



# COMPARATIVE SURVEY ON THE TRANSPOSITION OF THE NEW EU PUBLIC PROCUREMENT PACKAGE



*Department for European Union Policies*  
*The Italian National Anti-Corruption Authority*





Presidency of the Council of Ministers  
Department for European Union Policies

The Italian National  
Anti-Corruption Authority

## **PPN ITALIAN PRESIDENCY**

### **THE TRANSPOSITION OF THE NEW EU PUBLIC PROCUREMENT DIRECTIVES IN THE MEMBER STATES**



## **1. INTRODUCTION**

The Public Procurement Network (PPN) is a useful tool to exchange information about public procurement systems in European countries, implementation of European public procurement law and an instrument for exchange of good practices.

Italy assumed the Presidency of PPN on 1<sup>st</sup> July 2014. The Italian Presidency is held by the Department of European Union Policies of the Presidency of the Council of Ministers in cooperation with the National Anti-Corruption Authority.

The current Italian Presidency falls just upon the adoption of the new directives on Public Procurement: Directive 2014/24/EU on public procurement; Directive 2014/25/EU for entities operating in the utilities sector and Directive 2014/23/EU, a new directive on the award of concession contracts.

The public procurement package introduces relevant changes and challenging commitments for all member States, starting from the correct and timely transposition of the new provisions.

Therefore, the Presidency has considered it appropriate to make use of PPN, as a largely tested instrument, to start a cooperation and an exchange of information among the PPN members, focused on modalities and processes of the transposition and the implementation into national law of the new EU public procurement package. This exercise can be interesting and useful also for non EU PPN members.

The aim of the survey is not to have a complete framework of the definitive national implementation law as the transposition of the new directives into national law is still in process in all PPN countries.

The survey is aimed at providing for useful information on the planned implementation of the new rules, on the different transposition options currently being discussed at national level, in particular related to the non mandatory

provisions of the directives and, in some cases, on the current national legislation which already introduced some of new rules or on the current legal or institutional framework. This study can give an interesting overview on the results of the national consultation and the different comments on the topics selected.

## **2. PRESENTATION OF THE SURVEY**

In order to collect information the Italian Presidency has sent to PPN members a questionnaire which focused on several topics, selected after having consulted PPN countries and the national stakeholders.

With regard to the main objectives of the reform, the following issues were considered by the Presidency as the most interesting :

- *Non mandatory provisions of the directives*
- *The awarding procedure*
- *Techniques and instruments for electronic and aggregated procurement*
- *Choice of participants*
- *Use of environmental and social criteria*
- *Contract performance*
- *Exclusions*
- *Competition protection, control and monitoring of the correct application, fight against corruption*
- *Specific provisions of Directive EU/25/2014 and Directive EU/23/2014*

In attachment are available the contributions from the PPN countries who answered to the questionnaire.

## **3. SUMMARY RESULTS OF THE SURVEY**

In general, in all the countries involved the elaboration of the future framework of the national public procurement law is still in process. Thus, several PPN countries are not able to answer to the questionnaire at the moment.

Nevertheless, the survey is still open and it will be possible for PPN countries to give their contribution also in the coming months.

Some of the countries involved in the survey have prepared the first preliminary transposition draft of the national public procurement law which is being discussed at the national level (United Kingdom, Lithuania, Cyprus).

In the United Kingdom the Public Contracts Regulations are planned to come into effect in February 2015. Other countries plan to proceed to the drafting of the legislative texts in 2015. In most of the PPN countries a consultation has been launched involving a wide range of representatives from stakeholders. In Italy, after the closing of the negotiation phase, the Government launched, in view of the national transposition of the new directives, a consultation of all stakeholders involved (public administrations, representatives of economic operators and of social organizations), aimed at discussing, in particular, issues where Member States have policy choices for transposition and the most innovative and complex provisions of the directives. The consultation is still ongoing. Discussion papers were drawn up collecting comments and opinions expressed by the participants. In those documents also clarifications received by European Commission upon specific questions are inserted. The preliminary draft of the national public procurement law will take into account of the results of the consultation.

In the United Kingdom the Cabinet Office undertook informal, targeted engagement with a range of interested stakeholders through a series of discussion papers, to inform the government about the proposed policy positions on some policy choices. The draft regulations have been prepared in the light of those proposed policy positions. Also In Lithuania the first preliminary draft of the Lithuanian Law on Public Procurement transposing Directive 2014/24/EU is being discussed at the national working group of the stakeholders.

The main results of the survey are summarized for each section of the questionnaire as follows.

## **EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS**

### **1. Non Mandatory Provisions of the Directive**

*PPN Countries have been asked to indicate :*

- *which non mandatory provisions will be transposed*
- *for each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification*
- *which reasons support the non transposition of some of these provisions*
- *which main interests are supposed to be protected by non transposing some of these provisions.*

Most of the countries involved in the survey are still discussing which non-mandatory provisions in the directives they will and will not transpose.

In Italy an internal discussion about the transposition of non mandatory provisions is still ongoing. A decision on the transposition of such provisions often implies a political choice, thus a wide consultation with representatives of contracting authorities, economic operators and also social parties has been launched on this matter and currently a general consensus has already been expressed on some provisions, such as those regarding: reserved contracts to sheltered workshops; the right for organisations to participate in procedures for the award of public contracts exclusively for specific health, social and cultural services. As for mandatory or discretionary grounds for exclusion our legislation already provides as mandatory many of the grounds for exclusion listed in the past directive 2004/18/EC, therefore after taking into consideration stakeholders' views, our position will be that to maintain as mandatory these ground for exclusion in the transposition of the new directive (art. 57, par. 2).

A favourable opinion also emerges for provisions aiming at improving or facilitating SME's access to contract award procedures (in some cases already implemented in Italy's legislation, e.g. division of contracts into lots). For other non mandatory provisions an agreement has not been reached yet, as some parties prefer giving the provided faculties (powers) to contracting authorities, while for other parties those obligations should be imposed directly by law, thus

excluding any choice for CAs (e.g. electronic catalogues; procurement involving contracting authorities from different Member States, etc.)

Some of the countries involved do not plan to take over some or most of non mandatory provisions of Directive 24/2014 in order to ensure simplification and flexibility, to avoid unnecessary administrative burdens on both contracting authorities and economic operators and to avoid to implement additional obligations and exceptions (Slovakia, Norway).

In other countries the approach chosen is to let the stakeholders express their opinion on their transposition or non-transposition (Lithuania) or to make maximum use of the flexibilities provided by the new Directive.

In the United Kingdom the approach to the transposition of non-mandatory provisions was set out in the consultation documents to get views on how to transpose these in the draft Regulations. The general approach was to make maximum use of the flexibilities provided by the new Directive, but not to add more administrative burdens where this could be avoided. The approach to the options is subject to Ministerial approval.

In the Netherlands, on the basis of an agreement with Parliament, the Dutch cabinet is obliged to implement directives without any additional national provision except when the directive introduces a choice for a Member State. Anyway when implementing the new directives the perspective is to give flexibility to contracting authorities to decide how to organise their public procurement procedure.

In other countries there is a different approach. Poland intends to transpose almost all non-mandatory provisions of the new directives.

In Estonia some of non mandatory provisions will be transposed and made compulsory for contracting authorities to use (voluntary exclusion ground stipulated in article 57 paragraph 2), whereas most of non-mandatory provisions shall be transposed as possibilities for contracting authority.

Cyprus planned to transpose some specific provisions (i.e. the provisions regarding reserved contracts to sheltered workshops / operators professionally integrating disabled or disadvantaged persons, derogation from the mandatory

exclusion grounds for overriding reasons related to the public interest , the use of best price-quality ratio award criterion in service contracts except in justified cases, the right for organisations to participate in procedures for the award of public contracts exclusively for specific health, social and cultural services) for political reasoning, targeting sustainability and at the overall outcome of the relevant contracts, as well as the time needed for practical harmonization, than the procedure simplification.

## **2. The awarding procedure**

*PPN Countries have been asked to provide for information on the approach to implement some specific provisions of Directive 24/2014 (and analogous provisions of Directive 25/2014 and Directive 23/2014) concerning the awarding procedure.*

- **Competitive procedure with negotiation**

*PPN countries have been asked how they intend to implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29.*

From the survey it emerges that, when transposing this provision, the reasons for applying the competitive procedure with negotiation will take over strictly within the purview of art. 26 of Directive 2014/24.

In general, provisions of art. 26 will be transposed as provided by the directives.

In Italy, even though a specific decision has not been taken yet, it emerges that art. 26 will be transposed as provided by the directive itself.

In Cyprus the secondary legislation would provide for the procedural way of implementation (decisive organs, rules for evaluation committees etc.) as the national practice imposes and further relevant guidance or instructions can be issued by the Competent Authority for Public Procurement.

In some countries the transposition of this procedure such as other award procedures is intended in a structured way.



In Malta it is provided that a request is to be made by the contracting authority to the competent regulatory authority, based on grounds found in the directive, which decides whether to accept request or otherwise. This will be a two phase procedure.

In the Netherlands this provision will be implemented in two different chapters thereof: the one on procedures (in which the general procedural steps a contracting authority should take when using this procedure are laid down), and the chapter which deals with rules on calls for competition, exclusion, selection and award criteria, where the specific steps and safeguard clauses in the negotiations are laid down.

Also in Lithuania competitive procedure with negotiation and innovation partnership are intended to be transposed to reflect the conduction of procurement procedure on step-by-step basis.

Poland will also implement rules to be followed during negotiations - as principle of confidentiality, equal treatment of all bidders and non-discrimination. Moreover, the new law will implement the provisions of the directives, which provide the possibility to divide negotiations into separated stages in order to reduce the number of offers. In such case, contracting authority will be obliged to inform about it in notice or in other document.

- ***Innovation Partnership***

*PPN countries have been asked to explain how they intend to implement art 31 ruling the new procedure referred to as Innovation Partnership and in which strategic sectors they plan to use it.*

The Innovation Partnership is a completely new and complex award contract procedure. In general most of countries do not have much experience with the awarding of contracts aiming at developing innovative products.

Thus the national legislation in this area will be focused on the application practice on the national level as well as in the other Member States (Lithuania), or it is up to the contracting authorities to decide which procurement procedure

suits their needs best and therefore whether they will use this procedure (the Netherlands) .

In Italy, it's not possible currently to foresee how this new procedure could be implemented into the national legislation and sectors in which it could be used (a reference may be the case of pre-commercial contracts).

Most of the countries involved in the survey are not currently able to forecast in which areas the Innovation Partnership will be used. Some of them anticipated that this procedure could be used in case of complicated infrastructural projects (the Netherlands) or in the health sector, as well as in sectors which require the development of integrated systems (Cyprus), in the area of energy, ICT systems, medical products-services, transport and infrastructure (Greece). Austria intends to transpose the provision by taking over the wording of the Directive and so far no restrictions for its use are planned.

Other countries (Norway, Estonia) do not have plans of limiting the use of Innovation partnership other than requiring that the partnership can only be established where the aim is to develop an innovative product, service or work that is not already available on the market.

In the United Kingdom it is not yet clear which sectors will make use of this new procedure but its use will be encouraged.

- ***Possibility for CAs to examine the bids before checking the absence of grounds for exclusion***

*PPN countries have been asked whether they intend to transpose art 56.2 of Directive 24/2014*

Almost all of the countries who answered to the questionnaire are planning to transpose this provision (Austria, Lithuania, Malta, Norway, United Kingdom, Poland, Estonia, Cyprus, Slovakia). It is considered to be useful in terms of simplification and acceleration of the procedures .

In Italy the possibility to examine bids before checking the absence of ground of exclusion is still being discussed.

Feedback received from the majority of stakeholders is in favour of the possibility to re-organize the development of the award procedure, in terms of simplification of the procedure itself and with the aim of reducing administrative burdens and the number of challenges against awarding decisions.

Anyhow, it emerges a preference for applying this option to procedures where the evaluation of tenders may be carried out shortly (e.g. contracts awarded on the basis of the lowest price criterion or to the most economically advantageous tender but only when the contracting authority applies objective evaluation criteria) and, especially, by electronic means.

On the contrary, the possibility provided for in the directives is not deemed as useful and adequate when contracting authorities have to examine particularly complex tenders.

- ***Division of contracts into lots***

*PPN countries have been asked whether they intend to transpose art 46 of Directive 24/2014; if they plan to introduce the obligation foreseen by art 46 paragraph 4 and by means of which methodology they plan to identify the lots.*

In Italy a provision that obliges contracting authorities to divide contracts into lots has been already introduced in the Code of contracts (art. 2, 1-bis). This article also provides that contracting authorities must give (in the first procurement document) a specific motivation if they decide not to divide a contract into lots

The majority of stakeholders feedback on this provision is positive, as it may facilitate SME's access to contract award procedures.

Despite the national provisions on this matter (art. 2, 1-bis, of the Code of contacts), from the consultation different positions emerge on art. 46, par. 4, of the directive. Economic operators are contrary to an obligation of division into lots, as they prefer that a specific decision thereof is taken by the contracting authority, on a case by case basis.

Some countries did not plan to introduce the obligation to divide contracts into lots, leaving up to the contracting authorities to decide, on a case by case basis, whether a given contract should be awarded in the form of separate lots or not, and if so, how to divide the contract -size, subject-matter, etc. (Malta, Cyprus, Poland, Norway).

In other countries, such as Italy, this obligation is already foreseen.

In the Netherlands the current legislation already provides the obligation for contracting authorities to divide public contracts into lots. Contracting authorities are only allowed to deviate from this provision if they are of the opinion that dividing into lots is not appropriate and they have to motivate in the public procurement documents the reason(s) for this.

The Netherlands intend to maintain this provision and implement, as far as allowed, article 46 accordingly but it is still undecided on the implementation of article 46 paragraph 4.

Also in Lithuania it is planned to implement the relevant provisions that, as a general rule, would oblige contracting authorities to split contracts into lots and provide that they could avoid application of this rule only in cases when splitting the contract into lots would have negative effects .

United Kingdom plans to transpose art. 46, par. 4.

In Cyprus art. 46 para. 4 is transposed in a way that gives the possibility to the Competent Authority for Public Procurement to make, where needed, the division of specific contracts into lots mandatory, through implementing instructions/guidance or a relevant circular, based on good practice and experience gained.

### **3. Techniques and instruments for electronic and aggregated procurement**

- ***Electronic Procurement***

*PPN countries have been asked if they intend to postpone the application of article 22, par.1 of Directive 24/2014 until 18 October 2018.*

The PPN countries involved seem to be 50% in favour of postponing the application of article 22, par.1 (Slovakia, United Kingdom, Poland, Austria Cyprus) and 50% not in favour (Norway, Portugal, Estonia), but there are still some uncertainties on whether to postpone it or not.

*PPN countries have been asked how they intend to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned) and how they presently use electronic tools to conduct public tenders.*

In many PPN countries the mandatory use of eprocurement is already existing. The remaining countries are however planning to make it mandatory in the short and medium term.

Thus, there seems to be a positive and proactive approach to the use of eprocurement.

In Italy the national public procurement legal framework already contains rules that impose to Contracting Authorities the use of electronic procurement tools, in specific circumstances (purchases below the EU threshold, purchases for the Health sector, IT purchases for Central Ministries), mainly by making recourse to electronic platforms provided by Consip, as national CPB, and territorial CPBs (CAT).

Both the National and the territorial CPBs and the individual Contracting Authorities (also in an aggregated way) use, in some cases almost exclusively, electronic communication tools in order to implement several procurement procedures such as e-tenders, framework agreements and DPS.

According to the national law, Health bodies are obliged to use the DPS provided by Consip since it is a tool that allows for digital negotiations.

*PPN countries have been asked which framework is for e-procurement in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..).*

Some countries seem to have very detailed information on the take-up and use of eprocurement, others can provide data on some phases of the

eprocurement process. In some cases these data are published on the national websites as a clear demonstration of transparency.

*PPN countries have been asked if they are planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35).*

In terms of use of electronic tools, the majority of the countries have a national portal allowing to conduct e-tendering or at least some basic phases of the e-tendering procedure.

In several cases the national public platform is not the only one that can be used. Also private procurement platforms can be used, as long as the process takes place in a digital way.

An increasing number of countries are already capable of providing an end to end eprocurement platform.

The introduction of mandatory use of some eprocurement tools seems the trend for the future, with few exceptions. In some countries the national legal framework already pushes towards the use of these tools.

*PPN countries have been asked if the national legal framework foresees the obligation of public tender sessions and, in case it does, if they think it will be no longer necessary when using electronic tender procedures.*

When dealing with public tender sessions, countries are split among those who use public sessions, those who do not use them, those who leave it upon the discretion of the individual contracting authority.

More in general, national public procurement laws foresee mandatory public tender sessions when procurement is not fully carried out by electronic means.

Despite the trend, there still seems to be uncertainty on the need to continue holding public tender sessions when using e-tendering, several countries do not think it will be necessary to hold them, a few believe instead that they are a tool to guarantee transparency and accountability of the CA or CPB.

In Italy the national legal framework foresees the obligation of public tender sessions and it has been transposed in a very detailed way. The use of electronic procedures could modify some aspects of public tender sessions presently handled in a non digital way. As an example, the participation of CA and bidders at the same moment in the same place and the management of the bidding documentation, could be ruled differently.

- ***Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)***

*PPN countries have been asked if they are presently using the aggregated procurement tools foreseen by the directive and if they are planning to strengthen their use through the transposition.*

Wide use of Framework Agreements and recourse to CPBs seems to be the answer to aggregated procurement, either by means of one national CPB or by coexistence between the national CPB and the regional/territorial ones. Only in a couple of countries CPBs have not been set up.

Joint procurement is very rarely used up to date.

Italy already widely uses aggregated procurement tools such CPBs (both national and territorial) and framework agreements. Other modalities to aggregate procurement foreseen by the new directive are still to be analysed.

The strengthening of aggregated procurement is still under decision in most of countries. It could be left to the discretion of the single CA whether to use joint procurement or not.

Indeed, what still seems to be clear to PPN countries using CPBs and Framework agreements, is that they will continue using them.

#### **4. Choice of participants**

- ***Qualification***

*PPN countries have been asked, referring to art 19, paragraph 2 of Directive 24/2014, if they plan to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority.*

Most of the countries are not planning to implement any measure related to article 19 paragraph 2 in the national legislation. It will be up to the contracting authority to decide (Austria, Cyprus, Estonia, Malta, the Netherlands, Norway, Slovakia, UK).

In Italy, for temporary groups of companies, horizontal (all the companies perform homogeneous activities), and active in the public works field, the legislation currently already envisages that the requirements as to economic and financial standing or technical and professional ability required in the tender notice for an individual participant must be possessed by the agent at a minimum of 40 percent and the remaining percentage cumulatively by the principals or by the other members each at a minimum of 10 percent. The agent in any case assumes, during the bidding, the requirements as a percentage higher than each of the principals with reference to the specific tender. For temporary groupings of vertical type (a single enterprise plays the main activity and the others the remaining activities), the requirements as to economic and financial standing or technical and professional ability are owned by the agent in the main category; in the unbundled categories each principal possesses the provided requirements for the amount of the works in the class to be acquired and in the extent indicated by the individual firm. The requirements for unbundling processes not undertaken by the principals are owned by the agent in relation to the main category.

In Poland, a group of contractors, including temporary associations will be able to attend a public procurement procedure. The contracting authority will not be able to require from them to have a specific legal form to submit an offer or request to participate; however, the contracting authority will be able to request from them to adopt a specific legal form if they awarded the public contract, in so far as it is necessary for the satisfactory completion of the contract.



- **Exclusion grounds**

*PPN countries have been asked, referring to article 57 paragraph 4 of Directive 24/2014, which grounds for exclusion are planned to be transposed.*

In the current Italian law (Code of Contracts) all the grounds for exclusion contained in paragraph 4 - except for the cases referred to in subparagraphs d), e) and f) which have been introduced with the new Directive are already provided.

The transposition of those new non mandatory grounds of exclusion is still being discussed.

Most of the other countries plan to transpose all exclusion grounds (Austria, Cyprus, Estonia, Lithuania, Slovakia) and United Kingdom will transpose all grounds as optional. Norway and Poland will transpose some as mandatory and others as non mandatory.

*PPN countries have been asked which are the existing practices for self cleaning*

Most countries currently do not have any existing practices for self cleaning (Cyprus, Estonia, Greece, Italy, Lithuania, Malta, Norway, Poland, Portugal, Slovakia). Malta and Poland intend to introduce it with the transposition of the new directives. In the United Kingdom there are not examples of self-cleaning as envisaged by the Directive.

In Austria the self cleaning practices already exist as provided for the new directive.

In the Netherlands a form of self cleaning is currently provided by the national law but it is different from the method provided for in the Directive as the Directive gives economic operators a right to prove self cleaning while the national law gives a discretionary power to the contracting authority to allow an economic operator to prove self cleaning.

*PPN countries have been asked how they plan to regulate the application of paragraph 6 of art 57 of Directive 24/2014.*

Most of the countries have planned to transpose the article in their own legislation but, apart from Norway and Poland that plan to transpose Art 57 (6) more or less ad verbum, the others still don't know how. In Austria it is already implemented in the Federal Procurement Law.

- ***Self-declaration***

*PPN countries have been asked if they already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the grounds for exclusion in procurement procedures.*

Currently in the Italian system, the self declaration is already provided by law and according to art. 6-bis of the Code of Contracts in force, documentation proving the absence of grounds for exclusion and the respect of the selection criteria for participation in tender procedures governed by the Code of contracts is acquired only through the National database of public contracts established at the National Anti-Corruption Authority. To this end, the Authority has developed a computerized system known as AVCpass (Authority Virtual Company Passport), very similar to a Virtual Company Dossier that allows the online check of the absence of grounds for exclusion and the respect of the selection criteria for the participation in procurement procedures through the consultation from a single portal of the several databases that contain the different documents. In case in which there are only paper documents and they are related to the respect of the selection criteria (but not the causes of exclusion) the economic operator can scan them and put them into the computer system.

Most of the other countries do not currently use or have any plans for entirely digitalized systems in the evaluation of selection criteria or grounds for exclusion. (Estonia, Lithuania, Norway, Portugal, Slovakia, United Kingdom).

Cyprus and Poland are planning to develop it; in the Netherlands an entirely digitalized and automatized system is not possible.

- ***Mechanisms to verify abnormally low tenders***

*PPN countries have been asked which mechanisms are currently used to verify the abnormally low bids according to article 69.*

Most of the countries do not have a hard and fixed rule to verify abnormally low bids but each and every case is studied and decided accordingly (Malta, the Netherlands, Norway, Poland, Estonia, United Kingdom).

In Italy, for the verification of an anomaly, if the award criterion is the lowest price, there is a mechanism to identify, with a mathematical formula applied to the reduction offered by all the allowed competitors in the tender, an average threshold; all tenders offering a reduction rate equal to or above this threshold are considered to be abnormally low and must be verified prior to the award. If the award criterion is the most economically advantageous tender, the verification of the adequacy of the tender, is done only when the price component and quality component a score of more than four-fifths of the maximal grade provided for in the tender notice is achieved.

In Slovakia the current law embeds the possibility for the contracting authority to ask for the explanation when he has any doubts that there is abnormally low bid. The assessment, whether it is abnormally low price for contract and whether award procedure will be excluded, in principle is left to the contracting authority and on the subsequent explanation of the tenderer. Under the Act – the abnormally low tender is considered always the case when all bids have been submitted from at least three tenderers, who weren't excluded and all these offers meet the object of the contract, one of which is more than 30% lower than the second tender and more than 15% lower as is predicted value of contract.

In Cyprus the main mechanism used for the verification of the normal tender price is the presentation and explanation of the relevant cost breakdowns. Furthermore, the validity of any of the answers given by the tenderers in these investigation processes could be cross-checked with any other operator involved in the tender contents. Other reasons could reasonably affect the tender prices given (e.g. the economic crisis) can also be taken into account. Domestic jurisprudence in certain cases has indicated that particular differences between the estimated procurement value and the tender price in question should have

normally activated the said article. This does not preclude the right of the contracting authorities / entities to reject or investigate tenders of lower deviations.

Lithuania is planning to refer to the contracting authority the determination of requisites on temporary groupings among suppliers. Following the national Law on Public Procurement, the Government of the Republic of Lithuania authorised Lithuanian Public Procurement Office to define the concept of abnormally low tender. Consequently, the director of Public Procurement Office passed the order stating, that abnormally low tender means the tenderer's offered price of supplies, services or works, which, according to the contracting authority's assessment, is too low for proper performance of public procurement contract. In any case, the tender shall be considered abnormally low if the offered price of supplies, services or works meets one of the following conditions: is 15 per cent or more lower than arithmetic average of the prices offered by the other tenderers, whose tenders have not been rejected on other grounds; is 30 per cent or more lower than contracting authority's budget allocated to the specific public procurement contract. This order passed by the director of Public Procurement Office is compulsory only for public procurement above EU thresholds. In case of public procurement below EU thresholds the mentioned order may be applied.

In Portugal, the law establishes rules for abnormally low bids, in terms of a percentage refereeing to estimated price of the contract.

In Greece where the contracting authority establishes the submitting of an abnormally low tender, it is customary to request clarification from the operator for the price of its bid.

## **5. Award criteria: use of environmental and social criteria**

*PPN countries have been asked to indicate if, in the evaluation of qualitative aspects related to the quality/price ratio, they intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender.*

In Italy it is planned to provide for examples of environmental award criteria. Among those, the award criteria defined by the Minimum Environmental Criteria set within the National Action Plan Green Public Procurement. As for social criteria, there is no intention to provide additional detail on social characteristics other than provided for in article 67 of Directive 24/2014. The plan is to describe the social characteristics in some field-specific guidelines and give relevant examples.

Most of the countries involved do not intend to detail the social, environmental and innovative characteristics in the national law implementing the directives, but they prefer to retain a degree of flexibility even though these characteristics will have to be listed in the tender document and be public knowledge to all economic operators. There is no intention to provide additional detail other than provided for in article 67 (United Kingdom) and the specification of these requirements will be left on the contracting authorities themselves (Lithuania, Slovakia).

Several countries plan to describe the social, environmental and innovative characteristics in specific guidance to the regulation by indicating best practices (Norway, Cyprus, Estonia).

*PPN countries have been asked which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach.*

In Italy, when transposing article 68 of Directive 24/2014 it will be mentioned that “if such methods for calculation LCC are developed in the future Minimum Environmental Criteria, contracting authorities should refer to those methods”. In most of countries it is not planned to indicate or prescribe which calculation method contracting authorities will have to use. If common non-obligatory methods for calculation are developed in the future, contracting authorities might want to refer to those methods (Netherlands). It is also planned to take into account best practices of contracting authorities and where necessary, field-specific guidelines (Estonia, Cyprus).

*PPN countries have been asked if they intend to adopt specific provisions with reference to art. 67, par. 2 of Directive 24/2014 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only) and what criteria they consider necessary to detail as essential to the relaunch in the bidding against a fixed price.*

In Italy it is not planned to introduce specific indications in this regard in transposition of the art. 67, par. 2. Such indications could be introduced in the future within sectorial, non mandatory provisions e.g. the Minimum Environmental Criteria for a specific product or service, if appropriate. Also in Norway it is not planned to adopt a specific provision with reference to art. 67, par. 2.

Other countries intend to transpose this provision but the additional criteria will be regulated by the tender document.

*PPN countries have been asked, with reference to the life-cycle costing according to article 68 of Directive 24/2014, if they have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost.*

Most of the countries involved, included Italy, are not currently planning to adopt specific provisions with reference to art 68, except for providing best practices guides.

*PPN countries have been asked to indicate which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers), choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts.*

In Italy it has not been decided yet.

The Italian Ministry of the Environment has published in 2012 the “Guide for the integration of social aspects in public procurement” (Decree of the Minister of

the Environment, 6th June 2012, Italian Official Bulletin - July 10th 2012 n. 159). It is the official guide of the Italian Government for the integration of social (ethical) criteria in public procurement activities for all the Italian Contracting Authorities. The guide defines the “minimum social criteria” as the criteria aimed at promoting the application of internationally recognized standards regarding human rights and working conditions along the supply chain, as well as:

- *ILO “Core Conventions” listed in Annex X of the Directive 2014/24/EU (n. 87, 98, 29, 105, 100, 111, 138 and 182);*
- *ILO Convention on Occupational health and safety (n. 155), working time (n. 1), minimum wage (n. 131) and social security (102)*
- *the Universal Declaration of Human Rights;*
- *art. n. 32 of the Convention on the Rights of the Child;*

the national laws in force in countries where stages of the supply chain are performed.

The guide suggests to integrate the social criteria as specific clauses in the contracts, according to art. 26 and recital 33 of Directive 2004/18/EC. It suggests to develop a “structured dialogue” with the contractor aimed to monitor the application of social criteria along the supply chain.

The guide has been adopted by some relevant contracting authorities, like ARCA (the central purchasing body of Lombardy Region), the Italian Revenue Agency, Intercent-ER (the central purchasing body of Emilia Romagna Region) and the Region of Tuscany.

The guide will be updated for considering the possibility of the new Directive to integrate social criteria in all the phases of the procurement process, not only as contract performance conditions.

Lithuania transposed in the preliminary initial draft law all the possibilities to include social criteria (as contract award criteria or contract clauses) that are provided in the directive.

In other countries it is up to each individual contracting authority to decide whether and how it wants to include social criteria in procurement. In Netherlands the current legislation on Public Procurement prescribes that contracting authorities should in principle always use the criterium economically

most advantageous tender, unless they can motivate why in a specific case they prefer to refer to the lowest price.

In Estonia the use of most economically advantageous tender as a methodology for award criteria shall be stimulated by means of field-specific soft law guidelines that will be concluded in cooperation with associations and unions representing market actors in a specific field. Transposition shall not rule out the usage of lowest price only, however contracting authorities will be encouraged on wider and bolder use of most economically advantageous tender as a methodology for award criteria by means of training, informative forums, guidelines on field-specific best practices that will be published on the web-page of Estonian e-procurement environment.

*PPN countries have been asked, as for social security systems that fall outside the scope of application of the public procurement rules, if they have in force or plan to introduce such “out of the scope systems” and, if so, to explain their characteristics.*

In all the countries involved there is no intention to introduce such out of scope systems.

*PPN countries have been asked to indicate, as for the provisions about reserved contracts for certain services in article 77 , which criteria they intend to apply, in case of transposition of such optional provisions into national law.*

In Italy the specific legislation already includes this provision and criteria set out in article 77. It is planned to transpose such provision. Also in Austria this system is already in place.

United Kingdom intends to apply the criteria set out in article 77.

In other countries it is not planned to transpose this article or it has not decided on this issue yet.

*PPN countries have been asked, as for article 18 paragraph 2 and article 71, paragraphs 1 and 6, to provide some information about which “appropriate*



*measures”/”appropriate actions” have been already adopted, or they plan to introduce in order to adhere to these provisions.*

In Italy this matter is still being discussed. From the consultation of the stakeholders it emerges that specific solutions should be examined in order to ensure the appropriate measures for the compliance with collective agreements.

In general, in most of countries the national law on public procurement has already adopted several measures guaranteeing environmental, social and labour issues. The effective application of relevant labour and social laws and regulations is ensured by responsible authorities (such as labour or environmental inspectorates). Besides comprehensive national guides on both environmental, social and labour law considerations in public contracts have been produced.

Some countries intend to include the measures in article 18,2 under the exclusion criteria. Other countries are considering the possibility to transpose art. 18,2 by a basic national provision obliging contracting authorities to include into public procurement contracts a special clause binding economic operators to observe social/environmental/labour law provisions throughout the performance of the contract.

Some countries intend to transpose measures listed in article 71 paragraph 1 and 6.

## **6. Contract performance**

- ***Subcontracting***

*PPN countries have been asked if they intend to introduce the obligations referred to article 71, paragraphs 2 and 3.*

In Italy the obligation referred to in paragraph 2 is already existing in national legislation (Code of contracts), but only with reference to the obligation to indicate any share of the contract to be subcontracted. However, Italy does not plan to introduce the further obligation for tenderers to indicate any proposed

subcontractors, as it considers too onerous for the tenderer to fulfil the request at this stage of the procedure. A subcontract, in fact, may be assigned even a long time after the tender was submitted.

Concerning art. 71, par. 3, such a provision does already exist in the Code of contracts, even though the transfer of due payments directly from the contracting authority is not subject to the request of subcontractors.

Some countries involved intend to introduce the obligations referred in paragraph 2 (Austria, Malta, Slovakia, Poland). In Greece it is already provided in the national law.

Other countries (United Kingdom, Estonia, Norway, Cyprus) intend to implement this article by giving to the contracting authorities the option to ask for certain information regarding subcontracting or to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties.

As for obligations set in article 71 paragraph 3, it will be implemented by Austria, Slovakia and Poland.

In other countries, such as Italy, this provision already exists (Estonia, Cyprus, Greece).

*PPN countries have been asked if they intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7.*

In Italy the majority of stakeholders would appreciate the introduction of more stringent rules especially with regard to direct payments to subcontractors, in line with provisions already implemented in our legislation (see above).

Almost all of the countries involved do not intend to introduce more stringent liability rules or go further under national law.

- ***Modification of contracts during their term***

*PPN countries have been asked if they intend to implement the provisions of article 72.*

In general, as this article is a codification of jurisprudence and does not give Member States options, it is planned to be implemented into national law accordingly to the directive.

Norway intends to implement art. 72 in three separate provisions:

- *A provision on review clauses*
- *A provision on modification that are not possible without a new procurement procedure*
- *A provision on possible modifications, i.e. modifications that are not substantial.*

## **7. Exclusions**

- ***“In house providing”***

*PPN Countries have been asked to provide information on the modalities they plan to regulate the implementation of the provision in article 12 of Directive 24/2014, with particular reference to the possibility of private capital participation in the controlled legal person.*

In Italy the transposition of this provision will require a concurrent specification of the terms “*non-controlling and non-blocking*” as referred, in the directives, to the allowed forms of private capital participation in the controlled legal person. Such specification will be introduced in the light of a proper clarification provided by the European Commission.

Most of countries involved intend to follow the wording of the directive as faithful as possible when transposing and implementing article 12.

In Austria in-house exemption is already implemented in Federal Procurement Law.

Lithuania is considering several different alternatives, such as:

- *not to transpose in-house exceptions at all;*
- *transpose in-house exceptions, but restricting the conditions defined in the directive by refusing "bottom-up contract award", contract award between "in-house sisters", prohibiting private capital participation;*

- transpose in-house exceptions, but regulate it by a separate implementing law, providing for special procedural rules.

Norway intends simply introducing a prohibition on private capital participation without adding this modification.

## **8. Competition protection, control and monitoring of the correct application, fight against corruption**

*PPN Countries have been asked to describe the bodies responsible for the supervision/control of public procurement procedures and, in case of plurality of bodies, how supervision/control functions are shared among them.*

In the Italian law the supervision of public contracts of works, services and supplies is entrusted to an independent Authority, currently identified in the National Anti-Corruption Authority (A.N.AC.). Even the Antitrust has a limited jurisdiction to oversee the tender notice that contain clauses detrimental to free competition. In such cases the Antitrust may invite the contracting authority to modify the tender; if this is not done the same Authority may appeal against the tender notice before the administrative judge. As for the damage to the public revenue the control is entrusted to the Court of Auditors.

In the UK the body responsible for the policy and legal aspects of public procurement in relation to the EU Directives is the Crown Commercial Service, which is part of the Cabinet Office.

In Austria the bodies responsible are the Court of Auditors, administrative courts which make a formal control. They check the arithmetical correctness, compliance with existing regulations, and the employment of thrift, efficiency and expediency.

In Malta the Department of Contracts which is the Central Government Authority and Central Purchasing Body is responsible for the supervision and control of public procurement procedures and ensures that the public procurement regulations are observed by all parties involved.

In Slovakia the control activities related to the public procurement are executed by the Office for Public Procurement, as the body of the state

administration for this field. Other authorities are e.g. Audit authority which is within the central coordination body for the area of contracts which are financed from the EU funds. Ministry of finance of the Slovak republic together with the administration of the finance control, which execute the financial controls concentrated on keeping to the management of the public finance (here is included also the Public Procurement Law), but also indirectly there is the National Audit Office – as an independent body responsible for the management control of the use of public budgets and property of the state and self-governments.

In the Netherlands contracting authorities themselves are responsible for public procurement procedures. The accountant or audit units check the obligation to apply the Public Procurement Law 2012 in the yearly audit. The Netherlands has no supervisory body for public contracts. Concerning possible complaints about public procurement procedures, the civil court is competent, on application of economic operators (or contracting authorities), to decide in procurement matters.

In Norway the only body assigned exclusively to “monitoring” public procurement procedures is the Norwegian Complaints Board for Public Procurement (KOFA). KOFA is an independent body assigned to review complaints, primarily from economic operators, regarding infringements of the law on public procurement and associated regulations. The Office of the Auditor General (OAG) has a much wider scope for its work, and shall ensure that the community's resources and assets are used and administered in keeping with the Parliament's decisions. Through its auditing the OAG often has had a special focus on public procurement procedures and has put this topic on the agenda.

In Portugal the bodies responsible are the Court of Auditors and the Inspectorate-General of Finance and also sector Inspectorates-General.

In Estonia there are the Supervision Unit of Ministry of Finance with powers of control, declaration of a procurement null and void, prosecute administrative offences; the National Audit Office with powers of monitoring, non-binding recommendations to contracting authorities and to the Ministry of Finance; the Prosecutor's Office with the power to prosecute criminal offences.

In Lithuania the main body responsible for the supervision/control of public

procurement procedures as well as implementation of awarded public procurement contracts is the Public Procurement Office (PPO). It coordinates the activities of procurement and supervises classical sector contracting authorities as well as utilities sector contracting entities. In addition to the Public Procurement Office, other Lithuanian institutions involved in supervision/control of public procurement procedures as well as implementation of awarded public procurement contracts are the National Audit Office, the Special Investigation Service, the Competition Council, public legal persons authorised by a resolution of the Government of the Republic of Lithuania administering the financial assistance of the European Union.

In Cyprus the bodies responsible are the Competent Authority for Public Procurement (The treasury of the Republic of Cyprus), the Auditor General of the Republic of Cyprus, the Internal Control Service of the Republic of Cyprus. In Cyprus, the Competent Authority for Public Procurement is instituted by national procurement law to be the single body dedicated on public procurement supervision exclusively, ensuring through its functions the observance of all of the relevant requirements arising from public procurement law, at Cyprus level.

Polish public procurement control system is decentralized. Several institutions are authorized to conduct the control procedure of contract award procedures (Supreme Chamber of Control, Regional Clearing Chambers). However, the Public Procurement Office (PPO) plays the most significant role as it is the only institution with specialized units responsible for the control of public contract award procedure.

In Greece there are several bodies. The main are the following.

The Hellenic Single Public Procurement Authority has competences for monitoring and measurement the efficiency and effectiveness of actions taken by government; controlling of procedures for tendering, award and execution of public contracts, especially those which fall within the scope of EU laws and are co financed by EU; examination of infringement procedures in the field of the public contracts under investigations by the EU.

The Hellenic Competition Commission protects the proper functioning of the market and ensures the enforcement of the rules on competition.

The National Coordinator for Corruption follows an anti-corruption strategy related to prevention, strengthening the collaboration with other institutions and cooperation with society, at political level, carrying out inspections, surveys and investigations.

The Court of Auditors is competent for ex ante control of public contracts of large financial value, according to the Greek Constitution.

*PPN Countries have been asked to provide information about the competences of the bodies responsible for the supervision/control of public procurement procedures and in particular if they are responsible for prevention or repression and if they are independent authorities (from the Government).*

In Italy powers that A.N.AC. can exercise are both of prevention (through data collection activities, including all changes made to all contracts assigned, activities of market regulation and tracking of financial flows) and repression (through powers of supervision, sanction and compulsory administration). The activity of supervision concerns: public contracts entrusted to administrations, central and peripheral and those of regional interest; the object of the supervision is the observance of the legislation, regulation and the regularity of procurement procedures, the compliance with economic efficiency of the execution of public contracts, the fairness and transparency of procurement procedures, the protection of small and medium-sized enterprises and the respect for the rules of competition in the single tender procedures.

Closely related to the powers of supervision, are the powers of sanction exercised through the records of businesses in a computerized record of the Authority, and this results in the exclusion of economic operators from future tenders for a period from 1 to 12 months, in case of false declarations in the tender, and through financial penalties for failure to submit documents required by the Authority in its supervisory activity or by the contracting authority.

As regards the regulation of the market, A.N.AC. emanates acts of general nature (Determinations and Guidelines) to interpret the rules and give indications and assistance to contracting authorities and economic operators. A.N.AC. also emanates legal opinions on specific cases. The Authority processes the tender-

models, in the works, services and supplies that must be used by the contracting authorities.

A.N.AC. releases for each tender an identification code (CIG) that must be reported on all electronic payments regarding the contract. A.N.AC. also has the power to signal to the Government and Parliament particularly serious phenomena of non-compliance or distorted application of the law on public contracts.

A new power attributed to the President of A.N.AC. is the possibility to propose the compulsory administration. Specifically, in the event that the judicial authority processes certain crimes against the public administration, that is, in presence of detected anomalous situations and nevertheless symptomatic of illegal conducts or criminal events attributable to a company awarded a contract for the construction of public works, services or supplies, the President of A.N.AC. proposes to the competent Prefect, either: to order the renewal of the corporate bodies by replacing the person involved and, if the company does not abide by the terms established, to provide for the extraordinary and temporary management of the contractor only for the full implementation of the contract covered by the criminal proceedings or to provide for the extraordinary and temporary management of the contracting company limited to the complete execution of the contract subject to criminal proceedings.

In Malta they are responsible to ensure that the public procurement regulations are adhered to. Ad hoc committees are also answerable to the Department of Contracts to help in the monitoring process.

In Norway, in cases regarding infringements of the law on public procurement or associated regulations, the Complaint's Board gives advisory opinions.

In Lithuania, the main tasks of the PPO are regulated in the Law on Public Procurement and are related to the fields of regulation, supervision, analysis, methodological assistance, administration of the central portal of public procurement.

In Estonia, the Supervision Unit of Ministry of Finance has powers of control, declaration of a procurement null and void, prosecuting administrative offences; the National Audit Office has powers of monitoring, of providing non-binding recommendations to contracting authorities and to the Ministry of Finance; the



Prosecutor's Office has the power to prosecute for criminal offences.

In Cyprus, the Competent Authority for Public Procurement can act more preventively than as repressor, despite its direct involvement in the procedures. However, the new harmonizing legislation would allow for more repression to be achieved, as the Competent Authority for Public Procurement is especially assigned extended powers, besides the ones currently has. Particularly, in the case its newly introduced right for recommendations on the whole procurement procedure (including procurement documents and award decisions) are not followed by the contracting authorities / entities concerned, can take appropriate and effective action, where interested parties have no access to review procedures, as the new Directives require. In this respect, can refer abuses of use of negotiated procedures without prior publication to the Tenders Review Authority, the single Cyprus body responsible for procurement remedies, to the General Attorney of the Republic of Cyprus any other violations of procurement law and to the Council of Ministers any systemic problems, as for repressive measures to be adopted.

In Poland the objective of controls is to prove check the conformity of contract award procedures with the Public Procurement Law. Within 4 years from the day of the end of the contract award procedure the PPO President can commence ad hoc control. In case of disclosed breach of the provisions of PPL, the PPO President may: notify to the competent agent for public finance discipline of the breach of public finance discipline or make a request to the relevant enforcement committee to impose a penalty for the breach of public finance discipline; impose a financial penalty; apply to the court for the annulment of procurement contract in its entirety or in part. The ex-ante controls carried out by the PPO President may be divided into 2 groups: obligatory ex-ante controls if the value of contract is equal to or exceeds the PLN equivalent of EUR 20 000 000 for works and EUR 10 000 000 for supplies or services and the contract is co-financed from the EU funds; optional ex-ante controls, which the PPO President may commence ex-officio or on request if there is a justified presumption that the provisions of the PPL were violated in course of the contract award procedure what might have influenced results of the award procedure.

In some of the countries, as in the Italian case, there are independent bodies (Austria, Cyprus, Greece, Norway).

*PPN Countries have been asked to provide information about which and how many resources these bodies have; if the supervision functions are on a national or/and on a regional/local basis and if they adhere to international organizations.*

In general, apart from the specific Italian case where the original members of the ANAC were integrated by those of the suppressed AVCP, the staff members vary from 5 to about 50.

In Italy the staff of the structure consists of: 49 managers and 273 executives (17 of which come from other administrations and 7 with a fixed-term contract).

In Malta the Authority currently has a complement of 42 employees.

In Estonia the Supervision Unit of Ministry of Finance has 5 persons.

In Cyprus the Competent Authority for Public Procurement fully employs about 15 specialized persons.

In Norway 10 000 000 NOK or around 1 200 000 EUR is granted to the operation of KOFA in the national budget for 2015.

Most of them are all at a national level. Sometimes, as in the Italian case, at both basis (Estonia, Slovakia). In Austria they are established on federal and regional level.

In most of the countries involved these bodies adhere to international organizations (Italy, Cyprus, Malta, Slovakia).

In Italy A.N.AC. has joined the International Association of Anti-Corruption Authorities (IAACA), the network European Partners Against Corruption (EPAC), the Anti-Corruption Authorities' Portal (ACAs).

In Slovakia the Supreme Audit Office of the Slovak Republic is the member of several international organisations and clusters where are most highly control institution like INTOSAI, EUROSAI, the Contact committee of the heads of the supreme audit institutions of EU and the European Court of Justice, Visegrad Group Supreme control institutions of the countries V4+2.

In Cyprus the Competent Authority for Public Procurement is assigned the Cyprus contact point for the European Commission for public procurement.

*PPN Countries have been asked to provide information about the modalities used to prove compliance with the selection criteria in the procedures for the award of public contracts for works.*

Each country uses its own specific modalities:

In the Italian law to prove compliance with the selection criteria companies that perform public works must be qualified, that is, must have a certificate of qualification (a kind of driving license) that is issued by private companies which perform a public function: the Companies certification bodies (SOA), authorized and supervised in the performance of their activities by A.N.AC. The qualification certificate allows to carry out the work in accordance with the category (general works or special as plants) and with the rank (the maximum amount that can be run) with it attributed to the individual business. All qualification certificates are contained in the National database of public contracts held by A.N.A.C. and checked out in the tender by the contracting authorities through the system AVCpass.

In Malta the criteria are established in the procurement documents and depending on the documents submitted by the contractor, the contracting authority determines whether these criteria have been complied with or otherwise.

In Austria the proof submitted by bidders is verified; self-declarations are already used.

In the Netherlands economic operators have to sign the Dutch self declaration form in which they state they comply with the selection criteria in the procurement documents. Furthermore, an economic operator can use, e.g., certificates issued by the Chamber of Commerce, the Tax Office or the Ministry of Security and Justice to prove the economic operator is - respectively - not in a state of bankruptcy, paid his taxes and social security contributions, or does not fall under any of the mandatory exclusions grounds.

In Estonia there are different e-registries: e.g regarding commercial and works licences; also e-business registry to prove data on annual turnover.

In Cyprus notwithstanding the permitted methods currently provided by the procurement law, the selection criteria in all procurement procedures covered by the Directives should be documented within the tenders and could be further clarified if necessary during the evaluation process.

*PPN Countries have been asked to provide information about the modalities used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies.*

Each country uses its own specific modalities:

In the Italian law the proof of the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies is acquired by the contracting authority through a single computer system managed by ANAC., called AVCpass (Authority virtual company passport). It is a kind of virtual company dossier, enabling the contracting authority to acquire directly, from the different administrations that own them, the different certificates which proves the absence of grounds for exclusion under Article. 57 of Directive 24/2014.

In Malta recommended bidders are requested to furnish certificates showing that they do not fall under the exclusion criteria.

In Slovakia to demonstrate of the absence of grounds for exclusion is in the Slovakia possible by listing the entrepreneurs (the official list of approved economic subjects), by adducing of declaration on oath with adducing the documents from the winning tenderer (as is mentioned below) or by adducing of documents already in contract.

In Austria the proof submitted by bidders is verified; self-declarations are already used.

The Netherlands uses the 'Gedragsverklaring aanbesteden', roughly translated as a 'declaration of conduct in public procurement'. It is a certificate that proves that the exclusion grounds that are transposed in national legislation are not applicable to the economic operator. The certificate also shows if the economic

operator had any dealings with the national or European competition authority. The certificate is issued by the Ministry of Security and Justice on request and is applicable for two years.

In Norway, the procedure for reviewing cases consists of a written exchange of pleadings, similar to the hearing of civil actions. There is however no oral proceedings. Similar to civil actions before the courts, the procedure is adversary, as opposed to inquisitorial, and is limited to the parties' claims, pleas, allegations and evidence.

In Estonia tax debts are visible to contract authorities by means of e-procurement environment. Criminal offences on the basis of a court decision are visible to contract authorities by means of e-criminal offence registry.

In Cyprus exclusion grounds absence is documented and checked at a latest stage only for the bidder awarded the work, service, or supply contract before it is signed.

*PPN Countries have been asked if there are tools of guarantee in support of the tender in case of failure to sign the contract, in case it depends on circumstances attributable to the contractor.*

Most countries, as it happens in Italy, uses deposits as guarantees (Cyprus, Estonia, Malta, Poland, Slovakia).

*PPN Countries have been asked if control systems to ensure cost-effectiveness and legitimacy of the award of the contracts are provided and, if so, what are the procedures for implementing these controls.*

In most countries, as in Italy, the control systems are performed by the same bodies for the supervision/control of public procurement procedures.

In Italia there are the checks carried out both by A.N.AC. and by the Court of Auditors which in particular verifies that the execution of the contracts do not cause harm to the public revenue. Checks can be made ex officio or at the request of interested parties.

In Slovakia to ensure the cost effectiveness and legitimacy of the award of the contracts and use of public funds supervise the above-mentioned bodies such as the Supreme Audit Office, Financial Control Administration in collaboration with the Ministry of Finance SR, which is governed by separate regulations which is not in the scope of public procurement.

In Poland the control is led by the Supreme Audit Office (NIK). The basic task of the NIK is to audit the activity of government administration bodies, the National Bank of Poland (NBP), state legal persons and other state organizational entities.

In Austria legitimacy can be checked in formal remedy procedures and ensurance of cost-effectiveness – no formal control systems (beside the control by Court of Auditors) are in place.

In Estonia the National Audit Office controls this on a risk analysis basis. However recommendations of National Audit Office are non-binding, though strongly and widely accepted.

In Cyprus the Competent Authority for Public Procurement in the contact of its competences can provide contracting authorities / entities with suggestions regarding legitimacy and cost – effectiveness of procurement documents and award decisions on a case by case basis. Furthermore, it can provide for relevant general guidance in a best practices guide.

*PPN Countries have been asked if, when awarding a contract, any mechanisms are provided to ensure the traceability of financial flows and if there a specific body or an independent authority responsible for controlling these mechanisms.*

In some countries there are no specific systems related to the public procurement procedures. Other countries have their own mechanisms.

In Italy A.N.AC. releases for each tender an identification code (CIG) that must be reported on all electronic payments regarding the contract. One of the functions of the CIG attributed by law n. 136/2010 is that of identifying uniquely (trace) the financial movements related to commissions of works, services or supplies, regardless of the procedure to choose the contractor adopted and of the amount of the commission. In subcontracts the formalities required by the regulations on traceability are achieved through: the inclusion in the subcontract

of provisions governing the traceability; the communication in the subcontract of the dedicated current account/s and of the subjects delegates that work on the same; the payment, by the contractor of the fees through the dedicated current accounts and through the CIG code of the main contract. The power to verify the compliance with the provision and to impose sanctions is exercised by the prefectures.

In Malta, depending on the meaning of financial flows, there are two bodies which follow disbursements of certain funds, the Planning and Priorities Co-ordination Division and the treasury. Financial flows are supervised through IT systems.

In Poland the Regional Audit Chambers and Supreme Audit Office are responsible for controlling the mechanisms to ensure the traceability of financial flows

In Estonia contracting authorities are obliged to report by means of electronic procurement environment.

*PPN Countries have been asked what procedural safeguards they intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market and if they intend to regulate the involvement of the subjects consulted through individual and group audits.*

In Italy this is a choice left to the legislator. According to A.N.AC. a prior notice should be published, a single hearing should be permitted to those who have requested it, a smaller number of subjects on the basis of criteria predetermined in the tender notice should be identified and then a collective hearing with the latter group should be held.

In the Netherlands preliminary market consultations are already allowed and frequently done in the Netherlands. Thus far there have been no signals that this leads to compliance problems. The Netherlands will at this moment take no additional measures.

In Norway there is no plan to introduce any particular regulatory safeguards, but how to comply with the principles of non-discrimination and transparency in

preliminary consultations of the market is already described in national guidelines.

In Cyprus the subject is already covered under the general rules for sound procedures which are currently in force.

### **Specific provisions of Directive EU/25/2014**

*PPN countries have been asked about which type of methods for calculating the estimated value of procurement they intend to adopt according to article 16.*

In general, as the directive is detailed enough, almost all countries involved intend to follow it as closely as possible without introducing additional methods and plan to set up the uniform mechanism for calculating the estimated contract value for both contracting authority and contracting entity.

In Cyprus all types of value estimation will be provided at the discretion of contracting entities.

*PPN countries have been asked to indicate how they intend to regulate the procedure for the award of framework agreements according to article 51.*

Some countries (Estonia, Slovakia, United Kingdom) intend to strictly take over the award of framework agreement within the purview of art. 51. In the United Kingdom utilities have been operating frameworks agreements for many years and the main change from Directive 2004/17/EU is to limit the duration of such agreements to 8 years.

Norway plans to transpose art. 51 without introducing more detailed procedural rules on the award of the framework agreement or the award of contracts based on such an agreement and will leave it up to contracting entities to decide which rules and criteria should apply, as long as such rules and criteria ensure equal treatment of economic operators.

Poland plans to regulate this procedure similarly as in classical procurement regulations.



Cyprus provides for further guidance on implementation to be included in a best practices guide but this should not interfere in the field of entities choices for the application of this article, as the Directive's intention.

### **Specific provisions of Directive EU/23/2014**

*PPN countries have been asked to provide for information about the measures they intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive.*

In most of the countries involved in the survey this matter is still being discussed.

Anyway there is special attention for the position of SMEs, for instance by introducing a very lean self declaration and if possible applying these measures also to concessions (Netherlands). In Estonia 99,9% of all companies are SME's, hence the participation rate of SME's in public procurement is also approximately 99,9%. Also in Cyprus the majority of companies are SMEs.

*PPN Countries have been asked how they intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41.*

In most of the countries involved in the survey this matter is still being discussed. In general, they intend to set criteria for the contract award leaving the choice to contracting authority and contracting entity providing that will keep at minimum the requirements set in the art. 41 (Slovakia) and to give the contracting authorities the greatest possible discretion in determining which award criteria to apply (Norway).



## Austria

### EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

#### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*

This will be discussed on a case by case basis: no decision yet taken

- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *See above*
- *Which reasons support the non transposition of some of these provisions?*
- *See above*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*
- *See above*

#### **Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

##### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**

- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*

We intend to transpose the provision by taking over the wording of the Directive

- **Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*
- *In which strategic sectors do you plan to use it?*

We intend to transpose the provision by taking over the wording of the Directive; so far no restrictions for its use are planned

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**

- *Are you planning to transpose art 56.2?*

yes

##### **2. Division of contracts into lots**

- *How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?*

An obligatory division into lots will – presumably – not be implemented.

##### **3. Techniques and instruments for electronic and aggregated procurement**

## Austria

- **Electronic Procurement**

- *Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?*

yes

- *How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?*

-

This still needs to be discussed; AT has a national e-procurement strategy from 2011, which is in the process of updating in the context of the new Directives

- *Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc.)?*

No detailed statistics available

- *How are you presently using electronic tools to conduct public tenders?*

e-auctions are used, DBS not used; e-notification is obligatory, posting of procurement documents is obligatory (new rules of Directive mirror the existing AT legislation in this respect)

- *Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?*

No obligatory use of specific instruments is foreseen

- *Does the legal framework of your country foresee the obligation of public tender sessions?*

Only when opening bids in open procedures

- *In case it does, do you think that this will be no longer necessary when using electronic tender procedures?*

this depends on the e-tool CA/CEs are using; this will be discussed during the implementation process

- **Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)**

- *How are you presently using the aggregated procurement tools foreseen by the directive?*

CPBs are used; all new tools and possibilities will be transposed

- *Are you planning to strengthen their use through the transposition?*

#### **4. Choice of participants**

- **Qualification**

- *Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?*

CA

- **Exclusion grounds**

## Austria

- **Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?**

All grounds

- **Self-cleaning: which are the existing practices for self cleaning?**

As provided for in the new Directives (AT/D model )

- **How do you plan to regulate the application of paragraph 6 of art 57?**

Is already implemented in AT (see § 73 Federal Procurement Law)

- **Self-declaration**

- **Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?**

Not (yet) established; needs to be discussed (issue of costs, who is running the system, verification, responsibility ...)

- **Mechanisms to verify abnormally low tenders**

- **Which mechanisms do you use to verify the abnormally low bids according to article 69?**

No specific mechanism will be provided in the law (therefore it's p to the resp. CA/CE to develop/use a method)

### **5. Award criteria: use of environmental and social criteria**

- **In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?**

No specification is intended

- **Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?**

This is to be determined by the resp CA/CE by using a method respecting TEU principles

- **Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?**

not yet decided

- **With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?**

no such plans (yet)

- **Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).**

We will introduce no such choices/solutions; it's up to the CA/CE to include such criteria in a specific award procedure

## Austria

- ***As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?***

AT legislation covers the below threshold area as an example for such an “out of scope system”. More flexible rules apply to such procurements (however for ex the definition will apply to both areas)

- ***As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?***

We already have a system in place (the one used for today's non-priority services)

- ***As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?***

AT takes the view that for ex Art 18 (2) does not need a specific transposition measure (this was confirmed in the Council during the negotiations), same goes for Art 71 (1), Art. 71 (6) is a “can” provision!

### **6. Contract performance**

#### **• Subcontracting**

- ***Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?***
- *yes*
- ***Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?***

needs to be discussed

#### **• Modification of contracts during their term**

- ***How do you intend to implement the provisions of article 72?***

Not yet decided

### **7. Exclusions**

- ***In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?***

In-house exception already implemented in Federal Procurement Law (provision reiterates the Teckal formula)

### **8. Competition protection, control and monitoring of the correct application, fight against corruption**

- ***Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?***

Court of Auditors, administrative courts

- ***In case of plurality of bodies, how are supervision/control functions shared among them?***

## Austria

Type of control: formal control (as required by 89/669 + 92/13) = admin courts; Court of Auditors checks the arithmetical correctness, compliance with existing regulations, and the employment of thrift, efficiency and expediency.

- ***Which competences do they have? Are they responsible for prevention or repression?***

CoA can make recommendations; formal control = competences according to remedies Dir

- ***Are they independent authorities (from the Government)?***

yes

- ***Which and how many resources do they have?***

- ***The supervision functions are on a national or/and on a regional/local basis?***

CoA are established on federal and regional level

- ***Do they adhere to international organizations?***

What is meant by this question? Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?

The proof submitted by bidders is verified; self-declarations are already used in AT

- ***Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?***

See above

- ***Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?***

failure to sign the contract? – which circumstances are meant by this question?

- ***Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?***

Legitimacy can be checked in formal remedy procedures; ensurance of cost-effectiveness – no formal control systems (beside the control by CoA) are in place

- ***When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?***

no

- ***What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group auditions?***

- Needs to be discussed

### **Specific provisions of Directive EU/25/2014**

- ***What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?***
- Needs to be discussed; initial thoughts: no specific methods will be introduced, will refer to system of Dir
- ***How do you intend to regulate the procedure for the award of framework agreements according to article 51?***
- Needs to be discussed

## Austria

### **Specific provisions of Directive EU/23/2014**

- *What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?*

Needs to be discussed

- *How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?*

Initial thoughts: no regulatory measures will be taken



Cyprus

EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

**Non Mandatory Provisions of the Directive**

- ***From a general point of view, which non mandatory provisions will be transposed?***  
The provisions regarding (i) **reserved contracts** to sheltered workshops / operators professionally integrating disabled or disadvantaged persons, (ii) the use of all the **optional exclusion grounds** wherever mentioned, in all cases **by choice of the Contracting authority / entity** (iii) **derogation from the mandatory exclusion grounds** for overriding reasons related to the public interest (e.g. public health), or where exclusion would be clearly disproportionate, (iv) the **use of best price-quality ratio award criterion in service contracts** except in justified cases, (v) the **right for organisations to participate in procedures** for the award of public contracts exclusively for specific health, social and cultural services and (vi) the **transitional deadlines**, as provided by the Directives.
- ***For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?***  
The transposition of the above mentioned provisions, has rather political reasoning, targeting sustainability and at the overall outcome of the relevant contracts, as well as the time needed for practical harmonization, than the procedure simplification.
- ***Which reasons support the non transposition of some of these provisions?***  
No objection arose during their public consultation process.
- ***Which main interests are supposed to be protected by non transposing some of these provisions?***  
No such interest is pointed out.

**Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

**1. The Awarding Procedure**

- **Competitive procedure with negotiation:**



## Cyprus

- ***How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?***

We consider that the provisions of the said article are sufficiently detailed and flexible enough at the same time. In this respect, they will be transposed as provided by the Directives. Secondary legislation would provide for the procedural way of implementation (decisive organs, rules for evaluation committees etc.) as the national practice imposes. Further relevant guidance or instructions can be issued by the Competent Authority for Public Procurement (The Treasury of the Republic of Cyprus) through a circular or included in a best practices guide would be issued.

- **Innovation Partnership**

- ***How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?***

Similarly to the above answer.

- ***In which strategic sectors do you plan to use it?***

No planning is yet developed especially for this particular procedure. This planning could be more general, since the Council of Ministers which normally gives out such direction sets the strategic context and, in this respect, can approve or reject any suggestions coming from the contracting authorities for the use of innovation partnership at a given procurement procedure covered by the Directives. It is anticipated to be useful at the most in the health sector, as well as in sectors which require the development of integrated systems.

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**

- ***Are you planning to transpose art 56.2?***

Yes. It is anticipated to be useful enough in terms of the procedure simplification and acceleration, as it provides for discretion on a case by case basis.

## **2. Division of contracts into lots**

- ***How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?***

The way of division of contracts into lots is left by the draft legislation on the contracting authorities' / entities' discretion, as considered appropriate on a case by case basis. Article 46 para. 4 is transposed in a way that gives the possibility to the Competent Authority for Public Procurement to make, where needed, the division of specific contracts into lots mandatory, through implementing instructions / guidance or a relevant circular, based on good practice and experience gained.

## Cyprus

### **3. Techniques and instruments for electronic and aggregated procurement**

#### **• Electronic Procurement**

- ***Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?***

Yes, the legal postponement is set by the draft legislation on the said date. The actual implementation of the article is nevertheless expected to start earlier, in order for a pilot period to take place till the particular date.

- ***How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?***

Cyprus e-Procurement system is already mandatory to be used by all contracting authorities / entities in Cyprus, for the fulfilment of e-Notification requirements imposed by the current procurement law, whilst facilitates and used for e-Submission on the contracting authorities / entities discretion. Since the e-Procurement system is centrally maintained and managed, where necessary changes are needed to happen in harmonization of the new Directives, these will be reflected on the single platform, in order to be in compliance with the new mandatory provisions.

- ***Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc.)?***

On qualitative aspects, especially transparency, Cyprus e-Procurement system is considered to be in full compliance with the principle. As regards the value and number of e-Procurement, these are 100% on mandatory e-Notification and e-Awarding, whilst currently approximates 10% on e-Submission.

- ***How are you presently using electronic tools to conduct public tenders?***

The single e-Procurement system can cover all the spectrum of procurement procedure, starting from e-Notification and e-Submission to e-Evaluation and e-Awarding.

- ***Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?***

We plan to introduce all the tools provided for by the directives as referred to above at the contracting authorities / entities discretion. As regards the mandatory use of e-Catalogues, the draft legislation provides that the Competent Authority for Public Procurement can determine, through a circular, the kind of procurement requires such mandatory use.

- ***Does the legal framework of your country foresee the obligation of public tender sessions?***

No, public tender sessions remain confidential and made Known to the interested parties.

- ***In case it does, do you think that this will be no longer necessary when using electronic tender procedures?***

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## Cyprus

- **Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)**

- ***How are you presently using the aggregated procurement tools foreseen by the directive?***

There is a central agency conducting frameworks agreements, available for use to all contracting authorities / entities. There are also several central Purchasing Bodies based on the area of expertise, (e.g. IT, printing etc.) to which the contracting authorities / entities can be addressed, when are interested to procure such products.

- ***Are you planning to strengthen their use through the transposition?***

Yes, including the utilisation of the opportunities provided by the new tools that are made available in the new Directives (i.e. DPS, e-Catalogues etc.)

#### **4. Choice of participants**

- **Qualification**

- ***Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?***

The requisites would be determined by the contracting authority / entity as needed.

- **Exclusion grounds**

- ***Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?***

All the exclusion grounds provided in the said paragraph will be transposed, on the contracting authorities' / entities' discretion.

- ***Self-cleaning: which are the existing practices for self - cleaning?***

At the timing being, the classical case which is taken into account for admitting a tender or a request for participation in procurement procedure is the existence of a settlement in taxation and / or social security matters exclusively, observed on the deadline for the submission of tenders. No provision for self-cleaning measures for the situations of criminal nature or of other exclusion grounds is yet made or used.

- ***How do you plan to regulate the application of paragraph 6 of art 57?***

Since the relevant decisions will be taken on contracting authorities' / entities' level, the cases for examination may vary and no relevant jurisprudential rules are yet developed; only general guidance could be given out by the Competent Authority for Public Procurement, maybe through a best practices guide will be issued.

## Cyprus

- **Self-declaration**

- *Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?*

Such entirely digitalized systems will probably be planned at a later stage.

- **Mechanisms to verify abnormally low tenders**

- *Which mechanisms do you use to verify the abnormally low bids according to article 69?*

The main mechanism used for the verification of the normal tender price is the presentation and explanation of the relevant cost breakdowns. Furthermore, the validity of any of the answers given by the tenderers in these investigation processes could be cross-checked with any other operator involved in the tender contents. Other reasons could reasonably affect the tender prices given (e.g. the economic crisis) can also be taken into account. Domestic jurisprudence in certain cases has indicated that particular differences between the estimated procurement value and the tender price in question should have normally activated the said article. This does not preclude the right of the contracting authorities / entities to reject or investigate tenders of lower deviations.

### **5. Award criteria: use of environmental and social criteria**

- *In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?*

No detailed guidance is planned to be issued for such evaluation at this stage as this subject is considered to be of the contracting authority / entity discretion. General guidance might be provided at a later stage, through a best practices guide.

- *Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach?*

All of the methods imposed by the union legislation, which are transposed into national law. Further general guidance regarding the parameters should be taken into account could be issued through a best practices guide.

- *Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?*

## Cyprus

Yes, the said possibility will be given to contracting authorities / entities. Only general guidance could be given out by the Competent Authority for Public Procurement at this stage, maybe through a best practices guide.

- ***With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?***

Notwithstanding laws harmonizing union legislation on this subject, no other national legislation is in force at the time being, or drafted to be adopted. Further general guidance regarding the parameters should be taken into account could be issued through a best practices guide.

- ***Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).***

All of the relevant choices will be transposed.

- ***As for social security systems that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?***

No such systems are in place.

- ***As for the provisions about reserved contracts for certain services in article 77, which criteria do you intend to apply, in case of transposition of such optional provisions into national law?***

Though article selected to be transposed, no relevant criteria are yet discussed. The Council of Ministers as provided in the harmonising draft legislation should finally decide in which cases of procurement the use of the article would be appropriate.

- ***As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?***

Compliance with the said articles is normally ensured within the merits of each competent national service. No further plan is yet developed, however a closer and combined cooperation, targeted on public procurement, is anticipated to take place between the parties involved, in order for a better application of these articles to be reached.

## Cyprus

### 6. Contract performance

#### • Subcontracting

- ***Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?***

Yes. In the case of 71 para. 2, the possibility of asking the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors, is given to the contracting authority / entity by the harmonizing draft legislation. The provisions of para. 3 regarding direct payments to the subcontractors are already used, and will be also adopted by the new harmonizing legislation.

- ***Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?***

No. Not at least for the time being.

#### • Modification of contracts during their term

- ***How do you intend to implement the provisions of article 72?***

The subject of modifications is ruled by secondary legislation currently in force. The provisions of the new Directives are already introduced by the harmonising draft legislation. However, their practical implementation (the institution of central or decentralised system, the relevant thresholds etc.) is yet under consultation. New secondary repealing legislation is planned to be issued in the near future, which will replace the existing secondary legislation.

### 7. Exclusions

- ***In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?***

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### 8. Competition protection, control and monitoring of the correct application, fight against corruption

- ***Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?***

- Competent Authority for Public Procurement (The treasury of the Republic of Cyprus.)<sup>1</sup>

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<sup>1</sup> The Competent Authority for Public Procurement is exclusively dedicated, specialized and responsible for monitoring the procurement documents, procedures and award decisions made at Cyprus level, ensuring the observance of procurement law. It provides for relevant guidance to all contracting authorities / entities and sets appropriate controls and policies, e.g. through circulars, for every stage of the procurement procedure. Should be mandatory provided with

## Cyprus

- Auditor General of the Republic of Cyprus.<sup>2</sup>
- Internal Control Service of the Republic of Cyprus.<sup>3</sup>

- ***In case of plurality of bodies, how are supervision/control functions shared among them?***

The Competent Authority for Public Procurement is instituted by national procurement law to be the single body dedicated on public procurement supervision exclusively, ensuring through its functions the observance of all of the relevant requirements arising from public procurement law, at Cyprus level.

- ***Which competences do they have? Are they responsible for prevention or repression?***

The current competences of the Competent Authority for Public Procurement are noted above. At the time being, can act more preventively than as repressor, despite its direct involvement in the procedures. However, the new harmonizing legislation would allow for more repression to be achieved, as the Competent Authority for Public Procurement is especially assigned extended powers, besides the ones currently has. Particularly, in the case its newly introduced right for recommendations on the whole procurement procedure (including procurement documents and award decisions) are not followed by the contracting authorities / entities concerned, can take appropriate and effective action, where interested parties have no access to review procedures, as the new Directives require. In this respect, can refer abuses of use of negotiated procedures without prior publication to the Tenders Review Authority, the single Cyprus body responsible for procurement remedies, to the General Attorney of the Republic of Cyprus any other violations of procurement law and to the Council of Ministers any systemic problems, as for repressive measures to be adopted.

- ***Are they independent authorities (from the Government)?***

Yes.

- ***Which and how many resources do they have?***

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the procurement documents and be invited to attend meetings for public procurement award decisions by all of the contracting authorities in Cyprus, expressing its views wherever needed. Besides, being the Cyprus contact point for the European Commission on public procurement collects all necessary data / information on its demand, for the proper exercise of its duties.

<sup>2</sup> Auditor General or his appointed representatives for procurement sector, make, among their other duties, ex ante and ex post audits on procurement documents, procedures and award decisions at Cyprus level, whilst having also the right to be provided with the procurement documents and attend every meeting for public procurement award decisions, making recommendations where needed.

<sup>3</sup> Internal Control Service of the Republic of Cyprus has a more limited role in public procurement sector, as can make suggestions mainly on systemic issues, in the event such issues arise.

## Cyprus

The Competent Authority for Public Procurement fully employs about 15 specialized persons for the performance of its duties as mentioned above (monitoring procurement documents, procedures and award decisions, providing for guidance where needed, harmonizes national law with EU law, setting policies and controls).

- ***The supervision functions are on a national or/and on a regional/local basis?***

The supervision functions are on a national basis.

- ***Do they adhere to international organizations?***

The Competent Authority for Public Procurement is assigned the Cyprus contact point for the European Commission for public procurement.

- ***Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?***

Notwithstanding the permitted methods currently provided by the procurement law, the selection criteria in all procurement procedures covered by the Directives should be documented within the tenders and could be further clarified if necessary during the evaluation process.

- ***Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?***

Exclusion grounds absence may be attested in a formal declaration within the tenders, which is documented and checked at a latest stage only for the bidder awarded the work, service, or supply contract before it is signed.

- ***Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?***

Yes there two choices could be required in the procurement documents, both activated at the discretion of contracting authority / entity: Either a monetary participation guarantee issued by a bank institution in proportion with the contract value, which may be seized on the above circumstances, or a written commitment for the tender non withdrawal and provision for compensation by the tenderer to the contracting authority / entity in such a case.

- ***Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?***

The Competent Authority for Public Procurement in the contact of its competences can provide contracting authorities / entities with suggestions regarding legitimacy and cost – effectiveness of procurement documents and award decisions on a case by case basis. Furthermore, it can provide for relevant general guidance in a best practices guide.



## Cyprus

- ***When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?***

This function is not developed for the public procurement sector exclusively. Financial flows can be normally traced by Cyprus Financial Intelligence Unit (FIU) which is the national center for receiving, requesting, analyzing and disseminating disclosures of suspicious transactions reports and other relevant information concerning suspected money laundering or financing of terrorism activities, having special powers by law and using its own methods of investigation.

- ***What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group audits?***

This subject is already covered under the general rules for sound procedures which are currently in force.

### **Specific provisions of Directive EU/25/2014**

- ***What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?***

All types of value estimation will be provided at the discretion of contracting entities.

- ***How do you intend to regulate the procedure for the award of framework agreements according to article 51?***

We consider that the provisions of the said article sufficiently cover the principles of transparency and non-discrimination, being flexible enough at the same time. Further guidance on implementation might be included in a best practices guide, however this should not interfere in the field of entities choices for the application of this article, as the Directive's intention.

### **Specific provisions of Directive EU/23/2014**

- ***What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?***

No such measures are yet discussed, in terms of procurement law further opening. It is noted however that the majority of Cyprus companies are SMEs.

## Cyprus

- ***How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?***

We consider that the provisions of the said article sufficiently cover the principles of transparency and non-discrimination, being flexible enough at the same time. Further guidance on implementation might be included in a best practices guide; however this should not interfere in the field of contracting authorities / entities choices for the application of this article, as the Directive's intention.



## Estonia

### EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

#### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
  - *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
  - *Which reasons support the non transposition of some of these provisions?*
  - *Which main interests are supposed to be protected by non transposing some of these provisions?*
- a) Voluntary exclusion ground stipulated in article 57 paragraph 2 shall not only be transposed but also made compulsory for contracting authorities to use.
  - b) Direct payment voluntary provision stipulated in article 71 paragraph 3 shall not be transposed as direct payments are already possible under general stipulations of a cession of a claim of the Law on Obligations Act.
  - c) Full electronic procurement shall not be postponed but shall be taken onboard immediately (article 22 and article 90 paragraph 2).
  - d) Regarding that 99,9% of all Estonian economic operators are SME's and hence most of the contracts awarded are of a small volume, voluntary provision of article 46 paragraph 4 on obligatory separation into lots shall not be transposed.
  - e) In restricted procedure the voluntary option for the sub-central contracting authorities to use prior information notice and invitation to confirm interests, shall not be transposed due to possible disputes regarding the question which contracting authorities can clearly be defined as sub-central.
  - f) Other than those specified above, all non-mandatory provisions shall be transposed as possibilities for contracting authority.

#### **Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

##### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**

- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*

This will be implemented by transposition into national law on public procurement.

- **Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*

This will be implemented by transposition into national law on public procurement.

- *In which strategic sectors do you plan to use it?*

In all sectors.

## Estonia

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**
- ***Are you planning to transpose art 56.2?***

Yes.

### **2. Division of contracts into lots**

- ***How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?***

By transposition into national law on public procurement. No, we do not plan to introduce the obligation foreseen by art 46 paragraph 4.

### **3. Techniques and instruments for electronic and aggregated procurement**

#### • **Electronic Procurement**

- ***Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?***

No.

- ***How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?***

All contracting authorities will be obliged by law to carry out all procurement through existing electronic environment system (administered by the Ministry of Finance).

- ***Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..)?***

So far 70% of all procurements are carried out by electronic means through existing electronic environment system (administered by the Ministry of Finance). The percentage is rising.

- ***How are you presently using electronic tools to conduct public tenders?***

Procurements are carried out by electronic means through existing electronic environment system (administered by the Ministry of Finance).

- ***Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?***

Yes.

- ***Does the legal framework of your country foresee the obligation of public tender sessions?***

National public procurement law foresees mandatory public tender sessions when procurement is not fully carried out by electronic means through existing electronic environment system.

- ***In case it does, do you think that this will be no longer necessary when using electronic tender procedures?***

Public tender sessions shall no longer be necessary when procurement is fully electronic.

- **Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)**

## Estonia

- ***How are you presently using the aggregated procurement tools foreseen by the directive?***

Joint procurement is actively used in some sectors within the state. One institution has been proclaimed as central purchasing body of IT sector and is currently preparing drafts for the first central procurement. Regulation of framework agreements is transposed to national law and used by contracting authorities.

- ***Are you planning to strengthen their use through the transposition?***

No. The standard stipulations of directive shall be transposed.

#### **4. Choice of participants**

- **Qualification**

- ***Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?***

To the contracting authority.

- **Exclusion grounds**

- ***Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?***

All listed grounds.

- ***Self-cleaning: which are the existing practices for self cleaning?***

None.

- ***How do you plan to regulate the application of paragraph 6 of art 57?***

Self-cleaning will be possible in public procurement upon the threshold of application of the directive. Self-cleaning measures will be examined and evaluated case by case by the contracting authorities.

- **Self-declaration**

- ***Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?***

No.

- **Mechanisms to verify abnormally low tenders**

- ***Which mechanisms do you use to verify the abnormally low bids according to article 69?***

Case by case evaluation by the contracting authorities is used.

#### **5. Award criteria: use of environmental and social criteria**

- ***In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?***

This will not be detailed on the level of law. Best practices of contracting authorities will be studied and where necessary, field-specific guidelines will be drafted in cooperation with associations and unions representing market actors in a specific field.

- ***Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?***

## Estonia

This will not be detailed on the level of law. Best practices of contracting authorities will be studied and where necessary, field-specific guidelines will be drafted in cooperation with associations and unions representing market actors in a specific field.

- ***Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?***

No.

- ***With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?***

This will not be detailed on the level of law. Best practices of contracting authorities will be studied and where necessary, field-specific guidelines will be drafted in cooperation with associations and unions representing market actors in a specific field.

- ***Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).***

Use of most economically advantageous tender as a methodology for award criteria shall be stimulated by means of field-specific soft law guidelines that will be concluded in cooperation with associations and unions representing market actors in a specific field. Transposition shall not rule out the usage of lowest price only, however contracting authorities will be encouraged on wider and bolder use of most economically advantageous tender as a methodology for award criteria by means of training, informative forums, guidelines on field-specific best practices that will be published on the web-page of Estonian e-procurement environment.

- ***As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?***

Health Insurance Act and Estonian Health Insurance Fund Act and Health Services Organisation Act provide for general health and social insurance system that is based on principle of solidarity.

- ***As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?***

Article 77 paragraph 2 lists all criteria (a) to (d) as obligatory, hence, as of the threshold of application of the directive, all those criteria shall be applied. Below the named threshold, only criteria (a) and (b) will be applied, leaving the criteria (c) and (d) out.

- ***As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?***

Measures listed in article 77 paragraph 6 shall be transposed, additionally joint liability has been and will be possible also stemming from stipulations of Law on Obligations Act. Goals of article 77

## Estonia

paragraph 1 are achieved through existing national institutions and their functions (e.g Tax and Customs Board, Labour Inspectorate).

### **6. Contract performance**

#### **• Subcontracting**

- ***Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?***

No. However contracting authorities are free to regulate those obligations in their procurement documents. Estonian Law on Obligations Act allows direct payments to the subcontractor upon a previous consent of the contractor.

- ***Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?***

No.

#### **• Modification of contracts during their term**

- ***How do you intend to implement the provisions of article 72?***

All alternative modification grounds stipulated in article 72 shall be implemented in full as there is no discretion for member states for only partial implementation.

### **7. Exclusions**

- ***In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?***

Stipulations of article 12 shall be implemented in full as there is no discretion for member states for only partial implementation.

### **8. Competition protection, control and monitoring of the correct application, fight against corruption**

- ***Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?***

Ministry of Finance; National Audit Office; Prosecutor's Office

- ***In case of plurality of bodies, how are supervision/control functions shared among them?***

- a) Supervision Unit of Ministry of Finance – control, declaration of a procurement null and void, power to prosecute administrative offences
- b) National Audit Office – monitoring, non-binding recommendations to contracting authorities and to the Ministry of Finance
- c) Prosecutor's Office - power to prosecute for criminal offences

- ***Which competences do they have? Are they responsible for prevention or repression?***

- a) Supervision Unit of Ministry of Finance – control, declaration of a procurement null and void, power to prosecute administrative offences
- b) National Audit Office – monitoring, non-binding recommendations to contracting authorities and to the Ministry of Finance
- c) Prosecutor's Office - power to prosecute for criminal offences

## Estonia

- **Are they independent authorities (from the Government)?**

Yes.

- **Which and how many resources do they have?**

Supervision Unit of Ministry of Finance has 5 persons.

- **The supervision functions are on a national or/and on a regional/local basis?**

On all of those levels.

- **Do they adhere to international organizations?**

No.

- **Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?**

Different e-registries: e.g regarding commercial and works licences; also e-business registry to prove data on annual turnover.

- **Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?**

Tax debts are visible to contract authorities by means of e-procurement environment. Criminal offences on the basis of a court decision are visible to contract authorities by means of e-criminal offence registry.

- **Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?**

Yes. A bank deposit or a letter of guarantee from a bank.

- **Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?**

National Audit Office controls this on a risk analysis basis. However recommendations of National Audit Office are non-binding, though strongly and widely accepted.

- **When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?**

Contracting authorities are obliged to report by means of electronic procurement environment:

- (1) upon conclusion of the contract stating the price of the contract;
- (2) after the end of the contract, stating the actual price of the contract and reporting on any difference in price at the moment of conclusion of the contract and the actual final price. Contractual authorities shall state and explain in case of deviations from the stipulations of the contract (especially differences in the actual final price of contract).

- **What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group auditions?**



## Estonia

Contractual authorities may utilise e-procurement register as a tool to inform potential economic operators about their possibility to take part in market-research or to advertise on an actual market-research questionnaire that any potential economic operator may fill in.

### **Specific provisions of Directive EU/25/2014**

- ***What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?***

Stipulations of article 16 shall be implemented in full as there is no discretion for member states for only partial implementation.

- ***How do you intend to regulate the procedure for the award of framework agreements according to article 51?***

Stipulations of article 51 shall be implemented in full as there is no discretion for member states for only partial implementation.

### **Specific provisions of Directive EU/23/2014**

- ***What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?***

99,9% of all companies in Estonia are SME's, hence the participation rate of SME's in public procurement is also approximately 99,9%.

- ***How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?***

Stipulations of article 41 shall be implemented in full as there is no discretion for member states for only partial implementation.



Greece

## EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

### **A. INTRODUCTION - HSPPA (GREECE) PLAN ON THE IMPLEMENTATION OF THE NEW EU RULES ON**

**PUBLIC PROCUREMENT AND CONCESSIONS [DIRECTIVES 2014/23, 2014/24, 2014/25]**

Regarding the actions so far, on June 2014 HSPPA was designated as the responsible body to draft

the transposition texts including the developing of a national implementation plan. On July working Groups were formed (composition: the coordination lies to HSPPA, participant Ministry of Development, Ministry of Infrastructure, Center of International and European Economic Law Public Procurement Unit). The 1st plenary session was held on September.

In Greece, first of all, we faced some crucial problems regarding the official Greek translation of the

new directives. These problems are mainly of 3 kinds:

- same provisions/terms where the official Greek translation does not follow the previous directives one (though in English the wording remained the same) or even the translation between dir. 2014/24 and 2014/25
- new/amended provisions/terms wrongly translated in Greek
- translation unconformity regarding terms of the new directives (the same term is translated different in the same article without reasonable ground).

1So from July 2014 till October 2014 working groups listed and elaborated all the problems relating to the

official Greek translation and ended up in correction proposals.

Also, working groups prepared the draft national implementation plan.

Further more w.g. listed all directives provisions into those that impose obligations to MS and those giving

possibilities to them (*the MS shall/may*).

Plus they created a draft list of all potential utilities authorities and entities.

According to the national implementation plan, current actions include i) cooperation with Cyprus responsible authority for the deliberation and agreement relating to the official translation's correction,

ii) contact with EC services and sending to them the final translations corrections and iii) listing of all

directives provisions that require additional execution measures (new rules) to be taken from the MS, of

existing national rules non in accordance with new directives provisions or that need

abolition/amendment

and of possible additional national execution measures per case/directive provision. Plus, the preparation

of a list of all Greek bodies/entities/authorities involved in specific issues in order to start, in the next phase,

the consultation procedure with them on specific matters. In parallel we participate to the deliberation

process between MS and EC on i) IMI pilot project, ii) ESPD and iii) standard forms for publication of notices in

OJEU.

The medium term actions involve i) the presentation of possible alternatives regarding the type & number of

national implementing legislative acts (law/presidential decree), ii) consultation and deliberation with

involved parties and iii) contacts directly with other MS or through their plans notified to EC, especially on

preliminary issues and possible executive measures (PPN).

## Greece

Following the above, we will proceed to the drafting of the legislative texts (first drafts on September 2015).

Next we have i) the obligatory consultation on the drafts, ii) recording and reporting on consultation comments and iii) drafting final texts in order to be adopted (by the Parliament/President of Republic) by the 1st trimester of 2016.

Therefore, according to the above actions of the national implementation plan, it is too soon to give final answers, in particular for the Directives' optional provisions at this time of the implementation process

in Greece. Though, we can provide to you information i) on the current PP national law in Greece (answering some of the questionnaire issues) and ii) some preliminary thoughts and preoccupations on the options given to MS by the new directives.

### **B. CURRENT GREEK PP LEGISLATION**

The recent (August 2014) LAW 4281/2014 ON PP NATIONAL LEGISLATION REFORM (which includes and is

based on the provisions of the previous directives):

- enters into force on 1/3/2015, one year before implementing the new directives,
- it cannot be fully come into force without issuing the secondary legislation, but this legislation, even

if issued, a year or less after its issuing, will have to be abolished/seriously amended, after the transposition of the new directives.

The above will cause significant confusion to the Public Administration (cas) and the economic operators

and of course an additional burden to the whole implementation procedure. It is a difficult exercise we face

and we are primarily concerned on finding the best solution proposal for all the parties involved.

### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
- *This will be discussed on a case by case basis: no decision yet taken*
- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *See above*
- *Which reasons support the non transposition of some of these provisions?*
- *See above*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*
- **Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

Until today, the non mandatory provisions of the old public procurement directives provisions were

transposed entirely, as a .... , to the contracting authorities (instead of the MSs). During the imminent

transposition, other ways of using the non mandatory provisions will be explored.

### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**
- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*

## Greece

In the existing national law, this content can be found in article 24 of the Presidential Decree (PD) 60/2007, which derives from the transposition of article 30 of the Directive 2004/18/EC. During the transposition

2

process, the modification/adjustment of this provision is considered necessary to be compatible with the provision of article 29 of the Directive 2014/24/EE, regardless of the transposition mean that will be finally

selected. Furthermore, according to article 2 paragraph 2(c)(dd) of the law 4013/2011 "... The decisions of

the contracting authorities concerning the use of the negotiated procedure for the award of public contracts, according to article 25 paragraph 3 of the PD 59/2007 and articles 24 and 25 of PD 60/2007,

except in cases of force majeure, are issued prior to the Authority's opinion (HSPPA), as long as these

contracts, based on their estimated value, fall within the scope of the aforementioned PDs ....".

Regarding

this power, it should be taken into consideration if during the transposition of article 29 of the Directive

2014/24/EE will be maintained as a national rule.

- **Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*

- *In which strategic sectors do you plan to use it?*

-

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**

- *Are you planning to transpose art 56.2?*

Since there isn't a relevant provision in the current national law, the transposition of the entire article 31 seems inevitable. In addition, the strategic areas will be determined after consultation with the competent ministries and the relevant political decision will be taken. This rule could

be possibly implemented in the area of energy, ICT systems, medical products-services, transport and

infrastructure. In any case, the provision of article 31 raises concerns, on the one hand due to the general

wording of the process adopted and on the other hand due to the discretion which the CAs have to

associate with one or more partners, without justification in case of associating with only one partner. This

fact may lead to artificially narrowing down competition, especially in a field like research and innovation,

which is open to wide interpretation and can be used in the hands of some CAs as a mean of distorting

competition, especially when safeguards and severe restrictions are not provided concerning the implementation.

## **2. Division of contracts into lots**

- *How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?*

-

## **3. Techniques and instruments for electronic and aggregated procurement**

- **Electronic Procurement**

## Greece

- ***Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?***
- 
- ***How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?***
- 
- ***Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..)?***
- 
- ***How are you presently using electronic tools to conduct public tenders?***
- 
- ***Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?***
- ***Does the legal framework of your country foresee the obligation of public tender sessions?***
- 
- ***In case it does, do you think that this will be no longer necessary when using electronic tender procedures?***

According to the national law, the use of the public procurement portal is already mandatory (memorandum commitment), with respect to supplies and services, for the Central Administration bodies (Presidency of the Republic, Ministries, Decentralised Administrations and Independent Authorities) on the 1st July 2014. Referring to the General Administration bodies (including Municipalities, Regions, Social Security Organisations, their legal persons, Public Law Legal Persons and state Private Law Legal Persons) on the 1st October 2014 and for the entire public sector (e.g. Public Utilities Enterprise) from the 1st October 2015. For works, the respective provisions will be entered into force for the General Administration bodies on the 1st January 2015 and for the entire public sector from the 1st December 2015. In any case, the mandatory use of the Central Electronic Registry for Public Procurement (CERPP), regards public contracts of supplies, services and works with estimated value equal or greater of 60.000 euros, excluding VAT. Furthermore, specific questions concerning the use of statistical data for e-procurement, since the system is new and not fully operational in the entire public sector, the data that are currently available are the following:

- Number of award procedures through the e-procurement platform (since January 2014) = 193.
- Sum of values = 223.557.816,76 €.
- Advertisement and eNotification of all steps (documents and metadata regarding initial request, request approval, notice, contract, payment orders) of the awarding procedure in the Central Electronic Registry for Public Procurement (CERPP) for all contracts budgeted above 1.000 € is mandatory since February 2013.

Presently public tenders are conducted by using a single electronic platform which is administrated by the public sector. Decisions on mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35) will be concluded through the consultation with competent bodies. However electronic auctions are already

## Greece

conducted on the existing eProcurement platform. The use of electronic catalogues and dynamic purchasing systems are already foreseen to be used on this platform. The Greek legal framework foresees the obligation of public tender sessions. When using electronic tender procedures, probably it is no more necessary to have a public session during the opening phase of electronic tenders. At tender opening phase an e-procurement platform could “unlock” the tenders automatically when it is set to do so, using all the appropriate security protocols. All participants should then have access to the submitted documents according to their access rights.

- **Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)**
- *How are you presently using the aggregated procurement tools foreseen by the directive?*
- *Are you planning to strengthen their use through the transposition?*

At national level there are two central contracting authorities, the General Secretariat of Commerce regarding the procurement of goods with a value above 60.000 € and the Health Procurement Committee for supplies and services in the health sector. Both authorities are sourcing on behalf of other contracting authorities carrying out their own procedures. The framework agreement procedures governed by Presidential Decrees 60/07 and 59/07 are mainly carried out by the two aforementioned central contracting authorities and in addition, but to a lesser extent, by individual contracting authorities. The law 4281/2014 provides the possibility of setting up other central purchasing bodies by adopting provisions of article 21 of the Presidential Decree. In each case the authorities must be selected thoroughly after a market with regard to the specific supplies and it must be ensured that it is not a tool contrary to SMEs (possibly with the use of lots). It should be noted that mini aggregated purchasing systems by OTA (Municipalities Regions) on certain types of supply and services were predicted two years ago (food supplies, other perishable groceries and providers of related services, petroleum and drugs and consumable medical supplies for the needs of Municipalities, institutions and all their legal entities) with the procedures carried out by the relevant Municipalities / Regions.

#### **4. Choice of participants**

- **Qualification**
- *Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?*

It has not been decided in this phase whether or not this option should be incorporated. In any case it should be noted that any choice of integration of such an option would involve more work for the contracting authorities and members of the Commission, since they would be required to consider all offers (technical and financial), regardless of the grounds for exclusion. It should also be noted that the possibility and subsequent disclosure of financial and technical bids before checking the grounds for exclusion, coupled with the new regulations of Directive 2014/24/EU, according to which, at the option of the Member States, deviations from the mandatory exclusion grounds could be provided, could potentially influence the judgment of contracting authority to exclude in some cases.

- **Exclusion grounds**

## Greece

- *Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?*

-

- *Self-cleaning: which are the existing practices for self cleaning?*

National law does not provide respective practices with respect to the principle of formality, which has been prevailed in case law.

- *How do you plan to regulate the application of paragraph 6 of art 57?*

-

- **Self-declaration**

- *Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?*

At the moment there are no similar digitized systems.

- **Mechanisms to verify abnormally low tenders**

- *Which mechanisms do you use to verify the abnormally low bids according to article 69?*

Where the contracting authority establishes the submitting of an abnormally low tender, it is customary to request clarification from the operator for the price of its bid.

### **5. Award criteria: use of environmental and social criteria**

- *In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?*

-

- *Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?*

-

- *Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?*

- *With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?*

- *Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).*

-

- *As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?*

-

## Greece

- ***As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?***
- 
- ***As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?***

Article 18 paragraph 2: the International Labour Conventions and International Environmental Conventions have been ratified, which both are stipulated in Annex X of Directive 2014/24/EU. There are many disparate provisions of national labor and environmental law related to environmental and labor law issues in the performance of public contracts. Examples include the provision of Article 68 of Law. 3863/2010, which provides for specific obligations regarding the preparation of financial bids for cleaning service companies and grounds for exclusion in connection with the violation of these obligations, the existence and operation that provided for in paragraph 2a of Law. 3863/2010 "Offender Registry Cleaning service company and / or Guard") as an appropriate instrument for establishing any violations of the relevant legislation. It is one of the topics for consultation with stakeholders (eg Ministry of Labour, auditing bodies for labor law)

### **6. Contract performance**

#### **• Subcontracting**

- ***Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?***
- 
- ***Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?***

Article 71 paragraph 6: It should be pointed out that in the existing national legal systems there is no mechanism for sharing responsibility between subcontractor and main contractor towards the employer, as provided in under- paragraph a of paragraph 6. In under- paragraph b is mentioned that Article 176 of Law. 4281/2014, with effect from March 1, 2015, has adopted a first approach to

the issue of substitution of a subcontractor, and applies only if the contractor has invoked the technical / professional or and financial capacities of the subcontractor.

- The obligation referred to in Art. 71 paragraph 2 of the Directive 2014/24/EU (subcontracting clause) is currently reflected in no. 41 of Presidential Decree 60/2007 as a liability of the contracting

authority to request the tenderer to indicate in his tender any share of the contract he intends to subcontract to third parties and the subcontractors he proposes. Regarding the inclusion clause subcontracting arrangement, this is already included in par. 2 of Art. 175 of the law 4281/2014, with effect from 01.03.2015.

- The discretion of the Member States referred to in art. 71 paragraph 3 has already been adopted as

the discretion provided to the contracting authorities in art. 175 par. 3 of the law 4281/2014, with effect from March 1, 2015 (direct payments of subcontractors).

- Regarding the aspects referred to in art. 71 paragraph 7 of the Directive (stricter liability rules or further rules on direct payments to subcontractors) it should be noted that according meters, with the provision of Art. 175 paragraph 7 of Law 4281/2014, will be the relevant regulated decree.

Modifications: The Art. 72 of the Directive (amendment of public contract) has already been partly reflected

at the art. 177 of Law 4281/2014, with effect from March 1, 2015, and especially recommended at the cases

where the modification of a public contract is considered essential or not (art. 72 paragraph 1A, paragraph



## Greece

4, under- paragraph a, b, c and paragraph 5). Regarding the other topics of art. 72, as to their integration into national law, no decision has been taken.

- **Modification of contracts during their term**

- *How do you intend to implement the provisions of article 72?*

-

### **7. Exclusions**

- *In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?*

### **8. Competition protection, control and monitoring of the correct application, fight against corruption**

- *Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?*
- *In case of plurality of bodies, how are supervision/control functions shared among them?*
- 
- *Which competences do they have? Are they responsible for prevention or repression?*
- 
- *Are they independent authorities (from the Government)?*
- *Which and how many resources do they have?*
- 
- *The supervision functions are on a national or/and on a regional/local basis?*
- 
- *Do they adhere to international organizations?*
- 
- *Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?*
- 
- *Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?*
- 
- *Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?*
- 
- *Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?*

## Greece

- ***When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?***
- 
- ***What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group audits?***

### - INDEPENDENT AUTHORITIES

-Hellenic Single Public Procurement Authority

The main audit competences are

supervision and evaluation of public procurement inspection bodies

monitoring and measurement the efficiency and effectiveness of actions taken by government public procurement agencies

controlling of procedures for tendering, award and execution of public contracts, especially those,

which fall within the scope of EU laws and are co financed by EU

The SPPA may order other audit or inspection administrative bodies to collect data and carry out

controls

examination of infringement procedures in the field of the public contracts under investigations by

the EU

Hellenic Competition Commission

protects the proper functioning of the market and ensures the enforcement of the rules on competition.

fights against practices which impede or distort competition and cause damage to consumers

### II. NATIONAL COORDINATOR FOR CORRUPTION

The national coordinator follows an anti-corruption strategy related to prevention, strengthening

the collaboration with other institutions and cooperation with society, at political level, carrying out

inspections, surveys and investigations.

### III. COURT OF AUDITORS Public Procurement Control

ex ante control of public contracts of large financial value, according to the Greek Constitution.

Especially:

Public works, supplies and services contracts with estimated value more than 1.000.000 €

Public contracts awarded by local authorities and their legal entities with estimated value more

than 200.000 € or 500.000 €

Public works, supplies and services contracts co-financed by EU Programmes, whose estimated value exceeds the amount of 10.000.000 €

Supplementary Contracts

Control of Expenditure

Commissioners of the Court of Auditors control expenditure resulting from public contracts with a

budget exceeding the amount of 15.000 € before its first submission for payment.

### IV. MINISTRIES

Financial Audit Committee (EDEL)

It is the independent supervisory authority responsible for verifying the effective functioning of the

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management and control for all Operational Programmes 2007-2013.

Its mission is to ensure compliance with the principles of sound financial management of cofinanced programs.

Specifically EDEL:

carries out audits of the systems of the Managing Authorities, Intermediate Bodies Management and Certification Authority, and an appropriate sample of public contracts implemented by contracting authorities

monitors and evaluates the measures and corrective actions taken by the competent authorities following check

certifies the validity of the redemption requests submitted to the European Commission, taking into

account the results of the checks carried out by all relevant national and EU institutions

cooperates with the audit services of the European Commission to coordinate the control of operational programs and methods for conducting such exchanges and views on the results of audits of management and control and other issues

assesses the adoption of management and control systems

The Inspectors-Controllers Body for Public Works (SEDE)

The mission of the Inspection Body is the continuous (ordinary and extraordinary) inspection of execution of public work contracts performed by public sector bodies.

Inspections carried out by the S.E.D.E. may cover the whole production of public works or separate

phases of this procedure.

General Inspector for Public Administration

The mission of the General Inspector of Public Administration is:

To ensure the efficient and effective functioning of public administration,

To monitor the action and evaluate the performance of all the Inspecting-Controlling Bodies/Units

of Public Administration

To detect and track down corruption and maladministration phenomena.

In this context, the General Inspector may order ex officio all kind of inspections, post inspections and

investigations in public sector through the Inspecting-Controlling Bodies/Units of Public Administration.

To conduct all kinds of inspections, post inspections and investigations in the civil service and the

public sector

To call and preside over the Inspections -Controls Coordinative Body

The Inspectors-Controllers Body for Public Administration (SEEDD)

- conducts inspections, controls and investigations,

-collects evidence for the prosecution of potential criminal offences committed by civil servants

-conducts inquiries/preliminary examinations after a mandate by the competent Public Prosecutor

Inspector Controllers Body for Services of Health and Welfare (SEYYP)

Its mission is to develop and operate a central and peripheral mechanism for the conduct of systematic

inspections, audits and investigations in all departments and agencies under the jurisdiction or supervision

of the Ministry of Health and Welfare and Health Services of insurance agents.

### **Specific provisions of Directive EU/25/2014**

- *What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?*
- 

- *How do you intend to regulate the procedure for the award of framework agreements according to article 51?*

### **Specific provisions of Directive EU/23/2014**

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- *What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?*
- *How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?*



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### EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

#### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *Which reasons support the non transposition of some of these provisions?*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*

In Italy an internal discussion about the transposition of non mandatory provisions is still ongoing. A decision on the transposition of such provisions often implies a political choice, thus a wide consultation with representatives of contracting authorities and economic operators has been launched on this matter and currently a general consensus has already been expressed on some provisions, such as those regarding: reserved contracts to sheltered workshops; the right for organisations to participate in procedures for the award of public contracts exclusively for specific health, social and cultural services.

As for mandatory or discretionary grounds for exclusion our legislation already provides as mandatory many of the grounds for exclusion listed in the past directive 2004/18/EC. Therefore after taking into consideration stakeholders' views, our position will be that to maintain as mandatory these ground for exclusion in the transposition of the new directive (art. 57, par. 2).

A favourable opinion also emerges for provisions aiming at improving or facilitating SME's access to contract award procedures (in some cases already implemented in Italy's legislation, e.g. division of contracts into lots). For other non mandatory provisions an agreement has not been reached yet, as some parties prefer giving the provided faculties (powers) to contracting authorities, while for other parties those obligations should be imposed directly by law, thus excluding any choice for CAs (e.g. electronic catalogues; procurement involving contracting authorities from different Member States, etc.)

#### **Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

##### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**
- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*

In Italy, even though a specific decision has not been taken yet, it emerges that art. 26 will be transposed as provided by the directive itself.

- **Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*
- *In which strategic sectors do you plan to use it?*

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In Italy, it's not possible currently to foresee how this new procedure could be implemented into the national legislation and sectors in which it could be used (a reference may be the case of pre-commercial contracts).

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**
- ***Are you planning to transpose art 56.2?***

In Italy the possibility to examine bids before checking the absence of ground of exclusion is still being discussing.

Feedback received from the majority of stakeholders is in favour of the possibility to re-organize the development of the award procedure, in terms of simplification of the procedure itself and with the aim of reducing administrative burdens and the number of challenges against awarding decisions.

Anyhow, it emerges a preference for applying this option to procedures where the evaluation of tenders may be carried out shortly (e.g. contracts awarded on the basis of the lowest price criterion or to the most economically advantageous tender but only when the contracting authority applies objective evaluation criteria) and, especially, by electronic means.

On the contrary, the possibility provided for in the directives is not deemed as useful and adequate when contracting authorities have to examine particularly complex tenders.

### **2. Division of contracts into lots**

- ***How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?***

In Italy a provision that obliges CAs to divide contracts into lots has been already introduced in the Code of contracts (art. 2, 1-bis). This article also provides that CAs must give (in the first procurement document) a specific motivation if they decide not to divide a contract into lots

The majority of stakeholder feedback on this provision is positive, as it may facilitate SME's access to contract award procedures.

Despite the national provisions on this matter (art. 2, 1-bis, of the Code of contacts), from the consultation different positions emerge on art. 46, par. 4, of the directive. Economic operators are contrary to an obligation of division into lots, as they prefer that a specific decision thereof is taken by the contracting authority, on a case by case basis.

### **3. Techniques and instruments for electronic and aggregated procurement**

- **Electronic Procurement**

The answers to the questions of this section have been provided by Consip, the Italian Central Purchasing Body (CPB), within the frame of its activities and with reference to the national legislation.

- ***Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?***
- ***How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?***

The national public procurement legal framework already contains rules that impose to CA (Contracting Authorities) the use of electronic procurement tools, in specific circumstances (purchases below the EU threshold, purchases for the Health sector, IT purchases for Central Ministries), mainly by making recourse to electronic platforms provided by Consip, as national CPB, and territorial CPBs (CAT).

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- **Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..)??**

2013 data	Contracts number	Contracts value (mio)
Direct order from the e-catalogue (Framework Contracts, MEPA)	335.000	5.000
e-tendering (Framework Agreements, Request for Quotation on the MEPA, DPS, ASP tenders)	87000	3200
Economic Operators	21000	
Contracting Authorities	25000	

- **How are you presently using electronic tools to conduct public tenders?**

Both the National and the territorial CPBs and the individual Contracting Authorities (also in an aggregated way) use, in some cases almost exclusively, electronic communication tools in order to implement several procurement procedures such as e-tenders, framework agreements and DPS.

- **Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?**

According to art. 15 of DL 95/2012, Health bodies are obliged to use the DPS provided by Consip since it is a tool that allows for digital negotiations.

- **Does the legal framework of your country foresee the obligation of public tender sessions?**

Yes, it has been transposed in a very detailed way.

- **In case it does, do you think that this will be no longer necessary when using electronic tender procedures?**

The use of electronic procedures could modify some aspects of public tender sessions presently handled in a non digital way. As an example, the participation of CA and bidders at the same moment in the same place and the management of the bidding documentation, could be ruled differently

- **Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)**
- **How are you presently using the aggregated procurement tools foreseen by the directive?**

- **Are you planning to strengthen their use through the transposition?**

Italy already widely uses aggregated procurement tools such CPBs (both national and territorial) and framework agreements. Other modalities to aggregate procurement foreseen by the new directive are still to be analyzed.

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### **4. Choice of participants**

- **Qualification**

- *Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?*

For temporary groups of companies, horizontal (all the companies perform homogeneous activities), and active in the public works field, the Italian legislation currently already envisages that the requirements as to economic and financial standing or technical and professional ability required in the in the tender notice for an individual participant must be possessed by the agent at a minimum of 40 percent and the remaining percentage cumulatively by the principals or by the other members each at a minimum of 10 percent. The agent in any case assumes, during the bidding, the requirements as a percentage higher than each of the principals with reference to the specific tender. For temporary groupings of vertical type (a single enterprise plays the main activity and the others the remaining activities), the requirements as to economic and financial standing or technical and professional ability are owned by the agent in the main category; in the unbundled categories each principal possesses the provided requirements for the amount of the works in the class to be acquired and in the extent indicated by the individual firm. The requirements for unbundling processes not undertaken by the principals are owned by the agent in relation to the main category. (Art. 92, paragraphs 1, 2 and 3 of Presidential Decree no. 207/2010).

- **Exclusion grounds**

- *Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?*

In the current Italian law all the grounds for exclusion contained in paragraph 4 - except for the cases referred to in subparagraphs d), e) and f) which have been introduced with the new Directive 2014/24 / EU - are already provided.

- *Self-cleaning: which are the existing practices for self cleaning?*
- *How do you plan to regulate the application of paragraph 6 of art 57?*

The current Italian law does not provide for a procedure of self-cleaning.

- **Self-declaration**

- *Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?*

Currently in the Italian system, according to Art. 6-bis of the Code of contracts in force, documentation demonstrating the absence of grounds for exclusion and the respect of the selection criteria for participation in tender procedures governed by the Code of contracts is acquired only through the National database of public contracts established at the national Anti-Corruption Authority. To this end, the Authority has developed a computerized system known as AVCpass (Authority Virtual Company Passport), very similar to a Virtual Company Dossier that allows the online check of the absence of grounds for exclusion and the respect of the selection criteria for the participation in procurement procedures through the consultation from a single portal of the several databases that contain the different documents. In case in which there are only paper documents and they are related to the respect of the selection criteria (but not the causes of exclusion) the economic actor can scan them and put them into the computer system.

- **Mechanisms to verify abnormally low tenders**

- *Which mechanisms do you use to verify the abnormally low bids according to article 69?*

For the verification of an anomaly, if the award criterion is the lowest price, there is a mechanism to identify, with a mathematical formula applied to the reduction offered by all the allowed



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competitors in the tender, an average threshold; all tenders offering a reduction rate equal to or above this threshold are considered to be abnormally low and must be verified prior to the award. If the award criterion is the most economically advantageous tender, the verification of the adequacy of the tender, is done only when the price component and quality component a score of more than four-fifths of the maximal grade provided for in the tender notice is achieved.

### **5. Award criteria: use of environmental and social criteria**

- *In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?*

In Italy it is planned to provide for examples of environmental award criteria. Among those, the award criteria defined by the Minimum Environmental Criteria set within the National Action Plan Green Public Procurement. As for social criteria, there is no intention to provide additional detail on social characteristics other than provided for in article 67 of Directive 24/2014. The plan is to describe the social characteristics in some field-specific guidelines and give relevant examples.

- *Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?*

In transposing article 68 of the Directive will be mentioned that “if such methods for calculation LCC are developed in the future Minimum Environmental Criteria, contracting authorities should refer to those methods”.

- *Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?*

No intention to introduce specific indications in this regard in transposition of the art. 67, par. 2. Such indications could to be introduced in the future within sectoral non mandatory provisions e.g. the Minimum Environmental Criteria for a specific product or service, if appropriate.

- *With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?*

There is no plan about it actually.

- *Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).*

In Italy it has not been decided yet.

The Italian Ministry of the Environment has published in 2012 the “Guide for the integration of social aspects in public procurement” (Decree of the Minister of the Environment, 6th June 2012, Italian Official Bulletin - July 10th 2012 n. 159). It is the official guide of the Italian Government for the integration of social (ethical) criteria in public procurement activities for all

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the Italian Contracting Authorities. The guide defines the “minimum social criteria” as the criteria aimed at promoting the application of internationally recognized standards regarding human rights and working conditions along the supply chain, as well as:

- ILO “Core Conventions” listed in Annex X of the Directive 2014/24/EU (n. 87, 98, 29, 105, 100, 111, 138 and 182);
- ILO Convention on Occupational health and safety (n. 155), working time (n. 1), minimum wage (n. 131) and social security (102)
- the Universal Declaration of Human Rights;
- art. n. 32 of the Convention on the Rights of the Child;
- the national laws in force in countries where stages of the supply chain are performed.

The guide suggests to integrate the social criteria as specific clauses in the contracts, according to art. 26 and recital 33 of Directive 2004/18/EC. It suggests to develop a “structured dialogue” with the contractor aimed to monitor the application of social criteria along the supply chain.

The guide has been adopted by some relevant contracting authorities, like ARCA (the central purchasing body of Lombardy Region), the Italian Revenue Agency, Intercent-ER (the central purchasing body of Emilia Romagna Region) and the Region of Tuscany.

The guide will be updated for considering the possibility of the new Directive to integrate social criteria in all the phases of the procurement process, not only as contract performance conditions.

- ***As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?***
- ***As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?***

In Italy the specific legislation already includes this provision and criteria set out in article 77. It is planned to transpose such provision,

- ***As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?***

In Italy this matter is still being discussed. From the consultation of the stakeholders it emerges that specific solutions should be examined in order to ensure the appropriate measures for the compliance with collective agreements.

### **6. Contract performance**

#### **• Subcontracting**

- ***Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?***

In Italy the obligation referred to in paragraph 2 is already existing in national legislation (Code of contracts), but only with reference to the obligation to indicate any share of the contract to be subcontracted. However, Italy does not plan to introduce the further obligation for tenderers to indicate any proposed subcontractors, as it considers too onerous for the tender to fulfil the request at this stage of the procedure. A subcontract, in fact, may be assigned even a long time after the tender was submitted. Concerning art. 71, par. 3, such a provision does already exist in the Code of contracts, even though the transfer of due payments directly from the contracting authority is not subject to the request of subcontractors.

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- ***Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?***

The majority of stakeholders would appreciate the introduction of more stringent rules especially with regard to direct payments to subcontractors, in line with provisions already implemented in our legislation (see above) .

- **Modification of contracts during their term**
- ***How do you intend to implement the provisions of article 72?***

It is still being discussed.

### **7. Exclusions**

- ***In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?***

In Italy the transposition of this provision will require a concurrent specification of the terms “*non-controlling and non-blocking*” as referred, in the directives, to the allowed forms of private capital participation in the controlled legal person. Such specification will be introduced in the light of a proper clarification provided by the European Commission.

### **8. Competition protection, control and monitoring of the correct application, fight against corruption**

- ***Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?***
- ***In case of plurality of bodies, how are supervision/control functions shared among them?***

In the Italian law the supervision of public contracts of works, services and supplies is entrusted to an independent Authority, currently identified in the National Anti-Corruption Authority (A.N.AC.). Even the Antitrust has a limited jurisdiction to oversee the tender notice that contain clauses detrimental to free competition. In such cases the Antitrust may invite the contracting authority to modify the tender, if this is not done the same Authority may appeal against the tender notice before the administrative judge. As for the damage to the public revenue the control is entrusted to the Court of Auditors.

- ***Which competences do they have? Are they responsible for prevention or repression?***

In Italy powers that A.N.AC. can exercise are both of prevention (through data collection activities, including all changes made to all contracts assigned, activities of market regulation and tracking of financial flows) and repression (through powers of supervision, sanction and compulsory administration). The activity of supervision concerns: public contracts entrusted to administrations, central and peripheral and those of regional interest; the object of the supervision is the observance of the legislation, regulation and the regularity of procurement procedures, the compliance with economic efficiency of the execution of public contracts, the

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fairness and transparency of procurement procedures, the protection of small and medium-sized enterprises and the respect for the rules of competition in the single tender procedures.

Closely related to the powers of supervision, are the powers of sanction exercised through the records of businesses in a computerized record of the Authority, and this results in the exclusion of firms from future tenders for a period from 1 to 12 months, in case of false declared in the tender, and through financial penalties for failure to submit documents required by the Authority in its supervisory activity or by the contracting authority.

As regards the regulation of the market, A.N.AC. emits emanates of general nature (Determinations and Guidelines) to interpret the rules and give indications and assistance to contracting authorities and economic operators. A.N.AC. also emanates legal opinions on specific cases. The Authority processes the tender-models, in the works, services and supplies that must be used by the contracting authorities.

A.N.AC. releases for each tender an identification code (CIG) that must be reported on all electronic payments regarding the contract. A.N.AC. also has the power to signal to the Government and Parliament particularly serious phenomena of non-compliance or distorted application of the law on public contracts.

A new power attributed to the President of A.N.AC. is the possibility to propose the compulsory administration. Specifically, in the event that the judicial authority processes certain crimes against the public administration, that is, in presence of detected anomalous situations and nevertheless symptomatic of illegal conducts or criminal events attributable to a company awarded a contract for the construction of public works, services or supplies, the President of A.N.AC. proposes to the competent Prefect, either: to order the renewal of the corporate bodies by replacing the person involved and, if the company does not abide by the terms established, to provide for the extraordinary and temporary management of the contractor only for the full implementation of the contract covered by the criminal proceedings or to provide for the extraordinary and temporary management of the contracting company limited to the complete execution of the contract subject to criminal proceedings.

- ***Are they independent authorities (from the Government)?***

Yes.

- ***Which and how many resources do they have?***

In general, apart from the specific Italian case where the original members of the ANAC were integrated by those of the suppressed AVCP, the staff members vary from 5 to about 50.

In Italy the staff of the structure consists of: 49 managers and 273 executives (17 of which come from other administrations and 7 with a fixed-term contract).

- ***The supervision functions are on a national or/and on a regional/local basis?***

National but even on all the contracts of regional interest.

- ***Do they adhere to international organizations?***

In Italy A.N.AC. has joined the International Association of Anti-Corruption Authorities (IAACA), the network European Partners Against Corruption (EPAC), the Anti-Corruption Authorities' Portal (ACAs).

- ***Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?***

In the Italian law to prove compliance with the selection criteria companies that perform public works must be qualified, that is, must have a certificate of qualification (a kind of driving license) that is issued by private companies which perform a public function: the Companies certification bodies (SOA), authorized and supervised in the performance of their activities by A.N.AC. The qualification certificate allows to carry out the work in accordance with the category (general works or special as plants) and with the rank (the maximum

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amount that can be run) with it attributed to the individual business. All qualification certificates are contained in the National database of public contracts held by ANAC. and checked out in the tender by the contracting authorities through the system AVCpass.

- ***Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?***

In the Italian law the proof of the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies is acquired by the contracting authority through a single computer system managed by ANAC., called AVCpass (Authority virtual company passport). It is a kind of virtual company dossier, enabling the contracting authority to acquire directly, from the different administrations that own them, the different certificates which proves the absence of grounds for exclusion under Article. 57 of Directive 2014/24 / EU.

- ***Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?***

In Italy for the presentation of each offer, a guarantee equal to 2% of the tender amount is envisaged. The guarantee loses validity when the contract is stipulated.

- ***Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?***

In Italy there are the checks carried out both by A.N.AC. and by the Court of Auditors which in particular verifies that the execution of the contracts do not cause harm to the public revenue. Checks can be made ex officio or at the request of interested parties.

- ***When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?***

In Italy A.N.AC. releases for each tender an identification code (CIG) that must be reported on all electronic payments regarding the contract. One of the functions of the CIG attributed by law n. 136/2010 is that of identifying uniquely (trace) the financial movements related to commissions of works, services or supplies, regardless of the procedure to choose the contractor adopted and of the amount of the commission. In subcontracts the formalities required by the regulations on traceability are achieved through: the inclusion in the subcontract of provisions governing the traceability; the communication in the subcontract of the dedicated current account/s and of the subjects delegates that work on the same; the payment, by the contractor of the fees through the dedicated current accounts and through the CIG code of the main contract. The power to verify the compliance with the provision and to impose sanctions is exercised by the prefectures.

- ***What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group auditions?***

In Italy this is a choice left to the legislator. According to A.N.AC. a prior notice should be published, a single hearing should be permitted to those who have requested it, a smaller number of subjects on the basis of criteria predetermined in the tender notice should be identified and then a collective hearing with the latter group should be held.

### **Specific provisions of Directive EU/25/2014**

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- *What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?*
- *How do you intend to regulate the procedure for the award of framework agreements according to article 51?*

It is still being discussed.

### **Specific provisions of Directive EU/23/2014**

- *What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?*
- *How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?*

It is still being discussed.



## Lithuania

### EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

#### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *Which reasons support the non transposition of some of these provisions?*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*

**Answer.** Currently we have prepared the first preliminary draft of the Lithuanian Law on Public Procurement transposing Directive 2014/24/EU. This draft is being discussed at the national working group of the stakeholders. While preparing the initial draft law our position was to include all the non-mandatory provisions, so that stakeholders would have the possibility to consider them and to express their opinion on their transposition or non-transposition.

#### **Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

##### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**
  - *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*
- **Innovation Partnership**
  - *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*
  - *In which strategic sectors do you plan to use it?*
- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**
  - *Are you planning to transpose art 56.2?*

**Answer to question 1.** Concerning transposition of competitive procedure with negotiation and innovation partnership, we intend to transpose it in a structured way so as to reflect the conduction of procurement procedure on step-by-step basis. A separate section divided into articles is devoted to one procedure. First article of the section defines in what conditions there may be used the relevant procedure. Later it follows conditions of submitting a request to participate, then – possibility to use invitation to confirm interest (for competitive procedure with negotiation), selection of the candidates, invitation to submit tenders and finally - requirements for negotiations. Similarly we structure all the procedures, including competitive procedure with negotiation as well as innovation partnership.

Concerning Art 56.2 - we are planning to transpose it.

##### **2. Division of contracts into lots**

- *How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?*

**Answer to question 2.** At the national stakeholders group we have considered such a wording of the relevant provisions that, as a general rule, would oblige contracting authorities to split contracts into lots. And they could avoid application of this rule only in cases when splitting the contract into lots would have negative effects (as described in the recital 78 of dir. 2014/24/EU).

##### **3. Techniques and instruments for electronic and aggregated procurement**

- **Electronic Procurement**

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- **Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?**
- **How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?**
- **Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..)?**
- **How are you presently using electronic tools to conduct public tenders?**
- **Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?**
- **Does the legal framework of your country foresee the obligation of public tender sessions?**
- **In case it does, do you think that this will be no longer necessary when using electronic tender procedures?**
- **Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)**
- **How are you presently using the aggregated procurement tools foreseen by the directive?**
- **Are you planning to strengthen their use through the transposition?**

**Answer to question 3.** We do not intend to postpone the application of Article 22, par.1, until 18 October 2018.

E-procurement and e-invoicing are relevant issues in Lithuania. Since the 1<sup>st</sup> of September, 2009 the Law on Public Procurement obliges contracting authorities to carry out procedures electronically no less than 50 percent of their public procurements (in value) per annum. Recently, there was made a considerable progress concerning electronic procedures in public procurement and e-procurement amounts approx. to 90 percent from total publicized public procurement value. The first steps towards e-invoicing in public procurement have also been made in Lithuania. Ministry of Finance together with partners – Ministry of Economy and the State Enterprise Centre of Registers – launched the project “Establishment of electronic service “E-invoice”. The goal of this project is to create and install during 2014 the information system, which would ensure provision of electronic service “E-invoice”.

In order to promote the application of e-tools in public procurement at the national level, the following priority measures are planned for in 2015:

- Legitimize the obligation to submit for specified contracting authorities in the determined public procurement e-invoices only (implementation term - Q2 of 2015);
- Legitimize the obligation for contracting authorities to transmit contract notices of all procurement above public procurement directives thresholds, contract documents, correspondence, receive supplier tenders by electronic means only (implementation term - Q4 of 2015).

In order to promote transparency, efficiency of public procurement system and development of centralized public procurement, on 9 November 2012 the public entity CPO LT was established, which was granted the right to carry out the function of central purchasing body at the national level as from 1 January 2013. The following goods, services and works can be purchased on CPO LT e-catalogue: medicine, office supplies, computer hardware and office equipment, mobile phones, mobile communications, fuel at petrol stations, fuel in containers, electricity, modernization of buildings with designs, modernization of buildings without designs, technical supervision of the construction process, energy certificates and investment plans as well as services of expert examination of technical project. In 2014, central purchasing body e-catalogue will be expanded by the following new purchase models: printing equipment and support services, floor mat rental and exchange services, cleaning services, design services, security services and organization of business travels. Currently, there are more than 2200 contracting authorities registered in the central purchasing body e-catalogue.

In order to rationally use state budget funds, increase transparency, reduce corruption in public procurement and continue the development of purchasing through central purchasing bodies, Law on Public Procurement was amended in 2013, establishing that as from 1 January 2014 contracting authorities are obliged to acquire goods, services and works from or through the central purchasing body, when goods, services or works offered on the central purchasing body e-catalogue meet the needs of the contracting authority or the contracting authority cannot purchase them in a



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more efficient way rationally using funds allocated to that purpose. The total value of centralized public procurement in 2013 accounted for about 9.7 per cent of the total value of public procurement.

### 4. Choice of participants

- **Qualification**
  - Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?
- **Exclusion grounds**
  - Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?
  - Self-cleaning: which are the existing practices for self cleaning?
  - How do you plan to regulate the application of paragraph 6 of art 57?
- **Self-declaration**
  - Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?
- **Mechanisms to verify abnormally low tenders**
  - Which mechanisms do you use to verify the abnormally low bids according to article 69?

**Answer to question 4.** Concerning Art. 19 paragraph 2 - we are planning to refer to the contracting authority the determination of requisites on temporary groupings among suppliers.

We will transpose all grounds for exclusion referred to in article 57 paragraph 4, but they will remain optional for contracting authorities.

We do not have practice of using self-cleaning measures yet. While transposing paragraph 6 of Art. 57 we intend to leave it for contracting authorities discretion how to evaluate different self-cleaning measures.

We do not use (and are not planning to develop) entirely digitalized systems to check the requirements for participation and the grounds for exclusion in procurement procedures.

Concerning verification of the abnormally low bids - current Lithuanian Law on Public Procurement provides for the following regulation:

Article 40. Abnormally Low Tenders: "1. If, for a given contract, tenders appear to be abnormally low in relation to the supplies, works or services, the contracting authority shall request the tenderer to justify the offered price, and if the tenderer fails to produce justification to the satisfaction of the contracting authority, it shall reject the tender. The Government of the Republic of Lithuania or an institution authorised by it shall have the right to define the concept of an abnormally low tender in relation to the supplies, services or works.

2. In order to obtain justification of the abnormally low price, the contracting authority shall request in writing that the tenderer concerned provide details of the constituent elements of the tender which it considers relevant, price elements and calculations. In evaluating the price justification, the contracting authority shall take into consideration:

- 1) the efficiency of the manufacturing process, of the services provided or of the construction method;
- 2) the technical solutions chosen and/or the exceptionally favourable conditions available for the provision of supplies, services, or execution of works;
- 3) the originality of the supplies, services or works offered by the tenderer;
- 4) the compliance with the regulations on safety at work and working conditions, valid in the place of provision of supplies, services or performance of works;
- 5) the possibility of the tenderer benefiting from the State aid.

3. Where the contracting authority establishes that a tender is abnormally low on the grounds that the tenderer has obtained State aid, the tender can be rejected on that ground alone where the latter is unable to prove, within a sufficient time frame fixed by the contracting authority, that the aid in question was granted legally. Upon rejecting the tender on the said ground, the contracting authority must inform the European Commission of that fact. State aid shall be any measure corresponding to the criteria set in paragraph 1 of Article 107 of the Treaty on the Functioning of the European Union."

Following the Article 40(1) of the Law on Public Procurement, the Government of the Republic of Lithuania authorised Lithuanian Public Procurement Office to define the concept of abnormally low tender. Consequently, the director of Public Procurement Office passed the order (30-09-2009 No. 1S-

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96) stating, that abnormally low tender means the tenderer's offered price of supplies, services or works, which, according to the contracting authority's assessment, is too low for proper performance of public procurement contract. In any case, the tender shall be considered abnormally low if the offered price of supplies, services or works meets one of the following conditions:

- is 15 per cent or more lower than arithmetic average of the prices offered by the other tenderers, whose tenders have not been rejected on other grounds;
- is 30 per cent or more lower than contracting authority's budget allocated to the specific public procurement contract.

It should be noted that the above mentioned order passed by the director of Public Procurement Office is compulsory only for public procurement above EU thresholds. In case of public procurement below EU thresholds the mentioned order may be applied

### 5. Award criteria: use of environmental and social criteria

- **In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?**
- **Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?**
- **Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?**
- **With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?**
- **Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).**
- **As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such "out of the scope systems" and, if that is so, can you explain their characteristics?**
- **As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?**
- **As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which "appropriate measures"/"appropriate action" have been already adopted, or you plan to introduce, in order to adhere to these provisions?**

**Answer to question 5.** In our preliminary initial draft law transposing dir. 2014/24/EU we have not described in detail the social, environmental and innovative characteristics which could be used applying quality/price method. Preliminary we have left it for the discretion of contracting authorities. Also, we do not specify what essential criteria should be evaluated while applying the fixed price mechanism.

Currently we do not intend to adopt a special national legislation aimed at identifying a methodology to calculate life cycle costs or environmental externalities. We believe that it should be drafted by professionals in specific fields (transport, construction, etc.)

In our preliminary initial draft law we have transposed all the possibilities to include social criteria (as contract award criteria or contract clauses) that are provided in the dir. 2014/24/EU.

As a part of directives transposition process we do not intend to create specific "out of scope social security systems".

As for the provisions on reserved contracts for certain services in article 77, we have doubts concerning the need to transpose them into Lithuanian law on public procurement, as current national company law legislation does not provide for the type of organisations described in Art. 77(2).

As for the Art 18(2) we consider the possibility to transpose it just by basic national provision obliging contracting authorities to include into public procurement contracts a special clause binding

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economic operators to observe social/environmental/labour law provisions throughout the performance of the contract.

### 6. Contract performance

#### • Subcontracting

- *Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?*
- *Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?*

#### • Modification of contracts during their term

- *How do you intend to implement the provisions of article 72?*

**Answer to question 6.** We consider the possibility to transpose the provisions of article 71, paragraphs 2 and 3.

Also, we will transpose all the possibilities to modify contracts during their term as provided in Art. 72.

### 7. Exclusions

- *In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?*

**Answer to question 7.** Concerning in-house transactions we consider several different alternatives, such as:

- *not to transpose in-house exceptions at all*
- *transpose in-house exceptions, but restricting the conditions defined in the directive by refusing "bottom-up contract award", contract award between "in-house sisters", prohibiting private capital participation)*
- *transpose in-house exceptions, but regulate it by a separate implementing law, providing for special procedural rules.*

### 8. Competition protection, control and monitoring of the correct application, fight against corruption

- *Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?*
- *In case of plurality of bodies, how are supervision/control functions shared among them?*
- *Which competences do they have? Are they responsible for prevention or repression?*
- *Are they independent authorities (from the Government)?*
- *Which and how many resources do they have?*
- *The supervision functions are on a national or/and on a regional/local basis?*
- *Do they adhere to international organizations?*
- *Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?*
- *Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?*
- *Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?*
- *Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?*
- *When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?*
- *What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group audits?*

**Answer to question 8.**

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The main body responsible for the supervision/control of public procurement procedures as well as implementation of awarded public procurement contracts is **the Public Procurement Office (PPO)**. PPO was established in December 1996 and it is governed by the Law on Public Procurement and other laws, legal acts and international obligations of the Republic of Lithuania and its own regulations. The PPO is an institution which co-ordinates the activities of procurement and supervises compliance of procurement activities with the Law on Public Procurement and the implementing legislation. It coordinates the activities of procurement and supervises classical sector contracting authorities as well as utilities sector contracting entities. The PPO is independent public body, but it has to deliver the annual activity reports to the Government and National Parliament. The main tasks of the PPO are regulated in the Law on Public Procurement. They include the following:

- according to its competence draft and/or adopt legal acts regulating procurement;
- supervise compliance during public procurement procedures and carry out measures to prevent violations;
- according to its competence analyze cases of administrative offences;
- provide methodological assistance, draw up recommendations necessary for implementing the Law on Public Procurement, lay down the guidelines; organize training; offer consultations to contracting authorities and suppliers;
- approve the forms of procurement notices and specify the requirements for submitting notices for the contract awards below EU thresholds;
- approve standard forms of procurement reports and set the requirements for submitting the reports;
- collect, store and analyze information about public procurement;
- analyze and assess the procurement system and draw up proposals for its improvement;
- prepare and submit annual statistics, other requested information to the Commission of the European Communities;
- forward the notices of the contracting authority for publication in the Official Journal, and ensure publication of the notices and other relevant information submitted by the contracting authorities;
- present to the Commission of the European Communities information about the violations of EU law;
- maintain contacts with the relevant foreign institutions and international organizations;
- administer the central portal of public procurement.

Other Lithuanian institutions that are involved in supervision/control of public procurement procedures as well as implementation of awarded public procurement contracts are the following: National Audit Office, Special Investigation Service, Competition Council, public legal persons authorised by a resolution of the Government of the Republic of Lithuania and administering the financial assistance of the European Union.

### **Specific provisions of Directive EU/25/2014**

- **What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?**
- **How do you intend to regulate the procedure for the award of framework agreements according to article 51?**

### **Specific provisions of Directive EU/23/2014**

- **What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?**
- **How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?**

**Answer to the last two questions.** At this stage we have no comments.



## **Malta**

### **EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS**

#### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *Which reasons support the non transposition of some of these provisions?*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*

*The above is still being discussed internally and therefore a reply cannot be provided yet.*

#### **Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

##### **1. The Awarding Procedure**

###### **• Competitive procedure with negotiation:**

- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*
- *A request is to be made by the Contracting Authority to the competent regulatory authority based on grounds found in Art. 20. Relevant regulatory authority is then to decide whether to accept request or otherwise. This will be a two phase procedure.*

###### **• Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*
- *It is important that one shows that the product or service cannot be bought from goods and services that are already on the market.*

###### **- In which strategic sectors do you plan to use it?**

- *No decision has been taken yet but each Contracting Authority willing to utilise it shall request in writing permission to the competent regulatory authority and discuss the issues with the consultative bodies.*

###### **• Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**

- *Are you planning to transpose art 56.2?*
- *Yes it is Malta's intention to transpose art. 56.2*

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### **2. Division of contracts into lots**

- **How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?**
- *It will be transposed on the same lines of the directives and the methodology of identifying lots will be left up to the Contracting Authorities to decide on a case by case basis.*

### **3. Techniques and instruments for electronic and aggregated procurement**

#### **• Electronic Procurement**

- **Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?**
- *No it is not Malta's intention to postpone the application of this Article.*
  
- **How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?**
- *Malta is already implementing this strategy so no new set ups are planned.*
  
- **Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc.)?**
- *It is not clear what is meant by this query.*
  
- **How are you presently using electronic tools to conduct public tenders?**
- *Presently all tenders being issued by the Central Government Authority are through e-procurement.*
  
- **Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?**
- *It is Malta's intention to introduce and use the tools featuring in the Directives but their use will not be mandatory.*
  
- **Does the legal framework of your country foresee the obligation of public tender sessions?**
- *The meaning of public tender sessions is not clear in this question.*
  
- **In case it does, do you think that this will be no longer necessary when using electronic tender procedures?**
  
- **Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)**
- **How are you presently using the aggregated procurement tools foreseen by the directive?**
- *Currently the use of these tools is offered to all contracting authorities depending on their individual needs and the manner they intend to utilise them.*

## Malta

- **Are you planning to strengthen their use through the transposition?**
- Malta is not planning to strengthen the use of these tools through the transposition.

### 4. Choice of participants

#### • Qualification

- **Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?**
- It is being planned to refer the requisites to the contracting authority in line with what the national legislation establishes.

#### • Exclusion grounds

- **Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?**
- This matter is still being discussed.

#### - **Self-cleaning: which are the existing practices for self cleaning?**

- Currently Malta does not have any existing practices for self cleaning but these will be introduced with the transposition of the new directive.

#### - **How do you plan to regulate the application of paragraph 6 of art 57?**

- This matter is still being discussed

#### • Self-declaration

- **Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?**
- This matter is still being discussed

#### • Mechanisms to verify abnormally low tenders

- **Which mechanisms do you use to verify the abnormally low bids according to article 69?**
- Malta does not have a hard and fixed rule to verify abnormally low bids but each and every case is studied and decided accordingly.

### 5. Award criteria: use of environmental and social criteria

- **In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?**
- Malta's intention is to retain a degree of flexibility in the law in order to allow for the application of these characteristics depending on the particular project. Having said that, these characteristics will have to be listed in the tender document and be public knowledge to all economic operators.

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- **Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach?**
- *This will have to be determined on a case by case basis in the relevant tender document.*
- **Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?**
- *It is Malta's intention to transpose this article but no additional criteria are currently envisaged. The tender document will regulate the criteria.*
- **With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost**
- *Consultations are still to take place with regard to the life-cycle costing.*
- **Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).**
- *This matter is still being discussed*
- **As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such "out of the scope systems" and, if that is so, can you explain their characteristics?**
- *No, there is no intention to introduce such out of scope systems.*
- **As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?**
- *This matter is still being discussed*
- **As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which "appropriate measures"/"appropriate action" have been already adopted, or you plan to introduce, in order to adhere to these provisions?**
- *It is being ensured that there are sufficient safeguards to ensure that breaches will lead to the termination of the contract. Furthermore the Maltese Government is discussing the possibility to include the measures in article 18 under the exclusion criteria. Malta is still discussing whether to introduce article 18 (2) however there will be criteria that the economic operator will need to satisfy. Furthermore if Malta decides to include article 18(2) under the exclusion criteria, economic operators will be obliged to get certificates attesting that they do not fall under the grounds mentioned in article 18(2). Obligations will be extended to all economic operators including sub-contractors.*



## Malta

### 6. Contract performance

#### • Subcontracting

- **Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?**
- *While it is Malta's intention to introduce the obligations referred in paragraph 2, there is no intention to introduce the obligations set in article 71 paragraph 3.*
- **Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?**
- *It is not Malta's intention to create more stringent liability rules under its national law.*

#### • Modification of contracts during their term

- **How do you intend to implement the provisions of article 72?**
- *This matter is still being discussed*

### 7. Exclusions

- **In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?**
- *Malta intends to follow the wording of the directive as faithful as possible when it comes to the transposition and implementation of article 12.*

### 8. Competition protection, control and monitoring of the correct application, fight against corruption

- **Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?**
- *The Department of Contracts which is the Central Government Authority and Central Purchasing Body is responsible for the supervision and control of public procurement procedures in Malta. The Director of Contracts is responsible for the running of the Department of Contracts and generally for the administration of the procurement procedures as laid down under the public procurement regulations. The Department of Contracts ensures that the public procurement regulations are observed by all parties involved.*
- **In case of plurality of bodies, how are supervision/control functions shared among them?**
- *This is not applicable to Malta.*
- **Which competences do they have? Are they responsible for prevention or repression?**
- *They are responsible to ensure that the public procurement regulations are adhered to. Ad hoc committees are also answerable to the Department of Contracts to help in the monitoring process.*

## **Malta**

- **Are they independent authorities (from the Government)?**
- *No these are not independent authorities.*
  
- **Which and how many resources do they have?**
- *It currently has a complement of 42 employees.*
  
- **The supervision functions are on a national or/and on a regional/local basis?**
- *The supervision functions are on a national basis.*
  
- **Do they adhere to international organizations?**
- *Yes.*
  
- **Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?**
- *The criteria are established in the procurement documents and depending on the documents submitted by the contractor, the contracting authority determines whether these criteria have been complied with or otherwise.*
  
- **Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?**
- *Recommended bidders are requested to furnish certificates showing that they do not fall under the exclusion criteria.*
  
- **Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?**
- *Yes 1% of the estimated contract value is forfeited in case of default.*
  
- **Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?**
- *There are appeals processes to ensure both the cost-effectiveness and the legitimacy of the awards.*
  
- **When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?**
- *Depending on the meaning of financial flows, there are two bodies which follow disbursements of certain funds, the Planning and Priorities Co-ordination Division and the treasury. Financial flows are supervised through IT systems.*
  
- **What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group audits?**
- *The current safeguards are deemed to be adequate to ensure that principles of non-discrimination and transparency are adhered to so no extra safeguards are intended to be introduced.*

## **Malta**

### **Specific provisions of Directive EU/25/2014**

- ***What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?***
- *The directive is detailed enough so it is Malta's intention to follow it as closely as possible without introducing additional methods.*
  
- ***How do you intend to regulate the procedure for the award of framework agreements according to article 51?***
- *This matter is still being discussed*

### **Specific provisions of Directive EU/23/2014**

- ***What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?***
- *This matter is still being discussed*
  
- ***How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?***
- *This matter is still being discussed*



## Netherland

### EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

#### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *Which reasons support the non transposition of some of these provisions?*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*

The Netherlands is still full in the implementation process, and along with this the process of deciding which non-mandatory provisions in the Directives we will and will not transpose. On the basis of an agreement with Parliament, the Dutch cabinet is obliged to implement directives without any additional national rules. This is of course different when a directive introduces a choice for a Member State.

The Dutch Public Procurement Law 2012 (Aanbestedingswet 2012) is in force since April 2013. This law not only (again) transposes the European public procurement directives, but also contains a number of measures to create a.o. better access to public contracts for SMEs, and to lower the (administrative) burdens for economic operators and contracting authorities. The Netherlands will implement the Directives having in mind the goals of the Public Procurement Law 2012 (better access SMEs and lower admin burden) together with the perspective to give contracting authorities leeway to decide how to organise their public procurement procedure.

#### **Directive 24/2014 (and analogous provisions of Directive 25/2014 and directive 23/2014):**

##### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**
- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*

Due to the structure of the Dutch Public Procurement Law 2012, the article will be implemented in two different chapters thereof. In the chapter on procedures we will create an article in which the general procedural steps a contracting authority should take when using this procedure are laid down. Next, in the chapter which deals with rules on calls for competition, exclusion, selection and award, there will be a specific article in which the specific steps and safeguard clauses in the negotiations are laid down.

- **Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*

The Netherlands intends to implement article 31 in the same way as it will implement article 29.

- *In which strategic sectors do you plan to use it?*

It is up to the contracting authorities to decide which procurement procedure suits their needs best and therefore whether they will use this procedure. Regarding the fact that the innovation partnership is a complicated procedure, which can only be used in cases where the needs of the contracting authority cannot be met by products, services or works that are already available on the market and where R&D is a necessary part of the procedure, we imagine this procedure can be used in case of, for example, complicated infrastructural projects.

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**

- ***Are you planning to transpose art 56.2?***

The Netherlands is still undecided on this issue.

## **2. Division of contracts into lots**

- ***How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?***

The Dutch Public Procurement Law 2012 contains a provision that obligates contracting authorities to divide public contracts into lots. Contracting authorities are only allowed to deviate from this provision if they are of the opinion that dividing into lots is not appropriate. The contracting authority needs to motivate in the public procurement documents the reason(s) for this.

The Netherlands intend to maintain this provision and implement as far as allowed, article 46 accordingly. We are still undecided on the implementation of article 46 paragraph 4.

## **3. Techniques and instruments for electronic and aggregated procurement**

- **Electronic Procurement**

- ***Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?***

The Netherlands has not yet decided on whether to postpone the entering into force of the e-procurement provisions. If the parties within the procurement process are ready for enforcement of these provisions by April 18 2016, we will not postpone the period until 2018.

- ***How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?***

The e-procurement provisions will be included in the Dutch Public Procurement Law 2012.

- ***Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..)?***

We are not sure we understand this question correctly: Currently it is mandatory for contracting authorities to publish all tender notifications electronically. We cannot provide more information on this issue.

- ***How are you presently using electronic tools to conduct public tenders?***

There is a public e-procurement platform (TenderNed) and there are private providers of e-procurement platforms. Most platforms provide for the possibility to conduct the whole procurement process electronically.

- ***Are you planning to introduce the mandatory use of some tools introduced by the Directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?***

The Netherlands plans to introduce the electronic catalogue, the dynamic purchasing system and the electronic auction. We are at the moment not planning to introduce any mandatory use by contracting authorities.

- ***Does the legal framework of your country foresee the obligation of public tender sessions?***

For the response to this question we presume that a public tender session is a session in which the tenders are publicly opened. It's up to the contracting authority to decide whether it wants to organise such a session.

- ***In case it does, do you think that this will be no longer necessary when using electronic tender procedures?***

Not applicable.

- **Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)**

- ***How are you presently using the aggregated procurement tools foreseen by the Directive?***

Framework agreements are widely used in the Netherlands. Occasional joint procurement is mostly used by municipalities. We are not aware of a procurement procedure in which a contracting authority of another member state was involved. Central purchasing bodies are (almost) not used at all.

- ***Are you planning to strengthen their use through the transposition?***

Contracting authorities will be informed on the (increased) possibilities they have for joint procurement, but we are at the moment not planning to actively strengthening their use.

#### **4. Choice of participants**

- **Qualification**

- ***Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?***

The Netherlands is not planning to implement any measure related to article 19 paragraph 2 in national legislation. It will be up to the contracting authority to decide.

- **Exclusion grounds**

- ***Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?***

The Netherlands does not intend to make any of these non-mandatory grounds compulsory in the national legislation.

- ***Self-cleaning: which are the existing practices for self cleaning?***

The Netherlands currently has a form of self cleaning in article 2.88 paragraph b of the Public Procurement Law 2012. The difference between this article and the method provided for in the Directive is that the Directive gives economic operators a right to prove self cleaning and article 2.88 gives a discretionary power to the contracting authority to allow an economic operator to prove self cleaning.

- ***How do you plan to regulate the application of paragraph 6 of art 57?***

The Netherlands will transpose the article in the Dutch Procurement Law 2012. The Netherlands has not yet decided if any additional regulation will be added.

- **Self-declaration**

- ***Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?***

An entirely digitalized and automatized system is not possible. Economic operators will always have to grant permission (digital or not) to check their criminal records. The Netherlands is however currently investigating whether it is possible to fully digitalize and automatize the system to the greatest extent possible. Application and permission can be granted by the economic operator. After that, the system will automatically check exclusion grounds and present the operator with a digital certificate. A physical certificate will stay available.

- **Mechanisms to verify abnormally low tenders**

- ***Which mechanisms do you use to verify the abnormally low bids according to article 69?***

It is up to the contracting authorities to take measures to detect and handle abnormally low bids.

## **5. Award criteria: use of environmental and social criteria**

- ***In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?***

In the articles that transpose this issue, the Netherlands will provide for the same information as is provided for in the Directive.

- ***Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?***

The Netherlands will transpose article 68 of the Directive in the Dutch procurement law, however we will not prescribe which calculation method contracting authorities will have to use. If common non-obligatory methods for calculation are developed in the future, contracting authorities might want to refer to those methods.

- ***Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?***

The Netherlands does not intend at the moment to adopt specific provisions with reference to art 67 par. 2.

- ***With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?***

The Netherlands does not intend at the moment to adopt specific provisions with reference to art 68.

- ***Which choices and solutions will be adopted in the transposition of the Directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).***

In general, it is up to each individual contracting authority to decide whether and how it wants to include social criteria in procurement. The Public Procurement Law 2012 however, prescribes that contracting authorities should in principle always use the criterium economically most advantageous tender, unless they can motivate why in a specific case they prefer to refer to the lowest price.

- ***As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?***

The Netherlands does not have these kind of systems.

- ***As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?***

The Netherlands has not decided on this issue yet.

- ***As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?***

For compliance with labour and social laws and regulations, the Netherlands has the Inspectorate for Social Issues and Employment (Inspectie Sociale Zaken en Werkgelegenheid). Compliance with environmental laws and regulations, is surveilled by the Inspectorate for the Environment and Transport (Inspectie Leefomgeving en Transport). We have not decided yet whether we will introduce additional measures.

## **6. Contract performance**

### **• Subcontracting**

- ***Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?***

The Netherlands has not decided on this issue yet.

- ***Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?***

The Netherlands has not decided on this issue yet.

### **• Modification of contracts during their term**

- ***How do you intend to implement the provisions of article 72?***

As this article is a codification of jurisprudence, we will transpose the provisions of article 72 into the Dutch Procurement Law 2012. Since the article does not give Member States options, we will implement this article similar to the article in the Directive.

## **7. Exclusions**

- ***In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?***

The Netherlands have not decided on this issue yet.

## **8. Competition protection, control and monitoring of the correct application, fight against corruption**

- ***Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?***

Contracting authorities themselves are responsible for public procurement procedures. The accountant or audit units checks the obligation to apply the Public Procurement Law 2012 in the yearly audit. The Netherlands has no supervisory body for public contracts. Concerning possible complaints about public procurement procedures, the civil court is competent, on application of economic operators (or contracting authorities), to decide in procurement matters.

- ***In case of plurality of bodies, how are supervision/control functions shared among them?***

There are no supervisory or controlling bodies concerned with public procurement law (except bid rigging).



- **Which competences do they have? Are they responsible for prevention or repression?**  
Not applicable.
- **Are they independent authorities (from the Government)?**  
Not applicable.
- **Which and how many resources do they have?**  
Not applicable.
- **The supervision functions are on a national or/and on a regional/local basis?**  
Not applicable.
- **Do they adhere to international organizations?**  
Not applicable.
- **Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?**  
Economic operators have to sign the Dutch self declaration form in which they state they comply with the selection criteria in the procurement documents. Furthermore, an economic operator can use, e.g., certificates issued by the Chamber of Commerce, the Tax Office or the Ministry of Security and Justice to prove the economic operator is - respectively - not in a state of bankruptcy, paid his taxes and social security contributions, or does not fall under any of the mandatory exclusions grounds.
- **Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?**  
The Netherlands uses the 'Gedragsverklaring aanbesteden', roughly translated as a 'declaration of conduct in public procurement'. It is a certificate that proves that the exclusion grounds that are transposed in national legislation are not applicable to the economic operator. The certificate also shows if the economic operator had any dealings with the national or European competition authority. The certificate is issued by the Ministry of Security and Justice on request and is applicable for two years.
- **Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?**  
No.
- **Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?**  
Not applicable.
- **When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?**  
No, economic operators in any case will have to comply with financial regulation. There is no specific body that only supervises this obligation for public procurement law.
- **What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group auditions?**  
Preliminary market consultations are already allowed and frequently done in the Netherlands. Thus far there have been no signals that this leads to compliance problems. The Netherlands will at this moment take no additional measures.

## Netherland

- ***What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?***

The Netherlands has not decided on this issue yet.

- ***How do you intend to regulate the procedure for the award of framework agreements according to article 51?***

- The Netherlands has not decided on this issue yet.

### **Specific provisions of Directive EU/23/2014**

- ***What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive? What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?***

The Concessions Directive only applies to concessions with a value over 5 million euros. We think that the market for SMEs is limited for that reason. However throughout the entire Dutch Public Procurement Law 2012 there is special attention for the position of SMEs. For instance by introducing a very lean self declaration. If possible these measures will also be applied to concessions.

- ***How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?***

The Netherlands have not yet decided if it will regulate the discretion any further then necessary according to the Directive.



Norway

## EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

Initially, Norway would like to stress that we have not yet made any final decisions as regards the implementation of the new directives. The hearing paper has not yet been finalized. Therefore, in this document we can only express some preliminary views and plans.

### **Non Mandatory Provisions of the Directive**

- **From a general point of view, which non mandatory provisions will be transposed?**
- **For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?**
- **Which reasons support the non transposition of some of these provisions?**
- **Which main interests are supposed to be protected by non transposing some of these provisions?**

In Norway, the legislation on public procurement has been criticized for being too complex, too detailed and causing unnecessary administrative burdens on both contracting authorities and economic operators. We are in the process of simplifying the national legislation for contracts below the EU thresholds. Simplification and increased flexibility will also be a guiding principle for the work with implementation of the new directives. Consequently, most of the non mandatory provisions will probably not be transposed.

### **Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

#### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**

- **How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?**

We would like the contracting authorities to be able to use this procedure to the greatest extent possible. Our position is that the contracting authorities should be able to negotiate in all cases where they deem it to be necessary to achieve the best possible outcome. But the provision in article 26 (4) determines some limits that we will implement in Norwegian PP regulation.

- **Innovation Partnership**

- **How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?**

We consider the Innovation Partnership to be a type of contract, not a procedure. Most of the provisions in article 31 concern the period after the signing of the contract. Our proposal is to require the contracting authorities to use the negotiated procedure when they would like to establish an innovative partnership. In the preamble 49 it is stated that the innovation partnership should be based on the procedural rules that apply to the competitive procedure with negotiation.

- **In which strategic sectors do you plan to use it?**

We have no plans of limiting the use of innovation partnership other than requiring that the partnership can only be established where the aim is to develop an innovative product, service or works that is not already available on the market.

## **Norway**

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**
- **Are you planning to transpose art 56.2?**

*Yes, and we do not plan to restrict the use of the procedure to certain types of procurement or specific circumstances.*

### **2. Division of contracts into lots**

- **How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?**

*Norway plans to transpose Art 46 (1) – (3). We do not plan to make it obligatory to award contracts in the form of separate lots according to Art 46 (4). It will be left with the contracting authority to decide whether a given contract should be awarded in the form of separate lots or not, and if so, how to divide the contract (size, subject-matter etc.).*

### **3. Techniques and instruments for electronic and aggregated procurement**

#### • **Electronic Procurement**

- **Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?**

*We hope we will be able to have the technical solutions required to apply article 22, par. 1 in place by the latest April 2016.*

- **How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?**

*The national tender electronic daily (Doffin) already have the functionality of electronic publication of notices and communication between the contracting authorities and the tenderers. A centralised electronic solution and the institutional set up for the submission of tender is not yet ready, although there exist private service providers*

- **Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc.)?**

- **How are you presently using electronic tools to conduct public tenders?**

*See question two. Around 25% of tenders are submitted through electronic solutions provided by privately service providers.*

- **Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?**

*No, we do not plan to make them mandatory (electronic auction will be mandatory within a framework agreement).*

- **Does the legal framework of your country foresee the obligation of public tender sessions?**

## **Norway**

*If this means public opening of tenders, our legal framework does provide for it.*

- ***In case it does, do you think that this will be no longer necessary when using electronic tender procedures?***

*We are uncertain about this.*

- ***Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)***
- ***How are you presently using the aggregated procurement tools foreseen by the directive?***

*In particular framework agreements are used to a great extent in Norway today. There are furthermore several central purchasing bodies in the different public sectors in Norway. The use of procurement involving contracting authorities from different member states is rather limited.*

- ***Are you planning to strengthen their use through the transposition?***

*We will transpose all provisions on aggregated procurement, making it a choice for the contracting authorities whether to use such instruments. Norway does not plan to strengthen the instruments in the legislation further than what already follows from the new directive.*

#### **4. Choice of participants**

- ***Qualification***

- ***Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?***

*We have no plans of referring the determination of requisites, on temporary groupings among suppliers, to the national legislation.*

- ***Exclusion grounds***

- ***Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?***

*As we see it, Art. 57 (4) does not leave any choice for the Member State as whether to implement the facultative exclusion grounds or not, it only leaves the choice whether to make some or all of them mandatory. On this background, Norway plans to implement all exclusion grounds in paragraph 4.*

*Two of these – litra e) and f) – we plan to transpose as mandatory exclusions grounds. The reason for this is that we believe that it would be contrary to the general principles, in particular the principle on equal treatment, to not exclude an economic operator when there is a conflict of interest or a distortion of competition, since equal treatment would not be possible in these situations.*

*We plan to transpose the other exclusion grounds in paragraph 4 as facultative exclusion grounds.*

- ***Self-cleaning: which are the existing practices for self cleaning?***

*In Norway there is no set practices regarding the possibility of self cleaning.*

- ***How do you plan to regulate the application of paragraph 6 of art 57?***

## **Norway**

We plan to transpose Art 57 (6) more or less *ad verbum*. It will then be left up to the individual contracting authority to assess the measures taken by the economic operator and to decide whether such measures are sufficient.

- **Self-declaration**

- **Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?**

We do not at the present moment use or have any plans for entirely digitalized systems in the evaluation of selection criteria or grounds for exclusion. We are awaiting the ESPD.

- **Mechanisms to verify abnormally low tenders**

- **Which mechanisms do you use to verify the abnormally low bids according to article 69?**

Norway does not plan to introduce any special mechanisms to identify abnormally low tenders. It will be left with the contracting authorities to identify such tenders and to assess the information provided by the economic operator and whether this information satisfactorily accounts for the low price/cost.

## **5. Award criteria: use of environmental and social criteria**

- **In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?**

We do not plan to detail the social, environmental and innovative characteristics in the regulation. The plan is to just determine in the regulation that the contracting authorities can use such criteria in the choice of a supplier. We will describe the characteristics in our guidance to the regulation and give relevant examples.

- **Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?**
- **Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?**

We do not plan to adopt a specific provision with reference to art. 67, par. 2. Our plan is to regulate the award criteria in one provision where it is stated that the contracting authorities can set a fixed price or cost and let the economic operators compete on quality criteria only.

- **With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?**

We have at the present no such plans.

- **Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of**

## **Norway**

**suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).**

- 
- **As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?**

*Our social security system already falls outside the scope of application of the public procurement rules. This is organised as a purely public system.*

- **As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?**
- **As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?**

*Norway already have in place legislation which implements ILO convention 94 concerning labour clauses in public contracts. In addition, the regular supervisory authorities of course have the task to oversee both work carried out in the private and the public sector. Comprehensive national guides on both environmental, social and and labour law considerations in public contracts have also been produced. It is uncertain whether any additional measures will be taken in order to adhere to these provisions.*

### **6. Contract performance**

#### **• Subcontracting**

- **Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?**

*As we see it, Art. 71 (2) does not leave any choice for the Member State as whether to implement the possibility for contracting authority to ask for certain information regarding subcontracting – the only choice to made is whether it should be mandatory to ask for such information in some cases.*

*Norway plans to transpose this provision as a possibility only – we do not plan to make it mandatory for contracting authorities to ask for such information in any case.*

*We do not plan to transpose Art. 72 (3).*

- **Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?**

*We do not plan to introduce more stringent liability rules or go further under national law as referred to in Art. 71 (7).*

#### **• Modification of contracts during their term**

- **How do you intend to implement the provisions of article 72?**

- *We intend to implement Art. 72 in three separate provisions:*
  - o *A provision on review clauses*

## Norway

- A provision on modification that are not possible without a new procurement procedure
- A provision on possible modifications, i.e. modifications that are not substantial

### 7. Exclusions

- **In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?**

So far we have not found any practical application in Norway of the modification to the prohibition on direct capital participation (“non-controlling and non-blocking forms of private capital participation required by national legislative provisions which do not exert a decisive influence on the controlled legal person”). Therefore, we consider simply introducing a prohibition on private capital participation without adding this modification.

### 8. Competition protection, control and monitoring of the correct application, fight against corruption

- **Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?**

The only body assigned exclusively to “monitoring” public procurement procedures is The Norwegian Complaints Board for Public Procurement (KOFA). KOFA is an independent body assigned to review complaints, primarily from economic operators, regarding infringements of the law on public procurement and associated regulations.

The Office of the Auditor General (OAG) has a much wider scope for its work, and shall ensure that the community's resources and assets are used and administered in keeping with the Parliament's decisions. They do this through auditing, monitoring and guidance. The OAG audits the central government accounts and all accounts submitted by central government agencies and other authorities that are obliged to submit accounts to the central government, and carries out systematic analyses of the economy, productivity, goal attainment and effects on the basis of the Parliament's decisions and intentions (performance auditing). Through its audits, the OAG shall contribute to the prevention and detection of irregularities and errors. Through its auditing the OAG often has had a special focus on public procurement procedures and has put this topic on the agenda.

- **In case of plurality of bodies, how are supervision/control functions shared among them?**
- **Which competences do they have? Are they responsible for prevention or repression?**

In cases regarding infringements of the law on public procurement or associated regulations, the Complaint's Board gives advisory opinions, i.e. decisions not enforceable by law.

- **Are they independent authorities (from the Government)?**

Yes

- **Which and how many resources do they have?**



## **Norway**

10 000 000 NOK or around 1 200 000 EUR is granted to the operation of KOFA in the national budget for 2015.

- **The supervision functions are on a national or/and on a regional/local basis?**

They are on a national level.

- **Do they adhere to international organizations?**

No

- **Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?**

- **Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?**

The procedure for reviewing cases consists of a written exchange of pleadings, similar to the hearing of civil actions. There is however no oral proceedings. Similar to civil actions before the courts, the procedure is adversary, as opposed to inquisitorial, and is limited to the parties' claims, pleas, allegations and evidence.

- **Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?**

There is no such support (at least not on a national level)

- **Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?**

No, there are no national control systems to ensure cost-effectiveness.

- **When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?**

No, there are no such mechanisms especially designed for public procurements.

- **What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group audits?**

Norway plans to transpose Art 40 and 41 more or less ad verbum. We do not plan to introduce any particular regulatory safeguards, but how to comply with the principles of non-discrimination and transparency in preliminary consultations of the market is already described in national guidelines.

### **Specific provisions of Directive EU/25/2014**

- **What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?**

Norway does not intend to adopt any specific types of methods for calculating the estimated value of procurement according to Article 16 in Directive EU/25/2014.”

- **How do you intend to regulate the procedure for the award of framework agreements according to article 51?**

## **Norway**

*Norway plans to transpose Art. 51 without introducing more detailed procedural rules on the award of the framework agreement or the award of contracts based on such an agreement. Thus we will leave it up to contracting entities to decide which rules and criteria should apply, as long as such rules and criteria ensure equal treatment of economic operators.*

### **Specific provisions of Directive EU/23/2014**

- ***What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?***

*Not yet decided.*

- ***How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?***

*We plan to give the contracting authorities the greatest possible discretion in determining which award criteria to apply. We plan not to go any further than the directives do in regulating the award of the contract.*



Poland

## EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *Which reasons support the non transposition of some of these provisions?*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*

From a general point of view, Poland intends to transpose almost all non-mandatory provisions imposed by the new directives.

It is not expected to implement into Polish procurement law only solutions provided for the contracting authorities below the central level in restricted and competitive procedure with negotiation leading to the use of the prior information notice as an invitation to apply for the contract.

### **Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

#### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**

- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*

Following new directives, into Polish procurement law will be implemented all procedures laid down in the Directives as obligatory, including competitive procedure with negotiation.

Competitive procedure with negotiation will be implemented into the Polish law in the meaning of art. 29 of the Directive. Moreover, rules to be followed during negotiations - as principle of confidentiality, equal treatment of all bidders and non-discrimination – will be implemented as well.

The new law will also implement the provisions of the directives, which provide the possibility to divide negotiations into separately stages in order to reduce the number of offers. In such case, contracting authority will be obliged to inform about it in notice or in other document.

- **Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership? In which strategic sectors do you plan to use it?*

## ***Poland***

Innovation Partnership will be implemented into Polish law as defined in art. 31. The aim of the Innovation Partnership is to develop an innovative product, service or work, when the demand for such a product, service or construction work can't be met by the products, services or works existing on the market.

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**

- ***Are you planning to transpose art 56.2?***

Yes.

### **2. Division of contracts into lots**

- ***How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?***

It is proposed to allow the contracting authority to take a decision on the division of the contract into lots, as well as determine the size and the subject of such lots.

### **3. Techniques and instruments for electronic and aggregated procurement**

- **Electronic Procurement**

- ***Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?***

Due to abovementioned possibility, during the transition period (from 18 April 2016 to 18 October 2018) contracting authorities will be required to submit notices only electronically to the relevant publication, provide contract documents on its own website of the Public Information Bulletin or on their own site if they don't have website in Bulletin, exchange information with economic operators and accept applications and offers send by mail, fax, using electronic means or any combination of these methods.

- ***How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?***

It is planned to implement the directive within the prescribed deadlines, in accordance with the requirements imposed.

- ***Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..)?***

All information is available in the reports of the functioning of public procurement system in Poland, available in - both Polish and English language - on the website of the Public Procurement Office - <http://www.uzp.gov.pl/cmsws/page/?F;378>

For example, below – the data for electronic auction in Poland:

## Poland

	2010	2012	2013
<b>Number of EA</b>	247	867	1 396
<b>Savings</b>	89 336 546 PLN	228 000 000 PLN	321 405 865 PLN
<b>Number of EO</b>	1200	7378	n/a
<b>Number of CA</b>	456	2214	n/a

- ***How are you presently using electronic tools to conduct public tenders?***

Presently, in Poland electronic auctions and electronic bids are used. Publication of contract notices in electronic form is obligatory. In case of open procedure contracting authority is also obliged to make the contract documents available on its website.

- ***Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?***

Some techniques and instruments for electronic procurement (i.e. framework agreements and dynamic purchasing systems, electronic auctions) are already present in the Polish legal system, however they require a modification or – in some cases (electronic catalogues) also implementation, in accordance with the provisions of the new directive. Nevertheless, probably, the use of these instruments will not be obligatory for contracting authorities.

- ***Does the legal framework of your country foresee the obligation of public tender sessions?***

No.

- ***In case it does, do you think that this will be no longer necessary when using electronic tender procedures?***

n/a

- Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)

- ***How are you presently using the aggregated procurement tools foreseen by the directive?***

All forms of aggregated procurement available under the directive 2004/18/EC are also possible under the Polish Public Procurement Law. However, it is the decision of each and individual contracting authority whether one of these form will be used or not. There is also one institution playing the role of central purchasing body, but with limited scope of competence.

## **Poland**

- ***Are you planning to strengthen their use through the transposition?***

Yes. Aggregated procurement will be adapted to the requirements of new Directive.

### **4. Choice of participants**

- **Qualification**

- ***Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?***

In public procurement procedure will be able to attend a group of contractors, including temporary associations. Contracting authority will not be able to require from them to have a specific legal form to submit an offer or request to participate. However, the contracting authority will be able to request from the group of economic operators to adopt a specific legal form if they awarded the public contract, in so far as it is necessary for the satisfactory completion of the contract.

- **Exclusion grounds**

- ***Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?***

All mandatory grounds for exclusion provided by the classical directive will be transposed into Polish procurement law.

Moreover, the following conditions for the exclusion set out in the Directive as an option will be introduced to the Polish law as mandatory:

- art. 57 paragraph 4 (a);
- art. 57 paragraph 4 (d);
- art. 57 paragraph 4 (e);
- art. 57 paragraph 4 (h).

Other conditions set in art. 57 paragraph 4 of the Directive will be implemented into Polish law as facultative.

- ***Self-cleaning: which are the existing practices for self cleaning?***

Self-cleaning will be transposed into Polish law.

- ***How do you plan to regulate the application of paragraph 6 of art 57?***

According to the meaning set out in the Directive.

Economic operator being in one of the situations of exclusion will be able to provide evidence that the taken measures are sufficient to provide its reliability, despite the existence of adequate grounds for exclusion.

## **Poland**

If such evidence will be considered by the contracting authority as sufficient, the economic operator will not be excluded from the award of a public contract (self-cleaning).

The measures taken by economic operators should take into account the weight and the specific circumstances. If the measures are deemed insufficient, the economic operator will receive justification from the contracting authority.

- **Self-declaration**

- ***Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?***

Planning to develop.

- **Mechanisms to verify abnormally low tenders**

- ***Which mechanisms do you use to verify the abnormally low bids according to article 69?***

As provided in the Directive, into the Polish law will be implemented the terms of explaining bids, in which the proposed price or cost seems to be abnormally low in relation to the relevant works, supplies or services for the contracting authority.

Contracting Authority will be able to request explanations from economic operator regarding the following issues:

- the efficiency of the production process, services or of the construction method;
- the technical solutions chosen or available to the contractor exceptionally favourable conditions for the supply of products or services or the execution of a work;
- the originality of the work, supplies or services proposed by the economic operator;
- compliance with the obligations in the field of environmental protection, labour law or social law, including the part of the subcontractor;
- the possibility of the state aid obtaining.

Contracting Authority will evaluate the information provided in consultation with the economic operator.

### **5. Award criteria: use of environmental and social criteria**

- ***In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?***

Not decided yet.

- ***Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?***

## Poland

Not decided yet.

- *Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?*

Not decided yet.

- *With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?*

No.

- *Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).*

Not decided yet.

- *As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?*

Not decided yet.

- *As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?*

Not specified yet.

- *As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?*

Not specified yet.

## 6. Contract performance

### • Subcontracting

- *Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?*

Yes.



## *Poland*

- *Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?*

Not decided yet.

- **Modification of contracts during their term**

- *How do you intend to implement the provisions of article 72?*

The rules concerning the modification of procurement contracts during their term will be implemented into national law accordingly to the directive.

## **7. Exclusions**

- *In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?*

Apart from the implemented into the Polish legal exemptions from the application of public procurement for services it is necessary to implement new regulations on the basis of directives concerning - inter alia - cooperation between public sector entities so-called in-house procurement, public - public cooperation. Still, the conception of the implementation of the abovementioned regulations is under consideration.

## **8. Competition protection, control and monitoring of the correct application, fight against corruption**

- *Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures? In case of plurality of bodies, how are supervision/control functions shared among them? Which competences do they have? Are they responsible for prevention or repression? Are they independent authorities (from the Government)? Which and how many resources do they have? The supervision functions are on a national or/and on a regional/local basis? Do they adhere to international organizations?*

### **Control of public procurement contracts**

Polish public procurement control system is decentralized. Several institutions are authorized to conduct the control procedure of contract award procedures (Supreme Chamber of Control, Regional Clearing Chambers). However, the Public Procurement Office (PPO) plays the most significant role as it is the only institution with specialized units responsible for the control of public contract award procedure. Within Public Procurement Office act two departments responsible for control of public procurement procedures: Ad hoc Control Department and Department of Control for Contracts co-financed from EU funds. The objective of controls is to prove check the conformity of contract award procedures with the Public Procurement Law.

- **Ad hoc control**

## *Poland*

The PPO President commences an ad hoc control ex officio or on request in case of justified presumption, that in course of the contract award procedure a breach of the provisions of the Act appeared, which might have influenced the result. The ad hoc control may be commenced not later than within 4 years from the day of the end of the contract award procedure. The end of the ad hoc control is the submission of information on the result of ad hoc control, which contains in particular description of the contract award procedure, which was the object of the control and information on confirmation of breach or lack of breach. The awarding entity shall have the right to make justified reservations to the PPO President within 7 days from the submission of information on the result of ad hoc control.

- **Ex-ante control**

Ex-ante controls carried out by the PPO President may be divided into 2 groups:

- **Obligatory ex-ante controls** if the value of contract is equal to or exceeds the PLN equivalent of EUR 20 000 000 for works and EUR 10 000 000 for supplies or services and the contract is co-financed from the EU funds.
- **Optional ex-ante controls**, which the PPO President may commence ex-officio or on request if there is a justified presumption that the provisions of the PPL were violated in course of the contract award procedure what might have influenced results of the award procedure. Optional controls are usually commenced as a consequence of complaints lodged by the economic operators to the PPO President but also as a consequence of e.g. press releases.

During obligatory ex-ante control it is forbidden to conclude the contract. The end of an ex-ante control shall be the submission to the awarding entity of the information on the result of the control, which contains in particular: description of the contract award procedure, which was the object of the control, information on confirmation of breach or lack of breach, post control recommendations – if in course of the control the cancellation of the procedure or removal of the confirmed breaches was found legitimate. The head of the awarding entity, shall inform in writing the PPO President on the manner of performing post control recommendations. The awarding entity shall have the right to make justified reservations to the PPO President within 7 days from the submission of the information on the control results. The provisions of Article 167 paragraph 2-6 shall apply accordingly.

### **Appeals and complaints**

Public Procurement Law envisages 2 legal protection measures: appeal and complaint. The Public Procurement Law applies to public contracts and contests where their value exceeds the equivalent in PLN of EUR 30.000. An appeal is admissible only against actions non-compliant with the Public Procurement Law, performed by the awarding entity in the course of contract award procedure or against failure to act which the awarding entity is bound to perform under PPL. If the value of contract award procedure does not exceed the EU

## *Poland*

thresholds, the appeal is admissible also against actions:

- 1) choice of the negotiated procedure without publication, single-source procurement and request for quotation;
- 2) description of the method used for the evaluation of the fulfilment of conditions for participation in the contract award procedure;
- 3) exclusion of the appellant from the contract award procedure;
- 4) rejection of tender of appellant.

### **National Appeals Chamber**

National Appeals Chamber (NAC) is body in the review proceedings against actions non-compliant with the Public Procurement Law performed by the contracting authorities. According to PL PPL NAC is to consist of no more than 100 members appointed and dismissed by the Prime Minister from among persons satisfying the requirements, who obtained the best results in competitive procedure. A person eligible to become member of NAC: 1) is a Polish citizen; 2) has higher law education; 3) has full legal capacity to enter into legal transactions; 4) enjoys all public rights; 5) has an unblemished reputation; 6) has not been validly convicted of offences committed intentionally; 7) has minimum 5 year work experience in public administration or at the positions connected with giving legal advice, preparing legal opinions, preparing drafts of legal acts as well as acting before courts and offices; 8) is at least at the age of 29. The members of NAC are selected by qualifying procedure, which consists of: 1) a written exam in theoretical and practical knowledge of the contract award procedure rules and 2) an oral exam (interview).

The bodies of the Chamber are: Chairman, Vice-chairman, General Assembly composed of the members of the Chamber.

### **Complain to the court**

The parties and participants of the appeal procedure may complain to the court against the Chamber's ruling. The complaint should be lodged with the district court competent for the seat or place of residence of the awarding entity. The complaint should be lodged through the Chairman of the Chamber within 7 days of the day, on which the Chamber's ruling was submitted, dispatching simultaneously its copy to the complaint's opponent. The Chairman of the Chamber transfers the complaint together with the files of the appeal procedure to the competent court within not more than 7 days from the date of its receipt. Within 21 days of the day, on which the ruling was passed, a complaint may also be lodged by the PPO President. The PPO President may also join the pending procedure.

### **Contractual review**

Within 4 years from the day of the end of the contract award procedure the PPO President can commence ad hoc control. In case of disclosed breach of the provisions of PPL, the PPO President may:

## *Poland*

- 1) notify to the competent agent for public finance discipline of the breach of public finance discipline or make a request to the relevant enforcement committee to impose a penalty for the breach of public finance discipline;
  - 2) impose a financial penalty;
  - 3) apply to the court for the annulment of procurement contract in its entirety or in part.
- (see also paragraph concerning Institutional system - Supervision).

Public procurement contracts are regulated by the provisions of the Act of 23 April 1964 - Civil Code, unless the provisions of PPL provide otherwise.

- *Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works? Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?*

It is expected to implement all conditions of exclusion.

Economic operator in the situation of the exclusion will be able to use the so-called 'self-cleaning' mechanism.

- *Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?*

Yes. The contracting authority **shall require the economic operators to pay a deposit** where the value of the contract is equal to or exceeds the expressed in PLN equivalent of the amounts specified in the provisions issued under Article 11 para. 8 (EU thresholds). In case when the value of the contract is less than the amounts specified in the provisions issued abovementioned article, the contracting authority **may require the economic operators to pay a deposit**.

The deposit shall be paid prior to the final date for submission of tenders and the contracting authority shall define the amount of the deposit, however **not more than 3 % of the contract value**. If the contracting authority admits tenders for lots or awards contract in lots, it shall define the deposit amount for each lot. If the contracting authority envisages the award of supplementary contracts shall estimate the value of the deposit for the value of the main contract.

The deposit **may be paid in one or several of the following forms:**

- cash;
- bank sureties or guarantees of collective savings-loan fund, however the surety of collective savings-loan fund is always a financial surety;

## *Poland*

- bank guarantees;
- insurance guarantees;
- sureties given by entities, referred to in Article 6b para. 5 item 2 of the Act of 9 November 2000 on Establishment of Polish Agency for Enterprise Development (journal of laws of 2007 No. 42 item 275; of 2008 No. 116 item 730 and 732 and No. 227 item 1505 and of 2010 No. 96 item 620).

A deposit paid in cash shall be paid by a bank transfer to a bank account indicated by the contracting authority. A deposit paid in cash shall be kept by the contracting authority in a bank account.

(Article 45 PPL)

According to Article 46 PPL, the contracting authority **shall return a deposit** to all economic operators immediately upon the selection of the best tender or cancellation of the procedure, except for the economic operator whose tender has been selected.

The deposit of that economic operator whose tender has been selected shall be returned by the contracting authority immediately upon conclusion of the procurement contract and provision of a security on due contract performance, if requested.

The contracting authority shall return the deposit immediately upon request of the economic operator who withdrew its tender prior to the expiry of the time limit for submission of tenders.

The contracting authority may **request a new deposit** from the economic operators, whose deposit was returned based on the Art. 46 para. 1, if as a result of the final resolution the appeal its tender was selected the best (most advantageous). The economic operators shall pay a deposit within the time limit fixed by the contracting authority.

If the deposit was paid in cash, the contracting authority shall return it together with interest resulting from the bank account agreement where it was kept, less the cost of bank charges for maintaining the account and commission for the transfer of money to the bank account indicated by the economic operator.

The contracting authority **shall retain the deposit together with interest**, if the economic operator in response to the call, referred to in Article 26 para. 3, due to reasons attributable to it, neither submitted documents or declarations, referred to in Article 25 para. 1, plenipotentiaries, a list of entities belonging to the same capital group, referred to in art. 24 para. 2 point 5, or the information stating that it is not part of the same capital group, nor gave the consent to correct the error, referred to in art. 87 para. 2 point 3, what resulted in inability to select the most advantageous tender submitted by the economic operator.

The contracting authority **shall retain the deposit together with interest, if the economic**

## *Poland*

### **operator whose tender has been selected:**

- refused to sign the public procurement contract on terms specified in the tender;
- failed to produce the required security on due performance of the contract;
- the public procurement contract could not be signed due to a fault on the part of the economic operator.

- ***Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?***

Yes – control lead by the Supreme Audit Office (NIK). The basic task of the NIK is to audit the activity of government administration bodies, the National Bank of Poland (NBP), state legal persons and other state organizational entities. The NIK can also audit the activities of local government bodies as regards their legality, sound management, efficacy and integrity. The NIK undertakes audits ordered by the Sejm (lower chamber of the Polish Parliament) or its bodies, at the request of the President, the Prime Minister or on its own initiative. The functioning and the organization of the NIK are provided for in Chapter 9 of the Constitution of the Republic of Poland and the Act on the NIK of 23 December 1994 (with amendments introduced by the Act of 22 January 2010).

\*source: <http://www.nik.gov.pl/en/>

- ***When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?***

Yes - Regional Audit Chambers and Supreme Audit Office.

- ***What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group audits?***

Not specified yet.

### **Specific provisions of Directive EU/25/2014**

- ***What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?***

Similarly as in classical procurement regulations.

- ***How do you intend to regulate the procedure for the award of framework agreements according to article 51?***

Similarly as in classical procurement regulations.

*Poland*

**Specific provisions of Directive EU/23/2014**

- *What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?*

Not specified yet.

- *How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?*

Not specified yet.



## Portugal

### EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

#### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *Which reasons support the non transposition of some of these provisions?*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*

We don't have the information to answer those questions.

**Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

#### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**

- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*
- We don't have the information to answer this question.

- **Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*
- *In which strategic sectors do you plan to use it?*
- We don't have the information to answer those questions.

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**

- *Are you planning to transpose art 56.2?*
- We don't have the information to answer that question.

#### **2. Division of contracts into lots**

- *How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?*
- We don't have the information to answer that question.

#### **3. Techniques and instruments for electronic and aggregated procurement**

- **Electronic Procurement**

- *Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?*



## Portugal

- We don't have the information to answer that question, but considering our present framework, surely it won't be postpone.
- ***How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?***

In our system, e-procurement is already mandatory. It is based on private electronic platforms and on a Public Portal (BASE) that is a database and works like a web interface that allows public access for data searches.

- ***Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..)?***

According to our statistical report, in 2012 there 115 064 public contracts registered in BASE, which reached 3,47 billion Euros. The Portal is able to be consulted by anyone (citizens, economic operators, journalists, universities).

- ***How are you presently using electronic tools to conduct public tenders?***

The procedures are entirely conducted in the electronic platforms and automatically send to BASE

- ***Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?***

Those tools are already implemented in our system.

- ***Does the legal framework of your country foresee the obligation of public tender sessions?***

No. When the e-procurement was introduced, the public tender session stopped.

- ***In case it does, do you think that this will be no longer necessary when using electronic tender procedures?***

- Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)
- ***How are you presently using the aggregated procurement tools foreseen by the directive?***  
Framework agreements, central purchasing body and occasional joint procurement are already implemented and in use.

### ***Are you planning to strengthen their use through the transposition?***

- We don't have the information to answer this question.

## **4. Choice of participants**

- **Qualification**
- ***Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?***
- We don't have the information to answer this question.

## Portugal

- **Exclusion grounds**

- ***Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?***
- We don't have the information to answer this question.
- 
- ***Self-cleaning: which are the existing practices for self cleaning?***
- Presently, this mechanism is not provided by law.
- 
- ***How do you plan to regulate the application of paragraph 6 of art 57?***
- We don't have the information to answer this question.

- **Self-declaration**

- ***Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?***
- The self-declaration is already provided by law. Some documents can be electronically consulted by public authorities and others don't. But digitalisations are accepted.
- 

- **Mechanisms to verify abnormally low tenders**

- ***Which mechanisms do you use to verify the abnormally low bids according to article 69?***

Our law establishes rules for abnormally low bids, in terms of a percentage refereeing to estimated price of the contract.

### **5. Award criteria: use of environmental and social criteria**

- ***In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?***
- ***Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?***
- ***Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?***
- We don't have the information to answer those questions.
- ***With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?***

No

## Portugal

- ***Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).***
- We don't have the information to answer those questions.
  
- ***As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such "out of the scope systems" and, if that is so, can you explain their characteristics?***
- No for not having in force. For the plan, we can't answer.
  
- ***As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?***
- We don't have the information to answer this question.
  
- ***As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which "appropriate measures"/"appropriate action" have been already adopted, or you plan to introduce, in order to adhere to these provisions?***
- Related to article 18 paragraph 2 the current Portuguese law on public procurement has already adopted several measures guaranteeing environmental, social and labour issues. In certain situations an environmental impact assessment is needed; in others it is mandatory a Construction and Demolition Waste Control and Management Plan.
- Related to article 71, paragraphs 1 and 6, our law has some articles on subcontracting that apply to the subcontracted the some contractual conditions and there is also a mechanism of joint liability.

### **6. Contract performance**

#### **• Subcontracting**

- ***Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?***
- ***Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?***
- We don't have the information to answer those questions.

#### **• Modification of contracts during their term**

- ***How do you intend to implement the provisions of article 72?***
- We don't have the information to answer this question.

### **7. Exclusions**

## Portugal

- *In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?*
- We don't have the information to answer those questions.

### **8. Competition protection, control and monitoring of the correct application, fight against corruption**

- *Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?*
- The Court of Auditors and Inspectorate-General of Finance and also sector Inspectorates-General
  - *In case of plurality of bodies, how are supervision/control functions shared among them?*
  - *Which competences do they have? Are they responsible for prevention or repression?*
  - *Are they independent authorities (from the Government)?*
  - *Which and how many resources do they have?*
  - *The supervision functions are on a national or/and on a regional/local basis?*
  - *Do they adhere to international organizations?*
  - *Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?*
  - *Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?*
  - *Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?*
  - *Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?*
  - *When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?*
  - *What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of*

## Portugal

*preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group audits?*

- We don't have the information to answer those questions. They should be answered by the concerned entities.

### **Specific provisions of Directive EU/25/2014**

- *What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?*
- *How do you intend to regulate the procedure for the award of framework agreements according to article 51?*
- We don't have the information to answer those questions.

### **Specific provisions of Directive EU/23/2014**

- *What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?*
- *How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?*
- We don't have the information to answer those questions.



**Slovakia**

## **EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS**

### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *Which reasons support the non transposition of some of these provisions?*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*

The Slovak Republic does not plan to take over the following provisions of Directive 24/2014: 2014/24/EU Art. 20 parag. 1 – the right for sheltered workshops and marginalized „communities“ to participate – Slovakia plans to introduce this option only for the contracts with an estimated value of less than directive determine;

2014/24/EU Art. 26 parag. 5, the second subparagraph – unused option to award the contract from the side of contracting authorities „on the lower level than sub-central level “through advance notification;

2014/24/EU Art. 36/1/2 – not set a duty with certain types of goods electronic catalogues;

2014/24/EU Art. 39/2/2 – cross-border procurement – chosen only the possibility according to Art. 2 par. 1 point 14 letter. b);

2014/24/EU Art. 46/4 – not used the possibility to set a mandatory award of contracts in the form of separate parts;

2014/24/EU Art. 56/2/2 – not used the possibility to not allow so “reverse public tender” for certain contracts;

2014/24/EU Art. 57/3 – not used the possibility of non-exclusion from the public procurement, if it is public interest, e.g. public health or environmental protection;

2014/24/EU Art. 57/3/2 – not used the possibility of non-exclusion from the public procurement e.g. in the case of small debts;

2014/24/EU Art. 71/7 – not used more strict responsibility rules e.g. direct payments to subcontractors without asking for them;

2014/24/EU – Art. 77 – Reserving the contracts for certain services

In general, the reason of not taking over the mentioned provisions was not to implement other obligations and exceptions to -itself is- so complicated and strict legislative, which enhanced significantly the intent itself. We believe that it could have an opposite effect thanks to its further complexity.

**Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

## **Slovakia**

### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**

- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*

The Slovak Republic transposes all award contract procedures, while the reasons for applying the negotiated procedure with a publication take over strictly within the purview of Art. 26 of the Directive no. 2014/24

- **Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*

According to the completely new award contract procedure and the fact, that the Slovak Republic in general does not have much experiences with the awarding large contracts to develop innovative products, the innovative partnership procedure is taken over strictly within the purview of directives. Further legislative development in this area will be focused on the application practice on the national level as well as in the other Member States.

- *In which strategic sectors do you plan to use it?*

According to the answer given in the previous point it is currently difficult to forecast in which areas will be used this kind of awarding contract procedure. It is assumed that in the Slovak Republic this institute will be not used widely (massively).

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**

- *Are you planning to transpose art 56.2?*

The Slovak Republic takes over this open procedure with no exception. The possibilities of exclusion of this type of procedure for certain typ of contracts, the Slovak Republic is not going to use at this moment.

### **2. Division of contracts into lots**

- *How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?*

Slovakia does not plan to take over this option, while in relation to the application practice we do not exclude it for the future.

### **3. Techniques and instruments for electronic and aggregated procurement**

- **Electronic Procurement**

- *Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?*

Yes, the Slovak Republic plans to postpone the application of mentioned Article on 2018.

*How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?*

## **Slovakia**

The Slovak Republic has the intention to adapt existing state electronic award contract system (in our country called „system EVO“) in relation to compulsory electrification of public procurement according to the new directives. The timeline is not known yet, it will be depended on the setting of the concrete technical requirements and aspiration on the financial security.

- ***Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..)?***

The Office for Public Procurement does not have the specific data, whereas the options of electronic public procurement include the use of several electronic tools, as above-mentioned „EVO“, electronic contracting system (under which was recently launched the platform for awarding contracts below the thresholds of directives), and also for realization of electronic auctions- more certified private auction systems.

- ***How are you presently using electronic tools to conduct public tenders?***

As above-mentioned.

- ***Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?***

The choice of the tool for awarding contract is left to the will of contracting authority, while it is counted with the mandatory use of electronic auction with the exception of the contracts of service and works, here it eliminates the nature of intellectual admission.

- ***Does the legal framework of your country foresee the obligation of public tender sessions?***

In case that the question directs to the electronic tender opening, the Slovak Republic plans to remain the candidate's right to participate on the opening of parts of tenders which concern to the design for fulfilment of the criteria with an exception of cases when the electronic auction will be used.

- ***In case it does, do you think that this will be no longer necessary when using electronic tender procedures?***

The candidate's right to participate on the opening tender, the Slovak Republic sees it as the mean to promote the transparency in public procurement.

- ***Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)***



## Slovakia

- ***How are you presently using the aggregated procurement tools foreseen by the directive?***

The current national legislation has the option of the central procurement, whereby it is correct that the Ministry of Interior of the Slovak Republic is the central procurement body for awarding contracts for commercially available goods, services and works for all state authorities on the national and regional level with the exception when the concrete state authority has concretely with the ministry concluded the written agreement or when this authority can demonstrate thanks to the market research that the object of the contract can provide cheaper. Except the case in the previous sentences, the central authorities, entities (purchasing for the other entities) or European public authority.

- ***Are you planning to strengthen their use through the transposition?***

The following legislation will explicitly give the options of cross-border procurement as it is forecast in the new directives.

#### 4. Choice of participants

- **Qualification**

- ***Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?***

Option is left to the contracting authorities and contracting entities themselves.

- **Exclusion grounds**

- ***Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?***

The Slovak Republic does not see the reason for not-transposing of this provision, while the application of concrete reasons for exclusion is left on the contracting authorities and contracting entities themselves.

- ***Self-cleaning: which are the existing practices for self cleaning?***

The Slovak republic has no experiences with the self cleaning yet.

- ***How do you plan to regulate the application of paragraph 6 of art 57?***

The Slovak republic is working on it right now, we do not have the final proposal.

- **Self-declaration**

- ***Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?***

## **Slovakia**

No, on the present the tenderers and candidates are entitled to submit the declaration on oath, while supporting documents will be submitted only by the winning tenderer. Communication is done by the form of contracting authority to have all communication instruments generally available, not to restrict the option of tenderer or candidate to participate in the public procurement.

- **Mechanisms to verify abnormally low tenders**

- ***Which mechanisms do you use to verify the abnormally low bids according to article 69?***

The current Law embeds the possibility for the contracting authority to ask for the explanation when he has any doubts that there is abnormally low bid. The assessment, whether it is abnormally low price for contract and whether award procedure will be excluded, in principle is left to the contracting authority and on the subsequent explanation of the tenderer. Under the Act – the abnormally low tender is considered always the case when all bids have been submitted from at least three tenderers, who weren't excluded and all these offers meet the object of the contract, one of which is more than 30% lower than the second tender and more than 15% lower as is predicted value of contract.

### **5. Award criteria: use of environmental and social criteria**

- ***In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?***

The specification of these requirements will the Slovak republic leave on the contracting authorities themselves.

- ***Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach?***

The Slovak republic does not planned to prepare this kind of method.

- ***Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?***

The Slovak republic plans to transpose, whereby it is not counted with the setting of the concrete criteria over the price.

- ***With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?***

The Slovak republic does not have created this kind of methodology in the public procurement nor in the near future.

## **Slovakia**

- ***Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).***

The Slovak republic does not plan the list of approved economic operators refer also on the qualification assumes and the intention of the legislation in determining award criteria as well as embedded specific contractual provisions is keeping them on the will of contracting authorities.

- ***As for social security systems that fall outside the scope of application of the public procurement rules do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?***

The Slovak republic does not plan to adopt a special mode for the type of service.

- ***As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?***

The Slovak republic does not plan to take over the provisions Art. 77 of Directive 2014.

- ***As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?***

In actual Law on Public Procurement is absented adjustment on subcontracting, this will be embedded in the new law by taking over the new directives. Art. 71 par. 1 and par. 6 letter a) the Slovak republic plans to take over through an embedment one of the basic objectives for the contracting authorities to keep to the objectives in the area of environmental, social and legislative rights under the laws, of the EU law or from the international treaties. Art. 71 par. 6 letter b) the Slovak republic plans to take over as the option for the contracting authority to require in the tender documents that the proposed subcontractor does not have the reasons for the exclusion as it is assumed in the Art. 57. In the case of the existence of these reasons, the contracting authority will request in written form the replacement of such contractor.

## **6. Contract performance**

### **• Subcontracting**

- ***Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?***

The Slovak republic plans to take over both provisions.

- ***Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?***

The Slovak republic does not plan to exceed the legislative framework of directive yet.

## **Slovakia**

- **Modification of contracts during their term**

- ***How do you intend to implement the provisions of article 72?***

The Slovak republic understands the Art. 72 as embedded so call “de minimis clause“ that objective adjustment of the treaties can be done irrespective of any needs, with respecting of the fact that there must not change the overall nature of the treaty. This article will be implemented this way.

### **7. Exclusions**

- ***In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?***

The Slovak republic plans the Art. 12 take over strictly in the purview of the Directive.

### **8. Competition protection, control and monitoring of the correct application, fight against corruption**

- ***Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?***

In the Slovak republic the control activities related to the public procurement are executed by the Office for Public Procurement, as the body of the state administration for this field, also executes supervisory powers under the Directive 89/665. Another authorities are e.g. Audit authority which is within the central coordination body for the area of contracts which are financed from the EU funds; Ministry of finance of the Slovak republic together with the administration of the finance control, which execute the financial controls concentrated on keeping to the management of the public finance (here is included also the Public Procurement Law), but also indirectly there is the National Audit Office – as an independent body responsible for the management control of the use of public budgets and property of the state and self-governments. The controlling of the public procurement may be inferior to the internal controlling bodies for the contracting authorities themselves, respectively their superior people.

- ***In case of plurality of bodies, how are supervision/control functions shared among them?***

See the answer in the previous question.

- ***Which competences do they have? Are they responsible for prevention or repression?***

See the answer in the previous question.

- ***Are they independent authorities (from the Government)?***

## **Slovakia**

The Supreme Audit Office of the Slovak Republic is an independent body created on the basis of the Constitution of the Slovak republic, and when we are talking about the Office for Public Procurement, the statutory representative is not a member of the Government and the decision of the Office for Public Procurement in the supervisory activities in the public procurement is inferior to the research on the independent and impartial courts.

- ***Which and how many resources do they have?***

Please specify this question.

- ***The supervision functions are on a national or/and on a regional/local basis?***

The supervision functions applies both on the national and regional level.

- ***Do they adhere to international organizations?***

The Supreme Audit Office of the Slovak Republic is the member of several international organisations and clusters where are most highly control institution like INTOSAI, EUROSAI, the Contact committee of the heads of the supreme audit institutions of EU and the European Court of Justice, Visegrad Group Supreme control institutions of the countries V4+2.

- ***Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?***

The Slovak republic took over and also will transpose to the new legislative all conditions of participation according to the Directives, while the most frequently used requirements in the case of work contracts are - the requirement to demonstrate an achievement of the turnover in the certain level, adduce the list of the finished construction works, and also data about the education and practical experience or professional qualification of management, especially those who are responsible for managing the construction work.

- ***Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?***

To demonstrate of the absence of grounds for exclusion is in the Slovakia possible by listing the entrepreneurs (the official list of approved economic subjects), by adducing of declaration on oath with adducing the documents from the winning tenderer (as is mentioned below) or by adducing of documents already in contract. This conception the Slovakia plans to retain in the following adjustment of legislation with that the declaration on oath will be replaced by ESPD.

- ***Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?***

For this purpose serves the option of using guarantee institute based on which the bid of tenderer is mandatory under the threat of commise of certain financial part in favour to the contracting authority as well as the option of the contracting authority to conclude

## **Slovakia**

a contract with the second tenderer in the case when the first will refuse to provide the cooperation with the conclusion of the contract.

- ***Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?***

To ensure the cost effectiveness and legitimacy of the award of the contracts and use of public funds supervise the above-mentioned bodies such as the Supreme Audit Office, Financial Control Administration in collaboration with the Ministry of Finance SR, which is governed by separate regulations which is not in the scope of public procurement.

- ***When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?***

In the field of public procurement in Slovakia, there are no mechanisms for monitoring the financial flows, this activity is within the scope of law enforcement authorities or to intelligence agencies.

- ***What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group audits?***

Considering the fact that the market preparatory consultations are new legislative institute, Slovakia plans to take it over within the legislative directives and further legislative development will leave on the application experience.

### **Specific provisions of Directive EU/25/2014**

- ***What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?***

The Slovak republic plans to set up the uniform mechanism for calculating the estimated contract value for both contracting authority and contracting entity.

- ***How do you intend to regulate the procedure for the award of framework agreements according to article 51?***

The Slovak republic will strictly take over the award of framework agreement within the purview of Art. 51.

### **Specific provisions of Directive EU/23/2014**

- ***What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?***

## **Slovakia**

The Slovak republic according to the preliminary draft regulation of concessions does not plan to embed the specific measures in this field.

- ***How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?***

The Slovak republic set criteria for the contract award leaves on the choice of contracting authority and contracting entity providing that will keep at minimum the requirements set in the Art. 41.



## United Kingdom

### EU DIRECTIVES ON PUBLIC PROCUREMENT AND CONCESSIONS

#### **Non Mandatory Provisions of the Directive**

- *From a general point of view, which non mandatory provisions will be transposed?*
- *For each non mandatory provision, which are the elements supporting the transposition and the advantages in terms of greater procedure simplification?*
- *Which reasons support the non transposition of some of these provisions?*
- *Which main interests are supposed to be protected by non transposing some of these provisions?*

The UK approach to the transposition of non-mandatory provisions was set out in Annex B our recent consultation document covering our draft implementing Regulations for 2014/24/EU (the public sector Directive) <https://www.gov.uk/government/consultations/transposing-the-2014-eu-procurement-directives>. (Both the consultation document and the draft Regulations can be viewed via this link.) The general approach was to make maximum use of the flexibilities provided by the new Directive, but not to add more administrative burdens where this could be avoided. The approach to the options, which is set out in Annex B of the consultation document, is subject to Ministerial approval.

#### **Directive 24/2014 (and analogous provisions of directive 25/2014 and directive 23/2014):**

Our general approach to transposing the Directive was to copy out its provisions so that we did not alter or add to the substance of its mainly mandatory provisions.

#### **1. The Awarding Procedure**

- **Competitive procedure with negotiation:**
- *How will you implement the provision that foresees the possibility of using the competitive procedure with negotiation as established by art. 29?*

Please see the text of Regulation 29 in the draft Public Contracts Regulations 201, which can be viewed via the link given above.

- **Innovation Partnership**

- *How will you implement art 31 ruling the new procedure referred to as Innovation Partnership?*
- *In which strategic sectors do you plan to use it?*

Please see the text of Regulation 31 in the attached draft Regulations. It is not yet clear which sectors will make use of this, but we will encourage its use.

- **Possibility for CAs to examine the bids before checking the absence of grounds for exclusion**
- *Are you planning to transpose art 56.2?*



## United Kingdom

Yes, please see draft Regulation 56(3).

### **2. Division of contracts into lots**

- ***How will you transpose art 46? Do you plan to introduce the obligation foreseen by art 46 paragraph 4? By means of which methodology do you plan to identify the lots?***

Please see Regulation 46 in the draft Regulations attached. We do plan to transpose Article 46 (4).

### **3. Techniques and instruments for electronic and aggregated procurement**

#### **• Electronic Procurement**

- ***Do you intend to postpone the application of Article 22, par.1, until 18 October 2018?***

Yes

- ***How do you plan to implement the mandatory e-procurement provisions (when and what kind of institutional set up is planned)?***

Through the relevant regulations.

- ***Which is the framework for e-procurement in your country in quantitative terms (number and value of e-procurement) and qualitative terms (transparency, innovation etc..)?***

We do not have detailed information which would give an overview of this area.

- ***How are you presently using electronic tools to conduct public tenders?***

Please see the answer to the question above.

- ***Are you planning to introduce the mandatory use of some tools introduced by the directive such as the electronic catalogue (art 36), the dynamic purchasing system (art 34) and the electronic auction (art 35)?***

Yes. All of these tools are already made use of, but it will be helpful to have a more effective DPS as provided in 2014/24/EU.

- ***Does the legal framework of your country foresee the obligation of public tender sessions?***

No

- ***In case it does, do you think that this will be no longer necessary when using electronic tender procedures?***

Not applicable

- ***Instruments for aggregated procurement (framework agreements, central purchasing body, procurement involving contracting authorities from different member states, occasional joint procurement)***

- ***How are you presently using the aggregated procurement tools foreseen by the directive?***

## United Kingdom

Framework agreements are heavily used in the UK and much procurement is conducted through arrangements set up by central purchasing bodies. We are not aware of any procurement involving contracting authorities from different/other member states, such as through central purchasing bodies located in another member state.

- ***Are you planning to strengthen their use through the transposition?***

We are not planning to change the position regarding the use of domestic central purchasing bodies at this stage.

#### **4. Choice of participants**

- **Qualification**

- ***Referring to art 19 paragraph 2, are you planning to refer the determination of requisites, on temporary groupings among suppliers, to the national legislation or to the contracting authority?***

Please see the draft of Regulation 19 (3) – (6). See also the answer to Annex B, question B6, which sets out that the UK does not intend to set out standard terms for how groups of economic operators meet selection criteria.

- **Exclusion grounds**

- ***Referring to article 57 paragraph 4, which ground for exclusion do you plan to transpose?***

Please see draft Regulation 57 (9). All the grounds for exclusion will be transposed, but exclusion will be left to the discretion of the contracting **authority**.

- ***Self-cleaning: which are the existing practices for self cleaning?***

We do not have examples of self-cleaning as envisaged by the Directive.

- ***How do you plan to regulate the application of paragraph 6 of art 57?***

This has yet to be decided.

- **Self-declaration**

- ***Do you already use (or are planning to develop) entirely digitalized systems to check the requirements for participation and the ground for exclusion in procurement procedures?***

No

- **Mechanisms to verify abnormally low tenders**

- ***Which mechanisms do you use to verify the abnormally low bids according to article 69?***

This is currently left to contracting authorities.

#### **5. Award criteria: use of environmental and social criteria**

- ***In the evaluation of qualitative aspects related to the quality/price ratio, how do you intend to detail the social, environmental and innovative characteristics that the contracting authorities could take into account in the evaluation of the tender?***

There is no intention to provide additional detail other than provided for in Article 67. Regulation 67 transposes Article 67.

- ***Which kind of method will be used to determine and verify the monetary value of costs imputed to environmental externalities linked to products, works and services in the cost / effectiveness approach ?***

## United Kingdom

This has yet to be considered.

- ***Do you intend to adopt specific provisions with reference to art. 67, par. 2 (The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only)? If yes, what criteria do you consider necessary to detail as essential to the relaunch in the bidding against a fixed price?***

- No

- ***With reference to the life-cycle costing according to article 68, do you have in force, or plan to adopt, a specific national legislation aimed at identifying a methodology to calculate this cost?***

No

- ***Which choices and solutions will be adopted in the transposition of the directives regarding the possibility of including social criteria in procurement? (for example the use of participation requirements, qualification of operators registered in the lists of suppliers and service providers, choice of award criteria (most economically advantageous tender) and of rewarding requirements in the evaluation of tenders and possibility to include specific clauses in the contracts).***

We are not intending to set out particular choices or solutions.

- ***As for social security systems, that fall outside the scope of application of the public procurement rules, do you have in force or plan to introduce such “out of the scope systems” and, if that is so, can you explain their characteristics?***

No

- ***As for the provisions about reserved contracts for certain services in article 77 , which criteria do you intend to apply, in case of transposition of such optional provisions into national law?***

The criteria set out in Article 77. The criteria concerning the kind of organisation which can bid for such contracts are cumulative.

- ***As for article 18 paragraph 2 and article 71, paragraphs 1 and 6, could you provide some information about which “appropriate measures”/“appropriate action” have been already adopted, or you plan to introduce, in order to adhere to these provisions?***

As set out in Annex B B4 of the consultation document, we intend to introduce by administrative means the policy that these obligations should be mirrored by contract clauses, backed up by a standard contract condition.

### **6. Contract performance**

#### **• Subcontracting**

- ***Do you intend to introduce the obligations referred to article 71, paragraphs 2 and 3?***

Contracting authorities will be given the option the option to ask bidders about the relevant subcontracting matters (Article 71(2)). Direct payment (Article 72 (3)) will not be explicitly provided for.

- ***Do you intend to provide for more stringent liability rules under national law or to go further under national law as referred to article 71, paragraph 7?***

## United Kingdom

No.

- **Modification of contracts during their term**
- *How do you intend to implement the provisions of article 72?*

This is set out in draft Regulation 72.

### **7. Exclusions**

- *In house providing: how do you plan to regulate the implementation of the provision in article 12, with particular reference to the possibility of private capital participation in the controlled legal person?*

Please see draft Regulation 12.

### **7. Competition protection, control and monitoring of the correct application, fight against corruption**

The body responsible for the policy and legal aspects of public procurement in relation to the EU Directives is the Crown Commercial Service, which is part of the Cabinet Office. The questions below imply monitoring functions/control functions which do not relate to how public procurement is organized in the UK and so it is not possible to answer these in any detail. The governance provisions of the new Directive introduced very limited changes in relation to monitoring and administration.

- *Can you describe the bodies responsible in your country for the supervision/control of public procurement procedures?*
- *In case of plurality of bodies, how are supervision/control functions shared among them?*
- *Which competences do they have? Are they responsible for prevention or repression?*
- *Are they independent authorities (from the Government)?*
- *Which and how many resources do they have?*
- *The supervision functions are on a national or/and on a regional/local basis?*
- *Do they adhere to international organizations?*
- *Which modalities are used to prove compliance with the selection criteria in the procedures for the award of public contracts for works?*
- *Which modalities are used to prove the absence of grounds for exclusion in procedures for the award of public contracts for works, services and supplies?*

## United Kingdom

- *Are there tools of guarantee in support of the tender in case of failure to sign the contract, if it depends on circumstances attributable to the contractor?*
- *Are there control systems to ensure cost-effectiveness and legitimacy of the award of the contracts? If so, what are the procedures for implementing these controls?*
- *When awarding a contract, are there any mechanisms to ensure the traceability of financial flows? Is there a specific body or an independent authority responsible for controlling these mechanisms?*
- *What procedural safeguards do you intend to introduce to ensure compliance with the principles of non-discrimination and transparency in the activation of preliminary consultations of the market? Do you intend to regulate the involvement of the subjects consulted through individual and group audits?*

### **Specific provisions of Directive EU/25/2014**

- *What type of methods for calculating the estimated value of procurement do you intend to adopt according to article 16?*

We intend to copy out Article 16.

- *How do you intend to regulate the procedure for the award of framework agreements according to article 51?*

We intend to copy out Article 51. Utilities have been operating framework agreements for many years and the main change from 2004/17/EU is to limit the duration of such agreements to 8 years.

### **Specific provisions of Directive EU/23/2014**

- *What kind of measures do you intend to adopt in order to involve and encourage the participation of SMEs in the European Procurement Market, in particular as regards the concessions sector, as indicated by recital 1 of the Directive?*

This has yet to be decided

- *How do you intend to regulate the possibility of greater discretion given to contracting authorities in determining the criteria for the award of concessions pursuant to article 41?*

This has yet to be decided

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