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## The PPA and the EU Directives

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# Issues

- The transposition method of the directives in the new PPA
  - The characteristics of the regulation
  - The structure of the regulation
- The influence of EU law on changes in legislation
  - Conflict of interest
  - Rearrangement of concepts: subcontractor, certification of suitability and involving a third entity in the certification of suitability
  - PPP in the new PPA
- Amended procedural rules in EU procedures
- Exchange of views



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## The transposition method of the directives - the characteristics of the regulation

Directives 2004/18/EC, 2004/17/EC, 2007/66/EC in the PPA and in the Implementing Decrees

Directive 2009/81/EC in separate Decrees (the part pertaining to remedies may be integrated in the PPA)

The directives coordinate → the transposition method is very different in the different MSs: practically only the provisions of the directives or numerous detailed procedural rules

New PPA assigns a more important role to the basic principles and the governing case law

The objectives of the national law making process are similar to the objectives of the EU modernization (support SMEs, alleviate administrative burden, simplification, better validation of other legal political objectives) + domestic objectives: action against "debt-chains" simplification of the text of the legislation

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## The transposition method of the directives - the structure of the regulation

- Need for a new structure - the course of the procedures be more traceable in the regulation: setting of general procedural rules
  - Regulated on decree level:
    - Certifications to be submitted in relation to suitability and grounds for exclusion
    - Determination of technical specifications
    - Specific procedural rules pertaining to entities acting in the utilities sector
    - Detailed rules for public works (direct payment in it)
    - Administration service fee, penalty and ban
    - Notices and annual statistical summary
    - Rules concerning qualified tenderers, list of official public procurement consultants
    - Authorization to regulate in detail social and environmental aspects
    - Issues currently regulated in a Decree (centralized public procurement, design contest, electronic procedural acts)
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## The influence of EU law on changes of legislation

Provisions amended on the bases of the case law of the ECJ:

- Concept of concession
- Body governed by public law
- *In-house*
- Conflict of interest
- Possible changes in the negotiated procedure
- Amendment of contracts
- Duration of contract may not be disproportionate
- National procedures



## Conflict of interest

- No automatic, defined cases of conflict of interest, the criteria is the distortion of competition
- Participation in the procedure may result in the distortion of competition
- C-21/03, C-34/03.
- C-213/07.

## Certification of suitability together with a third entity - modification of concepts

The new PPA does not provide for a separate definition of the entities who may be involved in the certification of suitability and contribution to the certification of suitability is not linked to the status of subcontractor - no need to separate it from the subcontractor

Which are the requirements of the Act in order to avoid abuses? Data related to third entity must actually confirm the suitability of the tenderer:

- The presented resources will be actually employed by the tenderer in the course of the performance of the contract
- the things presented for the certification of suitability may not be actually made available
  - Reference
  - Certain cases of financial capability → guaranteeing

## PPP in the new PPA

*In-house* rules are included differently in the legislation of MSs: no separate legislation or in general the Teckal criteria or specific elements based on ECJ case law → in PPA the latter option remains i.e. more rigid regulatory method

Rules made more accurate on the basis of ECJ case law, common *in-house* organisation

Hamburg case is not transposed in the PPA through specific rules

Transfer of a task in public administration: except where the provision of a public task is transferred by a contracting authority (classical sector) to another contracting authority (classical sector) in such a way that the latter executes the provision of the transferred task completely independently from the first contracting authority, on its own responsibility, without any lucrative purpose



## Amended procedural rules, which exist in EU procedures as well

- Aggregation
- Rules pertaining to subcontractors ( $\emptyset$  separation of 10 %)
- There is no need to indicate in advance the exact day of sending the results or concluding the contract as the validity period of the tender determines the time limit for evaluation of tenders
- announcement of results and information notice concerning performance cease to exist
- Supply of missing information and request for provision of information
- Invalidity (not for formal reasons)
- Lack of success
- Increase accuracy of rules pertaining to certain types of procedure (negotiated procedure, competitive dialogue, framework agreement procedure)



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**Thank you for your attention!**