

# **EU Public Procurement The Revision of The Directives**

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# The Porosity of the Public Procurement Directives

*Exhaustive harmonisation: the enemy within*

*The treatment of porosity:  
the principle of transparency*

## Review of EU Public Procurement Directives

- Simplification
- Modernisation
- Link with 2020 EU Growth Strategy

# What will change?

## **Codification of administrative laws**

- ▶ Public sector rules
- ▶ Utilities rules
- ▶ Remedies

## Public sector procurement

- ▶ Eligibility of bodies governed by public law to tender
- ▶ Joint and Centralized procurement
- ▶ Official list of contractors
- ▶ The competitive dialogue
- ▶ Framework procurement
- ▶ Electronic Procurement

## Utilities procurement

- ▶ Remit and extent of coverage
- ▶ Special or Exclusive rights
- ▶ Affiliated undertakings
- ▶ Competitive markets

## Remedies Directive

- ▶ Clear divide between pre-contractual and post-contractual stages
- ▶ Balance between effective review of public contracts and need of efficient public procurement
- ▶ Standstill of contract conclusion, including direct awards
- ▶ Communication requirements
- ▶ Refocus of Corrective Mechanism
- ▶ Repeal of Attestation and Conciliation
- ▶ Monitoring requirements
- ▶ EEA coverage

# What will be achieved?

## **Simplification**

- ▶ Dichotomy of public and utilities procurement
- ▶ Legal certainty and legitimate expectation
- ▶ Legal efficiency
- ▶ Compliance discipline

## **Modernization**

- ▶ Electronic procurement
- ▶ Framework procurement

## **Flexibility**

- ▶ Disengagement of utilities from procurement rules

# Increase Cross-border Competition

- ▶ **Transparency**
- ▶ **Tradability of public contracts**

# Facilitation of PPPs

- ▶ Concessions
- ▶ White Paper on PPP

# Price Reduction

- ▶ EU Directives apply



- ▶ 10% to 20% lower prices
  - Scale economies
  - Aggregation rules
  - Commercialism of contracting authorities

# Themes for Review

- ▶ In- House arrangements
- ▶ Sub-dimensional procurement
- ▶ Non-priority Service Contracts
- ▶ Service Concessions

# In-house arrangements

The conditions for inapplicability of public procurement rules

C-107/98, *Teckal*

- CA exercises over an entity a control which is similar to that which it exercises over its own departments (control condition)

- that entity carries out the essential part of its activities with the controlling local authority or authorities (activity condition)

The in-house exemption also applies to concessions and Annex B-services

C-458/03, *Parking Brixen*

C-340/04, *Carbotermo*

# In-house arrangements in procurement

- ▶ Dependency and similarity of control
  - C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 48.
  - C295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado*, [2007] ECR I-2999, paragraph 65.
- ▶ Public-public cooperation → no similarity of control BUT remit of such relation to deliver a public task or service specified under Community law; no intention to circumvent public procurement rules; not pecuniary contractual relation
  - C-480/06, *Commission v Germany*, [2009] ECR I-04747
- ▶ Inter-municipal co-operative societies whose members are contracting authorities and a jointly controlled entity
  - C-324/07, *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29.

# Sub-dimensional contracts

- ▶ Below threshold contracts are excluded from the scope of the public procurement Directives but liable to compliance with the fundamental rules of the Treaty.
  - Transparency
  - Non-discrimination
    - C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 and 61.
    - C-59/00 *Vestergaard* [2001] ECR I-9505.
    - C-6/05 *Medipac-Kazantzidis AE v Venizelio-Pananio (PE.S.Y. KRITIS)*, [2007] ECR I-4557.
    - C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 and 17.
    - C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46 to 48.
    - C-264/03 *Commission v France* [2005] ECR I-8831, paragraph 32.
    - C-147/06 and C-507/03 *Commission v Ireland* [2007] ECR I-0000, paragraph 29.
    - C-412/04 *Commission v Italy* [2008] ECR I-0000, paragraph 65.
    - C-148/06, *SECAP SpA and Santorso Soc. coop. arl*

## CAVEAT

- ▶ Certain cross-border interest
  - C-507/03 *Commission v Ireland* [2007] ECR I-0000, paragraph 29,
  - C-412/04 *Commission v Italy* [2008] ECR I-0000, paragraph 65.
  - C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*, [2007] ECR I-12175.

# Services in Annex I B of the Public Sector Directive

- ▶ Requirements
  - Define the technical specifications by reference to national standards implementing European standards
  - Reference of technical specifications in the general or contractual documents
  - Notice of the results of the award procedure to the Publications Office
    - C-507/03, *Commission v Ireland*, (An Post) [2007] ECR I-9777.
    - C-231/03 *Coname* [2005] ECR I-7287, paragraph 17.

## Caveat

- ▶ If certain cross border interest
- ▶ Then fundamental EU principles such as transparency and non-discrimination apply

# Service concessions as public contracts

- ▶ Consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment
- ▶ Concession holder assumes the risk of operating the services in question
  - C-231/03, *Consortio Aziende Metano (Coname). v. Comune di Cingia de' Botti* [2005] ECR I-7287.
  - C-382/05 *Commission v Italy* [2007] ECR I-6657, paragraph 34.
  - C-437/07 *Commission v Italy* [2008] ECR I-0000, paragraph 29.
  - C-206/08 *WAZV Gotha v. Eurawasser Aufbereitungs* [2009] ECR I-8377.
- ▶ Concession services are excluded from the scope of public procurement Directives
  - C-324/98 *Telaustria and Telefonadress*, [2000] ECR I-10745.

## *Caveat*

- ▶ The fundamental principles of the Treaty, in general and, in particular, the principle of non-discrimination on the ground of nationality and the principle of transparency apply

## *Requirements*

- ▶ a degree of competitiveness in the award of such contracts
- ▶ a review process of the award procedure