



Public Procurement Seminar  
Online, 10-11 June 2021  
CJEU Case Law: core notions & principles  
and exceptions  
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[AD/2021/04]

# Agenda

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## 1. Legal framework

- Recent CJEU case law:
  - Scope of application
  - Exemptions from the scope
  - Application of TFEU & general principles

## 2. Applicability

## 3. Tender process

- Recent CJEU case law
  - Characteristics of procedure type
  - Obligations of contracting authorities
  - Exclusion of tenderers



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# Legal framework

Focus on legislation at the European Union level



# Introduction

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When realizing a public procurement project following legislation has to be observed:

1. EU primary legislation
2. EU secondary legislation
3. National legal framework

# EU primary legislation

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- Unlike competition law & state aid law, there are **no explicit provisions** on public procurement in the Treaty on the Functioning of the EU (**TFEU**)
- Procurement rules are derived from the TFEU on the “four freedoms”, in particular those relating to **free movement of goods** (Art. 34 TFEU) and **freedom to provide services** (Art. 56 TFEU) / **freedom of establishment** (Art. 49 TFEU).

# EU primary legislation (contd)

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- Freedom of establishment, Art. 49 TFEU
- Freedom of services, Art. 56 TFEU
- Non-discrimination, Art. 18 TFEU
- Principles of transparency, equal treatment, proportionality and mutual recognition have to be observed, see Arts. 49 and 56 TFEU.

# EU secondary legislation

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- EU Procurement law
- EU State Aid law
- EU Competition law

# Four different regimes

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## **Public regime (Directive 2014/24/EU)**

- Governmental and other public bodies

## **Utilities regime (Directive 2015/25/EU)**

- Water, energy, transport, and post

## **Concession regime (Directive 2014/23/EU)**

- Award of concessions, covering both concessions awarded by entities that are subject to the public regime, and concessions awarded by entities that are subject to the utilities regime

## **Defence and security contract (Directive 2009/81/EC)**



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# Recent ECJ case law

Re four sectoral Directives & exclusions



# C-796/18 *ISE v Stadt Köln*

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## Issue

- Interpretation of Art. 12(4) Dir. 2014/24: no tender procedure for contracts btw contracting authorities under certain conditions

ECJ held re 1<sup>st</sup> question:

- terms "public contract" & "contract", per Arts. 2(1)(5) & 12 Dir. 2014/24 not distinct concepts
- a "public contract" would exist if the referring court were to conclude that the arrangement between the parties was synallagmatic, in the sense that it was entered into for consideration

# C-796/18 *ISE v Stadt Köln*(contd)

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ECJ also held re second question:

- Art.12(4)(a) requires a commonality of objectives, not necessarily joint supply of same public service
- Terms "public contract" & "contract" per Arts. 2(1)(5) & 12 Dir. 2014/24 not distinct concepts
- Per Art.12(4) & recital 33: cooperation in question might include all types of activities related to the services performance & responsibilities assigned to or assumed by the participating authorities, including activities incidental to a public service, provided they contribute to achieving the public service mission that is the subject of the cooperation

# C-796/18 *ISE v Stadt Köln*(contd)

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ECJ also found re third question:

- Legislature not intended to depart from the ECJ's jurisprudence on the existence of a condition that the cooperation not result in a private party being placed in a position of advantage
- Art.12(4) need comply with Art.18 Dir. 2014/24
- When a contracting authority intends to award a public contract for the adaptation, maintenance or development of software acquired from a third party, it must ensure that sufficient information is made available to ensure that the tender process is transparent and treats interested parties in an equal and non-discriminatory manner

# C-796/18 *ISE v Stadt Köln*(contd)

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## Comments:

- Helpful clarification that concept of a "contract" under art.12(4) is not distinct from that of a "public contract" under art.2(1)(5)
- AG on this point—that type of contract under art.12(4) more accurately described as an "alternative" to a public contract — arguably inconsistent with the general scheme of the "exclusions" in Section 3 of the Directive
- ECJ's conclusions re 2<sup>nd</sup> question = unsurprising and confirm that the legislature, rather than merely codifying the case law predating the Directive, has provided for a more generous exclusion than was previously the case.
- Welcome confirmation re 3<sup>rd</sup> question

# C-264/18 – *P.M.*

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## Issue

- Does Directive 2014/24 lawfully exclude (certain) legal services and arbitration and conciliation services?

## ECJ held:

- By excluding these specific services from the Directive:
  - the EU considered national level is appropriate level to determine whether these services should be subject to public procurement rules so principle of subsidiarity not violated, a contrario, a good example of its application
  - & thus not requiring Member States to subject those services to public procurement rules, this Directive not automatically adversely affect the TFEU freedoms, in particular freedom of establishment (Art. 49 TFEU) and freedom to provide services (Art. 56 TFEU)

# C-264/18 – *P.M.* (contd)

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ECJ also concluded:

- (1) arbitration and conciliation services; (2) certain legal services; & (3) legal services involving activities concerned with the exercise of official authority: not comparable with services within scope of Dir. 2014/24 thus EU legislature's margin of discretion to exclude these services without violating the principle of equal treatment
- In relation to (1): arbitrators and mediators must always be accepted by all parties to a dispute and designated by them by common accord; so a public body cannot impose the successful tenderer of a public procurement procedure on the other party as the common arbitrator or mediator
- In relation to (2): relationship of *intuitu personae* between the lawyer and their client characterised by free choice of representative & relationship of trust:
  - making it difficult to provide an objective description of the quality expected of the services that the lawyer would have to provide
  - These rights could be threatened by a public procurement requirement for the contracting authority to provide details of the conditions for the award of such contract and the publishing requirements that must be given to such conditions.

# C-264/18 – *P.M.* (contd)

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ECJ also stated in relation to (3):

- Such services excluded from Arts. 49 & 56 TFEU
- Difference with the services falling within the scope of the Directive: these excluded services directly or indirectly rendered in the exercise of public authority and in functions, the purpose of which is to safeguard the general interests of the State or other public authorities

Comments:

- interesting to note ECJ decided based on the comparability test and not on evaluation as to whether difference in treatment between comparable services, which was objectively justifiable and proportional
- ECJ's findings here in line with its previous case-law in different matters, in which it recognised the uniqueness and individuality associated with the exercise of the profession of a lawyer i.e. their professional rules, independence, & confidentiality, & trust relationship with the client
  - ECJ's findings here now “completed” its previous reasoning

# Case C-260/17 *Anodiki*

## *Services EPE*

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### Issues:

- Exemption for certain employment contracts but reliance upon such exemption subject to judicial review

### ECJ held:

- notion of ‘employment contracts’, referred to in Art. 10(g) of Dir. 2014/24, covers fixed-term, individual labour contracts concluded with persons selected on the basis of objective criteria, such as the duration of unemployment, previous experience and the number of minor dependent children they have.
- The provisions of Dir. 2014/24, Arts. 49 and 56 TFEU, principles of equal treatment, transparency and proportionality, and Arts. 16 and 52 of the EU Charter of Fundamental Rights do not apply to a public authority’s decision to make use of employment contracts such as the above in order to perform certain tasks falling within its public interest obligations.
- A contracting authority’s decision to rely on above exemption based on belief that those contracts do not fall within the scope of Dir. 89/665 may be challenged under that provision by an economic operator with an interest in participating in a public procurement procedure with the same purpose as those contracts and who considers that those contracts do fall within the scope of that directive.

# Case C-124/17 *Vossloh Laeis GmbH*

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## Issue:

- Exclusion from procurement due to cartel participation

## ECJ held:

- Where an economic operator engaged in conduct falling within the ground for exclusion in Art. 57(4)(d) of Dir. 2014/24 & penalised by a competent authority, the maximum period of exclusion calculated from the date of that authority's decision.
- It is lawful for Member States, under Art. 80 of Dir. 2014/25 read in conjunction with Art. 57(6) of Dir. 2014/24, to require a bidder, who is potentially subject to exclusion, to confirm the details of any offences or misconduct to a contracting authority to prove the re-establishment of its reliability, although only to the extent strictly necessary.

# Four different regimes (contd)

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**All four regimes directives are supplemented by EU and national rules on enforcement:**

- Remedies Directive 89/665/EEC
  - As amended by Directive 2007/66/EC and now by Art. 46 of the new Directive 2014/23/EU on Concessions
  - Applies only to tender procedures falling in its scope – nonetheless common principles such as principles of equivalence & effectiveness also apply
- Remedies and procedural law concerning breach of EU public procurement law are to be considered matters for the national legislator, according to the principle of national and remedial autonomy.

# Four (and a half) different regimes...

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- But in addition:
  - The underlying “Treaty principles” (transparency, non-discrimination, equal treatment, proportionality, mutual recognition) apply where:
    1. Contract is awarded by an “emanation of the state”;
    2. Contract may be of “cross-border interest”; and
    3. No Treaty exemption applies.
- Underlying TFEU principles apply even when none of the specific regimes do (CJEU, 7.12.2000, C-324/98 - *Telaustria*).

# Case C-324/98 *Telaustria*

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The CJEU held, however:

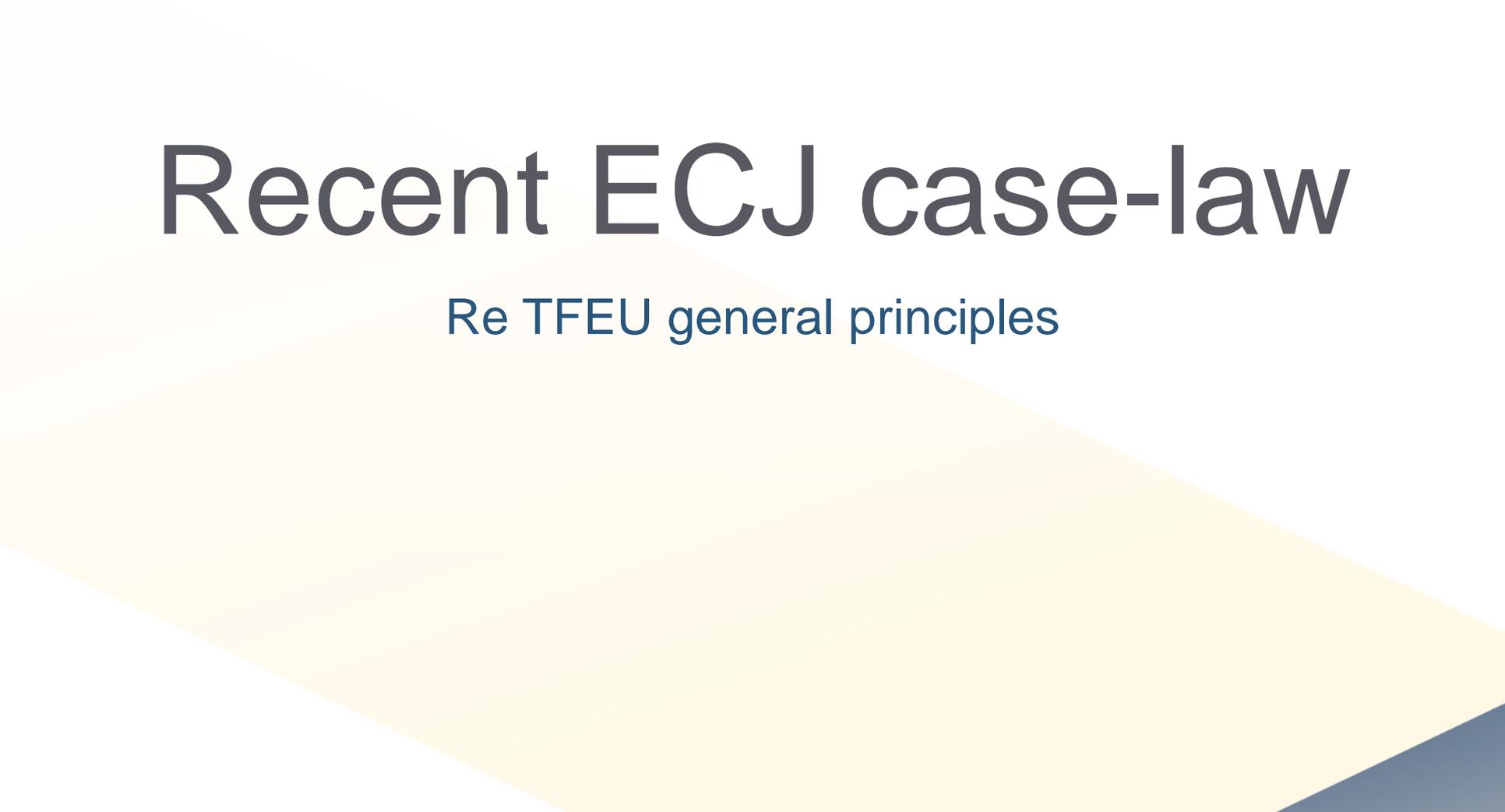
- **Art. 56 TFEU** implies an **obligation of transparency** in awarding government contracts, *which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed*
- General principles apply:
  - Transparency
  - Non-discrimination/Equal treatment
  - Mutual recognition
  - Proportionality.



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# Recent ECJ case-law

Re TFEU general principles



# C-309/18 *Lavorgna*

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## Issue

- Infringement of principles of judicial certainty, equal treatment & transparency by requiring provision of information in a tender, on pain of exclusion, without permitting the tenderer an opportunity to regularise its position

## ECJ held:

- Equal treatment: tenderers given the same opportunities in formulating the terms of their tenders & subject to the same conditions in the submission of their tenders
- Transparency:
  - Aim: preventing the risk of favouritism and arbitrariness by contracting authority
  - all the conditions and processes formulated in a clear, precise & unequivocal manner in the contract notice or in the specification, so as to: (1) permit all reasonably well-informed and diligent tenderers to understand them in the same way; and (2) enable the contracting authority to verify effectively whether the offers made by the tenderers meet the specified criteria

# C-309/18 *Lavorgna* (cont'd)

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ECJ concluded

- The principles of judicial certainty, equal treatment and transparency not prohibit a national regulation requiring provision of information in a tender, such as separately identified workforce costs, on pain of exclusion and without permitting the tenderer an opportunity to regularise its position
- This is permitted provided that both the condition and the possibility of exclusion are clearly prescribed in procurement documents or national regulations which are explicitly referred to in the former
- However, if the tender documents do not allow tenderers to separately identify these costs in their tenders then the principles of transparency and proportionality permit the possibility of a tenderer regularising its situation and providing relevant information within a time period specified by the contracting authority

# Case T-292/15 *Vakakis v Commission*

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## Issue:

EC's infringement of the principles of equal treatment, sound administration and protection of legitimate expectations following allegations of conflicts of interest

## ECJ held:

- 2 unlawful acts of maladministration committed:
  1. No adequate checks following statements made by Company A & Mr P; &
  2. Failure to properly investigate the alleged conflict of interests
- Inadequate investigation so infringement of the requirement to ensure equal treatment of tenderers & obligation to pay damages to the applicant for loss of opportunity and the costs of tendering.

# Case T-292/15 *Vakakis v Commission* (contd)

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ECJ also concluded:

- In all tender processes, contracting authority required to determine and verify whether there are real risks of any occurrence that might distort the competition.
- If such risk arises contracting authority must then act with due diligence based on all relevant information, to ensure tenderers all treated equally or expelled from the process where necessary.

# Case T-10/17 *Proof IT*

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## Issue:

- Unequal treatment where tenderer has advantage acquired from performance of previous contract?

## General Court held:

- Award criteria clearly formulated allowing all reasonably well-informed tenderers exercising ordinary care to understand their precise scope and interpret them in the same way &, thus, to submit their tenders.
- applicant not made use of the possibility to request clarification on any of the points and thus no complaint before the court that a criterion was vague

# Case T-10/17 *Proof IT* (contd)

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General Court also found:

- even if incumbent enjoyed an advantage = not a result of contracting authority's conduct eg unfair marking or other bias
- “inevitable” that an incumbent will enjoy an inherent *de facto advantage* where contract's to be re-procured & incumbent decides to bid.
- Incumbent's exclusion = only way to nullify advantage
- but this drastic action not to be expected as amount to discrimination against the incumbent and itself = breach of the TFEU principles.

# Case T-10/17 *Proof IT* (contd)

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## Comments:

- equal treatment principle = not a mandate for dealing with all bidders in an identical manner.
- need to treat bidders, who are in the same situation in the same way, and bidders who are in different situations, differently, eg incumbent and a new potential supplier in relation to the procurement and in terms of their relationship with the contracting authority.
- While authorities must always guard against any overt actions or decisions favouring the incumbent, equal treatment principle not breached merely for crediting the incumbent with knowing *what it knows* as a result of its prior contractual relationship with the contracting authority.

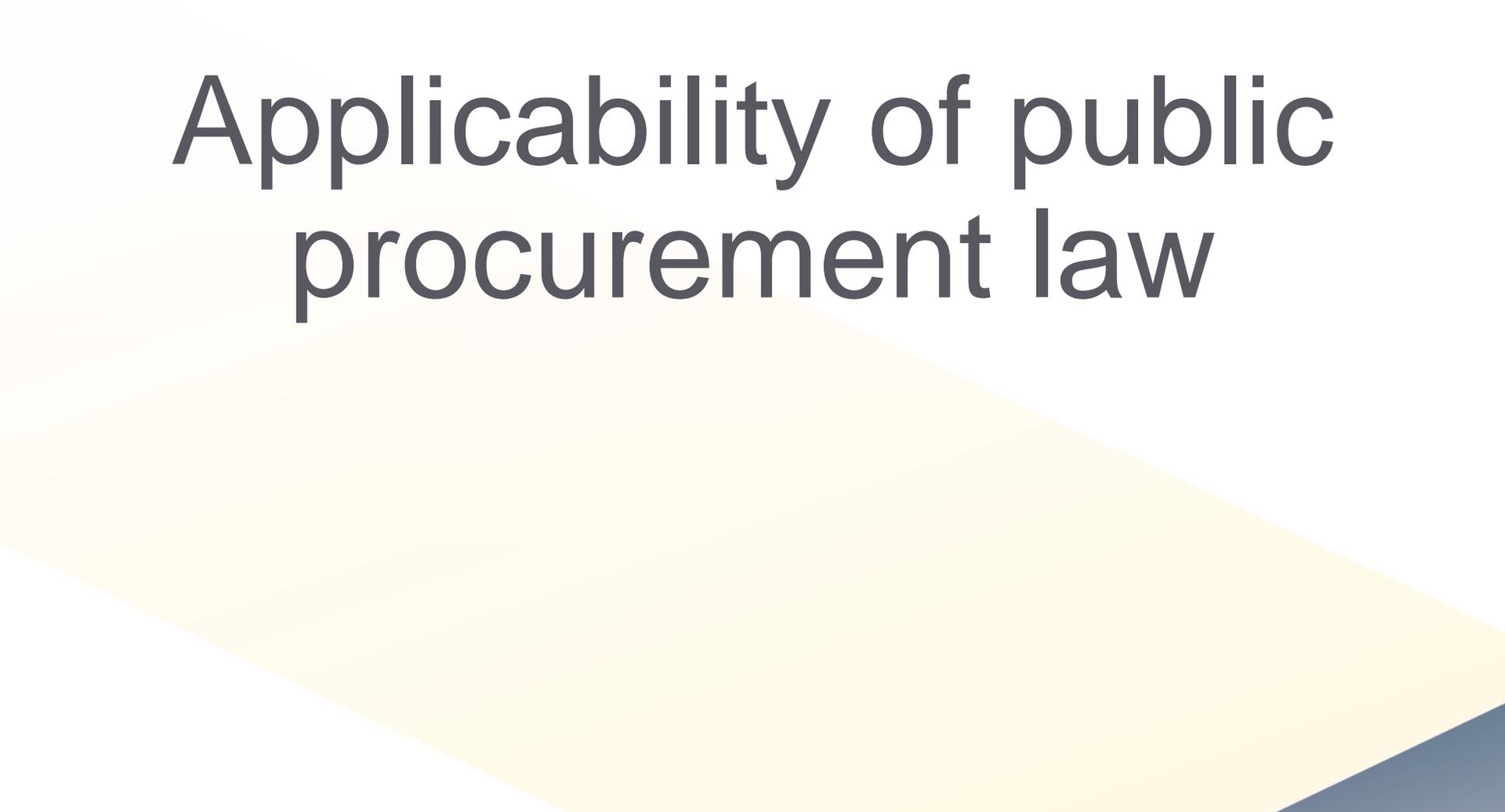
# Overview of EU public procurement regime

	Public regime	Utilities regime	Concession regime
Subject-matter and scope	Public contracts of works, supply, and services	Contracts of works, supply & services in regard to gas & heat, electricity, water, transport services, airports, postal services, extraction of oil & gas.	Works and services
Personal scope	Governments & other public bodies	Governmental and other public bodies and private undertakings operating on the basis of special or exclusive rights granted by a Member State	Includes both approaches, followed by Public and Utilities regimes.
Thresholds	See slide 38	See slide 38	See slide 38

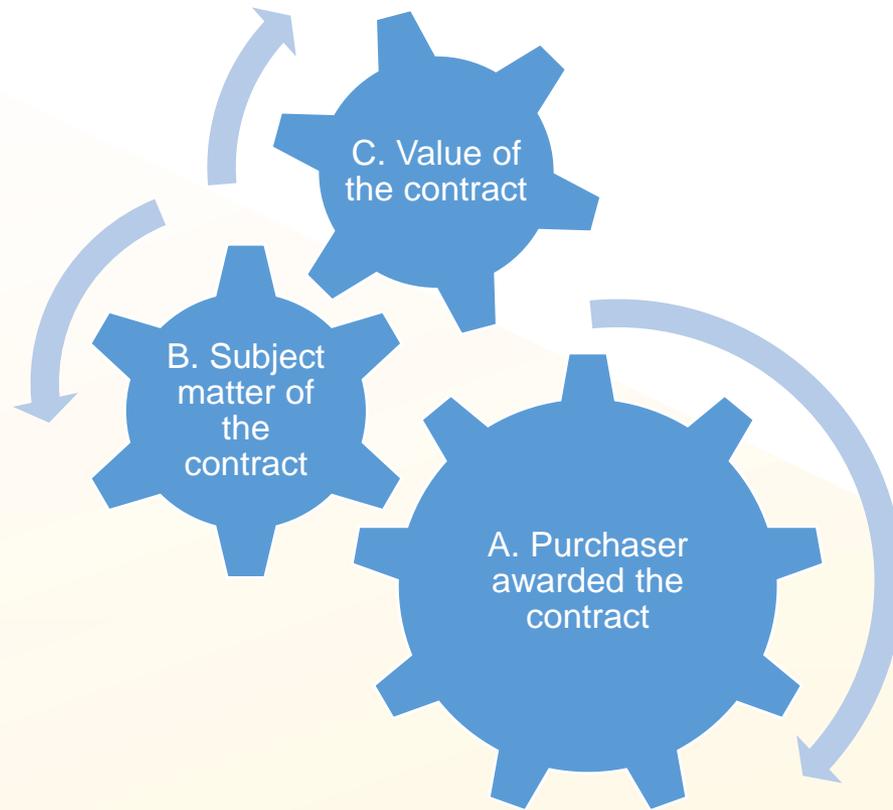


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# Applicability of public procurement law



# When do procurement rules apply?



# Application of EU public procurement law

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## General principle:

- Procurement law must be complied with in case of cooperation between public authorities and companies where there is a public contract within the meaning of the procurement directives.

## European procurement law is applicable when a

- **Public** contract authority **puts out a call for tendering a**
- **Public** contract (supply, construction or service contract), **which exceeds the set**
- **Thresholds: the latest thresholds are stipulated in Commission Regulations (EU) No. 2019/1827 – 2019/1830 (of 1st of January 2020).**

→ Europe-wide award procedure duty

# Kind of contracts caught

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## Public contracts:

- The contract is between one or more **contracting authorities** on the one hand and one or more **economic operators** on the other hand.
- The contract must be in **writing**.
- The contract must have **pecuniary interest** [Directive 2014/24, Art. 2 (1)(5)].

# Economic operator

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Any **natural or legal person** or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market [Directive 2014/24, Art. 2 (1)(10)].

Depending on contract, economic operator can be

- Contractor
- Supplier
- Service provider

# Kind of contracts caught (contd)

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- Supplies
- Services
  - Most services are included
  - But “light-touch” regime for certain social and educational services...AND legal services!
- Works (i.e. infrastructure) [Directive 2014/24, Art. 2 (1)(6-9)]
- Concessions [see Concession Directive 2014/23].

**Thames  
Tideway Tunnel**   
Creating a cleaner, healthier River Thames

# Concession Directive

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**Concessions** are contracts...

- ... where the consideration for the works (etc.) to be carried out consists either solely in the **right to exploit the work** or in this right **together with payment** from the contracting authority; and
- ... there is a **transfer of operational risk** from the contracting authority to the concessionaire.

# Is the purchaser subject to the procurement rules?

Public sector – “contracting authorities”; [Directive 2014/24, Art. 2(1)(1-4)]

## A. Central, regional, and local government



Bezirksregierung Köln

## B. Other bodies governed by public law

- Legal personality
- Established to meet needs in **the general interest**, not having an industrial or commercial character, and
- Another contracting authority provides more than 50% financing or has management supervision or appoints majority of directors (**cumulative criteria**)

# Financial thresholds

	Supplies & services	Light-touch services	Works	Concessions
Central government	€139,000	€750,000	€5,350,000	€5,350,000
Non-central government	€214,000	€750,000	€5,350,000	€5,350,000
Utilities	€428,000	€1,000,000	€5,350,000	€5,350,000

- Non – central government : = all bodies governed by public law, subject to control by central government – case 31/87 Beentjes = Dutch committee, which was not an independent legal person but committee`s composition & functions were determined by law
- **NB** – rules against “contract-splitting” to avoid exceeding threshold

# Outside the thresholds

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When awarding contracts below the thresholds, awarding authorities are still bound by:

- A general obligation under the EU Treaty not to discriminate on grounds of nationality
- Basic standards of transparency
- Impartiality

# Outside the thresholds (contd)

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For contracts below the thresholds, governed by national procurement law, the following principles are particularly relevant:

- Transparency and equal treatment, Arts. 49 and 56 TFEU
- Non-discrimination on ground of nationality Art.18 TFEU

(ECJ, Case C-324/98 – *Telaustria*)

# Possible exemptions

- Exclusions, e.g.
  - For technical reasons, where only one party can perform the contract
  - Purchase of land or an interest in land (but NB – for land disposals, procurement law might apply if conditions are attached to the sale)
  - Finance/securities
  - Contracts of employment
- Public-public cooperation (intra-public sector contracts)
- **Vertical cooperation**: entity controlled by the contracting authority and at least 80% of the controlled entity's economic activity is with contracting authorities (*Teckal*)
- **Horizontal cooperation**: two public authorities cooperate to perform an activity both have to perform (*Hamburg*)

BUT in certain cases Treaty principles might still apply - remember *Telaustria*

# Are any exemptions applicable?

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## **Vertical cooperation – “In - house”**

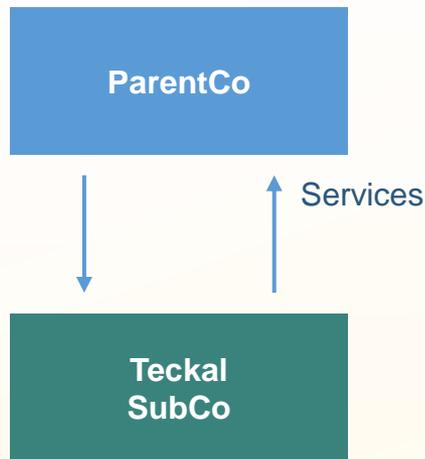
- Involves contracting authorities who contract the performance of a task to a separate, jointly owned and controlled entity that acts as the provider.

## **Horizontal cooperation – “In - state”**

- Public-public cooperation

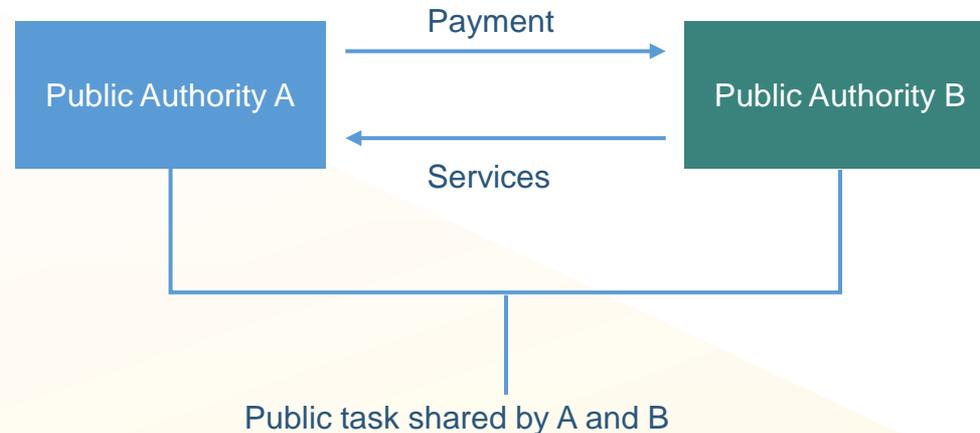
# Are any exemptions applicable? (contd)

## 1. Teckal (vertical cooperation)



... or vice versa

## 2. Hamburg (horizontal cooperation)



# Are any exemptions applicable? (contd)

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- In-house
  - Construction, supply, service contracts
  - Above the relevant threshold
- No need for public procurement procedure, when the transaction is clearly “in house”
- Current case law of ECJ
  - Case C-107/98 *Teckal*
  - Case C-366/02 *Stadt Halle*
  - Case C-410/04 *ANAV*

# Case C-107/98 *Teckal*

## Summary

- Directive 93/36/EEC is applicable where a contract for pecuniary interest is concluded in writing, involving amongst others the purchase of products.

A contract exists if an agreement was reached between two distinct "persons".

A contract between two distinct "persons" does not exist when:

- The local authority exercises control over the uncertain "person" which is **similar** to that which it exercises over its own departments (**the control test**); and
- At the same time, that "person" carries out the essential part of its activities on the controlling local authority's **behalf** (**the functional test**).

# Case C-107/98 *Teckal* (contd)

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## Guiding principle

- If a contracting authority concludes a contract with a third party that is only formally, but not substantially, independent from it,
- For that both *Teckal*-criteria must be fulfilled:
  - Control similar to control over its own departments [Case C-366/02 *Stadt Halle*]
  - Activity essentially on behalf of the controlling local authority (80% and more; [Directive 2014/24, Art. 12 (1)(b)])
  - No direct private capital participation in the controlled legal person.

# Case C-480/06 *Hamburg*

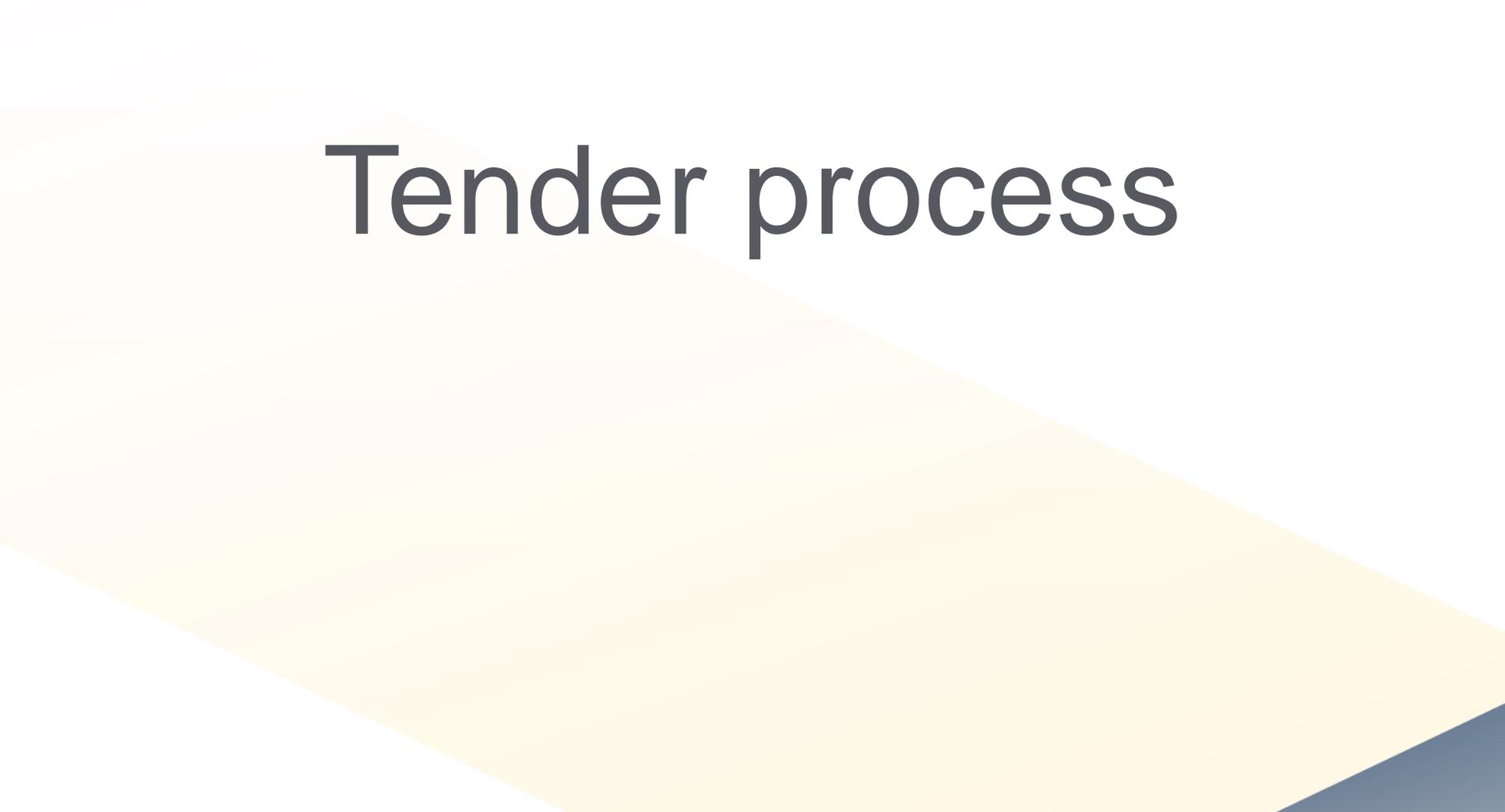
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- ECJ concluded that the contract in question is concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contract that may be necessary in respect of the construction and operation of the waste treatment facility.
- It was also pointed out that a public authority has the possibility of performing the public interest tasks conferred on it by using its own resources, without being obliged to call on outside entities not forming part of its own departments, and that it may do so in cooperation with other public authorities.



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# Tender process



# Steps

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- Advertisement in the Official Journal of the European Union (OJ) & Tenders Electronic Daily (TED)
- Receipt of expressions of interest
- Selection of bidders and invitation to tender or participate in dialogue or negotiate
- Submission of tenders (with or without a dialogue or negotiation process – depending on procedure)
- Evaluation and award decision
- Standstill period
- Contract award
- N.B. minimum time periods

# Types of procedure

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- **Open:**
  - Allows every interested candidate to submit an offer
- **Restricted:**
  - Only candidates meeting certain criteria are invited to submit tenders
- **Exceptionally, negotiated/competitive dialogue:**
  - This is applicable in exceptional circumstances, when the contracting authority is allowed to negotiate the terms of a contract with one or more suppliers of its own choice. Normally, not less than three candidates shall participate in dialogue.
  - Innovation partnership

# Open procedure

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All interested parties may submit tenders. Most suitable where both the subject matter of the contract and the award criteria are fairly simple

- The minimum time limit for receipt of tenders shall be 35 days from the date on which contract notice was sent
- Evaluate tenders without negotiation
- Award contract per award criteria
- Publish award notice within 48 hours and de-brief losers

# Restricted procedure

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Only suppliers invited by the authority may submit tenders. Post-tender negotiations are generally not permitted.

- The minimum time limit for receipt of requests to participate is at least 30 days from the date on which contract notice (prior information notice) was sent
- Shortlist tenders (at least 5) per qualification criteria
- Invite shortlist to tender, allowing at least 30 days (or 10 days if urgent)
- Evaluate tenders, without negotiation
- Award contract per award criteria
- Publish award notice within 48 days, and de-brief losers

# Negotiated procedure

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A contracting authority consults contractors or suppliers of its choice and negotiates the terms of the contract with one or more of them. Under certain very narrow circumstances the authority may award the contract directly to its preferred supplier without placing a notice in the OJ

- Publish contract notice in EU OJ allowing at least 37 days (or 15 if urgent) for reply
- Shortlist tenders (at least 5) per qualification criteria
- Invite shortlist to tender, and issue draft contracts and other materials
- Conduct negotiation in accordance with the terms of tender in as many stages as necessary (no time limits apply)
- Select preferred bidders as per award criteria and finalise contract
- Publish award notice within 48 days, and de-brief losers

# Negotiated procedure (contd)

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Used in cases of extreme urgency justified by unforeseeable circumstances:

- When for technical or artistic reasons or due to existence of special or exclusive rights, there is only one possible supplier or service provider;
- When an open or restrictive procedure has not attracted any tenders or any suitable tenders; or
- For the purchase of supplies on particularly advantageous terms, from either a supplier definitely winding up a business or the receiver or liquidator of a bankruptcy.

# Competitive dialogue

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To be used for particularly complex contracts where the contracting authority is not objectively able to:

- Define the technical means to satisfy its needs; or
- Identify in advance the legal and/or financial make-up of a project.
- Only available when neither the open or restricted procedure will allow the award of a contract.
- Provides for a greater degree of flexibility for the contracting authority to discuss its contractual needs with potential bidders.

# Competitive dialogue (contd)

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The contracting authority:

- Publishes a contract notice setting out its needs
- Selects candidates to participate in the dialogue
- Opens a dialogue with the shortlisted candidates in order to identify and define the means best suited to meet the contracting authority's needs
- Concludes the dialogue and asks the candidates for the submission of final tenders on the basis of these solution(s)
- Assesses the submitted final tenders on the basis of the specified award procedure without further discussion or negotiation

# In case...

- The needs of the contracting authority cannot be met without adaptation of readily available solutions; and/or
- Design or innovative solutions included; and/or
- Of complexity or the legal and financial makeup or because of risks attaching to them; and/or
- Technical specifications cannot be established with sufficient precision, the following procedures may be applied:

Competitive dialogue	Competitive procedure with negotiation
Only available under public sector rules. Only candidates meeting certain criteria are invited to conduct a dialogue and ultimately submit tenders (only limited room for post-tender discussions)	Only candidates meeting certain criteria are invited to negotiate, more flexible than competitive dialogue (only limited use in public sector).

# Innovation partnerships

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Contracting authorities should have access to a specific procurement procedure where:

- A need for the development of an innovative product or service or innovative works and
- The subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market.

# Other procedures

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Variations to the general procedures apply to:

- **Framework agreements** – an agreement, lasting no more than four years, between one or more contracting authorities and one or more economic operators.
- **Dynamic purchasing systems** – a completely electronic process for making commonly used purchases of items.
- **Electronic auctions** – allows all bids to be ranked using automatic evaluation methods but can only be used after a full initial evaluation of the tenders.
- **Design contests** – enable the awarding authority to acquire a plan or design selected by a jury.

# Bidder selection & bid evaluation

## Bidder selection and bid evaluation

- Basic requirements as to economic/financial standing and ability/technical capacity (e.g. experience)

## Contract award

- Under all three of the new directives authorities must award on the basis of most economically advantageous tender (**MEAT**) (e.g. additional aspects: quality, delivery time, etc.)

# Bidder selection criteria - ineligibility criteria

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Ineligibility criteria - bidder shall be excluded if:

- Participation in a criminal organisation
- Corruption, fraud, money laundering or terrorist offences/financing
- Child labour and other forms of trafficking in human beings
- Non-payment of taxes or social security contributions

Ineligibility criteria - bidder may be excluded if:

- Non-compliance with environmental, social and labour law
- Economic operator is bankrupt or subject of insolvency proceedings
- Grave professional misconduct which renders its integrity questionable
- Sufficiently plausible indications for anti-competitive agreements with other economic operators
- Conflict of interests or undue influence on the decision making process of the contracting authority (also in prior procurement proceedings)

# Bidder selection criteria

- Selection criteria may relate to:



Suitability to pursue the professional activity



Economic and financial standing (e.g. minimum yearly turnover, annual accounts, professional risk indemnity)



Technical and professional ability (e.g. human and technical resources, experience by providing suitable references).

- All requirements shall be related & proportionate to the subject matter of the contract.

# Contract award criteria

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## Most Economically Advantageous Tender (MEAT)

- Using a cost-effectiveness approach, such as life-cycle costing, best price-quality ratio assessment on basis of criteria linked to the subject-matter of the contract in question. Such criteria may comprise:
  - Quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions.
  - Organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff can have a significant impact.
  - After-sales service and technical assistance, delivery conditions (date, process and period).
- The contracting authority shall specify the relative weighting which it gives to each of the criteria chosen

# Standstill period

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Minimum “standstill period” between notification of award and contract conclusion: 10 or 15 days depending on means of communication

## Must inform

- In writing, as soon as possible
- Those who submitted an offer and those who unsuccessfully sought selection and yet to be informed of reasons of non-selection

## Must include

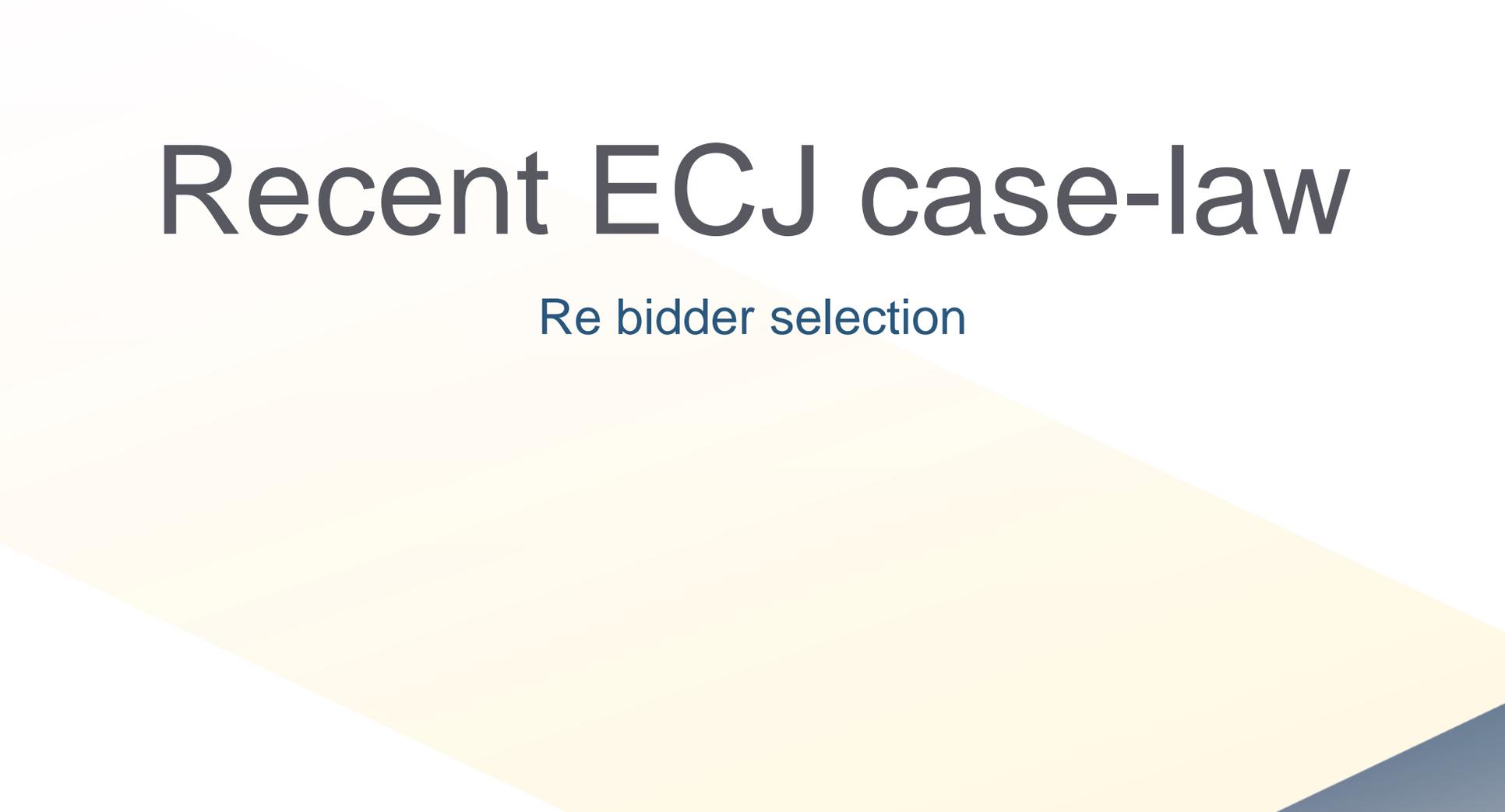
- Award criteria
- Reasons for decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by notice recipient & successful tenderer
- Name of successful tenderer
- A precise statement of exact standstill period.



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# Recent ECJ case-law

Re bidder selection



# Case C-546/16 *Montte SL v Musikene*

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Issue:

- Phased evaluation of bids in an open procedure

ECJ held:

- contracting authorities free to determine the level of technical merit tenders must provide, depending on the characteristics and subject-matter of the contract in question, and to establish a minimum technical threshold which those tenders must meet.
- Art. 67 of Dir. 2014/24 does not preclude the possibility of excluding, as a first step in the contract award stage, tenders not reaching a pre-determined minimum score threshold in the technical evaluation.
- A tender failing to meet such a threshold does not correspond, in principle, to the contracting authority's needs and must not be taken into account for the determination of the most economically advantageous tender

# Case C-546/16 *Montte SL v Musikene* (contd)

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ECJ also found:

- fact that Directive 2014/24 provides for the possibility of the competitive procedure with negotiation, the competitive dialogue procedure and the innovation partnership procedure being conducted in successive stages not mean that a 2-step evaluation of tenders inadmissible in an open procedure.
- need to ensure genuine competition until the final stage of the procedure in Art.66 Dir. 2014/24 does not concern open procedures.
- National legislation allowing contracting authorities to lay down minimum requirements as regards the technical evaluation in an open procurement procedure so that submitted tenders not meeting this threshold excluded from the subsequent stages of the procurement procedure, regardless of the number of tenderers remaining, not precluded under Art. 66 of Directive 2014/24

# Case C-546/16 *Montte SL v Musikene* (contd)

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## Comments

- The EU procurement directives do not expressly allow for an authority to require tenders to meet a minimum threshold score, failing which they will be rejected without having their financial proposal evaluated but also nothing said to rule out such a methodology
- Appears to be first procurement-related CJEU decision under Dir. 2014/24

# Case C-413/17 *Roche Lietuva*

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## Issue:

- Margin of appreciation afforded to contracting authorities in laying down technical specifications

## ECJ held:

- Contracting authorities have a wide margin of appreciation in laying down the technical specifications, so long as the principles of equality of treatment and proportionality are respected
- Latter is a matter for the national court to assess

# Case C-531/16 *Specializuotas transportas*

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## Issue:

- Obligations of related tenderers submitting separate bids in the same procurement to disclose connection in absence of express requirement

## ECJ held:

- *in the absence of national legislation or call for tender specification, related tenderers submitting separate offers in the same procedure are not obliged to disclose, on their own initiative, the links between them to the contracting authority.*
- *The contracting authority, when it had evidence that called into question the autonomous and independent character of the tenders, was obliged to verify, and request, where appropriate, additional information from those tenderers, whether their offers were in fact autonomous and independent.*
- *If the offers proved not to be autonomous and independent, Article 2 of Directive 2004/18 precluded the award of the contract to the tenderers having submitted those tenders.*

# Case C-531/16 *Specializuotas transportas* (contd)

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ECJ also found:

- when deciding whether tender's neither autonomous nor independent, principle of effectiveness requires that a breach of EU public procurement rules may be proved not only by consideration of direct evidence but also through "indicia", provided indicia = objective and consistent, and related tenderers = able to submit evidence in rebuttal.
- systematically excluding related undertakings from participating in the same public procurement procedure = counter to the effective application of EU law.
- but tenders by related undertakings must be submitted completely autonomously and independently.
- the principle of equal treatment under Art. 2 of Directive 2004/18 infringed if related tenderers allowed to submit co-ordinated or concerted tenders which would be likely to give them unjustified advantages in relation to the other tenderers.

# Case C-531/16 *Specializuotas transportas* (contd)

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## Comments:

- Questions in the standard selection questionnaire relating to persons of significant control and conflicts of interest should assist contracting authorities to identify the issues that arose in this case.
- Recommendation: authorities insert provisions within the procurement documents designed to bring such issues to their attention.

# Case C-531/16 *Specializuotas transportas* (contd)

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## Comments (contd):

- Given the virtually identical wording in Art. 2 of Directive 2004/18 and Art. 18 of Directive 2014/24, this ruling relevant for procurements conducted under the 2014 Directive thus:
  - contracting authorities should note the obligation upon them to verify whether offers are in fact autonomous and independent when they have evidence to the contrary.
- Note also ECJ's finding in Case C-144/17 *Lloyd's of London*: the principles of transparency, equal treatment and non-discrimination not preclude legislation of a Member State not allowing two syndicates of Lloyd's of London to be excluded from participation in the same procedure for the award of a public service contract for insurance merely because their respective tenders each signed by the General Representative of Lloyd's of London for that Member State, but instead allowing their exclusion if appears, based on unambiguous evidence, that their tenders not drawn up independently.

# Case C-9/17 *Maria Tirkonnen*

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## Issue:

- Definition of “public contracts” under Art. 1(2)(a) Dir. 2004/18

## ECJ held:

- Where a contracting authority was not involved in designating or choosing an economic operator to whom contractual exclusivity is to be awarded, Dir. 2014/28 not apply
- Decisive factor in determining whether an arrangement involves a public contract: presence of award criteria to compare and classify tenders
- Selection criteria aimed at evaluating the suitability of economic operators to perform the contract rather than at identifying the most economically advantageous offer are not "award criteria" even if the contracting authority had described them as such

# Case C-9/17 *Maria Tirkonnen* (contd)

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ECJ also found:

- Scheme through which the public authority admits all economic operators who meet the suitability requirements set out in the invitation to tender and who pass the examination referred to in the invitation to tender, does not constitute a public contract within the meaning of the Directive, even if no new economic operator can be admitted during the limited validity period of that scheme

Comments:

- Narrowing of the type of contractual arrangement covered by the EU procurement directives so more leeway to contracting authorities to design contracts in such a way
- The narrow focus on the existence of award criteria and the equation of their absence with the non-exercise of choice (or national preference) by contracting authorities is a matter of concern?
- N.B. same definition in Art. 2(1)(5) Dir. 2014/24

# Case C-367/19 *Tax-Fin-Lex*

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## Issue:

- Definition of “public contracts” under Art. 2(1)(5) Dir. 2014/24: requirement for pecuniary interest : legal basis for rejecting the tenderer’s bid in a public procurement procedure?
- In this case: EUR 0.00 proposed price in tender

## ECJ held:

### Re terms in above definition:

- "for pecuniary interest“: each of the parties undertakes to provide one form of consideration in exchange for another
- "consideration" need not necessarily consist of a payment of a sum of money – the supply of a service could be compensated by other forms of consideration, such as reimbursement of expenditure incurred in providing the agreed service.

# C-367/19 *Tax-Fin-Lex* (cont'd)

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ECJ also found:

- a contract under which the contracting authority is not legally obliged to provide any consideration in return for that which the other party to the contract has undertaken to provide not fall within "contract for pecuniary interest" under art.2(1)(5) Dir 2014/24
- the fact that the award of the contract could be of economic value to the tenderer in that it would open up access to a new market or enable the tenderer to receive references is too uncertain & is thus insufficient to fall under "contract for pecuniary interest"
- Answer to question: no but such tender = abnormally low tender under Art. 69 Directive 2014/24 so procedure therein followed: assessment in compliance with the principles of equal treatment, non-discrimination between tenderers, transparency & proportionality & tender not automatically rejected

# C-367/19 *Tax-Fin-Lex* (cont'd)

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## Comments

- Judgment not explore or resolve a number of questions concerning abnormally low tenders including whether there is a duty to investigate only where rejection is being considered, or more generally
- UK High Court 2018 judgment on this issue:
  - controversial decision: no duty to decide whether each tender received is abnormally low nor any general duty to investigate such tenders or to exclude those found to be unsustainable
  - Legislation's role here limited to the case in which the contracting authority itself decides that a tender is abnormally low and decides to reject it for that reason, merely requiring an investigation into its sustainability before the authority can reject it
- While ECJ at [32] seem to assume that investigation always required, at least where Euro 0.00 tender, this case concerned the situation where the tender was being rejected and does not shed any more light on the issue.

# Joined Cases C-523/16 *M.A.-T.I SUD* & C-536/16 *Duemme*

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## Issue

- Rectification of substantial irregularities in tender documents, subject to payment of financial penalty, see Art. 51 Dir. 2004/18

## ECJ held:

- Permitted in principle for national law to include mechanism for the rectification of substantial irregularities, subject to conditions:
  - No rectification where the procurement documents provided that the absence, incompleteness or other substantial irregularity concerned was a ground for exclusion
- Permitted in principle for national law to make the rectification of substantial irregularities subject to payment of a financial penalty, provided the financial penalty is consistent with the principle of proportionality.

# Joined Cases C-523/16 *M.A.T.I* *SUD* & C-536/16 *Duemme* (contd)

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ECJ also held:

- Request for clarification may not lead to submission by a tenderer of a new tender
- The opportunity for rectification is limited and is unlikely to extend to substantial irregularities
- Very concept of rectification of a substantial irregularity does not appear to be compatible with Art.51 Dir. 2004/18
- In principle, imposition of financial penalty for rectification allowed if proportionate but not if automatic application of the penalty set in advance, irrespective of the nature of the rectifications made and in the absence of specific reasons

Comment:

- Different rules under Art. 56(3) Dir. 2014/24?

# Case C-223/16 *Casertana Costruzioni*

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## Issue:

- Consortium's exclusion from the tendering procedure due to loss of eligibility for the relevant certification by their 3<sup>rd</sup> party ?

## ECJ held:

- Directive 2014/24 = *ratione temporis* not applicable to this case, which substantially amended the rights of economic operators relying on the capacities of other entities when bidding for a public contract.
- Permitting a bidding consortium to replace a disqualified member = a substantial modification of the tender.
- General rule: no amendment of a tender after submission
- Substantial modification not permitted after the expiration of the tender's deadline based on the equal treatment principle.

# Case C-223/16 *Casertana Costruzioni* (contd)

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## Comments:

- Decision relevant to application of general procurement principles
- Different rule under Directive 2014/24? :
  - Judgment = of limited assistance to participants in tenders under Directive 2014/24 given the scope of Art. 63(1) Directive 2014/24 for replacing entities not meeting selection criteria but not specify when this right can be exercised
  - However, the court's reasoning, although applied to Directive 2004/18, took into account established case law and the core EU general principles = relevant to tenders under Art.63(1) Dir. 2014/24
  - Necessary to reconcile this provision with equal treatment principle, e.g.:
    - by excluding the substitution of a new partner in cases where the deadline for tenders has expired; or
    - where the tenderer has been particularly negligent in its initial choice of business partner.

# Case C-223/16 *Casertana Costruzioni* (contd)

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## Comments (contd):

- Different rule under Directive 2014/24? :
  - Reg. 63(4) PCR 2015 seems to allow, or possibly even require, a contracting authority to give a tenderer a second chance to choose an eligible partner, in circumstances where the third party initially relied upon is found not to meet the authority's selection criteria.
  - Necessary to reconcile this provision with equal treatment principle, e.g.:
    - by excluding the substitution of a new partner in cases where the deadline for tenders has expired; or
    - where the tenderer has been particularly negligent in its initial choice of business partner.

# C-101/18 *Idis v Arcadis*

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## Issue

- Exclusion of a consortium from a public tender pursuant to Art. 45(2)(1)(b) of Dir. 2004/18 because its principal member has entered into an arrangement with creditors

## ECJ held

- This Art. leaves the application of the seven grounds for excluding candidates from participation in a contract, relating to their professional honesty, solvency and reliability, to the determination of the Member States
- the expression in this Art. “entered into an arrangement with creditors” may be specified & explained in national law, provided this done with regard for EU law
- from the time the application filed, the economic operator = subject to an arrangement with creditors, within the meaning of Art. 45(2)(1)(b) Dir. 2004/18:
  - no difference to this finding that, in its application for an arrangement with creditors, the economic operator reserved the right to submit a plan that provides for the continuation of its business.

# C-101/18 *Idis v Arcadis* (contd)

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ECJ also concluded:

- An operator who, at the date of the exclusion decision, not yet committed itself to entering into an arrangement with creditors as a going concern is not in a comparable situation, in terms of its financial stability, to that of an economic operator which has undertaken to continue its economic activity
- Art.45(2) of Dir. 2004/18:
  - not provide for uniform application at EU level of the grounds of exclusion that it mentions, since the Member States may choose not to apply those grounds of exclusion at all or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level
  - not preclude national legislation, which allows the exclusion from a public procurement procedure of an economic operator who, at the date of the exclusion decision, has filed an application for an arrangement with creditors, while reserving the right to present a plan which provides for the continuation of the business

# C-101/18 *Idis v Arcadis* (contd)

## Comments

- ECJ's ruling based on Dir. 2004/18 (now Dir. 2014/24) but still relevant today as Art. 45(2) Dir. 2004/18 replaced in similar terms by Art. 57(4)(b) Dir. 2014/24
- 1 aspect of the case not considered by the order for reference or ECJ: insolvent entity, LEI Srl, was only one of the parties within the bidding Consortium
  - LEI described as “the representative”, & “the principal”, of the Consortium
- If Idi Srl was also a Consortium member & if that entity had the necessary expertise and resources to perform the contract without LEI Srl, then Idi Srl could have argued before the Italian courts it was entitled (or possibly even obligatory) to be awarded the contract instead of the Consortium

## Comments (contd)

- Similar in Case C-396/14 where ECJ found: permissible for the contracting authority to allow the remaining member to replace the consortium in the tender process, provided that two conditions were met.
  1. The retained economic operator by itself must meet the selection requirements laid down by the contracting authority in the tendering procedure.
  2. The continued participation of that party in that procedure must not place the other tenderers at a competitive disadvantage.
- Whether these conditions are in fact met in any particular case will depend on a close examination of the relevant facts.

# Thank you!

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