

## The continuing relevance of the general principles of EU public procurement law after the adoption of the 2014 Concessions Directive

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### Abstract:

This paper aims to offer some reflections on the legal relevance of general principles of EU public procurement law after the adoption of the 2014 package of substantive Directives on public procurement. It focusses on the field of concession contracts because one of the explicit justifications for the adoption of Directive 2014/23 was to achieve a “uniform application of the principles of the TFEU across all Member States and the elimination of discrepancies in the understanding of those principles ... at Union level in order to eliminate persisting distortions of the internal market”. The paper claims that Directive 2014/23 has failed to deliver on three grounds. Firstly, because it has not actually created any relevant substantive harmonisation of tender requirements for concession contracts that fall within its scope of application. Secondly, because it cannot limit the CJEU’s extension of obligations derived from the same general principles beyond its scope of application. And, thirdly, because it fails to acknowledge the full-range of general principles of EU public procurement law and, in particular, the principle of competition—which creates a risk of internal inconsistency with the rest of the substantive Directives in the 2014 Procurement Package.

**Keywords:** Public procurement, general principles, concessions, scope of application, modernisation, consistency, contracts not covered, Comune di Ancona, CJEU.

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# **The continuing relevance of the general principles of EU public procurement law after the adoption of the 2014 Concessions Directive—*Or how the Concessions Directive has failed to deliver legal certainty***

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## **ABSTRACT**

This paper aims to offer some reflections on the legal relevance of general principles of EU public procurement law after the adoption of the 2014 package of substantive Directives on public procurement. It focusses on the field of *concession contracts* because one of the explicit justifications for the adoption of Directive 2014/23 was to achieve a “*uniform application of the principles of the TFEU across all Member States and the elimination of discrepancies in the understanding of those principles ... at Union level in order to eliminate persisting distortions of the internal market*”. The paper claims that Directive 2014/23 has failed to deliver on three grounds. Firstly, because it has not actually created any relevant substantive harmonisation of tender requirements for concession contracts that fall within its scope of application. Secondly, because it cannot limit the CJEU’s extension of obligations derived from the same general principles beyond its scope of application. And, thirdly, because it fails to acknowledge the full-range of general principles of EU public procurement law and, in particular, the principle of competition—which creates a risk of internal inconsistency with the rest of the substantive Directives in the 2014 Procurement Package.

## **KEYWORDS**

Public procurement, general principles, concessions, scope of application, modernisation, consistency, contracts not covered, *Comune di Ancona*, CJEU.

## **JEL CODES**

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## 1. INTRODUCTION

The issue of the legal value of general principles of EU public procurement law has been discussed for a long time, particularly in connection with the obligations that they impose in the tendering of contracts not covered by the existing EU Directives at any given time.<sup>1</sup> Beyond the academic debate, this has clearly created concern in the Member States and in practitioners' circles, particularly in relation to (services) *concessions contracts*, to the point of resulting in the adoption of new Directive 2014/23<sup>2</sup> as a means of overcoming the legal uncertainty derived from the pre-existing situation. In terms of recital (4) of the Concessions Directive

The award of public works concessions is presently subject to the basic rules of Directive 2004/18/EC of the European Parliament and of the Council; while the award of services concessions with a cross-border interest is subject to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of various Member States. Such risk has been confirmed by the extensive case law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects of the award of concession contracts.

A uniform application of the principles of the TFEU across all Member States and the elimination of discrepancies in the understanding of those principles is necessary at Union level in order to eliminate persisting distortions of the internal market. That would also favour the efficiency of public spending, facilitate equal access and fair participation of SMEs in the award of concession contracts, both at local and Union level, and support the achievement of sustainable public policy objectives.

In my view, there is no doubt that the main justification for the adoption of the Concessions Directive was to reduce legal uncertainty and to rationalise this *grey area* of EU public procurement law. However, what is not so clear is which conditions should be met for such a goal to be attained. I submit that legal certainty in this field (at least at the level to which the Concessions Directive aspires) would only be achieved if three conditions were met. First, it would have been necessary to create a harmonised, single set of substantive rules that determined in a clear way the obligations that stem from the general principles of EU public procurement. Second, it would have been necessary to delimit clearly and in a definite manner the contracts covered by its scope (hence, subjected to those substantive obligations) from those excluded from its coverage (hence, free from compliance with any obligations derived from general principles). And third, it would have been necessary to avoid risks of legal uncertainty derived from internal inconsistencies between the crystallisation of the general principles in the Concessions Directive and the rules on general principles of the other substantive directives of the 2014 procurement package—notably, Directives 2014/24<sup>3</sup> and 2014/25.<sup>4</sup> This paper aims to demonstrate how none of the conditions actually hold and, consequently, how the Concessions Directive has failed to deliver legal certainty.

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<sup>1</sup> For all, see C Risvig Hamer (then Hansen), *Contracts not covered or not fully covered by the Public Sector Directive* (Copenhagen, DJØF Publishing, 2012).

<sup>2</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1 (hereinafter, the 'Concessions Directive').

<sup>3</sup> 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] OJ L94/65 (hereinafter, the 'Public Service Directive').

## 2. CONCESSIONS DIRECTIVE DOES NOT CLARIFY THE OBLIGATIONS DERIVED FROM THE EU GENERAL PRINCIPLES OF PROCUREMENT

As mentioned in passing, the first of the conditions for the Concessions Directive to provide a meaningful degree of legal certainty would be for it to create a harmonised, single set of substantive rules that determined in a clear way the obligations that stem from the general principles of EU public procurement. This would overcome the perceived deficiency of the pre-2014 regulatory framework (at least for services concessions) through “[a] *uniform application of the principles of the TFEU across all Member States and the elimination of discrepancies in the understanding of those principles ... at Union level in order to eliminate persisting distortions of the internal market*” [rec (4)]. In my view, the content of the Concessions Directive could not be further from such a goal.

Unfortunately, however, the Concessions Directive is basically unnecessary piece of EU legislation that creates significant red tape and muddles an already complicated area of EU Economic Law. As I had anticipated,<sup>5</sup> most of the general provisions of the Concessions Directive are a copy (or a 'Frankenstein copy') of provisions already available in other procurement Directives and, mainly, in Directive 2014/24 on public sector procurement. Such duplication makes me think that the EU legislator would indeed have been better off by just including a limited set of specific provisions dealing with concession contracts within Directive 2014/24. By not doing so, it has created unnecessary duplication and complication.

As clear evidence of the basic unnecessaryness of the Concessions Directive, suffice it to stress that only 10 of its first 29 articles include specific rules for concession contracts (and, only 5 articles of those 10 are exclusively relevant for concession contracts, while the other 5 are slight modifications of general rules). All other articles are simply a repetition of provisions of other Directives. The table in the annex clarifies this assessment. The rest of the provisions, that is, those in Title II of the Concessions Directive, entitled “Rules on the award of concessions: general principles and procedural guarantees” are not more than either a further copy or a watered-down version of the actual rules established in other procurement Directives. In my view, the clearest example of the incapacity of the Concessions Directive to establish precise rules is to be found in its article 30.

Article 30(1) of the Concessions Directive simply determines some very basic and minimal (light-tough) requisites for the tender of concession contracts and stresses the procedural freedom of Member States, which results in a very broad requirement that “[t]he contracting authority or contracting entity shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with this Directive”. This opens the question whether Member States are allowed to have no further developed procedural rules, provided there is some sort of control of compliance with the minimum obligations of the Directive, or whether they need to establish more robust procedures. In my view, the second is the only reasonable option from a legal certainty perspective. On that note, it is important to stress that, in a rather circular way when it comes to specify the obligations derived from the general principles of EU public procurement,

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<sup>4</sup> 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] OJ L94/243.

<sup>5</sup> A Sanchez Graells, ‘What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of Their Economic Balance?’ (2012) 2 *European Procurement & Public Private Partnership Law Review* 94-104.

Article 30(2) of the Concessions Directive establishes that the “*design of the concession award procedure shall respect the principles laid down in Article 3 [ie, principles of equal treatment, non-discrimination and transparency]. In particular during the concession award procedure, the contracting authority or contracting entity shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others*”. Further than this (which, certainly, does not add any meaningful precision to the pre-existing framework), the specific obligations I can identify in the rules of Articles 31 to 45 of the Concessions Directive are, mainly, the following:<sup>6</sup>

- An obligation to publish a concession notice in most, but not all, cases (arts 31-33)<sup>7</sup>
- An obligation to provide electronic access to concession documents (art 34)
- An obligation to tackle conflicts of interest and prevent corruption (art 35)<sup>8</sup>
- An obligation to comply with rules on technical specifications (art 36)
- An obligation to comply with certain minimum procedural guarantees (art 37) [see discussion below], including certain debriefing guarantees (art 40)
- An obligation to carry out the selection and qualitative assessment of candidates fundamentally in line with the processes and requirements of other 2014 Directives (art 38)
- An obligation to respect certain time limits for receipt of applications and tenders for the concession (art 39)
- And an obligation to respect very minimum rules on award criteria (art 41), which basically link back to the general principles of EU procurement law (including, this time, the principle of competition)<sup>9</sup>

In my view, this is a very limited set of rules that fails to exhaust the obligations derived from the general principles of EU procurement law (as is particularly clear in relation to art 40, where the cross-reference is explicit). When it comes to the procedural guarantees that Member States need to ensure are in place in the award of concession contracts under Article 37 of the Concessions Directive, in my view, the lack of precision of some provisions fails to eliminate any legal uncertainty (and, in fact, may create more). In particular, it is worth stressing that Article 37(4) simply requires the contracting authority or entity to communicate *the description of the envisaged organisation of the procedure and an indicative completion deadline* to all participants, which could not be more imprecise. Along the same lines, Article 37(5) simply determines that the contracting authority or entity shall provide for appropriate recording of the stages of the procedure using the means it judges appropriate, and Article 37(6) allows the contracting authority or entity to hold negotiations

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<sup>6</sup> Please note that, in my view, the rules on subcontracting, modification, termination and reporting (arts 42 to 45) are irrelevant for the discussion because they do not affect the preparation and tender of concessions, which is the area traditionally covered by the case law of the CJEU and that where more doubts and contradictory opinions existed in the pre-2014 framework.

<sup>7</sup> This is, arguably, the easiest way of complying with transparency requirements and, consequently, it hardly specifies an obligation distinct from that derived from the CJEU’s (obscure) Judgment in *Telaustria and Telefonadress*, C-324/98, EU:C:2000:669.

<sup>8</sup> However, this obligation exists under the general principles of EU public procurement law, as declared by the CJEU in *eVigilo*, C-538/13, EU:C:2015:166.

<sup>9</sup> Article 41(1) of the Concessions Directive reads: “*Concessions shall be awarded on the basis of objective criteria which comply with the principles set out in Article 3 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority or the contracting entity.*”

with candidates and tenderers, although it specifies that the subject-matter of the concession, the award criteria and the minimum requirements shall not be changed during the course of the negotiations.

Even taken together, these procedural guarantees could not be sparser (compare them with the detailed rules of any of the procedures covered in the rest of the substantive directives, including the competitive procedure with negotiations) and they beg the question of how to implement them in a way that complies with the requirements of the general principles of EU procurement law, as required by Article 30(2) of the Concessions Directive itself. Consequently, in my view, it is impossible to argue that the Concessions Directive has created a harmonised, single set of substantive rules that determine in a clear way the obligations that stem from the general principles of EU public procurement and, consequently, the first of the conditions for it to create a significant level of legal certainty fails.

### **3. CONCESSIONS DIRECTIVE DOES NOT EXCLUDE THE CJEU'S EXTENSION OF OBLIGATIONS BASED ON GENERAL PRINCIPLES ON CONCESSION CONTRACTS OUTSIDE ITS SCOPE OF APPLICATION**

As submitted above, the second condition for the Concessions Directive to provide a meaningful degree of legal certainty would be for it to delimit clearly and in a definite manner the contracts covered by its scope (hence, subjected to those substantive obligations) from those excluded from its coverage (hence, free from compliance with any obligations derived from general principles). Or, in other words, to create a strict threshold (based on value, or otherwise), that allowed Member States to rely on bright-line tests to determine the need to comply with obligations derived from general principles of EU procurement law (then encapsulated in the Concessions Directive) or not.

The only way to achieve such a result would be to come up with a robust test to determine when a concession contract has *cross-border interest*, since this is the criterion that engages an obligation to comply with obligations derived from general principles of EU procurement law under the case law of the CJEU. The Concessions Directive is premised on the basis that such cross-border interest will (only?) exist where the value of the contract is above €5 million, calculated as the estimated total turnover of the concessionaire generated over the duration of the contract, net of VAT (art 6). In my view, this is clearly indicated in its recital (10):

This Directive should only apply to concession contracts whose value is equal to or greater than a certain threshold, which should reflect the clear cross-border interest of concessions to economic operators located in other Member States (emphasis added).

However, it is worth stressing that the Concessions Directive has adopted the same quantitative approach traditionally used in the other fields covered by substantive procurement directives and, consequently, it was bound to fail.<sup>10</sup> What may come as a surprise is that it actually failed to establish a viable bright-line value-threshold based test even before being finally enacted.

Indeed, in its Judgment of 14 November 2013 in *Comune di Ancona*<sup>11</sup> (hence, about four months prior to the adoption of the final version of the Concessions Directive), the CJEU put forward an argument for the existence of cross-border interest in the award of (public service) concession

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<sup>10</sup> For discussion, see P Telles, 'The Good, the Bad and the Ugly: EU's Internal Market, Public Procurement Thresholds and Cross-Border Interest' (2013) 43 *Public Contract Law Journal* 3-25.

<sup>11</sup> *Comune di Ancona* C-388/12, EU:C:2013:734.

contracts that openly challenged the quantitative rationale followed by the then planned new Directive on concessions.

In the case at hand, a concession for the management of a European Regional Development Fund (ERDF)-supported portuary infrastructure (a slipway) was directly awarded by the Comune di Ancona to the local fishermen cooperative. The justification provided for the direct award was, rather simply, that *“it was not necessary, for the purposes of granting a concession for management of the slipway, to publish a call for tenders, in so far as no operators apart from the Pescatori cooperative were interested in that concession”* (C-388/12 at para 16). In part, one of the reasons to consider that there would be no other bidder for the concession was that the concession was awarded

subject to a number of conditions. These included the obligation to pay the Comune di Ancona an annual charge calculated in such a way as to avoid substantial net revenue being generated for either the concession-granting authority or the concessionaire; a prohibition on modifying the implementation conditions of the operation eligible for funding; a prohibition on engaging in profit-making activity; the obligation to comply with all the applicable EU directives and standards; and the obligation to maintain the public-service function and intended use of the structure at issue. It was also stated that the slipway was to remain, in any event, the property of the Comune di Ancona (C-388/12 at para 12, emphasis added).

In a thoughtful and market-realistic approach to the existence of potential (corporate) interest in being awarded a non-revenue generating concession as a first step into a new market, the CJEU has clearly indicated that

50 [...] the Comune di Ancona has not invoked any objective facts capable of explaining the lack of any transparency in the award of the concession. On the contrary, it maintained that the concession was not liable to interest undertakings located in other Member States, in so far as the concession granted to the Pescatori cooperative was designed so as not to be capable of generating substantial net revenue for its beneficiary or an undue advantage for the latter or for the municipality.

51 However, the fact that a concession is not capable of generating substantial net revenue or an undue advantage for an undertaking or for a public body does not, in itself, support the inference that the concession is of no economic interest for undertakings located in Member States other than that of the contracting authority. In the context of an economic strategy to extend part of its activities to another Member State, an undertaking may take the tactical decision to seek the award in that State of a concession despite the fact that that concession is incapable as such of generating sufficient profit, since that opportunity could nevertheless enable the undertaking to establish itself on the market of that State and to make itself known there with a view to preparing its future expansion.

52 [...] in circumstances such as those of the case before the referring court, EU law does not preclude the award, without a call for tenders, of a public service concession relating to works, provided that that award is consistent with the principle of transparency, observance of which, without necessarily entailing an obligation to call for tenders, must make it possible for an undertaking located in the territory of a Member State other than that of the contracting authority to have access to appropriate information regarding that concession before it is awarded, so that, if that undertaking so wishes, it would be in a position to express its interest in obtaining that concession (C-388/12 at paras 50-52, emphasis added).

In my view, the argument used by the CJEU in para 51 of *Comune di Ancona* is sound in terms of business strategy and makes perfect sense. However, even if it focusses on 'net revenue' and the threshold of Article 6 of the Concessions Directive only refers to 'total turnover' (hence, they are not in stark conflict, as the threshold may catch concessions with a high turnover but very low operational or commercial margins), the qualitative approach followed by the CJEU should trigger some red flags.

I find that this shows that the quantitative approach adopted by the Concessions Directive will not mark the end of the story in the ongoing discussion regarding the rules and requirements applicable to contracts not covered by the procurement Directives—and, more specifically, to services concessions. It seems to me that a dual legal regime will persist between '*Directive concessions*' and '*Ancona concessions*', where the CJEU will continue pointing out to the potential existence of cross-border interest for concessions with a value below €5mn (or in the excluded and preferential sectors, such as water or social services).

If that is so, the passing of the Concessions Directive will only have increased legal complexity in this area and should not be seen as a necessarily positive development. In any case, and for the purposes of this paper, what seems clear is that the Concessions Directive has failed to meet the second condition needed for it to make a significant contribution to the creation of legal certainty, such as the clearly delimitation in a definite manner of the contracts covered by its scope (hence, subjected to those substantive obligations) from those excluded from its coverage (hence, free from compliance with any obligations derived from general principles).

#### **4. CONCESSIONS DIRECTIVE FAILS TO RECOGNISE PRINCIPLE OF COMPETITION AND CREATES A RISK OF INCONSISTENCY WITH THE CLASSICAL SECTOR AND UTILITIES DIRECTIVES OF 2014**

Finally, it is worth recalling that the third condition that should be met for the Concessions Directive to provide legal certainty was for it to avoid risks of legal uncertainty derived from internal inconsistencies between the crystallisation of the general principles in the Concessions Directive and the rules on general principles of the other substantive directives of the 2014 procurement package. In order to assess compliance with this condition, it is necessary to engage in a critical assessment of the already mentioned Article 3 of the Concessions Directive, which reads

1. Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

2. Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28 [confidentiality].

Generally, it is worth highlighting that the first part of Article 3(1) of the Concessions Directive is almost identical to Article 18(1) of the Public Service Directive.<sup>12</sup> The inclusion of the reference to the prohibition to estimate the value of the concession in such a way as to exclude it from the scope of application conflates some elements of Article 5(3) of the Public Service Directive into this provision, but that is not relevant for our discussion.

##### **4.1. Principle of competition and undue favourable treatment**

The second part of Article 3(1) of the Concessions Directive deviates from the formulation of the principle of competition included in the second part of Article 18(1) of the Public Sector Directive<sup>13</sup>

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<sup>12</sup> For drafting simplicity, the comparison is limited to the provisions in Article 18 of Directive 2014/24, but it also applies to Article 36 of Directive 2014/25.

<sup>13</sup> "*The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed*



and does not expressly include the requirement that the design of the concession award procedure shall not be made with the *“intention of artificially narrowing competition. 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—although it keeps the last caveat and extends it to instances of discrimination between certain works, supplies or services. Hence, specifically, the Concessions Directive suppresses the express mention of the principle of competition included in Article 18(1) of the Public Sector Directive and limits it to the presumption of distortions of competition in cases of favouritism or corruption. However, a review of the drafting process of the provision shows that the principle was always intended to form part of the Concessions Directive and, consequently, interpretative efforts to reconcile the shortened version of Article 3(1) of the Concessions Directive with the fuller version in Article 18(1) of the Public Sector Directive should fundamentally focus on the extension of the principle of competition as a general principle of EU procurement law to the Concessions Directive.

Indeed, in the 2011 proposal, the general principles called to govern the award of concessions were established in Article 7, where the Commission had included an explicit mention to the avoidance of distortions of competition: *“Contracting authorities and contracting entities shall treat economic operators equally and shall act in a transparent and proportionate way. The design of the concession award procedure shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition”* (emphasis added). The European Parliament kept this principle in a consolidated Article 26a(2) (Amendment 172), whereby *“During the concession award procedure, the grantor shall treat economic operators equally and shall act in a transparent and proportionate way. In particular, it shall not provide information in a discriminatory manner which may give some candidates or tenderers an advantage over others. The design of the concession award procedure shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition”* (emphasis added). Hence, it is very surprising that the final version of Article 3(1) of the Concessions Directive does not include an express reference to the prohibition of a design of the tender that artificially narrows competition.

The reconciliation of this omission with the clear pro-competitive orientation of the Concessions Directive requires, in my view, a flexible interpretation of Article 3(1) that, effectively, equates its interpretation to its functional equivalent in Article 18(1) of the Public Sector Directive. The intense pro-competitive orientation of the Concessions Directive is clearly evidenced by the inclusion of express warnings against unjustified restrictions or distortions of competition in the rules concerning: conflicts of interest (article 35), procedural guarantees concerned with short-listing [article 37(3)], selection and qualitative assessment of candidates (article 38), provision of information to candidates (article 40), and award criteria (article 41). Even if relatively unspecific or watered-down, as discussed above, such a plethora of pro-competitive requirements regarding some of the key elements in the design of the tender procedure applicable to concessions can only be reconciled with an interpretation of Article 3(1) of the Concessions Directive that is not only neutral towards the existence of restrictions of competition, but that positively prohibits them, in light with the expected interpretation of Article 18(1) of the Public Sector Directive.

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*where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.”*

In that regard, some remarks on the interpretation of the principle of competition in Article 18(1) of the Public Sector Directive and the interpretative difficulties that it creates might be worth taking into consideration. The adoption of the Public Sector Directive has resulted in the consolidation of the principle of competition in Article 18(1) *“The design of the procurement shall not be made with the intention of [...] artificially narrowing competition. 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”*. In my opinion, despite the positive aspects of the express recognition of the principle of competition in the new Public Sector Directive, the inclusion of a subjective element and the reference to the prevention of corruption or the avoidance of conflicts of interest by establishing an irrebuttable presumption of competitive distortion, raise many questions that are difficult to answer and that may give rise to more litigation.<sup>14</sup>

*Explicit recognition of the principle of competition.* Importantly, so far, the principle of competition in public procurement was only reflected somewhat partially and in a fractionated manner at EU law level, by means of both Directive 2004/18 (and earlier versions of the procurement Directives that it consolidated) and the interpretative case law of the ECJ in cases such as in *Fracasso and Leitschutz* (*“to meet the objective of developing effective competition in the area of public contracts”*),<sup>15</sup> *Lombardini and Mantovani* (*“all the requirements imposed by [Union] law must [...] be applied in such a manner as to ensure compliance with the principles of free competition”*),<sup>16</sup> and *SECAP* (*“assess tenders which are submitted to them under conditions of effective competition”*).<sup>17</sup> Additionally, the contours of the principle of competition were somewhat fuzzy and required a considerable interpretive effort to delineate the obligations derived therefrom.<sup>18</sup> From this perspective, the explicit recognition of the principle of competition in the new EU directive is to be welcomed. However, the explicit formulation adopts the policy is problematic for at least two reasons.

*Inclusion of a very problematic subjective element.* As mentioned, Article 18(1) of Public Sector Directive provides a formulation of the principle of competition in which the subjective or intentional element of any restriction of competition is emphasized: *“The design of the procurement shall not be made with the intention of [...] artificially narrowing competition”* (emphasis added). This intentional element is common to different language versions of the Directive (*“intención”* in Spanish, *“intention”* in French, *“intento”* in Italian, *“intuito”* in Portuguese or *“Absicht”* in German), so it cannot be justified as a deficiency in translation or an error in the wording of the provision. However, the recitals of the Public Sector Directive do not provide any clarification and, ultimately, this provision opens the door to complex problems of identification and attribution of intentional elements in the field of public procurement—or, more generally, in administrative (economic) law. In my opinion, this task is very complex, as it requires establishing the parameters by which a

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<sup>14</sup> For a preliminary discussion and exploratory interpretative ideas, see A Sanchez Graells, “The ‘new’ principle of competition in Directive 2014/24: a new set of presumptions?” in *How to Crack a Nut*, 20 May 2014, available at: <http://howtocrackanut.blogspot.co.uk/2014/05/the-new-principle-of-competition-in.html> [last accessed 18 March 2015].

<sup>15</sup> *Fracasso and Leitschutz*, C-27/98, EU:C:1999:420, para 31.

<sup>16</sup> *Impresa Mantovani*, C-285/99, EU:C:2001:640, para 76.

<sup>17</sup> *SECAP and Santorso*, C-147/06, EU:C:2008:277, para 29.

<sup>18</sup> For discussion, see A Sanchez Graells, “The Principle of Competition Embedded in EC Public Procurement Directives” (May 15, 2009), available at SSRN: <http://ssrn.com/abstract=1928724> [last accessed 18 March 2015].

decision that often involves various individuals (and potentially several administrative bodies) is considered affected by an underpinning anticompetitive intent.

In fact, I think that this task is virtually impossible, given that the traditional mechanisms of allocation of subjective factors in (administrative) disciplinary or criminal law are not applicable and very clearly require an "objectifying" reinterpretation of the intentional element in the provision. The reasons for the "objectification" of the wording of Article 18 of Public Sector Directive are multiple and mainly derived from the need for coordination of this new rule with some of its "functional neighbours". Remarkably, such coordination should take into account the objective character of the restrictions of competition derived from the rules of the TFEU and its interpretation by the CJEU. Indeed, the prohibitions in Articles 101 and 102 TFEU apply in abstraction from any volitional element of the offending parties. A competitive restriction in the market automatically results in a violation of those prohibitive norms, irrespective of the intention with which market players have conducted the practice restrictive of competition. Therefore, the objectification of Article 18 of the Public Sector Directive seems the most appropriate functional solution—but, acknowledgedly, it can be seen as lying somewhat far away from a literal interpretation of the provision. Broadly speaking, in my opinion, this objectification of the principle should be carried out by establishing a rebuttable presumption of restrictive intent in cases where, in fact, the tendering procedure has been designed in a manner that is restrictive of competition. The disproof of this rebuttable presumption would require the contracting authority or entity to justify the existence of objective, legitimate and proportionate reasons for the adoption of the criteria restrictive of competition (*ie* to provide a plausible justification for the imposition of restrictive conditions of competition in tendering the contract, so as to exclude the plain and simple explanation that it was intended to restrict competition therewith). In other words, if it could be justified that a "*reasonable and disinterested contracting entity*" (meaning free from any intent to restrict competition) would have taken the same decision on the design of the tender in a form restrictive of competition, the presumption of restrictive intent would not be applicable and, ultimately, the tender would be compliant with Article 18 of the Public Sector Directive (and, by functional implication, with Article 3 of the Concessions Directive).

*Linking distortions of competition and favouritism or corruption.* The second problematic aspect in the wording of Article 18(1) of the Public Sector Directive is, in my opinion, the establishment of a *iuris et de iure* presumption of competitive distortion in: "*Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly (sic) favouring or disadvantaging certain economic operators*". This assumption raises a potential problem of (logical) "capture" of the interpreters of this rule, as they may be tempted to consider that in the absence of (undue!) favouritism or corruption, no restrictions on competition are contrary to the precept—that is, they can be inclined to decide not to apply the "residual" part of the prohibition and limit it exclusively to cases covered by the presumption. Additionally, while it is true that most cases of favouritism or corruption will result in a restriction of competition, this is not always necessarily the case. For example, in cases where the beneficiary of favouritism could be awarded the contract under competitive conditions, or in cases in which corrupt practices are added to previous restrictions of competition created by the bidders active in the market; it could be argued that there is no (independent) restriction competition and, therefore, that the presumption is unnecessary or unjustified. In any case, the instances of favouritism included in the irrebuttable presumption would (also) be covered by the new rules relating to conflicts of interest envisaged in

Article 24 of the Public Sector Directive, and can even fit into one of the headings of mandatory exclusion of Article 57(1)(b) for corruption, as supplemented by the obligation to terminate the contract under Article 73(b). Therefore, the establishment of the presumption of anticompetitive intent in cases of favouritism or discrimination is, in my opinion, unnecessary and may be counterproductive. Ultimately, I think that it will be necessary for the bodies responsible for the implementation of these provisions to clearly distinguish instances of corruption from those of (simple) restriction of competition and, in the latter scenario, apply the first part of the principle of competition in an “objectified” manner, as advocated above.

#### **4.2. Principle of transparency**

The specification of additional transparency requirements beyond the general consolidation of the principle of transparency in Article 3(1) of the Concessions Directive has its origin in Amendment 63 of the European Parliament, which proposed (without justification) the introduction of a new article 1b setting out the “Principles of transparency by public authorities” whereby “*The details of concession contracts, including regarding the transfer of the substantial part of the economic risk as defined in the third subparagraph of point 2 of Article 2(1), and payments, if any, from the grantor to the economic operator, shall be made public and open to scrutiny, subject to the provisions on confidentiality laid down in Article 24. Any subsequent modifications to the contract shall also be made public.*” The final drafting of the principle in Article 3(2) is much shorter and fundamentally restricted to imposing disclosure of non-confidential information concerned with the award and execution of the concession (see Article 28 for further commentary on protection of confidential information). Under this drafting, it is hard to see this provision as extending in any meaningful manner the general obligations of transparency already imposed by the “standard” formulation of the principle as recognised in Article 3(1) of the Concessions Directive and, in any case, it seems clear that it would not be able to reduce them on the argument that it is a *lex specialis* that restricts transparency obligations to award and modification of the concession, as it is clear that Article 3(1) imposes a general duty to “act in a transparent and proportionate manner” in all matters and at all phases of the tendering of concessions [see comment to Article 18(1) of the Public Sector Directive].

#### **4.3 Overall assessment**

As this cursory look at Article 3 of the Concessions Directive has shown, its drafting diverges in significant ways from that of Article 18(1) of the Public Sector Directive. Even if those drafting divergences can be reconciled through interpretative efforts (as I have tried to do above), there is no doubt that such lack of harmonisation of the provisions that crystallize the general principles of EU public procurement in the different substantive directives included in the 2014 procurement package fails to exclude legal uncertainty and interpretative risks. Hence, once more, the Concessions Directive fails to meet one of the three necessary conditions for it to make a net contribution to legal certainty in this area of EU Economic Law.

### **5. CONCLUSIONS**

Very briefly, for all the reasons detailed in this paper, it seems clear to me that the Concessions Directive has failed to deliver on its attempt to create “*uniform application of the principles of the TFEU across all Member States and the elimination of discrepancies in the understanding of those principles ... at Union level in order to eliminate persisting distortions of the internal market*”.

## ANNEX

Concessions Directive	Public Sector Directive	Utilities Directive	Defence Directive
<b>Article 1</b>			
Article 1(1)	Article 1(1)		
Article 1(2)			
Article 1(3)	Article 1(3)		
Article 1(4)	Article 1(6)		
<b>Article 2</b>			
<b>Article 3</b>			
Article 3(1)	Article 18(1) but differences		
Article 3(2)			
<b>Article 4</b>			
Article 4(1)	Article 1(4) & 1(5)		
Article 4(2)	Recital (6)		
<b>Article 5</b>			
Article 5(1)			
Article 5(2)	Article 2(1)(10)		
Article 5(3)	Article 2(1)(12)		
Article 5(4)	Article 2(1)(11)		
Article 5(5)			
Article 5(6)	Article 2(1)(18)		
Article 5(7)	Article 2(1)(6)		
Article 5(8)	Article 2(1)(7)		
Article 5(9)	Article 2(1)(19)		
Article 5(10)		Article 4(3)	
Article 5(11)		Article 4(3)	
Article 5(12)	Article 2(1)(13)		
Article 5(13)	Article 2(1)(22)		
<b>Article 6</b>			
Art 6 generally	Article 2(1)(1), 2(1)(4) and 2(2)		
Art 6(1) in fine			
<b>Article 7</b>		Article 4	
<b>Article 8</b>			
Article 8(1)	Article 4 but different		
Article 8(2)	Article 5(1) but different		
Article 8(3)			
Article 8(4) to (6)	Article 5(3), 5(4) and 5(8)		
<b>Article 9</b>	Article 6		
<b>Article 10</b>			
Article 10(1)	Article 11 but different		
Article 10(2)			
Article 10(3)	Article 10(i) but different		
Article 10(4)	Article 9		
Article 10(5)			Article 12
Article 10(6)			Article 13
Article 10(7)	Article 15(2)		
Article 10(8)	Article 10		
Article 10(9)			
Article 10(10)		Article 19	
<b>Article 11</b>	Article 8		
<b>Article 12</b>		Reverse of Art 10	
<b>Article 13</b>		Article 29	
<b>Article 14</b>		Article 30	
<b>Article 15</b>		Article 31	
<b>Article 16</b>		Articles 34 and 35	
<b>Article 17</b>	Article 12		
<b>Article 18</b>			
<b>Article 19</b>	Cross-refer to Art 74 to 76		
<b>Article 20</b>	Article 3		
<b>Article 21</b>	Article 16		
<b>Article 22</b>		Article 6	
<b>Article 23</b>		Article 26	
<b>Article 24</b>	Article 20		
<b>Article 25</b>	Article 14		
<b>Article 26</b>	Article 19		
<b>Article 27</b>	Article 23		
<b>Article 28</b>	Article 21 and Recital (51)		
<b>Article 29</b>	Article 22 and Article 90		