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2026 Number 4

News and Analyses

To provide a guide to developments in public procurement in Europe and around the world; to act as a forum for informed debate on issues of procurement law and practice.

PUBLIC PROCUREMENT LAW REVIEW

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European Court of Human Rights	Court of Human Rights
International Court of Justice	International Court
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Editorial

To Make or Buy: Public Administration vs Public Procurement

Introduction to the Special Issue

EU law; In-house contracts; Public procurement

The fundamental legal controversy: autonomy of public administration vs EU procurement law

Public administration, in order to function and meet its purposes,[1] often needs to engage in some economic activity, such as acquiring goods, services or works. In most cases, such needs are satisfied by contracting on the market through public procurement procedures. In other situations, however, the public sector might itself be equipped to perform the economic activity, either directly or indirectly. Commonly referred to as the "make or buy" decision, this choice concerns fundamentally different, and to some extent competing, legal frameworks.

Traditionally, European Union(EU) public procurement law has focused primarily on the question of "how", providing an elaborate—arguably even over-regulated—legal framework governing the manner in which contracting authorities conclude contracts with market operators. However, the "make or buy" decision also raises the preliminary question of "if": that is, whether an entity subject to EU public procurement regulation may, or should, lawfully opt out of procurement procedures in favour of alternative methods for acquiring the required goods, services, or works.

To establish these boundaries, the EU procurement directives[2] offer a catalogue of exemptions from the obligation to conduct a procurement procedure. These include a family of exceptions based on the principle of administrative autonomy: the in-house exception—reflecting the right of public authorities to rely on their own resources—and the horizontal cooperation exception, which permits certain forms of inter-administrative cooperation as an alternative to market-based procurement. Initially developed in the case law of the Court of Justice of the European Union (CJEU),[3] these exemptions were subsequently codified into the procurement directives.[4] At the same time, the principle of administrative autonomy continues to entitle public authorities to decide how best to organise and manage economic activity.[5] The procurement directives lay down only minimum criteria for identifying an in-house relationship and do not oblige either Member States or contracting authorities to make use of the in-house exemption.

[1] Compilation of this special issue was supported by the Estonian Research Council grant (PRG1449).

[2] Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18, O.J. L. 94 (28 March 2014), pp.65–242. Directive 2014/23 of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance 2014 [32014L0023]. Directive 2014/25 of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 Text with EEA relevance 2014 (094).

[3] Example Case *Teckal (C-107/98) EU:C:1999:562*; *Commission of the European Communities v Federal Republic of Germany* (C-480/06) EU:C:2009:357; [2009] E.C.R. I-4747.

[4] Directive 2014/23 art.17, Directive 2014/24 art 12, Directive 2014/25 Art 28.

[5] Article 2 of Directive 2014/24.

Consequently, national legislators retain the discretion to restrict the use of in-house arrangements more narrowly than permitted under EU procurement law.[6]

From a legal perspective, tension arises from the fact that, on the one hand, the autonomy of internal administration enjoyed by Member States grants public authorities the freedom to choose "make" over "buy", while on the other hand, the competition-oriented objectives of EU public procurement law may constrain that freedom. Moreover, some Member States have chosen to constrain the administrative autonomy by limiting the discretion that EU public procurement law confers on contracting authorities following the principle of *competitive neutrality*. The case of *Irgita* exemplifies this debate concerning the freedom of public administrations to make such choices. In that case, the Lithuanian legislator established a default preference for outsourcing over in-house provision, subject to exceptional justification. Although the CJEU acknowledged the competence of Member States to regulate "make or buy" decisions, it simultaneously subjected such choices to the fundamental rules of the TFEU and the principles derived therefrom, thereby generating legal guidance that appears internally inconsistent. According to the Court in Irgita, when a public authority opts for an alternative method of management instead of public procurement, it must nevertheless comply with the fundamental principles of EU law.[7]

While the rationale of *Irgita* is not unexpected in principle, the scope and practical enforceability of the obligation to follow the fundamental principles remain legally unclear and raise concerns regarding its impact on efficiency. This calls into question the relationship between the *Irgita* ruling and the established understanding[8] that EU procurement law should not unduly interfere with the freedom of public authorities to carry out public service tasks using their own resources, including through cooperation with other public authorities. As outlined by Peedosk in this special issue, even though transposing art.12 of Directive 2014/24 provides essential instruments enabling public authorities to organise services internally, the same instruments meanwhile prompt questions regarding the balance between Member State autonomy and coherence within EU procurement law.[9] In other words, "make or buy" decisions run against a fundamental conflict between the freedom of administration and the pursuit of competition, the solution of which lacks guidance and legal clarity. In the worst-case scenario, such lack of clarity can reduce effectiveness of public administration, waste public resources or cause failures to accomplish lawful tasks of public authorities. In many Member States, such concerns have evidenced in particular sectors, such waste collection and management, heating and water supply, IT services etc.

As Janssen observes in this special issue, the topic has generated intense debate, with views spanning the full spectrum of positions. While contracting authorities argue that the limited scope of the exemptions influences negatively their discretionary power to perform public tasks, economic operators on the contrary, claim that the exemptions undermine the pursuit of competition on the market. Janssen's contribution offers a valuable addition to this discourse, examining the "demarcation" of the influence of EU public procurement law upon "make or buy" decisions, and exploring the boundaries of such decisions in the case of institutionalized and non-institutionalized exemptions. Furthermore, Janssen identifies a potential enforcement gap concerning lack of transparency and proposes EU-level legislative measures to address this shortcoming.[10]

[6] Case (C-285/15), Proceedings brought by Kauno miesto savivaldybė and Kauno miesto savivaldybės administracija (*Irgita*) EU:C:2019:829; Joined Cases (C-89/19) to (C-91/19), *Rieco SpA v Comune di Lanciano and Others*, EU:C:2020:87.

[7] Case (C-285/15), *Irgita*, fn.6, pp.48, 50.

[8] Recital 31 of Directive 2014/24.

[9] P. Peedosk, "Transposing Article 12 of Directive 2014/24: National Flexibility, EU Constraints, and the Future of In-House Transactions and Public-Public Cooperation", *passim*.

[10] W. A. Janssen, "Make-or-Buy Decisions and EU Public Procurement Law: a Stronger Role for Transparency?".

The “Make or Buy” paradigm: practical efficiency and national law

At the same time, in the interest of strategic planning and the efficient investment of public resources in socially beneficial infrastructure, the public sector must retain the ability to fully exercise the principle of administrative autonomy when engaging in economic activity. From an economic and public-administrative perspective, it may therefore be argued that the “make or buy” decision is, and should remain, primarily concerned with identifying administratively and economically viable alternatives, rather than with distinguishing between legally right and wrong options.

As Halonen and Kurttila observe in this special issue, *while legislation establishes the operational framework in which the public sector operates, broader questions concerning the organisation of public services are fundamentally economic policy issues rather than matters of legal interpretation alone*. They identify potential new limitations on in-house provisions as one of the most contentious and politically challenging issues in Finland. Meanwhile, it is important to recognize that the debate around in-house regulation in Finland *constitutes only one strand of a much wider discussion on the role of the public sector in the marketplace, particularly the question of when and under what conditions public authorities should engage in economic activities at all*. Accordingly, the debate surrounding “make or buy” decisions often focuses less on EU law as such and more on its national legislative transposition and administrative enforcement.[11]

These same themes—national implementation and practical operability – are addressed by several other contributions to this special issue, including those by Peedosk in a comparative, research-based analysis,[12] Soloveicik with regard to Lithuania, [13] and Vieira in the Portuguese context. [14] Soloveicik characterises in-house transactions as *a very convenient form of arranging the provision of particular services (waste management, street cleaning and maintenance, etc.) to local communities. It is rapid, precise, and comparatively insulated from administrative and bureaucratic burdens*. Furthermore, positive broader socio-economic benefits are mentioned, but at the same time, the risks for a fair competition environment as well. Interestingly, Soloveicik ties such risks particularly to smaller national markets.[15] In turn, Vieira analyses a specific interpretative dilemma arising from art.12 of the procurement directives, reflecting a structural tension within EU public procurement law: to what extent may mechanisms of organisational autonomy, grounded in primary law principles and CJEU case law, continue to operate within a *lex specialis* regulatory regime? This raises further questions as to how structural deficiencies in the EU procurement framework can be distinguished from national idiosyncrasies, and how interpretative dilemmas created by technical drafting choices should be resolved in light of the objectives and internal coherence of the legal framework as a whole.[16]

By comparing national legislative approaches ranging from verbatim transposition to more tailored regulatory solutions, Peedosk highlights the risks of gold-plating and assesses the current state of the CJEU’s case law. She further reflects on possible future developments in the regulation of in-house transactions and public–public cooperation in light of ongoing legislative initiatives at EU level.[17]

Moreover, even in the absence of specific national legislative modifications or special arrangements, the enforcement of existing EU rules under art.12 through national law remains highly relevant. As an illustrative example, the special issue discusses a recent judgment of the Supreme Court of Estonia concerning in-house contracts under EU public procurement law and the interpretation of the established control criterion. In determining whether the conditions justifying the award of an in-house contract were

[11] K. M. Halonen, S. Kurttila, “Country review: The Rising Debate over In House Companies in Finland”.
[12] Peedosk, fn 9.
[13] D Soloveicik. *In-house contracting in Lithuania: a case-study*.
[14] F. Vieira, “In the shadow of the Classical Directive?”
[15] D. Soloveicik, fn.13.
[16] F. Vieira, fn.14
[17] P. Peedosk, fn.9

fulfilled, the Court introduced a presumption, holding that sole ownership of a private limited company by a local authority under Estonian law by default satisfies the control requirement necessary to establish the lawfulness of an in-house arrangement under the EU law. This reasoning raises fundamental questions regarding the obligation of national courts to seek a preliminary ruling from the CJEU, calling for a more proactive approach and underscoring the importance of transparency and accountability in EU public procurement procedures. Although the Court's conclusion appears coherent within the framework of national law, it may be viewed as departing from the comprehensive assessment mandated by the directives of the EU and case law of the CJEU.[18]

In summary

The foregoing discussion highlights several noteworthy developments in contemporary legal research on the "make or buy" paradigm. In examining the conditions under which exceptional contracts may be excluded from the scope of EU public procurement law pursuant to Article 12, a number of additional issues have emerged that, while indirectly related, are integral to the same analytical framework and are likewise addressed in this special issue. These include, in particular, the duty of diligence incumbent upon contracting authorities when exercising discretionary powers,[19] and the identification of a closely related yet distinct category of public transactions that remains insufficiently regulated.[20]

This latter topic concerns a parallel sphere of public competitions that fall outside the application of EU law but are nevertheless grounded in the same fundamental principles of equal treatment, transparency, and proportionality. This category encompasses, *inter alia*, practices of self-supply and self-preference. As argued by Sõrm, Ginter, and Simovart in the contribution to this issue, these principles operate as universal constraints on the exercise of public authority in contemporary democratic systems, irrespective of their specific legal source or the precise regulatory framework applicable to a given transaction. Moreover, the requirement to follow appropriate procedures may apply independently of any remedial rights that the concerned parties may be vested with, may bind public administrations as an objective and unconditional requirement.[21]

By addressing the structural tension between administrative autonomy and the existing regulatory framework, the contributions collected in this issue shed light not only on doctrinal ambiguities but also on the practical implications of legal design for public governance. In this respect, the scholarly discussion offers new perspectives on the long-debated and inherently complex field of procurement exemptions under the EU directives, while also identifying potential pathways for resolving the underlying tensions. For the academic reader, I also hope that we have uncovered some enforcement gaps, interpretative challenges, and under-regulated domains of public action, in turn inviting further research and critical reflections on the evolving relationship between public administration and EU law.

Mari Ann Simovart

[18] C. Ginter, P. Peedosk, M. Simovart, "In-House Contracts and the Presumption of Control: Evaluating Estonia's Supreme Court Decision in Light of EU Public Procurement Law".

[19] K. Härginen, "Unforeseeable Events and Circumstances: Balancing the Contracting Authority's Duty of Diligence in EU Public Procurement Law".

[20] M. Sõrm, C. Ginter and M. Simovart, "Public competition and public procurement: the under- and overregulated fields of Estonian economic law".

[21] Sõrm, Ginter and Simovart, "Public competition and public procurement: the under- and overregulated fields of Estonian economic law".

In-House Contracts and the Presumption of Control: Evaluating Estonia's Supreme Court Decision in Light of EU Public Procurement Law

Carri Ginter[*]

Pilleriin Peedosk[**]

Mari Ann Simovart[***]

Control; Estonia; EU law; In-house contracts; Local authorities; Public procurement; References to European Court

Abstract

This article evaluates a recent ruling by the Supreme Court of Estonia on in-house contracts in EU public procurement law, particularly its implications for such contracts. In the judgement, the Supreme Court established a presumption that through sole ownership of a private limited company, a local government inherently meets the control criterion relevant for establishing a lawful in-house contract. That presumption is critically assessed against the European Court of Justice's (ECJ) requirement for active control verification based on specific circumstances. The analysis raises essential questions about a court's obligation to seek a preliminary ruling from the ECJ, and the failure to do so—a concerning trend that risks undermining the uniform application of EU law across member states. Ultimately, the article advocates for a proactive approach, emphasising European public procurement processes' need for transparency and accountability. After all, navigating EU law should be more apparent than finding the exit in a well-lit maze!

1. Introduction

We invite the reader to a heated topic,[1] the "*in-house*" realm of EU procurement law.The Supreme Court of Estonia (hereinafter the Supreme Court or the Court) resolved the Tapa district heating case in spring 2024.[2] The central question of the case was whether the local government was right to designate its own company as the provider of district heating services, without holding a public procurement procedure. The case poses the classic dilemma of whether an administrative body can freely provide a service itself or must outsource it—a "make or buy" problem relevant to both public procurement practice and legal scholarship.[3] In particular, the judgement is interesting with regard to establishing a *presumption* of

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[1] This work was supported by the Estonian Research Council grant (PRG1449).

[2] Supreme Court of Estonia 18 April 2024 Decision in *N.R. Energy Osauhing v Tapa Vallavolikogu, OU Tapa Vesi* (Case No.3-20-1313).
[3] Read more about "make or buy" problem from C. Ginter, M. A. Simovart, M. Sõrm, "Transparency obligations for make or buy decisions" (2023) 1 P.P.L.R. 1; P. Peedosk, "Life after Irgita (C-285/18) – More Questions Than Answers" (2024) 33 *Juridica International* 133.

fulfilling the control criterion over certain publicly owned companies. The Court did so without consulting the ultimate interpreter of EU law located in Luxembourg.

Public procurement rules serve as a cornerstone of efficient and transparent public administration, ensuring the functioning of the internal market and the fair use of public funds. However, a “make or buy” choice can complicate the overall picture as it involves balancing the interests of the open market and the autonomy of contracting authorities. What is a make or buy decision? The buyer can deal with its tasks independently—and has the right to decide to do so. A buy decision means going to the market to find a solution. The rule for in-house transactions (hereinafter also as the in-house exception) was first introduced by the European Court of Justice (ECJ) in the case of Teckal[4] and, after that, in others such as Stadt Halle[5]. It was later codified in the Directive 2014/24/EU.[6] The rule applies when a contracting authority provides services internally—utilising its own administrative, technical, or other resources—without engaging market participants, i.e., third parties outside its sphere of influence and without interfering extensively with the open market. Thus, local governments and states can conduct in-house transactions with entities they own and control. [7] In such scenarios, although the contracting authority obtains a service from a legal entity that is formally separate from the authority, it exercises control over the entity like over its own department, with the entity primarily providing services to the contracting authority itself.

This approach is crucial as it supports the public sector’s ability to provide services without increasing the private sector’s market share. It also preserves the public sector's ability to perform its basic tasks without the risks of interruptions caused by market failures.[8] The concept of an in-house transaction is based on the idea that public procurement law aims to regulate the use of public resources for market-based transactions rather than to promote the growth of the private sector by outsourcing public services.[9] Consequently, a public authority retains the freedom to fulfil its functions through a fully controlled unit without breaching the entrepreneurial freedom of market participants. In order for the transaction to be regarded an in-house contract, the authority must have a *decisive* influence over the concerned unit's strategic goals and critical decisions, similar to the control over its departments—this standard is known as the control criterion.[10]

However, despite abundant case law and codification, problems remain.[11] The ECJ has emphasised that in order to fulfil the control criterion, more than the standard shareholder rights under corporate law may be required, making it necessary to consider not only all the legislative provisions but also the relevant factual circumstances of a particular case.[12] Notably, the ECJ case law even further explains that meeting the conditions for an in-house transaction does not automatically guarantee compliance with EU law.[13]

[4] Case *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia ECLI* (C-107/98) EU:C:1999:562; [I999] E.C.R. 1-0812I.

[5] Case *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna ECLI* (C-26/03) EU:C:2005:5; [2005] E.C.R. I-00001.

[6] Directive 2014/24 on public procurement and repealing Directive 2004/18 [2014] O.J. L.94/65 (hereinafter Procurement Directive); For a discussion on the historic development of the concept and an argument that it was originally a rule, which developed into an exception, see C. Ginter, K. Härginen, M. Sõrm, “In-House Transactions: Lost in Translation?” (2020) 3 P.P.L.R. 117.

[7] Article 12 of Procurement Directive.

[8] Supreme Court of Estonia 5 March 2014 Decision in *Majandus- ja Kommunikatsiooniministeerium vs Edelaraudtee AS* (case no.3-3-1-2-14) at 34.

[9] S. Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the E.U.* and UK (Volume I. 3rd edn., Sweet & Maxwell 2014), para 6-162, p 499.

[10] Case C-107/98, *op.cit*., see above, fn. 7, para 50; Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG, ECLI* EU:C:2005:605; [2005] E.C.R. I-08585 at 65; Case *Commission v Italy ECLI* (C-371/05) EU:C:2008:410; [2008] E.C.R. I-00110 (summary publication) at 24.

[11] W. Hartung, K. Kuzma and W. Janssen, “Article 12 Public contracts between entities within the public sector” in A. Sanchez-Graells and R. Caranta (eds), *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar Publishing, 2021), paras 12.02, 12.08-12.09.

[12] Case Carbotermo SpA and *Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA ECLI* (C-340/04) EU:C:2006:308; [2006] E.C.R. I-04137, paras 38-39.

[13] Case C-285/18 miesto savivaldybė, *Kauno miesto savivaldybes administracija v UAB ‘Irgita’, UAB ‘Kauno svara’* EU:C:2019:829 at [61]–[64]; Joined Cases C-89/19 to C-91/19 *Rieco SpA v Comune di Lanciano, Ecolan SpA* (C-89/19), Comune di Ortona, Ecolan SpA (C-90/19), *Comune di San Vito Chietino, Ecolan SpA* (C-91/19) EU:C:2020:87 [2020] at [37].

The Tapa district heating case is particularly significant as it represents one of the most detailed examinations of the in-house exception in Estonia. It is equally important at the EU level, as it connects to the discussions on the limits of self-governance, the potential risks associated with restricting market access, and the evolving criteria for establishing 'control' in in-house arrangements under EU law.[14] Furthermore, the case raises the question of how far a national court can go without seeking a preliminary ruling. After giving an overview of the case, we analyse those issues, including the missed opportunity to seek guidance from the ECJ, potentially clarifying the interpretation and implementation of in-house exceptions. We then evaluate the presumption-based fulfilment of the control criterion *vis a vis* EU public procurement law.

2. The apa district heating case

1 Development of the case

In 2020, the Council of Tapa Municipality had to decide on how to continue centralized heat-supply upon the expiration of existing district heating contracts for the town of Tapa and the adjacent military area. While one option under consideration was granting a concession through a public procurement procedure, the municipality ultimately decided otherwise.[15] Instead, the right and obligation to provide district heating was awarded to OÜ Tapa Vesi, a private limited liability company wholly owned by the municipality itself.

Following the council's decision to designate OÜ Tapa Vesi as the network operator, a competitor who had previously leased a part of the heating distribution network (hereinafter the claimant) filed an appeal with the administrative court, seeking annulment of the decision. It argued that objectivity, equal treatment, and transparency principles had been breached, and alleged that an open public selection process was required. The municipality countered with its right to resort to an in-house transaction.[16]

Establishing the preconditions of an in-house transaction required much energy, as it involved going through all three levels of administrative courts in Estonia. If the conditions had not been met, the decision would have been annulled, and the claimant would have been given another shot at the contract.[17]

Throughout the dispute in all levels, the main legal issue was the meeting (or not) of the control criterion. It is important to note that the national law implements art.12 of the Procurement Directive properly with regard to the control criterion, reading as follows: *the controlled legal person is controlled by the controlling contracting authority or another legal person who exercises over the controlled legal person concerned a control which is similar to that which it exercises over its own departments*. Neither has Estonian law introduced any additional criteria or presumptions with regard to meeting the control criterion for an in-house contract. [18]

The Tallinn Administrative Court upheld the claimant's arguments, ruling that the transaction failed to meet the conditions for an in-house exception because the mere ownership of 100% of the shares or stakes in the company was insufficient. According to the court, more was needed, such as rights to participate in the company's management in a way that would exceed those typically granted under the general

[14] Case C-285/18, *op.cit.,* see above, fn. 16; Case C-11/19 *Azienda ULSS n 6 Euganea v Pia Opera Croce Verde Padova* (C-89/19),EU:C:2020:88 , *op.cit.*, see above, fn. 16, para 37; Case C-835/19 Autostrada Torino Ivrea Valle D'Aosta—*Ativa SpA v Presidenza del Consiglio dei Ministri, Ministero delle Infrastrutture e dei Trasporti, Ministero dell'Economia e delle Finanze, Autorita di regolazione dei trasporti* (C-383/21) and (C-384/21),EU:C:2020:970 [2020]; Joined Cases C-383/21 and C-384/21 *Sambre & Biesme SCRL* (C-383/21), *Commune de Farciennes v Societe wallonne du logement* (C-796/18) EU:C:2022:1022*Informatikgesellschaft fur Software-Entwicklung (ISE) mbH vs Stadt Koln* EU:C:2020:395.

[15] To read more about the complexities of concessions in Estonia see, C. Ginter, N. Parrest, M. A. Simovart, "Dual regulation of concessions in Estonia as an obstacle for effective application of EU law" (2012) 2 P.P.L.R. 73.

[16] Section 12 (2) of the Public Procurement Act of Estonia *https://www.riigiteataja.ee/en/eli/503102025001/consolide*.

[17] For a discussion about the *locus standi* on excluded tenderers, see C. Ginter, T. Väljaots, "Excluded Tenderer's Access to a Review in a Public Procurement Procedure" (2018) 4 E.P.P.P.L. 301.

[18] Public Procurement Act s.12 (2) (1).

corporate law. Furthermore, the Tallinn Court of Appeals added that OÜ Tapa Vesi's obligations to seek approval for specific actions from the Estonian Competition Authority indicated a lack of exclusive control by the municipality, further undermining the fulfilment of the control criterion. Both the courts relied on ECJ case law, citing the cases of Carbotermo[19] and Parking Brixen.[20]

2.2 The Supreme Court's findings

The Supreme Court disagreed. It stated that the administrative and circuit courts had been too strict when interpreting the ECJ's earlier cases[21]. In the Court's opinion, the cited precedents were "related to provisions on public limited (liability) companies under Italian law," which cannot be directly copied to Estonia. The Supreme Court emphasised the need to examine the rules governing shareholders' rights of control more closely as well as a possible difference between Member States' laws. The Court concluded that the regulations applicable to companies owned by local governments in Estonia were self-sufficient to provide the department-like control required by in-house conditions.[22]

Furthermore, according to the Supreme Court, courts are entitled to evaluate whether the legal prerequisites for an in-house transaction are met, regardless of how the concerned administrative body itself had understood or legally defined the contested transaction. In this case, Tapa municipality "had been having difficulties in establishing a proper legal ground and format" for its decision to vest OÜ Tapa Vesi with the right and duty to arrange the district heating. The municipality had not explicitly identified the contested arrangement as an in-house transaction in the initial decision at all. Nevertheless, as the municipality had actually regarded proper and relevant factual considerations, the court found no error of judgment there.[23]

The solution to our discussed case relies heavily on how the national law regulates the management of private limited companies. The Court found that in the case of a private limited company wholly owned by a local government, the control criterion is presumably met because such a municipally owned company can only act in the public interest. The court's argumentation can be effectively summarised as follows:[24]

- The Public Interest Requirement: municipalities can only own shares to fulfil public interest tasks, reinforcing their accountability to the community.[25]
- Exclusive Decision-Making Power: establishment, dissolution, and amendment of a company's charter are solely within the jurisdiction of the municipality's council, a political body legitimised via democratic elections.[26]
- Control by Local Government: a municipal authority exercises the rights of the shareholders, thus having significant control over the company's decisions.[27]
- Less Restrictive Regulations: unlike state-owned enterprises, municipalities' participation in companies does not require detailed legal requirements, allowing for more flexible governance.
- Strategic Aim Alignment: a municipality must prioritise public interests over company interests, enhancing its influence on strategic objectives and critical decisions. [28]

[19] Case C-340/04*, op.cit.*, see above, fn. 15.
[20] Case C-458/03*, op.cit.,* see above, fn. 13.
[21] Case C-340/04, *op.cit.*, see above, fn. 15,para 38; Case C-458/03*op.cit.,* see above, fn. 13,para 69.
[22] Supreme Court case no. 3-20-1313, *op.cit.*, see above, fn. 5, para 27.
[23] Supreme Court case no.3-20-1313, *op.cit*., see above, fn. 5, paras 32-33.
[24] Supreme Court case no.3-20-1313, *op.cit*., see above, fn. 5, paras 27–27.5.
[25] Whilst in the area of central heating, this argument holds, in practice, for historical reasons, municipalities also hold shares in companies which are not needed to fulfil their tasks, such as hospitals, which fulfil the government's obligations. See, for example, *https://www.itk.ee/en*.
[26] Under Section 22(1-24) of the Local Government Organization Act. – RT I, 09.01.2025, 5.
[27] Under Section 35(3) of the Local Government Organization Act.
[28] Under Section 37(1) of the Local Government Organization Act. This provision complements Section 35 of the Civil Code, which imposes a duty of loyalty on the members of the management bodies.

- Discretion in Governance: rules governing the type of private limited company called *osaühing* or OÜ, are more flexible, allowing municipalities to craft specific governance norms in the interests of public accountability.
- Wider Scope for Decision-Making: unlike public limited companies (Estonian term – *aktsiaselts* or *AS*), shareholders in *osaühing* (OÜ), usually smaller private limited companies, can decide on issues typically reserved for management.[29]
- Boundless Grounds for Dismissal: reasons for dismissing the management are not restricted, allowing municipalities great flexibility to enforce oversight.

The Supreme Court, therefore, concluded that a municipality's sole ownership of a limited liability company (*OÜ*) suggests control over significant decisions, which means meeting the control requirement for the in-house exception. Thus, the local government must be presumed to have sufficient influence over the company's strategic and significant decisions. However, this presumption can be overturned if the company's articles of association limit the shareholder's ability to manage the company and affect its governing bodies differently.[30] Accordingly,

"The collegium thinks that, in the case of a limited liability company whose sole partner is a local government unit, the control criterion for internal transactions is presumptively met, considering what is established by law. An exception may be a situation where the company's articles of association limit the partner's ability to manage the company and oversee the activities of the management bodies compared to what is prescribed by law."[31]

In essence, we can witness a certain shift when enforcing EU law on national level. While the ECJ's case law requires proof of something more than shareholder control to establish that the control criterion is met, the recent Estonian decision has introduced an opposite requirement in the case of in-house contracts with an *osaühing* (a limited liability company) owned by a municipality. In the latter case, proof of something less than the default statutory standard can demonstrate that the control criterion is *not* met. We submit that this approach would have been worth checking at the EU level.

3. Was the Supreme Court justified in interpreting EU law without seeking a preliminary ruling from the ECJ?

The practice of referring for preliminary rulings helps to ensure that EU law is interpreted and applied uniformly across all Member States. National courts have varying degrees of discretion regarding preliminary rulings. Courts whose decisions are subject to appeal (lower courts) may refer questions of EU law to the ECJ if they consider it necessary to resolve a case. In the case of a court of the last instance where no further judicial remedy exists under national law, such as the Supreme Court of Estonia, "that court is in principle obliged to refer to the Court within the meaning of the third paragraph of Article 267 TFEU where a question of the interpretation of the FEU Treaty is raised before it".[32] This obligation aims to prevent divergences in applying EU law and ensure consistency across Member States.[33]It is "based on cooperation, established to ensure the proper application and uniform interpretation of EU law in all the Member States, between national courts, in their capacity as courts responsible for the application of EU law, and the Court."[34] At some point in litigation, the ECJ should be allowed to opine on EU law. The

[29] The Estonian Commercial Code defines an *Osaühing* (OÜ) as a private limited company form designed for close-capital companies. Although the Code defines an *Aktsiaselts* (AS) as a public limited company, or an open-capital company, this designation does not necessarily imply that the company is listed on a stock exchange. In practice, many AS companies operate as private limited companies and are not publicly traded. The distinction between the two forms lies more in their structure and size: an AS typically has a larger scale of operations, a more complex governance framework, and higher minimum capital requirements compared to an OÜ, making it a suitable choice for larger businesses, even if they remain private.

[30] Supreme Court Case no.3-20-1313, *op.cit.*, see above, fn. 5, paras 27, 27.5.

[31] Supreme Court Case no 3-20-1313, *op.cit.*, see above, fn. 5, para 27.

[32] Article 267(3) of TFEU; Case *Commission v France ECLI* (C-416/17) EU:C:2018:811 at [108].

[33] Case C-416/17, *op.cit.*, see above, fn. 35, para 109.

[34] *Lucio Cesare Aquino vs Belgische Staat ECLI* (C-3/16) EU:C:2017:209 at 32.

Supreme Court is the last instance to facilitate this. A request for a preliminary ruling is justified not because it enables the delivery of advisory opinions on general or hypothetical questions but because it is necessary to resolve a dispute effectively.[35]

There are recognised exceptions to the obligation to ask for preliminary ruling stemming from the ECJ's decision in CILFIT[36] and Da Costa[37] as well as subsequent case law, such as Consiglio[38]. According to case law, "when the provision of EU law in question has already been interpreted by the Court" (*acte élairé*) or when "the correct application of EU law is so obvious as to leave no scope for any reasonable doubt" (*acte clair*).[39] However, "the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union."[40] Without circumstances justifying either of the exceptions, the ECJ must be consulted according to Article 267 of the Treaty on the Functioning of the European Union (TFEU).[41] In the discussed case, this did not happen.

Article 6 of the European Convention on Human Rights (hereinafter ECHR), which guarantees the right to a fair trial,[42] underscores the importance of judicial independence and access to a competent court. In cases involving courts of the last instance, the competence to answer questions of EU law generally shifts to the ECJ ensuring uniform interpretation and application of EU law across Member States. Accordingly, answering such questions without consulting with the ECJ may be considered *ultra vires*.

In recent jurisprudence, the European Court of Human Rights (hereinafter ECtHR) highlighted the importance of national courts providing justifications when *refusing* to seek preliminary rulings from the ECJ. For instance, in *Georgiou v Greece*, the ECtHR identified a breach of art.6 ECHR due to the Greek court's failure to refer questions to the ECJ and its lack of reasoning for this decision.[43] Similarly, in *Dhahbi v Italy*, the ECtHR found that the Italian Court of Cassation violated art.6 by not justifying its refusal to seek a preliminary ruling.[44] These cases emphasise a critical procedural safeguard: the obligation of national courts to either seek a preliminary ruling or to provide clear reasons for not doing so. This ensures that the right to a fair trial is upheld, and its neglect may indicate a similar procedural deficiency in our current situation.

While the Supreme Court cited the ECJ decisions regarding the control criterion,[45] it ultimately decided that Estonia's situation differed from Italy's and that, therefore, the ECJ's case law on Italian public limited companies was irrelevant.[46] The Supreme Court emphasised that under Estonian law, a private limited company (OÜ) wholly owned by a local government can be presumed to satisfy the control criterion unless its articles of association provide otherwise.[47] This conclusion seems to diverge from the above discussion about the exceptions to the rule arising from art.267 (3). While the ECJ has previously ruled on the control criterion, the Supreme Court considered those rulings irrelevant to Estonia's situation without addressing whether the case in question constituted a "new element" meriting an official "consultation" with the ECJ.[48] A new element—such as whether the fulfilment of the control criterion can be presumed—could

[35] Case C-3/16, op.cit., see above fn. 37, para 45.
[36] *Srl CILFIT vs Ministero della Sanita, ECLI* EU:C:1982:335; [1982] E.C.R. 3415.
[37] *Case Da Costa and Others,* 28/62 to 30/62, EU:C:1963:6 at [38].
[38] Case C-136/12 *Consiglio nazionale dei geologi v Autorita garante della concorrenza e del mercato, ECLI* EU:C:2013:489; [2013] 5 C.M.L.R. 40.
[39] Case 28/62 to 30/62, para 38, case C-416/17, *op.cit.*, see above fn. 35, para 110; case C-561/19, *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, EU:C:2021:799 at [36].
[40] Case C-160/14, *Joao Filipe Ferreira da Silva e Brito and Others v Estado portugues,ECLI* EU:C:2015:565 at [39].
[41] Treaty on Functioning of the European Union—ELT C 326, 26.10.2012, pp.47–390.
[42] Council of Europe. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms. In *Council of Europe Treaty Series 005*. Council of Europe, art..
[43] ECHR 57378/18, *Georgiou v Greece* (2024) 78 E.H.R.R. 4.
[44] ECHR 17120/09, *Dhabi v Italy*.
[45] Case C-458/03, *op.cit.*, see above, fn. 13; Case C-340/04, *op.cit.*, see above, fn 15.
[46] Supreme Court case no.3-20-1313, *op.cit.*, see above, fn 5, paras 27.2–27.4.
[47] Supreme Court case no.3-20-1313, *op.cit.*, see above, fn 5, paras 27, 27.5.
[48] P. P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials* (8th edition, Oxford University Press 2024), p 501.

have warranted referral to the ECJ. Moreover, the Court missed an opportunity to clarify whether the presumption-based fulfilment of the control criterion aligns with art.12 of the Procurement Directive.

We accept the Court's position that the rules in Italy and Estonia may differ. However, the fact that no comparative analysis of these rules can be found in the decision, seems to make this position a hypothesis rather than a certainty. Without such a comparative analysis we cannot conclude that "things are different". A reference for a preliminary ruling would have been a way to mitigate this problem.

4. Is constructing a presumption consistent with the EU law regarding the control criterion?

In the *Tapa district heating*case, the Supreme Court concluded that the control criterion was fulfilled because the Tapa municipality fully owned the private limited company (OÜ Tapa Vesi) and that such ownership inherently allowed the contracting authority to exert the required control under Estonian law, as a company owned by a local government must always act in the public interest.[49] The Court furthermore established that ownership of that kind creates an inherent presumption of control over the company by a local government. In other words, unless particular circumstances show otherwise, a private limited company (OÜ) owned by a local government in Estonian jurisdiction, always fulfils the control criterion for in-house contracts.

The Supreme Court's approach reflects a pragmatic and functional interpretation of the concept of in-house transactions. However, the decision raises a key concern: is it in harmony with EU law for a national court to construct a presumption regarding the fulfilment of a criterion established under EU law? While under the above-described circumstances, establishing the presence of control is justified under Estonian law, it is unclear if introducing a presumption of control is compatible with EU law.

In Carbotermo, the ECJ conveyed that sole ownership of the entity's share capital may generally suggest control but is not conclusive evidence.[50] Courts must also assess the specific circumstances, such as the statutory framework and relevant governance documents, to determine whether decisive influence is present. Similarly, in Sea, the ECJ reiterated that control must be examined comprehensively, considering all legislative provisions and circumstances that affect the relationship between the contracting authority and the controlled entity.[51] The ECJ has consistently emphasised the need to verify the control criterion actively, establishing that sole ownership would be insufficient to decisively conclude control[52] and that specific circumstances—such as the entity's statutes and the actual exercise of influence—must be analysed. The Supreme Court may have overlooked this requirement by relying primarily on statutory presumptions. Additionally, the ECJ has highlighted the importance of assessing statutory duties, governance frameworks, and practical decision-making processes to determine whether the contracting authority exerts a decisive influence.[53] There needs to be more than a general reference to company law.[54] Such an analysis is necessary to establish control and ensure the uniform application of the Procurement Directive across Member States.

While the ECJ recognises that sole ownership may suggest control, as seen in *Parking Brixen* and *Coditel Brabant*, it stops short of allowing presumptions to replace active assessments.[55] The ECJ uses terms like "tends to indicate" and "generally, but not conclusively" to signal that specific evidence must always substantiate control. Thus, the ECJ case law suggests that the control criterion is not generally fulfilled as a default, and the national courts are expected to conduct an analysis of the facts. This requires

[49] Supreme Court case no.3-20-1313, *op.cit.*, see above, fn 5, paras 27, 27.5.
[50] Case C-340/04, *op.cit.*, see above, fn. 15.
[51] Case C-573/07, *Sea Srl v Comune di Ponte Nossa ECLI* EU:C:2009:532, [2009] para 45.
[52] Case C-340/04, *op.cit.*, see above, fn. 15, para 37.
[53] Case C-573/07, *op.cit.*, see above, fn. 54, para 65.
[54] M. Steinicke and P. L Vesterdorf (eds), *EU Public Procurement Law: Brussels Commentary* (Beck [etc] 2018), p 264.
[55] Case C-340/04, *op.cit.*, see above, fn. 15, para 37; Case C-324/07, *Coditel Brabant SA vs Commune d'Uccle and Region de Bruxelles-Capitale ECLI* EU:C:2008:621; [2008] E.C.R. I-8457 at [31]; Case C-573/07, *op.cit.*, see above, fn. 54, para 45.

an assessment of the relevant circumstances and legislation—decision-makers must verify whether the conditions for the exemptions are met. This is further supported by the principle that the party seeking to act under an exception to the Procurement Directives bears the burden of proving its eligibility to rely on the exception.[56]

We therefore submit that the Supreme Court may have done only a part of the equation by listing the regulatory peculiarities of OÜ-s in municipal ownership. Whether or not those peculiarities alone are decisively sufficient to meet the control criterion, remains open. The construed presumption concerns only companies corresponding to the default structure established under the law. We suggest that the sufficiency of such a default structure is up for debate. Accordingly, we recommend that it would be overly optimistic for national courts to omit the checking of factual circumstances in cases concerning similar companies. Therefore, courts shouldn't base their verification of the in-house exception on the assumption that the control criterion is always satisfied in the case of companies owned by local governments. However, this can be argued to be what the Supreme Court implied.

5. Conclusion

The Estonian Supreme Court’s presumption-based approach to the control criterion raises concerns *vis a vis* the EU public procurement law. While the court's conclusion that sole ownership of a company implies sufficient control, aligns with some interpretations of national law, it diverges from the comprehensive assessment mandated by the directives and the ECJ's jurisprudence.

In a possible in-house situation, the ECJ emphasises the need for active verification, requiring courts to consider specific circumstances and governance frameworks rather than relying solely on presumptions. By prioritising a presumption of control without thorough contextual evaluation, we risk deviating from the established EU principles and jeopardising the uniform application of public procurement law across EU Member States.

This situation highlights the critical division of competencies within the EU legal system, where national courts are tasked with establishing the relevant facts in specific cases, and the ECJ provides an authoritative interpretation of EU law. National courts must conduct their fact-finding duties, ensuring that local circumstances are adequately assessed against the backdrop of EU legal standards. The interplay between these competencies underscores the collaborative framework necessary to ensure that EU procurement principles are consistently applied and avoid discrepancies arising from divergent interpretations.

Moreover, when opting not to seek preliminary rulings from the ECJ, national courts risk undermining EU law's uniform interpretation, leading to potential inconsistencies in application and legal uncertainty. In a scenario where a national court navigates complex issues of EU law, a failure to engage with the ECJ by seeking preliminary rulings, may result in missed opportunities for clarification and ultimately weaken the fundamental principles of the EU legal order.

Contracting authorities and national courts must adopt a proactive approach to ensure compliance with EU law and maintain legal certainty. This involves rigorously verifying the fulfilment of the control criterion in every in-house transaction, thereby enhancing transparency and accountability in public procurement practices. Article 12 of the Procurement Directive does not contain clear rules about the division of competences between the national and CJEU. While a national court has the task of fitting facts to the EU law rule, introduction of the presumption of control seems rather like a legislative move. Further examination of how presumption interacts with active assessment will be crucial in shaping the legal landscape for public procurement across Europe.

[56] Arrowsmith, *op.cit.*, see above, fn 12, paras 6-131 and 10-03; Case C-394/02, *Commission v Greece ECLI* EU:C:2005:336; [2005] E.C.R. I-04713, para 33; Case C-337/05, *Commission v Italy ECLI* EU:C:2008:203; [2008] E.C.R. I-02173 at [58].

Unforeseeable Events and Circumstances under EU Procurement Law: Balancing the Contracting Authority's Duty of Diligence

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Due diligence; EU law; Foreseeability; Negotiated procedure without prior publication; Public procurement

Abstract

While modifications can be made in the case of both unforeseeable events and circumstances, the use of the negotiated procedure without prior notice is only allowed in the case of unforeseeable events. In both situations, the degree of diligence required differs. When using the negotiated procedure without prior notice, the focus is on identifying the unforeseeable event and the urgent need for procurement. In contrast, while modifying a contract, establishing the unforeseeable circumstance by evaluating the due diligence of the initial award, and potentially asking for additional evidence from the tenderer. Relying on the CJEU's relevant case law, the article thus identifies differences between the practice concerning „unforeseeable events" and „unforeseeable circumstances" under EU public procurement law, examining if and to what extent these two notions overlap, partially or wholly, and if not, what are the key differences? By offering detailed insights into these distinctions, the article aims to provide legal clarity on the due diligence obligations in these specific procurement contexts.

1. Introduction

There is confusion about whether the unforeseeable event and circumstances as stipulated in the directives 2014/24 ('Public Sector Directive') and 2014/25 ('Utilities Directive') can be interpreted identically in both cases, while assessing the possibility of using the negotiated procedure without prior notice and evaluating the legality of modification to a public procurement contract. The EU public procurement rules do not answer these questions. The sixth generation[1,2] public procurement directives explain the nature of the duty of diligence of a contracting authority, but only regarding the modifications to a contract.[3] Even then, the directives only outline general premises that point to being diligent. Regarding the negotiated procedure without prior notice, the directives provide no guidance on what it means that an unforeseeable event is not attributable to the contracting authority. Therefore, the contracting authority lacks the security to conclude that it behaves lawfully.

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1 See about the development and phases of the public procurement directives in S. Arrowsmith, *EU Public Procurement Law: An Introduction*, Ch.2.3, p.55. Available on the Internet: *https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf* (12.11.2025).

2 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] O.J. L94; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] O.J. L94; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport, and postal services sectors and repealing Directive 2004/17/EC [2014] O.J. L94.

3 Accordingly, explanation no 109 in the Public Sector Directive; explanation 76 in the Concessions Directive, and explanation 115.

Even the scholars are of different opinions about what the notions ‘unforeseeable events and circumstances’ mean and when they apply. Some scholars refer to the need for an unforeseeable event (as opposed to circumstances) in the case of contract modification.[4] Others interpret the nature of unforeseeable circumstances in a case of contract modification more broadly than just a specific unforeseeable event, including general strikes, seaport blockades, as well as changes in law,[5] and, for example, a significant increase in the cost of materials and labour.[6]

Thus, besides the fact that the meaning of the terminology in both cases is unclear, it is also unclear whether the diligence required on both occasions is identical. Although the severity of a possible breach is similar in both cases, the market is unaware of the possibility of competing for a new contract or that, through a modification, the value of the contract concluded as a result of the so-called original public procurement would have been higher. Still, the degree of care of the contracting authority in either of these cases might differ. Even when, in both cases, the principles of transparency, non-discrimination, and equal treatment could be severely breached,[7] the occurrence of an unforeseeable event versus circumstances differs in practice.

The question analysed in this article is when it can be assumed that a contracting authority was sufficiently diligent when deciding to use the negotiated procedure without prior notice or modifying a contract in the event of unforeseeable events or circumstances. This article analyses the CJEU’s case law regarding the existence of such events and circumstances to establish the boundaries of cases where the use of the negotiated procedure or making modifications is legal and when it is not. The aim is also to ascertain the contracting authority’s more specific duties in both cases: when deciding on the use of a negotiated procedure without prior notice due to an unforeseeable event, and when making modifications to a public procurement contract due to unforeseeable circumstances.

2. An unforeseeable event and the negotiated procedure without prior notice

On the legislative level, the negotiated procedure without prior notice can be regarded as a compromise between the interests of the tenderers, who would always prefer that a tender is published so that they could participate in it, and the interests and needs of the contracting authorities, who sometimes face such circumstances where it is, as an exception, allowed to negotiate the contract with one or few market participants only, without publishing a tender. Such background influences the expected degree of diligence on the part of the contracting authority. It is up to the contracting authority to safeguard that using the so-called exemptional procedure[8] does not go further than it needs to. That is, it does not limit the effectiveness of the fundamental rights of the tenderers more than allowed by the derogation.

2.1. Premises for the use of the negotiated procedure without prior notice

The EU legislator has already stipulated very narrow conditions for using the negotiated procedure without prior notice. According to art.32(2)(c), the contracting authority is allowed to opt for that procedure in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures

[4] S. Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, 3rd edn. (Sweet & Maxwell, 2014), Vol.1, p.590.

[5] R. Caranta, A. Sanches-Graells, editors. P. Bogdanowicz, European Public Procurement. Commentary on Directive 2014/24 (Edward Elgar Publishing, 2021), pp. 786–787.

[6] P. Bogdanowicz, *Contract Modifications in EU Procurement Law* (Edward Elgar Publishing, 2021), p.97.

[7] See more on that topic M. A. Simovart, Unforeseen circumstances that justify changes to public contracts” in D. A. Dragos, K.M. Halonen, B. Neamtu and S. Treumer (eds.), *Contract Changes. The Dark Side of EU Procurement Law*. Edward Elgar Publishing, to be published in 2023 (European Procurement Law series), pp.69–74.

[8] The CJEU has, in its early practice, stated that the Article regulating the use of negotiated procedure without prior notice provides an exemption from the application of the provision on advertising and that the same Article provides for a derogation keeping in mind the premises listed in the Article. See *Commission v Spain* (C-24/91) [1992] EU:C:1992:134 at 5 and 13. In 2009, CJEU established that the negotiated procedure is exceptional in nature, *Commission v Germany* (C-275/08) [2009] EU:C:2009:632 at [54].

with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency must not, in any event, be attributable to the contracting authority.

As the grounds for using the negotiated procedure without prior notice have, for the main part, remained unchanged since the entry into force of the first generation public procurement directives in 1971,[9] the CJEU has developed a standard whereby, for the use of the negotiated procedure without prior notice, the following concurrent conditions need to be fulfilled:

1) the existence of an unforeseeable event;
2) extreme urgency rendering the observance of time limits laid down by other procedures impossible, and
3) a causal link between the unforeseeable event and the extreme urgency resulting therefrom.[10]

Already in 1988, the EU legislator specified in the second-generation public procurement directives that the circumstances invoked to justify extreme urgency cannot, in any event, be attributable to the contracting authorities.[11] This requirement has also remained unchanged ever since.

The COVID-19 crisis again raised this question[12] as many contracting authorities opted for the negotiated procedure without prior notice. For example, in Estonia, a criminal procedure was initiated against the Estonian Minister of Education and Research for allegedly using the procedure to purchase rapid COVID-19 tests for schools as a measure to keep them open, rather than opting for a total lockdown. Eventually, the criminal procedure was dropped, but the main points of concern remained: had the use of negotiated procedure without prior notice been a lawful choice? Did the new waves of the pandemic constitute new unforeseeable events? Should more than one tenderer have been invited into the negotiations?[13] Thus, it is unclear whether such COVID-19-related procedures were conducted in conformity with EU public procurement law.

Looking at the CJEU case law, the question of what constitutes an 'unforeseeable event' or 'extreme urgency' is (still) not at all clear to the contracting authorities. The main issues where mistakes are made in qualifying the use of the procedure are:

1) distinguishing the existence of an extreme urgency deriving from an unforeseeable event, whereby the link between the unforeseeable event and the conducted procurement procedure is too weak; and
2) distinguishing the unforeseeable nature of an event from the contracting authority's own actions that have contributed to the coming about of the alleged unforeseeable event.

The CJEU case law is analysed next to establish the nature of an unforeseeable event as one premise for the allowed use of the negotiated procedure without prior notice. After that, the scope of the activities and the degree of diligence are expanded upon.

[9] See Article 9(D), Council Directive 71/305 of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts [1971] OJ L 185, pp.5–14. English special edition: Series I Vol.1971(II), pp.682–692.

[10] For the first time in 1993, in *Commission v Italy* (C-107/92) [1993] EU:C:1993:344 at 12.

[11] Article 6.1(4)(d), Council Directive 88/295 of 22 March 1988 amending Directive 77/62 relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767 [1988] OJ L127, pp.1–14; Article 5(3)(c), Council Directive 89/440 of 18 July 1989 amending Directive 71/305 concerning coordination of procedures for the award of public works contracts [1989] OJ L210 (21 July 1989), pp.1–21.

[12] Communication from the Commission. Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis. C/2020/2078. OJ C108I , 1 April 2020, pp.1–5

[13] Estonian newspaper article covering the ending of the proceedings: *https://www.err.ee/1608793234/ministeerium-lopetas-kersna-vaarteomenetluse-kiirtestide-hankimise-asjas* (12 November 2025).

2.1.1. An unforeseeable event creating an urgent need

In all of the CJEU's case law, there are two types of cases related to the unforeseeable nature of an event where the contracting authorities have felt that the use of the negotiated procedure without prior notice is allowed:

1) mainly, these cases concern the avoidance of a possible dangerous event that the contracting authorities want to avoid in the future by acting in advance;
2) only a few cases stem from circumstances where an actual unforeseeable event has occurred, and thus the contracting authorities are faced with mitigating the sudden consequences.

As a general rule, using the negotiated procedure without prior notice is only allowed in the second type, the minority of cases. The reason is that contracting authorities are bound to organise their activities in a way that avoids possible crises, rather than creating them. It cannot be excluded that, in some very particular cases, using the procedure to mitigate an actual crisis due to the contracting authority's own undoing or mistake may also be possible. However, thus far, the CJEU case law contains no cases that prove this possibility.

For example, the CJEU declined to apply the procedure when the City of Milan sought to construct a solid urban waste plant three years after the Seveso chemical plant disaster in the same region.[14] A similar case involved an earthquake in Italy with devastating consequences, for which local municipalities sought to initiate relief efforts through new urban planning activities 1-2 years after the event.[15] As well as in a case where the officials reported an avalanche risk in the Alps, although the region had not had any in 13 years[16] and in cases where there was a risk of damage from floodwaters. The contracting authority procured construction services over a ten-year period to implement flood safety measures for the territories and zones affected by the floodwaters of the River Po.[17] Even where helicopters were procured to fight recurring forest fires, the CJEU did not consider the possibility of using the negotiated procedure without prior notice to be justified.[18]

The common denominator of all these cases is that the contracting authorities wished to prevent or prepare for a (new) future high-risk situation that could potentially be disastrous to human and animal life and the environment. Yet, even when there had been or was a previous unforeseeable event, the link to the urgent need to procure new goods, services, or construction works was too weak or even non-existent.

The 1976 Seveso chemical disaster brought about much damage as residents needed to be evacuated, women opted for voluntary abortion due to the exposure to the airborne chemical dioxin, thousands of animals died and were slaughtered to prevent the chemical from entering the food chain, not to mention the damage to the environment.[19] The Seveso district is close to Milan, and Milan's waste management plant was used for handling the waste material (also from Seveso). However, the incinerator leaked the poisonous dioxin, and it was concluded that the plant could not be used for handling the waste. Therefore, it was decided that a new waste management plant would be built using the negotiated procedure without prior notice.[20] It would seem that, among other reasons, the contracting authority needing an urban solid waste plant wanted to address an environmental problem as soon as possible, due to public opinion about environmental hazards following the Seveso disaster. Although there is no question that the chemical plant disaster was an unforeseeable event, building a new urban solid waste plant three years later did not

[14] *Commission v Italy* (C-199/85) EU:C:1987:115, p.11 and 15.
[15] *Consiglio Nazionale degli Ingegneri* (C-352/12) EU:C:2013:416.
[16] *Commission v Italy* (C-107/92) EU:C:1993:344.
[17] *Commission v Italy* (C-385/02) EU:C:2004:522.
[18] *Commission v Italy* (C-525/03) EU:C:2005:648.
[19] B. Eskenazi, M. Warner, P. Brambilla, S. Signorini, J. Ames, P. Mocarelli, "The Seveso accident: A look at 40 years of health research and beyond" (2018) 121 *Environmental International* 71–84.
[20] Opinion of Advocate General in the *Commission v Italy* (C-199/85) [1987] EU:C:1987:115 at 4–5.

constitute an immediate need for urgent public procurement. Although the toxic waste still needed to be handled appropriately, building a new waste management plant was not the only option for disposing of the poisonous material. For instance, it is known from public information that part of the toxic waste material from the district was handled nine years later in Switzerland.[21]

The same can be concluded about the need for construction works to avoid avalanche and flood damage, and to procure new helicopters to fight future forest fires. Even when the contracting authority was aware of the risk of hazardous situations, there was no immediate event to prevent or react to. The directive allows for the use of the procedure when an urgent need for new goods, services, or construction works arises from an unforeseeable event. That is, the need for procurement arises from a new event or an abrupt change in circumstances that could not have been reasonably anticipated or prepared for through the so-called standard procurement procedures. The explanations to the directive emphasise that this might be the case where natural catastrophes require immediate action.[22] So, even when an actual chemical disaster, avalanche, flood, or forest fire is an unforeseeable event, these events need to have occurred in close temporal proximity to the urgent need, after which the contracting authority is allowed to start weighing the use of the negotiated procedure without prior notice.

Concurrently, regular seasonal occurrences cannot be considered unforeseeable events.[23] Hence, not every first snow, heavy rain, or forest fire gives a free pass for signing contracts without a proper public procurement procedure. The regular seasonal occurrences may only be regarded as unforeseeable in some years due to such exceptional intensity or extent.[24] Even then, preparing for such a regular seasonal event is part of the due diligence of a contracting authority, as there is no element of surprise of the event taking place, and there cannot be an urgent need, as the need was evident already beforehand. As the use of the negotiated procedure without prior notice is a so-called exemptional procedure that heavily restricts competition and therefore undermines the fundamental rights of the tenderers as well as hinders the aims of the internal market, there is no justification for using it if the necessary goods, services, and construction works could reasonably be procured in advance. For example, as was the case with the recurring forest fires in the southern part of Italy and purchasing helicopters to help put them out.[25]

Moreover, in such cases, the sudden need for procurement does not arise from the unforeseeable event itself, but from the consequences it produces. It is not the avalanche itself that necessitates a new procurement, but rather, for example, a closed road that needs to be cleared and repaired. Supposing the avalanche passes without causing any damage, there is also no need to initiate a speedy procurement procedure. Simultaneously, the COVID-19 crisis definitely was unforeseeable, but the need for urgent procurements was due to the consequence that there was, for example, a lack of ventilators to save the lives of so many at once.

Although such a dissection of the event may seem like nitpicking, the broader aspect here is that, as evident from the CJEU case law, contracting authorities often conflate the unforeseeable event and the actual consequence. This creates a risk in legal decision-making that a contracting authority may misinterpret the prerequisites for using the negotiated procedure without prior notice. Emphasis needs to be on the wording of art.32(2)(c) of the directive, whereby the procedure is only allowed insofar as is strictly necessary, which means that the contracting authority needs to assess what and why is really necessary before deciding on the use of the procedure. Talking about crises as the permitted use for the negotiated procedure without prior notice is thus incorrect, but really common in everyday practice. Questions like

[21] The Institute of Environmental Management and Assessment. The Seveso antidote: *https://www.iema.net/articles/the-seveso-antidote?t=0* (12 November 2025).

[22] Public Sector Directive, explanation 80.

[23] Opinion of Advocate General in the *Commission v Italy* (C-525/03) EU:C:2005:343 at [63].

[24] Opinion of Advocate General in the *Commission v Italy* (C-525/03) EU:C:2005:343 at [63] and [68].

[25] *Commission v Italy* (C-525/03) EU:C:2005:648.

'is this procurement procedure really necessary?' and 'to what extent?' can only be answered by isolating the exact consequences of such crises that the contracting authority needs to tackle.

This is most evident from the *Consiglio Nazionale degli Ingegneri* case, where, in 2009, an earthquake struck the town of L'Aquila in central Italy with a magnitude of 5.8-5.9 on the Richter scale. This was the second deadliest earthquake in Italy since the 1980s, *inter alia,* damaging buildings that are part of the country's cultural heritage. The CJEU stated that an earthquake certainly constitutes an unforeseen event.[26] Nevertheless, the court did not agree that procuring urban planning and other related architectural services 1–2 years after the earthquake, even if to better prepare for the next possible earthquake, could be regarded as an urgent need after an unforeseeable event.[27] The contracting authority had thus correctly identified the existence of an unforeseeable event, but had misinterpreted its right to rely on it to mitigate losses and prepare for a possible similar natural disaster.

To sum up, both natural and man-made disasters are unforeseeable events. Even then, the 'unforeseeable event' and the 'extreme urgency' are not synonyms, allowing the contracting authority to opt for the negotiated procedure to fast-track the conclusion of a public procurement without adhering to the standard procurement procedures. The urgency of a need for procurement deriving from an unforeseeable event depends on the exact nature of the consequence of the event that is to be solved. The negotiated procedure may not be used to prevent a possible dangerous outcome if there has not been an unforeseeable event that would have caused such an outcome in the first place. Hence, if the contracting authority considers the use of the procedure (long) after an actual unforeseeable event to prevent future negative outcomes (*ex-ante use of the procedure*), it is a clear red flag that, and most probably, the procedure is not justified. Only in very narrow circumstances could the so-called *ex-ante* use of the exemptional procedure be considered lawful – that may only be the case when a threat of a new (dangerous) event is imminent and was previously unknown to the contracting authority.[28] Thus, as a general rule, for the procedure to be allowed as foreseen in the directive, the event must have already taken place just before the urgent need for a new procurement arose (*ex-post use of the procedure*).

2.1.2. The absence of an unforeseeable event and the contracting authority's own actions contributing to the making of the urgency

Another block of CJEU case law relates to the contracting authority's aspirations for avoiding an unwanted outcome that does not constitute an unforeseeable event. Often, political pressure or a desire to rectify the contracting authority's or even the state's own past mistakes in procurement planning or implementation have led to the use of the negotiated procedure. To start with, these cases lack the presence of an unforeseeable event, and even when such an event was present, all the cases concern the *ex-ante* use of the negotiated procedure without prior notice. They also exhibit how the alleged unforeseeable events came about due to reasons closely related to the contracting authority's or the state's own decisions and actions. Therefore, these cases are examples of the unlawful use of the procedure.

(a) Reasons originating from political pressure or domestic politics In the German river dredging case, the region's biggest employer had signed a contract for the delivery of a vessel that, at the time of signing the contract, would not be able to pass the too shallow river and, therefore, the ship could not have been delivered on the agreed time. As the state and regional authorities wished to maintain the jobs offered by and related to the servicing of that employer (altogether approximately 3,500 jobs), the authorities made efforts to help the private undertaking keep its contractual obligation of delivering the vessel on time. On a larger scale, the state sought to maintain the company's reputation and the reputation of Germany

[26] *Consiglio Nazionale degli Ingegneri* (C-352/12) [2013] EU:C:2013:416 at [48].
[27] *Consiglio Nazionale degli Ingegneri* (C-352/12) [2013] EU:C:2013:416 at [55].
[28] Opinion of Advocate General Gulman in case *Commission v Italy* (C-107/92), EU:C:1993:180 at 7.

as a shipbuilder as a whole. That is, to secure that the state is internationally reputable, which would boost future sales and employment in the country. Therefore, the state's considerations were on a larger socio-economic scale, bringing benefits not only to the region but also to the state.[29]

Although the responsible authority planned to carry out an open procedure, publishing prior notice months in advance, the contract was concluded as a result of the negotiated procedure without prior notice. A regional authority refused to give final consent for the permanent dredging of the river due to ecological reasons, but accepted a temporary dredging permit to allow the vessel to pass.[30] As the contractual deadline was related to the spring tide in the river, which made it possible for the vessel to navigate through the river, this created the alleged extreme urgency to complete the dredging works within a particular timeframe.[31]

The CJEU concluded that there was no unforeseeable event—it is foreseeable for the contracting authority that permits need to be obtained in a project like this, and that authorities may also reject such a project entirely.[32] The German state also tried to argue that the decisions of different authorities are unforeseen to other authorities. Although the CJEU did not address this argument, Advocate General Elmer explained that a Member State must be identifiable through all its authorities within that State. Therefore, a Member State must assume responsibility for all actions of the various authorities within that State. It must not be possible for one authority to excuse itself on the ground that it does not know what another authority is doing or is about to do.[33] Consequently, the circumstances of the alleged extreme urgency were all attributable to the contracting authority.

A similar case involved the construction of the Greek thermal-electricity generation plant's conveyor-belt system.[34] The Hellenic Republic argued that it needed to reach the time limits set by another state authority, which created extreme urgency for the use of the negotiated procedure without prior notice. Such short deadlines were followed because the local government authority and the local population were worried about the pollution problems resulting from the existing installations. The Advocate General Jacobs added that any contracting authority exercising a normal standard of diligence must be aware of the compulsory authorisation process, whether environmental or otherwise, which it must respect under applicable national rules when planning the award of contracts falling within the scope of the public procurement directives. As the obligations arising from the public procurement directives fall upon Member States, it is, therefore, their duty to ensure that the action or inaction of one of their constituent elements does not cause or force another State body or agency to fail in its obligation.[35] CJEU thus reiterated that the fact that an authority that must approve the project concerned may impose time limits is a foreseeable part of the procedure for approving that project.[36] To examine the case from a different perspective, the pressure exerted by the local government and community on the state does not constitute a reason for using the negotiated procedure without prior notice.

(b) Mistakes in general project management and planning a procurement Mistakes in planning the timeframe for the procurement or ignoring factual circumstances that indicated the need to initiate a public procurement process already earlier have been another ground for using the negotiated procedure without prior notice.

Such was the case with the avalanche barrier construction in the Alps, where the need to initiate procurement was already known to the contracting authorities months, if not even a year, in advance. The

[29] Opinion of Advocate General Elmer in case *Commission v Germany* (C-318/94) EU:C:1996:41 at 5–6, 17 and 19.
[30] *Commission v Germany* (C-318/94) [1996] EU:C:1996:149 at 4–5.
[31] Opinion of Advocate General Elmer in case *Commission v Germany* (C-318/94) [1996] EU:C:1996:41 at 6.
[32] *Commission v Germany* (C-318/94) [1996] EU:C:1996:149 at 15–19.
[33] Opinion of Advocate General Elmer in case *Commission v Germany* (C-318/94) EU:C:1996:41 at 26.
[34] *Commission v Greece* (C-394/02) [2005] EU:C:2005:336 at [10].
[35] Opinion of Advocate General Jacobs in case *Commission v Greece* (C-394/02) EU:C:2016:359 at [47]–[48] and [52].
[36] *Commission v Greece* (C-394/02) [2005] EU:C:2005:336 at [43].

time that could have been used for the appropriate public procurement process passed in preparation for the award process. At some point, it became evident that the contract could not be concluded or fulfilled in a timely manner if an open procedure were used. The CJEU thus stated that there was no urgent need for the procurement as the contracting authority could have applied the accelerated procedure provided for by the directive.[37]

The CJEU's position was the same in the Spanish university case, where the procedure was used to acquire construction works for the extension and renovation of a part of the university building due to the high number of students starting in the fall and the fact that the university received new funds for the work. As the university has control over the number of students admitted, it is apparent that this did not constitute an unforeseeable event.[38] Instead, the procedure was used as the last means to procure the needed work because the appropriate time for the correct procedure had passed. Again, the accelerated procedure could have been used instead.[39] Advocate General Lenz also emphasised that the allocation of funds cannot constitute an unforeseeable event, as this is objectively something that a contracting authority can foresee.[40]

In another case concerning Spain, the state had made an exception in their legislation for procuring medicinal products required by the hospitals. Those medicinal products could be bought from a single tenderer without any notification. The CJEU again reiterated that the directive regulates all such derogations exhaustively, and the Member States are not allowed to expand the premises for the use of the negotiated procedure without prior notice.[41] The argument about the permitted use of the negotiated procedure without prior notice was again submitted as a second line of defence. The real issue here was that, as the state had allowed the contracting authorities not to publish the tenders, they had thus not analysed the need for a public procurement procedure at all. The Kingdom of Spain argued that it was not foreseeable for the doctors to determine which medicine to prescribe for each patient, and thus, the need for the products was unforeseeable, and the demand for the product was urgent. Had the contracting authority analysed the data about the described medicine, it would have become apparent that most of the medicinal products are repeatedly prescribed. Hence, the recurring nature of the purchases would have been evident, as well as the obligation set by the directive to publish a procurement notice. Therefore, the need to argue that the use of a negotiated procedure without prior notice was allowed stemmed from the fact that both the state and the contracting authorities had been mistaken in their obligations set forth in the public procurement directives. As said, such circumstances do not constitute a right to close off the competition and breach the fundamental rights of the tenderers to be informed of such purchases.

(c) Preferring an economic operator On occasion, it also happens that the wish to procure from a particular tenderer is rather overwhelming that the disguise of the negotiated procedure without prior notice is the way to achieve that. This seemed to be so in the cases with the German software[42] and Italian helicopter purchases[43] and the Italian flood water damage prevention works.[44] The arguments that the contracting authorities were allowed to use the negotiated procedure without prior notice were drawn up as backup arguments, just in case there were no other convincing grounds to rely on. The CJEU rejected the use of the procedure in all these cases, as there was no unforeseeable event; instead, it seemed that the contracting authorities had chosen to make achieving the desired result a little easier.

[37] *Commission v Italy* (C-107/92) [1993] EU:C:1993:344 at 13–14.
[38] Opinion of Advocate General Lenz in case *Commission v Spain* (C-24/91) [1992] EU:C:1992:59 at 29.
[39] *Commission v Spain* (C-324/91) [1992] EU:C:1992:134 at 12–15.
[40] Opinion of Advocate General Lenz in case *Commission v Spain* (C-24/91) EU:C:2024:833 at [30]–[32].
[41] *Commission v Spain* (C-328/92) EU:C:1994:178 at [12]. See also the *opinion of Advocate General Lenz in the same case,* EU:C:1994:88 at 47. Newly reiterated in case *Obshtina Razlog* (C-376/21) [2022] EU:C:2022:472 at [56].
[42] *Commission v Germany* (C-275/08) [2009] EU:C:2009:632 at [61]–[63].
[43] *Commission v Italy* (C-525/03) [2005] EU:C:2005:648 at [3].
[44] *Commission v Italy* (C-385/02) [2004] EU:C:2004:522 at [17].

As a practising attorney, the author herself has many times experienced the unwillingness of decision-makers or contracting authorities to accept that, in cases where mistakes have been made but no unforeseeable event has occurred, the directives negate the possibility of using the negotiated procedure without prior notice as a clean-up tool. Moreover, the directives do not contain any procedures whatsoever to quickly remedy the contracting authority's or the state's previous mistakes. This seems to be the reason why S. Arrowsmith has indicated that when a pressing need for work arises that cannot be met adequately within the timescales of the accelerated procedure but was foreseeable or attributable to the contracting authority, the contracting authority is faced with the choice of accepting the damage that may occur to the public interest or violating the procurement rules.[45] R. Caranta has appropriately summarised this line of thought by saying that not every kind of urgency will do and that contracting authorities cannot avail themselves of their sloppiness.[46]

Depending on the Member States' criminal law regulations, it might be possible to argue that in such a case, the decision-maker is acting in a conflict of obligations. That is, having a duty to use an open public procurement procedure simultaneously when there is a relevant public interest in acting fast that excludes the possibility of initiating an open procedure. In such a case, the applicable domestic criminal law may exclude the responsibility of such a decision-maker, whereas the breach of EU public procurement rules remains.

2.2. The duty of diligence and the degree of care of a contracting authority while deciding on the use of the procedure

The due diligence obligation is derived from the EU public procurement principles.[47] As such, the primary purpose of the due diligence obligation is to safeguard the EU public procurement principles and the fundamental rights of the tenderers. Since the directives do not stipulate an obligation to be diligent, but such an obligation derives from the EU public procurement principles, a frequently mistaken mindset in practice is assuming that if there is no regulatory guidance, there are no obligations to follow and no rules to breach.

On the contrary, if there is no legal norm stipulating a concrete way of implementing the directives, the EU public procurement principles and the due diligence obligation arising from these principles require the contracting authority to find an appropriate way itself. This might also be why many contracting authorities err in the procurement planning phase, as the EU public procurement rules do not specify everything that needs to be considered when preparing the tender. Thus, the contracting authorities do not recognise the obligation to form the appropriate course of action independently, following the guidance of the EU public procurement principles. Based on CJEU practice, this also appears to be the case when using the negotiated procedure without prior notice. The following obligations can be pointed out regarding the contracting authority's obligations prior to using the negotiated procedure without prior notice.

(a) Analysing the use of accelerated deadlines and other ways for publishing a tender

When deciding to use the negotiated procedure without prior notice due to an unforeseeable event, the contracting authority must assess, in addition to the existence of an actual unforeseeable event, the possibility of utilising the accelerated time limits set for open procedures.[48] So, even when an unforeseeable event exists, and there is an urgent need for a procurement caused by such an event, the contracting authority still needs to analyse the possible use of accelerated tender submission deadlines. A contracting authority,

[45] S. Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, 3rd edn. (Sweet & Maxwell, 2014), Vol.1, p.1076.
[46] M. Steinicke, P. Vesterdorf, editors. R. Caranta, *EU Public Procurement Law. Brussels Commentary* (Beck, Hart, Nomos, 2018), p.437.
[47] See for a more thorough reasoning in K. Härginen. "Duty of diligence of a contracting authority in the EU public procurement law" (2022) 2 P.P.L.R, 76–88.
[48] See, for example, *Commission v Germany* (C-126/03) [2004] EU:C:2004:728 at [23].

thus, needs to not only state that it was impossible and that the need for procurement was more urgent than the accelerated deadlines would have allowed, but also provide proof that it analysed the reasons why following such deadlines was impossible.

In the Italian Alps avalanche barrier case, Advocate General Gulman stated that if a contracting authority is uncertain of receiving funds and together with a possible hazardous risk that creates an urgent need for a procurement later on, a tendering procedure is to be commenced in parallel to the other preparatory activities (as receiving of the funds), with a clear statement in the invitation to tender that the execution of the works would be dependent on final approval from the budgetary authorities.[49] Leaving aside the fact that this would be an unallowed *ex-ante* use of the negotiated procedure without prior notice, the due diligence of a contracting authority entails analysing and also using other possible ways that would still ensure the use of any other public procurement procedures that are published.

(b) Proving the existence of an unforeseeable event

The CJEU has repeatedly emphasised that the negotiated procedure without prior notice constitutes a derogation from the rules, whereby the burden of proving the actual existence of exceptional circumstances justifying a derogation lies with the person seeking to rely on those circumstances.[50] Such due diligence obligation derives from the principle of transparency.

None of the six generations of public procurement directives has defined the exact nature of the proof that a contracting authority must present to demonstrate that the choice of procedure was correct. When generalising the CJEU case law, it becomes apparent that the burden of proof not only touches upon the possible reasons justifying the use of the procedure but also the quality of the evidence a contracting authority can rely on. Meaning that the information that the contracting authority states to be true must be apparent from such evidence, and the conclusions may not be subjective and generic.

In the case of Italy purchasing helicopters from a single tenderer, Italy argued that, among other reasons, it had the right to do so due to the technical specificity of the helicopters and the need to ensure the interoperability of its helicopter fleet to reduce logistical, operational, and pilot-training costs. The court concluded that Italy had yet to demonstrate in what respect a change of supplier would have constrained it to acquire material manufactured according to a different technique likely to result in incompatibility or disproportionate technical difficulties in operation and maintenance.[51] Thus, when a Member State submits only theoretical and practical arguments for using the procedure, with no substantial evidence confirming that those arguments are also real in practice, the due diligence of a contracting authority for the allowed use of the procedure has not been met.

The CJEU was also critical of the quality of the proof in Italy's River Po case, where only one tenderer was used to construct the flood safety measures. Italy argued that the completion of the works by individual lots from multiple different contractors often causes problems arising from the fact that the work is not carried out in the same manner, and hence difficulties in establishing the respective liability for damages due to the destruction or deterioration of the works. Italy did submit an opinion of the Public Works Authority, but the CJEU found that it lacked detailed explanations on which the need to use a single contractor could be based.[52] The required proof must be linked to the individual case and support the establishment of unforeseeable circumstances justifying the derogation.[53]

Article 84(2) of the Public Sector Directive foresees the obligation of the contracting authorities to document the progress of all procurement procedures. To that end, contracting authorities must maintain

[49] Opinion of Advocate General Gulman in *Commission v Italy* (C-107/92) [1993] EU:C:1993:180 at 9.
[50] For example, as early as 1987, in case C-199/85 *Commission v Italy* [1987] EU:C:1987:115 at 14.
[51] *Commission v Italy* (C-337/05) [2008] EU:C:2008:203 at [55], [59]–[60], and *Obshtina Razlog* (C-376/21) [2022] EU:C:2022:472 at [569].
[52] *Commission v Italy* (C-385/02) [2004] EU:C:2004:522 at [17], [21]–[22].
[53] *Spain v Commission* (T-235/11), EU:T:2013:49 at [99].

sufficient documentation to justify decisions made at all stages of the procurement procedure, including documentation on communications with economic operators, internal deliberations, the preparation of procurement documents, any dialogue or negotiation, and the selection and award of the contract. The documentation must be retained for a period of at least three years from the date of contract award. Thus, due diligence requires not only acquiring sufficient proof for the use of the procedure but also the obligation to keep all related materials.

(c) Using the derogation 'in so far as strictly necessary'

Article 32(2)(c) also allows using the procedure 'in so far as strictly necessary'. The CJEU has not analysed this prerequisite in detail. Still, the legal question here is whether the due diligence of the contracting authority requires that the quantity of the purchase and/or the length of the contract concluded as a result of this procedure be taken into account when initiating a new regular procurement that could be broadly published.

According to the CJEU's settled case law, when interpreting a provision of EU law, account must be taken not only of its wording but also of its context and the objectives pursued by the rules of which it forms part.[54] Considering that the exemption was created to facilitate the contracting authority's urgent and unexpected need, which does not allow for a 'normal' tendering procedure, the answer to the question is that the use of the exemption may not involve such a contracting authority's need that a new open procedure could already procure. The European Commission also indicates this in its communication on using the public procurement framework in emergency situations related to the COVID-19 crisis. The Commission refers that the 'negotiated procedures without prior publication may offer the possibility to meet immediate needs. They cover the gap until more stable solutions can be found, such as framework contracts for supplies and services, awarded through regular procedures (including accelerated procedures)'.[55]

Therefore, considering also the way the rules on procurement and the internal market have developed up to this point, if conducting a public procurement by the rules of the so-called normal procedures is possible from a certain point in time, the principle of proportionality would oblige a contracting authority not only to consider it but also to conduct it. Thus, the duty of diligence requires the contracting authority to also assess the purchase quantity and the contract's length, and adhere to those quantities and/or the contract's length that are necessary until a regular procurement can be carried out.

(d) Competition light – an obligation to involve several tenderers

The directives give no guidance on conducting the negotiated procedure without prior notice. The Member States are allowed to foresee the detailed regulation; for example, the Estonian Public Procurement Act stipulates that the contracting authority may submit a proposal for one or a few market participants to tender.[56] Therefore, there is no reference whatsoever to the obligation to include more than one tenderer in the proceedings in case of extreme urgency.

Still, precisely such an argument was submitted in the aforementioned criminal case against the Estonian Minister of Education and Research for purchasing rapid COVID-19 tests for schools, having contacted only one tenderer. The same question arose in Germany, in the Rostock Higher Regional Court proceedings, where it was found that the limitation of competition must be proportionate and necessary. Therefore, a contracting authority must even open the exceptional negotiated procedure up to as much competition as

[54] *Imperial Tobacco Bulgaria* (C-55/21) [2022], p.44 and the case law cited therein.

[55] Communication from the Commission. Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis. C/2020/2078. OJ C108I (1 April 2020), p.2.3.4.

[56] Article 72(1), Estonian Public Procurement Act, RT I, 23 February 2023, p.6. Available on the Internet: *https://www.riigiteataja.ee/en/eli/528022023001/consolide (12 November 2025).*

possible. The court also explained that, as a general rule, multiple offers must be obtained, and the direct approach should not be limited to just one provider. A complete renunciation of competition can only be considered a last resort (the so-called '*competition light ruling*').[57]

The German court has based its argument on the proportionality principle and interpreted it in conjunction with the prerequisites for using the negotiated procedure without prior notice. Such an interpretation would mean that there is an inherent obligation that a contracting authority is always additionally required to follow while using the exemption, even though the directive does not stipulate it. At the same time, none of the CJEU's decisions list such an additional prerequisite. This would lead to the conclusion that there is no prohibition on turning to a single market participant, provided all requirements for using the exemption are fulfilled.

The argumentation of approaching more than one tenderer could be supported by the purpose of the exemption—to provide a contracting authority with an urgent possibility for extraordinary purchases when there is no other way in case of an unforeseeable event. Additionally, for this reason, the exemption is interpreted narrowly and strictly. As referred to earlier, the CJEU has explained that when interpreting a provision of EU law, an account must be taken not only of its wording but also of its context and the objectives pursued by the rules of which it forms part.[58] Based on that, it could also be argued that the inclusion of a broader competition in such a public procurement procedure is counterproductive to the purpose of the exemption, rendering the exemption meaningless. If the contracting authority is to research and involve more than one tenderer, then the whole reason for using the exemption might be lost.

It may nevertheless be concluded that it is part of the duty of diligence of a contracting authority to analyse whether involving some competition in the procedure is possible, even when following the accelerated deadlines is impossible. This approach aligns with the EU public procurement principles and safeguards the fundamental rights of bidders. The effort required to investigate the availability and interest of multiple tenderers is reasonable if not unduly onerous for the contracting authority.

3. Unforeseeable circumstances and the modifications to the public procurement contract

In 2014, the EU legislator changed the regulation of modifying a public procurement contract. A ground previously used as a premise for the negotiated procedure without prior notice is now part of the norm (art.72(1)(c)), allowing for changes in a contract where all the following conditions are fulfilled:

1) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
2) the modification does not alter the overall nature of the contract;
3) any increase in price is not higher than 50 % of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive.

In the context of this article, only the clause's first prerequisite is next analysed – what constitutes circumstances that a diligent contracting authority could not foresee and what is considered the diligence required of the contracting authority to be able to rely on the possibility of modifying the contract.

[57] The 09 December 2020 decision No.17 Verg 4/010 of the Oberlandesgericht Rostock (Vergabesenat).
[58] *Imperial Tobacco Bulgaria* (C-55/21) [2022] at [44] and the case law cited therein.

3.1. Unforeseeable circumstances allowing for the contract modifications

To start with a detour, the EU legislator does not tie the lawfulness of every contract modification to the contracting authority's duty of diligence or oblige the contracting authority to examine what caused the need. The *de-minimis* clause for the modification accepts changes to the contract even when they originate from the mistakes of the contracting authorities. That being said, the general framework for the lawfulness of the modification still applies.

In case of modifications due to unforeseeable circumstances, the EU legislator aims to offer flexibility to the contracting authority for adapting the existing public procurement contract to those new circumstances present. That is, not to force the contracting authority to initiate another procurement procedure.[59] Such flexibility is seen as the expression of the principle of proportionality by S. Arrowsmith, as it would be disproportionate in terms of disruption to the service in question and the cost of a new procedure to award an entirely new contract.[60] M.A. Simovart argues further that the principle of proportionality can even subject contracting authorities to the duty to consider the option of making changes.[61]

For the rightful use of such flexibility, the contracting authority must demonstrate that, in fact, unforeseeable circumstances existed and that, while preparing the public procurement, it did not contribute to the occurrence of such circumstances. In other words, the preparation of the procurement procedure was diligent.

Considering that the sixth-generation public procurement directives have been in force for twelve years already, it is remarkable that there are still only a few references to what constitutes unforeseeable circumstances. The scholars list the unforeseeable events expanded upon previously in this article as unforeseeable circumstances, including floods, fires, volcanic eruptions, earthquakes, general strikes, armed conflicts or border or seaport blockades, and the COVID-19 outbreak.[62] S. Arrowsmith also names a terroristic attack as such an unforeseeable event.[63] If a tenderer is included on a sanctions list, this could also be an unforeseeable circumstance. There is, nevertheless, room for arguing that unforeseeable circumstances in the meaning of Article 72 of the Public Sector Directive are broader than the unforeseeable events allowing for the application of the negotiated procedure without prior notice.

First, the explanation of the directive and the wording of the referred articles differentiate between unforeseeable events and circumstances, indicating that the meanings of these notions do not coincide. And there is a logical reason for that—art.72 is meant for especially long-term public procurement contracts, while art.32(2)(c) allows for a conclusion of a new public procurement contract on restricted terms. The public procurement contract that needs modification has already been published through a public procurement procedure prior to the contract's conclusion. In contrast, the negotiated procedure without prior notice allows for the conclusion of an entirely new contract without the market participants being aware of it. Thus, the impact on the principle of transparency and the fundamental rights of the tenderers is different.

Second, in the course of fulfilling long-term contracts, unforeseeable events such as earthquakes or forest fires may not occur. Still, over a ten-year period, technology might substantially change how a service is bought and delivered. The EU has decided to ban the sale of combustion engine cars and vans from 2035.[64] Even now that this is known, this decision, for example, certainly affects other economic

[59] Public Sector Directive, explanation no 109.

[60] S. Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, 3rd edn. (Sweet & Maxwell, 2014), Vol.1, p.590.

[61] M.A. Simovart. Unforeseen circumstances that justify changes to public contracts. In: D. A. Dragos, K.M. Halonen, B. Neamtu, S. Treumer (Eds.). *Contract Changes. The Dark Side of EU Procurement Law*. Edward Elgar Publishing, to be published in 2023 (European Procurement Law series), pp.69–70.

[62] R. Caranta, A. Sanches-Graells, editors. P. Bogdanowicz, European Public Procurement. Commentary on Directive 2014/24 (Edward Elgar Publishing, 2021), pp.786–787.

[63] S. Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, 3rd edn. (Sweet & Maxwell, 2014), Vol.1, p.590.

[64] Available on the Internet: *https://www.europarl.europa.eu/news/en/press-room/20230210IPR74715/fit-for-55-zero-co2-emissions-for-new-cars-and-vans-in-2035* (12.11.2025).

areas where ongoing public procurement contracts are in place, where such influence on fulfilment is unforeseeable (for instance, long-term concession agreements). Or, as seen today, material prices may gain unexpected heights, and there are considerable disturbances in the supply chain due to several concurring reasons. As a result, this renders the fulfilment of the public procurement contract, as initially agreed, useless or unproportionally burdensome, even without an abrupt natural disaster. As stated by E. Plas, perfect contracts cannot be drafted in advance, and new insights during the execution phase are often grounds for amending the contract.[65]

Thus, the clause is intended for circumstances that generally occur within a specified time frame (without a sudden or abrupt event), whereby the coming about and the exact nature of the changing circumstances were unforeseeable when public procurement was initiated. So, as referred to by P. Bogdanowicz, a change of law[66] and a significant increase in the cost of materials and labour[67] may also be unforeseeable circumstances that have occurred, allowing for the modifications.

That being said, all the aforementioned unforeseeable events and circumstances, on occasion, do not constitute unforeseeable circumstances in the meaning of art.72. The nature of such events and circumstances needs to be sudden and/or normally unforeseeable. Floods, forest fires, or even a change in laws or an infectious disease outbreak may (and even should) be predictable in some regions. Therefore, if such events recur in a specific region or the circumstances are reasonably known to the contracting authority, they constitute circumstances that the contracting authority should have considered while preparing the tender documents.[68] Therefore, the unforeseeable circumstances that allow for modifications based on art.72 may also vary depending on the characteristics of each individual contract, making it challenging for scholars to provide a definitive list of unforeseeable circumstances that can always be applied.[69] Essentially, it seems that even almost twelve years after the entry into force of the sixth generation public procurement directives, the best practical advice there is to give to the contracting authorities is that ‘it depends’ and that it should be ‘thoroughly analysed’ as there is no reasonable way of determining a lawful modification in advance.

At the same time, what is clear is that the changed circumstances may not depend on the internal factors caused by the contracting authority itself,[70] but often, such internal errors are mistaken for external circumstances. This makes the distinction between ‘genuine unforeseeable circumstances’ complicated from the “un-genuine unforeseeable circumstances’. In the Spanish railway building cases (T-540/10 and T-235/11), the CJEU analysed this based on the fourth generation directives, where the ground now part of art.72 was still part of the provision regulating the use of the negotiated procedure without prior notice.[71] The cases were later dismissed due to noncompliance with the time limits, but the Court’s argumentation remains of interest.

The European Commission decided to decrease the funds granted for the project due to breaches in some procurements conducted in the early 2000s. The contracting authority had signed many procurement contracts as a result of negotiated procedures without prior notice. The contracting authority believed it was rightfully entitled to use the procedure as there were unforeseeable circumstances unknown to the procurement authority when commencing the projects. The CJEU rejected the Kingdom of Spain's reasoning in each aspect.When generalising, the CJEU stated that the procurement authority needed to be more

[65] E. Plas. “Amendments to public contracts: in search of a sufficient degree of transparency” (2021) 1 P.P.L.R. 7.
[66] R. Caranta, A. Sanches-Graells, editors. P. Bogdanowicz, *European Public Procurement. Commentary on Directive 2014/24/EU* (Edward Elgar Publishing, 2021), pp.786–787.
[67] P. Bogdanowicz, *Contract Modifications in EU Procurement Law* (Edward Elgar Publishing, 2021), p.97.
[68] *Obshtina Razgrad* (C-441/22) [2023] EU:C:2023:970 at [66]–[71].
[69] See also S. Treumer. “Contract changes and the duty to retender under the new EU public procurement Directive” (2014) 3 P.P.L.R. 151.
[70] Public Sector Directive, explanation 109.
[71] Article 20(2)(f), Council Directive 93/38 of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors [1993] OJ L199.

diligent in identifying and mitigating project-related risks that could, in the future, necessitate additional work.[72]

For example, the CJEU stated that the mere fact that a public entity outside the contracting authority requires the carrying out of additional works cannot, in itself, be regarded as an unforeseeable circumstance.[73] If the appropriate national authorities have not been consulted in a timely manner, the possibility that they might later provide input to change the initial project plans is not unforeseeable.[74] Likewise, mistakes in the project, such as omissions and measurement and solution errors that are not constructive to implement, also do not fall within the notion of unforeseeable circumstances.[75] Such circumstances may feel like external factors to the contracting authority, but are not. As stated earlier, a contracting authority must be identifiable with all the authorities in that Member State. Therefore, a Member State must assume responsibility for all actions of the various authorities within that State. It must not be possible for one authority to excuse itself on the ground that it does not know what another authority is doing or is about to do.[76] Otherwise, the directives could be circumvented, and the realisation of the aims pursued by the directive would thus be deprived of its effectiveness.[77]

3.2. The duty of diligence of a contracting authority for deciding on the modifications

The explanations of the directives list[78] general due diligence obligations that a diligent contracting authority is to follow to conclude that it may modify the contract in case of an unforeseeable circumstance. Such activities are a thorough preparation of the *initial award* by the contracting authority, including taking into account the following:

1) the nature and characteristics of the specific project;

2) good practice in the field in question; and

3) considering the need to ensure an appropriate relationship between the resources spent preparing the award and its foreseeable value.

According to the CJEU, the operative part of an act (i.e., the explanations to the directive) is indissociably linked to the statement of reasons for it, with the result that, when it must be interpreted, an account must be taken of the reasons that led to its adoption.[79] Therefore, these obligations, as outlined in the explanations of the directives, serve as a framework for assessing the due diligence of a contracting authority's activities when preparing the initial public procurement. However, the list is not exhaustive. Due to the vast nature of the EU public procurement principles and the fact that the due diligence obligation is derived from these principles, there may be other specific diligent preparatory steps that the contracting authority needs to take for individual procurements to ensure it has been reasonably diligent.

The aforementioned due diligence obligations framework may also be regarded as a roadmap for the diligent preparation of any public procurement, as the directives do not distinguish the due diligence of a contracting authority in cases where the contracting authority wishes to amend the contract later on and in cases where amendments are not needed. Therefore, it may be assumed that the EU legislator presumes the same kind of diligence from all contracting authorities in preparing any public procurement.

Although the directives' explanations touch upon the due diligence of a contracting authority in the initial award procedure, due diligence also applies when deciding on modifications. The directives provide no guidance on this matter, meaning that it is up to the contracting authority to choose, based on EU public

[72] For a more thorough analysis, see K. Härginen. "Duty of diligence of a contracting authority in the EU public procurement law" (2022) 2 P.P.L.R. 76–88.
[73] *Spain v Commission* (T-540/10) [2013] EU:T:2013:47 at [90].
[74] *Spain v Commission* (T-540/10) [2013] EU:T:2013:47 at [92], and *Spain v Commission* (T-235/11) [2013] ECLI:EU:T:2013:49 at [84]–[86].
[75] *Spain v Commission* (T-540/10) EU:T:2013:47 at [109].
[76] Opinion of Advocate General Elmer in *Commission v Germany* (C-318/94) [1996] EU:C:1996:41 at 26.
[77] See, for example, the *effet utile* case C-434/97 *Commission v France* EU:C:2000:98 at [21].
[78] Accordingly, explanation no 109 in the Public Sector Directive; explanation 76 in the Concessions Directive, and explanation 115.
[79] *HUNGEOD and Others* (C-496/18) [2020] ECLI:EU:C:2020:240 at [69].

procurement principles and the due diligence stemming from them, the best way to determine whether an unforeseeable circumstance is present, allowing for modifications.

For example, when the tenderer proposes raising the contract price due to a price increase, relying on the price increase as an unforeseeable circumstance. In such a case, in addition to evaluating the due diligence of the initial public procurement, the contracting authority would need to thoroughly investigate whether the prices have increased, by how much, when, and whether the tenderer should have considered this while submitting the tender. Therefore, the contracting authority should make by itself all reasonable efforts to verify that the alleged unforeseeable circumstances exist. Such a verification process could be similar as is the process for verifying the tender price in case of a suspicion of an abnormally low price.

The directives do not differentiate the degree of due diligence based on the contracting authority's characteristics or the estimated value of the contract. The degree of diligence depends mostly on the nature and characteristics of the project. The impact of potential due diligence breaches on the fundamental rights of tenderers and the internal market is the same once the estimated value reaches the thresholds set by the directives.

Next, the actions a contracting authority needs to have taken to conclude that an unforeseeable circumstance in the meaning of art.72(1)(c) of the Public Sector has not arisen from the poor preparations by the contracting authority are discussed.

3.3. Obligations related to the thorough preparation of the initial award

(a) Considering the nature and characteristics of the specific project

Public procurement is a tool for achieving the goals entrusted to the contracting authority by the public. It involves coordination and communication with other stakeholders in a project's planning and execution phases. Thus, the key here is that as part of the contracting authority’s due diligence, the directive’s explanation does not oblige the contracting authority to consider the nature and characteristics of a ‘specific procurement’ but a ‘specific project’. This indicates that the due diligence obligation while preparing the initial award is broader, including the whole reason for the award and not narrowly the need for a specific award itself.

This corresponds with the directives’ more specific regulation about calculating the estimated value of the public procurement[80] and the subdivision of public procurement into lots.[81] The contracting authority is to consider all future purchases while calculating the value and is banned from technically subdividing procurements into lots to avoid a proper procedure. Thus, the directives’ regulation also assumes that the contracting authority makes decisions based on the main reason for public procurement (the whole project) and not only on individual purchases.

The notion that the contracting authority’s due diligence depends on the nature of the project means that the more detailed the project is, involving a high amount of information and interested parties, the higher the contracting authority’s due diligence of being aware of all project-related information, including all necessary administrative procedures needed to be finished before deciding on the scope of the procurement and initiating a tender. Again, in practical terms, the stronger the project management must be.

In the aforementioned Spanish railway case, the CJEU stated that a normally diligent contracting authority must achieve a prior consensus of the local governments affected by the construction.[82] Additionally, during the initial tendering phase of the contract, the contracting authority is to take due

[80] Article 5, Public Sector Directive.
[81] Article 46, Public Sector Directive.
[82] *Spain v Commission (T-540/10) EU:T:2013:47* at [90].

account of the possible harmful effects and environmental impact of such a contract[83], and, at least during the construction of such infrastructure, take reasonable account of possible changes in the socio-economic and demographic conditions of the areas concerned.[84] The nature of the railway construction project was complicated, detailed, and lengthy, which the contracting authority failed to consider before initiating the tenders. This oversight led to numerous additional negotiated procedures without prior notice due to changes in the initial project.

At the same time, the contracting authority's due diligence also depends on the project's duration. As indicated by the CJEU, the contracting authority must consider the information that may change during the project's execution. The longer the project, the more foresight the contracting authority needs in planning. Nevertheless, the contracting authority's obligation to consider the relevant information is not lower by shorter projects; it is generally just more easily achievable. The contracting authority still needs to define the scope of the procurement and research the necessary information for that.

The nature and characteristics of a project can reveal instances where the contracting authority lacks the necessary skills and expertise to prepare and conduct the procurement process independently. An example of this could be when the technical description of a project requires specialised knowledge of natural equipment or processes for building a CNG and LNG fueling station, but the contracting authority has no expertise in this field. In such a case, the contracting authority is required to involve a gas specialist who advises on the preparation of the technical description and the execution of the contract, ensuring that the project is carried out effectively in accordance with relevant regulations and standards. Additionally, the contracting authority may require support from a range of specialists, including lawyers, economists, analysts, and a project manager. It is thus part of the due diligence of the contracting authority to identify the lacking expertise and involve the necessary specialists or procure the advisory services.

Considering the nature and scope of the project would also mean considering the overall economic changes and adding relevant clauses to the contract, whereby it is already apparent in the initiation phase of the procurement that such clauses are most probably needed in the execution phase of the project, like indexation of the contract price or alternatives for changing the contract (reducing or expanding the scope and/or conditions for prolonging the execution deadline when specific circumstances arise, etc.).[85] Thus, adding flexibility to the future execution phase by regulating all reasonable contract conditions in advance that any reasonably diligent tenderer would do in preparing and executing such a project. Generally, such clauses are missing from the contracts because the contracting authorities have not diligently researched the nature and specifics of the project. Thus, the need for changes surprises them later on but is not unexpected in terms of due diligence.

(b) Considering the good practice in the field in question

In terms of due diligence, this involves the contracting authority's active efforts to become aware of relevant good practices, such as guidelines or other soft-law regulations, particularly in the project's field, for example, model contract conditions. If the contracting authority is unaware of such good practices in the relevant field, it would be required to initiate preliminary market consultations.

Thus, when assessing the due diligence of the contracting authority in the context of art.72(1)(c), if the unforeseeable circumstances arose from the fact that the contracting authority was unaware of the good market practice and being aware of that would have eliminated the need for later modifications, it is to be

[83] *Spain v Commission* (T-540/10) EU:T:2013:47 at [80].
[84] *Spain v Commission* (T-540/10) EU:T:2013:47 at [83].
[85] See also M.A. Simovart. Unforeseen circumstances that justify changes to public contracts. In: D. A. Dragos, K.M. Halonen, B. Neamtu, S. Treumer (Eds.). *Contract Changes. The Dark Side of EU Procurement Law*. Edward Elgar Publishing, to be published in 2023 (European Procurement Law series), p.93-94.

concluded that the contracting authority has not been diligent in the initial award and thus the modifications are not allowed.

(c) Balance between the preparatory investments and their foreseeable value

Public resources are always limited, and it should be weighed which preparatory investments to make, considering both time and money. How to determine the point where additional investments in preparatory activities beyond a certain level do not add much value and cannot be expected from the contracting authority?

The balancing point should be the possible threat of unequal treatment of the tenderers or breaching the transparency principle. That is, the contracting authority has gathered essential knowledge to conduct the procurement, thereby safeguarding all EU public procurement principles and the fundamental rights of tenderers. In practical terms, it would mean that the contracting authority is sufficiently informed of all relevant aspects of the project for drafting the procurement conditions, including the technical description, qualification, and evaluation criteria.

Therefore, the duty of diligence requires that the contracting authority actively identify and acknowledge those parts of the project that require additional information for proper legal decision-making. With these project parts, the contracting authority's expected degree of diligence is heightened. In case the information (or the lack thereof) later on shows that a decision to change the contract would depend on the missing or under-researched information, then the foreseeable value of such preparatory investment is very high, as this would constitute the future need to restrict the competition by ordering the required goods or services through a contract modification. The investments are thus relevant when they help ensure that the EU public procurement principles are followed in the initial procurement and avoid the need for later contract changes that could and should have been part of the initial public procurement scope.

In the event that the contracting authority failed to properly acquire certain information because it chose not to investigate, and despite this, continued to conduct the public procurement, which later necessitated modifications, the contracting authority has not been diligent. In other words, if new relevant information is obtained from additional analyses or expert opinions that could change the scope or relevant terms of the procurement documents and, thus, the contract conditions, the duty of diligence obliges the contracting authority to make such investments.

4. Conclusions

The CJEU case law analyzed in this article implies that, generally, there are no genuine unforeseeable events or circumstances that would invoke the use of the analyzed clauses and indicate preparatory mistakes in the procedure. However, the CJEU practice so far and the legal acts indicate that the notions 'unforeseeable event' and 'unforeseeable circumstance' do not have the same meaning. Therefore, legal decision-making differs in both cases, even if a similar event or circumstance appears to be the cause of a new procurement or contract change.

An unforeseeable event is, for example, a natural disaster that creates an urgent need for procurement. Unforeseeable circumstances encompass a broader range of events or circumstances that may necessitate modifying a contract. Unforeseeable circumstances do not (always) require there to be an abrupt event and may also develop over time in a way that we see coming, but the contracting authority was unable to see while preparing the procurement procedure and signing the contract.

The use of the negotiated procedure without prior notice is, however, only allowed after an unforeseeable event has occurred (*ex-post* use of the procedure. At the very least, the CJEU case law does not currently support the ex-ante use of the procedure before an unforeseeable event has even occurred. Apart from identifying an unforeseeable event and the urgent need that follows; the duty of diligence requires the contracting authority to analyse whether an accelerated deadline for the submission of tenders by any other procedure would be possible. At the same time, a very high degree of diligence is expected of a contracting authority while proving the existence of such an event and the urgent need. Even when it is apparent that an unforeseeable event exists, that does not automatically create and warrant an urgent need. A contracting authority also needs to weigh the amount of the products or the scope of the services required and establish for how long those are needed before a standard public procurement procedure can be initiated and a public procurement contract concluded. Furthermore, the duty of diligence also requires the contracting authority at least to assess and, if possible, investigate whether more than one market participant can be involved.

The level of diligence expected of a contracting authority is also very high when deciding on modifications to an existing public procurement contract due to unforeseeable circumstances. However, the content of the obligations differs from that applied to choosing the exceptional negotiated procedure. Changes to a contract can be made when an unforeseeable event occurs and other unforeseeable circumstances arise. On the one hand, the due diligence obligation involves assessing whether the unforeseeable circumstances stem from the poor preparation of the initial award. On the other hand, the contracting authority may also conduct a further investigation to verify the presence of the unforeseeable circumstances that the tenderer states.

It's essential to be very careful and thorough in both cases: conducting a negotiated procedure without prior notice and modifying the contract due to unforeseen circumstances. However, neither option can really rectify problems stemming from poor political or project management decisions. Therefore, the emphasis remains on the diligent preparation of the procurement as a whole.

Make-or-Buy Decisions and EU Public Procurement Law: A Stronger Role for Transparency?

Willem A. Janssen*

EU law; In-house contracts; Netherlands; Public procurement; Transparency

1. Introduction

Public authorities regularly face the challenge of determining the most effective way to ensure that a public task or responsibility is properly fulfilled. When societal needs are not adequately met by the market, whether due to inefficiency, limited access, or a complete lack of provision, governments must decide how to best intervene. When a public authority considers becoming directly involved in providing a service as a solution, it must decide upon what is referred to as the 'make-or-buy decision': should the activity be performed in-house, via a collaboration with other public authorities or entrusted to a market party via a public procurement procedure? This question is relevant for tasks generally coined as being in the public interest, such as the collection of waste, and for back-office services, such as IT or cleaning services. Recent vehement political debates about the provision of public transport concessions in the Dutch province of Zeeland that appears to have resulted in a change in service provision from 'buy' to 'make', the ongoing debate about the collection of waste in various cases before Dutch Courts or the question about who can provide cleaning services for the central Dutch government, showcase this discussion is very much alive in the Netherlands.[1] These discussions take place all over the European Union, often touching more fundamentally on how one perceives the role of market, the government, and everything in between.[2]

The decision to provide a service in-house, to cooperate with other authorities, or contract out the provision of a service has consequences for what rules are applicable. Where contracting out is preferred, the application of EU public procurement law, most predominantly vested in Directives 2014/24, 2014/23 and 2014/25 ('Public Procurement Directives'), typically limits the possibility of a direct award and requires adherence to public procurement principles of equality, transparency and proportionality. Alternatively, when collaboration with other public authorities is preferred, contractual relations within the scope of this field of law, means that the collaboration must rely on the various exemptions, such as the institutionalised exemption or the non-institutionalised exemption. Since 2014, these exemptions have been included in art.12 Directive 2014/24 and its equivalents in the other directives.[3]

Over the years, these exemptions have sparked much debate before the CJEU and on the national level.[4] These discussions have ranged more fundamentally from contracting authorities noting that the limited

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[1] See the legislative discussions about the Dutch Provincial Act on the In-house Provision of Public Transport Concessions *(Wet provinciale inbesteding vervoerconcessies*) or the article Cleantotaal, Henk Cornelisse, Inbesteden schoonmaak Rijksoverheid: Aannames correct?,*CleanTotaal.nl*, 24 June 2014, and note the Irado case discussed under note nr. 28.

[2] See the discussion below in paragraph 4.

[3] Respectively in art.11, art.12(1-3), and art.12(4).

[4] See, for instance, J Wiggen, "Public Procurement rules and cooperation between public sector entities: the limits of the in-house doctrine under EU procurement law" (2011) *Public Procurement Law Review* 157; J Wiggen, "Public procurement law and public-public co-operation: reduced flexibility but greater legal certainty ahead? The Commission's Staff Working Paper on the application of EU public procurement law to relations

scope of these exemptions negatively influences their discretionary power to perform public tasks to, on the contrary, market parties claiming that these use of these exemptions negatively influences competition on the market. However, the underlying objective of the litigating parties oftentimes seems also to indirectly aim at changing the outcome of the make-or-buy decision towards contracting out service provision. In this contribution, I consider how this decision is currently sheltered from the influence of European law in the EU Treaties, the case-law of the CJEU and in the Public procurement Directives (paragraph 2). Secondly, I discuss that challenging the exemptions in art.12 before the courts in an attempt to change the outcome of the make-or-buy decision seems futile due to their organisational nature and related lack of transparency (paragraph 3). Within this context, I consider two reforms of the Public Procurement Directives to increase transparency: the publication of the use of exemptions (paragraph 4) and the application of the principles of due care and proportionality to the make-or-buy decision (paragraph 5). I conclude with some final thoughts and a proposal for a redrafted art.40 Directive 2014/24 (paragraph 6).

2. The make-or-buy decision and the current limits of EU public procurement law

At present, it is fair to say that the make-or-buy decision is shielded strongly from the influence of EU public procurement law.[5] As Advocate-General Mengozzi noted, there is *'no provision having conferred on the Union the power to intervene in the internal organisation of its Member States.'*[6] In this light, art.345 TFEU prevents forced privatization of property ownership and, more importantly, art.4(2) TEU considers: *'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.'*Whereas this provision is mostly debated in rule of law-backsliding discussions[7], it provides an important demarcation of EU law as well by referring to '*their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'*.I have argued elsewhere that the constitutional and organizational structure of a Member State and how it wishes to organize can also be included in this 'national identity', thereby creating a starting point to conclude that the make-or-buy decision is still a discretion of the Member States themselves.[8]

This European constitutional position in the Lisbon Treaty is a logical consequence of the preceding jurisprudence of the CJEU. By following the Opinion of Advocate-General Roemer, the Court confirmed already in 1971 in *International Fruit Company* that each Member States can decide which public authority in their own national constitutional structure should be granted the responsibility to perform certain public tasks.[9] As a consequence, the allocation of 'powers' and 'obligations' is 'solely a matter for the constitutional system of each state'. In *Horvath*, the Court concluded even more broadly that *'[t]hus, it is settled case law that each Member State is free to allocate powers internally and to implement Community acts which are not directly applicable by means of measures adopted by regional or local authorities, provided that*

between contracting authorities and the 2011 proposal for a new Directive" (2012) *Public Procurement Law Review* 225; Kris Wauters, *Cooperative Agreements between Public Authorities: The Influence of CJEU Case Law on National Legal Systems* (Intersentia 2015); Willem Janssen, *EU public procurement law & Self-organisation*, Eleven 2018; Mario Comba and Steen Treumer (eds), *The In-House Providing in European Law* (DJØF 2010); Elisabetta Manunza, *EG-aanbestedingsrechtelijke problemen: bij privatiseringen en bij de bestrijding van corruptie en georganiseerde criminaliteit [EU public procurement problems related to privatisations and the fight against corruption and organised crime]* (Kluwer 2001); Willem Janssen, "The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach?" (2014) 10 *Utrecht Law Review* 168.

[5] This discussion builds on the analysis in Janssen, n. 3, pp.79–107.

[6] Opinion of A-G Mengozzi, 30 June 2016, *Remondis*, para.39.

[7] M. Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?', *Yearbook of European Law*, 2014, pp.298–334;

[8] The Court concluded in *Sayn-Wittgenstein*that this standpoint also includes the choice of a State to be a Republic. CJEU, 22 December 2010, *Sayn-Wittgenstein*, para.81-84.

[9] Opinion of A-G Roemer, 7 December 1971, *International Fruit Company*, para.1122.

that allocation of powers enables the Community legal measures in question to be implemented correctly [...].'[10] After the enactment of the Lisbon Treaty, the Court referred explicitly to Article 4(2) TEU in *Digibets* and *Remondis*.[11] In the first case, the Court noted that 'protection conferred' by this article also includes 'internal reorganisations of powers' within the Member States. Furthermore, it further expanded this conclusion by also including reorganisations and reallocations of competences in its scope.[12]

When it comes to the demarcation of the influence of EU public procurement law, the CJEU has also provided clarity on the discretionary power to choose for self-supply and cooperative forms of public task provision. In *Teckal*, where the exclusive right exemption could not be applied and the institutionalized exemption was interpreted, the Advocate- General stated that *'community law does not require contracting authorities to observe the procedure ensuring effective competition between interested parties where those authorities wish to take on themselves the supply of the products they need.'*[13] When considering a direct award for waste management, the Court itself confirmed the possibility to use one's own resources in the subsequent case of *StadtHalle*. It concluded that a *'public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments.'*[14] Furthermore, the logical consequence of being able to self-supply a service is that a public authority is not obliged 'to call upon entities not forming part of its own departments'.[15] More strictly speaking, Advocate-General Kokott noted that *'extensive interference in the organisational sovereignty of Member States and, in particular, in the self-government of many municipalities [which] is—even from the point of view of the market-opening function of procurement law—entirely unnecessary'*.[16]

The position of Public Procurement Directives follows suit with a hesitant stance towards impeding on the make-or-buy decision. The allocation of responsibilities and competences is left explicitly out of its scope in art.1(6) Directive 2014/24. More importantly, the preamble notes that *'It should be recalled that nothing in this 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 within the meaning of this Directive'*.[17] The preamble also further explicitates that *'However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.'*[18] The Concession Directive even refers to 'The principle of free administration by public authorities' by implicitly referring again to art.345 TFEU in subs.2 and art.4(2) TEU in sub 1: *'This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services. Those authorities may choose to perform their public interest tasks with their own resources, or in cooperation with other authorities or to confer them upon economic operators. 2. This Directive does not affect Member States' systems of property ownership. In particular it does not require the privatisation of public enterprises providing services to the public.'* The above constitutional embedment and the case-law of the Court underline the current limits of EU law, and thus also the limits of EU public procurement law in influencing the make-or-buy decision.

[10] CJEU, 16 July 2009, *Horvath*, par. 50.
[11] CJEU, 12 June 2014, *Digibets*.
[12] CJEU, 21 December 2016, *Remondis*, para.41.
[13] Opinion of A-G Cosmas, 1 July 1999, *Teckal* at [55].
[14] CJEU, 11 January 2005, *Stadt Halle*, para.48. This ruling was confirmed in CJEU, 13 November 2008, *Coditel*, para.48; CJEU, 9 June 2009, Commission v Germany, para.45.
[15] CJEU, 11 January 2005, *Stadt Halle*, par. 48.
[16] Onion of A-G Kokott, 11 March 2005, *Parking Brixen*, para.71.
[17] Recital No. 5 Directive 2014/24.
[18] Recital No. 31 Directive 2014/24.

3. The institutionalised and non-institutionalised exemption as an indirect discussion of the make-or-buy decision[19]

Despite this above context, the CJEU has been willing to impede on the ‘make’ alternatives following the make-or-buy decision by providing specific criteria for institutionalised and non-institutionalised cooperation. Accordingly, the make-or-buy decision itself is still left at the discretion of public authorities, but once the choice is made these rules provide boundaries based on the principles of equality, transparency and proportionality. Clearly, this also indirectly affects the make-or-buy decision, because these criteria also limit the extent to which cooperation is able to be applied in practice.

As interpreted for the first time by the CJEU in the milestone cases *Teckal* and *Commission/Germany*[20], art.12 Directive 2014/24 codified the subsequent lines of the Court’s jurisprudence and changed its contents as well. For both these exemptions, the discussions in academia and practice have predominantly focused around their scope due to a lack of legal certainty.[21]

As included in art.12(1-3) Directive 2014/24, the institutionalized exemption notes that a public contract awarded to a legal person governed by private or public law can be exempted if three cumulative conditions are fulfilled.[22] Accordingly, the control-criterion means that ‘the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments’ (a), the activities-criterion means that ‘more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority (b), and the private participation criterion means that ‘there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.’ (c). Additionally, joint control, as was interpreted by the CJEU in the *Coditel* case[23], is further defined by noting the need for the fact that a) ‘the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities’, which includes the possibility to have individual representatives represent several or all of the participating contracting authorities, b) ‘those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person’, which is similar to that of singular control, and that c) ‘the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.’ It was further clarified by the EU legislature that control can also exist in a holding structure and that horizontal awards and reversed awards, which use existing institutionalised exemptions, are also allowed.[24]

Outstanding legal questions for this exemption are at least if reversed and horizontal awards based on art.12(2) can also take place in joint control scenarios[25], and to what extent there is a limit to how many authorities can be represented by a single representative to still fulfill the criterion of joint control, noting that it is a minimum requirement.[26] Earlier this year, the CJEU clarified that the total turnover of the holding structure—and not that of an individual contracting authority - must be used to calculate the activities

[19] The analysis is this section builds upon the analysis in Willem Janssen, ‘Reforming the rules on public-public cooperation: towards legal certainty for art.12 Directive 2014/24, in Willem Janssen, François Lichère and Kirsi-Maria Magga (eds.), Reforming EU Public Procurement: Proposals for the Reform of Directive 2014/24, Edward Elgar (April 2026).

[20] CJEU, *Teckal* (C-107/98) EU:C:1999:562, [1999] ECR I-08121; Case *Commission v. Germany* (C-480/06) EU:C:2009:357, [2009] ECR I-04747.

[21] Note the analysis of the research noted in reference n. 3.

[22] Wojciech Hartung, 'Commentary on art.12(1–3) Directive 2014/24 in Roberto Caranta, Albert Sanchez-Graells (eds.), *EU Public Procurement* (Edward Elgar 2021).

[23] Case *Coditel* (C-324/07) EU:C:2008:621, [2008] ECR I-08457.

[24] Article 12(2) Directive 2014/24/EU.

[25] It appears this is not possible due to the reference to art.12(1) Directive and the conclusions in the *Sambre/Biesme* case (22 December 2022, Joined Cases C-383/21 and C-384/21). Also see on this Willem Janssen, E. Olsson, “On Competition, Free Movement and Procurement: Irgita’s Public Cooperation Conundrum”, (2020) 1 *European Procurement & Public-Private Partnership Law Review* 2–12.

[26] CJEU, 22 December 2022, Joined Cases (C-383/21 and C-384/21) (*Sambre/Biesme* case).

criterion.[27] Many questions still remain, however, about what turnover must be included in the calculation of this criterion. In practice, for instance, questions arise related to if the scope of the exempted contract or objectives of the cooperation provide the basis for the answer to this question.

The second prominent exemption in this context is the non-institutionalised exemption, vested in art.12(4) Directive 2014/24, which was codified after much less case-law from the CJEU when compared to the institutionalized exemption.[28] This exemption notes that a contract concluded 'exclusively between two or more contracting authorities' falls outside the scope of Directive 2014/24 if 'the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common' (a), if 'the implementation of that cooperation is governed solely by considerations relating to the public interest' (b) and 'the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation' (c).

Outstanding questions include at least 1) how the concept of 'ancillary activity' must be interpreted, and how that relates to 'tasks in the public interest' following the Stadt Köln case related to criterion (a),[29] 2) if profits can be made based on the requirement that the cooperation must be 'governed solely by consideration relating to the public interest' related to criterion (b), what turnover must be used under (c), and what 'complementary' cooperation means in practice for the shares of each participating contracting authority.

The above outstanding questions related to the institutionalised and non-institutionalised exemptions might lead to discussions before the CJEU or national courts, which will compensate for the lack of the promised legal certainty in the reforms of 2014.[30] One issue here is that the use of these exemptions remains unpublished, thereby limiting the chances of litigation, which is discussed in para.5.

In addition to litigation to enforce legal certainty, it is also likely that market parties contesting compliance with these exemptions are in fact aiming to alter the make-or-buy decision, and wish to ultimately obtain a public or concession contract.[31] However, the 'organisational approach' to these exemptions makes such attempts futile.[32] If the criteria of these exemptions are sufficiently fulfilled, there is no legal ground to contest the decision to provide a service through cooperation with other public authorities before the courts. Even if the cooperation is found to not comply with either one of the exemptions' criteria, it is clear that a renewed look at the criteria would provide ample opportunity for legal compliance through a different organizational structure. In other words, it means that market parties may have attempted, but are unable to contest 'make' decisions by contracting authorities based on EU public procurement law. A consequence of this regulatory approach is that there is an enforcement gap related to the make-or-buy decision, particularly in Member States that rely on the willingness of market parties to litigate in the absence of a public enforcement agency.

4. Member State initiatives that regulate the make-or-buy decision

Despite the hesitant stance of EU law to towards regulating the make-or-buy decision, it is clear that the Member States, including Poland, Finland, Italy and the Netherlands, are more active in regulating this

[27] CJEU, 15 January 2026, (C-692/23) (*Irado*). Also see Opinion of Advocate-General Rantos, 30 April 2025, C-692/23, who argued to also link the concept of undertaking with economic operator for consistency of EU law's interpretation. The analysis is this section builds upon the analysis in Willem Janssen, 'Reforming the rules on public-public cooperation: towards legal certainty for art.12 Directive 2014/24, in Willem Janssen, François Lichère & Kirsi-Maria Magga (eds.), Reforming EU Public Procurement: Proposals for the Reform of Directive 2014/24, Edward Elgar (April 2026).

[28] Case *ASL di Lecce* (C-159/11), (C-386/11), [2012] EU:C:2012:817*Piepenbrock* [2013] EU:C:2013:385; *Commission v Germany* (n 18).

[29] CJEU, 20 May 2020, Case C-796/18.

[30] Recital 31 Directive 2014/24/EU.

[31] See also Sue Arrowsmith, Richard Craven, "Public Procurement and Access to Justice: a Legal and Empirical Study of the UK System" Procurement Law Review 227–252.

[32] Elisabetta Manunza, "Incoherente ontwikkelingen in de relatie Markt en Overheid", *Tijdschrift voor Aanbestedingsrecht*, 2013, pp.200–207.

decision-making process instead of solely leaving it to democratically represented bodies to oversee such decisions.[33]

Poland and Finland have altered the activities criterion of the institutionalized exemption and have limited, amongst other things, the percentage of market activities with the aim of preventing distortion of competition.[34] Lithuania also limits the possibility of market activities from a similar perspective, but additionally provides a legal test that this exemption can only be used if *'good quality and availability of services cannot be ensured if they are purchased through public procurement procedures'*.[35] Furthermore, art.192(2) of the Italian Public Procurement Code is even more explicit than the mentioned examples and includes a twofold legislative test: *'First, the contracting authority is obliged to explain the circumstances which led to its decision not to use a public procurement procedure. That condition arises from what has become the secondary and residual nature of in-house award, to which recourse may be had only if it is demonstrated, on the one hand, that there is a 'market failure' on the relevant market, relating to foreseeable failures to meet the 'objectives of universality and social solidarity, economy and quality of services and optimal use of public resources' and, on the other, that the in-house entity would remedy that failure. Secondly, the contracting authority must indicate the benefits which it would derive from the in-house award, whereas that is not necessary where a public procurement procedure is used.'*[36] This regulatory approaches seem to put the process of decision-making at the forefront, whilst also leaving space for public authorities to provide services in-house if this can be supported by meeting the set legal standards. By referring to the *Irgita* case, the CJEU has confirmed again in the *Rieco* case that national legislation limiting the application of art.12 and, thus, also the make-or-buy decision is allowed under EU law. In *Irgita*, the Court had already concluded that *'Article 12(1) of Directive 2014/24 must be interpreted as not precluding a rule of national law whereby a Member State imposes a requirement that the conclusion of an in-house transaction should be subject, inter alia, to the condition that public procurement fails to ensure that the quality of the services performed, their availability or their continuity can be guaranteed, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.'*[37]

Outside of the scope of art.12 Directive 2014/24/EU, a relevant limitation to the make-or-buy decision is also the approach taken in the Netherlands. The Dutch Public Transport Decree 2000 ('PTD 2000') explicates the obligation of a public procurement procedure for public transport concessions.[38] This approach limits the make-or-buy decision entirely, making 'buy' the default. Some local governments, however, are still also allowed to self-supply these services instead of initiating such a procedure based on the PSO regulation, which is implemented in the PTD 2000.[39] Interestingly, the principles of good governance apply to the make-or-buy decision in the Netherlands as well, which is discussed further under paragraph 5.

These mentioned Member State approaches differ substantively from former Member State the United Kingdom and the United States of America that have an extensive history in regulating the make-or-buy decision. For instance, the UK had a Compulsory Competitive Tendering regime that was embedded in the Local Government Planning and Land Act 1980 and the Local Government Act 1988, which was

[33] Willem Janssen, "Swimming against the Tide: the Harmonisation of Self-organisation through article 12 Directive 2014/24" (2019) *European Procurement & Public-Private Partnership Law Review* 145–155. Also see the interesting discussion of the question if the case-law by the CJEU in Irgita and others infers a need for transparency in this phase, which is convincingly answered in the negative. M. Sõrm, C. Ginter, Mari Ann Simovart, "Transparency obligations for make or buy decisions" (2023) *Public Procurement Law Review* 1–14.

[34] Laki julkisista hankinnoista ja käyttöoikeussopimuksista (Finnish Public Procurement Act).

[35] Article 10(2) of the Law on Public Procurement (as applicable on 1 July 2017).

[36] CJEU, 6 February 2020, Joined Cases *(Rieco)* C-89/19 to C-91/19 at [15].

[37] CJEU, 3 October 2019, Case *(Irgita)* (C-285/18) at [50].

[38] Wet Personenvervoer 2000, Stb. 2000, 564.

[39] An Amendment of the PTD 2000 was passed by the Dutch Parliament in 2012, which exempted the four major cities in the Netherlands (Amsterdam, The Hague, Utrecht and Rotterdam).

abolished in 1994. Broadly said, it required competitive tendering between an in-house bid and a bid from the market. Similarly, the UK's regulatory approach resembles the approach of the USA in which public-private competitions also exist under the US FAIR ACT and the OMB Circular A-76 2003, which has been under a moratorium for a long time now. Consensus appears to exist on their ineffectiveness, noting for instance the high amount of administrative burdens and fictiveness of the in-house bid in such competitions, making the competitive nature less effective.[40]

5. Reform of the Public Procurement Directives: two proposals to increase transparency

The current reform of the Public Procurement Directives will inevitably lead to discussions about the role of EU public procurement law when it comes to the make-or-buy decision. Building on the discussion before, it is argued here that these discussions could not only address the legal uncertainty related to art.12 Directive 2014/24. One prominent point is the lack of transparency related to this decision, which exists on two levels, namely the use of an exemption and the decision-making prior to its use. *5.1. A proposal for transparency related to the use of an exemption*

5.1. A proposal for transparency related to the use of an exemption

At this point in time, there is no obligation to publish the use of exemptions from the duty to tender under the Public Procurement Directives. Whereas many transparency requirements exist to uphold the principle of equality, such a requirement currently does not exist if contracting authority wants to use an exemption, including those of art.12 Directive 2014/24. As a consequence, how does an economic operator know if the 80-20% or the 20-80% rules are met? How does that operator know if illegal private capital is involved in the shareholding or if there is in fact sufficient (joint) control? Or if the cooperation between contracting authorities is really 'complementary' or if the scope of cooperation is not stretched too much?

The answer to these questions is that these operators simply do not know in many cases. As a consequence, it means that it is likely that many cooperations that do not meet the requirements of art.12 remain unchallenged, particularly in the absence of other enforcement mechanisms than litigation by aggrieved bidders. An exemption to this conclusion is when service provision had initially been contracted out, and subsequently, a public-public cooperation is preferred meaning that the next public contract is not put up for tender. The de-throned incumbent can of course challenge such decisions before the courts or others may have been notified through the grapevine, but many economic operators would be unaware of such a 'make' decision. It is argued here that including an obligation for contracting authorities to publish their reliance on these exemptions could be considered in this reform, because would it would improve enforcement and compliance without overburdening contracting authorities or affecting their right to self-organise themselves.[41]

5.2. A proposal for transparency related to the make-or-buy decision itself

In light of the reforms of the Public Procurement Directives, it is also of interest to explore including more transparency for the make-or-buy decision itself, which is currently lacking. This regulatory step could be justified due to the organisational nature of the noted exemptions. Alternatively, it seems that transparency for the use of an exemption adds only value by ensuring compliance with the related criteria of an exemption, whereas regulating the make-or-buy decision itself appears to fill this crevice.

[40] S. Schooner, 'Competitive Sourcing: More Sail than Rudder?', Public Contract Law Journal 2004, pp. 263-297; M. Blum, 'The Federal Framework for Competing Commercial Work between the Public and Private Sectors' in J. Freeman, M. Minow, *Government by Contract: Outsourcing and American Democracy*, Cambridge, Massachusetts: Harvard University Press 2009, pp. 63-64.

[41] For a brief first introduction to this proposal, see Janssen 2018, n. 3 above, p.7.

At present, the only reference to the phase prior to a public procurement procedure is the reference to the possibility of market consultations in art.40 Directive 2024/24: Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.'

In addition to further research on the regulatory approaches noted by the Member States, it could be of interest to also consider applying the principles of good governance, which in one way or another appear to exist in many legal systems of the EU under administrative law.[42] This could result in a more balanced approach to regulating the make-or-buy decision, by considering the Dutch approach derived from the algemene beginselen van behoorlijk bestuur (the principles of good governance), in particular the principle of due care and the principle of proportionality. This would focus on improving the decision-making itself, rather than substantively regulating the criteria to consider for this choice. The latter approach was put forward by Manunza, who has argued that such decision-making should be inspired by economic arguments.[43] As relevant as these arguments are, they are only a part of the pallet of aspects to consider when making the make-or-buy decision, including market maturity, sustainability, strategic autonomy, organizational difficulties, cultural values and so on.

Under art.3:2 of the Dutch *Algemene Wet Bestuursrecht* (the General Administrative Law Act), which applies to make-or-buy decisions through art.3:14 of the Civil Code, public authorities must gather the necessary information on the relevant facts and interests before making a decision to ensure compliance with the principle of due care.[44] Furthermore, the principle of proportionality is commonly operationalized by considering 1) the nature and scope of the administrative decision, 2) the nature and weight of the objectives served by the decision, 3) the nature of the affected interests and the extent of the impact and 4) the balancing of interests.[45] Interestingly, the two-step approach taken in Italy, noted before in relation to the *Rieco* case, has elements that relate to it by emphasizing the need to explain the reason why an authority did not take recourse to a procurement procedure and to explain the benefits of an in-house approach to service delivery. Problematically speaking, and this is visible in many of the Member States discussed, this approach appears to put contracting out as the deficit, rather than improving decision-making in general, noting the same regulatory approach could in fact be applied to contract out a service.

To further substantiate the potential of a more principled-approach based on Dutch experiences, the Jong JGZ case and the RSO case provide more context as to how this is applied by the Courts in relation to the make-or-buy decision, and how this approach could lead to more transparency.

5.2.1. The Jong JGZ case—the decision to provide health case services in-house

The *Jong JGZ* case before the District Court of Zeeland showcases this more balanced approach.[46] In this case, the municipality of Breda worked with a market party called Jong JGZ, offering youth health case services for 0–4 year olds. After some years of contracting out performance, the municipality then decided to award a contract to a public-public collaboration called GGD, in which many other municipalities cooperated for the provision of care services for 0-18 year olds. Jong JGZ appealed before the court by claiming, amongst other things, that a violation of the principle of due care and the principle of

[42] Henk Addink,*Good Governance: Concept and Context*, Oxford University Press, 2019.
[43] E.R. Manunza, Over grenzen. Van verplichtingen voor overheden naar rechten voor burgers., Inaugural address at Utrecht University, 29 September 2010.
[44] For a broad introduction, see Tom Barkhuysen at all, *Bestuursrecht in het Awb-tijdperk*, Kluwer 2024.
[45] For a clear application of this test, see below in paragraph 5.2.1.
[46] District Court of Zeeland-West Brabant, 23 November 2023, ECLI:NL:RBZWB:2023:8185 (*Jong JGZ*).

proportionality, both principles of good governance, had occured.[47] Jong JGZ argued that the municipality did not conduct sufficiently careful research into how youth health care could best be procured. For instance, the municipality allegedly did not investigate at what quality and price Jong JGZ could provide youth health care for the broader 0–18 age group. Consequently, the municipality would also not be able to compare the quality and price offered by Jong JGZ with those of the GGD. Furthermore, one of the municipality's arguments for choosing in-house provision was based on an incorrect percentage of children to whom Jong JGZ allegedly provides care. The make-or-buy decision was, according to Jong JGZ, partly based on incorrect facts. Contrarily, the municipality noted that it had conducted a very extensive preparatory process. It emphasised that one of the most important factors in its decision was ensuring the continuity of the care pathway, given that a public procurement procedure could lead to a periodic change of economic operator. Furthermore, amongst other things, price was not decisive according to the contracting authority.

As noted before, a Dutch public authority must gather the necessary information on the relevant facts and interests before making a decision from the perspective of due care.[48] Within this context, the court concluded that the municipality acted with sufficient care in preparing its decision to proceed with in-house provision. Relevant here, according to the court, are that the municipality established a project team led by an external project leader. This team held multiple discussions with Jong JGZ, the GGD, and other relevant parties in the field of youth health care. The findings were analysed and led to the development of four scenarios. The advantages and disadvantages of each scenario were mapped out. Even though Jong JGZ identified errors in the data concerning its own organization, these, however, do not relate to the choice between the GGD and Jong JGZ but to the broader choice between in-house provision and contracting out via a public procurement procedure. Accordingly, whether Jong JGZ is more cost-effective than the GGD is not a decisive factor according to the court, similar to the scenario in which the municipality would have opted for a public procurement procedure. The court also assessed the principle of proportionality. Jong JGZ argued that in-house provision entails greater adverse consequences than those that would exist if the contract was awarded via a public procurement procedure. According to Jong JGZ, the decision resulted in revenue loss, the need to close several locations, negative consequences for staff, and disadvantages for parents and children. These adverse effects, it argued, are disproportionate to the interests the municipality seeks to serve through in-house provision. Contrarily, the municipality maintained that the public interests served by its decision outweigh the purely financial interest of Jong JGZ. It argued that the interests of parents were better served by in-house provision and that it had already taken significant steps to accommodate the interests of employees. Furthermore, it further noted that Jong JGZ was long aware that the current agreement would expire at the end of 2023 and that the municipality might opt for in-house provision thereafter. Ultimately, the Court concludes that the consequences of this decision, therefore, fall within Jong JGZ's entrepreneurial risk. Both the municipality and the GGD stress that it is primarily for the administrative authority to balance the relevant interests and to determine what outcome is reasonable in a particular case.

Building on the test of proportionality noted before, the court concluded that the municipality's discretion concerns its authority to opt for in-house provision rather than contract out via a public procurement procedure.[49] In this respect, the court noted that the objective of the decision is to ensure the delivery of youth health care for children aged 0–18, which is a statutory responsibility of the municipality as also imposed as a duty under public law.[50] Within this context, youth health care may therefore be carried out either by Jong JGZ or by the GGD, alongside the GGD's existing core and additional responsibilities. Regarding the weight of the objectives, the municipality aimed to avoid a division in the youth health care system. All parties agreed that having one continuous care pathway for children aged 0–18 is desirable.

[47] *Jong JGZ*, n. 42, par. 4.
[48] *Jong JGZ*, n. 42, para.5.19 and onwards.
[49] *Jong JGZ*, n. 42, para.5.22 and onwards.
[50] Article 5 of the Public Health Act assigns this task to the municipal executive.

According to the court, the municipality substantiated the advantages of assigning the task to a single organisation and decided to entrust it to the GGD, which already performs public health functions and currently provides youth health care for this age group. After the in-house transfer, there would no longer be any need to transfer client files, which would otherwise be required periodically after a tender. Thirdly, the court considers that the interests of Jong JGZ and its employees are affected by the decision, given that the in-house award means Jong JGZ will lose its current assignment to provide youth health care for children aged 0–4 in Breda. During the hearing, Jong JGZ emphasised that the negative effects of in-house provision through the GGD are far greater than those of a public tender. Finally, it was noted by the court that the municipality's decision is taken within a broad discretionary power. Furthermore, the municipality's interest in proceeding with in-house provision outweighs the interests of Jong JGZ. The end of contract was foreseeable for Jong JGZ and a public procurement procedure could have led to the same adverse consequences if it would have lost the contract in that context.

5.2.2. The RSO case—the decision to provide cleaning services in-house

An earlier case before the Court of Appeals Den Haag showcases a similar approach to the principle of proportionality in relation to make-or-buy decisions.[51] In this case, the Dutch Ministry of the Interior had established an in-house cleaning company, the RSO, which was also meant to commence cleaning services across the Dutch central government in due course. Cleaning companies, who had previously been contracted to provide these services, argued amongst other things that this decision constituted a violation of the principle of proportionality. Their reliance on this principle comes down to the argument that, when establishing the RSO, the State could not reasonably have assumed that there was a fair balance between the adverse effects for the cleaning companies and the objectives it sought to achieve with the establishment of the RSO.[52] In assessing this claim, the court first took note of the premise that a quasi-full efficiency review is, amongst other things, not appropriate. Accordingly, the court concludes that the State could have indeed reasonably concluded that there is proportionality between the adverse effects of establishing the RSO for the cleaning companies and the objectives pursued by that establishment. Even assuming that the positive effects of the RSO on the working conditions of cleaners fall short of expectations, and that those conditions are therefore no better than those in the private cleaning companies, there is still no evident disproportionality. In reaching this conclusion, the court considered that the purpose of the RSO is not solely to improve the working conditions of cleaners, but also to signal that cleaners make an important contribution to the proper functioning of the public administration. Furthermore, the State was aware of the consequences for the cleaning companies. This awareness led to a timely announced, gradual transition to the RSO and the transfer of cleaners from private cleaning companies, with existing agreements being respected. Although the financial consequences for the commercial cleaning companies are, in absolute terms, not insignificant, according to the court, these effects are mitigated by the uncontested finding that cleaning services for central government buildings represent only 1.8% of the total cleaning market. Compared with the current annual market growth rate of 3.8% (which has not been disputed by the cleaning companies), and given the time afforded by the phased transition for them to adapt their business operations, the Court concluded that these consequences cannot be regarded as disproportionate.

Overseeing these two Dutch cases, it is clear that the principles of due care and proportionality feed into a more transparent approach to the make-or-buy decision, which could in fact improve decision-making related to public service provision. It ensures that the decision is based on relevant facts and the competing interests have been balanced. Needless to say, this approach still leaves the discretionary power to self-supply, to work with other authorities or to contract out service provision at the public authority.

[51] Court of Appeals Den Haag, 28 December 2020, ECLI:NL:GHDHA:2020:898 (*RSO*).
[52] RSO, n. 47, para.4.16 and onwards.

Accordingly, it does not change the discussed role of arts 345 TFEU and 4(2) TEU or the case-law of the CJEU discussed in paragraph 2 and 3. Instead, it provides standards for the decision-making process, and makes this process more transparent.

6. Concluding thoughts and a legislative proposal

The make-or-buy decision has been firmly sheltered from the influence of EU public procurement law through the Treaties, the case-law of the CJEU and the Public Procurement Directives. As such, it comes as no surprise that article 12 Directive 2014/24/EU has become, as a consequence, the indirect legal battlefield for economic operators to contest ‘make’ decisions, thereby not only challenging decisions merely to achieve more legal certainty for the noted outstanding legal questions related to this provision. I have argued, however, that challenging these exemptions before the Courts with this purpose in mind seems futile due to the organisational nature of the institutionalised and non-institutionalised exemptions. Within the broader context of Member States actually moving to regulate the make-or-buy decision themselves, a stronger focus on transparency for these exemptions in future reforms of the Public Procurement Directives could be considered by 1) including the obligation to publish the use of an exemption and 2) by applying the principles of good governance to the make-or-buy decision. When overseeing the Public Procurement Directives, these two proposals for transparency can be implemented in art.40 Directive 2014/24:

> *“1. Contracting authorities take into account due care by gathering all the relevant facts and interests when deciding to either self-supply, rely on an exemption in this Directive to collaborate with other authorities or to launch a public procurement procedure under this Directive for the provision of a public service, and to act proportionally by considering the nature and scope of the decision, the nature of the affected interests and the extent of the relevant impact and to balance those interests.*
>
> *2. Contracting authorities may conduct market consultations with a view to support the obligations in sub 1 by informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.*
>
> *3.Contracting authorities that intend to use an exemption in this Directive shall make known their intention by means of a notice that is published in accordance with Article 51(2) to (4) and (5) to (6) and Article 52.”*

Noting the importance of this topic for the revision of the Public Procurement Directives, which is due to truly spark debate once the new proposals for EU legislation have come out in Q2 of 2026, it will no doubt also include vehement discussions of art.12 Directive 2014/24 and by extension the make-or-buy decision, which should at least also include the raised discussion about transparency in this contribution.

Country Review: The Rising Debate Over In House Companies in Finland

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EU law; Finland; In-house contracts; Public procurement

Introduction

In house rules and practices have been one of the most discussed and controversial topics in Finland over the past fifteen years. Recently, the issue has been the subject of growing public debate, media attention and several ongoing legal proceedings. This review examines the reasons for the current controversy surrounding in house companies and multi-owner in house entities. To fully understand the origins of the present debate concerning in house entities in Finland, it is necessary to look back 15 to 20 years and consider the broader developments that have shaped the Finnish in house landscape, including structural reforms in the public sector, evolving interpretations of EU procurement law, and the rapid expansion of multi-owner in house companies. [1]

Evolution of In House Regulation in Finland in short

The regulatory framework governing in house entities in Finland has evolved significantly over the past three decades. Finland's first national Public Procurement Act, which entered into force in 1994, did not contain specific provisions on in house procurement. Nevertheless, procurements from various entities related to, or under the control of, the contracting authority were also made during this period and had to be addressed in national case law. The legal guidance regarding these practices was based almost exclusively on the jurisprudence of the Court of Justice of the European Union (CJEU). The *Teckal* judgment[2] (1999) established the core criteria, and subsequent CJEU case law further refined the principles.

The first in house provisions were introduced when the first major comprehensive reform to the Procurement Act entered into force on 1 June 2007, in connection with the implementation of Directive 2004/18/EC. Although the directive itself did not yet codify the in house doctrine, Finland chose to incorporate in house rules into the national Procurement Act. The 2007 Act adopted the core EU-law criteria. Three criteria were established for in house arrangements: 1) a formally separate unit that is independent in terms of decision-making (separateness); 2) a unit over which the contracting authority exercises control alone or together with other contracting authorities, as it does over its own departments (control); and 3) a unit whose activities are primarily directed towards its owners (targeting of activities and limitation on out house sales).

The CJEU case law on in house entities was later codified in the 2014/24 Public Procurement Directive. The directive clarified the regulation of in house entities in several respects, including the criteria for control and the requirement regarding the allocation of activities (spesifically, the 20% limit on out house sales). In Finland, legislative amendments were initiated for a new Public Procurement Act in line with

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[2] Case C-107/98, *Teckal* EU:C:1999:562.

the new directive. This legislative preparatory work also necessitated revisions to the national in house provisions, which had been in effect since 2007. However, the adoption and implementation process proved to be politically challenging. A particular point of contention concerned the out house sales of in house entities, which the Procurement Directive allows up to 20%. This threshold had already been debated during the working group's preparations, with numerous alternatives between 0% and 20% examined. Ultimately, the working group proposed a 10% limit on out house sales, although several members submitted dissenting opinions. Opponents emphasized that allowing out house sales would conflict with the new national competition neutrality rules.

In Finland, the competition neutrality legislation entered into force at the end of 2013. The key factor influencing this legislation were the European Commission's decision concerning the state enterprise Destia and a complaint regarding Helsinki City's enterprise Palmia. In both cases, the enterprise's tax and insolvency protection advantages resulting from the public enterprise model were considered to create unequal conditions between private and public economic activities and thus to constitute illegal State Aid.[3] The cases ultimately led to the enactment of provisions on competition neutrality in Chapter 4a of the Competition Act (948/2011). The central conflict with the regulation of in house entities arose from the fact that national competition neutrality rules do not permit out house sales unless one of the exceptions provided in Section 30b of the Competition Act applies, for example, due to a market shortage. At the conclusion of the lengthy legislative process and the working group's deliberations, new national public procurement rules were introduced. The new rules deviated from the provisions set out in the Public Procurement Directive and limited our house functions even further – to max. 500,000 euros and 5 %.

The in house rules under the national Procurement Act were criticised in various ways, and in many respects, the arguments resemble the debate taking place now, eight years later. The significant tightening of the out house sales limits in the 2017 Procurement Act has likely further contributed to the development of the finnish in house market. Since then, the in house entities have been permitted to sell only marginally to non-owners. This has encouraged some organisations to seek business growth or flexibility in managing excess capacity by expanding their ownership base. Over the years, some in house entities have also actively marketed to contracting authorities the possibility to ”buy one share and skip the burdensome competitive procurement process”. This is linked more broadly to the whole discussion of how public procurement is often perceived as a burdensome process, and of in house arrangements as a means of avoiding competitive tendering.

The Finnish in-house market is substantial in scale: companies under public sector control generate a combined annual turnover of approximately EUR 7 billion.[4] Over the years, the in house market has expanded and the market has seen the emergence of in-house companies with exceptionally broad ownership pools. Many of the largest entities are owned by nearly all public sector organisations. Consequently, in certain sectors the majority of procurements are carried out through in house units, leaving private sector operators with limited opportunities to sell their products directly to contracting authorities. The rapid growth in the number of in house entities, particularly the rise of multi-owner in house companies, is often driven by the public sector's limited resources. The acquisition of shares in in house entities does not always appear to be driven by strategic reasons; rather, decisions have increasingly been justified by the opportunity to make purchases without undergoing competitive procurement.

[3] Destia C7/2006 ent. Tieliikelaitos ja Palmia SA.30679 (E 2/2010) Finland.

[4] Jansson & Karttunen, Kilpailu- ja kuluttajaviraston Katsauksia 1/2022, p.28. See here (available in Finnish): *https://www.kkv.fi/tutkimus-ja-vaikuttaminen/julkaisut/katsaukset/kuntien-ja-kuntayhtymien-toiminta-kilpailutilanteessa-markkinoilla-kkvn-katsauksia-1-2022/* (Visited 8.12.2025).

Related Regulatory Frameworks Affecting In House Entities

Finland introduced centralised procurement structures well before EU directives formally regulated them, with entities such as Hansel playing a key role in coordinating joint procurement for state authorities.[5] Directive 2004/18 was implemented through the 2007 Procurement Act, which introduced a definition of a central purchasing body and a specific provision on procurements made from such bodies. Finland further added two nationally-originating requirements to the definition of a joint procurement unit: (1) the unit must be explicitly established for joint procurement purposes, and (2) it must provide joint procurement services primarily to its owners. Therefore, the 2007 Public Procurement Act can be seen as a turning point in the intertwining of the criteria and operational scope of joint procurement units and in house entities. In practice there are many companies in Finland that operate both as a central purchasing body and as an in house entity which has further complicated the situation as the conditions for control in central purchasing services and in house purchases are different. This has likely also contributed to the prevailing perception in many in house entities that mere ownership of the entity would be sufficient to allow purchases to be made without competitive procurement.

Over the past 15 years, the majority of Finnish in house companies have experienced substantial growth. Many companies have numerous contracting authorities as shareholders, sometimes numbering in the tens or even hundreds. Some of the largest in house companies have 400 shareholders representing the State, all municipalities and all wellbeing services county. In some instances, a single contracting authority holds only a single share in the in house company. This development was strongly influenced by the social and healthcare reform, which came into effect from the beginning of January 2023. The reform introduced a new administrative level, dividing Finland into 21 wellbeing services county. As of that date, the responsibilities and organizational duties for social and healthcare services, as well as rescue services, were transferred to them from municipalities.

Contracts related to the organization of these services were transferred to the well-being services counties as they stood, and the well-being services counties become the parties to the contracts instead of the municipalities. There were numerous situations where the transferred contracts were not functional in terms of their content, for example, because they did not correspond to the well-being services counties actual needs, covered overlapping services, or the transferring municipality still required the services or systems included in the contracts. As a result, both the wellbeing services county and the municipalities had to organize the services by other means on very short notice. In such situations, purchasing a single share in an in house company was perceived as a quick and straightforward solution. In any case, the reform led to an explosive increase in the number of shareholders in in house companies in Finland. This caused turmoil, especially in the private sector.

Recent Case Law

The growing turmoil following the launch of the wellbeing services county eventually led to two requests for action being submitted to the Finnish Competition and Consumer Authority (the FCCA). These requests were submitted by three Finnish business interest organizations, which called for the FCCA to take action regarding an in house entity with nearly 400 contracting authority owners and argued that the joint control criterion was not met. The FCCA examined the cases based on the submitted requests for action and ultimately decided to submit proposals to the Market Court in both matters. The cases brought before the court by the FCCA, concerned Sarastia, a Finnish in house company providing ICT and financial services that also operates as a central purchasing unit.

[5] See Halonen, K-M. Central Purchasing Bodies in Finland, in Hamer, Carina and Comba, Mario (eds.), *Centralising Public Procurement: The Approach of EU Member States* (Edward Elgar 2021), 154–169.

Both cases (Supreme Administrative Court case KHO 2250/2025[6] and Market court case MAO 500/2024)[7] concerned an individual minority shareholder and focused on whether the joint control criterion was met. One of the cases proceeded all the way to the Supreme Administrative Court. Both the Supreme Administrative Court and the Market Court cases came to the same conclusion in their decisions: the control criteria were considered unfulfilled. The contracting authorities acting as minority shareholders lacked genuine possibility of participating in joint control of the in house companies: they had no real influence over the appointment of members of the board of directors and no shared representation there. The mere ability to vote in an advisory body that issued non-binding recommendations to the board of directors was not considered a true influence on decision-making. The Supreme Administrative Court's decision in the Sarastia case has wide-ranging implications for multi-owner in house entities and threatens the in house status of many such organisations. Consequently it is expected that numerous structural changes are likely to emerge within the Finnish in house sector in the coming years.

Also, a recent Market Court case Tiera (MAO 548/2025)[8] concerned the joint control criterion in an in house provider of ICT services with nearly 400 contracting authorities as shareholders. After the first Sarastia case, Tiera amended its company governance structure profoundly. In the absence of any majority shareholder, all shareholders were able to participate in the selection of board members, and each shareholder had a representative in the board. Although each board member represented tens of contracting authorities, the court found that the arrangement nevertheless provided the shareholders a genuine opportunity to exercise joint control. There was also a shareholder committee, where each shareholder had one vote. Some of the company's strategic decisions had to be taken to the committee, and its views were binding on the board members. As a result, Tiera's new governing structure was considered to meet the joint control criterion.

The most recent legislative development process

The current Finnish government has initiated a legislative process to increase competition and improve effectiveness in public procurement. As a result, a reform of the Public Procurement Act is currently underway. Among the proposed legislative changes, the reform seeks to tighten the rules and practical application of in house arrangements. The reform introduces additional criteria beyond those established in the Directive and existing national legislation. One of the proposed actions concerns a minimum of 10% ownership by each contracting authority.[9] Researchers in Finland have previously proposed limitations on the use of in house entities, similar to those in Lithuania, Spain, and Italy, which restrict the use of in house provision, for example, to situations such as demonstrable cost-efficiency or the presence of a substantial public interest.[10] Even so, the prime minister's coalition party had already proposed the 10% limit in its political program. The proposed 10% minimum ownership requirement would constitute a new additional criterion compared to the current legislation, and it would reduce the number of owners in multi-owner in house entities.

[6] The Supreme Administrative Court's decision 8.10.2025, KHO 2250/2025. See here (available in Finnish): *https://www.kho.fi/fi/index/paatokset/muitapaatoksia/1759741728734.html* (Visited 4.12.2025).

[7] The Market Court's decision 10.09.2024, MAO:500/2024. See here (available in Finnish): *https://markkinaoikeus.fi/fi/index/paatokset/hankinta-asiat/mao5002024.html* (Visited 4.12.2025).

[8] The Market Court's decision 10.10.2025, MAO:548/2025. See here (available in Finnish): *https://markkinaoikeus.fi/fi/index/paatokset/hankinta-asiat/mao5482025.html* (Visited 4.12.2025).

[9] The report of the working group on the reform of the Public Procurement Act. See here (available in Finnish): *https://urn.fi/URN:ISBN:978-952-327-841-7*. (Visited 8.12.2025)

[10] Pyykkönen, J. - Halonen, K-M. – Tukiainen, J. – Parviainen, A.: Selvitys julkisten hankintojen säästökeinoista. 6.3.2023. See here (available in Finnish): *https://vm.fi/documents/10623/150718668/Selvitys+julkisen+hankintojen+s%C3%A4%C3%A4st%C3%B6keinoista.pdf/392c82c8-c382-d667-d96b-f78f234abef8/Selvitys+julkisen+hankintojen+s%C3%A4%C3%A4st%C3%B6keinoista.pdf?t=1678084096339* (Visited 3.12.2025)

The working group report preceding the Government Proposal faced substantial criticism, opposition, and complaints, particularly in relation to the proposed in-house provisions.[11] Two complaints were made to the European Commission regarding the in house provisions, alleging that they infringe Procurement rules and EU legal principles.[12] According to the latest data from the Finnish Transparency Register (Avoimuusrekisteri), the Minister of Employment, Matias Marttinen, who is leading the legislative work for public procurement, has received the most lobbying contacts in Finland in 2025.[13] Minister Marttinen has made several statements emphasizing that advancing the Procurement Act reform is his top priority during his term, and they will not back down from it. [14] According to the Government Proposal, the waste sector will be excluded from the scope of the 10% minimum ownership requirement for in-house entities, and an extended transition period will be granted for in-house purchases in the health and social care sector, particularly in relation to ICT systems. (The exclusion of the waste sector will be addressed in the forthcoming Waste Act.).[15]

Also certain unethical practices took place during the legislative preparations. During the legislative iniatives impact evaluation stage, the in house companies' interest organisation instructed its members to respond the survey questionnaire conducted by the Finnish Competition and Consumer Authority (FCCA) in an unified manner to influence the results of the impact evaluation and to block the proposal. This was revealed a few months after the evaluation report was published, and the FCCA had to abandon all in house entities' responses in their data analysis.[16]

The Final Government Proposal for the Public Procurement Act is still in the process. Its publication has been eagerly anticipated, with expectations for it to be released before the end of 2025. However, in late 2025, the draft proposal was submitted for assessment by the independent "Legislative Review Body", which led to the delay of the original timetable of the Procurement Act reform. Finally, in February 2026, the Government submitted the Government Proposal to Parliament, where it is, at the time of writing, still awaiting parliamentary approval. The proposal has been revieved by several parliamentary committees, including the Constitutional Committee. All committees have agreed with the government proposal (with minor corrections). The Finnish Parliament will likely adopt the new proposed act during summer 2026, and it is expected to enter into force later in 2026.[17]

To sum it up, in house provisions and potential new limitations currently represent one of the most contentious and politically challenging issues in Finland. The core of the debate does not lay in the nature of the EU law itself, but rather in how national legislation and administrative practices are established. While legislation establishes the operational framework in which the public sector operates, broader questions concerning the organisation of public services are fundamentally economic policy issues rather than matters of legal interpretation alone.

The development of the in house market in Finland has likely resulted from several different factors, including general efforts to increase public sector efficiency, the entry of the public sector into competitive

[11] The statements are available in Finnish. See here: *https://www.lausuntopalvelu.fi/FI/Proposal/Participation?proposalId=ace05d59-c8e0-41c3-acbb-1c87e4cd1a23* (Visited 3.12.2025)

[12] EU-kantelu unionin tiukimmista inhouse-hankintasäännöistä – Lakiehdotuksen epäillään rikkovan EU-oikeutta. See here (available in Finnish): *https://www.sttinfo.fi/tiedote/71314777/eu-kantelu-unionin-tiukimmista-inhouse-hankintasaannoista-lakiehdotuksen-epaillaan-rikkovan-eu-oikeutta?publisherId=69819596&lang=fi* (Visited 8.12.2025) The Finnish Transparency Register's website: *https://avoimuusrekisteri.fi/* (Visited 4.12.2025)

[13] The Finnish Transparency Register's website: *https://avoimuusrekisteri.fi/* (Visited 4.12.2025)

[14] Työministeri Marttinen ei pakita palautevyöryn saaneessa uudistuksessa – kunnat: Jätehuolto ajautuu kaaokseen. See here (available in Finnish): *https://yle.fi/a/74-20175019* and Lakiluonnos hankintalaista tyrmättiin – Työministeri Marttinen: ei aikalisiä, tehdään täsmennykset ja eteenpäin. See here (available in Finnish): *https://yle.fi/a/74-20196381* (Visited 4.12.2025)

[15] Kiistelty laki on myllläämässä miljardien arvoiset hankinnat: Marttinen ilmoitti korjausliikkeestä | HS.fi *https://www.hs.fi/politiikka/art-2000011526415.html*. See here: (available in Finnish). (Visited 4.12.2025)

[16] KKV:n sidosyksikköjä koskevaa tutkimusta päivitetty: sidosyksiköille suunnatun kyselyn tulokset poistettu luotettavuuden varmistamiseksi. (available in Finnish). See here (available in Finnish).: *https://www.kkv.fi/ajankohtaista/tiedotteet/kkvn-sidosyksikkoja-koskevaa-tutkimusta-paivitetty-sidosyksikoille-suunnatun-kyselyn-tulokset-poistettu-luotettavuuden-varmistamiseksi/* (Visited 4.12.2025)

[17] Government Proposal to Parliament for an Act amending the Act on Public Procurement and Concession Contracts and related legislation (HE 2/2026): *https://www.eduskunta.fi/asiat-ja-aanestykset/valtiopaivaasiat/asiakirjat/edktunnus/EDK-2026-AK-1949* (Visited 8.6.2026)

markets, the development of in house regulation, the business and regional policy objectives of the companies, and perhaps most notably, the desire to avoid the administrative burden associated with competitive procurement. It is important to note, however, that this dispute constitutes only one strand of a much wider discussion on the role of the public sector in the market, particularly the question of when and under what conditions public authorities should engage in economic activities at all.

Transposing Article 12 of Directive 2014/24: National Flexibility, EU Constraints, and the Future of In-House Transactions and Public-Public Cooperation

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EU law; In-house contracts; Public procurement; Public-public arrangements

Abstract

This article critically assesses how Article 12 of Directive 2014/24 has been transposed into national laws and how the exemptions for in-house transactions and public–public cooperation operates in practice.[1] *Comparing different legislative approaches, the article focuses on the "copy-out" method, where the Directive is transposed verbatim, and "tailor-made" national solutions, where Member States add further conditions or restrictions, and confirms that the problem of gold-plating can be a cause of legal uncertainty and uneven application of the rules, as has been highlighted in recent evaluations. In addition, the article explores the role of EU general principles in the "make or buy" decision. With the EU currently reviewing its procurement rules and considering a single Public Procurement Act, the article provides a reflection on why and how the regulation of in-house transactions and public–public cooperation may change in the future.*

Introduction

Since 2014, the current Public Procurement Directives[2] have shaped how public contracts are awarded in the European Union (hereinafter EU) and its Member States. According to the latest figures, nearly €2.6 trillion is spent annually through public procurement, representing approximately 15% of the EU's GDP.[3]

The Public Procurement Directives lay down the minimum rules intended to ensure the free movement of goods, the freedom of establishment, and the freedom to provide services. For public procurements exceeding the international threshold, provisions coordinating national procurement rules were needed in order to give practical effect to these principles and to open public procurements to EU-wide competition.[4] For public procurements below the international threshold, the case law of European Court of Justice

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[1] The article is funded by the Estonian Research Council (project PRG1449).

[2] Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 2014 (OJ L94/65) (hereinafter Directive 2014/24); Directive 2014/25 of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17 2014 (OJ L94/243) (hereinafter Directive 2014/25); Directive 2014/23 of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts 2014 (OJ L94/1) (hereinafter Directive 2014/23). Altogether also referred to as Public Procurement Directives.

[3] European Commission. Commission staff working Document. Evaluation of Directive 2014/23 of Concessions, Directive 2014/24 of Public Procurement and Directive 2014/25 on Utilities. SWD.(2025) 332 final, p.1.

[4] Directive 2014/24 (n 3) rec.1; Directive 2014/25 (n 3) rec.2; Directive 2014/23 (n 3) recs 1 and 4.

(hereinafter ECJ) concerning the correct application of the Treaty of Functioning of the European Union (hereinafter TFEU) rules and principles remains relevant.[5]

The logic behind stipulating uniform rules across the EU seems rather straightforward. If economic operators are to participate effectively in public procurement across the EU, procedures in different Member States must be conducted according to rules that are sufficiently simple, clear, and harmonised so that tenderers do not encounter additional obstacles arising from procedural differences. Their primary concern should be to demonstrate to the contracting authorities the substantive merits of their tenders.

However, not all public purchasing activity is intended to be exposed to market competition. EU procurement law recognises that, in certain circumstances, contracting authorities may decide to provide services internally or to cooperate with other public authorities, without resorting to competitive procurement procedures.[6] These situations are reflected in the in-house and public-public cooperation exemptions, laid down in the Public Procurement Directives.[7] While the Public Procurement Directives establish conditions when in-house transactions and public-public cooperation fall outside the scope of EU public procurement law, they leave room for variations, allowing Member States to exercise discretion in tailoring provisions to their unique legal and institutional systems. The current regulation raises questions concerning the balance between Member State autonomy and the uniform application of EU internal market rules.

This article argues that these questions cannot be adequately understood without examining three interrelated dimensions of EU law: the division of competences between the European Union and the Member States, the level of harmonisation pursued by the EU legislator, and the manner in which art.12 of Directive 2014/24[8] has been transposed into national law. Together, these dimensions shape the regulatory space in which contracting authorities make "make or buy" decisions and determine whether such decisions remain a matter of national autonomy or fall within the scope of EU law.

In particular, the approach to art.12 of Directive 2014/24 as a minimum or a fully harmonising provision has significant implications for national regulatory discretion and determines whether Member States may introduce additional national conditions or whether the Directive establishes an exhaustive framework. The precise implications of this harmonisation technique for "make or buy" decisions are examined in greater detail below.

At the time of writing this article, the process of revising the EU's public procurement rules is underway.[9] During the consultations regarding the review of the Public Procurement Directives, in-house transactions and public–public cooperation were identified areas of real concern. Whilst contracting authorities reported a lack of legal certainty regarding the practical possibilities of relying on these exemptions, auditors of the European Commission observed that the improper application of the in-house transaction exemption is one of the most common violations in projects financed from EU funds.[10] Recent case law has also raised questions as to whether certain in-house transactions comply with competition law.[11] Furthermore, the evaluation report indicates that in-house transactions and public-public cooperation rules are among the most problematic areas, with only 18.5% of respondents finding them appropriate and relevant, and 39.3% of respondents disagreeing with the statement that *rules on public-public cooperation and in-house procurements are still relevant and adequate*.[12] In light of this dissatisfaction and perceived lack of sufficient clarity and legal certainty, revision of art.12 of Directive 2014/24 appears inevitable.

[5] Directive 2014/25 (n 3) recital 3.

[6] Directive 2014/24 (n 3) recs 5 and 31; Directive 2014/25 (n 3) recs 7, 38–39; Directive 2014/23 (n 3) rec.5.

[7] Directive 2014/24 (n 3) art.12; Directive 2014/25 (n 3) art.28; Directive 2014/23 (n 3) art.17.

[8] This article refers in particular to art.12 of Directive 2014/24 and its transposition into national law. Where substantive differences between the provisions of the Public Procurement Directives are of material importance to the legal analysis, these will be referred to separately.

[9] See for example, Council Conclusions on the European Court of Auditors' Special Report No.28/2023 Improve a fair and effective competition for EU public procurement contracts awarded for works, goods, and services 2024 (O.J. C,. C/2024/3521).

[10] European Commission (n 4), p.11.

[11] European Commission (n 4), p.11.

[12] European Commission (n 4), pp.60, 130 (Figure 28).

Against this background, the article examines whether at least part of the legal uncertainty and practical difficulties relating to in-house transactions and public-public cooperation might have been avoided, had these rules been implemented differently at national level. In particular, it considers whether divergent transposition techniques have contributed to fragmentation and to the application of EU general principles in the context of "make or buy" decisions. For this purpose, this article examines the legal and practical dimensions of transposing art.12 into national law and the effects of different regulatory approaches on the practical application of the in-house and public-public cooperation exemptions. Special attention is devoted to the phenomenon of "gold-plating", identified in the review of the Public Procurement Directives as one of the obstacles affecting the current framework.[13]

The article first sets out the conceptual background of in-house transactions and public-public cooperation (hereinafter together also referred to as art.12) in EU public procurement law. It then analyses the different approaches adopted by Member States when transposing art.12, with particular attention to the copy-out method and tailor-made solutions, including instances of gold-plating. The subsequent section examines how these transposition choices shape the practical scope of the exemptions and affect the "make or buy" decision. The article concludes by considering the broader implications of these findings in light of the ongoing reform of EU public procurement law.

1. Legislative framework of "Make or Buy" decisions

1.1 Division of competences between the EU and the Member States

In order to understand the challenges related to the transposition of the exemptions for in-house transactions and public-public cooperation under the Public Procurement Directives, it is necessary briefly to revisit the topic of division of competences between the EU and the Member States. This division determines whether, and to what extent, Member States may regulate the conditions under which contracting authorities are able to rely on such exemptions.

The EU may act only within the limits of the competences conferred upon it. Article 2 of the TFEU[14] divides these competences into three categories: exclusive, shared, and supporting competences. Regarding exclusive competence, only the EU may legislate. Member States may do so only if empowered by the Union or for the purpose of implementing Union acts, i.e., competition rules and the common commercial policy.[15]

By contrast, in areas of shared competence, Member States retain legislative authority to the extent that the Union has not exercised its competence.[16] The principle of pre-emption applies only insofar as the Union has acted in the relevant field.[17] If the Union decides not to exercise (or to cease exercising) its competence in a shared-competence area, Member States regain full legislative authority in that area.[18]

Public procurement forms an integral part of the internal market and therefore falls within the sphere of shared competence, under which the Union may adopt harmonisation measures while Member States retain regulatory autonomy to the extent that the Union has not exercised its competence.[19]

By adopting detailed public procurement rules, the Union has exercised its competence in this field and as a result, national public procurement regimes must comply with EU law. This distinction is particularly relevant in the context of art.12 of Directive 2014/24, as it determines whether, and to what

[13] European Commission (n 4), p.14.
[14] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2016 (OJ 2016/C 202/01).
[15] TFEU (n 15) art.2(1), art.3.
[16] TFEU (n 15) art.(2); *Panellinios Sindesmos Viomikhanion Metapiisis Kapnou v Ipourgos Ikonomias kai Ikonomikon* (C-373/11) EU:C:2013:567 at [26].
[17] Paul P. Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* , 8th edn(Oxford University Press 2024), pp.114, 134; *European Commission v Council of the European Union* (C-114/12) EU:C:2014:2151 at [93].
[18] Craig and De Búrca, *EU Law* (n 18), p.114.
[19] Craig and De Búrca, *EU Law* (n 18), p.114.

extent, Member States may introduce additional conditions governing the availability of in-house transactions and public-public cooperation when transposing EU procurement rules into national law.

The extent of Member States' regulatory autonomy depends on the harmonisation technique chosen by the EU legislator. Where full harmonisation applies, the Union establishes an exhaustive legal framework, leaving no scope for Member States to adopt supplementary provisions. EU legislation in such cases defines both the lower and upper limits of regulatory protection, thereby preventing Member States from legislating independently within that field.[20] By contrast, minimum harmonisation ensures a degree of consistency across Member States by establishing a common "lower threshold" of requirements in the directives, while allowing them to adopt more stringent rules, for example in pursuit of social, economic, or welfare objectives. Any such additional national conditions must comply with the TFEU and the principles of proportionality and non-discrimination, which operate as the "upper limit" of permissible regulation.[21] Within these boundaries, Member States remain free to regulate, although this flexibility inevitably reduces the degree of uniformity across the Union.[22]

The competence of the EU extends only to the specific aspects and objectives addressed by the relevant EU legislation and does not extend to the regulation of an entire policy field.[23] The challenge for EU policymakers is therefore to find the right balance between these two approaches. Minimum harmonisation helps to preserve the autonomy of Member States and allows them to better protect public interests, but may lead to legal fragmentation, which can have a negative impact on the functioning of the EU internal market.[24] Full harmonisation helps to ensure legal certainty and promotes market integration, while limiting the ability of Member States to address specific political, social, or other concerns through additional legislative measures.

1.2 "Make or Buy" in the limits of national discretion under shared competence

The harmonising public procurement rules is closely linked to the objective of ensuring the effective functioning of the internal market. Historically, Member States developed national public procurement regimes shaped by national political, economic and social priorities.[25] While such rules often served legitimate public-interest objectives, their diversity created obstacles to cross-border economic activity. Economic operators active across the EU would otherwise face significant challenges in navigating multiple regulatory frameworks, increasing participation costs and making it more difficult to safeguard their rights.

In practice, public procurement is generally understood to operate within a framework of minimum harmonisation. This allows Member States to adapt public procurement rules in ways that also consider national circumstances and support domestic policy objectives. Member States may, for example, introduce lower thresholds, additional reporting requirements, enhanced monitoring mechanisms or additional conditions for the application of exemptions laid down in the Public Procurement Directives. However, even within this flexible framework, Member States must ensure that any additional national rules do not create unjustified obstacles to the functioning of the internal market.

The Public Procurement Directives allow public procurement rules to be set aside in situations where contracting authorities decide to use their own resources ("vertical cooperation") or to cooperate with another contracting authority ("horizontal cooperation").[26] Free market competition is not always the most

[20] Craig and De Búrca, *EU Law* (n 18), p.657; Michael Dougan, "Minimum Harmonization and the Internal Market" (2000) 37 Common Market Law Review 853, 854.
[21] Craig and De Búrca, *EU Law* (n 18), p.733.
[22] Craig and De Búrca, *EU Law* (n 18), p.657; Dougan (n 21), p.855; S. Weatherill, "Beyond Preemption? Shared Competence and Constitutional Change in the European Community" in D. O'Keeffee, P. M. Tworney (eds), *Legal Issues of Maastricht Treaty* (Wiley, 1994).
[23] Craig and De Búrca, *EU Law* (n 18), p.114.
[24] Dougan (n 21), pp.853, 854.
[25] Craig and De Búrca, *EU Law* (n 18), p.8.
[26] Directive 2014/24 (n 3) rec.5, art.12; Directive 2014/23 (n 3) rec.5, art.13; Directive 2014/25 (n 3) rec.7, arts 28-30; Kristian Pedersen and Erik Olsson, "Commission v Germany - a New Approach to in-House Providing?" (2010) 1 Public Procurement Law Review 33, 34, 39; *Teckal Srl v*

efficient means of using public resources, especially where the public sector already has the necessary capacity to provide a service.[27] The exceptions for in-house transactions and public-public cooperation therefore confirm that contracting authorities may rely on their own resources, even when these are available in a legally separate entity. Contracts concluded through in-house transactions or public-public cooperation may therefore formally resemble a public contract, but they differ in substance, as market participants are not involved in their performance.[28]

Within this framework, art.12 regulates the legal conditions under which the "make" option may be exercised without triggering public procurement procedures, i.e., when the transaction falls outside the scope of EU public procurement law. Still, it should be considered that not every arrangement involving a legally distinct entity controlled by a contracting authority, or cooperation between public authorities is automatically excluded from the Directive's application. Rather, the conditions laid down in art.12 must be fulfilled in each case; otherwise, the ordinary EU public procurement rules apply.[29] The extent of Member State discretion in structuring this choice depends directly on the applicable harmonisation model discussed above.

These conditions were originally developed in the case law of the ECJ. The Court first articulated the principles governing in-house transactions in the *Teckal* judgment,[30] and subsequently developed the rules on horizontal cooperation in *Hamburg*.[31] Later judgments further clarified and confirmed the criteria for determining when an arrangement may fall outside the scope of the Public Procurement Directives.[32] These principles were later codified and in some respects extended during the adoption of the current Public Procurement Directives.

When transposing art.12 into national law, Member States had to choose between different legislative techniques. They could either adopt a copy-out approach (transposing the wording of the Public Procurement Directives verbatim), or develop specific, tailor-made national rules reflecting national particularities while respecting the minimum requirements laid down in EU law. This choice of transposition method has significant implications for how "make or buy" decisions are structured in practice and for the extent to which contracting authorities may rely on art.12 of Directive 2014/24 under national law.

When preparing a purchase or service order, contracting authorities may have to assess whether they have the necessary resources in-house (for example, within their own departments or through a legally separate entity linked to the contracting authority), whether the necessary resources are available elsewhere within the public sector (for example, from another contracting authority), or whether it is necessary to look for partners outside the public sector by means of a public procurement procedure. Put simply, contracting authorities must decide whether to rely on internal (internalise) or external (externalise)

Comune di Viano (Reggio Emilia) (C-107/98) EU:C:1999:562; [1999] E.C.R. I-8121 at [50]–[51]; *Stadt Halle v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* (C-26/03) EU:C:2005:5; [2005] E.C.R. I-1 at [48]–[49].

[27] Carri Ginter, Ivo Pilving, Pilleriin Peedosk, "§ 12. In-house transaction and public-public cooperation" in Mari Ann Simovart, Mart Parind, Erki Fels (eds), *Public Procurement Act: the commentary* (originally in Estonian) (Juura, 2025), pp.176–178; William A Janssen, "Swimming against the Tide: The Harmonisation of Self-Organisation through Article 12 Directive 2014/24/EU" (2019) 14 Eur. Procurement & Pub. Private Partnership L. Rev. 145.

[28] Carri Ginter, Kadri Härginen and Mario Sõrm, "In-House Transactions: Lost in Translation?" (2020) 30 P.P.L.R. 117. It should be noted that the case law is not entirely consistent with this assumption: the ECJ has, in certain judgments treated contracts concluded in the context of public–public cooperation as public contracts, see for example *ISE mbH vs Stadt Koln* (C-796/18) EU:C:2020:395.

[29] Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market 2011 (COM(2011) 15 final).

[30] *Teckal* (n 27).

[31] *Commission of the European Communities v Germany* (C-480/06) EU:C:2009:357; [2009] E.C.R. I-4747.

[32] *Carbotermo SpA v Comune di Busto Arsizio* (C-340/04) EU:C:2006:308; [2006] E.C.R. I-4137; *Stadt Halle* (n 27); *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari* (C-410/04) EU:C:2006:237; [2006] E.C.R. I-3303; *Parking Brixen GmbH v Gemeinde Brixen* (C-458/03) EU:C:2005:605; [2005] E.C.R. I-8612; *Sea Srl v Comune di Ponte Nossa* (C-573/07) EU:C:2009:532; [2009] E.C.R. I-8127 and etc.

resources.[33] In the literature, this choice is commonly referred to as the "make or buy" decision.[34] For the purposes of this article, the "make" option is understood to encompass both in-house transactions and public-public cooperation.[35] Situations in which a contracting authority directly employs the necessary staff or produces goods or services entirely within its own organisational structure are not addressed, as such arrangements fall wholly outside the scope of public procurement law.[36]

It is also important to distinguish between two forms of the "make or buy" decision. First, it is a political and regulatory choice made at the Member State level concerning how public sector cooperation is structured and regulated at the national level.[37] Secondly, it involves operational decisions taken by individual contracting authorities in their day-to-day practice.[38] This distinction is not always clearly reflected in legal scholarship or in the case law of ECJ, yet it is necessary to understand how EU law interacts with national regulation in this context.[39]

The extent of national discretion in structuring "make or buy" decisions depends on whether public procurement law is understood as establishing minimum or full harmonisation. Legal scholarship remains divided on whether art.12 constitutes an instance of minimum or full harmonisation.[40] The prevailing view supports minimum harmonisation, although arguments in favour of full harmonisation have also been made.[41] This ambiguity appears to reflect a deliberate legislative choice aimed at facilitating political compromise during the adoption of the Public Procurement Directives.[42]

2. Mechanisms for the transposition of art.12 of Directive 2014/24 into national law

The extent of Member State discretion under art.12 depends on the applicable harmonisation model. However, this discretion does not remain theoretical. It materialises through the legislative techniques chosen by Member States when transposing art.12 into national law.

The principal methods of transposition can be grouped around two approaches: the copy-out technique and the adoption of tailor-made national rules. These techniques reflect different regulatory choices and create different legal contexts in which contracting authorities make the "make or buy" decision.

2.1 The copy-out method

The copy-out method is a legislative transposition technique whereby a Member State reproduces EU legislation verbatim in its national law without adding interpretative detail, modifying the content, or introducing additional provisions.[43] This approach was used, for example, by Germany and the United Kingdom (UK) when transposing the Public Procurement Directives.[44]

[33] Stephanie Hötte, "Ode to Liberty? - The Determination of Services of General (Economic) Interest and the 'Make-or-buy' Decision" (2020) 45 *European Law Review* 491.

[34] William A. Janssen, *EU Public Procurement Law & Self-Organisation: A Nexus of Tensions & Reconciliations* (Eleven International Publishing, 2018), pp.10, 15; Mario Sõrm, Carri Ginter and Mari Ann Simovart, "Transparency Obligations for Make or Buy Decisions" (2023) 1 P.P.L.R. 1, 2; Hötte (n 34), p.487.

[35] Sõrm (n 35), pp.12–14; Hötte (n 34), pp.493–494.

[36] Sõrm (n 35), p.12.

[37] Sõrm (n 35), pp.3, 7.

[38] Sõrm (n 35), p.15.

[39] Pilleriin Peedosk, "Life after Irgita (C-285/18)—More Questions Than Answers" (2024) 33 *Juridica International* 133, 136.

[40] See for example, William A. Janssen and Erik Olsson, "On Competition, Free Movement and Procurement: Irgita's Public Cooperation Conundrum" (2020) 15 Eur. Procurement & Pub. Private Partnership L. Rev. 2.

[41] Sõrm (n 35); Janssen, *EU Public Procurement Law & Self-Organisation* (n 35), p.2.

[42] "Introduction" in Steen Treumer and Mario Comba (eds), *Modernising Public Procurement. The Approach of EU Member States* (Edward Elgar Publishing 2018), pp.4–5.

[43] Albert Sanchez-Graells, "The Copy-out of Directive 2014/24/EU in the UK and Its Limited Revision despite the Imminence of Brexit" (2019) 28 *Public Procurement Law Review* 186.

[44] Mario Comba and Sara Richetto, "Implementation of Public Procurement Directives in Italy: After Three Years Still a Long Way to Be Complete" (2019) 28 *Public Procurement Law Review* 201.

The reasons for choosing the copy-out method vary among Member States. In general, this technique promotes compliance with minimum requirements while limiting administrative burdens for contracting authorities, as it avoids the risk of gold-plating.[45] By adhering closely to the wording of the Public Procurement Directives, Member States can be confident that their national legislation aligns with EU law, thereby reducing the risk of misinterpretation or inconsistencies that may arise if additional national provisions are introduced.

However, the copy-out method also presents certain drawbacks. Ambiguities or contradictions contained in the Public Procurement Directives may be transposed directly into national law without clarification.[46] Moreover, where the EU legislator intended to leave room for national discretion to accommodate local specificities, a word-for-word transposition may squander the opportunity for Member States to tailor the rules to their own administrative, legal, or policy needs.[47]

2.2 Tailor-made national rules and gold-plating

The alternative to the copy-out method is a more time-consuming and comprehensive national legislative process through which a Member State seeks to develop the most suitable legislative solutions for its own legal and administrative context. For example, Estonia undertook a thorough overhaul of its public procurement system, which resulted in the transposition of the Public Procurement Directives being postponed until 2017 so that the entire system could be reformed. Notably, most of the legislative challenges faced by Estonia stemmed not from EU law but from issues within its national legal framework.[48]

This approach is closely linked to the phenomenon of gold-plating. Gold-plating occurs when Member States, instead of limiting themselves to transposing the minimum requirements set by EU legislation, voluntarily introduce additional national obligations that result in stricter procurement rules.[49] Overregulation in this sense does not imply the adoption of rules contrary to the Public Procurement Directives, but rather the choice to apply more stringent requirements than those envisaged by the EU legislator. This tendency is generally regarded as problematic.[50]

In some Member States, heightened concerns about corruption and a lack of trust in contracting authorities have prompted the adoption of national rules that exceed EU minimum standards, thereby significantly restricting the discretion of contracting authorities when applying the in-house and cooperation exemptions. Conversely, in Member States with lower levels of corruption and higher levels of public trust, national public procurement rules tend to afford contracting authorities greater flexibility and discretion.[51]

In Estonia's case, such overregulation was initially not viewed as particularly harmful. Given the relatively small size of the Estonian market and the limited number of procurements exceeding EU thresholds, a stricter regulatory framework was considered justified. This did not necessarily lead to unintended consequences or undermine the objectives of EU procurement law.[52] However, this position has begun to shift. A draft amendment to the Public Procurement Act is currently under consultation, aiming to simplify procurement procedures considerably. Among other reforms, the draft proposes raising

[45] Sanchez-Graells (n 44), p.195.
[46] Sanchez-Graells (n 44), p.189.
[47] Sanchez-Graells (n 44), pp.199–200.
[48] Mari Ann Simovart and Kadri Härginen, "Implementation of EU Public Procurement Law in Estonia - History Revisited" (2019) 28 *Public Procurement Law Review* 229, 230.
[49] Simovart (n 49), pp.232–233.
[50] Treumer and Comba (n 43), pp.6–7; See also European Commission (n 4), p.14.
[51] Treumer and Comba (n 43), p.1.
[52] Simovart (n 49), pp.232–233.

the thresholds for simplified procurement and abolishing the national public procurement threshold altogether, leaving only the international threshold in place.[53]

With regard to the transposition of art.12 of Directive 2014/24, several Member States (including Slovenia, Lithuania, and Finland) introduced additional or modified national rules governing the application of the in-house and public–public cooperation exemptions, or did not transpose the provisions on in-house and public-public cooperation into national law at all.[54] These Member States sought to minimise the potential negative effects of such arrangements on the internal market and thereby to strengthen competition across the EU through public procurement. Ideally, enhanced competition should lead to lower costs, better value for money, and a more efficient allocation of public resources. [55]

3. Influence of transposition methods upon "Make or Buy" practices

The previous chapter showed that Member States retain considerable discretion in transposing art.12 of Directive 2014/24 into national law, whether by reproducing the Directive's wording or by adopting more tailored regulatory solutions. That choice is not merely technical. It shapes the legal framework within which contracting authorities make "make or buy" decisions and affects the extent to which those decisions fall within the scope of EU law.

It should be considered how different approaches to transposition influence the legal character of the "make or buy" decision and examines the relevance of the general principles of EU law at both the regulatory and operational levels.

3.1 Scope of EU law

In-house transactions and public-public cooperation are generally regarded as falling outside the scope of EU public procurement law.[56] Therefore, the provisions of the TFEU and other internal market and free-movement principles should, in principle, not apply.[57] However, the question remains whether the decision to opt for an in-house transaction instead of a public procurement procedure, or to conclude a cooperation agreement between contracting authorities, falls within the scope of EU law.

In 2019, the ECJ had the opportunity to clarify how contracting authorities may approach the "make or buy" decision.[58] The Court found that such decisions do not fall solely within the competence of the Member States but may also fall within the scope of EU law. The Court emphasised that the general principles of EU law, such as transparency, proportionality, and equal treatment, must also be followed when making decisions on whether to internalise or externalise the procurement of works or services.[59] The ECJ has subsequently reaffirmed this principle in several judgments.[60]

[53] Draft Legislation to amend the Public Procurement Act, available at: *https://eelnoud.valitsus.ee/main/mount/docList/af8cc0c9-3216-4b07-be96-578959413744#qri4BGTb* (09.12.2025).

[54] Petra Ferk and Boštjan Ferk, "Implementation of Directive 2014/24/EU in Slovenia: Main Challenges Transcend the Legislative Provisions" (2019) 28 *Public Procurement Law Review* 242, 246–247; Kirsi-Maria Halonen, "The Attempt to Create Flexibility and Minimum Regulation - Transposition of Directive 2014/24 in Finland" (2019) 28 *Public Procurement Law Review* 213, 216–218; Janssen, *EU Public Procurement Law & Self-Organisation* (n 35); European Commission (n 4), p.211.

[55] Ferk (n 55), pp.246–247; Halonen (n 55), p.218.

[56] Directive 2014/24 (n 3) rec5.

[57] Sue Arrowsmith, The Law of Public and Utilities Procurement: Regulation in the EU and UK, 3rd edn (Sweet & Maxwell/Thomson Reuters 2014), Vol.1, pp.298–299.

[58] *Kauno miesto savivaldybe* (C-285/18) EU:C:2019:829.

[59] *Irgita* (n 59) at [48].

[60] *Azienda ULSS n 6 Euganea v Pia Opera Croce Verde Padova* (C-11/19) EU:C:2020:88; Joined Cases *Rieco SpA v Comune di Lanciano, Ecolan SpA* (C-89/19); *Comune di Ortona, Ecolan SpA* (C-90/19); *Comune di San Vito Chietino, Ecolan SpA* (C-91/19) EU:C:2020:87; *Autostrada Torino Ivrea Valle D'Aosta—Ativa SpA v Presidenza del Consiglio dei Ministri, Ministero delle Infrastrutture e dei Trasporti, Ministero dell'Economia e delle Finanze, Autorità di regolazione dei trasporti* (C-835/19) EU:C:2020:970; Joined Cases (C-383/21 and C-384/21) *Sambre & Biesme SCRL (C-383/21), Commune de Farciennes (C-384/21) v Société wallonne du logement (SWL)* EU:C:2022:1022; *Informatikgesellschaft für Software-Entwicklung* (n 29).

At the same time, the Court left unspecified when and to what extent these general principles influence the decision-making process of an individual contracting authority. This question has been the subject of considerable academic debate, and various authors have offered differing interpretations.[61] The *Autostrada* (C-835/19) decision appears to constitute a partial exception, as contracting authorities were primarily described as entities required to follow policy decisions taken by national legislators or policymakers.

That said, the overall direction of the case law shows that "make or buy" decisions are not completely shielded from the reach of EU law.

3.2 Regulatory and operational obligations under EU law

Before going further, it is necessary to distinguish between regulatory and operational levels of decision-making, that is, to determine at which level the obligation to comply with the general principles of EU law arises and to whom it is addressed.

First and foremost, it seems that this obligation lies with the Member States, including their local and regional authorities, in the exercise of their regulatory powers, as opposed to the concerned contracting authorities in the course of enforcement of the legal norms. When a Member State develops or amends rules governing in-house transactions or public-public cooperation, it must do so in a way that ensures the compatibility of those rules with the general principles of EU law.[62] Accordingly, the focus of EU law is not on each individual "make or buy" decision taken by contracting authorities, but on the preceding legislative and political choices by the Member State that define the conditions under which such decisions are made.

The obligation to follow the general principles of EU law may also extend to individual contracting authorities in their decision-making process. This is particularly relevant where their decisions have a cross-border impact or otherwise affect the functioning of the EU internal market.[63] In such cases, the actions of the contracting authority must be assessed not only in light of national law but also in light of the principles of EU law.

Since in-house arrangements and public-public cooperation fall outside the scope of EU procurement law, compliance with EU principles becomes relevant at the point when the contracting authority decides whether to proceed internally or to initiate a procurement procedure. It is this decision that determines whether market access is opened to economic operators.

3.3 Cross-border interest and art.12

The applicability of the general principles of EU law depends, in many cases, on the existence of cross-border interest. Cross-border interest refers to a situation in which economic operators from other Member States may be interested in the contract in question.

It is, however, questionable whether one can ever speak of cross-border interest in the context of in-house transactions and public–public cooperation. Cross-border interest means, as the term itself suggests, that undertakings from other Member States would have an interest in the contract.[64]

The main rationale behind the exception for in-house transactions and public–public cooperation derives from the assumption that no one can be forced to buy something they already have internally. Another underlying pillar of public procurement law is that a contracting authority cannot be forced to purchase anything that it does not need. In other words, a contracting authority defines its purchasing requirements

[61] Peedosk (n 40); Sõrm (n 35); Wojciech Hartung, "In-House Procurement – The Discretion of Member States Confirmed, the Relationship with Competition Law Remains Open: Case C-285/18 Irgita, Judgment of the Court of Justice of the European Union (4th Chamber) of 3 October 2019" (2019) 14 Eur. Procurement & Pub. Private Partnership L. Rev. 262; Janssen (n 41).

[62] Sõrm (n 35), pp.3, 7; Peedosk (n 40), p.136.

[63] *Irgita* (n 59) at [50]; *Azienda ULSS n 6 Euganea* (n 61) at [54]; *Rieco* (n 61) at [38]; Peedosk (n 40), pp.136–137.

[64] *Consorzio Aziende Metano v Comuni di Cignia de' Botti* (Case 231/03) EU:C:2005:487 at [20]; [2005] E.C.R. I-7287.

as well as the means of satisfying them based on its objective needs, not on what market operators may wish to offer. The same logic applies - or at least, should apply - to in-house transactions and public-public cooperation. If, for example, a contracting authority already has accountants on its payroll, it would hardly be reasonable from the perspective of the proper use of public funds, to pay for accounting services from external service providers.

However, the legal position on in-house transactions is in fact not as straightforward as it may seem. Depending on the subject matter of the contract, the contracting authority's location (e.g. where it is situated in a border-area), or the value of the works or services in question, it may indeed be possible to acknowledge potential interest from operators in other Member States.[65] It appears that the notion of cross-border interest is also implicitly referred to in the relevant "make or buy" case law.[66] Thus, if one seeks to find meaning and logic in the Court of Justice's case law since *Irgita*, the conclusion might be that although cross-border interest is generally difficult to affirm in the case of in-house transactions, in certain circumstances it may nonetheless exist.

3.4 The impact of transposition methods on the scope of EU law

The manner in which art.12 of Directive 2014/24 is transposed into national law, whether through a literal copy-out of the EU legislation or by adapting it to national needs, directly influences how contracting authorities can make practical decisions on whether to "make" or "buy". The chosen harmonisation method establishes the legal framework that determines when and to what extent these decisions fall within the scope of EU law, and what restrictions and principles must be observed.

The obligation to follow the fundamental principles of the TFEU is especially relevant in Member States that have opted for a tailor-made approach when transposing art.12 of and have introduced additional restrictions or requirements that affect contracting authorities' ability to choose the "in-house" or "public-public cooperation" option. Again, this is particularly important where the transaction has cross-border relevance.[67] In such situations, national rules must be drafted in a manner that ensures compatibility with the general principles of EU law and prevents unjustified obstacles to the functioning of the internal market.

Conversely, where a Member State has transposed art.12 verbatim, issues concerning the application of EU general principles may still arise if the same provisions are also applied to procurements below the international threshold. In such circumstances, although the Public Procurement Directives themselves may not apply, the Member State may have extended the scope of EU public procurement rules through its national legislation. Consequently, it must also ensure that these nationally created obligations comply with the general principles of EU law.[68]

A similar situation arises when a contracting authority voluntarily chooses to act within the scope of EU law, for example, by applying rules laid down in the Public Procurement Directives even when not legally required to do so, or where the contracting authority could have alternatively relied on the in-house or public-public cooperation exemptions.[69]

Overall, the approach taken by a Member State in transposing art.12 into national law largely determines the extent to which decisions on whether to perform tasks in-house or outsource them fall within the scope of EU law. Given the diversity of transposition methods adopted across the Union, it is not surprising that

[65] Carina Risvig Hansen, *Contracts not covered or not fully covered by the Public Sector Directive* (Djof Publishing 2012), pp.130–136.
[66] See case law referred to in footnote 59 and 61.
[67] Peedosk (n 40), p.138.
[68] *Azienda ULSS n 6 Euganea* (n 61) at [46]–[47], [54]; Sõrm (n 35), p.4; Aleksandra Sołtysińska, "Providing Compliance with the Condition of Economic Dependence in In-House Contracts" (2022) 17 Eur. Procurement & Pub. Private Partnership L. Rev. 158, 167.
[69] Magdalena Jaś-Nowopolska and Hanna Wolska, "Impact of the Judgement of CJEU in Case C-285/18 on In- House Transactions in Poland - Przegląd Prawno-Ekonomiczny 2021" [2021] Przegląd Prawno-Ekonomiczny 63, 72; Janssen (n 41), p.10.

questions have arisen concerning whether, and to what extent, Member States may modify the art.12 exception when incorporating it into national law.

Although the case law of the ECJ does not always provide definitive answers, the Court has confirmed that Member States may introduce additional rules under certain conditions. This supports the view that art.12 is intended to operate under a model of minimum harmonisation, preserving flexibility for Member States while respecting the general principles of EU law and safeguarding the functioning of the internal market.

Member States therefore enjoy considerable discretion in shaping the regulation of in-house transactions and public-public cooperation. However, both Member States and contracting authorities must proceed with caution, because by introducing additional restrictions on the use of these exemptions when incorporating them into national law, Member States may, on their own initiative, expand the scope of EU competence in an area that is primarily intended to remain within their own authority.

4. Conclusions

The transposition of art.12 of Directive 2014/24 and the application of the in-house and public-public cooperation exceptions highlights the intricate relationship between EU law and Member States' regulatory discretion. It is evident from the evaluation of the Public Procurement Directives that while minimum harmonisation affords Member States a degree of flexibility, it may at the same time lead to legal fragmentation capable of undermining the internal market and the broader objectives of the EU.

The method chosen by Member States to transpose art.12 of Directive 2014/24 plays a decisive role in determining whether, and to what extent, "make or buy" decisions fall within the scope of EU law. While in-house transactions and public-public cooperation are in principle excluded from EU public procurement rules, both the ECJ's case law and national transposition choices may trigger the application of general EU law principles, particularly where cross-border interest cannot be excluded. As a result, Member States enjoy significant discretion in regulating these exemptions, but the manner in which that discretion is exercised may unintentionally expand the reach of EU law into an area intended to remain largely within national competence.

It seems that a considerable part of the legal uncertainty surrounding in-house transactions and public-public cooperation is not attributable solely to the wording of art.12 of Directive 2014/24 but is also linked to the diversity of national transposition techniques. In particular, tailor-made national solutions and instances of gold-plating have, in some Member States, intensified fragmentation and contributed to uncertainty regarding the practical scope of the exemptions. The analysis suggests that certain problematic developments might have been mitigated had art.12 been transposed in a more restrained and coherent manner at national level, while at the same time indicating that some tensions are inherent in the structure of the Directive and its judicial development. The difficulties encountered in practice therefore appear to stem from the interaction between minimum harmonisation and national regulatory discretion: while the Directive preserves Member State autonomy, the manner in which that autonomy is exercised has, in certain circumstances, fostered divergence and prompted the application of EU general principles. The experience with art.12 thus illustrates both the benefits and the limits of regulatory flexibility within a system of shared competence.

As the EU continues to revise and refine its public procurement framework, policymakers must seek an appropriate balance between ensuring regulatory consistency and respecting Member States' autonomy, particularly in areas where public sector cooperation is essential for the delivery of public services. Given that a possible future solution may be the full harmonisation of EU public procurement law through the replacement of the current directives with a single Public Procurement Act, it is likely that the rules governing in-house transactions and public-public cooperation will also undergo significant change.[70] The aim of simplification and harmonisation suggests that in the future, Member States may be deprived of or see a reduction in their ability to exercise discretion when transposing procurement rules into national law and tailoring them to local needs.

If the EU intends to harmonise other aspects of procurement law to ensure uniform application across the EU,[71] it is fair to ask whether Member States' rights to regulate in-house transactions and public–public cooperation will also be curtailed more strictly than currently the case under the EU law. That said, it cannot be ruled out that the Commission's approach responds to genuine shortcomings of the current framework, particularly in light of the dissatisfaction of both contracting authorities and other stakeholders with the current rules governing in-house transactions and public-public cooperation.

For the moment, however, there is little to do but wait. Fortunately, the wait may not be long, as the Commission aims to finalise the Public Procurement Act by the end of the second quarter of 2026.

[70] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*. Commission work programme 2026, COM(2025) 870 final, Annex I, p.2.

[71] European Commission (n 71).

In the Shadow of the Classical Directive?

Article 12 of Directive 2014/24 and the Limits of Its Fallback Application in Portuguese Defence Public Procurement Law

Filomena Vieira

Defence and security contracts; EU law; In-house contracts; Portugal; Public procurement; Public-public arrangements

Abstract

This article examines the interaction between the Defence and Security Procurement Directive (Directive 2009/81) and the Classical Directive (Directive 2014/24) in light of a fallback clause introduced by Portuguese Defence Public Procurement Decree-Law.[1] *Under art.73 of Decree-Law No 104/2011 that transposes Directive 2009/81, the Public Contracts Code, which transposes Directive 2014/24, applies on a fallback basis, that is, to all matters not expressly regulated within the defence public procurement regime. This raises a central question: can the quasi-in-house and public-public cooperation mechanisms codified in art.12 of Directive 2014/24—rooted in the Court of Justice of the European Union (CJEU) case law—be invoked within defence procurement through such a fallback clause? Using the reasoning of the Portuguese Court of Auditors in Ruling No.18/2022 as a case study, the article explores this tension and argues that the Portuguese provision exemplifies a broader European uncertainty over the limits of fallback cross-application between procurement regimes. The discussion situates the issue within the current revision of Directive 2009/81 and its implications for coherence and legal certainty in EU defence procurement.*

1. Introduction: Between autonomy and integration: the legal tension behind the Portuguese fallback clause

Public procurement law in the EU is built on a delicate equilibrium between market integration and the institutional autonomy of public authorities. At the level of primary law, this equilibrium emerges most visibly in the tension between art.346 of the Treaty on the Functioning of the European Union (TFEU),[2] which safeguards Member States' freedom to protect essential security interests, and the Treaty principles of equal treatment, non-discrimination, transparency and proportionality, which underpin the internal market.

Early doctrinal accounts of EU public procurement law have largely conceptualised the discipline as an instrument of internal market integration,[3] grounded in the primacy of the Treaty free-movement rules and implemented through secondary legislation aimed at dismantling protectionist practices[4] by contracting

[1] This work was supported by the Estonian Research Council grant (PRG1449).

[2] Article 346 Treaty on the Functioning of the European Union (TFEU) (Consolidated Version) [2012] OJ C326/47.

[3] See Christopher H. Bovis, *EU Public Procurement Law* (Edward Elgar, 2007), pp.1–5.

[4] Albert Sánchez-Graells, *Public Procurement and the EU Competition Rules* (Hart, 2011), pp.3–6.

authorities. Within this paradigm, procurement directives are commonly understood as an elaboration of primary-law obligations operating within a hierarchical legal order in which Treaty principles prevail and exemptions are construed narrowly. This unitary and integration-oriented understanding of procurement law provides the background against which sector-specific regimes must be assessed.

The Defence and Security Procurement Directive[5] occupies a distinct place within the EU public procurement architecture. Adopted to open a historically fragmented[6,7] and protectionist market,[8] it was conceived as a *lex specialis* vis-à-vis the general procurement regime, its provisions forming a closed and self-contained system governing defence procurement. As it has been extensively documented in the literature, the Defence and Security Procurement Directive was conceived precisely to accommodate the specific economic, political and security characteristics of defence markets, and to regulate them through a specialised and autonomous procurement regime rather than through the transposition of the general public procurement model.[9] Before its adoption, most Member States relied almost systematically on art.346 TFEU to procure defence and security goods and services. As Trybus observes, until the late 1990s the Court of Justice of the EU (CJEU) displayed a certain deference concerning arts 346 and 347 TFEU.[10] This practice undermined the development of an internal market in the sector, even though the CJEU developed settled case law construing art.346 as a narrowly interpreted derogation from the general public procurement rules.[11] The Directive was therefore designed to coexist with art.346 TFEU, accepting that Member States may exceptionally rely on national security to exclude procurement from EU law altogether,[12] while strictly circumscribing the scope of that derogation. Following the Commission's 2004 *Green Paper on Defence Procurement* and its 2006 *Interpretative Communication on the Application of Article 296 EC*,[13] the Commission clarified that the exemption constitutes a Member State prerogative but must be interpreted strictly. Invoking it demands clear and reasoned justification, demonstrating that exclusion from EU rules is both necessary and proportionate to the protection of essential security interests.

The adoption of Directive 2009/81 thus represented a pivotal moment in addressing the inadequacy of Directive 2004/18 with respect to defence and security procurement. It aimed to open the defence market, promote competition, and foster innovation, thereby contributing to the development of a European Defence Technological and Industrial Base and, ultimately, a more integrated Defence Single Market. Yet, despite its ambition, the Directive left unresolved several entrenched practices—most notably offset

[5] Directive 2009/81 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 in the fields of defence and security [2009] O.J. L.216/76.

[6] Baudouin Heuninckx, "Defence Procurement and the European Defence Equipment Market: The Virtues of Kissing the Frog" (2015) 2(4) *Procurement Law Journal* 319, 324.

[7] The recognition of the specific fragmentation characteristic of defence market, split into small and closed national markets, led the European Commission to adopt in 2003 the Communication "Towards an EU Defence Equipment Policy" which came in line with their previous Communications adopted in 1996 and 1997. Since the early stages of defence policy development by the European Commission, the objective of increasing market efficiency and establishing a Defence Single Market was understood to depend, at least in part, on the harmonisation of procurement rules. See European Commission, *European Defence – Industrial and Market Issues. Towards an EU Defence Equipment Policy* (COM(2003) 113 final); European Commission, *The Challenges Facing the European Defence-Related Industries – A Contribution for Action at European Level* (COM(96) 10 final, 24 January 1996); and European Commission, *Implementing the Union's Defence Industrial Strategy* (COM(97) 583 final, 4 December 1997).

[8] See Christopher R. Yukins, "The European Defense Procurement Directive: An American Perspective" (2009) 51 *The Government Contractor* 383, emphasising that Directive 2009/81 was conceived as a calibrated opening of a historically fragmented defence market, without eliminating Member States' discretion in particularly sensitive procurements or displacing security-based Treaty derogations.

[9] See e.g. Martin Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* (CUP, 2014), chs 1–3; European Commission, *Green Paper on Defence Procurement* (COM(2004) 608 final); European Commission, *Interpretative Communication on the Application of Article 296 EC* (COM(2006) 779 final).

[10] Trybus (n 9), p.86.

[11] See Sue Arrowsmith, who noted, prior to the adoption of Directive 2009/81, that the practical significance of art.346 TFEU depended on the degree of discretion afforded to Member States in invoking it. While the Court's case law made clear that mere assertion of the exemption was insufficient, Member States were nevertheless considered to retain a wide margin of discretion in relation to genuinely sensitive defence material. This position remains unchanged under the current legal framework, in that reliance on art.346 continues to require a concrete and plausible security justification, failing which EU procurement law applies. Sue Arrowsmith, "The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?" (2006) 35 *Public Contract Law Journal 337*, 367–369.

[12] See European Commission, *Green Paper on Defence Procurement* (n 9); and European Commission, *Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement* (SEC(2006) 1233 final, 7 December 2006).

[13] European Commission, Interpretative Communication on the Application of art.296 (n 9).

arrangements—whose persistence continues to challenge the creation of a fair and competitive European defence market.

The result is a layered and sensitive regulatory balance: while defence procurement is subject to EU rules, its framework remains narrower and more flexible, reflecting the sector's strategic and confidential nature.[14]

Within this framework, the quasi-in-house and public-public cooperation exception—now codified in art.12 of Directive 2014/24[15]—has a structural significance within the EU constitutional order that predates its codification. Originating in the CJEU's Teckal[16] and Hamburg[17] judgments,[18] it reflects the principle that Member States retain the freedom to decide how to organise the performance of public tasks, including through cooperation between public entities. In other words, it delineates the boundary between public autonomy and market opening: contracting authorities may "make" instead of "buy", provided that the cooperation does not distort competition or circumvent procurement rules.

It is against this backdrop that the Portuguese transposition of the Defence Directive has introduced a singular interpretative challenge. art.73 of Decree-Law No.104/2011,[19] which transposes the Defence and Security Directive into the Portuguese legal framework, lays down that in all matters not expressly regulated by the Defence Public Procurement Decree-Law, the Public Contracts Code[20] (PCC) shall apply on a fallback basis, with the necessary adaptations. The PCC, in turn, transposes, among other procurement Directives, the Classical Directive (Directive 2014/24) and contains, among others, art.5-A, which implements art.12 on quasi-in-house and public-public cooperation.

This drafting arrangement gives rise to a crucial interpretative question: to what extent may mechanisms designed for the general procurement regime be applied in the defence sphere? The interplay between those two Articles thus brings to the fore a fundamental issue of interpretation: whether the Defence and Classical Directives embody the same underlying rationale of market integration, and if so, whether they pursue that goal through distinct and potentially conflicting normative frameworks. Before addressing the implications of Portugal's fallback clause, it is thus essential to ask whether Directive 2009/81 and Directive 2014/24 share the same rationale and scope. At a fundamental level, both instruments aim to contribute to the creation of an internal market for public procurement. Yet they pursue that objective through markedly different means, and the legal and policy contexts in which they operate diverge considerably. This characterisation is consistent with doctrinal analyses that conceptualise EU defence procurement as a structurally constrained or "qualified" internal market, in which processes of integration are shaped and limited by enduring power structures, national sovereignty considerations, and security-driven policy choices.[21]

Against this background, the fallback clause introduced by Decree-Law No. 104/2011 gives rise to a legal paradox. By providing that the PCC applies "in all matters not expressly regulated", it risks importing mechanisms designed for general market integration into a sector governed by a *lex specialis*. Yet the Defence Decree-Law does not operate as a mere set of exceptional provisions detached from the PCC. It

[14] On the role of the European Defence Agency and the Code of Conduct on Offsets in acknowledging this reality—notably the possibility of using offset mechanisms in ways that support the European Defence Technological and Industrial Base while minimising their adverse effects on the development of a fair and competitive European Defence Market. See Aris Georgopoulos, "The EDA and EU Defence Procurement Integration" in Nikolaos Karampekios and Iraklis Oikonomou (eds), *The European Defence Agency* (Routledge, 2015), pp.118–136).

[15] Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 [2014] OJ L94/65, art.12.

[16] *Teckal Srl v Comune di Viano (Reggio Emilia)* (C-107/98) [1999] E.C.R. I-8121.

[17] *Commission of the European Communities v Germany* (C-480/06) [2009] E.C.R. I-4747.

[18] For discussion of the preliminary reference procedure as an opportunity for the CJEU to develop general principles—and, as a result, of the gap-filling function of those principles, grounded in the Treaties themselves, which ensures the coherence of the EU legal order—see Koen Lenaerts and José A. Gutiérrez-Fons, "The Constitutional Allocation of Powers and General Principles of EU Law" (2010) 47 *Common Market Law Review* 1629, 1635.

[19] Decree-Law No.104/2011 of 6 October 2011.

[20] Public Contracts Code (Decree-Law 18/2008 of 29 January 2008, as amended).

[21] Nathan Meershoek, "The Constraints of Power Structures on EU Integration and Regulation of Military Procurement" (2021) 6(1) *European Papers* 831.

constitutes an autonomous normative framework—a *self-contained legal regime*—whose coherence and objectives must be interpreted within its own system and rationale. Consequently, where an apparent lacuna arises, the first step is not to trigger the fallback provision, but to seek an internal interpretation consistent with the directive's purpose and internal logic.

This, in turn, raises a further question: if the fallback provision has such a limited function, can it truly serve as the legal channel for applying Treaty-based freedoms—or should its scope be confined to reflecting those principles rather than creating them?

The response that follows is twofold.

First, can a fallback provision serve as the legal vehicle for applying mechanisms derived from primary-law freedoms—such as the right of Member States to organise the performance of public tasks through their own means or through inter-administrative cooperation? The answer must be negative. These freedoms derive directly from the Treaty and the case law of the CJEU—now codified in art.12 of Directive 2014/24 as regards quasi-in-house—and their existence cannot depend on a national fallback provision. However, in the specific case of art.12 of Directive 2014/24, its application through the fallback provision would never be possible, as this would breach the scope of the Directive itself. In fact, art.15(1)(a) expressly excludes from its scope any contracts that fall within the scope of Directive 2009/81—which means that the national fallback provision could never extend beyond the Directive's own scope of application.

It follows, therefore, that art.12 of the Directive could never be applied through the fallback provision.

Secondly, once such a fallback provision exists, how far may it reach? Its function should be confined to enabling the subsidiary application of national provisions that reflect or give effect to principles of primary law. It cannot, however, serve as a gateway to introduce mechanisms that go beyond those principles or that were intentionally excluded from the Defence Directive. Otherwise, the clause would undermine the coherence and autonomy of the *lex specialis* and blur the balance between market openness and the protection of strategic interests that the EU legislature deliberately sought to preserve.

This interpretative tension is particularly evident in practice. While Directive 2009/81 was transposed as a self-standing regime, Portugal's implementing law appears to reintroduce, through fallback cross-application, provisions originating in another directive with a distinct regulatory logic and objective. In practice, this raises a question that extends beyond national boundaries: can mechanisms derived from primary-law freedoms and codified in the Classical Directive be invoked within the field of defence procurement?

This article takes as its central research question the interpretative dilemma arising from Portugal's fallback provision—namely, whether mechanisms codified in art.12 of Directive 2014/24 can be applied within the field of defence procurement. The article addresses this question by combining two levels of analysis. First, it revisits the primary-law foundations of quasi-in-house and inter-authority cooperation to clarify their legal rationale and scope. Second, it examines the Portuguese implementation of Directive 2009/81 and the Court of Auditors' reasoning as a case study illustrating the systemic risks of fallback cross-application. By situating this national clause within the wider debate on the coherence and hierarchy of EU procurement regimes, the article aims to contribute to the ongoing discussion surrounding the revision of Directive 2009/81.[22] The forthcoming amendment offers a timely opportunity to codify—rather

[22] As a response to the European Council's call of March 2025, the European Commission launched a public consultation on 25 March 2025 entitled "Consultation to contribute to the Defence Omnibus Simplification Proposal", organised by its Directorate-General for Defence Industry and Space (DG DEFIS). The European Council's call is set out in European Council, "Special meeting of the European Council (6 March 2025) – Conclusions" (EUCO 6/25, 6 March 2025). The consultation, which closed on 22 April 2025, aimed to gather stakeholder views on regulatory and procurement-related barriers in the defence sector, including the simplification of intra-EU transfers and procurement procedures; the consultation document is in European Commission, "Consultation to contribute to the Defence Omnibus Simplification Proposal" (25 March 2025). It formed part of the preparatory work for the ongoing revision of Directive 2009/81 and related defence-procurement instruments, and it informed the Commission's proposal of 17 June 2025 to amend Directives 2009/43 and 2009/81: European Commission, "Proposal for a Directive of the European Parliament and of the Council amending Directives 2009/43/EC and 2009/81/EC, as regards the simplification of intra-EU transfers of defence-related products and the simplification of security and defence procurement" (COM (2025) 823 final).

than imply—the boundaries between self-provision, cooperation, and market procurement in the defence sector, thus contributing to a more coherent and predictable procurement framework across the Union.

2. The Portuguese legal framework

Portugal transposed the Defence and Security Procurement Directive through Decree-Law No.104/2011, adopted as a self-standing regime governing contracts for military and sensitive equipment, as well as related works and services. Although designed as, the Decree-Law simultaneously tethered itself to the general procurement framework, revealing an inherent tension between its autonomous scope and the fallback role of the PCC.

In the preamble of the Decree-Law No.104/2011, the legislator sought to ensure consistency with the existing public procurement system by declaring that, where the Decree-Law was silent, the PCC would apply on a fallback basis. This approach was justified in the name of legal certainty and coherence. It was also a pragmatic solution, since the PCC already contained detailed rules on procedural and contractual matters that could easily be adapted to the defence sector.

However, this cross-reference was given a general form in art.73, titled Fallback Application of the PCC, which provides that "in all matters not expressly regulated by this Decree-Law, the provisions of the Public Contracts Code and its complementary instruments shall apply, with the necessary adaptations".

At first sight, art.73 appears to be an administrative coordination clause. Yet it has profound legal consequences. The PCC is not limited to procedural rules; it also transposes Directive 2014/24, including through its art.5-A, which implements art.12 of the Classical Directive on quasi-in-house and public-public cooperation. As a result, art.73 potentially reopens the door to the mechanisms and exclusions of the Classical Directive within the field of defence procurement.

This creates an interpretative dilemma. On the one hand, the Decree-Law expressly incorporates certain PCC provisions—for example, those on the competitive dialogue or the restricted procedure with prior qualification—which clearly indicates the legislator's intention to align some procedures. On the other hand, art.73 extends this alignment in general terms, without specifying which provisions apply and which do not. The question therefore arises whether this fallback provision allows the application of art.5(A)PCC, and thus of the quasi-in-house and public-public cooperation rules, to situations covered by Directive 2009/81. What might at first appear as a technical drafting choice in national law in fact generates a substantive conflict of regimes. Upon closer analysis, however, this is an illusory conflict as art.15(1)(a) of Directive 2014/24 expressly excludes from its scope any contracts falling within Directive 2009/81. The fallback provision can therefore never lawfully activate the application of art.12 in areas governed by the Defence Directive, as noted above.

If the Defence Directive constitutes an exhaustive *lex specialis*, then the PCC may apply only where the Directive itself expressly permits it. Conversely, if the fallback provision were understood to authorise a broader importation of PCC provisions, the boundaries between the two regimes would become blurred, potentially undermining both the Directive's autonomy and the balance it seeks to achieve between transparency, competition, and national security.

This question lies at the core of the present article.

The issue is not purely theoretical. It was brought into sharp focus by the Portuguese Court of Auditors in *Ruling No.18/2022*, which examined a contract concluded by the Ministry of Defence under art.5-A PCC and questioned whether that provision could legitimately apply to defence procurement governed by Decree-Law No.104/2011. The following section analyses that case, which provides a concrete setting for examining not only the applicability of art.12 of the Classical Directive through the fallback provision, but also—and critically—the question left entirely unaddressed by the Court on whether the Treaty principles of quasi-in-house and public-public cooperation that art.12 codifies may operate independently within the Portuguese defence procurement regime.

3. The Portuguese Court of Auditors case law

The relationship between the Portuguese Public Contracts Code (PCC) and Decree-Law No.104/2011—which transposed Directive 2009/81—was tested before the Portuguese Court of Auditors in *Ruling No.18/2022*.[23] The case concerned the approval of a contract between the Ministry of National Defence and idD–Portugal Defence, S.A. (idD),[24] the State-owned defence holding company.[25] The contract entrusted idD with managing the acquisition programme for six ocean patrol vessels for the Portuguese Navy, including engineering supervision, procurement coordination and life-cycle logistical support. This case became the first judicial test of the fallback provision introduced by art.73 of Decree-Law No.104/2011, making its interpretation decisive for the relationship between the general and defence procurement regimes in Portugal.

The Ministry authorised the contract under art.5-A PCC, which transposes art.12 of Directive 2014/24 and governs quasi-in-house and public-public cooperation. The Ministry considered that, as idD was wholly owned by the State, the contract could be treated as an internal transaction between public entities and therefore exempt from competition. It further referred to Decree-Law No.104/2011, claiming that its art.73 fallback provision authorised the application of the PCC provisions in the absence of specific regulation within the defence regime. In this view, according to the Ministry of Defence, the fallback provision provided the necessary legal bridge for using art.5-A PCC in the context of defence procurement.

The Court of Auditors adopted a fundamentally different interpretation. After considering that the supply of the patrol vessels could not be justified under art.346 TFEU,[26] it examined the material scope of Decree-Law No.104/2011 and held that the contract at issue—covering services directly related to the acquisition and life-cycle management of military equipment—clearly fell within the field governed by the Defence and Security Procurement Directive.[27] The patrol vessels qualified as warships within the meaning of Council Decision 255/58,[28] and the related services were explicitly listed in Annex I of Directive

[23] Tribunal de Contas (Portuguese Court of Auditors), *Acórdão* n.º 18/2022 (1.ª Secção/SS, 3 June 2022), *https://www.tcontas.pt/pt-pt/ProdutosTC/acordaos/1sss/Documents/2022/ac018-2022-1sss.pdf* (last accessed 16 June 2025).

[24] It is relevant to note that idD—Portugal Defence, S.A. is the national defence holding company, structured as a public limited company wholly owned by the Portuguese State. It holds share capital in various Portuguese companies—some with majority private ownership, others wholly owned by idD—operating in the shipbuilding and naval maintenance sectors. Under the statutes, idD is vested with the competence to advise on military equipment transactions, particularly in the context of the implementation of the Military Programming Law, in coordination with the Directorate-General for National Defence Resources, which operates as a service within the direct administrative structure of the Ministry of Defence.

[25] During the *visto prévio* (prior approval) procedure before the Portuguese Court of Auditors and following a request for clarification on the contractual terms, the contracting authority decided to execute an amendment to the contract in order to remove a subcontracting clause. The amendment reflected the Court's position that subcontracting was incompatible with the legal nature of an in-house providing contract, and therefore prohibited idD–Portugal Defence, S.A. from subcontracting any part of the contract's object. For an interesting point of view on recourse to third parties to perform an in-house contract, although prior to 2014 Directives, see Opinion of AG Campos Sánchez-Bordona in *LitSpecMet* (Case C-567/15) EU:C:2017:319, 27 April 2017).

[26] This reading, however, does not appear entirely accurate, as the core issue lay in the insufficient reasoning provided by Portugal in support of the exemption. Indeed, in Case T-509/09, concerning the financial contribution and reimbursement of expenditure incurred by the Portuguese authorities for the acquisition of two ocean patrol vessels, the General Court emphasised that Portugal had invoked the protection of essential State security interests, as well as the existence of specific security measures applicable to the supplies in question, to justify a derogation from the general rules on the award of supply contracts and the adoption of a negotiated procedure without prior publication. However, the Court noted that Portugal had relied solely on the confidentiality of sensitive information related to the vessels' communications software and had failed to provide evidence that specific security measures were required for the procurement of the vessels themselves. In the absence of proof that the objective could not have been achieved through a competitive tendering procedure, the Court upheld the Commission's decision declaring the related expenditure ineligible for financial assistance under Decision 2001/431.

[27] It is relevant, in this regard, that the in-house contract examined by the Court of Auditors did not concern the acquisition of patrol vessels as such, but rather the provision of ancillary services relating to the management of pre-contractual procurement procedures and the monitoring of contract performance. While such services fall within the material scope of Directive 2009/81 as functionally linked to a defence procurement, they nevertheless concern activities that are, in principle, capable of being supplied on a competitive basis by private operators. From this perspective, the entrustment of procurement and contract-management functions to an in-house entity necessarily raises questions as to the impact of public intervention on existing or potential markets for professional services, even where the underlying defence acquisition itself takes place in a non-contestable market. See Hartung, Kuźma and Janssen, "Article 12. Public Contracts between Entities within the Public Sector" in Roberto Caranta and Albert Sánchez-Graells (eds), European Public Procurement: Commentary on Directive 2014/24 (Elgar Commentaries: Edward Elgar, 2021), pp.126–147, analysing the limits imposed by CJEU case law on public intervention in competitive markets under art.12 of Directive 2014/24; see also *Irgita UAB* (C-285/18) EU:C:2019:829 at 64, where the Court held that compliance with the conditions for in-house cooperation under Directive 2014/24 does not, as such, render an arrangement compatible with EU law.

[28] *Council Decision 255/58 of 15 April 1958 defining the list of arms, munitions and war material*, available at *https://data.consilium.europa.eu/doc/document/ST-14538-2008-REV-4/en/pdf* (last accessed 4 September 2025).

2009/81. Consequently, the Court found that the contract was subject to the procedural rules of the Defence Directive and not to the general PCC regime.

Turning to the substantive issue, the Court rejected the argument that art.5-A PCC could apply as a fallback rule. It held that the EU legislator did not intend to provide for, within the defence sector, the possibility of in-house contracting, given that in this specific field such arrangements could give rise to situations of market distortions—for example, through possible covert financing of public entities or undertakings under the guise of service contracts, potentially infringing the rules prohibiting State aid.

According to the Court of Auditors, "in-house contracting involving State-owned companies represents an increased risk in the defence sector compared with ordinary public procurement. It is therefore understandable that, in seeking to balance the specificities of the defence sector with the need to ensure transparency and competition, the legislator offset the greater flexibility of negotiated procedures by not including in-house contracting among the permissible exceptions".[29] It further reasoned that Directive 2009/81 constitutes a *lex specialis*, establishing a complete and self-contained set of procurement procedures for the defence and security sectors. However, the Court did not address the fact that Directive 2014/24 excludes from its scope any contracts falling under Directive 2009/81, nor did it explicitly address whether this *lex specialis* status affects the direct applicability of primary-law principles—an issue examined in the following chapter.

Directive 2009/81 deliberately omits any reference to in-house or public-public cooperation, even though such mechanisms had already been developed in the CJEU's case law prior to its adoption. The Court of Auditors therefore concluded that this silence could not be treated as an oversight but must reflect an intentional exclusion by the EU legislator.

In support of this interpretation, the Court of Auditors referred to the Commission Staff Working Document[30] on the evaluation of the Defence Directive, which noted that certain Member State experts had proposed including explicit provisions on in-house and public-public cooperation in a future amendment of the Directive. The Commission, however, did not act on that proposal—an omission that, in the Court's view, confirmed that Directive 2009/81 had been conceived as an exhaustive regime and that Member States were not authorised to import mechanisms from the Classical Directive through national law.

The Court further distinguished between two scenarios. Where the protection of essential national-security interests requires the exclusion of EU law altogether, art.346 TFEU and its national transposition in art.4(1)(e)PCC justify the full disapplication of both the PCC and Decree-Law No.104/2011. In all other cases, however, contracts falling within the material scope of the Defence Directive must be governed exclusively by Decree-Law No.104/2011, which implements that Directive. Accordingly, the fallback application of art.5-A PCC was inadmissible.

On these grounds, the Court of Auditors refused to approve the contract.[31] It held that the Portuguese Government had relied on a legal basis that was incompatible with the EU defence procurement regime and that the use of the in-house mechanism amounted to circumventing the procedural requirements of Directive 2009/81. The Court therefore reaffirmed the autonomy and exhaustiveness of the Defence Directive and ruled that its silence on in-house cooperation could not be remedied through fallback application of the Classical Directive.

[29] Ruling No.18/2022, para.12 (author's translation).

[30] European Commission, *Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security* (SWD (2016) 407 final), accompanying (COM (2016) 762 final).

[31] Under art.48 of the Lei de Organização e Processo do Tribunal de Contas (*Law on the Organisation and Procedure of the Court of Auditors*, approved by Law No.98/97 of 26 August 1997, as amended), public contracts above €750,000 are subject to prior approval (*visto prévio*) by the Court of Auditors before any payment may be made by the contracting authorities. If the prior approval is refused—because the procurement procedure or expenditure violated applicable public-finance or public-procurement rules—the contract ceases to have effect, although the contractor remains entitled to payment for services, works or goods already provided. For contracts exceeding €950,000, as the one in Ruling No.18/2022, performance cannot begin until the Court of Auditors has granted the *visto prévio*, and members of contracting authorities who authorise expenditure in breach of this requirement incur personal financial liability.

While based on Portuguese law, the reasoning in Ruling No.18/2022 highlights issues of wider European relevance. It illustrates how the interaction between distinct secondary regimes can generate uncertainty when national transposition measures introduce fallback provisions broad enough to allow the cross-application of another directive. More importantly, it invites reflection on whether mechanisms such as in-house and public-public cooperation, which derive from primary-law principles of institutional autonomy and self-organisation, may nonetheless retain horizontal applicability even in a sector governed by a *lex specialis*. This inquiry situates the Portuguese case within the broader constitutional balance between market openness and institutional autonomy in EU law.

The following section turns to that broader analytical question.

4. A possible lacuna in defence procurement? Interpreting the limits of fallback application

The decision of the Portuguese Court of Auditors gives rise to a more fundamental question: does the absence of an explicit provision on in-house and public-public cooperation in Directive 2009/81 reveal a deliberate legislative choice or a gap that may be filled by reference to primary-law principles and the CJEU's case law? The analysis that follows first examines this question *de lege lata*, on the basis of EU primary law and secondary legislation, before considering, in a separate step, whether an alternative reading may be advanced *de lege ferenda*.

4.1 The primary-law rationale behind in-house and public-public cooperation

This subsection addresses the issue *de lege lata*, focusing on the foundations of in-house and public-public cooperation in EU primary law and the Court of Justice's case law. The starting point lies in EU primary law, not secondary legislation. The rationale of art.12 of the Classical Directive is rooted in the CJEU's jurisprudence—notably *Teckal*[32] and *Hamburg*[33]— which recognised that public authorities must retain the freedom to determine how to perform public-interest tasks, including through cooperation among themselves, without necessarily opening those arrangements to competition. These judgments derive from the broader structural principle of Member-State autonomy within the EU constitutional order in the organisation of public services. In this sense, art.12 of the Directive2014/24 did not create a new rule but rather codified a pre-existing structural balance between market openness and institutional self-organisation. This approach is consistent with the academic literature emphasising that make-or-buy decisions, including recourse to in-house and public-public cooperation, precede the application of procurement directives and are primarily governed by Treaty-based principles of organisational autonomy, subject only to the fundamental rules of the TFEU.[34]

This balance finds further expression in art.14 TFEU and Protocol No.26 on Services of General Interest, which reaffirm the wide discretion of national and local authorities in organising, financing, and delivering services of general economic interest. Together, these provisions demonstrate that the autonomy of public authorities is not an exception to internal market law but one of its constitutional foundations. The Commission's 2011 Communication "A Quality Framework for Services of General Interest"[35] also emphasised that cooperation between public entities may legitimately pursue efficiency and solidarity objectives within the EU legal order. Against this background, a more fundamental issue arises concerning the limits of in-house cooperation under EU law. In-house arrangements are, inherently, designed to remove certain activities from the market and to replace competition with organisational integration. The

[32] *Teckal Srl v Comune di Viano (Reggio Emilia)* (C-107/98) [1999] E.C.R. I-8121.

[33] *Commission of the European Communities v Germany* (C-480/06) [2009] E.C.R. I-4747.

[34] Mario Sõrm, Carri Ginter and Mari Ann Simovart, "Transparency Obligations for Make or Buy Decisions" (2023) 32(1) *Public Procurement Law Review* 1.

[35] European Commission, "A Quality Framework for Services of General Interest in Europe" (COM (2011) 900 final).

reduction of market competition is therefore not an incidental effect of in-house cooperation, but rather its structural premise. EU law accepts this consequence as an expression of Treaty-based organisational autonomy; however, it does not follow that such autonomy is unlimited. As the Court of Justice has made clear,[36] compliance with the formal conditions for in-house cooperation does not, as such, render an arrangement compatible with EU law, nor does it exclude scrutiny under the Treaty principles of equal treatment, non-discrimination, transparency and the prohibition of distortion of competition with private operators.

If this rationale applies generally under EU law across the internal market, the question arises whether Member States may rely directly on those primary-law freedoms—even where sector-specific directives, such as the Defence Directive, remain silent. The issue is particularly sensitive in the defence sector, where considerations of security and confidentiality frequently justify restrictions of competition, but where the boundaries of such restrictions must still respect EU law coherence.

4.2 The Defence Directive as lex specialis

Directive 2009/81 was conceived as a *lex specialis* designed to regulate procurement in a sector characterised by secrecy, sovereignty and technological sensitivity. Its preparatory works and recitals make clear that it was intended to constitute a self-contained system, defining exhaustively the permissible procedures and exclusions. This understanding of Directive 2009/81 as an autonomous *lex specialis* is strongly supported in the literature. Trybus emphasises that the Directive was deliberately designed as an exhaustive regulatory framework for defence and security procurement, defining not only the procedures to be used but also the limits of permissible exclusions and derogations, precisely in order to reduce reliance on *ad hoc* recourse to art.346 TFEU. From this perspective, the absence of certain mechanisms found in the general procurement regime cannot be treated as a mere legislative oversight but must be understood in light of the Directive's specific regulatory logic and objectives.[37,38] It expressly refers to art.346 TFEU but omits any reference to in-house or inter-authority cooperation, notwithstanding that the relevant CJEU case law was already well established by 2008. The deliberate omission of those mechanisms therefore lends strong support to the conclusion that the EU legislator chose not to transpose them into the defence field.

The rationale for this separation was twofold. First, Recitals 2–5 of the Directive emphasise that opening the defence market to competition required gradual adaptation rather than full integration, taking account of national security concerns. Secondly, the Directive was meant to foster a European defence industrial base and ensure interoperability among Member States' armed forces, not to replicate the general procurement model. This differentiation, however, was not intended to detach defence procurement from the principles of EU law altogether, but to adapt them to a domain where confidentiality, supply security, and strategic autonomy prevail.

Nevertheless, the Directive's silence has occasionally been interpreted as leaving space for national flexibility. Because art.73 of Portuguese Decree-Law No.104/2011 permits the fallback application of the PCC "with the necessary adaptations", one might argue that the national legislator implicitly allowed for the continued relevance of general public-law principles—including those underpinning in-house cooperation. Whether this flexibility amounts to a legitimate interpretative complement or to a distortion of the Directive's autonomy lies at the centre of the present debate.

[36] *Irgita* (C-285/18) at [60]–[62].
[37] Trybus (n 9), Chs 1–3 and 6.
[38] In the same systemic sense, the existence of differentiated procurement regimes within EU law is well established, most notably in relation to utilities procurement, which has long been regulated under a sector-specific framework applying in place of the general public sector regime where its material scope conditions are met. See Sue Arrowsmith, *The Law of Public and Utilities Procurement*, 3rd edn (Sweet & Maxwell, 2014), Pt II.

4.3 The hermeneutic tension: system coherence versus functional necessity

From a *de lege lata* perspective, this interpretative tension arises precisely because both system coherence and functional necessity are legitimate aims under EU law. From a methodological perspective, any interpretation must respect the systemic coherence of EU law. A fallback provision cannot be used to re-import provisions that the EU legislator has intentionally excluded, since this would undermine the hierarchy and exclusivity of the *lex specialis*. The interpretative task therefore requires distinguishing between two different functions of fallback application. One concerns domestic procedural coordination, where national provisions supplement EU rules without altering their substance. The other would amount to substantive supplementation, through which Member States introduce mechanisms drawn from a different directive. Only the former can be admitted.

This distinction reflects the principle of proportionality in interpretation: Member States may fill procedural gaps where necessary for practical operation, but they cannot alter the substantive balance established by the EU legislator.

Applying this reasoning, art.73 of Decree-Law No.104/2011 may validly cover national matters not regulated by Directive 2009/81—such as administrative or contractual details that do not stem from EU law. However, it cannot serve as a legal basis to "import" the in-house and public-public cooperation mechanisms codified in art.12 of Directive 2014/24 into contracts governed by the Defence Directive. Article 15(1)(a) of Directive 2014/24 expressly provides that its provisions do not apply to contracts falling within the scope of Directive 2009/81, or to those excluded from it under arts 8, 12 and 13 thereof. Accordingly, even where the provisions of the Classical Directive reflect Treaty principles, their application is precluded whenever EU law expressly removes those contracts from the Directive's scope. The fallback provision in Portuguese law must therefore be interpreted restrictively: it may operate only for national matters genuinely outside the reach of Directive 2009/81, and never to extend mechanisms that the EU legislator has deliberately excluded. Any broader interpretation would contravene art.15(1)(a), compromise the autonomy of Directive 2009/81, and undermine the principle of strict construction of derogations from EU law.

It must be emphasised, however, that Treaty-based principles—such as the freedom of public authorities to determine how to perform public-interest tasks—do not operate through fallback provisions but derive directly from primary EU law.[39] Their applicability is autonomous and does not depend on the cross-reference mechanisms established in national legislation. Even where art.15(1)(a) of Directive 2014/24 precludes the extension of its provisions to contracts falling within the scope of Directive 2009/81, the underlying Treaty principles remain in force and must be respected. Secondary legislation cannot displace or neutralise these principles unless the EU legislator has explicitly and exhaustively regulated the matter. As the CJEU has consistently affirmed, exemptions in directives limit the reach of primary law only where such a comprehensive regulatory intention is evident—an intention that is particularly difficult to establish in the field of public procurement, where the *Teckal* and *Hamburg* jurisprudence continues to reflect principles of EU law that operate independently of secondary legislation.

It is submitted that, de lege lata, the absence *de lege lata*, the absence of art.12-type mechanisms in Directive 2009/81 must be understood as a deliberate legislative choice, which bars the application of in-house and public–public cooperation through fallback recourse to Directive 2014/24. However, this does not mean that quasi-in-house arrangements are *per se* incompatible with defence and security procurement. Treaty-based principles of organisational autonomy continue to apply across sectors, including defence procurement, and may, in principle, justify recourse to internal provision or inter-authority cooperation even in the absence of express secondary-law codification. Such reliance, however, must

[39] On the constitutional hierarchy between primary law, secondary legislation and general principles of EU law, and the autonomous operation of general principles within the scope of EU law, see Koen Lenaerts and José A. Gutiérrez-Fons, "The Constitutional Allocation of Powers" (n 18).

operate directly at the level of primary law and remain subject to strict scrutiny, in particular a prior transparency[40] and non-distortion assessment aimed at preventing the artificial creation or expansion of public undertakings capable of disrupting existing or potential markets.

4.4 An alternative reading: the case for limited cross-applicability

By contrast, this subsection adopts a *de lege ferenda* perspective, exploring whether functional or policy-based considerations could support a limited cross-applicability of in-house cooperation in the defence sector. Because the in-house and public-public cooperation rules reflect general principles of EU law rather than sector-specific exceptions, one might argue that their application in the defence field does not contradict the *lex specialis* but complements it, ensuring that public authorities retain organisational freedom even in security-sensitive contexts. The omission in the Defence Directive could thus be understood not as deliberate exclusion but as legislative economy: the EU legislator may have considered the principle self-executing and therefore unnecessary to repeat.

Acknowledging this alternative reading does not weaken the argument advanced here. On the contrary, it illustrates the interpretative uncertainty generated by fallback provisions such as art.73 of Decree-Law No.104/2011. Whether the omission is intentional or implicit, the lack of explicit codification undermines the uniform application of EU law and invites divergent national practices. This ambiguity also has policy implications: clarifying the scope of permissible cooperation is essential not only for legal coherence but for defence-industrial efficiency. Properly framed, public-public partnerships could strengthen supply-chain resilience and technological sovereignty while respecting transparency and competition safeguards. This reinforces the need for the ongoing revision of Directive 2009/81 to clarify expressly the status of in-house and quasi-in-house cooperation in the defence sector, either by codifying its applicability or by confirming its exclusion.

The practical implications of this alternative reading are illustrated by Ruling No.18/2022 itself. The contested contract did not merely allocate an existing internal task, but expressly incorporated, in its financial structure, the costs of establishing a dedicated operational team within the State-owned company for the purpose of contract performance over a period exceeding ten years. This configuration invites closer scrutiny as to whether quasi-in-house cooperation may be used to organise the internal performance of public tasks or whether it may instead operate as a form of long-term market substitution, capable of foreclosing existing or potential competitive supply.

This case also illustrates why the market impact of quasi-in-house arrangements cannot always be equated with that of pure self-supply. While it has been argued that pure self-supply and quasi self-supply are equivalent from the perspective of EU primary law and should therefore be subject to obligations of the same nature and intensity,[41] the author considers that such equivalence cannot be assumed in the abstract. In practice, quasi-in-house arrangements involving legally distinct entities may, depending on their duration, financial structure and the need to create or expand operational capacity, generate materially different market effects. From this perspective, the assessment of equivalence becomes necessarily sensitive to Member State practice, as illustrated by the configuration examined in Ruling No.18/2022 of the Portuguese Court of Auditors.

The Portuguese provision thus serves as a concrete illustration for a broader European question: how far can Member States rely on fallback application of general procurement rules within a specialised regime? The answer depends on the relationship between primary-law autonomy and secondary-law specificity. Unless the revised Defence Directive clarifies this hierarchy, national fallback provisions will

[40] Sõrm, Ginter and Simovart (n 34).
[41] See Sõrm, Ginter and Simovart (n 34), p.13, arguing that pure self-supply and quasi self-supply are equivalent situations and as such should be treated equally in the eyes of primary EU law. This would also mean that positive obligations stemming from primary law should also be of the same nature and intensity for all modes of self-supply.

continue to expose the fault line between the constitutional principle of organisational freedom within the EU legal order and the legislative objective of a coherent, exhaustive procurement framework.

In this sense, the Portuguese experience reflects the unresolved dialectic between integration and autonomy that continues to shape the evolution of EU procurement law, particularly in sectors where strategic discretion and legal certainty must coexist.

5. Concluding observations: clarifying the boundaries of organisational freedom in defence procurement

The analysis developed in this article has sought to clarify a question that, although arising from a specific national clause, reflects a broader tension in the architecture of EU public procurement law: to what extent may mechanisms grounded in primary-law principles of organisational autonomy and in CJEU case law such as in-house and public-public cooperation, apply within a regime conceived as a self-contained *lex specialis*?

The Portuguese fallback provision in art.73 of Decree-Law No.104/2011 exemplifies this uncertainty. By referring to the PCC as the general legal framework in matters not expressly regulated by Decree-Law No.104/2011, the national legislator blurred the boundary between two EU directives with distinct objectives. The result was an interpretative ambiguity that surfaced in Ruling No.18/2022 of the Portuguese Court of Auditors: the Portuguese Government argued that the fallback provision allowed the application of art.5-A PCC (transposing art.12 of Directive 2014/24) to a defence-procurement contract, while the Court held that Directive 2009/81 constituted an exhaustive and autonomous system, deliberately excluding such mechanisms.

The competing interpretations highlight a structural problem rather than a national peculiarity. If, as some may argue, art.12 of the Classical Directive merely codifies a general principle of EU law, then Member States could legitimately rely on it even in the absence of explicit secondary legislation—although not through the fallback clause, as art.15(1)(a) of Directive 2014/24 expressly excludes from its scope contracts falling under Directive 2009/81. If, however, the in-house and public-public exceptions are sector-specific derogations, then their omission from the Defence Directive must be treated as intentional, and any attempt to reintroduce them through national fallback application would compromise the coherence of EU procurement law.

This duality exposes the fragile equilibrium between the constitutional autonomy of public authorities and the integrative function of EU procurement law. It also demonstrates how, in practice, interpretative uncertainty can translate into governance uncertainty, affecting the organisation, efficiency, and legitimacy of public action in sensitive sectors.

Both readings reveal that the current framework lacks the clarity required to ensure consistent practice across Member States. The coexistence of multiple directives, each with distinct exclusions and objectives, generates normative overlap that only explicit legislative coordination can resolve. As early analyses of the Defence Directive already noted, the effectiveness and legitimacy of a specialised defence procurement regime depend on the clarity of its boundaries vis-à-vis both Treaty derogations and the general procurement framework, a concern that remains highly relevant in the context of any future revision of Directive 2009/81.[42] The ongoing revision of Directive 2009/81 therefore presents a crucial opportunity to close this interpretative gap. Whether by codifying the conditions under which in-house and public-public cooperation may operate under primary law in the defence sector or by expressly excluding it, the EU legislator should articulate a definitive position, thereby safeguarding both legal certainty and the balance between market openness and sovereign discretion.

[42] Trybus (n 9).

Clarification at this level would not only improve legal predictability but would also strengthen the constitutional dialogue between EU institutions and Member States, aligning the Defence Market's operational needs with the foundational principles of the Treaty.

From a broader perspective, the Portuguese experience demonstrates how apparently technical drafting choices, such as fallback clauses, can have far-reaching implications for the constitutional balance between EU integration and Member State autonomy. They are not neutral coordination tools but normative levers that reveal how the EU legal order manages diversity within a framework of unity. They test the boundaries between EU integration and Member State autonomy, between market efficiency and institutional self-organisation. Clarifying those boundaries is not merely an exercise in legislative precision; it is a prerequisite for the credibility and effectiveness of the emerging European Defence Market.

In-House Contracting in Lithuania: A Case Study

Deividas Soloveicik

EU law; In-house contracts; Lithuania; Public procurement

1. Introduction

The concept of in-house agreements is well-established, but it continues to retain significant practical and doctrinal relevance. There are obvious reasons for this. On the one hand, in-house contracting is an economic construct. From this perspective it is a very convenient form of arranging the provision of particular services (waste management, street cleaning and maintenance, etc.) to local communities. It is rapid, precise, and comparatively insulated from administrative and bureaucratic burdens. Besides, it has a direct positive impact on the wellbeing of many people by creating employment in specialised municipal companies, thereby stimulating local economic activity, strengthening household consumption, and contributing to broader socio-economic development. On the other hand, it is an exception from the public procurement regime. Needless to say, that every derogation from ordinary system of public procurement negatively affects the environment of free and honest competition. It may also cause stagnation, hinder innovation and impede the adoption of sound and efficient corporate-governance practices within such companies, among other adverse effects. Therefore, it is unsurprising that *Teckal*[1] criteria exist which were designed to avoid or at least to mitigate the said negative effects.

However, the practice shows that *Teckal* model is insufficient. As it is correctly noted in European Commission's conducted evaluation of inter alia Directive 2014/24[2], *recent case law has raised concerns regarding the compatibility of in-house arrangements when it comes to e.g. competition law, i.e. Irgita*[3,4]. Therefore, a proper balance must be sought between the advantages afforded by in-house contracting, such as sound economic governance and the reduction of administrative burdens in concluding such agreements, and its potential drawbacks, particularly the distortion of the competitive environment. This need is especially acute in small markets, such as that of Lithuania.

This article is a scholar analysis of the in-house model that exists in Lithuania. It aims to provide the scrutiny of Lithuanian substantive public procurement law which incorporates the concept of in-house contract. Moreover, this publication seeks to examine the national case-law on in-house agreements and to offer an academic assessment of the Lithuanian jurisprudence in this domain.

This article is structured as follows: the first part examines art.10 of the Law on Public Procurement of the Republic of Lithuania (LPP)[5], which sets out the legal requirements governing in-house contracts. The second part offers a scholarly analysis of the Lithuanian case-law on in-house contracting. The final part of this publication sets out the conclusions drawn from the conducted academic analysis.

[1] *Teckal Srl v Comune di Viano (Reggio Emilia)* (C-107/98) EU:C:1999:562; [1999] E.C.R. I-8121.

[2] Directive 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18, O.J. L. 94/65 (2014).

[3] *Kauno miesto savivaldybe* (C-285/18) EU:C:2019:369.

[4] Commission staff working document, evaluation of Directive 2014/23 on Concessions, Directive 2014/24 on Public Procurement and Directive 2014/25 on Utilities, 29-10-2025, *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025SC0332*, p.11.

[5] Law on Public Procurement of the Republic of Lithuania, 13 August 1996 No.I-1491. *Valstybės žinios*, 1996, 84-2000.

2. The substantive law governing in-house procurement in Lithuania

The Lithuanian legislature had already exercised its regulatory discretion to go beyond the classic *Teckal* criteria in the field of in-house procurement long before the CJEU delivered its judgment in *Irgita*. It is therefore hardly surprising that art.10 of the LPP contains provisions which, on the one hand, diverge from the regulatory framework laid down in art.12 of Directive 2014/24 and, on the other hand, operate to limit and restrict the practical scope for employing in-house procurement arrangements within the Lithuanian market.

Article 10(1) of the LPP stipulates that an in-house transaction falls outside the scope of procurement regulation only where the agreement is concluded between or among contracting authorities. In this way, the legislature emphasises that the in-house mechanism is a prerogative reserved exclusively for contracting authorities and contracting entities, thereby eliminating its availability in all other situations. It has to be mentioned that the law is silent on whether in-house contracting is possible between contracting authority and contracting entity (or a few of them), *i.e.* the mix of them. The law contains no explicit prohibition precluding this possibility. In the author's view, such an arrangement should be feasible, given the absence of a direct normative prohibition and considering that the functional character and institutional "DNA" of contracting authorities and contracting entities - at least those qualifying under art.4(1)(a) of Directive 2014/25—are essentially analogous. Moreover, according to the art.19 of the Directive 2014/25 the discussed option is legally possible. Nonetheless, insofar as the author has been able to ascertain regarding this option through practical engagement with national supervisory authorities, it appears that these bodies would not be inclined to endorse the aforementioned interpretation.

Article 10(1)(1) of the LPP includes the first *Teckal* criterion by specifying that in-house agreement is possible when *the contracting authority exercises over the other contracting authority a control which is similar to that which it exercises over its own service or unit by exercising a decisive influence over both strategic objectives and significant decisions thereof*. The Lithuanian legislator added that the latter situationsinclude decisions regarding *investment, transfer, lease, pledge, mortgage of fixed assets; acquisition or transfer of shares of other economic entities; transfer of the right to manage departments of the economic entity/entities.* This list of possible areas of extensive control is non-exhaustive. It is provided in the law for the clarifying purposes and anything what is similar most likely would fall under the provisions of art.10(1)(1) of the LPP as well. It is worth mentioning thataccording to the indicated legal norm, an in-house agreementis also permissible where the control in question is exercised by another legal person, which, in turn, is itself subject to the same degree of control by the contracting authority.

Article 10(1)(2) of the LPP incorporates the second *Teckal* criterion by stating that in-house mechanism is available in cases where *over 80 % of the average revenue from sales-purchase contracts received over the last three financial years by the controlled contracting authority represents revenue from contracts concluded with the controlling contracting authority or with the legal persons controlled by that contracting authority and intended to meet its/their needs or perform its/their functions.* As it might be seen from the text of the law the national legislator relates the requirement of the average revenue received by the controlled contracting authority form the controlling one to the term of the last three financial years. In cases such entity operates less than three financial years, then the corresponding performance must be envisaged in its operational plans. Meanwhile, art.10(3) of the LPP prohibits any direct participation of private capital in the controlled contracting authority, thereby completing the constellation of conditions governing in-house arrangements as envisaged in art.10(1) of the LPP.

The more authentic and distinct regulation of in-house procurement environment is provided in the second part of art.10 of the LPP. There are provisions, on the one hand, that implement the Member States' discretion to establish additional legal requirements, compared to the ones provided in the art.12 of the Directive 2014/24, related to in-house procurement, as much as they are in line with the public procurement principles. Such regulatory right of national legislator is developed by the CJEU in *Irgita* where the court ruled that *it is open to a Member State to impose on a contracting authority conditions, not laid down in art.12(1) of Directive 2014/24, if it is to conclude an in-house transaction, including conditions to guarantee the continuity, good quality and availability of the service*[6]. On the other hand, as it will be demonstrated later in this article, the second part of art.10 of the LPP encapsulates the jurisprudence of the national courts and thereby crystallises a distinct doctrine governing in-house procurement in Lithuania.

Article 10(2) of the LPP begins with the statement that an in-house transaction may be entered into only in exceptional cases and where the conditions set out in art.10(1) of the law are met. Accordingly, any assessment of the permissibility of an in-house procurement arrangement is predicated upon two primary legal conditions: first, whether the situation satisfies the *Teckal* criteria enshrined in art.10(1) of the LPP; and second, whether the case at hand constitutes an *exceptional* instance. It is not defined in the law what those exceptional situations for in-house procurement are. It might be thought that the exact three cases provided in further three paragraphs (subclauses) of art.10(2) of the LPP (which will be discussed later) constitute the said exceptionality. In other words, the law may be construed to mean that any scenario falling within the situations set out in arts 10(2)(1)–10(2)(3) of the LPP is, by definition, exceptional and thus gives rise to a justified possibility of concluding an in-house contract. However, in the opinion of the author of this article, this would not be a correct interpretation of art.10(2) of the LPP because this provision stipulates that in-house procurement is allowed (i) in the presence of *Teckal* criteria, (ii) exceptionality of the situation (iii) *andwhen* there is at least one out of three legal conditions provided in arts 10(2)(1)–10(2)(3) of the LPP. Thus, the wording of the law indicates a distinction between two sets of legal conditions: on the one hand, the *Teckal* criteria together with the requirement of exceptionality; and on the other, any of the three subsequent legal conditions. This would mean that the exceptionality as a precondition for in-house arrangement requires to construe art.10(1) of the LPP strictly and implement this legal mechanism only in cases when, for example, there is absolutely no objective competition in the market or when there are suppliers, but they would not guarantee such quality, price, timing, etc. In other words, the contracting authority should prove that it is inefficient from an economic governance perspective to rely on external contracting and such substantiation should be solid.

As it has been mentioned before, three additional and compulsory conditions (alternatively) are provided in arts 10(2)(1)–10(2)(3) of the LPP. Article 10(2)(1) of the law envisages that in-house contract can be concluded in cases when *procurement through a public tender would make it impossible to ensure the continuity, quality, or accessibility of the service*. This requirement extends the mentioned concept of exceptionality and, as it will be shown later in this article, puts a substantial burden of proof on the contracting if it wishes to choose the path of in-house procurement versus ordinary procurement procedure according to the LPP.

Article 10(2)(2) of the LPP stipulates that in-house contracts are possible when contracting authority procures public services that are provided under the art.55(2) of the Law on Local Self-Government of the Republic of Lithuania[7]. According to these provisions local municipalities are entitled to incorporate separate legal entities and assign them the provision of the following services: water supply, sewage treatment, heat supply, waste management, passenger transport, maintenance and management of territories and streets, catering, education, social care or healthcare. Pursuant to the same legal norms in-house agreement might be needed when the provision of public services requires the management and use of real estate owned by municipality or its legal entities, and other economic operators would not be able to provide such services in their own premises or if the services are related to the use of municipal real estate: concert halls, museums, exhibition halls, libraries, cultural centres, theatres, sports halls, arenas, stadiums, swimming pools with the purpose to provide public services in the fields of education, culture, and sports and to carry out related economic activities. Finally, in-house agreements are permissible, pursuant to the

[6] *Kauno miesto savivaldybe* (C-285/18) EU:C:2019:369 at [49].
[7] Law on Local Self-Government of the Republic of Lithuania, 7 July 1994 No.I-533. *Valstybės žinios*, 1994, 55-1049.

legal norms under discussion, where a newly established legal entity is entrusted with an economic activity and such operation has obtained the consent of the Competition Council.

The third alternative is regulated by art.10(2)(3) of the LPP where it is stated that in-house contract may be concluded if services necessary for internal administration are procured by contracting authorities that are state enterprises, public limited liability companies and private limited liability companies in which the shares held by the State by the right of ownership carry over 1/2 of votes at the general meeting of shareholders. This legal norm was designed to foster the centralised procurement in Lithuania because many large organisations (and municipalities) incorporate separate legal entities which accumulate the needed competence and expertise as well as provide services (legal, procurement organisation and management, accounting, etc.) for the group companies.

The remaining provisions of art.10 of the LPP are procedural in nature. They encompass the requirements of accountability and transparency (artss 10(3) and 10(4)), as well as the extension of the possibility of concluding in-house contracts to and among subsidiary contracting authorities (art.10(5)).

3. The development of the in-house procurement doctrine in the case-law of Lithuania

What makes the Lithuanian in-house procurement doctrine unique is that it has been developed over the years at three judicial layers. The national legal requirements and conditions for in-house agreements were shaped by the case-law of the Supreme Court of Lithuania, the Supreme Administrative Court of Lithuania and the Constitutional Court of Lithuania, not to mention the CJEU and the impact of its case-law on the concept across the jurisdiction of the EU.

The landmark ruling of the Supreme Court in the area of in-house procurement is, indeed, the *Irgita* case[8]. Needless to say, that this is the same case which the Supreme Court referred to the court of Luxembourg and, after receiving the judgement of the CJEU, set the precedent in the field of in-house contracting.

The first point of interest for the Supreme Court in this case was whether the Member States were allowed to expand the list of legal requirements within the national laws that would make the in-house contracting limited to, as it has been already demonstrated above, exceptional cases and other related conditions. The court received the positive answer from the CJEU and reiterated it in its own ruling by stating that *it follows from the preliminary ruling that <...> under European Union (EU) law, Member States may lawfully lay down additional criteria (conditions, restrictions) for the conclusion of domestic transactions in their national legal systems*[9].

Secondly, the Supreme Court addressed the question of whether the legal requirements governing in-house contracting, particularly those imposing specific limitations and present legal burdens on contracting authorities, *must* be expressly and unequivocally set out in the LPP (*i.e.*, written statutory law within a continental legal system), or whether such requirements may instead arise through judicial interpretation of the relevant legislation, namely the Law on Competition[10]. For this reason, the Supreme Court gave the background of its enquiry to the CJEU which is worth mentioning:

1) *Although Lithuanian case-law initially developed in line with changes of national legislation, the subsequent increasingly strict approach of the courts to the practice of concluding in-house transactions was essentially based on a change in the interpretation and application of the law, which was possibly influenced by the national practice of concluding in-house contracts;*

[8] The ruling of the Supreme Court of Lithuania of 17 December 2019 in civil case No.e3K-3-494-469/2019.
[9] The ruling of the Supreme Court of Lithuania of 17 December 2019 in civil case No.e3K-3-494-469/2019.
[10] Law on Competition of the Republic of Lithuania, No. I-533. 23 march 1997. *Valstybės žinios*, 1999, 30-856.

2) *From the end of 2011 to mid 2015, the Supreme Administrative Court of Lithuania established a practice that in-house contract meeting the Teckal criteria is lawful; since mid 2015, inter alia, taking into account two rulings of the Constitutional Court, it has begun to link the legality of in-house contracts not only to the Teckal criteria, but also to additional value-based grounds, inter alia, arising from the provisions of the competition law, such as the continuity, quality, and availability of services, as well as the impact on the equality of other economic operators and their ability to compete for the relevant services;*

3) *The content of the provisions of art.4 of the Competition Law has not changed significantly from the original version of this law <…>. Thus, art.4 of the Competition Law has for two decades enshrined the general obligation of public administration entities to ensure competition between economic entities (and the performance of this obligation) has been recognised by the courts at various stages both as a criterion for assessing the legality of in-house contracts and, in general, has not been taken into account*[11].

The court went on to state that in its opinion the CJEU emphasised the importance of positive public procurement law as a means of exercising the discretion of Member States and as a basis for resolving disputes between parties. The Supreme Court continued that even if competition law imposes certain restrictions on contracting authorities (additional conditions for concluding in-house transactions), such a situation, taking into account the relationship between the procurement law and other legal acts, should be resolved in favour of the procurement law. In the event of a conflict between a specific legal norm of a special law and a more abstract provision of a general legal act, the content of which derives only from case-law, priority must be given to the *lex specialis* (namely, the LPP). The Supreme Court also criticised the method of interpretation of law (in respect of any “new” requirements which stem not from LPP but from other legal acts, *e.g.* Law on Competition) which changes or even supersedes the direct legal regulation. Therefore, the Supreme Court set the following rules on in-house contracting:

1) *Contracting authorities may conclude in-house transactions with entities under their control only if such a right is expressly provided for in the LPP; the Lithuanian legislator has discretion to regulate such transactions in accordance with Directive 2014/24.*

2) *All substantive and procedural requirements sought to be applied by the legislator to the conclusion of in-house transactions, regardless of whether they are established in the exercise of obligations arising from EU law or in the exercise of domestic regulatory powers, must be clearly, accurate, unambiguous, and comprehensible in a single legal act—the LPP*[12].

Thus, the Supreme Court answered the question whether any requirements relating to in-house contracts may derive from legal sources other than the LPP itself. And the answer was negative. The courts‘ principal focus lay in the interplay between the public procurement law and other branches of law. Having concluded that the legality of an in-house agreement must be assessed solely in light of the LPP, the Supreme Court found no grounds to annul the contract challenged in *Irgita*, as it complied with all legal requirements for in-house contract laid down in the LPP. However, this was done on the basis of the courts’ case-law[13] according to which there cannot co-exist two and more similar agreements regarding the identical procurement object between the same contracting authority and different economic operators.

As noted earlier, the Supreme Administrative Court has likewise left a significant imprint on the development of the in-house procurement concept in Lithuania. The administrative courts in Lithuania are often addressed with the claims against the decisions made by the Competition Council. The latter authority is one of the fiercest opponents against the in-house agreements. It constantly deems that by its

[11] The ruling of the Supreme Court of Lithuania of 17 December 2019 in civil case No.e3K-3-494-469/2019.
[12] The ruling of the Supreme Court of Lithuania of 17 December 2019 in civil case No.e3K-3-494-469/2019.
[13] The ruling of the Supreme Court of Lithuania of 29 June 2017 in civil case No.e3K-3-300-469/2017.

nature the in-house contracting contradicts to the art.4 of the Law on Competition which requires public administration authorities, in performing their assigned functions, to safeguard the freedom of fair competition. Article 4 also prevents these authorities from adopting decisions or regulatory measures that grant privileges to, or discriminate against, individual undertakings or groups of undertakings, where such actions result or may result in distortions of competition. Accordingly, most cases brought before the administrative courts share a similar factual background: the claimants challenge a decision of the Competition Council and seek its annulment, arguing against the Council's instruction to the contracting authority to terminate the in-house agreement and to procure the services through an open procedure. As it has been mentioned earlier, the case-law of administrative courts regarding the in-house procurement changed through time. Initially, the courts adhered to the approach later developed in *Irgita*: namely, that where the *Teckal* criteria were satisfied, together with the other requirements expressly laid down in the LPP (including, for a period of time, the obligation to obtain the Public Procurement Office's consent prior to concluding an in-house contract), the contract was to be regarded as lawful. Later, as the Supreme Court outlined in *Irgita* case, the Supreme Administrative Court changed its course and expanded the list of the requirements for the in-house agreements by adding the creation of competition as a tool to measure the legality of each in-house contract. In other words, according to this line of case-law every in-house contract was valued from the perspective of both the LPP and the Law of Competition (art.4). However, *Irgita's* CJEU and Supreme Courts' judgements affected the legal mind of the Supreme Administrative Court. In one of its *post Irgita* case this court overruled the decision of the court of first instance and repealed the decision of the Competition Council[14].

In this case the claimants were the municipality and municipality company (*lith*. savivaldybės įmonė). The municipality assigned to municipality company the provision of ritual services and the maintenance of cemeteries to its subsidiary on the basis of in-house agreement. Both claimants argued that, under the LPP and the relevant supplementary legislation, the in-house contract in question was lawful. The claimants disagreed with the Competition Councils' conclusions that the in-house contract had to be treated as granting privileges or discriminating against individual economic entities and creating different conditions of competition. Both claimants argued that municipality company could not be put on the same grounds with all the market players. The claimants sought to prove that when assessing the presence or absence of competitors in the market, it was important to assess the scope of services provided (number of cemeteries, area occupied), the integrity of cemetery maintenance services, relevant timing and quality as well as the experience gained in this field. The municipality company allegedly had gained extensive experience in providing services of this nature, had the necessary human resources and had invested in work tools.

Meanwhile, the Competition Council reiterated the arguments set out in its contested decision. In its view, the decision correctly established that the municipality company had been afforded preferential treatment by the in-house agreement and that other economic operators had thereby been subjected to discrimination. The Council argued that the mere fulfilment of all legal requirements under the LPP (including the consent issued by the Public Procurement Office) did not absolve the claimants from their obligation to comply with the imperatives of fair competition, which, in the Council's view, had been infringed in this case.

The court of first instance held that: (i) the municipality could entrust cemetery maintenance and ritual services on the basis of in-house agreement only where, following a public selection procedure conducted in accordance with statutory requirements and open to both municipal undertakings and entities of other legal forms, it determined either that no other operators were capable of providing these services or that outsourcing would fail to ensure their continuity, quality, and accessibility as a public service; and (ii) in applying the LPP during the selection process, the municipality was obliged to assess the competitive

[14] The decision of the Supreme Administrative Court of Lithuania of 26 February 2020 in administrative case No.A-1491-629/2020.

implications of its decisions and to refrain from measures that confer privileges upon, or discriminate against, individual economic operators or groups thereof, thereby creating or potentially creating distortions in the conditions of competition on the relevant market. Thus, the court followed the in-house contracting doctrine which existed pre-*Irgita*. The reasoning of the court of first instance rested on the premise that the legal conditions for an in-house agreement under the LPP were not, in themselves, sufficient. It held that the criterion of competition, namely, the possibility for suppliers to access the market, constituted a *conditio sine qua non* in every assessment of the permissibility of an in-house contract.

The Supreme Administrative Court was of an opposite opinion. The court heavily relied on *Irgita* decisions, delivered by the CJEU and (especially) the Supreme Court. Therefore, the Supreme Administrative Court concluded that the ruling of the Supreme Court of Lithuania in *Irgita* case in the context of the case under consideration, taking into account all aspects of legal interpretation, implied that at the time of the conclusion of the disputed in-house agreement, there were no specific and clear positive public procurement law provisions establishing additional mandatory conditions for the conclusion of in-house contract, compared to the conditions listed in the LPP. Therefore, the court held that the contested decision of the Competition Council, which stated that the contract concluded between the municipality and the municipality company violated the requirements of art.4 of the Law on Competition, could not be deemed as lawful and justified.

The legal analysis demonstrates that the Supreme Administrative Court pivoted from its earlier case-law and established a narrower standard for in-house contracting. The Court also relied on several of its earlier decisions,[15] indicating that this approach reflects a consistent line of administrative case-law.

In addition to the case-law of the Lithuanian general and administrative courts, the jurisprudence of the Constitutional Court of Lithuania has also played a significant role in shaping the national concept of in-house contracting. It should be noted that both constitutional cases concerning in-house agreements shared a common feature: the applicants directly or indirectly challenged the unrestricted discretion of municipalities to entrust in-house agreements to their subsidiaries. For some time, it was a common practice for the municipalities to assign in-house contracts to their subsidiaries for the provision of services of waste management, passenger transport, maintenance and management of territories and street, etc. Needless to say, that there are private companies in the market that render the same services and compete with the legal entities owned by the municipalities. Where municipalities enjoyed almost unlimited discretion (according to “traditional” *Teckal* criteria) to award in-house contracts to their own companies, the competitive opportunities of private market operators were practically eliminated. Consequently, they began to question the constitutionality of this legal framework by challenging in-house agreements before the national courts and requesting that those courts refer the matter to the Constitutional Court for a ruling on the constitutionality of in-house contracting.

In the first case, the Constitutional Court delivered its decision in 2022. It started on the basis of a reference from the Panevėžys Regional Court[16] The latter court expressed doubts as to the constitutionality of art.10(2) of the LPP. In referring court’s opinion, the contested legal regulation established the unlimited right of municipalities to conclude in-house contracts in order to purchase public services only from municipal enterprises, *i.e.*, in practice, to conclude in-house transactions not only in exceptional, specific cases, but also to apply this method as the usual *modus operandi* for purchasing public services. Therefore, in the opinion of the referring court, such legal regulation may contradict to the constitutional principle of the rule of law.

The Constitutional Court began by examining the interaction between the relevant provisions of the Constitution of the Republic of Lithuania, the Law on Local Self-Government, and the LPP. One of the

[15] The decision of the Supreme Administrative Court of Lithuania of 18 December 2019 in administrative case No.eA-319-415/2019 and the decision of 5 February 2020 in administrative case No.eA-893-556/2020.

[16] The ruling of the Constitutional Court of Lithuania of 5 May 2022 in case No.KT54-N5/2022.

questions the court had to address was whether municipalities overall possessed the prerogative to establish companies for specific, designated purposes. On the basis of its interpretation of the applicable legislation the court noted that (i) municipality was responsible for the provision of the public services to the residents; (ii) it had to ensure that all residents had access to public services and that such services were provided on a continuous basis and (iii) when making decisions that implement their autonomous functions, including in the areas of catering, education, social care or healthcare, maintenance and management of territories and streets, water supply, sewage treatment and heat supply, waste management, the organization of public passenger transport services, the municipality must act in the interests of the community, comply with the principles of legality, transparency, and publicity. Besides, the municipality must comply with these requirements when selecting providers of the aforementioned public services. These conclusions allowed the Constitutional Court to rule that generally it is in line with the constitutional norms that municipalities are granted the right to incorporate their legal entities and assign them the provision of the public particular services. On the other hand, this led to the further clarification that, in exercising their constitutionally conferred powers and discretionary authority, municipalities must act in compliance with the Constitution and statutory law and must exercise their prerogatives in a manner that safeguards not only the public interest of the local community but also the wider national public interest. In this case it was the imperative of free market and fair, justified competition. According to the court this would mean that existing (and challenged) legal regulation creates conditions for municipalities to organise the provision of public services necessary for the territorial community, while respecting the principles that form the constitutional basis of the country's economy (freedom of economic activity and initiative, fair competition, and consumer rights protection enshrined in art.46 of the Constitution). Moreover, the municipalities must organise the provision of public services necessary for the territorial community in such a way that the market for the provision of such public services is not monopolized and the equality of suppliers, operating in this market, is not denied. Municipalities must also ensure the accessibility, continuity and good quality of such public services. In the light of the given interpretation of the Constitution and related legislation the Constitutional Court concluded that art.10(2) of the LPP as much as under the conditions established by law, an in-house agreement may be concluded by a municipality in accordance with the procedure established by the LPP, entrusting the provision of public services to an already established public service provider, does not contradict to the Constitution of the Republic of Lithuania.

It is evident from the Court's reasoning that, notwithstanding the developments in *Irgita* at both the EU and national levels, the Constitutional Court adopted a significantly broader approach to in-house contracting and did not confine its availability to the requirements of the LPP alone. The Court underscored the indispensable need to assess competitive effects (and potential restrictions thereof) whenever a contracting authority opts for an in-house arrangement in lieu of a public procurement procedure. This legal approach was reiterated and further articulated in the second constitutional case in 2024. It should be noted that this constitutional case did not concern the constitutionality of the provisions of art.10 of the LPP, but rather the legitimacy of art.55(3) of the Law on Local Self-Government of the Republic of Lithuania. As it has been analysed earlier in this article, one of the legal grounds for the in-house contract is envisaged in art.10(2) of the LPP when public services are acquired in accordance with art.55(2) of the Law on Local Self-Government of the Republic of Lithuania, *i.e.* when municipality concludes the in-house agreement with its controlled company regarding the provision of the above-mentioned public services. Before the case was heard by the Constitutional Court, according to art.55(3) of the Law on Local Self-Government of the Republic of Lithuania municipalities had not been required to evaluate effect of the in-house agreement to the competitive environment and competition generally. The mentioned provisions of the Law on Local Self-Government of the Republic of Lithuania directly disengaged the application of art.4 of the Law on Competition and even allowed the municipalities not to receive the consent from the Competition Council in case of incorporation of a new legal entity for the purposes of rendering the public services. As the Constitutional Court correctly noted *it is apparent from the travaux préparatoires of the contested legislation that its purpose is, inter alia, to enable municipalities to conclude in-house transactions without the consent of the Competition Council and without applying a competitive procedure when providing public services in the fields of education, culture, and sports, and to carry out related economic activities, real estate managed by municipalities must be transferred, if such property is the only one in the administrative territory of the municipality or in the residential area of the municipality*.[17] Furthermore, the Court recalled its findings in the 2022 case concerning the legality of art.10 of the LPP and summarised them as follows:

- *competition rules apply to undertakings entrusted with the operation of services of general economic interest, provided that the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them;*
- *exclusive rights may be granted to undertakings providing services of general economic interest only where the granting of such rights is necessary to limit or even eliminate competition in order to enable these services to be provided on economically acceptable terms;*
- *exceptions to the principles of competition, freedom of establishment, and freedom to provide services, inter alia, in the field of services of general economic interest and in the context of contracts between public authorities and entities controlled by them, must be interpreted strictly.*[18]

The court continued and repeated its full support to the principle of competition. The court stated that the protection of fair competition is the cornerstone of ensuring harmony between individual and public interests, preventing market monopolisation, and obliging public authorities to refrain from and prevent any measures that may distort competition. The court therefore held that, pursuant to arts 46 and 120 of the Constitution and the constitutional principle of the rule of law, the legislator, when imposing upon municipalities the obligation to organise the provision of public services essential to the territorial community through a legal framework that prevents the monopolisation of the relevant service markets and preserves the equality of economic operators, may provide for departures from this obligation only in *exceptional circumstances*. Such exceptions are where, in a concrete case, they are necessary to ensure the availability, continuity and adequate quality of the public services required by the local community, and only where these objectives cannot be attained by other means, namely through the preservation of fair competition. In light of these considerations, it is important to note that the Constitutional Court provided substantive guidance on the notion of ‘exceptional circumstances’ as envisaged in art.10(2) of the LPP, a notion which must, in all likelihood, be construed in accordance with the interpretative approach articulated by the Constitutional Court – in-house contracts are permissible *only* when (i) either there is no one in the market who can provide these particular services or (ii) from the point of view of sound and due economic governance the municipality can substantiate that it is prudent to arrange the provision of public services through its company.

Furthermore, notwithstanding the decisions delivered in *Irgita*, the Constitutional Court held that the constitutionality of art.10 of the LPP depends fundamentally on its *systemic* application in conjunction with other relevant legislation. It is clear that the court meant, needless to say, the application of art.46 of the Constitution as well as art.4 of the Law on Competition. Therefore, the Constitutional Court disagreed with the legislator regarding the legality of the contested art.55(3) of the Law on Local Self-Government of the Republic of Lithuania municipalities and declared that the legislator did not follow the ruling of

[17] The ruling of the Constitutional Court of Lithuania of 10 October 2024 in case No.KT80-N11/2024.
[18] The ruling of the Constitutional Court of Lithuania of 10 October 2024 in case No.KT80-N11/2024.

the Constitutional Court of 2022 and therefore ruled that the mentioned art.55(3) contradicted to the Constitution of the Republic of Lithuania.

What emerges from the case-law of the Constitutional Court, as much as it is related to the in-house contracting, is a consistent and robust emphasis on the principle of competition. Even though the court took into consideration the interpretation of the Directive 2014/24 given by the CJEU in *Irgita* as well as the ruling of the Supreme Court in the same case, it seems that the court silently disagreed with an idea that the LPP is the only legal source that is applicable in cases of in-house contracts. The trajectory of the courts' rulings indicates that, although the LPP constitutes the primary legal source governing in-house arrangements, other legal acts that impose an obligation to promote and give direct effect to the principle of competition likewise apply.

In one of the recent cases the Court of Appeals of Lithuania had to decide on legality of the in-house agreement which was concluded by the municipality and its subsidiary regarding the provision of waste management services[19]. The facts of the case did not differ from majority of situations the courts had previously addressed. The municipality maintained that it was entitled to conclude the in-house agreement, asserting that all conditions set forth in art.10 of the LPP had been satisfied. By contrast, the two claimants, private companies operating in the waste-management sector, argued that the municipality had failed to assess the agreement's impact on competition.

After a brief reference to and analysis of the art.10(2) of the LPP, the Court of Appeal concluded that an in-house contract may only be concluded in exceptional circumstances, therefore, the municipality and its subsidiary who concluded in-house agreement had the obligation to prove that at the time of its conclusion there were exceptional circumstances due to which the provision of services could not be organised by selecting a service provider via open procedure pursuant to the LPP. It is worth noting that the court referred to the previously analysed rulings of the Constitutional Court. The Court of Appeal noted that the official interpretation provided by the Constitutional Court permit the conclusion that the criteria a municipality must observe prior to entering into an in-house agreement are clearly delineated. Specifically, the municipality must assess: (i) whether, in compliance with the requirements of transparency and publicity, the provision of services cannot be organised through a public selection procedure as prescribed by legislation; (ii) whether the public services in question will be delivered at a high standard and on a continuous basis, ensuring their availability to all residents; and (iii) whether the conclusion of an in-house contract would not confer privileges upon a particular service provider or discriminate against other economic operators active in the relevant market.

4. Conclusions

The substantive law which governs the in-house contracting in Lithuania evolved throughout the years. art.10 of the LPP includes a number of additional legal requirements for in-house agreement compared to the *Teckal* criteria. The present legal architecture of in-house arrangements is far from a construct forged overnight. Rather, it represents the culmination of a sustained and rigorous search for an optimal model—one that embraces a hybrid configuration combining the legal possibilities provided by the EU public procurement law with additional requirements tailored to the structural particularities of a small market economy. This composite framework reflects both supranational legal imperatives and nationally specific considerations, thereby securing coherence while accommodating contextual nuance. Such approach of Lithuanian legislator was acknowledged by the CJEU and is in line with *Irgita* judgement.

Meanwhile, the national case-law on the subject is multi-layered. After the *Irgita* judgement from the CJEU, general and administrative courts were prone to follow a strict approach, meaning that the in-house agreement is allowed if all the requirements envisaged in art.10 of the LPP are met. However, the

[19] The ruling of the Court of Appeals of Lithuania of 28 January 2025 in a civil case No.e2A-109-370/2025.

Constitutional Court adopts a broader perspective, requiring that any scenario involving an in-house contract also include an assessment of the contract's impact on competition and on the ability of other economic operators to access the relevant market. Accordingly, not only the art.10 of the LPP is relevant but also are, for instance, the requirements of the Law on Competition. Because of the current Lithuanian case-law, both art.10 of the LPP and the very notion of in-house agreements are construed strictly, with the result that such contracts may be concluded only in rare and genuinely exceptional circumstances.

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Public Competition and Public Procurement: The Under-and Overregulated Fields of Estonian Economic Law

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Economic operators; Estonia; EU law; Public procurement; Third countries

1. Introduction

Next to the well-known and thoroughly (over-)regulated duties governing the world of public procurement law, there is a parallel world of public competitions.[1] Both the European Union (EU) and national laws recognise that not only in the case of buying but also when selling, public authorities must follow certain procedural steps, in order to protect general principles such as equal treatment and transparency. No harmonised procedures have been outlined for such competitions on the EU level. However, we submit that certain common ground can be found for establishing *when* a public competition is subject to certain universal principles of law, and what such universal principles are.

We will look at the topic in the case of Estonia where the case-law seems to have created a clear duty to organise competitions for allocating public resources even without any such obligation explicitly stated in the law. We will demonstrate how the case-law has defined public resources, developed the duty of arranging the use of or access to such resources, and established the minimum requirements for appropriate procedures—all based on the very abstract general principles. We submit that such developments deserve interest against the background of a very similar and at the same time very distinct world of public procurement.

Furthermore, we also submit that the grounds and terms of applying general principles to granting public resources may, in fact, be of interest in the context of public procurement, namely in the aftermath of the recent cases of Kolin and Qingdao.[2] As is well known, in those cases, the CJEU established the prohibition to apply the procurement directives for the benefit of so-called non-beneficiary third country operators, at the same time acknowledging the possibility of such operators being entitled to rely on some general principles of law of national origin. The cases have raised a myriad of questions and submissions regarding the types and origins of law that could be applicable in such situations.[3] By way of analogy, the

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[2] *Kolin Insaat Turizm Sanayi ve Ticaret AS v Drzavna komisija za kontrolu postupaka javne nabave* (C-652/22) EU:C:2024:910; *CRRC Qingdao Sifang and Others* (C-266/22) EU:C:2025:178.

[3] See, for instance: Participation in the EU procurement market of bidders from non-covered third countries (cases *Kolin* (C-652/22), and *Qingdao* (C-266/22)), GROW/E2-JPZ/CM-Ares(2025)… 22/05/2025 (hereinafter "EC Non-Paper 2025") (2 October 2025), *https://public-buyers-community.ec.europa.eu/system/files/2025-05/Kolin-QA-final-clean.pdf*; Mari Ann Simovart, "The (in-) ability of contracting authorities to neutralize the threat of hostile technology in EU public procurement" (2026) *European Defence & Security Law & Policy Quarterly* 1; Susie Smith, "Right of tenderers

principles governing public competitions can in turn provide guidelines about the rules possibly applicable to such third country operators in a procurement situation.

2. The requirement of appropriate procedure in Estonian case-law

2.1. The duty to not do nothing

The Supreme Court of Estonia first formulated a rule that could be called *the obligation of an appropriate procedure* for granting access to public resources, almost 20 years ago. The dispute concerned contracts between the City of Tallinn and a company that obligated the latter to construct public transport shelters, information boards and pillars on the city's streets and adjacent areas, free of charge, and in return was granted the right to use the constructed facilities for advertising and thus earn income by using them.[4] When an unsuccessful competitor challenged the City's actions in court, one of the central issues in the legal dispute was whether, in the absence of explicit rules arising from the law, the local authority still had to conduct an appropriate procedure.[5]

The Supreme Court established that with the contracts, the public authority granted the company use of an important public resource—streets and the adjacent land. Further, even though the Court ultimately dismissed the claim on procedural grounds (due to the competitor having failed to demonstrate a sufficient interest and violation of subjective rights),[6] the clear position of the Supreme Court was founded: referring to no legal instrument or specific provision, the Supreme Court simply established that "granting the use of public resources must take place in proceedings that allow all persons who meet justified requirements, to participate on equal grounds. The circumvention of these procedural requirements cannot be justified on the ground that there are no procedures or specific requirements laid down in legislative acts".[7] Thus, when granting access to a public resource or transferring assets, an administrative body must carry out an appropriate procedure. Even without a statutory obligation under the law, an administrative body cannot "do nothing"—on the contrary, if necessary, the administrative body has to develop and implement an appropriate procedure on its own, adhering to the principles that guarantee uniform treatment, openness, transparency and proportionality.[8] In other words, general principles of law universally recognized in today's democratic societies.

It must be noted that the court also found that the concerned contracts had the characteristics of a concession contract.[9] However, at the time of awarding the contract in July 2002, service concessions were not regulated by the then Public Procurement Act[10] and the Concessions Directive 2014 was light years away. Currently, similar arrangements are conducted following the regulation of concession contracts.[11]

The Supreme Court's position in 2005 did not remain the only flash of light in the sky—the same rule continues to govern cases two decades later.[12] For instance, the Supreme Court relied on the continued

from third countries that have not signed a relevant trade agreement to participate in Member State procurement procedures: C-266/22 CRRC Qingdao Sifan" (2025) 4 P.P.L.R. NA85–NA91; Marko Turudić, "Exclusion of third-country economic operators from EU public procurement and the Kolin judgment - new rules and lingering questions" (2025) 5 P.P.L.R 317–334.

[4] See, for instance: Participation in the EU procurement market of bidders from non-covered third countries (cases *Kolin* (C-652/22), and *Qingdao* (C-266/22)), GROW/E2-JPZ/CM-Ares(2025)… 22 May 2025 (hereinafter "EC Non-Paper 2025") (2 October 2025), *https://public-buyers-community.ec.europa.eu/system/files/2025-05/Kolin-QA-final-clean.pdf*.

[5] Administrative Law Chamber of the Supreme Court (15 December 2005), 3-3-1-59-05, para.18.

[6] Administrative Law Chamber of the Supreme Court (15 December 2005), 3-3-1-59-05, paras 20–21.

[7] Administrative Law Chamber of the Supreme Court (15 December 2005), 3-3-1-59-05, para.17.

[8] Administrative Law Chamber of the Supreme Court (15 December 2005), 3-3-1-59-05, para.17.

[9] Administrative Law Chamber of the Supreme Court (15 December 2005), 3-3-1-59-05, para.16.

[10] RT I 2000, 84, 534.

[11] See e.g. the public procurement "Installation and maintenance of public transport shelters and public outdoor toilets in the City of Tallinn, with the right to display advertising and charge users of outdoor toilets" (reference number 243491), *https://riigihanked.riik.ee/rhr-web/#/search-links*.

[12] See e.g. Tallinn Circuit Court (11 December 2019), 3-19-333, para.28; Tallinn Circuit Court (12 April 2019), 3-17-2911, para.20; Tallinn Administrative Court (12 February 2021), 3-20-919, para.11.

relevance of the principle in a dispute over designating a network operator for heat distribution in the *Tapa district heating* case.[13]

Legal proceedings concerning access to public resources are of course not at all unique to Estonia. For example, the Supreme Court of the Netherlands has derived indistinguishably similar obligations for the transfer of state and municipal assets, later partially codified.[14]

2.2 "Public resources" that require an appropriate procedure

2.2.1. Important and limited public resources

Returning to the above cited case concerning municipal advertising mediums, the Estonian Supreme Court described contracts between a city and a company as contracts whereby a public authority placed an important public resource at the disposal of a private entity.[15] This rationale inevitably raises the question of whether there is a link between the word 'important' and the obligation to arrange a competition. Did the Court hint at the Roman law principle of *de minimis non curat lex*—the law does not concern itself with trivial matters?

The aspect of importance is also underlined in some subsequent decisions—for example, the courts have identified a municipal airport as an important public resource.[16] At the same time, none of the judgements explain whether public resources and important public resources differ from each other with respect to any characteristics. Neither does Estonian case law define the level or meaning of importance in this context. It is possible that the courts have, either knowingly or unintentionally, drawn parallels with the State Assets Act[17] (SAA) and law on local government assets that often provides for the option to grant access to or transfer public or municipal assets by a discretionary decision (as opposed to via open competition) when the concerned assets are of low value or unnecessary for performing the administrative body's duties of public interest.[18] This, in turn, may be an incentive for courts to distinguish "important" public resources from unimportant ones. The possible explanation is to create a sort of standard *de minimis non curat lex* and the importance to be determined in the judge's ex post assessment. Thus, current case law is unclear whether the issue of importance of public resources is at all legally relevant, and if so, how is the importance to be determined.

The situation is the same with the word "limited". Almost all decisions use the phrase "limited public resource", without any explanation as to the relevance or meaning of the word "limited". As an only exception, the meaning of *limited* public resources is outlined in the oil shale extraction permit dispute, where the Supreme Court's refers to certain mineral resources that, while being owned by the state, are also subject to limited volume of mining and restricted amount of permissions of extraction.[19] As such, permits for oil shale extraction are a limited public resource.[20] Similarly, any public resource can be limited either because it is not in fact infinite or the state has chosen to limit access to it. Naturally, without the resource being limited in one way or other, putting it out to competition would be meaningless as any interested party could benefit from the resource anyway.

[13] Administrative Law Chamber of the Supreme Court (18 April 2024), 3-20-1313. See also: Carri Ginter, Pilleriin Peedosk, Mari Ann Simovart, "In-House Contracts and the Presumption of Control: Evaluating Estonia's Supreme Court Decision in Light of EU Public Procurement Law", in this issue, *passim*.
[14] E. Manunza, "Public Procurement Law as an Expression of the Rule of Law: On How the Legislature and the Courts Create a Layered Dynamic Legal System Based on Legal Principles" (2023) 5 P.P.L.R. 319–340.
[15] Administrative Law Chamber of the Supreme Court (15 December 2025), 3-3-1-59-05, para.16.
[16] Tallinn Administrative Court (12 February 2021), 3-20-919, para.11.
[17] RT I 2009, 57, 381; RT I (30 December 2024), p.16.
[18] Cf. SAA, s.19.
[19] Earth's Crust Act RT I (10.11.2016), p.1; ss.4 (1), 251.
[20] Administrative Law Chamber of the Supreme Court (21 February 2017), 3-3-1-26-16, para.43.

The Estonian approach seems to be similar to the rationale of a so-called situation of scarcity and the resulting obligation to follow an appropriate procedure under EU law, more specifically the Services Directive. The limitation referred to in art.12 of the Directive occurs in a *situation of scarcity*—a limitation arising from the lack of natural resources or technical capacity.[21] The interpretation of scarcity and the resulting limitation, have been clarified by the European Court of Justice in the cases *Promoimpresa*[22] and *Autorità Garante della Concorrenza e del Mercato (Commune de Ginosa)* concerning Italian beach concessions.[23]

In the first case, the main proceedings concerned the issue of whether the fixed-term right (so-called concession) granted to undertakings on Italian beaches for the use of the coastal area—for example, to operate a kiosk, veranda, bathing area, berth or pontoon—was automatically renewable or not. According to the Court of Justice, the concessions in question concerned natural resources and if the number of authorisations granted for the economic use of these coastal areas was limited due to the scarcity of natural resources, the authority had to organize a selection procedure between potential candidates.[24]

The methodology for establishing whether a coastal area is a limited resource, was addressed by the Court of Justice in the second case where an Italian municipality wishing to extend concessions, argued that there was also an unused coastal area on the territory of that municipality, alleging that this was not a situation of scarcity. The Court of Justice noted that the Services Directive allows a Member State to give preference to both a general and abstract assessment applicable to the whole territory of the state, and a case-by-case approach prevailing in coastal areas under the jurisdiction of the local authority or a competent administrative authority, as well as a combination of the two approaches. In any case, it is important that the choice is based on objective, non-discriminatory, transparent and proportional criteria.[25] However, it is likely that the limitation of natural resources in the context of the Services Directive should be understood as comparing apples with apples, and oranges with oranges. In other words, the right to exploit the coastal area of Lake Garda could not be substituted by the right to do the same in, for example, Apulia. In this example, the competence of the local authority as the issuer of the activity licence must also be considered, as the City of Garda cannot presumably grant activity licences for using the coastal area in Ginosa or *vice versa*.

On the other hand, it can also be admitted that natural resources are generally never unlimited. Some time, usable stretches of beach may run out all over Italy, seemingly leading to the conclusion that at least regarding state or local government real estate, the situation of scarcity exists, at all times and in the same manner, regardless of the location of the coastal area.

2.2.2. The function of public resources

According to case law, to answer the question of whether an asset is a public resource requiring an appropriate procedure, besides the importance and limited nature of the resource, it is also relevant who the asset belongs to, what functions are carried out with it or what purpose the asset is used for pursuing.

In a dispute over trading licences of a local authority, the Supreme Court made a distinction between the municipality issuing permits for trading on city streets or on private land. While in both cases a trading permit as such was legal and necessary, in the latter case the applicant was not being allocated limited public resources.[26] The determining feature in this case seemed to be the ownership of the land—clearly, the administrative body was not granting its own resources when approving trading activity on a private

[21] Directive 2006/123 on services in the internal market [2006] O.J. L. 376, Recital 62, art.12.
[22] ECJ (14 July 2016), *Promoimpresa* (C-458/14).
[23] ECJ (20 April 2023), *Autorità Garante della Concorrenza e del Mercato (Commune de Ginosa)* (C348/22).
[24] ECJ (14 July 2016), *Promoimpresa* (C-458/14) at [48].
[25] ECJ (20 April 2023), *Autorità Garante della Concorrenza e del Mercato (Commune de Ginosa)* (C348/22) at [46]–[48].
[26] Administrative Law Chamber of the Supreme Court (30 November 2004), 3-3-1-56-04, paras 24–25.

property. If the opposite were true, any activity licence should be considered a public resource—however, that does not seem to have been the original intention of the case law.

Somewhat more nuanced cases concerned different disputes over the use of the premises of the North Estonia Medical Centre. In 2017, the Medical Centre announced a private-law competition to lease its business premises in the hospital for the provision of general pharmacy services. One of the interested economic operators raised the argument that the granting of use of the premises constituted an allocation of public resources and should be subject to the procedural rules applicable for the management or governing public property. However, the courts took the view that the renting of business premises—even though done for the purpose of providing pharmacy services—did not constitute the provision of health services or the performance of any other public function and therefore, could not be regarded as the allocation of public resources.[27]

Interestingly, in another decision concerning the same competition, the administrative court focused i.a. on the question if the right to provide general pharmacy services on the premises of the Medical Centre affected the competitive situation on the market for healthcare services. Drawing a parallel with an earlier case (*Villa Benita* case),[28] the judgement notes that, compared to contracts for financing medical treatments, which are considered to be public resources because the existence of the contract generally ensured higher and/or more stable turnover for the service providers holding the contract, the provision of pharmacy services in a hospital did not affect the competitive situation to a comparable extent.[29]

These cases indicate the reluctance of the courts to regard all public sector assets as public resources for the purpose of establishing the obligation to carry out an appropriate procedure. When assets are not meant for public functions, then granting access to them cannot affect the performance of such functions either. The same follows from the case law of the Supreme Court with respect to the transfer of public assets.[30] For example, the Supreme Court recently analysed whether a subsequent transfer of the real estate initially transferred by the state to its company, *Riigi Kinnisvara Aktsiaselts* (RKAS, a company established for managing state real estate), must be carried out by means of an auction in accordance with the SAA or whether RKAS may transfer such property by way of a competition governed by private law.[31] The circuit court‘s rationale was that since the property in question had been previously transferred to RKAS by the state, and the state itself would be obliged to transfer such property strictly on the basis of procedural rules established under the SAA, in any further transfer such assets still remain a public resource that require a public auction or another similar appropriate procedure. The position undoubtedly has its logic, particularly in order to avoid very easy circumvention. The Supreme Court, however, did not agree with the above. First, the SAA does not apply to the transfer of the assets of a state-owned company. Secondly, the court considered it relevant that the property in question was an immovable that had become unnecessary both for the state and RKAS itself, thus serving no public functions, and the mere purpose of the transfer of the property was to earn income. From this, the Supreme Court concluded that the transaction in question was not a public law transaction, and no public procedure was therefore required.[32]

[27] Note: nor did the provisions of the SAA apply to the North Estonia Medical Centre which is an independent legal person and owner of the property. Tallinn Administrative Court Ruling (3 November 2017), 3-17-1784, para.14; Tallinn Circuit Court Ruling (12 March 2018), 3-17-1784, paras 15–17; Tallinn Administrative Court (13 November 2017), 3-17-2221, para.8; Tallinn Circuit Court Ruling (12 March 2018), 3-17-2221, paras 15–17.
[28] Administrative Law Chamber of the Supreme Court (29 November 2012), 3-3-1-29-12, para.14.
[29] Tallinn Administrative Court (14 December 2017), 3-17-1780, para.31.
[30] Ruling of the Administrative Law Chamber of the Supreme Court (28 February 2024), 3-22-2197.
[31] Ruling of the Administrative Law Chamber of the Supreme Court (28 February 2024), 3-22-2197, paras 12–16.
[32] Ruling of the Administrative Law Chamber of the Supreme Court (28 February 2024), 3-22-2197, paras 12–15.

2.2.3 Examples of public resources

To summarise the case law discussed above, Estonian case law considers an asset or a right associated with such asset, to be a public resource, the access to or transfer of which requires a conduct of an appropriate procedure—a public competition—if the asset fulfils at least one of the following conditions:

a) the number of assets or related rights is limited by objective inevitability or by the choices of the state, so that making them available for use may result in a significant competitive advantage for the person concerned (not everyone has access);
b) the asset or right is related to the performance of public functions either via its owner or purpose, and
c) the asset is not trivial.

Subject to the above reservations, *any* property of a local government or state can be a public resource.[33] In particular, examples concern real estate of the state or local government and the right of access to it, such as beach areas,[34] hunting areas,[35] municipal landfills,[36] parking spaces,[37] real estate suitable for the construction of a wind farm,[38] the right to extract oil shale,[39] the right to manage a public airport[40] the right to trade on public roads,[41] taxi ranks,[42] streets or adjacent land,[43] sand quarries along with the right to extract sand,[44] social and municipal housing,[45] vacant agricultural land.[46] Similarly, public resources include other types of assets, such as an authorisation issued by a public authority to engage in commercial fishing at sea or using a fishing vessel,[47] the right to operate as a network operator.[48]

In addition to property, monetary funds allocated for public administration purposes have been regarded as public resources. Thus, the Supreme Court first noted in a *Villa Benita* case that the funds allocated by the Estonian Health Insurance Fund for the provision of health services, are public resources,[49] and the following case-law has repeated the same rationale.[50] Other examples of public resources include: the Estonian Agricultural Registers and Information Board's (ARIB) support, social tax received by the state[51], local government support,[52] direct loans of the Rural Development Foundation,[53] and radio frequency bands.[54]

[33] See e.g. Tallinn Administrative Court (13 October 2022), 3-22-663, para.15.
[34] Tallinn Circuit Court (25 August 2017), 3-15-1072.
[35] Tallinn Administrative Court (13 October 2023), 3-22-2693, para.10.
[36] Administrative Law Chamber of the Supreme Court (27 October 2010), 3-3-1-66-10, para.19.
[37] Court *en banc* of the Supreme Court (7 December 2001), 3-1-1-27-01, para.27; Tallinn Circuit Court (25 January 2018), 3-16-2002, para.15; Tallinn Administrative Court (4 September 2020), 3-20-860, para.25.
[38] Tallinn Circuit Court Ruling (6 July 2018), 3-18-464, para.14; Tallinn Circuit Court (12 April 2019), 3-17-2911, para.20.
[39] Administrative Law Chamber of the Supreme Court (21 February 2017), 3-3-1-26-16, para.43.
[40] Tallinn Administrative Court (12 February 2021), 3-20-919, para.11.
[41] Administrative Law Chamber of the Supreme Court (30 November 2004), 3-3-1-64-04, para.34; Administrative Law Chamber of the Supreme Court (30 November 2004), 3-3-1-56-04, para.24.
[42] Tallinn Circuit Court (22 October 2010), 3-09-1397, para.12.
[43] Administrative Law Chamber of the Supreme Court (15 December 2005), 3-3-1-59-05, para.16; Tallinn Circuit Court (26 August 2014), 3-13-953.
[44] Tartu Administrative Court (29 April 2021), 3-20-923, para.16.
[45] Tallinn Circuit Court (23 March 2010), 3-09-564; Tallinn Circuit Court (27 September 2023), 3-22-1056, para.24.
[46] Administrative Law Chamber of the Supreme Court (27 May 2015), 3-3-1-14-15, para.28; Tallinn Circuit Court (28 June 2012), 3-11-1846.
[47] Tallinn Administrative Court (7 October 2019), 3-19-690, para.10.
[48] Administrative Law Chamber of the Supreme Court (18 April 2024), 3-20-1313, para.22.
[49] Administrative Law Chamber of the Supreme Court (29 November 2012), 3-3-1-29-12, para.14.
[50] Tallinn Circuit Court (30 May 2014), 3-13-986; Tallinn Circuit Court (6 October 2024), 3-14-50157; Tallinn Circuit Court (29 September 2015), 3-14-50626, para.12; Tallinn Circuit Court (28 January 2016), 3-14-333, para.17; Tallinn Circuit Court (28 January 2016), 3-14-332, para.21; Tallinn Circuit Court (25 January 2018), 3-16-520; Tallinn Circuit Court Ruling (18 July 2022), 3-22-1366, para.20.
[51] Tartu Administrative Court Ruling (25 May 2018), 3-18-941, para.13.
[52] Tartu Administrative Court (16 November 2020), 3-20-1317, para.12.
[53] Tartu Administrative Court (31 May 2022), 3-21-568, para.22.
[54] Tallinn Circuit Court (11 December 2019), 3-19-333; Tallinn Circuit Court Ruling (19 October 2023), 3-23-1949, paras 13–16.

Accordingly, the right to use any property or access to support as well as the right to financial support from the state or local government, or the financial support itself can constitute a public resource that must be subjected to an appropriate procedure.

2.3. The origins of the obligation to conduct an appropriate procedure

2.3.1 Creation in national case law

The obligation of an appropriate procedure or competition related to access of public resources is certainly nothing unusual for the national economic administrative law or the European Union Law. Even contrary, it is characteristic of economic administrative law in general that any benefits or rights governed by public law, should be granted to a person outside the administration, via fair competition. When a contracting authority acquires supplies, services or construction works, it usually has to organise a public procurement procedure. When public authorities distribute subsidies, the existence of an open and non-discriminatory procedure precludes them from being considered state aid.[55] In a situation where the number of activity licences is limited, the economic administrative body must select the recipients of licences in an impartial and transparent procedure, ensuring equal treatment.[56] As a rule, the assets of the state or local government must be transferred or released for use by means of a public auction.[57] Procedures in more specific areas mostly follow the same principles.[58]

Thus, it can be generalised that the appropriate procedure developed by the Supreme Court and its underlying principles—equal treatment, openness, transparency and proportionality—constitute a rule for any economic relations between the public administration and an entity or person outside the administration.

However, at least in the Estonian case law, the above provides no clarity as to the origin of the requirement of an appropriate procedure and accordingly, rules for interpreting the requirement. Thus, in the above-mentioned case 3-3-1-59-05, the Supreme Court did not refer to any precise source from which the obligation to organise an appropriate procedure could be derived. The sources are also scarce in later decisions. Rather, the obligation seems to have grown out of disputes in which the courts assessed the aspects local authorities should take into consideration when making their assets available for use in the private sector. In case law, the starting point was that since the assets of local authorities are primarily intended for public functions, local authorities exercise public authority in the selection of the recipients of their assets.[59] Drawing a parallel with the exercise of public authority, administrative bodies cannot be exempted from the application of the pertinent rules and fundamental principles of public law, including the principles of proportionality, equal treatment and legitimate expectations, when making assets available for use. This is the case even if the public administration acts in a situation where private and public law are inseparably intertwined.[60]

The principles of public law are not, in essence, a closed list but include constitutional values enshrined in public law, in particular the principles of legality and sound administration. The relevant case law does not go into great detail in listing the relevant principles, but rather refers to concepts such as public interest and legitimate expectations, alongside equal treatment.[61]

[55] See e.g. ECJ (24 October 2013), *Land Burgenland and Others v Commission* (C-214/12 P) at [94]; ECJ (24 July 2003), *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00).
[56] See e.g. GPEACA s.23.
[57] See e.g. SAA ss.8, 14 and 17.
[58] See e.g. s.54 of the Earth's Crust Act(ECA) - RT I, 08.07.2025, 59.
[59] Special Panel of the Supreme Court (20 December 2001), 3-3-1-15-01, paras 14 and 20.
[60] Ruling of the Special Panel of the Supreme Court (20 December 2001), 3-3-1-8-01, para.14.
[61] See e.g. Tallinn Circuit Court (22 October 2010), 3-09-1397.

In addition, the Supreme Court has always emphasised the duty of public administration to follow the rules of discretion.[62] Compliance with the rules of discretion under s.4 (2) of the Administrative Procedure Act[63] requires an administrative body to exercise its right of discretion in accordance with the limits of its authority, the purpose of discretion and the general principles of law, taking into consideration the relevant circumstances and weighing the legitimate interests. Courts in the Netherlands, for example, interpret the law in a similar way. After the Dutch legislator repealed the 1952 law governing the procedure for the transfer of state assets, disputes over the procedure for the transfer of state assets were settled on the basis of more general principles. Manunza has even listed the principles of private law, such as reasonableness and fairness, as relevant in the Netherlands, the principle of equal treatment under administrative law and its expressions, such as transparency, diligence and the prohibition of arbitrariness, and the influence of European Union law, i.e. also equal treatment and transparency. Later, the courts have also attributed meaning to the principle of sound administration and legitimate expectations.[64]

2.3.2 Constitutional grounds

The Estonian Supreme Court tied application of the above analysed principles to national constitutional law in two judgments made at the end of 2001. The disputes concerned determining a competent court over disputes of a lease of a municipal sports base to a party outside the administration and extension of the lease contract of a registered immovable belonging to the local government, focusing on the interaction of public and private law.[65] According to the Court, although a contract for granting use of city assets is private in nature, the phase of deciding the disposal of the assets of a legal person governed by public law belong to the field of public law, making private and public law intertwined in a multi-stage procedure. In the first stage, the party to whom the assets are to be entrusted is selected on the basis of public law rules, and then a private law contract is entered into between the parties. In the first stage, the public administration must "be guided by reasoned considerations in order to avoid unequal treatment of persons".[66] In the opinion of the Supreme Court, the constitutional principle of equal treatment would be violated if persons could not access the assets of the public administration on equal grounds.[67]

Thus, the obligation to follow an appropriate procedure for granting use of public resources is intended to protect the principle of equal treatment enshrined in the Constitution. Undoubtedly, the duty of the owner or holder of a public resource to manage it in a purposeful, expedient, economical and prudent manner also has a role to play here.[68] Similarly, ensuring the principle of equal treatment in Dutch law was also one of the reasons why, for example, the Dutch legislator decided as early as 1952 to provide for a sufficiently publicised, open and non-conditional tender procedure for the transfer of public assets as a rule. As a justification for this, it has been argued in literature that such a procedure guarantees fundamental democratic rights by allowing all persons who meet the conditions to have an equal opportunity to be awarded a contract with the state.[69] This relies on subs.12 (1) of the Constitution of Estonia, equal persons must be treated equally and unequal persons must be treated unequally.[70]

However, reference to the principle of equal treatment has not remained the only source for the case law imposing the duty to conduct an appropriate procedure when granting public resources. Numerous

[62] Administrative Law Chamber of the Supreme Court (3 November 2005), 3-3-1-35-05, para.7; Administrative Law Chamber of the Supreme Court (27 May 2015), 3-3-1-14-15, para.25. Cf. Tallinn Circuit Court (22 October 2010), 3-09-1397, para.12.

[63] RT I 2001, 58, 354; RT I (6 July 2023), p.31.

[64] E. Manunza, "Public Procurement Law as an Expression of the Rule of Law: On How the Legislature and the Courts Create a Layered Dynamic Legal System Based on Legal Principles" (2023) 5 P.P.L.R. 319–340.

[65] Special Panel of the Supreme Court (20 December 2001), 3-3-1-15-01.

[66] Ruling of the Special Panel of the Supreme Court, 20 December 2001, 3-3-1-8-01, para.16.

[67] Ruling of the Special Panel of the Supreme Court, 20 December 2001, 3-3-1-8-01, para.23.

[68] Cf. SAA subs.8 (1).

[69] E. (note 14).

[70] Court *en banc* of the Supreme Court (20 November 2021), 3-4-1-4-12, para.60.

cases demonstrate that the requirement of allocating public resources in an appropriate procedure, has an origin in the constitutional freedom of enterprise and the related right to fair competition. For instance, the courts have explained that contracts that allocate public financing to medical companies (clinics, hospitals etc.) for providing medical treatment under the public health insurance regulation,[71] affect the competitive situation on the health services market. Medical companies that are awarded contractual financing for the provision of medical treatment receive a *de facto* advantage that can interfere with the freedom of enterprise and restrict competition.[72] Thus, the case law seems to relate the appropriate procedure requirement to the constitutional freedom of enterprise and the need to balance the former with the opposing restriction of competition.[73] In disputes concerning restrictions on the right to establish pharmacies, the Supreme Court has referred to the freedom of competition as a part of the freedom of enterprise and found that the constitutionality of any state-imposed restrictions on the right of a company to establish a pharmacy, must be checked and balanced with the freedom of enterprise.[74] The freedom of enterprise may also be affected by competitive advantages related to the unequal distribution of state subsidies.[75]

There does not seem to be any disagreement in the literature or in case law that the restriction of competition by an administrative body is often essentially an infringement of the constitutional freedom of enterprise.

2.3.3 Origins in EU law

In situations involving a cross-border interest, the general principles of EU law apply next to the constitutional grounds[76] and have been applied in cases concerning lawfulness of restrictions of competition—primarily when a disputed contract has a major impact on competition and third parties due to its long duration.[77] Following the line of reasoning of the Court of Justice,[78] the Estonian Supreme Court has emphasised that a harmful impact on competition was *i.a.* evident in view of the fact that other undertakings—including potentially undertakings from other Member States—could not have competed for the awarded contractual operation for at least 49 years (which was the intended term of a challenged contract), had the contract remained in force.[79]

The courts have also referred to the restriction of competition in a dispute over the granting of a mining (extraction) permit. In an administrative case No.3-3-1-26-16 the legal question was, whether competitors had the right to challenge the granting of an extraction permit. The Supreme Court took the view that an extraction permit is a public resource and the granting of extraction permits in the case in question closed the oil shale mining market to new undertakings and precluded any changes in market shares (other than through the voluntary waiver of market shares by existing permit holders). In the Court's view, the inability to enter a market or expand one's activities due to legal restrictions interferes with the constitutional freedom of enterprise, and when deciding the issuing of permits, the concerned public body must also it also the situation in the light of the European Union law. [80]

[71] Health Insurance Act—RT I 2002, 62, 377; RT I (12 December 2024), p.22.

[72] Administrative Law Chamber of the Supreme Court (29 November 2012), 3-3-1-29-12, para.14; Tallinn Circuit Court (30 May 2014), 3-13-986; Tallinn Circuit Court (6 October 2014), 3-14-50157; Tallinn Circuit Court (29 September 2015), 3-14-50626, para.12; Tallinn Circuit Court (28 January 2016), 3-14-333, para.17; Tallinn Circuit Court (28 January 2016), 3-14-332, para.21; Tallinn Circuit Court (25 January 2018), 3-16-520; Tallinn Circuit Court Ruling (18 July 2022), 3-22-1366, para.20.

[73] Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia), Annotated Edition (2020) ss.31 and 32.

[74] Court *en banc* of the Supreme Court (9 December 2013), 3-4-1-2-13, para.105; Court *en banc* of the Supreme Court (22 December 2014), 3-4-1-30-14, para.54.

[75] Constitutional Review Chamber of the Supreme Court (9 June 2023), 5-22-13, para.41.

[76] Treaty on European Union [2016] O.J. C. 202, 7.6. Cf. Administrative Law Chamber of the Supreme Court (27 October 2010), 3-3-1-66-10, paras 15–17.

[77] Administrative Law Chamber of the Supreme Court (27 October 2010), 3-3-1-66-10, para.19.

[78] *Commission of the European Communities v Federal Republic of Germany*; ECJ (18 July 2007), paras 25–42.

[79] *Commission of the European Communities v Federal Republic of Germany*; ECJ (18 July 2007), paras 15–17.

[80] Administrative Law Chamber of the Supreme Court (21 February 2017), 3-3-1-26-16, paras 43 and 46.

2.4. What is an appropriate procedure?

In the case law discussed above, the term "appropriate procedure" is constantly used. The meaning of these words however depends largely on the particularities of each case, the applicable law and the object of the transaction. An appropriate procedure may include the features listed in the introduction to the article—equal treatment, openness, transparency and proportionality—or, depending on the circumstances, a procedure that does not correspond to these features. The impression is that the courts do not establish exaggerated requirements with regard to the details or quality of proceedings. In our opinion, this is also justified. Creating a reasonable element of competition should be enough in the big picture and a duty to *not do nothing* may be a justified baseline. Thus, the Estonian Supreme Court has regarded that both a so-called open procedure as well as, in certain cases, a direct contracting arrangement can constitute an appropriate procedure under the circumstances—the latter, if the law provides a basis and the prerequisites for the exercise of the corresponding right have been met.[81]

Generally, however, an "appropriate procedure" must ensure uniform treatment, openness, transparency and proportionality. The following prerequisites and features of appropriate procedures emerged from the initial case-law:[82]

a) any requirements imposed on interested parties must be justified;
b) the requirements must allow parties to participate in the procedure on equal grounds;
c) the procedure must ensure (to a reasonable extent) the uniform treatment of persons, openness, transparency and proportionality.

In subsequent cases, the courts have emphasised that, since the purpose of an appropriate procedure is to protect the procedural rights of interested parties and to prevent damage resulting from a breach of those rights, the appropriate procedure must, inter alia, comply with public law principles and take into consideration the rules of discretion and public interest.[83]

Such characteristics create obvious similarities to the rules of public procurement and the release of state assets for use. A similar parallel has, among other things, been drawn in Dutch case law, where the Dutch courts have also aptly added that the procedure must be designed in a way that reasonable tenderers could expect in such circumstances.[84] However, a full analogy with public procurement should be avoided. We have not been able to identify the intention of the legislator to subject such competitions to procurement rules, and the same result should not be achieved as a result of judicial interpretation.

When designing the procedure for granting use of public resources, case law has not gone beyond the above principles, nor should it. The authors of the article are therefore not aware of any disputes in Estonia that have focused on, for example, whether one or another specific measure under the appropriate procedure complied with the principles described. Most court disputes in which the issue of the procedure for making public resources available for use has arisen, address the fundamental question of whether the appropriate procedure was conducted at all and, if not, whether the failure was lawful.

To put it simply, any rules of appropriate procedures for allocating public resources seem to have "primordial roots" and are significant in situations where special rules have not (yet) been introduced into sectoral legislation or occasionally, where such special rules are in conflict with the applicable general principles. This is understandable, given that at the time when the Supreme Court first started to developed the case law in question, over 20 years ago, both under Estonian or EU law, the creation of sectoral procedural laws was still in its infancy.

[81] Administrative Law Chamber of the Supreme Court (18 April 2024), 3-20-1313, para.22.
[82] Administrative Law Chamber of the Supreme Court (15 December 2005), 3-3-1-59-05, para.17.
[83] Tallinn Circuit Court (22 October 2010), 3-09-1397, para.12.
[84] E. Manunza, "Public Procurement Law as an Expression of the Rule of Law: On How the Legislature and the Courts Create a Layered Dynamic Legal System Based on Legal Principles" (2023) 5 P.P.L.R. 319–340.

With the further development of more detailed legal frameworks, as the earlier gaps have been filled through the development of EU law and the corresponding harmonisation of Estonian law, the scope of application of the requirement concerning appropriate procedures has become more limited. For example, two decades ago, a largely unknown instrument of services concessions[85] is a harmonised field today.[86] The same applies to various activity licences, the procedure for granting of which is often regulated by sectoral EU or national legislation, the framework set by the Services Directive etc. Should sectoral legislation exhaustively take over, appropriateness of procedure will be subject to appropriate procedural rules provided for in legislation - *lex specialis derogat legi generali*. However, until such time, public administration occasionally needs to resort to the universal general principles. An administrative body must apply discretion and design the appropriate procedure in accordance with the principles discussed above. The same is true in a situation where the legal instrument governing the procedure exists, but the rules it lays down are not in line with the underlying principles of the procedure for making public resources available for use. In such a case, the question may arise as to whether the legal instrument should not be applied in any part, depending on the circumstances, either due to a conflict with the Constitution or the law of the EU.

3. Exemptions from the appropriate procedure requirement

3.1 Preferential treatment arising from legislation

Estonian case law has highlighted at least three similar situations in which there is no obligation to carry out an appropriate procedure, even though someone is vested with the right to use or own public resources. The first and obvious situation is when a preferential right to prefer someone is set out in law.

Already in 2004, the Supreme Court seemed to agree that, if several parties are interested in obtaining the use of local government assets, it must first be established whether it has been precisely defined by the legislator which of them should be given a priority.[87] Courts have subsequently emphasised the same,[88] particularly in disputes concerning the preferential treatment of hospitals based on the hospital network development plan.[89] On the other hand, these cases also been point out that the law does not have to specify exactly *who* should be preferred, but the abstract right or even the obligation to give preference may derive from various legal instruments.[90] The practice in other countries also shows that the obligation to organise an appropriate procedure does not necessarily arise where there is a proper justification for favouring one or the other party.[91] This is also logical in relation to the prohibition of arbitrary discrimination—on the proportionality scale, the discriminatory solution should only be opted for if it is not reasonably possible to achieve the legitimate objective in a non-discriminatory manner.

An interesting statutory preferences approved in the case-law concerns the right to use vacant agricultural land. In case 3-3-1-14-15, the Supreme Court resolved a dispute over who the local authority should grant the use of vacant agricultural land desired by several applicants. In this case, the right of preference for use was granted under the Land Reform Act[92]—a major legal act that used to govern the process of restoring land ownership in the aftermath of the Soviet occupation. As such, the law adopted in 1991 regulated a

[85] C. Ginter, N. Parrest, M.A. Simovart, “Dual regulation of concessions in Estonia as an obstacle for effective application of European Union law” (2012) 21(2) P.P.L.R. NA73−NA83.
[86] Directive 2014/23 on the award of concession contracts—[2014] O.J. L. 94.
[87] Ruling of the Administrative Law Chamber of the Supreme Court (18 June 2004), 3-3-1-26-04, para.10.
[88] Administrative Law Chamber of the Supreme Court (15 March 2006), 3-3-1-5-06, para.16.
[89] Tallinn Circuit Court (30 May 2014), 3-13-986, para.14; Tallinn Circuit Court (6 October 2014), 3-14-50157, para.19; Tallinn Circuit Court (28 January 2016), 3-14-333, para.17.
[90] Tallinn Circuit Court (28 January 2016), 3-14-333, para.14.
[91] E. Manunza, “Public Procurement Law as an Expression of the Rule of Law: On How the Legislature and the Courts Create a Layered Dynamic Legal System Based on Legal Principles” (2023) 5 P.P.L.R. 319–340.
[92] RT 1991, 34, 426, s.233 (6).

situation drastically different from today's legal landscape and society. Even today, the Land Reform Act provides that usufruct of vacant agricultural land is vested for the benefit of one person only and in the case of several applicants, the municipality is entitled to prefer an applicant who either actually uses the same plot of land on a legal basis, or whose land ownership borders with the concerned plot, or who is a self-employed person. The rationale behind introducing such preferential right was to avoid a situation where in an auction, bids would be made under a cover identities, the price of the land driven up, actual farmers unable to pay such a high price and the decoys would never cultivate the land. According to the rapporteur of the draft act: "After all, the idea is to give the land to an actual farmer for a specific purpose, not to a front man or a company purchasing land."[93] The parliamentary debate also showed the legislator's concern that vacant agricultural land would be acquired by foreign buyers instead of local farmers. In legal terms, the purpose of the preferential right was therefore to ensure that vacant agricultural land would be used primarily by persons in fact engaged in farming in the same area. Or as the Supreme Court has put it through the general objectives of the land reform: to use land more efficiently specifically for agricultural production.[94]

Another legally privileged position was discussed in case 3-3-1-26-16 and concerned an exception to issue extraction permits. While generally, extraction permits would be sold by way of an auction, an exception was made for a situation where the extractable mineral resources could be extracted for up to five years under an existing oil shale extraction permit and the holder of the permit applied for a new permit with respect to a new extraction permit area. In such a case, application of such an applicant would be processed as a matter of priority.[95] The legislator presented two arguments to justify this preference, both of which were related to the effects of the establishment of a new quarry. The economic argument was that "the smooth functioning of the economy" would be undermined if a new undertaking were to develop a new quarry next to the existing one. Furthermore, the environmental argument was that a new quarry should not be built next to an existing one because of the negative environmental impact.[96] On the other hand, the case law[97] does not agree with the above arguments of the legislator, doubting whether such a regulation was in compliance with the competition rules provided for in the TFEU.[98] Thus, the courts do not necessarily agree with the considerations of the legislator if these do not clearly comply with the content or consequences of a legal provision.

Several cases have concerned the Estonian Health Insurance Fund's right to prefer the hospitals included in the *hospital network development plan*, when awarding contracts for financing medical treatment. In these disputes, competing hospitals often argued that since the funds of the Fund are a public resource, their distribution must be subject to an appropriate procedure, to ensure, i.a. equal opportunities to other hospitals. However, the case-law disagrees: since the law defines equal regional access to medical treatment as a principle, and obligates the Estonian Health Insurance Fund to follow the development trends of the national health policy—which trends are reflected in the concerned hospital network development plan—when entering into contracts for the financing of medical treatment, it is neither contrary to these objectives nor unlawful to give preference to certain hospitals.[99] The listing of certain hospitals in the hospital network development plan, in turn, serves the objective of consistent availability and high quality

[93] Maareformi seaduse muutmise seaduse eelnõu (1006 SE) esimene lugemine (First reading of the draft Act Amending the Land Reform Act (1006 SE)). A verbatim report of the Riigikogu of 7 May 2002.

[94] Administrative Law Chamber of the Supreme Court (21 June 2010), 3-3-1-39-10, para.42.

[95] ECA s.301

[96] Maapõueseaduse ja säästva arengu seaduse muutmise seaduse eelnõu seletuskiri (Explanatory memorandum to the draft Act Amending the Land Crust Act and the Sustainable Development Act), 298 SE, p.3.

[97] Tallinn Administrative Court (10 March 2014), 3-11-2585, para.47. The Supreme Court has referred to the need to assess the compliance of such a preferential right with the TFEU, see Administrative Law Chamber of the Supreme Court (21 February 2017), 3-3-1-26-16, para.46.

[98] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union—O.J. C. 202 7.6.2016, pp.1–388.

[99] Administrative Law Chamber of the Supreme Court (29 November 2012), 3-3-1-29-12, paras 22–24; Tallinn Circuit Court (30 May 2014), 3-13-986; Tallinn Circuit Court (6 October 2014), 3-14-50157; Tallinn Circuit Court (29 September 2015), 3-14-50626, para.12; Tallinn Circuit Court (28 January 2016), 3-14-333, para.17; Tallinn Circuit Court (28 January 2016), 3-14-332, para.21; Tallinn Circuit Court (25 January 2018), 3-16-520; Tallinn Circuit Court (8 May 2023), 3-22-1366, para.20.

of health services, which in turn arise from the public interest, and the fragmentation of investments between different hospitals would not serve this purpose.[100]

In the context of EU law, case law has established that preferential access to funding does not constitute state aid, provided that the so-called Altmark criteria are met.[101] Neither are contracts for financing medical treatment concessions in the meaning of the public procurement law. Even if the award of such contracts would constitute a restriction of the freedom to provide services, as provided for in the TFEU, such a restriction would be proportional.[102]

Case-law also analysed and approved the preferential treatment of hospitals in the hospital network development plan, as being in harmony with the constitutional principles of freedom of enterprise and equal treatment. According to the courts, the presence or absence of a contract for financing medical treatments does not infringe a hospital operator's freedom of enterprise because they are free to provide health care services without such contracts as well. With regard to the principle of equal treatment, the courts have held that private hospitals and hospitals listed in the hospital network development plan are not comparable, because through the latter the state fulfils its obligation under s.28 of the Constitution.[103]

Often, the legislative drafts, parliamentary debates or the courts refer that the person establishing a preferential right must at least consider the reason for the priority to benefit from public resources. However, it is also clear from the case law that the considerations can be rather minimal—even essentially limited to a description of the problem which the preferential right is intended to alleviate. In other words, no substantive consideration—for example, a comparison of constitutional principles—has been required as a rule. With a few exceptions, of the concerned constitutional principles can, at best, be determined from the case law.

3.2. Right of administrative body to prefer itself

A version of the preferential treatment is the right of an administrative body to prefer themselves, as recently pointed out by the Estonian Supreme Court in a case concerning the designation by the municipality of a company belonging to the same municipality as the local heating network operator.[104] In essence, self-preference is allowed by both the in-house transaction instrument under the EU public procurement law (art.12 of the directive 2014/24) and Estonian administrative law. The latter provides for the similar possibility: an administrative body can award an administrative contract directly to a person related to the administrative body, without any prior publication of a contract notice.[105]

The self-preference, while seemingly tautological, means granting the use of public resources to a party closely related to, but legally outside of the administrative body. In this context, it is sufficient to conclude that, since EU law does not extensively limit the right of Member States to decide how to organise their public administration, or when a Member State must operate on the market (in a situation when self-provision of goods or services is a possibility), Member States are quite free to determine the distribution of tasks within the Member State. If, for example, in the case of such a division of tasks, the administrative body has foreseen that it will establish its own company for the performance of a task, EU law does not impose any special restrictions on obtaining supplies, services or construction works from that company. In essence, this would be a situation where one hand of an administrative body procures

[100] Tallinn Circuit Court (30 May 2014), 3-13-986, paras 14 and 16.
[101] ECJ *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00).
[102] Tallinn Circuit Court (6 October 2014), 3-14-50157, paras 30–46; Tallinn Circuit Court (28 January 2016), 3-14-333, paras 18–19.
[103] Tallinn Circuit Court (28 January 2016), 3-14-333, para.17.
[104] Administrative Law Chamber of the Supreme Court (18 April 2024), 3-20-1313. See also, Ginter, Peedosk and Simovart, "In-House Contracts and the Presumption of Control: Evaluating Estonia's Supreme Court Decision in Light of EU Public Procurement Law", in this number.
[105] Administrative Cooperation Act (ACA) RT I, 08.07.2025, 24, s.14.

from the other, with no need for an appropriate procedure or a competition. In legal literature and case law, the term "self-supply"[106] is often used here, which should include all forms of acquisition from oneself.

The right to self-supply has been unambiguously recognised in Estonian case law in the context of public procurement. The Supreme Court has repeatedly emphasised that the objective of public procurement law is not to increase the market share of the private sector at the expense of services provided by the public sector, and if the state considers it expedient to perform a task either itself or through companies completely under its control, this decision is generally not subject to the restrictions under public procurement law.[107] In other words, a person outside the administration cannot require that, instead of an in-house transaction, the administration should order respective service or construction work from the market. The decision of a person governed by public law to carry out a public function on their own or through a company under their control, without the involvement of private capital, does not infringe the freedom of enterprise laid down in s.31 of the Constitution.[108]

By way of analogy, it is not surprising that, in the case of granting of use of a public resource, the law similarly allows an administrative body to grant the use or ownership of a public resource to a person connected with them, essentially by means of a direct contract award. For example, s.41 of the Procedure for Granting Use of City Assets of Tallinn stipulates that the use of city property can be granted to companies with the city's shareholding, foundations established by the city, or legal persons governed by public law.[109] Under the same rationale, the state and local authorities can authorise a company or foundation over which the state or local authorities have dominant influence to perform an administrative duty, using a negotiated procedure without prior publication of a contract notice.[110] This preference is given against the background where the law generally requests to the contrary: as a rule, an administrative contract, irrespective of its value, must be awarded via a proper public procurement procedure.

3.3. Allocating public resources to third parties by discretionary decisions

The last, legislatively introduced option, to prefer a party when awarding public resources, is the right of the administrative body to release the assets directly, based on a discretionary decision. Contrary to so-called "self-preference", the benefitting party in this case does not have to be related to the administrative body. That option is provided for in specific legislation governing the use and transfer of state or local authority assets.

A "discretionary decision" essentially means the power of the concerned administrative body to award certain benefits upon proper consideration of circumstances, without an open competition or other appropriate procedure. For instance, according to the explanatory memorandum to the draft SAA, the general act regulating the award of state assets, award by a discretionary decision means that no auction or selective tender has to be organised for granting the use of or transfer the assets.[111] That is an exceptional possibility that generally requires the Government of the Republic to grant its consent.[112] The exceptional nature of a discretionary decision has also often been noted in the relevant legal instruments of local authorities[113] and the case law. For instance, a case of *Tootsi Wind Farm* emphases that generally, an auction is more in line with the principles of an appropriate procedure than the granting use of public assets by discretionary decision.[114] The use of a discretionary decision to allocate public resources entails

[106] M. Sõrm, C. Ginter and M. Simovart. "Transparency Obligations for Make or Buy Decisions" (2023) 1 *Public Procurement Law Review* 1–14.
[107] Administrative Law Chamber of the Supreme Court (5 March 2014), 3-3-1-2-14, para.24.
[108] Administrative Law Chamber of the Supreme Court (18 April 2024), 3-20-1313, para.22.
[109] Regulation 32 of the Tallinn City Council (13 June 2013), "Linnavara kasutusse andmise kord" (Procedure for Granting Use of City Assets)—RT IV (19 June 2013), p.19; (4 June 2024), p.6.
[110] ACA, s.14
[111] Explanatory note to the draft State Assets Act (SAA), 437 SE, pp.19–20.
[112] sections 19 (1) 2) and 30 (1) 3) of the SAA
[113] Tallinn Circuit Court (25 August 2017), 3-15-1072, para.25.
[114] Tallinn Circuit Court (12 April 2019), 3-17-2911, para.20.

the obligation to state reasons. The more probable it is that more than one person is interested in the award of the concerned assets, the greater the administrative body's obligation to justify the award via a discretionary decision.[115]

With regard to the grounds to use a discretionary decision, the Supreme Court emphasised in 2005 that a local government must comply with the general principles of constitutional and administrative law when organising the use and disposal of its assets, and must lay down precise rules if compliance with these principles is not otherwise adequately ensured.[116] Once such rules are in place, the administrative body is also obligated to comply with them.[117] In a similar line of reasoning, the Tallinn Circuit Court has aptly stated that "as a public authority, a rural municipality cannot freely dispose of its assets as a private person could do in its place; the rural municipality is strictly bound by public law procedures and by the prohibition of granting unjustified advantages and benefits, unless there is a legal basis for doing so".[118] In the case of several applicants, they must be treated equally, otherwise award of competitive advantages would be contrary to the Constitution (art.12 in conjunction with art.31), despite that the award is lawfully determined by a discretionary decision.[119]

As a general rule, overriding public interest or interest on the part of the administrative body—often regarded as equivalent—is the prerequisite for a discretionary decision, while the precise conditions for the use depend on the relevant act. With regard to overriding reasons, courts often seem to limit themselves to establishing whether the administrative body's use of a discretionary decision complies with the prerequisites laid down in legislation.[120] Occasionally, however, the analysis delves deeper—for example, where the words "public interest" are cited as the prerequisite for the use of a discretionary decision.[121] However, the case-law is somewhat conflicting and piecemeal.[122] For example, earlier prudent use of business premises by a private party was not regarded to be a relevant consideration justifying the use of a discretionary decision, the court noting pertinently that "the prudent use of property is the obligation of every tenant and it cannot give rise to an advantage in obtaining a public benefit without a respective legal provision".[123] For the same reasons, the courts have not always considered it lawful to give preference to an administrative body's long-term partner with good payment discipline[124] or previous user of the assets.[125] While on the one hand, the court attributed significance to investments made by the previous user in the property,[126] on the other hand, an obligation to invest was not necessarily regarded as justifying the preferential treatment of a potential future investor.[127]

At the same time, appropriate justifications for awards of assets under discretionary decisions have included the following: avoidance of a situation where the division of the local authority's land would result in inappropriately small plots and thus not facilitate the designate use[128]; the local authority's urgent need to generate income from the assets;[129] or the obligation to transfer land that the local authority needs for the construction of cycling and pedestrian tracks.[130]

In addition to grounds arising from public interest, relevant acts of local authorities often provide for the use of a discretionary decision in the event of a failed auction. Such a basis is analogous, in essence,

[115] Tallinn Circuit Court (25 August 2017), 3-15-1072, para.27.
[116] Administrative Law Chamber of the Supreme Court (3 November 2005), 3-3-1-35-05, para.9.
[117] Tallinn Circuit Court (5 March 2020), 3-19-54, para.10; Tartu Administrative Court (12 November 2007), 3-07-1711, para.2.
[118] Tallinn Circuit Court (18 January 2023), 3-21-2344, para.24.
[119] Tallinn Circuit Court (30 December 2010), 3-10-1204, para.15.
[120] See e.g. Tallinn Circuit Court (22 October 2010), 3-09-1397.
[121] Example Tallinn Circuit Court (25 August 2017), 3-15-1072.
[122] E.g. Tallinn Circuit Court (9 June 2009), 3-07-1395.
[123] E.g. Tallinn Circuit Court (9 June 2009), 3-07-1395, para.11.
[124] Tallinn Circuit Court (25 August 2017), 3-15-1072, para.28.
[125] Tallinn Circuit Court (9 June 2009), 3-07-1395, para.12-13; Tallinn Circuit Court (30 December 2010), 3-10-1204, para.19.
[126] Tallinn Administrative Court (20 April 2005), 3-04-393.
[127] Tallinn Circuit Court (9 June 2009), 3-07-1395, para.12.
[128] Tallinn Circuit Court (30 December 2010), 3-10-1204, para.20.
[129] Tallinn Circuit Court (25 August 2017), 3-15-1072, para.28.
[130] Tallinn Administrative Court (26 February 2010), 3-09-1315.

to the right to organise a negotiated procedure without prior publication of a contract notice, which is known in the field of public procurement law, when no tender has been submitted in an open or restricted procedure.

In summary, in the event of the use of a discretionary decision, legal practice shows a similar dynamic as in the case of granting use of public resources: an open and transparent procedure is presumed by default, but in cases arising from legislation, preference for specific persons is also permitted, if justified. Notably, some of the prerequisites for the use of such discretionary decisions are very similar to those under EU public procurement law, probably indicating to certain common heritage in the way of universal legal principles.

4. Conclusions

In Estonian case-law, the obligation to organise an 'appropriate' procedure for allocating public resources pursues to ensure that even in situations subject to no explicit statutory regulation, a state or local authority cannot depart from the principles of equal treatment, transparency and proportionality. National case-law has developed such obligations from universal principles of law, occasionally referring to national constitutional law as origin but in other cases not defining the source of the principles at all. We conclude that these principles are universal and govern the activities of public powers in today's democratic world despite of the clear origin of the principles.

Furthermore, we conclude that the requirement of appropriate procedure does not exist only for the benefit of participants competing for the limited public resources, but also *per se* or for the public administration itself. The understanding that a public body must follow the universal principles of transparency, equal treatment and proportionality, serves the purpose of good administration as well as reduction of corruption and thus, benefits the larger society—a wider circle of persons outside the directly involved parties. Among other situations, such universal principles demand that a contracting authority treat equally economic operators of third country origin, participating in public procurement procedures, again—not only for the benefit of the directly concerned third country operator, but for the greater good.

It is important to note the exceptions to the application of the appropriate procedure obligation, include, but are not limited to, self-supply or self-preference. While seemingly tautological, the right to prefer itself includes certain preferences to grant public resources to any party closely related to, but formally outside of the concerned administrative body. Since EU law does not set major limitations to the right of Member States to organise their public administration, nor impose the duty to operate via the market if options to operate otherwise are available, Member States are quite free to determine the distribution of such tasks.

News and Analyses

Special Report

Combatting Corruption and Collusion in Public Procurement in the UK

Key Observations and Recommendations from a Roundtable Workshop at King's College London on Mechanisms for Better Protecting Public Procurement Processes from Corruption and Collusion

Alison Jones and Robert D. Anderson*

Anti-competitive practices; Collusion; Corruption; Public procurement

1. The workshop: background and objectives

A. The workshop

On 11 September 2025 Alison Jones (Professor of Law, King's College London), Robert D. Anderson (Honorary Professor of Law, University of Nottinham), and Lucilia Falsarella Pereira (Senior Director, Competition and Markets Authority (CMA)) hosted a one-day workshop at King's College London on combatting corruption and collusion in public procurement.

The workshop brought together experts for a roundtable discussion under the Chatham House Rule on how to encourage a more proactive, integrated, and coordinated approach to preventing corruption and collusion in public procurement, and the building of a more resilient and pro-competitive procurement system. Participants included representatives from UK Government ministerial departments (the Cabinet Office and the Department of Health and Social Care (DHSC)), the CMA, the Serious Fraud Office (SFO), the Organisation for Economic Co-operation and Development (OECD), the Canadian Competition Bureau, the Comisión Nacional de los Mercados y la Competencia (CNMC, the Spanish competition authority), and the Norwegian Klagenemndssekretariatet (Appeals Board Secretariat), along with academic and practising lawyers and economists. It should be emphasised that the views set out in this report do not necessarily reflect the views of all participants.

The workshop was generously supported by King's College London's ESRC Impact Acceleration Account and the Dickson Poon School of Law's Centre of European Law.

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B. Terminology

i. Public procurement

Public procurement is the process by which governments (national, regional and/or local) and other public bodies purchase goods, services, and works with public funds. This purchasing delivers goods, services, and infrastructure that are vital to economic growth, development, and the health and welfare of citizens, such as the construction and maintenance of educational institutions, hospitals, roads, energy grids, and military equipment; the delivery of back-office functions, such as information technology, and front-line services, such as probation and social care; and the efficient delivery of medicines, hospital equipment and beds, desks, computers, and other goods that enable governments to function.

ii. Corruption

Corruption is often defined broadly in public administration as the abuse by public officials, for private gain, of power that has been entrusted to them—the putting of private interests ahead of public ones. It includes bribery, i.e., the accepting and receiving of a benefit to break the rules and subvert an entrusted process, or as a condition for carrying out a process that was meant to occur, and cronyism, the favouring of acquaintances, family, and friends over others.

In the context of public procurement, the World Bank has identified a core aim of corruption to be "to steer the contract to the favoured bidder without detection",[1] so leading to restricted and unfair access to government procurement contracts. It typically involves procurement decisions taken not in accordance with the principles of equal treatment and non-discrimination, but in favour of preferred bidders either in explicit exchange for improper compensation or other reciprocal benefits, or as a result of cronyism. It can involve grand corruption—large sums of money and a small number of powerful players, for example, where it pervades the highest levels of government or major government contracts are awarded in return for bribes to political leaders and their allies—or petty corruption—for example, procurement contracts occurring regularly at the local level, which may favour relatives or cronies. Corruption generally has both a demand-side ingredient (where a public official solicits, extorts, or receives pecuniary or other benefits from bidders, sometimes referred to as passive bribery) and a supply-side component (where businesses offer or give bribes or other advantages to public officials, sometimes referred to as active bribery).

Public procurement represents one of the highest corruption-risk activities among government functions, especially as corruption may be relatively easy to hide in this context and routinely involves the taking of significant actions and decisions by persons other than those whose interests are intended to be served (a principal–agent problem). The risk of corrupt practices frequently mounts when large sums of public funds are expended rapidly during a crisis.[2]

iii. Collusion

Supplier collusion refers to a specific form of cartel activity,[3] in which two or more independent firms collude to rig their bids in a tendering process (it is also commonly known as bid rigging or collusive tendering). Collusion can take a variety of different forms, involving the withholding of bids,

[1] World Bank Group, *Fraud and Corruption Awareness Handbook: A Handbook for Civil Servants Involved in Public Procurement* (International Bank for Reconstruction and Development/The World Bank, 2013), p.7.

[2] See Sue Arrowsmith, Luke R.A. Butler, Annamaria La Chimia and Christopher Yukins, *Public Procurement Regulation in (a) Crisis?: Global Lessons from the COVID-19 Pandemic* (Bloomsbury Academic, 2023).

[3] Broadly, cartels are joint arrangements (e.g. agreements or concerted practices) between two or more business rivals aimed at coordinating their competitive behaviour on the market and not competing in relation to one or more of the main parameters of competition between them (e.g. by fixing prices or other trading condition, allocating production or sales quotas, or sharing markets).

non-competitive bidding, bid suppression, cover bidding, market allocation, bid rotation, joint tendering or subcontracting,[4] or exchanging competitively sensitive information on bidders' intentions or strategy. In most cases, successful bid rigging involves the creation of a false impression, or illusion, of a genuine competitive bidding process, whilst the bidders in fact thwart the purpose of the tendering exercise (to extract the most competitive, cost-effective bid for the products or services through tendering), for example, by limiting price competition and/or sharing markets between themselves. The schemes may incorporate mechanisms to apportion and distribute profits among parties (a form of rent sharing), for example, through compensation, through side payments, by having the winning bidder subcontract work to losing or non-tendering firms, or through the coordinated bidding structure itself.

Public procurement is intrinsically vulnerable to supplier collusion, partly because of the public nature of the processes, the restrictions that may apply to the right to bid, and the large and regular sums of money that are frequently involved. In the public procurement context—supplier collusion and corruption may overlap and occur together, reinforcing one another and making each other more effective and stable.[5]

iv. Procurement fraud

The term procurement fraud is sometimes used to reference a crime of obtaining money by deceiving people in public procurement processes. In the UK a variety of criminal offences reach different forms of corruption and collusion impacting on public procurement, including bribery, misconduct in public office, and a criminal cartel offence.

C. Relevant legislative provisions in the UK governing corruption and collusion in public procurement

The regulation of corrupt practices and collusion in public procurement in the UK is based on sophisticated rules that govern public procurement (*see* detailed discussion of the Procurement Act 2023 (PA23) in Section 2 below) and on anti-corruption and competition laws that are enforced by highly respected agencies and administrative authorities.

Anti-corruption laws are set out in the Bribery Act 2010 (BA10)[6] and a variety of other criminal offences, including the common law offence of misconduct in public office.[7] Individuals convicted of bribery offences may be sentenced to up to 10 years in prison. Both individuals and corporations may also be required to pay an unlimited fine and have proceeds of their criminal activity confiscated under the Proceeds of Crime Act 2002. Successful prosecutions can be brought only with the consent of either the Director of Public Prosecutions (DPP) or the Director of the SFO, following investigation by local police, the City of London Police, the Ministry of Defence Police, the National Crime Agency (NCA), or the SFO. Wrongdoers may also be liable to pay damages following civil proceedings for the tort of bribery.

Cartel activity—such as bid rigging—is prohibited by Chapter I of the Competition Act 1998 (CA98) (and prior to Brexit the EU equivalent on which the CA98 Ch.I prohibition is based, art.101 of the Treaty

[4] Although joint tendering and subcontracting can be legitimate (e.g. allowing firms to be able to tender at all or to tender more efficiently through joining supplementary knowledge and skills), they may constitute anti-competitive bid rigging when used in relation to projects that could be undertaken by each firm individually and as a mechanism for mitigating operational problems of collusion.

[5] Robert D. Anderson, Alison Jones and William E. Kovacic, *Combatting Corruption and Collusion in Public Procurement: A Challenge for Governments Worldwide* (Oxford University Press, 2024). Related themes are explored in the essays in Sope Williams and Jessica Tillipman (eds), *Routledge Handbook of Public Procurement Corruption* (2024).

[6] The BA10 criminalises: (i) bribery (active and passive) committed by individuals and corporations to induce or reward the performance of a relevant function or activity improperly in both the public and private sector (Sections 1 and 2); (ii) bribery concerning foreign public officials and officials of public international organizations (Section 6); and (iii) failure to prevent bribes from being paid on an organization's behalf (Section 7).

[7] The latter seeks to hold public officials to account for misconduct committed in connection with their public duties. It carries a maximum sentence of life imprisonment and applies beyond bribery to breaches of duty giving rise to a risk of serious harm (e.g. because of conflicts of interest that exist), where a public officer acting as such wilfully neglects to perform his or her duty, and/or wilfully misconducts himself or herself, to such a degree as to amount to an abuse of the public's trust in the office-holder, without reasonable excuse or justification.

on the Functioning of the European Union (TFEU)) and by a criminal cartel offence set out in the Enterprise Act 2002 (EA02). The Ch.I prohibition is directed at undertakings—that is, corporations, or other entities engaged in economic activity. It is enforced publicly by the CMA and by certain sectoral regulators (in relation to conduct occurring within their sector)),[8] pursuant to an administrative model, and privately, by private litigants before the civil courts (e.g. by a claimant that has suffered loss in consequence of an infringement of the Chapter I prohibition, see further Section 5). The CMA, which acts as an investigator and decision-taker when enforcing the CA98, has the power to impose fines on undertakings that it finds to have infringed the rules of up to 10 per cent of their worldwide turnover.[9] It is also able to apply (under the Company Directors Disqualification Act 1986) for a disqualification order against, or to enter into a competition disqualification undertaking with, directors of companies found to have committed a CA98 infringement such that they are unfit to be involved in the management of a company; the maximum period of disqualification is 15 years.[10]

The criminal cartel offence, which operates alongside the CA98, applies to individuals engaged in entering into specific types of cartel agreements, including bid-rigging agreements and arrangements. It was introduced in 2002 to increase deterrents to cartel activity. An individual convicted of an offence may, on conviction on indictment, receive a sentence of up to five years' imprisonment and/or an unlimited fine. In England and Wales, and Northern Ireland investigations and prosecutions may be brought by the CMA, or the SFO, or with the consent of the CMA. In Scotland, prosecutions will be brought by the Crown Office and Procurator Fiscal Service (COPFS).

The PA23 also introduces severe consequences for businesses found to have taken part in cartel activity—a risk of mandatory exclusion from public procurement for a period of up to five years (see further section 2.I). The CMA has published a blog and an information note on what suppliers and contractors need to know about the new rules on exclusion and debarment on competition grounds in the PA23.[11]

D. Background and underlying research

For a number of years, Alison Jones and Robert Anderson have worked together with Professor William Kovacic (Global Competition Professor of Law and Policy, The George Washington University Law School) on a research project on combatting corruption and collusion in public procurement. In 2024, this resulted in publication of the book, *Combatting Corruption and Collusion in Public Procurement: A Challenge for Governments Worldwide* (Oxford University Press, 2024).[12] Throughout their work on the project, the authors engaged with public authorities across the world on the topic, including the UK's CMA.

As a result of this research, the authors believe that, even in jurisdictions such as the UK, with relatively clean economies and robust public procurement, anti-corruption and competition laws and systems in place, combatting corruption and collusion in public procurement should be a priority policy area on which governments, and relevant agencies, should focus attention and resources (despite the numerous other pressing issues and challenges that they face).[13] This is because:

[8] See CMA10 Guidance on concurrent application of competition law to regulated industries, March 2014.
[9] See public register of decisions at *https://www.gov.uk/government/publications/ca98-public-register/ca98-register*.
[10] See CMA 102 Guidance on Competition Disqualification Orders, February 2019,
[11] See the CMA's blog and information note, "New Procurement Act: exclusion and debarment on competition grounds - what suppliers and contractors need to know" and "The Procurement Act 2023: Information note on exclusion and debarment on competition grounds".
[12] Robert D Anderson, Alison Jones, and William E. Kovacic, *Combatting Corruption and Collusion in Public Procurement: A Challenge for Governments Worldwide* (Oxford University Press, 2024). See, for an earlier expression of related ideas, Robert D. Anderson, Alison Jones and William E. Kovacic, "Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement" (2019) 26(4) *George Mason Law Review* 1233.
[13] The CMA prioritised action on public procurement in the CMA Annual Plan 2025—2026 and in the CMA Strategy 2026—2029.

(1) Public procurement is an area where both vast sums of taxpayer money and the provision of vital public goods, services and infrastructure are at stake (gross spending on public sector procurement was approximately £434 billion across the UK in 2024/2025, representing approximately one third of all public sector spending).[14] As a result, if procurement processes are distorted by corruption or collusion, significant societal harm is highly likely to ensue: the quality and quantity of public goods and services that are central to economic and social development will be reduced; public money will be squandered and improperly diverted; and frustration amongst citizens and mistrust in government and its institutions may breed. Indeed, an extensive body of reports and academic literature highlights not only the substantial financial costs that can result from corruption and collusion in this sphere, but also, more broadly, their negative impact on economic growth, human development, poverty reduction, national security, and more generally, citizens' satisfaction with life.[15] Conversely, if incidences of corruption and collusion in public procurement are reduced, scarce public resources can be saved and a government can provide its citizens with more, and better, public goods and services at the same time as nurturing competition and innovation and instilling confidence in itself. Even small reductions in the incidence of corruption and collusion can, consequently, yield meaningful benefits.

(2) It appears that efforts by many countries to introduce and improve laws governing public procurement and fighting corruption and collusion have not fulfilled their potential or delivered the full benefits anticipated. Rather, because public procurement processes are inherently vulnerable to distortion by both corruption and collusion, and because the potential rewards from corrupt or collusive conduct in this sphere are so high, firms and individuals may quickly learn to adapt to new laws and systems, and to exploit any weaknesses that they identify within them. Indeed, in the UK, despite the fact that the law in these spheres has been overhauled and improved on several occasions over the last 30 years, a variety of Government and other reports and reviews estimate that significant sums are lost to procurement fraud each year.[16] Further, the House of Commons Public Accounts Committee has estimated that more effective use of competition in public procurement in the UK could save the Government £4.0–7.7 billion per year,[17] and the CMA has urged the government to recognise the importance of public procurement as a way of promoting healthy, competitive markets and of harnessing their benefits.[18]

Weaknesses in public procurement systems frequently derive from one or more common problems that exist within a system, with the result that: (i) public procurement processes still leave the door open, or ajar, to corruption and collusion in some ways; and (ii) anticorruption or competition laws do not have the deterrent effect intended. This may especially be the case where the respective public procurement, anti-corruption, and competition law regimes operate in silos, without sufficient coordination between relevant agencies or institutions.Where corruption and collusion risks remain real, or a sense of impunity

[14] See *https://commonslibrary.parliament.uk/research-briefings/cbp-9317/#:~:text=Gross%20spending%20on%20public%20sector,10%25%20in%202024%2F25*.

[15] See the literature discussed in Anderson, Jones and Kovacic, n.5, Ch.2.

[16] See e.g. Cabinet Office, "Cross-Government Fraud Landscape Annual Report 2019" (2020), and Public Sector Authority, Cross-Government Fraud Landscape, Annual Report 2022 report, UK Parliament, "£4 billion of unusable PPE bought in first year of pandemic will be burnt 'to generate power'", Public Accounts Committee, News Article (10 June 2022), Ministry of Housing, Communities & Local Government, "Review into the Risks of Fraud and Corruption in Local Government Procurement—A Commitment from the UK Anti-Corruption Strategy 2017 to 2022" (June 2020), International Public Sector Fraud Forum, "Fraud in Emergency Management and Recovery: Principles for Effective Fraud Control" (2020) (published in collaboration with the Cabinet Office and the Commonwealth Fraud Prevention Centre).

[17] House of Commons, Committee of Public Accounts, Competition in Public Procurement, Sixth Report of Session 2023–2024.

[18] See CMA Response to Transforming Public Procurement Green Paper 31 March 2021 and CMA Response to the Cabinet Office Consultation: Public Procurement: Growing British industry, jobs and skills, 25 September 2025. The CMA has also prioritised action on public procurement as one of its annual priorities for competition enforcement in the CMA 2026–2027 Draft Annual Plan.

prevails, additional steps will be required to bolster the working of a regime. Often, this may require more 'joined-up' approaches to the work of public procurement, competition, and anti-corruption regimes in addition to efforts to strengthen the effectiveness of such agencies in fulfilling their respective individual mandates.

E. Objectives of the workshop

Against this backdrop, the purpose of the workshop was for expert stakeholders to discuss a range of measures that could be considered to ensure a more proactive, integrated and coordinated approach to fighting corruption and collusion in public procurement, and the creation of a more resilient, and procompetitive, public procurement system. Discussions centred not only on the question of how to deter collusion and corruption through *ex post* law enforcement, but also on how better to prevent this conduct from happening in the first place (how to reduce both opportunities and incentives for this conduct). It was also considered how governments can ensure that overpayments made as a result of corruption or collusion during public procurement processes are recovered. A theme permeating the workshop sessions was how deeper coordination between agencies and institutions can be developed to better achieve these objectives. The discussions concentrated principally on the position in the UK, although frequent reference was made to examples of best practices and approaches tried across different jurisdictions.

The aim of the workshop was not to advocate for particular reforms, but (a) to encourage a dialogue focusing on potential problems, solutions and improvements to the working of an already comprehensive system such as that which exists in the UK, and (b) to bring together in one room different agencies and institutions to discuss whether closer cooperation and collaboration between them that could help to achieve their shared remits, and contribute to greater policy integration.[19] It thus sought to discuss ideas which would reduce further the risk of public procurement processes being distorted by either collusion and/or corruption and so: (a) decrease government spending and save taxpayer money; (b) provide UK citizens with more and better quality public goods and services; and, consequently, (c) increase economic growth, human development and national security, reduce poverty, and foster trust and confidence in the Government and its institutions.

2. Prevention of corruption and collusion in public procurement before they occur: increasing the resilience and protecting the integrity of relevant systems

A. Introduction to the morning panel discussions on the prevention of corruption and collusion in the procurement system

The morning panels of the workshop focused on the question of how opportunities for collusion and corruption in public procurement processes can be reduced. The complementary roles of competition and anti-corruption law enforcement and the recovery of overpaid sums were discussed in the afternoon panels. This division reflected the organisers' view that, given the complexities of *ex post* law enforcement and of recovering taxpayer money lost to corruption or collusion (see Sections 4 and 5 below), a principal focus of government attention and action should be on preventing corruption and collusion in procurement systems through measures such as: (i) the identification of risks early during public procurement processes; (ii) the *reduction* of those risks through enhanced training and other measures to strengthen procurement

[19] E.g. competition agencies may, in addition to their enforcement efforts, engage as the CMA does in advocacy effort with government, and work closely with public procurement officials and agencies, anti-corruption agencies, and businesses to encourage cooperation, coordination, the sharing of information, and compliance. Examples of the CMA's advocacy activities in relation to public procurement and work with procurement officials and agencies to increase detection were shared.

systems; and (iii) the building of integrity within the systems generally.[20] As was observed early on in the discussion, in the public procurement sector, "An ounce of prevention [can be] worth [well] more than a pound of cure".

The morning panels commenced with an in-depth presentation by Professor Sue Arrowsmith regarding the PA23. Issues focused on in the presentation and the ensuing in-depth discussion included the origins and objectives of the PA23; its key provisions and objectives; the treatment of competition and corruption issues in the Act; the role of transparency as a central tool for the prevention of corruption and the safeguarding of public interests; specific concerns regarding the role of transparency in regard to bid rigging; the central importance of issues concerning professionalisation of the procurement workforce and of adequate general training (not specific to competition or corruption law) for the prevention of corruption and collusion; the potential contribution of training in relevant aspects of competition or anti-corruption law; the scope for identifying specific corruption and collusion risks early in procurement processes; the role of exclusion and debarment as a risk management tool; the use of anti-collusion tendering clauses ("certificates of independent bid preparation"); the need for periodic review of relevant legislation; and the role of international frameworks in maintaining an open and resilient procurement system.

B. The Procurement Act 2023: origins and key objectives

As outlined by Professor Arrowsmith, for many years, UK public procurement rules were set out principally in Regulations derived from European Union (EU) law,[21] which in turn reflected the transnational architecture established by the World Trade Organisation Agreement on Government Procurement (WTO GPA). The UK rules closely followed the EU directives that they transposed. A core focus of this regime (which still applies in Scotland) was to open markets to cross-border competition and to eliminate discrimination against foreign suppliers.

As outlined by Professor Arrowsmith in her presentation, after the UK's exit from the EU, the Government overhauled and reformed the public procurement rules applying outside of Scotland. The reform was, however, subject to the need of the new system to comply with the requirements of the WTO GPA[22] and the UK's other trade agreements.[23]

The new PA23 received Royal Assent on 26 October 2023 and came into force on 24 February 2025.[24] The PA23 explicitly changed the focus of the procurement rules. The legislation still aims to open markets (as required by the GPA and other trade agreements). However, it goes beyond this, creating a dedicated legal framework to give effect to four specified objectives to which contracting authorities must have regard when making procurement decisions, see s.12(1) PA23: (i) delivering value for money; (ii) maximising public benefits; (iii) sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions; and (iv) acting, and being seen to act, with integrity.

Competition, and competitive tendering, are *not* themselves objectives of the PA23 but are treated as essential tools for achieving those objectives. For example, in order to achieve its goals, the PA23 provides for competitive tendering procedures for public contracts through open or competitive flexible procedures

[20] See, generally, Anderson, Jones and Kovacic, n.5.

[21] See e.g. the Public Contracts Regulations 2015 (SI 2015/12) (PCR).

[22] The UK avoided potential disruption to commercial supply relationships post-Brexit by joining the GPA as a Party to the Agreement in its own right, see Robert D. Anderson, "The UK's New Role in the WTO Agreement on Government Procurement: Understanding the Story and Seizing the Opportunity" (2021) 30(3) P.P.L.R. 159–170.

[23] See, for pertinent background, Sue Arrowsmith, "Transforming Public Procurement Law After Brexit: Some Reflections on the Government's Green Paper" (2021) 30 P.P.L.R. 103–123, and Sue Arrowsmith, "Reimagining Public Procurement Law: Proposals for Post-Brexit Reform" (2021) *Public Law* 69–87.

[24] The PA23, *https://www.legislation.gov.uk/ukpga/2023/54/enacted*, does not apply in Scotland. The Act is accompanied by secondary legislation, in the form of implementing regulations, and guidance.

(except in special cases where a direct award may be possible or warranted[25]). The detection of irregularities, and bidders' confidence in the process, is facilitated by provisions allowing unsuccessful tenderers to bring civil proceedings challenging awards or other actions taken. The PA23 also aims to speed up processes, reduce costs, remove obstacles to SME participation, and enhance flexibility for contracting authorities.[26]

Professor Arrowsmith noted that, although delivering value for money, transparency and integrity are at the heart of the PA23's objectives, maximising public benefits is also an explicit objective of the system. The system thus provides that contracting authorities may have regard to broader policy goals when making procurement decisions, often referred to as horizontal objectives, including the encouragement of participation by [local] small and medium-sized enterprises (SMEs) and sustainability. Indeed, the consideration of such factors (sometimes considered under the rubric of "social procurement") is often favoured by political actors and is increasingly prevalent in the United Kingdom. The discussion during the workshop noted that such additional objectives can sometimes reflect societal preferences; nonetheless, they introduce important complexities into the procurement system. Thus, not only was it questioned whether public procurement (as compared with other mechanisms such as taxation or governments grants/subsidies) is the most efficient means to achieve these wider objectives, but it was recognised that pursuing a broader (and sometimes conflicting) set of goals greatly complicates the work of procuring agencies as trade-offs and decisions must be made within, and between, each objective. Often, they can have the effect of unintentionally building scope for corrupt practices or favouritism into process—e.g. public authorities may set increasingly high but soft targets to exclude unwanted bidders from the process. Horizontal policies also risk diluting procurement officials' focus on the objectives of integrity, and value for money, which are already a challenge to achieve.

C. Competition and corruption under the PA23: General

The PA 2023 incorporates a range of provisions intended to promote competition and protect procurement processes from corruption and collusion, including the duty imposed on procurers to have regard to the importance of delivering value for money and to act and be seen to act with integrity when making procurement decisions. In addition, the Act incorporates: (i) provisions relating to the proactive publication of extensive information on a central digital platform and for competitive tendering procedures to be carried out in accordance with a tender notice and associated tender documents to be published via the Contracts Finder online portal (see also the discussion of the general role of transparency, in s.3.D)); (ii) expanded exclusion and debarment provisions, which provide for the disregarding of tenders from excluded or excludable suppliers that might pose a risk to a procurement process (see further Section I); (iii) provisions allowing negotiation and other dialogue to be built into any procurement model (a potential anti-collusion tool);[27] and (iv) a requirement for authorities to treat suppliers the same and not to put a supplier, without justification, at an unfair advantage or disadvantage, including as a result of a conflict of interest. On a related point, provisions that allow for the rejection of abnormally low tenders are based on the risk to performance and do not *require* rejection because of concerns over anticompetitive behaviour, such as predatory pricing or subsidies.

The PA23 also recognises that, in some cases, it may not be possible to rely on competition in bidding—in particular, in scenarios where the reality is that only one supplier may be able to tender for a contract (common in defence contracts, for example). In these circumstances, different mechanisms

[25] The Act provides for power to make regulations allowing direct awards where necessary to protect health or public safety or order: PA23, s.42.

[26] A particular aim was to speed up and simplify processes, and improve their flexibility and overcome perceived rigidities, see, Cabinet Office, "Green Paper: Transforming Public Procurement" (December 2020).

[27] Negotiations can thus be used to improve the best offer and may allow procurement officials to revert to the next best offer if negotiations with the best offer fail and the former can offer a more advantageous bid. PA23, s.43 also allows a switch to a direct award where there is evidence of corruption and collusion and there are not other suitable tenders, the contracting authority considers that a competitive award is not possible.

need to be built into the process to ensure that value for money can be achieved, and that inflated prices are not paid. Indeed, there was general recognition during the workshop that there is a need to develop better anti-corruption action plans, especially in the defence area.

D. The role of transparency in the PA23

An important general thrust of the PA23 is to increase transparency in procurement processes, in particular by providing for publication of extensive information on a central digital platform, including notices of direct awards, contracts, and amendments to contracts. Publication is carried out using the Open Contracting Data Standard.[28] The requirements of the Standard are intended to enable tenders, the procedures for participating in them, and their outcomes, to be communicated widely to a broad audience thereby not just increasing and facilitating bidding, but also allowing for stakeholder monitoring of the process for legal compliance and outcomes (including by spotting red flags indicating possible anti-competitive behaviour and corruption). Use of the Open Contracting Data Standard makes information simpler to analyse and more accessible for all these purposes.[29]

The new approach and procedures established by the PA23 were generally welcomed. However, some workshop participants made the following observations:

- The success of the system will be dependent on strict compliance by procurers with these provisions.
- Adherence to the Open Contracting Data Standard will make it easier to analyse the relevant data. Making relevant data available in the public domain in a central location is, in general, an important benefit for efficiency, public accountability and confidence in government. An essential next step is to use the data effectively. It was noted, in this regard, that Government does not always leverage its power. For example, important scope may exist for realising economies through joint procurement to meet the needs of different government entities. Also, comparing the results of procurements conducted at different levels of government may give rise to interesting findings—e.g., why is one tenderer receiving more bids for a desired good or service than another?
- It will be interesting to see how the new approach to exemptions from publication will be applied in practice. Care needs to be taken to ensure that the use of *redactions* to the data published do not unnecessarily limit the ability of government or relevant agencies, such as the CMA, to use data to detect collusion or other illegal practices. The appropriate use and scope of redactions is not something that individual authorities can easily assess. This is a matter on which central direction/assumption of responsibility could be helpful.
- Steps taken in procurement processes to guard against corruption by increasing transparency need to be balanced carefully against potential collusion risks. Transparency provisions (e.g. publicising the details of outcomes, winners, and losers (including prices offered)), in post-award phases, without protecting competitively-sensitive information can, depending on the circumstances and if not carefully applied, can have the effect of facilitating collusion by allowing tenderers to monitor a cartel's stability easily and without cost—and so to identify, and rapidly react against and punish, divergences from a collusive arrangement or the entry of new players.[30] The OECD recommends that contracting authorities should consider carefully what information is made available when publishing the results of a tender

[28] See Open Contracting Partnership, "The Open Contracting Data Standard", *https://www.open-contracting.org/data-standard/*.
[29] Procurement data, if complete and sufficiently disaggregated, can be used to monitor purchasing, identify corruption or collusion risks through, for example, quantitative analysis of bidding patterns, and help to develop performance indicators and collect information on the success of procurement reforms.
[30] See for more detailed discussion, Anderson, Jones and Kovacic, n.5, Chs 3 and 4.

> and, in particular, should avoid the disclosure of competitively sensitive information.[31] Some participants thus cautioned that transparency needs to be approached cautiously, ensuring that it is targeted at fostering accountability but without risking competitive distortion, and the reduction of competition between tenderers. This is where coordination among the relevant agencies is particularly important.

Supporting the latter concern, reference was made to a study of transparency regarding cement prices in Denmark. The Danish government did not know whether it was obtaining fair prices in its relevant purchases; in this circumstance, it undertook a study intended to be helpful to procurers. As a result, however, prices of cement went up substantially following release of the study. It was inferred that even if individual suppliers' prices are not revealed, the fact that there are only a few suppliers in the market may mean that operators can easily gauge and manipulate the prices that are being charged.

E. Professionalisation of the procurement workforce and the importance of adequate general training for relevant officials (not specific to competition or corruption law)

There was broad agreement among workshop participants that an essential step for the creation of procurement systems resilient to corruption and/or supplier collusion, involves the creation of a skilled, trained and appropriately managed procurement workforce. This has multiple dimensions: it entails the provision of adequate general training (see below) but also adequate remuneration for staff members, supervision and managerial support, and insulation from undue political influences. One participant observed that governments should pay more for responsible procurement staff than accountants as procurement officers are the "first line of defence" against corruption. In any event, corruption risks may be significantly reduced if procurement officials are appointed, promoted, and paid on merit, required to disclose any possible conflicting personal or business interests, and are empowered with solid market research skills and the necessary time to apply them.[32]

Further to this concern, the observation was made that, because procurement rules are often complex and, for understandable reasons, place considerable weight on the avoidance of risks and potential abuses, they may inadvertently deter procurement officers from taking justifiable risks, for example by awarding a contract to a relatively untested supplier (i.e., a new entrant) or ruling out, in advance, the use of new solutions for addressing established needs, which could ultimately be in the public interest. To an extent, eradicating such systemic biases may require conscious efforts, championed by senior officials, to change established mindsets, for example through adjustments to performance evaluation and reward systems.

In the above context, workshop participants attached the utmost importance to general training for public procurement officials (including e.g. the need to strengthen procurement officials' market research and negotiation capabilities), especially in situations where competition for contracts is limited. Both *market research* and, perhaps particularly, *negotiation* skills may serve as specific antidotes to the possibility of supplier collusion—the former by giving officials a better sense of whether the prices being offered in a tender process are reflective of competitive market realities and/or possibilities, and the latter by empowering them to leverage better deals from suppliers, in appropriate cases.

A further important dimension of training concerns *procurement design*. Beyond such "checkbox" concerns as the need to avoid reliance on proprietary standards or trademarks in the framing of technical specifications, procurements should be designed to take advantage, to the full extent possible, of new technologies available in the market. A simple step to facilitate this is to call for proposals regarding new

[31] See OECD, "OECD Guidelines for Fighting Bid Rigging in Public Procurement (2025 Update)", *https://www.oecd.org/en/publications/oecd-guidelines-for-fighting-bid-rigging-in-public-procurement-2025-update_cbe05a56-en/full-report/component-4.html#chapter-d1e557-e220d62f9c*.

[32] See for more detailed discussion, Anderson, Jones and Kovacic, n.5, Chs 3 and 4.

solutions to a specified problem, where appropriate, rather than issuing competitive tenders for a pre-specified solution.

The discussion also highlighted the need for training to help establish a different mindset for public procurers, including a greater willingness of procurers to take risks, and the need for procurers to adopt more common-sense approaches (such as asking themselves whether they would be prepared to accept a bid or proposal if they were paying for it themselves). At the same time, it was recognised that special controls were needed to be in place for purchasing in emergency situations so that opportunities for fraud and corruption can be designed out up front (see further discussion of building integrity into the system in the sections below).

F. Building awareness of competition concerns and integrity into the system: training procurement officials in relevant aspects of competition and anti-corruption law

Procurers will be in a better position to take steps to prevent, and detect, unlawful bid rigging practices if they have a good understanding of when they are likely to occur and how, and the harm that they cause. Training in competition law and economics can facilitate this by underlining the benefits to be reaped from open approaches to procurement design and procompetitive procurement practices, highlighting the factors that are likely to enable tenderers to collude effectively, the importance of careful market research at the outset of the tender process to the success of the tender (especially through tailoring it to reduce collusion risks), how collusive practices might undermine the process and be identified through careful bid evaluation, and how suspicions of collusion should be dealt with.

With respect to competition-oriented training, public officials are in a unique position to detect bid rigging arrangements when they arise. Training can therefore help to ensure that procurers are vigilant for signs of bid rigging and are encouraged to report suspicions of actual collusion to competition enforcers and to collect and pass on key data for screening and monitoring compliance with the competition law rules.

A reality, nonetheless, is that, even with better training, procurers may be reluctant or unwilling to derail or delay the procurement process they are employed to carry out, if their performance is evaluated not on how many cartels they discover, but on the basis of their ability to set up and complete the procurement process successfully and conclude contracts. Consequently, in addition to training, some participants considered that it is imperative that procurers are provided with incentives to monitor for, and report, suspected bid rigging. The discussion in the morning sessions of the Workshop focused on how competition law training for public procurement officials is—or should be—carried out. The question of how incentives for reporting of potential bid rigging by public procurement officials could be created was considered in greater detail in the afternoon discussions on detection of infringements and deterrence (see Section 4, below).

In the above context, representatives of the CMA outlined the important work the Authority has been doing to build relationships with procurement officials and to provide related training. The CMA routinely provides training sessions to procurement authorities to share information concerning the risks of bid rigging and the harm caused, to bring officials together to discuss the issues raised, and to offer tips on the detection of suspicious signs. Key points the CMA covers include: (i) basic aspects of competition law with respect to bid rigging/collusive tendering; (ii) how to recognise suspicious signs of bid rigging; and (iii) the benefits of early engagement by procurement officers with the CMA or other relevant authorities to follow up on suspicious conduct in specific cases. The CMA stresses (rightly, in the view of Workshop participants) that it will take the responsibility to assess whether actual competition offences have occurred; it does not expect procurement agencies to do this and will also do its best to minimise and disruption to procurement processes. The CMA has established contact with approximately 80,000 public sector officials in recent years, resulting in a growing number of approaches to the CMA regarding suspicious activity.

The CMA also offers advice to public authorities across the UK on the design of competitive procurement processes, to minimise risks and make bid rigging more difficult. The CMA has also published advice for public procurers and has developed an e-learning training module for public procurers available on the CMA's Cheating or Competing campaign page[33] and shared with public procurement officials via the Crown Commercial Knowledge Hub and through Local Government Authority channels.

Note was taken by participants that the CMA encourages procurement officials to contact the Authority informally and at an early stage. In this context, a concern was raised by Professor Arrowsmith as to whether the current requirement in the PA 23 for procuring agencies to consider whether suppliers should be subject to discretionary exclusion could pose a barrier to the free communication by procurement agencies with the CMA that the Authority desires. Specifically, procuring agencies might feel that any contact with the CMA would put agencies in the position of having taken internal notice of possible grounds for exclusion—placing a burden on them to resolve such concerns before proceeding. Professor Arrowsmith pondered whether it would be preferable to remove the requirement to consider discretionary exclusion from the PA 23 and simply encourage procurers to contact the CMA if/when concerns arise. At a minimum, further official guidance would be desirable, based on careful coordination between the CMA and the Cabinet Office.

Additional themes addressed in the course of the discussion included:

- The importance of not overloading procurement officials or putting them in the position of having to directly apply competition law. Rather, the purpose should be for them to understand what aspects of procurement conduct might constitute "red flags" and how to pursue the issue appropriately—i.e., to escalate internally and refer the matter to the CMA for appropriate action, also maintaining appropriate confidentiality at all times.
- The usefulness of appropriate clarity and guidance concerning the legitimacy and appropriateness of inter-agency consultations—this should, perhaps, be reflected not only in CMA communications and guidance but also in Cabinet-level directives.
- The benefits of sectoral approaches, whereby attention is focused on raising awareness and disseminating appropriate tools within sectors generally known to be particularly subject to a high likelihood of bid rigging. As an example, reference was made to the CMA's targeted campaigns activities in the construction industry, which have sought to amplify messages from CMA enforcement activity in the sector.[34]
- The potential contribution of training and advance consultation with the CMA concerning specific high-value procurements, in addition to general training and seminars.
- The special risks that may arise in the defence sector in which, as already noted, in certain circumstances only one or two suppliers may be in a position to bid on particular contracts. This is a situation possibly meriting both special oversight mechanisms and innovative approaches to the contracting process.

Representatives of the government of Norway discussed the role of competition law training for procurement officials in that country. The discussion emphasised the high proportion of cases under s.10 of the Norwegian Competition Act (which mirrors art.101 TFEU and the UK's CA98 Ch.I prohibition) that were accounted for by bid rigging in public procurement. Experience has shown that the risk of collusion is often not at the top of the mind of procuring authorities; in the course of outreach activities, officials responsible for competition law compliance had to clarify that they were not conducting audits, but were seeking only to raise awareness and share insights and guidance on identifying collusion risks

[33] See Advice for public procurers—Cheating or competing, *https://cheatingorcompeting.campaign.gov.uk/advice-for-public-procurers/*.

[34] See for example CMA blog 'Cartels in construction—CMA message for business leaders' and case studies on the "Cheating or Competing" campaigns page focused on the construction sector.

and suspicious conduct. A common concern expressed by procurement officials was whether contacting the Norwegian Competition Authority (NCA) would delay or obstruct the procurement process; in response, the Authority had indicated it would not issue instructions that would interfere, and the decision to proceed would remain with the procurement authority. The knowledge and vigilance of public procurers, combined with a low threshold for contacting the NCA, played a crucial role in detecting cartel activity. Since 2014, the Norwegian Competition Act has included provisions that allow for anonymous tip-offs to be made to the NCA, further lowering the threshold for reporting suspicious activity and enhancing its ability to uncover anti-competitive behaviour.

Representatives of the government of Norway also emphasised that public procurement authorities tend to be small and already have significant administrative burdens. It is important not to add to these unduly.

Concerning the potential contribution of training public procurement officials to raise awareness of suspicious signs that may indicate the presence of bid rigging, and actions to be taken to mitigate related risks, note was also made of the newly-updated OECD Guidelines for Fighting Bid Rigging in Public Procurement (2025 update, published on the day of, and to coincide with the holding of, the workshop). Indeed, the Guidelines, which provide advice for public procurement officers on public procurement design and identification of red flags are a valuable resource on the entire subject.

Turning to anti-corruption training, a number of innovative programmes were cited by Workshop participants. These included:

- NATO and UK Defence Academy programmes;
- Programmes of the Norway Centre for Integrity in the Defence Sector (CIDS) (see information available at *https://www.cids.no/*);
- Public Financial Management programmes and initiatives, including with respect to Internal audit and the Management of Fraud;
- Human Resource Management initiatives, including with respect to Gender-Specific Corruption Risks;
- Acquisition, Procurement and Supply Chain Logistics; and
- Programmes relating to ensuring integrity in complex Security Environments

Additional specific initiatives are discussed in Section G below on the scope for identifying specific corruption and collusion risks early in procurement processes.

Common elements of successful programmes and initiatives in this area include intensive, specialised training to inculcate a high level of ethical awareness and common commitment to shared norms; support and commitment at the highest levels of relevant institutions; and consistent managerial follow-up. While emphasising the importance and potential contribution of these programmes and initiatives, the difficulty of assessing their effectiveness was also acknowledged.

G. The scope for identifying specific corruption and collusion risks early in procurement processes

Several participants suggested that some further steps could be taken to identify and take measures to address specific risks of corruption and/or supplier collusion early in procurement processes, before money is released for spending. As an example, multilateral development banks (MDBs) typically have integrity units to advise borrowers regarding entities engaged in misconduct, for the purpose of precluding them from bidding on MDB-financed contracts. The European Investment Bank (EIB), the lending arm of the EU, also conducts *proactive integrity reviews* to identify corruption risk early and prior to allegations of misconduct being reported. For example, its Prevention and Detection Unit uses innovative technologies and big data analytics to identify Fraud and Integrity Risks (the Fraud and Integrity Risk Scoring Tool) in real time and to assess the risk of corruption and irregularities (through the development of a Corruption Risk in Procurement (CRIP) Robot) to identify fraud and as part of its standard monitoring processes in EIB-financed projects. These allow it to monitor and complete on-site review of selected projects and help to ensure that its funds are used for their intended purpose. These processes may also identify gaps in weaknesses in processes and procedures, and shape recommendations for improvements to policies, procedures, and controls to reduce opportunities for prohibited conduct.

Workshop participants shared information on several related initiatives:

- The Global Fraud Risk Assessment (GFRA) Tool—essentially a database which collates details and levels of the fraud risks of schemes/programmes once an Initial Fraud Risk Assessment (IFIA) or a Fraud Risk Assessment (FRA) has been undertaken. The former focuses only on inherent risks (i.e., likelihood of impact), but the latter includes the inherent risk, plus controls to determine the residual risk.
- The concept of a High Fraud Risk Portfolio (HFRP)—those schemes identified through GFRA or notified from elsewhere which are deemed to be the highest value and highest (fraud) risk in government. Responsible officials are still working through how and when to publish this and at what level of detail.
- The UK's "Building Integrity" programme, intended to ensure sound public financial management from a practical basis. This is currently delivered to overseas/international partners in the defence and security sector.
- The Government Counter Fraud Function within PSFA, which includes a Fraud Risk Assessors course and additional programmes. More broadly, the sharing of technical expertise by the PSFA to enable entities to better understand fraud and corruption risks. The PSFA is currently working on thematic risks, including fraud risks in the construction industry.

Work is under way on the development of related tools. Efforts are being made to ensure that fraud prevention receives due attention in the authorisation and review of government programmes and spending initiatives.

H. Special problems concerning the defence sector

There was a common acknowledgement at the Workshop that defence-sector procurements across the world often entail particular challenges with respect to preventing corruption and supplier collusion, and the adequacy of competition generally. In many such procurements, due to the specificity of requirements, the reality is that only one or two suppliers may be able to tender for a contract. In these circumstances, different mechanisms need to be built into the process to ensure that value for money can be achieved, and that inflated prices are not paid (for example, the Ministry of Defence's Cost Assurance and Analysis Service (CAAS)).

More generally, a need for enhanced anti-corruption programmes and training in this sector was noted by several participants. In this context, reference was made to the NATO Building integrity program,[35] including a self-assessment questionnaire that countries voluntarily fill in. It looks at different sectors and political oversight, separation of duties, etc. A peer review team then goes in to discuss the findings, and a Building Integrity Action Plan is developed for the country to follow/implement. Useful open-source material is available regarding this initiative.

[35] *https://www.nato.int/cps/en/natohq/topics_68368.htm*.

I. The role of exclusion and debarments as a risk management tool

The topic of debarment regimes received significant attention at the workshop. Such regimes are frequently aimed at preventing those that have committed infringements of anti-corruption laws, and in some cases competition laws, from participating in public tender exercises and at deterring firms from engaging in prohibited activity. Despite their laudable aims, many debarment regimes have been criticised for failing to achieve their objectives, especially if enforcement tends to be unpredictable and relatively few corporations are debarred in practice. This may occur where, for example, accessible registers for recording debarred companies are not kept, guidance indicating how debarment provisions are to be implemented and complexities overcome is unavailable or limited, or relevant authorities are reluctant to exercise debarment powers, perhaps because they are fearful of exacerbating procurement difficulties that already exist in concentrated markets or they believe that conviction under bribery or competition laws is already punishment enough. Further, mandatory debarment regimes in some jurisdictions have been criticised for being too blunt, especially where they do not allow the sanction to be tailored appropriately and proportionately to the offence committed—e.g. if they impose lengthy, mandatory debarment periods on contractors regardless of cooperation or self-cleaning.[36]

To be successful, some argue that a debarment regime requires: (i) flexibility to suspend or debar contractors which may threaten the integrity of procurement process, whilst preventing overly draconian and unnecessary debarments; (ii) a register of debarred companies to be instated and easily accessible to all procurement officials; and (iii) the publication of clear policy guidance for procurers addressing implementation issues and how complications are to be managed (e.g. what the scope and length of debarment should be, how debarment should be managed in concentrated markets, how self-cleaning is to be established, and when discretionary debarment powers should be exercised—and by whom).

According to the discussion at the workshop, the UK legislature was mindful of these concerns in enacting the PA23. For example, although the Act has extended mandatory exclusion grounds for suppliers posing an unacceptable risk to procurement processes to a variety of situations where a supplier, or a connected person, has been convicted of one or more specified offences (including bribery, theft, fraud, money laundering, the criminal cartel offence, or a civil competition law infringement), or found by the CMA (or another regulator) to have broken competition law by taking part in cartel activity, it builds flexibility into the system, It provides that a supplier is only excludable under the mandatory grounds if the circumstances giving rise to the application of the exclusion ground are likely to occur again, so creating incentives for self-cleaning (rather than operating as a punishment mechanism, therefore, it appears that its principal function is intended to be preventative). It also provides exceptions to the exclusion provisions where a supplier has been given formal immunity from penalties or prosecution (which it was noted, increase the incentives for suppliers involved in illegal cartel activity to be the first to report wrongdoing to the CMA under its leniency policy),[37] and provides for investigations to be conducted prior to a supplier being added to the debarment list. The Act also requires the keeping of a debarment list of excluded suppliers on a digital platform, so allowing public sector organisations to see who should be excluded.

[36] Such regimes may compromise the viability of the debarred company, have a chilling effect on self-reporting, cooperation and future compliance, and encourage prosecutors to pursue lesser offences to find other ways of resolving cases. The system could thus harm the debarred company (and its employees) as well as the taxpayer, especially through reducing competition in affected markets and undermining the goals of the procurement system. Some thus consider that it is "unworkable to permanently debar large contract firms", that inflexible, mandatory debarment systems are counterproductive to the goal of decreasing corruption and increasing corporate compliance, and advocate that, as in the US, a flexible, non-punitive regime should be available—debarment sanctions should be imposed "only in the public interest for the Government's protection and not for the purposes of punishment", see e.g. J. Tillipman and S. Block, "Canada's Integrity Regime: The Corporate Grim Reaper" (2022) 53 *George Washington International Law Review* 475.

[37] The CMA's leniency guidance, updated in October 2025, provides additional guidance on the interplay between the new procurement regime and the CMA's leniency regime.

The issue of whether the requirement for procuring agencies to consider discretionary exclusion of suppliers may deter informal communication by procurers with competition authorities (see above) was recalled. Some participants emphasised that a more focused process relying on a central debarment registry and placing fewer burdens on individual procuring agencies would be desirable. Some participants also stressed that it was easy to view debarment as a punishment, but this is not the intention; in fact, it is best viewed as a risk management tool, with the aim of protecting public procurement from suppliers who pose particular risks.

J. Breaking out of Silos

Some participants suggested that, over time, government has not always shown sufficient concern about the potential for corruption and collusion in public procurement and that this may partly be due to government departments operating in silos and not talking to each another sufficiently. Many of the efforts and initiatives discussed in the Workshop—for example, the CMA's efforts to engage with procuring agencies to raise awareness of the risks and signs of possible cartel activity—represent an effort to address this problem. The same is true of diverse efforts to increase communication and cooperation between ministerial departments, and relevant law enforcement agencies, be they the SFO or the City of London Police.

K. Still, the need for realism with respect to imposing obligations on the procurement workforce

In a note of realism, participants returned several times to the theme that public procurement by itself is a challenging task. If too many mandates are loaded on to procurement officials' jobs, there is a real risk that they will adopt a defensive posture, defining success more as staying out of trouble than taking risks and identifying new possibilities to obtain value for taxpayers' money. Note was also taken that the political and organisational context is important: it is vital that top-level support is provided for corruption and cartel prevention. Related initiatives at the Cabinet level were discussed. The political-military interface is an important focus, as is the Ministry of Defence procurement cycle. An important goal is full fraud risk assessment training for the public sector. Another important consideration is the potential role of governments in making and shaping—as opposed to merely participating in—markets.[38] Again, in regard to all such initiatives, it is important to allow procurement officials to remain focused principally on their mandate to purchase high-quality goods, services and public works at reasonable cost to the public treasury.

L. The role of framework agreements

There was general agreement that the role and impact of framework agreements merits assessment. A huge proportion of actual government procurements are carried out using such procedures, and it is important that there is sufficient understanding about their implications for competition, corruption control and the effectiveness of government spending. Current rules are very flexible and further guidance would be welcome.

M. Anti-collusion clauses

A discussion took place on the scope for bolstering the integrity of public procurement processes by the use of Certificates of Independent Bid Preparation or Independent Bidding, also known as "Certificates of Independent Bidding" or (in some jurisdictions) "Independent Price Determination". The idea of such

[38] For example, see the CMA's comments on this point in the CMA response to the Cabinet Office's public procurement consultation (2025).

clauses is that, before submitting a bid or proposal, suppliers must provide an attestation that their bids have been prepared independently, and not in coordination with actual or potential competitors. Some consider that the use of such clauses can have an important deterrent effect on bid rigging practices. They can also facilitate successful prosecutions, or civil actions, where suppliers do, in fact, collude, as they may help to establish separate offences based on false statements made.[39]

Participants noted that although such clauses are often used in public procurement processes, they are generally not mandated by legislation.

N. Remedies, monitoring and auditing

Some participants noted that an accessible, user-friendly, timely, and rigorously operated complaints and/or domestic review procedure for disappointed, or dissatisfied, bidders before an independent review body (such as a specialised procurement tribunal or ordinary court) is essential to facilitate detection of irregularities and breaches of public procurement rules and to build bidders' confidence in the integrity and fairness of the system. A challenge nonetheless is to design a review process which is timely, effective, transparent, and non-discriminatory, but which does not unduly restrain and delay procurement processes, or place an undue burden on relevant authorities by encouraging an excessive number of demands for review. This requires careful consideration of several questions, such as who should have standing to request review, permissible grounds for review, and the standard, and nature, of the review. It also demands that procedures are time-sensitive procedures and that meaningful remedies are available to rectify violations committed, including by setting aside tainted procurement awards, providing for processes to be rerun, and possibly even for the payment of damages. It was noted that review bodies should also have the power to impose interim measures to suspend commencement of an award pending resolution of the review proceedings. In addition to review procedures, internal and external oversight audits should be conducted.

With respect to the actual impact of remedy procedures in the UK, a view was expressed that the system in England and Wales is not very apt for rigorously looking at corruption and collusion issues (although it was noted that the system in Northern Ireland is better designed). Relatedly, a view was expressed that overall, the remedies system in England and Wales is weak and that Courts look at bid challenges by dissatisfied challengers but tend to glide past corruption/collusion issues.

It was noted that, in Norway, an appeals board had broad powers to handle complaints relating to all aspects of public procurement in Norway and, for example, to impose fines in relation to illegal direct procurements. Although such conduct was not necessarily corrupt, it was stated that the system, combined with the transparency and visibility created by complaints, appeared to be having a deterrent effect on corrupt practices and to be giving people trust in the system. There is also a proposal to give the Norwegian Competition Authority power to sanction illegal direct awards.

It was argued that a case could be made for more effective auditing of public procurement processes in the UK for example by internal counter-corruption officers dedicated to encouraging adherence to policies and procedures, analysing spending, and overseeing corruption risk assessments (e.g. through reporting on corruption and procurement risks, and liaising with law enforcement authorities); independent state auditors; or external auditors who might be able to identify trends and risk. It was noted that, following the abolition of the Audit Commission and the handing back of responsibility for ethical standards to local authorities, monitoring and scrutiny of local spending has become especially hard in spite of the large sums of money they spend.[40] Further, there is no longer any clear record of how many detected procurement

[39] See, for relevant background, OECD, "OECD Guidelines for Fighting Bid Rigging in Public Procurement (2025 Update)", *https://www.oecd.org/en/publications/oecd-guidelines-for-fighting-bid-rigging-in-public-procurement-2025-update_cbe05a56-en/full-report/component-4.html#chapter-d1e557-e220d62f9c*.

[40] Councils in England spend approximately GBP 55 billion a year on goods, and works and services, Local Government Association, "National Procurement Strategy for Local Government in England 2018" (June 2018), p.5. See also Transparency International UK, "Permission

fraud cases exist as this information does not have to be published under the Local Government Transparency Code.

O. Periodic evaluation and reform of public procurement processes

It was recognised that it was early days for the new PA23 procurement system which needs time to bed down. Nonetheless, some participants suggested that the discussion summarised above, and a range of related concerns about the ability of current rules to protect the integrity of public procurement processes in the UK, highlight the importance of procurement outcomes being systematically and regularly evaluated against key performance indicators. Such reviews would help to identify whether weaknesses in the system exist, and whether reforms can be instituted to ensure that the law is able to move in time with new practices and market developments. They noted that effectiveness of procurement review and reform processes should be a concern for the Treasury, the Cabinet Office, auditors, and parliamentary committees. Peer reviews organised by international organisations could also be a helpful tool for enabling procurement agency executives and other leaders to visualise ways in which their organisations can improve performance.

P. The role of international frameworks in maintaining an open and resilient procurement system

It was recalled that the GPA was an important source of guidance in framing the PA23, and has served as a springboard for reform in other countries that have joined the Agreement in recent years. The Agreement is grounded in principles of non-discrimination, transparency and procedural fairness—all key norms for sound procurement policy. Since 2012, it contains an explicit requirement by all participating governments to prevent corrupt practices and avoid conflicts of interest. Accordingly, some participants noted that preserving its role is in the interest of preventing corruption and of sound procurement policy in the UK and internationally.

Q. The need, notwithstanding the importance of prevention measures, to ensure effective investigation, prosecution, prohibition, and sanctioning of bid rigging and corrupt conduct in public procurements

While the discussion in the morning panels had focused on prevention measures, an enduring thread throughout the discussion concerned the necessity of effective investigation, prosecution and prohibition in appropriate cases. Indeed, the latter is an important underpinning of the efficacy of prevention measures. Enhancing the deterrence of harmful conduct that undermines the effectiveness and efficiency of public contacting processes, and ensuring recovery of damages in appropriate cases, are the subjects of the remaining sections of this Summary.

3. Deterrence: ex post enforcement of anti-corruption and competition laws in the public procurement sector

A. Overview

Recognising that opportunities for corruption and collusion cannot be eliminated entirely, two of the workshop's afternoon sessions focused on ex post enforcement of anti-corruption and competition laws.

Accomplished—Assessing Corruption Risks in Local Government Planning" (2020). See also concern expressed by National Audit Office that certain councils may not be securing value for money, National Audit Office. "Local auditor reporting in England 2018" (January 2019).

The discussion started by noting that across the world, global initiatives have encouraged countries, including the UK, to adopt stringent anti-corruption and competition laws and enforcement systems. Indeed, a House of Lords Select Committee described the UK's BA10 as the gold standard for bribery legislation and a lodestar for other countries, and in 2003, the EA02 introduced a criminal cartel offence into UK law. Nonetheless, fighting corruption and bid rigging is an especially complex task and it is clear that good laws and systems are not in themselves sufficient to ensure that the targeted conduct is deterred.[41] Rather, it seems that, even where good laws exist, those contemplating engaging in corrupt or collusive behaviour may weigh the costs and benefits of infringing the rules.[42] Infractions may consequently occur if it is estimated or perceived *ex ante* that the gain (from bribery or collusion) will be greater than the cost of engaging in such conduct. The success of a legal system in deterring illegal behaviour will thus depend upon there being a significant enough risk of (i) the illegal conduct being uncovered and prosecuted, and (ii) effective sanctions being imposed (including legal sanctions and loss to reputation). In contrast, if either detection levels are low or penalties weak, incentives for law-breaking may be created.[43] Anti-corruption and competition laws will only matter and ensure accountability, if enforcement actions ensure that the costs of acting corruptly or anti-competitively outweigh the benefits.

Set against this background, participants discussed how the deterrent effect of anti-corruption and competition laws can be increased, so that relevant players cannot act with impunity. Issues considered included the importance of prioritization of enforcement resources in this area; detection techniques beyond self-reporting and leniency, including reporting by public procurement officials and whistleblowers, cross-referral of cases between law enforcement agencies, and the use of screens (data analytics); and the use of sanctions and penalties beyond corporate fines (including individual sanctions and debarment/exclusion processes). Throughout, the challenges of enforcement in this sphere were noted given the hidden and secretive nature of the conduct involved.

B. Prioritization

There was broad agreement among workshop participants that anti-corruption and competition agencies should prioritise their resources on enforcing the law in relation to corrupt and collusive conduct impacting on public procurement. Further, that they should concentrate thinking on how best to increase the deterrent effect of the law. This was so despite the significant challenges involved in detecting corrupt and collusive practices, given their hidden nature, and the pressure on law enforcement agencies to deal with an ever-broader set of concerns. For example, in the competition context, competition authorities are having to manage an expanding set of challenges that include, dealing with new practices and increasing concentration in some markets, especially in the digital economy; concerns about exploitation of customers and consumers; concerns about anticompetitive practices in labour markets; and considering how competition law may support sustainability initiatives. In the anticorruption context, law enforcers may have to choose between investigating complex economic crimes, or focusing their limited resources on other serious crimes, such as terrorism, homicide, or other violations of the person or property offences. A further particular difficulty is to provide checks against corruption and collusion which distorts public procurement which is relatively low value at the local or municipal level[44] and how to increase oversight in potential trouble spots—such as infrastructure and construction, and the pharmaceuticals sector.

[41] Rather, it seems possible that, until recently at least, limited enforcement in both the bid rigging and bribery sphere has been insufficient to deter these practices.

[42] See S. Rose-Ackerman and B.J. Palifka, *Corruption and Government: Causes, Consequences, and Reform*, 2nd edn (Cambridge University Press, 2016), p.52.

[43] See e.g. E. Combe and C. Monnier, "Fighting Cartels: The Interaction between Detection, Sanction and Compliance" in A. Riley, A. Stephan and A. Tubbs (eds), *Perspectives on Antitrust Compliance* (Concurrences, 2022), Ch.8.

[44] Such purchasing, because of its smaller scale than central government purchasing, often attracts less scrutiny from auditors and journalists, and enforcement agencies may not think it worthwhile to pursue it given its complexity, but low-level and relatively low value. However, it provides rich opportunities for wrongdoing and can, cumulatively, result in significant harm to citizens. One solution may be for enforcers to target resources on

Participants noted that in the US, for example, the Department of Justice (DOJ) Antitrust Division has set up a Procurement Collusion Strike Force to prioritise enforcement in this sphere across the US. This has led to its opening of many investigations (involving numerous industries) impacting on government purchasing.[45] Discussions also highlighted the CMA's track record in taking enforcement cases that serve to protect the public purse and that in the UK, a number of cases involving bid rigging practices have been brought by the CMA (and by its predecessor, the Office of Fair Trading (the OFT)) or regulatory agencies with concurrent powers, for example:[46]

- In 2008, criminal convictions were obtained in relation to a global *marine hoses* bid rigging cartel (affecting both public contracts emanating from the Ministry of Defence and private tenders).[47] Three individuals pleaded guilty to dishonestly participating in the cartel following their arrest (and concluded plea agreements in the United States). They were sentenced to prison, disqualified from acting as company directors, and had over £1 million of assets confiscated. The companies involved were subsequently fined in administrative proceedings brought by the European Commission;[48]
- In 2009 in *Construction* the OFT uncovered 'endemic' bid rigging in the English construction industry, which had occurred between 2000 and 2006.[49] Bid rigging was established on 199 tenders, affecting building projects for schools, universities, hospitals, and private sector projects, worth more than £200 million, leading to the imposition of fines totalling £129.2 million on 103 companies. Although the OFT considered whether, as an additional deterrent, it should recommend to procurers that they exclude infringing firms from public procurement auctions, it ultimately considered this would be inappropriate given the pervasive nature of the problem, its ability to pursue only a small proportion of the likely infringements involved, and that many of the parties were taking competition law compliance seriously and steps to help avoid future breaches of competition law;
- More recently, bid rigging has been exposed in relation to the supply and installation of certain access control and alarm systems (6 December 2013); in *Design, construction and office fit-out services* (16 April 2019); and in relation to demolition and asbestos removal contracts.[50] With regard to the latter, the CMA found that ten suppliers of demolition and removal of asbestos services had engaged in cover bidding (and, in some cases, had made side or "compensation" payments) in relation to contracts worth over £150 million[51] (around £60 million of which related to public contracts).

some of these cases, to signal that this conduct is prohibited and to create a deterrent to its occurrence in the future. For example, in Residential estate agency services in Berkshire, 17 December 2019, the CMA found that local estate agents had breached competition laws by concluding a cartel. The decision led to three firms being fined more than GBP 600,000 and two directors being disqualified for their roles in the cartel. As this was not the first case involving estate agents breaking competition law uncovered by the CMA, it, sought to reinforce its message that they expected the sector to clean up its act—to comply with competition law and to expect consequences for non-compliance—and that this kind of behaviour will not be tolerated.

[45] See US Department of Justice, "Justice Department Announces Procurement Collusion Strike Force: A Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding" (22 November 2019).

[46] See also e.g. *Galvanised steel tanks for water storage* (19 December 2016) (civil and criminal proceedings in respect of bid-rigging); *Supply of products to the furniture industry* (28 March 2017) (market sharing and bid rigging); *Supply of solid fuel and charcoal products* (28 March 2018); *Anticompetitive conduct in the supply of terrestrial trunked radio devices, accessories and related services for use on the Airwave Network in Great Briain: Motorola/Sepura* (16 December 2023) (OFCOM).

[47] OFT Press Release, "Three Imprisoned in first OFT Criminal Prosecution for Bid-Rigging" (11 June 2008); *R. v Whittle, Brammar and Allison* [2008] EWCA Crim 2560.

[48] See Case (39406), 28 November 2009, aff'd but fines reduced, see Case T-146/09 RENV EU:T:2016:411.

[49] 21 September 2009. See also *West Midland Roofing Contractors* 17 March 2004, *Collusive tendering for Mastic Asphalt Flat-roofing Contracts in Scotland* 8 April 2005, *Collusive tendering for felt and single ply flat- roofing contracts in the North East of England* 8 April 2005, *Collusive tendering for felt and single ply roofing contracts in Western Central Scotland* 12 July 2005, *Flat Roof and Car Park Surfacing Contracts in England and Scotland* 23 February 2006.

[50] *Supply of demolition and related services* 12 June 2023. See also *Heathrow and Derwentside Immigration Removal Centres*, no grounds for action decision (14 February 2023) (suspected collusion between bidders as a result of one withdrawing from a procurement procedure investigated, but facts did not support a finding of infringement despite contact between the two bidders).

[51] Including for the development of the Bow Street Magistrates Court and Police Station, the Met Police Training College, and Oxford University.

The latter cases in particular illustrate the CMA's more recent prioritisation of action in the public procurement sphere, and its willingness to conduct investigations where suspicions of bid rigging arise. Indeed, in the course of the workshop, representatives of the CMA emphasised that, in accordance with the Government's Strategic Steer and programme on improving public services and investment in economic infrastructure, that bid rigging impacting on public procurement is a core focus area for the CMA. The CMA's annual plan states that the CMA will continue to take direct enforcement action against bid rigging practices impacting on public procurement, as well as using enforcement communications and engagement to work with potential victims of bid rigging.[52] The CMA annual plan also reiterates that under the PA23 suppliers found to have infringed competition law may be added to the new central debarment register and excluded from all public procurement for up to five years.

Enforcement actions against bribery or other corrupt activities seem, in contrast, to be less of a clearly identified target. Although the SFO has concluded several investigations involving bribery in procurement processes, because it is tasked with leading responses in international cases, because it focuses only on cases of serious and complex fraud involving a high value, and because it does not act when other agencies are better placed to do so, SFO investigations have mainly been focused on cases of foreign bribery. In 2024, however, it did secure a 30-month prison sentence and a £123,000 confiscation order for Jeffrey Cook, a former Ministry of Defence official, following his conviction for misconduct in public office. Cook had received secret payments and gifts in exchange for commissioning work from offshore consultants.[53] Some cases of domestic bribery impacting on public procurement have also been prosecuted by the Crown Prosecution Service (CPS) following non-SFO investigations, see for example *R. v Ozakpinar (Adam Osman)*.[54] Given this more fragmented and less coordinated picture of enforcement of anti-corruption laws, it may be wondered whether it would be beneficial for, for example, a specialised police unit or agency to be tasked more specifically with targeting corruption, and other crimes, impacting on the public sector.

Although bid rigging and corruption have been found to operate together in some jurisdictions, to the discussants' knowledge no recent case involving a finding of infringement has revealed both corruption and collusion operating simultaneously in the UK.

C. Detection techniques

i. Leniency and self-reporting schemes

UK competition and anti-corruption agencies possess their own distinct powers to gather evidence of infringements, subject to applicable rights of defence, through for example: interviewing individuals; requiring documents; entering premises to search for information; directed surveillance (monitoring the movement of people and vehicles); power to use covert human intelligence sources (for example, informants);and even more extensive powers under the Regulation of Investigatory Powers Act 2000 in criminal cases, including of intrusive surveillance, property interference and access to communications data. The discussion noted that surveillance powers are especially important to anti-corruption investigations and to anti-corruption agencies gathering evidence sufficient to shorten investigations and establish infringements. It was recognised, however, that the exercise of these powers is generally dependent on the relevant agency having sufficient *first* evidence of an infringement to trigger and allow their use.

[52] See CMA Annual Plan 2025–2026, *GOV.UK*.

[53] See *https://www.gov.uk/government/news/former-mod-official-jailed-for-taking-70k-in-kickbacks*. Between 2014–2022, however, it appears that only one case brought by the SFO, FH Bertling (Project Jasmine), related to bribery in a domestic procurement process, and it did not involve public procurement or bribery of a public official.

[54] In this case, Mr Osman, the chief procurement officer for the CPS, received concurrent sentences of two-and-a-half years' imprisonment for corruption and false accounting after he sidestepped normal procedures and awarded, in return for lump sum payments, contracts to two friends.

Gaining this first evidence is a challenge, given the secret nature of collusion and corruption and that victims are generally unaware that an offence has taken place.

It was noted that although competition and anti-corruption enforcement agencies ordinarily possess, and use, a range of mechanisms to obtain information and evidence of infringements (both reactive—through customer, competitor, or employee complaints, self-reporting or whistleblowing—and proactive—through intelligence, monitoring and search), many rely quite significantly on reactive ones to obtain initial evidence, including self-reporting by leniency or amnesty applicants.

For example, many competition agencies across the world encourage individuals and corporations to cooperate with them prior to or during cartel investigations through the operation of 'leniency' regimes, offering immunity from, or reduction in, penalties and/or immunity from prosecution (including for directors, officers and employees) for those self-reporting cartel infringements and meeting specified conditions (immunity in such regimes is often conditioned on being the first to come forward and report, so creating a prisoner's dilemma—whether to act now and quickly or to risk losing this benefit—and seeking to destabilise the operation of the cartel). Anti-corruption prosecutors also frequently offer forms of leniency, plea bargains, immunity or protection from prosecution to those that self-report (e.g. through use of no-action letters or deferred prosecution agreements (DPAs)—deferring prosecution in return for compliance with certain requirements e.g. payment of a penalty, compensation of victims or disgorgement of profits, and/or implementation of, or changes to, a compliance programme).

The importance of these schemes in facilitating the detection of secretive and easy to disguise conduct, and successful enforcement actions against them, was stressed during the discussions by all participants. In the competition sphere the CMA offers immunity from, or reductions in, fines to leniency applicants meeting specified criteria in CA98 cases, as well as immunity from criminal prosecution to certain applicants (and their directors, officers and employees), through no-action letters and director disqualification. Leniency has been granted in approximately 50% of CMA civil cartel cases and is a vital part of its amoury in its fight against cartels.[55] An effective leniency regime is a crucial part of the CMA's strategy to detect and enforce against cartels. The CMA leniency regime[56] also helps deter cartels, by making it riskier to be involved in one. It has been a powerful tool in the fight against cartels: since the publication of the CMA's previous leniency guidance 12 years ago, the CMA has received nearly 250 leniency applications and cases with leniency applicants have resulted in more than £355 million in financial penalties and the disqualification of 24 company directors.[57] However, the CMA does not rely solely on leniency applications to uncover cartel cases and has a long history of investing in proactive cartel detection. Indeed, over the years it has kept a fairly even balance between own-initiative cases and those that start with a leniency application.

In corruption cases in the UK, the position is more complicated as any criminal penalty to be imposed is determined by the courts, which will not necessarily approve and affirm any arrangement made with the prosecutor (such as a reduction in penalty in return for cooperation or a guilty plea). Nonetheless, criminal prosecution can be forgone against those that self-report infringements or cooperate extensively with investigators. For example, individuals can be offered conditional immunity from prosecution, following consultation with the Attorney General. Further, prosecutors may seek a civil recovery order (CRO) or conclude a deferred prosecution agreement (DPA) with legal persons instead of criminal

[55] Even if leniency is not available to an undertaking, the CMA also seeks to streamline administrative procedures and reduce the risk of appeals, by settling cases with firms that cooperate (including by admitting their involvement in the cartel activity identified by the CMA) through early adoption of infringement decisions and the imposition of reduced penalties.

[56] See CMA Guidance Leniency and no-action applications in cartel cases ("CMA Leniency Guidance") updated in 2025, following a public consultation, to: (i) ensure incentives to apply for leniency continue to support the CMA's enforcement objectives of deterring and taking action against harmful cartels; (ii) reflect current law—including the new debarment regime for cartelists introduced by the Procurement Act 2023—as well as CMA's current policy and practice; and (iii) make it more accessible and user-friendly. See also CMA short guides for businesses and individuals.

[57] Even if leniency is not available to an undertaking, the CMA also seeks to streamline administrative procedures and reduce the risk of appeals, by settling cases with firms that cooperate through early adoption of infringement decisions and the imposition of reduced penalties.

prosecution. It was noted that the SFO, and other enforcers of anticorruption laws, rely quite heavily on referrals of cases to them and a range of techniques, including the use of DPAs, to shorten cases which may otherwise be long and complex (see further Section 4.D.iv).

Although self-reporting programmes have had significant success and have obvious attractions for both those investigated (including for companies, the significant advantage that both prosecution and debarment or exclusion might be avoided) and law enforcers, workshop participants recognised that they are unlikely to be attractive if wrongdoing is stable and profitable and if there is not a good track record of enforcement following use of other detection techniques. In the discussions, the CMA thus highlighted the necessity of using, and its use of, a broad use of a range of detection techniques, which also bolster the success of a leniency programme (seeking leniency will not be attractive to cartel participants unless they think that there is a risk they might otherwise get caught), help to reveal conduct which would otherwise remain hidden, and help to uncover evidence essential to support successful enforcement actions.

ii. Whistleblowing, reporting by public procurement officials, cross-referrals, domestic information exchange and screens

Workshop participants discussed a range of mechanisms, beyond leniency, for uncovering infringements and how they might be improved. Tools discussed, included complaints, whistleblowing, direct referrals between agencies, and screens and competition agencies own *ex officio* investigations.

Some participants noted that leniency applications, which had been decreasing in number, were coming back to life in their jurisdiction, possibly because of innovative developments in relation to other detection mechanisms (such as screens). Further, that as well as encouraging greater use of self-reporting programmes, information from these wider sources was leading to the uncovering of important evidence—whether in themselves or by providing the foundation for the uncovering of evidence using powers of search, interview, and surveillance. A particular challenge, nonetheless, is to prioritise and balance resources especially as enforcement in relation to low-level and low-value local cases may be more difficult to justify and prove in the absence of evidence from self-reporting.

The success in the US of the Civil False Claims Act, which provides incentives for private citizens (including employees of contractors) to expose conduct that defrauds government purchasers, was highlighted in the discussion. It was noted that its success is partly dependent on the generous rewards available to whistleblowers. The statute (also known as the *qui tam* statute) entitles individuals to a substantial share of the funds (ordinarily 15–25 per cent) ultimately recovered by the government,[58] and has contributed to recoveries by the Federal Government of $billions.[59] In Spain, whistleblowing has also provided an important source of information for the competition authority.

The CMA encourages complaints from customers, employees, or other whistleblowers, offering significant financial rewards of up to £250,000 to those who offer information about cartel activity.[60] Workshop participants debated whether higher rewards could provide a stronger motive for reporting, [61] although the different nature of the UK (as compared to the US) regime was stressed. The role of a whistleblower is more prominent in the US system (where rewards consequently need to be more substantial). The SFO noted that it was looking at the whistleblowing scheme governing the reporting of corruption to it.[62] It is considering whether reform is necessary to the regime, given the benefits that

[58] As well as recovery of reasonable attorney's fees, court costs, and expenses.

[59] See Civil Division, Department of Justice, Fraud Statistics—Overview, available at *https://www.justice.gov/org/press-release/file/1567691/download*.

[60] See CMA Guidance on whistleblowing, *https://www.gov.uk/government/publications/whistleblowers-at-the-cma*. Whistleblowers in the UK are protected from reprisal by the Public Interest Disclosure Act 1998, s.47B.

[61] See e.g. (then) Chairman of the CMA, Andrew Tyrie's letter to the Secretary of State for Business Enterprise, Industry and Skills, available at *https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy*.

[62] *https://www.gov.uk/government/publications/information-for-whistleblowers/information-for-whistleblowers*.

whistleblower evidence provides and its ability to contribute significantly to shortened time spans for resolving cases.

It was remarked that in some jurisdictions where there was no system of reward for whistleblowers, anonymous reporting systems had had some success in encouraging persons (including public servants) to report cases. This was a compromise position, especially as it is of course easier to investigate a case, if the identity of the reporter is known.

Building on the discussion of competition law training for public procurement officials in the morning sessions, the afternoon sessions considered more specifically how procurement officials might be better incentivised to report suspicions of collusion following competition law training and how closer relations between procurement and competition agencies could be built. The discussion emphasised how competition law training could (as does the training provided by the CMA to public procurers) encourage public procurement officials both to be vigilant for ‘red flag’ indicators (first signs) of possible collusion and then to report its suspicions to the relevant competition authority.

Red flag indicators may include: fewer firms than anticipated bidding; bidders unexpectedly withdrawing from bidding, bidding in a particular territory or to a particular customer; suspicious bidding patterns when viewed over time or when compared with other bids or prior bids on different tenders, or where they involve identical line-item prices; similar pricing trends, discounts, or costs, or persistently or suddenly high prices, significantly above list prices or internal agency cost estimates;[63] different bidders having the same contact details or other indicators that bids have been prepared together (e.g. two or more proposals are submitted at the same time or with similar handwriting, typeface, paper, calculations, or amendments or with identical errors, or emanate from a common web or IP address); bid prices dropping when a new bidder submits a bid; refusal among competitors to negotiate pricing; routine sub-contracting to another (losing) bidder; or evidence of communication between bidders, especially shortly before the tender deadline, or of statements indicating knowledge of competitors pricing, price schedules, or other bid rigging activity.

Several workshop participants agreed on the need to strengthen incentives for the reporting of bid rigging suspicions to competition authorities; given that reporting might derail the procurement process that the reporting officials are employed to conduct, officials are not generally rewarded for reporting suspicions and in the UK, they might be obliged to consider discretionary debarment of all relevant tenderers. The importance of cooperation with and building closer relationships between public procurement and competition agencies was thus emphasised. The question of how strong ties between law enforcement agencies with overlapping or complementary remits was also a topic debated. Because a variety of economic crimes (including corruption and bid rigging) might impact on procurement processes, cooperation arrangements enable agencies to share information and to cross refer cases to each other, for example, where one agency comes across evidence beyond their remit but within the scope of another’s. It was noted that a memorandum of understanding (MoU) may provide a helpful tool, which encourages close coordination and referrals of cases between relevant agencies.

An interesting example of such an approach was that adopted in Canada, where the competition agency (the Competition Bureau) and relevant public procurement agencies have signed MoUs on the prevention, detection, reporting, and investigation of possible cartel activity. Their purpose is to promote cooperation and coordination between the agencies in addressing possible cartel activity in procurement processes and to institutionalise and ensure that cooperation endures beyond relationships forged between individual staff members. The MoUs specifically provide that where a procurement agency detects possible cartel activity in relation to a procurement process it will inform the Bureau.[64]

[63] E.g. where there appears to be rotation or allocation of winning bids by time, geography, job description, or product line.

[64] See “Memorandum of Understanding between the Competition Bureau and the Department of Public Works and Government Services regarding the prevention, detection, reporting and investigation of possible cartel activity”, *https://competition-bureau.canada.ca/en/how-we-foster-competition/collaboration-and-partnerships/memorandum-understanding-between-competition-bureau-and-department-public-works-and-government* and

The CMA emphasised that it works hard to build relationships with other institutions and its MoU with the SFO has helped the agencies to strengthen ties, and facilitated the exchange of information, between them. It was noted that Government ministerial departments have also developed good working relationships with law enforcement agencies and routinely report suspicions of criminal behaviour to appropriate and relevant agencies (such as the National Crime Agency). Further, that agencies in the UK have overcome hurdles (especially in relation to the sharing of data) to develop arrangements for exchanging information within statutory frameworks[65] and working towards the achievement of their common causes and objectives; see also Section 5. It was stressed that particular care was required where information was being shared between an agency conducting a civil investigation and an agency conducting a criminal investigation, so to ensure that all evidence is collected in accordance with relevant statutory rules and safeguards. The importance of good coordination was stressed by participants, including the need to prevent duplicative investigations and the optimal use of resources. It was noted that in some jurisdictions, such as the US, the same institution can investigate all different types of procurement fraud impacting on government contracting, so helping to streamline and facilitate investigations.

A detailed discussion was held regarding the potential use of screens, both structural—based on a list of factors that influence the likelihood of collusion (such as the number of rivals, homogeneity of the product, stability of the product, etc)—and behavioural (focusing on firms' behaviour), as a mechanism for acquiring first prima facie evidence of an infringement sufficient to trigger *ex officio* investigations. It was noted that public contract tenders are particularly suitable for the application of screening tools as the identification of a public tender market facilitates structural assessment (e.g. identification of concentrated market structures, and whether concentration is increasing, and (artificially) stable market structures) and the data generated by the process facilitates subsequent behavioural assessments. This has led to considerable research into the issue of how data analytics, data on market structure, and data collected during bidding processes (on tenders and bidders), can be used to devise and run tests to screen for possible cartel behaviour. Screens developed involve empirical analysis, based on economic and statistical assessment of variable data, which can be applied to flag possible unlawful cartel behaviour (looking for collusive markers, abrupt changes, or anomalies, in the data). Some data-driven detection tools adopt machine learning, for example, using informative patterns extracted from data from past scenarios.

Workshop participants recognised that the reliability of screens based on quantitative analysis of procurement data are acutely dependent on the availability of reliable and unbiased data sets.[66] The discussion emphasised that use of data screens is dependent on the availability of good data sets and, given the costs and technical capability involved, their use may not always be feasible in all jurisdictions.[67] It was also noted that relatively few countries yet have sophisticated systems in place and those that have developed systems had generally experienced a number of challenges along the way. Common challenges include that screens may flag too many or too few cases for further investigation and that they may not be able to distinguish explicit from tacit collusion. Another shortcoming is that generally they are not in themselves sufficient to prove collusion—that is, corroborative evidence is required. It was noted that in jurisdictions where screens were being used, they ordinarily are relied on to provide just one piece of evidence which might be used to trigger a deeper investigation.[68] The importance of continued use of, and

Memorandum of Understanding between the Competition Bureau and Defence Construction Canada, *https://competition-bureau.canada.ca/en/how-we-foster-competition/collaboration-and-partnerships/agreements-domestic-partners/memorandum-understanding-between-competition-bureau-and-defence-construction-canada*.

[65] See e.g. Criminal Justice Act, s.3(5)and EA02, Pt 9.

[66] If some of the key variables are missing from a procurement data system a qualitative collusion risk analysis may not be possible.

[67] In some jurisdictions competition authorities do not have access to public procurement data, meaning that they are only able to obtain fragmented and incomplete data which requires resource intensive, manual compilation of data prior to analysis and creates challenges to identifying cases of collusion. In the absence of a legal framework that mandates the availability of relevant procurement data in a structured digital format, acquisition of data will depend on individual requests for information from relevant authorities and suppliers.

[68] In most jurisdictions and in most cartel cases, direct evidence of explicit coordination is required to make a definitive adverse finding. It is hard to rely on economic evidence obtained through screening solely, particularly as the liability for having violated the cartel provisions of the competition

reliance on, more traditional leniency and whistleblowing tools was thus highlighted by workshop participants.

Despite these hurdles, the potential rewards that could be reaped from the use of these screens were highlighted by workshop participants, especially as technological developments and access to good quality procurement data improve and competition agencies strive to keep pace and catch-up with market players.[69] The discussion underlined: the increasing interest in cartel screens, largely due to the enabling digital environment; that large amounts of data can be accessed and processed, and the collected data can be analysed now in an increasingly automated manner, using machine learning in particular; conferences, academic publications, and competition authority announcements indicate that digital screening is gaining in popularity; some agencies (such the Spanish competition authority) are using these screens successfully[70] to start cases (e.g. to obtain warrants for investigations that led to the revealing of actual, direct evidence of collusion); other competition authorities are not publicising their initiatives, making it difficult to estimate the real success and impact of screening (although participants from agencies noted the high degree of cooperation and know-how sharing within networks such as the ICN); it is possible that the greater use of digital screens and computational analysis techniques will lead to the development of specific case law regarding the relevant standards of proof and in particular the value of evidence obtained through data analysis (as screens gain in accuracy, their value as evidence is likely to increase); the future of screening would benefit and will, to some extent, depend on co-operation among competition authorities to develop data screens in parallel and to share information relating to skills acquired, datasets built, technical expertise, successes and failures, as well as code and, under certain conditions, data (like synthetic data bases).[71]

The CMA explained that it is now building on its strong track record of enforcement against bid rigging, by leveraging its deep bid rigging identification expertise and extensive in-house AI and data science capability. Combining these, the CMA has been assisting public sector organisations to identify anomalies in bidding data and indicators of potential illegal conduct. Using the right tools, and with access to the right data, the CMA intends to increase its rates of detection of unlawful conduct, potentially unlocking considerable productivity gains and public sector savings for the benefit of UK taxpayers. Inspired by encouraging stories of the use of screens by other agencies and partnering with other departments to secure relevant data, they are honing and developing their skills in this area and focusing efforts on data screening techniques as an additional method in their toolkit to detect bid rigging. Under the new PA23 system and with better tools and increased resources from Government the CMA is driving this avenue of work forward.

The workshop discussion also noted that although anti-corruption agencies in the UK have been more reliant on referrals and reports in the past, some are now investigating the use of data analytics to identify

law is high. Economic evidence is only circumstantial evidence. But see e.g. a case where the Mexican competition authority, following an informal complaint from the Mexican Social Security Institute (IMSS) which had observed strange patterns in the procurement processes of various generic drugs, used empirical and behavioural screening of procurement databases before targeting and launching an investigation, and collecting evidence that supported its hypothesis of collusion. Eventually, it issued a decision (which also relied on the screens) and fined four pharmaceutical laboratories for eliminating competition through bid rigging in the market for human insulin and three other laboratories for coordinating bids in IMSS's public procurement of serums, see RA-019-2010, Resolución Recurso de reconsideración Fresenius Kabi México, S.A. de C.V. y otros, Diario Oficial de la Federación 10-06-2010. The Mexican Supreme Court of Justice affirmed and accepted the empirical and economic evidence provided by the screens, see 'Resuelve la SCJN caso sobre colusion en licitaciones del IMSS', COFECE-009-2015, available at *https://www.cofece.mx/images/comunicados/Boletines_2015/COFECE-009-2015.pdf*. See also CADE's (the Brazilian competition authority's) investigation of a cartel in more than 50 outsourced services procurement processes. It was launched following the use of tools developed by the agency's Cérebro (Brain) Project (an artificial intelligence system with develops programmed algorithms to detect suspicious behaviour). This information was passed to police, which, using search and seizure powers under warrant, uncovered further signs of communication confirming the results found by the econometric tools, see *https://www.gov.br/cade/en/matters/news/cade-launches-proceeding-to-investigate-cartel-in-outsourced-services-procurement*.

[69] See e.g. D. Pachnou and D. Westrik, "Developments in Cartel Screening" CPI Columns, January 2023; OECD, "Data Screening Tools in Competition Investigations" OECD Competition Policy Roundtable (2022); R.M. Abrantes-Metz, "Proactive vs Reactive Anti-Cartel Policy: The Role of Empirical Screens" (2013), pp.2–3, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284740* [Accessed 28 August 2025].

[70] Sometimes following the training of algorithms on cases where past infringement findings has been made.

[71] To the extent that cartels may be gaining in sophistication and/or operate across borders, international co-operation may also be important.

fraud patterns and to uncover more complex fraudulent arrangements that are emerging. These can be used not only to identify fraud *ex post* but to monitor developments in real time and to prevent fraud from happening in the first place.

D. Penalties and sanctions

i. Corporate fines

Many jurisdictions, including the UK, rely quite heavily on corporate fines—ether civil or criminal—to sanction infringements of competition and anti-corruption laws. Although these financial penalties (which are often very significant) may lower the incidence of prohibited conduct, they may not be sufficient to operate as a deterrent to highly profitable conduct. Rather, because the legal criteria for setting corporate fines frequently does not relate to the likely gain or the likelihood of detection, and is normally capped by the law, there is a danger that they are simply viewed by firms as a cost of doing business. Workshop participants thus debated whether additional controls should be used more extensively, including sanctions for individuals that play a role in instigating, or even not preventing, infringements (such as fines, director disqualification, or imprisonment), and non-monetary sanctions for corporations (such as debarment or exclusion for participating in public procurement processes).

ii. Individual penalties

Individual sanctions do exist in the UK for both breach of anti-corruption and cartel laws.

Although some individuals have been convicted in relation to bribery in the public procurement context, see the discussion of the cases against Mr Cook and Mr Osman in Section 3.B above, criminal prosecutions of individuals, especially senior executives, for bribery have often proved challenging. Further, in relation to cartels, a number of obstacles to successful prosecution of the criminal cartel offences have, as in other jurisdictions, been encountered.[72] This does not appear simply to be just because criminal cartel activity—because of the higher, criminal standard of proof—is extremely difficult to establish, but partly perhaps because criminalisation has been introduced as a mechanism for creating deterrence without (since the criminal cartel offence has to date been prosecuted on indictment in the Crown Court before a jury, even though it is offence that may also prosecuted summarily in the Magistrates' Court) building an adequate understanding in the public generally of why the conduct is morally reprehensible and worthy of criminalisation.[73] Other complicating factors may also include the difficulty of identifying criminal cartel behaviour, procedural difficulties resulting from the co-existence of the civil and criminal regimes, and the fact that the CMA usually acts pursuant to an administrative model and has more limited criminal law expertise.

Nonetheless, five individuals have to date been convicted under the criminal cartel offence, all following guilty pleas, and the CMA stressed during the workshop sessions that it always considers whether a potential new cartel case that comes to light would be an appropriate case for criminal prosecution. Indeed, in the global *Marine Hoses* bid rigging and market-sharing cartel, three individuals who pleaded guilty

[72] T. Calvani and R. Jones, "Why do countries with criminal antitrust sanctions fail to incarcerate price fixers?" (2024) 12(3) *Journal of Antitrust Enforcement* 438.

[73] The drive for criminalisation in the cartel context has resulted not from a public sense of "moral outrage" and a bottom-up process designed to ensure punishment or retribution, but from a top-down one, driven by the international initiatives and a desire to introduce greater deterrents to cartel activity alongside civil ones. In the *Galvanised Steel Tanks* cartel case, two defendants were acquitted by a jury, having argued that their admitted bid-rigging and price-fixing conduct was not criminal as they had not (as was then required under s.188 of EA02) acted dishonestly, see *Supply of Galvanised steel tanks: criminal investigation*, at: *http://www.gov.uk/cma* (the undertakings were subsequently found to have infringed CA1998, Ch.1, see *Galvanised steel tanks for water storage main cartel decision*, 19 December 2016 and *Galvanised steel tanks for water storage information exchange decision*, 19 December 2016). The criminal cartel offence was subsequently amended to remove the requirement for it to be established that the defendant had acted dishonestly.

to dishonestly participating in the cartel, were sentenced to prison, disqualified from acting as company directors, and had over £1 million of assets confiscated. It consequently remains possible that criminal convictions will result in the future, and it seems clear that one way of garnering greater support for the criminal cartel offence could be to target a prosecution on a bid rigging agreement, which negatively impacts on the purchase of vital public goods and services. Such cases are also likely to prove difficult for those prosecuted to defend, especially if the conduct has been hidden and certificates of independent bidding have been required and signed. During the discussions the CMA noted that the criminal cartel offence acts as a deterrent to extremely harmful cartel activity.

The CMA highlighted that it also makes use of director disqualifications to protect the public and hold those individuals in positions of power personally liable for the businesses they run. To date the CMA has secured the disqualification of 29 directors involved in wrongdoing from holding company directorships or being involved in the management of a company. The CMA now also regularly seeks director disqualification orders whenever appropriate in civil cases brought under the CA98 and considers that this is a very powerful deterrence tool which really makes individuals sit up and listen. The participants also discussed the existence of rules in some countries which allow (a) civil fines to be imposed on individuals in relation to competition law infringement (such as Spain and Brazil) or (b) for individuals that have played a role in cartel activity to be debarred from commercial activities or participating in public bidding processes (this possibility exists in Brazil, for example, even if it has rarely been used there). The latter rules are more extensive than those on disqualification applying in the UK, which only prohibit an individual from acting as a director or being involved in the management of a company in the UK in the future.

The discussion in the workshop also touched on the potential impact that naming individuals involved in prohibited conduct might have on deterrence. It was noted that to focus the mind of individuals and to publicise wrongdoing, some countries had central registers of those found to have been involved in certain illegal economic crime.

iii. Other corporate penalties

The morning sessions discussed the UK exclusion regime in some detail and its aim to preserve the integrity of procurement processes. The PA23 thus seeks to prevent those that have committed infringements of anti-corruption or competition laws, and who constitute a risk to a public procurement processes, from participating in public tender exercises (the principal aim of the PA23 regime). In the afternoon discussions, workshop participants highlighted that debarment regimes may also prevent such conduct by playing a deterrent function. The risk of losing the chance to secure public contracts for a period in the future can act as an incentive for a firm to comply with the rules, particularly where a significant proportion of its business is dependent on public contracts.

The discussion again emphasised, however, that debarment regimes need to be constructed with care if they are not to undermine their objectives and that the PA23 has been designed with potential pitfalls in mind. Debarment is not thus to be used as a draconian and rigid punishment. Rather, flexibility has been built into the system, including by providing for the possibility for firms to ‘self-clean’ and thereby be able to participate in procurement processes from which they might otherwise be subject to mandatory or discretionary exclusion. Exceptions also exist for suppliers granted immunity from penalties or prosecution, for example under the CMA’s cartel leniency regime.

One problem discussed was how to handle scenarios where exclusions would make it more difficult to conduct a public procurement exercise, for example, because the main supplier, or suppliers, operating in a concentrated market would be excluded. It was noted that the PA23 provides an overriding public interest exception which may apply in scenarios such as these. One commentator noted that in some jurisdictions, it had been debated whether in concentrated markets suppliers found guilty of bid rigging should, instead of being debarred, be required to divest or transfer assets to a third party, with the objective of opening the market to new rivals capable of challenging and competing with established players in the market.

The discussion also touched on the question of whether the criminal cartel offence should be expanded to corporations as well as individuals. Although it was recognised that criminalizing corporate cartel behaviour would raise the evidential bar for prosecutors (especially because of the higher standard of proof applicable in criminal cases and the difficulties presented by establishing that the controlling corporate mind knew of the offending behaviour), without substantially changing the available sanctions (corporate fines already being a core sanction for breach of the CA98), it was suggested that such a change would allow all competition cartel proceedings against individuals and corporations to be brought together under the umbrella of the criminal cartel offence. It might also bolster the moral case for criminalisation of cartels and reinforce community condemnation of such conduct where corporate culture has contributed to the commission of a cartel offence. Concerns about complexities raised by holding companies accountable could be met by creating, as in the case of bribery, a separate "failure to prevent" offence for corporations, a strict liability corporate offence of failing to prevent the conclusion of an unlawful cartel agreement by a director, officer, employee, or agent of the company, subject to a defence that the company had adequate procedures in place to prevent such actions.

Workshop participants were, however, concerned that an extension of the criminal cartel offence to corporations would raise too many legal and resourcing complexities, and that there were already sufficient penalties available to ensure the deterrent effect of competition law and to encourage compliance by corporations available in the UK.

iv. Settlements, deferred prosecutions and civil recovery orders

Participants noted the importance of law enforcement agencies being able, in appropriate cases, to shorten what would otherwise be difficult and lengthy proceedings using, for example, commitments procedures, settlements or deferred prosecutions.

The CMA will not usually accept commitments (a decision where undertakings under investigation make legally binding commitments as to their future behaviour to address competition concerns but in which no finding of a competition law infringements is made) in cartel cases. They do however often settle cartel cases, which enables an infringement decision to be adopted using a more streamlined and rapid procedure, see for example the *Demolition Services* case,[74].

In the anti-corruption sphere, DPAs in the UK allow prosecutions for bribery and other economic crimes against firms to be deferred in return for their compliance with certain requirements, for example: payment of a financial penalty (broadly in line with that which would have been imposed in the case of conviction following a guilty plea); compensation of victims; making a charity donation; disgorgement of profits; implementation of, or changes to, a compliance programme; cooperation in an investigation (self-reporting is beneficial but not a requirement and there is no obligation to admit guilt); and/or the payment of reasonable costs of the prosecutor. DPAs were introduced to build confidence in the justice system and to allow economic crime to be tackled better, particularly by encouraging self-reporting, cooperation, and future compliance. DPAs have obvious attractions for companies, including the significant advantage that mandatory debarment will not follow (as no conviction for a relevant offence has occurred). It was noted in the discussions, however, that DPAs do often involve conditions on firms which require elements of self-cleaning. They are also appealing to prosecutors, especially given the complexities, costs, and risks involved in establishing corporate criminal liability in England and Wales. The SFO highlighted that it is

[74] Demolition services (March 2023), *https://www.gov.uk/cma-cases/supply-of-construction-services*.

now also seeking to use unexplained wealth orders, where individuals cannot explain how they were able to obtain assets.[75]

5. Recovery of Funds overpaid as a result of corrupt or collusive behaviour

A. Overview

Financial penalties imposed for infringements of anti-corruption or competition laws are generally designed to punish and deter infringements, not to compensate victims. Damages and other recovery mechanisms may, however, enable victims of infringement to obtain compensation at the same time as increasing deterrents to illegal activity. Indeed, in the competition law sphere, individual and collective damages actions brought by victims of competition law infringements are now burgeoning before the courts in the UK and the Competition Appeal Tribunal. Frequently, the amount of damages being sought by victims significantly exceeds the penalties (if any[76]) imposed by a competition authority in respect of the infringement, so leading to a complex interaction between public and private enforcement of the rules. Against this backdrop, the final session explored the question of whether more could be done in the UK to ensure the clawing back of taxpayer money overpaid due to procurement fraud.

The workshop participants recognised the importance of recovering taxpayer money lost to procurement fraud. This was so, despite the complexity and cost of such proceedings, the fact that authorities might have fewer incentives (than private litigants) to seek recovery of lost public money (especially if sums recovered do not remain within the department that has suffered loss), and that authorities may be reluctant to sour relations with contractors they may have to, or may wish to, continue to conduct business with.

B. Competition Law proceedings

The workshop discussed how private proceedings relating to competition law infringements can be brought before the Competition Appeal Tribunal (the CAT a statutory tribunal) or the High Court in England and Wales.

i. Causes of action

The CAT has jurisdiction to hear claims, including collective claims, for damages (CA98, ss.47A and 47B) in relation to a breach of statutory duty for infringement of the civil cartel prohibition incorporated in Ch.I of the CA98 and, until Brexit, art.101 TFEU. The High Court does not have jurisdiction to hear collective claims under s.47B, which must be brought in the CAT. Such claims for damages (which are compensatory in nature) can be:

- follow-on—that is they rely on, and follow-on from, a prior infringement decision of the CMA (or sector regulator with concurrent powers under the CA98) or the European Commission (in relation to pre-Brexit infringements) to establish liability. These infringement decisions are binding on the High Court and CAT once final (broadly, once all appeals have been exhausted). A claimant (or, in collective claims, class representative) must still establish causation and quantify the damage suffered by them (or by the class members);

[75] *https://www.gov.uk/government/news/sfo-secures-11-million-with-first-unexplained-wealth-order*.

[76] For example, no penalty is imposed by the CMA on a business that successfully applies for immunity under the CMA's leniency regime, and damages claims are frequently brought on a standalone basis, without the CMA or other competition authority having adopted an decision finding an infringement of the CA98.

- stand-alone—where no prior infringement decision has been made and the claimant (or class representative) must prove all elements of the claim (a competition law infringement as well as causation and damage); or
- hybrid—a combination of follow-on and standalone actions.[77]

Other possible causes of action arising out of cartel and bid-rigging conduct, which can be brought before the High Court (but not the CAT), include conspiracy to defraud, fraudulent misrepresentation, unlawful means conspiracy, and other economic torts. However, it may be difficult for a claimant to establish all elements of the relevant tort, and such claims have often been struck-out.

ii. Experience to date

Workshop participants noted that despite the rapidly developing private litigation scene in England and Wales, very few claims appear to have been made following on from CMA (or OFT) bid rigging decisions, or by public authorities generally.[78] It was recognised, however, that some could have been settled informally without proceedings having been issued and some proceedings had been brought in reliance on European Commission decisions (such as *Power Cables* and *Gas Insulated Switchgear*).[79] Further, participants described some damages litigation that related to anticompetitive conduct of pharmaceutical companies (such as price fixing, pay for delay agreements[80] or excessive pricing[81]), which had caused loss to the NHS (some of which predated the CA98 or EA02 (so complicating public, as well as private, enforcement in those cases)). Indeed, it was noted that to date actions spearheaded by the DHSC's Anti-Fraud Unit, had led to the recovery of considerable sums, which had been improperly charged to the NHS. For example, one case discussed involved proceedings brought against five pharmaceutical companies—Goldshield Group, Kent Pharmaceuticals, Norton Healthcare, Generics UK, and Ranbaxy UK—alleged to have engaged in price fixing of penicillin-based antibiotics and the anticoagulant, warfarin. A criminal investigation by the SFO in relation to this case stalled (the conduct took place in the 1990s prior to the adoption of the criminal cartel offence into UK law),[82] but civil recovery proceedings resulted in settlements under which each company agreed to pay sums, collectively totalling millions of pounds.[83] These civil actions were facilitated by cooperation and the sharing of information between the SFO and the National Health Service.

Other cases considered mainly related to proceedings that are still ongoing and taking an extremely long time to resolve. For example, proceedings by The Secretary of State for Health and Social Care, Scottish and Welsh Ministers against Servier still continue after 14 years. As the DHSC case is a hybrid claim, relying partly on a 2014 infringement decision of the European Commission (*Perindopril*), the proceedings have been suspended pending appeals from the Commission's decision before the EU courts and, subsequently, following disputes over the running of limitation periods. Proceedings by the Secretary

[77] Until reforms were brought in by the Consumer Rights Act 2015, the CAT did not have jurisdiction to hear standalone and hybrid claims which had to be raised before the High Court.

[78] But see e.g. *Circadian v Carey* (relating to demolition services), which was settled after proceedings were issued but before service.

[79] See e.g. Case HC08C03243, *National Grid Electricity Transmission Plc v ABB Ltd and others*.

[80] Very broadly, agreements concluded between an originator and generic pharmaceutical companies restricting the ability of generic companies to market medicines or delaying their entry into the markets: see e.g. *Generics (UK) Ltd v CMA* (C-307/18) EU:C:2020:52. See also *Ministry of Defence v British Airways*, in which the MoD sought damages for overcharging in flight tickets purchased by it as a result of a cartel between airlines fixing fuel surcharges; the claim was settled.

[81] See also e.g. *Scottish Ministers v Accord UK*. See also *Spottiswoode v Airwave Solutions, Motorola* (a standalone collective claim relating to excessive pricing based on a CMA Market investigation report finding pricing for the 'Airwave' emergency services communication system that were well above competitive levels, which is being funded by the Home Office) and *Ministry of Defence v British Airways*.

[82] See also e.g. *Scottish Ministers v Accord UK*. See also *Spottiswoode v Airwave Solutions, Motorola* (a standalone collective claim relating to excessive pricing based on a CMA Market investigation report finding pricing for the 'Airwave' emergency services communication system that were well above competitive levels, which is being funded by the Home Office) and *Ministry of Defence v British Airways*.

[83] Ranbaxy UK agreed to pay £4.5 million in April 2005, Generics UK settled for £12 million in June 2005, Norton Pharmaceuticals agreed to pay £13.5 million in April 2006, and Goldshield agreed to pay £4 million in June 2007. Kent Pharmaceuticals also settled for an undisclosed sum. All settlements were on the proviso that the companies did not admit any wrongdoing or liability.

of State for Health and Social Care against Lundbeck, following-on from a 2013 European Commission decision (*Citaloprom*), are also still ongoing and have been transferred from the High Court to the CAT. Again, the proceedings were stayed during appeals before the EU courts.

iii. Challenges, practical issues and alternative solutions

Workshop participants discussed the complexity of both individual and collective competition law damages actions and the determination required to ensure that public funds overspent as a result of competition law infringements are recovered.

Participants also noted that these claims can be expensive, especially when brought against large and well-funded defendants. It was also noted that the expanse, complexity (procedural and substantive) and length may raise hurdles for public institutions that had suffered loss. Some of the challenges include, for example, burdensome disclosure obligations, tight limitation periods, and the impact of lengthy appeals processes in follow-on actions.

Given these problems, workshop participants discussed the merits of conditioning the conclusion of public enforcement proceedings on the payment of compensation to victims. For example, in the OFT's case *Independent Schools*,[84] 50 fee paying schools, found to have infringed competition law by exchanging information regarding future pricing intentions, agreed to pay a small fine of £10,000 but also to make *ex gratia* payments of £3 million into a trust fund to benefit pupils who attended the schools during the period of infringement. The CMA has also, having found that pharmaceutical companies infringed competition law, accepted, as part of a settlement decision (in which a company admits having infringed competition law, in return for a lower penalty) commitments to make payments to the NHS.[85]

In other cases, ex gratia payments have been made as part of commitments decisions (even though no finding of an infringement has been made). For example, in *Vifor Pharma* the CMA was investigating whether Vifor might have abused a dominant position through its conduct in relation to intravenous iron treatments, by making potentially misleading claims about a competitor. In May 2025, the CMA closed its investigation subject to Vifor Pharma's commitment to comply with certain requirements, which included a legally binding commitment to make a payment of £23 million to the DHSC (given concerns that the conduct could have had an adverse financial impact on the NHS).[86] Further, in *Housebuilders* (2025), [87] the CMA accepted commitments offered by housebuilders under investigation in relation to information exchange, which includes a commitment not only to change the way that they handle sensitive information but to pay £100 million to affordable housing programmes; and in *PayPoint* (2021) OFGEM decided to discontinue its investigation into a CA98 infringement and to accept commitments from PayPoint and a donation of £12.5 million to Ofgem's Energy Industry Voluntary Redress Scheme.[88]

Workshop participants also discussed the voluntary redress scheme provided for by the CA98, section 49C,[89] a form of alternative dispute resolution in place since 2015, and the UK Government consultation on opt-out collective actions.[90]

Section 49C of the CA98 allows applicants to submit voluntary redress schemes to the CMA, or a concurrent regulator, for approval and allowing victims to claim compensation without the need to pursue

[84] 23 November 2006.

[85] CMA, *Nortriptyline tablets—market sharing* (Case 50507.2) (4 March 2020) (payment of £1 million); CMA, *Anti-competitive agreement with respect to fludrocortisone acetate 0.1 mg tablets* (Case 50455), (9 July 2020) (payment of £8 million).

[86] CMA, *The supply of high-dose intravenous iron by Vifor* (Case 52377), Decision to accept binding commitments (23 May 2025).

[87] CMA, *Suspected anti-competitive conduct by certain housebuilders* (Case 51392), Notice of intention to accept commitments (9 July 2025) (proposed payment of £100 million).

[88] Ofgem, *PayPoint plc—Activities in the market or the provision of over-the-counter top-up services to prepayment energy customers*, Notice of Decision to accept binding commitments (23 November 2021) (payment of £12.5 million).

[89] Introduced by the Consumer Rights Act, see also Competition Act 1998 (Redress Scheme) Regulations 2015 (SI 2015/1587 and *Guidance on the approval of voluntary redress schemes for infringements of competition law*, CMA40, August 2015,

[90] *https://www.gov.uk/government/calls-for-evidence/opt-out-collective-actions-regime-review-call-for-evidence/opt-out-collective-actions-regime-review-call-for-evidence*.

litigation in the courts. Workshop participants noted that the CMA has never approved a scheme. Further one participant commented that the voluntary redress scheme was, most likely, unattractive to businesses because it requires an admission of harm. Some participants observed that, unlike a court or the CAT, the CMA may not be well placed to determine, in an administrative procedure, the harm caused by anti-competitive agreements or conduct.

In relation to the Government's consultation on opt-out collective actions, discussion focused on one question raised within it; whether the CMA should be empowered to issue directions for redress to reduce the need for private action. Broadly, the consultation is designed to assess whether the opt-out regime has met its objectives, in particular, to improve redress mechanisms for parties harmed by competition law infringements, and to provide a deterrent effect to future infringements, whilst at the same time as protecting defendants from having to settle unmeritorious claims. A particular concern outlined in the Government's consultation document is that in more than ten years since the opt-out regime was introduced only one collective claim has reached judgment in the CAT (and was unsuccessful[91]), with other cases generally concluding in settlement outside of court (hence limiting precedent on key issues) and most other claims either awaiting judgment or trial. Core areas of the review include, amongst other things, ADR, settlement, and damages. Whilst the CMA had not yet responded to the consultation at the time of the workshop, [92] some participants warned that the proposal to empower the CMA to issues directions for redress would impose an onerous, and arguably unrealistic, burden on the CMA. Litigation had exposed how difficult it is quantify the loss caused by a cartel or abuse of a dominant position and hence to map the scope of the redress, and the CMA did not usually assess harm or the effects of conduct in cartel cases (which are generally assumed to restrict competition "by object", without need for a demonstration of effects). A question was raised about whether the development might have knock-on or chilling effects on other aspects of the public enforcement regime, such as the leniency programme, and complicate further the relationship between public and private enforcement. It was noted nonetheless that the spectre of damages actions was already impacting on CMA investigations, and was a consideration for companies when deciding to apply for leniency or engage in settlement discussions. Participants reflected on the importance to the regime as a whole that both public and private enforcement worked effectively, noting that (for cartel cases at least) private action is rarely possible without public intervention first.

C. Anti-corruption law

Bribery proceedings have, in some cases, led to confiscation orders and the recovery of profits from bribery (especially through use of CROs and DPAs). CROs can be made following conviction in criminal cases or instead of criminal prosecution. Indeed, the SFO in its foreign bribery cases has made quite extensive use of DPAs,[93] and CROs,[94] and its civil asset confiscation team is persistent in its goal of seeking to recover assets and the proceeds of crime. The SFO also cooperates with authorities internationally, to seek recovery of assets from abroad.

It was noted that although the NCA was still investigating incidences of possible criminal offences against PPE Medpro during government procurement processes in the Covid-19 pandemic, the Secretary

[91] *Le Patourel v BT Group Plc* [2024] CAT 76, [2025] Bus. L.R. 808; permission to appeal refused, *Le Patourel v BT Group Plc* [2025] EWCA Civ 1061.

[92] The CMA published its response to DBT's call for evidence on the opt-out collective actions regime in October 2025, setting out why a discretionary power to direct redress could be an effective tool in certain cases which could more quickly and efficiently deliver redress than collective follow-on action, as well as its view on the circumstances in which cooperating businesses should be protected from private enforcement action.

[93] E.g. the SFO has concluded DPAs with Airbus SE, Amec Foster Wheeler, Anonymous SME, Gulrap Systems, Rolls-Royce Plc, Sarclad Ltd, and Standard Bank. On some occasions, the SFO has sought to reinvest the proceeds of crime in the jurisdiction in which the bribes were paid, see e.g. the SFO's confiscation order relating to the Smith and Ouzman case, paid for seven new ambulances in Kenya, GTDT, Anticorruption Laws, 2020, 180.

[94] Until 2012, SFO policy was to deal with self-reporting of foreign bribery by CRO where possible. See e.g. CRO under POCA against Mabey Engineering (Holding) Ltd, in recognition of sums received through share dividends derived from contracts won by subsidiary (Maybey and Johnson) from foreign bribery.

of State for Health and Social Care pursued its own case against PPE Medpro before the Commercial Court. The Secretary of State claimed £122 million spent on unused sterile surgical gowns. A five-week trial commenced in June 2025, and on 1 October 2025 the Commercial Court found that the gowns were supplied in breach of the contract, and that the DHSC is entitled to the full contract price as damages.[95]

6. Summary

This workshop was convened to enable a roundtable discussion between experts from a variety of institutions and backgrounds, on the challenges involved in protecting public procurement processes from corrupt and collusive practices, even in jurisdictions such as the UK that have sophisticated regimes in place. The organisers are grateful for the participation and insights of the CMA and all of the participants from other institutions.

Given the complexities of ex post law enforcement and of recovering public funds lost to corruption or collusion, the morning sessions of the workshop were devoted to the question of how public procurement systems can be constructed to reduce the incidences of corrupt and collusive practices taking place during public procurement processes. A close examination was made of relevant provisions in the PA23 and topics of discussion included objectives of public procurement laws; transparency of public procurement processes; open contracting and collection of procurement data; training of public procurement officials; the importance of building close relationships between competition agencies, law enforcement agencies and public procurement bodies and officials; mechanisms for early detection of fraud risks; use of certificates of independent bidding; debarment regimes; remedy procedures; and regular review of processes.

The afternoon sessions focused on the questions of how corruption and collusion can be deterred through ex post enforcement of competition and anti-corruption laws and the challenges of recovering public funds lost as a result of corrupt or collusive practices. Topics of discussion included the importance of competition and law enforcement agencies using a variety of techniques for detecting infringements; the challenges of enforcing complex economic crimes and criminal offences; the nature of penalties and sanctions for infringing anti-corruption and cartel laws; and the considerable complexities, expense, and length of legal proceedings for recovery of sums overpaid as a result of corruption or collusion.

The central purpose of the workshop was to bring together a variety of stakeholders from different agencies and backgrounds. This was intended to foster dialogue and mutual understanding of different goals and challenges faced in achieving individual remits, and to highlight the benefits of closer collaboration and cooperation between agencies in achieving their common objectives. We believe that the workshop was successful in achieving this goal. We also hope that this summary of the workshop's proceedings will be useful to interested stakeholders more broadly, by illuminating the nature of the problems discussed, sharing some of the proposals and suggestions made, and in highlighting the importance of continuing dialogue on these important issues.

[95] *The Secretary of State for Health and Social Care v PPE Medpro* [2025] EWHC 2486 (Comm).

International

Potential Reform of the UNCITRAL Model Law on Public Procurement

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Model laws; Public procurement procedures; UNCITRAL

Background to the UNCITRAL Model Law

The current iteration of the UNCITRAL Model Law on Public Procurement (*Model Law*)[1] dates from 2011, and is supported by a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (2012) (*Guide*),[2] Guidance on procurement regulations to be promulgated in accordance with art.4 of the Model Law (2013) (*Guidance*),[3] and a Glossary of procurement-related terms used in the 2011 UNCITRAL Model Law on Public Procurement (2013) (*Glossary*).[4] The *Model Law* contains the essential principles and procedures considered necessary for a national law on public procurement and to implement the policy objectives underpinning it (primarily, achieving value for money, avoiding corruption and ensuring public confidence in the system through the usual tools of transparency, competition and objectivity in decision-taking). The *Guide* seeks to explain the objectives of the Model Law and how its provisions are designed to achieve them. The *Guidance* explains how the framework nature of the Model Law is envisaged to be complemented through procurement regulations, and the *Glossary* discusses key terms in the Model Law and in other international instruments in the public procurement sphere. Together, this suite of UNCITRAL documents set policy approaches and the legal rules to implement them, and provide detailed recommendations for legislators, regulators and public procurement agencies and similar institutions that would implement and oversee the national public procurement regulatory framework.

Proposals to update the Model Law

In October 2024, UNCITRAL held a Colloquium on the *Law of International Trade for a Greener Future*,[5] which discussed whether UNCITRAL might issue guidance documents on the practical application and interpretation of existing UNCITRAL texts and possible additional ones to address climate action. Public procurement and public-private partnerships (PPPs) were among the policy areas addressed (UNCITRAL had updated its Legislative Guide and Model Legislative Provisions on PPPs in 2019).[6]

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[1] UNCITRAL Model Law on Public Procurement (2011), *https://uncitral.un.org/en/texts/procurement/modellaw/public_procurement*

[2] Guide to Enactment of the UNCITRAL Model Law on Public Procurement (2012), *https://uncitral.un.org/en/texts/procurement/modellaw/public_procurement/guide.*

[3] Guidance on procurement regulations to be promulgated in accordance with art.4 of the Model Law (2013), *https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/guidance-on-procurement-regulations-e.pdf.*

[4] Glossary of procurement-related terms used in the 2011 UNCITRAL Model Law on Public Procurement (2013), *https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/glossary-e.pdf.*

[5] See *https://uncitral.un.org/en/climatechangecolloquium2024*. The Report of the Colloquium is available at *http://undocs.org/en/A/CN.9/1204*.

[6] The UNCITRAL Model Legislative Provisions on Public-Private Partnerships (2019), *https://uncitral.un.org/en/mlpppp* and the UNCITRAL Legislative Guide on Public-Private Partnerships (2019) *https://uncitral.un.org/en/lgppp*, *PPPs texts.*

The discussion focussed on "trends and initiatives, at the international, regional and domestic levels, to modernise public procurement through the incorporation of green considerations in the procurement procedures and assessed the scope and best methods of incorporating green procurement principles in the UNCITRAL Model Law on Public Procurement",[7] discussing relevant initiatives in the European Union, World Trade Organisation and its *Agreement on Government Procurement (GPA)* and in the United States. The Colloquium concluded that UNCITRAL should consider updating the *Model Law* to reflect "trends and initiatives, at the international, regional and domestic levels, to modernise public procurement through the incorporation of green considerations in the procurement procedures, assessed the scope and best methods of incorporating green procurement principles in the UNCITRAL Model Law on Public Procurement", and concluded that any such work should be inclusive to ensure that the interests of developing countries and micro, small and medium-sized enterprises (MSMEs) would be taken into account.[8] Concretely, the Colloquium considered some initial proposals: "revising the preamble to allow for the inclusion of climate or environment-related policies, incorporating carbon emissions or reduction disclosure requirements in planning and contractor qualification stages, and introducing ecolabels and life cycle cost assessments". [9] The Colloquium showed no strong inclination to "revise the UNCITRAL instruments on public-private partnerships at the moment but suggest[ed] that more guidance on the interpretation of those instruments and capacity-building for users could be explored."[10]

In May 2025, the UNCITRAL Secretariat prepared a proposal to UNCITRAL (known as the "Commission" in UNCITRAL jargon), based on the Colloquium report.[11] The proposal, which was discussed at the Commission session in July 2025, set out a summary of:

"(a) existing UNCITRAL texts in this area; (b) what prompted the Commission to decide to undertake an update to the 1994 Model Law; (c) … developments at other organizations working in the area of public procurement; and (d) whether additional topics should be included in a potential revision of the 2011 Model Law and related texts".[12]

The Secretariat proposal suggested possible future work to expand the *Model Law's* coverage of the procurement cycle to planning and contract administration, and suspension and debarment. The proposal noted that these issues were addressed in the Guide and in the *PPPs texts*, but not in the text of the *Model Law*. It also highlighted that the proposed stocktaking of developments in other organisations might generate additional topics.[13]

The proposal also recommended that UNCITRAL "develop revisions to the Model Law on Public Procurement and related texts in order to enhance flexibility for countries pursuing greener procurement practices and to take into account recent legislative developments and practices, including those arising from the ongoing digitalization of international trade."[14]

In the 2025 session, the Commission considered the proposal under the heading "Climate change mitigation, adaptation and resilience", but took a different course. it opined that "climate-related issues fell outside the mandate of UNCITRAL and that those issues were already being considered [elsewhere]", and that reaching consensus on such a sensitive policy area and an approach to green procurement would be difficult.[15] Consequently, it decided "embarking on work to update the Model Law in order to support the 'greening' of public procurement was not desirable".[16] However, it continued that environmental and sustainability considerations merited further examination to ensure that the *Model Law* continued to

[7] Colloquium report, fn.5 infra, para.5.
[8] Colloquium report, fn.5 infra, para.10.
[9] Colloquium report, fn.5 infra, para.10.
[10] Colloquium report, fn.5 infra, para.23.
[11] A/CN.9/1230—Possible future work in the area of public procurement, *http://undocs.org/en/A/CN.9/1230*.
[12] A/CN.9/1230—Possible future work in the area of public procurement, *http://undocs.org/en/A/CN.9/1230*, para.9.
[13] A/CN.9/1230—Possible future work in the area of public procurement, *http://undocs.org/en/A/CN.9/1230*, para.17.
[14] A/CN.9/1230—Possible future work in the area of public procurement, *http://undocs.org/en/A/CN.9/1230*, para.26.
[15] A/80/17—Report of the United Nations Commission on International Trade Law Fifty-eighth session, *http://undocs.org/en/A/80/17*, para.215.
[16] A/80/17—Report of the United Nations Commission on International Trade Law Fifty-eighth session, *http://undocs.org/en/A/80/17*, para.218.

provide appropriate guidance to States for modernising their public procurement regimes and to ensure consistency among international instruments in the field (notably, the *GPA*).[17]

As a result, the Commission tasked the Secretariat with preparatory work to cover "recent developments in public procurement on suspension and debarment and on e-procurement (i.e. reflecting the ongoing digitisation of international trade)", in coordination with relevant international organisations (such as the WTO, OECD and World Bank).[18] The Commission report notes that "[d]oubts were expressed about extending the scope of the procurement cycle covered in the Model Law to the planning phase",[19] but is silent on contract administration.

The Commission report's conclusions broaden the scope of preparatory work to include "recent developments" in public procurement, without qualification beyond a statement that these should not include "issues of climate change mitigation, adaptation and resilience".[20] Consequently, the Secretariat has a fairly free hand in scoping the "recent developments" to be included in the preparatory work, other than as regards the use of public procurement to address "climate change mitigation, adaptation and resilience".

How the process to update the Model Law will unfold

The term "preparatory work" in the UNCITRAL context is a broad one. It refers to the process that leads to the agreement on and adoption of an UNCITRAL text. The term formally refers to the substantive work to prepare a draft text on a topic in UNCITRAL's work programme, largely through a "Working Group" that includes UN member States and relevant international organisations. The above instruction to the Secretariat, however, refers to work *before* a topic is included in UNCITRAL's work programme, including Secretariat-organised meetings (Colloquia, expert group meetings) and other consultations with States, international organisations and invited relevant experts (*informal consultations*).[21]

The Secretariat is therefore engaging in further *informal consultations*, prior to submitting a more concrete proposal for the Commission to consider at its next session, which will take place in July 2026.[22]

Topics under consideration

In January 2026, the Secretariat issued a Background Note and Request for Input (*Background Note*), which sets out the issues under consideration, and advises that it will review the input received and incorporate it into this next proposal to the Commission.[23] Importantly, the *Background Note* states that the process is not intended to reopen key procedures and principles of the *Model Law*, but to define a precise scope of work for updating the *Model Law* and supporting documents.

The proposed topics to be included are:

- E-procurement and digital transformation in the *Model Law*
  - — The use of data and potential to promote the *Model Law's* objectives as per its Preamble

[17] A/80/17—Report of the United Nations Commission on International Trade Law Fifty-eighth session, *http://undocs.org/en/A/80/17*, para.216.
[18] A/80/17—Report of the United Nations Commission on International Trade Law Fifty-eighth session, *http://undocs.org/en/A/80/17*, para.219.
[19] A/80/17—Report of the United Nations Commission on International Trade Law Fifty-eighth session, *http://undocs.org/en/A/80/17*, para.217.
[20] A/80/17—Report of the United Nations Commission on International Trade Law Fifty-eighth session, *http://undocs.org/en/A/80/17*, para.219.
[21] UNCITRAL's working methods and their importance to the acceptability and universal applicability of its texts are discussed in A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law, *https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf*, and in exhaustive fashion on the UNCITRAL website at *https://uncitral.un.org/en/about/methods/officialdocs*. Paragraph 23 of the Guide to UNCITRAL explains the nature of preparatory work and consultations.
[22] The proposal has now been published, "Preparatory work on updating the UNCITRAL Model Law on Public Procurement and related texts", Note by the Secretariat, available at: *https://docs.un.org/en/A/CN.9/1257*.
[23] Professor Chris Yukins, who teaches in the government procurement law programme at The George Washington University Law School in Washington, D.C. and one of the invited experts, has made the document available, *https://publicprocurementinternational.com/wp-content/uploads/2026/02/MLPP-background-note-and-request-for-input.pdf*.

- The impact of data and digitisation on key features of the procurement process governed by Ch.I of the *Model Law* (General Provisions)
- Choice of procurement methods and the suitability of existing methods in Ch.II for procuring digital technologies
  Whether the provisions on open tendering in Ch.III need to be updated to reflect digital means
  Whether provisions on e-procurement tools such as electronic reverse auctions and framework agreements should be updated

- The impact of digitisation in the *Model Law* and/or supporting documents, such as
  - The use of AI in the procurement process—blockchain, automated bid evaluation and automated decision-making, contracting and grievance mechanisms in procurement procedures
  - Interoperability standards
  - Co-existence of digital and paper-based systems and the importance of encouraging e-procurement

- Suspension and debarment
  - The *Background Note* highlights the importance of these mechanisms for anti-corruption and transparency, and the ongoing work of the United Nations Office on Drugs and Crime, which is the custodian of the United Nations Convention on Corruption, on implementing the procurement-related art.9(1) of that Convention and digital tools in that context
  - The Secretariat proposal in 2025 highlights that these mechanisms are covered in the *Guide* but not the *Model Law*, beyond a qualification requirement that effectively disqualifies suspended or debarred suppliers
  - That proposal also recalled UNCITRAL's consideration of suspension and debarment in 2015 and 2016, which considered the wide divergence of approaches at that time, and the fact that other organisations were working on the topic. The Commission had decided not to take up the issue then, but authorised the Secretariat review developments at an appropriate time, and report back to the Commission
  - The *Background Note* recognises the growing role of suspension and debarment, and lists the following aspects on which the Secretariat now seeks
    The use of centralised debarment registers
    § Expanded grounds for exclusion
    § The distinction between mandatory and discretionary exclusion and
    § The possibility for debarred bidders to be readmitted through corrective measures or programs (e.g., self-cleaning)

- Whitelisting or certification schemes to manage risk, streamline processes and promote certain policies
- o The *Background Note* refers to the growing use of whitelisting or certification schemes, and recalls the Commission's work on the related topics of suppliers' lists and framework agreements during the 2003–2011 reform process
- o The Commission's deliberations at that time led to framework agreements but not suppliers' lists being included in the (2011) *Model Law*, given the greater safeguards as regards transparency, competition and objectivity available through framework agreements

- o The UNCITRAL Working Group handling the update at that time concluded that the potential disadvantages to the use of suppliers' lists, as set out in background papers[24] and in the report of an earlier session,[25] might outweigh their benefits. The disadvantages included that the lists did not always provide the cost savings identified, they might restrict competition and facilitate collusion or corruption, and in practice operated as mandatory even where they were set up to be voluntary. All these risks were magnified where lists operated in a non-transparent manner.[26]
- The Working Group therefore decided not to include suppliers lists in the *Model Law*, also considering that the benefits could largely be provided through framework agreements[27]
- However, the Working Group did request that the topic be covered in the *Guide*, including a description of suppliers' lists and commentary on "their purported benefits, concerns observed as to their use, and safeguards and controls to be exercised in any compilation of a suppliers' list that might take place prior to a procurement using one of the Model Law's alternative procurement methods."
- It continued that the "Guide should emphasize that the use of a suppliers' list would not replace any step in procurement proceedings under the Model Law, and that no list should operate as a mandatory list." Further, any requirement for mandatory registration as a condition of participation would breach the then provisions on eligibility and qualification[28]
- At a subsequent session, the Working Group stated that the *Guide* commentary should highlight the differences between the two tools and their consequences, particularly as regards the requirement for the specifications for framework agreements be sufficiently detailed to allow for the award of a procurement contract.[29] This level of detail did not ultimately appear in the 2012 text of the Guide. Its discussion of the topic provides that "Suppliers' lists are not provided for in the Model Law because UNCITRAL considers that the very flexible provisions on framework agreements set out in Ch.VII of the Model Law allow for the benefits of suppliers' lists to be achieved, without running the elevated risks to transparency and competition that suppliers' lists are considered to raise."[30]
- The *Background Note* seeks input regarding these schemes, including "performance-based certification; categorisation of businesses …; and certification relating to compatibility, interoperability, and acceptability of digital, AI, and cloud-based products and services"
- While highlighting the potential benefits of these schemes, the *Background Note* also notes the concerns in the earlier Working Group, such as "bias, lack of transparency and negative impact on competition if not implemented properly"

- The use of non-price (evaluation) criteria to further efficiency, integrity and strategic procurement
  - — The *Background Note* refers to the considerable flexibility conferred by art.11(3) as regards non-price criteria
  - — It asks whether non-price criteria may allow States to pursue their socio-economic policies (e.g., procuring from and supporting domestic micro, small and medium-sized enterprises (MSMEs)

[24] The background papers on suppliers' lists (Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of suppliers' lists), dating from 2006, are available at *https://undocs.org/en/A/CN.9/WG.I/WP.45* and *https://undocs.org/en/A/CN.9/WG.I/WP.45/Add.1*.
[25] A/CN.9/568—Report of Working Group I (Procurement) on the work of its sixth session, *https://undocs.org/en/A/CN.9/568*, para.59.
[26] A/CN.9/568—Report of Working Group I (Procurement) on the work of its sixth session, *https://undocs.org/en/A/CN.9/568*, para.59.
[27] A/CN.9/648—Report of Working Group I (Procurement) on the work of its thirteenth session, *https://undocs.org/en/A/CN.9/648*, paras 134–136.
[28] A/CN.9/648—Report of Working Group I (Procurement) on the work of its thirteenth session, *https://undocs.org/en/A/CN.9/648*, para.136.
[29] A/CN.9/668—Report of Working Group I (Procurement) on the work of its fifteenth session, *https://undocs.org/en/A/CN.9/664*, para.100.
[30] *Guide to Enactment*, Commentary to Ch.VII, Framework Agreements, Introduction, para.3.

- — It also seeks input on the extent of use of such criteria and how they are reflected in the regulatory framework, and on whether they can fully replace price for strategic procurement
- — The flexibility in art.11(3) is noted to be under-appreciated. The article allows for the use of non-price criteria that do not relate to the subject-matter of the procurement, provided that they have legal authorisation and subject to the transparency and similar safeguards applying to all evaluation criteria, but users of the *Model Law* have indicated that the *Guide* commentary was insufficiently clear in explaining the implications

- Review procedures and dispute resolution methods in public procurement, including the use of alternative dispute resolution (ADR)
  - — The *Background Note* recalls that the use of ADR is not envisaged in the *Model Law* as regards the pre-contract phase of the procurement cycle, and seeks input on the extent of ADR use in practice (including case studies) and on any legal limitations or hurdles

- Contract termination procedures
  - — The *Background Note* recalls that the *Model Law* does not cover contract administration or termination procedures, which may be of particular importance in complex procurement. It also refers to the detailed guidance in the *PPPs texts*, and asks whether this guidance would suffice, or whether tailored guidance in the public procurement context is needed
  - — The *Background Note* also raises the potential relevance of issues covered in the UNCITRAL Notes on the Main Issues of Cloud Computing Contracts,[31] such as interoperability and integration, vendor lock-in for long-term contracts; cost management planning difficulties and cybersecurity and compliance

- Facilitating MSME participation in public procurement
  - — The *Background Note* queries whether the *Guide* should cover MSME support in more detail, drawing on the tools and forms of MSME support discussed in UNCITRAL's MSME-related texts,[32] and the use of public procurement to encourage MSMEs to formalise.

Next steps

At its session in July, the Commission will decide (a) whether to place the topic of public procurement and reform of the *Model Law* on its work programme; (b) the scope of any reforms to be undertaken; and (c) whether the work should be undertaken in a Working Group.

The 2025 proposal and *Background Note* underscore that any future reforms should take into account the suite of UNCITRAL texts on public procurement,[33] and that updates could be made to all or any of them.[34] The proposal refers to commentary in the existing *Guide* on coverage of the procurement cycle, suspension and debarment and e-procurement, which extends beyond the provisions of the *Model Law*.[35]

[31] Notes on the Main Issues of Cloud Computing Contracts (prepared by the secretariat of the United Nations Commission on International Trade Law, 2019), *https://uncitral.un.org/en/cloud*.
[32] Available at *https://uncitral.un.org/en/texts/msmes*.
[33] A/CN.9/1230, fn.11 supra, para.11.
[34] A/CN.9/1230, fn.11 supra, para.22.
[35] A/CN.9/1230, fn.11 supra, paras 19–23.

Thus, for example, there could be limited changes to the text of the *Model Law* and/or more extensive updates to the supporting documents, and updated references to the *PPPs texts* as necessary.[36]

While legal texts such as a Model Law are normally drafted in a Working Group, guidance documents, such as the *Guide, Guidance* and *Glossary* are usually prepared by the Secretariat (in consultation with States, relevant international organisations and experts) and subsequently approved by the Commission. The Working Group process is highly transparent: a defining feature is the comprehensive public availability of the preparatory process (working papers, reports, draft texts and revisions are all published on the UNCITRAL website). The reports of the Working Groups record the key issues discussed, reflect the various views and proposals raised, and explain the basis for the text eventually agreed. Although the informal consultation process is less obviously transparent, the outcomes are fed back into the preparatory process through reports to Working Groups and the Commission.

Thanks also to its inclusive and consensus-based nature, and technical (rather than political) orientation, the Working Group process is designed to ensure the broadest possible applicability of the resulting text.[37] However, the time taken to prepare an UNCITRAL text is usually measured in years. The 2025 proposal concludes with the statement that any future work on public procurement "could be completed expeditiously",[38] and the Secretariat states in the *Background Note* that the proposed reforms would not reopen major issues. It is likely that these statements are designed to address a possible concern from the member States—which might reduce the likelihood of putting the topic on the work programme—that opening the Model Law up for updates might lead to an extensive redrafting of the text and tie up a Working Group for many years, as happened when the earlier, 1994, text was updated to become the 2011 version.[39] (Those reforms were also not intended to be extensive, but became so.)

As will be apparent from the discussion above, in both its 2025 proposal and the *Background Note*, the Secretariat is in effect signalling that much of the work likely to be needed involves updates to the guidance documents through informal consultations. This may reduce the need for Working Group time, but will also limit transparency to some degree. However, as the technical focus of the preparatory work relies on input on current practices and reforms underway at national and international levels, academic commentary in writing and at conferences and general discussion can and does inform participants and so support the process. During the 2003–2011 reforms, for example, Professor Sue Arrowsmith commissioned and edited a collection entitled *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement,*[40] which discussed many of the issues under consideration in UNCITRAL, and highlighted developments elsewhere. It is to be hoped that lively commentary on the proposed reforms will surface this time, too. To that end, once the next Secretariat proposal is available and the Commission has decided the next steps, a further article commenting on the issues and approaches will feature in the PPLR.

[36] A/CN.9/1230, fn.11 supra, para.11. Although this point was made in the context of the climate change issue, it is of more general application.
[37] On UNCITRAL's working methods and their importance to the acceptability and universal applicability of its texts are discussed, see, for example, Caroline Nicholas, *"UNCITRAL's Role in Commercial Law Reform; History and Future Prospects*" in Orkun Akseli and John Linarelli (eds), *The Future of Commercial Law: Ways Forward for Change and Reform* (Bloomsbury Publishing, 2019), Ch.1.
[38] A/CN.9/1230, fn.11 supra, para.26.
[39] The process lasted from 2003–2011. The relevant Working Group documents are found at *https://uncitral.un.org/en/working_groups/1/procurement*.
[40] 13. Sue Arrowsmith (ed.), *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement* (Eagan: West 2009). A later edition, but with very limited changes, was also produced in 2011, edited by Jessica Tillipman. See also Sue Arrowsmith, "Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) 53 *International and Comparative Law Quarterly* 17–46.

European Union

Revision of the EU Public Procurement Framework

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EU law; European Commission; Public procurement

Background

On 12 March 2026 the European Commission announced[1] that it intends to present a revision of the EU public procurement framework in 2026, having gathered views from various stakeholders as part of the policy preparation process.

This note summarises the Commission's own perspective on the current legal framework, its intentions and what it hopes to achieve by the latest round of reforms, as set out in the Commission's announcement.

The Commission states that the reforms will aim to modernise the current rules, which are currently principally contained in a series of Directives from 2014[2], and will make better use of public procurement to support the EU's economic priorities. As outlined in its Clean Industrial Deal[3], the revised framework will allow for the use of sustainability, resilience and "Made in Europe" criteria in public procurement for strategic sectors.

The Commission states that the initiative is also part of its Single Market Strategy[4], which seeks to simplify and streamline the fragmented public procurement provisions across different pieces of legislation, making the rules easier for contracting authorities and business to apply. After reminding us that public procurement represents about 15% of EU GDP and is a key policy tool to support innovation, competitiveness and investment, the Commission states that the reform will aim to strengthen its role in supporting European competitiveness, resilience and economic security.

To prepare for the revision, the Commission carried out an evaluation[5] of the three procurement directives (2014/23 on Concessions, 2014/24 on Public Procurement and 2014/25 on Utilities), whose aims in 2014 were to ensure fair access to public procurement for businesses, secure better value for taxpayers' money, strengthen transparency and prevent corruption and support sustainable and innovative public spending.

The Commission states that this evaluation indicated that the Directives had only partially achieved their objectives. In particular, it showed that the directives did not significantly improve legal clarity or flexibility, while additional sector-specific rules had increased complexity. Whilst transparency had improved and the total value of procurement contracts had doubled, corruption risks remained and data gaps limited the monitoring of compliance with the regime.

Moreover, competition showed mixed results. The average number of bids per tender procedure had decreased, whilst large contracts continued to attract strong competition and SMEs won approximately

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[1] At *https://single-market-economy.ec.europa.eu/single-market/public-procurement_en*.

[2] Directive 2014/23 on Concessions; Directive 2014/24 on Public Procurement; and Directive 2014/25/EU on Utilities [2014] OJ L/94.

[3] Communication from the Commission of 26 February 25: *The Clean Industrial Deal: A Joint Roadmap for Competitiveness and Decarbonisation* (COM(2025) 85 final)

[4] Communication from the Commission of 21 May 25: *The Single Market: Our European Home Market in an Uncertain World. A Strategy for making the Single Market Simple, Seamless and Strong* (COM(2025) 500 final)

[5] Commission Staff Working Document of 14 October 25: Evaluation of Directive 2014/23 on Concessions, Directive 2014/24 on Public Procurement and Directive 2014/25 on Utilities (SWD(2025) 332 final)

71% of contracts. However, direct cross-border participation with the EU remained limited, while concerns about third-country participation in some sectors were increasing and the use of green, social and innovative procurement was progressing but remained uneven across the EU.

The Commission's evaluation concluded that the current EU public procurement legal framework continued to face significant challenges primarily related to its ability to channel public investment and spending efficiently and support EU strategic policy priorities. These problems were said to stem from several underlying causes. First of all, there was complexity, incoherence and legal uncertainty of the legal framework. The procurement process was hindered by overly complex, lengthy and inflexible procedures as well as concerns about legal coherence with procurement provisions in other EU legislation.

Secondly, cross European added value was below potential. Opportunities for companies to operate across borders remained limited due to the presence of market access barriers preventing cross-border participation. Additionally, imbalances in international market access persisted. Thirdly, there was uneven strategic policy impact. Material restrictions and fragmented and inconsistent requirements in EU procurement law made it difficult to use public procurement as a lever for EU strategic policy objectives, e.g. to support innovation and social and environmental sustainability. Finally, there were found to be weaknesses in governance. Uneven capacities across contracting authorities and a plethora of procurement portals that were neither interconnected nor interoperable, in combination with poor-quality data and data gaps contributed to a weak governance model of public procurement in the EU.

Legal basis

The Commission stated that art.114 (Approximation of Laws) (ex-art.95 TEC) of the Treaty on the Functioning of the European Union (TFEU), which provides the legal basis for the EU to act in the area of public procurement, enabling the establishment and functioning of the internal market, would be used for the revision. This competence is shared with the Member States, as stated in art.4(2)(a) TFEU. On this basis, the EU is empowered to take measures to harmonise and simplify public procurement rules, thereby promoting a level playing field and facilitating the free movement of goods and services within the EU.

Need for action

The size of the European procurement market, equivalent to about 15% of EU GDP, is said to be evidence of the clear potential of a coordinated EU approach in efficiently channeling investment in line with EU strategic priorities, while promoting a level playing field and ensuring fair competition in the Single Market.

The Commission considers that the problem cannot be adequately addressed by Member States due to the need for regulatory simplification and harmonisation across the EU. A more harmonised and simpler EU framework makes it easier for businesses to operate across borders, opening opportunities for companies, while allowing for more competition and delivering high-quality value-for-money goods, services and works to citizens.

As recent crises (such as the COVID-19 pandemic and more recent geopolitical events) have shown, the importance of having resilient and reliable supply chains is essential. By promoting a coordinated approach to public procurement, the EU can create a faster, more coordinated framework to increase the efficiency of the investments that reduce its external dependence and ensure that critical infrastructures, goods, and services are resilient and secured. This is of particular importance in strategic sectors and industries. Only EU-level action can create sizeable lead markets for sustainable and innovative solutions, while upholding social standards.

Objectives and policy options

The Commission's initiative is aimed at making public procurement an essential element of an efficient public investment strategy by enhancing simple, flexible and coherent public procurement procedures as well as transparency and preventing corruption and anti-competitive practices. It intends to support EU economic security and sovereignty by integrating Made in Europe criteria in strategic sectors and align the public procurement policy with EU strategic policy objectives, notably regarding social and environmental sustainability. The initiative thus seeks to strengthen the current public procurement framework through either legislative or non-legislative measures, or a combination of both.

Specific objectives which the Commission highlights will include:

• **Making public investment more efficient:** by achieving greater efficiency by means of (i) simplifying procurement procedures making them faster and more flexible and reducing administrative burden for both public buyers and economic operators, in particular SMEs, (ii) a consistent and coherent legal framework, (iii) a digital EU procurement marketplace, which can entail developing a digital public procurement marketplace with a single entry point for economic operators to public procurement procedures and data sharing (legislative and non-legislative options).

• **Designing tools to strengthen economic security and sovereignty:** by strengthening EU economic security, sovereignty and resilience by introducing Made in Europe criteria, on either a voluntary or a mandatory basis, for strategic sectors, and in line with international legal commitments (legislative and non-legislative options).

• **Aligning public procurement policy with EU strategic policies and objectives:** The alignment of public procurement policy with EU strategic goals is pursued primarily across three areas: green, social, and innovation. To advance these objectives, a range of measures may be envisaged ranging from non-legislative options (guidance, best practice) to either targeted improvements of existing legislation or the introduction of mandatory criteria in the procurement procedures (legislative options).

Likely impacts

According to the Commission, the revision of the EU rules on public procurement will aim to create a simpler, faster, and more transparent framework that would benefit contracting authorities by reducing administrative costs, enabling them to make a more strategic use of procurement thereby supporting public investment strategy, and increasing efficiency in the overall procurement process.

The revision is expected to benefit contracting authorities by allowing them to better use public procurement in a strategic manner, according to their environmental, social and innovation overarching strategies. Businesses, including SMEs, are also expected to significantly benefit from the revision process. The reduced administrative burden and improved legal clarity would enable them to reduce costs and allocate more resources, including time and human resources, to core business activities. Additionally, simplified procedures and increased transparency would provide easier access to cross-border business opportunities in the Single Market, allowing businesses to expand their customer base and increase their competitiveness.

Citizens would benefit from the revised EU rules on public procurement through improved public goods, products and services, and better value for money. The reform would contribute to ensure that taxpayers' money is used wisely, and with increased transparency and accountability mechanisms, thereby boosting confidence in public authorities.

The initiative would encourage environmentally sustainable procurement practices, contributing to reduced carbon emissions and resource use, aligning with EU environmental goals. It would also address fundamental rights and social standards.

The impacts are expected to vary across central, regional and local levels, benefiting areas with less efficient procurement practices more substantially.

It is said that the initiative aligns with several Sustainable Development Goals (SDGs), notably SDG 8 on economic growth, SDG 9 on innovation, SDG 10 on reducing inequalities and SDG 12 on responsible consumption, aiming for a sustainable and equitable procurement framework across the EU.

Conclusion

The Commission's Staff Working Document on the Evaluation of Directive 2014/23 on Concessions, Directive 2014/24 on Public Procurement and Directive 2014/25 on Utilities concludes by stating that the 2014 Directives aimed to achieve a number of different interrelated and at times complex objectives, while ensuring a coherent legal framework. The Commission's evaluation showed that while coherence was initially improved, the introduction of procurement provisions in other EU regulatory acts caused legal coherence concerns.

The evaluation showed that the 2014 Directives were coherent inter se and no significant internal incoherence between the main objectives of the Directives was found. However, legal uncertainty arose from the fact that the enforcement of environmental, social and labour law obligations was left to the discretion of Member States, which led to variations in their application.

As regards the external coherence of the 2014 Directives with procurement provisions included in other EU legislation, the rapid increase of the latter in sectoral legal acts ranging from energy to digital and environmental regulation has fragmented the legal framework and led to inconsistencies in terminology, scope and reporting obligations. Contracting authorities and stakeholders warned of the increasing complexity and incoherence that the proliferation of overlapping legal frameworks creates and the growing difficulties in applying them in practice.

The evaluation also confirmed that the 2014 Directives and the objectives they aimed to achieve remained highly relevant today, and in some cases even more so than in 2014. In particular, the need to simplify and modernise public procurement was even more important today, given Europe's competitiveness challenges and high overall bureaucratic burden. The procurement of sustainable works, products and services remained urgent given accelerated climate change and wider environmental challenges. In the current geopolitical context, the 2014 objective of fostering an integrated internal market was more important than ever for securing Europe's strategic autonomy and economic security.

Finally, the 2014 public procurement Directives aimed to ensure fair competition and deliver best value for public money while optimising societal outcomes and aid the prevention of corruption. These objectives had only partially been met. Despite attempts to simplify procurement procedures and make their use more flexible, procedures were still perceived as being too complex and rigid for contracting authorities to achieve their public investment objectives effectively. The interaction between public procurement provisions in sectoral legislation and the 2014 Directives had created regulatory incoherences that further complicate public procurement.

The 2014 reform transformed public procurement into a strategic policy tool for the pursuit of environmental, innovative and social objectives, but the use of procurement procedures towards these objectives remained uneven across Member States. New priorities such as economic security and strategic autonomy have emerged as market access inequality persisted and were accentuated by recent geopolitical developments.

Despite improvements in transparency, data gaps and quality issues at both EU and national level hampered effective governance, strategic decision-making and the prevention of corruption. The increasing complexity of public procurement required highly skilled procurement authorities, yet investments in professionalisation and capacity building, while beneficial, have proven too limited to date.

These challenges demonstrated that while initially defined policy objectives have been partially met, the current public procurement framework lacks the agility, coherence and strategic focus needed to respond effectively to current and emerging challenges.

It will be interesting to see with what concrete proposals the Commission comes forward later in the year to resolve the problems identified by its evaluation of the current EU procurement regime.

Court of Justice/General Court

The Legality of "Pre-Emption Rights" to a Project for the Project's Proposer: Urban Vision SpA v Comune di Milano (C-810/24)

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Hector Denfield**

Concession agreements; Equal treatment; EU law; Freedom of establishment; Italy; Project finance; Public procurement

Introduction and summary

The judgment of the Court of Justice of the European Union (the "Court of Justice") in *Urban Vision SpA v Comune di Milano* (C-810/24)[1] concerns a reference for a preliminary ruling from the Consiglio di Stato (Council of State, Italy) on the compatibility of art.183(15) of the Italian Public Procurement Code[2] (the "Public Procurement Code") with Directive 2014/23 on concession contracts.[3]

Article 183(15) of the Public Procurement Code sets out the Italian project financing procedure, which operates in three stages: (1) an economic operator (the "promoter") submits a works concession proposal; (2) the contracting authority assesses it and may, subject to amendments, approve it; and (3) if approved, the project is then procured pursuant to a competitive process, with the promoter invited to participate and granted a "pre-emption right". This right entitles the promoter, if not initially awarded the contract, to match the winning tenderer's offer within 15 days of notification of the initial award decision, thereby securing the contract. This is subject to reimbursement by the promoter of the initial winner's bid preparation costs, capped at 2.5% of the amount the initial winner anticipated investing in the project.[4]

Not surprisingly, the Court of Justice held that the pre-emption right is incompatible with EU public procurement law as it breaches the principle of equal treatment found in Directive 2014/23 and constitutes an unjustifiable restriction on the freedom of establishment under art.49 TFEU.[5]

Facts

In May 2020, the Municipality of Milan (the "Municipality") issued guidelines for urban regeneration projects which were to be delivered through "technical sponsorship", effectively meaning the delivery of the project by private sector economic operators.

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[1] *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[2] Decreto legislativo n.50—Codice dei contratti pubblici (Legislative Decree No.50 establishing the Public Procurement Code) of 18 April 2016 (GURI No.91 of 19 April 2016, ordinary supplement No.10)

[3] Directive 2014/23 on the award of concession contracts [2014] OJ L94/1.

[4] Paragraphs 38 and 59, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[5] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47

A proposal was received by the Municipality in March 2021 from a consortium of Digital Vox Srl and Vox Communication Srl (the "Consortium"). This proposal was subsequently approved by the Municipality[6] and put out to tender. In March 2023, the Municipality awarded the contract to Urban Vision SpA, which offered to design, install and operate 110 automated public toilets for 24 years at a cost to Urban Vision of EUR 34.1m, ownership of which was to be transferred to the Municipality after final inspection.[7] In return, the Municipality would guarantee Urban Vision the right to commercially exploit 97 digital advertising panels[8] (which Urban Vision would convert from analogue panels using its own resources, without receiving any financial consideration[9]) for 18 years, which the Municipality calculated as having a value to Urban Vision of between approximately EUR 10.4m and 15.5m.[10] The consideration for the contract consisted solely in the right to exploit the 97 advertising panels, with Urban Vision bearing the risk associated with demand.[11] The contract was therefore a works concession contract within the meaning of art.51(a) of Directive 2014/23.[12]

However, the Consortium exercised its pre-emption right by "adjusting" its tender to match Urban Vision's offer, and thus in April 2023 the Municipality awarded the contract to the Consortium.

Urban Vision challenged the decision by the Municipality to award the contract to the Consortium in the Regional Administrative Court of Lombardia, Italy, which rejected the appeal in January 2024. On further appeal to the Council of State, Italy (the "Referring Court"), the compatibility of the pre-emption right with Directive 2014/23 and the principles of freedom of establishment and freedom to provide services laid down in arts 49 and 56 TFEU was called into question. The Referring Court stayed the proceedings and referred the question to the Court of Justice.

Findings of the Court of Justice

Applicable law

The Referring Court had suggested that Directive 2006/123 was relevant to the analysis in addition to Directive 2014/23. However, the Court of Justice confirmed that only Directive 2014/23 applied, as the applicability of this Directive renders Directive 2006/123 inapplicable.[13]

As Directive 2014/23's intention was only to achieve "minimal coordination" of national concession procedures[14], compatibility with the TFEU was to also be considered alongside the Directive.[15] Since the works concession contract required the concessionaire to have access to Italy with a view to participating, on a stable and continuous basis, for 24 years, in the economic life of Italy, it engaged the right of establishment under art.49 TFEU.[16] However, the Court of Justice held that the provisions concerning the freedom to provide services under Article 56 TFEU are applicable only if, inter alia, the provisions relating to the right of establishment were not engaged. Accordingly, art.56 TFEU did not apply.[17]

[6] The judgment does not state that the proposal was approved but this would seem to be a necessary step under art.183(15) of the Public Procurement Code before it could be put out to tender.

[7] Paragraphs 19 and 22, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[8] It is not stated in the judgment if the digital advertising panels were to be located in the toilets; presumably they were, otherwise the connection between the two is unclear.

[9] Paragraph 22, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[10] Paragraphs 19 and 22, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173. It is not stated in the judgment but given that this figure is less than the initial EUR 34.1m outlay, this is presumably an annual return.

[11] Paragraphs 21 and 31, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[12] Paragraph 31, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[13] Paragraphs 31 and 32, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[14] Recital 8, Directive 2014/23 on the award of concession contracts [2014] OJ L94/1 and para.33, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[15] Paragraphs 33 and 34, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[16] Paragraph 35, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

[17] First paragraph of art.57 TFEU (Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47) and para.36, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

Equal treatment

The Court of Justice examined whether the pre-emption right infringes the principle of equal treatment, as enshrined in art.3(1) of Directive 2014/23.

The Court of Justice found that the pre-emption right calls into question the ranking of economic operators made by the contracting authority at the end of the tendering procedure and confers an advantage on the promoter, by allowing it to amend the price indicated in its initial bid to match that of the winner.[18] The Court of Justic held, in reliance on settled case law, that compliance with the principle of equal treatment is to encourage the attainment of the widest possible opening-up to competition of procedures for the award of concessions, and, further, requires tenderers to be on an equal footing when both formulating their tenders and when those tenders are assessed. As a general rule, a tender cannot be amended after submission, whether at the request of the contracting authority or of the tenderer.[19]

Since price is generally, in the Court of Justice's view, the decisive award criterion, allowing one tenderer alone to revise its price after submission breaches the principle of equal treatment and distorts healthy and effective competition.[20] In a procurement conducted pursuant to art.183(15) of the Public Procurement Code, submission of the most economically advantageous tender does not guarantee being awarded the contract.[21]

The Court of Justice considered and distinguished its earlier decision in *BibMedia* (C-737/22).[22] In *BibMedia*, the Court considered a clause in a procurement document which provided that the largest lot would be awarded to the tenderer that had submitted the most economically advantageous tender, while a lot of lower value would be offered to the tenderer that had submitted the second most economically advantageous tender, on the condition that it accept to perform that lot at the price of the tenderer which submitted the most economically advantageous tender. If the tenderer ranking second declines to match that price, the same proposal is made to the tenderer ranking third, and so on. The clause had the aim of maintaining competition in the economic sector concerned. The Court of Justice in *BibMedia* concluded that the clause did not contain any element of negotiation, by reference to the division of the contract into lots and to its objective of maintaining competition, and as such did not breach the principle of equal treatment.[23]

In contrast, the Court of Justice held that, irrespective of whether in the present case the pre-emption right involves negotiation between the promoter and the contracting authority, that right undeniably allows that promoter to amend its tender after it has been submitted, which is prohibited by the principle of equal treatment. The Court of Justice emphasised that it is all the more so since, unlike the clause in *BibMedia*, the pre-emption right was capable of producing anticompetitive effects. Accordingly, the Court of Justice held that the pre-emption right infringed not only art.3(1) of Directive 2014/23, but also art.41(1), which requires tenders to be assessed "in conditions of effective competition".[24]

Limits of a contracting authority's flexibility to design award procedures

Whilst Directive 2014/23 grants contracting authorities considerable flexibility in organising concession procedures, that flexibility remains subject to compliance with the Directive and the principles of transparency and equal treatment, thus precluding a procedure which includes the pre-emption right.[25]

[18] Paragraph 40, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.
[19] Paragraph 41, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.
[20] Paragraph 42, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.
[21] Paragraph 43, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.
[22] *Staten og Kommunernes Indkøbsservice A/S v BibMedia A/S* (C-737/22) EU:C:2024:495.
[23] Paragraphs 44 and 45, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.
[24] Paragraphs 46 and 47, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.
[25] Paragraphs 48 to 53, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

The Court of Justice also considered art.41(3) of Directive 2014/23 which provides that a contracting authority may, exceptionally, modify the ranking order of the award criteria where it receives a tender proposing an innovative solution with an exceptional level of functional performance unforeseeable by a diligent contracting authority. This is provided that the modification of the ranking order does not result in discrimination and that all tenderers are informed and invited to re-tender. Alternatively, if the award criteria were published at the same time as the concession notice, a new concession notice must be published. The Court of Justice held that this provision does not cover the Italian project financing procedure for several reasons, including, amongst others, that the Italian project financing procedure results in discrimination.[26]

Freedom of establishment

In light of its other findings, the Court of Justice held that the pre-emption right constitutes a restriction on freedom of establishment under art.49 TFEU as it is liable to dissuade economic operators from other Member States from participating in an Italian project financing procedure.[27] The Court of Justice then considered whether such a restriction could be justified.

The Referring Court noted that that the objective of the pre-emption right was to implement the principle of horizontal subsidiarity, set out in art.118 of the Constitution of the Italian Republic, by promoting private sector initiatives. It is an expression of a form of cooperation which can make the achievement of public interests more efficient in terms of time and resources. The pre-emption right thus benefits not just economic operators but also contracting authorities through the acquisition of new knowledge that is specific to the private sector and constitutes a stimulus for enterprise.[28]

The Court of Justice held that such an objective cannot come within the scope of grounds of public policy, public security or public health which, under art.52(1) TFEU, are the only grounds capable of justifying a restriction on freedom of establishment.[29]

Comments

The Court of Justice's central finding that the pre-emption right is a breach of the equal treatment principle is not surprising. The pre-emption right is effectively a mechanism for post-submission tender amendment in favour of only one economic operator, which is precisely what the equal treatment principle prohibits. The distinction drawn with *BibMedia* is also persuasive: the cascade mechanism in that case encouraged competition by offering opportunities progressively down the ranking, whereas the pre-emption right does the opposite: discouraging competition by treating more favourably a specific economic operator.

In the authors' view, the Court of Justice also correctly dismissed the idea that art.41(3) of Directive 2014/23 covered the pre-emption right. Article 41(3) is a narrow exemption, concerned exclusively with an unforeseen innovative tender submitted in response to a call for tenders and not with receipt of a proposal aimed at launching a project financing procedure. Therefore, the facts of this case are manifestly outside of the scope of that Article.

Whilst the Referring Court's question related solely to the pre-emption right, additional procurement law issues would likely arise as a consequence of the level of detail that an economic operator (the promoter) must provide when proposing a project pursuant to the Public Procurement Code. The promoter must ensure the proposal contains a feasibility project, a draft works concession agreement, a certified economic and financial plan which includes the amount of expenditure incurred in preparing the proposal, including

[26] Paragraphs 54 and 55, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.
[27] Paragraph 56, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.
[28] Paragraph 57, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.
[29] Paragraph 58, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

royalties in respect of intellectual works, and the service and management specifications.[30] Although the feasibility project may be amended before approval, it is likely that the approved project will still contain many of the features proposed by the promoter. This raises the prospect of there not being a level playing field when it comes to procuring the project: the promoter will have advance knowledge of the project relative to its competitors which may be difficult to neutralise, and the requirements of the project may be unduly favourable to the promoter, distorting competition.

The judgment leaves no doubt that the pre-emption right in the Italian project financing procedure is incompatible with EU public procurement law. The Italian legislature will now need to consider how it might modify the procedure to continue to reward promoter initiative while respecting the equal treatment principle.

[30] Paragraph 13, *Urban Vision SpA v Comune di Milano* (C-810/24) EU:C:2026:173.

Permissibility of Contract Award Criterion Relating to Increases in Payroll Above Levels Set in Collective Agreements: AESTE (C-210/24)

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Award criteria; Collective bargaining; EU law; Public procurement; Remuneration; Social policy

1. Introduction

This case (C-210/24) AESTE, [1] arose from a request for a preliminary ruling submitted to the European Court of Justice ("ECJ") by the Administrative Board of Contract Appeals of the Autonomous Community of the Basque Country, Spain[2] ("referring court"). The request was made in the context of proceedings concerning a contested award criterion to be applied as part of the assessment methodology to determine the successful tenderer to provide home help services. The contested award criterion allocates points to tenderers proposing increased rates of pay to staff delivering the services above the rates of pay established in the collective agreement for that sector. The contested award criterion also stipulates that no later than one month after the procurement contract has been formalised, following negotiations with the workers' representatives, the precise form that the pay increase is to take must be specified, and the successful tenderer is also to seek to formalise an agreement governing the working conditions of the staff assigned to the contract.

The referring court questioned whether the contested award criterion was suitable for identifying the most economic advantageous tender and had concerns that the linkage between salary increases and improvement in service quality was too hypothetical or general to be able determine the award of the contract. The ECJ endorsed a broad interpretation of the concept of what constitute social aspects of a contract linked to the subject matter of the contract. The ECJ concluded that the contested award criterion was a social aspect linked to the subject matter of the contract and was thus a suitable criterion for assessment of the most economically advantageous tender for the provision of the home help services.

The ECJ also considered whether the right to collective bargaining provided for in art.28 of the Charter of Fundamental Rights of the European Union (CFR)[3] precludes use of the contested award criterion. The ECJ was of the view that the contested award criterion was permitted and that it promoted, rather than undermined, the right to collective bargaining.

2. Facts

The request for a preliminary ruling was made in the context of proceedings before the referring court concerning a procurement procedure launched by the Municipality of Ortuella, Spain (contracting authority) for community based social service for families and/or persons in need ("home help service"). The home help service provides preventative, educational and care work for the benefit of families and/or individuals who have difficulties in maintaining or preserving their physical, social and/or emotional well-being. The

[1] *Asociación de Empresas de Servicios para la Dependencia (AESTE) v Ayuntamiento de Ortuella* (C-210/24) EU:C:2026:145, judgment, dated 05 March 2026.
[2] Órgano Administrativo de Recursos Contractuales de la Comunidad Autónoma de Euskadi.
[3] Charter of Fundamental Rights of the European Union (2016/C 202/02).

aim of the home help service is to allow users to continue living in their home and/or environment for as long as possible and appropriate, supported by qualified, trained and supervised staff. The estimated value of the contract is EUR 166,250.

On 13 June 2023, the Association of Care Providers (AESTE)[4] brought an action before the referring court seeking the annulment of one of the award criteria set out in the procurement documents (the contested award criterion) issued by the contracting authority.

The procurement documents required bidders to include in their tenders the rates of pay to apply to individuals performing the contract. The contested award criterion awards points to tenders which propose rates of pay above those established in the collective agreement for that sector (the reference rate). According to the methodology for calculation of points to be awarded for this criterion, tenders which do not propose any increase above the reference rate receive a score of 0 (zero) points. The tender containing the highest percentage proposed increase is allocated 40 points, which is the maximum number of points available for this criterion. Tenders proposing lower increases are awarded a proportion of 40 points relative to the tender containing the highest percentage proposed increase, applying a formula set out in the procurement documents.

The contested award criterion also stipulated that no later than one month after the procurement contract has been formalised, following negotiations with the workers' representatives, the precise form that the pay increase is to take must be specified. It also stipulated that the successful tenderer is to seek to formalise an agreement governing the working conditions of the staff assigned to the contract.

The Opinion of the Advocate General provides context for the decision by the contracting authority to use the contested award criterion:

> "it is clear from the file before the Court that the contracting authority used the contested award criterion because of the need to provide a solution to conflicts in the field of employment, including those relating to rates of pay, which had given rise to a lengthy period of protests by the persons assigned to providing the service. The use of that criterion was intended to ensure that a continuous and adequate service was maintained."[5]

The referring court had doubts as to the compatibility of the contested award criterion with various provisions of EU law and so decided to stay proceedings and submit a request for a preliminary ruling to the ECJ. The ECJ considered two distinct questions in its judgment: first, the suitability of the contested award criterion to identify the most economically advantageous tender in accordance with art.67 of the public sector directive[6] (Directive 2014/24), and; second, whether the right to collective bargaining recognised in art.28 of the Charter of Fundamental Rights of the European Union (CFR)[7] precludes use of the contested award criterion.

3. EU and national law

3.1. Contract award criteria

Article 67 of Directive 2014/24 entitled "Contract award criteria" requires contracting authorities to base the award of public contracts on the most economically advantageous tender. Contracting authorities may identify the most economically advantageous tender using the best price-quality ratio "which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the

[4] Asociación de Empresas de Servicios para la Dependencia.

[5] *Asociación de Empresas de Servicios para la Dependencia (AESTE) v Ayuntamiento de Ortuella* (C-210/24) EU:C:2025:529, Opinion of Advocate General Biondi, dated 03 July 2025. Paragraph 49.

[6] Directive 2014/24 on public procurement and repealing Directive 2004/18 [2014] OJ L94/65.

[7] Charter of Fundamental Rights of the European Union (2016/C 202/02).

subject matter of the contract." Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion. Article 67(3) of Directive 2014/24 provides that award criteria shall be considered to be linked to the subject matter of the contract where they relate to the provision of works, supplies or services under that contract "in any respect and at any stage in their life cycle". Article 67(4) of Directive 2014/24 requires that award criteria ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

3.2. "Light regime" for social, health, education and similar services

The "light regime" set out in arts 74–77 of the Directive 2014/24 applies to social, health, education, and similar services that are considered less suited to rigid procurement procedures. It reflects the idea that these services are often locally delivered, relationship-based, and presumed to be of limited cross-border interest. Light regime contracts above the financial threshold of EUR 750,000 are subject to a simplified procurement framework. While some advertising and reporting requirements remain, they are lighter than in the standard regime. Under the light regime, contracting authorities have much greater flexibility in how they run procurement processes, provided they still respect core principles including transparency and equal treatment. Article 76(1) of Directive 2014/24 requires Member States to put into place national procedural rules for the award of light regime contracts "as long as such rules allow contracting authorities to take into account the specificities of the services in question." Article 76(2) of Directive 2014/24 obliges Member States to "take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services". Light regime contracts below the financial threshold of Euro 750,000 fall outside the coverage of Directive 2014/24, leaving regulation to national law.[8]

In general, and with few exceptions, the Spanish law on public procurement (LCSP)[9] opts to impose on contracts not falling within the scope of Directive 2014/24 by reason of their estimated value the same legal rules as applicable to contracts subject to Directive 2014/24.[10] The LCSP requires social and environmental criteria to be included in all public procurements provided they are relevant to the subject matter of the contract. Article 145 of the LCSP transposes art.67 of Directive 2014/24 and thus allows for the use of qualitative criteria including environmental or social aspects linked to the subject matter of the contract. Social aspects are further described in a non-exhaustive list of characteristics of the contract including to improve working and pay conditions, promote stable employment and the organisation, qualification and experience of staff assigned to the performance of the contract where the quality of staff may have a significant impact on the level of contract performance.

The ECJ observed at the start of its judgment that the contract for home help services was for light regime services with a value below the financial threshold for application of that regime. The Spanish government confirmed, however, that the Spanish legislature intended to make the provisions of Directive 2014/24 applicable, directly and unconditionally, to contracts below the threshold of EUR 750,000. More specifically, it confirmed that arts 67(1) and (2) of Directive 2014/24 is applicable to social services contracts, with additional provisions transposing light regime provisions from Directive 2014/24.[11] The ECJ decided that there was thus a clear interest in the ECJ ruling on the question of the suitability of the contested award criterion to identify the most economically advantageous tender.[12]

[8] EU Treaty principles ensuring transparency and fairness can still apply to a below threshold light regime contract where the contract is of cross-border interest i.e. where there is a realistic prospect of interest from providers in other EU Member States.

[9] Ley 9/2017 de Contratos del Sector Público, por la que se transponen al ordenamento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014 (Law 9/2017 on public sector contracts, transposing into Spanish law Directives 2014/23/EU and [2014/24] of the European Parliament and of the Council of 26 February 2014), of 8 November 2017 (BOE No 272 of 9 November 2017).

[10] Paragraph 13 of Opinion of Advocate General, *AESTE* (C-210/24) EU:C:2025:529.

[11] Paragraph 32 of judgment, *AESTE* (C-210/24) EU:C:2026:145.

[12] Paragraphs 33 and 34 of judgment, *AESTE* (C-210/24) EU:C:2026:145.

4. Questions considered by the ECJ

4.1. Is the contested award criterion suitable to identify the most economically advantageous tender?

The first question considered by the ECJ was the suitability of the contested award criterion to identify the most economically advantageous tender, as required by art.67(1) of Directive 2014/24. The ECJ noted that contracting authorities are to base their contract award decision primarily on the criterion of the most economically advantageous tender, which must be assessed from the point of view of the contracting authority. In this context, the ECJ referred to art.67(2) of Directive 2014/24 under which a contracting authority may choose to apply the best price-quality ratio and assess criterion including qualitative, environmental and/or social aspects "provided those aspects are linked to the subject matter of the contract concerned".

The ECJ first considered whether the contested award criterion could be regarded as a social aspect of the contract and then went on to address the question of whether there is link to the subject matter of the contract.

The ECJ noted that the concept of a "social aspect" within the meaning of art.67(2) of Directive 2014/24 must be interpreted broadly. The ECJ referred to its own case law confirming that contracting authorities are entitled to choose award criteria "based on considerations of a social nature, which may concern the persons using or receiving the services which are the object of the contract, but also other persons."[13] The ECJ was of the view that payroll increases for persons performing the contract thus fall within the concept of a "social aspect".

Turning to the question of linkage of the social aspect of the contested award criterion with the subject matter of the contract, the referring court was uncertain whether the contested award criterion makes it possible to identify the most economically advantageous tender within the meaning of art.67(2) of Directive 2014/24. The referring court appeared to consider that the link between such a salary increase and the improvement of the service is too hypothetical to be able determine the award of that contract. The ECJ did not agree. The ECJ referred to the provisions of art.67(3) of Directive 2014/24 which confirm that the criteria can relate to services provided under the contract "in any respect and at any stage in their life cycle, including the factors involved in the specific process of providing those services, even where those factors do not form part of the material content." [14] ECJ noted that it is for the referring court to assess whether there is a direct link to the subject matter of the contract. The ECJ then went on to highlight several points indicating the presence of such a link and it emphasised that the referring court must conduct the assessment taking into account the specific features of the home help service. The ECJ flagged specific characteristics of the contract indicating a relevant link in this case, being the high intensity of the labour required, and the difficulties encountered by the contracting authority in offering a continuous and high-quality service. The ECJ also referred to observations made by the Advocate General in his Opinion that (i) the remuneration received by the successful tenderer is largely determined by salary costs and (ii) that in a contract of this nature it is not unreasonable to consider that the contested award criterion may contribute to the objectives of the contract by improving the quality, accessibility and continuity of the home help service, since more favourable remuneration would have the effect of improved staff retention and allow for the recruitment of more qualified staff.[15] The ECJ supported this interpretation by reference to art.76(2) of Directive 2014/24 concerning light regime services which provides that contracting authorities

[13] *Commission v Netherlands* (C-368/10) EU:C:2012 284 (para.85) where the requirement for fair trade coffee, which seeks to promote the needs of small-scale producers in developing countries, was confirmed as a social characteristic of the contract for the supply and management of automatic coffee machines.

[14] Paragraph 44 of judgment, *AESTE* (C-210/24) EU:C:2026:145.

[15] Paragraph 47 of judgment, *AESTE* (C-210/24) EU:C:2026:145.

may take in to account the need to ensure the quality , continuity and availability of services as well as the specific needs of service users.

The referring court had also raised the question of whether the use of the contested award criterion might infringe the principle of equal treatment between tenderers. The referring court was concerned that the application of the contested award criterion may place some tenderers, such as small and medium sized enterprises, at a disadvantage as they have less capacity to pay wages higher than the sectoral collective agreement. The ECJ stated that it did not have the information available to it to determine whether the contested award criterion is capable of creating such a discriminatory effect. The ECJ confirmed that it is for the referring court to carry out this examination in the light of the documentation available to the contracting authority when it was determining its needs as well as in the light of any consultations including with users and staff.

4.2. Do the provisions of art.28 of the Charter of Fundamental Rights of the European Union guaranteeing the right to collective bargaining preclude use of the contested award criterion?

Article 28 CFR guarantees the right of workers and employers, or their organisations to negotiate and conclude collective agreements at appropriate levels.[16] The ECJ noted in its judgment[17] that art.28 CFR presupposes that "social partners" (i.e. representatives of labour and management, including trade unions and employers' organisations) are autonomous. According to the ECJ, that autonomy means that during the negotiation stage of an agreement by the social partners they may engage in dialogue and act freely without receiving any order or instruction from elsewhere. They also enjoy broad discretion, not only in their choice to pursue a particular aim in the field of social or employment policy but also in defining the measures to achieve that aim. The ECJ also confirmed that where the right of collective bargaining is covered by provisions of EU law it must be exercised in compliance with that law.[18]

As noted above, the contested award criterion included two stipulations, that (1) no later than one month after the procurement contract has been formalised, following negotiations with the workers' representatives, the precise form that the pay increase is to take must be specified, and (2) the successful tenderer is also to seek to formalise an agreement governing the working conditions of the staff assigned to the contract. In the view of the ECJ, neither of these two aspects appears to undermine the autonomy of the social partners in the negotiation of a collective agreement. The ECJ endorsed the observations of the Advocate General in his Opinion that, rather than undermining the right to collective bargaining, the contested award criterion "seeks to facilitate dialogue between the social partners and, therefore, encourages the exercise of that right by requiring merely that the successful tenderer endeavour to conclude a collective agreement with the representatives of the staff assigned to perform the contract, without encroaching on the latter's right to participate in the determination of the elements of the salary increase and working conditions."[19] The ECJ was also of the view that the requirement that the successful tenderer negotiate the elements of the salary increase with staff representatives cannot compel those representative to accept all proposals contain in the tenderer's offer within the period prescribed, although it is for the referring court to verify whether that is the case. The ECJ concluded that art.28 CFR does not preclude use of the contested award criterion.

[16] *https://fra.europa.eu/en/eu-charter/article/28-right-collective-bargaining-and-action*.
[17] Paragraph 69 of judgment, *AESTE* (C-210/24) EU:C:2026:145. Referencing art.152 of the Treaty on the Functioning of the European Union.
[18] Paragraphs 70 and 71 of judgment, *AESTE* (C-210/24) EU:C:2026:145.
[19] Paragraph 74 of judgment, *AESTE* (C-210/24) EU:C:2026:145.

Comment

In the first sentence of his Opinion the Advocate General states that this case provides the ECJ "with an opportunity to address the issue of the use of public procurement for the pursuit of horizontal objectives of public interest, in particular for the promotion of social objectives."[20] The ECJ endorsed a broad interpretation of the concept of what constitute social aspects of a contract linked to the subject matter of the contract. On detailed analysis, however, the judgment is disappointing as it contains limited reference to and discussion of the relevant case law in what is a controversial area of public procurement law. It also misses opportunities for analysis of issues fundamental to the discussion of use of social criteria. For example, whilst is engages to a limited extent in discussion on the principle of equal treatment it does not address the question whether the contested criterion is sufficiently transparent. The ECJ acknowledges at several points in the judgment that it lacks sufficient information to determine questions which it has itself raised. Overall, the judgment leaves the reader with perhaps more questions unanswered than answered.

[20] Paragraph 1 of Opinion of Advocate General, *AESTE* (C-210/24) EU:C:2025:529.

Registration and Transparency Requirements as a Pre-Condition to Be Eligible to Be Awarded a Public Contract: A Note on AK Dlhopolec s.r.o., MABONEX SLOVAKIA spol. s r.o. and Others (C-590/24)

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EU law; Public procurement; Registration; Slovakia

1. Introduction

In this judgment[1], the Court of Justice of the European Union considered provisions of Slovak law concerning the requirement for certain companies and related persons to be registered on a register of public sector partners. Although the substantive elements of the judgment are concerned with the interpretation of provisions of the Charter of Fundamental Rights of the European Union ("the Charter") and the relevance of those provisions to a decision to impose a fine related to the registration requirement, the judgment will nevertheless be of general interest to those focused on the law of public procurement. However, as the Court considered the questions relating to substantive issues of procurement law to be inadmissible and therefore took no position on those issues, this note of the judgment is descriptive only and not discursive.

2. Facts and Question Referred

The Slovak law on the Register of Public Sector Partners ("RPSP") requires natural or legal persons who wish to enter into "property relations" with the Slovak public sector, and who thereby receive financial resources from public funds, including EU funds, to be registered on the RPSP. Such entities are known as "public sector partners". The RPSP law is intended to ensure transparency of the legal relationships entered into by the public sector by ensuring the disclosure of the ownership and management structure of entities that have economic relationships with it. The types of relationship covered include where the legal person is to enter into a contract with the public sector having a value exceeding certain thresholds set out in the RPSP law. Unsurprisingly, given the intent of the law, the information to be entered in the RSPP includes information pertaining to the beneficial owner of the public sector partner.

The registration process requires that the public sector partner use an "authorised person", who is independent (such as a solicitor or notary) and this authorised person must verify the identity of the beneficial owner of the public sector partner and subsequently apply for registration in the RPSP. This process went awry for a public sector partner called Mabonex Slovakia ("Mabonex") who were fined EUR 20,000 by a Slovakian Court. Two of its managers who acted on behalf of the company in this process as its statutory body were jointly and severally fined EUR 10,000 and Dlhopolec, who had acted as the authorised person, were also fined EUR 20,000. The court's reason for imposing the fines was a finding

[1] *AK Dlhopolec s.r.o.,MABONEX SLOVAKIA spol. s r.o and others* (C-590/24), judgment of 22 January 2026, a copy of the judgment is available at *http://curia.europa.eu*.

that the relationship between one of the managers of Mabonex and a manager of Dlhopolec, who were partners and managers of a third company, was an objective factor that could call into question the impartiality of the authorised person. The fines were appealed unsuccessfully before the Slovak courts with the matter ending up before Supreme Court of the Slovak Republic, which is the referring court.

In the referral the Supreme Court noted that there are a number of other legal consequences in addition to the imposition of the fine, such as the removal of the public sector partner from the RPSP; that the authorised person is jointly and severally liable for the payment of the fine imposed on the person acting as the statutory body of the public sector partner; and that removal of the public sector partner from the RPSP may result in a three-year ban on the persons concerned from serving as members of the statutory body of a company. From the perspective of public procurement, the public sector counterparty providing funds or property to a public sector partner has the right to terminate such contracts from the date on which the fining decision becomes final. In addition, without RPSP registration or for a period of two years following removal, a natural or legal person may not enter into property relations with the public sector, receive most EU funds or tender for a public contract with a value exceeding the threshold set out in Slovak law. The Slovak court observed that these provisions would seem to constitute obstacles to freedom of enterprise, the free movement of goods and capital, and the freedom to provide services within the EU.

The Slovak court referred a total of six questions to the CJEU, some of which were concerned with issues of procurement law. First it asked whether art.26 TFEU, in conjunction with arts 49 and 114 thereof, art.57 of Directive 2014/24, in conjunction with art.58 thereof, and art.3 of Directive 2014/23, in conjunction with arts 38 and 41 thereof, should be interpreted as precluding legislation, such as that at issue in the present case, which links the imposition of a fine pursuant to para.13 of the Law on the RPSP and the non-payment thereof with exclusion from the conclusion of contracts and concession contracts with the public sector (whether on the basis of a public procurement procedure or outside that procedure), solely as a result of (and therefore by reason of) removal from the RPSP. If the answer to that question was affirmative, did the same provisions preclude the imposition of a fine? However, if the answer to the first question was negative, are Article 49 of the Charter of Fundamental Rights of the European Union, and the principle of proportionality of penalties which arises therefrom, to be interpreted as precluding legislation, such as that at issue in the present case, which automatically, without any possibility of taking into consideration the seriousness of the offence (the initial unlawful act), the individual circumstances of its commission and the reasons for the non-payment of the fine imposed on the public sector partner, ties non-payment of the fine to removal of that partner from the RPSP?

Two further questions were raised regarding the relationship between art.49, the principle of proportionality and the fine imposed, with the final question being essentially as to whether the RPSP requirement relating to impartiality of the authorised person was sufficiently clear to satisfy the principle of legal certainty.

3. Judgment

The Court first considered the question of whether it had jurisdiction to give a preliminary ruling, with the Slovak Government arguing that the law on the RPSP was not derived from EU law.

The CJEU disagreed, considering that there was a "sufficient connection" between the EU procurement directives and the request. This was on the basis that the referring court had stated that any natural or legal person wishing to enter into property relations with the Slovak public sector, and in particular, to enter into a contract in the public procurement context, was required to register with the RPSP.[2] The RPSP law itself amended the provisions of Slovak law transposing Directives 2014/23 and 2014/24. Some of the contracts taken into account for the purposes of calculating the fine to be imposed on Mabonex had been

[2] *AK Dlhopolec s.r.o., MABONEX SLOVAKIA spol. s r.o and others* (C-590/24) , judgment of 22 January 2026 at [35]–[49].

awarded following public procurement procedures under the Directives. These were among the considerations that led the Court to conclude there was a sufficient connection between the request and the Directives. The Court also took into account that RPSP registration was a necessary condition for an economic operator to be able to enter into a contract in the context of a public procurement procedure with the corollary being that the absence of such registration would therefore be a ground for exclusion. In this regard the Court referred to the well-established position that although art.57 of Directive 2014/24 provides an exhaustive list of grounds for exclusion Member States are not precluded from having other rules intended, in particular, to ensure equal treatment, provided that the principle of proportionality is observed. Given these considerations and others, the Court concluded that it had jurisdiction to consider the request for a preliminary ruling.

The Court moved on to consider the admissibility of the specific questions referred with Slovakia arguing that Mabonex had not, in fact, been removed from the RPSP but remained on the register after having timeously paid the fine imposed. The position of the Slovak Government was therefore that a number of the questions referred related to an entirely hypothetical scenario and were therefore inadmissible. The Court substantively agreed with this assessment, noting that with regard to the first to third questions referred the referring court had indicated an answer was required to assess whether the potential removal of the public sector partner from the RPSP as a secondary consequence of failing to pay the fine was compatible with EU law. However, the absence of adequate factual background in the referral particularly with regard to Mabonex's RPSP removal and failure to pay the fine, meant that the Court treated this as a hypothetical situation. The first three questions referred were therefore considered inadmissible.[3]

The remaining questions referred by the Slovak court concerned various aspects of the interpretation of the Charter and whether the penalties at issue in the main proceedings were of a criminal nature. This aspect of the judgment is not concerned with issues particular to procurement law. It suffices to say that the Court, taking into account the specific features of the system of penalties related to the RPSP under Slovak law, determined that it was criminal in nature and therefore fell to be assessed in the light of the principles of legality and proportionality of criminal offences and penalties required by Article 49(1) and 49(3) of the Charter.[4]

Turning to the issue of whether the RPSP law was sufficiently specific to satisfy the requirements of art.49(1) and the principle of legal certainty, the Court concluded that it did not appear that the authorised person and the public sector partner in this case had been prevented from determining, in a sufficiently clear and precise manner, the types of acts and omissions which could make them criminally liable. The sixth question referred was therefore answered by the Court finding that art.49(1) of the Charter and the principle of legal certainty did not preclude national legislation of the kind under consideration in the present case.[5]

Finally, the Court considered the two questions related to the quantum of the penalty imposed; the first being whether art.49(1) and the principle of legal certainty precluded national legislation providing for the imposition of a fine corresponding to the economic benefit the penalised entity has derived from its relations with the public sector. The Court acknowledged that the concept of an economic benefit was a broad one, but considered that when using such concepts the ordinary methods of interpretation of the law might be used to address issues of ambiguity or vagueness. In this case, the referring court had explained that there was an explanatory memorandum relevant to the RPSP and such techniques of interpretation were quite usual under Slovak law. The Court therefore did not consider that a penalty predicated on the amount of a relevant economic benefit was problematic and answered the question accordingly.

[3] *AK Dlhopolec s.r.o., MABONEX SLOVAKIA spol. s r.o and others* (C-590/24), judgment of 22 January 2026 at [58].
[4] *AK Dlhopolec s.r.o., MABONEX SLOVAKIA spol. s r.o and others* (C-590/24), judgment of 22 January 2026 at [66]–[71].
[5] *AK Dlhopolec s.r.o., MABONEX SLOVAKIA spol. s r.o and others* (C-590/24), judgment of 22 January 2026 at [86]–[89].

Finally, the Court considered whether art.49(3) of the Charter precluded national legislation which automatically imposed a fine corresponding to the economic benefit received, without the authority imposing the fine having the ability to vary its amount based on the nature of the infringement committed or taking into account other negative legal consequences that the sanction may have for the company concerned. The Court did consider such a provision to be problematic; however, it also noted that art.49(3) did not preclude national legislation providing for the imposition of a fine within a range, provided that the competent authority takes into account, in particular, the nature, seriousness, circumstances and consequence of the breach in question.[6] A particular point of interest to procurement lawyers in this discussion was that Court's observation that although one consequence of the fine was the ability of public authorities to terminate contracts with the public sector partner, those were separate decisions taken by distinct authorities and did not follow automatically from the decision of the registration authority to impose the fine.[7]

[6] *AK Dlhopolec s.r.o., MABONEX SLOVAKIA spol. s r.o and others* (C-590/24), judgment of 22 January 2026 at [119].
[7] *AK Dlhopolec s.r.o., MABONEX SLOVAKIA spol. s r.o and others* (C-590/24), judgment of 22 January 2026 at [116].

Exclusion From Public Procurement for Grave Professional Misconduct and the Reliability of OLAF Evidence: UH v European Commission (T-1052/23)

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EU law; European Anti-Fraud Office; Exclusion; Fraud; Public procurement procedures

Introduction

This case concerns the exclusion[1] of an economic operator from procurement and grant award procedures under Regulation 2018/1046[2] (the Financial Regulation) following an investigation by the European Anti-Fraud Office (OLAF) into the performance of a service contract awarded by the Commission to a consortium with four participants. The applicant in the annotated judgment was the consortium leader. The contract concerned support to higher legal education in a third State, and had as its objective to help reconnect that third State's higher legal educational institutions with their EU counterparts in order to support the reinforcement of the rule of law. Based on OLAF's final investigation report which concluded that the applicant had committed irregularities and carried out fraudulent activities, the Commission adopted a decision excluding the applicant from award procedures for a period of two years on two grounds: first, grave professional misconduct, and second, significant deficiencies in complying with main obligations in the implementation of the contract.[3] Regarding grave professional misconduct, according to the Commission, the applicant had misrepresented information regarding the existence and composition of the consortium both in the procurement procedure and throughout the contract's implementation. Regarding significant deficiencies in fulfilling the main contractual obligations, according to the Commission, the applicant had not complied with the contact's provisions relating to insurance, accounting and OLAF's verification powers.

The judgment is of interest beyond the specific regulatory framework which it concerns. The exclusion grounds in the Financial Regulation resemble the mandatory and voluntary exclusion grounds in the Public Contracts Directive 2014/24,[4] and the General Court's assessment of the Commission's application of the relevant exclusion grounds is accordingly also of relevance to contracting authorities and practitioners in the Member States.

Central to exclusion under both the procurement rules in the Financial Regulation and the Public Contracts Directive is the same fundamental question, namely whether the contracting authority has

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1 Judgment of 28 January 2026, EU:T:2026:52.

2 Regulation 2018/1046 on the financial rules applicable to the general budget of the Union, amending Regulations No.1296/2013, No.1301/2013, No.1303/2013, No.1304/2013, No.1309/2013, No.1316/2013, No.223/2014, No.283/2014, and Decision No.541/2014 and repealing Regulation (EU, Euratom) No.966/2012 [2018] OJ L193/1, as amended (the Financial Regulation from 2018). The currently applicable Financial Regulation is Regulation 2024/2509 on the financial rules applicable to the general budget of the Union (recast) [2024] OJ L2024/2509. Where the provisions of Regulation 2024/2509 differ from those of Regulation 2018/1046 in respects relevant to the matters discussed in this case note, such differences will be noted in the footnotes as they arise.

3 Article 136(1)(c) and (1)(e)(iii), respectively.

4 Compare art.136 of the Financial Regulation to art.57 of Directive 2014/24 on public procurement and repealing Directive 2004/18.

established the factual basis for an exclusion decision to the requisite standard of proof. In this judgment, the General Court examines that question in considerable detail, confirming that an exclusion decision must be based on evidence that is sufficiently cogent, consistent, reliable and factually accurate, and finding that the Commission had failed to meet that standard. Although the assessment by the General Court is very case-specific, the judgment serves as a useful illustration of the rigour with which European Union courts and national review bodies will scrutinise the evidentiary basis of exclusion decisions and, in particular, of the importance of assessing not only the content of the evidence presented but also the circumstances in which it was produced.

Facts

In August 2012, the Commission published a contract notice for the award of the mentioned service contract. On 27 September 2012, the applicant submitted an expression of interest to the Commission as leader of a consortium comprising also of two companies, A and B, and a university, C.

On 6 May 2013, the Commission and the applicant concluded the contract at issue. Shortly after, on 8 May 2013, OLAF launched an investigation into the applicant and, in particular, the performance of the contract.

The contract was implemented and came to an end on 5 September 2015. The applicant subsequently submitted a final invoice, payment of which the Commission suspended on 26 November 2015. Following completion of an audit of the contract's performance, OLAF adopted its final investigation report on 14 November 2017, concluding that the applicant had committed irregularities and carried out fraudulent activities in connection with the performance of the contract.

The matter was also litigated at the national level. In June 2018, the applicant brought proceedings before the Brussels Court of First Instance[5] seeking payment of the final invoice. The Commission filed a counterclaim for reimbursement of all amounts paid under the contract. By judgment of 17 January 2020, the court dismissed the applicant's action and partially upheld the Commission's counterclaim, holding the applicant liable for half of the amounts invoiced. The applicant appealed that judgment to the Brussels Court of Appeal[6] in April 2020.

On 14 December 2022 the Panel established under art.143 of the Financial Regulation to assess whether the applicant should be excluded from future procedures for the award of contracts or grants under the Financial Regulation invited the applicant to submit comments on a draft recommendation proposing exclusion from award procedures for a period of three years on two grounds: (i) grave professional misconduct, and (ii) significant deficiencies in complying with main obligations in the implementation of the contract. The draft recommendation also envisaged publication of the exclusion on the Commission's website and registration of the applicant's legal representative in the Early Detection and Exclusion System (EDES) database.

Following the exchange of submissions between the applicant and the Panel, the Commission adopted the contested decision on 1 September 2023. The decision

~ (i) excluded the applicant from participating in award procedures governed by the Financial Regulation for a period of two years;

~ (ii) ordered publication of information related to that exclusion on the Commission's website; and

~ (iii) ordered registration of the applicant's legal representative in the EDES database.

[5] Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking), Belgium).
[6] Hof van beroep te Brussel (Court of Appeal, Brussels, Belgium).

The applicant brought the present action before the General Court under art.263 TFEU, seeking principally the annulment of the contested decision in its entirety and, in the alternative, a partial annulment.

Judgment of the General Court

The applicant relied on six pleas in law in support of its principal claim for annulment: (1) infringement of the rights of the defence; (2) errors of fact and of law regarding the alleged grave professional misconduct, directed against the first ground of the contested decision; (3) an inadequate statement of reasons and errors of law regarding the alleged grave professional misconduct, also directed against the first ground; (4) an error of law due to expiry of the limitation period in respect of the alleged grave professional misconduct, again directed against the first ground; (5) an error of fact regarding the alleged breach of certain main obligations, directed against the second ground; and (6) errors of law in the application of the limitation rules in respect of the alleged breach of certain main obligations, directed against the second ground.

The General Court considered it necessary to examine only the second and sixth pleas, in that order, having regard to the fact that the findings on those two pleas were sufficient to dispose of the action.

Since the General Court found that both grounds of the contested decision, that is grave professional misconduct and significant deficiencies in complying with main obligations in the implementation of the contract, were vitiated by errors of law and fact and by a legal error in the application of the limitation rules, respectively, the contested decision was annulled in its entirety. Below, only the second plea is considered.

Article 135(1)[7] of the Financial Regulation requires the Commission to set up and operate the EDES for the purpose of facilitating the early detection of persons or entities posing a risk to the Union's financial interests that are found to be in one of the exclusion situations referred to in Article 136(1)[8] of the Financial Regulation, and their exclusion from future award procedures.

The exclusion grounds in the Financial Regulation resemble the mandatory and voluntary exclusion grounds in Public Contracts Directive 2014/24 but are all mandatory subject to existence of a final judgment or final administrative decision. In situations where no final judgment or final administrative decision establishes that the economic operator must be excluded, according to Article 143[9] of the Financial Regulation a panel must be constituted to assess the case and issue recommendations on the envisaged exclusion ("the panel"). In these situations, according to art.136(2)[10] of Financial Regulation, the authorising officer responsible may exclude a person or entity on the basis of a preliminary classification in law of the conduct at issue, having regard to established facts or other findings contained in the Panel's recommendation.

The exclusion ground in art.136(1)(c)(i)[11] of the Financial Regulation covers situations where it has been established that the person or entity concerned is guilty of grave professional misconduct, including the fraudulent or negligent misrepresentation of information required for the verification of the fulfilment of selection criteria or in the implementation of a legal commitment. Article 136(1)(e)(iii)[12] of the Financial Regulation covers exclusion of a person or entity which has shown significant deficiencies in complying with main obligations in the implementation of a legal commitment financed by the Union budget, as established by an authorising officer or by OLAF following checks, audits or investigations.

The second plea is divided into three parts, alleging first, errors of law and of fact affecting the finding that the consortium involving the applicant and A, B and C did not exist. It also alleged, secondly, an error

[7] Now art.137(1) of Regulation 2024/2509.
[8] Now art.138(1) of Regulation 2024/2509.
[9] Now art.145 of Regulation 2024/2509.
[10] Now art.138(3) of Regulation 2024/2509.
[11] Now art.138(1)(c)(i) of Regulation 2024/2509.
[12] Now art.138(1)(e)(iii) of Regulation 2024/2509.

of fact vitiating the first ground of the contested decision, as regards the applicant's attempts to obtain a backdated consortium agreement or declaration. The third part of the second plea was not examined by the General Court.

First part, alleging errors of law and of fact affecting the finding that the consortium involving the applicant and A, B and C did not exist: (1) Error of Law

In support of the first ground of the contested decision, the Commission relied, in particular, on the fact that there was no signed consortium agreement between the applicant, A, B and C as proof that no consortium had existed. The applicant invoked an error of law on the ground that the absence of a signed consortium agreement was not proof of that the consortium did not exist, since the contract at issue imposed no requirement to sign such an agreement. It was common ground that no such agreement had been signed at any stage—whether before conclusion of the contract, during its implementation, or after its completion.

Pursuant to items 11 and 12 of the contract notice, participation in the award procedure was open to legal persons acting either individually or as part of a consortium, and a consortium could be either a permanent, legally established grouping or a grouping constituted informally for a specific tender procedure. The contract itself did not contain any clause requiring the applicant to formalise the existence of the consortium by means of a signed agreement after its conclusion; the only consortium-related provisions concerned the joint and several liability of consortium members and the prohibition on altering the composition of the consortium without the contracting authority's prior written consent. Moreover, the Commission had not referred to any infringement of contractual provisions, laws, regulations or professional ethical standards that would have required the applicant to sign a consortium agreement with A, B and C.

The Court observed that, in the absence of any rule requiring signature of a consortium agreement between the members of an informally constituted grouping, the absence of such a signature could be indicative of a lack of effective cooperation, but it is not decisive, since those persons or entities may in fact have cooperated—to varying degrees—for the purpose of achieving the aim in respect of which the consortium was formed, without having concluded a formal agreement between themselves.

The Court therefore concluded that, whilst it was common ground that the alleged members of the consortium had not signed a consortium agreement, the applicant was justified in maintaining that this fact alone did not permit the Commission to find that the consortium did not exist, given that neither the applicant nor its alleged partners were required by any legislative, regulatory or contractual rule to sign such an agreement. The Commission had accordingly committed an error of law by inferring the non-existence of the consortium from the mere absence of a signed agreement, and the first complaint was upheld.

First part, alleging errors of law and of fact affecting the finding that the consortium involving the applicant and A, B and C did not exist: (2) Error of Fact

In support of its finding that no consortium involving the applicant and A, B and C had ever existed, the Commission relied, inter alia, on the statements of those three entities to the effect that they had never been part of the consortium of which the applicant claimed to have been the leader and had never participated in the implementation of the contract at issue.

The applicant submitted that the Commission was not entitled to rely solely on the statements made by A, B and C after the investigation opened by OLAF, because according to the applicant this investigation had led those entities to distance themselves from the applicant. Instead, OLAF ought to have assessed the available evidence regarding the communications and activities of the alleged partners during the tendering and performance phases of the contract, from 27 September 2012 to 5 September 2015. This argument is of particular significance given the chronology of events: OLAF launched its investigation on 8 May 2013, yet only informed the applicant that the investigation was ongoing in March 2015. According to the applicant, it was only in early 2016—following OLAF's communication to A, B and C regarding that a fraud investigation involving the applicant had been opened—that those entities distanced themselves from the applicant. The applicant claimed that their statements were inadmissible as evidence produced *in tempore suspecto*.

The General Court found it necessary to determine whether the statements of A, B and C referred to in the OLAF report constituted evidence that was sufficiently cogent, consistent, reliable and factually accurate, and it made a detailed assessment.

As regards C, the OLAF report contained an email sent by a representative of C to OLAF on 21 March 2016, in which C confirmed, on the one hand, that it was a member of the consortium of which the applicant claimed to have been the leader and, on the other, that no consortium agreement had been signed; that it was expecting a final proposal in that regard; and that it had not received any payment pursuant to the contract at issue. The General Court pointed out that in so far as C thus confirmed its membership of the consortium, that statement did not constitute consistent evidence capable of substantiating the first ground of the contested decision; rather, it supported the applicant's contrary claims.

As regards A, an email of 18 January 2016 showed that A and the applicant had agreed to work as part of a consortium, that the applicant had sent a draft consortium agreement to A which had never been signed, and that their last communication was in November 2014, when A had helped the applicant to recruit a new team leader. That email was internally contradictory, in that A stated, on the one hand, that it had not been able to contribute to the implementation of the project and had received no compensation and, on the other, that it had nevertheless helped the applicant to recruit a new team leader in November 2014. Furthermore, the applicant produced email correspondence demonstrating A’s assistance in recruiting a new team leader. The General Court found that emails of 24 November 2014 and 5 January, 5 June and 20 October 2015, by which A requested that the applicant provide the final version of the draft consortium agreement along with the profit share clause, were capable of casting doubt on the Commission's finding that A was not part of the consortium. The General Court held that the change of position by A between November 2014 and December 2016—i.e. after OLAF had communicated to A the existence of a fraud investigation—undermined the reliability of A’s later statements.

A letter of 6 April 2016 from B provided that B had been sought out for the expression of interest and the response to the call for tenders but stated that B had never participated in any way in the implementation of the contract, that no consortium agreement had been signed, and that, a few days after B was interviewed by OLAF, the applicant had contacted B to request that it sign a consortium agreement and regularise the situation. However, the General Court found that the letter confirmed the contact between B and the applicant during the tendering phase and, in so far as it denied any participation in the performance of the contract, was contradicted by the documentary evidence showing that B had designated one of the four key experts who participated in the implementation of the project envisaged by the contract at issue.

It followed that the Commission's documentation in support of the first ground of the contested decision, relating to the non-existence of the consortium was based on statements of A, B and C which were vitiated by factual inaccuracies, and which were not capable of substantiating such a finding. Accordingly, the second complaint of the first part of the second plea was upheld in its entirety.

Second part, alleging an error of fact vitiating the first ground of the contested decision, as regards the applicant’s attempts to obtain a backdated consortium agreement or declaration

The second part of the second plea concerned the contested decision’s arguments related to two actions with regard to which it was claimed that the applicant had misrepresented information. One was by trying to obtain the signatures of the alleged consortium members on a backdated consortium agreement after the implementation period of the contract. The other was by drawing up a declaration to the effect that A and the applicant had been members of a consortium, more than one year after implementation of the project, after failing to obtain A’s signature on that draft agreement.

The applicant disputed that it had asked the other members of the consortium to sign a retroactive or backdated agreement, contending that its emails of 18 February and 27 November 2016 did not substantiate that accusation. The Commission, for its part, maintained that those emails showed that the applicant had sought A's signature on the consortium agreement after the contract had been carried out.

The General Court accepted, as a factual matter, that there was a retroactive element to both of the mentioned documents. The third version of the draft consortium agreement, transmitted on 18 February 2016, contained a final clause providing that it would enter into force on 5 May 2013, and the draft declaration transmitted on 27 November 2016 stated that the signatory did, prior to, during and after the completion of the project, consider itself to have been a member of a consortium. Whilst it was not apparent from either document that the applicant had asked the other parties to backdate them, the General Court accepted that both were retroactive in nature. Once signed, the declaration would have been retroactive more than one year after the contract had been carried out.

However, the General Court held that this finding could not stand independently of the underlying finding of non-participation, which had already been found to be vitiated by errors. It was apparent from the emails of 18 February and 27 November 2016 that the applicant's attempts to have A, B and C sign the third version of the draft agreement, or in the alternative a declaration, were intended to complete the legal formalisation of the consortium of which it claimed to have been the leader, in order to demonstrate the reality of that cooperation at a time when the matter was the subject of an OLAF investigation, and to regulate definitively certain financial and administrative matters relating to the consortium.

Since the Commission's finding that A, B and C did not participate in the performance of the contract as part of the consortium of which the applicant claimed to have been the leader was incorrect—including in fact—it followed that the contested decision was also vitiated by an error of fact by the Commission when the Commission concluded, in consequence of that finding, that the applicant’s attempts to obtain signatures on a retroactive agreement and declaration were intended to conceal the lack of a working relationship between them and the applicant and to provide false information.

Since the Commission’s findings in support of the first ground of the contested decision were vitiated by an error of law and by errors of fact, the second part of the second plea was upheld, and there was accordingly no need to examine the merits of the third part of the plea.

United Kingdom

Procurement (Amendment) Regulations 2026: Increasing Transparency

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Public contracts; Public procurement

1. Introduction

The Procurement (Amendment) Regulations 2026 introduce two new regulations into the Procurement Regulations 2024: Regulation 36A (supplier registration on the central digital platform for below-threshold contracts) and Regulation 38A (contract payment information). These amendments build upon the transparency and accountability framework established by the Procurement Act 2023 and the original Procurement Regulations 2024.

They represent a meaningful tightening of obligations for both contracting authorities and suppliers.

2. The original position

Regulation 36

Regulation 36 of Procurement Regulations 2024 sets out the information which must be included in a contract details notice published under s.87(3) of the Procurement Act 2023 for below-threshold contracts. This notifies the market when a notifiable below-threshold contract has been entered into. Among the required information is the contract subject-matter, estimated value and supplier details including the unique identifier for the supplier (except where the supplier has not obtained one).

Crucially, however, the original Regulation 36 placed no pre-publication obligation on contracting authorities to verify or obtain confirmation that the supplier had actually registered on the central digital platform or submitted the required information to it. The exception for suppliers who have "not obtained" a unique identifier, while pragmatic, therefore leaves an open question as to how the system would populate supplier data reliably.

Regulation 38

Regulation 38 of the Procurement Regulations 2024 concerns payments compliance notices, setting out what information must be included in a notice published under s.69(1) of the Procurement Act 2023. This applies to "public contracts" (so does not including below-threshold contracts) and includes contracting authority information, and the dates of the first and last days of the reporting period to which the notice relates. It also requires reporting on sums paid during the reporting period, including the average number of days taken to make payments and the percentage of payments made within defined time bands.

Notably, the original framework made no provision for the publication of individual payment data—that is, information about specific payments made to named suppliers under individual contracts. Transparency at the transactional level is therefore absent.

The new provisions

Regulation 36A

New Regulation 36A deals specifically with supplier registration on the central digital platform in the context of below-threshold contracts, and applies before the publication of a contract details notice under s.87(3) of the Procurement Act 2023.

Before publishing such a notice, the contracting authority must obtain from the supplier: (a) confirmation that the supplier has taken the steps set out in para.(2); and (b) its unique identifier.

The steps referred to in para.(2) are: (a) the supplier has registered on the central digital platform; and (b) the supplier has submitted the required information to that platform.

For these purposes, “required information” means the supplier’s name, its contact postal address and email address, and whether the supplier is a small and medium-sized enterprise, or a non-governmental organisation that is value-driven and which principally reinvests its surpluses to further social, environmental or cultural objectives.

This is a new pre-publication gate that did not exist under the original Regulation 36. Where previously a contracting authority could publish a contract details notice even where a supplier lacked a unique identifier (on the basis that they had simply “not obtained one”), Regulation 36A now mandates positive confirmation of registration and data submission before the notice may be published.

Regulation 38A

New Regulation 38A sets out what information about a payment must be published under s.70(1) of the Procurement Act 2023. This is an entirely new provision; the original Regulation 38 addressed only aggregate payments compliance notices under s.69(1), not individual payment data under s.70(1).

The payment information required includes, where the contracting authority which made the payment differs from the one which published the contract details notice under s.53 of the Procurement Act 2023, the same identifying information provided in respect of that other contracting authority.

The unique identifiers for both the procurement and the relevant contract must also be published.

In respect of each payment to which the information relates, the name of the supplier to whom the payment was made, the supplier’s unique identifier, the value of the payment net of VAT, and the date when the payment was made must all be included.

A unique identifier is not required to be published under para.(2)(c) or (d)(ii) if no notice relating to the relevant contract has been previously published on the central digital platform and the unique identifier is not available.

Nothing in Regulation 38A prevents a contracting authority from publishing other relevant information alongside the payment information.

3. Practical observations

For Contracting Authorities it is suggested that the following steps are appropriate.

i. Building a registration verification step into the contract award process

The obligation under Regulation 36A arises *before* publication of the contract details notice. This means that, as part of their post-award workflow process, contracting authorities effectively need to obtain from the supplier confirmation that they have registered on the central digital platform and submitted the required information, as well as their unique identifier.

ii. Updating contract documentation and supplier-facing communications

Contracting authorities should update their standard award letters and supplier onboarding correspondence to include an express requirement for the supplier to register on the central digital platform prior to the contract details notice being published.

iii. Preparing for granular payment reporting under Regulation 38A

Regulation 38A introduces transactional-level payment reporting. Finance teams and procurement teams will need to work closely together. Contracting authorities should audit their finance systems now to confirm that this data can be captured and extracted in a format compatible with the central digital platform's publication requirements.

For Suppliers the following are matters to consider:

i. Registration on the central digital platform if you not already done

Regulation 36A requires that, before a contract details notice is published, suppliers must have registered on the central digital platform and submitted the required information to it. Suppliers who are not yet registered risk creating a bottleneck at the point of contract award. This is particularly acute for SMEs and first-time public sector suppliers who may be unfamiliar with the platform. Registration should be treated as a prerequisite for doing business with any contracting authority, not an afterthought.

ii. Ensuring the platform profile is accurate and up to date

Inaccurate information could delay contract notice publication and, in turn, complicate payment timelines. Suppliers should review and refresh their profiles regularly, particularly where corporate structures, addresses or SME status has changed.

iii. Understanding that individual payments for "public contracts" will be publicly visible

Regulation 38A introduces a significant transparency measure: for each payment, the name of the supplier, its unique identifier, the net VAT value of the payment, and the date of payment will all be published. Suppliers operating across multiple contracting authorities will effectively have their payment data consolidated and publicly accessible. This has implications for commercial confidentiality, competitive intelligence, and reputational exposure. Suppliers should be aware that their trading patterns with the public sector will become more transparent.

4. Conclusion

Regulations 36A and 38A represent a meaningful step-change in the transparency architecture underpinning below-threshold procurement and public contract payment obligations. This comes at the cost of operational adjustments to existing processes and ensuring finance systems can support granular payment reporting. It also exposes payments to more scrutiny and may be an interesting source of data to identify or support a challenge where the data is not following an expected pattern.

These changes came into force on 1 April 2026 and the impact will be immediate.

Analysis of the Local Government (Exclusion of Non-Commercial Considerations) (England) Order 2026

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Below threshold contracts; Local authorities; Non-commercial considerations; Public procurement

1. Introduction

The Local Government (Exclusion of Non-commercial Considerations) (England) Order 2026 (SI 2026/94) (the **Order**) came into force on 4 February 2026.[1] It enables specified English local authorities to reserve below-threshold contracts to contractors based either in the UK or within a defined local area.

The Order is intended to boost local economic growth and diversify contractor participation by allowing authorities, on a voluntary basis, to shape competition for low-value procurements while preserving transparency via notice requirements under the Procurement Act 2023 (the *PA 2023*), Local Government Act 1988 (*LGA 1988*) and the Procurement Regulations 2024.

2. What does the Order do?

Historically, s.17 of LGA 1988 prohibited local authorities from considering certain "non-commercial matters" when making public procurement decisions, including the location or country of origin of contractors (s.17(5)(e) LGA 1988). The Order disapplies this prohibition for below-threshold contracts. This allows relevant local authorities to reserve the award of a below-threshold contract to either (i) contractors based within the United Kingdom or (ii) contractors based within the authority's local area (which may include the counties or London boroughs which border the authority's local area).

For the purposes of the Order, an authority's local area is the area where the authority primarily exercises its functions (disregarding any areas outside of the United Kingdom).[2] A contractor is "based within" a local area where it based or has established substantive business operations, not taking account of the location of the corporate ownership or control of the contractor.

The accompanying Government guidance stresses that authorities may also consider whether it is appropriate to reserve a below-threshold competition to small and medium-sized enterprises (*SMEs*) and voluntary, community and social enterprises (*VCSEs*), either in conjunction with or independent of a

[1] The Local Government (Exclusion of Non-commercial Considerations) (England) Order 2026.
[2] Order, s.3(6)

location-based reservation.[3] Authorities already have discretion to reserve competitions to such entities, as there is no prohibition under s.17 LGA 1998, and thus the Order does not cover such reservations.[4]

It is hoped that these changes will increase opportunities for local businesses, SMEs, and VCSEs and, as a result, generate local economic growth, particularly when coupled with reforms introduced in the PA 2023. For example, the PA 2023 requires authorities to have regard to the barriers SMEs may face in competing for contracts and consider the removal or reduction of such barriers.[5] It also removed some common barriers to SME participation (such as requiring insurance to be in place before contract award),[6] introduced 30 day payment terms throughout the public sector supply chain to assist with cash flow,[7] and generally enhanced transparency which helps SMEs to better understand decisions and optimise future bids.

3. What and who does the Order apply to?

The Order only applies to below-threshold contracts (as set out in Sch.1 of the PA 2023) which are being procured by (i) "best value authorities" in England (as defined in s.1 LGA 1988) and (ii) parish councils, to which the exclusions set out in s.17 LGA 1988 apply. Government guidance makes it clear that this is intended to capture joint committees when they are exercising the same procurement functions for those authorities or councils.[8]

Central government departments and arm's-length bodies are outside the scope of the Order, and will continue to follow a separate below-threshold policy (which is set out in PPN 005[9]).

4. How does the order interface with the Procurement Act 2023?

Where an authority relies on the Order to reserve the award of a contract to only local area or UK–only contractors[10], it must say so explicitly (setting out the extent of the relevant local area) in:

> "(i) the below-threshold tender notice for any "notifiable below-threshold contract" (as defined in s.87(4) PA 2023), or "

> "(ii) the advertisement for any non-notifiable below-threshold contract.[11]"

Other than inclusion of this additional detail, the relevant notice requirements (i.e. for below-threshold contracts) in the PA 2023 apply in full.

Any other relevant duties relating to below-threshold contracts contained in the PA 2023 continue to apply to authorities.[12] Government guidance states that authorities should also ensure that they "keep appropriate records of all decisions made in relation to any restriction of contractors under the Order, as required by s.98 PA 2023".[13] However, note that ordinarily s.98 PA 2023 applies to "public contracts" so

[3] "Guidance on reserving competitions for below-threshold contracts", *GOV.UK* (the *Guidance*), [18].
[4] Guidance, [19].
[5] PA 2023, ss.12(4), 86.
[6] E.g. the requirements in Public Contracts Regulations 2015, reg.58, have been removed.
[7] PA 2023, ss.68, 73.
[8] Guidance, [7].
[9] "PPN 005: Reserving below threshold procurements", *GOV.UK*.
[10] Note that the PA 2023 uses the term "suppliers" rather than "contractors". However, "contractors" has been adopted throughout this analysis for ease.
[11] Order, ss.3(8), 4
[12] Guidance, [19]
[13] Guidance, [37].

would not apply to the “below-threshold” contracts that the Order applies to. Clarification is thus required on this point.

5. How does the Order interface with the Local Government Act 1988?

The Order only disapplies s.17(5)(e) LGA 1988. Therefore, authorities remain subject to other duties contained in the LGA 1988—including the prohibition on considering the remaining “non-commercial matters” contained in s.17(5) LGA 1988.

The LGA 1988’s notification requirements are also unaffected. Therefore, if an authority decides to prevent a contractor’s participation in a procurement process due to geographic restrictions, implemented further to the Order, the authority must consider whether the contractor should be notified of the reasons for that decision, in accordance with s.20 LGA 1988.

If an authority fails to comply with the LGA 1988’s requirements and a potential contractor suffers loss or damage as a consequence of that failure, then a claim for judicial review proceedings may be available to that contractor.

6. How does the order interface with international obligations?

The WTO Government Procurement Agreement and the UK’s free trade agreements generally apply above specified financial thresholds. Because the Order is confined to below-threshold spend, these reservations do not typically engage treaty market-access obligations.

Authorities should, however, be mindful where a procurement’s structure might approach thresholds, and avoid any artificial splitting to circumvent international duties.

7. What is the impact of the Order?

The Order will allow authorities to increase access for local businesses, SMEs and VCSEs to public contracts that might otherwise be dominated by large national or foreign contractors. The ability to define an appropriate local area aligns procurement with real economic geographies.

However, there is a risk of reduced competition in narrow local markets, which could potentially impact quality and price. As emphasised in accompanying guidance, the Order should not be used as a way to de facto directly award contracts, and should always be applied in a way that result in some degree of competition.[14]

8. Practical checklist for authorities

1. Confirm scope/applicability: Verify if you are a “best value authority” or parish council (or joint committee acting for them) to which s. 17 LGA 1988 applies. Also, determine whether the contract is a below-threshold contract for the purposes of the PA 2023.
2. Define the area of reservation: Decide whether to reserve competition to UK-wide or local contractors. If local, specify the area precisely within the Order’s parameters, including any bordering areas where appropriate.
3. Considering layering reservations: Consider SME/VCSE reservations alongside location-based reservations where appropriate, consistent with guidance.
4. Record decisions: Document value-for-money considerations, competition analysis, and reasons for reservation; retain records for scrutiny.

[14] Guidance, [26].

5. Ensure that the correct notices are issued: Determine whether the contract is a notifiable below-threshold contract and prepare the correct notice/advertisement with clear reservation wording.
6. Run the process in line with the UK procurement regime: Ensure evaluation is fair and criteria do not indirectly discriminate, in line with the duties under the PA 2023; monitor bidder response to validate the market approach and correctly notify a contractor when decisions are made.

Levelling the Playing Field: Incumbent Providers, Equal Treatment Under the Public Contracts Regulations 2015, and Treating Suppliers the Same Under the Procurement Act 2023

Nigel Timothy Mpemba Patel*

Award criteria; Contracting authorities; Equal treatment; Public procurement procedures

One of the fundamental obligations in public procurement law under the Public Contracts Regulations 2015 ("PCRs") was the equal treatment of economic operators, which is now an obligation to treat suppliers the same under the Procurement Act 2023 (the "Act").[1] This note reviews key case law that applies the equal treatment obligation in the context of treatment of incumbent suppliers, which, as will be explained, requires contracting authorities to strike a balance between the interests of the incumbent provider and other bidders. In practice, this means that contracting authorities must exercise care when working to neutralise incumbent provider advantage and level the playing field provided this is technically easy, economically acceptable, and does not infringe rights.[2] Any levelling measures should not be arbitrary or excessive to avoid disadvantaging the incumbent provider. It is also suggested that, while rephrasing the legal framework and provisions in this area, the Procurement Act 2023 largely retains the same substantive approach.

Procurement under the Public Contracts Regulations 2015: The Public Procurement Review Service and the treatment of incumbent suppliers in the case law

Regulation 18 of the PCRs provides for equal treatment,[3] transparency and proportionality[4]:

> *"18.—(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*
>
> *(2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.*
>
> *(3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."*

The issues raised in procurement cases concerned with the principle of equal treatment suggest that tackling incumbent provider advantage is a more common obstacle than avoiding incumbent provider

* This note is based on the essay that won the Procurement Lawyers' Association 10th Annual Rosie Choueka Memorial Essay Competition.

[1] The Act came into force on 24 February 2025 and is now the key legislation for most public procurements in England and Wales and Northern Ireland. The PCRs will continue to apply to procurements that began before this date.

[2] See Europaiki Dynamiki v Commission (T-345/03) [2008] E.C.R. II-00341 at [3], [75] and [76].

[3] Regulation 18 reflects the EU principle of equal treatment (as found in Directive 2014/24). Post-Brexit the equal treatment principle remained in UK law under the PCRs, but now the Act provides the key legislation on treating suppliers the same.

[4] Regulation 24 and 42(10) of the PCRs are also relevant to equal treatment.

disadvantage.[5] Incumbent provider advantage arises because an incumbent provider may have, or be seen to have, an advantage over other bidders by virtue of their: knowledge and experience of the contracting authority; access to information not accessible by other bidders; existing relationship with the contracting authority; and continuity (i.e., no transition or start-up costs). Evidently, the fact that an incumbent provider may have some form of advantage because of their incumbency is inevitable.[6]

The Crown Commercial Service's Public Procurement Review Service's ("PPRS") database documents concerns raised about public procurement practices in England from 2018 to April 2025.[7] The data indicates that procurement issues involve failures of contracting authorities to level the playing field for new bidders more often than disadvantaging incumbent providers.

Between January 2018 and April 2025, five entries were recorded under the specific issue "favours incumbent," with at least 17 additional entries relating to incumbent advantage recorded under other issues such as "transparency".[8] For example, one case related to a Council's procurement for domestic abuse services. A bidder was concerned that the Transfer of Undertakings (Protection of Employment) ("TUPE") Regulations 2006 applied;[9] however, no information on this was available to potential bidders. The bidder complained that this was an unfair case of incumbent provider advantage. The complaint was upheld. The Council agreed to share the necessary TUPE information with all the bidders to ensure transparency and fairness.[10] In another case, a bidder complained about a Council tender that "*raised a number of concerns regarding the procurement scope, evaluation and timescales, which [the bidder] felt favoured the incumbent*". The complaint was upheld. The Council cancelled the procurement and noted they would reissue the tender in the following months.[11]

Comparatively, there is only one entry that specifically deals with incumbent provider disadvantage.[12] In this case, a London borough ran a procurement for the provision of home care services. The borough had stated that references for the tender must be from contracts unrelated to the borough. The incumbent provider raised a concern that this could exclude them from bidding for this contract. The complaint was upheld. The borough rescinded the condition and allowed the incumbent to use the borough to provide references.

Case law establishes that bidders must be treated equally. In *SIAC Construction Ltd v County Council of the County of Mayo,*[13] the European Court of Justice (Fifth Chamber) stated:

> *"the principle that tenderers must be treated equally [...] requires that tenderers be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority."*[14]

However, the inherent *de facto* advantage that an incumbent provider may have does not permit contracting authorities to prohibit an incumbent provider from bidding.[15] When managing incumbent

5 See for example the Crown Commercial Services, "Public Procurement Review Service results - January 2018 to April 2025" (2 April 2025), *https://assets.publishing.service.gov.uk/media/682de1e5b33f68eaba95390f/PPRS-Publications-January-2018-to-April-2025.xlsx* as discussed in para.4 of this note.

6 *Europaiki* (see above, fn.2), para.70.

7 Crown Commercial Service (see above, fn.5).

8 Crown Commercial Service (see above, fn.5), entries 429, 438, 439, 668, 687 are tagged under the issue "favours incumbent". Entries include 44, 81, 121, 276, 302, 318, 379, 410, 424, 475, 474, 531, 586, 606, 608, 612 and 667 raise issues concerning incumbent provider advantage.

9 When an undertaking is transferred due to the re-tendering of a public contract, the successful bidder may be obligated to retain the incumbent's employees under the same terms of employment.

10 Crown Commercial Service (see above, fn.5), entry 439.

11 Crown Commercial Service (see above, fn.5), entry 474.

12 Crown Commercial Service (see above, fn.5), entry 38.

13 *SIAC Construction Ltd v Mayo CC* (C-19/00) EU:C:2001:553; [2001] C.M.L.R. 59. See further, A. Brown, "Award criteria under the E.C. Procurement Directives: a note on the SIAC Construction case" (2002) 2 P.P.L.R. NA25.

14 See further, A. Brown, "Award criteria under the E.C. Procurement Directives: a note on the SIAC Construction case" (2002) 2 P.P.L.R. NA25, summary para.1 and see also paras 33–34.

15 *Fabricom SA v Belgium* (C-21/03 and C-34/03) EU:C:2005:127; [2005] 2 C.M.L.R. 25 at [36].

provider advantage, contracting authorities must exercise care to level the playing field while not disadvantaging the incumbent provider; this is the necessary balancing exercise.

The key EU case in this area is *Europaiki Dynamiki v Commission.*[16] In this case the successful tenderer was part of a consortium that included the incumbent provider and the successful tenderer intended to use the incumbent provider as a subcontractor.[17] The European Court of First Instance (Third Chamber) acknowledged that the successful tenderer had an inherent advantage by virtue of their connection to the incumbent provider.[18] A failed tenderer challenged two equal treatment related aspects of the tendering procedure.

First, the failed tenderer challenged the Commission's tendering specification that the first three months of the new contract would be an unpaid running-in period. The failed tenderer argued that the unpaid running-in period disadvantaged all tenderers financially, except the successful tenderer who did not need to include the unpaid running-in period costs in their offer because of their connection with the incumbent provider.[19] The Court held that the Commission did not need to waive the requirement for an unpaid running-in period to neutralise the successful tenderer's advantage. Contracting authorities must strike a balance between the interests involved. The Court noted that equal treatment does not mean contracting authorities have to neutralise incumbent provider advantage completely.[20] It must do so only to the extent that it is technically easy to effect, economically acceptable, and does not infringe on the rights of the incumbent provider.[21] The Court held that in this case it would be economically unreasonable to waive the requirement for an unpaid running-in period on the ground that one of the tenderers was advantaged by virtue of their connection with the incumbent provider.

Second, the failed tenderer claimed they lacked certain technical information that the successful tenderer had by virtue of their connection to the incumbent provider, leading to unequal treatment.[22] The Court found that this early access to information gave the successful tenderer an advantage, and providing the information to all tenderers simultaneously could have resulted in a different outcome without prejudicing the incumbent provider or any other tenderer. There was no technical or economic reason not to provide this information in a way that would help to secure a more level playing field.[23]

This case provides the foundational balancing approach that has been affirmed in subsequent cases regarding incumbent provider advantage.[24] There is no obligation on a contracting authority to neutralise the advantage of an incumbent provider in all circumstances. However, a contracting authority should take technically easy and economically acceptable measures to level the playing field that are not "arbitrary or excessive".[25]

[16] *Europaiki* (see above, fn.2). See further, P. Braun, "Addressing the competitive advantage of an incumbent provider: Evropaiki Dynamiki—*Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* (Case T-345/03)" (2008) 4 P.P.L.R. NA140.

[17] See further, P. Braun, "Addressing the competitive advantage of an incumbent provider: Evropaiki Dynamiki—*Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* (Case T-345/03)" (2008) 4 P.P.L.R. NA140, para.26.

[18] See further, P. Braun, "Addressing the competitive advantage of an incumbent provider: Evropaiki Dynamiki—*Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* (Case T-345/03)" (2008) 4 P.P.L.R. NA140, para.70.

[19] See further, P. Braun, "Addressing the competitive advantage of an incumbent provider: Evropaiki Dynamiki—*Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* (Case T-345/03)" (2008) 4 P.P.L.R. NA140, para.52.

[20] See further, P. Braun, "Addressing the competitive advantage of an incumbent provider: Evropaiki Dynamiki—*Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* (Case T-345/03)" (2008) 4 P.P.L.R. NA140, para.73.

[21] See further, P. Braun, "Addressing the competitive advantage of an incumbent provider: Evropaiki Dynamiki—*Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* (Case T-345/03)" (2008) 4 P.P.L.R. NA140, paras 3, 75 and 76.

[22] See further, P. Braun, "Addressing the competitive advantage of an incumbent provider: Evropaiki Dynamiki—*Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* (Case T-345/03)" (2008) 4 P.P.L.R. NA140, paras 89–96.

[23] See further, P. Braun, "Addressing the competitive advantage of an incumbent provider: Evropaiki Dynamiki—*Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission* (Case T-345/03)" (2008) 4 P.P.L.R. NA140, paras 157, 160, 180 and 204.

[24] *Amplexor Luxembourg Sarl v European Commission* (T-211/17) EU:T:2018 392 (Translated French version) and Case *Proof IT SIA v European Institute for Gender Equality* [2018] EU:T:2018:682. See also *Bromcom Computers Plc v United Learning Trust* (T-10/17) [2022] EWHC 3262 (TCC). See further, P. Henty, "Transparent scoring, clarifications and amendments to tenders, electronic communications and 'sufficiently serious breach'*: Bromcom Computers Plc v United Learning Trust*" (2023) 3 P.P.L.R. NA130.

[25] See *Amplexor* (see above, fn.24) and a helpful discussion of this case in *Abbvie Ltd v NHS Board* [2019] EWHC 61 (TCC) at [51].

The "arbitrary or excessive" test comes from the decision in *Amplexor Luxembourg Sarl v European Commission.*[26] In this case, the contracting authority allocated three per cent of funding for takeover costs to benefit new tenderers, compared to 0.3 per cent for Amplexor, the incumbent provider. Amplexor argued that this amounted to a breach of the principle of equal treatment. The Court dismissed the appeal and held that the differential funding was lawful. The mere existence of differential treatment between incumbent providers and non-incumbent providers did not give rise to a breach of equal treatment. The test was whether that differential treatment was "arbitrary or excessive".[27] The differing financial adjustments were necessary steps taken to neutralise the incumbent provider's advantage that did not infringe the incumbent provider's rights.

Accordingly, when contracting authorities consider to what extent differential treatment is permissible to neutralise incumbent provider advantage, they must ensure the approach they take does not create an arbitrary or excessive disadvantage for the incumbent provider. The case law shows that when ensuring legal compliance under the PCRs care is needed to balance the interests of the incumbent provider and the other tenderers.

Practical measures: how to level the playing field without disadvantaging the incumbent provider

Putting this into practice, treating bidders equally involves contracting authorities taking actions such as implementing measures with the incumbent provider, including ethical wall arrangements. In this context, ethical walls are internal arrangements designed to prevent information obtained through the incumbent's existing role from being shared with those involved in preparing the bid. They may include the separation of personnel. For example, where one division of an incumbent supplier is involved in providing a service to the contracting authority and another division bids for a procurement.[28] Ethical walls may also include restrictions on access to documents and systems, confidentiality obligations, and other internal controls intended to ensure that competitively useful information is not passed to the bidding team. Their purpose is to limit the extent to which the incumbent's prior involvement gives rise to a competitive advantage.[29]

It also involves providing full access to necessary information to all bidders at the same time. Further, it may require allowing for transitional costs of non-incumbents to be offset through funding or other means where this is technically easy to effect. Treating bidders equally also involves avoiding overly detailed or technical specifications, particularly where such specifications may in practice favour the incumbent or another bidder with particular prior knowledge or experience. Finally, it requires providing reasonable timescales so that all bidders have enough time to submit tenders.

The Procurement Act 2023

Subsections 12(2) and (3) of the Act are the new corresponding provisions to reg.18(1) of the PCRs. They state that:

> *"(2) In carrying out a covered procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment."*

[26] See *Amplexor* (see above, fn.24) and a helpful discussion of this case in *Abbvie Ltd v NHS Board* [2019] EWHC 61 (TCC) at [51].
[27] *Amplexor* (see above, fn.24).
[28] The practicality of such arrangements will depend on the structure and resources of the bidder, for example, small businesses may lack sufficient personnel to operate separate teams.
[29] See further, S. Treumer, "Technical dialogue and the principle of equal treatment - dealing with conflicts of interest after Fabricom" (2007) 2 P.P.L.R. 99.

> *"(3) If a contracting authority considers that different treatment is justified in a particular case, the authority must take all reasonable steps to ensure it does not put a supplier at an unfair advantage or disadvantage."(emphasis added)*

The Act adopts a different framework to the PCRs in so far as the obligation to treat suppliers the same is now an "objective". Previously, under reg.18(1) of the PCRs, the obligations of equal treatment, transparency and proportionality were described as "principles" and were mandatory requirements expressed through the directive "shall".[30] Under the Act,[31] the objectives differ in their obligatory weight; some require contracting authorities to "have regard to" them[32] while others require that contracting authorities "have regard to the importance of" them.[33]

Notably, the objective to treat suppliers the same is expressed as something the contracting authority "must" do. The objective not to put suppliers at an unfair advantage or disadvantage, when differential treatment is justified, is expressed as an objective the contracting authority "must take all reasonable steps to" reach. While there is a variation in the wording between the PCRs principle of *equal* treatment and the *same* treatment objective, they are both mandatory and so are not significantly different from each other. To phrase this differently, Rosie Choueka's blog invites readers to "consider the counterfactual," a practice she stated she always employed as a lawyer.[34] Applying this mindset, if the Act had stated that the same treatment objective was only subject to the obligation to have regard to it, similar to some other objectives, this would have indicated a different approach in this area.

Section 12 of the Act leaves behind the PCRs' "equal" treatment wording and introduces the new wording of "same" treatment. It could be suggested that the different wording indicates a substantive difference in approach between the PCRs and the Act. However, this is a tenuous proposition, as *equal* treatment requires identical situations to be treated in the *same* way and for different situations not to be treated in the same way. This position is supported in *Fabricom SA v Belgium* which, when considering equal treatment, states that:

> *"it is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."*[35]

Putting this into practice, a 2024 government manual on public procurement and the obligation to treat suppliers the same in the Act notes that:

> *"where an incumbent supplier is bidding again for its replacement contract, (and so will inevitably have an advantage over other tenderers due to their experience in the current contract) the contracting authority must consider how this incumbent advantage can be managed to ensure all suppliers have an equal footing to win the replacement contract. In this case, different treatment intended to neutralise the advantage enjoyed by the incumbent may be justified, and can be achieved for example by providing additional information on the contract specification. However, a lower risk alternative would be to provide the additional information to all suppliers (ie including the incumbent)."*

[30] See S. Arrowsmith, "The conceptual reorientation of procurement regulation in the UK: the new objectives of the post-Brexit regulatory regime and the enhanced role of hard law as a domestic policy tool" (2024) 4 P.P.L.R. 161.

[31] Transparency and proportionality are not included as objectives under s.12 of the Act. However, they are embedded throughout the Act.

[32] For example, the fact that small and medium-sized enterprises may face particular barriers to participation and whether such barriers can be removed or reduced.

[33] For example, delivering value for money; maximising public benefit; sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions; and acting, and being seen to act, with integrity.

[34] The individual to whom the Procurement Lawyers' Association Annual Rosie Choueka Memorial Essay Competition was established in memory of. See Rosie Choueka "Cancer, Conservatism and the counterfactual" (11 April 2015), *https://www.secondary1st.org.uk/cancer-conservatism-and-the-counterfactual/*.

[35] *Fabricom* (see above, fn.15) para.27.

Accordingly, the well-known equal treatment concepts discussed above under the PCRs may remain relevant under the Act, but that cannot simply be assumed. As Arrowsmith observes, "*[t]he fact that the Act was enacted to give effect domestic objectives, as well as the absence of obligations under EU law, may result in a different interpretation from that which applied to similar provisions transposing EU law*".[36] Although the legal language has changed, and the relevant concepts now fall to be interpreted within a different system of legal rules, this does not necessarily mean that there is a marked difference in the present instance. The PCRs' equal treatment principles and case law are likely to remain relevant under the Act.

The Government Commercial Function's *Procurement Act 2023 Guidance: Covered Procurement Objectives* is also instructive.[37] It appears to use the terms "equal" and "same" interchangeably.[38] Its guidance on incumbent supplier advantage reflects the case law discussed above in respect of reg.18 of the PCRs. Furthermore, it provides two helpful examples of where same treatment is not required:

> *"For example, if a supplier is a new entrant to the market and does not have the necessary certification in relation to a required standard, the contracting authority could allow it to progress on the basis that certification is achieved and demonstrated by the time of contract award (provided this is set out in the tender documents). Even if different treatment is justified, contracting authorities must do what they can to make sure it is not unfair. In this example, it would be an unfair advantage to exempt the supplier from the requirement to achieve the certification.*
>
> *"Another supplier might only be able to communicate remotely whereas all other suppliers can take part in face-to-face presentations. The remote supplier is being treated differently, but the contracting authority must take all reasonable steps to ensure it is not being put at an unfair advantage or disadvantage by, for example, ensuring that all suppliers receive the same information and that the face-to-face suppliers do not have informal access to the contracting authority outside of the presentations that would not be available to the remote supplier.*[39]

To the extent that the Act's new wording introduces a slight change, this note posits that the above examples indicate this shift is intended to clarify that contracting authorities possess the flexibility to adapt their procurement processes. This is particularly relevant in situations involving small and medium-sized enterprise bidders who may, for example, lack the necessary certification and can only communicate remotely. Adjustments in such a context can now be made with reduced concern that they will be seen as "narrowing competition" or "unduly favouring" certain bidders (as this wording of reg.18(2) and (3) of the PCRs is not replicated in the Act).

[36] Arrowsmith, op.cit. 4.3.

[37] Government Commercial Function "Procurement Act 2023 Guidance: Covered Procurement Objectives" (December 2024), *https://assets.publishing.service.gov.uk/media/6753121720bcf083762a6d23/Guidance_-_Covered_Procurement_Objectives_FINAL.pdf*.

[38] Government Commercial Function "Procurement Act 2023 Guidance: Covered Procurement Objectives" (December 2024), *https://assets.publishing.service.gov.uk/media/6753121720bcf083762a6d23/Guidance_-_Covered_Procurement_Objectives_FINAL.pdf*, see for example paras 4,9, 12, 23, 38, and 42 and the sub-heading titled "Direct requirements: Equal treatment" on p.7.

[39] Government Commercial Function "Procurement Act 2023 Guidance: Covered Procurement Objectives" (December 2024), *https://assets.publishing.service.gov.uk/media/6753121720bcf083762a6d23/Guidance_-_Covered_Procurement_Objectives_FINAL.pdf*, see for example paras 4,9, 12, 23, 38, and 42 and the sub-heading titled "Direct requirements: Equal treatment" on p.7.

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