und der Vergütung für besondere Leistungen sind im Übrigen nicht erfolgt.

Der Senat verkennt nicht, dass die zwischen der Antragstellerin und der Beigeladenen angestrebte Kooperation wirtschaftlich für beide Seiten vorteilhaft sein dürfte. Dennoch hält der Senat auch unter Berücksichtigung der Rechtsprechung des EuGH die Kooperation nicht für vereinbar mit dem Unionsrecht. Entgegen der Meinung der Antragsgegnerin und der Beigeladenen könnte das gleiche Ergebnis auch nicht in einer anderen Rechtsform erreicht werden. Die Antragsgegnerin mag selbst eine Krankenhausapotheke in ihrem Haus einrichten können, den Betrieb einer gemeinsamen Krankenhausapotheke durch mehrere Kliniken sieht das Apothekengesetz nicht vor.

Ergänzend weist der Senat darauf hin, dass er – in Anlehnung an die Entscheidung des OLG Düsseldorf vom 28. 07. 2011, Verg 20/11 – der Auffassung ist, dass auch bei einer interkommunalen Zusammenarbeit beachtlich ist, ob eine Verfälschung des Wettbewerbs drohe, weil der Auftragnehmer in nicht unerheblichem Umfang auf dem Markt tätig ist und von Dritten Aufträge akquiriert ...«[69]

Bereits zuvor hatte das OLG Düsseldorf die Beauftragung einer Nachbarkommune mit der Altpapiersammlung im Wege einer mandatierenden Zweckvereinbarung mit folgender Begründung für ausschreibungspflichtig erachtet: »Nach dem Vertragsentwurf soll die Beigel. die Sammlung und Beförderung des Altpapiers auf dem Gebiet der Ag. gegen Zahlung eines Entgelts ausführen. Damit wird sie außerhalb ihres Zuständigkeitsbereichs tätig und betritt als Leistungserbringerin einen Markt, auf dem sich weithin Unternehmen der privaten Entsorgungswirtschaft in einem entwickelten Wettbewerb um öffentliche Aufträge betätigen.«[70] Anders hat das OLG Düsseldorf einen Fall der Zuständigkeitsübertragung beurteilt und die Anwendbarkeit des Kartellvergaberechts ausgeschlossen, »wenn öffentlich-rechtliche Kompetenzen von einem Aufgabenträger auf einen anderen verlagert werden, und dies – wie im Fall der Gründung eines Zweckverbands ... – auf einer gesetzli-

69. OLG München, PharmR 2013, S. 249 (254 f.).
70. OLG Düsseldorf, NVwZ 2004, S. 1022 (1022). Siehe auch OLG Frankfurt, NZBau 2004, S. 692 (694 ff.); OLG Naumburg, NZBau 2006, S. 58 (59 ff.).

chen Ermächtigung beruht. Dann handelt es sich, auch wenn die Übertragung der Zuständigkeit auf eine (öffentlich-rechtliche) Vereinbarung zwischen den beteiligten Verwaltungsstellen zurückzuführen ist, um einen dem Vergaberecht entzogenen Akt der Verwaltungsorganisation.«[71]

Frage 4

Verträge zwischen dem öffentlichen und privaten Sektor unterfallen nach der *Legaldefinition des § 99 Abs. 1 GWB* nur dann dem Anwendungsbereich des Kartellvergaberechts, wenn sie entgeltlich sind und sich auf »die Beschaffung von Leistungen, die Liefer-, Bau- oder Dienstleistungen zum Gegenstand haben, Baukonzessionen und Auslobungsverfahren, die zu Dienstleistungsaufträgen führen sollen«, beziehen (siehe bereits Frage 2).[72]

(1) Ausnahmetatbestände

Überdies darf kein Ausnahmetatbestand greifen: So klammern – in Umsetzung der in den Art. 12 ff. VRL und im weiteren EU-Sekundärvergaberecht enthaltenen *Ausnahmebestimmungen* – § 100 Abs. 2 ff. GWB für alle Auftragsvergaben, § 100a GWB für nicht sektorspezifische und nicht verteidigungs- und sicherheitsrelevante Aufträge, § 100b GWB für den Sektorenbereich und § 100c GWB für die Bereiche Verteidigung und Sicherheit bestimmte Vertragsgegenstände vom Anwendungsbereich des Vergaberechts aus.[73] Auch vertraglich verliehene *Dienstleistungskonzessionen* unterfallen nicht dem Anwendungsbereich des Kartellvergaberechts (siehe Frage 2.3). Des Weiteren sind Verträge, die die *Ausübung öffentlicher Gewalt* i.S.d. Art. 51 (ggf. i.V.m. Art. 62) AEUV zum Gegenstand haben, nicht vom EU-Vergabesekundärrecht erfasst;[74] diese Ausnahmemöglichkeit findet sich allerdings nicht im nationalen Kartellvergaberecht (explizit) normiert und stellt nach der Rechtsprechung des BGH auch keinen ungeschriebenen Ausnahmetatbestand dar.[75] Im Streit um die Vergabepflichtigkeit von Rettungsdienst-

---

71. OLG Düsseldorf, NZBau 2006, S. 662 (LS 2). Anders für delegierende Zweckvereinbarungen OLG Naumburg, NZBau 2006, S. 58 (60 f.); NZBau 2006, S. 667 (LS 5).
72. Eine nähere Definition dieser Begriffe enthält § 99 Abs. 2-6 GWB.
73. *J. Aicher*, Die Ausnahmetatbestände, in: M. Müller-Wrede (Fn. 7), Kap. 11.
74. EuGH, Rs. C-160/08, Slg. 2010, I-3713, Rn. 73 f. – EK/Deutschland.
75. BGH, NZBau 2009, S. 201 (203 f.).

leistungen hat diese Ausnahmemöglichkeit eine Rolle gespielt;[76] nach Auffassung des EuGH liegt indes schon kein Fall der Ausübung öffentlicher Gewalt vor.[77]

(2) Beschaffungsbezug

Aufgrund des in § 99 Abs. 1 GWB geforderten *Beschaffungsbezugs* muss der Staat als Nachfrager auftreten; das schlichte Anbieten von Leistungen und Gütern – etwa von Unternehmen oder Grundstücken – unterfällt nicht dem Vergaberecht. Ist ein derartiger Vorgang indes durch ein Beschaffungsmoment geprägt, können vergaberechtliche Ausschreibungspflichten bestehen. Dies gilt etwa unter bestimmten Voraussetzungen für die *Veräußerung von Anteilen an Gesellschaften*, die aufgrund der In-house-Ausnahme ausschreibungsfrei Leistungen für ihren bisherigen Eigentümer erbringen.[78] Das gerade auch für Deutschland prominenteste Beispiel dürfte der Streit um Ausschreibungspflichten bei der *Investorenauswahl im städtebaulichen Bereich*, namentlich bei der Veräußerung von Grundstücken mit Baupflichten, sein. Hier hat die *Ahlhorn-Rechtsprechung* des OLG Düsseldorf zu einer relativ weit reichenden Anwendbarkeit des Kartellvergaberechts geführt: Nach dieser kontrovers beurteilten Rechtsprechungslinie impliziere ein Bauauftrag respektive eine Baukonzession nicht, »dass der Auftraggeber damit einen eigenen Bedarf befriedigen will«; es genüge vielmehr, dass die öffentliche Hand einen Dritten »mit der Erstellung (gegebenenfalls einschließlich Planung) von Bauwerken/Bauvorhaben entsprechend ihnen Erfordernissen beauftragt.«[79] Der deutsche Gesetzgeber ist dem im Zuge der Vergaberechtsmodernisierung des Jahres 2009 durch eine Änderung des § 99 Abs. 3 und 6 GWB entgegengetreten. Seitdem sind Bauaufträge definiert als

---

76. Zusammenfassend *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), or § 99 GWB, Rn. 15 ff.
77. EuGH, Rs. C-160/08, Slg. 2010, I-3713, Rn. 75 ff. – EK/Deutschland.
78. Im Einzelnen *C. Jennert*, Öffentlich-Private Partnerschaft (Fn. 43), Rn. 73 ff.; *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 169 ff. m.w.N.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 50 ff. Aus der Rechtsprechung (in casu jeweils verneint): OLG Naumburg, ZfBR 2010, S. 722; BeckRS 2010, 13763.
79. OLG Düsseldorf, NZBau 2007, S. 530 (531); bestätigt in NZBau 2008, S. 138, NZBau 2008, S. 271, und NZBau 2008, S. 461. Ähnlich weit OLG Bremen, NZBau 2008, S. 336; OLG Karlsruhe, NZBau 2008, S. 537. Anders BayObLG, NZBau 2002, S. 108. Siehe im Einzelnen – m.w.N. – *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 67 ff.; *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 174 ff.

»Verträge über die Ausführung oder die gleichzeitige Planung und Ausführung eines Bauvorhabens oder eines Bauwerkes *für den öffentlichen Auftraggeber*, das Ergebnis von Tief- oder Hochbauarbeiten ist und eine wirtschaftliche oder technische Funktion erfüllen soll, *oder einer dem Auftraggeber unmittelbar wirtschaftlich zugutekommenden Bauleistung* durch Dritte gemäß den vom Auftraggeber genannten Erfordernissen.«

Und eine Baukonzession liegt gemäß § 99 Abs. 6 GWB nur noch bei Einräumung eines befristeten Nutzungsrechts vor. Der Gesetzgeber begründete die Änderung wie folgt:

»Die aus der Rechtsprechung des OLG Düsseldorf ... resultierenden rechtlichen Unklarheiten sollen durch eine Klarstellung des Bauauftragsbegriffs beseitigt werden. Hierfür soll der einem Bauauftrag immanente Beschaffungscharakter durch eine Textergänzung deutlicher hervorgehoben werden. Die Ergänzung sagt, dass die Bauleistung dem öffentlichen Auftraggeber unmittelbar wirtschaftlich zugute kommen muss. Denn ein Bauauftrag setzt einen eigenen Beschaffungsbedarf des Auftraggebers voraus, wobei allein die Verwirklichung einer von dem Planungsträger angestrebten städtebaulichen Entwicklung nicht als einzukaufende Leistung ausreicht. Vergaberecht betrifft prinzipiell – außer im Falle einer besonderen Beschaffungsbehörde – nicht die Aufgabenebene einer staatlichen Institution, sondern lediglich die Ebene der Ressourcenbeschaffung zur Bewältigung der Aufgaben der Institution. Beide Ebenen dürfen nicht miteinander verwechselt oder verquickt werden.«[80]

Auf Vorlage des OLG Düsseldorf hin[81] hat der EuGH in der Rs. Helmut Müller GmbH Position bezogen und ein restriktives Verständnis des Bauauftrags vertreten, indem er ein (im Urteil weiter konkretisiertes) unmittelbares wirtschaftliches Interesse des Auftraggebers an der Bauleistung gefordert hat.[82] Infolgedessen hat das OLG Düsseldorf seine Rechtsprechung angepasst und die schlichte Vereinbarung von Bauverpflichtungen nicht mehr genügen lassen.[83] Die in der Rs. Helmut Müller GmbH entwickelten Grundsätze bestimmen nunmehr die Auslegung des § 99 Abs. 3 GWB.[84]

Abschließend sei darauf hingewiesen, dass auch bei den nicht vom EU-Sekundärrecht erfassten Auswahlverfahren die verfassungs- und unionsrechtlichen Anforderungen an Verteilungsverfahren zu wahren sind (näher Frage 6.3). Deren Missachtung in der Vergabepraxis respektive deren nur beschränkt effektive gerichtliche Durchsetzung gerade im Kontext des Ab-

80. Begründung Gesetz Modernisierung VergabeR (Fn. 10), BT-Drs. 16/10117, S. 18.
81. NZBau 2008, S. 727.
82. EuGH, Rs. C-451/08, Slg. 2010, I-2673, Rn. 45 ff. – Helmut Müller GmbH.
83. OLG Düsseldorf, NZBau 2010, S. 580 (580 f.).
84. Siehe *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 41 ff., 159 ff.; *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 67 ff.

schlusses zivilrechtlicher Verträge mag *Tendenzen zu einer expansiven Anwendung des Kartellvergaberechts* erklären, das geregelte Verfahren und effektiven Rechtsschutz vorsieht.

Frage 5

Hinsichtlich gemischter Verträge und ihrer Behandlung im deutschen Vergaberecht ist zwischen verschiedenen Konstellationen zu differenzieren.

(1) Abgrenzung zwischen Bau-, Liefer- und Dienstleistungsaufträgen

Zunächst kann sich die Frage der *Abgrenzung zwischen Bau-, Liefer- und Dienstleistungsaufträgen* stellen. Insoweit bestimmt § 99 Abs. 10 GWB:

> »Ein öffentlicher Auftrag, der sowohl den Einkauf von Waren als auch die Beschaffung von Dienstleistungen zum Gegenstand hat, gilt als Dienstleistungsauftrag, wenn der Wert der Dienstleistungen den Wert der Waren übersteigt. Ein öffentlicher Auftrag, der neben Dienstleistungen Bauleistungen umfasst, die im Verhältnis zum Hauptgegenstand Nebenarbeiten sind, gilt als Dienstleistungsauftrag.«

Anders als im Fall des § 99 Abs. 10 S. 1 GWB, der für die Abgrenzung von Dienstleistungs- und Lieferaufträgen das Wertverhältnis für maßgeblich erklärt (»main value test«),[85] kommt es bei der Abgrenzung von Bau- und Dienstleistungsaufträgen gemäß S. 2 auf den Hauptgegenstand an, was nicht nur nach dem Wert zu bestimmen ist (»main object test«).[86] So hat das OLG Düsseldorf betont, dass letzterer »lediglich eine Orientierungs- und Kontrollfunktion [erfüllt]. Entscheidend kommt es darauf an, aufgrund einer Analyse der kennzeichnenden und in den Verdingungsunterlagen dokumentierten rechtlichen sowie wirtschaftlichen Gesamtumstände den Schwerpunkt des Auftrags zu ermitteln«.[87] Die in § 99 Abs. 10 GWB nicht geregelte Abgrenzung von Liefer- und Bauaufträgen soll ebenfalls nach dem Hauptgegenstand

---

85. Gemäß § 99 Abs. 2 S. 2 GWB können Lieferaufträge »auch Nebenleistungen umfassen«; zur Bedeutung dieser Formel für die Abgrenzung *H. Pünder*, Öffentlicher Auftrag (Fn. 65), Rn. 86 f.
86. OLG Düsseldorf, VergabeR 2007, S. 200 (202); *H. Pünder*, Öffentlicher Auftrag (Fn. 65), Rn. 88 f.; *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 94 f.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 223 f.
87. OLG Düsseldorf, VergabeR 2007, S. 200 (202). Siehe auch VK Bund, Beschl. vom 31.7.2006, VK 2 – 65/06, juris, Rn. 43 ff.

(Schwerpunkt) erfolgen.[88] Mit Blick auf die in der EuGH-Rechtsprechung entwickelten Grundsätze (zu diesen sogleich unter 3.) werden diese Regeln nur für den Fall einer einheitlichen, nicht trennbaren Leistung für anwendbar erachtet; anderfalls hat eine separate Betrachtung stattzufinden.[89]

(2) Abgrenzung bei sektorenübergreifenden Verträgen

In § 99 Abs. 11 ff. GWB geregelt ist die Frage des anwendbaren Vergaberegimes, wenn der Vertrag *mehrere Tätigkeitsbereiche (allgemeines Vergaberecht, Sektoren, Verteidigung- und Sicherheit)* betrifft:

»(11) Für einen Auftrag zur Durchführung mehrerer Tätigkeiten gelten die Bestimmungen für die Tätigkeit, die den Hauptgegenstand darstellt.

(12) Ist für einen Auftrag zur Durchführung von Tätigkeiten auf dem Gebiet der Trinkwasser- oder Energieversorgung, des Verkehrs oder des Bereichs der Auftraggeber nach dem Bundesberggesetz und von Tätigkeiten von Auftraggebern nach § 98 Nummer 1 bis 3 nicht feststellbar, welche Tätigkeit den Hauptgegenstand darstellt, ist der Auftrag nach den Bestimmungen zu vergeben, die für Auftraggeber nach § 98 Nummer 1 bis 3 gelten. Betrifft eine der Tätigkeiten, deren Durchführung der Auftrag bezweckt, sowohl eine Tätigkeit auf dem Gebiet der Trinkwasser- oder Energieversorgung, des Verkehrs oder des Bereichs der Auftraggeber nach dem Bundesberggesetz als auch eine Tätigkeit, die nicht in die Bereiche von Auftraggebern nach § 98 Nummer 1 bis 3 fällt, und ist nicht feststellbar, welche Tätigkeit den Hauptgegenstand darstellt, so ist der Auftrag nach denjenigen Bestimmungen zu vergeben, die für Auftraggeber mit einer Tätigkeit auf dem Gebiet der Trinkwasser- und Energieversorgung sowie des Verkehrs oder des Bundesberggesetzes gelten.

(13) Ist bei einem Auftrag über Bauleistungen, Lieferungen oder Dienstleistungen ein Teil der Leistung verteidigungs- oder sicherheitsrelevant, wird dieser Auftrag einheitlich gemäß den Bestimmungen für verteidigungs- und sicherheitsrelevante Aufträge vergeben, sofern die Beschaffung in Form eines einheitlichen Auftrags aus objektiven Gründen gerechtfertigt ist. Ist bei einem Auftrag über Bauleistungen, Lieferungen oder Dienstleistungen ein Teil der Leistung verteidigungs- oder sicherheitsrelevant und fällt der andere Teil weder in diesen Bereich noch unter die Vergaberegeln der Sektorenverordnung oder der Vergabeverordnung, unterliegt die Vergabe dieses Auftrags nicht dem Vierten Teil dieses Gesetzes, sofern die Beschaffung in Form eines einheitlichen Auftrags aus objektiven Gründen gerechtfertigt ist«.

---

88. OLG München, Beschl. vom 5.11.2009, Verg 15/09, juris, Rn. 48; *H. Pünder*, Öffentlicher Auftrag (Fn. 65), Rn. 86 m. Fn. 403, Rn. 90 (Vorschlag, § 99 Abs. 11 GWB als allgemeine Regel anzuwenden, was der Wortlaut zulässt, aber mit Blick auf Systematik und Genese fraglich ist); *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 95.
89. *H. Pünder*, Öffentlicher Auftrag (Fn. 65), Rn. 92; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 221.

(3) Abgrenzung bei nur partiell vergabepflichtigen Verträgen

Des Weiteren kann sich die Frage stellen, ob das Kartellvergaberecht anwendbar ist, wenn der Vertrag *vergabepflichtige und ausschreibungsfreie Elemente* enthält, z.B. solche eines Dienstleistungsauftrags und einer Dienstleistungskonzession. Diese Frage ist nicht ausdrücklich geregelt; hier hat die Zuordnung entsprechend der in der EuGH-Rechtsprechung entwickelten Grundsätze stattzufinden (separate Beurteilung bei Trennbarkeit; Maßgeblichkeit des Hauptgegenstands bei einheitlichem Vertrag).[90] Vor diesem Hintergrund hat das OLG Karlsruhe in einem aktuellen Beschluss die »einheitliche Vergabe von Bau sowie langjährigem Betrieb einer Autobahnraststätte mit Tankstelle an einen einzigen Vertragspartner« als Dienstleistungskonzession qualifiziert:

»Es handelt sich der Ausschreibung zur Folge, die für die rechtl. Bewertung maßgebl. ist, um gemischte Verträge, deren Teile allerdings untrennbar miteinander verbunden sind. Aus den Bedingungen der Ausschreibungsbekanntmachung geht hervor, dass die Konzessionsverträge sich als einheitl. Verträge darstellen. Die Konzessionsverträge enthalten Regelungen sowohl zum Bau als auch zum Betrieb der Raststätte bzw. der Tankstelle. Die Konzessionsverträge sollen aber jeweils mit einem einzigen Partner geschlossen werden, der die Raststätte bzw. die Tankstelle zunächst nach eigenen Vorstellungen baut und danach zumindest 30 Jahre betreibt. Der Ag. hat für den Bau und für den Betrieb der Raststätte keine eigenen Vorstellungen entwickelt und keine wesentlichen Vorgaben gemacht. Die Vorgaben halten sich vielmehr in engen Grenzen und verweisen im Wesentlichen auf die Einhaltung gesetzl. Bestimmungen. Der Konzessionsnehmer kann und hat demnach den Bau der Raststätte bzw. der Tankanlage so zu planen, dass er seine Vorstellungen vom Betrieb dieser Anlagen verwirklichen kann. Dass der Ag. für die Zuschlagsentscheidung Beurteilungskriterien vorgesehen hat, die den Bau und den Betrieb betreffen, steht der Freiheit der Bieter, ihre eigenen Vorstellungen zu entwickeln, nicht entgegen. Die Beurteilungskriterien betreffen nur einzelne Punkte des Leistungsangebots, um überhaupt eine Auswahl unter den Bietern treffen zu können.

Hauptgegenstand der Konzessionsverträge sind die ausgeschriebenen Dienstleistungen. Der Bau von Raststätte und Tankstelle ist im Verhältnis zu deren Betrieb als untergeordnet anzusehen (vgl. auch EuGH, Urt. v. 10.04. 2003 – C-20/01 – Rn. 52). Die Raststätte und die Tankstelle dienen der Versorgung der Verkehrsteilnehmer. Die Versorgung erfolgt durch die vom Konzessionsnehmer zu erbringenden Dienstleistungen, und zwar für einen Zeitraum von mindestens 30 Jahren mit der Möglichkeit der Verlängerung um zweimal fünf Jahre. Der Ag. erwartet aufgrund seiner Erfahrungen in den genannten 30 Jahren Umsätze von rund 100 bis 150 Millionen Euro ... Der Wert der vom Konzessionsnehmer zu erbringenden Bauleistungen sind nicht unerheblich. Die Leistungen haben einen Wert von über 6 Millionen Euro. Raststätte und Tankstelle müssen auch zunächst errichtet werden,

90. OLG Karlsruhe, GewArch 2013, S. 325 (325); *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 198, 226.

damit die Dienstleistungen erbracht werden können. Doch machen die Bauinvestitionen weniger als 10 % der Gesamtinvestitionen, die insbes. durch den Personaleinsatz und den Wareneinkauf in der Vertragslaufzeit bestimmt werden, aus. Andererseits müssen die Bauten nur errichtet werden, damit der Konzessionär die Versorgungsleistungen erbringen kann. Hinzu kommt, dass die vom Konzessionsnehmer gem. § 15 Abs. 3 FStrG zu erbringende Konzessionsabgabe allein vom Umsatz, d.h. den durch seine Dienstleistungen erzielten Erlöse, bestimmt werden, der Umfang der Bauleistungen auf die Höhe der Konzessionsabgabe jedoch keinerlei Einfluss hat, insbes. keine Verpflichtungen des Ag. tangiert. Bei der anzustellenden Gesamtbetrachtung des ausgeschriebenen Vorhabens stellen sich die Bauleistungen insbes. aufgrund der Laufzeit der Verträge nur als ergänzende Nebenarbeiten dar, die den Charakter der Verträge nicht prägen können. Um den Dienstleistungen den die Konzessionsverträge prägenden Charakter zu geben, brauchen die Bauleistungen nicht von völlig untergeordneter Bedeutung zu sein.

Nicht maßgebl. ins Gewicht fallen kann, dass die Architektur der geplanten Bauten bei der Wertung mit 35 % ins Gewicht fällt. Denn die Bedeutung bei der Wertung für den Zuschlag prägt nicht den Charakter der Kommissionsverträge. Zudem wird die Architektur im Wesentlichen durch Leistungen in der Phase der Entwurfsplanung festgelegt. Diese macht aber nur einen geringen Teil des Auftragsvolumens der Bauleistungen aus.«[91]

In einer vor den maßgeblichen Urteilen des EuGH ergangenen Entscheidung aus dem Jahre 2005 ist der BGH indes einer strengen Linie gefolgt und hat mit Blick auf den mit Entsorgungspflichten einhergehenden »Verkauf« von Altpapier durch eine Kommune an ein Entsorgungsunternehmen festgehalten:

»Der Feststellung, dass der ... Vertrag daher ein Dienstleistungsauftrag ist, steht nicht entgegen, dass die Ag. und die Beigel. die gegenseitigen Rechte und Pflichten mittels eines Kaufvertrags geregelt haben, weil sie das Altpapier als ein werthaltiges Gut angesehen haben und es deshalb an die Beigel. gegen Entgelt veräußert werden soll. Denn § 99 I GWB stellt weder auf die zivilrechtliche Einordnung eines Vertrags noch darauf ab, ob in der Übernahme der Leistung i.S. des § 99 IV GWB, die von dem Unternehmen erbracht werden soll, ein wesentlicher oder gar der Hauptzweck des Vertrags liegt. Der Vertrag muss lediglich Dienstleistungen zum Gegenstand haben. Gemäß der Erläuterung, die § 99 IV GWB gibt, reicht es aus, dass der Vertrag sich überhaupt über Leistungen verhält, die das Unternehmen zu erbringen hat.

Ob ein Vertrag gleichwohl ausnahmsweise Dienstleistungen dann nicht i.S. von § 99 I GWB zum Gegenstand hat, wenn die vertragsgemäß von dem Unternehmen zu erbringende Leistung angesichts des rechtlichen und wirtschaftlichen Schwerpunkts des Vertrags nicht ins Gewicht fällt, braucht hier nicht abschließend entschieden zu werden. Angesichts des vor allem in § 97 I GWB zum Ausdruck kommenden Anliegens des in diesem Gesetz normierten Vergaberechtssystems, dass öffentliche Beschaffung, soweit sie nicht ausdrücklich ausgenommen ist, umfassend unter geregelten Wettbewerbsbedingungen erfolgt, könnte eine solche Ausnahme ohnehin nur in Fällen in Erwägung gezogen werden, in denen die Pflicht zur Dienstleistung völlig untergeordneter Natur ist und es deshalb ausge-

91. OLG Karlsruhe, GewArch 2013, S. 325 (325 f.).

schlossen erscheint, dass auch ihretwegen der Vertrag abgeschlossen worden ist. Ein solcher Fall ist hier jedoch nicht zu beurteilen.«[92]

Diese Linie setzen jüngere Entscheidungen fort; so ist etwa das OLG Düsseldorf dem jüngst in einem Beschluss vom 9.1.2013 im Kontext einer strategischen Partnerschaft (ÖPP) gefolgt.[93]

Allgemeine Grundsätze des EU-Rechts: Vergaberecht und mehr

Frage 6

(1) Zweiteilung des Vergaberechts

Das deutsche Vergaberecht ist infolge einer bewussten Entscheidung des Gesetzgebers zweigeteilt (siehe Frage 1): Auftragsvergaben, die in den Anwendungsbereich der EU-Vergaberichtlinien fallen, regelt das subjektive Rechte und gerichtlichen Rechtsschutz vorsehende Kartellvergaberecht; nicht vom koordinierten EU-Vergaberecht erfasste Auftragsvergaben – namentlich Unterschwellenvergaben, deren Anteil auf immerhin 90 % der staatlichen Beschaffungstätigkeit geschätzt wird[94] – unterfallen demgegenüber dem sog. *Haushaltsvergaberecht*, sind mithin im für die jeweilige auftragsvergebende Körperschaft geltenden Haushaltsrecht [Bundeshaushaltsordnung (BHO), Landeshaushaltsordnungen, kommunales Haushaltsrecht] normiert. Was schließlich nicht prioritäre Dienstleistungen betrifft, so sieht auch das deutsche Vergaberecht weniger strenge Vergaberegeln vor (§ 4 Abs. 2 Nr. 2 VgV; § 1 EG Abs. 3 VOL/A).

(2) Anforderungen des Haushaltsvergaberechts an nicht vom EU-Sekundärrecht erfasste Auftragsvergaben

Das Haushaltsvergaberecht sieht nur rudimentäre gesetzliche Regelungen vor: So fordert § 55 Abs. 1 BHO »eine öffentliche Ausschreibung ..., sofern

92. BGH, NZBau 2005, S. 290 (293).
93. OLG Düsseldorf, NZBau 2013, S. 120 (121). Siehe bereits zuvor OLG Karlsruhe, NZBau 2008, S. 784 (785). Ablehnend wegen der gebotenen Schwerpunktbetrachtung *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 198.
94. Siehe etwa *J. Pietzcker*, NJW 2005, S. 2881 (2881).

nicht die Natur des Geschäfts oder besondere Umstände eine Ausnahme rechtfertigen«, und verlangt § 55 Abs. 2 BHO, »[b]eim Abschluß von Verträgen ... nach einheitlichen Richtlinien zu verfahren«. Nr. 2.2 der Verwaltungsvorschriften zur BHO (VV-BHO) erklärt die Basisparagraphen der Verdingungsordnungen für anwendbar,[95] die nähere und etwa in Gestalt von Ausschreibungspflichten durchaus für Wettbewerb, Transparenz und Gleichbehandlung förderliche Regelungen vorsehen (zu diesen Frage 1.3).

Das *Defizit dieses Haushaltsvergaberechts* in seinem überkommenen Verständnis[96] besteht indes darin, dass es weder subjektive Rechte vermittelt noch gerichtlichen Rechtsschutz vorsieht und damit wenig zu einer effektiven Durchsetzung der vergaberechtlichen Grundsätze der Nicht-Diskriminierung, Gleichbehandlung und Transparenz beizutragen vermag. Infolge des zunehmend erkannten, entfalteten und auch durchgesetzten verfassungs- und unionsrechtlichen Rahmens der öffentlichen Auftragsvergabe ist in den letzten Jahren ein *Wandel* zu verzeichnen.

(3) Verfassungs- und unionsrechtliche Vorgaben für die staatliche Güterverteilung

So folgen auf unionsrechtlicher Ebene namentlich aus den Marktfreiheiten und auf nationaler Ebene namentlich aus dem allgemeinen Gleichheitssatz (Art. 3 Abs. 1 GG) *prozedurale und materielle Rahmenvorgaben*, die auch für nicht von den Vergaberichtlinien erfasste öffentliche Aufträge gelten: Erstens sind sachgerechte und diskriminierungsfreie Vergabekriterien aufzustellen, was die Verfolgung hinreichend legitimierter Sekundärzwecke nicht ausschließt. Zweitens ist eine mit Blick auf Effizienzerwägungen einerseits und Bewerberinteressen andererseits angemessene Verfahrensgestaltung zu wählen, mithin ist ein Vergabekonzept (Kriterien, Verfahrensmodalitäten) vorab festzulegen, dieses dem weiteren Verfahren grundsätzlich zugrundezulegen, für hinreichende Publizität des Vergabevorgangs zu sorgen, sind angemessene Fristen und die Chancengleichheit sowie Neutralität sichernde Kautelen (etwa Verbot selektiver Information) vorzusehen und ist schließlich das Ver-

95. Siehe zur rechtlichen Bedeutung dieser Inbezugnahme *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 4 m.w.N.
96. Siehe etwa BVerwGE 129, 9 (17 f.); VGH Mannheim, NVwZ-RR 1999, S. 264 (265); allgemein *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 492.

fahrensergebnis bekanntzugeben sowie zu begründen. Drittens ist adäquater Rechtsschutz zu gewähren.[97]

Über diese Rahmenvorgaben hinaus findet auch zunehmend ein *Anspruch auf Einhaltung der individualschützenden Bestimmungen der Verdingungsordnungen* Anerkennung. Letztere stellen zwar private und damit als solche nicht verbindliche Regelwerke dar (siehe Frage 1.3); allerdings wird die öffentliche Hand zu deren Einhaltung als Ausfluss des im allgemeinen Gleichheitssatz (Art. 3 Abs. 1 GG) wurzelnden Grundsatzes der Selbstbindung der Verwaltung für verpflichtet erachtet (zum Rechtsschutz siehe Frage 13.7).[98]

(4) Veränderungen im Rechtsrahmen

In jüngerer Zeit sind schließlich *zunehmende Gesetzgebungsaktivitäten auf Landesebene* zu verzeichnen: Diese betreffen nicht nur die Verfolgung von Sekundärzwecken (dazu Frage 11.3), sondern auch Verfahrens- und Rechtsschutzfragen, indem sie auch außerhalb des Anwendungsbereichs des Kartellvergaberechts die Einhaltung der Verdingungsordnungen verlangen,[99] auftragswertbasierte Vorgaben für die Auswahl des konkreten Vergabeverfahrens[100] oder eine Vorabinformationspflicht[101] statuieren sowie eine verwaltungsinterne Kontrolle vorschreiben.[102]

Hat sich die Wahrung und Durchsetzung der vergaberechtlichen Grundsätze der Nicht-Diskriminierung, Gleichbehandlung und Transparenz damit auch jenseits des Anwendungsbereichs der EU-Vergaberichtlinien verbessert, so bestehen Defizite fort (siehe Fragen 1.2 und 13.7). Überdies ist – trotz Reformversprechen und -forderungen sowie einem unabweisbaren gesetzgeberischen Handlungsbedürfnis – das Vergabeverfahren jenseits des Kartellverga-

---

97. Siehe im Einzelnen – alle m.w. N. – *F. Wollenschläger*, NVwZ 2007, S. 388; *ders.*, Verteilungsverfahren, 2010, S. 31 ff., 102 ff., 198 ff.; *ders.*, Primärrechtsschutz (Fn. 7), Rn. 7 ff.
98. Siehe nur BVerfGE 116, 135 (153 f.); BGH, NJW 1998, S. 3636 (3638); LG München I, ZfBR 2012, S. 507 (508). Näher m.w.N. *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 53 ff.
99. § 2a Abs. 1 HmbVgG; § 2 VgG M-V; § 2 Abs. 1 S. 3 LVergabeG Nds; § 1 Abs. 1 S. 2 SächsVergabeG; § 1 Abs. 1 SächsVergabeDVO; § 14 Abs. 3 MFG S-H und § 2 Abs. 1, § 4 Abs. 1, § 5 Abs. 1 SHVgVO; § 1 Abs. 2 S. 1 ThürVgG.
100. § 2a Abs. 2 HmbVgG; § 1 Abs. 2 SächsVergabeDVO; § 2 Abs. 2 f., § 4 Abs. 2 f., § 5 Abs. 2, § 8a SHVgVO; § 1 Abs. 2 S. 2 ThürVgG.
101. § 12 VgG M-V; § 9 Abs. 1 SächsVergabeDVO; § 14 Abs. 10 MFG S-H; § 19 Abs. 1 ThürVgG.
102. § 9 Abs. 2 ff. SächsVergabeDVO; § 19 Abs. 2 ff. ThürVgG.

berechts nach wie vor nicht kodifiziert. Im Bereich der Vergabe von Dienstleistungskonzessionen finden sich zunehmend punktuelle Regelungen (siehe Frage 2.3).

Als Praxisbeispiel für eine EU-weite Bekanntmachung lässt sich etwa auf das im August 2012 publizierte Verfahren zur Vergabe von Konzessionen zur Veranstaltung von Sportwetten auf der Grundlage des neuen Glücksspielstaatsvertrags – unbeschadet der aktuellen Kontroversen – verweisen.[103]

Frage 7

Nachdem der Anwendungsbereich weder der Marktfreiheiten noch der Grundrechte auf die öffentliche Auftragsvergabe beschränkt ist, beanspruchen die aus ihnen abgeleiteten materiellen und prozeduralen Anforderungen an die staatliche Beschaffungstätigkeit auch jenseits dessen Geltung (zu den Anforderungen im Einzelnen Frage 6.3). Angesichts seines sachlich unbeschränkten Anwendungsbereichs gilt der allgemeine Gleichheitssatz (Art. 3 Abs. 1 GG) für jedwede staatliche Verteilungstätigkeit.[104] Dies gilt auch für den unionsgrundrechtlichen allgemeinen Gleichheitssatz (Art. 20 GRC); insoweit ist freilich zu berücksichtigen, dass dieser die Mitgliedstaaten nur bei Durchführung des Unionsrechts i.S.d. Art. 51 Abs. 1 GRC bindet.[105] Für die Einschlägigkeit der Marktfreiheiten ist ein Zusammenhang mit der grenzüberschreitenden Ausübung einer wirtschaftlichen Tätigkeit darzutun;[106] jenseits binnenmarktrelevanter Vorgänge kann das unionsbürgerliche Freizügigkeitsrecht (Art. 21 AEUV), ggf. i.V.m. dem allgemeinen Diskriminierungsverbot (Art. 18 AEUV) greifen.[107] In diesem Rahmen gelten (nicht nur) die Grundsätze der Nicht-Diskriminierung, der Gleichbehandlung und der Transparenz auch für die Auswahl des Begünstigten eines einseitigen Verwaltungsakts.

Als Beispiel für die Entwicklung und Aktualisierung entsprechender verfassungsrechtlicher Vorgaben in der nationalen Rechtsordnung kann etwa die

---

103. ABl. S vom 8.8.2012, S 151-253153. Näher http://verwaltung.hessen.de/irj/HMdI_Internet?cid=b901b42be766387b0cbd4b219bb21af1 (Abruf: 25.2.2014).
104. Siehe *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 34 ff.
105. Dazu nur *F. Wollenschläger*, Grundrechtsschutz und Unionsbürgerschaft, in: A. Hatje/P.-C. Müller-Graff, Enzyklopädie Europarecht, Bd. 1, 2014, i.E., § 8, Rn. 16 ff., 20. Speziell zu den unionsgrundrechtlichen Vorgaben für die staatliche Verteilungstätigkeit *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 104 ff.
106. Näher *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 115 f.
107. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 133 f.

Vergabe von öffentlichen Ämtern sowie von Standplätzen auf Messen und Märkten, die Hochschulzulassung und die Frequenzvergabe angeführt werden.[108]

Abgesehen von der im Fragebogen in Bezug genommenen Dienstleistungsrichtlinie[109] finden sich entsprechende Anforderungen auch im beihilferechtlichen Gebot eines bedingungsfreien, transparenten und objektiven Vergabeverfahrens[110] und im vom europäischen sowie nationalen Wettbewerbs- und Kartellrecht aufgestellten Gebot einer diskriminierungsfreien Verteilung.[111]

Aus allgemein verwaltungsrechtlicher Perspektive ist schließlich festzuhalten, dass die aus den Grundrechten sowie den Marktfreiheiten abgeleiteten materiellen und prozeduralen Anforderungen an die staatliche Verteilungstätigkeit einen wichtigen Baustein für die andernorts unternommene Entfaltung eines *Verteilungsverfahrens als eigenständigem verwaltungsrechtlichem Verfahrenstyp* bilden.[112]

Öffentliches Auftragswesen und allgemeines EU-Recht, einschließlich Wettbewerbsrecht und staatliche Beihilfen

Frage 8

(1) Die Sonderrolle des Staates als Marktakteur und damit korrespondierende Bindungen

Obgleich der Staat wie private Wirtschaftssubjekte auch seinen Bedarf am Markt durch den Abschluss privatrechtlicher Verträge deckt, kann er nicht mit einem privaten Marktteilnehmer gleichgesetzt werden. Dies erhellen

108. Siehe zu diesen Materien *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 197 ff.
109. Siehe insoweit (und zu weiteren Sekundärrechtsakten) auch *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 156 ff.
110. Zu diesem Mitteilung der Kommission betreffend Elemente staatlicher Beihilfe bei Verkäufen von Bauten oder Grundstücken durch die öffentliche Hand, ABl 1997 C 209, S. 3; allgemein m.w.N. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 134 ff.; *ders.*, Grundstücksveräußerungen und Privatisierung öffentlicher Unternehmen, in: A. Birnstiel/M. Bungenberg/H. Heinrich (Hrsg.), Europäisches Beihilfenrecht, 2013, Kap. 1, Rn. 469 ff.
111. Hierzu *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 146 ff., 183 ff.
112. Umfassend dazu *F. Wollenschläger*, Verteilungsverfahren, 2010.

nicht nur die hinter dem Vergaberecht stehenden spezifischen Regelungsanliegen (namentlich wirtschaftlicher und sparsamer Umgang mit öffentlichen, weitgehend steuerfinanzierten Mitteln; Eindämmung der Gefahr von Wettbewerbsverzerrungen aufgrund hoher Staatsquote und damit einhergehender Marktmacht sowie aufgrund des Handelns atypischer Marktakteuere, die in der Regel keinem Insolvenzrisiko, aber politischer Beeinflussung ausgesetzt sind und auch allgemeinpolitische Ziele verfolgen; Sicherung der Chancengleichheit).[113] Vielmehr kennzeichnet die Sonderrolle des Staates ganz allgemein vor allem die Gemeinwohlverpflichtung jedweden Staatshandelns, mit der besondere Bindungen korrespondieren, namentlich an die Grundrechte und Grundfreiheiten.[114] Dass sich die Einsicht in diese Sonderrolle des Staates erst langsam durchgesetzt hat, erhellt im deutschen Kontext etwa die nur zögerliche Anerkennung der Fiskalgeltung der Grundrechte (dazu näher Frage 1.2). Und noch in seinem Beschluss zum Vergaberechtsschutz unterhalb der Schwellenwerte vom 13.6.2006 hat das BVerfG die Einschlägigkeit der Berufsfreiheit (Art. 12 Abs. 1 GG) unter Verweis auf die Rolle des Staates als gewöhnlicher Marktteilnehmer verneint:

> »Bei der Vergabe eines öffentlichen Auftrags beeinflusst die handelnde staatliche Stelle den Wettbewerb nicht von außen, sondern wird selbst auf der Nachfrageseite wettbewerblich tätig und eröffnet so einen Vergabewettbewerb zwischen den potentiellen Anbietern. Ein solches Verhalten einer staatlichen Stelle steht mit den Funktionsbedingungen der bestehenden Wirtschaftsordnung in Einklang. Es ist ein Wesenselement dieser Wirtschaftsordnung, dass ein Nachfrager den auf der Angebotsseite bestehenden Wettbewerb zu seinen Zwecken nutzt, indem er konkurrierende Angebote vergleicht und sich für das entscheidet, das ihm am günstigsten erscheint. Dabei ist es grundsätzlich Sache des Nachfragers, nach welchen Kriterien und in welchem Verfahren er das günstigste Angebot auswählt. Dementsprechend trägt ein Wettbewerber auf der Angebotsseite stets das Risiko, dass seinem Angebot ein anderes, für den Nachfrager günstigeres vorgezogen wird. Der wettbewerblichen Herausforderung durch konkurrierende Angebote hat der Anbieter sich durch sein eigenes wettbewerbliches Verhalten zu stellen.«[115]

---

113. Zu den Regelungsanliegen des Vergaberechts *F. Wollenschläger*, Vergabeverwaltungsrecht (Fn. 2), Rn. 7 f.
114. Siehe nur BVerfGE 116, 135 (153): »Jede staatliche Stelle hat bei ihrem Handeln, unabhängig von der Handlungsform und dem betroffenen Lebensbereich, die in dem Gleichheitssatz niedergelegte Gerechtigkeitsvorstellung zu beachten. Dieses Handeln ist anders als die in freiheitlicher Selbstbestimmung erfolgende Tätigkeit eines Privaten stets dem Gemeinwohl verpflichtet. Eine willkürliche Ungleichbehandlung kann dem Gemeinwohl nicht dienen«. Siehe ferner E 128, 226 (244 f.).
115. BVerfGE 116, 135 (152).

Mag man auch die Einschlägigkeit der Berufsfreiheit (Art. 12 Abs. 1 GG) im Kontext der öffentlichen Auftragsvergabe im Ergebnis mit guten Gründen verneinen, so ist doch aus den genannten Erwägungen heraus die Gleichsetzung der staatlichen mit der privaten Marktteilnahme zurückzuweisen und folglich keine tragfähige Begründung.[116]

Vor diesem Hintergrund ist die öffentliche Hand bei Beschaffungstätigkeiten vollumfänglich an die Grundfreiheiten gebunden, und zwar sowohl in deren Gestalt als Diskriminierungs-[117] wie auch als Beschränkungsverbote.[118] Folglich bedarf nicht nur die Schlechterstellung ausländischer Bieter, sondern jede Behinderung des innergemeinschaftlichen Handels einer Rechtfertigung.

(2) Im Besonderen: Beschaffungsautonomie und Produktneutralität

Das marktfreiheitliche Beschränkungsverbot erfasst im Vergaberecht namentlich die Vorgabe, nur bestimmte Produkte bei der Auftragsausführung einsetzen zu dürfen, ohne dass gleichwertige Alternativen erlaubt wären.[119] Dies ist auch in der nationalen Rechtsprechung und Literatur anerkannt[120] und überdies – Art. 23 Abs. 8 VRL umsetzend – in § 8 Abs. 7 VOL/A EG bzw. § 7 Abs. 8 VOB/A normiert; letzterer bestimmt:

»Soweit es nicht durch den Auftragsgegenstand gerechtfertigt ist, darf in technischen Spezifikationen nicht auf eine bestimmte Produktion oder Herkunft oder ein besonderes Verfahren oder auf Marken, Patente, Typen eines bestimmten Ursprungs oder einer bestimmten Produktion verwiesen werden, wenn dadurch bestimmte Unternehmen oder bestimmte Produkte begünstigt oder ausgeschlossen werden. Solche Verweise sind jedoch ausnahmsweise zulässig, wenn der Auftragsgegenstand nicht hinreichend genau und allgemein verständlich beschrieben werden kann; solche Verweise sind mit dem Zusatz ‚oder gleichwertig' zu versehen.«

---

116. Siehe näher m.w.N. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 202 ff.
117. EuGH, Rs. C-225/98, Slg. 2000, I-7445, Rn. 85 ff. – EK/Frankreich (Nord-Pas-de-Calais); Rs. C-234/03, Slg. 2005, I-9315, Rn. 28 ff. – Contse u.a.; *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 125; *ders.*, NVwZ 2007, S. 388 (391 f.).
118. EuGH, Rs. C-359/93, Slg. 1995, I-157, Rn. 27 – UNIX; Rs. C-59/00, Slg. 2001, I-9505, Rn. 22 – Vestergaard; *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 125; *ders.*, NVwZ 2007, S. 388 (391).
119. Ibid.
120. OLG Düsseldorf, Beschl. vom 17.2.2010, Verg 42/09, juris, Rn. 27 ff.; OLG München, ZfBR 2007, S. 732 (733); LG Frankfurt/Oder, 13 O 360/07, juris, Rn. 76; VK Münster, Beschl. vom 24.6.2011, VK 6/11, juris, Rn. 91 ff.; *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 12.

Dies bedeutet freilich nicht, dass der Staat bei der öffentlichen Auftragsvergabe keinen Spielraum genösse. Vielmehr kommt ihm – im gesetzlichen Rahmen – ein *Beschaffungsermessen* zu.[121] Dieses bezieht sich insbesondere auf die Bestimmung des zu beschaffenden Objekts einschließlich seiner Eigenschaften. Insoweit hat die Rechtsprechung mehrfach Nachprüfungsanträge zurückgewiesen, die auf eine Modifikation des vom Auftraggeber nachgefragten Leistungsgegenstands zielten.[122]

In der vergaberechtlichen Rechtsprechung ist ein Spannungsfeld zwischen der Beschaffungsautonomie und dem Gebot der Produktneutralität hervorgetreten. In jüngeren Entscheidungen hat etwa das OLG Düsseldorf den Spielraum des Auftraggebers – entgegen seiner früheren Rechtsprechung und anderen Obergerichten[123] sowie unter Kritik[124] – gestärkt:

»Zwar ist jede produkt-, verfahrens- oder technikspezifische Ausschreibung und damit auch die von der Antragsgegnerin getroffene Technologiewahl zugunsten einer Datenfernübertragung über ISM per se wettbewerbsfeindlich. Das bedeutet freilich nicht, dass eine solche Ausschreibung in jedem Fall vergaberechtlich zu tadeln ist. Dann bliebe unbeachtet, dass die Festlegung des Beschaffungsgegenstandes der ausschließlichen Bestimmung durch den öffentlichen Auftraggeber unterworfen ist, der genauso wie Private allein die Art der zu vergebenden Leistung und den Auftragsgegenstand bestimmt. Entschließt er sich zur Beschaffung, ist er frei in seiner Entscheidung, welchen Auftragsgegenstand er für erforderlich oder wünschenswert hält. Die Bestimmung ist einer etwaigen Ausschreibung und Vergabe vorgelagert und muss vom öffentlichen Auftraggeber erst einmal in einer zu einer Nachfrage führenden Weise getroffen werden, bevor die Vergabe und das Vergabeverfahren betreffende Belange der an der Leistungserbringung interessierten Unternehmen berührt sein können. Dagegen können Bieter nicht mit Erfolg beanspruchen, dem Auftraggeber eine andere Leistung mit anderen Beschaffungsmerkmalen und Eigenschaften, als von ihm in den Verdingungsunterlagen festgelegt worden ist, anzudienen ...

Hat der Auftraggeber die Leistung bestimmt und entsprechend ausgeschrieben, dann unterliegt die ausgeschriebene Leistung freilich den einschlägigen vergaberechtlichen Vorschriften [Grundsatz der Produktneutralität]. Diese Vorschriften sind freilich im Lichte des Bestimmungsrechts des öffentlichen Auftraggebers auszulegen und anzuwenden.

Eine Rechtfertigung durch den Auftragsgegenstand ist dabei bereits anzunehmen, wenn auftrags- und sachbezogene Gründe zu der bestimmte Unternehmen oder Erzeugnisse bevorzugenden Leistungsbestimmung führen. Derartige Gründe können vielgestaltig sein und sich zum Beispiel aus der besonderen Aufgabenstellung, aus technischen oder gestal-

121. Siehe dazu und zum Folgenden *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 12 f.; ferner *J. Ziekow*, in: ders./Völlink (Fn. 33), § 99 GWB, Rn. 20 f.
122. Siehe OLG Düsseldorf, NZBau 2005, S. 532 (533); NZBau 2009, S. 334 (335); OLG Koblenz, NZBau 2002, S. 699 (703).
123. Strenger noch OLG Düsseldorf, NZBau 2005, S. 532 (533), sowie OLG Jena, NZBau 2006, S. 735 (736).
124. Kritisch etwa *J. Byok*, NJW 2012, S. 1124 (1124 f.), m.w.N.

terischen Anforderungen oder auch aus der Nutzung der Sache ergeben. Es genügt, dass sich die Forderung besonderer Merkmale, bezogen auf die Art der zu vergebenden Leistung, (nur) rechtfertigen lässt, womit dem Umstand Rechnung zu tragen ist, dass in die (auch) kaufmännische Entscheidung des Auftraggebers, welche Leistung mit welchen Merkmalen nachgefragt und ausgeschrieben werden soll, in der Regel eine Vielzahl von Erwägungen einfließt, die sich etwa daraus ergeben können, dass sich die auf dem Markt angebotenen Leistungen trotz grundsätzlicher Gleichartigkeit regelmäßig in einer Reihe von Eigenschaften unterscheiden. Eine Differenzierung nach solchen Kriterien, soweit sie auf die Art der zu vergebenden Leistung bezogen sind, kann dem Auftraggeber nicht verwehrt werden. Nach welchen sach- und auftragsbezogenen Kriterien er seine Beschaffungsentscheidung auszurichten hat, ist ihm wegen seines insoweit bestehenden Bestimmungsrechts im Nachprüfungsverfahren nicht vorzuschreiben ...

Führt eine an sach- und auftragsbezogenen Kriterien orientierte Beschaffungsentscheidung zur Festlegung auf ein bestimmtes Erzeugnis oder zur Wahl einer bestimmten Technologie, ist die damit verbundene Beschränkung oder Einengung des Wettbewerbs als Folge des Bestimmungsrechts des öffentlichen Auftraggebers grundsätzlich hinzunehmen.

Daraus folgt hinsichtlich des an eine Beschaffungsentscheidung, die zu einer Wettbewerbsbeschränkung führt, anzulegenden Prüfungsmaßstabs und der Prüfungsdichte, dass die Entscheidung des öffentlichen Auftraggebers im Rahmen des Nachprüfungsverfahrens nicht inhaltlich auf Vertretbarkeit, Nachvollziehbarkeit oder erst recht auf Richtigkeit, sondern nur daraufhin zu kontrollieren ist, ob sie auf sach- und auftragsbezogenen Gründen beruht. Ist ein derartiger sachlicher Bezug zum Auftragsgegenstand zu bejahen, findet ... keine Überprüfung nach den Maßstäben statt, die für die Ausübung eines Beurteilungsspielraums entwickelt worden sind. Insbesondere müssen der Beschaffungsentscheidung keine Untersuchungen in Form von Markterforschungen oder Marktanalysen vorangehen, die das Ziel haben zu erforschen, ob sich ein vertretbares Ausschreibungsergebnis auch durch eine produkt- oder technikoffene Ausschreibung erreichen lässt.

Durch das Erfordernis der sachlichen Auftragsbezogenheit wird im Sinne einer Negativabgrenzung sichergestellt, dass der Auswahl- und Beschaffungsentscheidung des Auftraggebers nicht sachfremde, willkürliche oder diskriminierende Erwägungen zugrunde liegen. Eine weitergehende Überprüfung insbesondere auf sachliche Richtigkeit oder Nachvollziehbarkeit der vom Auftraggeber genannten Gründe hätte dagegen zur Folge, dass im vergaberechtlichen Nachprüfungsverfahren – gegebenenfalls mit sachverständiger Hilfe – ermittelt würde, ob alternative Anforderungen seinem Beschaffungsziel genauso oder besser entsprechen und er gegebenenfalls verpflichtet würde, eine Leistung mit anderen als den von ihm festgelegten Merkmalen und Eigenschaften zu beschaffen. Dieses wäre mit dem Bestimmungsrecht des Auftraggebers unvereinbar.«[125]

Nach diesen Grundsätzen hat das OLG Düsseldorf auch eine Markterkundung für entbehrlich erachtet:

125. OLG Düsseldorf, Beschl. vom 17.2.2010, Verg 42/09, juris, Rn. 28 ff. Siehe auch ZfBR 2012, S. 723 (724 f.); NZBau 2012, S. 785 (788 ff.).

»Die Oberlandesgerichte Jena (Beschluss vom 26. 06. 2006 – Verg 2/06 – Anna-Amalia-Bibliothek) und Celle (Beschluss vom 22. 05. 2008 – 13 Verg 1/08 – Farbdoppler-Ultraschallsystem) gehen demgegenüber davon aus, dass der Auftraggeber sich zunächst einen Marktüberblick verschaffen und dann begründen muss, warum eine andere als die von ihm gewählte Lösung nicht in Betracht kommt.

Die letztgenannte Auffassung engt nach Auffassung des Senats das Bestimmungsrecht des Auftraggebers zu sehr ein. Solange die Anforderung nicht dazu führt, dass die Ausschreibung faktisch auf ein oder wenige Produkte zugeschnitten ist und die Anforderung objektiv sach- und auftragsbezogen ist, wird dem Grundsatz der Vergabe im Wettbewerb und der Wahrung der Bietervielfalt hinreichend Rechnung getragen. Die Vergabenachprüfungsinstanzen können dem Auftraggeber nicht eine technische oder ästhetische Lösung vorschreiben, die zwar auch in Betracht kommt, aber vom Auftraggeber aus nachvollziehbaren Gründen nicht gewünscht wird. Wird zudem verlangt, dass in den Vergabeunterlagen der Ausschluss von Alternativen bereits bei der Entscheidung dokumentiert wird, wird das Vergabeverfahren durch die Notwendigkeit des Auftraggebers, immer denkbare Alternativen umfänglich zu prüfen und zu bewerten, stark verkompliziert. Wie auch sonst ist der Auftraggeber nicht gehalten, die Ausschreibung so zuzuschneiden, dass sie zum Unternehmens- oder Betriebskonzept eines jeden möglichen Bieters passt ... Der Einwand, diese Rechtsprechung erlaube schrankenlos Produktbestimmungen, greift nicht durch. Auch nach der Rechtsprechung des Senats wird das Vorhandensein sachlich gerechtfertigter objektiver und plausibler Gründe geprüft, was willkürliches und diskriminierendes Verhalten des Auftraggebers ausschließt.«[126]

Spielraum besteht etwa auch bei der Festlegung der Vergabekriterien (siehe speziell zur Möglichkeit der strategischen Beschaffung *Frage 11*).

Frage 9

Der an der Spitze des Kartellvergaberechts stehende § 97 Abs. 1 GWB erklärt die *Beschaffung im Wettbewerb* zu einem fundamentalen Grundsatz des Vergaberechts.[127] Beeinträchtigungen drohen in vielfältiger Hinsicht, was hier nicht näher auszuführen ist. Fragt man mit Frage 9 spezifischer nach »Vergabevorschriften, die einem Missbrauch Vorschub leisten und so den Wettbewerb einschränken«, so ist festzuhalten, dass etwa mit der vergaberechtlich prinzipiell zulässigen Berücksichtigung von Projektanten, mithin von für den Auftraggeber vorab tätig gewesenen Personen (siehe § 6 Abs. 7 VOB/A EG),[128] mit der möglichen Abweichung vom Grundsatz einer produktneutralen Ausschreibung (siehe § 8 Abs. 7 VOB/A EG und Frage 8.2),

126. OLG Düsseldorf, ZfBR 2012, S. 723 (724 f.).
127. Allgemein zur Bedeutung des vergaberechtlichen Wettbewerbsgrundsatzes und seiner Ausprägungen *O. Dörr*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 1 GWB, Rn. 1 ff.
128. Dazu nur *O. Dörr*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 1 GWB, Rn. 12.

mit der funktionalen Leistungsbeschreibung (siehe Frage 12.1) oder mit der gestatteten strategischen Beschaffung (siehe § 97 Abs. 4 S. 2 und 3 GWB und Frage 11) Risiken für den Wettbewerb einhergehen; indes begrenzen die genannten Normen gleichzeitig diese Möglichkeiten, so dass der Handhabung der Vergabevorschriften im Einzelfall entscheidende Bedeutung zukommt (siehe im Kontext der Produktneutralität etwa Frage 8.2[129]). Vergleichbares gilt mit Blick auf die über die unionsrechtlichen Vorgaben hinausgehende[130] und im Zuge der Vergaberechtsreform des Jahres 2009 verschärfte[131] Pflicht zur Berücksichtigung und Förderung mittelständischer Interessen gemäß § 97 Abs. 3 GWB, die ebenfalls in einem Spannungsverhältnis zum Wettbewerbsgrundsatz steht.[132] Diese Norm bestimmt:

»1. Mittelständische Interessen sind bei der Vergabe öffentlicher Aufträge vornehmlich zu berücksichtigen. 2. Leistungen sind in der Menge aufgeteilt (Teillose) und getrennt nach Art oder Fachgebiet (Fachlose) zu vergeben. 3. Mehrere Teil- oder Fachlose dürfen zusammen vergeben werden, wenn wirtschaftliche oder technische Gründe dies erfordern. 4. Wird ein Unternehmen, das nicht öffentlicher Auftraggeber ist, mit der Wahrnehmung oder Durchführung einer öffentlichen Aufgabe betraut, verpflichtet der Auftraggeber das Unternehmen, sofern es Unteraufträge an Dritte vergibt, nach den Sätzen 1 bis 3 zu verfahren.«

Daneben kennt auch das Landesrecht die Pflicht zur Förderung mittelständischer Interessen bei der öffentlichen Auftragsvergabe (siehe etwa Art. 18 des Bayerischen Mittelstandsförderungsgesetzes[133]).[134]

Die Bündelung des Beschaffungsbedarfs mehrerer öffentlicher Auftraggeber durch eine *zentrale Beschaffung* wird trotz der dadurch vergrößerten

---

129. Zur Problematik auch *B. Tugendreich*, NZBau 2013, S. 90 (91 ff.).
130. Siehe nur *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 3, 11 ff., der gleichzeitig die Unionsrechtskonformität bezweifelt [anders *J. Ziekow*, in: ders./Völlink (Fn. 33), § 97 GWB, Rn. 49].
131. Zum Hintergrund *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 1, 9 f.
132. Das Spannungsverhältnis betonend OLG Schleswig, ZfBR 2013, S. 69 (69 ff.); *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 3. Zum Ausschluss umsatzstarker Unternehmen von Vergabeverfahren als Maßnahme der Mittelstandsförderung *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 49 f.
133. GVBl. 2007, S. 926, zuletzt geändert durch Gesetz vom 8.4.2013, GVBl. 2013, S. 174.
134. Näher zur landesrechtlichen Mittelstandsförderung *C. Antweiler*, in: Dreher/ Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 51 ff. Für eine Übersicht auch http://www.forum-vergabe.de/fileadmin/user_upload/Weiterf%C3%BChrende_Informationen/%C3%9Cbersicht_Mittelstandsf%C3%B6rderungsgesetze_L%C3% A4nder_Mai.2013.pdf (Abruf: 26.2.2014).

Marktmacht der öffentlichen Hand vergaberechtlich für unproblematisch erachtet[135] und die Grenzziehung dem Kartellrecht überantwortet.[136] Freilich fordert die eben erwähnte Mittelstandsklausel des Vergaberechts (§ 97 Abs. 3 GWB), mittelständische Interessen hinreichend zu berücksichtigen, namentlich durch (die Prüfung einer) Teil- bzw. Fachlosvergabe.[137]

Hinsichtlich der Konzessionsvergabe ist schließlich zu berücksichtigen, dass die Marktfreiheiten eine mit Blick auf Amortisations- und Gewinninteressen des Inhabers einerseits und auf das Interesse der Neubewerber am Marktzugang andererseits angemessene Laufzeit fordern.[138] Im Bereich der energierechtlichen Wegenutzungskonzessionen sieht § 46 Abs. 2 EnWG eine Laufzeit von bis zu 20 Jahren vor, § 4a Abs. 2 S. 1 des Glücksspielstaatsver-

---

135. OLG Schleswig, ZfBR 2013, S. 69 (69); NZBau 2013, S. 395 (396); *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 46 m.w.N.; *M. Dreher*, NZBau 2005, S. 427 (432 f.); *ders.*, in: U. Immenga/E.-J. Mestmäcker (Hrsg.), Wettbewerbsrecht, Bd. 2. GWB, 4. Aufl. 2007, § 97 GWB, Rn. 113. Kritisch *H. Schröder*, Zentrale Bedarfsbündelung vergaberechtlich zulässig?, http://www.vergabeblog.de/ 2013-03-14/zentrale-bedarfsbundelung-vergaberechtlich-zulassig (Abruf: 25.2.2014).
136. OLG Schleswig, ZfBR 2013, S. 69 (69); NZBau 2013, S. 395 (396); *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 46; *M. Dreher*, NZBau 2005, S. 427 (433); *K. Hailbronner*, in: E. Grabitz/M. Hilf (Hrsg.), Das Recht der Europäischen Union, 40. Aufl. 2009, B6, Rn. 12. Für Beispiele aus der kartellrechtlichen Rechtsprechung: OLG Koblenz, Urt. vom 5.11.1998, U 596/98 – Kart, juris, Rn. 11 ff.; LG Hannover, WRP 2012, S. 99 (100 f.): Marktbeherrschende Stellung (in casu: Bildung einer freiwilligen Einkaufskooperation für Impfstoffe durch Krankenkassen) scheidet regelmäßig aus, wenn »die an der Vereinbarung Beteiligten einen gemeinsamen Marktanteil von weniger als 15 % sowohl auf den Einkaufsmärkten als auch den Verkaufsmärkten« haben. Zur Zulässigkeit einer § 1 GWB unterfallenden kommunalen Einkaufskooperation – allerdings unter Geltung des § 4 Abs. 2 GWB a.F. – BGH, NVwZ 2003, S. 1012; näher *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 48; zur Unzulässigkeit der Bildung von Nachfragekartellen *K. Hailbronner*, a.a.O.; anders – insbesondere mit Blick auf das europäische Kartellrecht – *M. Fehling*, Innovationsförderung durch staatliche Nachfragemacht: Potentiale des Vergaberechts, in: M. Eifert/W. Hoffmann-Riem (Hrsg.), Innovationsfördernde Regulierung, 2009, S. 119 (126 f.).
137. OLG Schleswig, ZfBR 2013, S. 69 (69); NZBau 2013, S. 395 (397 ff.); *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 47. Siehe allgemein zur Losvergabe nur *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 3 GWB, Rn. 25 ff.; aus der Rechtsprechung etwa OLG Düsseldorf, ZfBR 2012, S. 608 (608 f.).
138. Siehe etwa EuGH, Rs. C-323/03, Slg. 2006, I-2161, Rn. 47 f. – EK/Spanien; ferner Rs. C-451/08, Slg. 2010, I-2673, Rn. 79 – Helmut Müller GmbH; *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 126; *J. Wolswinkel*, REALaw 2 (2009), S. 61 (98 ff.).

trages überlässt die Bestimmung der Dauer dem Land; die Ausschreibung des Jahres 2012 enthielt eine Befristung bis zum 30.6.2019.[139]

Frage 10

Weder das europäische noch das nationale Vergaberecht sehen eine allgemeine Bereichsausnahme für die Vergabe von Aufträgen vor, die Dienstleistungen von allgemeinem wirtschaftlichem Interesse zum Gegenstand haben. Eine Ausschreibungsfreiheit kann sich nur mit Blick auf den konkreten Beschaffungsgegenstand aufgrund spezieller Ausnahmetatbestände oder der (seltenen) Einschlägigkeit der (nur) auf europäischer Ebene bestehenden Bereichsausnahme für Tätigkeiten, die mit der Ausübung öffentlicher Gewalt i.S.d. Art. 51 (ggf. i.V.m. Art. 62) AEUV einhergehen (näher Frage 4.1), ergeben. Erleichterte Anforderungen an das Vergabeverfahren gelten, wenn der Vertrag eine sog. nicht prioritäre Dienstleistung betrifft, worunter etwa soziale und medizinische Leistungen fallen (dazu Frage 6.1). Für einzelne Sektoren existieren überdies Sonderregimes, etwa im Bereich des Öffentlichen Personennahverkehrs (siehe VO 1370/2007; §§ 8a, 8b PBefG), wobei Art. 5 Abs. 1 VO 1370/2007 dem Anwendungsbereich der RL 2004/17/EG und der VRL unterfallende ÖPNV-Dienstleistungsaufträge im Bereich Busse und Straßenbahnen diesen beiden Richtlinien unterstellt.[140]

Ganz allgemein gilt, dass Vergabe- und Beihilfenrecht angesichts ihres unterschiedlichen Regelungsanliegens nebeneinanderstehen, so dass aus der Beihilfen- nicht auf die Vergaberechtskonformität eines Vorgangs geschlossen werden kann (und umgekehrt), mögen sich auch Überschneidungen zwischen beiden Rechtsmaterien ergeben.[141] Letzteres hat gerade die *Altmark-Trans-Rechtsprechung* verdeutlicht, nach der die (mit Ausgleichszahlungen einhergehende) Beauftragung eines Unternehmens mit der Erbringung einer Dienstleistung von allgemeinem wirtschaftlichem Interesse (u.a.) dann als markt- und damit auch beihilfenrechtskonform anzusehen ist, wenn sie in einem Vergabeverfahren erfolgt ist, das auf die Ermittlung des wirtschaftlich

139. Siehe http://verwaltung.hessen.de/irj/HMdI_Internet?cid=b901b42be766387b0cbd4b219bb21af1 (Abruf: 25.2.2014).
140. Im Überblick *H. Diehl*, ÖPNV und Vergaberecht, in: M. Müller-Wrede (Fn. 7), Kap. 35.
141. *H. Kaelble*, Verhältnis zum EG-Beihilfenrecht, in: M. Müller-Wrede (Fn. 7), Kap. 36, insb. Rn. 8, 36 ff.; *R. Schotten/S. Hüttinger*, in: Dreher/Motzke (Fn. 13), § 99 GWB, Rn. 21.

günstigsten Bewerbers gerichtet ist.[142] Nach dieser Rechtsprechungslinie steht indes neben der Möglichkeit, die Marktkonformität prozedural, mithin durch Durchführung eines Vergabeverfahrens, sicherzustellen, die (materielle) Alternative, nachzuweisen, dass der Ausgleich nach den Kosten eines durchschnittlichen, gut geführten Unternehmens bemessen war, das den entsprechenden Leistungsanforderungen genügt, »wobei die dabei erzielten Einnahmen und ein angemessener Gewinn aus der Erfüllung dieser Verpflichtungen zu berücksichtigen sind.«[143] Gelingt letzteres und erweist sich die Beauftragung damit als beihilfenrechtskonform, unterliegt diese wegen der parallelen Anwendbarkeit von Vergabe- und Beihilfenrecht aber gleichwohl dem Vergaberecht (so nach seinen Voraussetzungen anwendbar). Die beihilfenrechtliche Alternativität von prozeduraler (Vergabeverfahren) und materieller (Wertbetrachtung) Ermittlung der Marktkonformität findet sich im Übrigen auch im Kontext von Grundstücks- und Unternehmenstransaktionen der öffentlichen Hand, wobei sich hinsichtlich letzterer eine Präferenz für die Ausschreibung andeutet.[144]

Ein (nicht nur) in Deutschland im Kontext des Streits um die Vergabepflichtigkeit von Rettungsdienstleistungen diskutierter Aspekt war schließlich die Frage, ob der *Privilegierungstatbestand des Art. 106 Abs. 2 AEUV*, der die (eingeschränkte) Anwendbarkeit des EU-Binnenmarkt- und EU-Wettbewerbsrechts auf die Erbringung von Dienstleistungen von allgemeinem wirtschaftlichem Interesse betrifft, Ausnahmen von vergaberechtlichen Verfahrenspflichten rechtfertigt. Diese Bestimmung lautet:

---

142. EuGH, Rs. C-280/00, Slg. 2003, I-7747, Rn. 93 – Altmark Trans. Der EuGH hat drei weitere – auch im Falle einer materiellen Betrachtung geltende – Voraussetzungen für die Marktkonformität aufgestellt (Rn. 89 ff.): »Erstens muss das begünstigte Unternehmen tatsächlich mit der Erfüllung gemeinwirtschaftlicher Verpflichtungen betraut sein, und diese Verpflichtungen müssen klar definiert sein ... Zweitens sind die Parameter, anhand deren der Ausgleich berechnet wird, zuvor objektiv und transparent aufzustellen, um zu verhindern, dass der Ausgleich einen wirtschaftlichen Vorteil mit sich bringt, der das Unternehmen, dem er gewährt wird, gegenüber konkurrierenden Unternehmen begünstigt ... Drittens darf der Ausgleich nicht über das hinausgehen, was erforderlich ist, um die Kosten der Erfüllung der gemeinwirtschaftlichen Verpflichtungen unter Berücksichtigung der dabei erzielten Einnahmen und eines angemessenen Gewinns aus der Erfüllung dieser Verpflichtungen ganz oder teilweise zu decken.« Bestätigt in Rs. C-34/01, Slg. 2003, I-14243, Rn. 30 ff. – Enirisorse. Dazu auch *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 139 f.
143. EuGH, Rs. C-280/00, Slg. 2003, I-7747, Rn. 93 – Altmark Trans.
144. Umfassend *F. Wollenschläger*, Grundstücksveräußerungen (Fn. 110), Rn. 469 ff.

»Für Unternehmen, die mit Dienstleistungen von allgemeinem wirtschaftlichem Interesse betraut sind oder den Charakter eines Finanzmonopols haben, gelten die Vorschriften der Verträge, insbesondere die Wettbewerbsregeln, soweit die Anwendung dieser Vorschriften nicht die Erfüllung der ihnen übertragenen besonderen Aufgabe rechtlich oder tatsächlich verhindert. Die Entwicklung des Handelsverkehrs darf nicht in einem Ausmaß beeinträchtigt werden, das dem Interesse der Union zuwiderläuft.«

Mag die Anwendbarkeit dieser Norm auch theoretisch nicht ausgeschlossen sein, so ist doch fraglich, ob eine Rechtfertigung des Verzichts auf die Durchführung eines Vergabeverfahrens nach diesem Standard gelänge. In seinem Urteil zu Rettungsdienstleistungen hat der EuGH dies jedenfalls mit Blick auf die »Verpflichtung, die Bekanntmachung der Ergebnisse der Vergabe des betreffenden Auftrags zu gewährleisten«, verneint.[145]

Strategische Nutzung des öffentlichen Auftragswesens

Frage 11

(1) Allgemeines

Die (rechts-)politische Sinnhaftigkeit und rechtliche Zulässigkeit der strategischen Beschaffung wird auf nationaler genauso wie auf europäischer Ebene kontrovers diskutiert;[146] gleichzeitig wird mitunter eine Zurückhaltung der öffentlichen Auftraggeber, nach politischen Kriterien zu beschaffen, konstatiert,[147] die ganz im Gegensatz zu den Regelungsaktivitäten auf Landesebene steht (dazu 3.). Während für eine Verfolgung von Sekundärzwecken die Gemeinwohlorientierung jedweden Staatshandelns und das angesichts des hohen Vergabevolumens große Steuerungspotential der öffentlichen Auftragsvergabe zur Realisierung allgemeinpolitischer Ziele streitet, verweisen Kritiker zunächst auf die Gefahr einer ökonomisch nachteiligen Marktzersplitterung nicht nur mit Blick auf das Einkaufsverhalten der öffentlichen Hand und Privater, sondern bei unterschiedlichen Präferenzen der einzelnen öffentlichen Auftraggeber auch innerhalb des öffentlichen Beschaffungsmarktes.[148] Des

145. EuGH, Rs. C-160/08, Slg. 2010, I-3713, Rn. 125 ff. – EK/Deutschland.
146. Siehe m.w.N. nur *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 82 ff.
147. *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 82.
148. Siehe dazu und zum Folgenden m.w.N. *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 82 ff.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 97 GWB, Rn. 108.

Weiteren bemängelt werden Nachteile für kleine und mittlere Unternehmen, eine Verteuerung des Einkaufs, das Missbrauchspotential (Diskriminierungsgefahr), Wettbewerbsbeschränkungen und eine mit Blick auf die unternehmerische Freiheit sowie demokratische Legitimation problematische Wirtschaftslenkung.

(2) Regelung im Kartellvergaberecht

Das deutsche Vergaberecht ermöglicht die strategische Beschaffung *auf verschiedenen Stufen der Auftragsvergabe*, nämlich bei der Definition des Auftragsgegenstands, bei der Leistungsbeschreibung, beim Aufstellen von Eignungs- und Zuschlagskriterien sowie in Gestalt von Ausführungsbedingungen und weiteren Anforderungen.[149]

Eine (Teil-)Regelung für die Verfolgung von Sekundärzwecken findet sich in § 97 Abs. 4 GWB:

»[1]Aufträge werden an fachkundige, leistungsfähige sowie gesetzestreue und zuverlässige Unternehmen vergeben. [2]Für die Auftragsausführung können zusätzliche Anforderungen an Auftragnehmer gestellt werden, die insbesondere soziale, umweltbezogene oder innovative Aspekte betreffen, wenn sie im sachlichen Zusammenhang mit dem Auftragsgegenstand stehen und sich aus der Leistungsbeschreibung ergeben. [3]Andere oder weitergehende Anforderungen dürfen an Auftragnehmer nur gestellt werden, wenn dies durch Bundes- oder Landesgesetz vorgesehen ist.«

Demnach kommt eine strategische Beschaffung mittels Eignungskriterien gemäß *§ 97 Abs. 4 S. 1 GWB* wegen deren abschließender Normierung[150] nur eingeschränkt in Betracht; ein Beispiel stellt das in Grenzen zulässige Erfordernis von Umweltmanagementmaßnahmen dar.[151] *§ 97 Abs. 4 S. 2 GWB*, der an Art. 26 VRL anknüpft,[152] gestattet, zusätzliche Anforderungen an Auf-

---

149. Siehe nur *P. M. Huber/F. Wollenschläger*, WiVerw 2005, S. 212 (218 ff.); *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 80 ff.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 97 GWB, Rn. 108 ff.
150. Zu dieser EuGH, Rs. C-360/89, Slg. 1992, I-3401, Rn. 19 ff. – EK/Italien; *P.M. Huber/F. Wollenschläger*, WiVerw 2005, S. 212 (220); *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 86; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 97 GWB, Rn. 83 ff., 131.
151. Siehe nur *P. M. Huber/F. Wollenschläger*, WiVerw 2005, S. 212 (221 f.); *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 85 ff.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 97 GWB, Rn. 127 ff. Aus der Rechtsprechung des EuGH namentlich Rs. C-368/10, n.n.v., Rn. 102 ff. – EK/Niederlande.
152. Begründung Gesetz Modernisierung VergabeR (Fn. 10), BT-Drs. 16/10117, S. 16.

tragnehmer zu stellen, die sich allerdings zum einen nur auf die Auftragsausführung beziehen dürfen und zum anderen in einem sachlichen Zusammenhang mit dem Auftragsgegenstand stehen müssen. Die Tragweite dieser Öffnung des Vergaberechts für die Verfolgung von Sekundärzwecken ist im Einzelnen umstritten, zumal sich die Frage nach ihrer Abgrenzung von technischen Spezifikationen sowie sonstigen Vergabekriterien und nach dem erforderlichen Zusammenhang stellt und ein Vorbehalt der Verfassungs- und Unionsrechtskonformität (namentlich Marktfreiheiten) besteht.[153] Als Beispiele werden die (auftragsbezogene) Beschäftigung von Langzeitarbeitslosen, eine umweltfreundliche Auftragsdurchführung oder (auftragsbezogene) Tariftreue- und Mindestlohnvorgaben genannt.[154] *§ 97 Abs. 4 S. 3 GWB* erklärt über diese Möglichkeiten der strategischen Beschaffung hinausgehende »[a]ndere oder weitergehende Anforderungen« auf gesetzlicher Grundlage generell für zulässig. Demgegenüber ist freilich zu berücksichtigen, dass mit der differenzierten und die EuGH-Rechtsprechung kodifizierenden VRL eine abschließende Regelung geschaffen wurde, die für eine strategische Beschaffung jenseits ihres Rechtsrahmens nach weithin vertretener Auffassung keinen Raum lässt.[155] Dies sperrt insbesondere die Aufstellung »allgemeine[r] Anforderungen an die Unternehmens- oder Geschäftspolitik ohne konkreten Bezug zum Auftrag (z. B. allgemeine Ausbildungsquoten, Quotierungen von Führungspositionen zugunsten der Frauenförderung, generelle Beschäftigung von Langzeitarbeitslosen)», was nach der Gesetzesbegründung indes »nach wie vor dem Landes- oder Bundesgesetzgeber vorbehalten bleiben« soll.[156]

Nachdem der in Umsetzung des Art. 53 Abs. 1 lit. a VRL ergangene § 97 Abs. 5 GWB die *Zuschlagserteilung* auf das wirtschaftlichste Angebot vor-

---

153. Näher *M. Burgi*, NZBau 2011, S. 577 (581 f.); *P. M. Huber/F. Wollenschläger*, WiVerw 2005, S. 212 (227 ff.); *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 88 ff.

154. Siehe Begründung Gesetz Modernisierung VergabeR (Fn. 10), BT-Drs. 16/10117, S. 16; *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 93 ff., 105 f.

155. *M. Dreher*, in: Immenga/Mestmäcker (Fn. 135), § 97 GWB, Rn. 197 f.; *P.M. Huber/ F. Wollenschläger*, WiVerw 2005, S. 212 (226); *P. Steinberg*, NZBau 2005, S. 85 (91 f.); *F. Wollenschläger*, Vergabeverwaltungsrecht (Fn. 2), Rn. 43; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 97 GWB, Rn. 150 ff.; ferner *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 96: kein Anwendungsbereich. A.A. *A. Losch*, EuR 2005, S. 231 (238 ff.). *M. Burgi*, NZBau 2011, S. 577 (582 f.), ordnet demgegenüber Bedingungen, die nicht ausschließlich, aber auch den Auftrag betreffen, Satz 3 und nicht Satz 2 zu.

156. Siehe Begründung Gesetz Modernisierung VergabeR (Fn. 10), BT-Drs. 16/10117, S. 16 f.

schreibt, sind auch andere Kriterien als der niedrigste Preis maßgeblich; dies deckt – in den unionsrechtlichen Grenzen (namentlich Auftragsbezug, Publizität, Nichtdiskriminierung, Willkürfreiheit), die hier nicht näher zu entfalten sind – die Verfolgung von Sekundärzwecken.[157]

(3) Landesvergabegesetze, namentlich Tariftreueerfordernisse

Mit Blick auf den *allgemeinen verfassungsrechtlichen Rahmen* ist festzuhalten, dass das BVerfG in seiner Tariftreue-Entscheidung vom 11.7.2006 die Statuierung wirtschaftslenkender Vergabekriterien (in casu: Tariftreueerfordernis) als Eingriff in die unternehmerische Freiheit (Art. 12 Abs. 1 GG) qualifiziert hat, der allerdings angesichts seiner sozialen Zielsetzung (Sozialstaatsprinzip; Voraussetzung für die Grundrechtsverwirklichung) gerechtfertigt war.[158] Einen engeren Rahmen hat dann bekanntermaßen der EuGH in seinem auf Vorlage des OLG Celle ergangenen *Urteil in der Rs. Rüffert* vom 3.4.2008 gesteckt.[159] Wie eng dieser genau ist, spielt für die Beurteilung der infolge der Rüffert-Rechtsprechung zwar geänderten, hinsichtlich ihrer Europarechtskonformität aber immer noch mit einem Fragezeichen versehenen[160] landesrechtlichen Tariftreue- und Mindeslohnregelungen eine Rolle.[161]

Damit ist der Bogen zu den von zahlreichen (nicht allen) Ländern erlassenen *Landesvergabegesetzen* geschlagen, die spezifische Regelungen zur strategischen Beschaffung enthalten.[162] Das Landesrecht stellt, wie bereits ange-

157. Näher *P. M. Huber/F. Wollenschläger*, WiVerw 2005, S. 212 (229 ff.); *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 38 ff.; *J. Ziekow*, in: ders./Völlink (Fn. 33), § 97 GWB, Rn. 139 f.

158. BVerfGE 116, 202 (220 ff.).

159. EuGH, Rs. C-346/06, Slg 2008, I-1989, Rn. 37 ff. – Rüffert. Näher *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 105 ff.

160. Siehe *J. Byok*, NJW 2013, S. 1488 (1492); *A. Csaki/A. Freundt*, KommJur 2012, S. 246 (248 ff.).

161. Näher *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 103 ff.

162. Siehe etwa das Berliner Ausschreibungs- und Vergabegesetz (BerlAVG) vom 8.7.2010, GVBl., S. 399, zuletzt geändert durch Gesetz vom 5.6.2012, GVBl., S. 159, oder das Gesetz über die Sicherung von Tariftreue und Sozialstandards sowie fairen Wettbewerb bei der Vergabe öffentlicher Aufträge (Tariftreue- und Vergabegesetz Nordrhein-Westfalen – TVgG-NRW) vom 10.1.2012, GV NRW 2012, S. 17, nebst Verordnung zur Regelung von Verfahrensanforderungen in den Bereichen umweltfreundliche und energieeffiziente Beschaffung, Berücksichtigung sozialer Kriterien und Frauenförderung sowie Förderung der Vereinbarkeit von Beruf und Familie bei der Anwendung des Tariftreue- und Vergabegesetzes Nordrhein-Westfalen (Verordnung Tariftreue- und Vergabegesetz Nordrhein-Westfalen – RVO TVgG-NRW) vom

klungen, vornehmlich Tariftreue- und weitgehend auch Mindestlohnvorgaben auf. § 4 TVgG-NRW bestimmt etwa:[163]

»(1) Öffentliche Aufträge für Leistungen, deren Erbringung dem Geltungsbereich des Arbeitnehmer-Entsendegesetzes ... unterfällt, dürfen nur an Unternehmen vergeben werden, die sich bei Angebotsabgabe durch Erklärung gegenüber dem öffentlichen Auftraggeber schriftlich verpflichten, ihren Arbeitnehmerinnen und Arbeitnehmern bei der Ausführung des Auftrags wenigstens diejenigen Mindestarbeitsbedingungen einschließlich des Mindestentgelts zu gewähren, die durch einen für allgemein verbindlich erklärten Tarifvertrag oder eine nach den §§ 7 oder 11 des Arbeitnehmer-Entsendegesetzes erlassene Rechtsverordnung für die betreffende Leistung verbindlich vorgegeben werden. [...]

(2) Öffentliche Aufträge ... im Bereich des öffentlichen Personenverkehrs auf Straße und Schiene dürfen nur an Unternehmen vergeben werden, die sich bei Angebotsabgabe schriftlich verpflichten, ihren Beschäftigten (ohne Auszubildende) bei der Ausführung der Leistung mindestens das in Nordrhein-Westfalen für diese Leistung in einem der einschlägigen und repräsentativen mit einer tariffähigen Gewerkschaft vereinbarten Tarifverträge vorgesehene Entgelt nach den tarifvertraglich festgelegten Modalitäten zu zahlen und während der Ausführungslaufzeit Änderungen nachzuvollziehen. [...]

(3) Öffentliche Aufträge über Leistungen, die nicht den Vorgaben der Absätze 1 und 2 unterliegen, dürfen nur an Unternehmen vergeben werden, die sich bei der Angebotsabgabe durch Erklärung gegenüber dem öffentlichen Auftraggeber schriftlich verpflichtet haben, ihren Beschäftigten (ohne Auszubildende) bei der Ausführung der Leistung wenigstens ein Mindeststundenentgelt von 8,62 Euro zu zahlen. [...] .«

Mit Blick auf derartige Regelungen problematisiert wird insbesondere, ob auf der Basis der Rüffert-Rechtsprechung nur für den öffentlichen Sektor geltende Mindestlohnvorgaben in Einklang mit der Dienstleistungsfreiheit stehen;[164] die Vergabekammer Arnsberg hat mit Beschluss vom 26.9.2013 ein entsprechendes Vorabentscheidungsersuchen an den EuGH gerichtet.[165]

Weitere Regelungsgegenstände betreffen etwa die umweltverträgliche Beschaffung, die Beachtung der ILO-Kernarbeitsnormen oder die Frauenförderung (siehe insoweit §§ 7 ff. BerlAVG und §§ 17 ff. TVgG-NRW). Auf *Bundesebene* statuieren etwa, was am Rande vermerkt sei, §§ 141, 143 SGB IX eine – allerdings nur jenseits des Kartellvergaberechts greifende – Pflicht zur

---

14.5.2013, GV NRW 2013, S. 254. Zum Landesvergaberecht im Überblick *O. Dörr*, in: Dreher/Motzke (Fn. 13), Einleitung, Rn. 84 ff.

163. Siehe auch die Übersicht bei http://www.forum-vergabe.de/fileadmin/user_upload/Weiterf%C3%BChrende_Informationen/%C3%9Cbersicht_%C3%9Cbersicht_Vergabe-_und_Tariftreuegesetze_L%C3%A4nder_01.07.2013.pdf (Abruf: 26.2.2014).
164. So *A. Csaki/A. Freundt*, KommJur 2012, S. 246 (248 ff.).
165. VK Arnsberg, Beschl. vom 26.9.2013, VK 18/13, juris.

bevorzugten Berücksichtigung von anerkannten Werkstätten für behinderte Menschen und Blindenwerkstätten.[166]

(4) Energieeffizienz

Seit einer in Umsetzung der Richtlinien 2006/32/EG und 2010/30/EU erfolgten Änderung der Vergabeverordnung im Jahre 2011[167] stellt diese besondere Vorgaben für Auftragsvergaben auf, die »*energieverbrauchsrelevante Waren, technische Geräte oder Ausrüstungen*« betreffen (§ 4 Abs. 4, § 6 Abs. 2 VgV).[168] Für Dienstleistungs- und Lieferaufträge verlangt § 4 Abs. 5 VgV zunächst, dass »[i]n der Leistungsbeschreibung ... im Hinblick auf die Energieeffizienz insbesondere folgende Anforderungen gestellt werden [sollen]: 1. das höchste Leistungsniveau an Energieeffizienz und 2. soweit vorhanden, die höchste Energieeffizienzklasse im Sinne der Energieverbrauchskennzeichnungsverordnung«. Von dieser Soll-Vorgabe sind Abweichungen im Ausnahmefall möglich.[169] Des Weiteren sind gemäß § 4 Abs. 6 Nr. 2 VgV »in geeigneten Fällen, a) eine Analyse minimierter Lebenszykluskosten oder b) die Ergebnisse einer Buchstabe a vergleichbaren Methode zur Überprüfung der Wirtschaftlichkeit« zu fordern. Schließlich ist die ermittelte Energieeffizienz als Zuschlagskriterium »angemessen zu berücksichtigen« (§ 4 Abs. 6b VgV). Eine korrespondierende Regelung für Bauaufträge enthält § 6 Abs. 3 ff. VgV.

Die Richtlinie 2009/33/EG über die Förderung sauberer und energieeffizienter Straßenfahrzeuge hat der deutsche Gesetzgeber durch eine im Jahre

166. *M. Opitz*, in: Dreher/Motzke (Fn. 13), § 97 Abs. 4 GWB, Rn. 98 ff.
167. Vierte Verordnung zur Änderung der Verordnung über die Vergabe öffentlicher Aufträge vom 16.8.2011, BGBl. I, S. 1724.
168. Näher *M. Gaus*, NZBau 2013, S. 401; *T. Stockmann/D. Rusch*, NZBau 2013, S. 71; *C. Zeiss*, NZBau 2012, S. 201.
169. Siehe Begründung zur Vierten Verordnung zur Änderung der Verordnung über die Vergabe öffentlicher Aufträge, BR-Drs. 345/11, S. 8: »Der Begriff »sollen« lässt den Auftraggebern im Rahmen der Leistungsbeschreibung noch angemessenen Spielraum für die Fälle, in denen die Forderung der höchsten Leistungsniveaus und Effizienzklassen ausnahmsweise nicht möglich ist. In diesem Fall ist der öffentliche Auftraggeber gehalten, die höchst möglichen Anforderungen zu stellen«; *C. Zeiss*, NZBau 2012, S. 201 (202 f.). Restriktiv (aber bei der Standardbestimmung weiter) *T. Stockmann/D. Rusch*, NZBau 2013, S. 71 (74 f.).

2011 erfolgte Ergänzung der Vergabeverordnung umgesetzt;[170] für die *Beschaffung von Straßenfahrzeugen* gibt § 4 Abs. 7 ff. VgV vor:

»(7) Öffentliche Auftraggeber gemäß § 98 Nummer 1 bis 3 des Gesetzes gegen Wettbewerbsbeschränkungen müssen bei der Beschaffung von Straßenfahrzeugen Energieverbrauch und Umweltauswirkungen als Kriterium angemessen berücksichtigen. Zumindest müssen folgende Faktoren, jeweils bezogen auf die Lebensdauer des Straßenfahrzeugs im Sinne der Tabelle 3 der Anlage 2, berücksichtigt werden:

1. Energieverbrauch,
2. Kohlendioxid-Emissionen,
3. Emissionen von Stickoxiden,
4. Emissionen von Nichtmethan-Kohlenwasserstoffen und
5. partikelförmige Abgasbestandteile.

(8) Zur Berücksichtigung des Energieverbrauchs und der Umweltauswirkungen nach Absatz 7 ist:

1. § 8 EG VOL/A mit der Maßgabe anzuwenden, dass der Auftraggeber in der Leistungsbeschreibung oder in den technischen Spezifikationen Vorgaben zu Energieverbrauch und Umweltauswirkungen macht, und
2. § 19 EG VOL/A mit der Maßgabe anzuwenden, dass der Auftraggeber den Energieverbrauch und die Umweltauswirkungen von Straßenfahrzeugen als Kriterium angemessen bei der Entscheidung über den Zuschlag berücksichtigt.

(9) Sollen der Energieverbrauch und die Umweltauswirkungen von Straßenfahrzeugen im Rahmen der Entscheidung über den Zuschlag finanziell bewertet werden, ist die in Anlage 3 definierte Methode anzuwenden. Soweit die Angaben in Anlage 2 [zu Daten zur Berechnung der über die Lebensdauer von Straßenfahrzeugen anfallenden externen Kosten (entspricht dem Anhang zur Richtlinie 2009/33/EG)] dem Auftraggeber einen Spielraum bei der Beurteilung des Energiegehaltes oder der Emissionskosten einräumen, nutzt der Auftraggeber diesen Spielraum entsprechend den lokalen Bedingungen am Einsatzort des Fahrzeugs.

(10) Von der Anwendung des Absatzes 7 sind Straßenfahrzeuge ausgenommen, die für den Einsatz im Rahmen des hoheitlichen Auftrags der Streitkräfte, des Katastrophenschutzes, der Feuerwehren und der Polizeien des Bundes und der Länder konstruiert und gebaut sind (Einsatzfahrzeuge). Bei der Beschaffung von Einsatzfahrzeugen werden die Anforderungen nach Absatz 7 berücksichtigt, soweit es der Stand der Technik zulässt und hierdurch die Einsatzfähigkeit der Einsatzfahrzeuge zur Erfüllung des in Satz 1 genannten hoheitlichen Auftrags nicht beeinträchtigt wird.«

---

170. Verordnung zur Änderung der Vergabeverordnung sowie der Sektorenverordnung vom 9.5.2011, BGBl. I, S. 800.

Frage 12

Nicht zuletzt aufgrund von jüngeren Vorstößen auf europäischer Ebene[171] stellt auch die Innovationsförderung ein zunehmend an Bedeutung gewinnendes Anliegen im Vergaberecht allgemein und im Rahmen der strategischen Beschaffung im Besonderen (allgemein dazu Frage 11) dar.[172] Dies spiegelt sich nicht nur im bereits vorgestellten § 97 Abs. 4 S. 2 GWB wider, der seit seiner Neuformulierung im Zuge der Vergaberechtsreform des Jahres 2009 auch »innovative Aspekte« zum Kreis möglicher Ausführungsbedingungen rechnet (siehe Frage 11.2). Vielmehr sind auch (1) die Möglichkeit einer funktionalen Leistungsbeschreibung sowie die Zulassung von Nebenangeboten (Varianten), (2) der wettbewerbliche Dialog oder (3) die Vergabefreiheit von bestimmten Forschungs- und Entwicklungsdienstleistungen zu nennen.

(1) Funktionale Leistungsbeschreibung und Nebenangebote

In Einklang mit Art. 23 VRL sehen § 7 Abs. 9, 13 VOB/A EG und § 8 VOL/A EG zunächst die Innovationen fördernde Möglichkeit einer Leistungsbeschreibung auf der Grundlage eines Leistungsprogramms statt auf der Grundlage eines Leistungsverzeichnisses vor. Letztere stellt für Bauaufträge gemäß § 7 Abs. 9 VOB/A EG indes den Regelfall dar, wohingegen der Rekurs auf ein Leistungsprogramm gemäß § 7 Abs. 13 VOB/A EG voraussetzt, dass »es nach Abwägen aller Umstände zweckmäßig ist, abweichend von Absatz 9 zusammen mit der Bauausführung auch den Entwurf für die Leistung dem Wettbewerb zu unterstellen, um die technisch, wirtschaftlich und gestalterisch beste sowie funktionsgerechteste Lösung der Bauaufgabe zu ermitteln«. In der Praxis wird von funktionalen Leistungsbeschreibungen Gebrauch gemacht, wobei Angaben zum Ausmaß divergieren.[173] Ein bedeutsames und lehrreiches Beispiel stellt die Einführung eines Systems zur automa-

171. Siehe nur das Grünbuch der Europäischen Kommission über die Modernisierung der europäischen Politik im Bereich des öffentlichen Auftragswesens. Wege zu einem effizienteren europäischen Markt für öffentliche Aufträge, KOM (2011) 15 endg., S. 51 ff.
172. Siehe nur *M. Burgi*, NZBau 2011, S. 577; *M. Fehling*, Innovationsförderung (Fn. 136), S. 119; *ders.*, NZBau 2012, S. 673.
173. Siehe BGH, NJW 1997, S. 61 (61): »verbreitet«; zurückhaltender *U. Bernhardt*, in: Ziekow/Völlink (Fn. 33), § 7 VOB/A, Rn. 56. *M. Burgi*, NZBau 2011, S. 577 (581), meint, dieses Instrument würde in Deutschland »seit jeher unterschätzt«.

tischen Erhebung von Lkw-Maut (Toll Collect) dar.[174] Diese Alternative reduziert den Ausschreibungsaufwand für den öffentlichen Auftraggeber und bezieht die Expertise der Auftragnehmer frühzeitig ein, stellt aber gleichzeitig gewisse Hürden für eine Beteiligung auf und verkompliziert die Bewertung; überdies birgt sie nach Angaben aus der Praxis die Gefahr nachträglichen Streits um den Leistungsumfang und von Haftungsrisiken für den Auftragnehmer.[175] Schließlich finden sich auch Mischformen.[176] Eine weitere Möglichkeit, Innovationen zu befördern, stellt die Zulassung von *Nebenangeboten (Varianten)* dar.

(2) Wettbewerblicher Dialog

Die fakultativ in Art. 29 VRL vorgesehene Verfahrensart des *wettbewerblichen Dialogs* fand mit dem ÖPP-Beschleunigungsgesetz[177] im Jahre 2005 Eingang in das deutsche Vergaberecht (siehe namentlich § 101 Abs. 4 GWB; § 3 Abs. 7 VOB/A EG; § 3 Abs. 7 VOL/A EG). Der durch sie ermöglichten flexiblen und private Expertise schon frühzeitig einbindenden Beschaffung gegenüber stehen die Dauer und Komplexität derartiger Verfahren, die relativ hohen Zugangshürden sowie das Problem des Schutzes von Geschäftsgeheimnissen.[178] In der Vergabepraxis findet der wettbewerbliche Dialog nur selten Anwendung, was angesichts seiner Voraussetzungen und Komplexität aber nicht weiter verwunderlich ist; bis Ende des Jahres 2010 sollen 47 Verfahren für Bauaufträge durchgeführt worden sein.[179] Dieses Bild bestätigt ein Blick in die aktuell (Stand von 27.2.2014) auf der Homepage des Bundes veröffentlichten 1141 Ausschreibungen, unter denen sich ein einziger wettbewerblicher Dialog findet.[180] Gleichwohl lassen sich gewichtige Projekte (namentlich im Städtebau) nennen: der Stadionneubau in Mainz (Coface

174. Siehe *M. Fehling*, Innovationsförderung (Fn. 136), S. 122 f.
175. Siehe *U. Bernhardt*, in: Ziekow/Völlink (Fn. 33), § 7 VOB/A, Rn. 40, 54 f.
176. Dazu *U. Bernhardt*, in: Ziekow/Völlink (Fn. 33), § 7 VOB/A, Rn. 56.
177. Art. 1 f. Gesetz zur Beschleunigung der Umsetzung von Öffentlich Privaten Partnerschaften und zur Verbesserung gesetzlicher Rahmenbedingungen für Öffentlich Private Partnerschaften vom 1.9.2005, BGBl. I, S. 2676.
178. Siehe *D. Loskant/R. Osebold*, Der wettbewerbliche Dialog – Das Partnering-Modell für den öffentlichen Auftraggeber?, http://www.bbb-kongress.de/images/Tagungsband_Beitrag10_Loskant.pdf (Abruf: 25.2.2014), S. 91 (94 f.).
179. Siehe *D. Loskant/R. Osebold*, Der wettbewerbliche Dialog (Fn. 178), S. 96.
180. http://www.bund.de/DE/Ausschreibungen – node.html (Abruf: 27.2.2014).

Arena),[181] die Innenstadtentwicklung in Hanau[182] und Nidderau[183] oder der Landtagsneubau in Brandenburg.[184]

(3) Vergabefreiheit bestimmter Forschungs- und Entwicklungsdienstleistungen

Die *Ausnahme für Forschungs- und Entwicklungsdienstleistungen*, die sich in Umsetzung von Art. 16 lit. f VRL in § 100 Abs. 4 Nr. 2 GWB findet,[185] hat das Bayerische Oberste Landesgericht in einem Beschluss vom 27.2.2003 im Kontext der Vergabe einer Untersuchung von Rüstungsaltlastverdachtsstandorten thematisiert und insoweit ausgeführt:

»Der Grund für die Ausnahmebestimmung wird in den nationalen Gesetzgebungsmaterialien nicht erläutert; der Regierungsentwurf des Vergaberechtsänderungsgesetzes verweist insoweit nur auf die Vergaberichtlinien (BT-Dr 13/9340, 15).

Aus Erwägungsgrund 9 DKR (Erwägungsgrund 25 SKR) ergibt sich, dass Beiträge zur Finanzierung von Forschungsprogrammen nicht erfasst werden sollen. An gleicher Stelle wird auf die Bestimmung des EG-Vertrages Bezug genommen ..., der sich mit der Stärkung der wissenschaftlichen und technischen Grundlagen der europäischen Industrie durch die Unterstützung von Forschung und Entwicklung befasst; an der Erreichung dieses Ziels habe auch die Öffnung der öffentlichen Beschaffungsmärkte ihren Anteil. Im Richtlinienvorschlag der Europäischen Kommission vom 13.12.1990 (ABlEG, Nr. C 23 v. 31.1.1991) und im geänderten Vorschlag vom 28.8.1991 (ABlEG, Nr. C 250 v. 25.9.1991) hatte es geheißen, dass die Richtlinie nur solche Dienstleistungen über Forschung und Entwicklung betreffen solle, deren Ergebnisse ausschließlich dem öffentlichen Auftraggeber zufallen.

Die – insoweit im Amtsblatt nicht wiedergegebene – Begründung der Kommission zu ihrem Richtlinienvorschlag (Dokument KOM [90] 372 endg.; abgedruckt in: BR-Dr 13/91 v. 10.1.1991) führt aus, dass den Verträgen im Bereich Forschung und Entwicklung in vielen Fällen die Gegenseitigkeit fehle, die mit dem Begriff öffentlicher Aufträge untrennbar verbunden sei. Dies sei z.B. der Fall, wenn die Forschungsergebnisse in erster Linie der Forschungsstelle (Unternehmen, Forschungsinstitute oder Universitäten) selbst zur Verfügung stehen und nicht dem Auftraggeber. Die Kommission erwägt des Weiteren eine Begrenzung der Anwendbarkeit der Richtlinie auf Aufträge, die ausdrücklich die Ausarbeitung von festliegenden Ergebnissen für einen bestimmten Abnehmerkreis vorsehen. Die Finanzierung von allgemein bedeutsamer Forschung zum Nutzen der Gesellschaft insge-

---

181. Siehe http://www.juve.de/nachrichten/deals/2009/09/hbm-baut-neues-mainzer-stadion (Abruf: 25.2.2014).
182. Umfassend dokumentiert unter www.wettbewerblicher-dialog.de (Abruf: 25.2.2014).
183. http://www.kompetenzzentrum-wettbewerblicherdialog.de/referenzen/nidderau.html (Abruf: 25.2.2014).
184. http://www.landtag.brandenburg.de/de/aktuelles/landtagsneubau/von_der_entscheidung_bis_zur_umsetzung/der_fortgang_des_verfahrens/397181 (Abruf: 25.2.2014).
185. Näher zu dieser *J. Aicher*, Die Ausnahmetatbestände (Fn. 73), Rn. 19 ff.

samt, oder eines erheblichen Teils davon, stelle in diesem Sinne wohl keine Auftragsforschung dar.

Was unter Forschung zu verstehen ist, wird weder in den Richtlinien noch in Art. 163ff. EG-Vertrag definiert ... Forschung hat jedenfalls zum Ziel, neue Erkenntnisse zu gewinnen, gleich ob es sich um Grundlagenforschung oder um angewandte Forschung handelt (vgl. zum Begriffsverständnis der Europäischen Kommission Anlage I zum Gemeinschaftsrahmen für staatliche FuE-Beihilfen, AblEG, Nr. C 83 v. 11.4.1986 sowie Nr. C 45 vom 17.2.1996; Calliess/Ruffert Kommentar zum EU-Vertrag und EG-Vertrag, 2. Aufl., Art. 163 Rdnr. 4). Dass der Begriff Forschung in [§ 100 Abs. 4 Nr. 2 GWB n.F.] sowohl die Grundlagenforschung als auch die angewandte Forschung umfasst, kann nicht zweifelhaft sein. Die dort normierte Rückausnahme für bestimmte Arten von Forschungsaufträgen, die dem Vergaberegime unterfallen sollen, wird jedoch im Bereich der angewandten Forschung eher zum Zuge kommen als bei der reinen Grundlagenforschung.«[186]

In casu war die Ausnahme indes aufgrund der in § 100 Abs. 4 Nr. 2 GWB enthaltenen Rückausnahme nicht anwendbar.[187] Mangels Durchführung eines Vergabeverfahrens kann die Beihilfenkonformität bei Gebrauchmachen von dieser Ausnahme gemäß der Altmark-Trans-Rechtsprechung (*siehe Frage 10*) ausschließlich materiell ermittelt werden, nämlich mit Blick auf die Marktkonformität des Austauschverhältnisses.[188]

(4) Fazit

Zusammenfassend lässt sich festhalten, dass die verschiedenen Instrumente zur Innovationsförderung auf eine Flexibilisierung des Verfahrens, auf die frühzeitige Nutzbarmachung privaten Know-Hows der Interessenten und auf eine Kooperation zwischen diesen und der öffentlichen Hand setzen. Damit ist gleichzeitig ihre Problematik angesprochen: Sie reduzieren die im Interesse von Transparenz und Chancengleichheit bestehende Formalisierung des Vergabeverfahrens, zwingen zu einer Offenlegung von Geschäfts- und Betriebsgeheimnissen, bergen Missbrauchsgefahren und können zu Kostensteigerungen führen.[189]

---

186. BayObLG, NZBau 2003, S. 634 (635). Formateriungs teils angpasst.
187. BayObLG, NZBau 2003, S. 634 (635 f.).
188. Dazu *M. Fehling*, NZBau 2012, S. 673 (679).
189. Zu diesem Zielkonflikt nur *M. Fehling*, NZBau 2012, S. 673 (674).

Nachprüfungsverfahren

Frage 13

Aufbauend auf einer Skizze des kartellvergaberechtlichen Nachprüfungsverfahrens (1) seien im Folgenden dessen Grundlagen entfaltet, namentlich die Entscheidung für ein System des präventiven Rechtsschutzes bei grundsätzlicher Stabilität des Beschaffungsvertrags (2), die weitgehenden, vorläufige Maßnahmen einschließenden Entscheidungsmöglichkeiten der Vergabekammer (3) sowie der Vorrang des Primärrechtsschutz vor dem Sekundärrechtsschutz (4). Angesichts der Effektivität des Nachprüfungsverfahrens blieben die Konsequenzen der Reform der Rechtsmittelrichtlinien des Jahres 2007 beschränkt (5). Nach einem Blick auf die Rechtsschutzstatistik (6) sei abschließend der Rechtsschutz außerhalb des Kartellvergaberechts entfaltet (7).

(1) Grundzüge des kartellvergaberechtlichen Nachprüfungsverfahrens

Seit Inkrafttreten des Kartellvergaberechts zum 1.1.1999 kennt das deutsche Vergaberecht für in den Anwendungsbereich der EU-Vergaberichtlinien fallende Aufträge nicht nur subjektive Rechte, sondern auch gerichtlichen Rechtsschutz (siehe Frage 1.1).[190] Das in den §§ 102 ff. GWB normierte *vergaberechtliche Nachprüfungsverfahren* ist einem eigenen Rechtsweg zugewiesen und dem allgemeinen kartellrechtlichen Rechtsschutzverfahren nachgebildet.[191] In erster Instanz entscheiden der Verwaltung zugeordnete Vergabekammern, denen sachliche und persönliche Unabhängigkeit zukommt (§§ 104 ff. GWB). Gegen ihre durch Verwaltungsakt (§ 114 Abs. 3 S. 1 GWB) ergehenden Entscheidungen steht die sofortige Beschwerde zum Vergabesenat des Oberlandesgerichts (OLG) binnen einer Notfrist von zwei Wochen offen (§§ 116 ff. GWB). Eine weitere Beschwerdemöglichkeit kennt das Nachprüfungsverfahren nicht; indes muss das OLG im Interesse der Rechtseinheit die Sache dem Bundesgerichtshof (BGH) vorlegen, wenn es von Judikaten anderer OLGs oder des BGH abweichen möchte (§ 124 Abs. 2 GWB; Divergenzvorlage).

---

190. Ausführlich zu Rechtsschutzmodellen in Verteilungssituationen m.w.N. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 633 ff.
191. Näher *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 263 ff.

(2) Stabilität des Beschaffungsvertrags und präventiver Rechtsschutz

Fundamental für das kartellvergaberechtliche Nachprüfungsverfahren ist die Systementscheidung für einen *präventiven Rechtsschutz*. Ihr Hintergrund ist das Stabilitätsdogma: Der durch den Zuschlag zustande gekommene (zivilrechtliche) Beschaffungsvertrag genießt *Stabilität*, d.h., dass auch eine rechtswidrige Vergabe grundsätzlich nichts an dessen Wirksamkeit ändert und eine nachträgliche Anfechtung des Vertragsschlusses ausscheidet.[192] § 114 Abs. 2 S. 1 GWB regelt insoweit: »Ein wirksam erteilter Zuschlag kann nicht aufgehoben werden.« Die Begründung zum Vergaberechtsänderungsgesetz (1998) führt erläuternd aus:

»Das Recht auf Einhaltung der Vergaberegeln kann nur bis zum Abschluß des Vergabeverfahrens geltend gemacht werden, weil nach erteiltem Zuschlag und Abschluß eines Vertrages kein Raum mehr für Rechte auf Einhaltung von Verfahrensregeln ist; nach deutschem Recht kommt durch den Zuschlag der Vertrag zustande, der grundsätzlich nicht mehr aufhebbar ist ... [§ 114 Abs. 2 S. 1 GWB] schreibt ein Prinzip des deutschen Vergaberechts fest. Mit dem Zuschlag wird das Vergabeverfahren beendet und zugleich der Vertrag zwischen Auftraggeber und Auftragnehmer geschlossen. Eine Aufhebung dieses Vertrags ist nicht möglich ...«[193]

Um angesichts dieses Ausschlusses repressiven Primärrechtsschutzes die von der verfassungs- und unionsrechtlichen Rechtsschutzgarantie geforderte Möglichkeit einer Anfechtung der Vergabeentscheidung zu gewährleisten, sieht das Kartellvergaberecht präventiven Rechtsschutz und Kautelen für dessen Effektivität vor.[194] So ist der öffentliche Auftraggeber gemäß § 101a Abs. 1 S. 1 GWB zum einen dazu verpflichtet, »die betroffenen Bieter, deren Angebote nicht berücksichtigt werden sollen, über den Namen des Unternehmens, dessen Angebot angenommen werden soll, über die Gründe der vorgesehenen Nichtberücksichtigung ihres Angebots und über den frühesten Zeitpunkt des Vertragsschlusses unverzüglich in Textform zu informieren«, damit die nicht zum Zuge kommenden Bieter ggf. ein Nachprüfungsverfahren initiieren können (*Vorabinformationspflicht*). Damit diese Möglichkeit nicht nur auf dem Papier steht, sieht § 101a Abs. 1 S. 3 ff. GWB zum anderen eine

192. Näher zur Stabilität der Vergabeentscheidung m.w.N. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 251 ff. und (allgemein) S. 621 ff.; ferner BGH, NJW 2001, S. 1492 (1492 f.).
193. Begründung VgRÄG (Fn. 9), BT-Drs. 13/9340, S. 17 (zu § 114 GWB a.F.) und S. 19 (zu § 124 GWB a.F.).
194. Näher *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 253 ff. m.w.N.

von der Übermittlungsart der Vorabinformation abhängige *Wartefrist* von zehn bis 15 Tagen vor, innerhalb derer der öffentliche Auftraggeber nach erfolgter Vorabinformation den Zuschlag nicht erteilen darf. Initiiert ein (zunächst) unterlegener Bieter ein Nachprüfungsverfahren und setzt die Vergabekammer den öffentlichen Auftraggeber hiervon in Kenntnis, greift ein *Zuschlagsverbot* (§ 115 Abs. 1, § 118 Abs. 3 GWB), von dem nur im Ausnahmefall dispensiert werden kann (§ 115 Abs. 2, § 121 GWB). Handelt der öffentliche Auftraggeber diesem zuwider, ist der Vertrag gemäß § 115 Abs. 1 bzw. § 118 Abs. 3 GWB i.V.m. § 134 BGB im Interesse effektiven Rechtsschutzes nichtig, worin eine *Ausnahme vom Stabilitätsdogma* liegt.[195] Entsprechendes gilt gemäß § 101b Abs. 1 Nr. 1 GWB bei Verstößen gegen die Vorabinformations- und Wartepflicht; um legitimen Bestandsinteressen Rechnung zu tragen, verlangt § 101b Abs. 2 GWB in diesem Fall allerdings eine *rechtzeitige Geltendmachung* des Verstoßes in einem Nachprüfungsverfahren:

»Die Unwirksamkeit nach Absatz 1 kann nur festgestellt werden, wenn sie im Nachprüfungsverfahren innerhalb von 30 Kalendertagen ab Kenntnis des Verstoßes, jedoch nicht später als sechs Monate nach Vertragsschluss geltend gemacht worden ist. Hat der Auftraggeber die Auftragsvergabe im Amtsblatt der Europäischen Union bekannt gemacht, endet die Frist zur Geltendmachung der Unwirksamkeit 30 Kalendertage nach Veröffentlichung der Bekanntmachung der Auftragsvergabe im Amtsblatt der Europäischen Union.«[196]

Nachdem § 101b Abs. 2 S. 2 GWB, anders als Art. 2f Abs. 1 lit. a RL 89/665/EWG, kein Begründungserfordernis für den Verzicht auf eine Ausschreibung vorsieht, wird er teils für unionsrechtswidrig erachtet.[197]

Eine bedeutsame Neuerung infolge der Reform der Rechtsmittelrichtlinie in diesem Kontext stellt die klare Anordnung der Nichtigkeitsfolge für *Defacto-Vergaben* dar, wobei wiederum der Vorbehalt einer Feststellung im Nachprüfungsverfahren greift (§ 101b Abs. 1 Nr. 2 GWB); zuvor klaffte insoweit eine Lücke im Fehlerfolgenregime und schied (Primär-)Rechtsschutz regelmäßig aus.[198]

Jenseits der soeben skizzierten, nur in Ausnahmefällen greifenden Nichtigkeitsgründe verbleibt es aber, sieht man einmal von einem sittenwidrigen

195. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 254 f. m.w.N.
196. Dazu *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 256. Zur Frage einer korrekten Umsetzung der 30-Tage-Frist *F. Shirvani*, VergabeR 2013, S. 669 (675 f.).
197. *H.-J. Prieß*, BauR 2010, S. 1346 (1349 f.).
198. Näher m.w.N. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 257 ff.

(etwa kollusiven) Verhalten der öffentlichen Hand ab, bei dem aus dem Stabilitätsdogma folgenden Grundsatz der Vertragsverbindlichkeit.[199] Am Rande verwiesen sei noch auf die ebenfalls die Stabilität des Beschaffungsvertrags berührende Frage nach *Kündigungs- bzw. Rücktrittspflichten* bei einem Vergabeverstoß (§ 313 BGB), die aus Bestandsschutzgründen aber nur zurückhaltend angenommen werden können.[200]

Keinen Gebrauch gemacht hat der deutsche Umsetzungsgesetzgeber von der in Art. 2d Abs. 3 RL 89/665/EWG vorgesehenen Möglichkeit, eine Ausnahme von der Nichtigkeitsfolge aus zwingenden Gründen eines Allgemeininteresses bei gleichzeitiger Anordnung alternativer Sanktionen i.S.d. Art. 2e Abs. 2 RL 89/665/EWG vorzusehen.[201] Selbiges gilt für die Option einer bloßen Unwirksamkeit ex nunc gemäß Art. 2d Abs. 2 RL 89/665/EWG bei gleichzeitiger Anordnung alternativer Sanktionen i.S.d. Art. 2e Abs. 2 RL 89/665/EWG.[202] Nicht im nationalen Recht normiert ist überdies die in Art. 2d Abs. 4 RL 89/665/EWG vorgeschriebene freiwillige Ex-ante-Transparenz hinsichtlich der Direktvergabe eines Auftrags, weshalb für eine unmittelbare Anwendung der Richtlinienvorschrift plädiert wird.[203]

(3) Entscheidungsmöglichkeiten einschließlich vorläufiger Maßnahmen

Hinsichtlich ihrer *Entscheidungsmöglichkeiten* ist die Vergabekammer nicht auf eine Untersagung des Zuschlags oder eine (ausnahmsweise mögliche, siehe 2.) Feststellung der Unwirksamkeit des Beschaffungsvertrags beschränkt; vielmehr räumt ihr § 114 Abs. 1 GWB die Befugnis ein, die zur Korrektur des Vergabeverstoßes für geeignet erachteten Maßnahme anzuordnen:

> »Die Vergabekammer entscheidet, ob der Antragsteller in seinen Rechten verletzt ist und trifft die geeigneten Maßnahmen, um eine Rechtsverletzung zu beseitigen und eine Schädigung der betroffenen Interessen zu verhindern. Sie ist an die Anträge nicht gebunden und kann auch unabhängig davon auf die Rechtmäßigkeit des Vergabeverfahrens einwirken.«

---

199. Siehe m.w.N. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 260 f.
200. Näher m.w.N. *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 261 ff.; ferner *M. Knauff*, Effektiver Vergaberechtsschutz, in: M. Müller-Wrede (Fn. 7), Kap. 25, Rn. 50.
201. Befürwortend *H.-J. Prieß*, BauR 2010, S. 1346 (1347 ff.); ferner *F. Shirvani*, VergabeR 2013, S. 669 (677).
202. Befürwortend *F. Shirvani*, VergabeR 2013, S. 669 (676 f.).
203. *F. Shirvani*, VergabeR 2013, S. 669 (674 f.). Anders (und zum Hintergrund dieser Regelung) *A. Schwab/S. M. Seidel*, VergabeR 2007, S. 699 (705 ff.).

In der Praxis zu findende Tenorierungen sind etwa die Verpflichtung, fehlerhafte Verfahrensschritte, beispielsweise die Angebotswertung, zu wiederholen, die Verdingungsunterlagen vergabekonform zu gestalten oder (ausnahmsweise) die Ausschreibung aufzuheben.[204] Dieser Entscheidungsspielraum ist auch deshalb notwendig, weil aufgrund der Obliegenheiten zur unverzüglichen Rüge von Vergabeverstößen (§ 107 Abs. 3 Nr. 1 GWB) und zur Stellung des Nachprüfungsantrags binnen 15 Kalendertagen nach Verweigerung der Abhilfe auf eine Rüge hin (§ 107 Abs. 3 Nr. 4 GWB) verfahrensbegleitend Rechtsschutz zu suchen ist [siehe demgegenüber § 44a Verwaltungsgerichtsordnung (VwGO) für den allgemeinen Verwaltungsprozess].[205]

§ 115 Abs. 3 GWB ermöglicht der Vergabekammer[206] überdies, wenn das Zuschlagsverbot des § 115 Abs. 1 GWB (zu diesem 2.) zur Rechtswahrung nicht ausreicht, weitere *vorläufige Maßnahmen* anzuordnen:

> »Sind Rechte des Antragstellers aus § 97 Absatz 7 im Vergabeverfahren auf andere Weise als durch den drohenden Zuschlag gefährdet, kann die Kammer auf besonderen Antrag mit weiteren vorläufigen Maßnahmen in das Vergabeverfahren eingreifen. Sie legt dabei den Beurteilungsmaßstab des Absatzes 2 Satz 1 zugrunde. Diese Entscheidung ist nicht selbständig anfechtbar. Die Vergabekammer kann die von ihr getroffenen weiteren vorläufigen Maßnahmen nach den Verwaltungsvollstreckungsgesetzen des Bundes und der Länder durchsetzen; die Maßnahmen sind sofort vollziehbar. § 86a Satz 2 gilt entsprechend.«[207]

Als mögliche Maßnahmen genannt werden, dem öffentlichen Auftraggeber zu untersagen, mit einigen Bieter nachzuverhandeln, Betriebs- und Geschäftsgeheimnisse weiterzugeben oder mit der Vertragsdurchführung zu beginnen (De-facto-Vollzug).[208] Die Gesamtantragszahl ist indes gering, die Statistik verzeichnet für alle nach § 115 GWB möglichen Anträge, mithin vorläufige Maßnahmen und Gestattung des Zuschlags gemäß § 115 Abs. 2 GWB, für

---

204. Siehe *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 114 GWB, Rn. 35 ff.; *E. Brauer*, in: Ziekow/Völlink (Fn. 33), § 114 GWB, Rn. 13 ff.
205. Siehe allgemein zum Zeitpunkt des Rechtsschutzes in Verteilungsverfahren *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 654 ff.
206. Zur analogen Anwendbarkeit auf das OLG nur OLG Düsseldorf, NZBau 2008, S. 461 (462).
207. Als Beurteilungsmaßstab gibt § 115 Abs. 2 S. 1 GWB eine umfassende Interessenabwägung vor.
208. OLG Brandenburg, NZBau 2007, S. 329 (332); *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 115 GWB, Rn. 46.

die Jahre 1999-2012 Zahlen zwischen neun und 59 Anträgen (Mittelwert 29,9), wobei die Erfolgsquote im Mittel bei 13,18 % lag.[209]

(4) Vorrang des Primärrechtsschutzes vor dem Sekundärrechtsschutz

Eine weitere, das deutsche (Verwaltungs-)Rechtsschutzsystem auch jenseits des Vergaberechts kennzeichnende Systementscheidung stellt der *Vorrang des Primärrechtsschutzes vor dem Sekundärrechtsschutz* dar, mithin die Subsidiarität der Gewährung von Schadensersatz gegenüber einem unmittelbaren Angriff der belastenden Maßnahme mit dem Ziel ihrer Aufhebung. Diese subsidiantät wirkt in zweifacher Hinsicht: Sie stellt zum einen eine Anforderung der verfassungs- (aber auch unionsrechtlichen) Rechtsschutzgarantie an die Ausgestaltung des Rechtsschutzsystems dar und gestattet einen Verweis des Rechtsschutzsuchenden auf Schadensersatz bei Ausschluss oder Erschwerung des Primärrechtsschutzes nur bei besonderer Rechtfertigung.[210] Zum anderen ist ein Anspruch auf Schadensersatz ausgeschlossen, wenn der negativ von einer Vergabeentscheidung Betroffene nicht alle ihm möglichen und zumutbaren Wege des Primärrechtsschutzes beschritten hat (kein »dulde und liquidiere«);[211] § 839 Abs. 3 BGB enthält eine Normierung dieses allgemeinen Rechtsgedankens für das Amtshaftungsrecht, indem er einen Ersatzanspruch ausschließt, »wenn der Verletzte vorsätzlich oder fahrlässig unterlassen hat, den Schaden durch Gebrauch eines Rechtsmittels abzuwenden.«

Angesichts der Effektivität des kartellvergaberechtlichen Primärrechtsschutzsystems kommt *Schadensersatzansprüchen* nur eine *untergeordnete Bedeutung* zu.[212] Das Kartellvergaberecht kennt mit § 126 S. 1 GWB einen eigenständigen Anspruch auf Ersatz des Vertrauensschadens bei durch einen Vergabeverstoß frustierter echter Chance auf den Zuschlag:

»Hat der Auftraggeber gegen eine den Schutz von Unternehmen bezweckende Vorschrift verstoßen und hätte das Unternehmen ohne diesen Verstoß bei der Wertung der Angebote eine echte Chance gehabt, den Zuschlag zu erhalten, die aber durch den Rechtsverstoß be-

---

209. Siehe http://www.forum-vergabe.de/fileadmin/user_upload/Downloads/Statistik_Nachpr%C3%BCfungsverfahren_1999-2012.pdf (Abruf: 26.2.2014).

210. Ausführlich *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 89 ff., 131 f., m.w.N.

211. *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 79. Befürwortend auch *L. Horn/ H. Hofmann*, in: Dreher/Motzke (Fn. 13), vor § 102 GWB, Rn. 19. A.A. *C. Alexander*, in: H. Pünder/M. Schellenberg (Hrsg.), Vergaberecht, 2011, § 126 GWB, Rn. 7, 46; tendenziell a.A. auch OLG Düsseldorf, Urt. vom 15.12.2008, 27 U 1/07, juris, Rn. 116.

212. Siehe auch *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 264.

einträchtigt wurde, so kann das Unternehmen Schadensersatz für die Kosten der Vorbereitung des Angebots oder der Teilnahme an einem Vergabeverfahren verlangen. Weiterreichende Ansprüche auf Schadensersatz bleiben unberührt.«

Dieser Anspruch enthält eine Beweiserleichterung im Vergleich zum allgemeinen Schadensrecht und findet auf alle Auftragsvergaben Anwendung, wohingegen die Nachprüfungsrichtlinien eine entsprechende Vorgabe nur für den Sektorenbereich kennen (Art. 2 Abs. 7 RL 92/13/EWG).[213] Daneben findet das allgemeine Schadensrecht Anwendung (siehe § 126 S. 2 GWB), wobei dem Anspruch aus culpa in contrahendo (§§ 280 Abs. 1, 241 Abs. 2, 311 Abs. 2 Nr. 1 und 2 BGB) eine besondere Bedeutung zukommt. Dieser beruht auf dem Gedanken, dass aufgrund der Ausschreibung zwischen (potentiellen) Bietern und dem öffentlichen Auftraggeber ein vorvertragliches Vertrauensverhältnis zustande kommt, das den öffentlichen Auftraggeber zur Einhaltung der Vergabevorschriften verpflichtet; deren Verletzung wirkt folglich anspruchsbegründend.[214] Der ersatzfähige Schaden kann je nach Pflichtverletzung vom Ersatz der Aufwendungen für die Beteiligung[215] bis hin zum positiven Interesse (entgangener Gewinn) reichen, so es dem nicht zum Zuge gekommenen Bewerber gelingt nachzuweisen, dass er hätte zum Zug kommen müssen, und der Auftrag tatsächlich vergeben wurde.[216] Auch wenn nur ein Ersatz des negativen Interesses verlangt wird, spricht der BGH wegen des wettbewerblichen Charakters des Vergabeverfahrens Ersatzansprüche nur dem Bieter mit dem »annehmbarsten Angebot« zu;[217] anderes gilt nur, wenn die Beteiligung an der Ausschreibung ohne den Vergabefehler unterblieben wäre.[218] Wäre die Ausschreibung aufzuheben gewesen, kommt schließlich

213. Zum Hintergrund *C. Alexander*, in: Pünder/Schellenberg (Fn. 211), § 126 GWB, Rn. 1 ff.; *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 126 GWB, Rn. 6 f.
214. Siehe nur BGHZ 139, 259 (260 ff.); NJW 2000, S. 661 (662 f.); NZBau 2011, S. 498 (499 f.) – Verzicht auf ein besonderes Vertrauensmoment; näher *C. Alexander*, in: Pünder/Schellenberg (Fn. 211), § 126 GWB, Rn. 53 ff.; *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 126 GWB, Rn. 23 ff.; *L. Horn/H. Hofmann*, in: Dreher/Motzke (Fn. 13), vor § 102 GWB, Rn. 21; *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 269 ff.
215. BGHZ 139, 259 (261, 268); ferner NJW 2000, S. 661 (663); *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 126 GWB, Rn. 32.
216. BGHZ 120, 281 (284 f.); ferner NJW 2000, S. 661 (663); NZBau 2004, S. 283 (283); NZBau 2006, S. 797 (798); NZBau 2008, S. 505 (505); NZBau 2010, S. 387 (388); *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 126 GWB, Rn. 35 f.
217. BGHZ 139, 259 (261). Differenzierend *C. Antweiler*, in: Dreher/Motzke (Fn. 13), § 126 GWB, Rn. 32.
218. BGH, WRP 2008, S. 370 (374).

der anspruchsausschließende Einwand rechtmäßigen Alternativverhaltens in Betracht.[219]

(5) *Effektivität des Nachprüfungsverfahrens und beschränkte Auswirkungen der Reform der Rechtsmittelrichtlinien in Deutschland*

Angesichts der von Anfang an bestehenden Effektivität des kartellvergaberechtlichen Nachprüfungsverfahrens hat die RL 2007/66/EG und ihre Umsetzung in das deutsche Recht, abgesehen von der bereits erwähnten Regelung der De-facto-Vergabe, zu keinen wesentlichen Änderungen im Rechtsschutzsystem geführt.[220] Die Gesetzesbegründung zur Vergaberechtsreform des Jahres 2009 betont insoweit:

»Die Änderungen des GWB sind in erster Linie Klarstellungen zum Anwendungsbereich sowie die Einführung einer Sanktionierung der bislang folgenlosen rechtswidrigen sog. De-facto-Vergaben. Auch an der Grundstruktur der Nachprüfungsverfahren wird festgehalten: Zuständig bleiben Vergabekammern und Oberlandesgerichte. Die vorgeschlagenen Änderungen im Rechtsschutz sollen zu noch mehr Effizienz und Beschleunigung des Nachprüfungsverfahrens führen. Einige Vorschriften, die sich bislang in der Vergabeverordnung befanden (z. B. Zuständigkeit der Vergabekammern, Statistikpflichten), werden in das GWB aufgenommen.«[221]

In diesem Zusammenhang ist insbesondere darauf hinzuweisen, dass die im Zuge der Reform in die Nachprüfungsrichtlinien aufgenommenen Stillhaltefristen (Art. 2a RL 89/665/EWG), ein zentrales Element der Neuregelung, bereits zuvor (u.a.) im deutschen Vergaberecht normiert waren (§ 13 VgV a.F.), was zugleich die wechselseitige Anpassungsdynamik im Prozess der Europäisierung unterstreicht.[222] Überdies kannte das deutsche Vergaberecht die

---

219. Siehe BGHZ 120, 281 (285 ff.); NJW 2000, S. 661 (663); *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 271 m.w.N.
220. Zur Reform *K. Costa-Zahn/M. Lutz*, NZBau 2008, S. 22; *M. Knauff/T. Streit*, EuZW 2009, S. 37; *H.-J. Prieß*, BauR 2010, S. 1346; *A. Schwab/S. M. Seidel*, VergabeR 2007, S. 699; *F. Shirvani*, VergabeR 2013, S. 669. Kritisch zur nationalen Umsetzung *M. Knauff/T. Streit*, a.a.O., S. 40; ferner *J. Stoye/M. Freiherr von Münchhausen*, VergabeR 2008, S. 871. Ausführlich zu Umsetzungsdefiziten *F. Shirvani*, a.a.O., S. 673 ff.
221. Begründung Gesetz Modernisierung VergabeR (Fn. 10), BT-Drs. 16/10117, S. 14. Siehe auch *K. Costa-Zahn/M. Lutz*, NZBau 2008, S. 22 (29); *G. Landsberg*, in: Pünder/ Schellenberg (Fn. 211), § 102 GWB, Rn. 4.
222. Siehe *F. Wollenschläger*, Vergabeverwaltungsrecht (Fn. 2), Rn. 79; ferner *A. Schwab/ S. M. Seidel*, VergabeR 2007, S. 699 (700, 702 ff).

Nichtigkeitsfolge bei Verstößen gegen die Informations- und Wartepflicht mit Ausnahme der De-facto-Vergabe (§ 13 S. 6 VgV a.F.). Selbiges gilt für den Suspensiveffekt des Nachprüfungsantrags (Art. 1 Abs. 5, Art. 2 Abs. 3 RL 89/665/EWG). Dass die Reform keine gravierenden Änderungen im Rechtsschutzsystem nach sich gezogen hat, belegen auch die Verfahrenszahlen, die seit dem Jahr 2004 tendenziell abnehmen (siehe unten 6.).

(6) Rechtsschutzstatistik

Blickt man auf die *Rechtsschutzstatistik* für die Jahre 1999 bis 2012,[223] so lag die Verfahrenszahl vor den Vergabekammern zwischen 395 und 1493 Verfahren pro Jahr (Mittelwert 1066,8) bei einer seit 2004 abnehmenden Tendenz (2012: 893). Etwas mehr als zehn Prozent der Anträge erwiesen sich im Mittel als unzulässig, in knapp einem Drittel der Verfahren erging eine Sachentscheidung, etwas über ein Drittel erledigte sich durch Rücknahme. Die Erfolgsquote der Nachprüfungsanträge liegt im Mittel bei 13,1 Prozent. An 15,22 Prozent der Verfahren vor der Vergabekammer schloss sich eine Beschwerde zum Oberlandesgericht an, wobei diese in gut zwei Dritteln der Fälle vom Antragsteller initiiert wurde. Im erwähnten Zeitraum fielen bei den Oberlandesgerichten zwischen 50 und 314 Beschwerdeverfahren bei ebenfalls seit dem Jahr 2004 rückläufiger Tendenz an (Mittelwert 215,5; 2012: 184 Verfahren), wobei die Erfolgsquote im Mittel bei etwas über 20 Prozent lag.

(7) Rechtsschutz außerhalb des Kartellvergaberechts

Die *Zweiteilung des Vergaberechts* (siehe Frage 6.1) manifestiert sich auch beim Rechtsschutz. Trotz vielfacher Reformforderungen[224] und -versprechen[225] hat der Gesetzgeber bis heute »schon wegen der Vielzahl der Fälle« davon abgesehen, das soeben entfaltete und effektive kartellvergaberechtliche Nachprüfungsverfahren auf nicht vom Anwendungsbereich des EU-Se-

223. Siehe die Aufbereitung des forum vergabe e.V. unter http://www.forum-vergabe.de/fileadmin/user_upload/Downloads/Statistik_Nachpr%C3%BCfungsverfahren_1999-2012.pdf (Abruf: 25.2.2014) und die unter http://www.forum-vergabe.de/ vergaberechtliche-informationen/weiterfuehrende-informationen (Abruf: 25.2.2014) abrufbare Einzelstatistik des Bundesministeriums für Wirtschaft und Technologie gemäß § 129a GWB.
224. Siehe nur *T. André*, VergabeR 2011, S. 240 (240, 244 f.), m.w.N.
225. Siehe Koalitionsvertrag 2009 (Fn. 8), S. 17.

kundärrechts erfasste Auftragsvergaben zu übertragen,[226] und auch kein anderweitiges Rechtsschutzverfahren geschaffen. Dies bedeutet indes nicht, dass keine Rechtsschutzmöglichkeiten bestünden. Vielmehr sind die im Unions-, Verfassungs- und einfachem Vergaberecht wurzelnden, zunehmend auch anerkannten und für jedweden Beschaffungsvorgang geltenden Bindungen der öffentlichen Hand (zu diesen Frage 6.3) nach den allgemeinen Regeln und Verfahren des Prozessrechts durchzusetzen. Dies birgt freilich Unsicherheiten, geht mit Rechtsschutzdefiziten einher und nährt eine schon mehr als zehn Jahre intensiv (und bis zum BVerfG[227]) geführte Debatte über das »Ob« und »Wie« sowie die Effektivität des Vergaberechtsschutzes unterhalb der Schwellenwerte, der immerhin ca. 90 % aller Auftragsvergaben betrifft.[228] In jüngerer Zeit zeichnen sich allerdings deutlichere Konturen ab, ohne dass freilich alle Streitfragen und Probleme gelöst wären.[229]

Aufgrund der einheitlich zivilrechtlichen Deutung des Vergabevorgangs (dazu Frage 1.2) stellt der privatrechtliche Vertragsschluss den einzigen Anknüpfungspunkt für Rechtsschutz dar, der konsequenterweise vor den *ordentlichen Gerichten* und nicht vor den Verwaltungsgerichten zu suchen ist. Weithin wird, wie auch oberhalb der Schwellenwerte, ein einmal abgeschlossener Beschaffungsvertrag unter Berufung auf den Grundsatz »pacta sunt servanda« für stabil erachtet, so dass Verstöße gegen Vergabevorschriften nichts an der Wirksamkeit des Vertrages ändern;[230] dementsprechend geht auch nachträglicher Primärrechtsschutz ins Leere, was das BVerfG in seiner Entscheidung zu Unterschwellenvergaben vom 13.6.2006 für mit der grundgesetzlichen Rechtsschutzgarantie vereinbar erklärt hat.[231] Damit ist im Wege einer einstweiligen Verfügung *vorbeugender Rechtsschutz* mit dem Ziel einer Untersagung des Vertragsschlusses zu suchen, der materiell-rechtlich in einem auf den Vergabeverstoß gestützten Unterlassungsanspruch wurzelt (§§ 1004, 823 Abs. 2 BGB i.V.m. Grundrechten/Grundfreiheiten bzw. vorvertragliches Vertrauensverhältnis, das zur Einhaltung individualschützender

226. Begründung VgRÄG (Fn. 9), BT-Drs. 13/9340, S. 12; erneut bekräftigt im Jahre 2009 in der Begründung Gesetz Modernisierung VergabeR (Fn. 10), BT-Drs. 16/10117, S. 14.
227. BVerfGE 116, 135.
228. *J. Pietzcker*, NJW 2005, S. 2881 (2881).
229. Zusammenfassend *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 80 ff.
230. Zu dessen Herleitung *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 490 ff., 623 ff., m.w.N. Anerkannt in VG Mainz, NZBau 2011, S. 60 (63 f.); OLG Stuttgart, VergabeR 2011, S. 236 (238).
231. BVerfGE 116, 135 (156 ff.).

Vergabevorschriften verpflichtet).[232] Die Möglichkeit, vorbeugenden Rechtsschutz zu suchen, steht und fällt freilich mit der Kenntnis vom bevorstehenden Vertragsschluss und einem hinreichenden Zeitfenster, um Rechtsbehelfe einzulegen. Oberhalb der Schwellenwerte sichert dies die präventiven Primärrechtsschutz ermöglichende Vorabinformations- und Wartepflicht (§ 101a GWB), die einen angemessenen Kompromiss zwischen Bestands- und Rechtsschutzinteresse darstellt. Für Auftragsvergaben unterhalb der Schwellenwerte hat das BVerfG indes auch diese Verfahrensgestaltung für nicht verfassungsrechtlich geboten erachtet,[233] so dass insoweit Primärrechtsschutzdefizite bestehen. Jüngere Entwicklungen in der europäischen und nationalen Rechtsprechung[234] sowie im Landesrecht[235] eröffnen allerdings gegenteilige Perspektiven.[236] Dies ist auch deshalb zu begrüßen, weil der – bei verschlossenem Primärrechtsschutz – verbleibende Sekundärrechtsschutz regelmäßig am kaum zu erbringenden Nachweis der Kausalität des Vergabefehlers für den Schaden scheitert.[237]

Auch bei Erreichen des Primärrechtsschutzes drohen weitere prozessuale Nachteile für den Rechtsschutzsuchenden infolge der zivilrechtlichen Qualifikation des Vergabevorgangs deshalb, weil weder der verwaltungsprozessuale Amtsermittlungsgrundsatz (§ 86 VwGO) noch die Akteneinsichtsrechte des Verwaltungsverfahrens- und Verwaltungsprozessrechts (§ 29 VwVfG; § 100 VwGO) unmittelbar greifen; dem ist durch eine entsprechende Modifi-

---

232. Im Einzelnen m.w.N. *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 66. Aus der Rechtsprechung etwa BGH, NZBau 2011, S. 498 (499 f.); NZBau 2012, S. 46 (47 f.); OLG Düsseldorf, NZBau 2012, S. 382 (385).
233. BVerfGE 116, 135 (156 ff.).
234. Siehe namentlich EuG, Rs. T-461/08, Slg. 2011, II-6367, Rn. 118 ff. – Evropaïki Dynamiki/EIB (unbestimmt noch EuGH, Rs. C-91/08, Slg. 2010, I-2815, Rn. 65 – Wall AG). Das OLG Düsseldorf hat in einer jüngeren Entscheidung [ZfBR 2012, 505 (506)] immerhin entgegen dem BVerfG offen gelassen, ob eine Vorabinformations- und Wartepflicht geboten ist.
235. So in Mecklenburg-Vorpommern (§ 12 VgG M-V), Sachsen (§ 9 Abs. 1 SächsVergabeDVO), Schleswig-Holstein (§ 14 Abs. 10 MFG S-H) und Thüringen (§ 19 Abs. 1 ThürVgG).
236. Siehe dazu auch *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 5, 20 ff., 35 ff., 80 f., m.w.N.
237. Dazu *F. Wollenschläger*, Verteilungsverfahren, 2010, S. 658 ff., und *ders.*, Sekundärrechtsschutz als effektiver Rechtsschutz jenseits des Kartellvergaberechts?, in: FS Marx, 2013, S. 873 (879 ff.), beide m.w.N. – Indes hat das BVerfG eine Optimierung des Sekundärrechtsschutzes zur Kompensation des nicht erreichbaren Primärrechtsschutzes angemahnt BVerfGE 116, 135 (159), zu den (begrenzten) Möglichkeiten insoweit *F. Wollenschläger*, a.a.O., S. 659 ff. bzw. 881 ff.

kation des Zivil(prozess)rechts nach den Grundsätzen des Verwaltungsprivatrechts entgegenzuwirken.[238] Zu Unrecht erachten Teile der Rechtsprechung zudem nur willkürliche Vergabeverstöße für relevant.[239]

Trotz der skizzierten Rechtsschutzdefizite ist in den letzten Jahren eine zunehmende Zahl von Rechtsschutzverfahren im Unterschwellenbereich zu konstatieren.[240] Gleichwohl bleibt die Reform auf der Tagesordnung.[241] Das Diskussionspapier des Bundeswirtschaftsministeriums von Juli 2010 erwägt als Reformoptionen ein rein verwaltungsinternes Verfahren, eine Verbesserung des bestehenden Rechtsschutzes vor den ordentlichen Gerichten sowie eine – ggf. modifizierte – Anwendung des kartellvergaberechtlichen Nachprüfungsverfahrens.[242]

Abschluss und Reform

Frage 14

Angesichts der Vielzahl der durch die EU-Vergaberechtsreform aufgeworfenen Rechtsfragen einerseits und dem beschränkten Zuschnitt und Umfang eines Länderberichts andererseits enthält sich der folgende Abschnitt einer allgemeinen Diskussion des Reformpakets und geht lediglich auf einige in der deutschen Debatte besonders präsente Aspekte ein, namentlich die Konzessionsvergabe sowie die Ausschreibungsfreiheit von In-house-Vergaben und Kooperationen zwischen öffentlichen Einrichtungen.[243]

---

238. Siehe dazu *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 71 ff. m.w.N. Zur Geltung des Verwaltungsprivatrechts für die öffentliche Auftragsvergabe auch BVerwGE 129, 9 (19).
239. Siehe nur OLG Brandenburg, VergabeR 2009, S. 530 (532); ferner VergabeR 2012, S. 133 (135 f.). Dagegen *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 51 m.w.N.
240. Siehe – unabhängig vom Erfolg im Einzelfall – nur BGH, NZBau 2012, S. 46; OLG Brandenburg, VergabeR 2008, S. 294; OLG Düsseldorf, NZBau 2010, S. 328; NZBau 2012, S. 382; OLG Jena, VergabeR 2009, S. 524; LG München I ZfBR 2012, S. 507.
241. Siehe auch *F. Wollenschläger*, Primärrechtsschutz (Fn. 7), Rn. 82 m.w.N.
242. Zusammenfassung in Behördenspiegel 2010, S. 20. Dazu *T. André/D. Sailer*, NZBau 2011, S. 394 (398 ff.); *M. Burgi*, NVwZ 2011, S. 1217 (1218 ff.).
243. Siehe zur Reform im Überick *A. Schwab/A. Giesemann*, Vergabe 2014, i. E. Zur Thematik Innovationen *M. Fehling*, NZBau 2012, S. 673.

Obgleich Verfassungs- und Unionsrecht bereits jetzt materielle und prozedurale Vorgaben für die *Vergabe von Konzessionen* aufstellen (siehe Fragen 6.3 und 7), ist das – letztlich realisierte – Kodifikationsvorhaben auf teils erheblichen Widerstand in Deutschland gestoßen; dieser entzündete sich vielfach an einer (angeblichen) Erschwerung der Erbringung wichtiger Leistungen der Daseinsvorsorge und der fehlenden Notwendigkeit einer (detaillierten) unionsrechtlichen Regelung.[244] Auch hat der Bundesrat (erfolglos) Subsidiaritätsrüge erhoben.[245] Diese Vorbehalte haben ihren Niederschlag auch in Ausnahmebestimmungen gefunden, die in den Richtlinienentwurf aufgenommen wurden, namentlich für den Wassersektor (Art. 12 KRL) und – obgleich vom EuGH nicht als Ausübung hoheitlicher Gewalt qualifiziert (siehe Frage 4.1) – für den Rettungsdienst (Art. 10 Abs. 8 lit. y KRL).[246] Das Vorhandensein eines geschriebenen Rechtsrahmens erhöht nunmehr nicht nur die Rechtssicherheit und -klarheit im Verhältnis zum Status Quo; auch die Rechtsbeachtung und -durchsetzung dürfte sich verbessern.

Ein weiterer zentraler Diskussionspunkt in Deutschland war die Frage, unter welchen Voraussetzungen *In-house-Vergaben und Kooperationen zwischen öffentlichen Einrichtungen* dem Vergaberecht unterliegen. Auch insoweit leistet die Kodifikation der bislang lediglich in der Rechtsprechung entwickelten Grundsätze [siehe nunmehr Art. 12 VRL (2014) und Art. 17 KRL] einen Beitrag zu mehr Rechtssicherheit. Die bereits mit Blick auf die EuGH-Rechtsprechung artikulierte Kritik einer übermäßigen, gar verfassungs- und unionsrechtswidrigen Beschneidung der Organisationshoheit der öffentlichen Hand durch zu weit reichende Ausschreibungspflichten (siehe Frage 3) begleitete auch das Gesetzgebungsverfahren.[247] Sie hatte teils Erfolg, liegt die Schwelle des für die Einschlägigkeit der In-house-Ausnahme notwendigen

244. Siehe etwa Stellungnahme der kommunalen Spitzenverbände vom 1.2.2012, Az. 74.08.63 E, http://www.forum-vergabe.de/fileadmin/user_upload/Stellungnahmen_zum_Gr%C3%BCnbuch_2011/bv_stellungnahme_eu_vergaberechtsreform_31012012.pdf?, S. 11 ff. (Abruf: 25.5.2014); Stellungnahme der Vereinten Dienstleitungsgewerkschaft (ver.di) zum Vorschlag der EU-Kommission für eine EU-Richtlinie für die Konzessionsvergabe vom 24.5.2012; *J. Lattmann/A. Lott*, ZögU 36 (2013), S. 58 (69 f.).
245. Beschl. des Bundesrates vom 2.3.2012, BR-Drs. 874/11 (B).
246. Siehe für einen entsprechenden Vorstoß Beschl. des Bundesrates vom 2.3.2012, BR-Drs. 874/11 (B), Nr. 10.
247. Siehe etwa Stellungnahme der kommunalen Spitzenverbände vom 1.2.2012, Az. 74.08.63 E, http://www.forum-vergabe.de/fileadmin/user_upload/Stellungnahmen_zum_Gr%C3%BCnbuch_2011/bv_stellungnahme_eu_vergaberechtsreform_31012012.pdf?, S. 9 ff. (Abruf: 25.2.2014); ferner *B. Klein*, VergabeR 2013, S. 328 (336).

Eigengeschäfts im Gegensatz zum Kommissions-Vorschlag bei nur noch 80 % und sind Minderheitsbeteiligungen Privater, die keine Kontroll- und Sperrmacht vermitteln, entgegen der bisherigen EuGH-Rechtsprechung unschädlich.[248] Auch die Anforderungen an die Vergabefreiheit von Kooperationen zwischen öffentlichen Einrichtungen wurden im Gesetzgebungsverfahren entschärft, insbesondere genügt nun die Erfüllung gemeinsamer öffentlicher Aufgaben [Art. 12 Abs. 4 lit. a VRL (2014)], ohne dass es sich, wie noch im Kommissions-Entwurf vorgesehen, um »wechselseitige Rechte und Pflichten der Parteien handeln« muss. Die kommunale Seite qualifiziert insoweit »[d]ie nach dem Trilog-Verfahren gefundene Kompromisslinie ... als Erfolg«.[249]

248. Siehe auch *E.-D. Leinemann/F. Dose*, VergabeNews 2013, S. 98 (98 f.).
249. Siehe Städte- und Gemeindebund Nordrhein-Westfalen, Mitteilung 532/2013 vom 9.7.2013, http://www.kommunen-in-nrw.de/mitgliederbereich/mitteilungen/detailansicht/dokument/einigung-zu-eu-vergaberechtsreform-und-konzessionsrichtlinie .html? (Abruf: 25.2.2014).

GREECE

Ilias Mazos[1] *et Elsa Adamantidou*[2]

Le contexte

Question 1

1.1/ Avant l'adoption des premières directives européennes relatives aux marchés publics, la Grèce disposait déjà d'un large éventail de règles, surtout de fond, concernant spécifiquement la passation des marchés publics. Le droit administratif grec a cependant subi des modifications notables sous l'impulsion du droit européen. Dans cet esprit, les éléments suivants peuvent être mentionnés à titre indicatif :

(a) Le paysage du contentieux des marchés publics, surtout en matière de mesures provisoires, a complètement changé.

Avec le vote de la loi 2522/1997, la voie de droit du référé précontractuel est venue remplacer la traditionnelle demande de suspension des actes unilatéraux des pouvoirs adjudicateurs, laquelle ne pouvait prospérer qu'en cas de conséquences dommageables irréversibles ou difficilement réversibles de l'acte contesté et qui avait été jugée par la Cour de Justice non conforme à la directive 89/665 (C-236/95, *Commission c/ Grèce*). Ainsi le législateur a-t-il assuré l'efficacité de la protection provisoire dans le cadre des procédures d'appels d'offres tombant sous le champ d'application des directives européennes, pour autant que ces procédures étaient organisées par des entités adjudicatrices ayant la forme de personnes morales de droit public et relevaient par conséquent de la compétence de la juridiction administrative. En revanche, les marchés passés par les « organismes de droit public » ayant la forme de personnes morales de droit privé (entreprises publiques, sociétés publiques, sociétés d'économie mixte etc.) ne sont pas considérés en droit grec comme étant de nature administrative (par ex. Conseil d'Etat grec [CdE]

1. Conseiller d'Etat, Conseil d'Etat Hellénique.
2. Chef d'Unité, Unité de Surveillance des Marchés Publics, CIEEL.

236/2012, Tribunal des Conflits grec 10/1987, 15/1992 3/1999). L'ensemble de leur contentieux appartenait dès lors jusqu'à récemment à la compétence de la juridiction judiciaire.

Or, depuis la loi 3386/2010 la compétence juridictionnelle pour les différends de la phase précédant l'attribution des contrats publics visés par cette loi a été unifiée au profit de la juridiction administrative. Il en résulte qu'à l'heure actuelle, s'agissant des contrats qui entrent dans le champ d'application des directives européennes ainsi que des concessions de services, l'ensemble des litiges nés lors de la phase précontractuelle sont soumis à la compétence de la juridiction administrative, indépendamment de la nature administrative (pouvoir adjudicateur – personne morale de droit public) ou privée (pouvoir adjudicateur – personne morale de droit privé) de ces contrats.

La distinction opérée en droit grec entre les contrats administratifs et les contrats privés de l'administration conserve toutefois tout son intérêt pour la question de la détermination de la juridiction compétente pour trancher les différends de la phase de l'exécution du contrat : les litiges nés de l'exécution des contrats administratifs appartiennent toujours à la compétence de la juridiction administrative, tandis que les litiges nés lors de la phase de l'exécution des contrats privés continuent à relever de la compétence de la juridiction judiciaire (v. également *infra*, question 13).

(b) Des modifications importantes ont également été apportées à certaines règles de fond sous l'influence du droit européen des marchés publics. La loi 3316/2005 relative à l'attribution des contrats de projets est caractéristique en ce sens. Elle a été adoptée dans le but de mettre fin à la possibilité pour les pouvoirs adjudicateurs, reconnue sous le règne de la loi 716/1977, d'inclure l'évaluation de l'expérience des soumissionnaires dans les critères d'attribution des contrats en question.

1.2/ Globalement, il n'existe plus aujourd'hui dans la législation grecque de dispositions qui mettent sérieusement en cause l'application ou encore l'effet utile des règles européennes sur les marchés publics. La jurisprudence nationale a joué un rôle important dans ce sens, de même que l'activité consultative de l'Unité de Surveillance des Marchés Publics du Centre de Droit Economique International et Européen, qui se développe depuis maintenant 17 années consécutives.

Des dispositions isolées paraissent certes toujours améliorables, mais sans que cela implique des réformes législatives radicales. Ce dont paraissent avoir le plus besoin les règles actuelles de passation des marchés publics en Grèce c'est leur codification, dans un effort de rassembler dans des textes cohérents

les dispositions éparses existantes, d'en identifier les éventuelles contradictions et d'éliminer les dissonances injustifiées qui s'observent dans les réglementations en vigueur des différents types de contrats publics.

Enfin, une initiative législative qui favoriserait le rapprochement mutuel des règles qui régissent les contrats publics « européens » et « nationaux » irait encore plus en avant dans le sens de la simplification du système. Sur le plan du droit matériel, cela est déjà acquis, à un certain degré, grâce à l'invocation et l'application jurisprudentielle des principes généraux du droit européen à l'occasion d'affaires portant sur des contrats publics « nationaux » (v. *infra*, question 6, sur l'interprétation des dispositions du droit national à la lumière des principes généraux du droit européen des marchés publics). Sur le plan toutefois des règles contentieuses, la protection offerte actuellement aux opérateurs économiques candidats à l'obtention de contrats nationaux reste toujours inférieure par rapport à celle offerte aux candidats dans le cadre des contrats européens, et ce surtout au niveau de la protection provisoire, malgré certaines améliorations déjà apportées sur ce point par le législateur. Il serait donc souhaitable que le dernier s'attache à rendre les voies de recours à disposition des candidats aux contrats nationaux aussi efficaces que celles qui sont prévues pour les contrats européens analogues, afin d'éviter que la protection juridictionnelle des candidats aux contrats nationaux s'avère parfois excessivement difficile (principe d'effectivité).

Les limites du droit européen des marchés publics

Question 2

2.1/ La notion de marchés publics, telle qu'elle a été élaborée dans le droit de l'Union Européenne, a été incorporée telle quelle dans la législation grecque avec la transposition en droit interne des directives 2004/17 et 2004/18 (décrets présidentiels 59 et 60/2007). La qualification d'un contrat de marché public au sens du droit européen entraîne l'application des dispositions matérielles tant européennes que nationales relatives aux travaux, fournitures et services, et ce indépendamment de la nature administrative ou privée, au sens du droit grec, du contrat.

La cession d'une activité par l'autorité publique à un opérateur économique, qui s'accompagne souvent de l'octroi de droits exclusifs ou spéciaux, se réalise en droit grec par le biais d'actes unilatéraux ou bilatéraux. L'acte unilatéral peut être une loi, une décision administrative réglementaire prise

sur habilitation législative ou bien un acte administratif individuel (autorisation administrative). L'acte bilatéral (contrat) peut constituer un marché public au sens des directives 2004/17 et 2004/18 ou être le résultat d'une procédure de mise en concurrence organisée en dehors du champ normatif de ces directives (par ex., selon l'article 8 du règlement 1370/2007). Le contrat de concession de services peut quant à lui être soit le résultat d'une procédure d'appel d'offres ou tout simplement l'aboutissement d'une attribution unilatérale, législative ou administrative. Il nécessite en tout état de cause, selon la doctrine administrativiste dominante en Grèce, une ratification législative, les clauses relatives à l'organisation du service et aux relations du concessionnaire avec les usagers du service ayant une nature réglementaire.

2.2/ Il n'existe pas en Grèce de systématisation particulière, jurisprudentielle ou doctrinale, des critères selon lesquels s'identifient et se réalisent les attributions législatives, administratives ou autres qui n'entrent pas dans la définition européenne des marchés publics. Ces formes extra-contractuelles d'attribution d'activités existent pour autant, en particulier dans le domaine des services d'intérêt général. On peut noter à titre indicatif les deux cas ci-après :

(a) L'autorisation sans mise en concurrence de l'exploitation exclusive de jeux de hasard au bénéfice de la société anonyme (S.A.) « Organisme de pronostics de matchs de football » (« OPAP »), sur la base d'une disposition législative et en vertu d'une décision administrative (arrêté ministériel).

Le droit exclusif d'exploiter une série de jeux de hasard a été accordée en 2000 et pour une durée de 20 ans, sur la base de l'article 27 de la loi 2843/2000 et sans mise en concurrence, à la S.A. OPAP, dont l'Etat grec était le principal actionnaire avec une participation à hauteur de 51 %. L'OPAP a été introduit en bourse en avril 2001. Quand en 2011 l'autorisation exclusive de l'exploitation de tous les jeux sauf les paris a été prolongée jusqu'à l'an 2030 en vertu de la loi 4002/2011, la participation étatique au capital de l'OPAP se limitait à seulement 34 %.

En vertu d'un arrêté du Ministre des Finances pris sur la base de la loi 4002/2011 l'OPAP a obtenu l'autorisation d'installer et d'exploiter l'ensemble des machines de jeu (35.000) dont le fonctionnement est autorisé par la loi sur le territoire grec. L'OPAP devrait installer et faire fonctionner 16.500 de ces machines de jeux, alors que le droit d'installation et d'exploitation des autres 18.500 devrait être cédé par l'OPAP, à la suite d'un appel d'offres international et avec contrepartie, à des tiers concessionnaires. De telles cessions de droits n'ont pas encore eu lieu à ce jour.

Des entreprises étrangères qui souhaitaient ouvrir des établissements de jeux de hasard en Grèce, mais dont les demandes d'autorisation avaient été tacitement rejetées par les autorités administratives compétentes, ont introduit des recours pour excès de pouvoir devant le Conseil d'Etat grec. L'Assemblée de ce dernier (CdE, Ass., 213/2011) a alors adressé une question préjudicielle à la Cour de Justice portant sur la compatibilité avec le droit européen du droit exclusif d'exploitation dont bénéficie l'OPAP en vertu de la législation nationale. La Cour a jugé (C-186/11 et C-209/11, *Stanleybet et al.*) qu'une telle législation pourrait être considérée comme contraire aux articles 43 et 49 TCE, s'il s'avèrerait que celle-ci n'est pas apte pour servir les fins pour lesquelles elle a été mise en place (violation du principe de proportionnalité). Cette appréciation appartient cependant au juge national.

L'attribution directe, en vertu d'une disposition de loi, de l'exploitation de jeux de hasard à un opérateur privé est donc loin d'être inintéressante pour le droit européen, même si l'examen de sa compatibilité avec ce droit ne se fait pas uniquement à la lumière du droit des marchés publics, mais aussi à la lumière du droit de la concurrence et des libertés fondamentales consacrées dans les traités.

(b) Le bail d'exploitation d'un champ géothermique cédé à la S.A. « Entreprise Publique d'Electricité » (« DEI ») sans mise en concurrence, sur la base d'une disposition législative et par le biais de décisions administratives (arrêtés ministériels) :

La loi 1475/1984 relative à la recherche, à la location et à l'exploitation des ressources géothermiques et le Code minier grec (décret législatif 210/1973) ont permis l'édiction, en 1985-1986, d'une série d'arrêtés ministériels par lesquels l'Etat grec a loué à la S.A. DEI, à la demande de cette dernière et sans organiser d'appel d'offres, le droit d'explorer et d'exploiter des ressources géothermiques à haute température sur le territoire grec. Ce droit, cédé pour une durée de 30 ans avec possibilité de prolongation, appartient exclusivement à l'Etat grec selon les articles 143 du décret législatif 210/1973 et 3 paragraphe 1 de la loi 3175/2003.

Le droit d'exploitation en cause a été cédé en 2007 à la S.A. « Entreprise Publique d'Electricité – Sources d'Energie Renouvelables » (« DEI APE »), filiale de la S.A. DEI. Aux fins de consolidation de cette cession de bail, le Ministre de l'Environnement, de l'Energie et du Changement climatique a émis en 2011 une série d'arrêtés ministériels approuvant la cession (sur la base des articles 7 paragraphe 1 et 13 paragraphe 1 de la loi 3734/2009) et soumettant la nouvelle société locataire à l'obligation de procéder à l'installation, à la mise en service et à la pleine exploitation d'unités opérationnelles

d'exploitation des ressources géothermiques. Il est à noter que ce n'est qu'en vertu de la loi 3175/2003 que le législateur grec a prévu pour la première fois que la cession des droits de l'Etat grec en matière de ressources géothermiques se réaliserait désormais avec le recours obligatoire à une procédure d'appel d'offres, ce qui auparavant ne constituait qu'une simple possibilité conformément à l'article 144 paragraphe 1er du Code minier.

Dans ce cas, un droit de l'Etat relatif à l'exploitation de ressources naturelles a été cédé sans mise en concurrence à une société anonyme, filiale de la S.A. DEI, à laquelle la participation de l'Etat remonte aujourd'hui à environ 51 % des actions.

2.4/ À la différence des exemples précédents d'attribution législative et administrative d'activités à des opérateurs économiques sans mise en concurrence, le programme de privatisations qui est actuellement en cours en Grèce se réalise par le biais de l'organisation d'appels d'offres internationaux, selon des procédés analogues à ceux des marchés publics régis par le droit européen, et qui semblent donc se conformer aux exigences de ce droit (v. aussi *infra*, question 10). Tel fut par exemple le cas de la toute récente (été 2013) vente du droit exclusif d'exploitation des six loteries d'Etat pour une durée de 12 ans. Le contrat de concession de services conclu à l'issue du processus d'appel d'offres international organisé a d'ailleurs été ratifié par la loi 4183/2013.

Question 3

3.1/ La législation grecque offre des exemples de réglementation spécifique de certaines formes de coopération entre organismes publics.

(a) Le Code des Municipalités et des Communes grec permet la conclusion de contrats de coopération intercommunale entre des collectivités locales de niveau identique ou différent. Ces contrats de coopération peuvent avoir pour objet l'attribution de l'exercice d'une compétence – ou de l'appui à l'exercice d'une compétence – par une collectivité locale à une autre ou encore la collaboration des collectivités locales en vue de la réalisation de travaux, de fournitures et de services (article 99 de la loi 3852/2010). Ce Code reconnaît également la possibilité de conclusion de contrats de plan (« contrats de programme » selon les termes employés par le législateur) entre les collectivités locales et des organismes de droit public pour la conception et l'exécution de travaux, pour l'élaboration de projets de développement d'une région ou pour la prestation de services de tous types (article 100 de la loi 3852/2010). Ces

contrats sont conclus sans organisation d'un appel d'offres, ni national ni européen.

(b) La loi grecque prévoit par ailleurs que lorsqu'un organisme public ne dispose pas du personnel technique requis pour la préparation et la mise en œuvre de la procédure de passation d'un marché public d'élaboration de projets ou de travaux ou pour le suivi de la réalisation de projets ou de travaux, il lui est loisible de solliciter l'exercice de ces compétences par l'autorité sous la tutelle de laquelle il est placé ou par les autorités de la Région dans le territoire de laquelle il siège. Si ces autorités ne sont pas en mesure d'exercer ces compétences, le maître de l'ouvrage peut les attribuer, en intégralité ou en partie, à un autre pouvoir adjudicateur (mandataire) par le biais d'un contrat de plan (article 3 de la loi 3316/2008).

(c) De plus, pour la conception et l'exécution de travaux et de projets de l'Eglise de Grèce lesquels contribuent au progrès national, économique, culturel ou social, ainsi que pour la prestation de services à caractère humanitaire, toutes les personnes morales de droit public relevant de l'Eglise de Grèce peuvent conclure des contrats de plan entre elles, avec l'Etat ou avec d'autres organismes de droit public (article 12 de la loi 3513/2006).

(d) Enfin, la loi grecque prévoit la conclusion de contrats de plan entre le Ministère de la Santé et de la Solidarité, les autres ministères, les Régions, les Systèmes Régionaux de Santé et de Solidarité (« PeSYP »), le Centre National de l'Aide Sociale Directe (« EKAKV ») et les collectivités locales, ou entre les organismes susmentionnés et tout organisme non lucratif, public ou privé, certifié dans le registre spécial tenu à cet effet par le Ministère de la Santé et de la Solidarité. Ces contrats sont conçus comme un outil visant à coordonner et à renforcer l'intervention dans le domaine de la réintégration sociale et à promouvoir la conception et la réalisation de programmes de soin social et de bénévolat (article 11 de la loi 3106/2003).

Les exemples précités représentent alors autant d'hypothèses de coopération entre organismes publics institutionnalisées dans la loi et aboutissant à la conclusion de contrats publics sans organisation préalable de concours.

3.2/ La possibilité pour les organismes publics grecs de conclure les contrats de plan susmentionnés a certes pour conséquence potentielle la restriction réelle de la concurrence au sein du marché concerné. Par le passé, quand des opérateurs privés étaient eux aussi admis comme co-contractants possibles des autorités publiques dans le cadre de contrats de plan, les critiques formulées de

la part des associations professionnelles à l'encontre de ce type de contrats étaient assez fortes. Mais leur caractère d'ores et déjà purement public a limité les cas de contestation juridictionnelle des contrats de plan en Grèce.

Pour ce qui concerne plus largement les questions éventuelles de concurrence qui émergent à l'occasion de coopérations public – public, les ordonnances récentes 282-285/2013 de la Commission des sursis du Conseil d'Etat grec, quoique relatives à une procédure d'appel d'offres pour un partenariat public – privé en vue de la réalisation de la construction et du fonctionnement d'une usine de traitement de déchets urbains, sont intéressantes. Afin d'obtenir la suspension de la procédure, la société demanderesse faisait valoir entre autres qu'avec l'admission comme candidate de l'Entreprise Publique d'Electricité (« DEI » S.A.), dont l'Etat grec détient environ 51 % des actions, l'Etat finirait, en cas d'obtention du contrat par la S.A. DEI, par participer au partenariat avec un pourcentage plus élevé par rapport à celui de ses concurrents, en violation des principes de libre concurrence, d'égalité de traitement et de proportionnalité. Or, l'argument ayant été rejeté comme irrecevable, la Commission des sursis n'a pas eu l'occasion de l'examiner au fond (sur cette affaire v. aussi *infra*, question 9).

3.3/ De plus, si les conditions spécifiques s'imposant aux partenariats public-public que la Cour de Justice a formulées dans l'affaire C-159/11 n'ont pas à ce jour été adoptées de façon explicite par la jurisprudence grecque, elles n'ont pas non plus été repoussées par cette dernière. L'on pourrait même lire la décision 607/2012 de la Cour des Comptes grecque comme adhérant indirectement à la logique de la Cour de Justice. L'affaire concernait un contrat de plan conclu entre le Ministère de l'Intérieur et une municipalité relativement à une activité d'appui informatique à l'échelle nationale. La Cour des Comptes a jugé que la conclusion d'un tel contrat n'entrait pas dans le champ normatif de la directive 2004/18, sauf s'il s'avèrerait que le recours à l'instrument juridique du contrat de plan était un subterfuge dans le but de permettre la prise en charge réelle de l'activité visée par un tiers (une entreprise municipale en tant que troisième partie au contrat). Dans cette espèce, la Cour des Comptes a accepté, majoritairement, l'existence d'un véritable contrat de plan au sens de la loi, aux motifs que toutes les parties contractantes avaient pris des engagements réels, leurs responsabilités se complétaient mutuellement et le contrat avait pour objet la coopération des parties pour la poursuite d'un but d'intérêt général. Ces considérants, et surtout le dernier, peuvent aisément être rapprochés des conditions posées par la Cour de Justice dans son arrêt sur l'affaire C-159/11, selon lequel la coopération entre des organismes publics qui repose sur un contrat sans mise en concurrence préalable n'est autorisée que si : a)

elle remplit une mission de service public, commune aux organismes publics qui coopèrent, et b) elle est exclusivement animée par des considérations propres à la poursuite d'objectifs d'intérêt public.

Question 4

Le régime juridique applicable aux partenariats ou aux accords consensuels public-privé exclus du champ normatif des directives européennes n'est pas traité de manière systématique dans la législation grecque. Les exemples ci-après, mentionnés à titre indicatif, montrent tout de même que la tendance actuelle est en Grèce à la soumission de la passation des conventions de ce type aux exigences découlant des principes généraux du droit européen des marchés publics.

(a) La vente d'actions appartenant à une entreprise publique est exclue du champ d'application des directives 2004/17 et 2004/18. Elle se réalise cependant avec l'organisation d'une procédure d'appel d'offres et elle est soumise aux principes généraux du droit européen des marchés publics (CdE 606/2008, implicitement).

(b) Il en va de même pour la conclusion des contrats d'emprunt des collectivités locales (Cour des Comptes grecque 19/2012), pour la cession, le transfert ou la concession de droits d'exploitation de ressources naturelles, pour la cession par bail du droit de l'Etat grec pour la recherche et l'exploitation d'hydrocarbures dans des zones terrestres et marines du pays, laquelle aboutit à la conclusion d'un contrat de concession de travaux publics (CdE, Comm. des sursis, 195/2013), pour la cession, par contrat de concession de services, du droit exclusif d'exploitation par la Radiophonie-Télévision Grecque (« ERT ») de signaux de radiodiffusion à des réseaux câblés en dehors de l'Europe (CdE, Comm. des sursis, 213/2013) ou encore pour l'octroi à des opérateurs privés de divers droits exclusifs (services de téléphonie mobile, production d'énergie électrique, fonctionnement de chaînes de télévision, organisation de jeux de hasard etc.).

Question 5

Dans la lignée de la jurisprudence européenne, le Conseil d'Etat grec cherche à identifier l'objet principal du contrat (critère du caractère prééminent), lorsqu'il s'agit de répondre à la question du droit applicable et en particulier à la question de l'assujettissement ou non du contrat au champ normatif des direc-

tives européennes (CdE, Comm. des sursis, 135/2001, 438/2002, 797/2004, 808/2004). En vue de l'identification de l'objet principal du contrat, la volonté contractuelle des parties est elle aussi prise en compte par le juge. L'indivisibilité du contrat en tant que condition que la Cour de Justice pose expressément pour l'application du critère de l'objet principal n'a pas spécialement préoccupé la jurisprudence grecque jusqu'à ce jour. Il semble cependant que cette dernière accepte, à l'instar du juge européen, l'idée selon laquelle si le contrat mixte se présente comme divisible, chacune de ses parties sera soumise au régime juridique correspondant à son objet.

La question préjudicielle posée par l'Assemblée du Conseil d'Etat grec à la Cour de Justice concernant la nature du contrat de privatisation du casino Mont Parnès est un exemple révélateur de ces problèmes (CdE, Ass., 606/2008, CJUE C-145/08 et C-149/08, *Loutraki*). Appliquant le critère de l'objet principal du contrat, l'Assemblée a conclu à la non applicabilité en l'occurrence du droit européen des marchés publics. Elle a en effet considéré que la vente des actions du casino avait constitué l'objet principal du contrat, alors que l'attribution au soumissionnaire du service de gestion du casino et son obligation d'accomplir une série de travaux, assumée dans le cadre du prix payé pour le transfert des actions, représentaient des objets accessoires du contrat.

Il est intéressant de relever sur ce point un critère différent auquel ont recouru les juges de l'une des opinions dissidentes exprimées dans l'arrêt 606/2008 afin de résoudre la question non de la nature du contrat de privatisation du casino, mais de sa soumission ou non aux exigences procédurales de la directive 89/665. Ils ont fait valoir que les contrats mixtes qui contiennent des sections relatives à l'exécution de travaux, de fournitures ou de services relèvent du champ normatif des directives européennes, et par conséquent aussi du champ de la directive procédurale 89/665, quand bien même il ne ressortirait pas que l'un des objets susmentionnés revête un caractère prééminent dans le cadre du contrat pris dans son ensemble. Cette interprétation assurerait, selon les juges de l'opinion dissidente, l'application pleine et effective des directives européennes et contribuerait, à l'inverse, à faire éviter le risque de leur contournement.

Les principes généraux du droit européen : le droit des marchés publics et au-delà

Question 6

6.1/ Le juge grec a pleinement adopté les principes généraux du droit européen des marchés publics ; il s'assure de leur respect par les autorités adjudi-

catrices grecques lors de l'attribution tant des contrats qui tombent sous le champ d'application des directives européennes que de ceux qui en sont exclus en raison de leur objet ou de leur faible valeur économique. En effet, les principes du droit européen des marchés publics constituent également des principes de l'ordre juridique national, en tant que facettes particulières des principes internes d'égalité, d'Etat de droit, de protection de la libre concurrence etc.

Ainsi, le contrat de prêt bancaire conclu par une municipalité pour mener à bien des activités relevant de sa compétence a été jugé comme n'entrant pas dans le champ d'application de la directive 2004/18 en raison de son objet. Il n'empêche que les municipalités sont tenues de respecter les principes fondamentaux du droit des marchés publics, en particulier le principe d'interdiction des discriminations fondées sur la nationalité, ainsi que l'obligation corrélative de transparence (Cour des Comptes grecque 19/2012, 552/2012 1284/2011, 3036/2011, 10/2008).

De même, la cession par bail de l'utilisation et de l'exploitation à long terme de complexes hôteliers appartenant à l'Organisme National du Tourisme (« EOT ») a été qualifiée de contrat de concession de services. Elle a par conséquent été conclue en dehors du champ normatif de la directive 2004/18, mais bien dans le respect des principes généraux du droit européen des marchés publics (Cour des Comptes grecque 79/2009).

6.2/ La jurisprudence grecque se réfère aux principes généraux du droit européen des contrats publics en utilisant tantôt la terminologie européenne et tantôt, sans que cela suggère une différenciation sémantique, sa propre terminologie en la matière. Elle a parfois livré des interprétations spécifiques du contenu des principes généraux européens à l'occasion d'affaires entrant ou non dans le champ d'application des directives.

Par exemple, le principe de formalisme, qui occupe une place centrale dans la jurisprudence du Conseil d'Etat grec, implique que tant l'autorité adjudicatrice que les opérateurs économiques sont liés, lors de l'attribution et l'exécution du contrat, par les clauses contenues dans l'appel d'offres. Les principales composantes du principe de formalisme s'analysent dans : a) l'interdiction pour l'autorité adjudicatrice de modifier ultérieurement les clauses essentielles de l'appel d'offres (CdE, Comm. des sursis, 228/2013), b) la règle selon laquelle seules les irrégularités qui concernent le stade en cours de la procédure de passation du marché peuvent être soulevées par les opérateurs économiques (principe de l'actualité) (CdE, Comm. des sursis, 64/2012, 637/2012), et c) l'interdiction pour l'opérateur économique de contester la validité des clauses de l'appel d'offres ultérieurement à la soumission sans ré-

serve de son offre (jurisprudence constante depuis l'arrêt CdE, Ass., 1415/2000), ce qui constitue aussi une manifestation du principe de sécurité juridique (sur ce point v. aussi *infra*, question 8).

À l'opposé du principe de formalisme, le juge grec mobilise également le principe d'équité, selon lequel l'autorité adjudicatrice peut légalement accepter des dérogations aux exigences de formalisme, dans la mesure où cela n'équivaut pas à une atteinte portée à la justification même de la règle formelle violée. Dans cet esprit, il a été jugé que la participation d'un candidat dont la garantie de participation était dotée d'un délai de validité plus long que le délai de validité de l'offre elle-même était légale, malgré le fait que l'appel d'offres interdisait les garanties de participation à validité limitée dans le temps (CdE 3984/1990).

6.3/ Il arrive en outre au juge grec d'interpréter des dispositions législatives, voire constitutionnelles, à la lumière des principes généraux du droit européen des marchés publics, dans l'objectif de limiter les cas d'incompatibilité du droit national avec le droit européen. À la suite de l'arrêt rendu par la Cour de Justice sur l'affaire C-213/07 (Michaniki AE c/ Grèce), les juridictions internes ont été confrontées à une délicate question d'harmonisation entre la Constitution et le droit européen. Le Conseil d'Etat grec a interprété la disposition de l'article 14 paragraphe 9 de la Constitution grecque comme n'imposant ni l'interdiction de la conclusion du contrat ni l'annulation obligatoire du contrat déjà conclu dans les cas où il serait constaté que le concessionnaire est aussi le propriétaire ou l'actionnaire principal d'une entreprise de médias. Toute autre interprétation conduirait, aux yeux du Conseil, à la méconnaissance du principe de proportionnalité. Ainsi les dispositions de la loi 3021/2002, selon lesquelles la nullité du contrat serait la conséquence obligatoire en cas de constatation de l'incompatibilité prévue à l'article 14 de la Constitution, ont été déclarées non conformes à la Constitution (CdE, Ass., 3470/2011).

Lorsque l'interprétation du droit grec conformément au droit européen s'avère impossible, l'exigence de respect des principes généraux du droit européen des marchés publics peut conduire à la mise à l'écart de la disposition nationale. Un exemple typique en ce sens constitue en Grèce la pratique administrative consistant dans l'observation d'une publicité minimale même dans les procédures d'adjudication simple de marchés de fournitures d'une valeur économique inférieure à 60.000€ hors TVA, nonobstant la disposition contraire expresse contenue dans l'article 2 paragraphe 4 du décret présidentiel 118/2007 portant réglementation des fournitures publiques.

6.4/ Il est enfin possible de relever des cas d'application volontaire par les autorités adjudicatrices grecques des règles contenues dans les directives européennes relatives aux marchés publics ou des principes généraux européens en la matière, même dans des cas qui ne relèvent pas du droit européen. On note en ce sens l'application volontaire des dispositions de la directive 92/50 lors de l'appel à manifestation d'intérêt pour la concession à des opérateurs privés du droit d'exploitation de plages organisés appartenant à l'Organisme National du Tourisme (« EOT ») (CdE 2793-2795/2012).

Question 7

La doctrine grecque accepte l'applicabilité des principes généraux du droit européen des marchés publics s'agissant également des attributions législatives ou administratives d'activités de services, sous forme par exemple de concessions de services qui s'accompagnent d'une ratification législative ou de transferts ou cessions de droits qui se matérialisent par une décision administrative. La jurisprudence corroborant cette position doctrinale est néanmoins rarissime, une rareté qui pourrait s'expliquer entre autres par l'absence dans l'ordre juridique grec d'une voie de droit qui permette la contestation juridictionnelle directe des dispositions législatives.

En tout état de cause, l'affaire relative à l'OPAP grec (v. *supra*, question 2) démontre pleinement l'intérêt que représentent les attributions en question du point de vue du droit européen. À la suite de la prise de position de principe de la Cour de Justice dans cette affaire (C-186/11 et C-209/11, *Stanleybet et al.*), la façon dont l'Assemblée du Conseil d'Etat grec tranchera la question de savoir si l'octroi législatif d'un droit exclusif d'exploitation de jeux de hasard à la S.A. OPAP était ou non conforme aux principes consacrés aux articles 49 et 56 TFUE (ex-articles 43 et 49 TCE) est attendue prochainement.

Les marchés publics et le droit européen, notamment le droit de la concurrence et le droit relatif aux aides d'Etat

Question 8

Il va de soi que certaines décisions prises par les pouvoirs adjudicateurs, et surtout certaines clauses des appels d'offres, peuvent être considérées comme des mesures imposant des restrictions sur le marché intérieur. Or, la question de la violation des libertés du Traité est rarement soulevée dans le conten-

tieux des marchés publics : les affaires pertinentes ne dépassent pas le nombre de 80 sur un total d'environ 5.000 ordonnances rendues par le Conseil d'Etat grec entre janvier 1998 et septembre 2013 suivant la procédure spéciale du référé précontractuel concernant les marchés visés par les directives européennes (92/50, 93/36, 93/37, 2004/17, 2004/18).

Ce paradoxe apparent est le résultat : (a) de la participation limitée des opérateurs économiques établis dans un autre Etat membre aux procédures d'adjudication des marchés publics se déroulant en Grèce, (b) des traits particuliers du contentieux administratif hellénique : la conformité des clauses des appels d'offres aux règles européennes ne peut, en principe, être contestée par les opérateurs économiques, dont les intérêts seraient lésés, qu'avant la soumission des offres (CdE, Ass., 1415/2000, 1667/2011), et (c) du fait que les dispositions des directives, correctement transposées et appliquées par les autorités nationales, satisfont les exigences du Traité.

Deux cas d'application de principes du droit européen des marchés publics (principe de non discrimination, principe de proportionnalité) peuvent être cités :

(a) CdE, Comm. des sursis, 34/2010 : l'évaluation négative portée par le pouvoir adjudicateur sur l'« efficacité organisationnelle » d'un opérateur économique, qui a participé à un marché complexe de travaux et de services, pour la seule raison que le soumissionnaire était établi dans un autre Etat membre, violerait le principe de la libre prestation de services au sein du marché intérieur. La Commission des sursis fait dans son ordonnance mention expresse du préambule de la directive 2004/18, selon lequel (point 2) la passation des marchés publics conclus dans les Etats membres doit respecter les principes du Traité, y compris le principe de libre prestation de services et le principe de non discrimination qui en découle.

(b) CdE, Comm. des sursis, 143/2010 : les décisions des pouvoirs adjudicateurs doivent se justifier par des raisons d'intérêt général. Elles doivent aussi être propres à garantir la réalisation des objectifs poursuivis et ne doivent pas aller au-delà de ce qui est nécessaire pour les atteindre.

Question 9

Certes, des règles et des pratiques relatives aux marchés publics peuvent être détournées de leur objectif, y compris les concessions à long terme, qui soulèvent des interrogations sur leur conformité à la Constitution hellénique dans la mesure où elles impliquent une certaine aliénation du pouvoir étatique.

Pour éviter tout risque de détournement, le juge national des marchés publics, agissant dans le champ de sa compétence, peut toujours rechercher l'objectif poursuivi par la disposition juridique (interprétation téléologique de la règle). Dans une affaire récente (CdE, Comm. des sursis, 317/2013) le Conseil d'Etat grec a procédé à une interprétation de l'article 37 de la directive 2004/17 conforme à son but. D'après cette disposition, « dans l'appel d'offres, l'entité adjudicatrice peut demander ou peut être obligée par un Etat membre de demander au soumissionnaire d'indiquer, dans son offre, la part du marché qu'il a l'intention de sous-traiter à des tiers ainsi que les sous-traitants proposés ». L'objectif de cet article serait, selon le préambule de la directive (point 43), « de favoriser l'accès des petites et moyennes entreprises aux marchés publics ». Il a donc été jugé que le sous-traitant proposé doit être « effectivement indépendant » (« tiers ») de l'opérateur économique (soumissionnaire) qui l'a indiqué dans son offre.

La question de la légalité de la participation d'une entité adjudicatrice à un marché public, en tant qu'opérateur économique, a été soulevée (sans pour autant être résolue) à l'occasion de la réception de l'offre d'une Université (organisme de droit public) à un marché de services. Le juge a statué que l'appel d'offres, dont la légalité ne pouvait plus être contestée, permettait la participation au marché des opérateurs économiques, indépendamment de leur statut juridique (CdE 1128/2009). Ensuite, le Conseil d'Etat grec a jugé (CdE, Comm. des sursis, 282-285/2013) que la société « Entreprise Publique d'Electricité » (DEI SA), dont la majorité des actions appartient à l'Etat grec, peut, conformément à son statut, participer à un partenariat public – privé, en tant qu'opérateur économique, vu l'objet du marché (valorisation énergétique des déchets).

Question 10

En droit hellénique, la plupart des Services d'Intérêt Economique Général (SIEG), qui ne sont pas assurés par l'Etat ou par des entités publiques, sont externalisés à des acteurs du marché par le biais de procédures similaires à celles des marchés publics (publicité, libre concurrence etc.). Parmi les exemples de cette pratique, qui s'est développée à une époque plus ou moins récente, sans doute pour des raisons politiques, on pourrait citer le cas des services de transports maritimes (CdE, Comm. des sursis, 215/2013). Il s'ensuit que la question de l'application des règles européennes relatives aux aides d'Etat n'a pas encore préoccupé la jurisprudence en ce qui concerne l'« externalisation » des SIEG (on repère une seule affaire où il est fait référence à l'arrêt *Altmark* : CdE 3232/2010).

Le règlement 1370/2007, relatif aux services publics de transport des voyageurs par chemin de fer et par route, prévoit une période de transition, ce qui explique le fait que son application n'a pas encore alimenté le contentieux administratif ou judiciaire grec.

La Grèce a récemment lancé, ou au moins annoncé, un vaste programme de privatisations. Dans ce cadre-là, se pose la question des procédures à suivre dans la mesure où l'« externalisation » des SIEG est en cause.

Utilisation stratégique des marchés publics

Question 11

Les préoccupations environnementales et sociales ne sont pas étrangères à la législation hellénique des marchés publics. La loi 3855/2010 (« Mesures pour l'amélioration de la performance énergétique au stade de l'utilisation finale, services énergétiques et autres dispositions », JO A, 95), qui a transposé la directive 2006/32, a autorisé le gouvernement (article 8) à établir, par arrêté interministériel, les exigences minimales d'efficacité énergétique des achats du secteur public en utilisant des méthodes d'évaluation du coût de cycle de vie des produits fournis. Ces exigences incluent : a) l'achat de nouvel équipement d'une consommation d'énergie efficace, même en fonction d'attente, b) le remplacement, la revalorisation et le maintien préventif de l'équipement existant. De la même façon, c'est-à-dire par arrêté ministériel, seront également fixées les mesures de réduction de la consommation énergétique des bâtiments du secteur public et des réseaux d'éclairage des espaces publics d'usage commun. La loi a aussi introduit dans la législation hellénique les « marchés publics verts » en prévoyant l'inclusion de paramètres environnementaux lors de la conclusion des marchés publics, afin d'assurer le progrès constant des performances environnementales et la réduction des conséquences néfastes pour l'environnement. D'après l'article 18 de la loi, un comité interministériel est chargé de la coordination et de l'harmonisation de l'action administrative, de l'élaboration d'un plan national d'action pour la promotion des « marchés publics verts », de l'élaboration de critères environnementaux, ainsi que de la proposition de toute réglementation ou modification législative nécessaire. Le comité, reconstitué après les élections législatives de 2012, serait actuellement en train de préparer le plan d'action envisagé par la loi.

En ce qui concerne les aspects sociaux des marchés publics l'on doit signaler la loi 4019/2011 (« Economie sociale, etc. ») qui prévoit les « marchés publics de référence sociale » (d'intérêt social). Dans ces cas-là, la décision de passation d'un contrat doit s'assortir des critères énumérés par le législateur à titre indicatif : la création d'occasions d'emploi, l'intégration des groupes sociaux vulnérables, l'égalité des chances etc.

Etant donné que toutes les réglementations nationales précédemment mentionnées demeurent encore à un état embryonnaire, la jurisprudence nationale n'a pas encore été confrontée à la question du risque d'exploitation abusive des préoccupations d'ordre stratégique aux fins de favorisation de produits et de fabricants locaux.

Il n'y a rien d'étonnant dans ce que, dans un pays en crise, il y ait une attitude plutôt favorable vis-à-vis de l'achat stratégique.

La directive 2009/33, relative à la promotion de véhicules de transport routier propres et économes en énergie, a été, prima facie correctement, transposée dans la législation nationale (loi 3982/2011, articles 66 à 70). Des mesures ont aussi été adoptées, au vu du règlement 106/2008 concernant un programme communautaire d'étiquetage relatif à l'efficacité énergétique des équipements de bureau, par un arrêté ministériel publié au Journal Officiel (B 1122) le 17/6/2008. Cet arrêté introduit des paramètres environnementaux et des étiquetages écologiques en ce qui concerne l'équipement dont le secteur public est fourni. Il dispose que si les achats du secteur public ne se conforment pas à cette nouvelle réglementation, ceux-ci ne seront pas considérés comme des frais incombant à l'Etat.

Question 12

Dans le domaine de l'innovation, l'outil des achats publics avant commercialisation, dont la seule raison d'être est la recherche – et qui sont exclus du champ d'application de la directive 2004/18 – demeure encore inconnu du législateur national et de la pratique administrative. Toutefois, le dialogue compétitif, qui est lui aussi apte à favoriser l'innovation, a été adopté par l'article 13 de la loi 3389/2005 ; les pouvoirs adjudicateurs y recourent de plus en plus souvent ces dernières années, surtout dans le cadre des partenariats public-privé. L'on pourrait citer à cet égard des projets de gestion des déchets (étude, financement, construction, maintien, gestion technique et fonctionnement des installations), d'un projet de revalorisation, agrandissement et exploitation d'une station de ski ou encore des projets de développement et d'exploitation d'installations touristiques. La jurisprudence a déjà tranché la question de la compatibilité du dialogue compétitif avec la « sécurité envi-

ronnementale » d'un projet ; il n'y a pas d'incompatibilité a priori (CdE 1986-1988/2013).

Solutions

Question 13

La loi 3386/2010 (loi transposant la directive 2007/66) prévoit que toute personne concernée – ayant ou ayant eu un intérêt à obtenir un marché déterminé et ayant été ou risquant d'être lésée par une violation alléguée – dispose des voies de recours suivantes contre des infractions aux règles (européennes et nationales) relatives aux marchés publics : (a) le recours d'urgence (protection dite « provisoire » : recours administratif préalable obligatoire auprès du pouvoir adjudicateur et, ensuite, référé précontractuel auprès de la Cour Administrative d'Appel et, dans certains cas – concessions, marchés visés par la directive 2004/17, marchés dont la valeur est égale ou supérieure aux 15.000.000 euros – auprès du Conseil d'Etat), (b) le recours pour excès de pouvoir à l'encontre des décisions des autorités adjudicatrices, exercé auprès de la Cour Administrative d'Appel et, le cas échéant, auprès du Conseil d'Etat, (c) le recours en déclaration de l'absence d'effets d'un marché, et (d) l'action en réparation du préjudice subi. Les deux derniers cas relèvent de la compétence soit du juge judiciaire soit du juge administratif, selon la nature du contrat.

Les mesures provisoires sont octroyées avant la conclusion du contrat. Tant l'introduction du recours préalable auprès du pouvoir adjudicateur que le délai du référé précontractuel ainsi que l'introduction dudit référé entraînent tous la suspension immédiate et automatique de la possibilité de conclure le marché.

La loi dispose qu'un marché puisse être déclaré dépourvu d'effets par le juge compétent dans les trois cas prévus par la directive 2007/66 (article 2 quinquies, par. 2). À ce jour le juge grec n'a rendu que des arrêts ou ordonnances de rejet de telles demandes de déclaration (CdE 3204/2012, CdE, Comm. des sursis, 155/2012, 305/2012).

L'utilisation volontaire d'avis de transparence ex ante (comme d'ailleurs la soumission volontaire des pouvoirs adjudicateurs aux règles de publicité en ce qui concerne les marchés non visés par les directives) est répandue dans la pratique.

Des dommages – intérêts sont accordés dans les affaires de marchés publics. Le dommage est susceptible d'être recouvert d'après les principes géné-

raux du droit administratif relatifs à la responsabilité des entités publiques (en ce qui concerne les contrats administratifs) ou d'après les règles du Code Civil (en ce qui concerne les contrats de droit privé visés par les directives).

S'agissant des marchés non visés par les directives : a) certains, dont les concessions de services, sont soumis au contentieux des marchés visés par les directives (CdE, Comm. des sursis, 250/2012), et b) pour le reste, les opérateurs économiques concernés disposent des recours de droit commun (recours en suspension d'un acte de l'autorité adjudicatrice – personne publique, recours pour excès de pouvoir, action en réparation du préjudice, en ce qui concerne les marchés régis par le droit administratif).

Dans la pratique judiciaire hellénique, pour des raisons de célérité et d'efficacité, il s'observe une préférence pour les voies de recours qui affectent la décision d'attribution des marchés (référé précontractuel et recours pour excès de pouvoir).

Globalement, le système mis en place par la loi 3386/2010 s'avère efficace dans la pratique.

Conclusion et réforme

Question 14

En Grèce, comme d'ailleurs dans les autres pays européens où l'institution de la concession (de travaux et, surtout, de services) est une construction jurisprudentielle, l'aléa financier (le risque de l'exploitation) paraît le propre de la concession vis-à-vis des marchés. Le « transfert du risque » est assuré par les clauses contractuelles.

La jurisprudence (CdE, Comm. des sursis, 712/2012) n'a pas exclu a priori les partenariats public–privé institutionnels du champ d'application des règles relatives aux concessions.

La pratique et la jurisprudence affirment que les contrats de partenariat public – privé, comme moyen de financement privé, ont été plusieurs fois utilisés pendant ces dernières années de crise. Par contre, il n'y a pas encore de jurisprudence relative aux contrats à long terme et à leurs conséquences sur la concurrence.

Parmi les lacunes des directives de 2004, l'on pourrait signaler l'absence – exception faite pour les délais de réception des demandes de participation et de réception des offres – de règles imposant des délais stricts en ce qui con-

cerne le déroulement de la procédure avant que la décision d'attribution du marché soit prise.

Le recours à la procédure du dialogue compétitif et, d'une manière plus générale, aux négociations entre les pouvoirs adjudicateurs et les soumissionnaires, pourrait certes être renforcé par de nouvelles règles européennes. Néanmoins, il s'agit aussi d'une question de changement de « culture administrative », qui seul aurait pu produire des résultats tangibles.

En ce qui concerne les « procédures électroniques » deux lois récentes peuvent être signalées : la loi 4038/2012 instituant l'enchère électronique des marchés publics de fournitures et la loi 4155/2013, particulièrement ambitieuse, instituant le « Système National Electronique des Marchés Publics ». Si l'on ne voit pas pourquoi le marché ne pourrait pas s'adapter aux nouvelles règles de procédure, il reste à voir si l'administration hellénique, en pleine et douloureuse « restructuration » à cause de la crise, est prête à passer à un « monde sans papiers ».

Sur la base des éléments évoqués il est manifeste que les nouvelles règles annoncent un changement du droit européen dans la direction de la qualité et de la homogénéité des règles, pour autant que les Etats membres affirment leur volonté à s'y conformer. Par ailleurs, ce changement est capable d'influer positivement sur le droit grec une nouvelle fois. Ainsi qu'il a été indiqué précédemment, le droit administratif hellénique a été déjà appelé à s'adapter aux règles techniques des directives des marchés publics, ainsi qu'aux principes du droit européen régissant les procédures d'attribution des marchés. Afin d'assurer l'application efficace et uniforme des ces règles et principes par les pouvoirs adjudicateurs, une autorité administrative indépendante a été créée par la loi 4013/2011. L'on doit aussi ajouter que les règles du contentieux des marchés publics, surtout en matière de mesures provisoires, ont complètement changé : conformément à la directive 89/665, le référé précontractuel a remplacé la demande « traditionnelle » de suspension de l'acte unilatéral du pouvoir adjudicateur, qui n'était possible qu'aux cas où les conséquences dommageables de la décision contestée apparaissaient comme irréversibles ou difficilement réversibles et qui avait été censurée par la Cour de Justice comme non conforme à la directive 89/665 (v. *supra*, question 1).

HUNGARY

Anita Németh[1]

The context

Question 1

The first Public Procurement Act was adopted in 1995 in Hungary (Act XL of 1995 on Public Procurements, hereinafter referred to as: 'PPA of 1995' or 'the first PPA'). The 'mission' of the first PPA was to establish the grounds for a modern public procurement system and rules after the change of the political and economic regime, as well as to reach at least a partial harmonisation on the basis of the Europe Agreement (Association Agreement). The Act covered not only the scope and the rules on the public procurement procedures but founded a special institutional and remedy system (Public Procurement Council, since 2012 Public Procurement Authority; and in the framework of the independent Council the Public Procurement Arbitration Board, the special remedial body of first instance; see Answer 13).[2] This institutional system has been almost completely unchanged since 1995-96, contrary to the regulatory system which is ever-changing and problematic. The room for manoeuvring under the Europe Agreement was also utilised and the PPA of 1995 left possibilities for the application of certain preferential provisions.[3]

The second Public Procurement Act was passed in 2003 (Act CXXIX of 2003 on Public Procurements, hereinafter referred to as: 'PPA of 2003' or

---

1. *Dr. Anita Németh* – Attorney at law, official public procurement adviser, lecturer at the Faculty of Law of Eötvös Loránd University (ELTE), Budapest; former Head of the EU Law Department of the Ministry of Justice, Hungary.
2. This special institutional system was based on 'practical' considerations (aspects of independency and efficiency) instead of theoretical considerations.
3. See also: Dessewffy Anna – Németh Anita: 40 év után ismét lesz Magyarországnak közbeszerzési törvénye. Magyar Közigazgatás 1995/3. (*Anna Dessewffy – Anita Németh: After 40 years Hungary has a Public Procurement Act. In Hungarian Public Administration.*)

'the second PPA')[4] in order to ensure the full transposition of the public procurement acquis of the EC/EU and at the same time to utilise the experiences gained from the practice. The second PPA attempted to put together the Hungarian, generally stricter solutions with the European requirements and case law, and resulted in a three-level system with EC regime, national regime and a simple public procurement regime (below the national thresholds), together with the differences between the procedures of the classic contracting authorities and the utilities. This comprehensive 'Code of Public Procurements' amounted to 407 Articles and gave authorisations for several implementing Decrees.

The third Public Procurement Act of 2011 in force (Act CVIII of 2011 on Public Procurements, hereinafter referred to as: 'PPA' or 'PPA of 2011' or 'the third PPA')[5] served two main purposes: the simplification and more flexibility as well as the better implementation of certain policy goals such as the support to the SMEs. Even the number and the scope of the implementing Decrees were extended to reach a 'leaner' Act. Certain solutions erected from the strong policy goals were in conflict with the requirements of the EU.

The pre-history of the public procurements[6] *and the legal theory* could not prepare the groundwork well for the codification of public procurements in the early 1990s. However, remarkable 'oeuvres' were also published.[7] After the change of the regime a kind of renaissance of the private law approach could be observed.[8] Later, mostly the public lawyers turned to the exciting questions of the public contracts,[9] but these theories could not be implemented into the legislation (see also Answer 2).

---

4. The PPA of 2003 is available *in English* from the homepage of the Public Procurement Authority: http://kozbeszerzes.hu/letoltesek/66/
5. The PPA of 2011 (*entered into force on 1 January 2012*) is available *in English* from the homepage of the Public Procurement Authority:
http://kozbeszerzes.hu/data/documents/2013/08/12/PPA_2013_07_01.pdf
(Not official translation, prepared by the Public Procurement Authority. This translation is used in this Paper.)
6. See e.g.: Public supply Regulations of 1934, Law Decree No. 19 of 1987 on Competitve Negotiations.
7. See e.g.: Harmathy Attila: Szerződés, közigazgatás, gazdaságirányítás. Budapest, Akadémiai Kiadó, 1983. (*Attila Harmathy: Contract, public administration, economic management.*)
8. See e.g.: Act XVI of 1991 on Concession. (The Hungarian text – also in cases of other pieces of legislation – can be downloaded from www.njt.hu)
9. See e.g.: *Ádám Antal*: A közjogi szerződésekről. Jura 2004/1.; *Horváth M. Tamás*: A közigazgatási szerződések szabályozási koncepciója. Magyar Közigazgatás 2005/3.; *Kovács István*: Koncesszió – koncessziós szerződés. Gazdaság és Jog 1997/12.;

Nevertheless, it was unquestionable that *the topic of public procurement entails private and public law elements altogether, with the influence of the EU legislation*. It can be stated that the codification of the public procurements preceded the Hungarian theories, and the result of this (see below) confirms that it is *a sort of mixed area of law.*

Public procurements are regulated by a *separate Act (PPA) and it's implementing Decrees.*[10] The provisions of the PPA and the Decrees are *mandatory*[11] (contrary to the dispositive nature of the Civil Code[12]). The preparations and the tendering procedure before the conclusion of a public procurement contract are regulated in *quite a detailed and intervening manner* and also with the necessary guarantees (*public interests*). This cannot be regarded as a minimal regulation and these rules are enforceable. However, the 'outcome' of the procedure is a *contract* where the PPA requires the *Civil Code to be applied* as a background piece of legislation, together *with the special derogations* set out by the PPA.[13]

Molnár Miklós – Margaret M. Tabler: Gondolatok a közigazgatási szerződésekről. Magyar Közigazgatás 2000/10.; *Petrik Ferenc*: A közigazgatás aktus alakváltozása, a közszerződés. Magyar Közigazgatás 2005/5.; *Petrik Ferenc*: Közszerződés a közjog és a polgári jog határán. Gazdaság és Jog 2005/11.; *Tilk Péter*: A hatóság döntései és a hatósági szerződés az új eljárási törvény alapján. Magyar Jog 2006/2.

(Antal Ádám: On public law contracts, in Jura; Tamás Horváth M.: The regulatory conception of the administrative contracts, in Hungarian Public Administration; István Kovács: Concession – concession contract, in Economy and Law; Miklós Molnár – Margaret M. Tabler: Thoughts on administrative contracts, in Hungarian Public Administration; Ferenc Petrik: Transformation of administrative acts, the public contract, in Hungarian Public Administration; Public contract at the borderline of the public law and civil law, in Economy and Law; Péter Tilk: Decisions and the contract of the authority on the basis of the new Act on Administrative Proceedings, in Hungarian Law.)

10. See Article 182 of the PPA of 2011 on the authorisations.
11. See Article 3 of the PPA: 'Derogation from the provisions of this Act is authorised only to the extent that such derogation is expressly allowed by this Act. For the purposes of the application of the provisions of this Act as well as for the purposes of the issues which are not covered by an act of legislation, the objectives of the rules concerning public procurements and the basic principles of public procurement shall be observed in the course of preparing and the executing the public procurement procedure, concluding and performing the contract. [...]'
12. Act IV of 1959 on the Civil Code (hereinafter referred to as: 'the Civil Code').
13. See Article 3 of the PPA: '[...] The provisions of Act IV of 1959 on the Civil Code [...] shall be applied to the contracts concluded on the basis of a public procurement procedure, with the differences set out by this Act.'

The remedy system is also special[14] (see Answer 13), an administrative model was chosen instead of a pure court model. This means that the *special administrative body, the Public Procurement Arbitration Board* has competence and its proceedings are regulated by the PPA together *with the subsidiary Act on the General Rules of Administrative Proceedings and Services*.[15] The administrative decisions of the Arbitration Board can be reviewed by the *administrative and labour courts in an administrative litigation*. On the other hand, other legal disputes related to the public procurement contracts and civil law claims related to the public procurement procedures fall within the competence of a *civil court.*

There are *other kinds of challenges.*

The Union public procurement legislation is a framework-type, functionality-oriented set of laws driven by the internal market (but also with several detailed rules and extended case law) and the EU also tries to re-position the roles of the public procurement (sustainable public procurement). Due to the continental legal traditions and the procurement distrust, culture and the fight against corruption, the Hungarian public procurement regulations were generally more stringent, full of details, focusing on the traditional aspects of the procurements. The two approaches are different.

If the transposition is organic and to some extent detailed, the national legislation and jurisdiction can be confronted with the ever-developing Union case law. If the harmonisation leaves much room for the implementation in line with the functionality, the actors of the public procurement market and institutions will 'feel' legal uncertainty (e.g. in case of the notion of public body or other parts of the scope).[16]

In certain cases the Union requirements may 'be transformed' somehow in the national system and the matter can have a new meaning, special practice (e.g. in case of abnormally low tenders)[17] or be in conflict with the Union law.[18]

---

14. See the Part Five (Articles 133-166) of the PPA.
15. See Article 134(1) of the PPA: '(1) The provisions of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services [...] shall apply to the proceedings of the Public Procurement Arbitration Board, unless otherwise provided by this Act or the Government Decree based on the authorisation of this Act.'
16. See: Németh Anita: Közbeszerzés vagy beszerzés? Európai Jog 2013/1. 13-27. (*Anita Németh: Public procurement or procurement? In European Law.*)
17. See: Dezső Attila: Aránytalanul alacsony ár az Európai Unió közbeszerzésében. Európai Jog 2013/2. 24-30. (*Attila Dezső: Unreasonably low price in the public procurements of the EU. In European Law.*)
18. See e.g.: Case C-575/10 *Commission v Hungary*.

More challenges can be observed at the technical level. (See also Answer 14.)

The boundaries of EU public procurement law

Question 2

Public procurement contracts are not defined by the PPA. Under the provisions on the scope of the PPA, Article 5 stipulates:

> 'Public procurement procedures shall be conducted by organisations defined as contracting authorities (entities) *with the aim of concluding contracts for pecuniary interest for the realisation of* purchases (procurements) of specified subject and value (public procurement).'

There are provisions concerning the contracting authorities (entities), the subject-matters of the public procurements, the exceptions, estimated values and thresholds as important elements of the 'definition' of public procurement.[19] The 'final', 'fifth step' in the 'test of the definition of public procurement' is the notion of the 'contract', where the only codified requirement is the 'for pecuniary interest' and the related subject-matter.[20]

The PPA provides for three other relevant rules: the definition of the economic operator (Article 4, point 9), the subsidiary role of the Civil Code (Article 3, third sentence) and a rule under the Part Four on the public procurement contracts [Article 124(1)]:

> '*economic operator*: any natural or legal person, any company without legal personality, individual firm, any entity which has legal capacity under its personal right who or which *offer on the market* the execution of public works and/or the construction of any work, the supply of goods or the provision of services;'

> 'The provisions of Act IV of 1959 on the Civil Code [...] shall be applied to the contracts concluded on the basis of a public procurement procedure, with the differences set out by this Act.'

---

19. See Articles 6-18 and 120 of the PPA.
20. See: Németh Anita: Közbeszerzés vagy beszerzés? Európai Jog 2013/1. 13-27. (*Anita Németh: Public procurement or procurement? In European Law*.)

'Contracts shall be concluded based on successful public procurement procedures, in writing, with the entity (person) winning the procedure – in the case of joint submission of the tender, the entities (persons) winning the procedure – in accordance with the final terms communicated in the public procurement procedure, the content of the draft contract and the tender.'

This means that all kinds of agreements, contracts in the light of the Civil Code can be treated as a public procurement contract, and at the same time this approach allows applying the *functional* viewpoint of the EU and being in accordance with the case law of the Court of Justice of the European Union (ECJ).

The general definition of the *public contracts* (*public administration contract*) is missing from the legal system. In the theory several articles studied the issue and analysed the criteria.[21] On the basis of the theoretical works a legislative proposal (Act) on the general rules of the public contracts was elaborated by the Ministry of Justice in 2006, but this Act was never adopted.

Certain questions of competences in connection with specific public contracts were also on the agenda of the courts.[22]

Concession contracts have two possible meanings in the Hungarian legal system. The definitions of the public service and works concession of the

21. See e.g.: *Ádám Antal*: A közjogi szerződésekről. Jura 2004/1.; *Horváth M. Tamás*: A közigazgatási szerződések szabályozási koncepciója. Magyar Közigazgatás 2005/3.; *Molnár Miklós – Margaret M. Tabler*: Gondolatok a közigazgatási szerződésekről. Magyar Közigazgatás 2000/10.; *Petrik Ferenc*: A közigazgatási aktus alakváltozása, a közszerződés. Magyar Közigazgatás 2005/5.; *Petrik Ferenc*: Közszerződés a közjog és a polgári jog határán. Gazdaság és Jog 2005/11.

    (Antal Ádám: On public law contracts, in Jura; Tamás Horváth M.: The regulatory conception of the administrative contracts, in Hungarian Public Administration; Miklós Molnár – Margaret M. Tabler: Thoughts on administrative contracts, in Hungarian Public Administration; Ferenc Petrik: Transformation of administrative acts, the public contract, in Hungarian Public Administration; Public contract at the borderline of the public law and civil law, in Economy and Law.)

22. 1/2012 (XII.10.) KMK.-PK. vélemény a pénzügyi támogatásokkal kapcsolatos perek hatásköri kérdéseiről; A Kúria joggyakorlat-elemző munkacsoportjának összefoglaló véleménye a pénzügyi támogatásokkal kapcsolatos polgári és közigazgatási ügyek joggyakorlatáról [*Opinions of the courts in respect of competences (civil or administrative courts) in litigations related to legal relationships involving financial support.*] http://www.lb.hu/sites/default/files/Penzugyi_tamogatasok_osszefoglalo_velemeny.pdf http://www.lb.hu/hu/kollvel/12012-xii10-kmk-pk-velemeny-penzugyi-tamogatasok kal-kapcsolatos-perek-hataskori-kerdeseirol

PPA are in line with the approach of the EU, even with the new Directives[23] (see Answer 14). Act XVI of 1991 on Concession (and Act CXCVI of 2011 on the National Assets) enables the State and local governments to enter into agreements (concession contracts on the basis of a concession/tendering procedure) with private individuals and companies, both domestic and foreign, regarding grants of concessions temporarily in a number of areas of activity reserved exclusively to the state or local governments.

Problems might arise when a special sectoral Act provides for a special regime (even without a concession/tendering procedure) if it covers a concession-like situation[24] which can be evaluated as a matter of public procurement in the light of the Union notion. In these cases the legislator should take into account the scope of the EU public procurements and codify or respect the principles and rules laid down by the Treaty and Directives (typically in case of non-priority services[25]). (Other sub-questions are answered in the following points.)

Question 3

The in-house situation was introduced with great debate, *gradually and by codification* into Hungarian law. On the basis of the case law of the EU, the amendment of Act XXIX of 2005 to the PPA of 2003 first incorporated those conditions under which an agreement was not to be considered as public procurement contract.[26] Due to the development of the public procurement law of the EU (further case-law),[27] the extension of the in-house was possible and necessary.[28] The broader interpretation of the 'similar control' (structural criterion) ensured that more contracting authorities jointly can exercise these control rights also.

23. Proposals for new Directives: http://www.europarl.europa.eu/committees/en/ imco/ subject-files.html?id=20120214CDT38033
24. See also Article 12(3), (8) on the exclusive economic activities of the State and local governments of the Act CXCVI of 2011 on the National Assets.
25. See contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC, and Annex 4 to the PPA.
26. See Article 2/A of the PPA of 2003.
27. See in particular: Cases C-324/07 *Coditel Brabant*, ECR [2008] I-08457, C-573/07 *Sea*, ECR [2009] I-08127.
28. In the legal practice problems arose in connection with the single company. In this respect the joint ownership was not recognised by the courts. See: EBH2003. 884.; Pécsi Ítélőtábla Cgf. V. 30 125/2007/2. sz. ítélete (judgements of the courts).

Thus, Article 9(1)(k) of the PPA of 2011 contains a completed[29] in-house situation among the exceptions:

'The procedure laid down in this Act *shall not apply to agreements* which are

(ka) concluded by a contracting authority defined in Article 6(1)(a)-(d)[30] and an economic operator solely owned by that authority, and over the economic operator, with consideration to its task related to the implementation or the organisation of the implementation of the public task or public service, the contracting authority fully possesses supervisory rights in relation to management tasks and the strategic objectives and substantial decisions of the economic operator can be fundamentally influenced by the contracting authority, on condition that at least 80% of the annual net revenue of the economic operator is derived from the performance of the contracts to be concluded with the single member (shareholder) contracting authority in the given financial year, following the conclusion of the contract;

(kb) concluded by a contracting authority and an economic operator whose shares or business stake are exclusively owned by that contracting authority and by other contracting authorities defined in Article 6(1)(a)-(d), and over which, with consideration to its task related to the implementation or the organisation of the implementation of the public task or public service, the contracting authorities jointly, fully possess comprehensive supervisory rights in relation to management tasks and whose strategic objectives and substantial decisions can be fundamentally influenced by the contracting authorities, on condition that at least 80% of the annual net revenue of that economic operator is derived from the performance of the contracts to be concluded with the contracting authority members in the given financial year, following the conclusion of the contract;'

See also the related provisions [Article 9(2)-(4) of the PPA]:

'(2) The provisions set out in paragraph (1)(k) shall be applicable if the economic operator according to paragraph (1)(k) is owned by the state; in this case the additional conditions according to paragraph (1)(k) shall be applicable with relation to the legal entity exercising ownership rights (the organ directed by the minister, or if applicable, by other person directing a central administrative organ) as a contracting authority.

(3) Contracts specified in paragraph (1)(k) may be concluded for a definite period of time, for not more than five years, unless otherwise stipulated by law. For the purposes of paragraph (1)(k), the counter value of public services provided to third parties on the basis of the contracts shall be regarded as deriving from the performance of those contracts regardless whether this counter value is paid by the contracting authority or by the person using this public service.

29. See Article 9(1)(kb) of the PPA.
30. These are the so-called classic organisations, the contracting authorities.

(4) The criteria laid down in paragraph (1)(ka) and (kb) shall be fulfilled throughout the full term of the contract. If the criteria laid down in paragraph (1)(ka) and (kb) are not fulfilled anymore the contracting authority may and shall terminate the contract with a period of notice that permits for it to ensure the implementation of the public task (to conduct the public procurement procedure).'

It is clear that the solution of the Hungarian regulation only covers the so-called *vertical in-house situations* of the so-called *classic* contracting authorities. Furthermore, it is emphasised in connection with the in-house situation that the contracting authorities shall have tasks related to the implementation or the organisation of the implementation of the public task or public service, which criterion also must be fulfilled.

In our opinion, some items of the new provisions of the in-house can be evaluated as steps back; such as the reduction of the economic criterion from 90% to 80% (deterioration of the competition aspects),[31] raising the duration of the 'in-house agreement' without competition from maximum 3 to 5 years, and the abolition of the requirement of making impact analysis (neglecting the control, efficiency aspects).[32]

As to the *public-public cooperation*, the exceptions developed in the case law of the EU have *not* yet been generally introduced *into the PPA*. *Only certain specific grounds for exception* have been inserted, such as Article 9(1)(l) and (5)(h),[33] by the inspiration of different cases of the ECJ. However, it is evident that public-public cooperation forms can be more extended.

---

31. Although, the new Directives also provide for the same limit of 80%. (The Proposals contained first 90% in this respect.)

32. See Article 9(1)(k) and (3)-(4) of the PPA of 2011 and – in comparison with – Article 2/A(1)(b) and (4)-(5) of the PPA of 2003.

33. Article 9(1)(l) of the PPA: 'The procedure laid down in this Act shall not apply to the provision of the obligatory public educational task of the local government through a non-public institution maintaining body pursuant to the Act LXXIX of 1993 on Public Education, and the transfer of the institution maintaining rights of a public educational institution to a non-public maintaining body.'

(The ministerial reasoning refers to the Case C-109/92 *Wirth v Landeshauptstadt Hannover*, ECR [1993] I-06447 and to the field of non-economic services of general interest.)

Article 9(5) of the PPA: 'The procedure laid down in this Act shall not apply to the services in the following cases: [...]

(h) when the implementation of a public task is transferred by a contracting authority defined in Article 6(1)(a)-(c) to another contracting authority defined in Article 6(1)(a)-(c) on condition that the contracting authority shall implement the public task totally independently from the transferring authority, assuming all the responsibility and acting without any lucrative purpose.'

The case law of the EU and the Hungarian PPA with its mandatory nature can be in conflict in respect of the horizontal public-public cooperation. The interpretation requirement 'in the light of the EU law' and the narrow and special exceptions related to the public-public cooperation can raise questions. In our view (and taking into account the interpretation approach of the Public Procurement Arbitration Board and the courts), the national legislation can be more stringent than the Union law in this respect, on the other hand, the codified and available exceptions of the PPA shall be interpreted in line with the EU law.

Some cases in the field of horizontal public-public cooperation[34] and the working document of the European Commission[35] were not considered enough to codify the conditions for a broader exception into the PPA. However, the new Directives including the in-house as well as the public-public horizontal situations can be a better basis for national codification.[36]

As part of the freedom of administration (public task/service provision), the Act on Local Governments of Hungary stipulates that local governments (body of representatives) may establish budgetary organs, economic organisations, non-profit organisations or other organisations, as well as conclude contracts with natural and legal persons or organisations not having legal personality. Local governments may establish associations having legal personality in order to perform more efficiently and sensibly some of their public and administrative tasks and duties.[37]

It is clear that the in-house 'exception' of the PPA refers to agreements. It means that this is a contractual approach: Every kind/type of *agreement (contract)* can serve as a basis for this exception.[38] At the same time, this question

[See Case C-264/03 *Commission v France*, ECR [2005] I-08831, paragraph 54, and Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), SEC(2011) 1169 final, Brussels, 4.10.2011, p. 19-21.]

34. See Cases C-480/06 Commission v Germany, ECR [2009] I-04747, C-159/11 Ordine degli Ingegneri della Provincia di Lecce and Others, not yet published.
35. Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), SEC(2011) 1169 final, Brussels, 4.10.2011.
36. See Article 11 (Contracts between entities within the public sector) of the new Directive on public procurement.
37. See more precisely in Articles 41(6) and 87 of Act CLXXXIX of 2011 on Local Governments of Hungary.
38. Agreements (contracts) can be also understood between the contracting authority (authorities) and its (in-house) company.

is *left open* at the special public-public exceptions in the PPA (transfer of public tasks by whatever means), and left to the domain of the public law regulations.

Question 4

The scope of the Public Procurement Directives seems to be wide and functional (see the notion of public contracts and the three main types of this contract). However, the case law of the ECJ indicates that the boundaries are not so evident. The new Directives – in our evaluation – intend to deal with this issue and provide for a more precise determination of the scope (see e.g. the topic of the public-public cooperation); however, several considerations are left in the Preamble [see paragraph (3)-(4) with their sub-points of the Directive on public procurement[39]]. According to the Preamble, this reasoning does not broaden the scope but defines it more clearly, obviously also with regard to the developments of the case law.

Among these considerations the Preamble emphasises that the EU rules on public procurement are not intended to cover all forms of public actions, nor all forms of disbursement of public money but only those aimed at the acquisition of supplies, services or works for consideration by means of a public contract, and such acquisitions of works, supplies or services should be subject to Directives, whether they are implemented through purchase, leasing or other contractual forms.[40]

In this respect the notion of procurement, the notion of acquisition (and the contractual forms) should be taken into account.

Therefore, *the contracts for the sale or utilisation of public assets or privatisation agreements* fall also outside the scope of the PPA. However, mixed arrangements may occur. (See also Answers 5 and 6.)

Initially, *the acquisition or rental of land, existing buildings or other immovable property or rights thereon* was covered by the Hungarian public procurement rules, but later due to the Union exclusion and non-relevance of internal market, the PPA also excluded these transactions from its scope.[41]

---

39. Proposal for a Directive on public procurement, 2011/0438 (COD). http://www.europarl.europa.eu/document/activities/cont/201309/20130913ATT71292/20130913ATT71292EN.pdf
40. See Paragraph (3) of the Preamble of the new Directive on public procurement.
41. See the definition of the supply contract in Article 7(2) of the PPA and the exclusions to the service contracts in Article 9(5)(a) of the PPA.

As to the exclusion of certain *in-house situations*, see Answer 3, in respect of the coverage of the *service concession*, see Answers 2, 6 and 14.

We see one rather grey or complex and debated area: In the field of acquisition of services the uncertain borderlines between the procurements and authorisation and licensing schemes (on a selective basis) due to the broad notion of acquisition and services. (See also Answer 2.)

At the same time we consider that all contracts and interventions of the public sector (even in the cases of the inverse of procurements) should take into account the principles and rules of the Treaty on the Functioning of the Europen Union. (Also for Answer 7.)

Question 5

The mixed arrangements (part procurement, part non-procurement) are *not regulated* by the PPA in respect of situations similar to the cases of Loutraki (C-145/08 and C-149/08) and Mehiläinen (C-215/09). However, it is not excluded that in similar situations the PPA *could be interpreted in the light of these cases* (no mandatory provisions against this interpretation and Article 5 of the scope of the PPA[42] leaves room for the functional interpretation).

The new Directives would contain more precise provisions on mixed procurements in accordance with the case law of the ECJ.

The PPA *provides for 'other types' of mixed situations*, regulated already by the Directives; e.g. mixed subject-matters of public procurement,[43] applicable procedures in terms of non-priority services (Annex 4 of the PPA) and priority services (Annex 3 of the PPA),[44] or mixed activities of the utilities.[45]

In the legal practice certain complex contracts caused difficulties and the determination and delimitation of the contract (utilisation of public assets/rental or service concession contract); for instance, in cases where the contracting authority utilised the public spaces for advertising, when at the same time ordering services.

The Public Procurement Arbitration Board stated that the fact that a transaction also contains parts not qualified as public procurement (utilisation of

42. Article 5 of the PPA: 'Public procurement procedures shall be conducted by entities defined as contracting authorities (entities) with the aim of concluding contracts for pecuniary interest for the realization of purchases (procurements) of specified subject and value (public procurement).'
43. See Article 8 of the PPA *in the Annex* of this Paper.
44. See Article 19(2) of the PPA *in the Annex* of this Paper.
45. See Article 20(2)-(4) of the PPA *in the Annex* of this Paper.

public assets) has no relevance. If in the framework of the transaction a public procurement is to be realised (services in connection with a complex advertising activity), it shall apply public procurement procedure irrespective of the classification of the part or the whole transaction. In this context the questions of the main object of the contract as well as the severability were touched upon, stating in the latter that the exploitation right and the complex advertising services were not separable in that case. The Arbitration Board finally qualified the transaction as service concession contract.[46]

The general principles of EU law: public procurement law and beyond

Question 6

The Hungarian legislation has different approaches to so-called non-covered procurements.

Below the Union thresholds the national regime, national public procurement procedures shall apply (Part Three, Articles 119-123 of the PPA).

The *national thresholds* in the year 2013 are:[47]

In case of classic contracting authorities / general rules:
- public supply and service contracts: HUF 8 million (approximately: € 26,667)
- public works contracts: HUF 15 million (approximately: € 50,000)
- public works concession contracts: HUF 100 million (approximately: € 333,333)
- public service concession contracts: HUF 25 million (approximately: € 83,333)

---

46. See e.g.: D.1000/15/2011. (Decision of the Arbitration Board), FB 19.Kpk. 45.731/2007/10. végzés. (Decision of the Court). (Public procurement decisions of the Arbitration Board and courts can be downloaded from: http://www.kozbeszerzes.hu/jogorvoslat/hatarozatok-listaja/).
47. The national thresholds of public procurements are determined by the annual Budget Acts of Hungary. See Article 10 of the PPA and Act CCIV of 2012 on the Central Budget of 2013 of Hungary.

In case of utilities / special rules:

- public supply and service contracts: HUF 50 million (approximately: € 166,667)
- public works contracts: HUF 100 million.

Below the national thresholds there is no requirement for tendering.

The *scope of the national regime* is different from the Union regime: *Special exclusions* were determined.[48] The number and the scope of these exceptions grows increasingly with the intention not to apply a tendering procedure.

A somewhat *lighter regime* is provided for the national procedures,[49] and the contracting authority (entity), according to its choice, shall proceed in line with the *Union regime* (Part Two of the PPA), *with the differences* stipulated in Articles 122 and 122/A of the PPA, or shall conduct *a procedure developed 'freely'* but in a manner pursuant to Article 123 of the PPA.[50] In the latter case these *framework rules*[51] *were established* on the relevant primary law (principles) of the EU and Commission Interpretative Communication on the Community law applicable to contract awards not, or not fully, subject to the provisions of the Public Procurement Directives.[52] (See also Answer 9.)

As to the *service concession contracts*, the scope of the PPA also extends to these concessions with two 'derogations.' The contracting authority shall apply the national regime even if the value of the service concession contract is equal to or greater than the Union threshold.[53]

In respect of service concessions, the PPA and the Act on Concession can be in collision; therefore, (and taking into account the present exception of the service concession contracts under the Directives) the PPA gives priority to the Act on Concession.[54]

As far as the *non-priority services* are concerned (Annex 4 of the PPA), the scope of the PPA also extends to these services with a 'derogation': the

---

48. See Article 120 of the PPA *in the Annex* of this Paper.
49. The 'national notices' are published in the Public Procurement Bulletin, the Official Journal of the Public Procurement Authority.
50. See Article 121 of the PPA.
51. See Article 123 of the PPA *in the Annex* of this Paper.
52. Commission Interpretative Communication (2006/C 179/02).
53. See Articles 119 and 19(4) of the PPA.
54. See Article 9(1)(i) of the PPA: 'The procedure laid down in this Act shall not apply, if the service concession falls under the scope of the Act on Concessions, noting that the contracting authority shall immediately notify in writing the Public Procurement Authority of the procedure;'

contracting authority (entity) is allowed to apply the national regime even if the value of these service contracts is equal to or greater than the Union threshold.[55]

However, certain non-priority services are excluded from the scope of the national regime.[56]

There are *special rules or tendering procedures* in certain areas where Directive 2004/18/EC established specific exclusions (Article 16); e.g. in cases of certain employment contracts or arbitration and conciliation services. Different considerations are behind these Union exclusions, and – in our understanding – in some cases the special procedures create a ground for the exclusion.

Similarly, in *non-procurement cases*, for instance in matters of the utilisation of public assets, special tendering procedures may apply.[57]

It is clear that in these cases there is a coverage, but it is not full at all.

Question 7

Unilateral administrative measures are covered by the principles of non-discrimination/equal treatment and transparency *if the administrative act falls under the scope of the Act CXL of 2004 on the General Rules of Administrative Proceedings and Services* (see the procedural principles of the Act).

If a case comes *under the scope of Directive 2006/123/EC on services in the internal market*, these principles are also applied (see *Act LXXV of 2009 on the General Rules of Providing Services* transposed Directive 2006/123/EC together with other modifying Acts).

Certain sectoral Acts also contain these principles.

Problems may arise when the administrative measure is not an action of the administrative authority (not covered by the Act on the General Rules of Administrative Proceedings and Services) but regulated by a special, sectoral piece of legislation.

---

55. See Articles 119 and 19(2) of the PPA.
56. See Article 120 of the PPA. See also Article 19(3) of the PPA:

    '(3) As regards legal services specified in Annex 4 the contracting authority shall not conduct a public procurement procedure, but the contract notice pursuant to a separate piece of legislation shall be published concerning the conclusion of a public procurement contract reaching EU thresholds and such a public procurement contract shall be included in the annual statistical summary drawn up on the basis of a standard form specified in a separate piece of legislation.'
57. See in particular: Act CVI of 2007 on the State Assets, Act CXCVI of 2011 on the National Assets, Act CLXXXIX of 2011 on Local Governments of Hungary.

If a decision of the administrative authority violates the freedom of competition, the Hungarian Competition Authority has competence under the Competition Act.[58]

Public procurements and general EU law, including competition and State aids law

Question 8

One of the most sensitive issues of public procurement is the 'what to buy' question and the related requirements and guarantees preventing the abuses of the contracting authorities (entities) in respect of their possible discriminative preferences.

In Case Contse (C-234/03) referred to – in our view – the reasoning of the ECJ was founded on pure internal market terms, because the referring national court based its questions on the fundamental rules laid down by the Treaty.[59] The subject-matter of the case and the disputed elements were not covered by the secondary legislation (Directive 92/50/EEC).[60]

It is *not excluded* that a decision of the contracting authority (entity) may be treated according to the fundamental rules by the primary legislation of the EU (as also part of the national legal system). *However, if the Union second-*

---

58. See Article 85 of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

    Article 85(1)-(2): '(1) Where in the course of its operation the Hungarian Competition Authority finds that any public administrative resolution violates the freedom of competition, it shall request the public administrative body to amend or withdraw the resolution in question. [...]

    (2) Where such a public administrative body fails to comply within 30 days with the request defined by the above Section (1), the Hungarian Competition Authority may seek a court review of the resolution of such a public administrative body violating the freedom of economic competition, except in cases where the law excludes a court review of such public administrative resolutions. No such claim may be lodged after one year has elapsed from the entry into force of such a resolution, and no application for justification may be submitted where the time limit is missed.'
    http://www.gvh.hu/domain2/files/modules/module25/1042494F32220B4B9.pdf
    (Hungarian Competition Act *in English*)
59. See C-234/03, paras 23-24 of the judgement.
60. See C-234/03, paras 22, 48 of the judgement.

ary legislation and the national rules harmonised provide for the principles and detailed rules, the case will certainly be treated on this basis.

At the same time we must state that the special and detailed national legislation is still more familiar for the legal practitioners than the primary EU law and related cases.

Nevertheless, *in some decisions of the Public Procurement Arbitration Board direct references were made to the Case Contse (C-234/03),* but the decisions were based on the relevant provisions of the PPA.[61]

In similar cases (and as to the technical specifications, qualification/suitability requirements and evaluation criteria) the necessary principles and provisions are provided by the PPA and implementing Decrees,[62] and the jurisdiction is in line with the ECJ's.

This means that there are limitations and guarantees in respect of the 'what to buy' question (but in this framework there is also room for manoeuvring), and infringements in this field are quite frequent.

It would be a separate topic to analyse the relationship between the Union 'imperative requirements in the general interest' and 'the principle and rule of necessity (and proportionality)' under the PPA. (See also Answers 9 and 11.)

Question 9

Competition and other policies or certain special rules can be in a conflict in a different manner.

Transparency International Hungary (TI-HU) prepared *a study* in 2011 on the elements distorting competition in the PPA of 2003.[63] This study listed 14

---

61. See: D.410/22/2011., D.408/26/2010., D.27/9/2008. [FB 25.K.31.239/2008/4.], D.478/6/2007. (Decisions of the Arbitration Board and the Judgement of the Court).
62. See the principles (Article 2) of the PPA *in the Annex* of this Paper. In respect of the technical specifications see Articles 26-28 of the Government Decree No. 310/2011. (XII.23.) Korm. on the way of certification of suitability and verification of the non-existence of the grounds for exclusion *as well as the definition of public procurement technical specifications in public procurement procedures.* (Available *in English*:) http://kozbeszerzes.hu/data/documents/2013/08/12/Gov._Decree_310_2011_23_December_from_1st_July_2013.pdf

    In respect of the qualification/suitability requirements see Article 55(3) of the PPA *in the Annex* of this Paper.

    In respect of the evaluation criteria, see Article 71(3)-(4) of the PPA *in the Annex* of this Paper.
63. Competition distorting elements in the effective Public Procurement Act. Study by the Transparency International Hungary. April 11, 2011. http://www.transparency.hu/uploads/docs/competition_distorting_eng_small.pdf

topics where – in the view of the TI-HU[64] – the provisions of the Act distort competition, open opportunities for misuse, and thus pose a risk of corruption on public procurement procedures in Hungary.

The new PPA of 2011 'solved' some of the problems among these issues but still contains provisions criticised by the study and by others. We highlight only some more serious concerns.

Although in the so-called national procedural regime (generally, in public procurements under the Union thresholds) it is permitted to apply the *so-called 'three-bid mock-procedure'* (a procedure without prior publication of a notice), if the single precondition is fulfilled; specifically, if the estimated value of the public supply or service contract does not reach HUF 25 million (approximately: € 83,333) or the estimated value of the public works contract does not reach HUF 150 million (approximately: € 500,000). In this procedure the contracting authority shall send an invitation to tender to at least three tenderers simultaneously and directly. The latest modification of the PPA abolished (in consultation with the European Commission) the former compulsory requirement that only SMEs were to be involved in these procedures.[65]

It might be noted that these public procurement contracts represent lower values, but at the same time the following statistics should also be considered: Around 80% (according to the number of cases) of the Hungarian public procurement procedures take place in the national regime, which represent about 20% of the public procurements in value; and 54% of these national procedures were negotiated procedures without prior notices, in 90% of which these 'three-bid' procedures were applied, in 2012.[66]

Another issue may be the so-called *reserved public procurements*, where the contract is published in advance, but only those tenderers can participate in the competition whose revenues did not reach a certain threshold in the previous year. It is not reasonable to maintain rules (even in the national regime) that are easily circumvented, limiting the possible competition and represent only apparent advantages for SMEs.[67]

The provision stating that *a subcontractor intended to be involved in the performance of the contract for more than 25% of the value of the public*

---

64. Together with the view of the Foundation for Modern Public Procurement.
65. See Article 122(7)-(8) of the PPA *in the Annex* of this Paper. (See also Article 122/A of the PPA.)
66. See the Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 6, 98, 100. http://www.parlament.hu/irom39/10294/10294.pdf
67. See Article 122(9)-(10) of the PPA *in the Annex* of this Paper.

procurement shall automatically qualify as a bidder (joint tenderer with joint liability) has a direct impact on the freedom of bidding and cooperation, and may also distort competition.[68] We must add that different considerations were behind this 25%-rule.

Transparency and efficiency and fair competition can also be in conflict. Nevertheless, the PPA favours *transparency* (e.g. maintains the openness of the opening of the bids,[69] or the concluded public procurement contract has to be published[70]), but also introduced *certain measures* to enhance the prevention of the collusion. For instance, in the course of the provision of additional information (before the time limit for the submission of tenders) the contracting authority (entity) may not disclose which of the economic operators has asked for the information, and in the open procedure the economic operators who have also received the given additional information may not be referred to either.[71]

Qualification (suitability) requirements may also be crucial, although the PPA requires the respect of the principle and rule of necessity and proportionality,[72] and the law practice is consistent in that, for instance the minimum yearly turnover or the references in value which economic operators are required to have, shall not exceed the estimated contract value, while the new Directive would introduce a 'two times' limit.[73]

Applicants continue to challenge the qualification (suitability) requirements of the notices in order to be able to participate in the public procurement competition. According to the latest Report of the Public Procurement Authority, the number of this kind of infringements is still high.[74]

We also consider that long term contracts, framework agreements and centralised systems can have great influence on the market and the possible competition. (See Answer 14 in respect of the long term contracts.) Therefore, the newly introduced[75] *possible extension of the maximum term (four*

---

68. See Article 26 of the PPA *in the Annex* of this Paper. See also Article 25(6) of the PPA: '(6) Joint tenderers are jointly liable for the performance of the contract to the contracting authority.'
69. See Article 62(2)-(5) of the PPA *in the Annex* of this Paper.
70. See Article 31 of the PPA.
71. See Article 45(5) of the PPA *in the Annex* of this Paper.
72. See Article 55(3) of the PPA *in the Annex* of this Paper.
73. See Article 56(3) of the new Directive on public procurement.
74. See the Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 87.
75. See Article 109(5) of the PPA (as modified by the Act CXVI of 2013) *in the Annex* of this Paper.

years) of the framework agreement can be criticised; albeit it is based on the Directive.[76] Different systems of centralised public procurements have been established in Hungary,[77] where framework agreements are typically applied.

There is a *special system* 'extracted from the normal system' of public procurement: Under a Government Decree,[78] the central administrative organ, police and public hospitals (etc.) are obliged to procure goods and services from prisons capable of providing them. There is no opt-out from the 'obligation to supply.' Though this increases the internal employment of the prisons (social considerations), at the same time it excludes competition and also achieves contrary aims.[79]

Finally, those rules or practices can be mentioned which not only limit but also generally exclude competition, e.g. exceptions (certain national exceptions, exceptions related to 'semi-security' reasons), splitting of the contracts, in-house situations, non-well-founded special or exclusive rights (also by the legislation of the State).

Question 10

National, regional and local authorities have the freedom to define, in conformity with Union law, services of general economic interest (SGEIs), their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue its public policy objectives.[80]

In the Hungarian legal system we cannot find a systemic legal approach; for instance, in respect of definition of the SGEIs and the relationship between the public procurement rules and state aid rules, however the EU rules should be implemented or applied.

---

76. See Article 32(2) of the Directive 2004/18/EC.
77. See the so-called governmental centralisation [in respect of certain essential products and services for the administration, such as communication devices, PC, other office techniques, furniture, papers, vehicles – Government Decree No. 168/2004. (V.25.) Korm.], and the centralisations in the health sector [Government Decree No. 16/2012. (II.16.) Korm. and No. 46/2012. (III.28.) Korm.].
78. See Government Decree No. 44/2011. (III.23.) Korm.
79. See: Tünde Tátrai and Györgyi Nyikos: The uses and abuses of public procurement in Hungary, in Charting a Course in Public Procurement Innovation and Knowledge Sharing, PrAcademics Press (edited by Gian Luigi Albano, Keith F. Snider and Khi v Thai), Boca Raton, Florida, USA, 2013, p. 44.
80. See e.g. the Preamble (3c) of the new Directive on public procurement.

It is interesting that the new Civil Code[81] includes a rather general approach stating under the 'definition' of the 'public service contract' (Article 6:256): 'By concluding *public service contracts*, service providers shall be obliged to provide users with *services of general economic interest*, and users shall be obliged to pay fee for such services.'

There is no reference in the PPA as to the SGEIs, but the functional scope of the PPA can cover the cases of outsourcing public services. Act on Concession (and Act on the National Assets) also has to be taken into account. (See Answers 2, 6 and 14.)

At the same time, if we take the exceptions under the PPA, only one exception can be found due to the *specific EU and Hungarian rules* (special competition/tendering rules; see Regulation 2007/1370/EC on *public passenger transport services* by rail and by road; Act XLI of 2012 on Passenger Transport Services):

Article 9(1)(j) of the PPA: *'The procedure laid down in this Act shall not apply to the conclusion of public procurement contracts on public passenger transport services by road and by rail under the Act on Passenger Transport Services; however, in the case of public passenger transport services by bus or tram, only if the contract is considered a service concession; the contracting authority shall notify within three days in writing the Public Procurement Authority of any tender under the Act on Passenger Transport Services;'*

According to the Act on Passenger Transport Services: If a public (passenger transport) service contract qualifies as concession contract under the PPA, the special tendering procedure of the Act on Passenger Transport Services shall be applied (with certain exceptions) before the conclusion of the contract.[82]

There are other *special pieces of legislation*. For instance, Act CLXXXV of 2012 on Waste confirms the application of the PPA in case of *waste management public services*, stating that the local governments shall apply the public procurement procedure of the PPA for the supply of waste management public services, with regard to the exceptions of the PPA.[83]

In the field of *water public services and water utilities services*, the application of a tendering procedure is also a requirement.[84]

---

81. Act V of 2013 on the Civil Code (enters into force on 15 March 2014).
82. See Article 23(1)-(2) of the Act XLI of 2012 on Passenger Transport Services.
83. See Article 33(1)-(3) of the Act CLXXXV of 2012 on Waste.
84. See Act LVII of 1995 on Water Management, Act CCIX of 2011 on Water Utility Services.

Government Decree No. 37/2011. (III.22.) Korm.[85] on procedures relating to the State aids implies the provisions on the compensations for the public services in line with the acquis of the EU.[86] It is the State Aid Monitoring Office's task to ensure that State aid in Hungary is granted in accordance with the State aid rules of the European Union.

There are also certain pieces of legislation[87] where the Government established exclusive right for a designated company and the Government Decrees contain reference to the application of 2012/21/EU Commission Decision.[88]

Strategic use of public procurement

Question 11

In Hungary a gradual shift can be detected towards the green and social public procurement – at least at the policy level. More precisely*, the importance of sustainable public procurement has been emphasised, while in the general attitudes and in practice the strategic use of public procurements is not so widespread. However, the SMEs supporting policy and practice is quite strong, but at the same time also controversial (see Answers 1 and 9).*

It is interesting how Hungarian public policy and the actors of the public procurements position the public procurement in respect of the traditional and the complementary objectives.

The PPA of 2011 has incorporated into the purposes of the Act the 'new' goals:[89]

85. Goverment Decree No. 37/2011. (III.22.) Korm. on procedures relating to State aid measures under Article 107(1) of the Treaty on the Functioning of the EU and the regional map.
86. See Articles 19-21 of the Decree.
87. See e.g.: Government Decree No. 5/2011. (II.3.) Korm. on the National Information Infrastructure Development Programme (and see the National Information Infrastructure Development Institution), Government Decree No. 128/2012. (VI.26.) Korm. on Certain Rules related to the Operation of the National Asset Management Company.
88. Commission Decision 2012/21/EU on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.
89. Article 1 of the PPA.

This Act regulates public procurement procedures and rules concerning the legal remedies related thereto for the sake of a reasonable and effective use of public funds and with the aim of providing for the public control thereof, and furthermore with the aim of ensuring fair competition in public procurement. In addition, the purpose of this Act and the legislation based on its execution is *to enhance access of small and medium-sized enterprises to public procurement procedures, to promote sustainable development, social considerations of the State and lawful employment.*

Furthermore, it is required by the Act: The purposes of the rules concerning public procurements *shall be observed* in the course of preparing and the executing the public procurement procedure, concluding and performing the contract.[90]

It can be noted that the relationship among the purposes of the Act is not given and not clear, and the application requirement of these 'new' objectives is more of a request or expectation nature than actually enforceable.

At the same time the *toolbox* available generally today is provided for in the public procurements (for the green and social public procurements: performance based technical specification, grounds for exclusion, criteria for qualitative selection of the tenderer or the candidate, contract award criteria/ most economically advantageous tender, contract terms, reserved contracts).[91]

These tools are *not compulsory*, it depends on the contracting authorities (entities) whether to apply them or not. There is a room for manoeuvring.

In this room the emphasis is growing towards the effective and the sustainable public procurements together with the SMEs supporting policy.

On the basis of the authorisation granted in PPA of 2011 the Decree on the mandatory sustainability considerations in public procurements has not been adopted by the Government.[92]

---

90. See Article 3 of the PPA.
91. See Article 48(3) of the PPA, Government Decree No. 310/2011. (XII.23.) Korm. on the way of certification of *suitability* and verification of the non-existence of the grounds for exclusion as well as the definition of public procurement *technical specifications* in public procurement procedures; Articles 55-56, 71(2)(b), (3)-(4), 125(1)-(3), 29 of the PPA.
92. See Article 182(1) point 20. of the PPA: 'The Government shall be empowered to regulate in a Decree detailed rules which may be provided for in relation to environmental protection, sustainability and energy efficiency requirements covering all stages of the public procurement procedure, as well as cases and ways of enforcement of environmental protection, sustainability and energy efficiency considerations in public procurements in relation to budgetary authorities controlled or supervised by it,

The Public Procurement Authority in its Reports to the Parliament deals recurrently with the questions of green and social procurements and the situation of the SMEs. The expression of the sustainable public procurement appeared first in the Report on the year 2012.[93] This Report also first includes *statistics* on green and social public procurements below the Union thresholds.[94]

Green and social public procurement is an actual 'topic' and the manuals and best practices can be found on the website of the Public Procurement Authority.[95]

On the other hand, *in practice* the application of the green or social public procurements are not frequent and the *general attitude* is not so positive. According to certain research,[96] these complementary objectives are not the most important (except for the objective of supporting SMEs), and the more traditional purposes, such as the efficient spending of public money, the fight against corruption and transparency are in the first place.[97]

At the same time there are challenges and risks: Green and social public procurements require awareness and special knowledge ('knowhow'), and it is easy to be confronted with other principles and rules, such as non-discrimination and equal treatment.

There are also *positive experiences* or contracting authorities (large and more professional organisations, utilities) where e.g. the green procurement has been launched and followed (Municipality of Budapest and Miskolc and at the central agent for the governmental centralised public procurements).[98]

The 'green public procurement brochure of good practice examples'[99] also contains two *Hungarian examples* (GPP Example 31: energy efficient light-

---

to public foundations founded by it and the business organisations owned by the State.'

93. See the Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 39-41.
94. See the Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 6, 27, 35.
95. http://www.kozbeszerzes.hu/jogi-hatter/zold-kozbeszerzes-3/
96. http://www.kozbeszkut.hu/files/Tatrai_tamop_kozbesz_10.pdf , see p. 16-17. (*Hungarian public procurements, Sustainable public procurement, 2011.*)
97. See also Tünde Tátrai and Györgyi Nyikos: The uses and abuses of public procurement in Hungary, in Charting a Course in Public Procurement Innovation and Knowledge Sharing, PrAcademics Press (edited by Gian Luigi Albano, Keith F. Snider and Khi v Thai), Boca Raton, Florida, USA, 2013. 29-53.
98. See the Reports of the Public Procurement Authority to the Parliament. http://www.kozbeszerzes.hu/tevekenysegek/eves-beszamolo/
99. http://ec.europa.eu/environment/gpp/case_en.htm

ing on Budapest's bridges[100] and GPP Example 37: centralised procurement of greener office supplies[101]).

As to the transposition of Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, see Government Decree No. 48/2011. (III.30.) Korm. Legal practice also exists.[102]

Directive 2010/31/EU on the energy performance buildings has been transposed by several pieces of legislation.[103]

Question 12

Innovation has been a matter on the agenda of public procurement *policy*. The Public Procurement Authority in its report to the Parliament on the year 2012 first dealt expressly with the question of innovation.[104] Innovative public procurement as a 'topic' can be found on the website of the Public Procurement Authority.[105] The Authority concluded a cooperation agreement with the National Innovation Office in 2012, and pre-commercial procurement[106] (PcP; built on an exception to the public procurement procedures[107]) is a common area of interest.

The National Research and Development and Innovation *Strategy* (2013-2020) has been adopted by the Government, and its action plan for the years 2013-2014 also deals with public procurements.[108]

Innovation is a strategic goal. The *toolbox* available generally today is provided for in public procurements (performance based technical specifica-

100. http://ec.europa.eu/environment/gpp/pdf/news_alert/Issue13_Case_Study31_Budapest_Bridge.pdf
101. http://ec.europa.eu/environment/gpp/pdf/news_alert/Issue16_Case_Study37_Hungary_supplies.pdf
102. See e.g. D.293/19/2013. (Decision of the Public Procurement Arbitration Board).
103. See in particular: (as modified) Act LXXVIII of 1997, Act LXXVIII of 1993, Government Decrees No. 312/2012. (XI.8.) Korm., 313/2012. (XI.8.) Korm., 176/2008. (VI.30.) Korm, and see Government Resolution No. 1246/2013. (VI.30.) Korm.
104. See the Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 41.
105. http://kozbeszerzes.hu/jogi-hatter/innovativ-kozbeszerzesek/
106. See also in this subject matter: Hlács András: Innováció a közbeszerzés előtt – Kereskedelmi hasznosítást megelőző beszerzés. Közbeszerzési Szemle 2013/7. 55-60. (*András Hlács: Innovation before the public procurement – Pre-commercial procurement. In Public Procurement Review.*)
107. See Article 9(5)(f) of the PPA, in line with Article 16(f) of Directive 2004/18/EC.
108. Government Resolution No. 1414/2013. (VII.4.) Korm. on the adaption of the National Research and Development and Innovation Strategy.

tion, contract award criteria/most economically advantageous tender, certain possibilities for negotiations, competitive dialogue, possibility for PcP).[109] However, further tools could improve the situation (more negotiation, alignment of the rules on competitive dialogue, innovation partnership, solutions for cross-border procurements in the new Directives).

On the other hand, in practice innovative public procurements are not frequent and the *general attitude* is sceptical. Public procurement is considered rather as an obstacle to the innovation – at least the vast majority of the opinions show this on the basis of certain research.[110]

As to the *performance (or functional requirements) based technical specification*, this possibility has been transposed into Hungarian law since 2006 on the basis of Directives 2004/17/EC and 2004/18/EC.[111] It is used frequently, compared with the other alternative (standards) determining the technical specification of the subject-matter of the contract. However, little information is available due to the fact that these detailed specifications can be found in the documentations.

Most of the problems arise from the cases where the discriminative nature of the specification emerges, or legal disputes arise where the technical specification refers to a specific make or source or other similar reference, or where the claimant is not capable of meeting the technical requirements.[112]

As far as *the competitive dialogue* is concerned, this type of procedure is almost not used in Hungary at all. The reasons for this are complex; in particular, the special (and harmonised) grounds for the use of this procedure, the legal uncertainty and risks implied, the duration of the procedure and the lack of culture for the application. (See also Answer 14.)

According to the statistics, competitive dialogue was applied in 2006: once (utilisation of real estate); in 2007: once (IT); in 2008: once (public catering); in 2009: three times (IT; sport swimming pool and baths/spa investment and development; leadership training); in 2010: twice (IT); in 2011-

---

109. See Article 48(3) of the PPA, Government Decree No. 310/2011. (XII.23.) Korm. on the way of certification of suitability and verification of the non-existence of the grounds for exclusion as well as the definition of public procurement *technical specifications* in public procurement procedures; Article 71(2)(b), (3)-(4), Article 89(2)(b)-(d), Article 94(4)(a), Articles 101-107, Article 9(5)(f) of the PPA.
110. http://www.kozbeszkut.hu/files/Tatrai_tamop_kozbesz_10.pdf, see p. 16-17.
111. See Act CLXXII of 2005 on the Amendment of the Act CXXIX of 2003 on Public Procurements.
112. See the Reports of the Public Procurement Authority to the Parliament.

2012: none.[113] These figures show that this type of procedure is not used at all in the context of innovation.

The EU modernisation policy has established the toolkit: innovation partnership,[114] revised competitive dialogue in the new Directive and the lesser-known pre-commercial procurement[115] (not public procurement) as different kinds of possibilities and frameworks for the innovation would be available. However, the details and the clear borderlines should be elaborated and these possibilities put in practice in Hungary.

Remedies

Question 13

Without describing in details the *Hungarian remedy system* available in case of public procurement infringements, it is worth mentioning that this special system was established by the first Act of 1995 on Public Procurements and has not been fundamentally altered, but only modified from time to time to improve its efficiency.[116] *One of the most remarkable modifications was inspired by the transposition of Directive 2007/66/EC* through the Act CVIII of 2008 on the Amendment of the Act of 2003 on Public Procurements.

In order to ensure quite rapid, effective and professional remedies, a special body, the so-called Public Procurement Arbitration Board (Arbitration Board) was founded,[117] operating in the framework of the independent Public Procurement Authority.[118] This Arbitration Board of administrative nature has the competence in any infringements or disputes related to public procurement procedures (design contest, defence and qualified procurement procedures, with certain exceptions). Its competence also extends to the cases

113. See the Reports of the Public Procurement Authority to the Parliament.
114. See Article 29 of the new Directive on public procurement.
115. Communication from the European Commission on the Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe, COM(2007) 799 final, Brussels, 14.12.2007.
116. See a related article: Molnár Miklós: Megjegyzések a közbeszerzési jogorvoslatok bírói modelljéhez. Új Magyar Közigazgatás 2010/2. (*Miklós Molnár: Comments to a court model of the public procurement remedies. In New Hungarian Public Administration.*)
117. See Articles 176-179 of the PPA.
118. See Articles 167-175 of the PPA.

where the amendment to or the performance of the contracts, concluded on the basis of a public procurement procedure, violates special provisions of the PPA or an implementing Decree. Other legal disputes related to the public procurement contracts and civil law claims regarding public procurement procedures fall within the competence of a (civil) court.[119] The administrative decisions of the Arbitration Board can be reviewed by (administrative and labour) courts if so requested in the form of claims submission (application for a review).[120]

The main impacts of Directive 2007/66/EC can be summarised in the topics of 'standstill period', 'automatic suspension' of the conclusion of the contract in case of initiating a review procedure, and the sanction of ineffectiveness of the contract due to the most serious procedural infringements.

In Hungary, in practice the introduction of '*automatic suspension' was an effective change* in order to prevent the conclusion of a contract drawn without the necessary tendering or with irregular tendering (however, the possibility for interim measures had already been provided). 'Automatic suspension' lasts until the Arbitration Board makes its substantial decision or the decision closing the case.[121]

The *'standstill period' was not a novelty*; the Hungarian public procurement acts had already provided for this kind of period (of 8 days since 1 September 1999),[122] therefore these rules had only to be slightly adjusted.[123] On the contrary, *the special cases of ineffectiveness* of Directive 2007/66/EC were transposed into the act as a *new sanction* (invalidity).[124]

---

119. See the competences more precisely in Articles 133-134 of the PPA.
120. See more precisely in Articles 156-157 of the PPA.
121. See Article 124(7) of the PPA: '(7) Where an application for review procedure [Article 137(2)] is filed or a review procedure is initiated (Article 140), the contract – in the case stipulated in paragraph (3) the contract on the part of procurement affected by the review procedure – may be concluded only after the substantial decision or the decision closing the public procurement case has been made, except in cases where the Public Procurement Arbitration Board allows the conclusion of the contract [Article 144(4)]. Where the validity period of the tender of the successful tenderer has expired, the contract may only be concluded with the successful tenderer by the contracting authority if he makes a statement that he maintains his tender.'
122. See also Case C-81/98 *Alcatel Austria and Others*, ECR [1999] I-07671.
123. See Article 124(6) of the PPA: '(6) The contract shall be concluded by the contracting authority within the validity period pursuant to paragraph 5, unless otherwise provided by this Act, and the contract may not be concluded in any case before the end of a period of ten days following the date of dispatch of the written summary.' Exceptions to the 'standstill period' can be found in Article 124(8) of the PPA.
124. See Article 127(1)-(3) of the PPA.

Some comments are needed on the question of the effectiveness of 'automatic suspension.'

This suspension does not extend to the court review procedure (if the decision is challenged in the court procedure). It is reasonable because of the longer duration of the court proceedings. Thus, this approach does not guarantee reaching 'full' effect with the suspension (beyond the exceptions).[125] (However, according to the latest statistics on the year 2012, roughly every twelfth public procurement procedure was taken before the Arbitration Board,[126] and in 70% of the substantial decisions of these cases infringements were identified. About 20% of the decisions of the Arbitration Board were claimed to be reviewed by the court, and in these cases the courts upheld around 70% of the decisions of the Arbitration Board.[127]) On the other hand, the contracting authority (entity) has the possibility to suspend the public procurement procedure or postpone the conclusion of the contract until the court makes its final decision.[128]

It is more noteworthy that the 'new' provisions on the administrative service fee of the procedure of the Arbitration Board increased the amount of this fee necessary to request a procedure (upon application) before the Arbitration Board to an extreme extent.[129] This step was criticised several times

125. However, the most serious infringements are covered by the ineffectiveness/invalidity of the contract. See Article 127 of the PPA.

126. In all 695 remedy procedures were requested, initiated before the Arbitration Board in 2012.

127. See the Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 78-94.

128. See Article 153(5) of the PPA.

129. See Article 138(2) of the PPA and Government Decree No. 288/2011. (XII.22.) Korm. on the detailed rules for the application of sanctions which may be imposed by the Public Procurement Arbitration Board and on the administrative service fee to be paid to the Public Procurement Arbitration Board.

Article 1(1) of the Decree: '[...] administrative service fee [...] in case of public procurement contracts equalling or exceeding the EU threshold, 1% of the estimated value of the public procurement procedure or, in case of subdivision of the contract into lots, 1% of the value of the lot subject to the review procedure, but *not more than HUF 25,000,000 (twenty-five million forints)*[*approximately € 83,300*]*;* in case of public procurements not reaching the EU threshold and design contests, 1% of the estimated value of the public procurement procedure or, in case of subdivision of the contract into lots, 1% of the value of the lot subject to the review procedure, but not less than HUF 200,000 (two hundred thousand forints) and not more than HUF 6,000,000 (six million forints).'

The amount of the fee increases in line with the number of the defined elements of the plea. See Article 1(2) of the Decree.

and by several forums in Hungary: The right to remedy cannot be affected by this kind of administrative burden. (According to the statistics, in 2012 the number of cases upon application before the Arbitration Board decreased by 36.3%, compared to the previous year. The reasons are complex, but the high amount of the fee also contributes to this reduction.[130])

In the context of the effective remedies and Directive 2007/66/EC, other interrelations and related issues can also be mentioned.

The Arbitration Board may take *interim measures*, upon request or ex officio, before the conclusion of the contract, if it is probable that an infringement of the rules of the PPA has been committed or a risk thereof exists. As an interim measure, the Arbitration Board may order the *suspension of the public procurement procedure*; or request the contracting authority (entity) to invite the applicant to take part in the procedure.[131] According to the statistics, the number of this interim measures is steadily declining. This situation correlates with the automatic suspension effect concerning the conclusion of the contract.[132] The contracting authority (entity) also has the possibility to suspend its ongoing public procurement procedure if the Arbitration Board launched the remedy procedure. It is required to notify the Arbitration Board of this effect.[133]

Other *preventive tools* are also quite useful and successful: the possibility for the *self-correction* of the contracting authority (entity) concerning the unlawful final decision on the evaluation of tenders or the requests to participate,[134] and the possibility for initiating a *preliminary dispute settlement* at the contracting authorities (entities). The preliminary dispute settlement provides for a quick 'procedure' between the applicant and the contracting authority (entity), and in its frame it is exceptionally permitted to do certain procedural acts, furthermore it may extend the 'standstill period.' It can be used during the whole public procurement procedure, but most frequently it is applied at the end of the procedure, after the final decision.[135]

(Available *in English*: http://kozbeszerzes.hu/data/documents/2012/11/07/Government_Decree-288_22-12-2011.pdf)

130. See the Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 79.
131. See Article 144 of the PPA.
132. See the Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 85.
133. See Article 142(3) of the PPA.
134. See Article 78(1)-(2) of the PPA *in the Annex* of this Paper.
135. See Article 79 of the PPA *in the Annex* of this Paper.

On the basis of Directive 2007/66/EC, the *invalidity of the public procurement contracts is regulated by Article 127(1) of the PPA* as follows:

A contract falling under the scope of the PPA is null and void, if
a) it was concluded with the unlawful bypassing of the public procurement procedure;
b) it was concluded as a result of a negotiated procedure without prior publication of a notice and the conditions for the application of this type of procedure were not fulfilled;
c) the parties concluded the contract with the infringement of the rules regarding the standstill period,[136] and as a result they deprived the tenderer of the opportunity to resort to a remedy proceeding before the conclusion of contract, and at the same time they infringed the rules applicable for public procurements in such a way that it influenced the prospects of the tenderer to win the public procurement procedure.

The *exceptions* are also determined:[137] Contrary to the above, the contract is not null and void, if

a) the contracting authority (entity) has not conducted a public procurement procedure with prior publication of a notice or it has concluded an agreement with bypassing the public procurement procedure[138] as it presumed to have a right to apply a procedure without a prior publication of a notice or to conclude a contract with bypassing the procedure, and it has published a notice in accordance with the standard form provided in a separate piece of legislation about its intentions to conclude a contract, furthermore it has not concluded the contract (agreement) within ten days following the publication of the notice;
b) a significantly important interest is connected to the performance of the contract.

The economic interest directly connected to the contract (in particular the costs resulting from the obligations due to the delayed performance, to the conduction of a new public procurement procedure, to the possible changes of the contracting partner or to the invalidity) shall not be regarded as significantly important public interest, and the further economic interests connected

136. See Articles 79(5) and 124(6)-(7) of the PPA.
137. Article 127(2) of the PPA.
138. See Article 9(1)(k) of the PPA (in-house contracts).

to the validity of the contract shall be regarded so exclusively in cases when the invalidity of the contract would result in disproportionate consequences.[139]

It is worth mentioning three additions.

Taking into account generally the so-called dominant position of the contracting authority (entity), the PPA provides for the *invalidity of certain terms* of the public procurement contracts.[140]

Furthermore, the 'sui generis' invalidity cases of the PPA do not exclude the *possibility of the invalidity of the public procurement contract in other cases on the civil law basis,* expressly providing that the application of the legal consequences in the PPA shall not exclude the application of Article 200(2) of the Civil Code[141] with regard to stating the invalidity of contracts concluded infringing the regulations applicable for public procurement and public procurement procedures.[142]

According to this Article 200(2) of the Civil Code, 'contracts in violation of regulations and contracts concluded by evading a regulation shall be null and void, unless the regulation stipulates another legal consequence. A contract shall also be null and void if it is evidently in contradiction to good morals.'

The *precondition* of the application of this civil law consequence is that the public procurement infringement has been stated in a legally enforceable decision by the Arbitration Board, or in the course of the review of the decision of the Board, by the (administrative and labour) court, thus the review procedure of the Arbitration Board shall be requested or initiated.[143] In this question the court practice is uniform.[144]

On the other hand, the interpretation of Article 200(2) of the Civil Code and the PPA in the cases of contract invalidity (nullity) is *not uniform*. It is not quite clear in the judgements of the civil courts to what extend the public

139. Article 127(3) of the PPA.
140. See Article 127(4) of the PPA: '(4) The provision of the contract concluded pursuant to a public procurement procedure shall be considered null and void should it exclude or restrict the application of legal consequences stipulated to a breach of contract perpetrated by the contracting authority except for the case set out in Article 301/B(2) of the Civil Code concerning the interest for late payment.'
141. See also Article 6:95 of the new Civil Code.
142. See Article 127(5) of the PPA.
143. See Article 165(1) of the PPA.
144. LB Pfv.VII.20.406/2009/6. ítélet, LB Pfv.VII.21.645/2010/4. ítélet (judgements of the Supreme Court).

procurement infringements (beyond the sui generis invalidity grounds) may affect the validity of the public procurement contracts.[145]

In our view, only such more serious public procurement infringements may result in the sanction of invalidity which has impact e.g. on the winning entity, the result of the procedure, the participation in the competition, or on the content of the winning contract. In case of minor infringements it would be disproportionate if, in addition to the legal consequences of administrative nature, the legal effect erected from the contract also should be refused. The courts could evaluate and balance all the circumstances in their decisions concerning the question of the invalidity of the contract.[146]

Due to the *competences of the Arbitration Board and the courts*, if the Board states in its substantial decision that an infringement set out in Article 127(1) of the PPA has occurred (invalidity of the contract), it shall take an action with a view to annulling the contract and applying the legal consequences of invalidity. Simultaneously with the initiation of the legal proceeding, the Arbitration Board shall request the court – as an interim measure – to suspend the further execution of the contract.[147]

In order to enhance the *procedural effectiveness*, a special procedure was introduced[148] into the Hungarian legal system: *a single (administrative) court procedure* for the review of the decision of Arbitration Board and for the statement of the invalidity of contracts infringing regulations applicable for public procurement procedures.[149]

---

145. SZÍT Gf.I.30.008/2009/4. ítélet, LB Pfv.IX.21.222/2009/6. ítélet (different approaches of the courts).
146. Németh Anita: A közbeszerzési szerződések és az érvénytelenség. Jogi Tanulmányok Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskoláinak III. Konferenciája 2012. április 20. I-II. kötet, Szerkesztette: Fazekas Marianna, ELTE ÁJK, Budapest, 2012. ISSN 1417-2488, I. 445-456. (*Anita Németh: The public procurement contracts and the invalidity. In Legal Studies of ELTE.*) http://www.ajk.elte.hu/file/doktkonf2012_01.pdf
147. See Article 164(1) of the PPA. See also Article 164(2)-(7) of the PPA.
148. It was introduced already by the Act CVIII of 2008 on the Amendment of the Act CXXIX of 2003 on Public Procurements.
149. See Articles 161-163 of the PPA.
   Article 161(1)-(2): '(1)The applicant shall request the review of the decision of the Arbitration Board and the statement of the invalidity of the contract on which the decision is based – due to the reasons specified in Article 127(1) – and the application of the legal consequences of the invalidity exclusively in one single legal procedure. The legal procedure shall be initiated against the Arbitration Board and the contracting parties. The application shall be submitted to the Arbitration Board not later than fifteen days after the reception of the decision.

As to the *use of the voluntary ex ante transparency notices*, only one published notice[150] could be found in the database[151] of the Public Procurement Authority, thus this instrument is not widespread at all in Hungary.

Damages can be awarded, but in the practice it is quite difficult and not frequent, for two reasons.[152] Here the precondition also plays a role: The claim shall be admissible on condition that the infringement has been stated in a legally enforceable decision by the Arbitration Board or the (administrative and labour) court.[153] Furthermore, the court is consistent in that for full damage compensation it is necessary to prove without a doubt by the claimant that he would have been the winner of the public procurement procedure. In case of a claim for the 'negative interesse' (costs), a lightened evidence is possible by the PPA[154] on the basis of Directive 2007/66/EC.

The coverage of the Hungarian special public procurement remedy system is in line with the scope of the public procurements and the PPA (see also above at the competence of the Arbitration Board and Answers 2 and 4). Therefore, *this remedy is available* e.g. in case of contracts below the Union thresholds (and at the same time above the national thresholds) or non-priority service contracts, or service concession contracts [with the exception of those cases where the Act on Concession shall be applied, thus the civil courts have competence in related legal disputes].

---

(2) In the course of the legal procedure other civil right claims shall not be open for enforcement, the statement of the invalidity of the contract due to reasons other than those listed in Article 127(1) shall not be requested.'

150. See http://kozbeszerzes.hu/adatbazis/mutat/hirdetmeny/portal_11611_2013/
151. See http://kozbeszerzes.hu/adatbazis/keres/hirdetmeny/
152. See also about the difficulties: Arnould, Joël: Damages for Performing an Illegal Contract – the Other Side of the Mirror: Comments on Three Recent Judgements of the French Council of Sate. P.P.L.R. 2008/6.; Treumer, Steen: Towards an Obligation to Terminate Contracts Concluded in Breach of the EC Public Procurement Rules: the End of the Status of Concluded Public Contracts as Sacred Cows. P.P.L.R. 2007/6.; P.P.L.R. 2006. 159-240.
153. See Article 165(1) of the PPA.
154. See Article 165(2) of the PPA: '(2) If tenderers only claim the reimbursement of their costs (damages) incurred in the preparation of a tender and in relation to their participation in a public procurement procedure from the contracting entity, it is sufficient to prove for the enforcement of such a claim that
(a) the contracting entity has violated a legislative provision applicable to public procurement or the public procurement procedure, and
(b) they have had a real chance of winning the contract, and
(c) the infringement has adversely affected their chance of winning the contract.'

In summary, we can say that in Hungary *the primary and preventive remedy tools (see above) are preferred* vis-à-vis the so-called secondary legal protection (damages).

Conclusion and reform

Question 14

The announcement of the latest modernisation of the EU public procurement policy and law[155] was a necessary and appropriate step. Indeed, now one of the questions is *how the outcome of the EU legislative process and later the transposition and implementation of the new Directives in the MS relate to the original goals of* 'towards a more efficient European Procurement Market.'

We share the view that the adoption of the *new Directive on the award of concession contracts* (Concession Directive) can be evaluated as a positive milestone in European public procurement history and law. However, the impact of this EU framework legislation on the Hungarian jurisdiction is not dramatic, due to the fact that the concession contracts (including services concession contracts) have already been generally covered by the scope of the Hungarian public procurement law or the Act on Concession or other special pieces of legislation (see also Answers 2, 4 and 6). Nevertheless, further adjustments will be necessary for the full and appropriate harmonisation.

As to *the concept of the concessions* in the new Directive, which follows the present 'functional' definitions together with the normative inclusion of the element of the risk transfer, this notion is in line with the definitions of the Hungarian PPA already influenced by the EU approach. The PPA has also incorporated the requirement of the transfer to the concessionaire of the risks in the definitions of the works and services concessions.[156] This means that

---

155. Green Paper on the modernisation of the EU public procurement policy. Towards a more efficient European Procurement policy. COM(2011) 15 final. Brussels, 27.1.2011.
156. Definitions of the PPA:
Subject-matters of public procurements
Article 7
'5. *Public works concession* is a public works contract whereby the consideration by the contracting authority for the works to be carried out consists either in the right to

here is no tension between the European and our national approach; however, certain revisions of our legal system are needed (in respect of the Act on Concession, also its relation to the PPA and some special pieces of legislation). The clarifications and the delimitations of the Directive (also in the Preamble, reflecting the judgements of the ECJ) relating the notion of the concession contracts and the operating risk may contribute to the right transposition and interpretation of the Concession Directive.

Public Private Partnerships (PPP) and long-term contracts were previously used strategically in certain sectors.[157] These projects and contracts were not considered as efficient systems.[158]

The present Government announced in 2011 the overall revision of these PPP projects and contracts.[159] In 2012 the State Audit Office inter alia published a Report on the audit of the implementation and social utilisation of the contracts of cultural and higher education priority projects implemented in PPP schemes.[160] Nowadays, PPP projects are not preferred by the economic

exploit the work for a specified period of time or in this right together with monetary consideration, and in which the whole risk or at least the major part of the risks related to the exploitation are borne by the winning tenderer.

6. *Service concession* is a public service contract whereby the contracting authority transfers the right to exploit commercially the provision of the relevant services (the right of exploitation) for a specific period of time and the consideration is the right of exploitation or the transfer of this right together with a monetary consideration, and in which the whole risk or at least the major part of the risks related to the exploitation are borne by the winning tenderer.'

157. Government Resolution No. 2098/2003. (V.29.) and 2028/2007. (II.28.) Korm. on the application of the novel forms of the PPP; PPP Handbook, 2004., http://www.kukg.bme.hu/oktatas/bsc/segedletek/BMEKOKGA182/PPP_kezikonyv.pdf
158. See e.g. the Audit Report of the State Audit Office: http://www.asz.hu/report-summary/2009/summary-of-the-audit-on-the-implementa tion-of-ppp-development-projects-of-local-governments-supported-in-the-framework-of-the-sport-xxi-facility-development-programme-and-on-the-projects-impact-on-the-services-provided-by-local-governments/0919-sportxxi-facility-dev-programme.pdf http://www.asz.hu/jelentes/0919/jelentes-a-sport-xxi-letesitmenyfejlesztesi-program-kereteben-tamogatott-onkormanyzati-ppp-beruhazasok-megvalositasanak-es-onkor manyzati-feladatok-ellatasara-gyakorolt-hatasanak-ellenorzeserol/0919j000.pdf
159. Government Resolution No. 1269/2011. (VIII.4.) Korm. contains the principles of the revision of PPP projects.
160. http://www.asz.hu/report-summary/2012/summary-of-the-audit-on-the-implementa tion-and-social-utilisation-of-the-contracts-of-cultural-and-higher-education-priority-projects-implemented-in-ppp-schemes/1287-ppp-angol.pdf

policy. However, the relationship between the PPP projects and the public procurements was clear: If a project falls under the 'functional' notion of the public procurement or concession contract and the scope of the PPA or the Act on Concession, the award procedure and these pieces of legislation must also be applied.

Certain restrictions concerning the long-term contracts have also been introduced. According to Act CXCVI of 2011 on the National Assets, concession contracts under the Act on Concession and public works and services concession contracts under the PPA (in respect of the national assets) can be concluded only for a fixed-term and for maximum 35 years (main rule).[161] The PPA provides for a more general and adequate limitation on the term of public procurement (and concession) contracts.[162] Nevertheless, in the light of Article 16 of the Concession Directive, the Hungarian rules on the duration of the concession will have to be revised and modified.

In the EU modernisation procedure it was broadly supported to allow more flexibility, efficiency and *negotiations in the award procedures* (for the 'classic' regime), and at the same time to consider the possible risks and therefore the procedural safeguards. The final outcome of the compromises seem to be weak in this respect: Guarantees are not deeply elaborated and the applicability of the competitive procedure with negotiation is still limited.[163] An opposite solution could have been 'tested' and introduced.

As far as *the competitive dialogue* is concerned, this type of procedure is almost not used in Hungary at all. The reasons for this are complex. (See also Answer 12.) However, much may depend on the transposition of the revised rule of the applicability of this type of procedure in the new Directive and the (national) details of the procedural rules, but we find that this situation and attitude will not change soon basically. On the other hand, the broader formulation of the applicability of *the competitive procedure with negotiation* may

---

http://www.asz.hu/jelentes/1287/jelentes-a-ppp-konstrukcioban-megvalosult-kiemelt-kulturalis-es-felsooktatasi-projektek-szerzodeseinek-teljesulese-es-tarsadalmi-hasznosulasa-ellenorzeserol/1287j000.pdf

161. Article 12(3) of the Act CXCVI of 2011 on the National Assets.
162. Article 125(8) of the PPA: '(8) In the notice launching the procedure, the period of the contract shall be set by the contracting authority in such a way that does not bind him for an indefinite or definite but disproportionate period of time, which would not be in compliance with the aim of maintaining competition and effective use of public funds, unless such a period of the contract is justified by the subject-matter, the chosen structuring of the contract, or the terms of payment related thereto or the investment realised by the successful tenderer.'
163. See Articles 24, 27 of the new Directive on public procurement.

lead towards a more frequently used type of procedure. We have to mention that the joint regulation of the situations where a competitive procedure with negotiation or a competitive dialogue can be used, is not the clearest solution [in Article 24(1) of the Directive].

If we take the place for *negotiations,* in the special regime for 'utilities' (where there are no restrictions on the application of the negotiated procedure with prior publication), this type of procedure is the most preferred and frequently (around 66%) used procedure in Hungary.[164] (For the time being, precise statistics are not available on the negotiations in the general national regime.) Statistics do not show any increase in the infringements and legal remedy on the basis of this higher application of the advertised negotiated procedures.[165] It is worth mentioning that the PPA provides for several special procedural safeguard rules in case of negotiated procedures,[166] where the principles[167] of the PPA also play determining functions. Beside the negotiated procedure, the contracting entities quite often apply the type of open procedure due to its one-stage character and the less risk involved.

Certain Hungarian research also shows that there is a strong belief in negotiations as a tool to increase the efficiency in public procurements, but not as the only and the most important factor. Among the latter can be found the fight against corruption, the dissemination of public procurement culture and the use of electronic procedures.[168]

As regards the above national experience and beliefs in negotiations, the EU fears, latest solutions and compromises are not completely confirmed, even if in this respect we take into consideration certain differences in the public procurements above or under the union thresholds, or differences between the contracting authorities and the utilities.

Electronic procedures and the use of e-technology are real challenges in Hungary. While there is a belief in electronic public procurements due to the expected positive effects,[169] quite a few things have happened in Hungary.

---

164. Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 17.
165. Report of the Public Procurement Authority to the Parliament, J/10294 (year of 2012), p. 83.
166. See Articles 90-93 of the PPA.
167. See Articles 2-3 of the PPA.
168. http://www.kozbeszkut.hu/files/Tatrai_tamop_kozbesz_10.pdf, see p. 12-13.
169. See some related research: http://www.kozbeszkut.hu/files/Tatrai_tamop_kozbesz_10.pdf, see p. 13, 24-26., http://www.kozbeszkut.hu/kutatas/a-magyarorszagi-elektronikus-kozbeszerzes-terjedesenek-feltetelei-a-piaci-szektorban (*Conditions for the electronic public procurements in the market sector in Hungary, 2010.*)

As to the general circumstances, some progress has been made in the field of electronic public administration, and there are well functioning e-procurement market solutions, but only some segments can be mentioned where the whole procedure is electronised; e.g. simplified electronic company registration, payment order e-procedure and certain tax administration e-procedure.

In the field of electronic public procurement, Hungary has no national strategy (and detailed action plans) for electronic public procurement (only former and controversial attempts).[170] At the same time only partial results can be mentioned; in particular, the compulsory e-notices (e-submission of the notices) and the possibility of e-communication, certain e-procedural acts and electronic auctions.[171]

Among the types of procedures the dynamic purchasing system is also specified by the PPA (already since 2007), but the Government Decree on this special e-procedure has never been elaborated and entered into force.[172] In 2011 a wider introduction and application of the e-procurements (and e-review procedure) was on the agenda: The requirement of the mandatory use of e-tendering above the Union thresholds came into force,[173] but these provisions were repealed very soon,[174] because the necessary preconditions had not been established in time (e.g. lack of implementing regulations and institution, unprepared actors).

Consequently, despite the mostly positive attitudes (fears also exist), interests and some steps taken, the introduction of the compulsory application of e-procurement may result in difficulties particularly for the smaller contracting authorities (e.g. certain local governments) and SMEs (bidders).[175] Therefore, special action plan, preparations and assistance would be necessary.

---

170. See Communication from the Commission on the End-to-end e-procurement to modernise public administration, COM(2013) 453 final, Brussels, 26.6.2013, p. 10. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0453:FIN:EN :PDF
171. See Government Decree No. 257/2007. (X.4.) Korm. on the rules pertaining to procedural acts which may be conducted by electronic means in public procurement procedures and to electronic auctions. See also COM(2013) 453 final.
172. See Articles 4 point 4., 82(3), 182(1) point 15 of the PPA.
173. See Act CVIII of 2008 on the Amendment of the Act CXXIX of 2003 on Public Procurements.
174. Repealed by Act XII of 2010, Article 53(10) (since 1 March 2010). Mandatory e-procurement below the Union thresholds would have been entered into force on 1 July 2010.
175. See also in this subject matter: http://www.kozbeszkut.hu/images/stories/pdf/ekozbeszerzes_szab_tamop.pdf (*Tünde Tátrai: Regulatory questions in the e-procurement, 2012.*)

The new Directives will have *no conceptual impact* on the Hungarian jurisdiction, however in particular the more precise scope, the codification of the case-law in certain questions and the rules on procurement implicating contracting authorities from different Member States may also contribute to an improved harmonised legislation.

Beyond the national perspectives, the impact of this state of European modernisation attempt is that the new Directives portend *no radical change* in the light of the latest modernisation goals (e.g. effectiveness, simplification), and this stage is more in line with the previous steps and developments. Nevertheless, the increasingly expansive and deeper European public procurement legislation on the legal ground of the internal market may raise further interesting questions.

---

http://www.kozbeszkut.hu/kutatas/a-magyarorszagi-elektronikus-kozbeszerzes-terjedesenek-feltetelei-a-piaci-szektorban

ANNEX

EXTRACT FROM THE PPA OF 2011[176]

Article 2
(1) In the public procurement procedure, the contracting authority (entity)[177] shall ensure and the economic operators shall respect the fairness, the transparency and the public nature of competition.

(2) The contracting authority shall ensure equal opportunities and equal treatment for economic operators.

(3) In the course of the public procurement procedure, contracting authorities and economic operators shall act in good faith and in compliance with the requirements of honesty and proper practice of the law.

(4) When the contracting authority uses public funds, it shall act respecting the principle of effective and responsible management.

(5) In the course of the public procurement procedure, national treatment shall be applied to economic operators established in the European Union as well as to goods originating in the Community. As regards economic operators established outside the European Union and goods originating outside the Community, national treatment is to be applied in accordance with the international obligations assumed by Hungary and the European Union in the field of public procurement.

(6) Public procurement procedures shall be conducted in Hungarian. The contracting authority may make it possible to use another language instead of Hungarian but it shall not be made compulsory.

Article 8
(1) If the contract covers several subject-matters of public procurement interdependent by their nature, then such contract shall be classified according to the subject-matter of public procurement of determining value.

(2) If a public procurement has as its subject-matters public supply and services, and if the value of services covered by such a contract exceeds that of the supply covered thereby, the contract shall be considered a public service contract.

---

176. The longer references to the PPA of 2011 can be found here.
177. Contracting authorities generally imply contracting entities.

Article 19(2)
(2) For the purposes of services specified in Annex 4, Part Three of this Act may be applied. In the case of public procurement contracts which have as their object a complex service including both a service specified in Annex 3 and a service specified in Annex 4, Part Tree of this Act may be applied if the value of the service specified in Annex 4 exceeds the value of the service specified in Annex 3.

Article 20(2)-(4)
(2) Specific rules stipulated by Chapter XIV shall be applied where the contracting authority defined in Article 6(1)(a)-(f) shall need the public procurement contract for ensuring one or more activity (activities) specified in Article 114(2) and at the same time for ensuring activities other than those specified therein, but the subject-matter of the public procurement contract is required primarily for ensuring its public utilities activity pursuant to Article 114(2). Since the conduct of one and only public procurement procedure may not serve as a pretext for conducting the public procurement procedure according to Chapter XIV or for avoiding the application of this Act, it shall be taken into consideration *whether the elements of the public procurement contract related to the pursuit of different activities may be separated from each other*.

(3) Where the contracting authority defined in Article 6(1)(a)-(d) shall need the public procurement contract for ensuring one or more activity (activities) specified in Article 114(2) and also for ensuring activities other than those specified therein and it may not be established which of those activities require primarily the public procurement contract, Chapters I-XIII shall apply.

(4) Where the contracting authority defined in Article 6(1)(e)-(f) shall need the public procurement contract for ensuring one or more activity (activities) specified in Article 114(2) and at the same time for ensuring the implementation of activities other than those specified therein, and it may not be established which of those activities require primarily the public procurement contract, the provisions of Chapter XIV shall apply.

Article 26
If an economic operator participates in a direct manner in the performance of the contract, in case of the possibility of division into lots, the contract concerning one part, for more than 25% of the value of the public procurement, this economic operator may not be considered as a subcontractor, and shall be referred to in the tender (in the request to participate) as a joint tenderer and shall be involved in the performance of the contract as a joint tenderer (in the stage of participation of the public procurement procedure, as a candidate). The percentage of the participation of a person (an organisation) in the performance of a contract is determined by his share from the counter value – net of VAT – relating to the subject-matter of the contract.

Article 45(5)
(5) The provision of additional information may not prejudice the equal opportunities of economic operators. The full contents of the information shall be made accessible or sent to all of those economic operators which expressed their interest in the procedure to the contracting authority, in the participation stage of procedures consisting of more than one

stage and in negotiated procedures without the publication of a contract notice all the economic operators invited directly to submit a tender or request to participate. In the course of the provision of additional information the contracting authority may not disclose which of the economic operators asked for the information, and in the open procedure neither the economic operators who also received the given additional information may be referred to.

Article 55(3)
(3) The contracting authority shall confine the establishment of suitability criteria *to the subject-matter of the contract* and may prescribe such criteria *only to the extent actually necessary for the performance of the contract, also taking into consideration the estimated contract value.*

Article 62(2)-(5)
(2) The tender opening procedure may be attended only by the contracting authority, the tenderers, and persons invited by them and – in case of contracting authorities receiving support for the public procurement – the representatives of organisations and persons specified in a separate piece of legislation.

(3) Upon opening the tenders, the names and addresses (seat, residence) of the tenderers, as well as the main quantifiable particulars to be assessed according to the evaluation criteria (sub-criteria), shall be announced.

(4) When the opening of the tenders – or, in the case of a negotiated procedure that of the final tenders – is started, immediately before the opening of the tenders, the contracting authority shall disclose the estimated value of the public procurement contract calculated without taking into account the provision set out in Article 18(2), as well as the amount of the funds available for the performance of the contract, where the division of the contract into lots is allowed, for each lot. In a negotiated procedure, if the contracting authority does not request the submission of final tenders in writing, it shall disclose the estimated value of the public procurement contract and the amount of the funds available for the performance of the contract – if the division of the contract into lots is allowed, for each lot – in the framework of the last negotiation, after all the tenderers submitted their final tender.

(5) Upon opening the requests to participate, the names and addresses (seat, residence) of the candidates shall be announced.

Article 71(3)-(4)
(3) If the contracting authority wishes to select the most economically advantageous tender, it shall specify:
(a) the constituent factors for assessing the most economically advantageous tender;
(b) the rated multiplier of each constituent factor to determine its weight*, as consistent with the actual significance of such factor (hereinafter referred to as 'weight');*
(c) the lowest and highest scores, to be the same for all constituent factors, for the content elements of tenders when evaluating according to constituent factors;
(d) the method(s) that shall provide the scores in the range between the limits of the scores [point (c)].

(4) The contracting authority shall specify the constituent factors pursuant to paragraph (3)(a), according to the following requirements:
(a) Within the scope of constituent factors the financial and economic standing, the technical and professional abilities of the tenderer for performing the contract shall not be evaluated;
(b) The constituent factor for the amount of consideration shall always be provided for among the constituent factors;
(c) *The constituent factors shall always be based on quantifiable elements or elements that may be evaluated based on professional requirements and shall be related to the subject-matter of the public procurement, the material terms of the relevant contract* (in addition to the price, e.g.: quality, technical merit, aesthetic and functional characteristics, environmental and sustainability characteristics, running costs, economy and cost-effectiveness, after-sale service and technical assistance, supply of spare parts, securing stocks, delivery date or period); the offered degree of employment of unemployed or long-term unemployed people may be evaluated among the constituent factors.
(d) The constituent factors shall never allow the same substantial element in a tender being taken into consideration more than once;
(e) *If within the scope of the constituent factors sub-factors have been specified, the relevant weight of these shall be specified commensurate to their actual significance.* If the contracting authority, specifying the method described in paragraph (3)(d), describes which components or characteristics of the tender element relating to the constituent factor will be examined by him in the case of a given constituent factor that may be evaluated based on professional requirements, it may not be considered as the stipulation of a sub-factor.

Article 78(1)-(2)
(1) The contracting authority may modify on one occasion the written summary concerning the evaluation of tenders, if necessary, retract the communication on invalidity, furthermore rescind the contract already concluded within twenty days from the dispatch of the written summary to the tenderers or, if the performance of the contract has already been started and the original status quo may not be restored anymore, terminate the contract immediately, should he observe after the sending of the results that the result (or lack of success) was unlawful and the modification provides legal remedy thereto. The contracting authority shall dispatch the modified written summary by fax or electronic means to all tenderers at the same time, without delay.

(2) From the sending of the summary concerning the evaluation of the requests to participate to the candidates to the expiry of the time limit for submission of tenders, the contracting authority shall have the right to amend on one occasion the written summary, if necessary, retract the communication on invalidity, furthermore to send an invitation to tender to the candidate setting a new time limit for submission of the tender should he observe after the sending of the results that the result (or lack of success) was unlawful and the modification provides legal remedy thereto. The contracting authority shall dispatch the modified written summary by fax or electronic means to all candidates at the same time, without delay.

Article 79
(1) The following entities may initiate a preliminary dispute settlement:
(a) the tenderer or the candidate, within 3 business days after having knowledge of the illegal event, if it considers that the written summary or any procedural act of the contracting authority or any other document made during the public procurement procedure, except for those listed in point (b), is partly or completely illegal;
(b) any interested economic operator or the chamber or the interest representation body with an activity related to the subject-matter of procurement (for the purposes of this Article, hereinafter jointly referred to as 'applicant') not later than ten days before the expiry of the time limit to submit tenders or to participate, in accelerated procedures or negotiated procedures without prior publication of a contract notice launched for extreme urgency until the expiry of these time limits, if he considers that the contract notice, the invitation to tender, the invitation to participate, the documentation or the modification thereof is partly or completely illegal.

(2) The applicant shall state in his application to the contracting authority (hereinafter referred to as 'preliminary dispute settlement application') the points of the written summary deemed unlawful, or other document, or procedural action, furthermore his recommendations, remarks, and the data and facts and supporting his opinion and he shall also refer to the documents – if any – supporting such data and facts.

(3) The preliminary dispute settlement application shall be dispatched to the contracting authority by fax or electronic means, and the contracting authority shall inform the applicant for settlement about its standpoint regarding the application not later than three days after the reception of the application by the means identical to that of the submission, furthermore the contracting authority shall inform all tenderers or candidates – known by it – participating in the procedure about the submission of the preliminary dispute settlement application and his answer to it.

(4) Where the infringement of law committed in the procedure is remediable through these procedural acts, the contracting authority may require – on not more than one occasion, not later than three business days after the reception of the preliminary dispute settlement application – the tenderers (candidates) to supply missing information (Article 67), to provide information (Article 67) or an explanation (Articles 69-70), setting a time limit of three business days, even if the procedural rules would not allow to do so. In this case the contracting authority shall inform the applicant for settlement and the tenderers (candidates) about the submission of the application for preliminary dispute settlement on the date of dispatch of the request for the supply of missing information or for the provision of information or for explanation, and he shall inform these entities about his answer to the application not later than seven business days after reception of the application.

(5) If a tenderer has submitted a preliminary dispute settlement application in connection with a procedural act done, document made following the opening of tenders within the time limit pursuant to paragraph 1 and in compliance with paragraph 2, the contracting authority may not conclude the contract – if division into lots was possible, he shall not conclude the contract on the part of procurement concerned – before the end of a period of ten

days from the date of submission of the application, following the date of dispatch of its reply, even if the standstill period would otherwise expire until that date.

Article 109(5)
(5) The term of a framework agreement may not exceed four years, except in extraordinary, duly justified cases, in particular with regard to the subject-matter of the framework agreement. In this respect it shall be considered whether the specific features related to the given framework agreement require the setting of a longer fixed term, and whether or not it results in a disproportionate restriction of competition. The notice starting a public procurement procedure to be conducted for the conclusion of a framework agreement exceeding four years shall specify the justification of the setting of a longer term. In the framework agreement, the contracting authority may indicate that it undertakes to realise a specific part of the envisaged quantity of the public procurement. The contracting authority shall not be bound to realise the public procurement based on the framework agreement if, due to unforeseeable and unavoidable reasons beyond its control, material circumstances making the contracting authority incapable of concluding or performing the contract(s) arise after the conclusion of the framework agreement. In such a case the contracting authority shall notify without delay, in writing the tenderers who signed the framework agreement and the Public Procurement Authority.

Article 120
This Act shall not apply to the following procurements not reaching EU thresholds:
(a) to the procurement of textbooks, if it is carried out in accordance with the Act on the Rules for the Textbook Market, in the framework of the supply of textbooks to schools and the textbook is registered in the textbook register;
(b) to the procurement of supplies and services for the full boarding of children situated in children's homes and apartment homes on the basis of Act XXXI of 1997 on the Protection of Children and on Guardianship Administration, for the full boarding of those who receive after-care and of persons receiving social services under Articles 59-85/A of Act III of 1993 on Social Administration and Social Benefits;
(c) to hotel and catering services, entertainment, cultural and sport services specified in Annex 4;
(d) to the purchase conducted through crisis management for humanitarian aid within foreign affairs assistance about which the competent committee of the Parliament has made a preliminary decision excluding the application of this Act;
(e) to the procurement of cold foodstuffs and cooking raw materials, fresh and processed vegetables and fruits, milk and dairy products, cereals, bread products, honey, eggs, horticultural plants;
(f) in case of a public service aimed at the creation of a literary (technical, scientific) work, or involving consulting or personal interpreting activity necessary for the performance of the contracting authority's core activity;
(g) to the employment of public procurement consultant activity;
(h) to Article 3(5)(7)(9) of the Act CXXVIII of 2011 on Disaster Management and the Amendment of Certain Related Acts; as well as, in case of a crisis, emergency or serious situation, to public procurements carried out with the aim of preventing epidemic diseases in animals, directly preventing or avoiding damage caused by serious industrial or traffic

accidents or by water, preventing adverse impacts on water quality, as well as for the purposes of protective preparedness or the subsequent reconstruction;
(i) to the procurement of goods made, services provided and works executed in the framework of obligatory employment of prisoners;
(j) to the procurement of goods made, services provided and works executed in the framework of public work employment relationship;
(k) to the raising of a loan and borrowing, as well as to services related to cash management pursuant to the Act CXII of 1996 on Credit Institutions and Financial Enterprises;
(l) to the procurements of the organization providing services defined in Article 114(2)(d);
(m) to the purchasing of items within the domain of cultural goods and other rights related thereto.

Article 122(7)-(8)
(7) The contracting authority may launch a negotiated procedure without prior publication of a contract notice in the following cases as well:
(a) If the estimated value of public supply or services does not reach HUF 25 million or the estimated value of public works does not reach HUF 150 million; [...]

(8) In the case of application of paragraph (7)(a), Article 100(1) shall not apply. Competition shall be ensured by the contracting authority also in cases specified in paragraph (7)(a) and (c) and at least three economic operators – which are able to comply with the suitability criteria for the performance of the contract according to the contracting authority – shall be invited to tender. In the course of the selection of economic operators to be invited to tender, the principle of equal treatment shall be complied with and, *if possible, in particular* the participation of micro, small or medium-sized enterprises shall be ensured. For the purposes of the consideration thereof, the restrictive provision laid down in Article 3(4) of the Act XXXIV of 2004 on Small and Medium-sized Enterprises and the Support Provided to Such Enterprises shall not apply.

Article 122(9)-(10)
(9) The contracting authority may reserve the right to participate in a public procurement procedure for tenderers not reaching in the previous year in the case of public supply and public services a revenue HUF 100 million net of VAT, in the case of public works a revenue of HUF 1 billion net of VAT, who use subcontractors also complying with the condition set in this paragraph for the performance of the contract and who fulfil the defined suitability criteria with the support of the capacity of another entity also complying with the conditions set by this paragraph.

(10) In the case of public works and works concessions paragraph (9) only applies if the value of the public procurement does not exceed HUF 500 million.

Article 123
(1) The contracting authority may develop independent procedural rules not subject to provisions set out by Part Two of this Act.

(2) The type of procedure chosen by the contracting authority may not be changed by him in the course of the public procurement procedure; if he develops independently the rules concerning the procedure to be conducted by him in the course of the public procurement procedure, those rules shall be indicated in the notice launching the procedure. The notice launching the procedure shall ensure in all cases that, on the basis of it, the economic operators are able to submit appropriate tenders or requests to participate with equal opportunities.

(3) The notice launching the procedure shall state all the information necessary for suitable tendering (request to participate) by the economic operators, in particular the most important elements of the contract to be awarded (the subject of the procedure, the quantity, the contract terms) and a short description of the way of awarding (award criteria and method), the time limit for submission of tenders (time limit to participate) and the information concerning the way of contacting the contracting authority. The contracting authority shall be bound to arrange for the opening of the tenders at the time and place indicated in the notice launching the procedure. The invitation shall be published by the contracting authority in a notice drawn up pursuant to the standard form specified in a separate piece of legislation.

(4) In the notice launching the procedure the contracting authority shall be entitled to prescribe to apply in the public procurement procedure one or more grounds for exclusion set out in Articles 56-57, however, other grounds for exclusion than those set out by this Act may not be prescribed. The contracting authority shall be bound to provide for the application of the ground for exclusion specified in Article 56(1)(k) and (2). As regards suitability, the contracting authority may provide for other objective suitability criteria and way of certification than the suitability certification criteria set out in the separate piece of legislation, but the provisions set out in Article 55(3) shall be applied in such a case as well.

(5) For the purposes of establishing the procedural rules according to paragraph (1), the contracting authority shall be bound to ensure the public nature of procedures to the appropriate degree, in compliance with this Act.

(6) The contracting authority shall ensure all the economic operators established in the European Union equal access (right to participate), mutual recognition of diplomas, certificates and other evidence of formal qualifications, as well as provision of information on time limits suitable for the submission of tenders (requests to participate), drawing up of the regulations making it possible to have preliminary information on the applicable procedural rules and respect of the principle of non-discrimination and equal treatment when the decision closing the procedure is taken.

(7) The subject-matter of the contract shall be described by the contracting authority in a non-discriminatory way; public procurement technical specifications may not be set by the contracting authority in such a way as to exclude certain economic operators or goods from the procedure or to result in their inappropriate, discriminatory or preferential treatment. If the precise and intelligible description of the subject-matter of the public procurement justifies reference to a specific make or source, or type, or a particular process, activity, person, patent or trade mark, the specification shall state this was justified only by the need to

specify the subject-matter precisely, and such a reference shall be accompanied by the word 'or equivalent.'

(8) As regards the budgetary authorities controlled or supervised by the Government, the public foundations established by the Government as well as the business organisations owned by the State, the Government shall have the right to set binding procedural rules according to paragraph (1)-(7) for public supplies and public services not reaching EU thresholds.

(9) The contracting authority shall inform in writing tenderers, candidates as well as, before the opening of tenders, the economic operators who have expressed their interest in the procedure about all the decisions and information affecting the results of the procedure and the detailed justification thereof as soon as possible and not later than three business days after the decision. After the completion of the evaluation of tenders, the contracting authority shall be bound to draw up a written summary which provides information on the evaluation of tenders and the reasons for the selection of the winning tender, and to send that written summary to all tenderers at the same time, by fax or by electronic means.

(10) For the purposes of establishing the individual procedural rules pursuant to paragraph (2), the contracting authority shall be bound to provide for the grounds for exclusion specified in Article 74(1) and (3), and shall be entitled to provide for the grounds for exclusion specified in Article 74(2), noting that the ground for exclusion specified in Article 74(1)(d) shall only apply in case of the prescription of suitability criteria.

(11) In the course of the procedure, provisions set out in Articles 80 and 81 shall be applied accordingly.

REPUBLIC OF IRELAND

Catherine Donnelly,[1] *Jenny Mellerick,*[2]
Aileen Murtagh,[3] *Joanne Finn*[4] *and Brady Gordon*[5]

The context

Question 1

The approach adopted by the Irish system prior to the implementation of the EU public procurement rules was largely an approach of minimal regulation, in which public servants were trusted and granted a wide discretion on how to choose contractors. That said – although seemingly not tested prior to the introduction of the EU regime – choices made by contractors would have been subject to the usual principles of administrative law. Indeed, this is the regime that currently applies to sub-threshold contracts which do not have cross-border interest.[6] Moreover, although not without uncertainty,[7] Irish courts have perhaps been less willing than their English counterparts to deem public contracts to fall beyond the scope of administrative law and in the private law sphere.[8]

---

1. Dr. Catherine Donnelly is a Barrister in the Law Library, Dublin and Blackstone Chambers, London and Associate Professor at Trinity College Dublin.
2. Jenny Mellerick is Partner at McCann FitzGerald.
3. Aileen Murtagh is an Associate at A&L Goodbody.
4. Joanne Finn is Partner and head of the EU Competition and Regulated Markets group at Eugene F. Collins.
5. Brady Gordon is a PhD researcher at Trinity College Dublin.
6. *O'Kelly Brothers Civil Engineering Company Ltd v Cork County Council* [2013] IEHC 159.
7. See, e.g., *Rajah v Royal College of Surgeons in Ireland* [1994] 1 ILRM 233; *Quinn v King's Inns* [2004] 4 IR 344.
8. Contrast, for example, the Irish case *McCord v ESB* [1980] ILRM 153 and the English case, *R v Lord Chancellor's Department, ex p Hibbit and Saunders* [1993] COD 326 (DC) 328-9. In England, see also *L v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

In terms of adaptation challenges, it appears that, at least now, Irish contracting authorities are generally aware of their obligations to follow the prescriptive EU regime. Some case law suggests that – even though Ireland shares a border with another EU Member State, which often creates potential for cross-border interest and engagement of the general Treaty principles – there remains perhaps a resistance to or lack of awareness of the scope for applicability of the general principles to sub-threshold contracts.[9] It may be that tensions with the former discretionary system also arise in the context of the remedial scheme that applies for breaches of the EU rules. Despite the implementation of the Directive 2007/66 in 2010,[10] Ireland continues to have a comparatively low number of procurement cases which reach hearing (in the region of two to three cases each year at most). Concerns about prohibitive litigation costs and about jeopardizing chances in future competitions (despite the prescriptiveness of the EU regime) tend to influence decisions on whether to proceed with litigation.

Generally, public procurement law is very much applied as a form of administrative judicial review in Ireland. The applicable rules governing the legal procedures are similar in substance to those applicable to administrative law judicial review. Procurement challenges are also perceived as being located within the realm of administrative judicial review: the relevant rules are firmly located in the judicial review section of the Rules of the Superior Courts, in Order 84A,[11] following the usual judicial review scheme in Order 84, while procurement cases are managed by the judicial review section of the High Court. Indeed, the close links between procurement review and administrative review in Ireland are perhaps best demonstrated by the *SIAC* case,[12] in which the question arose as to the suitability of Ireland's traditional administrative law standard of review – whether a decision 'was unreasonable in the sense that it plainly and unambiguously flew in the face of fundamental reason and common sense'.[13] While the ECJ did not comment explicitly on the Irish administrative standard, the Opinion of AG Jacobs recommended that in his view the test of objectivity in the award procedure should

9. See, e.g., *O'Kelly Brothers Civil Engineering Company Ltd v Cork County Council* [2013] IEHC 159.
10. European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010).
11. Ord. 84A R.S.C. (S.I. No. 15 of 1986).
12. Case C-19/00 *SIAC Construction v Mayo County Council* [2001] ECR I-7725.
13. *SIAC Construction Ltd. v Mayo County Council* [1997] IEHC 97.

be 'rather less extreme'.[14] Upon return to the Irish courts, the Supreme Court therefore referred to two European procurement cases, Case T-19/95 *Adia Interim*[15] and Case T-203/96 *Alsace International Car Services*[16] to enunciate a new 'manifest error' administrative standard of review that comports with the 'wide discretion' afforded to Community contracting authorities in procurement.[17]

The boundaries of EU public procurement law

Question 2

There is no specific definition of a '*public contract*' in national law. Nor are sharp distinctions drawn between different forms of administrative action and secondary legislative measures.[18]

The definition of a '*public contract*' was considered in the case of *Student Transport Scheme v Minister for Education and Skills*.[19] This case involved a challenge by the Applicant to the alleged award of a public contract by the Respondent, the Minister for Education and Skills ('the Minister') to Bus Éireann – the Irish State-owned operator of bus services – for the administration of the State-wide School Transport Scheme ('the Scheme'). The Applicant contended that the arrangements between the Minister or the Department for Education and Skills ('the Department') and Bus Éireann for the administration of the Scheme gave rise to a contract which ought to have been subjected to competitive tender. The Court concluded that no such contract arose.[20]

14. Case C-19/00 *SIAC Construction v Mayo County Council* [2001] ECR I-7725.
15. [1996] ECR II-321.
16. [1998] ECR II-4239.
17. *SIAC Construction Ltd. v Mayo County Council* [2002] 5 JIC 0902.
18. G. Hogan, D.G. Morgan, *Administrative Law in Ireland* (4th Edition, Sweet and Maxwell 2012) paras 17-01 - 17-37. See, e.g. *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 per Murray CJ.; *East Donegal Co-Operative Livestock Mart Ltd. v Attorney General* [1970] IR 317 at 341, per Walsh J.
19. [2012] IEHC 425.
20. For a commentary on the case, see P. McGovern 'Ireland – the dividing line between a contract and an administrative scheme of a non-contractual nature, and the issue of standing under the EU procurement rules' [2013] 3 PPLR NA88.

In reaching this conclusion, the Court referred to a number of cases of the Court of Justice of the European Union ('the CJEU'), including Case C-523/03 *Commission v Ireland*,[21] Case C-295/05 *Asemfo v Tragsa*[22] and Case C-220/06 *Correos*.[23] The Court adopted the view that the following – established as fact – were indicia of a relationship between the respondent and the notice party which was not contractual:[24]

- The Scheme was unilateral in nature as evidenced by the manner of its inception when the Minister wrote to Bus Éireann's state-owned parent ('CIE') on 10 February 1967, as follows: '... *I wish to inform you that I have decided to give the total administration of this scheme to CIE.*' In a reply, the parent accepted the task assigned to it and referred to the previous letter '*informing [CIE] of your decision to entrust to us responsibility for the total administration of your new scheme for free transport /or children attending post-primary schools*'.
- Bus Éireann was required to administer the Scheme as agents of the Minister and is obliged to operate the Scheme in accordance with its general directions and policy.
- Bus Éireann performed its functions because it had been instructed to do so.
- The Minister – not Bus Éireann – controlled and directed the policy of school transport through eligibility criteria which are laid down by the Government.
- The Scheme was operated on a cost recovery basis.
- The Minister had increased the charges for children using the Scheme, thereby making it harder to meet eligibility requirements and reducing demand for school transport.
- Funding to the Scheme had been cut by the Minister, and while Bus Éireann was entitled to make representations, it could not bind the Minister in any way to the status quo ante.

Question 3

There is no over-arching scheme of regulation for public-public cooperation in Ireland. In the *Student Transport* case already discussed above, for exam-

21. [2007] ECR I-11353.
22. [2007] ECR I-02999.
23. [2007] ECR I-12175.
24. [2012] IEHC 425, paragraph 26.

ple, the Court added to its analysis that the Scheme would have been exempt from the EU procurement rules by virtue of the *Teckal* exemption.[25] In this case, the public-public cooperation arose, as outlined above, by virtue of administrative entrustment – communicated by way of letters – of the task to Bus Éireann's parent; no particular form of arrangement was required. Where a public-public cooperation arrangement arises, it will generally fall within the scope of general administrative judicial review.

There appears to be very little empirical evidence on whether, as a general matter, public-public partnerships are limiting the amount of business in the market. The *Student Transport* case clearly involved a substantial endeavour, ultimately providing services to approximately 111,000 pupils on approximately 6,000 transport routes, however a recent survey found that only 5% of suppliers typically focus on contracts valued at €1 million or more.[26] It does not appear that public-public cooperation such as that at issue in *Student Transport* is particularly widespread and as such, it seems debatable whether such cooperation is having an impact on the market.[27]

Question 4

So far as we are aware, there is no 'blanket' category of public-private consensual arrangements considered by Irish authorities to fall outside the scope of application of EU procurement rules. In general, the approach laid down by European law is followed: namely, that to see whether any individual arrangement falls outside the scope of application of the EU rules, one must first consider the provisions of the relevant procurement Directive; if the Directive does not apply (whether because of the nature or value of the contract, for example if it is covered by one of the exemptions in Article 16 of Directive 2004/18/EC), it must then be considered whether general EU Treaty obligations apply due to the prospect of cross-border interest in the contract; if there is no such prospect, national guidelines on public procurement must

25. Case C-107/98 *Teckal Sri v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] ECR I-08121.
26. A. Flynn, P. Davis, D. McKevitt, E. McEvoy, 'Mapping public procurement in Ireland' [2013] 1 PPLR 74, 82.
27. A survey of representatives of contracting authorities found that 86% claim that they advertise contracts for the supply of goods in compliance with Irish national guidelines. 65% state that SME access is an important consideration in purchasing. A. Flynn, P. Davis, D. McKevitt, E. McEvoy, 'Mapping public procurement in Ireland' [2013] 1 PPLR 74, 83-84.

be considered, which are binding on some, but not all, contracting authorities (but are typically followed even by bodies on whom they are not binding). These guidelines (such as the *Code of Practice for the Governance of State Bodies*)[28] provide a general approach that arrangements entered into by contracting authorities with the private sector are to be subject to competitive tendering unless there are justifiably exceptional circumstances (it is left to the contracting authority to record and justify the decision not to go to competitive tendering in any particular case). The formality of the procurement procedures involved vary depending on the size of the contract (for example, a very low-value contract might involve merely contacting a number of economic operators to seek quotations for the work, while a contract close to the threshold for application of the procurement Directives will typically involve a process similar to a full Directive competition).

However, where a particular arrangement falls within the limited circumstances identified by the European courts as permitting a direct award (for example, the in-house *Teckal* exemption, the mutual co-operation exemption, or any of the circumstances listed in Article 31 of Directive 2004/18/EC), it would be typical for contracting authorities to take the view that they are entitled in such circumstances to directly enter into a contract with a particular economic operator (they may nonetheless choose to follow the national guidelines on domestic procurement referred to in the foregoing paragraph, although this would be atypical).

As regards more unusual public-private arrangements, such as licences to operate games of chance, sales of land involving development, and service concessions, as a general rule EU case law is considered in order to determine whether the arrangement is subject to the general obligations of the EU Treaty or whether EU rules have no application.

Question 5

Ireland does not have any specific legislation dealing with the situation of mixed arrangements and we are not aware of any case law from the Irish courts which has specifically identified and addressed this issue. In general, the approach of Irish authorities would be to follow the jurisprudence of the European courts in Case C-145/08 *Club Hotel Loutraki*[29] and Case C-215/09 *Mehiläinen Oy*,[30] although the slightly different approach taken in those cases

28. *Code of Practice for the Government of State Bodies* (Department of Finance, 2009).
29. (Court of Justice, Fourth Chamber, 6 May 2010).
30. (Court of Justice, Third Chamber, 22 December 2010).

to how robustly the CJEU will look into the indivisibility of the contract can make them difficult to apply in the context of any particular mixed arrangement.

In the context of arrangements subject to two potentially applicable regimes (e.g. one element a standard public service contract and one element a concession or a sale of shares), rather than arrangements where one element is subject to procurement rules and the other is not, the approach is typically to comply with the regime which imposes the most stringent obligations and to apply that regime to both elements.

The general principles of EU law: public procurement law and beyond

Question 6

Aside from national legislation implementing the two public procurement Directives and the accompanying remedies regime, Ireland does not have any specific legislation dealing with the award of contracts (or consensual arrangements) excluded, not covered, or not fully covered by the Directives. Instead, the approach of Irish authorities and the Irish courts has typically been to follow the case law of the European courts in such circumstances, including as regards the application of general EU Treaty obligations in cases where there is a prospect of cross-border interest: see the response to Question 4 regarding the approach taken.

Award of contracts which are not subject to any EU rules, following consideration of the various levels of EU regulation, are subject only to national guidelines and circulars on procurement issued by various government departments, and to the *Code of Practice for the Governance of State Bodies* issued by the Department of Finance.[31] Whether such guidelines are legally binding will differ from authority to authority depending on the legislation applicable to such authority and depending on the legislative basis for issuing such guidelines. However, in practice many contracting authorities follow the guidelines/circulars in any event. Those guidelines change from time to time, but the general principle, as set out in the response to Question 4, is that competitive tendering is the default approach for public bodies entering into con-

31. *Code of Practice for the Government of State Bodies* (Department of Finance, 2009).

tracts with the private sector, save in justifiably exceptional circumstances (which it is for the public body involved to record and justify).

Question 7

The Irish courts are cognizant of the scope of the principles of equal treatment and transparency beyond the scope of the procurement directives.[32] Recently, in *Student Transport Scheme Ltd.,* the court reaffirmed that the general principles apply to the procurement of services '*whether or not they fall within the scope of the Public Contracts Directive.*'[33] While there is nothing to limit the scope of those principles, in practice they have been developed in three situations analogous to a public works contract: Where the situation is an exception under the directives;[34] the granting of concessions;[35] and, recently, the granting of a single license to provide services in a legally restricted market.[36] While the English courts have taken all three situations as a guide,[37] the Irish courts have tended to look for the existence of a contract under the first two situations, but not considered the principles outside of those contexts.[38] Most recently, in *Student Transport Ltd.* the courts did not consider the application of equal treatment and transparency once the possibility of a contract had been eliminated.[39] There is currently no definitive rule in Ireland indicating that the case law on transparency should be applied to unilateral administrative measures.

---

32. See question 4. See also, for example: *Baxter Healthcare Ltd. v Health Service Executive* [2013] IEHC 413, para. 36 and *Fresenius medical Care Ltd. v Health Service Executive* [2013] IEHC 414, para. 33; where the courts accepted that the general principles apply at all stages in relation to Annex IIB contracts.
33. [2012] IEHC 425, para. 6.
34. See, e.g., Case C-59/00 *Vestergaard v Spøttrup Boligselskab* [2001] E.C.R. I-9505; *Baxter Healthcare Ltd. v Health Service Executive* [2013] IEHC 413, para. 36; *Fresenius medical Care Ltd. v Health Service Executive* [2013] IEHC 414; *Release Speech Therapy v Health Service Executive* [2011] IEHC 57.
35. See, e.g., Case C-324/98 *Telaustria v Telekom Austria* [2000] ECR I-10745. Case C-231/03 *CoNaMe v Comune di Cinglia de' Botti* [2005] ECR I-7287.
36. Case C-203/08 *Sporting Exchange Ltd. v Minister van Justitie* (Court of Justice, Second Chamber, 3 June 2010); Case C-470/11 *Garkalns v Rigas dome* (Court of Justice, Fourth Chamber, 19 July 2012).
37. See, e.g. *AG Quidnet Hounslow LLP v Hounslow LBC* [2013] 1 CMLR 25, para. 63.
38. See, e.g. *Student Transport Scheme v Minister for Education* [2012] IEHC 425, para. 20.
39. [2012] IEHC 425.

Public procurements and general EU law, including competition and State aids law

Question 8

Decisions taken by contracting authorities may constitute measures imposing restrictions on the internal market. Insofar as such decisions impose such restrictions, they must comply with the principles of non-discrimination and proportionality.

The principle of non-discrimination prohibits contracting authorities from discriminating against suppliers directly or indirectly, in their procurement process, on grounds of nationality. Even if the contracting authority does not expect any foreign tenders in response to a contract notice, it may not include requirements that only Irish companies are aware of or can perform in the contract documents. The contracting authority may not, for example, give preference to a local company.

The Commission has investigated several Irish cases on the issue of discrimination on the grounds of nationality. One such case is *Case 45/87 Commission v Ireland (Dundalk Water Scheme),*[40] in which a contracting authority specified the pipes needed for a water scheme according to the national standard which measured the external diameter, while other European pipe standards referred to internal diameter. The Court found that the clause specifying the Irish standard restricted the supply of pipes needed for the Dundalk scheme to Irish manufacturers alone and indirectly prevented the supply of equivalent pipes from outside Ireland, concluding that Ireland had failed to fulfil its obligations under Article 34 TFEU.

Contracting authorities are also bound by the principle of proportionality in their procurement decisions. An example of the application of this principle is contained in *Circular 10/10: Facilitating SME Participation in Public Procurement*, which was issued by the Department of Finance and in which:

> *'contracting authorities are strongly reminded that the levels they set for suitability criteria (especially in relation to a potential tenderer's turnover levels) must be both justifiable and proportionate to the needs of the contract'.*[41]

---

40. [1988] ECR 4929.
41. *Circular 10/10: Facilitating SME Participation in Public Procurement* (Department of Finance, 2010) 2.

The question of whether decisions taken by contracting authorities which impose restrictions on the internal market must be additionally justified by imperative requirements in the general interest has not been considered by the Irish courts. In performing their functions, and in particular in taking decision which may affect rights or impose liabilities, Irish contracting authorities must act in accordance with administrative law, which imposes strong requirements for procedural fairness, or 'natural and constitutional justice'. They are also bound to comply with the *Code of Practice for the Governance of State Bodies*.

Question 9

There are no public procurement rules specific to Ireland which lend themselves to abuse thus potentially limiting competition.

Question 10

SGEIs can be outsourced to market participants, but any such awards should follow public procurement type procedures.

Strategic use of public procurement

Question 11

The potential for using public procurement legislation to achieve environmental and social objectives has been under discussion in Ireland since the initial case law of the ECJ recognized the possibility in Case C-513/99 *Concordia Bus.*[42] The first Guidance from the Irish government contracts committee, *Environmental Considerations in Public Procurement*, was published in 2004 and regularly updated since. However, there is no specific Irish legislation in this area, the achievement of horizontal goals in the procurement context being largely left to national guidelines and circulars on procurement. The financial crisis has increased enthusiasm for the use of public procurement to achieve wider social policy goals, to the extent that a recent Irish

42. Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and Hkl-Bussiliikenne* [2002] ECR I-7123 (*Concordia Bus*).

study notes that the proliferation of governmental reports referring to public procurement as a policy tool.[43] Particular enthusiasm appears to be reserved for the encouragement of sustainability objectives and encouraging the accessibility of public contracts for SMEs.[44] However the extent to which this enthusiasm results in a change in the behaviour of contracting authorities is unclear. Some recent research suggests that significant headway is being made in practice on some social policy issues.[45] However, there is undoubtedly a tension between the twin demands of ensuring efficiencies in public spending on one hand and furthering wider social policy goals on the other. Social considerations that involve increased costs have not been viewed as feasible in Ireland during the crisis, with the exception of employment related objectives, such as the participation of SMEs. Key elements in the promotion of the latter objective are the encouragement of measures by public sector bodies such as the national advertisement of smaller contracts, breaking contracts into lots where possible, reducing the administrative burden on tender participants wherever possible, and refraining from disproportionate requirements such as very high levels of turnover or insurance with which SMEs often find it difficult to comply.

The Irish authorities have implemented secondary law instruments such as Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles by way of statutory instrument, maximizing the possible discretion provided for the Directive by permitting any of the optional approaches to be employed by awarding authorities.[46] However, no date on the use of such mechanisms by the Irish public sector is available.

Question 12

As discussed above, discussion of the use of procurement to achieve policy results, including innovation, has increased in Ireland during the financial crisis. Increasing pressure is being put on contracting authorities from central

---

43. A. Flynn, P. Davis, E. McEvoy and D. McKevitt, 'Baselining Public Procurement in Ireland' (Dublin City University Business School, 2012).
44. For example in *Green Tenders: An Action Plan on Green Public Procurement* (Department of Environment, Community & Local Government, 2011).
45. A. Flynn, P. Davis, D. McKevitt, E. McEvoy, 'Sustainable Public Procurement in Practice: Case Study Evidence from Ireland' in *Charting a Course in Public Procurement Innovation and Knowledge Sharing* (Academic Press, 2012).
46. European Communities (Clean and Energy Efficient Road Transport Vehicles) Regulations, 2001 (S.I. No. 339 of 2011).

government to ensure that they are fostering innovation through their procurement practices. Procurement is seen as a key policy area in the Government's approach to a competitive economy, and a 'Procurement Innovation Group' was established by the Department of Enterprise Trace and Employment in 2008, with a view to providing guidelines to public sector organisations on fostering innovation. Empirical evidence as to the impact of such guidelines is rare. Particular challenges have been identified by review groups including that public sector buyers may be risk averse and that the real potential for innovation lies on the supply side, rather than with the purchasers. The guidelines include practical steps that the public sector can take to mitigate these factors inhibiting innovation, including full market consultation in advance of procurement processes. Government guidance also encourages suppliers to approach awarding authorities with innovative proposals prior to the initiation of procurement processes, acknowledging the reality that innovations suggested during such processes may arrive too late.

The competitive dialogue procedure was quickly adopted in Ireland on its introduction in Directive 2004/18 and early studies suggested that its usage in Ireland was slightly higher than the EU norm.[47] Indeed the procedure has been used in a fairly wide range of public sector projects including stadia, forestry projects and schools. However there has been a marked decrease in its use in recent years and the perception is that this is partly because of the experience that the procedure is difficult to operate effectively being both costly and slow with insufficient clarity as to the compatibility of particular practices with the procurement rules. However, given the decrease in the public sector commissioning complex projects since 2007 and the documented cases of contracting authorities using the negotiated procedure in place of competitive dialogue because of the difficulties for tenderers in accessing funding, it will be some time before it can be identified whether there is a genuine trend away from use of the competitive dialogue procedure by Irish awarding authorities. Industry stakeholders have recently expressed concern that it is not used enough and that an increase in its use would have a positive impact on innovation in procurement practices.[48]

47. R. Craven, S. de Mars, 'Use of Competitive Dialogue in the European Union: an Analysis from the Official Journal' in S. Arrowsmith, S. Treumer, *Competitive Dialogue in EU Procurement* (Cambridge University Press, 2012).
48. IBEC, *Public Contracts Group Consultation on public procurement in Ireland*, (IBEC 2013).

Remedies

Question 13

Directive 2007/66/EC was implemented into Irish Law by the Public Authorities' Contracts (Review Procedures) Regulations and the Utility Undertakings (Review Procedures) Regulations.[49] Remedies available under Irish law have been strengthened primarily by the automatic suspension pending a decision on an application to the courts and the mandatory nature of ineffectiveness.[50]

Regarding interim measures, prior to 20 December 2009 the applicant was required to seek an injunction as part of an application for interim relief.[51] The proceedings themselves did not suspend the award automatically.[52] While interlocutory remedies must still be sought within the review process, the contract must now be suspended until a decision is taken on the initial application. The remedies which may be awarded by the Court include interlocutory orders, set-aside or variation of a contract, ineffectiveness, and 'alternative penalties' (e.g. a pecuniary penalty or a limitation on contract duration).[53] It should be noted however that recent research suggests that interim remedies may be under-sought. A recent study found that the standstill period '*may be under exposed and limitedly used*'.[54]

---

49. European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010); European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 (S.I. No. 131 of 2010).
50. Ord. 84 A R.S.C. (S.I. No. 15 of 1986).
51. P. McGovern, P Curran, 'Ireland' in H.-J. Prieb, *Getting the Deal Through: Public Procurement* (Law Business Research Ltd., 2011) 124.
52. C. Donnelly, 'Remedies in public procurement law in Ireland' [2009] PPLR 19; H. Delaney, *Equity and the Law of Trusts in Ireland* (4th edn, Thomson Round Hall, 2007) 509-543. See, e.g. *Clane Hospital Ltd. v Voluntary Health Insurance Board* (Unreported, High Court 22 May 1998).
53. Regs 11-15 European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010). Regs 65-76 of the Award of Contracts by Utility Undertakings Regulations 2007 (S.I. No. 50 of 2007) provide similar remedies.
54. *The Impact of the Remedies Directive on Small Indigenous Suppliers in Ireland* (DCU Business School, 2013) Available at: http://www.winningintendering.eu/_fileupload/summary_remedies%5B1%5D.pdf

Contracts may be declared ineffective under the Regulations in the three specific circumstances provided for in the Directive.[55] Prior to their entry into force, the courts retained discretion to nullify the contract at any stage.[56] The mandatory nature of ineffectiveness has circumscribed the discretion formerly available to the Irish courts in that regard, however discretion to 'grant any other remedy in relation to a contract' is preserved outside of those situations.[57] The rules have therefore amounted to a bolstering of the remedies falling into the three situations while preserving the court's discretion outside of them.

Damages remain available '*whether or not [the court] exercises any of its other powers*'.[58] In determining an application for interlocutory injunction, the Irish courts apply the established principles in *Campus Oil Ltd.*[59] That test relies heavily on the adequacy of damages, and thus at that stage damages are the preferred remedy. However, if the claim proceeds to trial, and a failure to comply with the procedures on the part of a contracting authority is found, the *restit*o *in integrum* principle of tort applies.[60] This requires the plaintiff to show that she would have suffered compensable loss, and therefore secured the contract – a difficult burden in particular where the applicant did not take part in the procedure.[61] The courts have shown ingenuity in crafting alternate remedies.[62]

Contracts not covered by the directives remain subject to principles of judicial review, contract and tort law, as well as the general principles where applicable.[63] There are also a range of alternative remedies including freedom

55. Reg. 11 European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010).
56. C. Donnelly, 'Remedies in public procurement law in Ireland' [2009] PPLR 19, 32.
57. Regs 13-14 European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (S.I. No. 130 of 2010).
58. *Dekra Eireann Teoranta* [2003] 2 IR 270 at 295-296.
59. *Campus Oil Ltd. v Minister for Industry and Energy* [1983] IR 88, following *American Cyanamid Company v Ethicon Ltd.* [1975] AC 396.
60. BME McMahon and W. Binchy, *Law of Torts* (3rd Edn, Dublin, 2000), para. 44.7.
61. Damages on a 'loss of chance' basis has not yet been considered by the Irish courts under the Directives. C. Donnelly, 'Remedies in public procurement law in Ireland' [2009] PPLR 19, 27.
62. *Copymore Ltd. v Commissioners of Public Works in Ireland* [2013] IEHC 230.
63. See, e.g., *Baxter Healthcare Ltd. v Health Service Executive* [2013] IEHC 413, para. 36; *Fresenius Medical Care Ltd. v Health Service Executive* [2013] IEHC 414; *Release Speech Therapy v Health Service Executive* [2011] IEHC 57.

of information requests,[64] competition law actions, and standards in public office complaints.[65]

Conclusion and reform

Question 14

The fundamental concepts underlying the directives remain largely the same, however the new directives will facilitate legal certainty and help simplify tendering procedures.

The understanding of concession contracts in Irish law is similar to that under the Concessions Directive.[66] Public service concession contracts are understood in Ireland are public service contracts where the consideration consists only of the right to exploit the service.[67] Risk exploitation has been defined as existing in contracts where 'the effect of drawing an economic benefit to itself, in whole or in substantial part, through payment for the service it thereby provides.'[68] Benefits under the directive will therefore largely come from increased certainty as to which procedures are required for such contracts.

The benefits of the new proposal for a directive on public procurement will likewise lie in fostering legal certainty and clarity. Government guidance has reflected the concern of SMEs that cumbersome requirements have led to tendencies towards restricted procedures, single large suppliers, and confusing evaluation procedures.[69] Government objectives of attaining economies of scale through aggregated contracts may naturally tend towards longer-term

64. C. Little, C. Waterson, 'Evolution, not Revolution' [2011] 11 CLP 255.
65. P. McGovern, P Curran, 'Ireland' in H.-J. Prieb, *Getting the Deal Through: Public Procurement* (Law Business Research Ltd., 2011) 119.
66. Recital 7, Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, COM (2011) 897 final.
67. Reg. 3, European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. No. 329 of 2006).
68. *Danninger v Bus Atha Cliath* [2007] IEHC 29 at 36.
69. *Guidance for Public Contracting Authorities: Facilitating SME Participation in Public Procurement* (Department of Finance, 2010) *The Impact of the Remedies Directive on Small Indigenous Suppliers in Ireland* (DCU Business School, 2013) Available at: <http://www.winningintendering.eu/_fileupload/summary_remedies%5B1%5D.pdf>

contracts and framework agreements, the constrictive effect of which has been subject of recent litigation.[70] The expansion of the circumstances where the negotiated and dialogue procedure is permitted will bolster Department of Finance initiatives to simplify procedures and increase purchaser engagement with suppliers.[71]

70. See, e.g., *Copymoore Ltd. v Commissioners of Public Works in Ireland* [2013] IEHC 230.
71. See: *Guidance for Public Contracting Authorities: Facilitating SME Participation in Public Procurement* (Department of Finance, 2010).

ITALY

Roberto Mastroianni[1]

Le contexte

Question 1

Pour ce qui concerne l'adoption, en Italie, des règles européennes sur les marchés publics, elle a été caractérisé par une succession, dans les années, de différentes sources normatives, jusqu'à l'adoption, en 2006, d'un véritable code des marchés publics (d.lgs. 12 avril 2006, n. 163, « Codice degli appalti pubblici » et successives modifications).

Cette normative présente, dans son complexe, une forte origine communautaire, même dans les domaines qui seraient exclus des prévisions du droit européen (comme, par exemple, les marchés publics en dessous des seuils d'application de la directive n. 2004/18/CE) et est influencé non seulement des règles spécifiques de la matière mais aussi par les valeurs et les principes des Traités. C'est pour cette raison que le chemin d'adaptation du système national au système de l'Union, y compris pour ce qui concerne le respect de la jurisprudence européenne, a demandé un travail continu dans le temps, qui n'a pas toujours suivi un parcours et une évolution linéaires. S'il est vrai, d'une part, que la majorité des défis a été surmonté à partir du moment de la reconnaissance du principe de la primauté du droit communautaire, de l'autre part des contrastes sont nés à partir de ce moment. En premier lieu, il est force de noter que le principe de la primauté, avec son corollaire de la disapplication de la normative nationale en contraste avec le droit de l'Union, a fait que les juges administratifs soient confrontés à un pouvoir qui était traditionnellement attribué aux juges ordinaires. Pour ce qu'il concerne les différents objectifs des deux systèmes, le droit administratif national a dû s'adapter à une nouvelle notion de « organisme de droit public » (qui finalement implique un nombre plus grand de sujets) et à des objectifs plus amples, c'est-à-dire dans

1. Professeur de droit de l'Union européenne à l'Université de Naples « Federico II ». L'auteur remercie M.me Vittoria Bocchetti, doctorante en droit de l'Union européenne à l'Université « Parthenope » de Naples pour la précieuse collaboration.

le sens d'une perspective ouverte à la sauvegarde de la concurrence entre entreprises communautaires et non seulement des intérêts particuliers des administrations concernées. Dans ce contexte, à côté d'un processus de révision interprétative de plusieurs aspects de la discipline normative nationale, on a, au même temps, assisté à l'introduction de nouveaux outils juridiques, auparavant inconnus dans le droit administratif italien, c'est le cas, par exemple, de l'« avvalimento ».[2]

Les plus grandes défis face auxquelles le système national a été confronté concernent la capacité des administrations publiques d'agir en tant que sujets privés dans le cadre de l'engagement aux règles du droit privé, en particulier des contrats. La solution a été trouvée dans la reconnaissance, aux administrations concernées, d'une « capacité générale » de droit privé, dans la mesure où elles peuvent appliquer et peuvent être destinataires des règles de droit commun, sauf dérogations spécifiques.[3] Néanmoins, cette solution continue à poser des problèmes applicatifs pour ce qui concerne la résiliation du contrat, même si la dite approche a la tendance à garantir que il soit établi un raisonnable équilibre entre les sujets publiques et privés.[4]

Une autre question concerne les spécificités de notre système constitutionnel, c'est-à-dire la séparation des pouvoirs entre Etat central et Régions, s'agissant de vérifier quelles administrations sont compétentes lorsque les contrats de marché public relèvent de l'intérêt régional. La question a été résolue dans le sens de vérifier, concrètement, la portée du contrat, de manière qu'il n'y existe pas, à priori, une distinction de compétences spécifique et générale, mais a laissé au législateur national la fixation des principes fondamentaux dans les matières de compétence concurrente entre Etats et Régions.[5]

Actuellement plusieurs questions concernant l'implémentation en Italie de la discipline européenne sur les marchés publics font l'objet de l'activité de la Cour de Justice de l'Union Européenne. On y retrouve, par exemple, la question de l'interprétation du contrat de location d'une chose future qui fait l'objet

---

2. C'est-à-dire, le groupement, qui est prévu aux les articles 4 et 48 de la directive n. 2004/18 CE et, au niveau interne, aux articles 49 et 50 du Codice degli appalti pubblici.
3. À ce sujet, le d.lgs. n.163/2006, art. 2, alinéa 4, prévoit que pour ce que n'est pas expressément prévu dans le code des marchés public, l'activité contractuelle des administrations publiques est soumise aux règles du code civil.
4. Voir l. 241/1990, art. 1 et 11, ainsi que successives modifications (loi n. 15/2005).
5. Voir arrêts Corte Costituzionale, n. 401, du 28 novembre 2007 ; n. 320 du 30 juillet 2008 ; n. 411, du 17 décembre 2008 ; n. 160, du 22 mai 2009 et n.283, du 6 novembre 2009.

d'une procédure préjudicielle devant la Cour de Justice (saisie par le Consiglio di Stato[6]), il étant question de vérifier s'il peut être assimilé à un contrat de marché public de travaux (auquel s'applique la directive 2004/18/CE, car il ne fait pas partie des exclusions spécifiques visées à l'article 16, sous a).[7] De plus, une question préjudicielle s'intéresse à l'interprétation de la réglementation nationale relative à la possibilité de réadmission à une procédure d'appel d'offres par un soumissionnaire qui en aie été exclu en raison d'une erreur figurant dans son dossier de réponse à l'appel d'offres et, par conséquent, sa conformité à l'article 45 de la directive 2004/18/CE.[8] En conclusion, on ne peut pas dire que le processus d'adaptation du droit national au droit de l'Union européenne en matière de marchés publics soit définitivement complet,[9] comme on relève du fait que la Commission Européenne ait mise en demeure l'Etat italien pour la violation, notamment, des directives 17 et 18 du 2004.[10]

---

6. Voir Ordonnance de renvoi du Consiglio di Stato, sect. V, n. 1962, du 11 janvier 2013.
7. Voir CJUE, affaire pendante C-213/13, *Impresa Pizzarotti*. La question relève aussi au sujet d'une possible violation et/ou contournement, de la part de l'Italie, de la réglementation européenne en matière d'attribution de marchés de travaux pour des montants supérieurs à 4 845 000 euros (la procédure est au cours de la phase de pré-instruction EU-pilot 232 1/11 MARKT devant la Commission Européenne).
8. Voir CJUE, affaire pendante C-42/13, Cartiera dell'Adda. Voir P. Provenzano, *La teoria del 'falso innocuo' in materia di dichiarazioni ex art. 38 D.Lgs. n. 136/2006 al vaglio della Corte di giustizia*, Rivista italiana di diritto pubblico comunitario, 2013, pag. 234 ss.
9. Voir aussi, CJUE, affaire C-564/11, ordonnance du 16 mai 2013, *Consulta Regionale Ordine Ingegneri della Lombardia e a. c. Comune di Pavia*, juridiction de renvoi Consiglio di Stato ; affaire C-159/11, arrêt (grande chambre) du 19 décembre 2012, *Azienda Sanitaria Locale di Lecce, Università del Salento/Ordine degli Ingegneri della Provincia di Lecce, e.a* , juridiction de renvoi Consiglio di Stato ; affaire C-352/12, ordonnance du 20 juin 2013, *Consiglio Nazionale degli Ingegneri c. Comune di Castelvecchio Subequo et Comune di Barisciano*, juridiction de renvoi TAR Abruzzo ; affaire C-94/12, arrêt du 10 octobre 2013, *Swm Costruzioni 2 SpA et Mannocchi Luigino DI c. Provincia di Fermo*, juridiction de renvoi TAR Marche. Toutes ces affaires concernent l'interprétation de la directive n. 2004/18/CE. Concernant les procédures de recours (directive 89/665/CEE), voir affaire C-100/12, arrêt du 4 juillet 2013, *Fastweb SpA c. Azienda Sanitaria Locale di Alessandria*, juridiction de renvoi TAR Piemonte.
10. Voir EU-pilot 232 1/11 MARKT cité à la note n. 6 ci-dessus.

Les limites du droit européen des marchés publics

Question 2

En droit italien, les contrats publics sont définis comme « contrats de marché public ou de concession, qui ont pour objet l'acquisition de services, ou de fournitures, ou l'exécution de œuvres ou travaux » et qui sont conclus par les pouvoirs adjudicateurs (art. 3, alinéa 3, *Codice dei contratti pubblici*). Cette catégorie comprend donc les marchés publics et les concessions. Pour ce qui concerne les premiers, il s'agit de « contrats à titre onéreux, conclus par écrit entre un ou plusieurs pouvoirs adjudicateurs et un ou plusieurs opérateurs économiques et ayant pour objet l'exécution de travaux, la fourniture de produits ou la prestation de services » (art. 3, alinéa 6). L'aspect de la nature de la prestation ou de son destinataire présente, donc, une relevance publique. Concernant les concessions, qu'elles soient concessions de services ou concessions de travaux publics, il s'agit toujours de contrats, conclus par écrit, qui ont les mêmes objets des marchés publics ; toutefois, la contreprestation consiste dans le droit de gérer les services ou les travaux fournis, parfois accompagné par le payement d'un prix. La seule différence substantielle par rapport aux marchés publics se retrouve dans le (soi-disant) « risque de gestion », qui découle sur le concessionnaire, en considération du fait que il est rémunéré par les usagers et non pas par les pouvoirs publics.

Au sujet de la participation à la fourniture des services exclusivement par des personnes morales de droit public, la doctrine italienne majoritaire est de l'avis de permettre cette participation, en advenant à une vérification, cas par cas, de la compatibilité des taches liées à la concession avec les buts propres des personnes publiques concernées.[11]

À ce propos, la jurisprudence italienne a correctement suivi l'interprétation de la Cour de Justice dans l'arrêt Asemfo (C-295/05), dans les sens de admettre l'exception *in house* seulement lorsque elle a été déjà prévue par une prévision normative nationale.[12]

Dans ce contexte, il est intéressant de relever – comme la Cour de Justice l'a déjà souligné – qu'il n'est pas incompatible avec les exigences publiques (par exemple en matière de planification urbaine) l'utilisation des instruments

11. Voir Consiglio di Stato, V section, arrêt n. 4327, du 29 juillet 2003, ainsi que TAR Campania, I section, arrêt n. 3411, du 12 juin 2002.
12. Voir Consiglio di Stato, VI section, arrêt n. 1514, du 3 avril 2007.

contractuels et/ou consensuels ; malgré cela, on ne doit pas forcément qualifier ces outils en tant que contrats de marchés publics.[13]

Question 3

Dans le cadre des pouvoirs d'auto-organisation des administrations publiques, il est possible qu'une administration se serve d'une autre administration publique pour l'approvisionnement de biens et services ou pour la prestation de services à sa communauté. Dans ce contexte, le lien entre les administrations peut relever d'une façon interne, lorsqu'il n'y a pas de distinction et autonomie entre les deux, ou bien de façon intersubjective, lorsqu'il s'agit de deux entités formellement et subjectivement distinctes. Dans ce dernier cas, la passation directe est interdite, au moins qu'il ait une unité substantielle des deux entités, et alors il y aura les conditions pour une exception *in house*.

Dans le système italien il a été posé[14] la question de la compatibilité de cette règle avec le principe de légalité, selon lequel les pouvoirs et les taches administratives ne peuvent être transférés que sur la base de précises règles de droit.[15] Dans le domaine des marchés publics, le principe de légalité a pu être surmonté en considération du fait que le recours au système de l'*in house* n'implique pas le transfert de pouvoirs administratifs, mais plutôt l'attribution de taches exécutives, sans l'exercice d'aucun pouvoir propre de l'administration. Cela n'empêche pas que le législateur ainsi que les jurisprudences nationales ont l'aptitude à appliquer les principes communautaires en la matière de façon encore plus stricte. Il en dérive, néanmoins, que, en présence des conditions nécessaires, ces liens sont règlementés sous la forme des contrats publiques, étant suffisant que il y ait au moins deux centres d'intérêts qui constituent les parties essentielles du contrat.

À cet état des choses, il a été nécessaire d'intervenir au niveau législatif pour garantir la sauvegarde de la concurrence et des libertés fondamentales des entreprises européennes ainsi que l'implémentation des principes communautaires dans la matière. Le d. l. n. 112 du 25 juin 2008, à l'art. 23 bis (et successives modifications), discipline les services publics locaux et leurs mo-

---

13. Voir G. Carullo, *Rapporti tra potestà pubbliche ed opere di urbanizzazione*, sur Rivista italiana di diritto pubblico comunitario, 2010.
14. Voir. R. Garofoli – G. Ferrari, *Manuale di diritto amministrativo*, Roma, 2011, pag. 540 et suivantes ; L. Torchia, *Lezioni di diritto amministrativo progredito*, Bologna, 2010, pag. 19. En général, sur l'application du principe de legalité, voir Corte Costituzionale, arrêt n. 115, du 7 avril 2011.
15. Voir TAR Lazio, sect. III, arrêt du 25 janvier 2007, n. 563.

dalités de concession et gestion, en garantissant l'application, dans ce domaine, de tous principes communautaires de concurrence, liberté d'établissement et libre prestations des services à tous les opérateurs économiques intéressés, ainsi que l'accessibilité aux services publics locaux à tous les usagers.

Successivement, le d.l. n. 135/2009, et la conséquent loi n. 166/2009, ont expressément prévu l'admissibilité de l'*in house* en tant que possible dérogation au système des marchés publics, à condition que ça soit motivé d'une situation exceptionnelle qui, à cause de caractéristiques économiques, sociaux, environnementales particulières du territoire concerné, ne permette pas un recours utile et efficace au marché.

Il en demeure, dans tous cas, le respect, par toutes les administrations concernées, du droit de l'Union Européenne et des règles de droit interne, ainsi que l'obligation de motiver les raisons pour lesquelles il a fallu recourir à l'instrument de l'*in house*.

Question 4

Les contrats de partenariat public-privé sont disciplinés, en droit italien, par le *Codice dei contratti pubblici*, à l'article 3, alinéa 15 ter. Il s'agit, selon cette disposition, de contrats ayant pour objet une ou plusieurs prestations, toute comme la projection, la construction, la gestion ou le maintien d'œuvres publiques ou le fournissement de services, où le financement des risques des prestations est – totalement ou partiellement – à la charge des privés. Pour ce qui concerne le choix du partenaire, la règle générale est celle de l'appel d'offres public, dans le respect du droit de la concurrence national et communautaire et selon les orientations des autorités compétentes. Au sujet, le Conseil d'Etat italien a souligné que l'appel d'offres concerne, en même temps, l'attribution des pouvoirs ainsi que l'attribution de la qualité de partenaire (Consiglio di Stato, VI section, arrêt n. 4603, du 23 septembre 2008, ainsi que d. l. n. 135/2009). La jurisprudence est discordante dans l'établir si, une fois choisi le partenaire par le biais d'un appel d'offre, est-il possible de conférer l'attribution des pouvoirs par voie directe.[16]

Au même sujet, il faut souligner que le problème des partenariats public-privés est très actuel dans le système national. Concernant la dite question du contrat de location de choses futures, lorsque'il s'agit de louer, de la part des administrations publiques, bâtiments qui ne sont pas encore venu en existence

16. Voir, dans le sens de l'exclusion et d'une interprétation restrictive, C.g.a., arrêt n. 589, du 27 octobre 2006 ; pour une interprétation extensive, Consiglio di Stato, II section, n. 456, du 18 avril 2007.

et dont la réalisation est faite sur la base d'un projet de la même administration.[17] Dans l'attente de connaître l'avis de la Cour de Justice sur la possibilité d'inclure un tel contrat dans le cadre des marchés publics (art. 16 dir. 2004/18/CE et art. 19 *Codice dei contratti pubblici*), il est opinion de la jurisprudence administrative italienne que ce type contractuel sorte du champ d'application de ladite normative. Il s'agirait d'ailleurs, selon le Conseil d'Etat, d'un véritable contrat de location de droit privé (soumis aux dispositions du *Codice civile* italien) et non pas d'un marché public de travaux dissimulé.[18]

Question 5

Les problèmes majeurs en matière de contrats mixtes concernent l'individuation du régime juridique à appliquer à ces contrats, en considération des spécificités de chacun des secteurs impliqués (travaux, services et fournitures), malgré l'origine « publique » commune à tous.

Dans le système judiciaire italien les accords mixtes sont prévus par l'art.14 du cité d.lgs. n.163/2006, c'est-à-dire le *Codice dei contratti pubblici*. Ils sont définis comme ceux contrats « qui ont pour objet travaux et fournitures ; travaux et services ; travaux, services et fournitures ; services et fournitures ». Le critère à respecter dans la détermination de la discipline à appliquer est celui de l'« accessoriété », qui repose sur la prévalence « quantitative et fonctionnel » des prestations, en tenant compte, au même temps, de l'importance économique mais aussi du lien d'accessoriété entre les prestations. Par contre, ce critère de l'accessoriété ne joue pas un rôle exclusif. En effet, dans l'ordre juridique italien, il est intégré par celui de la prévalence économique, comme il ressort du troisième alinéa du dit art. 14.[19] Par conséquent, la normative en matière de travaux publics doit être appliqué quand l'objet d'un contrat a une fonction publique, dans le sens que le résultat utile est exactement celui auquel vise l'administration publique et donc il s'agit de réaliser une œuvre publique ou d'utilité publique. Dans ce cas-là, lorsque le contrat prévoit aussi le déroulement d'activités de services ou fournitures, éventuellement de valeur économique prédominant, ceux-ci jouent une fonction instrumentale. Le même résultat se produit toutes fois où, dans les contrats

17. Voir CJUE, affaire pendante C-213/13, *Pizzarotti*.
18. Voir Consiglio di Stato, sect. V, arrêt n. 2765, du 30 mai 2007.
19. Voir, à ce propos, Consiglio di Stato, sect. V, arrêt n. 2765, du 30 mai 2007.

mixtes, la prestation de travaux a une valeur économique supérieure au 50 % du contrat global.[20]

Les principes généraux du droit européen : le droit des marchés publics et au-delà

Question 6

L'art. 2, alinéa 1, du *Codice dei contratti pubblici* identifie, en tant que principes à respecter dans la passation et dans l'exécution des contrats des marchés publics, entre autres, ceux de l'économicité, de l'efficacité, de la libre concurrence, de l'égalité de traitement, de non-discrimination, de la transparence, de la proportionnalité. En outre, en considération du fait que cet article ait été inséré dans la partie du code relative aux dispositions communes à tous les contrats, il en dérive sa valence généralisée dans le secteur des contrats publics.[21] Dans l'exercice concret de leurs pouvoirs les juridictions italiennes vérifient la correcte application de ces principes, en ayant été souligné[22] que la nature publique de l'activité administrative ne cesse pas lorsque les administrations agissent selon les règles du droit privé et, pour autant, elles sont obligées de respecter les dits principes dans la passation et dans l'exécution des contrats publics.

Concernant les marchés publics inferieurs au seuil, la Cour de Justice avait clairement exprimé la nécessité d'appliquer ces principes également dans ces cas.[23] En terme général, dans l'attribution des marchés publics sous seuil il n'est pas obligatoire d'appliquer la discipline communautaire de droit dérivé, mais les administrations sont néanmoins liées aux principes généraux prévus par les Traités.[24]

Pour ce qui est des contrats explicitement exclus, l'article 27 du *Codice* prévoit expressément le respect des principes de l'économicité, de l'efficace, de l'impartialité, de l'égalité de traitement, de la transparence et de la propor-

20. Voir Consiglio di Stato, sect. V, arrêt n. 2765, du 30 mai 2007.
21. Voir aussi TAR Milano, Ière section, arrêt n. 11, du 11 janvier 2010.
22. Voir Consiglio di stato, sect. IV, arrêt n. 649, du 17 juin 1997.
23. Voir, par exemple, CJUE, affaire C-59/00, arrêt du 3 décembre 2001, *Vestergaard.*
24. Voir Consiglio di Stato, VI section, arrêt n. 362, du 30 janvier 2007.

tionnalité, mais il limite le cadre opérationnel de ces principes à la seule phase de la passation.[25]

Cependant l'application des principes d'économicité, efficacité, impartialité, égalité de traitement, transparence et proportionnalité n'est pas exclue.

Les concessions de travaux publics, disciplinés à l'art. 142 et suivants, sont objet d'application de la discipline de l'Union, y compris les principes, en étant soumises à la même normative relative aux marchés publics (c'est-à-dire aux règles prévues par le législateur national), sauf dérogation expresse. Font exception à cette règle les concessions de services, qui sont exclues du champ d'application de la discipline des marchés publics, qui restent sujettes aux principes des Traités pour ce qui concerne le choix du concessionnaire.

Question 7

Comme l'on a déjà eu l'occasion de préciser, l'activité des administrations publiques se fonde sur le respect des principes du droit de l'Union.[26] Les administrations publiques, lorsqu'elles exercent leur activité contractuelle, sont soumises aux règles et aux principes généraux de droit public, surtout pour ce qui concerne la phase du choix de l'autre contractant. Il en dérive, de ce fait, la nécessité d'appliquer les règles de transparence et d'égalité de traitement, et leurs corollaires, au moment de la sélection du concessionnaire, du destinataire de l'adjudication ou de tous bénéficiaires de mesures administratives unilatérales. En général, dans l'ordre juridique national, ces principes doivent en effet trouver application au cours de toute la série d'actes que les pouvoirs adjudicateurs et les administrations publiques accomplissent dans l'exercice de leurs pouvoirs impérieux. Une sorte de dérogation à ces principes peut se retrouver dans la phase proprement de négociation, qui est normalement discipliné par les règles du droit privé. Il est clair, alors, que l'application ou pas des principes de non-discrimination, d'égalité de traitement et de transparence est requise en fonction de la phase du processus de négociation et non pas en fonction de la nature de l'activité publique, autorisatrice plutôt que contractuelle.

---

25. Plus précisément, le premier alinéa dudit article prévoit : « *La passation des contrats publics qui ont pour objet travaux, services, fournitures, et qui sont exclus – en tout ou en partie – de l'application du présent Codice, se déroule dans le respect des principes de l'économicité, de l'efficacité, de l'impartialité, de l'égalité de traitement, de la transparence, de la proportionnalité. ...* »
26. V. art. 1, alinéa, l. n. 241/1990, comme modifié par la l. n. 15/2005.

Pour ce qui concerne les autorisations, il est vrai qu'elles sont considérées, dans l'ordre juridique italien, en tant que mesures administratives unilatérales,[27] et en considération de leur statut juridique elles sont soumises à l'application de l'art. 1 de la cité loi n. 241/1990 et, par conséquent, aux principes du droit de l'Union.[28] Cette circonstance est confirmée aussi en matière d'autorisation à l'accès et à l'exercice d'une activité de service. En effet, la mesure de transposition de la directive 2003/126/CE sur les services dans le marché intérieur, c'est-à-dire le d. lgs. n. 59/2010, comprend explicitement ces principes dans le cadre des règles à suivre lorsqu'il s'agit non seulement de régler l'accès et l'exercice du service, mais aussi lorsqu'il s'agit d'en limiter la portée (par exemple temporelle ou territoriale). Il est donc clair que même dans ce domaine l'application des principes de transparence, de non-discrimination et d'égalité de traitement résulte obligatoire toute fois où l'activité exercée par l'administration publique est de nature autoritaire-publique et non pas contractuelle-privée.

Les marchés publics et le droit européen, notamment le droit de la concurrence et le droit relatif aux aides d'Etat

Question 8

De la jurisprudence de la Cour de Justice il ressort de façon plutôt claire son orientation à « *appréhender l'ensemble des procédures nationales de passation des marchés publics, quel que soit le montant financier en jeu, à la une des libertés fondamentales reconnues et garanties par le Traité, spécialement*

27. Il s'agit, précisément, d'une mesure avec laquelle l'administration permet au sujet autorisé le déroulement d'une activité privée dont la compatibilité avec les intérêts publics impliqués a été déjà vérifiée (entre outres, R. Garofoli – G. Ferrari, *Manuale di diritto amministrativo*, Roma, 2012, pag. 925).
28. La loi du 7 aout 1990, n. 241, discipline les Nouvelles normes en matière de procédure administrative et de droit d'accès aux documents administratifs, à son article 1, concernant les Principes généraux de l'activité administrative, prévoit que « L'activité administrative poursuive des buts déterminés par la loi et est régie par critères d'économicité, d'efficace, d'impartialité, de publicité et de transparence, selon les modalités prévues par la présente loi et par les autres dispositions qui disciplinent les procédures, ainsi que par les principes de l'ordre juridique communautaire ».

en matière d'établissement et de prestation des services ».[29] Il n'y a aucun doute, en effet, que les comportements des pouvoirs adjudicateurs peuvent avoir des conséquences sur le marché intérieur – qu'il soit du côté de la concurrence ou bien sur celui de la libre prestation de service – imposant parfois des restrictions au même marché. C'est pour cette raison que, comme l'on a déjà souligné, dans l'exercice de leurs pouvoirs publics, les administrations sont sujettes au respect des principes de la concurrence, ainsi qu'aux principes de transparence, de non-discrimination et d'égalité de traitement.[30] À ce sujet, le département des politiques européennes de la *Presidenza del Consiglio dei Ministri* (Présidence du Conseil des Ministres) a clarifié que les principes de l'évidence publique doivent être appliqués de façon proportionné à l'importance de la situation, en considération ainsi du fait que, à la lumière des règles du droit de l'Union, l'activité de choix du contractant (c'est-à-dire le sujet adjudicateur) ne peut être déterminée en raison du seul intérêt public.[31] Il est vrai, en fait, que l'objectif primaire est celui de la sauvegarde des intérêts des entreprises qui opèrent et qui sont en concurrence sur le marché. Par conséquent, les pouvoirs adjudicateurs, dans l'adoption de leurs choix et décisions d'achat, doivent toujours préférer la solution que, bien qu'en ligne avec les objectifs poursuivis, engendre la moindre restriction possible.[32] Afin d'accomplir cette évaluation, les administrations publiques, à chaque fois, adoptent comme paramètre de leur action tous les intérêts qui sont concrètement impliqués.[33] Lorsqu'il serait le cas, par exemple, d'annuler la procédure de passation ou le contrat à cause de la violation d'une règle sur les marchés publics, le juge compètent (dans l'ordre juridique italien c'est le juge administratif) peut vérifier s'ils subsistent des raisons impératives d'intérêt général qui, dans la situation particulière, justifient la dérogation.[34] En outre, concernant les marchés publics sous seuil – qui d'ailleurs, dans le système italien, sont sou-

---

29. Voir E. Meisse, *Procédure de passation*, sur Europe 2005, nº 412 Comm. p.19, commentaire à l'arrêt CJE C-234/03.
30. Ces principes, en tant qui principes généraux du droit de l'Union, font ainsi partie intégrante de l'ordre juridique interne, Voir arrêt TAR Bologna, section II, n. 153, du 16 février 2009.
31. Circulaire P.C.M. – Dipartimento per le politiche comunitarie n. 945, du 1er mars 2002.
32. Voir, entre outres, Consiglio di Stato, sect. V, arrêt n. 2087, du 14 avril 2006.
33. Voir TAR Bari, sect. III, arrêt n. 2908, du 17 décembre 2008.
34. Voir, par exemple, le cas d'un contrat de marché public qui est passé de façon définitive sans l'appel d'offre ou sa publicité. G. Urbano, *La disciplina dei contrati pubblici tra tutela della concorrenza e misure anticrisi*, Nel Diritto – Rivista telematica di diritto coordinata da Roberto Garofoli, 2012.

mis aux mêmes règles des marchés au-dessus du seuil –, les pouvoirs adjudicateurs ne sont pas obligés à respecter les règles de transparence lorsque la valeur du marché est « économiquement très limitée », dans le sens qu'on peut raisonnablement imaginer qu'aucune entreprise ayant siège dans un autre Etat serait intéressée à la passation du contrat. Dans un tel cas, les effets sur le marché intérieur seraient très aléatoires et indirects.[35]

Question 9

Dans le système italien il a été souligné que les seules prévisions normatives ne représentent pas, en eux, un moyen suffisant pour éloigner les risques de collusion et de manipulation dans les marchés publics, en étant nécessaire l'individuation d'instruments internes aux administrations qui garantissent d'obtenir le résultat.[36] De toute façon, le *Codice dei contratti pubblici* prévoit des règles fondamentales, qui poursuivent, en même temps, les buts de la prévention des risques de collusion[37] et de la tutelle de la concurrence entre entreprises. Dans ce contexte, il est donc important de surveiller tant le niveau de transparence utilisé par les administrations que la manière dont elles exercent leur pouvoir discrétionnaire. En effet, la modification du niveau de transparence (dans le sens de demander aux soumissionnaires un nombre « excessif » et détaillé de requises), si d'une part pourrait représenter une garantie pour le bon fonctionnement du marché, de l'autre part risque de restreindre ultérieurement la concurrence, jusqu'au cas – limite – de représenter un moyen pour proposer des appels d'offres faites « sur mesure », c'est-à-dire pensées sur une entreprise particulière. Dans ces cas, en effet, les appels d'offres sont conçues sur la base des caractéristiques spécifiques de certains concourants et normalement cachent un accord entre le pouvoir adjudicateur et l'entreprise. C'est pour cela que la jurisprudence italienne a établi que les administrations, lorsqu'il s'agit de exiger des requises ultérieurs ou plus stricts par rapport à ceux demandés par la loi, doivent en démontrer la proportionnalité en considération de l'objet du contrat.[38] Pareillement, les administrations ne peuvent pas non plus, en principe, prévoir des clauses d'exclusion de l'ap-

35. Voir CJUE, affaire C-231/03, arrêt du 21 juillet 2005, *Coname*.
36. Relation du Président de la *Corte dei Conti* lors de l'ouverture de l'année judiciaire 2010.
37. Voir art. 247 Codice dei contratti pubblici au sujet de la *Normativa antimafia*.
38. Voir, entre outres, Consiglio di Stato, sect. V, arrêt n. 3083, du 8 septembre 2008 ; TAR Lecce, sect. III, arrêt n. 677, du 3 mars 2010, ainsi que Consiglio di Stato, sect. VI, arrêt n. 14, du 11 janvier 2010.

pel ultérieures à celles prévues par la loi, qui sont typiques et impératives.[39] Un autre moyen qui risque de détourner les règles sur les marchés publics de leurs objectifs est celui de l'existence de conditions d'urgences, prévu à l'art. 57 du *Codice* (art. 31 dir. 2004/18/CE), qui autoriseraient la passation en absence d'appel d'offres. Cette procédure est autorisée lorsque l'urgence dépende de conditions imprévues et indépendantes des administrations, et cela afin d'éviter qu'elle représente un instrument pour contourner le système des appels d'offres.[40] Plus en général, on peut dire que les pouvoirs discrétionnaires des administrations adjudicateurs s'arrêtent lorsqu'il n'y a plus de lien entre la dérogation (à la procédure ou aux critères établis par la loi) et les exigences de la situation concrète, dans le sens que pour raisons de durée ou proportion les seules règles ordinaires seraient à appliquer.[41]

Question 10

L'exercice des services publics demande nécessairement, pour les opérateurs privés qui en sont impliqués, la soumission à contrats onéreux avec les administrations qui externalisent les services, normalement en recourant au type de la concession. En considération du fait que le déroulement du dit service public est apte à donner à un tel operateur, sur un certain marché, une position de privilège par rapport aux autres opérateurs, il est obligatoire de soumettre ces formes d'accords (ou bien de conventions) à des règles d'autorisations spécifiques. Les administrations publiques, en effet, ne sont pas autorisées à attribuer à un opérateur, de façon tout à fait discrétionnaire, droits spéciaux ou exclusifs pour le déroulement d'activités destinées à la réalisation d'intérêts collectifs. Comme dans la sélection de l'associé privé, éventuellement de minorité, de l'*Ente locale* (c'est-à-dire le pouvoir publique local), il est obliga-

---

39. Voir Consiglio di Stato, sect. V, arrêt n. 4268, du 21 aout 2002.
40. Voir Consiglio di Stato, sect. V, arrêt n. 6392, du 16 novembre 2005 et, à ce propos, TAR Lazio, sect. I, arrêt n. 1656, du 28 janvier 2009.
41. Par exemple, pour ce qui est des ordonnances de la *Protezione civile* – qui d'ailleurs se fondent sur l'art. 5 de la loi sur le service national de protection civile (legge 24 febbraio 1992, n. 225) – il a été souligné que l'application de mesures extraordinaires dans la passation des marchés publics sont justifiées exclusivement au long de la durée de l'émergence, au-delà de laquelle les exigences de concurrence et de transparence doivent trouver pleine application. Autrement, les pouvoirs publiques abuseraient de ces instruments et produiraient des restrictions de la concurrence. Voir V. Salamone, *Le ordinanze di protezione pubblici*, sur Foro amm. C.d.S., n. 3, 2008, pag. 952 ss.. Sur la réitération des contrats et les limites temporaires voir Consiglio di Stato, sect. IV, arrêt n. 6458, du 31 octobre 2006.

toire de effectuer la sélection par le biais d'un appel d'offres ou bien d'une procédure similaire/équivalente. Le respect de cette règle est nécessaire afin d'éviter la consolidation de positions de monopole et la soustraction aux règles d'égalité de traitement, de transparence et de concurrence pour les entreprises intéressées.[42] À cet égard il a été souligné par la jurisprudence italienne qu'il n'y a pas de discrimination lorsque les pouvoirs adjudicataires admettent à participer à l'appel d'offres organismes/operateurs qui sont au même temps destinataires de leurs subventions ou de subventions d'autres administrations publiques.[43] Au contraire, selon la jurisprudence communautaire, une telle exclusion constituerait une violation du principe de l'égalité de traitement.[44] Etant donc nécessaire, pour toute forme d'externalisation, le recours aux règles communautaires en matière de SIEG, il en dérive aussi l'application, le cas échéant, des règles relatives aux aides d'Etat.

Utilisation stratégique des marchés publics

Question 11

Dans le cadre du droit interne il est prévu, comme critère générale, au cité art. 2 du *Codice degli appalti pubblici*, le respect des principes de l'économicité et de l'efficacité lorsque'il s'agit de la passation ou de l'exécution des marchés publics. Par contre, ce même article prévoit une possibilité de dérogation au principe de l'économicité, étant possible qu'il soit subordonné, dans les limites de la loi, à des critères, énoncés dans l'appel d'offres, qui sont inspirés aux exigences sociales et environnementales. Il est bien possible, dès lors, que les pouvoirs adjudicateurs imposent des conditions afin de promouvoir des objectifs sociaux, à condition que ces clauses soient compatibles avec l'ordre juridique communautaire et national. Précisément, cette condition de compatibilité résulte respectée lorsque les conditions ou les critères ultérieurs pour la passation sont clairement identifiés dans l'appel d'offres ou dans le cahier des charges. En outre, ils ne doivent pas engendrer une limitation au marché et/ou une mesure discriminatoire (par rapport à une ou plusieures entreprises), finalisé à détourner les règles de concurrence. Il en sort que la véri-

42. Voir Corte di Cassazione, SS. UU., arrêt n. 16856, du 2 aout 2011.
43. Voir, par exemple, Corte di Cassazione, SS. UU., arrêt n. 28338, du 22 décembre 2011.
44. Voir CJUE, affaire C-213/07, arrêt du 16 décembre 2008, *Michaniki*.

table raison de cette possibilité de dérogation réside, pour ce qui concerne l'aspect social, dans le but de poursuivre un parcours de politique sociale ainsi que de développement soutenable, toujours dans une optique de balancement entre les intérêts économiques et industriels, d'une part, et les intérêts sociaux et environnementaux, de l'autre part. Il est intéressant de souligner que l'apparition, dans le secteur des marchés publics, des interactions entre les exigences des prestations économiques et les questions sociales et environnementales s'est présentée, en premier lieu, au niveau de l'Union. Il est bien à partir de cela que les administrations et les législations nationales ont ouvert leurs portes à ces préoccupations, surtout dans le cadre de l'implémentation, dans l'ordre interne, de la discipline européenne. Dans ce contexte, le système italien demande parfois, même si de façon non absolue, que certaines valeurs prévalent sur le critère générale de l'économicité. Il est vrai, d'autre part, que la sauvegarde de certaines valeurs primaires, comme la santé ou l'environnement, joue un rôle centrale non seulement selon un point de vue éthique, mais aussi d'un point de vue économique. Le mauvais état de l'environnement ou de la santé des citoyens, en effet, représente souvent la cause d'une aggravation des dépenses et des pertes économiques pour les administrations publiques, centrales ou locales. C'est pour cette raison que même dans des périodes de crise économique l'attention publique reste toujours élevée face aux objectifs sociaux et environnementaux. Pour cela, le critère appliqué afin d'évaluer les offres dans le cadre d'un marché public est celui du rapport entre qualité et prix, qui tient en compte, en même temps, des aspects économiques et des aspects socio-environnementaux.

Dans cette perspective, l'Etat italien poursuive, par exemple, un politique qui mire à économiser les dépenses énergétiques et l'utilisation de matières brutes. Les soi-disant « *green public procurements* » représentent, en effet, une véritable réalité dans l'ordre juridique national, grâce aussi aux développements de la normative interne, qui favorisent certainement la réalisation des dits objectifs. Il en ressort de manière claire que l'Etat italien a correctement transposé la législation communautaire[45] et respecte les obligations qui en dérivent.

45. Pour ce qui concerne le respect du règlement n. 106/2008 CE, la loi n. 296/2006 (Legge finanziaria) a prévu un plan d'action national pour la soutenabilité des consommations dans les administrations publiques (articles 1126, 1127 et 1128). Pour ce qui concerne la directive 2009/33/CE, elle a été transposée avec le d. lgs. n. 24 du 3 mars 2011. En outre, le 6 juin 2012 il a été approuvé un décret ministériel concernant l'intégration des aspects sociaux dans les marchés publics.

Question 12

Comme l'on vient de souligner, la politique de la demande publique résulte plus orientée à la réduction des dépenses (donc aussi des frais d'approvisionnement) que au développement du système productif vers des objectifs d'innovation. Cependant l'Italie, dans les dernières années, a eu tendance à suivre une approche qui mire à développer l'innovation. Dans cet esprit, le Ministère du développement économique a lancé, en 2006, un plan qui établit les lignes stratégiques pour le développement et la compétitivité du futur système productif italien.[46] Dans ce cadre, les *Progetti d'innovazione industriale* (Projets d'innovation industrielle) représentent donc le principal instrument pour la relance de la politique industrielle : à partir des objectifs de technologie et de productivité individués par le gouvernement (comme l'efficacité énergétique, la mobilité soutenable, les nouvelles technologies), ils mirent à favoriser le développement de certaines typologies de produits et de services à haut contenu innovateur, dans des domaines stratégiques pour le Pays. Comme l'on a déjà dit, des résultats intéressants ont été obtenus pour ce qui concerne la diffusion et l'utilisation des *green public procurements*, où les administrations publiques poursuivent le but de la diffusion de technologies respectueuses de l'environnement. D'ailleurs, le domaine dans lequel l'innovation a produit le plus de résultats est celui de la gestion des achats publics, surtout pour ce qui est des procédures d'*e-procurement* (c'est-à-dire, les achats en ligne, pour l'effectuation électronique des appels d'offres pour les marchés publics). De plus, il faut souligner que, dans ce domaine, l'Italie a devancé la législation de l'Union, en ayant été le premier Pays qui a adopté un acte normatif à ce sujet.[47] La caractéristique particulière de l'*e-procurement* c'est celle d'avoir déplacé sur un support informatique toutes les phases liées à la passation du marché public (la présentation des offres, la comparaison compétitive, la passation et même les payements). Dans ce contexte, l'ultérieur aspect d'intérêt est représenté du fait que les systèmes d'achat électronique constituent aussi un moyen pour la diffusion de l'innovation, dans le sens qu'ils favorisent la circulation des informations et permettent aux entre-

---

46. Le plan s'appelle *Industria 2015* et prévoit que, dans une perspective de moyen-longue période, le futur système italien de production se base sur : 1. une série de mécanismes généralisés pour la requalification et le renforcement des PME, le soutien de la recherche, la réduction des couts, la promotion des investissements et la croissance dimensionnelle ; 2. les nouveaux systèmes d'incitation « sur mesure ».
47. Il s'agit du d.P.R. n. 101 du 4 avril 2002, alors que les principes se retrouvent dans la *Legge finanziaria* (loi financière) du 2000.

prises de développer les technologies innovatrices dans les domaines de l'information et de la communication. Par contre, l'utilisation des marchés publics n'a pas produit beaucoup de résultat concernant l'introduction de biens et services innovateurs. Il est vrai aussi que, à ce fin, les administrations publiques, lorsque'elles veulent acheter des biens ou services hautement innovateurs, récurrent à l'instrument du dialogue compétitif ou bien à celui du partenariat public-privé. Le dialogue compétitif pose des problèmes concernant l'absence de vraies motivations, pour les entreprises, à participer à la procédure et à investir pour le réalisation d'une offres qui soit hautement technologique (en étant pourtant apte à satisfaire les conditions requises par les pouvoirs adjudicateurs) lorsque'il y a le risque de ne pas obtenir le contrat de marché public. Afin de surmonter cet obstacle, les administrations prévoient parfois un système qui récompense tous les participants et qui augmente de phase en phase, jusqu'à la passation finale du marché public.

En outre, il se pose au même temps un problème délicat pour ce qui concerne la protection des droits de la propriété intellectuelle des entreprises qui participent à ces procédures d'innovation. Dans le cadre de la forte interaction qui s'instaure entre les entreprises et les administrations publiques, en raison de la dite circulation des informations qui caractérise le système technicisé, il arrive que les pouvoirs adjudicateurs publicisent les résultats produits par les participants aux appels d'offres afin de partager le bénéfice potentiel. Il est clair, par contre, que cet aspect est en contraste avec les normales exigences des entrepreneurs, qui doivent protéger la confidentialité industrielle et donc limiter la circulation des données et des informations, en sauvegardant la propriété intellectuelle des innovations ainsi que l'exploitation économique dans le cadre des formes légaux habituelles (brevets, registration, ...). Afin de faire face aux opposantes exigences, il est alors – peut-être – le cas de privilégier la transparence et la publicité plutôt que la confidentialité, sans pour autant exclure, lors il est le cas, la reconnaissance d'un avantage économique, comme une licence d'utilisation ou une royaltie en faveur des innovateurs.

Solutions

Question 13

La directive 2007/66/CE représente, dans le système italien, la base juridique de la reconnaissance de certains outils fondamentaux, comme la tutelle provisoire *ante causam* et l'indemnisation en cas d'atteinte à un « intérêt légitime »,

ainsi que la source, concrète, de la tutelle du principe de l'effectivité. La directive a été transposée par le biais du d. lgs. n. 53 du 20 mars 2010,[48] lequel a établi une discipline commune pour tous les marchés publics, indépendamment de leur valeur économique. Dans ce cadre, les mesures provisoires jouent un rôle fondamental car elles permettent aux juridictions compétentes d'adopter, sans délai, toutes les mesures aptes à éviter que, au cours de la procédure de recours, le requérant puisse subir des dommages ultérieurs. De plus, l'efficacité des dites mesures se retrouve dans le fait que, selon le droit administratif, la plupart des dispositions des pouvoirs adjudicateurs et des administrations est efficace et a une valeur contraignante, sur les positions juridiques des destinataires, dès le moment de son adoption. Pour cela, les moyens les plus efficaces afin de faire face à la possible illégitimité des dispositions des administrations sont les mesures provisoires, vu qu'une prononciation successive d'une juridiction risquerait d'être inapte afin de satisfaire complètement les intérêts des entreprises requérantes. Il en ressort, alors, que la tutelle des dommages ne joue qu'un rôle secondaire dans la sauvegarde de la position des inspirants contractants.

À ce propos, le système italien, déjà avant de l'adoption de la directive du 2007, avait soutenu la prééminence des mesures provisoires par rapport aux dommages,[49] en reconnaissant aux juridictions compétentes la possibilité, en cas de recours, de annuler les dispositions illégitimes ainsi que celle de passer le contrat et de reconnaitre le droit à la relative conclusion.[50] La question de l'efficacité du système concerne aussi l'aspect des termes d'expiration pour l'exercice du droit au recours. En effet, la prévision d'un tel terme ne représente pas, en soi, une limitation à l'exercice de ce pouvoir, il étant vrai, par contre, que dans certaines situations spécifiques cela peut engendrer la violation du principe de l'efficacité. Dans l'exercice de ses pouvoirs, il est alors demandé à la juridiction compétente de vérifier que l'administration n'ait pas agit d'une façon telle que le recours soit concrètement impossible ou excessivement onéreux pour les soumissionnaires. Dans cette perspective, le législa-

48. Voir en propos R. De Nictolis, *Il recepimento della direttiva ricorsi*, www.giustizia-amministrativa.it, n. 5/2010.
49. Voir, entre outres, Consiglio di Stato, sect. IV, arrêt n. 950, du 2 mars 2004.
50. Voir Consiglio di Stato, assemblée plénière, arrêt n. 9, du 30 juillet 2008. Dans le cas de l'annulation d'une procédure de passation, la solution normalement poursuivie est celle du renouvellement de l'appel, lorsque la possibilité reconnue à l'entreprise d'y participer représenterait une véritable indemnisation (Consiglio di Stato, sect. VI, arrêt n. 5693, du 2 novembre 2007).

teur italien a respecté les termes individué par la directive.[51] De plus, il est intervenu avec une discipline spécifique concernant l'illégitimité des passations en cas de manquement ou d'inexacte publication de l'appel d'offres (dans ce cas, selon l'art. 245, deuxième alinéa, le terme de recours est entre 30 jours et 6 mois à partir de la conclusion du contrat). Concernant la clause de « *stand still* », c'est-à-dire le terme de suspension de la procédure entre la passation et la rédaction du contrat, l'alinéa 10 *ter*, art. 11 du *Codice dei contratti pubblici* prévoit que, dans le cas de proposition d'un recours contre la passation, avec contextuelle demande de mesures provisoires, il est interdit de conclure le contrat dans le délai des 20 jours successifs à la propositions de la demande, à condition que dans ce délai il y ait l'adoption de la mesure provisoire ou la publication du dispositif de l'arrêt. Il faut alors souligner que l'évolution de cette prévision est allée dans le sens de l'inefficacité du contrat qui ait éventuellement été conclu en violation de ces règles, alors que dans les versions précédentes de l'article les termes n'avaient pas de caractère contraignant et que, le cas échéant, le juge aurait successivement du l'annuler. Il ressort clairement que la prévision actuelle représente un moyen de tutelle concrète de l'efficacité du système pour ce qui est, au même temps, de l'intérêt public (c'est-à-dire la résolution des controverses avant la conclusion du contrat) et des intérêts des entreprises impliquées. Il est de même prévu la possibilité de déroger à cette clause de « *stand still* » et cela, plus spécifiquement, lorsque l'exécution du contrat est requise de façon urgente, en laissant aux administrations le pouvoir de déterminer, à chaque fois, l'étendue du concept d'« urgence ».

Plus en général, pour ce qui est de la question de la privation des effets du contrat, le système italien fait une différenciation entre les cas de violations graves et « les autres » violations.[52] Dans la deuxième catégorie sont comprises des hypothèses qui demandent une analyse plutôt approfondie des intérêts en jeux et, pour que le juge puisse déclarer l'inefficacité du contrat, il faut

51. Ces termes varient entre 10 et 15 jours du moment de la connaissance de la décision de la part du pouvoir adjudicateur (voir art. 245 Codice dei contratti pubblici).

52. Comme la Corte di Cassazione l'a souligné, ces hypothèses concernent exclusivement les vices relatifs à la phase de la formation de la volonté contractuelle et du consensus, exception faite pour les vices de forme. La phase de l'offre publique, en effet, vise à la correcte formation du consensus, telle qu'elle sera successivement manifestée et définie lors de la conclusion du contrat. Il est vrai, en fait, que le consensus, bien qu'existant, serait vicié à cause de l'annulation de l'offre publique, alors que les vices de forme, qui invalident souvent le déroulement de l'offre, ne sont pas capables de influencer le contenu de la volonté (Voir Corte di Cassazione, SS. UU., arrêt n. 27169, du 28 décembre 2007).

que le recourant en fasse une demande expresse.[53] Dans la première catégorie sont normalement comprises les hypothèses d'illégitimité en relation aux conditions de publicité ou à la clause de *stand still*,[54] alors que la juridiction compétente est libre de ne pas déclarer le contrat inefficace si elle considère qu'il y ait des raisons impérieuses d'intérêt général[55] qui imposent la conservation du contrat, bien qu'il se configure une présomption d'inefficacité. La possible configuration des dites exigences impérieuses, par contre, représente un moyen qui risque de restreindre l'application des règles de concurrence entre les opérateurs. En outre, dans certaines circonstances, le juge est libre d'opter pour la conservation des effets du contrat, en tout ou en partie, de façon définitive ou temporaire, à condition d'appliquer des sanctions accessoires, qui soient, en plus, effectives, dissuasives et proportionnées à la valeur du contrat et à la gravité de la violation, ainsi que indépendantes de l'indemnisation. En conclusion, comme l'on vient de l'expliquer, le système introduit par le d. lgs. n. 53 du 2010 se présente efficace par rapport à la tutelle de la position des entreprises, surtout pour ce qui concerne la possibilité de obtenir le résultat du remplacement du soumissionnaire illégitime, certainement plus préférable à l'outil des dommages.[56] Au même temps, ce système apparait efficace à la réalisation des intérêts publics, en garantissant l'instauration du lien

53. Voir art. 122 c.p.a. (*Codice del processo amministrativo*). Il s'agit, en général, des intérêts des parties, de l'effective possibilité que le requérant parvienne à la passation en considération des vices, de l'état de l'exécution du contrat et de la possibilité de prendre la place du soumissionnaire illégitime.
54. Il s'agit des cas où : a) la passation n'a pas été précédée de la publication de l'appel d'offre, lorsque elle est prévue obligatoirement ; b) la passation s'est déroulée selon l'instrument de la négociation en dehors des cas où cette méthode est permise et cela ait déterminé l'omission de la publicité prescrite ; c) les termes de suspension entre la passation et la conclusion du contrat ou les termes procéduraux de suspension n'aient pas été respectés, empêchant l'exercice du droit de recours (art. 121 c.p.a.).
55. Il s'agit, par exemple, d'exigences impérieuses de caractère technique. Par contre, il ne peut pas s'agir de motivations de caractère économique, directement liées au contrat (comme les couts relatifs au retard dans l'exécution et la nécessité de lancer un nouvel appel d'offres). Voir art. 245 *bis* Codice dei contratti pubblici.
56. Selon le Consiglio di Stato, l'indemnisation représente un « succédanée résiduel » lorsque il n'est possible obtenir la passation, qui représenterai le vrai intérêt du requérant (sect. IV, arrêt n. 482, du 31 janvier 2012). Dans tous cas, les juges administratif ont souligné que « afin de l'indemnisation, il n'est pas nécessaire de prendre en considération l'élément subjectif de la violation – c'est à dire la faute – du pouvoir adjudicateur ». Cette orientation, qui d'ailleurs est propre aussi des juges communautaires, représente un outil efficace dans la protection concrète de l'intérêt de la partie.

contractuel dans le seul cas où il est destiné à durer dans le temps et en garantissant le correct fonctionnement du marché et de la concurrence.

Conclusion et réforme

Question 14

Comme l'on a déjà eu occasion de souligner, l'intervention, dans l'ordre juridique italien, des directives en matière de marchés publics a contribué à un véritable renouvellement du système. S'il est vrai, d'une part, que le système italien suivait déjà les orientations du droit – à l'époque – communautaire et, dans des hypothèses limitées, il a même anticipé les pas du législateur européen (comme l'on a vu par rapport, par exemple, à l'*e-procurement*), de l'autre part la transposition des directives a aussi représenté l'occasion pour une intervention plus ample, comme l'on voit par rapport au régime des marchés sous seuil. Dans ce contexte certains instruments jouent parfois un rôle plus intensif dans le fonctionnement quotidien du marché national. Pour ce qui est, par exemple, des financements privés, la situation de crise économique encourage le recours à ce genre de rapport entre les administrations publiques et les sujets privés (on y réfère, normalement, comme au « *project financing* »). C'est pourquoi, en 2011, le législateur italien est intervenu en la matière, en identifiant – même si toujours dans l'unité de cet instrument – une nouvelle forme, qui se fonde sur l'initiative exclusivement privée.[57] Dans ce contexte, par contre, il faut toujours faire attention à éviter que le recours à la stipulation avec les privés puisse engendrer une compartimentation des marchés (ou de certains secteurs), lorsque'il y ait tendance à fixer des rapports de longue durée. Cette attitude, d'ailleurs, pourrait représenter une forme de détournement des objectifs visés par les directives et de restriction de la concurrence.

Par contre, bien que, pour plusieurs raisons, le procès de modernisation du secteur des marchés publics soit toujours en avancement, il y a des aspects qui ne peuvent pas faire objet de renouvèlement. C'est le cas, par exemple, de la discipline concernant les négociations et le dialogue entre les pouvoirs adjudicateurs et les soumissionnaires. À ce sujet, on ne peut certainement pas envisager un rapprochement à l'encontre des règles plus similaires à celle du système américain sans qu'il en dérive la violation des aspects fondamentaux

57. Voir d. l. n. 70 du 13 mai 2011.

de notre système. Le recours, par exemple, de la négociation précédée de la publicité préalable ne serait pas suffisant à surmonter les disparités qui en découleraient ni le contournement des règles de la concurrence. En conclusion, bien que l'Etat italien, pour certains aspects, ait été un précurseur (comme dans l'application des technologies à ce secteur), en cet état des choses, et surtout en considération de l'actuelle phase de stagnation économique, il paraissait que après la période de changement et évolution qui a caractérisé les années passés, on s'apprête à traverser une phase de maintien des objectifs et des instruments qui ont déjà été fixés. Néanmoins, des nouveautés sont à envisager en relation avec l'implémentation de la (future) directive sur les contrats de concession. Il s'agira, en principe, d'adapter le système interne concernent la nouvelle définition de « risque opérationnel substantiel »[58] , la durée des concessions[59] et les modifications des concessions en cours d'exécution.[60]

---

58. Ceci concerne le transfert du risque du concessionnaire, qui devrait inclure aussi l'absence de récupération des investissements et des couts liés à la réalisation des travaux et des services.
59. Qui devra être limitée à la période de temps nécessaire à la récupération des investissements effectués par le concessionnaire.
60. Il faudra préciser les conditions sur la base desquelles une nouvelle passation sera requise en raison des modifications. Voir *Camera dei deputati – XVI Legislatura – Dossier di documentazione sulla Proposta di direttiva sull'aggiudicazione dei contratti di concessione (COM(2011)897)*, du 21 mai 2012.

LUXEMBOURG

Giulia F. Jaeger[1]

Le contexte

Question 1

Le droit luxembourgeois est essentiellement d'origine napoléonienne. Le droit administratif est celui d'un Etat de droit moderne. La philosophie qui prévaut lors de la transposition de directives de l'Union européenne, en particulier des directives sur les marchés publics, est celle de la confiance dans le fonctionnement des règles administratives, y compris du contentieux administratif, pour faire face aux dérives du système.

Le cadre réglementaire des marchés publics est, en substance, constitué par la loi du 25 juin 2009[2] sur les marchés publics (modifiée par la loi du 18 décembre 2009[3]) ainsi que les règlements grand-ducaux du 3 août 2009[4] portant exécution de la loi du 25 juin 2009, du 8 juillet 2003 portant institution de cahiers spéciaux des charges standardisés en matière de marchés publics et du 12 octobre 1998 portant exécution de l'article 6 de la loi du 27 juillet 1997.[5]

Les directives sur les marchés publics ont nécessité des adaptations ponctuelles de ce cadre. Il convient de faire état d'un certain nombre de défis auxquels le Grand-duché de Luxembourg (Luxembourg) a été confronté quant à la transposition des directives relatives à l'amélioration de l'efficacité des procédures de recours en matière de passation de marchés publics, à savoir la di-

1. Avocat à la Cour, Luxembourg ; Candidat notaire, Luxembourg ; Senior associate ; cabinet d'avocats, www.dsmlegal.com; gjaeger@dsmlegal.com
2. Publiée au journal officiel luxembourgeois, appelé Mémorial (ci-après ME) A-172, du 24 décembre 2009, p. 2492.
3. Publiée au ME A-254 du 24 décembre 2009, p. 5109.
4. Publié au ME A-180 du 11 août 2009, p. 2608.
5. Publié au ME A-92 du 30 octobre 1998, p. 2220.

rective 89/665/CEE[6] du Conseil, du 21 décembre 1989 et la directive 92/13/CEE[7] du Conseil, du 25 février 1992, d'une part, et la directive 2007/66/CE,[8] remplaçant les deux premières, d'autre part.

De prime abord, il convient de préciser que les deux premières directives, à savoir les directives 89/665/CEE et 92/13/CEE, ont été transposées au Luxembourg par la loi du 13 mars 1993 et par le règlement grand-ducal du 17 mars 1993. Quant à la directive 2007/66/CE, elle a été transposée par la loi du 10 novembre 2010[9] abrogeant celle du 13 mars 1993.

Au Luxembourg, avant la transposition des directives relatives à l'application des procédures de recours en matière de marchés publics, il existait d'ores et déjà des voies de recours dans ce domaine. En effet, le soumissionnaire évincé disposait de deux voies de recours, qui étaient, premièrement, un recours en annulation devant les juridictions administratives[10] contre les décisions d'adjudication constituant des décisions administratives individuelles et, deuxièmement, un recours en indemnisation devant les juridictions de l'ordre judiciaire.[11] Ainsi, les deux exigences fixées par la directive 89/665/CEE, à

---

6. Directive 89/665/CEE du Conseil, du 21 décembre 1989, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des procédures de recours en matière de passation des marchés publics de fournitures et de travaux (JO L 395 du 30.12.1989, p. 33-35).
7. Directive 92/13/CEE du Conseil, du 25 février 1992, portant coordination des dispositions législatives, réglementaires et administratives relatives à l'application des règles communautaires sur les procédures de passation des marchés des entités opérant dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications (JO L 76 du 23.3.1992, p. 14-20).
8. Directive 2007/66/CE du Parlement européen et du Conseil, du 11 décembre 2007, modifiant les directives 89/665/CEE et 92/13/CEE du Conseil en ce qui concerne l'amélioration de l'efficacité des procédures de recours en matière de passation des marchés publics (JO L 335 du 20.12.2007, p. 31).
9. Publiée au Mémorial, A 203 du 12 novembre 2010, p. 3376.
10. Si à l'époque, le Comité du Contentieux du Conseil d'Etat était compétent pour connaître des recours contre des décisions administratives telles que les décisions d'adjudication, depuis 1997 ce sont les juridictions de l'ordre administratif, à savoir le Tribunal administratif en première instance et la Cour administrative en instance d'appel, qui sont compétentes en la matière. Ces juridictions administratives ont compétence pour annuler des décisions d'adjudication. Le délai de recours est de trois mois à partir de la notification correcte de la décision d'adjudication, conformément à l'article 13, paragraphe (1) de la loi du 21 juin 1999 portant règlement de procédure devant les juridictions administratives (Projet de loi instituant les recours en matière de marchés publics, Chambre des députés n° 6119, 1. Historique).
11. L'indemnisation du soumissionnaire irrégulièrement évincé relève, en raison du système juridictionnel dualiste, de la compétence du juge civil et se fait sur la base de la

savoir l'accessibilité et l'efficacité des recours ainsi que la possibilité de dédommagement en cas de préjudice subi, étaient déjà satisfaites en droit luxembourgeois.

En revanche, d'autres exigences, telles que l'instauration d'un contrôle préventif en amont de la conclusion du marché (prévu par la directive 89/665/CEE), l'instauration d'un délai de suspension (standstill – prévu par la directive 2007/66/CE) entre la décision d'adjudication et la conclusion du contrat, ainsi que la mise en place des sanctions adéquates et efficaces, à savoir l'absence d'effet des marchés passés en violation de certaines obligations imposées par les directives 2004/17/CE[12] et 2004/18/CE[13] et les sanctions de substitution, nécessitaient de la part des autorités luxembourgeoises des modifications tant législatives que jurisprudentielles.

Premièrement, en ce qui concerne le contrôle préventif, la loi du 13 mars 1993 avait instauré une procédure de *référé précontractuel* devant le Président du Tribunal administratif du Comité du Contentieux, afin qu'il puisse intervenir préalablement à la décision portant adjudication du marché en ordonnant des modifications du cahier des charges ou en prenant d'autres mesures destinées à garantir la libre concurrence sans que ces mesures ne fassent l'objet d'un examen par le juge du fond. Cette procédure est maintenue par la loi du 10 novembre 2010. Cette nouvelle attribution a cependant dérogé à la règle générale en vigueur à l'époque selon laquelle un recours devant une juridiction administrative n'est ouverte que contre des décisions à *caractère individuel*, alors que les dispositions des dossiers de soumissions, y compris le cahier des charges, sont à considérer comme des actes administratifs à *caractère réglementaire*.[14] Par ailleurs, le Président s'est vu attribuer, en tant que juge des référés précontractuels, des pouvoirs très étendus. En effet, il dispose non seulement de la faculté d'annuler des dispositions des dossiers de soumis-

---

responsabilité quasi délictuelle, sur le fondement de l'article 1382 du Code Civil, ou encore de la loi du 1er septembre 1988 relative à la responsabilité civile de l'Etat et des collectivités publiques.

12. Directive 2004/17/CE du Parlement européen et du Conseil, du 31 mars 2004, portant coordination des procédures de passation des marchés dans les secteurs de l'eau, de l'énergie, des transports et des services postaux (JO L 134 du 30.04.2004, p. 1).
13. Directive 2004/18/CE du Parlement européen et du Conseil, du 31 mars 2004, relative à la coordination des procédures de passation des marchés publics de travaux, de fournitures et de services (JO L 134 du 30.04.2004, p. 114).
14. Si le recours en annulation vise à contester la légalité de la décision d'adjudication, acte à caractère individuel, il en va différemment pour ce qui est du recours en référé, qui est dirigé contre le dossier de soumission, considéré le plus souvent comme étant un acte de portée générale.

sion contraires à la norme du droit de l'Union européenne, mais encore de corriger des dispositions, de suspendre la procédure d'adjudication et même de supprimer des dispositions litigieuses, de sorte qu'il s'agit d'un *recours en réformation*. Or, il y a lieu de préciser que, dans le domaine des marchés publics, le juge administratif du fond ne dispose, dans le cadre du recours en annulation, que d'un contrôle de légalité, la loi luxembourgeoise ne lui conférant pas un pouvoir de réformation.

Deuxièmement, s'agissant du délai de suspension, le Luxembourg, suite à une mise en demeure de la Commission, a dû modifier sa législation prévoyant que la décision d'adjudication valait conclusion du contrat. Ainsi, le règlement grand-ducal du 7 juillet 2003 portant exécution de la loi du 30 juin 2003 a prévu, dans son article 90, paragraphe 4, que *« la conclusion du contrat avec l'adjudicataire a lieu après un délai d'au moins quinze jours à compter de l'information donnée aux autres concurrents [..] ».* L'article 5, alinéa 1er, de la loi du 10 novembre 2010 se substitue à ce dispositif en prévoyant que *« la conclusion du contrat qui suit la décision d'attribution [...] ne peut avoir lieu avant l'expiration du délai d'au moins dix jours à compter du lendemain du jour où la décision d'attribution du marché a été envoyée aux soumissionnaires et candidats concernés si un télécopieur ou un moyen électronique est utilisé ».*

Troisièmement, l'instauration de ce délai de suspension minimal a soulevé des interrogations quant à sa mise en œuvre effective. En effet, si le délai de suspension était instauré dans le but de permettre au soumissionnaire évincé de disposer d'une voie de recours autre que le recours indemnitaire – se limitant à l'octroi de dommages et intérêts – le caractère bref de ce délai ne permettait pas au juge administratif de rendre une décision au fond et aucune disposition législative n'imposait au pouvoir adjudicateur, une fois le juge saisi, d'attendre la décision de ce dernier avant de signer le contrat. Ainsi, dans l'Ordonnance du 4 avril 2006 (N° 21098 du rôle), il fut retenu qu'il fallait admettre que la nouvelle réglementation a conféré au Président du Tribunal administratif, statuant dans le cadre des articles 11 et 12 du règlement de procédure devant les juridictions administratives, le pouvoir de prononcer le *sursis à exécution* d'une décision d'adjudication d'un marché public, un tel sursis entraînant essentiellement que, tant qu'une ordonnance de sursis à exécution produit ses effets, le pouvoir adjudicateur ou l'entité adjudicatrice ne saurait conclure le contrat d'exécution du marché litigieux. Il mérite d'être également noté que l'exigence quant à la condition d'un *préjudice grave et définitif,* qui conditionne l'admissibilité des demandes de sursis à exécution sur le fondement des articles 11 et 12 du règlement de procédure, a été abandonnée en

matière de marchés publics afin de garantir l'effet utile de la réglementation prévoyant le délai de suspension.[15]

Enfin, la directive ayant laissé aux Etats membres le soin de déterminer les conséquences de l'absence d'effet d'un marché, le législateur luxembourgeois a opté pour une solution qui laisse l'appréciation de ce point au juge saisi. Ainsi, l'article 10 de la loi de 2010 lui laisse le choix entre l'annulation rétroactive de toutes les obligations contractuelles et une annulation « limitée aux obligations qui doivent encore être exécutées », qui sera à compléter par des pénalités financières. Quant à la concordance et la cohérence entre les procédures judiciaires et administratives, la jurisprudence devrait encore régler la question de savoir dans quelle mesure la déclaration sans effet par le juge civil affecte la décision administrative d'adjudication.

Les limites du droit européen des marchés publics

Question 2

Si la distinction entre les *contrats administratifs*, d'une part, et les *contrats de droit privé*, d'autre part, n'est pas inconnue en droit luxembourgeois, elle présente néanmoins une importance limitée – par rapport à d'autres systèmes juridiques – dès lors que les deux types de contrats relèvent de la compétence des juridictions judiciaires.[16]

Un contrat administratif peut être défini comme un contrat qui se forme si l'une des parties est un établissement public et que le contrat est exorbitant de droit commun par ses clauses ou son régime. L'article 1101 du Code civil définit le contrat de manière générale comme étant *« une convention par laquelle une ou plusieurs personnes s'obligent envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose. »*.

En revanche, la distinction entre *les contrats* et *les actes administratifs*, qu'ils soient de nature législative, règlementaire ou décisionnelle, présente

15. Projet de loi instituant les recours en matière de marchés publics, Chambre des députés, n° 6119.
16. En droit luxembourgeois, la répartition de compétences entre les juridictions judiciaires et administratives s'opère non pas en fonction des sujets de droit – personnes privées ou autorités administratives – mais en fonction du droit qui engendre une contestation portée devant le juge.

une importance primordiale en termes de répartition de compétences entre les juridictions administratives ou les juridictions judiciaires. De manière générale, les contrats se distinguent, par leur *caractère bilatéral ou plurilatéral,* des actes administratifs – mesures législatives/réglementaires[17] et décisions administratives – qui sont eux des *actes unilatéraux.*

En outre, à l'occasion de plusieurs arrêts, les juridictions administratives ont défini les *décisions administratives* comme étant des actes émanant d'une « autorité administrative légalement habilitée à prendre des décisions unilatérales obligatoires pour les administrés ». Ainsi, il a été précisé que « l'acte doit émaner d'une autorité relevant, du moins pour cet acte, de la sphère du droit administratif, et participant à un titre quelconque à l'exercice de la puissance publique, c'est-à-dire exerçant des prérogatives de droit public, investie pour l'acte considéré de pouvoirs exorbitants du droit commun applicable entre particuliers, en d'autres termes du droit, de prendre des décisions unilatérales opposables aux destinataires et exécutoires, au besoin, par voie de contrainte ».[18] Il a également été jugé que « la prévision de certaines clauses réservant à la partie au contrat ayant le statut de personne de droit public certains droits exorbitants du droit commun dans le cadre d'une relation contractuelle n'a pas pour effet de remplacer la relation de nature contractuelle par une relation entre une autorité et un administré ».[19]

En droit luxembourgeois, le contentieux des marchés publics se subdivise en trois grandes catégories : le contentieux de l'adjudication, le contentieux de l'exécution et les litiges avec les tiers.[20]

En vertu de la loi du 25 juin 2009, les marchés publics sont des *contrats à titre onéreux*, conclus par écrit entre, d'une part, un ou plusieurs opérateurs économiques et, d'autre part, un pouvoir adjudicateur, et ayant comme objet l'exécution de travaux, la fourniture de produits ou la prestation d'un service. On retrouve aussi les définitions de « marchés publics de travaux », « marchés publics de service » et « marchés publics de fourniture ».[21]

---

17. La distinction entre les actes législatifs et règlementaires repose sur un critère organique. Au Luxembourg, les lois sont promulguées par le Grand-Duc, après le vote de la Chambre des Députés. C'est lui aussi qui prend les règlements et arrêtés indispensables à l'application de ces lois. Ils ont une portée générale qui les différencie des actes administratifs qui ont une portée limitée à leurs destinataires.
18. Tribunal administratif, arrêt du 8 mars 2006, n° 20636.
19. Idem.
20. Le contentieux (2006), Conférence de Me Marc Thewes sur les procédures en matière de marchés publics.
21. Article 3, 1 a) de la loi du 25 juin 2009 sur les marchés publics.

Toutefois, en vertu de la théorie de l'acte détachable, la conclusion d'un contrat par une autorité publique est nécessairement précédée d'une décision de contracter prise par ladite autorité et qui se « détache » du contrat. Ainsi, l'établissement unilatéral du cahier des charges est considéré en droit luxembourgeois comme étant *un acte administratif détachable du contrat*, relevant, de ce fait, de la compétence des juridictions administratives. De même, les décisions d'exclusion[22] de la participation aux marchés publics sont considérées comme étant des décisions administratives unilatérales, détachables du contrat.

S'agissant des concessions,[23] en l'absence d'une définition légale existant en droit luxembourgeois avant la loi du 25 juin 2009 sur les marchés publics, portant transposition des directives 2004/17/CE et 2004/18/CE, la Cour administrative les a définis par opposition aux marchés publics, constituant des *contrats à titre onéreux*. Dans un arrêt du 25 février 2010,[24] à propos d'un contrat de gestion du réseau de télécommunications à large bande, la Cour administrative a notamment jugé qu'en l'absence d'une rémunération payée directement par la commune à la société, le contrat ne pouvait être considéré comme un contrat à titre onéreux au sens de la loi sur les marchés publics, mais s'apparentait plutôt à une concession.

La loi du 25 juin 2009 considère les concessions comme étant des contrats. En effet, l'article 3 définit les « concessions de travaux publics[25] [et/ou de services[26]] comme étant un contrat présentant les mêmes caractéristiques qu'un marché public de travaux [ou de service], à l'exception du fait que les

22. Cour administrative, arrêt du 26 juin 2003, n° 15341C. La Cour administrative a jugé qu'une décision d'exclusion de la participation aux marchés publics pour une durée de six mois envers une association momentanée, prise suite à la résiliation du contrat de marché public, constituait un acte administratif. La Cour administrative a vu dans cet acte la manifestation d'une volonté unilatérale d'une autorité administrative faisant usage de ses prérogatives de puissance publique.
23. « La concession peut être définie de manière générale comme un mode de gestion résultant d'un acte appelé contrat de concession, par lequel une personne administrative (le concédant) charge une autre personne, privée ou publique (le concessionnaire), de gérer et de faire fonctionner un service public. Elle est traditionnellement un moyen de décharger la personne publique des frais et des risques du service, du coût des investissements, en totalité ou en partie, en même temps qu'elle laisse l'exploitant disposer du revenu du service pour la rémunération des frais et le profit d'un bénéfice », Jérôme KRIER, « La réalisation des objectifs de service public en matière de médias électroniques au Grand-Duché de Luxembourg », Ann. Dr. Lux., vol. 4 (1994), p. 267.
24. Tribunal administratif, 25 février 2010, n° 24553.
25. Loi du 25 juin 2009 sur les marchés publics, article 3, 3.
26. Loi du 25 juin 2009 sur les marchés publics, article 3, 4.

contreparties des travaux [ou de la présentation de service] consiste soit uniquement dans le droit d'exploiter l'ouvrage [service], soit dans ce droit assorti d'un prix. »

Question 3

Pour répondre à cette question, il faut s'intéresser aux lois régissant la capacité contractuelle des personnes morales de droit public. En effet, si les personnes morales de droit public jouissent de la personnalité juridique, cette personnalité est limitée dans le cas des personnes morales décentralisées – terme qui, au Luxembourg, vise exclusivement les communes et les établissements publics – qui disposent d'une personnalité spécialisée et qui sont soumises à un contrôle de tutelle.[27]

Si l'Etat dispose de la pleine capacité de contracter, il doit néanmoins respecter certaines procédures en la matière. En effet, l'article 99 de la Constitution subordonne à l'autorisation de la loi « toute acquisition par l'Etat d'une propriété immobilière importante, toute réalisation au profit de l'Etat d'un grand projet d'infrastructure ou d'un bâtiment considérable, tout engagement financier important de l'Etat ».

S'agissant des communes, l'article 173 ter de la loi du 23 février 2001 sur les syndicats communaux[28] prévoit que « sans préjudice de la législation sur les marchés publics, les communes et les syndicats de communes peuvent conclure entre elles et avec des personnes morales de droit public et de droit privé et avec des particuliers des conventions en des matières d'intérêt communal. Ces conventions sont soumises à l'approbation du Ministre de l'Intérieur, si leur valeur dépasse 100.000 euros. Cette somme pourra être relevée par règlement grand-ducal ». Il y a lieu de noter que la loi communale[29] n'évoque pas l'association entre l'Etat et une commune.

S'agissant des établissements publics, leur domaine d'activité est limité à leur domaine de spécialité en vertu de l'article 108 bis de la Constitution.

Les contrats internes ainsi que les coopérations public-public sont exemptés des règles des marchés publics prévues par la loi du 25 juin 2009 lorsque

---

27. Voir les articles « Les partenariats public-privé en droit luxembourgeois », 2009, Mes Marc Thewes et Thibault Chevrier, et « La gestion des biens du domaine public », 2010, Marc Thewes, publié au JTL, 2009, p. 105.
28. Publiée au ME A-36, du 26 mars 2001, modifiée en vertu du règlement grand-ducal du 23 avril 2004 (MA A-74, du 18/05/2004, p. 1096).
29. Loi du 1 mars 1988 ; voir le texte coordonné publié au MA A-167, du 12/12/2013, p. 1.

l'objectif poursuivi relève d'une mission de service public. À cet égard, il y a lieu de distinguer entre deux formes de coopération : premièrement, la coopération interne ou « *in house* » et, deuxièmement, la coopération horizontale.[30]

Le premier partenariat public-public est le concept dit de la coopération « *in house* » (ou coopération « en interne ») qui concerne des contrats de fournitures, de travaux ou de services conclus entre deux ou plusieurs pouvoirs adjudicateurs ayant une personnalité juridique distincte mais dont l'une dépend de l'autre et n'est pas autonome. En vertu de la jurisprudence de la Cour de justice de l'Union européenne,[31] les marchés attribués à une entité publique ne sont pas considérés comme des marchés publics si, d'une part, les pouvoirs adjudicateurs exercent sur cette entité un *contrôle analogue* à celui qu'ils exercent sur leurs propres services et si, d'autre part, l'entité réalise avec ces pouvoirs *l'essentiel de son activité*. En droit luxembourgeois, bien qu'aucune jurisprudence à ce sujet n'existe à l'heure actuelle, on peut supposer que les juridictions administratives suivront le raisonnement du juge de l'Union en la matière.

La seconde forme de coopération est la coopération « horizontale », qui ne se limite pas au recours à une entité interne sous contrôle commun puisqu'elle peut rester à un niveau purement contractuel (coopération horizontale non institutionnalisée). Ce type de dispositif n'est pas couvert par les règles de l'UE sur les marchés publics, s'il s'agit de l'exercice conjoint par les entités entièrement publiques, et par leurs propres moyens, d'une mission de service public, dans un but commun et comportant des droits et obligations réciproques allant au-delà de l'exécution d'une tâche contre rémunération pour la poursuite d'objectif d'intérêt public. Ce type de coopération horizontale vise le plus souvent les partenariats intercommunaux.

Enfin, il faut noter qu'un dernier type de partenariat public-public existe au Luxembourg : celui du transfert de compétences d'une autorité à l'autre pour l'accomplissement d'une mission de service public. Ce type de partenariat ne relève pas de la réglementation régissant les marchés publics si celui-ci correspond au transfert de l'entière responsabilité de la mission (et non à une simple délégation de son exécution à une autre autorité).

---

30. Voir « Le livre vert de la Commission sur la modernisation de la politique de l'Union européenne en matière de marchés publics – Vers un marché européen des contrats publics plus performant » – COM(2011) 15 final (ci-après « COM(2011) 15 final »).
31. Voir les arrêts de la Cour du 18 novembre 1999, Teckal, C-107/98, Rec. p. I-8121, et du 10 septembre 2009, Sea, C-573/07, Rec. p. I-8127.

Question 4

En ce qui concerne les Partenariats public-privé (PPP),[32] il y a lieu de relever qu'en droit luxembourgeois, aucune définition n'est prévue et même aucune loi n'a été promulguée à cet effet. De même, à l'heure actuelle, les juges n'ont pas encore eu l'occasion de se prononcer sur leur compatibilité avec les règles traditionnelles du droit constitutionnel et administratif. Les éléments caractéristiques des PPP peuvent être nombreux et la Commission européenne en a proposé[33] quatre, à savoir leur durée relativement longue, le mode de financement principalement assuré par le secteur privé, le rôle important de l'opérateur économique et la répartition des risques.

La Commission distingue le partenariat contractuel du partenariat institutionnalisé, distinction qui semble être également transposable en droit luxembourgeois.

S'agissant de la première catégorie, dite PPP contractuel, il y a lieu de se référer à l'affaire Commune de Bettborn, qui avait conclu, avec un partenaire privé, un « accord de coopération » en vue de la réalisation d'un parc d'éoliennes sur son territoire. Aux termes de ce contrat, la commune et le partenaire privé devaient chacun assumer la moitié du coût de réalisation du projet et des frais d'exploitation.[34] Cependant, le juge administratif s'étant concentré sur la question de savoir si la commune avait compétence pour conclure un tel contrat (si l'objet du contrat n'allait pas au-delà de l'intérêt communal), il n'a pas abordé la question de savoir si un tel accord de coopération conclu entre la commune et un partenaire privé était régi selon les règles relatives aux marchés publics.

S'agissant de la deuxième catégorie, dite PPP institutionnalisé, il y a lieu de rappeler que, dans le silence de la loi, l'Etat est libre de prendre des participations dans des structures de droit privé, comme des sociétés commerciales, des associations sans but lucratif et des groupements d'intérêt économique. En outre, le législateur a toujours la possibilité de créer, par une loi

---

32. Défini généralement comme étant « la collaboration, autour de projets, de l'Etat ou de ses démembrements, d'une part, et des entreprises privées, d'autre part », P.Lignières, Partenariats public-privé, 2è ed., Litec, Paris, 2005, n° 6.
33. COM(2004) 327 final.
34. Ce partenariat a été refusé par le ministre de l'Intérieur, agissant comme autorité de tutelle, ce qui a amené la commune d'introduire un recours devant les juridictions administratives. La Cour administrative a donné raison au ministre au motif que ceci n'était pas un projet d'intérêt communal. Voir l'arrêt de la Cour administrative du 13 décembre 2001, n° 13407C.

organique spéciale, une personne morale *ad hoc.* La création de sociétés d'économie mixte, soit par voie législative, soit par une prise de participation dans le capital, semble échapper aux règles applicables aux marchés publics. Toutefois, l'attribution directe d'un marché public à une société d'économie mixte ne serait possible que lorsque la sélection du partenariat privé est intervenue dans le cadre d'une procédure ouverte.[35]

À titre d'exemple, il y a lieu de citer la loi du 29 mai 2009,[36] autorisant le gouvernement luxembourgeois à réaliser le Campus scolaire de Mersch par le biais d'un PPP. Il est précisé dans cette loi qu'il s'agit bien d'un marché public conclu pour un long terme (article 4 : période de 25 ans renouvelable) et dans lequel le pouvoir adjudicateur s'engage financièrement auprès de l'entité privée.

Les permis d'exploitation des jeux de hasard sont réglés au Luxembourg par des lois[37] et donc leur caractère consensuel n'est pas accepté.

Question 5

L'accord mixte forme en général un tout indivisible où l'objet principal est décisif pour déterminer le régime juridique.

En effet, si l'élément prépondérant du contrat relève du champ d'application de la loi sur les marchés publics, alors la légalité du contrat est à apprécier sur le fondement de la législation sur les marchés publics.

À cet égard, il convient de rappeler que, dans son arrêt du 8 mars 2006, le Tribunal administratif a expressément indiqué que, lorsqu'un contrat réserve à la personne de droit public, partie au contrat, des prérogatives de puissance publique, l'existence même de ces clauses ne transforme pas ledit contrat en une relation entre une autorité publique et un administré.[38]

Si la question des accords mixtes est pertinente en droit luxembourgeois, il ne semble cependant pas que les juridictions luxembourgeoises aient eu à

35. Arrêt de la Cour du 15 octobre 2009, Acoset, C-196/08, Rec. 2009 p. I-9913.
36. Loi du 29 mai 2009, (ME A-126, p. 1760) relative à la réalisation du Campus scolaire de Mersch pour le Neie Lycée et pour le Lycée technique pour professions éducatives et sociales par le biais d'un partenariat public-privé.
37. Il existe deux opérateurs de jeux de hasard au Luxembourg : Les Œuvres Grande Duchesse Charlotte (voir loi du 22 mai 2009, ME A-10 du 26.5.2009) et le Casino de Mondorf (autorisation accordée sur le fondement de l'article 5 de la loi du 20 avril 1977, ME A-24 du 14 mai 1977, p. 548).
38. Supra note 19.

connaitre de litiges où cette problématique se soit posée concrètement du fait de circonstances spécifiques.

Les principes généraux du droit européen : le droit des marchés publics et au-delà

Question 6

Les principes s'appliquant dans l'attribution des contrats exclus, non couverts ou partiellement couverts par les directives sur les marchés publics sont au nombre de trois, à savoir, premièrement, le principe d'égalité de traitement, deuxièmement, le principe de non-discrimination et, troisièmement, le principe de transparence. L'application desdits principes découle tant de la législation luxembourgeoise que des règles fondamentales du droit de l'Union européenne.

Le livre Ier de la loi du 25 juin 2009, s'appliquant aux marchés publics non couverts ou partiellement couverts par les directives des marchés publics, prévoit dans son titre II, intitulé « Principes », que les « pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité, de manière non discriminatoire et agissent avec transparence ».

En outre, les juridictions administratives veillent à l'application de l'arrêt Telaustria,[39] c'est-à-dire au respect par les autorités publiques des principes généraux de non-discrimination, d'égalité de traitement et de transparence[40] pour les attributions non couvertes ou partiellement couvertes par les directives sur les marchés publics.

L'application de ces principes aux contrats non couverts par les directives sur les marchés publics va dans le sens d'une plus grande transparence et donc de la mise en concurrence des acteurs économiques.

---

39. Arrêt de la Cour du 7 décembre 2000, Telaustria et Telefonadress, C-324/98, Rec. 2000 p. I-10745.
40. Voir les décisions suivantes : Tribunal administratif (TA) 25-2-10 (24553); TA 27-4-2011 (26295) pour les principes de non-discrimination et de transparence ; TA 16-12-09 (24816 confirmé par l'arrêt de la Cour administrative 18-5-2010 (26547C) et CA 15-7-04 17627 C, pour le principe d'égalité; Cour administrative 15-7-2010 (26698C) pour le principe de non-discrimination par rapport à une clause du cahier des charges qualifiée de discrimination indirecte ainsi que pour la charge de la preuve.

Cependant, il convient de souligner que cette application n'est pas sans constituer un certain risque d'incertitude juridique ainsi qu'une charge administrative et procédurale pour les administrations. Dès lors, d'un point de vue économique, il est permis de s'interroger quant à la réalité des avantages tirés d'une mise en concurrence lorsque ceux-ci sont mis en balance avec l'impact sur l'efficience administrative. Cette observation est d'autant plus pertinente, semble-t-il, lorsqu'il est rappelé que les contrats concernés ont une valeur qui n'atteint pas les seuils des directives sur les marchés publics.

Question 7

Les principes de non-discrimination, d'égalité de traitement et de transparence (ou les règles qui en sont dérivées) s'appliquent également à la sélection du bénéficiaire de mesures administratives unilatérales.

À cet égard et à titre d'exemple, la décision du Tribunal administratif du 25 février 2010[41] mérite d'être mentionnée puisqu'il a été rappelé, au sujet de l'*octroi d'un contrat de concession de services*, hors du champ d'application de la directive sur les marchés publics, que les autorités publiques concluant de tels contrats étaient tenues de respecter les règles fondamentales du traité, à savoir les principes de non-discrimination en raison de la nationalité et de l'égalité de traitement ainsi que l'obligation de transparence. Il a également été rappelé que, même si l'autorité publique n'était pas nécessairement tenue par une obligation de procéder à un appel d'offres, l'obligation de transparence lui imposait de garantir, en faveur de tout concessionnaire potentiel, un degré de publicité adéquat permettant une ouverture des concessions de services publics à la concurrence, ainsi que le contrôle de l'impartialité des procédures d'attribution.

En l'espèce, l'administration communale ayant lancé, par le biais d'un bureau d'ingénieurs-conseils, un appel d'offres en vue de l'attribution de la gestion de télédistribution dans la commune (elle a envoyé des dossiers d'appel d'offres à quatre firmes spécialisées et deux de ces firmes ont remis des offres), le Tribunal administratif a jugé que l'attribution de la concession a eu lieu après une mise en concurrence et qu'il y avait par conséquent lieu d'écarter les griefs tirés de la violation des principes d'égalité de traitement, de non-discrimination et de transparence.

41. Tribunal administratif, 25 février 2010, n° 24553.

Les marchés publics et le droit européen, notamment le droit de la concurrence et le droit relatif aux aides d'Etat

Question 8

Lors de la passation des marchés, le pouvoir adjudicateur doit respecter les principes du traité, notamment les principes de la libre circulation des marchandises, de la liberté d'établissement et de la libre prestation de services, ainsi que les principes qui en découlent, comme l'égalité de traitement, la non-discrimination, la reconnaissance mutuelle, la proportionnalité et la transparence.

La loi du 25 juin 2009 prévoit également, dans son article 4, le principe selon lequel les pouvoirs adjudicateurs traitent les opérateurs sur un pied d'égalité, de manière non discriminatoire et agissent avec transparence.

Lorsque l'attribution du marché se fait selon le principe de l'offre économiquement la plus avantageuse, le pouvoir adjudicateur tient compte des critères qualitatifs, comme le service après-vente, les avantages techniques, la durée du cycle de vie, les caractéristiques environnementales, etc.

Les spécifications techniques, figurant dans les documents du marché, tel que l'avis de marché, le cahier des charges ou les documents complémentaires, doivent être établis de manière à permettre l'accès égal des soumissionnaires et ne pas avoir pour effet de créer des obstacles injustifiés à l'ouverture des marchés publics à la concurrence.

Cependant, il est indéniable que les marchés publics restent parfois perçus comme une barrière non financière au commerce entre Etats membres dans la mesure où il est difficile pour les acteurs économiques, et plus particulièrement pour les petites et moyennes entreprises, de participer aux marchés publics dans d'autres Etats membres. L'ensemble des décisions prises par les autorités adjudicatrices participent à l'établissement de cette barrière.

Par conséquent, la règlementation relative aux marchés publics a une importance économique essentielle et mérite une attention accrue en temps de crise économique. Il est donc fondamental que chaque décision individuelle soit être prise à l'aune des principes de non-discrimination et de proportionnalité.

Question 9

Du côté de l'adjudicateur, exclusivement, il y a, d'abord, le conflit d'intérêts qu'il faut prévenir car il constitue en soi un dysfonctionnement, indépendam-

ment des intentions des intéressés.[42] Il y a, ensuite, le favoritisme, par exemple lorsque l'adjudicateur souhaite ou préfère une offre locale au détriment des offres émanant d'opérateurs européens ou bien mondiaux.[43] Enfin, la pratique du fractionnement des marchés permet de contourner les dispositions relatives aux seuils au-dessus desquels le recours à l'appel d'offres public est requis, ce qui représente un problème quant à l'efficacité des directives.

Adjudicateur et adjudicataire sont tous deux concernés par les risques de commissions pécuniaires illégales ou autres avantages illégaux (« pots-de-vin ») et donc de corruption.[44] Au niveau national, il convient de relever que les dispositions législatives relatives aux marchés publics ne contiennent pas de règles spécifiques concernant la lutte contre la corruption. Il faut donc se reporter aux textes généraux et mentionner les dispositions de notre Code pénal. Les articles 246 et suivants sanctionnent la corruption au sens large des personnes chargées d'une mission publique (fonctionnaires nationaux et européens, magistrats, élus, etc.), la prise d'influence et les actes d'intimidation commis contre ces personnes. Le Luxembourg a adhéré aux différents instruments internationaux destinés à lutter contre la corruption.[45] Parmi les instruments de lutte contre la corruption, la transparence dans les procédures

---

42. Voir arrêt du Tribunal de l'Union européenne du 15 juin 1999, Ismeri Europa/Cour des comptes, T-277/97, Rec. p. II-1825, point 123.
43. Une illustration luxembourgeoise pourrait être le comportement des CFL, au cours des années 1974 à 1990, qui préféraient des livraisons luxembourgeoises. Voir en ce sens la décision du Conseil de la concurrence du 23 octobre 2013, point 36 : « Nach Angaben aller Kartellteilnehmer gab es bereits Absprachen oder zumindest gemeinsame Verständnisse zwischen den Weichenherstellern in den 1970er oder 1980er Jahren • Genaue Details oder Ursprunge des Kartells sind zu diesem Zeitpunkt nicht mehr nachzuvollziehen. Voestalplne BWG sagt aus, dass das Einverstandnis zwischen Kihn und Voestalpine BWG uhrsprunglich von der CFL eingeleitet wurde, da diese luxemburgische Lieferungen bevorzugten ».
44. Le coût supplémentaire à charge de la collectivité engendré par la corruption est double. Le corrupteur a tendance à inclure le coût de la corruption dans le prix soumis. L'adjudicateur corrompu attribuera le marché à ce prix, englobant le « pot-de-vin » dont il a bénéficié, et qui, d'ordinaire, est plus élevé que celui qui serait issu d'un processus concurrentiel sain, sans que cette augmentation soit justifiée du fait d'une qualité supérieur du marché·
45. Le Grand-duché de Luxembourg a signé le 17 décembre 1997 la Convention de l'OCDE du 21 novembre 1997 sur la corruption d'agents publics étrangers. Dans ce contexte, il convient de signaler aussi la loi du 1er août 2007. Cette loi a approuvé la Convention en question et a institué au Luxembourg le Comité de Prévention de la Corruption.

d'adjudication occupe une place importante. Cette transparence est cependant en opposition avec le secret qui doit entourer les offres soumises à l'adjudicateur afin de garantir pleinement la concurrence efficace entre soumissionnaires. En effet, ces derniers doivent rester dans l'ignorance de la place qu'occupe leur offre parmi toutes les offres soumises. Probablement, une amélioration de la transparence est encore possible (par exemple, concernant les décisions prises par l'adjudicateur accessibles au grand public, l'accessibilité du grand public aux procès-verbaux des séances d'ouverture des offres, etc.).

Le principe de transparence exige que les agissements des pouvoirs publics se fassent à livre ouvert. Ainsi, les commandes publiques sont précédées, sauf exception, par le recours à la concurrence moyennant publicité. Or, si le principe de transparence constitue l'un des principes fondamentaux en matière de marchés publics, il est susceptible de faciliter les tentatives de collusion des opérateurs économiques.

Du côté des soumissionnaires, exclusivement, il peut y avoir une dérive lorsqu'il y a une rupture dans l'égalité de traitement. C'est le cas d'un soumissionnaire qui a participé, lors d'une phase préalable et préparatoire, à l'appel d'offres. Ce soumissionnaire dispose d'informations privilégiées considérables, influant sur la qualité et le prix de son offre. La garantie de l'égalité de traitement n'est plus assurée. Cette inégalité s'amplifie par rapport à un soumissionnaire sortant qui bénéficie d'avantages concurrentiels naturels. Il connait les désidératas, le fonctionnement et les sensibilités de l'adjudicateur mieux que quiconque. Ces connaissances privilégiées se reflèteront dans son offre qui sera plus ciblée sur les besoins de l'adjudicateur que celles de ses concurrents.

Une autre dérive consiste dans les ententes entre soumissionnaires, ententes qui génèrent souvent des soumissions concertées. Les soumissions concertées visent à distribuer entre leurs membres les bénéfices majeurs générés par l'adjudication du marché à une offre plus élevée que celle qui aurait été retenue s'il y avait eu une mise en concurrence saine des offrants. Ces ententes ont pour objet ou pour effet d'éliminer la concurrence entre les membres de l'entente.

En effet, si la définition détaillée des besoins de l'acheteur public dans un cahier des charges prenant en compte tous les paramètres de la fourniture ou de l'ouvrage en cause constitue un préalable à l'exercice de la concurrence, elle peut, en revanche, avoir des effets anticoncurrentiels et provoquer des soumissions concertées. Le fait de porter à la connaissance des entreprises soumissionnaires les critères de sélection quantitatifs détaillés est susceptible de favoriser les ententes, en ce que cela rend prévisibles, pour les soumissionnaires, les conditions d'attribution du marché. Que l'attributaire soit dési-

gné au moins-disant ou à l'entreprise répondant aux critères quantitatifs définis, une entente permettrait à ses membres de désigner entre eux, en concertation et à l'insu de l'acheteur public, celui qui déposera l'offre moins-disante ou répondant aux critères et ceux qui déposeront des offres « de couverture », plus élevées ou s'écartant des critères d'attribution.

Toutes les ententes présupposent que les membres de l'entente se connaissent, que les soumissionnaires communiquent entre eux (par exemple, à travers des associations du secteur, etc..) et que les membres acceptent les conditions de l'entente dans la conviction qu'ils y trouvent leur intérêt réciproque (win/win situation). Le caractère secret est une constante de la soumission concertée. La lutte contre les ententes doit se faire en prenant pour cible un ou plusieurs de ces composants.

Question 10

Lorsque le SIEG est attribué sous la forme d'un marché public ou d'une concession, les pouvoirs publics doivent respecter les règles édictées dans les directives relatives aux marchés publics et dans les cas de concession, les principes découlant des traités, plus particulièrement des articles 49 à 56 du TFUE. En vertu de la jurisprudence de la Cour de Justice de l'Union européenne, les principes d'égalité de traitement et de non-discrimination en raison de la nationalité impliquent, notamment, une obligation de transparence, l'autorité publique devant garantir un degré de publicité adéquat permettant une ouverture de concession de services à la concurrence ainsi que le contrôle de l'impartialité des procédures d'adjudication.[46]

Toutefois, l'autorité publique peut externaliser la fourniture du SIEG à des acteurs du marché sans mise en concurrence dans certaines hypothèses, notamment lorsqu'il s'agit d'un marché public de service exclu du champ d'application de la directive (article 21 de la directive)[47] ou lorsque l'attribution se fait sur la base d'un droit exclusif (article 18 de la directive[48]). Il y a égale-

46. Arrêts de la Cour Telaustria et Telefonadress, précités, et du 13 octobre 2005, Parking Brixen, C-458/03, Rec. p. I-8585.
47. Les marchés figurant à l'annexe II-B de la directive 2004/18, comme par exemple les marchés de services sociaux et de santé, les services culturels et sportifs, etc.
48. En vertu de l'article 18 de la directive : « La présente directive ne s'applique pas aux marchés publics de services attribués par un pouvoir adjudicateur à un autre pouvoir adjudicateur ou à une association de pouvoirs adjudicateurs sur la base d'un droit exclusif dont ceux-ci bénéficient en vertu de dispositions législatives, réglementaires ou administratives publiées, à condition que ces dispositions soient compatibles avec le traité ».

ment lieu d'ajouter que la Cour de Justice a admis la possibilité d'attribuer directement la gestion de service public à une société mixte (PPP), pourvu que le partenaire privé ait été choisi dans le cadre d'une procédure ouverte.[49] En outre, l'attribution directe, sans mise en concurrence, d'un marché ou d'une concession de service public est possible dans le cadre de coopération in-house ou de coopération public-public, exposées dans le cadre de la question 3 ci-dessus.

Si les règles en matière d'aides d'Etat n'exigent pas qu'un SIEG soit confié à un opérateur à l'issue d'une procédure d'appel d'offres,[50] une telle procédure présente une pertinence particulière quant à la quatrième condition de l'arrêt Altmark de la Cour de Justice. En effet, lorsque l'attribution des SIEG se fait par une méthode autre qu'une procédure de marché public, la compensation représentant la contrepartie de prestations effectuées par les entreprises bénéficiaires pour exécuter des obligations de service public serait considérée comme affectant le développement des échanges dans une mesure contraire aux intérêts de l'Union, au sens de l'article 106, paragraphe 2, du traité, et, par conséquent, ne pourrait échapper à l'application des règles relatives aux aides d'Etat.[51]

Utilisation stratégique des marchés publics

Question 11

Il ressort des considérants des directives sur les marchés publics que les objectifs environnementaux et sociaux sont une part entière du domaine des marchés publics, et ce à tous les stades de la procédure. Le livre vert de la Commission sur la modernisation de la politique de l'Union européenne en matière de marchés publics[52] met particulièrement l'accent sur l'utilisation

49. Arrêt de la Cour du 15 octobre 2009, Acoset, C-196/08, Rec. p. I-9913.
50. Voir, notamment, l'arrêt du Tribunal de l'Union européenne du 15 juin 2005, Olsen/Commission, T-17/02, Rec. p. II-2031.
51. Communication de la Commission relative à l'application des règles de l'Union européenne en matière d'aides d'Etat aux compensations octroyées pour la prestation de services d'intérêt économique général – Texte présentant de l'intérêt pour l'EEE (JO C 8 du 11.1.2012, p. 4-14), et Communication de la Commission – Encadrement de l'Union européenne applicable aux aides d'Etat sous forme de compensations de service public (2011) (JO C 8 du 11.1.2012, p. 15-22).
52. COM(2011) 15 final.

stratégique des marchés publics permettant aux pouvoirs publics de réaliser certains objectifs de la stratégie Europe 2020, tels que le respect de l'environnement et la lutte contre le changement climatique, la réduction de la consommation d'énergie, l'amélioration de l'emploi, de la santé publique et des conditions sociales, ainsi que la promotion de l'égalité accompagnée d'une meilleure inclusion des groupes défavorisés.

Les autorités luxembourgeoises ont pleinement tenu compte de ces objectifs lors de la transposition des directives relatives aux marchés publics en droit interne. En effet, l'article 11 de la loi du 25 juin 2009 érige en « principe général » la prise en considération des objectifs environnementaux et sociaux par les pouvoirs adjudicateurs.[53] En outre, la loi luxembourgeoise, à l'instar des directives sur les marchés publics, donne aux pouvoirs adjudicateurs les moyens de tenir compte de ces objectifs dans le cadre des règles de procédures régissant les passations de marchés publics. En effet, les considérations environnementales et sociales peuvent être prises en considération lors des différentes étapes de la procédure, telles que la description de l'objet du marché et des spécifications techniques, la définition des critères de sélection et des critères d'attribution ainsi que les clauses d'exclusion. De plus, le juge national devra tenir compte de ces objectifs lorsqu'il sera amené à interpréter le droit national transposant le droit de l'Union européenne.

Au Luxembourg, les considérations environnementales et sociales comme critères d'attribution des marchés publics sont de plus en plus intégrées, et ce dans des domaines très variés tels que les travaux publics, les transports publics, etc. Les autorités luxembourgeoises tiennent dûment compte des incidences énergétiques et environnementales dans leur décision de passation de marchés publics, privilégient les produits appartenant à la classe d'efficacité énergétique la plus élevée et encouragent le développement de bâtiments publics plus économes en termes d'utilisation de ressources. En outre, la prise en compte de l'« accessibilité[54] » est non seulement encouragée par les clauses relatives aux marchés publics, mais aussi rendue obligatoire dans un certain nombre de cas par d'autres outils juridiques.

Si le Luxembourg est pleinement conscient de l'importance de l'intégration des aspects environnementaux et sociaux dans les marchés publics, il est également soucieux de la prise en compte d'autres aspects afin que ces derniers ni

53. L'article 11 de la loi du 25 juin 2009 dispose que les « pouvoirs adjudicateurs veillent à ce que, lors de la passation des marchés publics, il soit tenu compte des aspects et des problèmes liés à l'environnement et à la promotion du développement durable ».
54. Article 23 de la directive, relatif à l'utilisation des critères d'accessibilité pour les personnes handicapées et la conception pour tous les utilisateurs.

ne créent une charge administrative disproportionnée pour les pouvoirs administratifs, ni ne faussent la concurrence sur les marchés publics.

Question 12

Les autorités luxembourgeoises considèrent que la stimulation de l'innovation par les marchés publics, qu'elle soit technologique ou sociale, est une nécessité. Il y a lieu de rappeler que le livre vert de la Commission[55] appelle les Etats membres à encourager l'innovation par l'intermédiaire des marchés publics et que les directives sur les marchés publics proposent plusieurs techniques pour promouvoir l'innovation, qui se retrouvent également dans la loi du 25 juin 2009 sur les marchés publics.

Tout d'abord, s'agissant des concours, les pouvoirs adjudicateurs peuvent acquérir un plan ou un projet dans les domaines, par exemple, de l'architecture, de l'ingénierie ou du traitement de données : les participants sont invités à proposer des projets hors du cadre strict du cahier des charges.

Ensuite, hors le cas des marchés particulièrement complexes, les pouvoirs adjudicateurs peuvent, s'ils estiment que le recours à la procédure ouverte ou restreinte ne permet pas d'attribuer le marché, recourir à une autre procédure qui est le dialogue compétitif.[56] Dans le cadre du dialogue compétitif, le pouvoir adjudicateur entretient un dialogue avec les candidats afin de développer une ou plusieurs solutions aptes à répondre à ses besoins.

En outre, en ce qui concerne les variantes et les solutions techniques alternatives, l'article 25 du règlement grand-ducal[57] indique que le pouvoir adjudicateur peut, dans le cahier spécial des charges, soit envisager différentes possibilités d'exécution pour une ou plusieurs positions du bordereau qui doivent alors être spécifiées de façon précise, soit prévoir la possibilité d'admettre des solutions techniques alternatives pour lesquelles il fixe les critères auxquels elles doivent répondre. En cas de solutions techniques alternatives, le résultat souhaité de la prestation doit être clairement défini par le cahier spécial des charges. En vertu de l'article 166 dudit règlement, lorsque le critère d'attribution est celui de l'offre économiquement la plus avantageuse, les pouvoirs adjudicateurs peuvent autoriser les soumissionnaires à présenter des variantes.

---

55. COM(2011) 15 final.
56. Voir article 41 de la loi du 25 juin 2009.
57. Règlement grand-ducal du 3 août 2009 portant exécution de la loi du 25 juin 2009 sur les marchés publics et portant modification du seuil prévu à l'article 106 point 10 de la loi communale modifiée du 13 décembre 1988, tel que modifié, ME A n° 180, p. 2608.

Enfin, s'agissant des contrats relatifs à des services de recherche-développement d'envergure, ceux-ci sont exclus du champ d'application de la loi sur les marchés publics. L'exclusion ne s'applique qu'à des marchés de services qui portent véritablement sur des projets de recherche et de développement, sans prolongements industriels directs. Les simples marchés d'études n'entrent pas dans cette catégorie. Les marchés recherche en matière de fournitures et de travaux ne sont pas concernés.

Les contrats relatifs à des programmes de recherche-développement sont exclus du champ d'application de la loi si le pouvoir adjudicateur ne finance que partiellement (c'est-à-dire à moins de 50 %) le programme,[58] ou s'il n'acquiert pas la propriété exclusive des résultats du programme. Ces deux conditions sont alternatives, la satisfaction de l'une ou de l'autre suffit à justifier l'exclusion du champ d'application. Ainsi, seul constitue un marché public soumis à la loi le contrat dans lequel le pouvoir adjudicateur est amené à acquérir l'intégralité de la propriété des résultats du programme de recherche et à en assurer l'intégralité de son financement ou plus de 50 %.

Nous ne disposons pas d'un nombre suffisant de marchés publics centrés sur l'innovation pour être en mesure de dégager une tendance permettant d'évaluer l'efficacité de la directive, compte tenu de sa transposition récente en droit luxembourgeois. Cependant, dans la mesure où l'innovation est souhaitée, sa promotion à travers l'utilisation stratégique des marchés publics est possible.

Solutions

Question 13

La loi du 10 novembre 2010 a transposé en droit luxembourgeois la directive 2007/66/CE.[59] La possibilité de saisir le président du Tribunal administratif avant la décision d'adjudication permet aujourd'hui une résolution plus rapide qu'auparavant[60] des litiges dans le domaine des marchés publics. De même, la

58. Article 30, chapitre IV, Livre II, loi du 29 juin 2009 sur les marchés publics.
59. Voir Thewes Marc et Chevrier Thibault, Regards sur la réforme des recours en matière de marchés publics , dans Journal des tribunaux Luxembourg, 2011, p. 85 et ss.
60. Voir Guy Perrot, « Panorama de jurisprudence sur les référés en matière de marchés publics (2009-2012) », dans Les cahiers du droit luxembourgeois, 16 novembre 2012, éd. legitech.

résolution en amont des litiges en la matière a pour conséquence que les procédures en dommages et intérêts, intentées par des soumissionnaires dont l'offre n'a pas été retenue à un moment où le marché est en pleine exécution, sont devenues moins fréquentes. Toutefois, même si la nouvelle procédure instaurée suite à la directive 2007/66/CE contribue à accroître l'efficacité de la procédure en matière de marchés publics, il n'en demeure pas moins que des améliorations sont encore possibles, voir nécessaires.[61]

Tout d'abord, il y a lieu de noter que, depuis son entrée en vigueur, un nombre limité de recours a été introduit sur la base de la loi du 10 novembre 2010 instituant les recours en matière de marchés publics[62] et transposant la directive sur les procédures de recours. En effet, seules 6 ordonnances ont été rendues par le président du Tribunal administratif, déclarant les recours irrecevables ou non fondés. Durant la même période, la plupart des recours ont été formés sur la base des articles 11 et 12 de la loi de 1999 portant règlement de procédure devant les juridictions administratives. Sur 24 recours introduits, seules 5 ordonnances présidentielles y ont fait droit.[63]

Ensuite, force est de constater que la loi du 10 novembre 2010 ne s'applique pas aux marchés publics du livre Ier qui continuent à être régis par la loi du 21 juin 1999 portant règlement de procédure devant les juridictions administratives. En effet, l'article 1 dispose que la loi de 2010 « s'applique uniquement aux marchés visés par les livres II et III de la loi modifiée du 25 juin 2009 ». Or, cette dualité de régime est source d'insécurité juridique et soulève des problèmes en termes de répartition de compétence, de délai de recours et de conditions d'octroi des mesures provisoires.

En effet, « la loi de 2010 maintient une dualité de compétences réparties entre le président du Tribunal d'arrondissement siégeant comme juge des référés et le président du Tribunal administratif. Or, en pratique, seul ce dernier est amené à rendre des ordonnances en matière de marchés publics ».[64]

La recevabilité des demandes en référé fondées sur l'article 11 de la loi du 21 juin 1999 portant règlement de la procédure devant les juridictions administratives, telle que modifiée[65] et relatives à des marchés du livre Ier de la loi de 2009 est fonction de l'état de l'affaire au principal. Comme le précise M.

61. Voir Guy Perrot, « L'inefficacité des recours en référé en matière de marchés publics », dans LAWS, le magazine de la conférence du jeune barreau, n°1, 2013, p. 32.
62. Publié au ME A n° 203, p. 3378.
63. Perrot, Ibid.
64. Perrot, Ibid.
65. Publiée au ME A n° 98, p. 1892. La loi de 1999 a été modifiée par la loi du 28 juillet 2000, sur l'organisation judiciaire (ME A n° 71, p. 1418).

Perrot dans son article, « tant que l'affaire au fond n'est pas en état d'être plaidée ni décidée à brève échéance, le référé est recevable ». Cependant, lorsqu'il s'agit de marchés publics tombant sous le régime des livres II et III de la loi de 2009, les demandes de mesures provisoires doivent être formées dans les 10 ou 15 jours de l'information donnée aux soumissionnaires évincés sur l'attribution du marché. Les délais de recours ne sont pas harmonisés, ce qui ne contribue pas à la sécurité juridique. « Une uniformisation des délais de recours serait judicieuse ».[66]

Enfin, il faut noter que la loi de 1999 maintient la condition d'un préjudice grave et irréparable pour l'octroi des mesures provisoires relevant du livre Ier alors que cette condition a été abandonnée concernant les marchés publics relevant des livres II et III de la loi de 2009. Une telle divergence quant à la condition d'octroi des mesures provisoires entre les marchés publics du livre Ier et ceux des livres II et III est susceptible de créer une inégalité de traitement entre les justiciables. Pour y remédier, il pourrait être considéré opportun d'étendre le champ d'application de la loi de 2010 aux marchés visés au livre Ier et de modifier la loi de 1999 quant aux conditions d'octroi des mesures provisoires en matière de marchés publics.

La question générale relative à la réparation de dommages subis à la suite d'attributions de marchés publics dans des conditions irrégulières sanctionnées, notamment, par le Conseil de la concurrence de Luxembourg ne s'est pas encore posée devant les juridictions nationales. Peut-être que la décision rendue le 23 octobre 2013[67] dans l'affaire dite des « aiguillages » des chemins de fer luxembourgeois pourrait être l'occasion d'envisager une demande en dommages et intérêts.

Conclusion et réforme

Question 14

Le Luxembourg semble être ouvert aux nouvelles propositions de la Commission concernant ce domaine et est prêt pour une application efficace et rapide des différents textes qui seront adoptés.

66. Perrot, Ibid.
67. Affaire « aiguillages », 2013-FO-03, du 23 octobre 2013.

La proposition de la Commission portant sur les contrats de concessions aiderait fortement à moderniser le cadre légal luxembourgeois, puisque celui-ci est quasi inexistant en la matière et engendre, par conséquent, une insécurité juridique. En ce qui concerne la prise en charge du risque, les juridictions internes ont appliqué la jurisprudence de la Cour de justice de l'Union européenne,[68] c'est-à-dire que, lorsque le prestataire est rémunéré sur le prix que payent les usagers, cela doit s'accompagner d'un transfert de risque du pouvoir adjudicateur vers l'entreprise privée. Ainsi, on est en présence d'une concession de service public et non plus d'un marché public.[69]

Actuellement, le Luxembourg est un Etat qui n'a pas une longue expérience en matière de PPP. Néanmoins, dans le cadre de la recherche et de l'innovation, ces partenariats sont encouragés par l'Etat.[70] Les PPP sont entendus par la Commission comme des instruments servant à investir dans l'innovation, la recherche ou encore l'environnement. Tous ces objectifs sont portés par l'Union européenne dans la stratégie Europe 2020, et il va sans dire que le Luxembourg s'implique dans ces objectifs et le fera de manière efficace à travers les marchés publics.

Le dialogue compétitif instauré en 2004 encourage particulièrement le recours aux partenariats, mais le Luxembourg n'en fait usage que de manière limitée. Le livre vert de la Commission sur la modernisation de la politique de l'Union en matière de marchés publics[71] montre bien qu'un recours plus large à une procédure de négociation est demandé. Si ceci est accepté dans la nouvelle directive, il faudra encadrer correctement ce recours puisque le pouvoir adjudicateur disposera de plus de libertés et le risque de dérives augmentera, aussi bien du côté du pouvoir adjudicateur (par exemple le favoritisme) que du côté des soumissionnaires (par exemple le risque de soumissions concertées).

La proposition de la nouvelle directive est entièrement orientée de façon à ce que les nouvelles procédures encouragent davantage l'innovation. Ce changement va, sans doute, avoir un impact sur le droit des marchés publics internes. La modernisation de ce domaine est demandée depuis longtemps par les acteurs économiques. L'utilisation stratégique des marchés publics se fera de façon plus efficace puisque la proposition est bien plus explicite sur ce thème que ne l'est la directive actuelle.

---

68. Arrêt de la Cour, Parking Brixen, précité, point 40.
69. Tribunal administratif, 25 février 2010, N° 24553.
70. http://www.innovation.public.lu/fr/collaborations/collaborations-publiques-privees/index.html
71. COM(2011) 15 final.

La question des petites et moyennes entreprises est à évoquer à propos de la modernisation, car ce sont souvent elles qui sont le moteur de celle-ci. En effet, il serait important de leur permettre un meilleur accès aux marchés publics. Ainsi, la simplification leur sera très profitable et il serait peut-être même bénéfique que leur soit dédiées des procédures spéciales.

Quant aux instruments électroniques, il est évident qu'ils sont la matérialisation de la modernité par excellence. Grâce à eux, une meilleure publicité peut être assurée puisqu'elle sera diffusée de façon plus large et plus rapide dans toute l'Union européenne. Ces procédures électroniques font l'objet d'un règlement grand-ducal.[72] En substance, ce texte prévoit que le Ministère compétent pour les travaux publics est responsable d'un « portail marchés publics » permettant la publication des avis de marchés publics et le dépôt des candidatures et offres des soumissionnaires. L'acceptabilité de ce nouveau mode de travail électronique semble grande, même si la période écoulée depuis sa mise en place est trop courte pour pouvoir tirer des conclusions définitives à cet égard.

72. Règlement grand-ducal du 27 août 2013 relatif à l'utilisation des moyens électroniques dans les procédures des marchés publics, modifiant le règlement grand-ducal modifié du 3 août 2009 portant exécution de la loi du 25 juin 2009 sur les marchés publics et portant modification du seuil prévu à l'article 106 point 10 de la loi communale du 13 décembre 1988 ; publié au ME A°161 de 2013, p. 3096.

MALTA

Ivan Sammut[1]

The context

Public procurement is the process whereby supplies, services and works are works are acquitted by the state, government institutions, the public sector and local authorities. The main legal source of Maltese procurement law is the subsidiary legislation enacted under Chapter 174, *The Financial Administration and Audit Act* of the Laws of Malta.[2] A definition of this technical term is found under Maltese law where it stated that public procurement is *'the acquisition, under works supplies and services contracts by public bodies or bodies governed by public law falling within the meaning of contracting authorities'*.[3] It is a public law process whereby the government or other identifiable emanations of the state contract with the private sector in order to acquire goods, supplies or services. The main specific subsidiary instruments governing local procurement rules are Subsidiary Legislation 174.04 – The Public Procurement Regulations[4] and Subsidiary Legislation 174.06 – The Public Procurement of Entities Operating in Water, Energy, Transport and Postal Services Sectors Regulations.[5] The Public Procurement Regulations transpose the EU's Directive 2004/18/EC and the Remedies Directive, whilst the Public Procurement in Utilities Regulation transposes Directive 2004/17/EC. Another important legislation is Subsidiary Legislation 174.08 – The Public Procurement of Contracting Authorities or Entities in the fields of Defence and Security Regulations[6] which transpose Directive 2009/81/EC.

1. Dr., Senior Lecturer, Faculty of Law, University of Malta.
2. Chapter 174 of the Laws of Malta http://www.justiceservices.gov.mt/
3. Cleaner and More Energy-Efficient road transport vehicles Regulations, Laws of Malta Special Legislation (S.L.) 174.07, Regulation.
4. Public Procurement Regulations, Laws of Malta S.L. 174.04.
5. Public Procurement Regulations, Laws of Malta S.L. 174.06.
6. Public Procurement Regulations, Laws of Malta S.L. 174.08.

Question 1

The general principles underlying Malta's public procurement regime derive from the TFEU and the case-law developed by the Court of Justice of the European Union and the General Court, including the following: the free movement of goods; the freedom to provide services; the freedom of establishment; equal treatment; non-discrimination; proportionality; transparency; and mutual recognition. These underlying principles must be observed in the application and interpretation of local procurement legislation, and are relevant even where the contract falls below the EU thresholds and, generally, in matters not caught by the Public Procurement Directives (for example, the award of a public service concession contract).

The principles of public procurement as reflected under the EU Directives are also manifested within the Maltese Regulations. It seems that in certain instances Maltese law goes beyond what is stated within the directives in order to safeguard these principles. This is particularly evident with the 'separate packages in tender offer' procedure whereby Maltese law guarantees equal treatment and non-discrimination by maximising objectivity and transparency. Moreover, as regards the application of the principles of transparency, equal treatment and non-discrimination, the Maltese regime does not merely rely on the basic principles of EU law as expounded by the Treaty, but renders these principles applicable to all contracts irrespective of their value. It would therefore seem that there has been a correct transposition of the principles of public procurement into Maltese law.

To the above one may add that public procurement rules fit well with the overall system of administrative law. One may have full redress to any breach of rights via the local administrative structure including full recourse to the court system. There is no need for any *ad hoc* mechanisms for the local procurement regulations as the normal administrative redress is enough to satisfy any need of redress.

The boundaries of EU public procurement law

Question 2

The Public Contracts Regulations govern the award of a 'public contract', which is defined as 'any contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting author-

ities and having as their object the execution of works, the supply of products or the provision of services as defined in this regulation'. A distinction is made between public works contracts, public service contracts, public supply contracts and public works concessions (defined as public works contracts, except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction, or in this right together with payment), in line with the Public Procurement Directives. The Public Procurement Regulations apply to supply, works and service contracts, as defined therein, which have a value equal to or exceeding the prescribed threshold.

The first types of contracts are public service contracts. Public service contracts, the estimated value of which is equal to or exceeds the threshold value of two hundred thousand euro (€200,000) net of VAT, issued in connection with a subsidised public work by an authority not being a contracting authority, where fifty per cent or more of the value of the public service contract is subsidised directly by a contracting authority. Contracting authorities awarding such subsidies shall ensure compliance with this regulation both when they themselves award the contract for and on behalf of those other entities and where the public contract is awarded by one or more entitles other than themselves. Then there are public supply contracts. When a contracting authority grants to a body other than a contracting authority, regardless of its legal status, special or exclusive rights to engage in a public service activity, the instrument granting this right shall stipulate that the body in question must observe the principle of non-discrimination by nationality when awarding public supply contracts to third parties. Finally there are public works contract and public works concessions where the estimated value of the contract or concession, at the dispatch of the EU contract notice for publication, is equal to or exceeds the threshold value, shall be awarded in terms of these regulations. These shall also apply to public works contracts issued by an authority not being a contracting authority where those contracts involve civil engineering activities or building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings or buildings used for administrative purposes, the estimated value of which is equal to or exceeds the threshold value of five million euro (€5,000,000) net of VAT, but where fifty per cent or more of the value of the public works contract is subsidised by a contracting authority. Contracting authorities awarding such subsidies shall ensure compliance with this regulation both when they themselves award the contract for and on behalf of those other entities and where the public contract is awarded by one or more entities other than themselves.

The Public Contracts Regulations apply irrespective of the estimated value of the contract, although the rules applicable to contracts with an estimated value (net of VAT) exceeding €47,000 are more detailed than the rules prescribed in respect of contracts with a value below this threshold. Contracts with an estimated value equal to or exceeding the EU thresholds (as per the Public Procurement Directives) must be awarded following an international tender procedure in line with the Public Procurement Directives. The Public Procurement Regulations only concern the award of contracts which have a value excluding VAT estimated to be no less than €412,000 in the case of supply and service contracts and €5,150,000 in the case of works contracts.

The Maltese regulations prescribe how the estimated value of a contract is to be calculated, so as to avoid circumvention of the application of the Regulations. As a general rule, contracting authorities are not allowed to establish an estimated value of a contract with the intention of avoiding, or to adopt any mechanism, including subdivision of public contracts, the purpose of which is to circumvent the application, in part or in whole, of the Public Contracts Regulations. Similarly, the Public Procurement Regulations prescribe that contracting entities may not circumvent these regulations by splitting works projects or proposed purchases of a certain quantity of supplies and/or services, or by using special methods for calculating the estimated value of contracts.

Whilst public service concession contracts are excluded from the scope of application of the Public Contracts Regulations and are not subject to any special rules, public works concessions are subject to the relevant provisions transposing the Public Procurement Directives. The Public Procurement Regulations do not apply to works and service concessions awarded by contracting entities carrying out one or more of the activities covered by the same regulations, where those concessions are awarded for carrying out those activities. Although there are no special rules in relation to concessions falling outside the scope of application of the Regulations, the award thereof nevertheless remains subject to the provisions of the TFEU Treaty and the general principles of EU law. This means for instance that, depending on the circumstances, the public concession may have to be awarded by tender. In terms of the Regulations, a (public) service and works contract is a contract for pecuniary interest, whilst in the case of a (public) service or works concession contract, the consideration consists either solely in the right to exploit the service or works or in such right together with payment.

Question 3

The principles established by the European Court of Justice regarding 'in house' administrative arrangements apply (in particular, the *Teckal* case). The Regulations expressly provide that they do not apply to public service contracts awarded to an entity which is a contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or administrative provision which is compatible with the TFEU.

It is the Director of Contracts' function to issue calls for tenders and to award period contracts for the provision of equipment, stores, works or services which are of a common use to contracting authorities listed under Schedule 2 of the Public Contract Regulations, and to periodically notify Heads of Departments of the prices and conditions applicable for, and the procedure to be followed in, the procurement of such equipment, stores, works or services, where these are obtained directly from the contractor. The Public Procurement Regulations specifically offer contracting entities the possibility to purchase works, supplies and, or services from or through a central purchasing body as defined in the Public Contracts Regulations (i.e. the Department of Contracts).

Where the criterion for the award of the contract is MEAT,[7] contracting authorities may authorise tenderers to submit 'variants', provided that this is indicated in the contract notice. In cases where tenderers are allowed to submit such alternative solutions, the contracting authority must state the minimum requirements to be met by the variants and any specific requirements for their presentation in the contract documents, only variants meeting such minimum requirements may be taken into consideration.

Question 4

Contracting authorities shall ensure that there is no discrimination between economic operators, and that all economic operators are treated equally and transparently in all calls for tenders whatever their estimated value. They ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this regulation between national rules implementing EU law and other national rules. Contracting authorities respects fully the confidential

7. The most economically advantageous tender.

nature of any information furnished by economic operators. Such information includes in particular, technical or trade secrets and the confidential aspects of tenders.

Regulation 4 of the Public Procurement Regulations transposes Article 2 of the Public Sector Directive and thus introduces the principles of equal treatment, transparency and non-discrimination into Maltese law. It states that 'Contracting authorities shall ensure that there is no discrimination between economic operators, and that all economic operators are treated equally and transparently in all calls for tenders whatever their estimated value.'[8] It is interesting to note that this regulation is applicable to all calls for tenders irrespective of their estimated value. In fact, it is found under Part I[9] of the regulations which is applicable to all contracts by virtue of regulations 18,[10] 22[11] and 37.[12] Moreover, regulation 68 of the Utilities Regulations states that 'Regulation 4 ... of the Public Procurement Regulations shall *mutatis mutandis* apply to these [Utilities] regulations'.[13] Therefore, it would seem that, under Maltese law, the principles of equal treatment, transparency and non-discrimination are applicable to all contracts irrespective of their value or subject matter. It may thus be stated that these principles are also applicable across the board and therefore also to contracts which are not regulated by the EU directives, such as, for example; contracts falling below the EU thresholds and other matters which fall outside the scope of the directives (for example the award of a public service concession contract).[14]

Review bodies have held that these obligations subsist at all stages of the procurement process. In fact, in *Case No. 318*,[15] the PCRB (Public Contract Review Board) stated that in procurement procedures, it is imperative 'for

8. Public Procurement Regulations, Laws of Malta, S.L. 174.04 (S.L. 174.04 Public Procurement Regulations), Regulation 4(1).
9. S.L. 174.04 Public Procurement Regulations, Part I – The General Provisions.
10. Ibid. Regulation 18.
11. Ibid. Regulation 22.
12. Ibid. Regulation 37.
13. Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations, Laws of Malta, S.L. 174.06 (S.L. 174.06 Utilities Procurement Regulations), Regulation 68.
14. Franco B. Vassallo and Joseph Camilleri, 'A practical cross-border insight into public procurement' [2012] ICLG to: Public Procurement 143, available online at http://www.mamotcv.com/files/5/PP12_Chapter-21_Malta.pdf, last accessed on 15/10/13, pg. 143.
15. PCRB Case No. 318 *Birgu SS05/11; Services Tender for Street Sweeping and Cleaning in Birgu* [2011], The 2011 Report on the Workings of the PCAB and the PCRB 444.

full transparency to be felt by, and equal opportunities to be given to, all participating tenderers'.[16] Likewise, in *Case No. 239*,[17] the PCAB (Public Contract Appeals Board) reiterated that bidders are to be given the opportunity 'to participate on a level playing field and that the process is equally transparent for all bidders'.[18] It may therefore be stated that the principles of equal treatment, transparency and non-discrimination are manifested within the Maltese regulations in a manner similar to that under the EU public procurement directives.

The principle of objectively is also manifested within Maltese law. As was confirmed by the PCAB in *Case No. 202*,[19] evaluation boards should evaluate all information submitted by economic operators in an 'objective and transparent manner.'[20] Maltese law introduces various safeguards in order to guarantee objectivity. Persons 'having a financial or other interest that is likely to prejudice the discharge of their functions as members of the contracts committee are to be disqualified from being appointed to and from remaining as members of a Committee.'[21] Similarly, persons 'having any direct or indirect interest in any contract dealt with by such committee are to disclose the nature of their interest at the first meeting of that committee after the facts have come to their knowledge; such disclosure is to be recorded in the minutes of that meeting of the committee and the member having an interest as aforesaid shall withdraw from any meetings at which such contract is discussed.'[22] Moreover, individuals participating in the evaluation of tenders or proposals are to sign a Declaration of Impartiality and Confidentiality,[23] whereby, they are to confirm their independence and promise to act in an honest and fair manner. It should also be noted that the ethics clauses found within the tender

16. Ibid. 447.
17. PCAB Case No. 239 *Adv CT 88/2010 – CT 2040/2010 – DH 3566/09; Leasing of Chauffeur Driven Transportation Facility for the Distribution of Pharmaceuticals for the Pharmacy of Your Choice Scheme* [2010], Report on the Working of the GCC, PCAB and PCRB during 2010 612.
18. Ibid. 618.
19. PCAB Case No. 202 *Ref: 322/CSD/09; Restricted Invitation to Tender for a Concession Contract for the Provision of Scheduled Bus Services in Malta* [2010] Report on the Working of the GCC, PCAB and PCRB during 2010 299.
20. Ibid. 319.
21. S.L. 174.04 Public Procurement Regulations, Regulation 80(4).
22. Ibid. Regulation 80(5).
23. Evaluation Report Template; Department of Contracts (Malta) Website; available online at; https://secure2.gov.mt/eprocurement/templates; last accessed on 28/03/2013.

templates provided by the Department of Contracts state that attempts by candidates or tenderers to influence an evaluating committee or the Central Government authority during the process of examining, clarifying, evaluating and comparing tenders will lead to a rejection of the candidacy or tender and may also result in an administrative penalty.[24]

The obligation of confidentiality as set out under Article 6 of Directive 2004/18/EC and Article 13 of Directive 2004/17/EC is also transposed by virtue of regulation 4. Regulation 4(4) states that 'Contracting authorities shall respect fully the confidential nature of any information furnished by economic operators. Such information includes in particular, technical or trade secrets and the confidential aspects of tenders.'[25] Moreover, sub-regulation 5 then states that, 'In the context of provision of technical specifications to interested candidates and tenderers, of qualification of candidates and selection of tenderers and of award of contracts, contracting authorities may impose requirements with a view to protecting the confidential nature of information which they make available.'[26] It may thus be stated that the obligation of confidentiality on the part of both parties also subsists under Maltese law. In fact, the tender templates provided by the Department of Contracts[27] provide that economic operators and their staff are obliged to maintain professional secrecy during the duration of the contract and also after its completion. With regards to the obligation of confidentiality on the part of the contracting authority, the templates provide that personal information submitted is to be processed pursuant to the Data Protection Act,[28] moreover, the declaration of impartiality and confidentiality[29] obliges the persons participating in the evaluation of tenders or proposals to hold in trust and confidence any information disclosed, discovered or prepared as a result of the evaluation and not to disclose any information to third parties or keep copies of any such information.

The question thus arises as to what would happen in the case where a party seeks information regarding bids or tenders. It is generally accepted that tenderers may seek information regarding their own bid or tender, however they cannot ask for information regarding the bids of other participants. In

24. Tender Templates; Department of Contracts (Malta) Website; available online at; https://secure2.gov.mt/eprocurement/templates; last accessed on 28/03/2013.
25. S.L. 174.04 Public Procurement Regulations, Regulation 4(4).
26. Ibid. Regulation 4(5).
27. Tender Templates (n 142).
28. Data Protection Act, Chapter 440 of the Laws of Malta.
29. Evaluation Report Template (n 141).

fact, in *Case No. 217*,[30] the PCAB stated that it is standard practice for a tenderer not to be given access to the bid of other tenderers in line with the obligation of confidentiality.[31] Matters could be complicated in the event that an individual makes a request for information under the Freedom of Information Act[32] – a legislative instrument which grants eligible persons the right to access documents held by public authorities.[33] The tender templates state that 'the provisions of the contract are without prejudice to the obligations of the Central Government Authority in terms of the Freedom of Information Act'.[34] It would therefore appear that contracting authorities could be obliged to divulge information on the basis of a freedom of information act request. That said, the Freedom of Information Act itself states that it does not apply; to documents which contain personal data subject to the Data Protection Act; or information the disclosure of which is prohibited by any other law.[35] Therefore it is clear, that any information which is considered to be confidential under Regulation 4 cannot be subject to a freedom of information request; however, like the EU directives, Maltese law does not define which categories of information should be considered as confidential. It is therefore humbly submitted that the legislator ought to clarify the situation by providing better guidelines as to which information may be rendered confidential.

It appears that the principles of public procurement as reflected under the EU Directives are also manifested within the Maltese Regulations. It seems that in certain instances Maltese law even goes beyond what is stated within the directives in order to safeguard these principles. This is particularly evident with the 'separate packages in tender offer' procedure whereby Maltese law guarantees equal treatment and non-discrimination by maximising objectivity and transparency. Moreover, as regards the application of the principles of transparency, equal treatment and non-discrimination, the Maltese regime does not merely rely on the basic principles of EU law as expounded by the treaty, but renders these principles applicable to all contracts irrespective of their value. It would therefore seem that there has been a correct transposition of the principles of public procurement into Maltese law.

---

30. PCAB Case No. 217 *DG/90/2009; DH/1196/2008; Tender for the Supply of Negative Pressure Therapy Unit* [2010] Report on the Working of the GCC, PCAB and PCRB during 2010 419.
31. Ibid. 424.
32. Freedom of Information Act, Chapter 496 of the Laws of Malta (FoI Act).
33. Ibid. Article 3.
34. Tender Templates (n 142).
35. FoI Act, Article 5(3).

Question 5

A contract having as its object works, supplies or services falling within the scope of these regulations and partly within the scope of the Public Procurement Regulations, or the Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations, shall be awarded in accordance with these regulations, provided that the award of a single contract is justified for objective reasons.

The award of a contract having as its object works, supplies or services falling partly within the scope of these regulations, with the other part not being subject to either these regulations, or to the Public Procurement Regulations, or the Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations, shall not be subject to these regulations, provided that the award of a single contract is justified for objective reasons. The decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of these regulations or of the Public Procurement Regulations, or the Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations.

The general principles of EU law: public procurement law and beyond

Question 6

The exclusions and exemptions set out in the Public Procurement Directives were transposed in the Regulations. In respect of Malta, no decisions in terms of Article 30 of Directive 2004/17/EC have been adopted.

Question 7

The Public Procurement Regulations,[36] particularly regulations 7, 21, 34, 83, 84 and 85, transpose the Remedies Directives into Maltese law. These rules

36. Public Procurement Regulations, Laws of Malta, S.L. 174.04 (S.L. 174.04 Public Procurement Regulations).

are also *mutatis mutandis* applicable to the Utilities Regulations[37] by virtue of its regulation 68. It should be noted that these rules have been recently amended[38] following a request by the European Commission in the light of its findings that the rules previously in force did not constitute a correct transposition of the Remedies Directives.[39] The Maltese Regulations provide for two review bodies; the department of contracts[40] and the Public Contracts Review Board, more commonly known as the PCRB.[41]

The Department of Contracts, a government department falling under the portfolio of the Ministry of Finance, is the body empowered to provide pre-contractual remedies to interested parties in cases where the respective contract has a value less than €120,000.[42] It is the Director of Contracts himself who is responsible for the provision of these remedies; however, he may delegate this responsibility to any other official within the department.[43] The Director is empowered to take interim measures, including measures to suspend or to ensure the suspension of the award procedure; to set aside or ensure the setting aside of decisions taken unlawfully; take other measures aimed at correcting the alleged infringement or preventing the causation of further damages; and to refund the costs incurred by any tenderer in acquiring the tender documents in the case of cancellation or to ensure that such person obtains these documents free of charge if the tender is going to be reissued.[44]

The Public Contracts review board is a review body set up by law 'to hear and determine complaints submitted by any person having or having had an interest in obtaining a particular public contract.'[45] It is responsible for addressing; pre-contractual concerns raised by interested parties in relation to all public contracts whose value exceeds €120,000; complaints where the esti-

---

37. Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations, Laws of Malta, S.L. 174.06 (S.L. 174.06 Utilities Procurement Regulations).
38. L.N. 65 of 2013, Public Procurement (Amendment) Regulations,2013 [19/02/2013] Government Gazzette of Malta No. 19,032.
39. European Commission Press Release, 'Public Procurement: Commission acts to ensure that Greece and Malta comply with EU rules' [24th November 2011], available online at http://europa.eu/rapid/press-release_IP-11-1441_en.htm, last accessed on 26/04/13.
40. S.L. 174.04 Public Procurement Regulations, Regulation 7.
41. Ibid. Regulation 34.
42. Ibid. Regulation 7(1).
43. Ibid.
44. Ibid. Regulation 7(2).
45. Ibid. Regulation 34(2).

mated value of the contract exceeds €12,000 in cases where the contract is issued by an authority listed under schedule 1, complaints relating to a contract award decision or the cancellation of a contract, raised by the parties concerned; and complaints relating to public service concession contracts.[46] In the event that a complaint or appeal is submitted, the award process is to be completely suspended.[47]

The PCRB is granted the power to; take interim measures, set aside or ensure the setting aside of unlawful decisions, and to award damages to persons harmed by infringement.[48] Moreover, it has the power to consider a contract ineffective in the circumstances prescribed by the law, consequently, the PCRB may declare a contract to be null from the date of its decision.[49] Moreover, the Review Board also has the power to impose alternative penalties on contracting authorities,[50] in the form of fines or the shortening of the duration of the contract.[51]

The decisions of the PCRB must be issued in writing and must state the reasons which justify its decision.[52] If the decision of the PCRB is not appealed within the time limits set out, the board's decision will be considered final and would constitute an executive title enforceable in terms of Article 273 of the COCP.[53] [54] The Regulations also ensure the possibility that decisions of first instance review bodies are subject to review. Persons who feel aggrieved by the decisions of the Director of Contracts may appeal, on a point of law, to the Court of Appeal sitting in its Superior Jurisdiction.[55] Pending the decision of the court, the process of the call for tenders is to be suspended.[56] Time limits ensuring that the case is heard within a reasonable time are set out within the law.[57]

With regards to decisions given by the PCRB, persons not satisfied with such decisions may also file an appeal with the Court of Appeal sitting in its

46. Ibid. Regulation 85(1).
47. Ibid. Regulations 21 and 84(1).
48. Ibid. Regulation 85(2).
49. Ibid. Regulation 85(3)(a).
50. Ibid. Regulation 85(3)(b).
51. Ibid. Regulation 85(3)(c).
52. Ibid. Regulation 85(4).
53. Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta.
54. S.L. 174.04 Public Procurement Regulations, Regulation 85(8).
55. Ibid. Regulation 7(3)(a).
56. Ibid. Regulation 7(3)(d).
57. Ibid. Regulation 7(3)(c) & (d).

Superior Jurisdiction requesting that it overturn the review body's decision.[58] Such was the case in *UNEC Ltd vs. Director of Contracts et*[59] and *Design Solutions Ltd vs. Director of Contracts et*[60] where the court overturned the PCRB's decision. As with appeals from decisions of the director of contracts, the process of the call for tenders is to be suspended until the court gives its decision.[61] This was not the case prior to the 2013 amendments whereby a reference to the Court of Appeal did not delay the director of contracts or the head of the contracting authority from implementing the decision of the PCRB. The regulations again set out time limits to ensure that cases are heard within a reasonable time.[62] A right of appeal is also granted to the department of contracts and the respective contracting authority; however this right is limited to decisions regarding the award of damages and the ineffectiveness of contract.[63] It should also be noted that prior to the 2013 amendments; appeals were to be filed before the Court of Appeal in its Inferior Jurisdiction and not the Court of Appeal (Superior Jurisdiction).

Public procurements and general EU law, including competition and State aids law

Question 8

The Maltese regulations regulate all contracts covered by the EU public procurement directives. It must be said, however, that the Maltese Public Procurement Regulations, unlike the EU Directive, also regulate contracts falling below the threshold value. Moreover, under S.L. 174.04 the award procedure of public works concession contracts is also regulated.[64] Keeping in mind that

58. Ibid. Regulation 85(5)(a).
59. Appell Civili Numru 5/2012 *United Equipment Company (UNEC) Ltd. vs. Id-Direttur tal-Kuntratti, u Il-Korporazzjoni Enemalta ghal kull interess li jista' ikollha* [10/07/2012] Qorti tal-Appel.
60. Appell Civili Numru 32/2011 *Design Solutions Limited vs. Direttur tal-Kuntratti, Kunsill Malti għax-Xjenza u t-Teknologija* [29/11/2012] Qorti tal-Appell.
61. S.L. 174.04 Public Procurement Regulations, Regulation 85(5) (d).
62. Ibid. Regulation 85(5)(c) & (d).
63. Ibid. Regulation 85(5) (e).
64. Directive 2004/18/EC regulates public works concessions in a limited manner. It is only the publication requirements for the award such contracts which is regulated. The award procedure for such contracts is not regulated by the directive.

the EU directive is a minimum harmonization directive, it may be stated that as regards the scope, the Maltese legislator has transposed Directive 2004/18/EC and Directive 2004/17/EC correctly.

The principles of public procurement as reflected under the EU Directives are also manifested within the Maltese Regulations. As regards the application of the principles of transparency, equal treatment and non-discrimination, Maltese law does not merely rely on the application of the basic principles of EU law as expounded by the treaty, but renders these principles applicable to all instances of public procurement irrespective of the value of the contract. Moreover, as is particularly evident with the 'separate packages in tender offer' procedure, there are certain instances where Maltese law seems to have gone beyond what is stated in the directives in order to safeguard these principles. It can thus be stated that the principles of public procurement have been correctly transposed into Maltese Law.

Question 9

The 'lowest price offered compliant with the tender specifications', as put forward by S.L. 174.04 contrasts with the EU directive's 'lowest price only' criterion. By making use of the word 'only' the directive makes it clear that the award is to be based solely on the price element. It seems that, under S.L. 174.04 – the Public Procurement Regulations, a selection criterion (technical compliance) was included as part of an award criterion, thereby blurring the distinction between the selection and award stages. As a consequence, the criterion of the 'lowest price offered compliant with the tender specifications' is not in line with the case law of the CJEU which clearly states that even though it is possible for the selection and award stages to be conducted simultaneously, both stages should be governed by different rules.[65] That said, the end intention seems to be the same, with the lowest priced offer being selected from amongst the technically compliant tenders. Nevertheless, it can be argued that an amendment is necessary in this regard.

Question 10

This cannot take place.

65. Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands* [20/09/1988] Court of Justice of the European Union, 4652.

Strategic use of public procurement

Question 11

The regulation on Public Procurement exposes both a legal and an economic approach to the integration of public markets in the EU. The legal approach to the regulation of public procurement in parallel with the economic arguments support the fundamental principles of the Treaty, in particular the principals of free movement of goods and services and the right of establishment, and the principles deriving there from such as the principle of equal treatment, the principle of non-discrimination, the principal of mutual recognition, the principle of proportionality and the principal of transparency. The economic approach seeks to bring about competitiveness within an integral public market across the EU.

Directive 2004/18/EC[66] and Directive 2004/17/EC[67] were transposed into national legislation via Legal Notices 177 of 2005 and 178 of 2005 respectively. The Directives are based on Court of Justice case-law.[68] In the case of award criteria it clarifies the possibility for Contracting Authorities to take environmental criteria into consideration, amongst other things. In 2010, LN 177 of 2005 was repealed by LN 296 of 2010.

Article 31 (2) of LN 296 enables the contracting authorities to 'lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations'.

Furthermore, Article 46 (2) (b) allows the contracting authorities, without prejudice to the legally binding technical rules in Malta, and insofar as these are compatible with EU law, to formulate technical specifications *'in terms of performance or functional requirements',* which *'may include environmental characteristics'.* However, such parameters must be sufficiently precise to al-

66. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
67. Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in water, energy transport and postal services sectors.
68. See Case 31/87, Beentjes (1988) ECR 4635, See Case C-513/99, Concordia Bus Finland (2002) ECR I-712315.

low tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract.

Importantly, sub-Article 46 (5) stipulates that:

'Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in sub-regulation (2)(b), they may use the detailed specifications, or if necessary, parts thereof, as defined by European, national or multi-national eco-labels, or by any other ecolabel provided that: (a) those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract; (b) the requirements for the label are drawn up on the basis of scientific information; (c) the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate; and (d) they are accessible to all interested parties: Provided that contracting authorities may indicate that the products and services bearing the eco-labels are presumed to comply with the technical specifications laid down in the contract documents; however they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.'

Article 52 (2) stipulates that 'Evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services'. This evidence may include:

'an indication of the environmental management measures that the economic operator will be able to apply when performing the contract: Provided that should contracting authorities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators' (Article 52(2)(f)).

The above provisions firmly establish a legislative base within which GPP can take place in Malta.

Question 12

The Malta Council for Science and Technology (MCST) National Strategic Plan for Research and Innovation for 2007-2010, entitled *Building and Sustaining the R&I Enabling Framework (2006)*, argues that Malta can and should address an aggressive research and innovation (R&I) capacity. The vision is expressed as 'Research and Innovation at the heart of the economy to

support value-added growth and wealth.' The Strategy presents 66 initiatives one of which addresses innovative public procurement: 'MCST and the Department of Contracts should by end 2007 introduce transparent mechanisms to reward R&I through public procurement'. Initiative 25 of the Strategy states that: 'There is one powerful instrument which government departments and entities must apply to promote R&I – and this is public procurement ... It is thus proposed that MCST works with the Department of Contracts to design a transparent mechanism which rewards R&I.' MCST's initiatives in the area include the organisation of two workshops. The first one was to launch the innovative procurement initiative, organized by MCST together with the Ministry of Finance and the Contracts Division on May 14th 2007. The second one, 'Making Innovation Work for Public Procurement' on May 13th 2008, stressed the need to address innovative procurement as a priority for leveraging demand and investment of innovation.

An example of a case-study is the following:
ICT infrastructure to support the Active-Active Data Centre concept – Procuring Agency: the Department of Contracts on behalf of MITA[69]

What was procured and why it is innovative?

An Active-Active Data Centre system is based on the concept of having two geographically separate data centres to mirror and operate synchronously, which is a change from the previous Data Recovery Site system which was inactive until required. In this case, the ICT infrastructure for the Active-Active Data Centre was procured, namely the enterprise server and storage consolidation project.

Agency information and policy background:

The procuring agency was the Department of Contracts (whose mission is to regulate public procurement activities on the principles of fairness, transparency and non-discrimination) on behalf of Malta Information Technology Agency (MITA, former MITTS), which is a government agency focused on providing ICT services to the Public Sector). The project formed part of the ICT Infrastructure Change Programme, which was started in 2001 with the

69. MITA was Malta Information Technology and Training Services Limited (MITTS) at the time of this case, which was then transformed into a government agency in 2009.

aim of revolutionising the Government's ICT infrastructure. The direction set by Government in its ICT projects for Malta provided the mandate.

The procurement process:

The procurement team consisted of executives from the Department of Contracts and MITTS, and the process lasted from April 2005 (preparation) to November 2006 (contract awarded), with a negotiated procedure adopted. Rather than technical specifications, a set of business requirements were stipulated to increase the potential innovativeness of this project. Value for money was the key criterion used, which can be expressed as the lowest long term cost over the lifetime of the project, at the quality expected. Three bidders were shortlisted for the negotiated procedure phase, with the tender being awarded to one company. The contract entailed a 7-year partnership agreement for EUR8.8 million including VAT.

Impacts:
- The product performed as well as expected and was more efficient than what it replaced.
- The product met the target in terms of cost-efficiency, but it cannot be directly compared with its predecessor due to different/additional functions, and lack of information of the previous system.
- The level of service to the end-users improved due to the specified business requirements.

Lessons:
Like any innovative solutions, it was not easy to implement the product in the organisation but the difficulties were not insurmountable. No reference groups were used.

Remedies

Question 13

Not all contracts fall within the remit of the EU Remedies Directives. In fact, this set of directives only applies to contracts falling within the scope of the Public Sector Directive and the Utilities Directive. In this regard, Maltese law has gone beyond EU legislation and provided for the review of the actions of

contracting authorities even in cases where the contract in question has a value falling below the thresholds.

The procedures for review are made available to '*any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract or a cancellation of a call for tender*'[70] in line with the Remedies Directives. Moreover, parties who are not satisfied with the decision of such first instance review bodies have a right to seek review with the Court of Appeal sitting in its Superior Jurisdiction.[71] Notwithstanding the fact that the Remedies directives do not require Member States to cater for a right of appeal to the department of contracts or the respective contracting authority, Maltese law grants them a limited right of appeal. As was confirmed by the CJEU in the *Simvoulio Apokhetefseon Lefkosias case*,[72] the provision of such a right to the contracting authority/entity is still in line with the spirit of the Remedies Directives and thus constitutes a correct transposition of the said rules.

The powers conferred upon review bodies are also in conformity with the provisions of the Remedies directives with such bodies being afforded the power; to take interim measures, to award damages and to set aside unlawful decisions.[73] Moreover, it is also possible for the PCRB to impose alternative penalties[74] and to render a contract ineffective.[75]

Maltese law provides that where a complaint or appeal is submitted, the award process is to be completely suspended.[76] Thus, the Remedies Directives' provisions regarding the automatic suspension of the contract award procedure are also correctly transposed. The standstill period discussed under EU law was also transposed into the Maltese regulations with contracting authorities being barred from awarding a contract during the period within which appeals may be filed.[77] This allows interested parties sufficient time to seek review prior to the contract being awarded.

One may state that certain provisions of the Maltese regulations tend to go beyond what is stated within the EU rules. The fact that both the economic

70. Ibid. Regulation 84(1).
71. Ibid. Regulations 7(3)(d) and 85(5) (d).
72. Case C-570/08 *Simvoulio Apokhetefseon Lefkosias* (n 532) par. 38.
73. S.L. 174.04 Public Procurement Regulations, Regulation 85(2).
74. Ibid. Regulations 85(3)(b) & (c).
75. Ibid. Regulation 85(3)(a).
76. Ibid. Regulations 21 and 84(1).
77. Ibid. Regulation 21(2).

operator and the contracting authority (albeit in a limited manner), are granted a right to appeal the decisions of review bodies shows that the Maltese legislator has successfully created a system which does not favour either. Moreover, the suspension of the contract award procedure throughout review proceedings ensures that individuals interested in being awarded a particular contract are granted a right of review which is both genuine and effective. In this light, it may thus be stated that the EU Remedies Directives have been correctly transposed into Maltese law.

Directive 89/665/EEC states that it applies to those contracts regulated by the Public Sector Directive.[78] Directive 2004/18/EC regulates, albeit in a limited manner,[79] public works concessions but excludes service concession contracts.[80] Therefore, Directive 89/665/EEC is applicable to public works concession contracts but not to service concession contracts. Directive 92/13/EEC, states that it is applicable to those contracts which are regulated by the Utilities Directive.[81] Since Directive 17/2004/EC expressly excludes both works and service concessions from its scope,[82] it follows that Directive 92/13/EEC is not applicable to both public works and public services concession contracts.

Under Maltese law, the Public Procurement Regulations provide that public works concessions are regulated.[83] Therefore the situation with regards to such contracts is analogous to that under the EU Directives with remedies being available in cases where the contract in question is a public works concession. With regards to service concession contracts, the Maltese regulations state that these contracts are excluded from their scope,[84] however, contracting authorities may subject their decisions (where the contract in question is a public service concession) to review.[85] Therefore, with regards to service concessions, the regulations on remedies are not applicable unless the contracting authority itself decides to render its decisions subject to review. The Utilities regulation excludes both public works concessions and public ser-

78. Directive 89/665/EEC, Article 1.
79. Directive 2004/18/EC only regulates the publication requirements for the award of work concession contracts by virtue of a special set of rules under Title III. It should be stated that the award procedure for such contracts is not regulated.
80. Directive 2004/18/EC, Article 17.
81. Directive 92/13/EEC, Article 1.
82. Directive 2004/17/EC, Article 18.
83. S.L. 174.04 Public Procurement Regulations, Regulations 3, 70 and 71.
84. Ibid. Regulation 17(2).
85. Ibid. Regulations 17(2) and 34(4).

vice concessions from its scope.[86] Therefore, the situation with regards to concession contracts under the Utilities Regulations is the same as that under EU law.

It can therefore be stated that as regards remedies where the contract in question is a concession contract, Maltese law is also in line with the EU Directives.

Conclusion and reform

Question 14

The importance of a well-oiled system governing public procurement cannot be emphasised enough. It has been stated that public procurement is a fundamental aspect of the economy as well as an important tool in the promotion of innovation[87] and the attainment of secondary and non-commercial goals.[88] The fact that it is a matter of primary public policy importance[89] was further emphasised within the Europe 2020 strategy[90] where the public procurement regime was defined as being central in the attainment of the Union's targets of smart, sustainable and inclusive growth. This, coupled with the regime's pervasive nature, consolidates public procurement's position as a 'cornerstone of the EU internal market'.[91] Therefore, it can be stated that public procurement will definitely retain its standing as one of the most important regimes under EU law.

86. Ibid. Regulation 18.
87. Leif Hommen and Max Rolfstam, 'Public Procurement and Innovation: Towards a Taxonomy' [2009] 9 1 Journal of Public Procurement 17, 17.
88. Teresa Medina-Arnaiz, 'Integrating Gender Equality in Public Procurement: The Spanish Case' [2010] 10 4 Journal of Public Procurement 541, 541.
89. European Commission and Internal Market Services, ' EU Public Procurement Legislation: Delivering Results (Summary of Evaluation Reports)' available online at http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf, last accessed on 27/04/2013, pg. 6.
90. COM(2010) 2020 final, Communication from the Commission, 'EUROPE 2020: A strategy for smart, sustainable and inclusive growth' [03/03/2010].
91. Joyce Anne-Marie van Genderen-Naar, 'EU Public Procurement and the ACP-EC Cooperation' available online at http://www.normangirvan.info/wp-content/uploads/2009/06/article-joyce-vg-naar-on-eu-public-procurement-and-acp.doc, last accessed on 27/04/2013, pg. 2.

The proposed directives aim to simplify and enhance the flexibility of the public procurement regime.[92] It is immediately evident that the proposed directives are drafted in a clearer manner than those currently in force with the stages of the procurement process being clearly identified in separate sections. This makes the mechanics of the procedure, on the whole, much easier to understand. Moreover, the introduction of new procedures such as the Innovation Partnership procedure proves the commission's commitment in the promotion of innovation in line with the goals set out in the Europe 2020 strategy.[93]

The proposed directives substitute the award criterion of the 'lowest price only' with that of the 'lowest cost'.[94] It is evident that these criteria differ. Whilst the 'lowest price only' criterion is based solely on price, the 'lowest cost' may be assessed either on the element of price, or, on the basis of a cost-effectiveness approach, such as life-cycle costing.[95] It is not clear why the commission felt the need to introduce such an award criterion, when it could have been easily implemented within the framework of the MEAT criterion. This appears to be especially true when one considers that in the *SIAC Construction* case[96] the contracting authority had made use of the MEAT criterion in order to award the contract on the basis of the 'ultimate cost as determined by an expert'.

---

92. Rhodri Williams, 'Commission proposals to modernize public procurement' [2013] 3 P.P.L.R. NA101, NA101.
93. COM(2011) 896 final, Proposal for a Directive of the European Parliament and of the Council on public procurement [20/12/2011], 2011/0438 (COD) (Proposal for a Directive on Public Procurement) Detailed explanation of the proposal, pg. 8.
94. Proposal for a Directive on Public Procurement, Article 66.
95. Ibid.
96. Case C-19/00 *SIAC Construction v County Council of the County of Mayo* [18/10/2001] Court of Justice of the European Union.

THE NETHERLANDS

Gert-Wim van de Meent and Elisabetta R. Manunza (Eds)
Contributors: Redmar Damsma, Anne Fischer-Braams, Willem A. Janssen, Maaike R. Küthe, Marije Louisse, Elisabetta Manunza, Gert-Wim van de Meent, Nienke Saanen, Sarah Schoenmaekers and Martine Vidal[1]

The context

Question 1

Although the first procurement legislation dates from the nineteenth century, the Netherlands have always lacked a coherent legal framework for public procurement; so the main challenge was to establish such a framework. For many years after the adoption of the first procurement directives, the Netherlands pursued an *ad hoc* implementation policy. This policy led to a confusing array of procurement rules in a variety of legislative measures (acts, royal decrees, pseudo legislation like ministerial circular letters, procurement regulations etc.). This lack of a coherent legal system hindered effective and rapid implementation of further series of procurement directives.[2] In the 'nineties' the Dutch legislator chose to implement the directives by simple reference. This led to a better track record of implementation. There were also important disadvantages: contracting authorities and market parties had to consult the text of the directives and could not rely on the text of the national procurement legislation. Ten years later, the Parliamentary Committee of Inquiry into

1. Redmar Damsma LL.M (Loyens & Loeff N.V.), Anne Fischer-Braams LL.M (Maasdam Broers Fischer Advocaten), Willem A. Janssen LL.M (Universiteit Utrecht), Maaike Küthe LL.M (Pels Rÿcken Drooglever Fortuija N.V.), Marije Louisse LL.M (Loyens & Loeff N.V.), prof. dr. Elisabetta R. Manunza (Universiteit Utrecht), prof. dr. Gert Wim van de Meent (Loyens & Loeff N.V. / Universiteit Amsterdam), dr. Nienke Saanen (Universiteit Delft), dr. Sarah Schoenmaekers (Universiteit Maastricht), Martine Vidal LL.M (AKD advocaten & notarissen N.V.).
2. See P. Glazener, E.H. Pijnacker Hordijk, E.M.A. van der Riet, Application in the Netherlands of the Directives on public procurement, *Sociaal Economische Wetgeving Tijdschrift voor Europees en economisch recht, 1990, p. 194-223, p. 199.*

the Construction Industry concluded that Dutch public procurement procedures were vulnerable to collusion by market parties. The Committee also found that the Netherlands lacked a transparent legal framework for public procurement (see answer to question 8). This led Dutch government to develop a single framework for all contracting authorities and for all public contracts, not only for the implementation of European procurement law but also for 'national' public contracts, or contracts not caught by one of the directives with or without a clear cross-border interest. After more than ten years the Public Procurement Act 2012 (*Aanbestedingswet 2012*) entered into force in April 2013 (see further our answer to question 6).

In the Netherlands, public procurement contracts are considered civil law agreements, and are generally enforced through private law. This is due to the fact that decisions taken in the context of a public procurement procedure are classified as decisions taken in preparation of a private law juridical act, i.e. concluding a contract. Article 8:3 of the *Algemene Wet Bestuursrecht* (*Awb* / Dutch Administrative Law Act) stipulates that the judicial review of such decisions[3] does not fall within the scope of competence of the administrative courts. As a consequence the civil courts have jurisdiction. A tenderer wishing to challenge a contracting authority's award decision has to initiate proceedings before a civil court (the competent District Court).

There are some exceptions to this general rule. For instance, award decisions relating to public transport concessions must be appealed before an administrative court on the basis of the *Wet personenvervoer 2000* (Public Passenger Transport Act 2000). Furthermore, a decision by an administrative body to award an exclusive right in the meaning of article 18 of Directive 2004/18 can also be challenged under administrative law.

The boundaries of EU public procurement law

Question 2

As was noted in the answer to question 1, in the Netherlands judicial protection in public procurement cases is usually provided by the civil and not by the administrative courts. The definition of a public contract for procurement

3. The conclusion of an agreement or any preparatory acts – such as an award decision – in order to conclude a public procurement agreement. This kind of decisions are not deemed to be challengeable decisions within the meaning of article 1.3 of the *Awb*.

purposes is currently laid down in article 1 Public Procurement Act 2012. This article resembles the definition and criteria as laid down in Directive 2004/18/EC.[4] Where these criteria are met, the contract falls within the scope of the Public Procurement Act 2012 (see further also the answer to question 6).

It is worth noting however that contrary to the Procurement directives, framework agreements are considered as 'public contracts' under the Public Procurement Act 2012.[5] Framework agreements are subsequently defined as agreements governing conditions to establish public contracts, which therefore seem to be erroneous. However, the distinction between framework agreements and public contracts is recognised by national case law.[6]

Framework agreements are also regulated in the Public Procurement Act 2012, which sets slightly higher demands compared to the two Procurement directives. Articles 2.142 and 2.143 stipulate that a framework agreement can only be entered into by a contracting authority with either one or more than three economic operators. The duration of a framework agreement is in principle limited to four years, although well-motivated exceptions can be made.

Following the Procurement Directives, Dutch public contracts have to be concluded in writing and there must be a pecuniary interest (*bezwarende titel*). In national case law this requirement is subject to functional interpretation for the benefit of the 'effet utile' of the Procurement directives. In case of an indirect compensation or in the situation where a contracting authority has an economic interest in the realisation of project, a pecuniary interest can be deemed present.[7] An agreement specifying only intentions can also qualify as

4. There are small – non-substantial – differences with regards to the way the article is phrased.
5. Art.1 Public Procurement Act 2012.
6. District Court The Hague, 27 October 2010 (ABIOM etc./vtsPN), LJN: BO1960, point 5.10.
7. See, for example: Court The Hague, 31 January 2001 (Motierepolder), LJN: AB045; or more recently District Court Groningen, 10 June 2011 (Montagne II/ Gemeente Winsum), LJN: BQ8211. No pecuniary interest was present in for instance District Court Alkmaar, 20 April 2011 (Exploitatiemaatschappij West-Friesland/Gemeente Hoorn), LJN: BQ2032, and District Court Roermond, 10 January 2013 (Wee-Play Kinderopvang/Gemeente Roerdalen), LJN: BY8739.

a public contract.[8] Administrative decisions made by contracting authorities are not considered to qualify as having a pecuniary interest.[9]

There are no general provisions with criteria for distinguishing public contracts that are caught by European and/or Dutch procurement legislation from other transactions where the public sector is involved. The scope of the Public Procurement Act is limited to public purchasing as explained before. Therefore, grants and subsidies, the grant of concessions for the performance of social or health services of general interest and the distribution of (limited) authorisations and licenses are normally not caught by this Act. The general principles of Union law can apply in case of a (clear) cross-border interest. In national case law, also the answer to the question if there has been an entrustment of a 'public' task by a legislative measure is often used to distinguish other transactions from public contracts.[10] For instance, an agreement between the State and the Central Bureau of Statistics is not considered as a public contract, as Article 3 of the corresponding Act (*Wet Centraal Bureau voor de Statistiek*) entrusts the Bureau with the task to conduct research in the field of statistics.[11]

Question 3

The Public Procurement Act 2012 does not contain 'additional' exceptions to the EU public procurement regime with regard to *quasi* in-house performance or public-public cooperation. In general Dutch government and public authorities have various options at their disposal for performing their public tasks. Assuming there is no specific statutory obligation in this respect, they have the discretion to choose for *internal* (e.g. provide the services by their own resources or in collaboration with other public authorities) or for *external* performance (e.g. through a separate entity or a selected entity through a com-

8. District Court The Hague, 24 September 2008 (De Raad Bouw B.V./Gemeente Noordwijk), LJN: BF4232 and Court of Appeal The Hague, 26 October 2010, (De Raad Bouw B.V./Gemeente Noordwijk), LJN: BO2080.
9. Administrative Law Division, 6 January 2010 (Appellant/ Vereniging tot Behoud van Natuur), LJN: BK8364.
10. E.g. District Court 's-Gravenhage 29 April 2008 (Gfk/ Staat), LJN: BD3221, para. 3.2; Dutch Supreme Court 9 July 2004 (Vereniging bergers etc./ Staat), LJN: AO4011 para. 3.3; Administrative Law Division, 28 October 1996 (Appelante/Gemeente Voerendaal) LJN: AN5242.
11. District Court 's-Gravenhage 29 April 2008, (Gfk/ Staat) LJN: BD3221, para. 3.1 and 3.2.

petitive tender).[12] As a consequence many different arrangements for performance exist, like: i*n-house performance (zelfvoorziening), quasi-in-house performance, public-public cooperation, concessions etc.*

An increase in collaborations between different public authorities was reported by the government in 2010. According to the government there were 698 collaborations based on public law, and 1022 collaborations based on private law.[13] These numbers can be explained by a growing belief that market performance, and competition, are not always able to provide the desired outcomes for certain services. This trend towards further internalisation of service performance is also explained by the Dutch government's vision of a 'compact' state, whereby 'compact' appears to stand for a strong and small government, which is able to operate in a quick and efficient way.[14]

In the Netherlands, public-public cooperation takes place on all levels of government, but is mostly seen on a decentralised level. For example waterboards (*waterschappen*) often collaborate in order to perform their statutory tasks which are to maintain the Dutch dykes system, and to guarantee the availability of clean water. Other examples of such cooperation can be found in the waste sector, where the collection of household waste is statutorily assigned to municipalities,[15] and in relation to healthcare services, in which the responsibilities following from the Social Support Act (*Wet maatschappelijke*

12. We distinguish between *public procurement procedures* and other *competitive procedures / competitive tendering*. The term *public procurement procedures* refers to the procedures laid down in the EU Public Procurement Directives 2004/17 and 2004/18. We use the term *competitive procedures* or *competitive tendering* for other forms of competitive buying in situations which fall not within the scope of the EU Public Procurement Directives and that have been developed in the case law of the European Court of Justice, such as for service concessions and for the award/distribution of licenses or permits (for example for games of chance or the exploitation of casinos or lotteries).
13. Visienota 'Bestuur en Bestuurlijke inrichting', 10 November 2011.
14. Note 13, supra, p. 1-4. See also the recent *Hervormingsagenda Rijksdienst, Parl Docs* 31 490, nr. 119 (22.05.13). In response to this development, Manunza has proposed a framework which governs the decision to internalize or externalize public service provision. See also: Manunza, E.R., Berends, W.J. (2013) Social Services of General Interest and the EU Public Procurement Rules, in: U. Neergaard c.s., *Social Services of General Interest in the EU*, Legal Issues of Services of General Interest, Den Haag: T.M.C. Asser Press. See also, Janssen, W.A., 'Public Procurement Law and In-house Performance of Public Services in Liberalized Markets: Improving a Paradox', *NILG Series*, Boom Uitgevers 2014 (forthcoming).
15. Article 10.21 Wet Milieubeheer, Stb. 1979, 442 (Environmental Management Act).

ondersteuning) are also assigned to this level of government.[16] Additionally, 'back-office' services for public authorities, such as IT-support, education and transport, are also frequently provided by collaborating public authorities.[17]

Despite the lack of codification of the 'Teckal' and the 'Hamburg'-exemptions, the Public Procurement Act 2012 can have consequences for the choice between internal or external provision of the public task, as it has further emphasised the need to motivate procurement choices. According to Article 1.4 of the Act contracting authorities must base the choice for the type of procedure they intend to use, and the choice for the selection criteria of tenderers or candidates in this procedure, on objective criteria (clause 1). An explanation for these choices must be available upon the request of market parties (clause 3). This obligation may improve *the choice between internal or external performance*, as it requires contracting authorities to scrutinise which performance alternative is most suitable for the performance of their public tasks.[18]

The Dutch courts are consistent in their application of the different exemptions. Market parties have attempted but failed to break open public-public collaborations in a number of sectors. The waste sector is one of those sectors. In its case *AVR/Westland*, the Dutch Supreme Court confirmed an earlier ruling by the Court of Appeal, that allowed the municipality of The Hague to participate in HVC, a joint venture of lower public authorities, and to award HVC a contract without any previous tendering procedure.[19] HVC is a private limited company that provides the waste collection and disposal services to the participating municipalities on the basis of an exclusive right. In previous years *AVR* provided those services for The Hague after it had won the tender procedure. The Supreme Court further found that it was further possible to rely on the cumulative criteria of the Teckal-exemption.

16. Stb. 2006, 351.
17. See for example District Court Utrecht, 14 January 2009, ECLI:NL:RBUTR:2009:BG9524. In this case the municipalities of Amsterdam, Rotterdam, The Hague and Utrecht were allowed to continue their IT collaboration in the form of 'Wigo4it' because of the applicability of the 'Teckal'-exemption.
18. E.R. Manunza, R.G.T. Bleeker, De invloed van het Europees recht op het Nederlandse aanbestedingsrecht, in: A. Hartkamp, J.J. Israel, L. Keus, C.H. Sieburgh, CH (Eds), De invloed van het Europese recht op het Nederlandse Privaatrecht, Kluwer, Deventer, *forthcoming* 2014.
19. Dutch Supreme Court, 18 November 2011, LI:NL:HR:2011:BU4900, Court of Appeal The Hague, 15 December 2009, ECLI:NL:GHSGR:2009:BK6928.

Question 4

Dutch municipalities have been exempted from the obligation to organise public tenders for contracting social support services for, most notably, elderly and disabled persons, since 1 October 2012. The exemption is a result of a legislative initiative by the Socialist Party in the House of the Representatives of the Dutch parliament (*Tweede Kamer*).[20] The Government opposed to the initiative and considered a categorical exclusion *contra legem* Directive 2004/18/EC. According to the Government, the contracting authority should determine beforehand, on a case by case basis, whether the main activities qualify as cleaning (category 41, II-A service) or health care (category 25, II-B service). Should the activities (in their majority) qualify as cleaning, the contracting authority would have no choice but to tender by using the regular procurement procedures. The Government even requested the European Commission for an opinion on the matter. The Commission rendered its (unofficial) opinion on 8 April 2010,[21] that supported the Government's view.

We are not aware of other legal provisions on consensual arrangements that are not caught by the European procurement rules. Nevertheless, there have been court rulings confirming that certain public activities do not fall within the scope of the procurement rules, even in the absence of specific legislation. This happened to be the case for certain research assignments awarded to the Centraal Bureau of Statistics (CBS) by the central government. According to competent court the requested research belonged to the legal attributions of the CBS, so that the assignments did not qualify as a public services contract under the applicable Directive.[22] We also refer to our answer to Question 3.

Another area where there is discussion about the application of the public procurement rules, is that of property development. The criteria given by the Court of Justice in Helmut Müller have provided clarity when the sale of land by a public authority qualifies as a public works contract. In most of the Dutch cases the competent court found that not all of the cumulative criteria had been met, often because of the decision whether or not to execute the works was left to the discretion of the contractor and, as such, was not legally enforceable by the public authority. In order to 'escape from' the applicability of the procurement rules public authorities and project developers sometimes

20. Act of 25 June 2012, Stb. 310.
21. Kamerstukken II 2009/10 31 353, no. 10 (appendix).
22. District Court The Hague 29 April 2008, LJN: BD3221 and District Court The Hague 29 September 2009, LJN: BK0046.

agree to refrain from the obligation to build in combination with a sale back obligation for the developer in case he has not realized the works in a certain period of time.[23]

Question 5

There are no specific provisions in Dutch law that apply to mixed arrangements (part procurement, part non-procurement). The calculation rules in Directive 2004/18/EC are applicable to contracts with an estimated value exceeding the applicable threshold. In relation to mixed arrangements, Dutch case law is in line with the jurisprudence of the Court of Justice: the prevalent object determines which rules are applicable. The prevalent object has to be determined based upon the essential obligations that prevail and that are, as such, apparent for the contract concerned.[24]

There is however a specific provision on combining (clustering) of contracts (Article 1.5 Public Procurement Act 2012). Pursuant to this article contracting authorities are under the obligation not to cluster contracts unnecessarily and to divide contracts in lots as much as possible. This obligation applies regardless of the value of the contract, i.e. for contracts below and above the European thresholds. It is important to note that clustering is not categorically ruled out, but must be explained in the tender documents. Further the contracts must be sufficiently connected and the effect of excluding SME's must be taken into account. The contracting authorities must also weigh the possible economies of scale (lower prices, better conditions) against any adverse organisational and financial consequences for itself and for the tenderers.

The question of severability has been addressed in Dutch case-law. In the cases concerned, Dutch courts do not deviate from the line to be found in the European case-law. For example, in relation to works contracts, the ruling has been that the division by a municipality of a works contract into, on the one hand, the construction of a shell-plus car park, and, on the other hand, the realisation of the interior of the car park and ground level, entailed an artificial division. According to the judge in this case a car park can only function as

23. Compare District Court Arnhem 13 July 2011, LJN: BR4826; Court of Appeal Arnhem 26 April 2011, LJN: BR2011,127.
24. Dutch Supreme Court, 18 January 2013, AB 2013, 108, District Court Rotterdam, 7 March 2013, LJN: BZ3535, District Court The Hague, 30 November 2010, LJN: BO9252, District Court The Hague, 18 August 2010, LJN: BN4803.

one technical and economical entirety if the interior has been realised.[25] In another case it was decided that the division by a municipality of a contract (in relation to the renewal of a theatre) into providing theatre-related technical advice on the one hand, and providing installation advice on the other, was in line with the applicable rules, since the municipality had explained the substantial differences between these types of advice (which came down to the specific knowledge that was needed in relation to the theatre-related technical advice).[26]

The general principles of EU law: public procurement law and beyond

Question 6

Contracts and arrangements that fall outside the definition of public or special sector contract

Public procurement contracts are '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'.[27] Contracts and arrangements can fall outside the definition of a public or special sector contract for various reasons. E.g. they do not involve a contractual relationship between separate legal entities (in-house), they qualify as quasi-in-house (Teckal-exemption), they involve conferment of an exclusive right, they involve co-operation between public entities executing a common public task, there is no pecuniary interest involved, they hold no obligation for the economic operator to perform, they involve the sale of land or real estate owned by a public authority, they concern the sale of (shares in) a public company, they involve

25. District Court Arnhem 25 January 2010, NJF 2010, 125. The Court of First Instance EU has clarified in its judgment of 29 May 2013 in case T-384/10 (Kingdom of Spain v European Commission), not yet published that it is not necessary for the definition of 'work' that the work is a technical and economical entirety. These conditions apply alternatively.
26. District Court of Den Bosch 10 September 2012, LJN: BX7223.
27. See Art. 1, Par. 2, subsection a, Directive 2004/18/EC and Art. 1, Par. 2, subsection a, Directive 2004/17/EC for the definition of contracts.

the authorisation to operate a lottery, etc. Provided these contracts and arrangements have a certain cross-border interest, they are subject to the fundamental rules and principles of the TFEU, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency. This follows directly from European Union law.

For the aforementioned contracts and arrangements, the EU principles have not been translated into specific operative national Dutch rules. However, for public contracts and concessions, the principles have been implemented in the Public Procurement Act 2012.

Where contracts and arrangements outside the definition of a public or special sector contract are at stake, the fundamental EU-rules and principles and restrictions of the freedom of establishment and to provide services can be put forward in national court proceedings. Under Dutch administrative law, these contracts and arrangements outside the definition of a public or special sector contract may also be subject to general principles of proper administration (*algemene beginselen van behoorlijk bestuur*) and/or are subject to civil law pre-contractual principles of reasonableness and fairness (*redelijkheid en billijkheid*).

Public Procurement Act 2012

To some extent, Dutch procurement legislation and supporting policy rules go beyond the minimum level of harmonisation required by the EU-Procurement Directives. The Public Procurement Act 2012 has a broad scope. The Act is applicable to (i) contracts entirely within the scope of application of the EU-Procurement Directives, (ii) contracts that are only partially covered by these Directives,[28] (iii) contracts excluded from the scope of application of the Directives, but with a clear cross-border significance[29] and (iv) contracts excluded from the scope of the Directives, lacking a clear cross-border interest.[30] The Act covers all phases of procurement: from market orientation to the final award of a contract, including the justification and legal protection of tenderers.

Together with the Act, the Procurement Decree (*Aanbestedingsbesluit*) entered into force. This Decree designates the Proportionality Guide (*Gids Pro-*

28. E.g. contracts for non-priority services, contracts for public works concessions.
29. E.g. contracts below the European thresholds, contracts for public services concessions.
30. National contracts, with or without prior contract notice.

portionaliteit), the Works procurement regulation for public work contracts below the European threshold (*Aanbestedingsreglement Werken 2012*) as mandatory guidelines.[31] Contracting authorities must comply with the Proportionality Guide and the Works procurement regulation or sufficiently explain the reasons for non-compliance.[32]

Part 2 and 3 of the Act, respectively, implement the European Public Sector Directive and Utilities Directive, closely following their structure, definitions and defining the same exclusions as the two Directives do. Therefore we will not focus on these 'European' parts of the Act.[33]

Rules for contracts covered, not covered or not fully covered by the EU-Procurement Directives: general provisions, principles and starting points

General Provisions

Division 1.2.1 of Chapter 1.2 contains general provisions which apply to any type of public or special sector contract, provided it is in writing and for pecuniary interest. These general provisions are thus applicable to all procurement contracts, with a value above and under the European thresholds, contracts that are only partially covered by the EU-Directives, contracts with or without a clear cross-border significance, national contracts and national negotiated contracts, with or without prior contract notice. The general provisions hold the following: (1) an obligation to select (i) the procurement procedure and (ii) the economic operators to be admitted to the procedure on the basis of objective criteria (*objectiviteit*);[34] (2) an obligation to create as much

31. See Art. 10 and 11 Procurement Decree. For an overview of the different elements of the Act, see G.W.A. van de Meent and R.S. Damsma, A new Procurement Act in the Netherlands, *ICLR*, 2013 (30), p. 413-431. For a more detailed discussion, see G.W.A. van de Meent, S. Stellingwerff Beintema and R.S. Damsma, De (nieuwe) Aanbestedingswet (Deel 1), *Tijdschrift voor Bouwrecht*, 2013 (3), p. 241-255, Ibid. De (nieuwe) Aanbestedingswet (Deel 2), *Tijdschrift voor Bouwrecht*, 2013 (4), p. 361-374.
32. Please note that the current Guide provides mandatory guidelines only for contracting authorities and not yet for special sector companies. The latter category has been urged by the Government to abide voluntarily by the rules of the Guide.
33. Please note that the Defence Procurement Directive 2009/81/EC has been implemented by the *Aanbestedingswet op defensie en veiligheidsgebied*, Stb. 2013, 44. See also Art. 2.23 (1), sub a-d, in conjunction with Art. 2.23 (2) Public Procurement Act 2012.
34. Art. 1.4 (1) Public Procurement Act 2012. Upon written request the contracting authority must inform the economic operator of the reasons for these choices.

societal value[35] as possible in return for spending the public resources involved in the contract (*maatschappelijke waarde*);[36] (3) a prohibition of unnecessary clustering of contracts (*clusterverbod*);[37] (4) an obligation to divide a contract into lots (*verdeling in percelen*);[38] (5) an obligation to maximise, as much as possible, relief of the administrative burden related to the tender procedure (*beperking administratieve lasten*).[39] Most of these general provisions, especially those mentioned under 3-5 above, aim to enforce better access for small and medium sized enterprises (SME's) to public (and special sector) contracts.

Objectivity is an obligation that must be met under all circumstances. The other general provisions, on the other hand, are obligatory in principle. Deviations from these provisions is possible, but must be substantiated in the tender documents. The Act, the Procurement Decree, the various mandatory and facultative guidelines and supporting policy rules, all to some extent demonstrate this new systematic approach, called '*comply or explain'*.

Principles regarding contracts, below the European thresholds, with a clear cross-border interest

The principles that contracting authorities and special sector authorities are obliged to apply in awarding public and special sector contracts, public works concessions, design contests and services concessions, below the European thresholds, yet having a clear cross-border interest, are the same as those which must be applied for contracts, public works concessions and design contests that fall under Part 2 or Part 3 of the Act, thus covered fully by the EU-Procurement Directives. These principles are: equal treatment and non-discrimination,[40] transparency[41] and proportionality.

---

35. The notion of societal value – introduced by Amendment – is not described in the provision itself, but in the Explanatory Note of the Amendment as the proper allocation and possible saving of public funds in an economical sense (good value for tax payer's money). The achievement of societal goals, such as social inclusion and sustainability, are seemingly not necessarily intended by this article.
36. Art. 1.4 (2) Public Procurement Act 2012.
37. Art.1.5 (1) Public Procurement Act 2012.
38. Art. 1.5 (3) Public Procurement Act 2012. The obligation is regardless of the value of the contract, thus also applicable for contracts below the European thresholds. If subdivision into lots is deemed inappropriate, this must be explained in the tender documents (*comply or explain*).
39. Art. 1.6 Public Procurement Act 2012.
40. Art. 1.8 Public Procurement Act 2012.
41. Art. 1.9 Public Procurement Act 2012.

New is that the principle of proportionality has been expressly laid down in the Act. The principle states that all requirements, conditions and criteria must relate equitably to the object of the contract.[42] It applies to all phases of the procurement procedure, including the conditions of the contract and thus reaching beyond the phase of conclusion of the contract. The contracting authority must take proportionality into account when clustering/not clustering contracts, formulating exclusion and suitability criteria, setting deadlines and providing compensation or not for high costs of tendering.[43]

Starting points for national procedures regarding contracts below the European thresholds that lack cross-border interest and voluntarily pre-announced

The principles mentioned before are called starting points for national procedures that are voluntarily announced. Starting points for public and special sector contracts, having a value below the EU thresholds and lacking a clear cross-border interest, and awarded by a national procedure with a voluntary prior notice, are thus: non-discrimination and equal treatment,[44] transparency[45] and proportionality.[46] Proportionality as a starting point again applies to all phases of the procurement procedure, including the conditions of the contract.

Starting points for national negotiated procedures regarding contracts, below the European thresholds, lacking cross-border interest, without prior notice

Starting points for contracts, eligible to be awarded by a negotiated procedure to which three to five economic operators are invited (*meervoudig onderhandse procedure*) are: equal treatment[47] and proportionality.[48] However, the starting point of proportionality does, for this procedure, not apply to the content of suitability requirements and the number of suitability requirements.

---

42. Art. 1.10 (1) Public Procurement Act 2012.
43. Art. 1.10 (2) Public Procurement Act 2012.
44. Art. 1.12 (1) Public Procurement Act 2012.
45. Art. 1.12 (2) Public Procurement Act 2012.
46. Art. 1.13 Public Procurement Act 2012.
47. Art. 1.15 (1) Public Procurement Act 2012.
48. Art. 1.16 Public Procurement Act 2012.

Administrative rules for contracts below the European thresholds

In Chapter 1.3 of the Act, administrative requirements are laid down for all contracting and special sector authorities when they award contracts or concessions for public works below the European thresholds. If they voluntarily publish a contract notice, they must do so via the one designated electronic procurement platform and prescribed formats of TenderNed.[49] Supposedly, no qualitative criteria for exclusion and/or suitability requirements have to be imposed for national negotiated procedures without prior notice. If, nevertheless such requirements are imposed, the use of the designated model of Economic Operator's Own Statement is obligatory, rather than requesting various certificates and other means of proof.[50] If contracting or special sector authorities choose to apply grounds for exclusion based on irrevocable convictions, they have to use the designated statement of good conduct, de *Gedragsverklaring aanbesteden*.[51] Furthermore, all procurement documentation must be made available free of cost.[52]

Proportionality Guide: binding for all contracts

A statute for all public contracts is the Gids Proportionaliteit (Proportionality Guide). This Proportionality Guide elaborates on the principle of proportionality and contains a series of obligations and restrictions for contracting authorities. Some examples from the Guide: as evidence of the economic operator's technical ability to perform the contract, contracting authorities may require only one reference project per core capability and only reference projects with a value of 60% at maximum of the estimated value of the contract.[53] Risks must be allocated where they are best managed or best influenced.[54] Unlimited liability may not be required.[55] As mentioned before, the rules (voorshriften) of the Proportionality Guide are mandatory. In that sense it is legally binding on contracting authorities. Contracting authorities must

49. Art. 1.18 Public Procurement Act 2012.
50. Art. 1.19 Public Procurement Act 2012.
51. Art. 1.20 Public Procurement Act 2012. See G.W.A. van de Meent and R.S. Damsma, A new Procurement Act in the Netherlands, *ICLR*, 2013 (30), par. 4.2.3 for more details of this new standard for integrity screening.
52. Art. 1.21 Public Procurement Act 2012.
53. Rule 3.5G Proportionality Guide.
54. Rule 3.9A Proportionality Guide.
55. Rule 3.9D.1 Proportionality Guide.

comply with these rules, or explain in the tender documents why they choose to deviate from them. Special sector authorities are not bound, *strictu sensu*, by these rules. However, they have been publicly urged to abide by them all the same by the competent Minister of Economic Affairs in the light of the forthcoming entire evaluation of Dutch procurement legislation and supporting policy rules. This evaluation must take place before 1 April 2014.[56]

Question 7

In the Netherlands, there are no general provisions with regard to selecting the beneficiary of unilateral administrative measures, e.g. the allocation of limited authorisation schemes. Only the *Dienstenwet* that implements the Services Directive contains a number of general provisions concerning selection and duration of the authorisation.[57] This absence of general provisions and further due the influence of Union law and case-law of the Court of Justice we have seen a strong development of case-law, for example on the issue how to select a company in case of a limited number of authorizations.[58]

Administrative authorities have to comply with the principles of Dutch administrative law. It is possible to distinguish between substantive general principles and formal general principles.[59] The first category offers a standard for reviewing the content of an administrative decision and the second category a standard for reviewing the preparation of and the reasons for a decision. Important substantive principles are the principles of equality, non-discrimination, legal certainty, legitimate expectations, probition of arbitrariness and the principle of proportionality. Important formal principles of administrative law are, for example, the principle of due care, the principle of reasonable time and the principle of transparency.

In the absence of a clear obligation to follow one of tender procedures of the Public Procurement Act 2012, the principles of proper administration and

56. Art. 4.28 Public Procurement Act 2012.
57. Stb. 2009, 503. See e.g. C.J. Wolswinkel, The Allocation of a Limited Number of Authorisations, Review of European Administrative Law 2009, p. 61-104 and C.J. Wolswinkel, De verdeling van schaarse vergunningen. Convergentie in de jurisprudentie?, JBplus, 2013, p. 62-80.
58. Wolswinkel (2013), p. 63.
59. R. Widdershoven, M. Remac, General Principles of Law in Administrative Law under European Influence, The European review of Private Law 2012, p. 381-407, p. 387.

in particular the principles of due care and equal treatment may cause an obligation to follow a transparent competitive (selection) procedure.[60]

An illustrative example is the case of a municipality that had sold advertisement space on the back of its parking tickets to a local car wash company. A competitor complained that the municipality by infringing the principle of equality had committed tort against him, and started summary proceedings. The District Court found that the municipality had to follow a transparent competitive (selection) procedure and could not exclude interested parties without proper motivation.

It is difficult on the basis of national case law to directly distribute public (and private) entitlements, especially where these are scarcely available, to any interested party, when other parties could also be interested in the entitlements. For instance, when limited authorization schemes for the exploitation of gaming halls are scarce, but new permits will be granted, the administrative body granting the permits is obliged to offer interested economic operators the chance to express their interest and compete for the new permit.[61] In literature, it is debated whether Dutch limited authorization schemes can be qualified as service concessions.[62] This will however depend on the conditions of the limited authorization scheme.

In the auctioning of rights to use certain frequencies for telecommunication or broadcasting purposes, the question arose in court whether governmental policy had to also address newcomer's wishes in the auction. In 2004 the Trade and Industry Appeal Tribunal (*College van Beroep voor het bedrijfsleven*) ruled that the Dutch State was not held to organize the auction in such a way that newcomers were at an advantage.[63]

An administrative body is nevertheless obliged in the general public interest to find the most suitable candidate to award public (and private) entitlements that are scarcely available. How to select this candidate depends on the circumstances of the case.[64] The allocation (for example by sale) of land by

---

60. See for example District Court Arnhem, 23 September 2010 (gemeente Nijkerk/ Parkmedia), LJN: BN9729 and CBb, 3 June 2009, (gemeente Den Haag/ Swiss Leisure Group), LJN: BI6466.
61. Trade and Industry Appeals Tribunal (College van Beroep voor het bedrijfsleven), 3 June 2009 (gemeente Den Haag/Swiss Leisure Group), LJN: BI6466.
62. A. Drahmann, Uitdijing van de werking van het transparantiebeginsel: van concessies naar vergunningen?, NTB 2012, p. 184.
63. Trade and Industry Appeals Tribunal, 29 March 2004 (Minister van Economische Zaken / Versatel 3G), LJN: AO7734.
64. F.J. van Ommeren, Schaarse vergunningen; De verdeling van schaarse vergunningen als onderdeel van het algemene bestuursrecht, Deventer: Kluwer 2004, p. 55 and 75.

administrative bodies must take place – according to the principles of proper administration – with respect of objective criteria for the selection of a buyer.[65]

For the division of subsidies and grants administrative bodies can also choose to use a tender procedure or beauty contest. This is obligatory where there is a limit to the amount that can be granted.[66] In this case, principles of proper administration apply to the way in which the requests are evaluated. For instance, in a case where a request for a grant for a theater company was denied based on expert advice from a committee in which a member of a competing company (which did receive the grant) was installed, the Administrative Law Division found that this violated the principle of impartiality of the administrative authority.[67] Nevertheless the discretionary margin that administrative authorities have for the assessment which applicant will receive the grant is still large when compared to that in the context of the Procurement Directives.

Public procurements and general EU law, including competition and State aids law

Question 8

Decisions taken by contracting authorities within the scope of the Public Procurement Directives may form direct or indirect impediments to intra-Union trade. E.g. contracts may contain discriminatory specifications or require national standards acting directly or indirectly as an import barrier.[68]

Decisions taken by contracting authorities outside the scope of the Public Procurement Directives can also turn out as restrictions on the internal market

---

65. District Court Zwolle, 15 Februari 2008 (A&B/Gemeente Dalfsen), LJN: BC7320, Court of Appeal ’s-Hertogenbosch, 7 Februari 2006, (Appelant 1 & 2/ Gemeente Son en Breugel), LJN: AW2547, District Court Arnhem, 27 December 2005 (X/Katholieke Universiteit), LJN: AV2019.
66. See: Articles 4:25 and 4:26 of the Algemene wet bestuursrecht(Administrative Law Act).
67. Administrative Law Division, 24 March 2010 (Minister van OCW / Stichting de Theatercompagnie), LJN: BL8723.
68. ECJ, judgment of 22 September 1988 in case 45/87 Commission of the European Communities v Ireland (Dundalk), ECR 1988 4929.

if there is a 'certain cross-border interest'.[69] If such cross-border interest exists, these decisions should comply with principles of non-discrimination, proportionality and transparency. If they do not comply with these fundamental principles, they should be justified by imperative requirements in the general interest.

In the Betfair-case the Dutch authorities failed to demonstrate such justification as, in the present structure for control over the entities licensed to organize gaming, they could not exercise sufficiently strict control.[70]

In principle, it is for an applicant to demonstrate that a contract has a certain cross-border interest. In recent Dutch case law the applicant tends to fail this burden of proof.[71] On the other hand the Public Procurement Act 2012 introduces the obligation for a contracting authority to choose the procurement procedure on the basis of objective criteria. Making that choice, implies assessing, among other things, whether a contract bears a certain cross-border interest.

Question 9

According to the OECD public procurement regulations themselves can create an environment that facilitates bid-rigging.[72] Thus, by increasing transparency in public tendering with the aim of bringing about more competition, such legislation may actually have the opposite effect by facilitating anti-

69. ECJ, judgment of 13 November 2007 in case C-507/03 Commission of the European Communities v Ireland (An Post); ECR 2007 I-09777, ECJ, judgment of 15 May 2008 in case C-147/06 Secap v Commune di Torino, ECR 2008 I-03565.
70. See Judgement Dutch State Council (Raad van State) 23 March 2011, ECLI:NL:RVS:2011:BP8768 (Betfair), par. 2.10.12 and 2.10.13 together with CJEU, judgment of 3 June 2010 in case C-203/08 Sporting Exchange v Minister van Justitie, ECR 2010 I-04695, par. 59.
71. Court of Appeal The Hague 29 June 2010, ECLI:NL:GHSGR:2010:BN4167, par. 4; Court of Appeal 's-Hertogenbosch 12 februari 2013, ECLI:NL:GHSHE:2013:BZ1714, par. 4.7; Dutch Supreme Court 18 January 2013, ECLI:NL:HR:2013:BY0543.
72. OECD, Public Procurement: The Role of Competition Authorities in Promoting Competition, 2007, 7: '*[t]he formal rules governing public procurement can make communication among rivals easier, promoting collusion among bidders. While collusion can emerge in both procurement and 'ordinary' markets, procurement regulations may facilitate collusive arrangements*'. This is because many public procurement rules, such as requirements for the disclosure of bidders and the terms and conditions of each bid, allow bidders to become familiar with each other and the procurement process through repeated interaction.

competitive behaviour to some extent. The OECD has proposed a number of practical measures that contracting authorities can take in order to mitigate the risk of collusive practices. These measures focus on increasing the knowledge and awareness of public servants involved in the procurement process by training and by the introduction of detection systems. The OECD further focusses on the actual design of the procurement process. Cost reduction of bidding and participation requirements should increase competition. New incentives should encourage newcomers to participate in the bidding process. Specifications should be clearly defined so as to avoid bias, but predictability should be avoided as this can lead to collusion. The procurement process should also be designed to reduce communication amongst bidders, for example by not scheduling regular pre-bid meetings or by carefully considering what information about the tender needs to be publicly disclosed. Finally, the award criteria should be carefully chosen so as not to unnecessarily deter smaller bidders.

Bid-rigging in the Netherlands

Small is sometimes not beautiful. The Netherlands has quite a history when it comes to bid-rigging and fixing of public contracts. Over the years, the Dutch anti-trust agency, currently the *Autoriteit Consument en Markt* (ACM, formerly *Nederlandse Mededingingsautoriteit*, NMa), has been quite busy in detecting and sanctioning companies involved in bid-rigging practices in several sectors (like construction, installation, green maintenance, homecare etc.). Especially in the construction sector it turned out that collusion had become endemic. In November 2001 a senior employee of a major construction company blew the whistle on a widespread practice of bid-rigging. In the course of the following year, the proceedings of the Parliamentary Committee of Inquiry into the Construction Industry and resulting Report established the wide ranging impact of the affair. The Committee concluded that Dutch public procurement procedures were vulnerable and easy to abuse. Subsequently, the *NMa* issued a sector-wide appeal for companies to report cartel offences voluntarily. Almost 500 construction companies responded by filing applications for leniency with the *NMa*. To further stimulate the construction industry to make a clean break with the past, construction companies were given the choice of participating in a 'fast lane' or accelerated sanctions procedure in order to benefit from a lower fine. Approximately ninety per cent of companies chose for the 'fast lane'. The number of fining decisions finally amounted to approximately 1,400.

Public Procurement Act 2012

The relevance of preventing and deterring bidder's collusion has not received the attention it should deserve in the legislative process leading to the Public Procurement Act 2012. Nevertheless the Act contains some of the measures that the OECD deems important for avoiding anti-competitive practices from tenderers. We will focus on two of them: (i) access of small and medium-sized enterprises (SME) to public contracts and (ii) exclusion grounds with regard to integrity.

(1) Access SME: division of public contracts into lots
Dividing contracts into lots is suggested as an effective method to reduce collusion. Although the division of contracts into lots is not an ideal solution in all situations – e.g. some projects can become more expensive if different contractors are involved in the execution phase, or in concentrated markets the division of a contract into lots is supposed not to attract more competition – contracting authorities could pursue such a strategy whenever technically or economically feasible.

One of the underlying goals of the Public Procurement Act 2012 is to give small and medium-sized enterprises (SME) better access to public contracts. To that end, the Act contains a 'ban on clustering':[73] this is an obligation not to combine[74] contracts unnecessarily and to divide contracts into lots as much as possible. This obligation applies regardless of the value of the contract, i.e. for contracts both below and above the European thresholds. Various aspects need to be taken into account whenever a contracting authority considers to 'cluster' contracts. The contracts have to be sufficiently connected. Any exclusionary effects for SME must be taken into account. The contracting authority is also obliged to weigh the possible economies of scale (lower prices,

73. Article 1.5 Public Procurement Act 2012, (Second further modified amendment by MPs Verhoeven and Gesthuizen, Kamerstukken II 2011/12,32 440, no. 47). See also the answer to question 6: contracting authorities must comply with these rules, or explain in the tender documents why they choose to deviate from them.

74. 'Clustering' is a broad concept; as such there are many different forms of 'clustering' imaginable. For example: two contracting authorities (e.g. several neighbouring municipalities) or even different branches or departments from the same contracting authority procuring a public contract together are 'clustering' in the sense of the Public Procurement Act 2012. Another example: a contracting authority procuring two different services at the same time (e.g. catering and cleaning services) also 'clusters'. In both these examples, the contracting authorities would have to explain in the tender documents why they have chosen to 'cluster' the products and services concerned.

better conditions) against any adverse organisational and financial consequences for itself and for the tenderers.

There is also a provision that clustered contracts must, in principle, be divided into lots, unless the contracting authority does not find this appropriate and sets out its reasons in the tender documents. To give an example of the consequences of this rule: it seems possible to justify a decision to (continue to) procure together with other contracting authorities. In that event, however, the cooperating authorities should consider, for example, whether their contract can be (geographically) divided into various lots. As a result, not only the decision to 'cluster' (i.e. procuring together with other contracting authorities) but also the considerations whether or not to divide the contract into lots need substantiation in the tender documents.

(2) Exclusion grounds with regard to integrity: the Declaration of Conduct Public Procurement

An important instrument in the prevention of collusion is the exclusion of tenderers that have infringed competition law or, more specifically, were members of a previously discovered cartel. In this respect, the Public Procurement Act 2012 has introduced the Declaration of Conduct Public Procurement, a new tool for the Netherlands that standardises integrity screening.[75] On the basis of Article 2.89(2) of the Act, the Declaration provides conclusive proof that the undertaking in question is not subject to the exclusion grounds referred to in Article 2.86 (various serious offences, e.g. money laundering and bribery of public servants), Article 2.87(b) and (c) (violation of professional conduct rules and grave professional misconduct) insofar as convictions with the force of *res judicata* or irrevocable judicial decisions are involved. Unlike in the past, the integrity screening also expressly applies to infringements of competition law. Undertakings that were fined in the recent past for violations of the Dutch or European cartel prohibitions or the prohibition against abuse of a dominant position must therefore take account of the possibility that they may no longer be able to obtain a Declaration of Conduct Public Procurement with all the risks of exclusion that this entails. In order not to thwart the use of the leniency programmes of the Netherlands Competition Authority (*Autoriteit Consument en Markt* or ACM) and the European Commission,[76] which have proven very effective in practice,[77] penalty deci-

75. Kamerstukken II 2011/12, 32 440, no. 10, page 42.
76. For the ACM's leniency programme, see: the Policy rules of the Minister of Economic Affairs, Agriculture and Innovation on the reduction of fines related to cartels (Stcrt. 2009, 14078).

sions in which the ACM or the Commission has granted immunity from or a discount on the fines on the basis of a leniency programme are not taken into account in that respect.[78] The Declaration of Conduct Public Procurement is valid for a period of two years. This has been favourably received by the business community. In addition, it is interesting that the new statutory scheme explicitly provides that a contracting authority does not have to exclude a tenderer if its learns that one or more compulsory or optional exclusion grounds are applicable to the tenderer. Article 2.88 of the Act provides that a contracting authority need not exclude a tenderer i) for compelling reasons of general interest, ii) if the undertaking has taken sufficient measures to restore the violated trust or iii) if the exclusion is disproportionate with a view to the time that has passed since the conviction and in view of the nature and scope of the contract. '*Sufficient measures to restore the violated trust*' include, according to the Explanatory Memorandum to the Public Procurement Act 2012, having a functioning compliance programme. The text in Article 2.88(b) and (c) of the Act is a national 'add-on' to that of Article 45(1) of the Public Sector Directive. The Dutch Government felt it was desirable to offer contracting authorities the leeway to also waive exclusion if the tenderer has taken sufficient measures to restore trust or if this is not deemed disproportionate with a view to the time that has passed since the conviction or the nature and scope of the contract.[79]

Public and private enforcement of EU and Dutch competition law

Over the years, the *ACM,* and especially its legal predecessor the *NMa* which is generally seen as a very active and punitive anti-trust agency, have been quite busy detecting and punishing collusive practices in several sectors (such as construction, installation, green maintenance, care, taxi transport etc.). Many of those fines were upheld in court. By contrast, there are only a few

77. For the European Commission's leniency programme, see: the Guidelines for the calculation of fines imposed pursuant to Article 23(2)(a) of Regulation no.1/2003/EC (OJ EU 2006/C 210/02).
78. The text of the law was tightened further by Memorandum of Amendment, as a result of which the exception only applies in cases of fine reduction on the basis of the leniency programme. In other cases involving a fine reduction (for example, cooperating in an investigation by the ACM/Commission or greatly reduced creditworthiness), the relevant decision will still be included in the assessment referred to in Article 4.7. Kamerstukken II, 2010/2011, 32 440, no. 11, pages 5-6.
79. Parliamentary Documents II 2010/11, 32 440, no. 3, Explanatory Memorandum, page 80.

examples of private enforcement by contracting authorities whose ‘public purse’ had suffered as a result of the breach of anti-trust rules. A very interesting case is that of TenneT, the Dutch national grid operator versus different companies of ABB. In 2007 the European Commission fined ABB for its participation in the Gas Insulated Switchgear cartel, a global cartel whereby the members divided markets, set quotas and then agreed not to become active into each other markets. The cartel further protected the bid of the designated member by submitting les attractive bids. TenneT had issued a tender for gas insulated switchgear for its power systems and claimed damages as a victim of the collusive behaviour by ABB. Given the content of the Commission decision, the competent District Court Oost Nederland found itself bound to find ABB liable for civil damages.[80] The court considered it highly likely that TenneT had suffered damages, as the collusive practices by its nature and object were aimed at letting customers like TenneT pay higher prices than they would have done in normal market conditions. The amount of damages will be established in a separate procedure. The court considered that a comparison between offers made during the years that the cartel was active and offers made after the end of it, would be a suitable point of refererence for the assessment of damages. The court further rejected the ‘passing-on defence’ of ABB and indicated that it would be ‘unreasonable’ to deduct any benefit for TenneT as a result of increased electricity prices for consumers, from the damages to be paid by ABB. Instead the court suggested that the injury suffered by the electricity consumers as indirect purchasers could be compensated if TenneT uses the damages to be paid by ABB for reduction of electricity prices in near future. It is clear that if this line of thinking crystallises into a final judgment, this will be valuable for contracting authorities in case they want to claim damages suffered from bid-rigging.

Question 10

The EU State aid package and Dutch law

In the new package on State aid rules for services of general economic interest, entered into force on 31 January 2012,[81] the Commission also stressed to

80. ECLI:NL:RBONE:2013:BZ0403.
81. Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012, C 8/2; Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union

act in accordance with EU rules in the area of public procurement, including the requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty, if a public authority desires to compensate entities for their public task performance.[82] However, the package does not contain a legal obligation to (always) follow a public procurement procedure or another competitive procedure whenever an undertaking is entrusted with a SGEI, also when the entrustment of the SGEI falls outside the scope of the public procurement rules.

In the Netherlands, there are no national state aid rules. For this reason, the European package must be applied integrally in Dutch practice. The *Mededingingswet (*Dutch Competition Act) is not applicable when it concerns state aid.[83] The EU rules are directly applicable, regardless of whether or not a public procurement procedure has taken place. The fact that a competitive tender procedure has been correctly followed, does not by definition mean that there is no state aid.[84] On the other hand, the fact that the public procurement rules have *not* been applied, because the measure falls outside the scope of the public procurement rules, does not by definition mean that state aid exists, although this situation will sooner raise the suspicion that state aid exists. The actual *existence* of state aid, however, still depends on whether or not the criteria of art. 107 (1) TFEU are fulfilled.

---

to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, 2012/21/EU,OJ 2012, L 7/3 Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ 2012, C 8/15). A *de minimis* Regulation followed in April 2012 (Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ 2012, L 114/8). Notifying the Commission of such compensation is still necessary due to a higher risk of distorting competition. The *de minimis* Regulation exempts categories of compensation from the duty to notify the Commission.

82. Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), 2012/C 8/03), par 19. Letter from the Commission to the Permanent Representation of the Netherlands in the European Union of 06.06.2013, p. 1.
83. Stb. 1997, 430.
84. See for example Decision 2008/440/EG (WRAP), OJ 2008, L 155/20.

Entrusting an entity with a SGEI obligation

The Public Procurement Act 2012 does not contain specific rules on how to entrust an undertaking with a SGEI obligation; a general obligation to follow the public procurement rules does not exist, provided that the entrustment is in conformity with specific regulation (see further below) or relevant EU rules, including the public procurement rules.

The Dutch government and public authorities have from a public procurement perspective, discretionary power to decide which performance possibility they deem suitable for the performance of their public tasks; *internal* performance (e.g. their own devision or in collaboration with other public authorities) or *external* performance. As a result, different performance modalities in the public domain can occur for the same service in different geographical areas, such in the case of the collection of household waste (see also the answer to question 3 above).

Several ways are used to entrust an entity with a SGEI:

1. by specific regulation: (i) Act (e.g. *Woningwet* (Housing Act), in which the Dutch housing corporations are entrusted with social housing)[85]; (ii) by Ministerial Regulation (e.g. *Besluit houdende aanwijzing van de stichting GaN als uitvoerder van een Dienst van Algemeen Economisch Belang* (Designation of the National Authority for Data concerning Nature),[86] *Regeling tot aanwijzing van Koninklijke TNT Post BV als verlener van de universele postdienst* (Regulation concerning the Designation of Royal TNT Post BV as the provider of the universal postal services);[87] (iii) by Provincial Decree (e.g. *Aanwijzing van activiteiten van stichting Cubiss Brabant als Dienst van Algemeen Economisch Belang* (Designation of the Cubiss Brabant foundation as SGEI provider in relation to public library services);[88] (iv) by Municipal Decree (e.g. *Aanwijzing diensten van WOM als Diensten van Algemeen Economisch Belang tot 2022* (the Designation of WOM as a provider of a SGEI in the field of urban area develop-

85. Stb. 1991, 736.
86. Stcrt. 2010/15265.
87. Stcrt. 2009/82.
88. Province of Noord-Brabant, Aanwijzing van activiteiten van stichting Cubiss Brabant als Dienst van Algemeen Economisch Belang (DAEB) tot 2022, Provinciaal Blad van Noord-Brabant, number 296/12.

ment));[89] (v) by Decisions of the *Nederlandse Zorg Authoriteit* (Dutch Healthcare Authority), that can entrust healthcare providers with a SGEI;[90]
2. by limited authorisation schemes;
3. *internal* performance by the public authority: own devision or in collaboration with other public authorities; by a separate public entity (quasi in-house);
4. by (private) contract: (i) public procurement procedure or service concessions (e.g. the public transport concession which allowed for the right to operate a high-speed train line, which was granted to HSA);[91]
5. by exclusive rights (e.g. waste collection).[92]

The case of public transport

The public procurement rules *are* applicable to public passenger transport. In this respect, the Dutch legislator used the discretion in the relevant EU rules (art. 5 (6) Reg. no. 1370/2007) to provide for an obligation to tender. The Public Passenger Transport Act 2000 (PPTA 2000) holds as a general obligation that service concessions for public passenger transport have to be tendered.[93] Exceptions to this obligation exist for public passenger transport in Amsterdam, Rotterdam, The Hague and Utrecht.[94] The public transport companies that perform transport services in these cities are owned by the municipalities and are considered as in-house. There is also an exception for the concession regarding the main rail network. This concession was directly awarded to the Dutch Railways,[95] whose shares are fully owned by the Dutch state. The concession for 2015-2025 will also be directly awarded to the

89. Municipality of the Hague, Aanwijzing activiteiten WOM als diensten van algemeen economisch belang – RIS 180239, 12 April 2011.
90. Wet marktordening gezondheidszorg (Healthcare Market Regulation Act), Stb. 2006, 432, article 56a (7). See also TK 32 620, nr. 33, par. 2; Aanwijzing ex artikel 7 Wet marktordening gezondheidszorg (Designation ex article 7 Healthcare Market Regulation Act), Stcrt. 2012, 26978, article 6 (2), NZA Beleidsregel BR/CU-2071 (Dutch Healthcare Authority Communication), par. 5.3.
91. This respective concession can be found on: http://www.rijksoverheid.nl/documentenen publicaties/besluiten/2008/01/01/vervoerconcessie-voor-de-hogesnelheidslijn-2008.html. Date consulted: 28 October 2013.
92. HR 18 November 2011, AVR/Westland, ECLI:NL:HR:2011:BU4900.
93. Art. 19 and 49 PPTA 2000 and art. 37 Public Passenger Transport Decree 2000.
94. Art. 63a PPTA 2000.
95. Art. 67 PPTA 2000.

Dutch Railways.[96] In both cases (large city passengers transport and main rail network), compensation is granted in conformity with the *Altmark*-criteria and Reg. (EC) no. 1370/2007 and therefore there is either no state aid or the compensation is exempted from the obligation to notify.

The Dutch courts are obliged to apply the state aid rules.[97] In the past few years, various state aid cases in which an undertaking was entrusted with a SGEI have been brought before Dutch national courts. However, these undertakings were mostly not selected through a tender procedure, because the measure fell either outside the procurement rules or an exception was applicable. There are several examples which illustrate that the Dutch courts are well aware of the public procurement and state aid rules and that judges apply them when necessary. In addition, these cases show that, more and more, public procurement law and state aid law go hand in hand, especially when it concerns SGEI. One of these examples is the case of the ferry service Gorinchem.[98] The service provider was (a department of) the municipality of Gorinchem, which meant that public procurement law was not applicable due to the in-house character. The ferry service was designated as a SGEI. However, the compensation of the costs did not fulfil the *Altmark*-criteria in relation to state aid. It did not fall within the scope of the SGEI-Decision either.[99] Therefore, the compensation had to be notified to the Commission, who would then decide upon its admissibility.

Strategic use of public procurement

Question 11

Public procurement procedures can be used as a tool to achieve environmental and social policy goals. The focus here is on the Public Procurement Act 2012 and regulations that are based upon this Act, Dutch policy initiatives

---

96. TK 2011-2012, 22 026, no. 343; the Design Brief has been adopted in January 2013.
97. See also the Commission Notice on the enforcement of state aid law by national courts, OJ 2009, C 85/1, no. 10.
98. ECLI:NL:RBROT:2013:BZ5824.
99. Decision 2005/842/EC, replaced by Decision 2012/21/EU. Both are relevant to this specific case due to the period in which the national procedural steps took place (before, on and after 31 January 2012).

that have been developed to achieve environmental and social policy goals, and relevant Dutch case law.

The Public Procurement Act 2012 and its regulations

Pursuant to Article 1.4(2), contracting authorities or special sector companies should aim to secure as much societal value ('*maatschappelijke waarde*') as possible for the public resources when they conclude a public contract. As already explained in our answer to question 3, societal value refers to the proper allocation and possible saving of public funds (in an economic sense).[100] The deployment of long-lasting unemployed or disabled persons in the execution of a public contract can be considered an element of societal value.[101]

In addition, the Public Procurement Act 2012 provides for sustainability requirements to be taken into account in all phases of the procedures: the selection (Article 2.93), award (Articles 2.114 and 2.115), and execution phase (Articles 2.80, 2.82). Furthermore, technical specifications can be used to achieve environmental or social goals (Articles 2.75 and 2.76).

The *Gids Proportionaliteit* (Proportionality Guide),[102] designated by the Procurement Decree[103] as statutory guideline,[104] contains 'best practices' in relation to, *inter alia*, sustainability and social requirements. The Proportionality Guide clarifies what is considered to be proportionate in a particular procurement phase. It indicates for example in paragraph 3.5.6 that if only a few undertakings can meet certain sustainability requirements, it is unwise to mention those in the technical specifications, as this might invoke a risk of lack of competition. In such a case, it is better to mention the sustainability criteria as subcriteria of the award criteria.

The proportionality principle laid down in the Public Procurement Act 2012 and the Proportionality Guide, in combination with the duty for contracting authorities to 'comply with the Public Procurement Act 2012 or explain in case of non-compliance' is remarkable, as it may arguably be much

100. Kamerstukken II 2011-2012, 32 440, nr. 46.
101. Kamerstukken II, 2011-2012, 32 440, nr. 46.
102. The Proportionality Guide is the result of negotiations by market participants, contracting authorities and independent persons and is considered to be a balanced outcome for all partners.
103. See Article 10.1 Procurement Decree and Article 1.10 sub 3 Public Procurement Act 2012.
104. As earlier notices, contracting authorities may deviate from the rules in the Proportionality Guide, if they state this in advance in the tender documentation and explain why the deviation is proportionate.

stricter than required by Directive 2004/18/EC. Furthermore, the proportionality principle intends to ensure that all requirements imposed by contracting authorities are proportionate to the object and scope of the public contract. Application of this principle might therefore strengthen the position of SMEs during public procurement procedures.[105]

The Public Procurement Act 2012 is not the only Dutch act that lists environmental and social policy goals. Other acts and regulations, such as the *Wet Sociale Werkvoorziening* (Sheltered Employment Act), *Wet Milieubeheer* (Environmental Management Act), *Arbowet* (Working Conditions Act), *Regeling bevordering Aankoop Schone en Energiezuinige Wegvoertuigen*[106] (Regulation Promoting the Purchase of Clean and Economical Vehicles) list rules relating to environmental and social policy goals as well.

Dutch policy initiatives

Sustainability and social return within the context of public procurement procedures are considered to be of major importance in the Netherlands. The Dutch Government aims to buy 100% of its supplies and services in a sustainable way.[107]

Dutch lower public authorities aim to buy 75% of the supplies and services in a sustainable way since 2010, increasing to 100% in 2015.[108] Many Dutch municipalities have signed the *Manifest Professioneel Duurzaam Inkopen* (Manifest Professional Sustainable Procurement).[109] Parties that have signed this Manifest agree to engage in strategic procurement and to pursue ambitious sustainability and social aims in all phases of the procurement process.

---

105. G.W.A. van de Meent, R. Damsma, 'A new Procurement Act in the Netherlands', The International Construction Law Review, 2013 (30), p. 430.
106. Stcrt. 2011/9372.The Regulation Promoting the Purchase of Clean and Economical Vehicles is the implementation of the Clean Vehicles Directive (directive 2009/33/EC).
107. Kamerstukken II 2004-2005, 29 800, nr. 130; Kamerstukken II 2005-2006, nr. 30 300, 134, p. 2. See for the view of the Dutch Government: Ministry of Infrastructure and Environment, letter regarding 'Advies Duurzaam Inkopen' (Advice Sustainable Purchasing), reference DGM/PDI 2011047226, June 2011, p. 8-9.
108. Klimaatakkoord Gemeenten en Rijk (Climate Agreement Municipalities and Central Government), 2007-2011.
109. Ministry of Infrastructure and Environment, Manifest Professioneel Duurzaam Inkopen (Manifest Professional Sustainable Procurement), accessible via the website of PIANOo (www.pianoo.nl).

The Dutch Government monitors the level of sustainable public procurement through the *Monitor Duurzaam Inkopen* (Monitor Sustainable Procurement). In this Monitor the Ministry of Infrastructure and Environment verifies whether contracting authorities fulfil the specific sustainability requirements that are set for the product group to which the procured product involved belongs.[110] Within the framework of the EU Energy Star Programme, specific sustainable public procurement criteria have been created for at least 45 product groups (e.g. banking services, catering).[111] These criteria are no statutory criteria, but are developed as a starting point for sustainable purchasing.[112] It can be deduced from the latest Monitor published in 2010 that of the purchases by the Dutch Government 99.8%, by the Dutch provinces 95.8%, by the municipalities around 85-90% are in compliance with sustainability requirements.[113]

Dutch case law also illustrates the prevalence of social return and life cycle costs in the process of public procurement.[114] Overall it can be suggested that there is a growing tendency for Dutch courts to focus on the observance of public procurement law, specifically concerning the observance of the transparency principle. There is a positive attitude toward green public procurement in the Netherlands. The courts are well aware of the importance of green public procurement and do not hesitate to be strict when it comes to assessing sustainability requirements.[115]

Question 12

Although the Dutch Minister of Economic Affairs acknowledges the relationship between innovation as a goal of public policy goal and the use of public

110. KPMG, 'Monitor duurzaam inkopen 2010' (Monitor Sustainable Procurement 2010), 15 June 2011.
111. See the website of Agentschap NL (www.agentschapnl.nl) and the website of PIANOo (www.pianoo.nl) for more information on the product groups.
112. In addition, various guidelines and checklists have been developed in order to guide contracting authorities in their sustainable procurement.
113. KPMG, 'Monitor duurzaam inkopen 2010' (Monitor sustainable procurement 2010), 15 June 2011.
114. See for example: District Court Amsterdam, 5 December 2011, LJN: BV0510. See also District Court Noord Nederland, 22 February 2013, LJN: BZ2831; District Court Amsterdam, 22 January 2013, LJN: BZ0664; District Court Midden-Nederland, 1 February 2013, LJN: BZ0311 within the framework of EU Energy Star.
115. See e.g. District Court Dordrecht, 16 December 2010, LJN: ZA 10-260.

buying as a tool to foster innovation,[116] the systematic use of public procurement for innovative purposes has been fairly limited so far.[117] We will focus on the possibilities the Public Procurement Act 2012 provides and some policy initiatives that have been taken. Also a few relevant state aid-related aspects will be taken into consideration.

Many articles in the Public Procurement Act are worth mentioning in this respect, e.g.:

- Article 2.114 requires contracting authorities to award the contract to the company with the most economically advantageous tender (or to explain if their award is based on lowest price). If the awarding takes place based on such a tender, the contracting authority has the possibility to apply innovative criteria that outweigh the price criteria.[118]
- The principle of proportionality has not been substantiated in the Public Procurement Act 2012 itself, as this was deemed to unnecessarily restrict the freedom for contracting authorities in relation to customisation and innovation.[119] Further substantiation took place in the Gids Proportionaliteit (Proportionality Guide).[120]
- Contracting authorities should verify only that the tenderer has the right competences to execute the contract, and not whether he has executed identical contracts in the past (Article 2.93). In this way, young and innovative companies that have 'the skills but not a proven track record' should gain better chances to win public contracts.[121]
- Pursuant to Article 2.83, contracting authorities may allow tenderers to propose variants,[122] if the award is based on the criteria of most economically advantageous tender. According to the Dutch legislator, contracting authorities that allow variants can profit from innovations that are created for their organisation, and, more generally speaking, for society.[123]

116. Kamerstukken II, 2010-2011, 32 440, nr. 10, p. 20.
117. Kamerstukken II, 2009-2010, 32 440, nr. 3, p. 9-10.
118. Kamerstukken II, 2010-2011, 32 440, nr. 10, p. 23.
119. Kamerstukken II, 2010-2011, 32 440, nr. 10, p. 9-10.
120. Kamerstukken II, 2010-2011, 32 440, nr. 10, p. 9-10.
121. Kamerstukken II, 2010-2011, 32 440, nr. 10, p. 16.
122. A variant bid is a bid which is different from that specifically requested by the contracting authority in the tender documents. Examples of variant bids are those proposing different pricing structures, or new and innovative ways of delivering a service.
123. Kamerstukken II, 2010-2011, 32 440, nr. 10, p. 21, 31, 45, 61.

- Contracting authorities may contact market parties in the pre-tender phase (for example by organising a market consultation) or during the tender stage itself (by using the procedure of the competitive dialogue).[124]
- Article 2.76 provides for the possibility to formulate technical specifications in a functional way. Functional specification is deemed to encourage innovative tenders.[125]

State aid

When a public contract is aimed to promote or facilitate fundamental research, violation of state aid rules is unlikely, even when it is awarded directly. According to EC Regulation 800/2008 (General Block Exemption Regulation, GBER), 100% funding of fundamental research is compatible with the internal market.[126] Contracts for fundamental research that fulfil the criteria laid down in the GBER need no notification to the European Commission. For industrial research and experimental development, the aid intensity, as calculated on the basis of the eligible costs of the project, shall not exceed 50% and 25% respectively in order to be exempted from the notification obligation. In April 2008, the Commission declared the Dutch *Omnibus Decentraal Regeling* (Omnibus Local Scheme) to be compatible with the internal market.[127] This scheme is a framework for lower public authorities (provinces and municipalities) within they can grant individual subsidies in support of research, development and innovation (R&D&I) activities.[128] Notification of individual state aid measures or schemes that comply with the Omnibus Local Scheme is not necessary. The GBER and the Omnibus Local Scheme foster innovation by exempting the funding of R&D&I from the notification ob-

124. Kamerstukken II, 2010-2011, 32 440, nr. 10, p. 21. The procedure of the competitive dialogue is regulated by Articles 2.28 and 2.29 Public Procurement Act 2012. The Act does not regulate pre-tender meetings of contracting authorities and market parties.
125. See A. Schmidt e.a., *Aanbesteding en innovatie*, Den Haag: Sdu uitgevers, 2009. See also A.R. Apostol, 'Formal European Standards in Public Procurement: A Strategic Tool to Support Innovation', PPLR, 2010(19), p. 57-72.
126. Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ 2008, L214/3. See for the conditions Article 7 GBER.
127. European Commission, 16 May 2007, N 56/2007; European Commission, 3 April 2008, N 726a/2007.
128. See the website of Europa Decentraal: www.europadecentraal.nl.

ligation. This exemption could be an explanation why very few cases about state aid issues regarding the funding of innovative projects end up in court, even though the granting of the funding is not tendered. However, there are court cases where the state aid argument was invoked by the administrative body the other way around: the subsidy could *not* be granted because the project was *not* innovative, so that granting of the subsidy *would* have constituted state aid.[129]

Remedies

Question 13

In Dutch procurement practice, there is a clear preference for remedies that affect the award decision. In the overwhelming majority of cases (approximately 92% of the cases between 2004 and 2009 were settled in summary proceedings[130]), interim relief is requested before the conclusion of the contract in order to prevent the contracting authority from concluding the contract.[131]

Actions for damages on the basis of breach of procurement law are relatively rare. The general rule of Dutch tort law applies: all damages are, in principle, recoverable (Article 6:95 Dutch Civil Code), as long as causality between the alleged unlawful act and the damage can be established.[132] If it becomes clear that the claimant would have won the tendered contract if the breach of procurement law had not occurred, this claimant is entitled to re-

129. See e.g. the judgment of the Administrative Law Division of the Council of State, 12 June 2013, ECLI:NL:RVS:2013:CA2913 (Stichting Innovatieprojecten OIZ).

130. '*Aanbestedingsrechtspraak in Nederland: 1 september 2004 – 31 augustus 2009*', Final report, June 2010, Van Doorne NV / Ministry of Economic Affairs.

131. In the Dutch legal system it is not required to follow-up with another proceedings for the interim relief judgment to have binding force; therefore, often, in practice, the interim judgment contains the sole and final ruling on a procurement dispute (barring appeal of the interim judgment), as losing parties tend to resign themselves to this verdict.

132. This is laid down in Article 6:98 of the Dutch Civil Code: 'only damage that is connected in such a way to the event that made the debtor liable, that it, in regard of the nature of his liability and of the damage caused, can be attributed to him as a consequence of this event, is eligible for compensation.'

cover all his damage, including lost profit.[133] A claim for damages is sometimes awarded pro rata, based on the number of tenderers. In such cases, the burden of proof is lower as claimants only need to prove that they would have had a reasonable chance, based on the selection criteria or their past performance, to be awarded the contract. The amount of damages awarded would then be the damage occurred divided by the number of tenderers. It should be mentioned that parties can bring a claim for an advance payment of damages in an interim judgment, although it is rare to see a court award such claims.[134]

After a national report in 2007 raised concerns with regard to the legal protection offered during public procurement procedures,[135] Dutch legislation was enacted in order to transpose the Directive 2007/66/EC: *Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden* (*Act on the Implementation of Public Procurement Remedies Directives – Wira*).[136] The Dutch procurement remedies system went further than the sole implementation of Directive 2007/66/EC, and for instance introduced the requirement for contracting authorities to provide tenderers with all relevant reasons for a negative decision.

One of the main strengths of the Dutch interim remedy system is arguably its speed in decision making: usually it is possible to obtain an interim ruling within 4-9 weeks after filing the case before a court. The widespread use of expiration periods in the tender documents speeds the system up even further by requiring disappointed tenderers to initiate interim proceedings within 20

133. See, District Court of Zutphen 28/12/2011, LJN: BU9991; District Court of Amsterdam, 29/5/2012 LJN: BX1677; Arnhem-Leeuwarden Court of Appeal 23/4/2013, LJN: BZ8540. In practice, this situation does not occur often, because it is not an easy task to prove that the tender ordinarily would have won the tender. In other cases, the claimant will have to be satisfied with a compensation of a ‘loss of a chance’; for example, with six likely candidates for a re-tender, the chance of the claimant to have won the hypothetical re-tender is estimated at one sixth, meaning the claimant will be awarded one sixth of the damages he has occurred.

134. See, District Court of Zwolle-Lelystad 30/1/2009, LJN: BH9335; District Court of Middelburg 11/11/2011, LJN: BU4046; Arnhem-Leeuwarden Court of Appeal 2/7/2013, ECLI:NL:GHARL:2013:4715.

135. Hebly, J.M., De Boer, E.T. & Wilman, F.G., *Rechtsbescherming bij aanbesteding*. Zutphen: Paris, 2007.

136. Its predecessors, Directive 89/665/EC on remedies in the public sector and 92/13/EC on remedies in the special sectors, were not implemented. The Dutch government held the opinion that the Dutch legal system already provided the level of legal protection these two Directives desired to secure in all Member States. See G.W.A. van de Meent, *Bill of June 17, 1992: Raamwet EEG-voorschriften aanbestedingen (Framework Law on the EEC Procurement Rules*), PPLR (6) 1992, p. 427.

days of receipt of the award decision. In this way, the required standstill period – which in itself is not formulated as an expiration date in Article 2.127 Public Procurement Act 2012 – is transformed into a 'contractual' expiration date. Courts have consistently deemed appeals, lodged after the 20 days have expired, inadmissible on the basis of such 'contractual' expiration date, barring exceptional circumstances.[137]

Judgements of appeal courts can also be expected within a reasonable time frame (3-4 months within the moment of lodging the appeal), thanks to the widespread use of *spoed-appèl* (which can be translated as 'accelerated appeal'), considerably speeding up the process by drastically cutting the time allotted to the defendant(s) to file their responses to the claim(s).[138]

Another trait of the Dutch legal system is the absence of a specialised court or a reviewing authority to specifically deal with procurement-related cases. Instead, there are 11 district courts[139] and a large number of summary proceedings judges, which in practice sometimes leads to conflicting lines of case law. An example of this can be found in the differing lines taken by the Courts of Appeal of The Hague and Amsterdam on the grounds for termination of an agreement on the basis of procurement law, as is explained further on in the answer to this question.

A further possible concern, in the light of the effectiveness of the remedy system for tenderers, is the predominant use of the so-called Grossmann-exception – named after the ECJ's *Grossmann*-judgment.[140] In this judgement, the ECJ allowed that the claims of a claimant could, in certain circumstances, be dismissed on the (sole) grounds that the claimant should have been more proactive, i.e. by informing the contracting authority of his com-

137. In this way the Alcatel-period (20 days in the Netherlands (section 2.127 Public Procurement Act 2012), it used to be 15 days before 1 April 2013) is in fact turned into an expiration period. This expiration-practice is condoned by Dutch case law, provided that the expiration clause in the tender documents is stated in unambiguous terms. (see, District Court of Arnhem 3/8/2009, LJN: BJ6233; District Court of Leeuwarden 18/11/2009, LJN: BK3744; District Court of Maastricht 19/5/2011, LJN: BQ6111).

138. The term for appeal in an interim procedure is also much shorter than in a procedure on the merits, and an appeal has to be lodged within 4 weeks of the judgment in first instance. The decision whether an appeal qualifies as accelerated, is made by the Court, upon the specified request of either of the parties.

139. In this respect, recently, the situation has improved somewhat as a result of a reorganisation of the courts on 2012/2013 (de Wet herziening gerechtelijke kaart) – merging the 19 courts into 11.

140. CJE, judgment of 12 February 2004 in Case C-230/02, Grossmann Air Service, Bedarfsluftfahrtunternehmen. GmbH & Co. KG v Republik Österreich, ECR 2004 I-01829.

plaints at an earlier stage in the tender proceedings. The ECJ's underlying idea seems to be that the contracting authority should be given the opportunity to handle the complaint at a point of time when it can still easily be rectified. It is important to note that in the Grossmann case before the court, the claimant had not submitted a bid on the tender at hand. In the Netherlands, however, the ECJ's opinion has been interpreted as a general rule: a tenderer should show proactive behaviour in the process, such as raising questions on the matter of litigation during the procurement process, or initiating court proceedings as soon as possible. Failure to do so would lead to dismissal of (part of) the tenderer's claim.[141] This general rule has been applied in a number of situations, including situations in which a party – in contrast to the original Austrian case leading up to the Grossmann-judgment – had in fact submitted an offer in the tender procedure at hand, yet, for whatever reason, failed to be sufficiently proactive.[142] In several cases, as a result, the courts did not even touch on the substance of (a number of) complaints of the claimant tenderer.[143] The number of cases in which the Grossmann exception has been invoked (and sustained) already runs into the hundreds. Moreover, the Grossmann-doctrine is precisely a matter in which the approaches of the various courts differ strongly; some courts regularly use the Grossmann-exception to dismiss claims,[144] while other courts refuse to apply it at all.[145]

Directive 2007/66/EC and its consequences

On the whole, Directive 2007/66/EC has not changed the existing system of remedies in the Netherlands to a large extent. The directive was originally codified in a brand new Act, the *Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden* (the *Wira*). Since April 2013, the Wira no longer exists; its provisions have been integrated (almost unchanged) into the Public Procurement Act 2012.

The two main innovations that the Directive 2007/66/EC has led to in the Netherlands are the following. Firstly the possibility to nullify contracts on the basis of a violation of procurement law. Before the introduction of the

141. See, District Court of Maastricht, 2/2/2009, LJN: BH2419; District Court of Groningen 12/10/2012, LJN: BY3312.
142. See, Arnhem Court of Appeal, 23/1/2012, LJN: BV1139; District Court of Rotterdam, 26/3/2012, LJN: BW5773.
143. District Court of North-Netherlands, 12/6/2013, LJN: CA3005.
144. District Court of The Hague, 30/10/2012, LJN: BY4999.
145. For instance, District Court of Amsterdam, 24/5/2012, LJN: BX3388.

Wira, this was only theoretically possible, as the Dutch Supreme Court (*Hoge Raad*) ruled that a violation of procurement law, in principle, did not warrant the conclusion that the agreement that was concluded would be void.[146] The Wira introduced the grounds of nullity (or 'ineffectiveness' in the terminology of the Directive) enshrined in Article 2d of Directive 2007/66/EC. Secondly, the Wira introduced the concept that an award decision shall contain all the relevant reasons. This is one of the few instances where the Wira went beyond minimum implementation. The Directive requires Member States to provide that the award decision contains a summary of the relevant reasons, yet the Dutch legislator has decided to require all the relevant reasons. The Wira and its successor, the Public Procurement Act 2012, apply to contracts concluded after 20 December 2009.

In Section 4.3 of the Public Procurement Act 2012, the grounds for terminating contracts (previously listed in section 8 of the *Wira*) are listed. There is some discussion in the case law where it concerns the possibilities for judges in interim proceedings to terminate contracts on grounds related to procurement law other than the ones listed in this section, with the Courts of Appeal of The Hague and Amsterdam taking a different approach. The Court of Appeal of The Hague takes the approach that agreements can never be set aside/terminated on grounds other than those listed in Section 4.15. The Court does however admit claims for a prohibition of (further) execution of the contract in very limited cases, i.e. where a contracting authority has abused its powers or where execution of the contract would lead to a breach of formal law or infringe public order or public morality.[147] The Court of Appeal of Amsterdam takes a broader view of the possibilities for annulment, and has ruled that other reasons – such as a 'regular' breach of procurement law – could lead to annulment or prohibition of execution of the contract, also in appeal.[148] This issue has not yet been finally resolved by a ruling of the Supreme Court.

As far as the authors are aware, no court decisions have been published where an agreement was annulled on the basis of the Public Procurement Act 2012 or the prior *Wira*. An action for annulment was brought only in a hand-

146. Except for the existence of 'special circumstances', which, as far as the authors are aware, have never occurred in published case law. HR 22/01/1999, NJ: 2000,305.
147. See: Court of Appeal of the Hague 17/5/2011 LJN: BQ4365; Court of Appeal of the Hague 17/5/2011, LJN: BQ5659; Court of Appeal of the Hague 17/7/2012, LJN: BX0981.
148. See for instance: Court of Appeal of Amsterdam 17/8/2010 LJN: BN5585.

ful of cases.[149] This could be explained, as mentioned above, by the preference for tenderers to choose the route of starting a summary trial, where award of the contract is still an option, instead of the lengthier route of a procedure on the merits. Recently, a summary trial judge has ruled for the first time that an action based on the *Wira* would probably be successful in a case on the merits.[150]

Another novelty that the implementation of Directive 2007/66/EC introduced is the obligation for contracting authorities to state all relevant reasons in the decision to award the tender. Should the contracting authority fail to state all relevant reasons, then the Alcatel standstill period during which the contract cannot be signed does not commence. The Dutch Supreme Court has recently delivered two judgments (in joined cases) where it interpreted this provision quite strictly. The Supreme Court took the view that contracting authorities are in principle not allowed to add other relevant reasons to the ones listed in the communication of the award decision, as this would infringe the fundamental principle of non-discrimination and equal treatment. As a result, contracting authorities now have to include all the applicable grounds for the exclusion of any tenderer in their first communication.[151]

Outside of the scope of Directive 2004/18/EC, the regime of effective remedies is also applicable, and the regime applies to private procurement procedures as well, although the regime as such is less effective in those procedures. The sanction of annulment of the contract in the meaning of Article 4.15 Public Procurement Act 2012 does not apply in these cases.[152] Even more importantly, private contractors are able to limit the legal remedies available to undertakings extensively (i.e. with regard to the required motivation of the award decision and with regard to the required stand still peri-

149. See for instance: District Court of the Hague 30/11/2010, LJN: BO9252; District Court Breda 30 March 2011 LJN: BP9751. Court of Appeal of the Court of Leeuwarden 15/05/2012, LJN: BW6167; District Court of The Hague, 27/02/2013 LJN: BZ3895, District Court of the Middle-Netherlands 15/05/2013, LJN: CA0341.

150. See: District Court of the Eastern-Netherlands 15/2/2013 LJN: BZ3890.

151. See: Dutch Supreme Court 17/12/2012, LJN: BW9231 and LJN: BW9233. It is not entirely clear whether contracting authorities are allowed to 'repair' a faulty communication of an award decision, simply by taking a brand new award decision which states all the relevant reasons – even if this does not lead to a different winner of the contract. Recently, the interim judge of District Court of the Hague has allowed this practice (ruling on 17/4/2013, LJN: BZ7736).

152. In that sense a recent judgment by the District Court of Amsterdam seems erroneous. See: District Court of Amsterdam 21/9/2012, LJN: BX9050.

od).[153] Voluntary *ex-ante* transparency notices seem to be used quite regularly by contracting authorities too.[154]

A final word on alternative dispute settlement. In the past, the *Raad van Arbitrage voor de Bouw* (the Arbitration Tribunal for the Construction Sector) played a key role in the settling of procurement disputes, setting many important precedents. Many procurement regulations dealing with works tenders provided an arbitration clause, thus making arbitration tribunals competent to rule on procurement disputes. In 2004 and 2005 the regulations were amended so that they did not contain an arbitration clause any longer.[155] Since then, the role of this arbitration tribunal as the leading procurement disputes settlement body has been taken over completely by the public (civil) courts.[156] It may however be possible to witness a revival of the out-of-court settling of procurement disputes as a result of the Public Procurement Act 2012 that explicitly allows the settling of procurement disputes by invoking arbitration.

Curiously, the Act itself does not provide an explicit legal base for the formation of a brand new Committee of experts on procurement (*Commissie van aanbestedingsexperts*).[157] The Committee however is formed on the initiative of the Minister of Economic Affairs and is government funded.[158] It has the aim of providing an inexpensive and low-key alternative to litigation in

153. Dutch Supreme Court 03/05/2013, LJN: BZ2900.
154. A July 2013 search for voluntary ex-ante transparency notices on TED in the Netherlands led to 147 hits (since its introduction in December 2009).
155. This was a result of the grand scale fraud in the construction sector (*'Bouwfraude')* which came to light in 2001-2002, after which the Government at that time decided to transfer the competence on procurement matters from the Arbitration Tribunal to the civil courts. Some authors allege this was done because the Arbitration Tribunal for the Construction Sector is not a court or tribunal in the meaning of Article 267 TFEU (and therefore does not have the competence to request prejudicial decisions from the CJEU). Therefore, it fails to meet the requirement of Article 2(9) of Remedies Directive 89/665/EEC that the body which conducts the judicial review must be a court or tribunal within the meaning of Article 267 of the Treaty on the Functioning of the European Union.
156. 'Aanbestedingsrechtspraak in Nederland: 1 september 2004 – 31 augustus 2009', Final report, june 2010, Van Doorne NV / Ministry of Economic Affairs, p. 43.
157. Article 4.27 merely supplies that the Minister should encourage the formation of such Committee. As a consequence, the new Committee does not have the authority to hand out rulings which are binding on the contracting authority.
158. The members of the Committee are appointed by the Minister of Economic Affairs, vide article 3 *Reglement Commissie van Aanbestedingsexperts* (Regulation for the Committee of Procurement Experts).

procurement law. (Potential) tenderers can submit complaints to the Committee, in practically any form; there are few formal requirements other than that the tenderer first submitted his complaint to the contracting authority and that the complaint is properly substantiated.[159] The Committee is, however, not obliged to take a complaint into consideration.[160] The opinions of the new Committee are published. It is important to note that these opinions lack binding force.[161] Because of this, neither the contracting authorities nor the courts are legally held to take them into consideration. Therefore it still remains to be seen whether this Committee will be able to play a meaningful role in procurement practice.

Conclusion and reform

Question 14

The answers to the previous questions have resulted in a broad discussion of relevant issues relating to their respective area of public procurement. As such, aspects which are particularly relevant for the jurisdiction of the Netherlands have been discussed in passing. Challenges, issues and best practices related to these topics have been considered alongside the answer of the question. Their discussion contained numerous viewpoints, such as the principles and goals of public procurement law. The authors have adopted this approach because many of these additional topics are best discussed within the context of their specific situation and can often not be assessed in a separate manner.

---

159. See article 8 *Reglement Commissie van Aanbestedingsexperts* (Regulation for the Committee of Procurement Experts). However, the step of first filing a complaint with the contracting authority, can be skipped if the contracting authority did not indicate how to submit a complaint in its tender documentation. It is expected that the requirement of substantiating the complaint will be easy to meet, as the whole idea of the Committee is to provide a low-key alternative to government courts.
160. See article 10 *Reglement Commissie van Aanbestedingsexperts* (Regulation for the Committee of Procurement Experts).
161. See articles 12, 13 and 14 *Reglement Commissie van Aanbestedingsexperts* (Regulation for the Committee of Procurement Experts). The first non-binding decision of the Committee was published on 12 June 2013 and concerned the proportionality of liability clauses. See: https://www.commissievanaanbestedingsexperts.nl/aansprakelijkheidsregeling-disproportioneel.

POLAND

Aleksandra Sołtysińska[1]

The context

Question 1

Polish regulations pertaining to public procurement are based on the mixed model, in which occur elements of civil, administrative and public commercial law; and thus:

- a public procurement contract is a civil law contract,
- the method of awarding contracts is based on the institution of tender, where on the one side there is the contracting entity, which organizes the tender, and on the other side there are economic operators competing for the procurement,
- the method of awarding contracts – the tender procedure – has been regulated in a separate act – Public Procurement Law – and it is fairly detailed as to the specification of the contracting entity's obligations; within the framework of the tender procedure determined by the legislator, the contracting entity stipulates their requirements concerning a specific procurement order; additionally, most contracting entities have developed their own internal codes regulating the tender committees' conduct and procedures;
- the obligations of the contracting entities during the tender proceedings are translated into the rights of the economic operators, the exercise of which may be pursued with the use of the appeal procedure before the National Chamber of Appeal and subsequently before court;
- the tender procedure, which aims at awarding a contract on public procurement, is to a considerable degree regulated by mandatory provisions of law, which limit the contracting entity's freedom of entering into standard civil law contracts with reference to the following areas: free choice of

1. PhD, the Jagiellonian University in Cracow, The Chair of European Law.

the contractor, freedom to shape the content of the contractual provisions and free choice of the contract form;

- the inequality between the parties of the public procurement contract lies in granting some specific legal instruments solely to the contracting entity – a body acting in the public interest and satisfying some specific needs of the public; and the risk of the contracting entity's failure in achieving the intended goal is of a different nature than regular risk undertaken in business operations, since it would lead to the situation in which justified needs of the general public would remain unsatisfied;
- the provisions of the act Public Procurement Law limit the freedoms stemming from civil law also with reference to the content of the contract; the aim of those limitations is to safeguard effective expenditure of public money as well as observance of the principles of fair competition and equal treatment: they introduce obligatory measures for securing fulfilment of the contractual obligations, a prohibition of introducing significant changes to the contract or regulations concerning the contract duration time;
- the contracting entity has been granted the right to renounce a contract in the event of a material change of circumstances causing that the execution of the contract is no longer in the public interest, and which could not have been foreseen at the time of entering into the contract;
- the tender proceedings are subject to supervision and review by authorized administrative (reviewing) bodies: the President of the Public Procurement Office, the Supreme Chamber of Audit[2] and Regional Accounting Chambers;
- the content of public procurement contracts is open to the public;
- tender proceedings are conducted in a manner ensuring fair competition and equal treatment and in compliance with the principles of transparency and open access to information; the aforementioned principles grant economic operators certain rights, the execution of which may be pursued before a special supervisory body – the National Chamber of Appeal;
- the tender proceedings regulated in the act Public Procurement Law have been modelled on Directives 2004/18 and 2004/17;
- similar principles apply to procurement that falls outside the scope of Directives 2004/18 and 2004/17, albeit the procedures are slightly less for-

2. *Najwyższa Izba Kontroli* – (another translation that may be encountered: *the Supreme Chamber of Control*).

malised, and the economic operators' powers to challenge the contracting entity's decision before the National Chamber of Appeal are limited.

The boundaries of EU public procurement law

Question 2

The definition of a public contract has been given in the act Public Procurement Law and modelled on the definitions used in Directives 2004/18 and 2004/17 – a public contract is a contract for pecuniary interest concluded between the contracting entity and an economic operator, which has as its object services, supplies or construction works. The meaning of the terms: pecuniary interest, services, supplies and construction works has been modelled on the one given to them in Directives 2004/18 and 2004/17 and interpreted in domestic practice and case-law in compliance with the EUCJ case-law.

In principle, the obligation to launch tender proceedings emerges in the situation when provision of certain services, supplies or construction works does not take place within the framework of the central or local administration system, but it is 'contracted out' and performed by a subject selected in the competitive tender procedure. The acts regulating the system of administration in Poland enumerate the tasks performed by competent bodies and the manner of their financing. Performance of certain tasks is 'contracted out' if there is an intent to enter into a relationship between the contracting entity and a separate and independent subject, which however does not necessarily operate in the competitive market or in the private sector, since it is possible for another contracting entity or one of its organisational units to act as a service provider, supplier or contractor. Nevertheless, entering into the said relationship requires both parties' consent and is based on consensual cooperation.

Tasks commissioned by one administrative authority or unit to another fall outside the system of public procurement – for example: the state delegates certain tasks to local governments by way of a legal regulation or individual agreements, and the fact entails direct assignment of funds for this purpose as well as supervision.

Communes (gminy) are obliged to perform the tasks conferred to them by statutory regulations; on the other hand, undertaking tasks falling within the scope of central government administration by way of an agreement is voluntary, and the consent is given in the form of resolution. The legal character of

such agreements is currently disputed – there are views to be found in the doctrine which hold that they are civil law contracts, and there are others claiming that they are administrative contracts which may nevertheless generate certain civil law results (in particular, disputes about property resulting from these agreements are settled in accordance with civil procedure). Administrative contracts, while establishing an obligation to perform certain public tasks, simultaneously confer the competences to apply administrative law procedures of conduct.

The rules and time schedules for transferring funds for performance of the delegated tasks are specified by the law or in the agreement. Such funds are subsidies designated for the performance of the delegated tasks and they may not be used for financing any other tasks.

Question 3

In-house arrangements have not been fully defined in the act Public Procurement Law, yet they have been accepted in the practice of court decisions in compliance with the EUCJ guidelines included in e.g. the *Teckal* or *Coditel Brabant* cases, which requires examination in every individual case whether the conditions of holding control over the dependent subject and the performance by the said subject of tasks predominantly for the contracting entity have been fulfilled. Admissibility of *in-house* arrangements stems from the interpretation consistent with European Union law of the concept of *public procurement* itself as a contract concluded between two independent subjects. Additionally, it takes into account the specific character of administration functioning, which permits creation of organisational units to facilitate smooth and efficient performance of public tasks.

Moreover, the provisions of the act Public Procurement Law explicitly state that tender procedures are not to be applied to public procurement granted to public sector enterprises by public authorities which are the founding entities of the enterprises in question if the following conditions are fulfilled:

- the principal share of the public sector enterprise business activities are public tasks performed for the benefit of this public authority,
- the public authority supervises the public sector enterprise in a manner that is equivalent to the supervision over its own units which are not legal persons, and, in particular, it influences strategic and individual decisions concerning the management of the enterprise affairs,
- the object of the procurement falls within the scope of the public sector enterprise principal business activity.

A public sector enterprise is a legal and organisational entity which performs certain selected tasks for remuneration and covers its costs and obligations out of its income. The public sector enterprise has legal personality, and, because of that, granting it an *in-house* contract will be admissible only if it is its founding entity that awards the contract and provided that the aforementioned conditions are met.

In other cases, the manner of making *in-house* arrangements depends on the relation between the contracting entity and the dependent enterprise:

- if the dependent enterprise has legal personality, the *in-house* arrangement may adopt the form of a contract; or, alternatively, the articles of association of such legal person may stipulate that certain services shall be provided for the benefit of the founding entity, and in such case it is not necessary to make a contract, and the services may be financed with the funds from a subsidy,
- if the dependent enterprise has no legal personality, but it is an organisational unit set up for the performance of certain tasks, the commission of certain services is done by way of internal acts.

Separate provisions stipulate that the commune (gmina) may set up its own organisational units for the purpose of discharging some of its responsibilities. Provisions on public procurement are not applicable in such cases, and it is not necessary for the commune to make contracts with its own organisational unit. It is accepted in the case-law and in the doctrine that the ground for commissioning these tasks is the very act of the competent commune authority establishing this unit and specifying the scope of its operations. There is also some room in the relations between the commune and the organisational unit it has established for concluding a public procurement contract on services, supplies or works for the commune, but it is only possible on condition that the commission will concern tasks that fall outside the scope of operations for which the unit has been set up by the commune.

Commune organisational units may adopt different legal forms – they may remain within the commune structure or become separate entities, such as a civil law or commercial partnership, a foundation or a public sector enterprise or company. Separate entities may run business operations or some other types of activity (e.g. a health service foundation), they may be legal persons or not.

All the aforementioned organisational units may be set up by individual units of local self-government solely for the purpose of performing their own

tasks or the ones commissioned to them, and they may not be established for any other purpose.

Polish law provides for a possibility of cooperation between contracting entities for the purpose of performing public tasks outside the system of public procurement. For example, communes may establish communal unions and partnerships as well as associations if discharging certain duties separately and independently exceeds their individual technical and financial capacities.

Recently, some doubts have emerged in publications on the matter as to the question whether awarding *in-house* contracts may be viewed as the contracting entity's right grounded in Directive 2004/18. The dispute concerns the regulations implemented by the Polish legislator which impose on communes the obligation to award public procurement contracts on waste disposal and utilisation services – the act in question imposed on all communes the obligation to launch tender proceedings in order to award the said contracts and thus excluded the option of performing these tasks by the communes themselves with the use of their own organisational units. The question concerning this matter has been referred to the Constitutional Tribunal.

Question 4 and 10

An example of contractual arrangements between public and private sectors are relations established pursuant to the Act on Public Benefit and Volunteer Work called in the publications on the matter – public social partnerships. Public benefit activities are in this case activities which are useful for the public, undertaken by non-governmental organisations in the sphere of public services. The cooperation may be established by way of entering into a contract on local initiative implementation or into a partnership agreement. Public administration authorities observe the principles of fair competition and transparency, so commissioning public services to non-governmental organisations takes place after all the tenders have been submitted and evaluated in an open contest.

Another example of relations between public authorities and the private sector are public private partnerships, where the object of choice is the private partner, and not a specific service or product. In compliance with the Act on Public Private Partnership, it is a cooperation of a public entity with a private partner, based on a contract, serving the purpose of providing some public service on the conditions and with the division of risk stipulated in the provisions of the contract concluded by the parties.

Question 5

Polish law does not contain any special regulations concerning mixed arrangements within the meaning of the judgments in cases C-145/08 and C-149/08 *Loutraki* or C-215/09 *Mehiläinen Oy*. If a part of the contractual provisions were referring to a public procurement, which should have been awarded by way of tender proceedings, review authorities would certainly consider the fact of entering into such a contract as an infringement of public procurement rules. The contract in question would be declared ineffective in the part in which it in fact awarded a public contract, pursuant to the provisions of the act Law on Public Procurement on the rights of contractors, suppliers and providers to legal remedies as well as on the competence of the Public Procurement Office President to refer the case to court in order to obtain a decision declaring such contract ineffective.

The general principles of EU law: public procurement law and beyond

Question 6 and 7

The act Law on Public Procurement contains detailed regulations concerning the award of public contracts not covered by Directive 2004/18, and they are similar to the rules governing the award of the so-called European Union public contracts, albeit far more liberal. At the award of contracts below the European thresholds, it is not obligatory to publish a contract notice in the Official Journal of the EU, submit certain specific documents as to the contractors' capacity to carry out the contract, demand deposits or perform other formalities. The contracting entity may apply other tender procedures while awarding a contract not covered by Directive 2004/18, e.g. a request for quote.

Public contracts of the value not exceeding the equivalent of 14,000 euros do not have to be awarded in tender procedures.

Utilities contracts of the value not equal to or not exceeding the thresholds determined in Directive 2004/17 do not have to be awarded by way of tender procedures.

In practice, contracting entities generally observe the guidelines of the European Commission Communication recommending application of the principles of equal treatment and transparency in the case of domestic contracts

which are likely to stir some interest abroad. Such practice is required especially with public contracts financed out of the European Union funds.

The Polish provisions of law differentiate between concession contracts and concession as a method of regulating economic activity of certain types. The latter concession may be defined as a unilateral administrative decision within the meaning of the question asked, which grants a given entity the right to carry out certain economic activity on the conditions specified in the decision or in the provisions of law. The legislator regulated the requirements to qualify for a concession separately depending on the type of activity – in general, equal treatment and transparency apply to the process of issuing such decisions, and the requirements for granting a concession should be objective.

Public procurements and general EU law, including competition and State aids law

Question 8

Contracting entities are obliged to describe the subject of contract in compliance with the rules implemented from Directive 2004/18 and Directive 2004/17. The purchased services and supplies respond to the justified needs of the contracting entity, and the description of the contract subject must be compliant with the principle of fair competition.

The practice of review authorities indicates the necessity of observing the rule of fair competition – contracting entities are not completely free with reference to the subject of their purchase – while describing the purchased products, services or construction works, contracting entities are aware of the obligation to substantiate the content and manner of the description.

Description of the procurement subject indicating national or regional preferences is prohibited as non-compliant with the principle of equal treatment. An exception are the so-called Union preferences directly implemented from the Sector Directive 2004/17.

Contracting entities may impose higher requirements on products and services than the ones stipulated in the European Norms if their needs call for it, and such practice is not contradictory to the provisions of Directives 2004/18 and 2004/17.

Question 9

Descriptions of procurement subjects may in practice lead to limitation of competition, especially if the contracting entity intends to buy a specific product or service, but since they cannot specify the make or the trade mark, they enumerate all the elements of a given product or service, which actually narrows down the pool of potential contenders to the one offering the preferred procurement subject.

The review authorities point out to the following errors made by contracting entities in their descriptions of procurement subjects:

– too detailed description, which leads to limitation of fair competition,
– absence of any justification for certain requirements imposed by the contracting entity on products, services or manner of carrying out the contract,
– absence of equivalence criteria, or various interpretations of the concept of equivalence.

Strategic use of public procurement

Question 11

The act Law on Public Procurement permits the use of the process of awarding public procurements for the purpose of achieving other goals than effective expenditure of public funds, yet contracting entities do not have any considerable experience in this respect.

One of the elements of broadly understood description of the procurement subject are the requirements for the performance of the contract. The contracting entity may specify its requirements as to the manner of performing the contractual obligations, such as:

– employment of unemployed or adolescent persons for the purpose of granting them some professional experience,
– employment of disabled persons,
– establishment of a training fund within the meaning of the provisions on the promotion of employment and labour market institutions in which the payments made by employers would constitute at least a quadruple of the lowest payment specified in these provisions, or increasing the employers' payments to the training fund to this amount.

The requirements must comply with the principle of non-discrimination derived from the TFEU, and they are binding at the stage of the performance of the contract – economic operators applying for the award of the contract are not obliged to meet the aforementioned requirements before signing the contract.

Additionally, at the stage of evaluating the potential contractors' capacity to carry out the public contract, the contracting entity is obliged to exclude such candidates or tenderers who have been convicted for an offence against the environment, against the rights of people performing paid work, or an offence of infringing the regulations on employing foreigners residing on the territory of Poland against the provisions of law.

Implementing Directive 2004/18, Polish legislator introduced a measure allowing contracting entities to make a reservation in the public procurement notice that only such operators are eligible for the award of the contract whose employed staff are composed in the proportion of over 50% of disabled persons within the meaning of the Polish Act on Occupational and Social Rehabilitation and Employment of Disabled Persons or within the meaning of applicable provisions of the Member States of the European Union or the European Economic Area.

The Public Procurement Office presents recommendations and undertakes actions of information dissemination concerning the so-called green procurement.

Question 12

Activities promoting the use of public procurement as a tool to foster innovative solutions have been undertaken in the recent years. They include publications, trainings and conferences. Nevertheless, in practice only a small number of tender proceedings now in progress have set promotion of innovation as their goal.

Remedies

Question 13

The system of legal remedies to which contractors and other entities are entitled in Poland is regulated in the act Law on Public Procurement, and it is modelled on the regulations of Directives 89/665 and 92/13.

Poland has also implemented Directive 2007/66 introducing standstill periods and the sanction of the contract ineffectiveness.

The standstill period

The act Law on Public Procurement stipulates two obligatory standstill periods:

- the contracting entity concludes the public procurement contract within the time limit no shorter than 10 or 15 days (depending on the selected mode of communication) from the day of dispatch of the notice informing on the selection of the best tender – if the contract in question falls within the scope of Directives 2004/18 or 2004/17,
- the contracting entity concludes the public procurement contract within the time limit no shorter than 5 or 10 days (depending on the selected mode of communication) from the day of dispatch of the notice informing on the selection of the best tender – if the contract in question does not fall within the scope of Directives 2004/18 or 2004/17.

The aforementioned time limits allow the interested economic operators to submit an appeal against the decision of the contracting entity on the selection of the best tender. From the time of submission of the appeal onwards, the period of obligatory suspension of the contract conclusion is prolonged basically until the date when the case is finally adjudicated by the National Chamber of Appeal.

The contracting entity may conclude the public procurement contract before the expiry of the standstill periods in the following cases:

a) there is only one interested economic operator taking part in the procurement proceedings:
   - only one tender has been submitted in the open tender proceedings,
   - only one tender has been submitted in the restricted tender proceedings, negotiated procedure with publication or competitive dialogue, or, if an economic operator has been excluded, the deadline for submission of an appeal against this exclusion has expired, or upon submission thereof the National Chamber of Appeal has announced its judgment or decision concluding the appeal procedure, or
b) the contract concerns a procurement awarded in the negotiated procedure without publication, in the dynamic purchasing system or on the basis of a framework agreement, or

c) no tender has been rejected in the public procurement proceedings falling outside the scope of Directive 2004/18 and:
   - no economic operator has been excluded in the open tender procedure or request for quote,
   - in the case of restricted tender proceedings, negotiated procedure with publication, competitive dialogue or electronic bidding, the deadline for submission of appeal against the exclusion of an economic operator has expired, or the National Chamber of Appeal has concluded the appeal proceedings instigated upon submission thereof.

Interim measures

The provisions of the act Law on Public Procurement stipulate that if an appeal has been submitted, the contracting entity may not conclude the contract until the National Chamber of Appeal has announced its judgment or decision concluding the appeal proceedings.

The contracting entity may submit a request to the National Chamber of Appeal for the prohibition on concluding the contract to be revoked. The Chamber may revoke the prohibition on concluding the contract if the contracting entity's failure to conclude the contract may cause negative consequences for the public interest, particularly in the fields of public defence and security, exceeding the benefits gained from the necessary protection of the interests of all the parties which may have, with some probability, suffered damage as a result of the actions undertaken by the contracting entity in the procurement proceedings.

Annulment of the contract

Admitting the appeal, the National Chamber of Appeal may – if the protested public procurement contract has been concluded:

- annul the contract; or
- in justified cases, annul the contract with reference to the obligations that have not been fulfilled and impose a financial penalty, especially when it is not possible to return the services or supplies provided on the basis of the contract being annulled;

or

– impose a financial penalty or decide to shorten the duration of the contract if it finds that upholding the contract promotes important public interest, particularly in the fields of public defence and security; the act Law on Public Procurement states that important public interest does not mean economic interest directly connected to the procurement, and in particular the costs incurred as a result of delaying the execution of the procurement contract, launching new public procurement proceedings, awarding the contract to another contractor, supplier or service provider or legal obligations resulting from annulling the contract. Economic interest in upholding the contract may be considered an important public interest only if annulling the contract would bring about disproportionate consequences,

or

– if the public procurement contract was concluded in the circumstances admitted in the act – state the infringement of the provisions of the act.

In principle, annulling the contract is effective from the moment of its conclusion.

The National Chamber of Appeal may not annul a contract if it would constitute a serious threat to the broader programme of public defence and security necessary due to the interests of the security of Poland.

Financial penalties

The financial penalties imposed on the contracting entity are up to 10% of the value of the contractor's remuneration stipulated in the concluded contract, depending on the type and extent of the infringement as well as on the value of the contractor's remuneration stipulated in the concluded contract for which the penalty is being imposed.

If the National Chamber of Appeal finds that the infringement concerns the standstill period, and no other provision of the act Law on Public Procurement has been violated, it imposes on the contracting entity a financial penalty of up to 5% of the value of the contractor's remuneration stipulated in the concluded contract, depending on all the relevant circumstances in which the procurement was awarded.

Grounds for annulling a contract

Deciding whether to annul a contract, the National Chamber of Appeal takes into account all the relevant circumstances, including the gravity of the infringement, the contracting entity's conduct as well as the consequences of the contract annulment.

The act Law on Public Procurement stipulates that a contract may be annulled by the National Chamber of Appeal on the following grounds recommended in Directive 2007/66:

- concluding the public procurement contract without prior dispatch of the contract notice to the Publications Office of the European Union or application of the negotiated procedure without publication or sole-source procurement procedure in violation of the provisions of the act,
- concluding the public procurement contract in violation of the standstill period if the fact rendered it impossible for the National Chamber of Appeal to admit an appeal before the contract conclusion,
- the contracting entity rendered it impossible for contractors hitherto not admitted to participation in the dynamic purchasing system to submit their indicative tenders or rendered it impossible for contractors admitted to participation in the dynamic purchasing system to submit their tenders in the procurement proceedings launched in this system,
- the contracting entity awarded the procurement on the basis of a framework agreement prior to the expiry of the standstill period when there were several contractors.

Voluntary publication of the intent to conclude a contract

The contract shall not be annulled if the contracting entity launched the negotiated procedure without publication or the sole-source procedure having reasonable grounds to believe that they were acting in compliance with the act, and the contract was concluded after the period of 5 days from the date when the notice on the intent to conclude the contract was published in the Public Procurement Bulletin or after the period of 10 days from the date when such notice was published in the Official Journal of the European Union.

In the case of the dynamic purchasing system or the framework agreement, the contract shall not be annulled if the contracting entity had reasonable grounds to believe that they were acting in compliance with the act, and the contract was concluded after the expiry of the standstill period.

Other grounds for annulment

The sanction of ineffectiveness may also be imposed on public procurement contracts falling outside the scope of Directives 2004/18 and 2004/17.

Even before the implementation of Directive 2007/66, the act Law on Public Procurement introduced prerequisites for public procurement contract annulment, which constitute *lex specialis* provisions with reference to the provisions of the civil code.

A contract may be annulled in the part going beyond the description of the subject of procurement contained in the specifications. Any significant amendment of the contract may also be annulled if the possibility of making such amendment as well as conditions for making thereof had not been provided for in the procurement notice or specifications.

The President of the Public Procurement Office may apply to court for annulment of a contract on the aforementioned grounds within the period of 4 years from the date of its conclusion or amendment.

General information on the system of appeals

Poland has implemented all the legal remedies provided for in the appeal directives, albeit interim measures are no more than automatic and obligatory prohibition of concluding the contract until the National Chamber of Appeal has issued its final judgment. The proceedings before the National Chamber of Appeal are based on the principle of quick pace – the judgment should be announced within the period of 15 days. The most extensively used legal remedy is the one available at the first instance, aiming at challenging the contracting entity's decision made in the course of the tender proceedings (prior to the conclusion of the contract), i.e. the appeal to the National Chamber of Appeal, which may result in the order imposed on the contracting entity to perform or repeat some action or in the order annulling some action of the contracting entity. Due to high cost of court proceedings at the second instance, contractors rarely use the remedy of complaint against the judgment of the National Chamber of Appeal. Only sporadically are claims for damages encountered in the judicial practice.

Interestingly, legal remedies concerning the procedure of concluding concession contracts on construction works and services have been regulated in a different manner – the complaints are lodged with the competent regional administrative court, and the proceedings follow the rules stipulated in the provisions on the procedure before administrative courts.

In practice, both contracting entities and economic operators point out to the impossibility of obtaining uniform interpretation of the provisions on public procurement and to the resulting uncertainty – each of the numerous review authorities have developed their own rules on how the procurement proceedings ought to be correctly conducted. Therefore, on the one hand rigorous review of tender proceedings forces contracting entities to observe the provisions of law and ensures their effectiveness, on the other hand, however, the extensive review system leads in some cases to contradictory appraisals of the same action undertaken by the contracting entity.

Conclusion and reform

Question 14

The suggestions put forward in the proposals for new directives coordinating public procurement procedures may contribute to the increased flexibility of tender procedures, and particularly to introducing changes into the stage of evaluating the contractors' capacity to execute the contract and into the grounds for exclusion. The EUCJ emphasised, in its numerous judgments on public procurement, the prohibition of automatism and the necessity of individual valuation of each contractor's situation with regard to possible infringement of the principle of fair competition. The provisions introducing the so-called *self-cleaning* are also an interesting solution.

Polish law already contains provisions regulating concessions on construction services and works as well as regulating public-private partnerships, so the proposal for a new directive on concessions will not introduce any significant changes to the legal system.

PORTUGAL

Ana Luísa Guimarães[1]

The context

Question 1

Portuguese Public procurement law is founded not only in European Law but also in the Portuguese Constitution and in Constitutional Law, as is the case with some other EU Member States. In spite of there not being any express references to the Public Administration's pre-contractual activity, the Portuguese Constitution allows the detection of certain guidelines that the legislator can't ignore when constructing the legal framework related to public procurement.

Amongst these references we can find concrete legal principles that are in line with the Constitution and that must guide administrative activity (such as the principle of public interest, of efficiency, of proportionality, of transparency and of equality), and we can also find the assumption, on the part of the State, of the task to protect effective competition in the economic landscape and to safeguard the freedom of economic initiative.

Based on these constitutional provisions that are relevant in terms of public procurement, the legislator is forced to regulate in such a way as to effectively comply with said principles. However, it should be remembered that, given their density as principles and their reciprocal overlapping, these principles must be weighed up against each other and pondered contemporaneously, which means that the legislator cannot escape the need to resolve the conflicts amongst them, which, in turn, inevitably often leads to reducing the protection afforded to the principles (abstractly) in conflict.

Indeed, the main challenge faced by the national legislator in this area rightly lies in trying to find a balance between the various underlying inter-

1. Senior Associate, *Sérvulo & Associados, Sociedade de Advogados, RL,* Lisbon (www.servulo.com).This report reflects only the views of its author and not those of the Firm or its clients. The author would like to thank Eva Montenegro Oddo for the useful contribution in the revision of the text.

ests and objectives of public procurement law, especially with regards to the contracts not covered by European directives, and where, therefore, States' room to manoeuvre is, in principle, larger. Moreover, this challenge is all the greater when we consider the current crisis Portugal is going through.[2]

The national legislator (currently the legislator of the Public Procurement Code, approved by Decree-Law n. 18/2008, of January 29, hereinafter only referred to as the CCP) considering, on the one hand, the principle of public interest, especially in terms of administrative efficiency, and, on the other, that of competition, allows direct awards for contracts under a certain value, eliminating the need to publish a tender notice, on the understanding that the economic benefit does not justify an open competitive tender. And, in these cases, the legislator allows the contracting authorities to invite only one entity, thereby leaving to the discretion of the contracting authorities the selection of the invited entities.[3]

However, the jurisprudence of the TJUE has been invoked, especially by the Court of Auditors, in spite of some criticism on the part of the doctrine, for deeming illegal inviting only one entity to a direct award. It is in this context that a fog of legal insecurity falls on the contracting authorities, since, in spite of there being a legislative norm that clearly allows them to act in a certain way, at present they don't feel confident enough to choose the best procedure to be adopted.

2. As a result of which, moreover, the value of concluded public contracts has been decreasing. For a statistical analysis of this matter see Relatório da Contratação Publica em Portugal, 2011, Instituto Nacional da Construção e do Imobiliário (InCi) – http://www.base.gov.pt/base2/downloads/RelContr_Pub_2011.pdf
3. This is, therefore, a vote of confidence in favour of contracting authorities, but it is also counterbalanced by some other rules, such as the restriction on inviting an entity with which other contracts of over a certain value have already been concluded. This rule is, in fact, a concretisation of the principles of competition and impartiality, although it could be argued that, in this case, the legislator excessively sacrificed the principle of public interest.About scuh rule of the CCP, cf. João Amaral e Almeida/Pedro Fernández Sánchez, 'O limite à contratação reiterada da mesma entidade no âmbito do procedimento de ajuste directo (n.º 2 do artigo 113.º do CCP)', *in Temas de Contratação Pública, I*, Coimbra Editora, Coimbra, 2011, pp. 291 ff..

The boundaries of EU public procurement law

Question 2

It was the CCP, that firstly defined public contracts within the scope of the Portuguese public procurement framework.

The CCP offers a very wide definition of *public contracts* definition that goes further than the strict obligation of transposing the European directives of 2004. A public contract is defined as any contract entered into by a contracting authority and whose object includes obligations that are, or are likely to be, subject to market competition, namely because of the contract's nature or characteristics, as well as due to the position of the parts involved in the contract or because of the context of the pre-contractual stage. This means, as expressly clarified by Portuguese legislation, that the contracts included in the European directives find a place under the scope of this general clause, as do services and works concessions, company agreements and privatization agreements. However, it should be stressed that, apart from these main examples, other contracts may be covered by the wide definition presented above.

It should also be stressed, however, that, for the contracting authorities that are 'bodies governed by public law' (i.e. that are not legal public law entities) the public procurement rules established in the CCP are only applicable in the case of the agreement comprehending provisions for the following contracts: *(i)* works, *(ii)* services, *(iii)* leases or acquisition of goods, *(iv)* works concessions and *(v)* service concessions.

Lastly, within the context of 'special sectors' (Utilities Directive), the scope of the application of the CCP is limited to the same contracts, although in what concerns contracts covered by the European directives (works, services and goods), the provisions of the Code only apply in cases where the value of the contract exceeds the European thresholds.

In terms of distinguishing public contracts from legislative measures and administrative decisions, said distinction is the traditional one between these various concepts. The first element of the concept of public contracts is its bilateral and consensual features, which are the basic criteria used to distinguish public contracts from unilateral administrative decisions and legislative measures.

The concept of concessions could, in fact, raise some problems in what concerns the boundaries of EU public procurement law, as, in its essence, it can be both unilateral (an administrative decision) and bilateral (a contract). In any case, in Portugal the concept is increasingly used less often in its first

sense, and when legislation refers to it in specific rules, it is commonly designated as a contract. This is the case for public domain concessions and generally for concessions for the use of natural resources and for gambling operations, although none of these is deemed a service concession.

However, although Portuguese public procurement legislation is primarily aimed to apply to public contracts, it should be borne in mind that the CCP extends its rules to some administrative decisions (cf. question 7), which goes some way to helping to avoid escaping to the public procurement law.

It is understood that the procurement rules established in the CCP do not apply to legislative measures (due to the fact that no agreement has been entered into). Nevertheless, it is accepted that, by means of the application of the general principles of Constitution and of European law, these legislative measures may be deprived of their effects if they fail to comply with these principles. In this context, it is important to keep in mind that, in accordance with article 18 of Directive 2004/18/CE, the CCP also excludes from its scope the agreements entered into between two contracting authorities provided one of them benefits from the exclusive right to render the services and the award of such exclusive right is compatible with constitutional and European rules and principles. And, turning the viewpoint around, such a contract would not fulfill the concept of 'public contract' since it would include obligations that are not subject to market competition. The attribution of exclusive rights to an entity by means of a legislative measure may therefore be a tempting option given that the control over a legislative measure is traditionally rather limited (at least by the Constitutional Court).

Question 3

In house arrangements are expressly foreseen in the CCP. As from 2008, Portuguese legislation recognizes them as one of the exclusion cases in the application of public procurement rules.

The terms in which in house arrangements are foreseen in the CCP demonstrate a clear inspiration from the jurisprudence of the Court of Justice, arising from the two initial in house tests set in the *Teckal* case (i.e. the requirement regarding the absence of private capital is not expressly foreseen).

Portuguese legislation clearly invokes 'similar control' and the test of the 'essentiality of activities' using the language and concepts used by the Court of Justice in order to admit the interpretations by the Court of these concepts.

Such exclusion does not in itself transform the nature of the agreement; it remains a public contract, although not subject to the entire procurement statutory scheme foreseen for public contracts. Notwithstanding the exclusion of

the application of the general procurement rules set forth in the CCP, the legislation specifies that the excluded contracts, including in house arrangements, shall comply with the general principles applicable to administrative entities and with the rules of the Administrative Procedure Code that reflect constitutional provisions (cf. question 6).

Public-public partnerships or cooperation, in the sense of the case Commission v Germany, have not yet been directly recognized by Portuguese legislation for the purposes of public procurement and have also not yet been discussed by jurisprudence, although they are well known in doctrine. It might only be the transposition of the next revision of the European directives, in case the Commission's proposal is adopted, that will bring this recent concept to the Portuguese legal framework.

In any case, it should be noted that Portuguese legislation establishes that the CCP only applies to contracts entered into between contracting authorities of a public legal personality in case these contracts include provisions for the following agreements: *(i)* works, *(ii)* services, *(iii)* leases or acquisition of goods, *(iv)* works concessions and *(v)* service concessions. One wonders why legislation hasn't established the same rule for agreements entered into between said entities and other contracting authorities of a non-public legal personality. In any case, this limitation to the scope of the rules applicable to public-public agreements means that, apart from the cases in which the in house exemption applies, the procurement rules only apply to public-public partnerships (at least when the parties are public law entities) in case of contracts that include provisions for the above referred contracts.

Question 4

In what regards the contracts expressly excluded by the CCP, a distinction shall be made, as it is easier to separate *absolute exclusions* (i.e. those that apply regardless of the legal nature of the contracting authority) from *relative exclusions,* referring to the ones that depend on the legal nature of the contracting authority.

On *absolute exclusions*, the CCP follows the European directives very closely, so there is no need to mention the ones listed in articles 12 to 18 of Directive 2004/18/CE that are also expressly excluded from the scope of the CCP. That being said, the CCP introduced some innovation in this field (due to its expansive orientation in what regards its own scope of application). In this sense there are some cases of excluded contracts in the directives that are not excluded by the CCP, but that are instead subject to a direct award, the CCP having thereby gone further than the directives regarding these contracts

(this is the case of arbitration and conciliation services and research and development services). Moreover, and bearing in mind the wide concept of public contracts, there are some other contracts that are expressly referred to as falling outside of the public procurement rules and that do not have to be put out to tender (without violating EU directives and rules) and that are not expressly mentioned in the directives as excluded contracts: *(i)* contracts for donations of goods in favor of any contracting authority; *(ii)* contracts by which contracting authorities (of public law personality) sell or rent goods or render services, except if the other party is also a contracting authority; *(iii)* agreements whose main subject is the award of subsidies by public law authorities and; *(iv)* company agreements whose share capital is exclusively held by a contracting authority of public law personality.

In addition to this there are *relative exclusions*, and in fact the public contract concept suffers a direct restriction when the CCP foresees that the procurement rules therein established apply only to *(i)* contracts entered into between contracting authorities of public law personality and *(ii)* contracts entered into by 'bodies governed by public law' *in case* said contracts contain provisions for works, services, leases or acquisition of goods, works and services concession agreements (cf. question 2).

Regarding *privatization agreements*, which are on the Portuguese agenda nowadays, and taking into account that said above in terms of the concept of public contracts and the restriction introduced by the CCP in what regards 'bodies governed by public law', a distinction must therefore be made. A privatization contract entered into by a 'body governed by public law' is not covered by the CCP while a privatization contract entered into by a contracting authority of public law personality must comply with CCP rules. However, there isn't a legal vacuum in what regards public procurement rules applicable to privatization agreements entered into by a 'body governed by public law' (namely public enterprises). Law n. 71/88, of May 24, governs share purchase agreements by public entities, and Law n. 11/90, of April 5, governs the reprivatization of nationalized assets after the revolution of April 1974, and they both establish the need for a public tender under given circumstances. Privatization procedures that have been recently launched in Portugal have been subject to Law n. 11/90, of April 5, and not to the CCP. Notwithstanding this interpretation of the applicable legal rules, it is important to highlight that this issue has not yet been submitted to a jurisprudential decision. Furthermore, it is important to keep in mind that the national legal community does not ignore that, even in the eventuality of the CCP not being applicable, the general principles of EU law apply and so does the construction created by the Court of Justice for this purpose, and the institutionalised public-

private partnerships doctrine adopted by the European Commission and the Court of Justice.

Question 5

In line with the Court of Justice, the CCP expressly welcomes the severability criterion as a condition for entering into mixed arrangements. To this end, the CCP establishes that a mixed arrangement may only be concluded in case the provisions covered by its object are technically or functionally indivisible or, in case they are not, its severability causes considerable inconvenience to the contracting authority. This rule naturally obliges the contracting authority to provide adequate reasoning in case it opts for a mixed arrangement rather than for the celebration of separate agreements.

However, the solution found to determine the public procurement framework applicable to mixed arrangements is, to a certain extent, different from the one achieved by European Law and also from the one established in the previous legislation (revoked by the CCP), which set forth the criterion of the 'most significant financial component'. Instead of applying the European framework of the principal object of the contract to the mixed arrangement, the CCP opts, in most cases, to apply the principle of the most demanding legal regime, which therefore contaminates the other part of the agreement, without considering which is the most important or the most valuable.

The choice of the legal procedure according to the contract value at the conclusion of a mixed arrangement is made on the basis of the contract for which the CCP foresees the lowest value limit.

Additionally, if, regarding any of the provisions included in the mixed arrangement, one of the material criteria applicable to the choice of the legal procedure applies (for example, a material criterion that allows a direct award, apart from the value of the agreement), this circumstance 'contaminates' (here in favor of the contractual component not covered by said material criterion) the other provision covered by the same mixed arrangement and this can therefore be concluded through the procedure allowed by the referred material criterion.

In cases where the mixed arrangement includes provisions for a works, supply of goods or services agreement and for any other contracts (except for a service or work concession or a company agreement), it shall follow the rules applicable to the former group.

Lastly, the CCP anticipates one other possible case regarding mixed arrangements: the combination between provisions of a works, supply of goods or services agreement, service or work concession or a company agreement

and any of the expressly excluded contracts (absolute exclusions – cf. question 4). The public procurement framework applicable to such cases is the same one that is applicable to the part of the mixed arrangements covered by the CCP.

The general principles of EU law: public procurement law and beyond

Question 6

Notwithstanding the exclusion of the application to some contracts of the general procurement rules set forth in the CCP (cf. question 4), said exclusion does not make these contracts completely free in what regards the configuration of the pre-contractual procedure. The CCP specifies that the excluded contracts (cases of absolute exclusion, cf. question 4), including in house arrangements, shall comply with the *general principles applicable to administrative entities* and with the rules of the *Administrative Procedure Code (CPA) that reflect constitutional provisions*.

The effect of this provision is to force the contracting authorities to comply, even in the case of excluded contracts, with the general administrative principles, namely the principles of the pursuit of public interest, of the existence of a procedure, of the decision and its notification, of the involvement of the parties concerned, of justice, of good faith, of proportionality, of efficiency, and, last but not the least, of transparency, equal treatment and impartiality. It is precisely these latter principles that, considered individually, may require the contracting authorities to opt for the most open and most public procedures, as the most adequate way to achieve a truly equal treatment of all the partiesconcerned. In this context, there are two aspects that should also be mentioned, as they have been noted by national doctrine: *(i)* firstly, in cases where the contract can only be concluded with one single operator, due to given circumstances that would also apply in case the contract was not excluded, the demand of its opening to competition may not be made in this context; *(ii)* secondly, these principles cannot be analysed merely from an individual perspective, but have also to be weighed up against other general principles of the administrative activity, such as the public interest principle and, more concretely, the administrative efficiency one, and, as a possible result of this exercise, in certain situations a direct award rather than a more intense opening to the market might be justified (cf. question 1).

Complementarily to the subjection of the excluded contracts (the above referred absolute exclusions) to the general administrative principles, the CCP establishes that contracting authorities that have public law personality may only conclude these contracts with co-contractors that fulfill the legal qualification requirements for the execution of said contracts.

Generally, in what regards the way the CCP treats the concept of public contracts and the contracts not covered or not fully covered by the directives and in favor of an adequate comprehension of how the CCP translates the principles of non-discrimination, equal treatment and transparency into rules, it shall be borne in mind that a wide concept of public contracts has been adopted (cf. question 2), although some specific exclusions are foreseen (cf. question 4). As for contracts covered by the CCP, the latter establishes several procedures,[4] all of them, except for direct award, being initiated by the publication of a contract notice.

Notwithstanding this option in Portuguese legislation, it is important to stress that there is still room for the application of European jurisprudence and *soft law* regarding the contracts not covered, or not fully covered, by the directives (something that is well known in Portugal and that has been invoked), as well as for the application of the general administrative principles that arose from the Portuguese Constitution, in several jurisprudential decisions, mainly of the Court of Auditors (cf. question 1). Further to this application to the above referred (absolutely) excluded contracts, this same can be applied to the referred relative exclusions (cf. question 2) and also to the contracts that, although covered by the CCP, are not subject to an open tender (advertised) due to their value being below the European thresholds, but are instead subject to a direct award (although regulated by the CCP and by several rules and procedural obligations) (cf. question 1).

Question 7

The CCP has a provision which is deemed to be unique within the context of other similar jurisdictions: it expressly foresees that the *procurements rules therein established also apply, with any appropriate adjustments needed, to the procedures of unilateral attribution by public authorities of any advantages or benefits through administrative decisions or the like in lieu of a public contract*.

4. Direct award; public tender; restricted procedure; negotiated procedure (with the prior publication of a notice) and competitive dialogue.

The general legal regime for administrative decisions (including, but not limited to, authorizations and licenses) can be found in the Administrative Procedure Code (CPA), whose rules do not reflect the competition principle to the same extent as public procurement rules, although in many cases unilateral decisions correspond to an economically beneficial award.

If the public contract concept offered by the CCP is so wide that it comprehends not only the contracts that could be private law ones, but also contracts concerning the exercise of public powers, provided they call economic operators or citizens to tender,[5] it is easy to understand why the same should apply to the administrative decisions whose effects are replaced by a contract.[6]

As for the legal condition of the appropriate adjustments needed to be made to the normal framework of the CCP, and although it has not yet been applied in any known Court decision, doctrine has already mentioned that such a decision has two separate implications.[7] Firstly, it forbids the application of the rules that, by their very nature, can only be applied to contracts. Secondly, it forces the adaptation of the rules that were conceived to be applied to contracts but shall consistently also be valid for administrative decisions.

This being said, it is important to remember that the procurement rules set forth in the CCP only apply to administrative decisions that potentially claim the interest of several operators in cases where the procedure regarding such administrative decisions is not ruled by special legislation, as it occurs in many cases. Although the existing special legislation was revoked by the

5. Without prejudice to the cases in which such contracts are regulated under special legislation, subsequent to the CCP.
6. It must be borne in mind that an administrative authority may choose between the use of an administrative decision or a contract for the production of the intended juridical effects and, if it is not made clear that both options imply the compliance with competition rules, an opt-out from the application of procurement rules in these cases would be provided for.
7. Cf. Mark Kirkby, 'Actos administrativos sujeitos a procedimentos adjudicatórios de contratação pública – o artigo 1.º, n.º 3, do Código dos Contratos Públicos', *in Revista dos Contratos Públicos*, n. 5, p. 203.

CCP,[8] there are some subsequent specific rules that prevent the application of the CCP.[9]

Public procurements and general EU law, including competition and State aids law[10]

Question 8

The internal market rules laid down in the TFEU do apply to contracting authorities acting in competitive markets at national level. Although, according to the internal market case-law of the Court of Justice, the addressees of the fundamental freedoms rules in the Treaties are Member States and only 'acts of private individuals or undertakings 'are outside the scope of the said rules, it is clear that contracting authorities may in many cases be included in the concept of State, in this regard.[11]

It is widely understood, within the scope of multilevel protection of competition, that public procurement law also envisages this objective. Therefore, the intervention in the market on the part of contracting authorities can be analyzed from two different perspectives. In certain cases, when the concept of 'enterprise' applies, the public activity of purchasing and concluding conces-

8. Decree-Law n. 18/2008, of January 29, that approved the CCP, includes an extremely far-reaching repeal provision, establishing that every rule concerning the matters governed by the CCP shall be deemed revoked.
9. Examples of the latter concern the national rights-of-use for frequencies for the development of mobile networks and services (in the case of limitation of the rights to be awarded), the award of television and radio licenses, the award of financial support to the film, audiovisual and multimedia industries by the *ICA – Instituto do Cinema e Audiovisual, I.P.* (cf. Mark Kirkby, op. cit., p. 177 and 178). In any case, it is worth mentioning that all these special rules establish the obligation of a procedure claiming for competition and, therefore, overall it is not critical for the competition principle.
10. This part of the report benefited from the important contribution of Miguel Gorjão-Henriques, Head of Competition Law at *Sérvulo & Associados, Sociedade de Advogados, RL*, Lisbon (www.servulo.com), for which the author is sincerely grateful.
11. As Gormley correctly points out, 'any attempt by a Member State or a public body to discriminate against imports when awarding public supply contracts will be incompatible with article' 34 TFEU; 'the same applies in respect of public works contracts and (in the relation to the use of goods) in respect of public service contracts' – cf. Lawrence W. Gormley, *Eu Law of Free Movement of Goods and Custom Union*, Oxford, 2009, pp. 397-398 and 423.

sion contracts may be taken as enterprise behaviour, and in this case the protection of competition is assured by the prohibition of certain behaviours pursuant to competition rules,[12] even with the limitations laid down in article 106 of the TFEU or the correspondent article 4 of the Portuguese Competition Law (Law 19/2012 of 8 May). However, such purchases can be seen – as they generally are – as the public sector entity behaving like a client and, in this sense, the protection of the legal interest of competition occurs through the creation of a market with non-discriminatory access. In this case, public procurement law can be seen as 'a regulating plus regarding competition law'.[13] In fact, it 'heightens, in substantial terms, the juridical value of competition, by demanding that public sector entities promote themselves competitively ('by creating competition') thereby not limiting themselves to merely respecting competition rules'.[14] In this regard, the competition principle represents a binding factor in what regards the activity of the contracting authorities, that forces contracting authorities to follow the rule of the maximum opening to competition, although it is legislation that defines the extent to which the competition principle may be implemented.[15]

Based on public procurement rules and principles, the Portuguese administrative courts have already invalidated anti-competition behaviour on the part of contracting authorities.[16]

Question 9

There isn't a specific rule in either the CCP or the European Directives that has been identified as producing the result of restricting and limiting competition as a specific effect.

Nevertheless, as recognized in the question, public procurement rules that were *originally* conceived to ensure transparency, equal treatment and effi-

---

12. Cf. Pedro Gonçalves, 'Concorrência e contratação pública (a integração de preocupações concorrenciais na contratação pública)', *in Estudos em Homenagem a Miguel Galvão Telles*, Volume I, Coimbra, Almedina, p. 492.
13. Cf. Pedro Gonçalves, op. cit., p. 496.
14. Cf. Pedro Gonçalves, op. cit., p. 496.
15. Cf. Pedro Gonçalves, op. cit., pp.493/ 494. In the sense that in CCP, the optimization imperative present in the competition principle 'has not been completely implemented', v. Rui Medeiros, 'Âmbito do novo regime da contratação pública à luz do princípio da concorrência', *in Cadernos de Justiça Administrativa*, n. 69, 2008, p. 6.
16. Cf. Esperança Mealha and Dora Lucas Neto, 'A concorrência na jurisdição administrativa', in *Contratação Pública e Concorrência*, Cláudia Trabuco e Vera Eiró (Org.), Almedina, 2013, pp. 177/178.

ciency in the market, may themselves at the same time and to a certain extent facilitate bid-rigging by bidders or, at least in some cases, lead to some distortion of competition.

In Portugal the matter hasn't been discussed in depth, but there are some points that have been stressed by doctrine and even handled by the jurisprudence and by the Competition Authority.

This is the case in the event of a grouping of bidders, which the CCP allows widely in the same terms as European Union Law. However, as this may give induce coordinated behaviour that may lead to restrictive practices, grouping of bidders shall be investigated by the tender jury in order to verify their compliance with competition rules. The Portuguese Competition Authority has already investigated and sanctioned a case of restrictive competition practices related to a grouping of bidders (decision of 24.10.2007), in relation to a public tender for the acquisition of aircrafts to fight forest fires, the tender having been annulled by the contracting authority.

It is interesting to note, as the doctrine has already done, that sometimes it is the contracting authority (the public buyer) that is in a situation of abuse and exploitation of bidders. Portuguese doctrine has already emphasized that the situation of public authorities of being deeply bound to public law is enough to achieve fair public procurement. General principles of administrative law, particularly the proportionality one, and of the competition principle, may be used, if and when necessary, to censor any measure or practice that represents an 'abuse of contracting position'.[17] Notwithstanding this position, the same doctrine has defended the possible inclusion in the CCP of a provision regulating the 'abuse of contracting position' through the general prohibition of these practices and by establishing the nullity of an act or rule containing such abuse.

Question 10

In Portugal public services (more common than the name SGEIs, Services of General Economic Interest) may be *(i)* provided directly by public entities (either through organizations without independent legal status or through state or local public enterprises, with or without public legal personality, in the latter case, predominantly subject to private law), or may be *(ii)* contracted to private entities, in which case the most relevant contractual legal instrument for the purpose of attributing the management of a service is the

17. Cf. Pedro Gonçalves, op. cit., p. 509 ff.

public service concession. However, in spite of the high level of privatisation processes currently taking place in Portugal, there are still examples of public enterprises in the country – wholly or partially owned by public bodies – that are public services concessionaires.[18]

With regards to the first model of public services provision, it is known that the conferral of management to an entity that has legal personality and is separate from its owner entity, although created by the latter, has to be framed under the light of an in house relationship (cf. question 3) and it has been dealt with accordingly in Portugal. It also warrants noting that the European structure surrounding IPPPs (institutionalized public private partnerships) is known amongst the Portuguese legal community and it is believed that it is taken into consideration by the contracting authorities when they constitute IPPPs.

As for the option of managing public services by contracting them to private entities, it's important to bear in mind that CCP, on this matter, goes much further than the European directives, namely in contrast to the new draft directive on concessions.[19] It should be noted that the rules foreseen in the CCP for the award of a concession contract are applied independently of the value of said contract. In this regard, the CCP offers three alternative types of open tender procedures (initiated by an advertisement) that the contracting authority can select. In addition to these three methods, competitive dialogue is also allowed. The direct award is applicable only *(i)* on those occasions when, for material reasons, this process is allowed for the award of any kind of contract, (this, in fact, being in line with the criteria set out in the directives). And to these conditions one must add another one foreseen by the CCP *(ii)* i.e. when warranted by reasons of *relevant public interest*, public service concessions may be awarded by direct award. This, therefore, means that it is up to the contracting authority to decide, within the margin to decide freely that it has, what is a relevant public interest in each case.[20]

18. Exemplary cases of this are the multi-municipal water and sanitation services provider and the public service television broadcaster.
19. In fact, Portuguese law has evolved in such a way as to progressively abandon the idea that, since the private entity substitutes the Administration, and does not simply aid it, the latter could, normally, freely select the concessionaire. For an analysis of this evolution see Lino Torgal, 'Concessão de obras públicas e ajuste direto', in Estudos em Homenagem ao Professor Freitas do Amaral, Almedina, Coimbra, 2012, p. 984.
20. It is believed, however, that this provision has not yet been used.

Lastly, it is important to also refer to the utilities sectors, area in which the theme of SGEIs gains particular prominence, and where the already mentioned greater demands of the CCP are maintained in comparison to the European directives when it comes to public services concessions. The legal regime described above is entirely applicable to the utilities sectors, with the exception of the competitive dialogue, which is not admitted in this case.

EU State Aid rules do apply in all circumstances. Regarding State Aid, the case law is well known and finantial support to SGEI may only be adopted either not constituting State aid (v.g., complying with the *Altmark Trans* case law; be it justified under the private investor or creditor principle) or being considered as compatible with the internal market, in the cases where they are notified and approved, so to speak. It is important to note that among the provisions applicable to works and services concessions, the CCP establishes that 'only the contract entitles the concessionaire to the right to the economical and financial provisions, provided that they comply with the European and national rules on competition'. Therefore, when the award decision is deemed not to fulfil State Aid rules, its conformity with competition rules – both national and or at EU level – may be assessed. The Portuguese Competition Act (approved by Law n. 19/2012, of May 8) refers to SGEIs and basically repeats the provision of the TFUE regarding this matter. In any case, the Portuguese Competition Authority has no mandatory powers in the field of State aid and may only evaluate and adopt 'recomendations' to the competent Governmental authorities.

Strategic use of public procurement

Question 11

Whereas in the domain of electronic public procurement Portugal has been presented as a success case, the same does not apply in the domain of strategic public procurement.

Although the CCP contains provisions adequately transposing the European directives on the subject (provisions, it should be said, that do not impose any obligations on contracting authorities, but only include the option of including these kinds of objectives in tenders), this has not been enough to encourage contracting authorities to make effective use of these provisions and to integrate evaluation criteria in tenders and in the specifications of the contract provisions, with the aim of putting these objectives into practice. In

spite of the lack of statistical data in Portugal on the matter, it may be concluded however that there hasn't been a substantial implementation of these political goals.

Question 12

Please refer to previous question.

Remedies

Question 13

The first Remedies-Directives were transposed in Portugal by Decree-Law 134/98, of May 15, and were subsequently transferred to the Code of the Process of the Administrative Courts (CPTA), where they gave origin to the urgent process regulated by Articles 100 to 103 (only applicable to supply of goods, services acquisition contracts, works and works concession contracts[21]) and by 132 of the CPTA (regarding provisional measures and applicable to all contracts). The substantive and procedural rules are today contained within the CCP.

Directive 2007/66/EC was transposed into Portuguese law by Decree-Law n. 131/2010, of December 14, and it was implemented in practical terms by modifications to the CCP regarding the procurement framework (with the introduction of a notice for voluntary ex ante transparency) and also regarding the resulting invalidity of the agreements.[22]

Two remarks regarding the transposition of Directive 2007/66/CE. Firstly, the doctrine has already noted that Article 2, Paragraph 3 (hampering effect on the conclusion of the contract in case of administrative or judicial claims

21. Cf. finally, on this subject, Carlos Fernandes Cadilha and António Cadilha, *O Contencioso pré-contratual e o Regime de Invalidade dos Contratos Públicos, Perspetivas face à Diretiva 2007/66/CE (segunda Diretiva 'Meios contenciosos')*, Almedina, 2013, p. 146.
22. New rules were introduced into the CCP for the cases of *(i)* infringement of the publication in the JOUE of the notice regarding public procurement, of *(ii) the* suspension period of at least 10 days between the award decision and the conclusion of the agreement, both already established in the CCP and of *(iii)* exclusion or limitation of ineffectiveness.

against the award decision) has not yet been transposed,[23] although the Portuguese legislator will have understood that some mechanisms already foreseen in the Code of the Process of the Administrative Courts (CPTA) safeguard the compliance with this European rule. Secondly, the doctrine has also noted that Article 2-D of the Directive has not been completely and duly transposed, in what regards the establishment of a principal urgent action designed to produce a prompt decision in case of subparagraph a) of Article 2, Paragraph 3, once the urgent process regulated in Articles 100 to 103 of the CPTA may only be used during the procedure and before its end.[24]

Bearing this context in mind, it is important to carry out a practical assessment of how the means established in the Remedies Directive have been used in Portugal.

In terms of legitimacy, the CPTA provides for a wide legitimacy model that goes beyond the contract's parties.

The biggest practical difficulties that have been noted lie in the domain of the provisional measures. The biggest practical obstacle is the delay time to the process for provisional measures; procurement procedures are significantly speedy (the CCP provides for several mechanisms of procedural acceleration and tender procedures in Portugal are performed through an electronic platform) and this contrasts with Courts' timescales (due to the continuous backlog of cases in the administrative courts). The *stand still clause* is not enough to allow a decision of the provisional measure, especially when, as it mostly happens, the award decision is claimed. This difficulty, which could be mitigated with the automatic provisional suspension of the submission of the provisional measure application, is, however, caused by the possibility of the contracting authorities issuing a grounded administrative decision based on public interest, which mostly happens without any substantial justification, and which is, in practice, successful in its objective. The transposition of Article 2, Paragraph 3, of the Directive would certainly be very welcome as a contribution to the prevention of the 'fait accompli' before the decision, at least, of the provisional measure.[25]

---

23. Cf. Carlos Fernandes Cadilha and António Cadilha, *O Contencioso pré-contratual e o Regime de Invalidade dos Contratos Públicos, Perspetivas face à Diretiva 2007/66/CE (segunda Diretiva 'Meios contenciosos')*, Almedina, 2013, pp. 307 ff.
24. Cf. Carlos Fernandes Cadilha and António Cadilha, op. cit., pp. 333 ff.
25. About the possible alternatives that can be used by the portuguese legislator to operate such transposition, v. Carlos Fernandes Cadilha and António Cadilha, op. cit., p. 313 ff.

Another difficulty is related to the legal decision criteria of the provisional measures in regards to contracts. On the one hand, they will be deferred when the success of the claim submitted in the principal action is manifest – although jurisprudence has interpreted this criterion in an overly prudent way so it rarely happens. On the other hand, the second criterion – which is the balance of the interests at risk, and verifying whether the risks resulting from the acceptance of the provisional measure are higher than those arising from its refusal, without the possibility of these risks being mitigated or prevented by taking different provisional measures – has been interpreted by jurisprudence in similar terms to the general criterion for the decision of provisional measures, considering, in practice, the criterion of 'periculum in mora' in the same terms foreseen outside the field of contracts. In fact, instead of limiting the analysis to the risks to the applicant's interests, jurisprudence has demanded an analysis of the risks in terms of their gravity, their recoverability and their inevitability.[26] It is therefore almost impossible, in practical terms, to obtain the approval of a provisional measure in the contractual domain.

In addition to and still regarding this second criterion, some jurisprudence considers that any damages invoked by the applicant represent merely material and economic interests, which are easily offset, the public interest thereby systematically prevailing.[27] Instead, what is expected of the courts, as doctrine has highlighted, is to pass judgment on whether damages caused to public interest or to other interests by the acceptance of the provisional measure are higher than those caused to the applicant's interests in the case of its refusal.[28]

However, it is appropriate to note that the referred difficulties have not discouraged recourse to legal remedies on the part of bidders and other parties involved in bidding processes, even if success rates are low.

Attention can be drawn to the general trend towards the replacement of decisions to annul agreements by decisions conferring compensation. However, and once the latter is established in restrictive terms,[29] doctrine has al-

---

26. Cf. Ana Gouveia Martins, 'Algumas questões sobre a concessão de providências cautelares no âmbito dos procedimentos de formação de contratos', in Cadernos de Justiça Administrativa, n. 85, Jan/Feb. of 2011, p. 3.
27. Cf. Carlos Fernandes Cadilha and António Cadilha, op. cit., p. 320.
28. Cf. Ana Gouveia Martins, 'Algumas questões sobre a concessão de providências cautelares no âmbito dos procedimentos de formação de contratos', *in Cadernos de Justiça Administrativa*, n. 85, Jan/Feb. of 2011, p. 15.
29. The award of compensation for positive interest (corresponding to the loss of economic benefit that would have been obtained from the execution of the agreement) for breaches of public procurement rules has been successively refused by jurispru-

ready considered that the remedies system becomes ineffective in influencing the behavior of contracting authorities and in preventing irregularities in procurement procedures.[30]

Conclusion and reform

Question 14

In general, apart from some innovative procedural adjustments that need to be transposed as well as some of the provisions relating to the execution phase of the contract, a significant overhaul of national legislation to ensure its compliance with European law is not expected. A more radical change to the CCP consequent to the new directives will arise, in our view, in the shape of a political choice rather than a strictly legal one.

In regards to giving a new boost to strategic public procurement, it appears that the current Portuguese situation (cf. questions 11 ad 12) will be maintained, in the sense that, apart from giving contracting authorities the possibility of making use of related objectives, the legislator might opt for not creating incentives for this to be done effectively.

In what concerns electronic public procurement, Portugal already has a completely electronic procurement system (with the exception of direct awards in which paper supports can still be used), which means that contracting authorities and economic operators are likely to already be familiar with the use of said electronic platforms, so, in this area the new directives will not modernise the Portuguese legal system.

As already mentioned, within the scope of the application of the CCP, Portuguese public procurement law already includes concession, public services and work concession contracts, so it is also believed that, in this field, the new concessions directive will not introduce any relevant amendments to Portuguese law. The same should also happen in terms of the concession concept itself and of the concept of risk of exploitation. In the CCP the con-

---

dence, covering, therefore, only the negative interest [cf. Decisions of Supremo Tribunal Administrativo, of 7th October 2009 (Proc. 823/09), of 3rd March 2005 (proc. 41794-A, and of 29th September, 2004 (Proc. 1936/03) and of Tribunal Central Administrativo do Norte, of 28th june, 2012 (Proc. 6934/10), in www.dgsi.pt]. V. Carlos Fernandes Cadilha and António Cadilha, op. cit., pp. 52 and 53.

30. Cf. Carlos Fernandes Cadilha and António Cadilha, op. cit., p. 338.

cept of concession is in line with what appears in the draft directive, and the CCP also establishes that concession contracts must 'imply a significant and effective transfer of risk to the concessionaire', condition which is also found and developed in Decree-Law n. 111/2012, of May 23, applicable to (contractual) public-private partnerships. This is, therefore, a wide concept of risk, which also includes the risk of exploitation. So, notwithstanding further reflections that might stem from interpretations by the Commission or decisions of the ECJ, no legislative change in this regard is expected.

SLOVENIA

Petra Ferk and Boštjan Ferk[1]

The context

Question 1

The first experience with the procurement standards in Slovenia has origins in 1993 with adoption of by-laws, which regulated basic procedures for the implementation of a public tender for the purchase of equipment, investment and maintenance work, research projects and services, wholly or partially financed from the state and municipal budgets.[2] Most of institutes introduces by this by-laws were unknown and their legal nature was much discussed, e.g. does the public tender have the same nature and consequences as public auction?[3] The first law, the Public Procurement Act (hereafter: PP Act) followed in 1997.[4] When proposed, the PP Act took into consideration the rules in other countries, the recommendations of international organizations, Slovenia's obligations set out in international treaties (GATT, EFTA), and its quest for full membership in the EU.[5] At the time of the adoption, two main reasons for introduction of new law were highlighted. First, the formalistic requirements for harmonization of Slovenian legal system with the EU rules,

---

1. Dr. Boštjan Ferk, LL.B. is the Managing Director of the Institute for Public-Private Partnership, Slovenia, e-mail: bostjan.ferk@pppforum.si; Petra Ferk, M.Sc. is the Researcher at the Institute for Public-Private Partnership, Slovenia, and a PhD Candidate at the Faculty of Law, University of Ljubljana, e-mail:petra.ferk@pppforum.si. Authors would like to thank Nina Pekolj, Researcher at the Institute for Public-Private Partnership, for the research work on Q5 and Q13.
2. Ordinance on the procedure for the implementation of the invitation to tender for public procurement (*Odredba o postopku za izvajanje javnega razpisa za oddajo javnih naročil*), Official Gazette of the Republic of Slovenia, No. 28/1993, 19/1994.
3. Mordej, A.: Javna naročila v sistemu državne uprave [Public procurement in the system of state administration], Podjetje in delo, No. 7/1994, p. 945 ff.
4. *Zakon o javnih naročilih* (ZJN), Official Gazette of the Republic of Slovenia, No. 24/1997.
5. Predlog ZJN [Proposal of the Public Procurement Act], Poročevalec, No. 15/1996.

and second, more importantly, the experience of the other EU Member States on public procurement which affect the economy of the State. Not only the making of public finances, but also their use was acknowledged to be important.[6]

The boundaries of EU public procurement law

Question 2

In Slovenian legal theory the term of the public contract was traditionally unknown and unused, therefore the EU term of 'public contract' as defined in Article 1(2)(a) of Directive 2004/18/ES was adopted in legal literature as a term comprising public procurement and concessions.[7] However, the legal status of 'public contracts' as known the EU context was not yet addressed before the Slovenian courts.[8]

In Slovenian legal theory following constitutional elements deriving from the definition given in the Article 1(2)(a) of Directive 2004/18/ES were identified as essential to define the public contract:[9]

– the mere existence of the contract;[10]

---

6. Kranjc, V.: Pravnovarstvo v postopkih oddaje javnih naročil [Legal protection of the public procurement procedures], Podjetje in delo, No. 1/1997, p. 3.
7. Pirnat, R.: Javne pogodbe [Public contracts], Pravna praksa, No. 12/2008, p. 54 ff.
8. Single judgement in this context dealing with the definition of the 'commercial contract' as defined in Code of Obligations (*Obligacijski zakonik*, Official Gazzette of the Republic of Slovenia, No. 97/2007 – consolidated version, 30/2010) is the judgement of the High Court in Celje, No. Cpg 343/2006, 6 June 2007 in which the Court took rather extensive approach in the definition of the commercial contract concluded between the municipality and the private operator for works, due to the fact that the municipality was acting in its *service* and not *regulatory* function. On legal nature and features of works contracts, concluded in public procurement procedures see Kranjc, V.: Gradbena pogodba, sprememba cene, javna naročila [Construction contract, change of price, public procurement], Podjetje in delo, No. 2/2006, pp. 439–443.
9. Ibidem.
10. Case C-295/05, ASEMFO [2007], paragraph 53, 54, 60; Case C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia [2007], paragraph 46–55; Case C-532/03, Doublin City Council [2007], paragraph 35-37. On analysis see Ølykke, G. S.: The Definition of a 'Contract' Under Article 106 TFEU,

– at least one of the parties to the contract is a public entity (contracting authority) and at least one of the parties to the contract is private operator;
– subject to the contract are goods, services and/or works;[11]
– pecuniary interest.[12]

Additionally, the term of the 'administrative contract', as traditionally known in e.g., German, Italian or French legal systems, has never been codified and used in Slovenian legal system. Nevertheless in the Slovenian comparative legal theory there is a clear typological distinction between 'public contracts' and 'administrative contracts'.[13]

To complete the answer, a brief note is required on regulation of the concessions in Slovenian law.

The umbrella act, which regulates the contractual and institutional public-private partnerships in Slovenia is the Public-Private Partnership Act (hereafter: PPP Act),[14] introduced in 2006. But even before the PPP Act came into effect, the Services of general economic interest Act (hereafter: SGEI Act)[15] and Institutes Act[16] enabled the cooperation between the public and the private sector on the field of the services of general interest. However, this cooperation was relatively limited and was not practiced. Traditionally, provision of services of general interest was under the domain of the public sector without the active participation of the private sector. The SGEI Act presup-

in Szyszczak, E., Davies, J., Andenæs, M., Bekkedal, T. (ed.): Developments in Services of General Interest, Springer, Hague, 2011, pp. 111-113.

11. Case C-220/05, Jean Auroux [2007], paragraph 47.
12. Case C-159/11, Azienda Sanitaria Locale di Lecce [2012], paragraph 29.
13. On this issue Pirnat, R.: Javne pogodbe [Public contracts], p. 55, fn. 9; Pirnat, R.: Upravna pogodba – ali jo slovensko pravo potrebuje [Does Slovenian law requires an administrative contract], Zbornik posveta VI. Dnevi javnega prava, Portorož, 2000, p. 99; Kerševan, E.: Uprava in sodni nadzor [Administration and judicial review], Pravna fakulteta Univerze v Ljubljani, 2004, p. 189.
14. *Zakon o javno-zasebnem partnerstvu* (ZJZP), Official Gazette of the Republic of Slovenia, No. 127/2006. In English language is the PPP Act available on the website <www.dkom.si/util/bin.php?id=2012060612243070> (22 August 2013).
15. *Zakon o gospodarskih javnih službah* (ZGJS), also Public Utilities Act, Official Gazette of the Republic of Slovenia, Nr. 32/93, 30/98.
16. *Zakon o zavodih* (ZZ), Official Gazette of the Republic of Slovenia, Nr. 12/91, 45/94, 8/96, 31/00, 36/00. Institutes Acts among others regulates the concessions for services, which were traditionally regulated as 'social services' – e.g., concessions for kindergartens, medical care, etc.

posed concession[17] as the only possible form of providing services of general economic interest, by a legal person of private law.

The PPP Act clearly distinguishes between the public-private partnerships and the public procurement. The bordering line is the allocation of risks. The public-private partnership can be either in a form of a contractual partnership or an institutional (equity) partnership, which is very rarely used in practice (for now). The contractual partnership may have a form of a concession or a public procurement partnership.

The public procurement partnership is the specific arrangement of the Slovenian PPP Act. One talks about the public procurement partnership, if the public partner bears the majority or entirety of the commercial risk involved in operating a public-private partnership project. In such a case the public-private partnership, irrespective of its title or arrangement in a special law, for the purposes of the PPP Act shall not be deemed to be a concession, but a public procurement partnership. Public procurement partnerships are therefore those contractual partnerships in which the greater part of commercial risk is taken by the public partner. Partnerships where the greater part of commercial risk is taken by the private partner are defined by the PPP Act as concession relationships. If it is not possible from the content of a public-private partnership to determine who bears the majority of commercial risk and where there is a doubt, the relationship shall be deemed to be a public procurement partnership and therefore subject to stricter procedural provisions. For details, see Q5.

As a primary principle, the PPP Act is based upon the principle of the subsidiarity of applicability, as defined in Article 3 of the PPP Act. It shall be applicable for the procedures of establishing and operating public-private partnerships with regard to those issues that are not regulated otherwise by a special act (in the first place the SGEI Act and the PP Act[18]) or regulation issued on the basis thereof for individual forms of public-private partnership.

The procedure for a conclusion of a concession contract is basically regulated by the SGEI Act and the PP Act, with the exception of a few issues which are regulated on a primacy of applicability in the PPP Act. According to the SGEI Act, the procedure for the conclusion of the concession contract is a four-stage procedure.[19] The SGEI Act defines relatively in detail, the content of the concessions act (*koncesijski akt*) as a first step. The concession act

17. See Article 6 of the SGEI Act.
18. *Zakon o javnem naročanju* (ZJN-2), Official Gazette of the Republic of Slovenia, No. 12/2013-consolidated text.
19. See Articles 29 to 39 of the SGEI Act.

shall be adopted by the government or a representative organ of a municipality. Concessions act shall define the content of a service of general economic interest and the procedure of selecting a concessionaire. Second step is the procedure for the selection of the concessionaire (tender). The concession act defines basic features of the tender procedure on a case-to-case basis. Works concessions above certain threshold are regulated by the EU public procurement provisions. Within the Slovenian legal system, the concession is defined as a transfer of service function from the state to the contractor, which is granted by an administrative decision (*upravna odločba*), as the third stage of the procedure. The instrument of selecting the public-private partnership contractor in all other forms of the public-private partnership shall be deemed as a commercial operation instrument ─ this is act of business (*akt poslovanja*). The distinction is important for the legal protection of contractors that were not selected. Legal protection in the case of concession granted by administrative provision is assured before the administrative court. In all other cases when the public-private partnership contract is granted by a commercial operation act, the legal protection is assured before the special and independent government body National Review Commission for Reviewing Public Procurement Procedures (hereafter: National Review Commission),[20] established predominantly to resolve disputes that occur during public procurement procedures.

Question 3

Legal theory traditionally divides the core functions of the public administration among regulatory, service and promotional functions.[21] While the regulatory function of the State in the first place comprises acts by right of dominion (*iure imperii*), and nowadays requires regulatory quality in terms of better and smarter regulation;[22] the service function comprises the commercial activities of a state (*iure gestionis*); whereas the promotional function comprises the promotion of certain functions in society, the development of a particular area or social life of the state measures that are not regulatory in nature (e.g., fiscal measures, subsidies). Here we mainly deal with the regulatory and service function, whereas the service function is of particular importance.

20. See <http://www.dkom.si/?lng=eng> (14 August 2013).
21. Godec, R.: O funkcijah in o načelih državne uprave [The functions and principles of the public administration], Vestnik Inštituta za javno upravo, No. 1-2/1979.
22. See e.g. Rakar, I.: Ocenjevanje vplivov predpisov [Regulatory Impact Analysis], Uprava, letnik III, 1/2005, p. 52.

Regulatory and service functions are closely related in determining public-public relations, and case-to-case based analysis is required to determine which functions are being pursued in particular relation. Here only some general observations on the issue in which forms the public-public cooperation could be regulated are identified.

Public-public cooperation comprising regulatory functions could be carried out in all manners which are typical for regulatory function – laws, by-laws, administrative decisions.

Public-public cooperation comprising service function in the widest sense could be carried out in a manner of public law contract (public procurement, concession), private law contract, institutional cooperation,[23] in-house relations and theoretically, also in all manners which are typical for regulatory function as identified above.

However, if we look at the issue outside of the frame of the EU public procurements rules as in the (first) questions, namely that the 'genuine' forms of in-house and public-public cooperation are excluded from the EU public procurement rules, only private law instruments and legislative action remain as a possible instrument to regulate the public-public cooperation.

The second important issue which has to be identified and which determinates the form of the public-public cooperation is the nature of the performance as an economic or non-economic nature. As AG Trstenjak exposed her opinion in the *Provincia di Lecce*[24] the Court exempts inter-municipal cooperation as public-public cooperation from the scope of procurement law on the basis number of criteria, out of which we would like to expose the 'performance of a common public interest task or tasks relating to the pursuit

---

23. SGEI Act defines following organisational forms in which services of general economic interest can be provided: (1) administrative department of public utilities (*režijski obrat*) as a special organisational unit within the state body or the body of a municipality without legal personality; (2) public commercial institute (*javni gospodarski zavod*) as a special non-profit form of executing services of general economic interest, established by a person of public law; (3) public undertaking (*javno podjetje*) which can be established either as Limited Liability Company or Public Limited Company according to Companies Act (*Zakon o gospodarskih družbah*, Official Gazzette of the Republic of Slovenia, No. 65/2009 – consolidated version, 83/2009, 33/2011, 91/2011, 100/2011, 32/2012, 57/2012, 44/2013); (4) concession, as described above at Q2. First three stated forms of public-public cooperation are institutional, while the latter is contractual.
24. Opinion of AG Verica Trstenjak delivered on 23 May 2012 in case C-159/11, Azienda Sanitaria Locale di Lecce v Ordinedegli Ingegneri della Provincia di Lecce and others, paragraph 66 ff.

of objectives in the public interest'. We see this criterion as a main issue that is not being address properly in Slovenian regulation. One can find examples in Slovenian legislation where the in-house relation is established 'formally properly' following EU in-house doctrine; however, the nature of performance is predominantly economic.[25]

Although the performance of the 'common public interest task or tasks relating to the pursuit of objectives in the public interest' as a part of in-house relation was not expressly addressed by the Court of Justice in line of cases defining in-house relations it can be seen from the analyses that in all cases the 'objectives in the public interest' were pursued.[26]

Question 4

Main consensual arrangements between the public and private sectors in Slovenian legislation which are considered to fall outside the scope of application of EU rules and PP Act are the following:

- public service contracts awarded by contracting authority in respect of the services listed in Annex II B of the Directive 2004/18/EC, which are also exempted in the national legislation;

25. E.g., in 2011 Company DDC Consulting & Engineering Ltd. was converted and renamed into DRI Investment Management, Company for Development of Infrastructure Ltd. by the Capital Assets Management Agency of the Republic of Slovenia. In conformity with the new Act, the new Company has been incorporated with a purpose 'to carry out services of investment engineering, investments management in public infrastructure and other consultancy services as an internal contractor for the state, its bodies and legal entities of public law. The Company may also carry out profitable activity and acts in the market with an objective to create profit, whereby it is not allowed to implement the majority or essential part of its activity'. DRI Investment Management web page, News archive, 15 April 2011, <http://www.dri.si/news/2011-04-15-DDC-renamed-into-DRI-upravljanje-investicij-doo-DRI-Investment-Management-Ltd> (14 September 2013).
26. On this issue see Otting, O., Sormani-Bastian, L.: A Review Procedure before the National Courts is not Relevant for Declaring a Failure to Fulfil an Obligation under the Treaty: A Note on Commission v Germany (C-275/08), Public Procurement Law Review 2/2010, p. NA63; Ølykke, G.S.: The Definition of a 'Contract' Under Article 106 TFEU, 2011, pp. 118-119.

– contracts for works, supply and services under national thresholds set in the PP Act[27] and Public Procurement in Water Management, Energy, Transport and Postal Services Area Act;[28]
– contracts for disposal of the physical assets of the state, regions and municipalities, which fall within the Act on physical assets of the state, regions and municipalities;[29]
– service concession contracts, see Q2;[30]
– in-house contracts, see Q3.[31]

As in some other Member States, the organisation of games of chance is also an exclusive competence of the state in Slovenia. According to the Gaming Act[32] the Government of the Republic of Slovenia can award up to fifteen concessions for casinos and forty-five concessions for gambling halls. Regarding the casino's ownership the Gaming Act defines possible shareholders of a concessionaire for a casino, which has to be a joint-stock company. That is to say, that apart from the Republic of Slovenia, local communities and legal entities, owned or founded by the Republic of Slovenia, shareholders of a concessionaire can also be (only up to 49% of shares) companies, organised as a joint-stock company, which fulfil certain conditions set by the Gaming Act. The pure fact that gambling may only be organised on the basis of a concession issued by the state is not disputable in the light of EU law, how-

27. Thresholds for the supply and services is 20,000 EUR and 40,000 EUR for works (Article 12).
28. *Zakon o javnem naročanju na vodnem, energetskem, transportnem področju in področju poštnih storitev* (ZJNVETPS), Official Gazzette of the Republic of Slovenia, No. 72/2011-consolidated version, 43/2012, 90/2012. A threshold for the supply and services is 40,000 EUR and 80,000 EUR for works (Article 17).
29. *Zakon o stvarnem premoženju države in samoupravnih lokalnih skupnosti* (ZSPDSLS), Official Gazzette of the Republic of Slovenia, No. 86/2010, 75/2012, 47/2013.
30. For the procedure of the conclusion of the service concession contract, see Q2. It is important to stress, that irrespective of the form of selection instrument, a public-private partnership contractor shall always be selected, unless otherwise provided by law, on the basis of a public tender, notice of which must also be published on the Internet. See Articles 42 to 52 of the PPP Act.
31. On this issue Ferk, B.: Sklepanje neposrednih pogodb brez uporabe pravil javnega naročanja [The direct award of the contracts without the use of public procurement rules], Problemska konferenca komunalnega gospodarstva, Gradivo s konference, 27. in 28. september 2012, Terme Olimia, Podčetrtek.
32. *Zakon o igrah na srečo* (ZIS), Official Gazzette of the Republic of Slovenia, No. 2011-consolidated version, 108/2012.

ever the Slovenian gaming rules do not seem to fully comply with the EU Court's case law.[33]

Question 5

As previously stated, the possible forms of public-private partnerships defined by the PPP Act are:[34]

- Contractual Partnerships, that may have form of:
  - a concession or
  - a public procurement partnership.
- Institutional or equity partnerships, that can be established:[35]
  - by founding a new legal entity;
  - through the sale of an interest by the public partner in a public company or other entity of public or private law;
  - by purchasing an interest in an entity of public or private law, recapitalisation or
  - in another manner in comparative terms legally and actually similar and comparable to the aforementioned forms and through the transfer of the exercising of rights and obligations proceeding from the public-private partnership to such person.

Contractual Partnerships can have either a form of a concession or a public procurement partnership, as described in Q2. As stated, the public procurement partnership is the specific arrangement of Slovenian PPP Act. If the public partner bears the majority or entirety of the commercial risk involved in operating a public-private partnership project, the public-private partnership, irrespective of its title or arrangement in a special law, for the purposes PPP Act shall not be deemed to be a concession, but a public procurement partnership.[36] Should this be the case, the procedural provisions of the PP Act as a whole are applicable. If it is not possible from the content of a public-private partnership to determine who bears the majority of commercial risk, namely, where there is doubt, the relationship shall be deemed to be a public

33. For the analysis see Hojnik, J., Luin, D.: Gambling Regulation in Slovenia: from Adapting to Socialist Morality up to EU Free Trade Environment, Gaming Law Review and Economics, No. 17/2013, pp. 8-19.
34. See Article 23 of the PPP Act.
35. See Article 96 of the PPP Act.
36. See Article 27 of the PPP Act.

procurement partnership[37] and again, the procedural provisions of the PP Act as a whole are applicable. Therefore in this, the most important case, the question of the severability has been explicitly addressed.

Opposite to public procurement partnership, the concession usually includes a special or exclusive right to provide services of general (economic) interest or other activity in the public interest (services concession). It may also include the construction of structures and facilities that are in part or entirely in the public interest or the right to their use, operation or exploitation (works concession).The works concession above the set threshold fall within the PP Act, whereas the services concessions are out of the scope of the PP Act. For the procedure see Q2.

The general principles of EU law: public procurement law and beyond

Question 6

As a baseline, one could say that in Slovenian legislation the following general principles are applicable to the award of contracts (e.g., service concessions), which are excluded, not covered, or not fully covered by the EU procurement directives: principle of the transparency, equal treatment, value for money and mandatory publication. Those principles have the origins in the administrative law and public finance law. However, publishing is not mandatory on the official national web-portal, on which the public-procurement tenders are being published; therefore, the publishing can be e.g., made on the web page of the municipality.[38] The main Acts in this area, the SGEI Act as well as the PPP Act, are both defining the content of the publication of notices. For more clarification on relevant procedural provisions for each exemption see Q2 to Q5.

Question 7

Looking at the question from the widest perspective, one can argue that principles of non-discrimination and equal treatment are nonetheless constitution-

37. See Article 28 of the PPP Act.
38. See: <http://www.enarocanje.si/?podrocje=portal> (22 September 2013).

al principles; therefore, they should be assured in all procedures before the law. However, discussion on assuring the transparency as the crucial enabling factor for the equal treatment might give different results considering specific sectors ─ e.g., gambling as described in Q4.

Nevertheless, the tendency in Slovenian law is to assure the principles of non-discrimination, equal treatment and transparency in the selection of the beneficiary of unilateral administrative measures.

This can be seen from the following few examples of 'quasi concessions' as e.g., concessions for the exploitation of natural resources. Invitation to tender is foreseen also for the concession for the mining rights,[39]in principle also for the concession for the water rights (for the production of drinks, operation of the ports if the investor is the private operator, bathing sites, etc.),[40] concession for the construction and operation of the cableway installations, etc.[41]

Public procurements and general EU law, including competition and State aids law

Question 8

On our opinion, the majority of the Slovenian contracting authorities consider they do not have much room of choice concerning what to buy. This perception is probably resulting from the fact that procurement procedures were not a traditional method of purchasing goods and services by the state. Public procurement issues started to be dealt with systematically when Slovenia initiated the process of joining the EU – see Q1 on this aspect. Second main reason could be that the EU procurement rules are applied into Slovenian legislation in a rather strict manner, e.g., lower thresholds for publishing procurement notices as set by the EU public procurement directives, 'strict' decisions of the National Review Commission, which followed the principle of the of

39. Article 16 of the Mining Act (*Zakon o rudarstvu*), Official Gazzette of the Republic of Slovenia, No. 98/2004-consolidated version, 68/2008, 61/2010, 62/2010.
40. Article 139 of the Waters Act (*Zakon o vodah*), Official Gazzette of the Republic of Slovenia, No. 67/2002, 110/2002, 2/2004, 41/2004, 57/2008, 57/2012.
41. Article 28 of the Cableway Installations and Ski Lifts Act (*Zakon o žičniških napravah za prevoz oseb*), Official Gazzette of the Republic of Slovenia, No. 126/2003, 56/2013.

strict formalism.[42] The strict application of EU rules is probably the logical result of the fact that the Slovenian market is a rather small market with little above 2 million inhabitants ─ Slovenia covers only 20,273 km^2.

On the basis of the previous decisions of the National Review Commission, we believe that if the case would be similar to the *Contse,*[43] that these criteria would be applied by the national authority more strictly. There is very little chance that they would not found discriminatory.

One must agree that the decisions made by the contracting authorities can impose restrictions on the internal market. As the issue of importance in this sense, regarding the Slovenia market, we see language requirements. It is usual that the public procurement notices and all tender documentation are prepared in Slovenian language. The tendering specifications often classify the Slovenian language as the admission condition. Contracting authorities rarely decide to publish the notice and tender documentation in English language or any other official language of the EU ─ not even in the procedures of a higher value and importance, although they are often challenged with the problems of not receiving two, or more bids, especially after the global financial crisis severely damaged the construction sector. It is true, that the effort and the expense of preparing the tender documentation in two languages is high, however, the benefits in many cases could be much higher. Due to the fact that EU law does not prescribe preparation of the tender documentation in two official EU languages as obligatory, it would be beneficial for the contracting authorities to be enough self-critical. They could self-initiatively prepare tender documentation in two official EU languages when preparing the tender documentation of high value and importance.

Question 9

Certain public procurement rules, as identified in the Questionnaire, can lend themselves to limit competition should they be abused.

In Slovenian procurement market, in the construction sector, collusion did occur in recent past. When identified, it resulted in criminal proceedings.[44]

Framework agreements can be abused. However, the Contracting authority always has the possibility to include the clause to obtain the right to termi-

---

42. See the decisions at < http://www.dkom.si/> (31.8. 2013).
43. Case C-234/03, Contse SA, VivisolSrl and OxigenSalud SA v Ingesa [2005].
44. The media named this landmark case 'The Clean Shovel'. The judgements of conviction against former directors of all the main Slovenian construction companies who were accused in this case were delivered in May 2013; they were appealed.

nate the contract into the framework agreement, should the collusion be identified.

In the respect of demanding qualification requirements unduly, referring to the admission conditions as well as the evaluation criteria, which can restrict competition and are of particular importance for SMEs, the Slovenian legislation enables a commonly named 'quick review procedure'. This is a review claim referring to the contents of the call, the invitation to submit tenders or the tender documentation. Review claim in 'quick review procedure' may not be filed after the time limit to submit the bids has expired, except in awarding low-value contract and service contract from the B List of Services, where only the notice on award for the contract is public and obligatory.[45]

Question 10

One must recall that according to EU settled case law the Article 106(2) TFEU among its conditions for application does not include a requirement to the effect that a Member State must have followed a competitive tendering procedure for the award of the SGEI. The Court expressly stated that it is not apparent either from the wording of Article 106(2) TFEU or from the case-law on that provision that an SGEI may be entrusted to an operator only as a result of a tendering procedure.[46] Therefore, the requirements to satisfy the fourth *Altmark*[47] condition does not coincide (in full) with the requirements of the Article 106(2) TFEU in terms of public procurement rules and it is possible to outsource SGEIs to market participants without following the public procurement decision.

Nevertheless, in reference of the *Altmark* judgement the Commission clearly identifies that the simplest way for public authorities to meet the fourth *Altmark* criterion is to conduct an open, transparent and non-discriminatory public procurement procedure in line with Directive 2004/17/EC and Directive 2004/18/EC. The conduct of such a public procurement procedure is also often a mandatory requirement under the existing

45. Act on legal protection in public procurement procedures (*Zakon o pravnem varstvu v postopkih javnega naročanja,* ZPVPJN*)*, Official Gazzette of the Republic of Slovenia, No. 43/11, 60/2011, 63/2013, Article 25.
46. Case T-17/02 Olsen v Commission [2005], paragraph 239; Case T-442/03, SIC v Commission [2008], paragraph 145.
47. Case C-280/00, Altmark [2003].

Union rules, as explained by the Commission in the SGEI Communication 2011.[48]

Firstly, taking into account the development of the public procurement market internal market, one can argue that SGEIs can be outsourced to market participants without following public procurement procedures, including a direct award, and that there are a few such possibilities; for more information see Q4. Secondly, speaking about outsourcing of SGEIs without following public procurement-*like* procedures in the wider sense of procurement-*like* procedures, these options are more limited. E.g., the conclusion of the low-value contracts below the EU/national thresholds requires a 'certain' procedure. These requirements are less rigid and more informal, nevertheless (at least) the benchmark and value for money should be followed.[49] As the Commission explains, where a public authority chooses to entrust a third party with the provision of a service, it is required to comply with the Union law governing public procurement, stemming from Articles 49 to 56 of the TFEU, the Union Directives on public procurement and sectorial rules. Also in cases where the Directives on public procurement are wholly or partially inapplicable (for example, for service concessions and service contracts listed in Annex IIB to Directive 2004/18/EC, including different types of social services), the award may nevertheless have to meet the TFEU requirements of transparency, equality of treatment, proportionality and mutual recognition.[50] Thirdly, taking into account the State aid rules development following the *Altmark* judgment these options are (close to) non-existent or merely theoretical should the contracting authority aim for a safe harbour, especially if the contract value is 'high'.

In the *Altmark* case, the Court of Justice held that in principle and under given conditions exclusive rights for the provision of SGEIs may be granted through non-competitive procedures, as stated in the Questionnaire.

However, the objective of the fourth condition of the *Altmark* judgement is to ensure that the authority, by paying a proper market price for the service, grants no advantage. It provides two possibilities for determining this market price: either via public procurement or by establishing an appropriate benchmark, namely the costs of a typical undertaking, well run and adequately provided with material means so as to be able to provide the SGEI. Sinnaeve

48. Communication C(2011) 9404 final, paragraph 63.
49. The Court of Audit of the Republic of Slovenia can and does audit these procedures on a sample basis while performing audits. The Ministry of Finance has to be notified about these contracts by the end of February each year for statistics purposes.
50. Communication C(2011) 9404 final, paragraph 5.

states that the second alternative is not only second best, because it will always remain a proxy, but it is also difficult to use in practice since a suitable benchmark is often simply not available. As a result, in practice the main focus is placed on the first alternative, i.e. the public procurement route, which is from a State aid perspective easier to apply and also preferable as it allows for a competitive process. The difficulty here steams from the vagueness of the *Altmark* judgement, which gives no indications as to which public procurement procedure can or should be used.[51]

Therefore, the SGEI Communication 2011 makes an important contribution in replying to those questions.[52] However, unfortunately, the SGEI Communication 2011 does not clarify all aspects of the interplay between the public procurement and state aid rules to SGEI compensation.[53] The relationship with the public procurement rules that follow from the *Altmark* case is also strengthened in the SGEI Framework 2011 by a provision – that the aid granted in violation of the procurement rules is considered to be contrary to the interest of the Union within the meaning of Article 106(2) TFEU.[54]

As identified by the General Rapporteur in Q14, the new Public sector directive is aiming to introduce the flexibility found in the utilities sector, thus allowing contracting authorities on a general basis to have recourse to negotiated procedures with prior advertisement. More emphasis is therefore given on the negotiation procedure,[55] which was traditionally treated rather 'hostile', as the General Rapporteur nicely stated in the Questionnaire. On the other hand, this development might cause even greater discrepancy between the public procurement rules and state aid rules due to the fact that the Commission sees only an open and restricted procedure fully and without limitations in line with the fourth *Altmark* criterion.[56] We believe that after adopting the new public procurement package, the further clarification from the Commission on the identified issues, which do cause confusion on the national level, will be highly beneficial.

---

51. Sinnaeve, A.: What's New in SGEI in 2012? – An Overview of the Commission's SGEI Package, EStAL, No. 2/2012, p. 352.
52. Communication C(2011) 9404 final, paragraphs 63-66.
53. Sinnaeve, A.: What's New in SGEI in 2012?, EStAL, No. 2/2012, p. 366.
54. Sauter, W.: The Altmark package Mark II: New rules for state aid and the compensation of services of general economic interest, European Competition Law Review, No. 33(7)/2012, p. 311.
55. Silva, P.: Overview on the New Concessions Directive, Discussion at the EC-EPEC Private Sector Forum, Brussells, 18 April 2013.
56. Communication C(2011) 9404 final, paragraph 66.

Strategic use of public procurement

Question 11

Public procurements in Slovenia are used as a tool to achieve environmental policy goals, but not as much as an instrument to achieve the social policy goals.

In 2011, the Decree on Green Public Procurement[57] was adopted. With the Decree on Green Public Procurement following Directives were transposed into Slovenian legal system: Directive 2009/33/EC, partially also Article 5 of the Directive 2006/32/EC and Article 9(1)(2) of the Directive 2010/30/EU. The Decree on Green Public Procurement sets environmental requirements for the following subjects of procurement: electricity; organic food, beverages, agricultural products for food and catering services; office paper and sanitary paper products; electronic office equipment, audio and video equipment, refrigerators, freezers and their combinations, washing machines, dishwashers and air conditioners; buildings; furniture; cleaners, cleaning and laundry services; cars and trucks and bus services; tires. The Decree on Green Public Procurement demands the use of the life-cycle costing method for certain groups of works, goods and services, mainly where the nature of the object of procurement and the circumstances of the procurement allow it.

We consider the implementation of the normatively set goals in the practice as the main challenge. Namely, the State is embracing strategic public procurement on normative level, but the implementation in the practice in lagging behind. The problems with the implementation of the Decree on Green Public Procurement in the practice can also be seen from the mere fact that in the two years of its validity, five amendments were required. As one of the main obstacles for successful implementation of the Decree on Green Public Procurement into practice we see insufficient capacities of the bidders and fragmented national market, which is too small to be interesting for foreign bidders.

In terms of public procurements being used as a tool to achieve the social policy goals one should mention Article 19 of the PP Act, which regulates ‘Reserved contracts’ as a special arrangement in the award of public procurement contracts. Where the award of contract is reserved, the contracting authority shall, in compliance with all tender conditions, select a bidder

57. *Uredba o zelenem javnem naročanju*, Official Gazzette of the Republic of Slovenia, No. 102/2011, 18/2012, 24/2012, 64/2012, 2/2013. See also Ferk, P.: Current PPP Developments in the Republic of Slovenia, EPPPL, No. 4/2011, p. 230.

demonstrating the status of social enterprise or employment centre, pursuant to the Vocational Rehabilitation and Employment of Disabled Persons Act[58] and whose tender price and/or the economically most advantageous tender shall not exceed 5% of the tender price submitted by the most successful bidder which is not a social enterprise or employment centre. The provision is rarely used in the practice.

Question 12

In Slovenia, public procurements are not used as a tool to foster innovation. Public procurements are being handled in a very formal and conservative manner. References are required for everything. On an example of the competitive dialogue one can observe, that it is used only in public-private partnerships and very rarely even in these procedures. Contracting authorities are not self-confident enough to use it. Also, the conservative stance of the Court of Audit of the Republic of Slovenia does not help in the respect of additionally restricting the use of the competitive dialogue. Namely, the Court of Audit demands to acquire at least three qualified bidders in the first stage procedure for each procedure, although the three bidders may not even exist on the market. Again, the specific feature of the small Slovenian market is of importance.

On the other hand, the bidders are not used to suggest innovative solutions. Lack of tradition might be an important reason for such behaviour of the bidders, who expect that the contracting authority defines technical specifications explicitly.

Remedies

Question 13

The Directive 2007/66/EC[59] was implemented into the Slovenian legal system by the Legal Protection in Public Procurement Procedures Act (hereafter:

---

58. *Zakon o zaposlitveni rehabilitaciji in zaposlovanju invalidov*, Official Gazzette of the Republic of Slovenia, No. 16/2007 – consolidated version, 14/2009, 84/2011, 87/2011, 96/2012.
59. Directive 2007/66/EC of the European parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to im-

LPPPP Act 2011),[60] which was adopted in mid-2011. With LPPPP Act 2011, the legal protection in public procurement has been completely re-organized. Prior to LPPPP Act 2011, the legal nature of the National Review Commission had not been clear, and what is more, the 'inter-parties' procedure had not been assured in all aspects.[61] The main novelty of the LPPPP Act 2011 was definition of the reasons for contract nullity and introduction of the procedure before the court to establish that a contract or an individual contract is null and void.

Legal protection from infringement in public procurement procedures in Slovenia shall be granted in (1) the pre-review procedure, which takes place before the contracting authority; (2) the review procedure taking place before the National Review Commission, which consists of five members, of which one is acting as President and one as Deputy-president. All members are appointed by the Parliament. The judicial protection (3) is regulated in the Chapter V of the LPPPP Act 2011 and takes place in the first instance at the district court, which is exclusively competent according to the act regulating courts.

Article 42 regulates the contract nullification proceedings. In accordance with the conditions of the LPPPP Act 2011, nullification of the contract may be exercised not only by a person with legal interest (a person who has or had an interest to be awarded a public contract and who incurred or could have incurred damages due to the alleged infringement shall be deemed to have legal interest) but also by the representative of the public interest. In such case, nullity of a contract is exercised by the Republic of Slovenia, represented by the Office of the Attorney-General of the Republic of Slovenia. Reasons for contract nullity are exhaustively and not descriptively defined in Article 44. Should the contract be established null and void, the nullity exists *ex tunc*. Consequences are regulated in Article 46. In the stated cases, the Court may decide that the contract remains valid despite the infringements, providing it establishes the existence of compelling reasons relating to the public, defence

---

proving the effectiveness of review procedures concerning the award of public contracts, Official Journal of the European Union, 20. 12. 2007, L 335/31.

60. *Zakon o pravnem varstvu v postopkih javnega naročanja* (ZPVPJN), Official Gazette of the Republic of Slovenia, No. 43/2011, 60/2011-ZTP-D, 63/2013 English translation available at:
http://www.dkom.si/index.php?lng=eng&vie=cnt&gr1=praPod&gr2=zrpSPra).

61. On this issue see Ferk, P.: Ali je Državna revizijska komisija sodišče [Is the National Review Commission the Court], Podjetje in delo, No. 6-7/2008, pp. 1079-1088; Ferk, P.: Pravni status Državne revizijske komisije [Legal nature of the National Review Commission], Pravna praksa, No. 12/2008, pp. 63-65.

or security interests which require the contract to remain valid (Article 45). The Court shall also forward decisions, which, due to compelling reasons of public, defence or security interest, keep the contract valid despite infringements, to the ministry of finance, laying out the compelling reasons of public, defence or security interest. The ministry of finance shall inform the European Commission of these decisions on an annual basis.

Article 43 of the LPPPP Act 2011 regulates the interim relief (temporary suspension and temporary decree). The plaintiff may propose to suspend performance of the contract or individual contract by issuing a temporary decree or to temporarily remedy the situation as defined in the LPPPP Act 2011.

Remedying damages are regulated in Article 49. Liability for damages arising from nullity of the contract or infringement of public procurement rules shall be judged according to the rules of law of obligations regarding responsibility without guilt. Anybody who deems they have incurred damages due to the unlawful acts of the contracting authority in the public contract award procedure may bring action against the contracting authority demanding remedy of such damages. When the contracting authority failed to carry out the public contract award procedure although it should have pursuant to the act regulating public procurement, remedying of damages may be exercised through the complaint for establishing nullity.

In July 2013, the National Assembly adopted the first amendment to the LPPPP Act.[62] The main objective of the 2013 amendment was to increase the efficiency of public procurement through faster and more efficient procurement procedures. Namely, the previous procedures offered a very wide scope of protection to the bidder, practically for *any* breach, although they were not essential and the bidders could not be damaged. This reflected in lengthy procedures, high expenses and a growing burden of procedures for the National Review Commission, which has seen the greatly increased caseload in recent years. The 2013 amendment enumerates the violations, which are considered to be such that materially affected or could materially affect the procurement procedure. Violations are explicitly stated. The amendment also introduces a new provision enabling the priority for the review procedures, in which the subject is co-financed from EU funds. These proceedings are usually intended for large-scale and complex projects with pre-defined dynamics drawing on EU funds, which *per se* requires quick and efficient procurement procedures. Final major change of the amendment is the introduction of the propor-

62. *Zakon o spremembah in dopolnitvah Zakona o pravnem varstvu v postopkih javnega naročanja* (ZPVPJN-A), Official Gazette of the Republic of Slovenia, No. 63/2013.

tionality principle to determine the amount of fees in the review procedure as a refund of the costs of pre-review and review procedures.

Conclusion and reform

Question 14

Q14 opens several different aspects on how the new directives are to contribute to the modernisation of EU public contracts law. In reflection of the Slovenian jurisdiction, we consider that the new directives will contribute to (at least) the issues, as identified below.

First, one of the main problems in terms of service concessions in Slovenian jurisdiction is that the PPP Act defines service concessions according to risk allocation, while the SGEI Acts defines service concessions in a much wider manner – according to the subject of the contract – which often results in a conflict of applicability of laws. The new Directives will contribute to a greater clarity on this issue.

Second, at a policy level, Slovenia has neither the strategy on the public-private partnerships and/or private funding on a long term contracts nor the higher value (pilot) projects on the state level. Key drivers of the PPPs in Slovenia are the municipalities with smaller scale projects.[63]

Third, some reflections on the use of competitive dialogue in Slovenian market have already been given in this report, and a new public procurement will hopefully contribute to greater certainty on national level in this respect and/or encourage wider use of the negotiation procedure, which might 'replace' the competitive dialogue.

Fourth, the Slovenian experience with the negotiation procedure with prior notice is positive, both under provisions of the PP Act and Public Procurement in Water Management, Energy, Transport and Postal Services Area Act. No negative influence on transparency and equal treatment was identified. On the contrary, the number of revision procedures is in the negotiation procedures with prior notice lower as in open procedures.

Fifth, we believe the Slovenian market is ready for the use of e-procurement, which is to some extent already used on some issues such as

63. On this issue see Ferk, P.: Current PPP Developments in the Republic of Slovenia, EPPPL, No. 4/2011, p. 231; Ferk, P.: Current PPP Developments in the Republic of Slovenia EPPPL, No. 3/2013, pp. 269-271.

framework agreements and e-catalogues. Instruments as e-signature, e-invoicing, e-archive and other elements of electronic communication are being strengthened. The orientation towards e-procurement is generally positive and new public procurement directives might present additional push for further development.

On our opinion the new public procurement directives do not represent a major and/or systematic change of the EU public procurement law, except in the field of the e-procurement. Nevertheless, adjustments of the existing public procurement rules to today's challenges are to be welcomed.

SPAIN

Gimeno Feliú, José María[1] *and Valcárcel Fernández, Patricia*[2]

The context

Question 1

The classic Spanish public contracts system was built on the basis of the French one, which was precisely the model which had had more influence in the Communitarian system of public procurement.

Before joining the EU, Spain had already developed a fully-fledged administrative regulation on public procurement, different and apart from the compilations of laws ruling private agreements, such as Civil and Trade law Codes. That public law searched for a complete and harmonious regulation of public contracts, starting with the procedure's development (from design to awarding) and following with the agreement's life (from implementation to extinction).

Sharing the same model could make think that the process of settling down the Spanish law into the European one would be easy-going and would focus on adapting the former to some seminal exigencies from the European Directives about design and awarding the proceedings, with the goal of fostering the principles of non discrimination, publicity, transparency and competition in the whole system.

However, reality showed that the Spanish legislator was especially reluctant to a consistent transposition. On the contrary, he used to pass over three basic points from the Directives.

1st. Accurate identification of the Directives' subjective sphere of application: Several reasons accounts the Spanish legislator for so long misunderstanding the notion of 'body governed by public law' as tantamount to 'contracting authority', from which the Directive adopted the functional doctrine on the enti-

1. Full Professor of Administrative Law. University of Zaragoza.
2. Associate Professor of Administrative Law. University of Vigo.

ties submitted to European law. This means that the Directives do not matter whether contracting bodies are rooted in a public regime or in a private one. Neither do the Directives make depend the system on the legal status nor in the form of the body. On the contrary, they take their aim to other criteria; meanly the entity's goal defined by law. In Spain, that setback was pervasive up to the passing of the Law 30/2007, which adapts the Directive 2004/18/CE.

Before that, contracts arranged by public bodies governed by private law – specially commercial companies and corporations-, were ruled by trade law, with no role for the public procurement legislation. One of the reasons for excluding those firms from the Directives lied in the public accounting standards of the period, which laid down that their accounts do not be counted as public debt, which eased the process for Spain to enter the third phase of Economic and Monetary Union. That blank infringement stubbornly admitted by the internal law caused Spain to be repeatedly sentenced by the Court of Justice (Judgements of May, 15th, 2003 (C-214/00, *Commission vs Spain*); October, 16th, 2003 (C-283/00, *Commission vs Spain*); January, 13th, 2005 (C-84/03, *Commission vs Spain*).

2nd. System of remedies: When in 1995 the whole European regulation on public procurement was transposed for the first time, through the Ley 13/1995, the Spanish legislator purposefully excluded to add the Directive 89/665/CEE (the Remedies Directive) to the transposition pack. Two main reasons were put forth in the Explanatory Memorandum of the above law:

1. Because remedies are alien to this law, which is strictly about the substance of public procurement.
2. Because Spanish administrative and proceedings legislation already disposes of a (general) system of remedies applicable to public procurement.

Contrary to the rationale of the law, several judgements from the EC Court showed how the Spanish model of generic remedies did not comply with the Directive, since there lacked a built-in system of remedies specifically designed for procurement according to the minimal requisites set by the Directive 665/89 (Judgement of May, 15th, 2003, C-214/00, *Commission v Spain*; October, 16th, 2003, *Commission v Spain*; April, 3rd, 2008, C-444/86).

The doctrine come out of these rulings and the surveillance from the European Commission forced the Spanish legislator to rectify its primary understanding and to set to reform the contracting law to establish a regime of special remedies.

The first modification took place with the Law 62/2003, of December, 30th, which adds Article 60 bis to the public procurement law. The Article foresees an array of interim measures taken from the general proceedings law. For that reason – lack of specificity – the reform was deemed unsatisfactory by the European Commission.

But it was not until the 2007 Law that the Articles 37 and 38 establish an ad hoc remedies system, so fulfilling European requirements. Ameliorated in 2010, this system is reckoned to be working fine and achieving the searched outcomes. It has been based on the complex of a brief and specific remedy (*recurso especial*) implemented before a category of independent and specialised administrative courts (*tribunales administrativos de recursos contractuales*), one statutory at the central level and others at the disposal of those Autonomic Communities willing to create them. As a main pitfall, the fact that the law has solely foreseen the recurso and the tribunales administrativos to complaints against the socalled contracts submitted to harmonized rules (*contratos sometidos a regulación armonizada*). That is, those public contracts whose budget exceeds the amount signalled in the law and so they must be published at a Communitarian level (Article 13).

3rd. Modifications of the contract: It is well known that arbitrary reforms of the contract can easily distort the original awarding. In Spain, the power of modifying unilaterally the object of public contracts – *ius variandi* – constitutes one of the most important prerogatives acknowledged to any Administration and one of the most obvious expressions of how much Spanish laws have considered public contracts regarding private agreements. In Spain, the practice of procurement has relaxed the understanding of the figure under the principle that it is an administrative power justified out of the management of general interests. The Spanish Supreme Court has become to claim that the public interest cannot be restrained by the clauses of the contract (Judgement of February, 1st, 2000).

Spanish law has formalized this conception by allowing the contracting authority to modify a contract on the basis of simple ‘new needs’. Such a wide frame seemed to be at odds with the Directive 2004/18/CE. Upon these parameters, the Direction General of Internal Market of the European Commission addressed a Letter to the Spanish Authorities, in December, 12th, 2006, regarding the public procurement law draft. The Letter claimed that the Directives did not authorise to modify contract by reason of the sheer appearance of new needs. Moreover, it recalls that basing the amendment on ‘unforeseen reasons’ must be interpreted in an objective and non expansive way, synonymous with ‘unforeseeable reasons’.

Since Spanish Government did not reached to adapt its law to the requirements of the Letter, the Commission sent him a reasoned opinion in November, 27th, 2008, as the previous step to appeal the EC Court. Facing to be sued, the regime was changed in 2010. In short, after that, the former infringements and deficiencies to comply with the Directive may be esteemed overcome.

However, the abovementioned only mean that Spanish law fits the Directive. Eventual breachs are currently located in the procurement proceedings phase, specially coming from the interpretation of the law by the operators.

The boundaries of EU public procurement law

Question 2

Article 2.1 of the Spanish law of public contracts (TRLCSP) define them as '*the onerous contracts, whichever their nature, signed by the entities and organisations subjected to the contracting law*'.

This notion, taken from the Directive 2004/18/CE, has showed itself helpless to let the operators distinguish the actual public contracts from other sorts of agreements specifically excluded from the TRLCSP. Article 4 of this law quotes a set of transactions that, by their nature, object, regulation or other particular features, have been set apart from the public contract discipline and law. There are several among them worth of a deeper insight, since they are often used for drawing up relationships that should be included in the category of public contracts:

1st. Cooperation agreements between public bodies or between them and private entities (not only firms): Excluded by Article 4.1 c) and 4.1. d) TRLSCP.

Cooperation agreements are arrangements linking two or more public entities or a public entity with particulars as a means to meet a common interest or fulfil a public goal that concerns both partners. On the contrary, contracts demand reciprocal obligations: the public partner receives a benefit from a firm, which is paid on that basis. Interests are not coincidental: the Administration goal is to achieve a public profit; that of the firm to be paid for its work.

Two features define cooperation agreements against public contracts:

a) Non contractual nature or object: Literally, Article 4 excludes from the application of TRLCSP those agreements whose nature and object are not the typical of public contracts, such as they are defined within the law.
   Therefore, those transactions having the characteristic object of a public contract must be identified as such and subjected to its legal discipline (construction and running of public goods, supplying of goods, delivering a service, etc).
b) Existence of a collaborative element: in administrative contracts, as long onerous dealings, the contracting authorities receive a good or service in return for a price, paid to the awardees. It is easy to realise that the partners' interests are different (goods and services/price).

On the contrary, in the case of cooperation agreements, both parties work together to implement the activities at issue to meet a common interest for them both. Co-participation may adopt different sorts (joint staff, common funding or planning) and degrees.

The collaborative element does not prevent the agreement from having a (prevalent) economic contents.

The lack of any law to discipline cooperation agreements has motivated that actual public contracts have been disguised under the formal appearance of agreements, avoiding the application of the public contracts law. The same disguise has been used to channel public grants without following a competitive selection process. In 2010, the Spanish Court of Auditors sent a motion to the Cortes proposing the definition of a framework for a correct use of the collaborative agreement.

2nd. Administrative concessions or public domain concessions: Unlike other European countries legislation, in Spain there has been no problem to consider that several types of concessions are public contracts and, as such, be ruled by the TRLCSP. The 2004 Directives rule the public works concession but does not include the concession of public services within any category of public contracts. Not only does the Spanish law do, but devotes an entire chapter to it, as well.

However, the concept of concession is not univocal. Besides the contractual concessions, it exist in Spanish legislation the figure of the concessions of public domain, called also demanial concessions. Unlike contracts, the latter are unilateral actions by which an Administration awards a particular with the privative use of public areas. Concessions of public domain possess a different nature from contractual concessions and are excluded from the applica-

tion of the public contracts law by Article 4.1 o) TRLCSP, sending it regulation to the public estate law.

One of the main differences between the disciplines of both types of concessions (contractual and demanial) is the different lenght. Public services concessions may last 50, 25 or 10 years by virtue of the contractual object (Article 278 TRLCSP), whilst demanial concessions may last up to 75 years.

In practice, there are several cases where it is doubtful to appeal either to contractual concessions or to demanial concessions. Perhaps the paradigmatic case is that of the *public parkings*:

a) Sometimes, local authorities have understood that the key of the operation is the long-lasting privative use of public estate, joint to the construction of permanent or not removable facilities.
b) Sometimes, these authorities highlight the public service component the parking represents and decide to manage the service through a public concession.

3rd. Licenses: This type of public activities are also excluded from the public contract law by Article 4.1.o) TRLCSP.

A license is an unilateral administrative resolution that empower a particular to engage in any activity initially forbidden to him. It has particularly foreseen to give permission to undertake economic activities.

The current process of liberalization embodied by the Services Directive 123/2006/CE is characterized by a progressive decline of administrative constraints in favour of free market. Therefore, some activities previously subjected to concession nowadays solely need license. Others, subjected to license have been fully 'released'.

One particular case of liberalization is that of the *Technical Inspection of Vehicles* (TIV). In Spain, Autonomic Communities have got the faculty to establish the TIV legal regime and the degree the implementation is to be liberalised. Some of them have entrusted the TIV to their own internal services; others have awarded administrative contracts; and a third group leave the activity to the market. So, different models can be summarized: a) Direct public management; b) Institutionalized public-private partnership (mixed economic society); c) Public services concessions; d) Private management firms through license.

4th. Legislative provisions: Besides the cases set by the TRLCSP, sectorial laws pick other exclusions. There must be stressed town-planning regulation: the relationship between an Administration and a particular for the latter to

engage in urban development works (which are public works, according to the EC doctrine) sets apart the contracting law.

The most prominent case is that of the Development Agent, set out by a 1994 law of Comunidad Valenciana and afterwards spread to other regions. The institution was heavily contested by the European Parliament's Committee on Petitions (Aiken Report), answering petitions from other European countries citizens that had purchased real estate and houses around the Spanish Mediterranean shore and had seen their houses put off or unfinished.

As a consequence, the European Commission sued the Kingdom of Spain before the Court arguing that urban works developed by Development Agents have been channelled through town-planning regulation without meeting the requirements established by the Directive 2004/18/CE for awarding public works contracts. The Judgement of May, 26th, 2011 (Case C-306/08, *Commission v Spain*) rejected the complain. The Court claimed that the development works implementation spread over and goes beyond public works. It adds to them activities such as development plan wording and pure urban-planning operations.

Question 3

According to the EC doctrine public-public partnership admits two forms: a) non-institutionalized (cooperation agreement); institutionalized (in house providing). Article 4 of the Spanish public procurement law includes both figures among the large number of agreements excluded of its application.

On the first hand, the non institutionalized public-public partnership would be channelled through cooperation agreements (Article 4.1 c). As the answer to question 2 has put forth, these agreements are not public contracts and do not follow their legal discipline, provided that their nature is not that of a public contract. What comes to mean that the essential nature, qualities, goals and, meanly, object, are not what the public procurement law assign to public contracts. *A contrario sensu*, whether by gauging the features of the deal, it is a contract by substance and function, if not by name, it must be submitted to public contract rules

In spite of the rules, cooperation agreements lack of a rule in Spanish law. Each one's clauses are its only precepts, complemented by the principles of public procurement in case of doubt or lack of rule. Therefore, under the appearance of cooperation agreement hide real public contracts, for which their legal regime has been avoided.

On the second hand, in house providing has been taken away from the category of public contracts by Article 4.1 n). Article 24.6 has defined its nature,

features and regime following the parameters set out by the EC Court, without innovation on this part.

This regime generously favours the creation of technical services, relaying on the principle of self-organization, which enables Administrations to establish public and private personifications. However, a high level of incoherence is usual regarding the type of entity to be chosen. Theoretically, the logic of the system would drive an Administration to shape a public personification for decentralizing in its hands several public issues previously handled by that. On the contrary, the former would choose a private body to develop an economic activity on an equal footing with private firms dealing in the same market. But in Spain there is no correlation between the kind of activity and the type of personification selected to embody it.

Regarding this subject, it matters to stress that in July of 2013, the Spanish Competition Authority (CNC, today CNMC) published a report entitled 'In house providing: consequences of it use from the perspective of the promotion of competition'. The report does warm about the excessive appeal to the in house providing technique in Spain. It points to that there are a impressive number of entities qualified as internal technical resources in all the levels of every Administration (150 only in the national Administration). They have entered the most varied and valuable sectors of the economic activity: consultancy, public works, provision to the Army, forestry works, electronic certificate services, external promotion and many others. Although several of then are long-lasting, even inveterate internal resources, others have only acquired this conditions very recently and without sound foundations. Such proliferation is causing important distortions to competition.

Resorting to in house providing entails that a meaningful volume of goods and services entrusted to technical services are distracted to public procurement awarding proceedings. As an example, the CNC Report points out that 37 in house entities belonging to the national Administration turned over about 2,500 million/€ in 2012.

Question 4

To answer this question we must pay attention to what was explained in question 2, stressing, in particular, that:

a) Article 4 of TRLCSP determines that cooperation agreements, whose object is not the one of a public contract, are outside of the rules of the public contract Law. On the contrary, If the object of the cooperation agreement is the typical one of the benefits of a public contract under the TRLCSP,

the agreement is governed by TRLCSP and subjected to the requirements of publicity and transparency set in the public procurement Directives.

b) Some Spanish planning Laws, provide formulas to execute public works by private entities that are awarded without applying the rules of the public procurement Law. In this field we must take into account the decision of the ECJ in its judgment of May 26th, 2011 (Case C 306/08 Commission v Kingdom of Spain) to which we have referred in paragraph 4 of the answer to question two.

Question 5

a) Our national legislation does not provide the possibility of public contract with non-contractual typing performance. It should be a finalist interpretation and determine if the main cause of the celebrated business is a typical public contract and thus attract the rules of engagement. This is the case, for example, with the urban development contracts.
b) Spanish legislation differentiates between public administrations and public contracts of entities that are not public administration. In the first case, below the Community threshold, work the same principles of equality of treatment and concurrency. There is an exception in a simplified procedure by amount which allows the direct award. Also applied extensively negotiated without advertising without negotiating procedure. However, the contracting authorities not public administration only must approve own rules. In practice there are no effective transparency, the market has been unduly limited and favours corruption.

The general principles of EU law: public procurement law and beyond

Question 6

Answered in previos question – point b).

Question 7

N/A

Public procurements and general EU law, including competition and State aids law

Question 8

Spanish legislation of public procurement respects and adapts to this field the precepts of the TFEU regarding the principle of freedom of establishment and freedom to provide services, as well as the principles contained in the public procurement Directive when determines the conditions of capacity, solvency or selection criteria, award criteria and special conditions for the execution of contracts under it.

In the event that a contracting authority, when preparing the documents and technical specifications of a contract, include any condition, requirement or criteria that imply a violation of these principles, and this is denounced by any interested, the current Spanish remedy system would allow this flaw to be detected and corrected before the award of the contract.

This has been demonstrated in different cases by the specialized administrative bodies that resolve the appeals against any default in the contractual procedure. We find an example, in the Resolution 187/2013 of May 23 th, 2013 of the Central Court of Contract Resources (TCRC). It identifies the doctrine on the Prohibition of incorporating criteria of territorial roots as a condition of solvency or award, and admits it as special execution condition if the roots were tied to the object of the contract and fulfilled the requirements of the proportionality test.

Question 9

a) Collusion and bid rigging: The first-hand reply of the Spanish Public Procurement model against bid rigging is quoted in the additional provision num. 23rd of the current public procurement law (Legislative Decree 3/2011, November, 14th, 2011). In spite of being placed within the core law on public contracts, such provision outsources the conflict, by calling all the public entities concerned by the tender for supplying the national or regional Competition agencies with any evidence – even circumstantial – of bid rigging that they found within the procedure.

Although contracting bodies may be assimilated to a sui generis regulator, the outsourcing laid down by the additional provision num. 23rd amounts to deprive them from a large piece of their regulatory powers: those formed by the function of guarantying 'antitrust competition' before and alongside the

contract life (tender, award and implementation). The outcome is twofold. The Legislative Decree 3/2011 does set out some methods to shield competition among bidders during the procedure (competition for the market). But even though it was notorious that the candidates bargained and came to an agreement on the contract awarder before the procedure starts, the Legislative Decree did not set own rules for ensuring that, in that case, the bidders must abide by the antitrust rules (competition in the market).

Hence, the Legislative Decree puts the contracting bodies out of action in case that bid rigging success provokes that the contract awarding decision is plagued with type I or type II errors (the colluders win). Such paradox is almost inevitable although they are absolutely aware of the antitrust law breach. As an example, the Decision Transporte Ayuntamiento de Las Palmas adopted by the CNC (Spanish Competition Authority).

The city council of Las Palmas started a procedure to award a contract to provide the transportation local service for sporting and educative activities. Once the offers known, a bidder complained that other three rivals' proposals were exactly the same in terms of price per ticket, in more than nine hundred cases. Over the contracting process successive reports acknowledged the strong evidences of collusion. Nevertheless, the procedure went on until the contract was awarded to the best rated candidate; precisely one whose bids were in question. Few days after the decision, the contracting authority decided ex officio to report the case to the Comisión Nacional de la Competencia.

As the example shows, both logic and reality have proved how useless is a Spanish-like model to face collusion within public procurement. Deprived of its own solutions, the ultimate answer offered by the Legislative Decree 3/2011 is the additional provision 23rd reference clause. Since antitrust agencies have been modelled to act after the breach has taken place, it is not exaggerated to say that Spanish public procurement runs the risk to become fully cartelised sooner rather than latter.

b) Other rules and practices able to shutting down markets or to giving relevant market power to contracting authorities: The Spanish law undoubtedly complies with the European Directives on public contracts in the design of figures such as (long term) concessions, framework agreements and central purchasing bodies. To the point that the former can be deemed as an unambitious transposition of the latter.

Similarly, some prerogatives at the contracting authorities disposal may well directly or indirectly strengthen its capacity to jeopardise competition. Especially, by giving them free hand to design and impose the requisites both of the procedure and the contract. Though within legal boundaries, contract-

ing bodies unilaterally set out all the administrative clauses as well as the technical specifications and features of the product. Special attention must be paid to three categories endowed with a large capacity to constrain competition: criteria for qualitative selection, contracting award criteria and conditions for performance of the contract.

None of the abovementioned problems has been properly addressed in the Spanish law. Neither infra legal rule exist to address them. Therefore, several national and regional administrative bodies cope with these restrictions. First, administrative bodies for contracting remedies frequently declare procedures void on the basis that selection or awarding criteria are overwhelming or disconnected with the object of the contract. Second, some Competition authorities have delivered Guides and reports complaining about those constraints.

Question 10

There are different systems to provide SGEI:

a) Direct provision through public entities (specially public companies).
   Law 4/2007, on the transparency of the financial relationships between public administrations and public companies, imposes on every public company or company endowed with exclusive or special rights the duty of carrying separate accounts. One of the accounting sections will pick up every kind of compensations granted for the management of the special/exclusive rights or SGEI. This is an issue directly lied down to fulfil the Altmark requirements.
   It is the case of postal services included in SGEI concept. In Spain those services are directly provided by a public entity. In this case, the Law 43/2010, on universal postal services sets the obligation for this entity to keep a separate account for the services and products which are included as universal service.
b) Regulated firms serving a SGEI: (gas, energy, telecommunications, etc.). These sectors, previously monopolized by the state, have been liberalized and put into the hands of market firms, and the umbrella of legal and institutional regulations. Therefore, European and internal Regulation and Regulators take over the role of ensuring the fulfilment of the Altmark conditions.
c) When acting as contracting bodies, a certain type of entities entrusted with SGEI or special/exclusive rights are subjected to public procurement rules, irrespective its nature or property. It is the field of the Law 31/2007, on the procurement procedures of entities operating in the water, energy,

transport and postal services sectors (by virtue of transposition of the Directive 2004/17).

Strategic use of public procurement

Question 11

Public contracts are not only a means of supply of raw materials or services in the most advantageous conditions for the State, but that today, through public procurement, public authorities conducted a policy of intervention in the economic, social and political life of the country, making public procurement within a scope of activity through which to guide certain behaviour of the economic agents involved: who want to access public contracts must necessarily comply with the requirements that determine the contracting entities. This instrumental view of public procurement leads, as it suggests T. MEDINA, to talk about the use of public procurement in order to guide and strengthen business behaviour beneficial to the public interest unless they are necessarily connected with the direct functional satisfaction of the contract. The instrumental of the procurement perspective advised – and is thus made in Spain – in the selection phase is required and assess compliance with Community environmental and social policy legislation, because otherwise supposed to abandon a consolidation of policies of powerful tool and paid field to a possible relocation of the business towards legislation that do not collect these policies since obviously translates into economic costs that would be hardly profitable. In this line, it should be recalled that criteria related to the protection of the environment (eco-labels, recyclable products, treatment of discharges, etc. systems) are admitted in many tenders.

Greater problem social criteria, because they fit poorly as criteria of solvency and rarely are used as conditions for performance.

Question 12

Public purchasers should be able to acquire innovative products and services that promote the future growth and improve the efficiency and quality of public services. To this end, the proposed directive sets the innovation partnership, a new special procedure for the development and the subsequent acquisition of products, works and services new and innovative, which, however, shall be provided within the levels of benefits and costs agreed. In addition,

the proposal improves and simplifies the procedure for competitive dialogue and facilitates cross-border joint procurement, an important instrument for innovative acquisitions.This strategy of buying public innovation is articulated through two types of measures: through an increase in the demand for innovative products and services, and through the so-called 'pre-commercial procurement', understood as belonging to the phase of research and development (R & D) pre-market activities which covers the exploration of solutions that are specific to the design phases, creation of prototype, test and pre-production products, stopping before the commercial production and sale... A characteristic of pre-commercial procurement is the sharing of risks and benefits depending on market conditions, since the public purchaser reserves not the results of R & D for use exclusively, but shares with the companies the risks and benefits of the R & D necessary to develop innovative solutions that exceed those available in the market. In this case, i.e. where the public sector entity makes the distribution of risks and benefits at market prices, R & D services can be paid without submitting to the rules of contract under one of the exclusions listed in the EU public procurement directives. Specifically it is the 16.f article) of Directive 2004/18/EC for which ‘the this Directive shall not apply to those public service contracts: (...)’ ((f) relating to research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the exercise of their own activity, provided that the service provided is wholly remunerated by the contracting authority ‘and article 24.e) of Directive 2004/17/EC which States that ‘the this Directive shall not apply to service contracts’(: [...] e) relating to the research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the exercise of their own activity, provided that the service provided is wholly remunerated by the contracting entity’. In Spain there is no detailed regulation that favours this change in strategy. A regulation allowing allowing the hiring of the result by public administrations (initially and with limitations) that promote investment initiatives there is a greater profitability, in the pre-commercial purchase would require allowing you to migrate through grant-building culture of the collaboration through the contract.

Remedies

Question 13

The new resource of pre-contractual character rests in Spain on a new figure such as administrative tribunals, which recognizes schools, full jurisdiction with possible resetting of the individualized legal situation and, where appropriate, compensation, manifested in the content of the final resolution. The suspension is automatic in the majority of cases, ensuring the useful effect of the resource.

The novelty is certainly relevant both from a dogmatic level and practical management. Not in vain, as he has been remembering, a legal system seeking effective and efficient in the implementation of its provisions need of procedural and procedural mechanisms that allow 'repair and correct' effectively contraventions to provisions. Otherwise a risk of corruption and mistrust in a system which, while it may formally be correct, in practice becomes as 'generator or facilitator' of non-compliance that are consolidated and favor the idea that justice is not equal for all citizens.

This is a crucial issue, because it depends on the essence of the fundamental right to effective judicial protection. It is noted that the main function of the administrative tribunals of public contracts is control of the tendering procedure, being able to pronounce on the annulment of illegal decisions taken during the procurement procedure, including the removal of discriminatory technical, economic or financial features contained in the notice of tender, indicative, specifications, regulatory conditions of the contract or any other document related to the tendering or adjudicationas well as, if applicable, on the feedback of performances. In any case, its function is exclusively control of compliance with the principles and legal procedures, in such a way that is not possible the replacement of the technical trial that valued different award criteria, as long as the legal formalities are met, there is motivation and it is rational and reasonable.The experience of these years allows to note a preference for this system of justice administrative by its speed and expertise and, preferably, for efficiency (high percentage of resource estimate) main conclusion, without a doubt, the creation and operation has meant a remarkable advance on the need for effective control, as well as guaranteeing the right to guardianshipallow a more efficient management of public funds and enable the effectiveness of the right to good administration.

Conclusion and reform

Question 14

a) This proposal for a directive is, without doubt, the great 'new', especially by what means enlargement of the object community to national practices Regulation (as well as conceptual debugging in the field of public services). This regulation is undoubtedly strategic to encourage investment and revive the economy in a market, where the risk, as we shall see, is one of its features notes (in complex contracts and long-lasting) properly and, therefore, requires a stable legal framework and language. Accordingly, the main objective of this new directive is clarifying the legal framework applicable to the award of concessions, as well as to clearly delineate the scope of application of the framework. And, of course, increase legal certainty since, on the one hand, contracting authorities and entities will have precise rules that incorporate the principles of the Treaty to the granting of concessions and, on the other hand, economic operators will benefit from some basic guarantees with respect to the tendering procedure.In the current times of budget constraints the policy of concessions seems a tool of undeniable practical interest.It is necessary to check, therefore, if the mode of remuneration agreed is the right of the lender to exploit a service (or work) and implies that this assumes the risk of exploitation of the service (or work) in question. Although this risk can certainly be very limited from the outset, the qualification of concession nevertheless requires the contractor to transfer to the licensee all or, at least, a significant part of the risk that runs. Obviously, the risk of economic exploitation of the service must be understood as the risk of exposure to the uncertainties of the market, which can result in the risk of facing competition from other operators, the risk of a mismatch between supply and demand for services, the insolvency risk of the debtors of the prices for services renderedthe risk of that revenues do not fully cover operating costs or even the risk of liability for damage caused by an irregularity in the provision of the service. Thus, risks such as those linked to mismanagement or misjudgments of the economic operator are not determinants for the purpose of qualifying a contract as a public contract or concession of services, since such risks, in fact, are inherent to any contract, whether they are of a public service or a service concession contract. But you can not forget, as good indicated M.A. BERNAL BLAY, who rigorously the principle of risk and ventura in administrative concessions would generate more problems, it impossible on many occasions to ensure a continuous and regular provision of public services.Very interested in this nuance

when interpreting in 'new' concept of operational risk and its anchorage in the traditional conception of risk and ventura of the concessions. Understand that the new legislation increases the variable risk in these contracts may involve not only a collapse of traditional principles, but, mainly, a limitation not beloved by the text itself since the Community institutions considered strategic this new regulation of concessions. For this reason, the current rules of financial balance of the contract don't seem to counter – rather the opposite – the concept of operational risk. And this by the logic of the application of the principle of proportionality in contracts of long-lasting and complicated relations juridico-economicas (and financial) that justify a correction to the idea of the unlimited risk by actions not controlled by the dealer, to non-recruitment or due diligence in granting planning. Every contract, irrespective of its legal nature, it has to ensure that provisions requiring the parties to give, deliver or receive are equivalent from the economic point of view. That balance or equivalence of benefits, initially identified at the time of the agreement, must be subsequently during the period its execution, in application of the general principle of validity of conditions contractual rebus sic stantibus.Accepting as inherent to the concept of operational risk the idea of economic balance of the contract and its dynamic application, the regulations raises questions that must be resolved in the implementation (in fact our current regulation does not resolve them) as a poor regulation of risks can be an impediment – or extra financial costs – investments that require this type of contracts. Cases of factum principis, which, in my opinion, should include any administrative (or legislative) decision unpredictably alter the proper apportionment of risks and allowing you to not unduly distort should finalize legal level the internal rate of return (IRR). Do not recognize such an option for the balance of the contract entails important dose of legal uncertainty that will affect investment in these contracts. And nothing breaks the principle of equality or efficiency because it allows to provide security to ensure the proper execution of the contract and its financial plan regardless of whoever is awarded. Also progress clause and its particular obligacional meaning, must set as the technical evolution can lead to such imbalance that management of the concession, planned in a different technique environment make unviable. Promote technological advances to any matter, but when the investment affect the logic on which it was planned to the investment you should set the TIR. Finally, although understood now excluded well the effects of unpredictable risk could be adjusted. At this point, the administrative liability (RPA) is an element of important safety, functioning as effect called on the investors to ensure part of the business more than the logical risk of management of the concession.

b) In Spain of CPP is set as an exceptional mode unable to technical, legal or economic recourse to any other typical contracts. The plurality of benefits that can pick up this agreement and their complexity in the design of the object as in the articles of the tender and the legal regime of the contract procedure make this a difficult contract insofar as well says GONZALEZ GARCIA, is a *'contract to assemble'*, susceptible of various and different combinations in both makes it possible to meet complex needs. In addition, in the words of S. of the SAZ, differences from other contractual modalities reside in fabric type to use to make the tailored suit. Of course the real success in the performance of this contract modality requires the implementation of an effective quality control mechanism and the fulfilment of the commitments entered into by the parties and that it must extend, as well points M. GARCÉS, verification of committed, both human and technical resources. You should also articulate an effective mechanism of financial control of a permanent nature, noting that the main value of audits to be carried out will be the ensure the quality and correctness of the tarifas. To conclude, the debate of the CPP is topical, especially in times of economic crisis like the present, and one of the challenges of public management that should be analysed from the standpoint of your convenience – from the perspective of efficiency – and not only of its formalization. And facing some ideological objections who see in this mode a privatisation of public services should be remembered, in the words of G. MARCOU *'various contracts on the basis of the private sector is responsible for the financing of investments and/or exploitation of public works or public services, are not, strictly speaking, a form of privatization, but it is rather a set of legal institutionsthat they are intended to mobilize private investments and savoir faire industrial and technical of the private sector, in order to provide the necessary public facilities for society and the economy'*. In any case, in deciding the contractual type more appropriate and suitable for the specific provision should be taken into account as possible delimiters the following criteria: to) the CPP has budgetary advantages, which make them very interesting in times of crisis and budgetary constraints, where certain infrastructure would be but non-viable (but this option is conditional to the private partner access easily to financing on acceptable terms;) b) the criterion of greater value/money inherent in these models allows a greater eficacia-eficiencia in the management of projects, with few deviations or problems of implementation, that by your own design, they are more adaptable to change resulting in long term contracts (but must be an appropriate balance of risks); c) favor, a priori, a better distribution of budget funds, promoting social solidarity, at the same time promoting the idea of intergenerational solidarity and the 'culture' that the infrastructures are not 'free'; d) but also have high trans-

action costs and certain problems of moral hazard because they understand that the private partner has an unlimited public endorsement. In addition, they can pose accounting uncertainties to be little transparent funding systems and difficult to control. In short, and in the words of P. VALCÁRCEL, *'to contracts of CPP only should seek after a detailed study of the circumstances of each project that cast that the realization of the same by the public sector is inefficient because it is not ready to face it in the way that means necessary. For this reason, the increased cost that will bring the assumption of the same by individuals, is offset by real capital gains obtained in terms of efficiency, compared to the rest of alternatives, in the care of the pursued public role. Not valid, therefore, global, broad or generic answers but that should have a broad and deep knowledge of the capabilities and efficiency of the public sector or other contractual methods other than this type of collaborative mechanisms to decide what in each case appropriate'*. These are times of new challenges for the management of procurement, used as the main tool for the implementation of necessary policies, which recommend a reflection on the need for a reform of the public procurement rules that allow the goal of greater efficiency and integrity in the award of public contracts. And certainly formulas of CPP, as well as the proper classification and choice of contract can be used to meet referral goals. But it is also the time of progress in the mechanisms of collaboration with other public authorities, as explicitly recommended in the STJUE on November 13, 2008, Coditel Brabant SA (points 48 and 49). And – without forcing the limits of the technique of the Convention to hide a contract – it is possible to articulate mechanisms of collaboration – especially for the proper and efficient development of public services. Paradigmatic is the STJUE of June 9, 2009, (Commission v Federal Republic of Germany, p.o. box 47), which admits the possibility of joint collaboration between public authorities through links conventional considering that a public contract but an organisational formula and not contractual, there as long as the concurrence of a series of circumstances that allowed such consideration is credited(: a) common public interest objective; (b) provision that has no commercial, for lack of dedication to market; and (c) existence of rights and reciprocal duties beyond the remuneration or compensation.

SWEDEN

Pernilla Norman[1] *and Eva-Maj Mühlenbock*[2]

The context

Question 1

Sweden has implemented the Directives on public procurement in separate statutes, closely following the wording of the Directives. The main statute is the Public Procurement Act (2007:1091) (hereinafter called the Public Procurement Act). Litigation on public procurement is vast and the courts tend to follow the wording of the statutes quite closely. As concerns the approach, the Swedish way does bare some aspects of approach number 3), the Public Procurement Act and the other statutes are quite detailed and they are indeed enforceable in court, but the difference regarding the approach is that the statues do not leave much scope for the Rule of law to be applied.

Concerning the enforcement of the Public Procurement rules two court systems works in parallel in Sweden. The Administrative Courts are competent as regards cases trying the application of the Public Procurement rules,

1. Pernilla Norman is Advokat at Lindskog Malmström Advokatbyrå and doctorat candidate at the University of Linköping. Pernilla Norman has extensive knowledge and experience of EU law, competition law, public procurement law and related contract law. Pernilla Norman has written a number of books within these fields of law and is a highly regarded and frequently engaged lecturer both at conferences and universities. Pernilla Norman was assisted by associate, jur kand Hans Näsbrandt in preparing this national report.
2. Eva-Maj Mühlenbock is a Partner and Head of the Public Procurement group at Advokatfirman Lindahl's Stockholm office since 2003. Eva-Maj Mühlenbock has vast experience and education in public procurement and is a highly regarded and frequently engaged lecturer. She is also one of the authors to the legal commentary on the Swedish Public Procurement Act. Eva-Maj Mühlenbock was assisted by associate jur.kand. Linnea Skarle in preparing this national report.

whereas the Civil Courts are competent to try cases regarding damages following breach of the Public Procurement rules.[3]

The boundaries of EU public procurement law

Question 2

The definition of public procurement contracts is copied from the text of the Directives. The scope of each Act is set out in the text of that statute. The scope of the Public Procurement Act is laid down in Section 1[4] and also states exceptions from its scope.[5] In addition to what follows from the Act on Public Procurement 'Myndighetsutövning' falls outside the scope of the Act. 'Myndighetsutövning' is an administrative concept regarding the exercise of authority and includes decisions or other actions that are ultimately expressions of society's powers in relation to citizens. Generally can be said that only a very limited tasks of Swedish authorities fall within the term 'Myndighetsutövning'.

Question 3

The exclusion of in house and public-public cooperation is stipulated in the Public Procurement Act section 2, article 10 a. This regulation was initially incorporated in Swedish law as a temporary rule and was as such in effect since the 15th of July 2011, although able to apply retroactively. As of the 1st of January 2013 this temporary rule was replaced by permanent regulation.[6]

Following the criteria in the Teckal case,[7] the regulation excludes in house contracts from the scope of the Public Procurement Act.

3. Section 16 of the Public Procurement Act.
4. Section 1 article 2 describes te scope of the Act.
5. Articles 3-8.
6. SFS 2010:570 and SFS 2012:392.
7. C-107/98.

Question 4

The Public Procurement Act does only apply to purchases made by the public. However, not all purchases falls under the scope as section 1 article 6 of the Public Procurement Act exempts the following situations:

1. the acquisition of a land unit, leasehold rights, tenancy rights, tenant owner rights, site leasehold rights, easement rights or any other right to a land unit, though the Public Procurement Act applies to procurement of financial services as a result of contracts referred to in this item
2. the acquisition, development, production or co-production of program material intended for radio and television programs and the procurement of broadcasting time,
3. arbitration or conciliation assignments,
4. financial services in connection with the issuing, sale, purchase or transfer of securities or other financial instruments,
5. employment,
6. research and development services other than those where the results belong exclusively to the contracting authority, or
7. operations that relates to the management of the public debt or relate to services from a central bank

Further, certain types of contracts in the telecommunication sector, which is considered fully exposed to competition is exempted[8] as services provided for *in house* in line (however not identical) with C-107/98 Teckal, defense procurements,[9] procurement procedures under other international rules[10] and procurement within the water, energy, transport, postal services sectors (Utilities Act applies).[11]

Thus, if any consensual agreement between the public and private sectors are entered into falls under section 1 articles 3, 3a, 4 or 6 or section 2 article 10 a, the Public Procurement Act does not apply.

8. Public Procurement Act, section 1 article 4.
9. Public Procurement Act, section 1 article 3 a.
10. Public Procurement Act, section 1 article 5.
11. Public Procurement Act, section 1 article 3.

Question 5

Co-ownership by public and private parties is rare in Sweden and such mixed arrangements would be strictly defined and extremely limited. Consequently, there are no regulation for such arrangements in Swedish law.

The general principles of EU law: public procurement law and beyond

Question 6

The general principles of non-discrimination, equal treatment, proportionality, transparency and mutual recognition apply not only to procurement contracts which exceed the thresholds provided for in the Public Procurement Act, but also to procurement contracts falling below these thresholds.[12]

Further, the general principles of EU law must be respected in awarding service concession contracts. As service concession falls outside the scope the Procurement Directives, the Public Procurement Act does not however apply. Hence, the right to initiate a review of a procurement procedure under the Public Procurement Act cannot be relied upon. Instead, a tenderer must rely on the possibility to ask for a legality review of the service concession contract provided for in the Local Government Act (1991:900), which scope of application is rather limited.

Question 7

As soon as an administrative measure is of cross-border interest in a way that it affects trade between member states, the general principles under FEUF apply.

The above mentioned principles have since long formed a part of our legal tradition, although the accession to the EU has influenced and reinforced their importance. For example the prohibition to favour an individual resident is a fundamental principle under the Local Government Act (1991:900) which derives from the basic democratic values of equality and objectivity.

12. Public Procurement Act, section 15 article 2.

Public procurements and general EU law, including competition and State aids law

Question 8

The starting point in every procurement, under Swedish law as well as in the rest of the Union, must always be that there is a need in the organization that needs to be fulfilled. It is thus not the procurement department, nor the courts in case of a court proceeding that can or should define the object of the procurement. However the public procurement must be conducted in a way that the fundamental principals (such as transparency, non-discrimination, equal treatment and proportionality) are upheld.

In most procurements, any breach of the fundamental principles that might occur does not impose restrictions on cross-boarder trade. However, the case for locally produced food is an example where procurements have been drafted in a way that restrict the free movement of the Internal market. However, the national courts have applied the Public Procurement Act in favour of cross-boarder trade. Requirements in a procurement hindering the free movements have consequently been found unlawful.

Question 9

Under section 1 article 11 of the Public Procurement Act suppliers may submit a joint tender.[13] The provision aims to ensure that competition is maintained in larger tender procedures, where small- and medium-sized companies otherwise would have difficulty participating, as they not alone possess the capacity the contracting authority demands. The right to submit a joint tender is an absolute in a way that it may always be relied upon by suppliers. Thus, a contraction authority cannot in the tender documents prohibit a supplier to invoke the capacity of a subcontractor.

The possibility to collaborate in tender procedures is not without restrictions as it must be seen in the light of the prohibition of anticompetitive agreements provided for in competition law. A joint tender that has either as its object or effect the prevention, restriction or distortion of the competition will therefore not be accepted. Hence, the provision in chapter 1 section 11 of

13. This can under the Public Procurement Act, section 11 article 12, be done by invoking the economic, technical and professional abilities of other undertakings.

the Public Procurement Act may only be invoked in situations where the suppliers are not themselves capable of submitting an individual tender.

Recently, several high profile cases concerning collaboration in procurement procedures has been brought to court by the Swedish Competition Authority (SCA). Further, the SCA has this year published a guideline on its website where it provides guidance for in which situations cooperation between tenderers in general is allowed respective in violation of competition law. Although the guideline is not exhaustive it provides for some clarifications as to the relationship between the Public Procurement Act and the competition law, which before was not evident.

Question 10

No, unlike the situation were the public provide for and finance a service of general economic interest (SGEI) itself, the Swedish Public Procurement Laws[14] does apply if a contracting authority outsources a SGEI to a private market participant. The Public Procurement Laws is also applicable in situations where a private market participant together with the public sets up a company jointly owned in which the SGEI is carried out.[15]

Strategic use of public procurement

Question 11

The Public Procurement Act enables contracting authorities to consider environmental and social aspects in several ways:[16]

- By imposing *requirements* on the supplier or the good
- By using them as a *criteria* for the evaluation of the tenders
- By using them as a *specific contract term* when fulfilling the awarded public procurement contract

---

14. The Public Procurement Act and The Swedish Act on Utilities (2007:1092).
15. Madell, Tjänster av allmänt intresse – ett svenskt perspektiv, SIEPS 2011:8, s. 83.
16. Konkurrensverkets informationsmaterial 'Miljöhänsyn och sociala hänsyn i offentlig upphandling', s. 10. http://www.konkurrensverket.se/upload/Filer/Trycksaker/Info material/ miljokrav_upphandling.pdf *(2013-10-31).*

Whilst environmental consideration aims to encourage utilization of sustainable products throughout the supply chain and the society as a whole, social consideration aims at inter alia employment opportunities, compliance with labour right, social inclusion and corporate social responsibility.

Any environmental or social consideration set out by a contraction authority must be clear and easy to evaluate and verify. They must all be presented in the contract documents.[17] Further, environmental and social policy goals may only be considered if they are of relevance and proportionate. Thus, if a natural link between the public procurement procedure and an environmental or social consideration is missing or if the general principles for public procurement procedures set out in EU law, such as the principle of proportionality, is not respected, the environmental or/and social consideration will not be accepted.[18]

When initiating a 'green' public procurement procedure, public authorities should consider a life-cycle cost method. It is subject to discussion whether this holistic approach manages to uphold the indispensable natural link with the public procurement procedure needed (see above) and what options there are when all information of the life-cycle cost of a product simply is not available.[19]

The strategic use of public procurement procedure for achieving environmental goals has been subject to a Swedish Government Official Report, in which environmental consideration is suggested to be taken more on a long-term perspective than today.[20]

As apparent from case law, environmental or social policy consideration may be used by the contraction authorities to wrongfully favour local suppliers.[21]

---

17. Konkurrensverkets rapport om miljöhänsyn i offentlig upphandling, s. 47. http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/uppdragsforskning/forsk_rap_miljohansyn_off_upph.pdf *(2013-10-31).*
18. Konkurrensverkets informationsmaterial 'Miljöhänsyn och sociala hänsyn i offentlig upphandling', s. 9. http://www.konkurrensverket.se/upload/Filer/Trycksaker/Infomaterial/miljokrav_upphandling.pdf *(2013-10-31).*
19. Miljöstyrningsrådets rapport 2012:1 'Ekonomiska och sociala hänsyn i offentlig upphandling', s. 56.
20. SOU 2013:12 'Goda affärer – en strategi för hållbar offentlig upphandling'.
21. See for example case 4471-1997 of the Administrative Court of Appeal in Jönköping.

Question 12

In Sweden innovations and an innovative climate are regarded as fundamentally important for prosperity and growth. Public procurement is identified as an area that can promote and enable innovations. A separate Swedish Government Official Report on innovations in public procurement has been pubished.[22] The conclusion of the Report is that public entities should use procurements as a tool to foster innovation. This can and should be done within the framework of the present Public Procurement Act. Thus further legislation is not needed (with the exception of procedures for pre-commercial procurement).

Remedies

Question 13

The Public Procurement Act provides for remedies that can result in the rectification of a procurement procedure or, if a contract has been concluded, the ineffectiveness of such contract. In addition, the Public Procurement Act also provides for the possibility to damages due to violation of the Act.

A standstill period applies during which a contract may not be concluded. This period expires 10 or 15 calendar days (depending on the means of communication used) after the procurement decision is sent to the participating tenderers. The standstill provision applies irrespective of whether the procurement procedure falls within the scope of the Procurement Directives or not.

An application for a judicial review of a contracting authority's procurement decision must be submitted to the County Administrative Court before the expiry of the standstill period. The review of procurement decisions is given priority by the courts. If the contracting authority has violated the provisions of the Directives or national rules transposing the Directives, resulting in damage or potential damage to a supplier, the Court will order the award procedure to be recommenced or that it may not be concluded until the violation has been rectified. The standstill period will apply during the judicial review and will expire 10 days after the court rendered its decision (prolonged standstill period). The prolonged standstill period will however not apply if

22. SOU 2010:56 'Innovationsutredningen'.

the case is appealed to the Administrative Court of Appeals and the Supreme Administrative Court. The higher courts may however, upon application by a supplier, prohibit the conclusion of the procurement process until the final ruling is rendered by an interlocutory ruling.

Upon conclusion of a procurement contract, a judicial review of the procurement procedure may no longer be conducted. However, in accordance with Article 2d of Directive 2007/66/EC, the Public Procurement Act has introduced provisions by which a concluded contract could be declared ineffective by court in the following situations:

- When a contract has been awarded without prior publication of a contract notice without being permissible in accordance with the provisions of the Public Procurement Act and the Utilities Act
- When there is an infringement of the stand still-provisions combined with another infringement where this cause damage to a tenderer
- When there is an infringement of the provisions regarding reopening of competition within a framework agreement where this cause damage or potential damage to a tenderer

The provision on a contract's ineffectiveness applies to procurements that exceed as well as falls below the thresholds set out in the Procurement Directives. The possibility to apply for a judicial review of a contract must be made within certain time frames.[23]

The consequence of a contract being declared ineffective derives from the general contractual principles of Swedish law, entailing the retroactive cancellation of all contractual obligations. A supplier that claims harm may, in addition to apply for the ineffectiveness of a contract entered into in violation of the Public Procurement Act, also institute proceedings for damages by filing an action in a General District Court. To what extent good and bad faith may affect the right to damages after a contract has been declared ineffective, is currently not clear as there is no case law addressing this situation.

Thus, a contracting authority that has failed to comply with the Public Procurement Act may be liable for compensation for damages caused to a supplier. A supplier that has been harmed may be awarded compensation for the costs it incurred in the procurement procedure as well as compensation for loss of profit. Naturally, a supplier that files for damages must be able to prove a violation

---

23. Public Procurement Act, section 7 artilcle 3, section 15 article 21, section 9 article 9, section 15 article 19.

of the Public Procurement Act and the extent of its loss. This implies that a supplier must be able to prove that it would have been awarded the contract if no violation of the Public Procurement Act had taken place.

Any action for damages may be brought before a General District Court within one year of either the date of entry of effect of the relevant procurement contract, or the date of a ruling by which the contract was declared ineffective. If this period is exceeded, the right to damages is forfeited.[24]

The last couple of years the awareness of the remedies provided for by Directive 2007/66/EC have increased. Although the majority of suppliers only utilize the possibility to a judicial review of the public procurement procedure itself the frequency of claim for damages has recently increased.

Conclusion and reform

Question 14

In issuing the Swedish Government Official Report 'Goda affärer – en strategiskt hållbar upphandling'[25] the Government gave the committee a wide assignment to look at public procurement and its effects in a broad perspecitve. One aspect of the work of the committee has been to prepare Swedish position in the negotiations regarding the new directives. The Report contains very few legislative proposals. Most of its proposals concerns methods of getting procurement to be placed on more strategic levels within the procuring entities, improving training and education within the field of public procurement etc.

The much sought after changes of the Public Procurement Act, aiming at facilitating for all parties involved in public procurements are hopped to come from the new modernized directives. The easement for the use of negotiations is one such example. Regarding electronic procurement it can be said that the use of electronic tools for procurement is widely spread among Swedish procuring entities. It must be observed however, that there are crucial legal issues following the practice of electronic procurement tools that have not yet been addressed and thus presently constitutes a threat to the efficiency of those procedures.

24. Public Procurement Act, section 16 article 21.
25. SOU 2013:12.

SWITZERLAND

Evelyne Clerc[1]

Le contexte

Question 1

Bien que non membre de l'UE, la Suisse dispose d'un droit des marchés publics « euro-compatible », pour quatre raisons. En premier lieu, la réglementation et la jurisprudence de l'UE influencent *indirectement* le droit suisse, par le biais de l'*Accord OMC sur les marchés publics* du 15 avril 1994 (AMP).[2] En effet, les négociateurs de l'AMP se sont inspirés du droit de l'Union, car celui-ci constituait alors la forme la plus achevée d'ouverture des marchés publics parmi les pays industrialisés. Par exemple, la définition des « organismes de droit public » et des « entreprises publiques » qui figurent parmi les pouvoirs adjudicateurs assujettis à l'AMP (selon les annexes 2 et 3 de l'Appendice I déposées par la Suisse), constitue une reprise des définitions correspondantes figurant dans les directives de l'UE. En Suisse, la réglementation des marchés publics est une compétence partagée de la Confédération et des cantons. La loi fédérale sur les marchés publics (LMP)[3] et l'accord intercantonal sur les marchés publics (AIMP),[4] ainsi que leurs réglementations d'exécution respectives,[5] ont été adoptés en vue de transposer en droit interne

1. Professeur à la Faculté de droit de l'Université de Neuchâtel (Suisse), Chaire de droit européen et de droit de la concurrence, LL.M. (NYU), LL.M. (Collège d'Europe, Bruges) membre de la Commission de la concurrence (Comco).
2. Accord OMC sur les marchés publics, entré en vigueur le 1.1.1996, RS 0.632.231.422.
3. Loi fédérale du 16 décembre 1994 sur les marchés publics (LMP), RS 172 056.1.
4. Accord intercantonal sur les marchés publics (AIMP) du 25 novembre 1994, révisé le 15 mars 2001.
5. Pour la Confédération : Ordonnance du 11 décembre 1995 sur les marchés publics (OMP), RS 172.056.11. Pour les cantons : chaque canton adopté, sur la base du modèle non-contraignant constitué par les Directives-types d'exécution de l'AIMP, sa propre réglementation cantonale mettant en œuvre les accords internationaux et l'AIMP.

les obligations internationales de la Suisse en matière de marchés publics. Deuxièmement, le législateur fédéral a voulu, en adoptant la loi fédérale sur les marchés publics, assurer autant que possible l'*eurocompatibilité* du droit suisse en matière de marchés publics, sauf dans certains domaines où il se justifiait d'adopter une solution différente.[6] De même, la loi fédérale sur le marché intérieur (LMI) est calquée sur le modèle du marché intérieur de l'UE.[7] L'article 5 LMI, ainsi que la protection juridictionnelle qui y est associée par l'article 9 LMI, ont pour objectif la suppression du protectionnisme cantonal et communal en matière de marchés publics à l'intérieur de la Suisse.[8] Troisièmement, l'eurocompatibilité est *directement* renforcée par un *Accord bilatéral* conclu en 1999 entre la Confédération suisse et l'ancienne Communauté européenne (Accord MP), qui assure entre les deux Parties une ouverture des marchés publics équivalente à celle résultant de la mise en œuvre des Directives de l'UE entre les Etats membres.[9] Quatrièmement, la *pratique* suisse tend à reprendre les nouveaux modes de passation des marchés adoptées dans l'UE, indépendamment de leur incorporation dans le droit positif suisse. Ainsi, le marché relatif à la rénovation de la gare de Genève a été passé selon une « procédure de mandats d'étude parallèles » très similaire à celle du dialogue compétitif introduit par les directives UE.[10]

La transposition des accords internationaux, et de ce fait la reprise indirecte du droit de l'UE, s'est traduite en Suisse par un foisonnement de régle-

---

6. Message du Conseil fédéral du 19.9.1994 relatif à l'approbation des accords du GATT/OMC (Cycle d'Uruguay) (Message 1 GATT), FF 1994 IV p. 343 s.
7. Loi fédérale du 6 octobre 1995 sur le marché intérieur, RS 943.02 ; Message du Conseil fédéral du 23.11.1994 concernant la loi fédérale sur le marché intérieur (LMI), FF 1995 I p. 1217-1223.
8. Evelyne Clerc, Art. 5 LMI N 4, 15, 32, 36-37 in : Vincent Martenet/Christian Bovet/Pierre Tercier (ed.), Commentaire Romand – Droit de la concurrence, 2e éd., Bâle 2013.
9. Accord du 21 juin 1999 entre la Confédération suisse et la Communauté européenne sur certains aspects relatifs aux marchés publics (Accord MP), RS 0.172.052.68. L'Accord MP prévoit une ouverture des marchés passés par les districts et les communes, ainsi que ceux passés par des entités de droit public ou de droit privé actives dans les chemins de fer, les télécommunications et l'énergie (autre que l'électricité) ou par des entités privées non dominées par l'Etat mais titulaires de droits spéciaux ou exclusifs et assurant un service au public dans les secteurs eau/énergie/transports/ télécommunications (art. 3 §§ 1-3 Accord MP. Les art. 4 et art. 6 §§ 1-2 Accord MP formulent des règles et principes généraux de passation des marchés calquées sur celles de l'AMP et des directives de l'UE (Clerc, Commentaire CR (*supra* n. 8), art. 5 LMI N 28.
10. JAAC 70/3 (2006), décision CRM 2004-17 du 8 septembre 2005, cons. 4.d/aa.

mentations applicables – souvent cumulativement – aux marchés fédéraux et cantonaux. Les objectifs poursuivis sont l'ouverture de l'accès au marché pour les soumissionnaires établis en Suisse et à l'étranger (dans des Etats parties à un accord en matière de marchés publics avec la Suisse), l'égalité de traitement entre les soumissionnaires, la transparence des procédures de passation, le renforcement de la concurrence entre soumissionnaires et l'utilisation économique des fonds publics. L'imbrication des accords internationaux ainsi que des règles de droit fédéral, intercantonal et cantonal complique l'application du droit des marchés publics. Si les instruments législatifs sont nombreux, leur densité normative est en revanche limitée par la tradition de concision législative suisse. Un grand nombre de questions, comme la délimitation de la notion même de marchés publics, n'ont (encore) aucune réponse réglementaire, de sorte qu'elles sont résolues par les tribunaux à l'occasion de cas d'espèce. En s'appuyant sur la doctrine qui suit elle-même souvent une approche de droit comparé, la jurisprudence suisse reprend souvent des solutions présentant de fortes analogies avec celles retenues dans le droit et la jurisprudence de l'UE.

Ce n'est qu'avec la transposition de l'article XX AMP, signé en 1996, qu'une *voie de recours* en matière de marchés publics a été introduite dans le droit fédéral et cantonal. Cette révolution copernicienne et la crainte d'une paralysie de l'activité de l'Etat par une inflation de recours contre les décisions d'adjudication, expliquent les dérogations adoptées par rapport aux voies de recours ordinaires.[11] La protection juridictionnelle relève du contentieux de droit administratif. Elle est assurée, en première instance, par les cours de droit public des tribunaux cantonaux et le Tribunal administratif fédéral et, en seconde instance, par le Tribunal fédéral. Les principales limitations concernent l'octroi de mesures provisoires, en particulier l'effet suspensif, qui n'est accordé que sur requête et non pas de manière automatique en première instance, le raccourcissement du délai de recours à 10 ou 20 jours au lieu du délai usuel de 30 jours, l'octroi d'un *standstill* de par la loi ou la jurisprudence afin d'éviter une politique du fait accompli, la restriction des effets du recours à la seule constatation de l'illicéité de la décision lorsque le contrat est déjà conclu entre le pouvoir adjudicateur et l'adjudicataire, le plafonnement des dommages-intérêts aux seuls frais d'élaboration de l'offre et aux frais de re-

11. Etienne Poltier / Evelyne Clerc, Art. 9 LMI N 29-39, 45-51, 73-79, 94-101, 104, 108, 113-126, 141-151 in: Vincent Martenet/Christian Bovet/Pierre Tercier (ed.), Commentaire Romand – Droit de la concurrence, 2e éd., Bâle 2013 ; Peter Galli / André Moser / Elisabeth Lang / Marc Steiner, Praxis des öffentlichen Beschaffungsrechts, 3e éd., Zurich 2013, p. 573-746.

cours, une limitation du recours en matière de droit public au Tribunal fédéral aux seules décisions relatives à des marchés publics qui atteignent les valeurs seuils internationales et qui soulèvent une question juridique de principe.[12] Pour les marchés publics non soumis aux accords internationaux (ce qui correspond grosso modo dans l'UE aux marchés non soumis aux directives), la Confédération exclut toute possibilité de recours,[13] tandis que les cantons ouvrent une voie de recours qui peut toutefois être exclue pour les marchés de faible valeur passés par une procédure de gré à gré.[14]

Selon la théorie des deux niveaux (*Zweistufentheorie*), le droit des marchés publics relève du *droit administratif* jusqu'à l'adjudication du marché.[15] Le contrat ultérieurement conclu avec l'adjudicataire relève le plus souvent du droit privé, mais il peut également constituer un contrat de droit administratif.[16] Les défis rencontrés sont de plusieurs ordres. En premier lieu, la compétence partagée entre la Confédération et les cantons a donné lieu à des règles divergentes dans certains domaines sensibles. Ainsi, les négociations sont interdites pour les marchés cantonaux et communaux, alors qu'elles sont possibles à des conditions restrictives pour les marchés fédéraux.[17] La prise en compte de critères relevant de l'aptitude du soumissionnaire parmi les critères d'adjudication, principalement pour les marchés de services et de travaux, a fait l'objet d'une longue jurisprudence avant d'être finalement admise dans certaines limites.[18] La délimitation de la notion même de marchés publics, en particulier sa délimitation avec les actes unilatéraux, les marchés *in house*, les concessions, les PPP et les collaborations entre collectivités publiques, est un

---

12. Pour les recours en première instance : voir art. 14-18 AIMP et art. 9 LMI concernant les marchés publics cantonaux et communaux, et art. 22, 26-35 LMP concernant les marchés publics fédéraux. Pour les recours en seconde instance au Tribunal fédéral, voir pour le recours en matière de droit public l'art. 83 let. f LTF (loi fédérale du 17 juin 2005 sur le Tribunal fédéral, RS 173.110) et, pour le recours constitutionnel subsidiaire les art. 115-118 LTF.
13. Art. 2 al. 3 i.f. LMP.
14. ATF 131 I 137. Il s'agit des marchés de fournitures d'une valeur inférieure à 100'000 CHF, des marchés de services d'une valeur inférieure à 150'000 CHF et des marchés de travaux d'une valeur inférieure à 150'000 CHF dans le second œuvre et à 300'000 CHF dans le gros œuvre.
15. ATF 134 II 297, cons. 2.1 ; Galli et al., *supra* n. 11, p. 503, N 1088.
16. ATF 125 I 209, cons. 6b ; ATF 129 I 416, cons. 3.4 ; ATF 134 II 297, cons. 2-3 ; ATF 135 II 49, cons. 4.3.1 ; Tribunal fédéral, arrêt 2C_795/2012 du 1er mai 2013, cons. 4.4.
17. Art. 11 let. c AIMP ; art. 20 LMP et art. 26-26a OMP.
18. Tribunal fédéral, arrêt 2C 91/2013 du 23 juillet 2013, destiné à la publication, cons. 2.

chantier encore ouvert.[19] Les tribunaux ont aussi subordonné la qualité pour recourir à l'exigence d'un lien de causalité, en ce sens que le soumissionnaire évincé ne dispose d'un intérêt juridiquement protégé que s'il a une chance réelle d'obtenir l'adjudication en cas de bien-fondé du recours ; à défaut, l'illégalité de la décision attaquée n'est pas la cause du prejudice.[20] Le sort du contrat conclu de manière anticipée, c.-à-d. avant la publication de l'adjudication ou avant l'échéance du délai de recours, est controversée en doctrine et n'est pas définitivement réglée par la jurisprudence.[21]

Les limites du droit européen des marchés publics

Question 2

En l'absence d'une définition dans le droit positif interne ou international, c'est à la jurisprudence que revient la tâche de définir la notion de marchés publics. Selon le Tribunal fédéral, on se trouve en présence d'un marché public lorsqu'une collectivité publique, qui intervient sur le marché libre en tant que « demandeur » ou « acquéreur » de prestations, acquiert auprès d'une entreprise (privée), moyennant le paiement d'un prix, les moyens nécessaires dont elle a besoin pour exécuter ses tâches publiques. C'est la collectivité publique qui est « consommatrice » de la prestation et c'est l'entreprise privée qui en est le « fournisseur ».[22] Chacun des éléments de cette définition jurisprudentielle soulève des controverses quant aux contours exacts de la notion de marchés publics.

Un marché public implique un *contrat synallagmatique*, passé *à titre onéreux*, par opposition à un acte administratif unilatéral ou à l'exercice d'une

19. Voir les discussions à ce sujet *infra*.
20. Pour le recours constitutionnel subsidiaire au Tribunal fédéral, voir arrêt 2D_49/2011 du 25 septembre 2012, cons. 1.3.2 ; arrêt 2C_720/2012 du 1 février 2013, cons. 2.1-2.2.
21. ATF 129 I 410, cons. 3.4 ; Tribunal fédéral, arrêt 2C_339/2010 et 2C_434/2010, du 11 juin 2010, cons. 3.2 ; arrêt 2C_446/2011 du 10 octobre 2011, cons. 1 ; arrêt 2C_611/2011 du 16 décembre 2011, cons. 2.2 ; Martin Beyeler, Welches Schicksal dem vergaberechtswidrigen Vertrag, PJA 9/2009, p. 1141 ss; Poltier/Clerc, Commentaire CR (*supra* n. 11), art. 9 LMI N 116-123.
22. ATF 125 I 209, c. 6b ; ATF 135 II 49, c. 4.2 ; Tribunal fédéral, arrêt 2C_198/2012 du 16 octobre 2012, cons. 5.1 ; Pierre Moor / Etienne Poltier, Droit administratif, vol. II – Les actes administratifs et leur contrôle, 3e éd., Berne 2011, p. 503.

compétence prévue par la loi. La nature du contrat (de droit privé ou de droit administratif) conclu avec l'adjudicataire n'est pas déterminante et doit faire l'objet d'une analyse fonctionnelle, afin d'éviter que le droit des marché publics ne soit contourné par le choix d'une construction juridique particulière.[23] La distinction est mouvante entre un marché public, à savoir l'activité par laquelle l'Etat se procure des fournitures ou services dont il a besoin pour réaliser lui-même une tâche publique (*blosse Hilfstätigkeit*, qui est effectuée par contrat de droit privé) et une simple délégation de l'exploitation d'une tâche publique à une personne privée (effectuée par contrat de droit administratif).[24]

Pour qu'il y ait marché public, il faut en tous cas que l'acte revête un caractère synallagmatique, soit au sens étroit lorsque l'Etat acquiert une prestation moyennant une contre-prestation en faveur de l'adjudicataire, soit au sens large lorsque les deux parties exercent en commun une activité dans laquelle chacune fournit certaines prestations et reçoit des contre-prestations (*public private partnership*). Ne constitue pas un marché public le simple fait que l'Etat autorise (unilatéralement) une entité privée à exercer une activité, car il exerce dans un tel cas une compétence réglementaire et n'acquiert aucune prestation. De même, l'octroi d'une concession d'usage privatif du domaine public n'est pas un marché public, car l'Etat n'acquiert rien, mais confère au contraire un droit à une entité privée et reçoit (en règle générale) une contre-prestation à ce titre. Il n'en va autrement que lorsque l'octroi de la concession s'accompagne de contre-prestations d'une certaine ampleur de la part du concessionnaire qui font normalement l'objet d'un marché public.[25]

L'existence d'un marché public ou d'une concession de travaux suppose en tous cas que le pouvoir adjudicateur ne se limite pas à réguler une activité privée, mais qu'il délègue à son partenaire (concessionnaire) l'exécution d'une tâche publique qu'il appartiendrait autrement à l'Etat d'assurer. Tel n'est pas le cas lorsqu'un parking est construit sur l'initiative d'une entreprise privée. Le fait qu'une telle construction privée fasse l'objet d'autorisations relevant du droit des constructions et de l'aménagement n'en fait pas une tâche publique. Si, en revanche, l'Etat était lui-même le maître de l'ouvrage, la construction du parking serait assujettie aux règles sur les marchés publics. Conformément au principe de légalité (art. 5 al. 1 Cst.), une base légale serait toutefois néces-

23. Tribunal fédéral, arrêt 2C_198/2012 du 16 octobre 2012, cons. 5.1.
24. ATF 134 II 297, c. 2-3 ; ATF 135 II 49, 54 ; Clerc, Commentaire CR (*supra* n. 8), art. 5 LMI N 59.
25. Tribunal fédéral, arrêt 2C_198/2012 du 16 octobre 2012, cons. 5.1.

saire pour que l'Etat ait la faculté ou l'obligation de construire un parking. A défaut, il ne s'agit pas d'une tâche publique.[26]

La jurisprudence accorde une importance fluctuante à la *liberté contractuelle du prestataire, en particulier dans la fixation du prix*. La désignation d'un dentiste scolaire n'était pas un marché public, au motif que ce dentiste devait appliquer un tarif de prix décidé par le gouvernement cantonal, ce qui rendait impossible toute mise en concurrence des soumissionnaires.[27] En revanche, un service d'enlèvement des ordures communales par une entreprise privée constituait un marché public, à savoir une activité auxiliaire à l'accomplissement d'une tâche publique par un pouvoir adjudicateur, en raison notamment de la description détaillée des prestations contractuelles ainsi que la faible marge de liberté en résultant pour l'entreprise privée.[28]

On ne saurait éluder le droit des marchés publics en prévoyant dans une réglementation l'acquisition d'un produit ou service auprès d'une entreprise déterminée. Il n'y a en revanche pas d'attribution d'un marché public lorsqu'une *disposition légale* se limite à fixer les spécifications à remplir par un produit/service et que celui-ci est offert par plusieurs entreprises privées.[29]

Le *caractère onéreux* du marché public ne nécessite pas nécessairement le paiement d'un prix par le pouvoir adjudicateur ; toutes les formes de rémunération sont possibles selon l'article II, paragraphe 2, AMP. Même si une ville ne verse pas directement une somme d'argent en contrepartie de la fourniture et gestion d'un système de vélos en libre-service, cette prestation a bien un prix qui correspond à la diminution du montant offert par le soumissionnaire à la ville pour la redevance liée à l'octroi du monopole d'affichage.[30]

En droit suisse, la *concession* nécessite l'existence d'un monopole de droit ou de fait, qui confère à l'Etat le droit exclusif d'exercer une activité économique. Par la concession, l'Etat transfère ce droit exclusif à un tiers, le plus souvent une entité privée.[31] L'octroi d'une concession d'usage privatif du domaine public, par exemple pour l'affichage publicitaire sur le domaine public, n'est pas un marché public, car l'Etat n'acquiert rien, mais confère au contraire un droit à une entité privée et reçoit (en règle générale) une contre-prestation

26. Tribunal fédéral, arrêt 2C_198/2012 du 16 octobre 2012, cons. 5.2.1-5.2.3.
27. Tribunal fédéral, arrêt du 16.05.2001, 2P.19/2001, cons. 1a/cc.
28. ATF 134 II 297, cons. 3.2-3.3.
29. Tribunal fédéral, arrêt 2C_333/2012 du 5 novembre 2012, cons. 6.
30. ATF 135 II 49, c. 5.2.2.
31. Etienne Poltier, Art. 2 al. 7 LMI N 13 ss, 24-26, in : Vincent Martenet/Christian Bovet/Pierre Tercier (ed.), Commentaire Romand – Droit de la concurrence, 2e éd., Bâle 2013.

à ce titre.[32] Il en va autrement que lors d'une opération mixte par laquelle une ville octroie une concession d'affichage sur le domaine public, tout en exigeant du concessionnaire la mise en place et la gestion d'un système de vélos en libre-service. En ce cas, la contre-prestation acquise du concessionnaire, lorsqu'elle est dissociable de la concession d'affichage, constitue un marché public *stricto sensu*.[33] Le sort des concessions de services ne fait l'objet que de peu de jurisprudence. Le fait qu'un canton charge une école privée de donner des cours d'informatique à des chômeurs, moyennant le versement d'une subvention par le canton pour chaque chômeur ainsi formé n'est pas un marché public. Le canton ne se procure pas des biens ou services pour exercer lui-même une tâche publique, mais il transfère l'accomplissement de celle-ci à une entité privée.[34] L'octroi d'une concession de services peut faire l'objet de règles spéciales dans le droit fédéral, qui imposent une mise en concurrence, par exemple pour la téléphonie mobile.[35] En outre, l'article 2 alinéa 7 LMI impose aux cantons et aux communes (mais non à la Confédération) de publier un appel d'offres et de ne pas discriminer les personnes établies en Suisse lors d'une concession de monopole. La procédure d'appel d'offres prévue dans la disposition précitée ne semble ne pas avoir pour conséquence de subordonner l'octroi de concessions de monopole cantonal ou communal à l'ensemble de la réglementation applicable aux marchés publics, mais uniquement à certaines garanties procédurales minimales, y compris la protection juridictionnelle prévue par l'article 9 LMI.[36] L'analogie avec les règles applicables aux marchés publics est toutefois si forte que le Tribunal fédéral a jugé que les conditions posées a la recevabilité d'un recours dans le domaine des marchés publics valent aussi lorsque la violation alléguée porte sur l'article 2 alinéa 7 LMI.[37] L'existence d'un marché public ou d'une concession de travaux suppose en tous cas que le pouvoir adjudicateur ne se limite pas à réguler une activité privée, mais qu'il délègue à son partenaire (concessionnaire) l'exécution d'une tâche publique qu'il appartiendrait autrement à l'Etat d'assurer. Tel n'est pas le cas lorsqu'un parking est construit sur l'initiative

32. ATF 125 I 209, cons. 6 ; Tribunal fédéral, arrêt 2C_198/2012 du 16 octobre 2012, cons. 5.1.
33. ATF 135 II 49, cons. 4.3-5.3.
34. ATF 128 III 250, cons. 2.
35. Art. 24 de la loi fédérale du 30 avril 1997 sur les télécommunications (LTC, RS 784.10).
36. Tribunal fédéral, arrêt 2C_167/2012 et 2C_444/2012 du 1er octobre 2012, cons. 5.
37. Tribunal fédéral, arrêt 2C_857/2012 du 5 mars 2013, cons. 1.4.

d'une entreprise privée qui sollicite à cet effet une autorisation.[38] Le Tribunal fédéral a aussi jugé que la ville de Genève assume une tâche publique lorsqu'elle attribue l'usage accru du domaine public et met en location pendant la saison estivale un nombre déterminé de pavillons glaciers situés sur les quais du lac, qui constituent un lieu de promenade particulièrement touristique et fréquenté. Selon l'article 35, alinéa 2, de la Constitution fédérale, la ville de Genève est liée par les droits fondamentaux et les principes généraux de droit public, comme l'interdiction de l'arbitraire, lorsqu'elle choisit les titulaires des pavillons glaciers.[39]

L'article 2 alinéa 7 LMI impose un appel d'offres si l'Etat prend lui-même l'initiative de concéder l'exploitation d'un monopole cantonal ou communal à une entreprise privée. Tel n'est pas le cas lorsque l'initiative de la construction d'un parking émane de promoteurs privés, et que le canton accepte ensuite d'octroyer à cette fin une concession d'usage privatif du domaine public.[40]

La Commission de la concurrence a rendu en 2010 deux avis relatif à l'application de l'article 2 alinéa 7 LMI pour le renouvellement de concessions hydrauliques ou électriques, en se fondant sur une application analogique des règles de l'exception in house.[41]

Question 3

Le sort des partenariats public-public et des contrats internes au regard du droit des marchés publics en est encore au stade des balbutiements dans la pratique suisse. A notre avis, le droit suisse ne permet pas d'écarter le droit des marchés publics au seul motif qu'un marché serait passé entre deux pouvoirs adjudicateurs. Premièrement, le Tribunal fédéral a toujours maintenu entre parenthèses la qualification « privés » des soumissionnaires dans sa définition de la notion de marchés publics.[42] Il a aussi souligné que la seule forme d'un contrat de droit administratif plutôt que de droit privé ne suffit pas à elle seule à exclure qu'il s'agisse d'un marché public.[43] En deuxième lieu, dans les accords internationaux auxquels elle est partie, la Suisse n'a formulé qu'une exception très limitée, qui concerne les marchés de services attribués à une entité qui est elle-même un pouvoir adjudicateur et qui bénéficie d'un

38. Tribunal fédéral, arrêt 2C_198/2012 du 16 octobre 2012, cons. 5.2.1-5.2.3.
39. Tribunal fédéral, arrêt 2C_167/2012 et 2C_444/2012 du 1er octobre 2012, cons. 4.
40. Tribunal fédéral, arrêt 2C_198/2012 du 16 octobre 2012, cons. 6.2.
41. DPC 2011/2 p. 345 et 353. Voir *infra*, question 4.
42. ATF 125 I 209, cons. 6b ; ATF 135 II 49, cons. 4.2.
43. ATF 134 II 297, cons. 2-3.

droit exclusif.[44] Troisièmement, l'article 94 de la Constitution prévoit que la production de biens et la prestation de services sur le marché incombent en principe à l'économie privée. Les unités administratives fédérales ne peuvent ainsi fournir de prestations commerciales à des tiers que si une loi les y autorise.[45] Sont considérés comme tiers les cantons et communes, les Etats étrangers, les organisations internationales, les entreprises liées à la Confédération et les opérateurs privés. Des prestations peuvent être directement fournies, sans base légale, aux autres unités de l'administration fédérale centrale ou décentralisée ainsi qu'au Parlement fédéral et aux tribunaux fédéraux, dès lors qu'il ne s'agit pas de tiers.[46] A notre sens, la règle des art. 41 et 41*a* LFC consacre en substance l'exception *in house*, mais de manière moins restrictive que la jurisprudence de la CJUE, car elle permet des attributions « externes » sans mise en concurrence, lorsqu'une base légale le prévoit.[47]

Question 4

La problématique de l'exception *in house* n'est pas codifiée dans le droit positif. Elle ne fait pas encore l'objet de jurisprudence du Tribunal fédéral.

Dans deux avis rendus en relation avec l'application de l'article 2 alinéa 7 LMI à l'octroi de *concessions* hydrauliques, la Commission de la concurrence a recommandé l'application analogique des conditions de l'exception in house en relation avec l'article 2 alinéa 7 LMI.[48] Ces avis ont eu pour suite, paradoxale, une modification de deux lois fédérales dans le but de soustraire l'octroi ou le renouvellement de concessions hydrauliques ou électriques au champ d'application de l'article 2 alinéa 7 LMI.[49] Toutefois, les débats parle-

---

44. Note 1 à l'annexe 6 de l'Appendice I à l'AMP ; Note 1 à l'Annexe VI à l'Accord MP ; Note 1 de l'Appendice 10 à l'Annexe R de la Convention AELE.
45. Art. 41 et 41*a* de la Loi fédérale du 7 octobre 2005 sur les finances de la Confédération ; LFC, RS 611.0.
46. Message du Conseil fédéral relatif à la modification de la LFC, FF 2009 p. 6537 s.
47. Clerc, Commentaire CR (*supra* n. 8), art. 5 LMI N 79 ; Martin Beyeler, In-house-Vergaben, in : J.-B. Zufferey/H. Stöckli (édit.), Aktuelles Vergaberecht 2010/Marchés publics 2010, Zurich 2010, pour qui la neutralité concurrentielle est le critère déterminant, p. 66 N 109, mais qui admet assez largement un « privilège in-state », p. 81-92.
48. DPC 2011/2 p. 345 et 353.
49. RO 2012 3229 : art. 3*a* et art. 5 al.1 de la Loi du 23 mars 2007 sur l'approvisionnement en électricité (LApEl ; RS 734.7) ; art. 60 al. 3bis et art. 62 al. 2*bis* de la Loi fédérale du 22 décembre 1916 sur l'utilisation des forces hydrauliques (Loi sur les forces hydrauliques, LFH ; RS 721.80).

mentaires ont souligné que les autorités concédantes doivent garantir une procédure transparente et non discriminatoire dans l'octroi de ces concessions.

Question 5

Le droit des marchés publics ne connaît pas de catégorie ad hoc pour des prestations mixtes. Lorsqu'un marché mixte conjugue des prestations qui sont dissociables, c'est-à-dire dont le regroupement dans un marché unique n'apparaît pas indispensable, ces prestations sont considérées séparément afin de déterminer les règles de passation de marché éventuellement applicables à chacune. En revanche, lorsqu'un marché mixte comprend des prestations indissociables, la totalité du marché est passée selon les règles applicables à celle des prestations dont la valeur financière est prépondérante.[50]

Les principes généraux du droit européen : le droit des marchés publics et au-delà

Question 6

Les marchés publics non soumis aux accords internationaux (AMP, Accord MP et Convention AELE) restent soumis aux principes généraux de non-discrimination, de transparence et d'interdiction de l'arbitraire. La passation des marchés publics de niveau fédéral a lieu selon des procédures analogues à celles applicables aux marchés soumis aux accords internationaux, qui sont prévues dans le chapitre 3 de l'Ordonnance sur les marchés publics. Il existe toutefois deux différences fondamentales : d'une part, aucune voie de recours n'est garantie pour ces marchés[51] ; d'autre part, les marchés de faible valeur peuvent faire l'objet d'une passation selon une procédure sans appel d'offres, qu'il s'agisse d'une procédure sur invitation ou d'une procédure de gré à gré.[52] De même, les marchés publics cantonaux et communaux non assujettis aux

50. Galli et al., *supra* n. 11, N 240, Hans Rudolf Trüeb, art. 5 BöB N 35 in : Matthias Oesch/ Rolf Weber/Roger Zäch (éd.), OFK-Wettbewerbsrecht II, Zurich 2011 ; Martin Beyeler, Der Geltungsanspruch des Vergaberechts, 2012, N 615, 724, 1121 ss et 1134 ; Clerc, Commentaire CR (*supra* n. 8), art. 5 LMI N 81.
51. Art. 39 OMP.
52. Art. 35-36 OMP.

accords internationaux sont passés selon des procédures de passation similaires, y compris la faculté de procédure sur invitation et de gré à gré.[53] Contrairement aux marchés publics fédéraux, ils restent susceptibles de recours, le Tribunal fédéral ayant toutefois reconnu aux cantons la faculté d'exclure toute voie de recours pour les marchés de faible valeur passés par une procédure de gré à gré.[54]

Il en va de même pour l'attribution des concessions de service en monopole selon l'article 2 alinéa 7 LMI (cf. *supra* questions 2 et 4).

La passation des marchés dans le domaine de la défense est hors du champ d'application du droit des marchés publics. Sont seules réservées la liste exhaustive de fournitures figurant en annexe 1 de l'Appendice à l'AMP déposée par la Suisse.

Question 7

Selon la jurisprudence du Tribunal fédéral, lorsqu'une collectivité publique assume une tâche publique au sens de l'article 35 alinéa 2 Cst, elle est liée par les droits fondamentaux et les principes généraux de droit public. En conséquence, le choix des personnes autorisées à louer et exploiter durant l'été un pavillon glacier sur la rade du Lac de Genève, qui se double d'une permission d'usage accru du domaine public pour l'usage d'une terrasse sur le domaine public, doit respecter les droits constitutionnels et principes généraux de l'activité administrative.[55] L'égalité de traitement des concurrents économiques, garanties par l'article 27 de la Constitution, peut aussi être invoquée, à des conditions très restrictives toutefois.

53. Art. 11, 12 et 12bis AIMP et annexe 2 à l'AIMP.
54. Art. 9 LMI, art. 14-18 AIMP ; ATF 131 I 137 : il s'agit des marchés de fournitures d'une valeur inférieure à 100'000 CHF, des marchés de services d'une valeur inférieure à 150'000 CHF et des marchés de travaux d'une valeur inférieure à 150'000 CHF dans le second œuvre et à 300'000 CHF dans le gros œuvre.
55. Tribunal fédéral, arrêt 2C_167/2012 et 2C_444/2012 du 1er octobre 2012, cons. 4.

Les marchés publics et le droit européen, notamment le droit de la concurrence et le droit relatif aux aides d'Etat

Question 8

L'accès aux marchés publics cantonaux et communaux, garanti à l'article 5 LMI, peut faire l'objet de restrictions aux conditions matérielles cumulatives énumérées à l'article 3 alinéa 1 et 2 LMI, à savoir lorsqu'elles sont applicables sans discrimination, reposent sur un intérêt public prépondérant et satisfont au principe de proportionnalité. En outre, l'article 9 LMI confère un droit de recours en cas de restriction à l'accès au marché intérieur suisse. Lorsqu'une restriction affecte un marché public cantonal ou communal assujetti aux accords internationaux auxquels la Suisse est partie en matière de marchés publics, le renvoi prévu par l'article 5 alinéa 2 LMI commande, à notre avis, d'interpréter les conditions de l'article 3 alinéa 1 LMI à la lumière des exigences posées par lesdits accords.[56]

Les marchés publics fédéraux échappent en revanche à un tel contrôle, car ils ne sont pas assujettis à la LMI.[57]

Question 9

Les cartels de soumissionnaires (accords horizontaux sur les prix, répartition des marchés) sont sanctionnés par les règles du droit de la concurrence.[58] L'autorité suisse de la concurrence (Commission de la concurrence, Comco) a déjà adopté plusieurs décisions dans ce domaine,[59] tandis que des enquêtes sont encore pendantes. Le droit des marchés publics s'applique, cumulativement au droit de la concurrence, en cas de cartels de soumissionnaires. Il pré-

56. Clerc, Commentaire CR (*supra* n. 8), art. 5 LMI N 141.
57. Clerc, Commentaire CR (*supra* n. 8), art. 5 LMI N 29 et 86.
58. Art. 5 al. 3 de la loi fédérale du 6 octobre 1995 sur les cartels et autres restrictions à la concurrence (LCart, RS 251).
59. DPC 2000/4, p. 588, *Markt für Strassenbeläge* ; DPC 2001/1, p. 110, *Chambre genevoise de l'étanchéité et de l'asphaltage [CGE]* ; DPC 2009/3, p. 196, *Elektroinstallationsbetriebe Bern* ; DPC 2008/1, p. 50, *Pavimentazioni stradali in Ticino*; confirmée sur le fond et sur le principe de publication de la décision par jugement du TAF, DPC 2008/2, p. 358 ; TAF, DPC 2010/2, p. 368 et TAF, DPC 2010/2, p. 393 ; DPC 2012/2, p. 270, *Strassen- und Tiefbau im Kanton Aargau* ; décision du 23 avril 2013 de la Comco, non encore publiée, concernant les marchés publics de travaux dans le canton de Zurich ; voir Clerc, Commentaire CR (*supra* n. 8), art. 5 LMI N 52.

voit des sanctions propres comme l'exclusion des soumissionnaires concernés, l'interruption et à la répétition de la procédure de passation, voire une adjudication de gré à gré à une entreprise tierce non impliquée,[60] ou même l'exclusion des entreprises parties au cartel de tout marché public ultérieur, pour une durée allant jusqu'à cinq ans.[61] En cas de découverte de soumissions concertées dans un marché public fédéral, le pouvoir adjudicateur concerné a l'obligation de signaler le cas à la Comco,[62] qui peut seule imposer des amendes.

Les cartels de soumissionnaires sont plus fréquents lorsqu'un marché est passé par une procédure sur invitation, plutôt qu'en procédure ouverte ou sélective à la suite d'un appel d'offres public. En ce sens, la possibilité pour les pouvoirs adjudicateurs suisses de justifier relativement facilement un découpage du marché en plusieurs parties ayant chacune une valeur inférieure aux seuils imposant un appel d'offres, nuit à l'ouverture des marchés et facilite les cartels de soumissionnaires.[63] Les prolongations de concession sans appel d'offres constituent aussi une restriction à la concurrence.[64]

Contrairement à l'arrêt *FENIN* de la Cour de justice de l'UE,[65] un *pouvoir adjudicateur* assujetti à la réglementation sur les marchés publics peut être simultanément qualifié d'entreprise au sens du droit de la concurrence.[66] A ce second titre, un pouvoir adjudicateur peut en particulier abuser d'une éventuelle position dominante, notamment par le biais des conditions générales, échelles de tarif et contrats-types, ou en raison d'éventuelles irrégularités durant la procédure de passation du marché.[67]

---

60. Pour les marchés fédéraux : art. 11 let. e LMP ; art. 30 al. 2 let. b et art. 13 al. 1 let. b OMP ; pour les marchés cantonaux et communaux : § 27 let. e, § 36 al. 1 let. b-c, § 9 al. 1 let. b des Directives AIMP.
61. § 38 Directives AIMP.
62. Art. 24 Org-OMP.
63. Art. 3 al. 2 Directives AIMP. Pour un exemple en droit fédéral, voir Tribunal administratif fédéral, arrêt B-913/2012 du 28 mars 2012, cons. 4.2.
64. Tribunal fédéral, arrêt 2C_857/2012 du 5 mars 2013.
65. CJCE, arrêt FENIN c/ Commission, 11.7.2006, aff. C-205/03 P, Rec. 2006 p. I-6295.
66. Art. 2 al. 1*bis* LCart.
67. DPC 2007/4, p. 517, *Beschaffung von Leichten Transport- und Schulungshelikoptern [LTSH] durch armasuisse*; DPC 2008/2, p. 356-357, *Verbesserung des Rechtsschutzes bei Beschaffungen durch armasuisse*; Clerc, Commentaire CR (*supra* n. 8), art. 5 LMI N 51.

Question 10

Il n'existe pas de règles générales applicables à l'externalisation de SIEG. Nous renvoyons sur ce point aux considérations développées en relation avec l'octroi de concessions aux questions 2 et 4 *supra*. En particulier, les règles suisses en matière d'aides d'Etat[68] ne prévoit aucun contrôle d'éventuelles distorsions de concurrence résultant de l'octroi sélectif de telles aides, ou de l'absence d'un appel d'offres.

Les concessions pour le transport régional de voyageurs par route font l'objet de « procédures de commande ». Les règles spéciales applicables contiennent des principes et procédures de passation similaires à celles prévues par le droit des marchés publics.[69]

Utilisation stratégique des marchés publics

Question 11

La prise en compte de critères environnementaux ou sociaux existe aussi bien en droit fédéral qu'en droit intercantonal et cantonal, même si une partie de la doctrine y était initialement hostile, au motif qu'il s'agissait de critères « étrangers » aux critères économiques devant déterminer l'offre économiquement la plus avantageuse.[70]

Le caractère *écologique* de la prestation ou le développement durable figurent expressément parmi la liste exemplative des critères d'adjudication.[71] Les critères environnementaux peuvent aussi faire partie des spécifications techniques définissant l'objet du marché. Un critère lié à la distance de transport entre le lieu du siège de l'entreprise et celui de la fourniture de la prestation est susceptible de discriminer indirectement les soumissionnaires extérieurs.

68. Loi fédérale du 5 octobre 1990 sur les aides financières et les indemnités (LSu, RS 616.1).
69. Art. 31*a*-31*c* et art. 32-32*l* de la Loi du 20 mars 2009 sur le transport de voyageurs (LTV, RS 745.1). Pour une jurisprudence rendue sous l'empire du droit antérieur, voir Tribunal administratif fédéral, arrêt A-3163/2009, arrêt du 27 mai 2010, cons. 3.
70. Galli et al., *supra* n. 11, p. 372 s., 413-428 ; Clerc, Commentaire CR (*supra* n. 8), art. 5 LMI N 131-134.
71. Art. 21 al. 1 LMP ; art. 27 al. 2 OMP ; § 32 al. 1 Directives AIMP; voir aussi la brochure 'Sustainable Procurement – Recommendations for the federal procurement offices', juin 2012, accessible sous http://www.bbl.admin.ch.

Le Tribunal fédéral a toutefois admis le principe d'une prise en compte d'un tel critère dans le cas d'un marché d'enlèvement des ordures communales d'une durée de trois ans et qui comportait 250 tournées de ramassage. Le critère des trajets devait être mis en relation avec les autres éléments qui, dans l'exécution du marché en cause, ont un impact sur l'environnement. En l'espèce, le pouvoir adjudicateur avait surestimé l'importance des trajets effectués sans arrêt et « à vide » des camions, par rapport à la pollution générée par la tournée de ramassage elle-même qui nécessitait 1350 arrêts et redémarrage. En outre, des éléments comme le type et l'âge des véhicules utilisés, qui jouent un rôle important dans les émissions polluantes, n'avaient pas été pris en compte.[72]

Les critères *sociaux* interviennent à plusieurs titres. Ils permettent d'exclure les soumissionnaires qui ne respectent pas les dispositions en matière de protection sociale des travailleurs, du fait du non-paiement des cotisations aux assurances sociales ou du non-respect des conditions locales de travail ou de la violation de l'égalité de traitement femmes-hommes.[73] De tels critères imposent aussi de respecter les conventions fondamentales de l'Organisation internationale du travail.[74] Le droit fédéral prévoit que, si des offres équivalentes sont proposées par des soumissionnaires suisses, le pouvoir adjudicateur prend en considération la mesure dans laquelle les soumissionnaires offrent des places de formation.[75] Un critère encourageant la formation d'apprentis, peut avoir un effet discriminatoire pour les soumissionnaires établis hors de Suisse, dans des Etats ne disposant d'un système de formation duale. Par ailleurs, le Tribunal fédéral considère qu'il faut prendre en compte le nombre relatif d'apprentis plutôt que le nombre absolu, afin d'éviter de favoriser les grandes entreprises, et qu’il faut limiter la pondération accordée à un tel critère.[76]

Question 12

Le *dialogue compétitif* ne constitue pas une procédure de passation séparée en droit suisse. Toutefois, cette procédure existe dans le droit fédéral sur la

---

72. Tribunal fédéral, arrêt du 31.5.2000, DEP 2000 p. 613, cons. 4.
73. Art. 11 let. c et d, art. 8 al. 1 let. b et c et al. 2 LMP ; art. 6 OMP ; art. 11 let. e et f AIMP.
74. Art. 7 al. 2 OMP et annexe 2*a* à l'OMP.
75. Art. 27 al. 3 OMP.
76. ATF 129 I 313 où une pondération de 10 % était excessive par rapport au critère du prix, lui-même pondéré à raison de 20 %.

base d'une interprétation extensive de la notion de négociation.[77] Le dialogue « peut développer les propositions de solutions ou de procédés, lorsque le marché porte sur des prestations complexes ou sur des prestations intellectuelles ».[78] Dans les cantons, une procédure sélective souvent basée sur un mandat d'études parallèles joue un rôle analogue.[79]

Les *droits de propriété intellectuelle* des soumissionnaires sont protégés.[80] Un pouvoir adjudicateur, fédéral ou cantonal viole les droits de propriété intellectuelle d'un soumissionnaire évincé, ou d'un sous-traitant de celui-ci, s'il autorise sans droit l'adjudicataire à utiliser des éléments figurant dans l'offre d'un soumissionnaire non retenu. Il porte simultanément atteinte aux règles prohibant la concurrence déloyale. Le pouvoir adjudicateur répond du préjudice causé en raison d'une violation des règles sur les brevets, le droit d'auteur ou la concurrence déloyale selon les principes applicables à la responsabilité de droit public.[81]

Solutions

Question 13

Le *standstill* interdisant la conclusion du contrat avant l'échéance du délai de recours est prévu expressément pour les marchés cantonaux et communaux.[82] Il résulte de la seule jurisprudence pour ce qui concerne les marchés publics fédéraux, dans la mesure où l'absence de conclusion du contrat est nécessaire pour assurer la protection juridictionnelle effective du recourant et permettre à celui-ci de requérir ensuite du juge des mesures provisoires à même de sauvegarder ses possibilités commerciales.[83]

Contrairement aux règles générales de la procédure administrative, le dépôt d'un recours n'a pas d'effet suspensif automatique, celui-ci devant être

77. Les négociations sont autorisées en droit fédéral aux conditions limitatives de l'art. 20 LMP et art. 26 OMP.
78. Art. 26*a* OMP.
79. Galli et al., *supra* n. 11, N 1002 et 1022-1029.
80. Art. 23*a* OMP ; § 17 Directives AIMP.
81. ATF 139 III 10, cons. 2 ; Tribunal fédéral, arrêt 4A_397/2012 du 11 janvier 2013, cons. 2.
82. Art. 14 AIMP.
83. JAAC 1997/61 n° 24, cons. 2 ; JAAC 1998/62 n° 32.I, cons. 2 ; JAAC 1998/62 n° 32.II, cons. 3d ; Poltier/Clerc, Commentaire CR (*supra* n. 11), art. 9 LMI N 74-77.

demandé par le recourant.[84] Le *standstill* et l'octroi de l'effet suspensif jouent un rôle central dans la protection juridictionnelle des soumissionnaires, car une décision d'adjudication ne peut plus être annulée lorsque le contrat est déjà conclu. Dans une telle hypothèse, un recours dont le bien-fondé est reconnu n'aboutit qu'à une constatation d'illicéité de la décision d'adjudication.[85] Le recourant doit alors ouvrir une seconde procédure pour obtenir des dommages-intérêts dont le montant est plafonné aux seuls frais engagés en relation avec la procédure de passation et de recours, à l'exclusion de la réparation du gain manqué.[86] De ce fait, la protection secondaire n'est pas sur un pied d'égalité avec la protection primaire. Le refus d'octroi de l'effet suspensif au recours amène souvent le recourant à retirer son recours.

Le sort du contrat conclu sur la base d'une décisions d'adjudication illicite (en particulier une attribution de gré à gré injustifiée et non publiée) ou celui d'un contrat conclu de manière prématurée (en particulier durant le délai de *standstill* ou alors que l'effet suspensif est demandé ou accordé) ne fait pas l'objet de règle spécifique en droit suisse des marchés publics. En doctrine, la question est controversée.[87] La jurisprudence est aussi partagée, en particulier quant à la possibilité pour le juge saisi d'un recours contre l'adjudication de se prononcer – à titre préjudiciel – sur la validité du contrat conclu. Elle ne l'exclut toutefois pas.[88] Le Tribunal fédéral a jugé qu'une juridiction administrative cantonale saisie d'un recours contre une adjudication peut, lorsqu'elle statue sur la requête de mesures provisoires, se réserver pour le cas où elle devrait admettre le recours sur le fond, de donner au pouvoir adjudicateur des instructions quant à la conduite à tenir par rapport au contrat conclu irrégulièrement durant la période de *standstill*.[89] Tant que le contrat n'est pas encore exécuté intégralement, et pour autant qu'il puisse être scindé en plusieurs parties, le recourant pourrait exécuter les parties non encore réalisées, de sorte qu'il doit être possible d'interdire par mesures provisoires l'exécution du contrat. Il n'est pas exclu qu'un contrat conclu en violation des règles sur les marchés publics soit considéré comme nul dans des cas graves, ou soit entaché d'une invalidité *sui generis*, ou qu'il soit valable mais que sa résiliation puisse

---

84. Art. 28 LMP ; art. 17 AIMP.
85. Art. 32 al. 2 LMP ; art. 9 al. 3 LMI ; art. 18 al. 2 AIMP.
86. Art. 34 al. 2 LMP ; Galli et al., *supra* n. 11, N 1414 ss.
87. Voir Poltier/Clerc, Commentaire CR (*supra* n. 11), art. 9 LMI N 120-123 ; Galli et al., *supra* n. 11, N 1325-1337 ; Beyeler, Schicksal (*supra* n 21) p. 1141 ss.
88. JAAC 1997/61 n° 24, cons. 2 ; ATAF 2009/19, cons. 7.2.
89. Tribunal fédéral, arrêt 2C_446/2011 du 10 octobre 2011, cons. 1 ; arrêt 2C_339/2010 et 2C_434/2010, du 11 juin 2010, cons. 3.2.

être ordonnée à l'adjudicataire par le juge, ces questions n'ayant pas encore été tranchées par la jurisprudence.[90]

La question de la voie de recours pour les marchés publics non soumis aux accords internationaux (correspondant approximativement aux marchés non soumis aux directives européennes) est résolue différemment pour les marchés publics cantonaux et fédéraux. Les adjudications des pouvoirs adjudicateurs fédéraux échappent à toute voie de recours,[91] tandis que les cantons ouvrent une voie de recours[92] qui peut toutefois être exclue pour les marchés de faible valeur passés par une procédure de gré à gré.[93] De même, les concessions de monopoles cantonaux ou communaux soumises à l'article 2 alinéa 7 LMI peuvent faire l'objet d'un recours selon l'article 9 LMI.

Conclusion et réforme

Question 14

Du fait de la révision de l'AMP, la Confédération et les cantons ont entrepris de réviser chacun leurs réglementations respectives sur les marchés publics. Un groupe de travail commun tente à cette occasion d'harmoniser autant que possible les règles fédérales et cantonales en matière de marchés publics sur des questions aussi controversées que, par exemple, les négociations ou les voies de recours relatives à des marchés inférieurs aux seuils.

90. Tribunal fédéral, arrêt 2C_611/2011 du 16 décembre 2011, cons. 2.2.
91. Art. 2 al. 3 LMP ; art. 39 OMP.
92. Art .9 LMI ; art. 15 AIMP.
93. ATF 131 I 137. Il s'agit des marchés de fournitures d'une valeur inférieure à 100'000 CHF, des marchés de services d'une valeur inférieure à 150'000 CHF et des marchés de travaux d'une valeur inférieure à 150'000 CHF dans le second œuvre et à 300'000 CHF dans le gros œuvre.

THE UNITED KINGDOM

Brian Doherty[1]

The context

Question 1

Systematic challenges: advisability of & choices in regulating; results in the UK

In the main, the EU has chosen the means of single market directives to regulate public procurement. As would then be expected in fulfilment of the UK's duty to give full effect to EU law in the manner that is usually done in the legal systems of the UK directives, these have been transposed into the UK national law by way of implementing statutory measures (eg see the Public Contracts Regulations 2006 for England Wales and Northern Ireland[2] and for Scotland the Public Contracts (Scotland) Regulations 2006).[3] These measures are secondary legislation made by government departments under the power of section 2(2) of the European Communities Act 1972.[4] This legislation is supplemented by guidance of various sorts issued by central and local authorities. It is worth noting that within the UK, the central government has devolved to regional administrations the power to regulate procurement. Constitutions of the devolved administrations provide that Ministers and Departments in the administrations 'do not have the power' to do... any act which is incompatible with EU law. (eg see s 24 of the Northern Ireland Act 1998[5]). Thus there is a high premium set at national level for the devolved authorities to comply with the EU rules. In addition, any failure to do so can also enable the central government to exercise 'override' powers to effect compliance if

1. Deputy to the Solicitor, Departmental Solicitors Office, Government Legal Service, Belfast, Northern Ireland (all views expressed are personal).
2. SI 2006 No 5.
3. SSI 2006 No 1.
4. c 68.
5. c 32.

that becomes necessary (see for example section 80 of the Northern Ireland Act 1998). However, as mentioned, although Scotland has its own statutory regime implementing the EU rules, Northern Ireland and Wales are regulated by statutory instruments made by the central government which extend to those jurisdictions. The content of the implementing regulations are very similar. Thus the differing devolved jurisdictions have not generally to date availed of the discretion confirmed by the CJEU in its *Horvath* decision[6] to implement differently (albeit within the discretion given to Member States) in the different internal jurisdictions, although there are indications they may do so to some extend as a result of their separate consultations on the implementation of the pending new directives. Each jurisdiction in the UK has built up case law from court decisions on disputed procurement processes which enhance the understanding of what is already provided for in the implementing regulations. The limitation period within which review cases under the EU remedies regime needs to be taken has been set at 30 days and the earlier additional requirement that it should in any event be brought 'promptly' had been removed following the judgment in the *Uniplex* case[7] that this requirement did not meet the EU law principle of transparency.

The current method of transposition of EU Directives in the UK is explained in the UK government's Department of Business Innovation and Skills document 'Transposition Guidance – How to implement European Directives effectively' of April 2013.[8]

The General Rapporteur invites comments on the following aspects:

1. – the challenges faced (by the UK) in implementing the rules, and the ways they were overcome

The guiding principles adopted by the UK in implementing EU obligations capture the essence of the UK's approach, and they apply to the area of procurement law. For the purposes of this paper, they indicate the attitude of the UK to the challenges posed and how they were met in the process of transposition. They touch on themes that will be raised later. They are that:

6. *Horvath v Secretary of State for Environment, Food and Rural Affairs* C-428/07
7. C-406/08 Uniplex [2010] ECR 1.
8. HM Government: This and other UK government documents quoted in this paper contain public sector information licensed under the Open Government Licence v2.0.

1. Ministers must ensure that:
   a. they are well sighted on all EU measures relevant to their department, from the initial Commission proposal through to transposition and implementation; and
   b. their department assesses from the outset the impact on the UK of the proposed legislation and effectively project manages the process from negotiation to transposition:
2. When transposing EU law, the Government will:
   a. ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed;
   b. wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;
   c. endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;
   d. always use copy out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy out, they will need to explain the reasons for their choice;
   e. ensure the necessary implementing measures come into force on (rather than before) the transposition deadline specified in a directive, unless there are compelling reasons for earlier implementation; and
   f. include a statutory duty for Ministerial review every five years.

As indicated these are just guidelines and there are exceptions to their operation. For example regarding 2.e, waiting until the transposition deadline before transposing, in the case of the latest set of directives the UK government intends to go for early transposition so that the UK can take advantage of the additional flexibilities in the new rules (eg regarding Mutuals) as soon as possible. These rules would bite on new procurement exercises commenced after the date when the new UK rules take effect.

A keynote element of that UK government policy is that the implementation should not go beyond the minimum necessary – (no 'gold-plating'). The UK government's approach to transposition is now primarily by way of 'copy-out' (where the implementing legislation adopts the same wording as that of the Directive so far as is possible or where it cross-refers to the relevant Directive provision) and not 'elaboration' (implementing in a way that uses language that differs from the wording of the Directive in order to clarify its meaning for legal or domestic policy reasons). This was not previously the

policy approach, so it will be interesting to see what difference this makes to the transposition of the new round of EU directives in the area. The measures should certainly be easier to cross reference with the directives. It should also mean that readers can avoid having to puzzle over why the UK elaborated in the manner it did.[9]

2. – how the original legal (including theoretical) framework is still creating frictions in the full implementation of EU law

Turning from these technical aspects of the adoption of the procurement directives, I would like to reflect on the more general setting:

As far as transposition is concerned I would suggest that there is no reason to think that the UK has not fully and faithfully carried into law the requirements of the EU directives. In this context I have some difficulty identifying 'frictions' in regard to the terms of the implementing measures. It can, however be said that the UK is adopting a copy-out approach in part to reduce the risk of the elaboration which would otherwise take place in 'translating' the terms of the directive into the usual parlance which had been the favoured approach of the UK drafters of implementing legislation. Adopting a 'copy-out' approach, which is now the policy of government, is a radical change to the traditional approach to legislative drafting in the UK. In adopting this approach the risks associated in deviating from the actual wording of the directives largely shifts away from the state in respect to its role as the authority responsible for accurate transposition. It is notable that the legislative drafters in Ireland have in the past been much more ready to use a copy-out approach.

However, apart from the issue of transposition, at a number of levels there are symptoms of the system not operating comfortably in the UK. Rather than simply freeing the market from risk of discrimination, there is evidence that the rules are causing various other distortive effects to the operation of the market to occur. Some of what follows is anecdotal and not based upon formal legal research, though I think that this is an area calling for further investigation.

There is now an established trend to litigate in a significant number of procurements on the issue of whether the EU rules have been properly applied and especially in Northern Ireland. This has created an area of legal practice which did not exist before the rules were made. In the UK, cases are usually taken to the High Court in the first instance, with counsel and solici-

9. House of Commons Library: Government action on gold-plating: SN/IA/5943.

tors representing the parties. If the matters end up in court, the time in processing the cases is very considerable. A case which goes to the High Court for hearing would rarely be resolved in less than 6 months in Northern Ireland. For example, the case of *McLaughlin & Harvey Ltd. v Department of Finance & Personnel*[10] commenced in 2008 has not yet completed. There are different views from the judiciary in different parts of the UK on how individual cases are to be dealt with procedurally. On the one hand Mr Justice McCloskey of the Northern Ireland High Court has said,

> 'the court's experience to date is that uncertainties and imponderables abound in this sphere of litigation. The cases have proved to be organic in nature. From the inception of proceedings, the Plaintiffs' grounds of challenge are intrinsically likely to alter. Some grounds may fade away, whereas other, new grounds may enter the fray, particularly as a result of discovery of documents. It is not easy for the court to efficaciously monitor all developments.'[11]

However, on the other hand in the case of *Corelogic Ltd. v Bristol City Council*[12] the High Court in Great Britain issued a warning that causes of action not included in the basic claim form may not be brought outside the 30 day limitation period.

By contrast with the UK's judicial system for dealing with disputes, from the European Commission's 26th November 2012 seminar on Remedies in procurement law,[13] it was impressive to see the number of member states which had specialised adjudicatory systems and bodies for procurement cases which resolved cases much sooner than in the UK, (in some cases initial adjudication of disputes could be concluded in a few weeks) and in various states with relatively low levels of further appeal.

In my opinion the rebalancing of the remedies regime has encouraged what was already a growing trend to litigate which did not exist in the UK before – in particular the creation of an automatic stay on procurement processes appears to have increased the incentive to litigate about procurement processes, where in many cases this may in effect mean at least delaying a competitor from winning a contract. Before the new rules, it was for the complainant to approach the court to apply for interim relief, and the issue was

10. [2011] NICA 60 & [2008] NIQB 122.
11. Papers from the Irish Centre of European Law archive: June 2012 Conference on European Procurement Law.
12. [2013] EWHC 2088.
13. Available online at: European Commission: DG The European Single Market: News.

dealt with on a level playing field, and where the courts had discretion as to the form in which the relief, if granted, could be given.

Again, anecdotal evidence suggests that in many cases litigation concerns procurements where there are only local contractors, there having been no bidders from outside the Member State (or other areas of the member state) concerned. This raises a question as to the need for the rules to apply to procurement processes which do not have an inter-state dimension.

All these difficulties have led to distortions of economic activity occuring. Such delay and uncertainty has discouraged the use of procurements where they can be legally avoided. Examples of the distortions that occur are: keeping or bringing services in-house, deciding not to procure but to grant aid parties who are operating in the area of economic activity where a procurement might otherwise have been used, stopping procurements where litigation is threatened and using overlapping established procurement frameworks which are already in place, either for that reason or because procurement processes are delayed/rerun as a result of allegations of impropriety.

I will refer to this theme of the distortive effects of the EU rules, or since the rules are prescriptive of what is legal, the absence of rules allowing authorities to use new techniques as these are developed, at various points in this report. However I will mention one such instance at this point, and that relates to framework agreements. These were not provided for in the original Directives (other than for utilities), and until the judgment in the *Greek Bandages case*,[14] and ultimately until the 2004 Directive, the law was not made clear. For a period the Commission objected to the use of the technique. The N. Ireland devolved government had good reason to know this as 10 years before the directive the use of the technique there was challenged by the Commission on the basis that frameworks were not provided for in the then applicable procurement directive. The result was that the particular procurement process and the use of frameworks generally were stood down for a period. This is one example of the damping down effect of such prescriptive rules on the development of innovative procurement techniques, and where there may be prolonged delays until EU legislation 'catches up' with new contracting techniques.

The general rapporteur raises the question of striking a balance between trusting the civil servants and regulating. As it has transpired, even taking the proposed new measures into account, we have ended up with an extensive, detailed, intricate and quite complex regime above and beyond what the trea-

14. Case C-79/94.

ty single market principles provided for. I believe that time spent by public servants administering and in particular trying to be compliant with the rules, are distracting, and that the rules discourage procurement professionals from developing bona fide innovative procurement techniques. (For another potential example see the decision in Henry Brothers v Department of Education for Northern Ireland[15] procurement). I believe that a statement of Professor Steve Kelman from Harvard's John F. Kennedy School of Government is apposite:

> 'As a strategy of organisational design, rules have a cautious character. When we design organisational models based on rules we guard against disaster, but at the cost of stifling excellence. Government officials deprived of discretion which could produce misbehaviour are at the same time deprived of discretion that could call forth outstanding achievement.'[16]

If the full implementation of EU public procurement law is aimed at improving the operation of the (single) market, then I suggest the evidence from the UK generally, and certainly from the legal jurisdiction of Northern Ireland is of more complex and slower processes, no sufficiently clear links between the burdens the rules entail, including resultant litigation, with the achievement of single market goals, an attrition to value for money outcomes and distortion of the free market which the founding treaty intended to foster.

The boundaries of EU public procurement law

Question 2

Defining 'public contracts' and distinguishing them from other state measures

No doubt the issues around what is and what is not caught by the procurement rules are a shared concern to procurement professionals across the EU Member States. Since the Rome Treaty of 1957 through to its latest iteration in the TFEU, the founding constitution of the EU has wisely chosen not to

15. [2011] NICA 59 & [2008] NIQB 105 and 153.
16. See Kelman: Procurement and Public Management: the Fear of Discretion and the Quality of Public Performance: AEI Press 1990.

regulate whether the Member States place economic activity in the public or private sector (see Art 222 of the Rome Treaty, now art. 345 TFEU), 'This Treaty shall in no way prejudice the rules in member states governing the system of property ownership'. Given the diversity of approaches adopted by different member states, and the policy changes within member states over the decades in this sensitive area, was seemed a prudent choice. Furthermore, a careful balance was struck by the equally wise and prescient provision in the competition chapter on regulating the borderline area between public and private ownership of key economic assets, which concerns public undertakings and undertakings to which Member States grant special or exclusive rights (see art 90 Rome Treaty and art. 106 TFEU). It is a tribute to the work over half a century ago of the original drafters of the Rome Treaty that these fundamental treaty rules on competition and the free market have essentially not been changed since that time. Against this background it is not surprising that the procurement rules, aimed at buttressing the single market by bringing more rigour to the treaty anti-discrimination provisions in the form of regulation of the public purchasing of member states, should present challenges in respect of which purchasing should be subject to these rules and which should not.

As the rules have matured and various aspects of the borderline areas of the application of the rules has become somewhat clearer, it is not surprising that the latest iteration of these rules in the form of the draft Classic Directive include a series of propositions regarding where key boundaries of the application of the rules have emerged (in the current draft at time of writing see recitals 3 and 4 which comprise some 17 paragraphs of the draft).

The UK has a tradition of being prepared to think and organise imaginatively about how the state should best organise many economic resources (as no doubt have other Member States), in particular for present purposes as to whether economic activity should be set in the public, private or semi-public sector. Furthermore, political ideology has meant that through the decades at times more, and times less trust has been placed variously on the public, the regulated semi-public or the private sector to deliver the most appropriate economic activity. In principle it is this setting which renders procurement activity more or less likely to attract the application of the procurement rules.

Here are a few examples of where the divisions between the three sectors I identified have changed in many cases in the UK: In Victorian times the business of running sizeable maritime ports was often placed in the hands of a company or trust constituted by statute which gave various powers and imposed various duties on the economic entity, all to be exercised in a commercial manner. These were often known as, 'trust' ports. Many were privatised

under the Conservative governments led by Margaret Thatcher. Originally, railways were largely privately owned as was coal and steel production, all to be later to ne taken into public ownership and later still to be re-privatised with greater or lesser subsequent government regulation. Education has remained a mixed sector. The energy industries have been increasingly privatised, though regulated. Interestingly, the more recent changes, largely to sell into the private sector, but retaining a greater or lesser degree of government regulation, has not been evenly carried out across the UK. For example in Northern Ireland unlike in the rest of the UK, the main ports, the main public transport and water industries remain in the public or semi-public sector.

For the purposes of the procurement rules, not only the EU, but the UK authorities have provided *guidance* on the kind circumstances raised in the *Irish Ambulances/Asemfo /Teckal/ Lodi/Muller/ Aurox*[17]/Concessions/licensing subject matter areas on which the General Rapporteur invites comment. There have also been occasional *national court cases* in the UK applying the EU rules. I list the guidance and cases below on the matters raised by the General Rapporteur, and then comment on them in turn.

With respect to UK government guidance and discussion papers, these have appeared sporadically over time.

Key UK government policy documents[18] are:

– Procurement Policy Note 03/06: Office of Government Commerce: ‘Shared Services in Government’- EU Public Procurement Rules Considerations (Cabinet Office – March 2007);
– Public Procurement Policy Note-preliminary guidance on the application of the public procurement rules to development agreements. Information Note 11/09. 16th October 2009 (Office of Government Commerce);
– Public Procurement Note: Public Procurement Rules, Development Agreements and s106 ‘Planning Agreements’; Updated and Additional Guidance Information Note 12/10. 30th June 2010 (Office of Government Commerce)
– Government Shared Services: A Strategic Vision – July 2011.

17. Case references are available in the general Rapporteur’s questionnaire.
18. The Office of Government Commerce (OGC) was absorbed into the Efficiency and Reform Group (ERG) of the Cabinet Office, and is served by team of lawyers from the Treasury Solicitors Office. Policy documents can be found in the cabinet office section of the government publications website under ‘procurement’.

Key UK cases applying the EU law are:

- Re: *Tecka*l: Brent London Borough Council v Risk Management Partners Ltd[19]
- Re: *Helmut Muller*: *R. on the application of Midlands Co-operative Society Ltd) v Birmingham City Council*, (Admin)[20]
- Re: *Auroux*: *AG Quidnet Hounslow LLP v Hounslow*[21]

This material provides some insights into how these aspects of the procurement rules have worked within UK constitutional arrangements and have interacted with the UK's free market based system and government purchasing objectives. Taking each in turn:

Guidance

– Procurement Policy Note 03/06

This is effectively a commentary for UK purposes on the European Commission's Interpretative Communication (IC) on Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives

- 'Shared Services in Government' – EU Public Procurement Rules Considerations (Cabinet Office – March 2007):

This provides the UK government's view that the future for government purchasing is a shared services approach:

> 'by 2016 the majority of the transactional elements of Corporate Services in the public sector will be delivered through a handful of professional shared service organisations. Some of these organisations will remain inside the public sector, but many will be outsourced' (Cabinet Office, 2006).

The guide, which is aimed at key stakeholders in the procurement process, refers to the EU rules in this area as complex and evolving as a consequence of emerging case-law. In setting the context for the rules it recommends early legal advice on when a shared service exists – for example sharing a service

19. [2009]EWCA Civ 490; [2010 PTSR 349 & [2011]UKSC 7.
20. [2012]LGR393 [2012]All ER (D) 181.
21. [2012] EWHC 2639 (TCC).

between two or more central government departments does not attract the application of the rules as 'the Crown' (a collective term for the executive power of government) is one legal person. At central government level, legal powers in general derive from the Crown. In UK law the Crown is indivisible. The Crown is a single legal entity and each Crown body discharges functions on behalf of the Crown. The in-house exception is distinguished from the *Teckal* exemption. In the UK system there exists various non-departmental public bodies (commonly referred to as NDPBs) and these are assumed not to be Crown bodies for the purposes of shared Crown services provision.

– Public Procurement Policy Note-preliminary guidance on the application of the public procurement rules to development agreements. Information Note 11/09. 16th October 2009 (Office of Government Commerce); and
– Public Procurement Note-Public Procurement Rules, Development Agreements and s 106 'Planning Agreements'; Updated and Additional Guidance Information Note 12/10. 30th June 2010 (Office of Government Commerce).

This guidance was produced in the wake of the *Auroux* case and following developments and in particular because the European Commission had raised concerns over whether a number of property development agreements between public bodies and developers attracted the application of the procurement rules as public works or public works concessions contracts. The UK had argued that the rules did not apply in a number of cases. As a result, and no doubt honouring the art 10 TFEU obligation of co-operation, the UK published preliminary guidance on the issue. The initial guidance is interesting: it not only explains the law as it was known, but speculatively addresses where it believes the line should be drawn in a range of cases such as where a development agreement was ancillary to a lease, where licences to build were involved, where there is mixed land ownership and where there are developments including a public contract. In each case in some instances it proposed that the procurement rules do not apply.

The newer guidance, though more substantial and detailed, still shows that there remains considerable uncertainty about the application of the rules in various cases. In general it follows the format of the previous guidance. It does however pay special attention to statutory planning agreements. These are agreements for works which are entered into in connection with the grant of planning permission. Drawing on the *Helmut Muller* judgment the view is taken that these will not normally attract the application of the procurement

rules even though they possess some of the characteristics of public works contracts. They will be in writing, with a contracting authority, works will be involved and the agreement will be enforceable. However as the guidance points out such agreements will normally not be for pecuniary interest, rather, the agreement is for regulatory reasons. As a mere exercise of regulatory powers, it is not regarded, in the words of the *Muller* judgment as being, 'a requirement specified by the contracting authority'. Finally it is considered that a works contract only exists where there is a specific, legally binding contractual obligation to undertake work or works and this is not the case in respect of a planning obligation to carry out works. However as such arrangements are often complex it is considered that planning agreements need to be considered on a case-by-case basis.

The UK guidance indicates the UK's comfort with the CJEU analysis and findings in *Auroux* and *Muller*. This is consistent with its earlier guidance. It does however comment on the Muller case discussion of where direct economic benefit arises. It will be recalled the court ruled that a public contract would not arise unless the contracting authority received a direct economic benefit. In giving examples of where this arises, it included reference to where the authority has assumed economic risks in case the works are an economic failure. The guidance posits that it is not wholly clear where the exact boundary lies with this 'direct economic benefit' test, and suggests that requirements such as that a certain percentage of housing in a new development be 'affordable' (to those with lower income) should not be seen as a direct economic benefit to the authority.

Government Shared Services: A Strategic Vision – July 2011

This document, which points the direction forward in terms of government policy, needs only to be mentioned briefly. It identifies the strategic vision and future operating model for government controlled procurement. It recognises the benefits to be gained from shared purchasing and urges a shared services approach to buying for government departments and their arms length bodies. The work on this continues, and it points up the need for timely and accurate analysis and application of the relevant EU procurement rules.

Caselaw

Regarding Teckal:

Brent London Borough Council v Risk Management Partners Ltd
This case concerned a claim for damages against various London Boroughs by 'Risk Management Partners' in relation to the award of contracts for insurance. These authorities had awarded Part A services to London Authorities Mutual (LAM), a mutual insurance company of the London Boroughs (local government entities). The authorities were members of LAM. There had been no tendering procedure under the public contracts regulations implementing EU Directive 2004/18. The key issue was whether a regulated procedure should have taken place, or whether the Teckal exemption applied. The case reached the Supreme Court which held that the Teckal doctrine was available to apply to the circumstances even though it had not been explicitly implemented in the national regulations implementing the directive, and further, that the doctrine applied on the facts (and thus that there was no need for a regulated process to take place). The court held in particular the Teckal requirement that the awarding authority must have 'control' over the entity was fulfilled where the local authority members of LAML could direct the board of LAML by decisions made with a 75% majority of the members. The court took the view that that the term 'contract' in the implementing regulations should be interpreted teleologically to implement the directive, and therefore that it did not cover in-house arrangements. Such finding will be even more obvious in the case of the implementation of the new set of (currently) draft directives as the UK has now changed its implementation policy from an 'elaboration' policy to a 'copy-out' approach to directive implementation (see question 1). The CJEU decisions in *Carbotermo* (distinguished), *Coditel Brabant* and *Asemfo v TRAGSA* (relied on) were discussed, and the notion of shared services endorsed.

Regarding Helmut Muller:

*R. on the application of Midlan*ds *Co-operative Society Ltd) v Birmingham City Council*
The case was the first to consider the application of the Public Contracts Directive in the planning and development context of the UK after the landmark cases of *Auroux v Roanne* and *Helmut Muller*. The Co-Op Society challenged a decision by Birmingham City Council to sell certain land interests in Stirchley to Tesco, as well as the authorisation 'in principle' for the exercise

of compulsory purchase powers to facilitate land assembly for Tesco's proposal for retail-led regeneration of Stirchley. At the time the Co-Op had an existing retail store in Stirchley as well as planning permission for a different scheme. The claim was brought on several grounds, including that the transaction, viewed together with planning obligations that Tesco had entered into relating to the relocation of a community centre and bowling facility currently located at the site, was a 'public works contract' engaging the public procurement rules in the Public Contracts Regulations 2006. These obligations were generated under a statutory planning agreement which allowed for obligations to carry out particular works to become a part of the grant of planning permission. Following the CJEU's judgment in *Muller* the court found that in order for a contract to fall within the scope of the Directive, there needed to be a binding legal obligation upon the contractor to carry out or be responsible for the carrying out of works. There was no such binding obligation in this case. The statutory 's. 106 agreement' (under the Planing Act) would only be triggered if Tesco chose to implement the development, and there was no obligation on Tesco to do so.

Regarding Auroux:

AG Quidnet Hounslow LLP v Hounslow LBC
This case concerned a proposed agreement between Hounslow Council and Legal & General (L&G) for the development of land partly owned by the Council. However a local developer (Quidnet) challenged the legality of the arrangement on the basis that it should have been processed through a regulated procurement process, and as it was alleged there had been insufficient advertising, that art 56 TFEU had been breached. However the court found that art 56 was not breached as the subject matter was wholly internal to the member state, all the parties involved were English and the land was in England. Furthermore the court held that the proposed agreement was in essence concerned with the leasing of land, not about service provision by L&G. Nor was it considered that the agreement restricted the ability of third parties to provide services. Interestingly the court also added that even if it was wrong about art 56TFEU, Quidnet had not demonstrated there was any interest in the contract from outside the UK, and on this basis he would have refused to exercise the discretion to grant relief.

R. on the application of Midlands Co-operative Society v Tesco Stores Limited

When Tesco submitted the sole bid for the sale of land by Birmingham City Council, the Co-op challenged the transaction as it had not been conducted as a regulated procurement. This was because the land was a part of a wider land regeneration project with community benefits agreed under s 106 of the Town and Country Planning Act 1990. These obligations would become enforceable once a planning permission was obtained. However the court held that as Tesco was not legally obliged to comply with the development obligations at the point at which the transaction was concluded, it followed that the 2006 procurement regulations did not apply. The court went on to say that even if the obligations had been enforceable it did not follow that the procurement rules would apply. In particular the court commented that it would have to be determined whether the obligations in question were actually within the ambit of the 2006 Regulations or simply an extension of the Council's planning controls.

Regarding Gaming Licences C-260/04 and Sporting Exchange C-203/08

In respect of gaming licences and concessions generally, in the key CJEU cases of *Betfair* and *Ladbroke*, although both companies have UK connections, the cases concern the circumstances of their operations in the Netherlands and I therefore defer to Netherlands colleagues for comments on the effects of the outcomes of those cases on the national legal system there.

However in the UK there has been the relatively recent case of *JBW Ltd. v Ministry of Justice*[22] concerning the procurement of bailiff services by the Ministry of Justice which applied the *Commission v Italy, C-382/05, Wasser C-206/08 and Stadler C-274/09* decisions all to the effect that a concession only exists when the service provider undertakes the risk connected with the operation of the services. The JBW Ltd case involved the procurement of bailiff services by the Ministry of Justice. The service which had been put to the market was to collect unpaid fines by seizing and realising the value of property of the debtor (the collection of 'warrants of distress' issued by Magistrates Courts). The contractors were paid through a fee payable by executing the warrants. The tenderers competed on the basis of the level of fees and the service quality. JBW had been unsuccessful and claimed that the procurement rules had not been complied with. In the end after some difficulty (the court indicated that this was not a paradigm case of a concession) the

22. [2012] EWCA Civ 8.

Court of Appeal held that in all the circumstances this was indeed a concession. Although the Ministry exercised detailed control over the service provision, and the scope for exploitation of the opportunity by the concession holder was limited (no opportunities to expand the 'market' and price charged), it also considered that as the risks involved were passed over to the contractor (even though they were considered to be low), there was no direct payment by the Ministry to the concession holder, rather the payment came from the assets of the debtor, and that they were the receivers of the service, albeit unwilling ones.

I would like to comment on two other aspects of this segment of the topic. Firstly, one other area of demarcation, not specifically identified by the general rapporteur but which has attracted academic comment in the past, concerns distinguishing when grants of financial assistance by public authorities attract the application of the procurement rules and when they do not. This is an issue of particular importance to underdeveloped parts of the UK where the provision of financial assistance by government and its agencies is a major activity. Helpfully, for the first time the Commission has specifically referred to this area of demarcation in the recitals to the new (draft) classic directive where it says:

> 'The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities. Furthermore, the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under the public procurement rules.' (recital 3)

I take the critical distinguishing feature to be that the disbursing authority is not procuring the works good or services which it is funding, that is to say, it is in essence assisting activity which the recipient chooses to do in its own right, as it is considered to be a desirable activity. Of course if, in the event, this activity does not take place where the assistance has been already given, it will in all likelihood be returnable to the disbursing authority under the arrangements for disbursement. Any grant giving exercise, especially where there are 'strings attached', needs to be carefully considered by reference to its features to determine whether the offer attracts the application of the public procurement rules.

If a public authority wishes to pay a grant in connection with the provision of services, then the critical question of deciding whether the procurement rules apply to that arrangement is whether the recipient undertakes a legal obligation to provide the services in question. If it does, that is a public services

contract and therefore subject to the EU rules, regardless of whether it is labelled 'grant-giving' or not. (See also comments on grant-giving under Question 7).

Finally, the general rapporteur refers to the phrase 'concessions for the exploitation of natural resources'. I wish to point out that EU law itself draws on aspects of the model of the procurement rules for other purposes and one of those is in regulating the member states opening of their markets for granting and using authorizations for the prospection, exploration and production of hydrocarbons. An example can be seen in Directive 94/22/EC.

Question 3

Regulating in-house arrangements, public-public partnership & like arrangements

In the United Kingdom, Parliament, the Courts and Her Majesty's government are three manifestations of a unitary Crown – the Crown as head of state. Generally speaking, however, the term 'Crown' is more often associated with the administration of government. Crown bodies are not divisible in law. However local government bodies are. The Crown can provide services to itself and to certain non departmental public bodies (providing they are not distinct as a matter of fact or law). So procurement rules do not apply to two entities which form part of the same legal person. Arrangements between two legal persons comprised in separate legal entities are in principle covered by the procurement rules under discussion.

So under *Tecka*l in the setting of the UK, when 2 Crown bodies A and B decide to, for example, share services, then the procurement rules do not apply. Similarly, where A, B & C are Crown bodies – and create E within the Crown, E is not distinct in law so again the public procurements rules do not apply. Where A, B & C are Crown bodies – and create E as a separate legal entity outside of the Crown, then the public procurement rules apply unless E is not distinct as matter of fact.

It is also useful to note that in the sort of circumstances where the *Tecka*l and shared services jurisprudence might apply, procuring entities may also look to the use of other procurement approaches, such as framework agreements. These can be set up so that a wide range of public sector bodies can call down their requirements under them. Another approach might be to set up central purchasing bodies. These might for example act as a goods warehouse for commonly required supplies.

The general rapporteur asks us to comment on how these non-procured agreements are regulated. The commonly used means of regulating such arrangements in the UK is by way of what has been termed ‘service level agreements’. This is an agreement between parties, setting out in detail the level of service to be performed. Where such agreements are between central government bodies, they are structured as memoranda of understanding, which are not legally enforceable contracts (because the Crown cannot sue itself) but are intended to reflect binding terms and conditions between the parties to the memorandum.

However this is not the only way to arrange such co-operation. For shared services, for example for local government entities, the parties may enter into a legally binding agreement to control their collaborative activities.

Because these activities involve public bodies performing public functions it will always be relevant to consider in the UK whether they have the powers (normally under statute) to collaborate, and perhaps in some cases not only the degree of collaboration, but how the functions are to be carried out may be constrained by statute. It follows that in this respect administrative law principles may apply and it follows that the functions may be subjected to judicial review on the usual grounds available in the UK, for example, the principle which requires that the one to whom power is delegated cannot itself further delegate that power (‘delagatus not potest delegare’) may be applicable.

The general rapporteur also asks for some reflection regarding the limitations imposed by the procurement rules on what might otherwise be competed for; if there are such restrictions on when public-public partnerships involved can also trade in the private market; and, whether and how the conditions for public-public partnership laid down in the case law are understood and complied with.

In the UK, as in other Member States, this subject matter needs to be considered in the context of the constitutional limitations on the remit of EU law. The TFEU, in common with its preceding treaties on European integration does not prejudge Member States' decisions to place economic activity in the public sector, the private sector or somewhere in between, for fundamental reasons connected with the freedom of States to choose whether the activities are subject to market conditions, or to democratic control as possessions of the state on behalf of its citizens or to place the activities somewhere in between in the semi-state or state regulated sector of economic activity. I suggest it follows that the results of the decisions of member states in this context are not a matter for criticism, as they result from the constitutional dispensation we are working within. What is clear is that the decisions of member

states on where economic activity will be placed will influence whether the resultant businesses have to comply with the EU public procurement rules or not.

I am not in a position to give any quantitative estimate of what is excluded in the UK from the application of the procurement rules by virtue of the *Teckal* and shared services exclusions from the full application of the procurement rules. It is clear however that the limitations on member states elucidated in cases such as *Ordine degli Ingegneri della Provincia di Lecce and Others (C-159/11),* need to respected.

Particularly under the Thatcher and Major led conservative governments (1980s – '90s), the UK adopted a policy backed by legislation of compulsory competitive tendering (CCT) focussed on local government provision where in-house government services were tested against private sector provision by means of public procurements. My understanding is that in such a circumstance, public accounting rules would ensure that the in-house bidders bid would reflect the true cost of, let us say the service offered, and could not be the subject of cross subsidisation. CCT was abandoned in the late 1990s. It was not regarded as a success.[23]

It may be useful to add that the increased volume of public procurement law cases coming before UK courts and the specialist lawyers that have become increasingly indispensable to contracting authorities and bidders alike in this context might suggest that the lack of litigation on this particular aspect of the rules suggests that these particular rules are understood, and their application is by and large respected.

As a final comment on this area I would like to add that normally the basic decisions on structuring economic activity in ways that happen to attract or do not attract the application of the procurement rules because of choices that involve *Teckal* and shared services styled arrangements, are normally driven by political decisions. However, it is also the case that in a range of instances, in the light of the detailed laborious time consuming processes which go with

---

23. 'Under Compulsory Competitive Tendering service quality has often been neglected and efficiency gains have been uneven and uncertain, and it has proved inflexible in practice. There have been significant costs for employees, often leading to high staff turnover and the demoralisation of those expected to provide quality services. Compulsion has also bred antagonism, so that neither local authorities nor private sector suppliers have been able to realise the benefits that flow from a healthy partnership. All too often the process of competition has become an end in itself, distracting attention from the services that are actually provided to local people. CCT will therefore be abolished' Department of the Environment Transport and the Regions: Criteria for Project Selection.

the application of the procurement rules in the UK, especially where there is an increased risk of litigation and where litigation is expensive and can cause major delays to procurement processes, authorities have increasingly considered using options which legitimately avoid the application of the procurement rules. Insofar that this happens, it means in effect that the regulated procurement regime is creating its own distortions to how the free market might otherwise operate. (See also comments at Question 1).

Question 4 and Question 5

Consensual and mixed procurement/non-procurement arrangements

The questions posed by the General Rapporteur in this context are essentially questions of policy or commercial practice. However, as a matter of law there is much which can be added. Clearly there needs to be a written contract and for consideration; it needs to be for works, supplies or services. Then there are the issues of whether the full regulatory regime or just the principles of EU law only apply. The thresholds have a bearing on that issue. Further, there are the specific exemptions mentioned by the general rapporteur, (which may be express or implied). Finally, there are the exclusions of in house provision, acquisitions from other public bodies (consortia; general purchasing bodies), subcontractor provision, step-in rights, supply incidental to wider transactions, privatisations, joint ventures, planning and development agreements and products goods and services that cannot be bought from a general market.

Clearly it is simply not possible to the space available to explore all of these areas. Besides, there are excellent reference points already for those interested to explore these areas in a UK setting, such as Arrowsmith's excellent, 'The Law of Public and Utilities Procurement'.[24]

Nevertheless, I will dip into a number of these headings to give a flavour of the UK experience of matters falling outside the scope of the rules.

Firstly, it is worth noting that it is for EU law to define the detail of what is meant by 'contract' in the context of the EU procurement rules, not UK or any other Member States laws. The issue is therefore treated more as a question of substance rather than of form. For example under English law the courts have sometimes held that no contract exists in domestic law in providing services and utilities such as electricity water mail or gas (see for example

24. Sweet and Maxwell 2nd Ed. 2005. (new ed. expected 2014).

Norweb plc v Dixon.[25] In principle such arrangements are probably covered by the Directives. The corollary is also probably the case – that is there are some acquisitions which are contractual in UK law that are not contracts under the regulations. UK law has a very specific technical definition of 'consideration' (a requirement that a contract takes the form of 'an exchange' rather than a gratuitous promise by one party) which is generally a necessary element for the existence of a contract. However, the EU's concept of pecuniary interest, does not necessarily match exactly the English law on consideration.

Then there are issues arising concerning extension, renewal or amendments to contracts, and when these events trigger a fresh contract attracting the application of the procurement rules. Such changes can be provided for in the agreement itself. I understand that the other alternative of general law effecting such change is less common in the common law jurisdictions (England and Wales, Northern Ireland and Ireland) and is more likely in the civil law jurisdictions. Some light was cast on this matter in the Commission's state aid decision in the *London Underground case*,[26] which considered what changes were allowed after the preferred bidder had been selected in a notice led negotiated procedure, and this seems also to be relevant to changes to concluded contracts. It is established that a post contract change which favours a contracting partner is more likely to involve a new contract. However the extent of change, as that case illustrates, depends on the justification for the change. In *London Underground* the Commission considered whether the contractor's bid would still have been the best bid after the change was made. In general, both before conclusion, but especially after conclusion of the contract, changes are more likely to be justified in innovative complex long term contracts because planning is more difficult and because the costs of a new procedure are higher. Because of the UK's attachment in the past to PFI (private finance initiative) partnership contracts this model has by its nature been likely to give rise to issues in this area, due to the length of the contracts and therefore the greater likelihood of changes in demand often contain clauses to facilitate changes to specifications and conditions.

PFI contracts can also test the boundaries between works and services contracts as these often relate to constructing and running institutions such as hospitals, schools, prisons and in the transport area over a long period of time (20- 30 years in some cases). UK government guidance (in addition to that

25. [1995] W.L.R. 636.
26. Commission Decision 264/2002.

from the EU) is available in this area. There had been debate about the relevant test to use, a 'main objective of the contract' test and a 'relative value' (of the works and services) test, the latter having been approved by the Commission in the *London Underground case*. However this has been overtaken by the 2004 Directive which adopted a 'principal object' test, which operated at least where a principal object can be discerned, the relative value test remaining available where it cannot (*Commission v Italy Case C-412/04*).

Our rapporteur invites comment on contracts that are expressly excluded. Among these features the security exemption, where the contract must be accompanied by special security measures. On this, the case of *R. v Secretary of State for Home Affairs Ex Parte Evans Medical*[27] is of interest. In this case the CJEU held that the security exemption could not be used to exempt a contract for the delivery of drugs. It held that the proper concern for the security of passage of the drugs could be adequately addressed by the use of an award criteria in an open or restricted procedure evaluating the bidders' ability to provide security; or alternatively by putting stringent security requirements into the specification. As a result if would seem that the scope for using this exemption is rather restricted.

Another general observation is that when implementing the directives the UK has not departed from its own domestic tradition of whenever possible, controlling procurement by non-legal rather than by legal means – the main legal obligations are there as a result of EU law. It is however the case in the UK that formal procurement procedures may be used even where there is no legal obligation to do so, to give a guarantee of regularity and an assurance that a fair competitive process has taken place. Interestingly it has been estimated that about half of supplies and services contracts and two thirds of works contracts awarded by UK central government were below the thresholds.[28]

Regarding privatisations, the idea of privatising an in-house service provision and an accompanying guarantee to buy back services from the privatised entity has been a common theme in the UK of some decades and this raises a question as to the applicability of the procurement rules. The issue was considered in the English High Court in *Severn Trent v Dur Cymru Cyfyngrdig (Welsh Water) Ltd*.[29] A company – UUCo., purchased a part of Dur Cymru's water business and undertook to provide various services formerly provided

27. Case C-324/93 [1995] ECR 1 563.
28. Office of Fair Trading: Assessing the impact of public procurement on competition: September 2004.
29. [2001] EuLR 136.

in-house. It was argued that this arrangement was merely incidental to the purchase of the water business and that therefore a sale of services was not involved. This argument was rejected, the judge finding that both a sale and a service provision were involved, and that in this case the service provision was not merely incidental but was at the very essence of the transaction. The decision has been criticised as obiter dicta and incorrect by at least one eminent commentator in the field, who has opined that a more subtle approach is called for given that a balance needs to be struck in such circumstances between the policy of opening specific work to competition in the short term whilst allowing for effective privatisation to take place which will in the longer term create more competition.

Finally, I do not have a sense at this point that the UK arranges its policy approach to make agreements severable, or to rearrange its affairs to avoid the operation of the procurement rules. I do however have a sense that in practice in an increasing number of circumstances, contracting authorities take into account the cost and delay, including litigation risks incumbent is applying these complex rules and in consequence they may rearrange their plans to use legitimate means to avoid procurements in order to avoid the application of the rules.

The general principles of EU law: public procurement law and beyond

Question 6

Rules and principles applicable to contract awards/consensual arrangements not covered by the procurement directives

The question of whether the general principles of non-discrimination/equal treatment and transparency apply to the process of awarding contracts expressly excluded, I suggest, needs to be considered in terms of the application of EU law generally. These principles are not limited to the area of regulated procurements or even also to that category along with procurements which are not subject to the full regime. In fact, it can be said that the general principles apply within the ambit of the area occupied by EU law. It follows that one needs to look at each area excluded from the procurement regime, examine whether that area is subject to EU law where it is applicable, apply the general principles through the prism of that applicable law. Although that

statement can be made simply, the application of it requires a more detailed scrutiny of the subject matters areas in question.

Firstly, given the imbedded and general nature of the EU law on the '4 freedoms' of goods, services, establishment and capital, particularly the first two of these, any procurement process of actual or potential cross-border effect, needs to respect the anti-discrimination on grounds of nationality principle that is the TFEU established norm. That such a principle is applicable and effective in its application to government purchasing outside the application of the Directives is readily apparent from the case of *Commission v Ireland*[30] (Dundalk Water supply), where a contacting authority's use only of imperial measurement for the diameter of water pipes, and where it did not make available to bidders the option of using a metric equivalent or a simple 'or equivalent' option, was found to be discriminatory on grounds of nationality.

Next, many areas of the treaty laws, such as competition or employment laws may also be applicable when public purchasing or acquisition is being considered and will bring the application of the general principles in their train. For example, let us take the general rapporteur's exemption (a), the acquisition or rental of land: in this case I believe the starting point would be art. 345 TFEU which provides, 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.' Nevertheless, this backdrop does not mean that individual property transactions cannot attract the application of EU rules, for example with respect to 'solus' agreements for franchising which have attracted the application of EU competition rules, because of their anticompetitive effects where they tie down areas of the market, in respect of beer (assistance to purchase bars), or petrol sales (assistance to purchase petrol stations), or where state compulsory land purchasing operates, where the system discriminates against non-nationals. In these instances one can see that the general principles of the treaty would come into play. Employment contracts attract the application of different EU laws. And so for our purposes in the context of land acquisitions, as discussed above, where a sale of land is on such terms that the procurement rules are engaged, they bring the application of the general principles in their train.

If, on the other hand, the subject matter of the exclusions does not fall within the scope of EU law, then only national law, and in the UK, one or a combination of national legal regimes may come into play with respect to procurement procedures: public administrative law principles, which are available generally to condition the use of public discretion; general contract

30. Case 43/87.

law, general laws on trading, for example with respect to fraud and any other national legislation on tendering, such as that on social issues which may be applicable.

Question 7

Non-discriminati*on/equal treatment/transparency & unilateral measures*

Firstly, I am assuming that this issue should be addressed on the assumption that the circumstances involve a potential cross-border interest, and therefore a question is whether, in that setting, general Treaty principles might apply even to the 'selection of the beneficiary of unilateral administrative measures'. I suggest that an obvious example would be financial grant-giving) under arrangements which did not amount to a regulated public procurement contract (because the recipient undertook no obligation to for example, provide services). That the general rapporteur's question should be answered in the affirmative seems to me unlikely in the UK, in the light of the decision in *AG Quidnet Hounslow LLP v Hounslow LBC* (already mentioned in Question 2 above). At least in ordinary circumstances, I do not think that failing to benefit from the exercise of a unilateral administrative measure (such as not being given a grant) amounts to a restriction upon the freedom to provide services. It is of course possible that in some circumstances the conferring of an economic advantage, such as the making of such a grant might involve state aid issues, but that is another matter.

It is also possible that, regardless of any procurement law issues, public authority decisions on the legality of the exercise of a discretion amounting to the conferral of an advantage by unilateral administrative measure, such as a grant giving may attract judicial review on ordinary domestic law principles. In cases in which would-be recipients have to compete against each other for finite advantages, what is required by ordinary public law fairness may well overlap with what procurement law would require under the principles of transparency and equality. But public law is unlikely (for example) to put any obstacle in the way of limiting the competition for grants to voluntary organisations, if there is some rational basis for such a restriction, whereas that would clearly be impossible in a case governed by the Public Contracts Regulations in the UK. An authority which proposes to fund the provision of services will need to come to a clear view at the outset as to whether it does or does not need to secure from the recipient of funding an enforceable legal obligation to provide the services, or whether it is content to proceed upon the assumption that if the monies are paid and their permissible use suitably re-

stricted, the recipient's own objects are likely to drive it towards providing the services. Depending upon the nature of the services and how important they are as a means of delivering public policy objectives, no doubt amongst other factors, the latter approach may or may not suffice. If an enforceable legal obligation is required, (Part B, below threshold and service concession cases and to the availability of any specific exceptions under the Regulations/Directive excluded or where there is potential justifications under the Treaty) the authority will need to proceed on the basis that it is necessary to comply with procurement law in awarding the contract under which funding will be provided. If it is considered possible and desirable to do without such an enforceable obligation, then the authority will be able to proceed outside the framework of procurement law, although the documentation would need to be clear about that.

In *R (Chandler) v Secretary of State for Children, Schools and Families*,[31] the Court of Appeal in England held that an academy sponsorship agreement between the Secretary of State and a university was outside the scope of European procurement law. The court concluded that an arrangement under which services are provided on the basis only of reimbursement of costs, and without any view to profit, is not a contract 'for pecuniary interest' and accordingly falls outside the scope of the Directive. The court also stated that a party not seeking to make a profit from the provision of the services in question could not be said to be offering those services 'on the market', and so was not an 'economic operator' within the meaning of the Directive. The court's reasoning is focused upon whether the particular contract in question is or is not performed for profit, rather than on the status of the organisation performing it. So an organisation which is 'not for profit' in the sense that it does not ultimately aim to make a profit for distribution to its members may nonetheless be seeking to generate a return on a particular contract. These were clearly meant as statements of general application not limited to the particular circumstances or nature of the services at issue in that case.

If Chandler is correct, then it would follow that a contract providing for the payment of a grant, under which the amount paid to the recipient did not and could not exceed the costs incurred by it in providing a service, would not amount to a public services contract (at least within the meaning of the Directive), even if the recipient was under a contractual obligation to provide the service in question. Quite where the dividing-line between profit and cost-recovery lies in this context may be debateable. Probably the recovery of

31. [2010] LGR 1.

costs could include an appropriate contribution to the overhead costs of providing the services, at least where the overheads in question were not fixed but could vary with the volume of activity undertaken (paragraph 59 of the judgment in *Chandler* appears to suggest that it is sufficient if there can be said to be no profit on the basis of applying realistic accounting conventions). The contract would certainly need to include provisions whereby the amount actually spent on the service was properly recorded and monitored, and anything not spent on that service was returned to the paying authority, so that the contract could not generate any surplus.

There is reason to be doubtful about the correctness of *Chandler* in this respect. Although the presence or absence of an intention to make a profit may be a very important consideration in distinguishing between a contract within the meaning of the Directive on the one hand, and an administrative arrangement outside the Directive on the other, to conclude that no contract which is not aimed at making a profit can be a contract for pecuniary interest, appears to me to be too simplistic, and only doubtfully supported by the CJEU authority that was cited. There are certain judgments where the reasoning does not sit altogether happily with that in *Chandler*, including *CoNISMa*[32] and *Commission v Germany* (the Hamburg decision). In *CoNISMa* it was held that a consortium of universities was an economic operator even though it was a not for profit organisation without a regular market presence, and in Germany the test of a contract being for pecuniary interest was said to be whether it was of direct economic benefit to the contracting authority; see also the Advocate General's opinion on the question of pecuniary interest in *Commission v Spain*[33] at paragraphs 80 and 86. However, it is not clear that the contracts in issue in those cases were themselves costs-only contracts, and the reasoning of the CJEU and Advocate General certainly does not confront that situation directly.

There are also two possible respects in which it might be said that *Chandler* does not conclude the argument even if the decision is correct so far as it goes. One is that the judgment expressly does not reach a final conclusion about the possible relevance of general Treaty principles (as opposed to the Directive itself) to the award of contracts on a cost-recovery basis, although it would be somewhat odd if such contracts were subject to those principles whilst kept systematically outside the Directive because they were of insufficient relevance to the internal market – the position in relation to the Treaty

32. C-305/08.
33. C-306/08.

should if anything be a fortiori. The other is that it was apparently accepted by the claimant in Chandler that, if the case fell outside the Directive then it fell outside the Regulations as well.

Finally, the recent judgment of 19th December 2012 in *Azienda Sanitaria*[34] appears to contradict the conclusion in *Chandler*. The CJEU held that a contract cannot fall outside the concept of a public contract merely because the remuneration remains limited to reimbursement of the costs incurred to provide the service.

Public procurements and general EU law, including competition and State aids law

Question 8 and Question 9

Procurement, the application of general single market rules & the risk of competition limiting abuses

The setting of the boundary between the application of public law and private law raises issues of principle and practice in both the UK, and I am sure also in other member states and the position is no different in principle at EU level. For example in the UK see *Re Gerald Dorido Solinas*[35] judicial review judgment (on the powers of Ministers in the Northern Ireland Executive) for reference to a selection of cases in which apparently enforceable private contractual provisions are ousted by the operation of public administrative law. In that particular case contractual provisions were set aside to allow public administrative law to regulate what would otherwise have been considered to be a set of circumstances regulated solely by contract law. In the context of the application of the competition rules of the TFEU, it has long been clearly established that, taking the traditional teleological approach, the key competition articles have been applied to state bodies that are operating in a trading milieu (see for example *Commission v Italy*[36]).

I think this answers the question posed by the General Rapporteur as far as the potential application of arts 101 and 102 TFEU (restricted practices and abuse of a dominant position) to the state when it is trading are concerned. Of

34. Case C-159/11.
35. [2009] NIQB 43.
36. C-118/85.

course the TFEU is based on a respect for the Member States' choices as to whether in various sectors the main economic (trading) activity will take place in the private or public sector, or somewhere in between, in what is sometimes referred to as the semi-state sector. From the outset, the authors of the Treaty have also made provision in the competition rules for a more nuanced approach to the consequences of this sector, in particular by article 106 TFEU (special or exclusive rights). In principle, where such circumstances arise, art. 106 TFEU is applicable.

Noting that not all EU law enforcement is in the hands of the Commission or the CJEU, it can nevertheless be said that just because the provisions are in principle available as a matter of law to regulate does not mean that they would be exercised by those institutions where there is a choice of measures applicable. See for example the choice made by the CJEU to use the free market provisions in preference to the competition chapter provisions where they were both were the subject of an art 177 reference (as it then was, now art. 267 TFEU) to the CJEU in *Redmond v Pigs Marketing Board*.[37] My sense is that as a matter of principle in matters of public procurement, and in line with the founding Treaty provisions, the key enforcement institutions would look to the single market rules and their related legislation as a first choice for enforcement of EU norms rather than the competition rules where both are potentially applicable.

As to whether procurement rules stifle competition, from experience in practice I am in no doubt that in specific particulars and in general, they do stifle competition. In fact, by definition I suggest that once it is accepted that the concept of competition inherently means allowing the free market operate as such, it follows that to regulate the procurement process, particularly in the detail which the procurement rules provide for, inevitably gives rise to distortions of competition. As to a specific example, allowing correction of tenders during the course of a competition might well improve competition, but risks allegations of breach of the principle of transparency and equality. Transparency itself may foster collusion between tenderers.

Because of the time and trouble required to meet the requirements of the rules, contracting authorities are more likely to use longer term procurements, to make greater use of frameworks (the use of which was initially frowned on by the Commission) and to frame procurement requirements so that they may become SME unfriendly. This has then led to initiatives at EU and national level to use legal means to encourage SME participation in bids.

---

37. C-83/78.

It is also worth noting that fostering competition does not always equate to getting best value for money. Opening a tendering process where there it is very unlikely that there will be more than one bidder, or an international market means that if this is indeed transpires to be the case, then the negotiating position of the contracting authority has been much reduced, by making this obvious to the single tenderer available, where the threat of a competition may have produced a better value for money deal. In electronic auctions the requirement to be transparent about rankings at all times during the bidding process may encourage collusion.

As to the rules in general, the time, trouble and heightened litigation risk these rules have engendered in the UK, have meant that decisions to keep services in-house which might otherwise have been subjected to competition, or to bring services in-house when litigation starts on a procurement process are more likely. A policy to buy a service provision may be stood down and instead a policy to aid by grant of financial assistance may be made instead. Contracting authorities may be named on several legally procured framework contracts with different durations, so that if litigation starts on a procurement process, instead of completing it, it can be terminated and the goods or services obtained from the overlapping framework so that security of supply can be maintained and the time, expense and uncertainty of litigation can be avoided.

The General Rapporteur's reference to SGEIs, and therefore inevitably to art 106 TFEU and to the *Altmark* jurisprudence, invites national rapporteurs to reflect on the partial shelter SGEIs obtain from the full application of the competition and other fundamental treaty rules, including in some instances from the procurement rules. Where the *Altmark* decision is applicable to a set of circumstances it is not compulsory (and indeed it may not be sensible) to have a procurement to establish the minimum compensation necessary to operate a service of general economic interest. In my view art 106TFEU is a necessary concomitant of the founding fathers' decision to leave it to the Member States to place some economic activity in public sector or private sector or somewhere in between. It deals with the 'in between' bit. This has allowed the principles of the treaty to operate in an effective manner in all the Member States, irrespective of the differing democratic decisions of Member States on the relative utility for their citizens of public sector or private sector enterprise. It represents an enlightened balance between the democratic wishes of the member states in what are usually sensitive areas of economic activity and the preservation of a suitably orchestrated approach to applying competition and free market rules to all sectors of the economy.

The balance struck in the UK between public and private sector enterprise in this respect has changed over time. A range of SGEIs existed over a long period of time, certainly back to the nineteenth century, where they could be seen in the form of corporate bodies created by statute. A statutory corporation typically has no shareholders and its powers are defined by the Act of Parliament or other legislative instrument which creates it. Such bodies were normally created to provide public service, examples in the past including trust Ports, British Railways, the National Coal Board and the Post Office Corporation. Many of these have been transferred out of the public to the semi-state or to private sector especially during the conservative governments led by Margaret Thatcher from 1979 to 1990 (see question 2).

With respect to restrictions on what can be bought under the procurement regime, *Contse* and cases from this line of authority, *Commission v Italy* and *Commission v Italy,* as well as earlier jurisprudence, such as *Commission v Ireland* (Dundalk Pipes)[38] are illustrations of how effective the general provisions of the treaty can be in addressing directly discrimination problems with procurements which have the potential to directly impact on the operation of the single market. This is in contrast to many judicial decisions about what can seem arcane details of the application of the procurement regulations, without direct reference to actual effects on the single market and in circumstances where the disputes are between entities which are all based within the member state or within one jurisdiction of a member state. One aspect of the intrusiveness of the rules is that although the key focus of regulation is on the face of it to allow freedom of trade, the rules actually regulate in ways what can be bought, and in doing so create certain conundrums, and also restraints on contracting authorities freedom to contract.

An example of the former in the UK is the understandable desire for reasons other than discrimination on grounds of nationality for the devolved authorities to 'ensure greater uptake of sustainable and/or local food'. There is a well developed private sector ability to promote local produce to visitors from outside, and there are well-developed examples of this to be seen. In respect of Northern Ireland, see for example the locally based Hastings Hotel Group booklet on Food Provenance.[39] This is not an approach that the public sector even where it is operating in parallel areas, or wishes to showcase its wares can readily emulate even when catering for tourists or distinguished guests. So, for example, in Wales, in the production by the National Assembly for

38. C-3/69, 3/88 & 45/87 respectively.
39. readily accessible from the Hastings Hotels website www.hastingshotels.com

Wales of the paper, 'Sustainable Public Food Procurement',[40] one can see a much more oblique approach in this area of the guidance to local contracting authorities on the subject. Whilst there may be a very understandable desire to use local produce in a range of circumstances, the ability of the public sector to do so is very constrained by the procurement regime.

In a similar vein, although in this case with the authority of the CJEU, the decision in *Commission v Kingdom of the Netherlands*[41] (fair-trade coffee), means that an award criterion may relate to fair trade production provided that relevant criteria (including transparency) are met.

More generally, public authorities need to take care in describing what they wish to purchase in a way which will not give rise to allegations of national preference. For example, if a contracting authority wishes to buy water pipes, and chooses to exclude from its specification pipes which are composed of asbestos where there is no proven risk that the use of such pipes is injurious to health, but where it knows consumers of the water perceive (albeit wrongly) that there may be such a risk, and where key suppliers from outside the state specialise in asbestos pipes may claim that he has been discriminated against. This is reflected in the inclusion of an 'or equivalent' requirement when specifying. It is generally accepted that anything other than a functional requirement in other than a restricted class of cases (where artistic reasons pertain) is required.

Question 10

Can SGEIs be outsourced without following public procurement-like procedures, inc. direct awards; & if there is no direct award do state rules apply?

The short answer to each of the questions posed in the headline above is, I believe, in the affirmative in both cases.

I have no reason to report from the UK that the current state of play with the development of EU law in this area is not accepted and applied where it is relevant.

UK government guidance is available as follows: Guidance for State Aid practitioners of June 2011[42]

There has been some judicial activity also in respect of the application of the *Altmark* jurisprudence although it was discussed in *Stagecoach, Go-*

40. National Assembly of Wales: October 2012 (Paper number 12/046).
41. C-368/10.
42. Department of Business Innovation and Skills (BIS).

Ahead and others v S. of S. for Transport[43] in the context of Regulation (EEC) No1191/69 of the Council of 26 June 1969 on action by the Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterways as amended (and now repealed).

There may be an implied sense from the general rapporteur's comments that failings and shortcomings in the current state of EU law in the area still exist. I think that it needs to be borne in mind that there are a range of circumstances where a competitive process is not feasible or appropriate. For example in the UK where established institutions are charged by statute with carrying out SGEI activities exclusively by themselves, there is no possibility that the service can be outsourced as the state has entrusted the responsibility with the state designated institution only. Furthermore as it is within the state's privilege to decide what economic functions will be carried out by the state (in whatever form), it follows that it is not appropriate that the EU should require that these activities be subjected to a competitive process. Of course the compensatory amounts should always be in compliance with state aid law requirements and the Member State should be in a position to be transparent by being able to demonstrate, even in the absence of a competitive process that this is so. Altmark and associated guidance shows what must be done in this respect.

Strategic use of public procurement

Question 11

The challenge of using public procurement to advance social/environmental aims

As a matter of the policy approach adopted there has been a mixed history in the UK. In a nutshell, during the years of the conservative governments under Mrs Thatcher, the tendency was for the central policy to be focussed on letting the market operate without adding what were seen as extraneous requirements. Getting the best value for money was perceived to be achieved by looking at procurement through a narrower prism. The addition

43. 2010 EWHC 223 (Admin).

of wider objectives was seen as adding cost. However, latterly, especially with the creation of devolved government in the UK, all the jurisdictions in some shape or form have adopted policies embracing the addition of environmental and social objectives when procuring.

There is therefore guidance available in the UK to contracting authorities to this end. Examples, in addition to the Welsh example given above are the UK's 'Buy, and make a difference'[44] and in Northern Ireland the guide 'Equality of Opportunity and Sustainable Development in Public Sector Procurement'.[45]

Northern Ireland provides a good example of a transition to a policy approach that wishes to take the most from the space EU law has created for policy development. As I will show, this was not always the case as a matter of government policy. However, the Northern Ireland Act 1998 (effectively the constitution of the devolved government) included a provision (section 75) which imposed a duty on all public authorities:

> 'to have due regard to the need to promote equality of opportunity between persons of different religious beliefs, political opinions, racial groups, ages, marital status or sexual orientations as well as between men and women, people with disability or those without and those with dependants and those without'.

The Equality Commission of Northern Ireland's guidance unequivocally stated that public authorities' procurement policies form an integral part of how they carry out their functions. Their procurement policies should therefore give effect to section 75 duties.

Before a fully democratically accountable devolved government was restored in Northern Ireland the direct rule administration from London view was uncompromising on the use of procurement to drive social change:

> 'The government's longstanding position is that public procurement of goods and services is to be based on value for money ... and should not be used to pursue other aims.'

However a dramatic shift occurred with the institution of a devolved administration in 1999. Procurement policy was devolved to the local government to administer, and in its first programme of Government, that administration picked key areas for particular review including public procurement policy.

44. 2008 Office of Government Commerce.
45. 2008 Equality Commission for Northern Ireland and the Central Procurement Directorate of the Department of Finance and Personnel.

The team that took this stream of work forward found several key constraints to policy development:

(1) the constraint of section 24 of the Northern Ireland Act requiring the local government to act in compliance with EU law, together with the power in section 14(5)(b) of the Act on the part of the UK government to intervene to revoke legislation which had an adverse effect on the single market for goods and services within the UK;
(2) the political constraint, which was that four parties with diverse political opinions would have to sign up to the results;
(3) the NI Treasury Officer of Accounts, Treasury and Office of Government Commerce's overarching policy to obtain 'value for money'.

After intensive discussions to overcome these challenges, the team's report identified the need to obtain best value for money as its starting point. But in a critically important comment it added that this 'allows for the inclusion as appropriate of social, economic and environmental goals within the procurement process', thus linking this approach with the section 75 duty.

A pilot project to assist the unemployed was recommended to test this approach. This was especially significant as this had particular equality implications in Northern Ireland given that for many years Catholics were approximately twice as likely to be unemployed as Protestants. Addressing unemployment therefore came to be regarded as a part of the fair employment agenda. (I should add that the statistical base could be established as Fair Employment legislation had been passed in Northern Ireland requiring employers to carry out monitoring of their employees – so that there could be transparency about the scale of the problem, and a targeted approach taken to resolving it).

The pilot scheme involved the insertion of a special condition into twenty selected procurement contracts in Northern Ireland. This required suppliers to implement a plan with a clear, specific and concise utilisation strategy for the employment of unemployed people (the employment being provided either by contractors or sub-contractors). No maximum or minimum number was defined. The definition of unemployment was carefully considered by the Equality Commission so as not to discriminate against women. Further, the unemployed could be from anywhere in the EU (or from outside if the bidder was also from outside the EU). Under the tender documentation, the proposed plan was to be submitted as part of a bid and failure to comply would be subject to an appropriate penalty. The feasibility and quality of the plan could only be taken into account at the award stage where otherwise equivalent ten-

derers who submitted a plan were in competition. This was to comply with the *Nord Pas de Calais decision*[46] and indeed with the European Commission's interpretation of it.[47] I would like to make some comments on this approach:-

1. The approach was modest. Academic and other debate about the meaning and significance of *Beentjes* and the *Nord Pas de Calais* decisions meant that to obtain legal certainty a very conservative policy option was chosen. To have had the project mired in legal uncertainty as to its compatibility with EU law would have had a very detrimental effect on whether it was regarded as a success.
2. Modest though the initiative was, it gained the approval of the then Executive and created a distinctly different policy approach to that in the rest of the UK. Arguments for parity of approach with that operating in England were therefore defeated – this was against the background that procurement was a devolved matter which was therefore within the discretion of the local administration;
3. Given the presence of section 75 of the Northern Ireland Act and the particular problems of Northern Ireland, it was not unnatural that such a different approach be taken.

An evaluation of the project was submitted to the Procurement Board of Northern Ireland in September 2005. It showed that the cost of job creation was modest compared to other schemes. It was considered that clarity between value-for-money and social objectives were achieved by the two-stage selection process: first price and quality, and secondly assessing the scheme only in the event of a tie between bidders. The gains were, however, modest. Approximately 50 workers from the target group remained in employed afterwards.

Ultimately this is attributable to the modesty of the scheme due to EU law constraints and the lack of clarity on what was possible. Nevertheless the scheme pointed the way to a broader use of this kind of orchestration or regulation into the operation of private sector entities. Other examples where such an approach could be taken might include social, environmental and health and safety objectives.

46. C-225/98 Commission v France.
47. See Interpretative Communication of the Commission on the Community Law Applicable to Public Procurement and the possibilities for integrating social considerations into Public Procurement COM/2001/0566 Final.

As a result of the successful pilot, Northern Ireland Government, together with NGOs under the new devolved administration adopted the comprehensive guidance, 'Equality of Opportunity and Sustainable Development in Public Sector Procurement' in May 2008 (Equality Commission for Northern Ireland and the Central Procurement Directorate Equality of Opportunity and Sustainable Development in Public Sector Procurement (May 2008)). The document provides guidance on everything from strategic and project development through specification and selection to the performance management of contracts.

First Minister Peter Robinson in the foreword to the Guidance acknowledged that:

> 'the leverage of public procurement to contribute to delivering greater equality and social inclusion as well as sustainability goals within the current legislative framework should not be underestimated. In Northern Ireland public procurement accounts for approximately 1.9 billion of supplies, services and construction works and over the next 10 years this will be added to by a further 20 billion under the Investment Strategy for Northern Ireland'.

The document is an interesting reflection of both the policy priorities and the struggle with the EU rules to make sensible policies in this area.

In particular, it illustrates the constraints, uncertainties and slow development of EU law and consequently the convoluted design of the pilot project. This is an illustration of the results of the imposition of 'top-down' Single Market regime set against determined local 'bottom-up' efforts to address urgent challenging and divisive inter-communal issues. It should be borne in mind that the fledging and hard-won devolved government was, through enlightened use of procurement, trying to assist a community to emerge from long term conflict, and to address directly the causes of inequality (here with respect to long term unemployment). This was intended to bring communities together to identify with their own elected, though relatively untested government structures and publicly procured assets – in short, to help make a hard-won democratic system work effectively.[48]

48. The Minister with responsibility for public procurement, Sammy Wilson commenting in the NI Assembly on the launch of a guidance document on integrating of social policy objectives into procurement processes said: 'A lot of practical help has been given [with the Guidance document]. We have to be careful, of course. Everybody [in the debate] qualified their comments with the words 'keeping within the law'. Again, there is a bit of tension, because, 'being a member of the European Union ties our

Question 12

Are public procurements used as a tool to foster innovation?

These questions raise issues on which I thought it best to consult my colleagues from the central procurement directorate in Northern Ireland (CPD). From them I have elicited the following observations:

A mixture of performance based and technical specifications are used within the central procurement directorate of the devolved government in Northern Ireland. Since the upsurge in NI legal cases (and the number of competitions which have been abandoned during the standstill period to avoid the risk of legal challenges), the tendency has been to increase the weighting in relation to price, and evaluate quality against 'mandatory requirements' (i.e. the economic operator has to demonstrate they meet the specification before their tender is assessed). In these cases the non-price assessment is generally weighted at 30% or lower. Over the last 12 months of the date of writing, the majority of regulated ICT contracts have been awarded on the basis of the lowest priced tender that meets the specification. This shift has eliminated any opportunity to encourage or assess innovation. The procurement professionals have confirmed that this approach has been driven by the volume, diversion of effort, delay and outcomes of litigated procurements.

The competitive dialogue is generally used for complex ICT procurements and the number of these would be low (probably 2 or 3 over the last few years). This procedure undoubtedly provides scope for innovative solutions to be suggested. However, the risk of challenge is as great (if not greater) when a contracting authority excludes an economic operator's solution during the dialogue phases. Contracting authorities are treading with caution regarding the ability to objectively assess innovation particularly when having to compare the relative advantages and characteristics between the successful and unsuccessful tenders. Protecting Intellectual property is also an issue for bidders.

CPD is well aware that innovation should be considered at the earliest stages of the commissioning process and can work well when contracting authorities genuinely engage with markets when the need is identified.

Generally, when Contracting Authorities start a procurement competition they have already 'defined' how they want the service to be delivered. Some

hands and our feet and puts tape around our mouth and a hood over our head, when it comes to the freedom to do things.'

of this is due to the rules regarding 'Managing Public Money',[49] a policy document, where business case approval is predicated on certainty and defined outputs, thereby stifling innovation.

Performance based specifications are widely used. However, a hindrance that is identified by CPD colleagues with this is that following a decision of the Northern Ireland High Court in Northern Ireland, where the measure for evaluating price adopted was held to be flawed and where the court considered that without an element for including price as a part of the evaluation of which bid was the most economically advantageous tender (MEAT), the process did not comply with the EU procurement rules (*Henry Bros v Department of Education for Northern Ireland*) *CPD* have abandoned the use an innovative procurement technique intended to provide better value for money. This technique only looked at sample pricing mechanisms pre-award, but post award operated in partnership with the winning bidder, taking an 'open-book' approach to the actual pricing post-award (which was designed to avoid the all too common problem of bidders making low priced bids, but using every opportunity to raise the price afterwards under the contract or by invoking dispute procedures (the so-called 'low bid, high claims' culture), identified in various studies (by Sir Michael Latham (1994); Sir Peter Levine (1998); Sir John Egan (1990), as a real problem with publically procured contracts), by working in partnership with contractors and using a mechanism to reward savings suggested by the contractor as construction proceeded, could no longer be used. I should add there was no suggestion in the case that any discrimination on grounds of nationality was raised.

Remedies

Question 13

Directive 2007/66/EC: Strengthening remedies against breaches of the rules?

Of course the 2007 Directive has been transposed across the UK and is in operation in procurement cases brought before the courts. It has substantially changed the law as it had operated before its provisions came into place. Be-

49. Managing Public Money: Department of Finance and Personnel for Northern Ireland 2008/2012.

fore, it was up to the complainant to apply for an injunction to the relevant court. There was no automaticity about the grant of this interim remedy. Rather each side had to make its case to the court, the complainant having to show that it had a prima facie case and both sides to address the court on where the balance of convenience lay in the specific circumstances regarding whether the interim relief was granted. This could in effect lead to a mini-hearing, sometimes taking more than a day of court time where the rights and wrongs of the procurement process were debated. It was considered that in some instance contracting authorities would agree to desist from proceeding with a procurement process in order not to have its arguments heard before they could be developed in full. In any event, the introduction of the automatic stay has not ended these preliminary hearings as contracting authorities have still quite frequently applied at the outset to have the stay lifted. In this, readers are referred to the comments of Mr Justice McCloskey at topic 1 of this paper on what a public procurement case might involve in a court proceeding. It has been increasingly recognised that generally, but in particular the results of this key element of the process of challenging public procurement processes had led to distinctly different outcomes in cases heard in the Northern Ireland legal jurisdiction and the other jurisdictions of the UK. It is considered that the normal outcome of this preliminary phase in Northern Ireland is not to lift the stay, whereas in the rest of the UK, the stay is normally lifted. It is difficult to see why this should be so, and various reasons have been advanced, including that there has been a difference of judicial treatment generally to procurement cases between the jurisdictions, with the scrutiny in Northern Ireland being more anxious of the processes of contracting authorities (for an example of a radically different approach to the same issues see the Court of Appeal judgment in *Clinton* where two of the judges in the Court of Appeal came to radically different conclusions on the basis of the agreed facts), or a greater desire to 'run' cases in Northern Ireland than elsewhere, where more cases may be settled at an early stage without litigation, or simply differences in quality of the procurement processes in the different jurisdictions.

In general, concern has been expressed by contracting authorities that the institution of an automatic stay has encouraged more litigation on procurement matters, and there is no doubt that across the UK, but especially in Northern Ireland, it is generally regarded that since the institution of the rules, but particularly latterly, procurement litigation, procurement law specialists in solicitors firms and a growing specialist procurement law bar has developed with their main focus being the operation of the EU rules.

As to VEAT notices in my own jurisdiction 8 VEAT notices have been issued, all in respect of services and supplies contracts, none in respect of works contracts.

As to damages, I know of no cases where damages have been awarded in the UK, or where the remedy of ineffectiveness has been granted to date of writing. In one prolonged piece of litigation where proceedings initially issued in 2008, and the case was heard in the High Court, appealed to the Court of Appeal, and findings made in favour of the complainant, the case was remitted to the High Court again to consider the award of damages, there is as yet no sign at time of writing of the process coming to an end. Of course, it is not possible to say how many cases may have been settled out of court, or procurements withdrawn during the process of a complaint and /or a judicial remedy being sought

As to cases where the full regime is not applicable, it is the case that the full remedies regime as developed for regulated contracts does not apply

The legal regime in the UK before the procurement rules and their attendant remedies regime existed allowed in differing circumstances for each of the headings adumbrated by the general rapporteur to apply. For example, an award decision could be challenged on contractual/administrative law grounds. Exceptionally, a contract could be found to be void, for example where there had been fraud or misrepresentation, and damages could be awarded in a range of circumstances.

The EU remedies regime has in the case of regulated contracts set the traditional balances aside both in respect of interim and final remedies. Of course the EU legal regime has a superior status in the national legal system, but it does not follow that the issues raised by the rules and their enforcement put against those raised in a purely national setting merit a different remedies regime. What is clear in the UK is that the substantive procurement rules and the attendant legal regime has given rise to delay in awarding contacts, prolonged litigation in some cases, a growth area for litigation and the role of lawyers, and apparently an uneven application of at least the remedies regime in respect of the interim measures decisions.

Of course some of this at least can be put down to the common law's adversarial approach to conducting litigation. On the other hand various continental states appear to have highly efficient specialist administrative tribunals which appear to effectively administer and enforce the rules speedily and at minimum expense.

Conclusion and reform

Question 14

The *new directives: contributing to the modernisation of EU public contracts law?*

At time of writing (October 2013), the most up to date UK official document on the new directives generally, summarising the key elements and their import in a UK context is the Cabinet Office procurement policy note 'Further progress on the modernisation of the EU procurement rules' of 25 July 2013 (Information Note 05/13). At this point I understand European Parliament approval in plenary session, technical modifications and translation need to be undertaken before the measures are adopted in December 2013 by current estimates. The UK's view of the outcomes of the negotiations is that,

> 'For contracting authorities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. And for suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.'

The UK takes the view that its priority objectives have been achieved. These were:

- To make clear that contracts could be awarded directly for a period of, for instance, three years, to employee led organisations/mutuals, to enable employees to gain experience of running public services prior to full and open competition
- Reducing lengthy and burdensome procurement processes that add cost to business and barriers to market competition,
- Providing more flexibility for purchasers to follow best commercial practice, so that the best possible procurement outcomes can be achieved, and
- Supporting measures to enhance SME access to public procurement, where such measures are non-discriminatory and are consistent with a value for money approach.

More specifically the UK has welcomed:

i) A much simpler process of assessing bidders' credentials, involving greater use of supplier self-declarations, and where only the winning

bidder should have to submit various certificates and documents to prove their status

ii) More freedom to negotiate – constraints on using the negotiated procedure have been relaxed, so that procedure is available for any requirements that go beyond 'off the shelf' purchasing.

iii) Poor performance under previous contracts is explicitly permitted as grounds for exclusion

iv) The distinction between Part A and Part B Services has been removed, and a new light-touch regime introduced for social and health and some other services. There will be OJEU advertising and other specific obligations for this new light-touch regime, but a much higher threshold has been agreed (EUR 750,000).

v) The rules on 'Dynamic Purchasing Systems' have been greatly simplified, with the removal of the onerous obligation to OJEU-advertise call-off contracts made under the DPS

vi) The ability to reserve the award of certain services contracts to mutuals/social enterprises for a time limited period

vii) Electronic marketplaces for public procurement are expressly permitted, removing any doubt as to their legality

viii) Reduced red-tape on suppliers' response times: The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced by about a third. This flexibility could be helpful for speeding up simpler or off-the-shelf procurements, but still permits longer timescales for requirements where bidders will need more time to respond.

ix) Review of thresholds: The directive includes a binding commitment on the Commission, to review the economic effects on the internal market as a result of the application of thresholds, which could lead to an increase in the thresholds, which have been broadly static for 20 years. The review must happen within 3 years of the directive's transposition.

x) Legal clarity that buyers can take into account the relevant skills and experience of individuals at award stage where relevant (eg for consultants, lawyers, architects)

xi) Improved rules on social and environmental aspects, making it clear that:
   - social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects which had previously been allowed).
   - buyers can require certificates/labels or equivalent evidence of social/ environmental characteristics, thus facilitating procurement of

contracts with social/ environmental objectives and refer to factors directly linked to production processes

xii) Electronic communication / e-procurement will become mandatory following 4.5 years after the directive's adoption.

xiii) Various improved safeguards from corruption:
- specific safeguards against conflicts of interest, similar to common existing UK practice where declarations are signed by procurement staff to confirm they have no outside interests with bidders etc
- similar provision against illicit behaviour by candidates and tenderers, such as attempts to improperly influence the decision-making process or collusion; safeguards against undue preference in favour of participants who have advised the contracting authority or been involved in the preparation of the procedure.
- self-cleaning measures, for suppliers who have cleaned up their bad practices

xiv) Buyers will be encouraged to break contracts into lots to facilitate SME participation, but there is discretion not to do so where appropriate.

xv) The new rules encourage and allow preliminary market consultation between buyers and suppliers, which should facilitate better specifications, better outcomes and shorter procurement times.

xvi) A turnover cap has been introduced facilitating SME participation. Buyers will not be able to set company turnover requirements at more than two times contract value.

xvii) A new procedure has been introduced: the 'Innovation Partnership' procedure. This is intended to allow scope for more innovative ideas. The supplier essentially bids to enter into partnership with the authority, to develop a new product or service.

xviii) The full life-cycle of costings can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which may save money over the long term but appear more costly on the initial purchase price

xix) Public authorities will no longer have to submit detailed annual statistics on their procurement activities. The Commission will collect this information directly from the online system, thereby freeing up valuable time and resources for public authorities.

xx) 'E-certis': Where contracting authorities require certificates etc from winning bidders, suppliers need to know what type of information and documents they will need to provide. 'E-certis' will be a central, online point where suppliers can find out the type of documents which they may be asked to provide in any EU country, even before they de-

cide to bid. This should be of particular help when suppliers wish to bid cross-border, as they may be unfamiliar with the detailed requirements of other EU Member States

xxi) Concessions contracts (works and services) will need to be advertised in OJEU where the contract value exceeds EUR 5million, and procured in compliance with the new procedural rules regime for concessions.

I wish to reflect generally on where we have reached with the EU procurement regime. I think it might be useful to get a historical perspective on where we are now by going back to basics and reminding ourselves of the roots of procurement law within the scheme of EU law. Its foundation is within the original Treaty provisions establishing the Single Market Project, articles 30 and 34, 43 and 49 of the Rome Treaty (on goods, establishment and services), as they then were (now 28, 43 and 49 TFEU). From the detailed regulatory setting where we find ourselves now, it seems a world away to remember that these provisions were in effect merely declaratory and not of real effect. It was considered impractical at the outset to apply the provisions directly. The treaty's freedom of movement of goods provisions only became directly effective in 1971. The original liberalisation directive on procurement, 70/32 was modest in scope prohibiting practices that favoured national providers in public works contracts, but the roots of the current legislative regime are in this and following directive in 1971 and 1977. It is also extraordinary to recall that these measures were largely disregarded and not well enforced, and it was only with the single market project in the run-up to 1992 that this area of law was given priority, dusted off, and further legislative measures adopted

It is interesting to reflect on what has been achieved in this respect. I suppose that we could not have reached the detailed regime we have now, had the practice of national preference across the EU not been substantially addressed. In the process of moving the single market policy forward, the policy has moved from simple national barrier removal to the creation of a detailed regulatory regime. This appears to have been on the assumption that procurement practices that do not allow for fair competition between firms may also operate as barriers to trade and produce trade distortions. I am not an economist – but I know there is continuing debate about the degree of distortion, and I must leave that debate to others. However, such a starting point explains why the view has been taken that trade barriers cannot be removed solely through negative obligations – it is considered that it is difficult to prove discrimination. It is also considered that apart from discrimination, trade barriers also arise from inefficient sourcing – for example if you do not

advertise widely enough, you cannot expect that the best bidders, even if they are more distantly based, will respond. In effect we do now have in the public procurement sphere a regime dealing with the key elements of contract law in the common law systems, especially ‘offer’ but also ‘acceptance’, ‘consideration’, ‘illegality’ and ‘remedies’.

It is clear that the EU legal regime does not displace all national or regional discretion in the operation of procurement policy – rather, as was emphasised by the European Court in the *Beentjees* case[50] they provide a framework within which Member States implement their own national procurement policies. Nevertheless, despite the optimistic view of the UK presented above, procurement professionals would say there is still have a complex regulatory regime. It is clear in the UK that the various legal jurisdictions have experienced a burgeoning number of cases at EU, national and local level, interpreting the rules and the number of lawyers and administrators we need to deal with the regime climb steadily over the years.

The single market project is a necessary and worthy cornerstone of the EU. It is intended to create an absence of constraint on the operation of the market. The procurement rules are aimed at the removal of barriers to trade between Member States, and at the creation of a setting where contracting authorities can get the best from the market. The new procurement directives are intended to simplify that regime in this context. This is an acceptance that the rules have been too burdensome. It should not be surprising, therefore, as aspects of this paper relate, that I have observed worrying effects in practice such as distortions of the market, reduced innovation, an inability to respond adequately to local needs by advancing local social policy through procurement, more costly and slower processes and increased litigation. All these aspects seem antipathetical to the operation of an effective single market. The lifting of some burdens is therefore to be welcomed. However, even with these changes, I think that there will still be a set of detailed rules on public procurement which will continue to create a series of constraints on the freedom of public contracting authorities to get the best from the market and which will not address, or not address fully the problems I have referred to. Whilst some aspects of practice can be improved at national level, I doubt that the new directives will go far enough to free up the operation of the market. In short even with the new regime I believe the rules will still be a disproportionate means to an end. Time will tell.

---

50. C-31/87.

List of editors and authors

Elsa Adamantidou
Head of Public Procurement Monitoring Unit, CIEEL – (Greece)

Roberto Caranta
Dr., Professor of Administrative law, University of Torino – (General Rapporteur)

Evelyne Clerc
LL.M. (NYU), LL.M. (Collège d'Europe, Bruges), Professor in European law and Competition law, Faculty of Law, University of Neuchâtel – (Switzerland)

Ivaylo Dermendjiev
Dr., Attorney-at-law, Senior Partner, 'Simeonov & Dermendjiev' Law Firm – (Bulgaria)

Anna Dimoulis
Lawyer-linguist, European Court of Justice, Finnish Translation Unit, Luxembourg – (Finland)

Brian Doherty
Deputy to the Solicitor, Departmental Solicitors Office, Government Legal Service, Belfast, Northern Ireland – (The United Kingdom)

Catherine Donnelly
Barrister in the Law Library, Dublin and Blackstone Chambers, London; and Associate Professor at Trinity College Dublin – (Ireland)

José Maria Gimeno Feliú
Full Professor of Administrative Law, University of Zaragoza – (Spain)

Boštjan Ferk
Dr., LL.B., Managing Director of the Institute for Public-Private Partnership – (Slovenia)

Petra Ferk
M.Sc., Researcher at the Institute for Public-Private Partnership, PhD Candidate at the Faculty of Law, University of Ljubljana – (Slovenia)

Patricia Valcárcel Fernández
Associate Professor of Administrative law, University of Vigo – (Spain)

Joanne Finn
Partner and Head of the EU Competition and Regulated Markets group at Eugene F. Collins – (Ireland)

Michael Fruhmann
Mag. Dr., Head of Unit, Federal Chancellery, Constitutional Service – (Austria)

Brady Gordon
PhD reasercher at Trinity College Dublin – (Ireland)

Ana Luísa Guimarães
Senior Associate, Sérvulo & Associados, Sociedade de Advogados, RL, Lisbon – (Portugal)

Pavlína Hubková
Mgr. (Charles University, Prague), Ing. (University of Economics, Prague), Researcher at the European University Institute (Florence) – (Czech Republic)

Catherine Jacqueson
Dr., Associate Professor, Research Centre in Legal Studies in Welfare and the Market, Faculty of Law, University of Copenhagen – (Editor)

Giulia F. Jaeger
Barrister, Luxembourg; candidate for the function of notary, Luxembourg; senior associate, Law firm – (Luxembourg)

Jiří Kindl
Dr. (Charles University, Prague), M.Jur. (Oxon), Partner in Weil, Gotshal & Manges (Prague); member of the Czech Bar Association; Lecturer at the Faculty of Law, Charles University in Prague – (Czech Republic)

Eija Kontuniemi
Chief Legal Councel, Hansel ltd, State Central Procurement Unit – (Finland)

Filip Kuhta
LL.M., Research Fellow, Jean Monnet Chair for European Public Law, Faculty of Law in Zagreb – (Croatia)

Anna Kuusniemi-Laine
Partner, Castrén & Snellman Attorneys Ltd, Helsinki – (Finland)

Elisabetta R. Manunza
Dr., Professor, University of Utrecht – (The Netherlands)

Roberto Mastroianni
Professor of EU law, University of Naples « Federico II » – (Italy)

Ilias Mazos
Conseiller d'Etat, Greek Council of State – (Greece)

Gert-Wim van de Meent
Dr., Professor, University of Amsterdam, and Loyens & Loeff N.V. – (The Netherlands)

Jenny Mellerick
Partner at McCann FitzGerald – (Ireland)

Arthur Merle-Beral
Chamber of Commerce and Industry of Paris – (France)

Aileen Murtagh
Associate at A&L Goodbody – (Ireland)

Eva-Maj Mühlenbock
Partner and Head of the Public Procurement group at the Law Firm Lindahl's Stockholm office – (Sweden)

Ulla Neergaard
Dr., Professor of EU law, Faculty of Law, University of Copenhagen – (Editor)

Anita Németh
Dr., Attorney at law, official public procurement adviser; Lecturer at the Faculty of Law of Eötvös Loránd University (ELTE), Budapest; former Head of the EU Law Department of the Ministry of Justice, Hungary – (Hungary)

Pernilla Norman
Lawyer at the Law Firm Lindskog Malmström and doctorate candidate at the University of Linköping – (Sweden)

Tomáš Pavelka
JUDr. (Charles University, Prague), LLM (Cantab); stagiaire attorney at Cleary Gottlieb Steen & Hamilton LLP (Brussels) – (Czech Republic)

Agris Peedu
Deputy Secretary General, Ministry of Finance of the Republic of Estonia – (Estonia)

Nikola Popović
Dr., Member of the Council of the Croatian Agency for Post and Electronic Communications (HAKOM, NRA) – (Croatia)

Sune Troels Poulsen
Dr., Associate Professor, University of Copenhagen, Faculty of Law – (Denmark)

Martin Ráž
Mgr. (Charles University, Prague), M.Jur. (Oxon), senior associate in Havel, Holásek & Partners (Prague); member of the Czech Bar Association – (Czech Republic)

Ivan Sammut
Dr., Senior Lecturer, Faculty of Law, University of Malta – (Malta)

Aleksandra Sołtysińska
Dr., Chair of European Law, the Jagiellonian University in Cracow – (Poland)

Ines Tantardini
Chamber of Commerce and Industry of Paris – (France)

Adrián Tokár
Member of the Legal Service, European Commission – (Institutional Rapporteur)

Markus Ukkola
Senior Adviser, Competition Policy, Ministry of Employment and the Economy, Finland – (Finland)

Ferdinand Wollenschläger
Dr., Professor, Chair of Public law, European law, European and International Economic law, Faculty of Law, University of Augsburg – (Germany)

Grith Skovgaard Ølykke
Dr., Associate Professor of EU law and State aid, Law Department, Copenhagen Business School – (Editor)

ABBREVIATED QUESTIONNAIRE GENERAL TOPIC 3

The Context

Question 1

Which main systemic challenges were/are Member States confronted with when adopting EU style public procurement rules?

The boundaries of EU public procurement law

Question 2

How are public contracts defined, and what are the criteria that set them apart from legislative measures, administrative decisions, or other arrangements which are not considered public contracts?

Question 3

How are in house arrangements and instances of public-public partnerships or other public-public cooperation forms regulated?

Question 4

Which (if any) consensual arrangement between the public and private sectors is considered to fall outside the scope of application of EU rules?

Question 5

What kind of mixed arrangements are to be found in your jurisdiction and how are they regulated?

The general principles of EU law: public procurement law and beyond

Question 6

Which rules or principles are applicable to the award of contracts (or consensual arrangements) excluded, not covered, or not fully covered by the EU procurement directives?

Question 7

Do the principles of non-discrimination/equal treatment and transparency (or rules derived therefrom) also apply to the selection of the beneficiary of unilateral administrative measures?

Public procurements and general EU law, including competition and State aids law

Question 8

Can decisions taken by contracting authorities be treated as measures imposing restrictions on the internal market? If so, shall they comply with the non-discrimination and proportionality principles and be additionally justified by imperative requirements in the general interest?

Question 9

Which if any public procurement rules may lend themselves to abuse thus potentially limiting competition?

Question 10

Can SGEIs be outsourced to market participants without following public procurement-like procedures, including through direct award? Do EU State aid rules apply if the latter is the case?

Strategic use of public procurement

Question 11

Are public procurements used as a tool to achieve environmental and social policy goals and if so what are the challenges?

Question 12

Are public procurements used as a tool to foster innovation?

Remedies

Question 13

To what extent (if any) and how has Directive 2007/66/EC strengthened the remedies against breaches of EU public procurement rules?

Conclusion and reform

Question 14

How are the new directives to contribute to the modernisation of EU public contracts law?

The proceedings of XXVI FIDE Congress in Copenhagen in 2014 are published in three volumes, where this book concerns: Public Procurement Law: Limitations, Opportunities and Paradoxes.

The three editors, Professor and President of FIDE, Ulla Neergaard, Associate Professor and Secretary General of FIDE, Catherine Jacqueson, and Associate Professor Grith Skovgaard Ølykke, are all distinguished scholars within EU law. The General Rapporteur, Professor Roberto Caranta, is one of the absolute leading scholars within the particular field of public procurement law in Europe. The Institutional Rapporteur, Adrián Tokar, is a Member of the Legal Service of the Commission of the European Union, and has long and acknowledged experience in the area.

Their impressive analyses are contained in this book together with important and valuable studies on the implementation of the relevant EU law in the Member States all over Europe. Thereby, this book hopefully constitutes a goldmine for comparative and EU lawyers in the field of public procurement law.

DJØF Publishing
ISBN 978-87-574-2924-4